

Joint Civil Society Contribution to the Defence of Democracy Package

13 April 2023

1. Introduction

We welcome the proposal for a Defence of Democracy Package as a potential important contribution to enhancing democratic participation, protection, resilience, and recognition of civil society organisations. We believe that to be effective such a package should fill the gaps in the current European Democracy Action Plan by developing a coherent and strategic approach to civil society. We would like to highlight in this context the conclusions of the Conference of the Future of Europe that called for a Civil Society Strategy in the framework of the European Democracy Action Plan (EDAP) revision. Civil Society should be recognised as the cornerstone of democracy, and benefit from a separate pillar in the EDAP next to election integrity, media pluralism and fight against disinformation.

We take, as documented by the call for evidence, that the proposal for a Defence of Democracy Package has the aim of protecting and strengthening EU democracies and that it will include measures to foster an enabling civic space and promote inclusive and effective engagement by public authorities with civil society and citizens in order to bolster resilience from within. We also acknowledge the recognition that *a strong and enabling civic space is critical for the resilience of our democracies* and of the role of civil society organisations in acting as *watchdogs, holding governments to account, protect and promote fundamental rights, and combating disinformation*. Finally we also place high expectations on the recognition that *active and engaged public participation is essential to the quality of democratic life*.

We have therefore included in our submission several concrete proposals aiming at building resilience and empowering civil society as part of the fourth pillar of the EDAP, and more particularly on the protection, participation and funding of civil society.

We also take note of the intention of the Commission to be fully consistent with the rule of law report and fully compliant with the Charter of Fundamental Rights in preparing its proposal. However, we are highly concerned that despite the sensitivity of the measures to address covert foreign interference in EU democracies, and its influence on public decision-making to freedom of expression, association and assembly, the package will not undergo a proper impact assessment.

We also understand that despite the ongoing public consultation a draft proposal for legislation (directive) is already being drafted, depriving civil society and citizens of meaningful input into the consultation process for such an instrument, its framework, and of the choice of legal instrument. This is also a practice in violation of article 6(4) of the Aarhus Convention to provide for public participation when "all options are open".

Although the information in the call for evidence does not go into detail, we understand that the draft legislative proposal would lead to the creation of a specific register for NGOs and other actors that receive foreign funding. We are seriously concerned that such an approach is contrary to core European values, freedoms and fundamental rights. It would potentially restrict access to finance

for NGOs, stigmatise them and place NGOs receiving foreign funding under suspicion (and those outside EU philanthropic organisations that give grants and support to EU based organisations). It would also place barriers on cross-border philanthropy and the Freedom of Association and Free Flow of Capital rights. It would also have a detrimental impact on all civil society organisations' activities both in the European Union and in third countries.

While civil society has been advocating for increased transparency of lobbying and the creation of transparency registers to ensure a level playing field, we are increasingly aware of how such instruments can be misused by third actors and authoritarian/illiberal governments to shut down civil society organisations. Even at the European level we see that these tools include measures that are increasingly targeted at NGOs who are subject to more stringent requirements than lobbyists or representatives of third countries.

There is a strong risk of creating a contradictory response between tackling rule of law and civic space challenges and the development of measures which aim to address undue foreign interference, as these measures could have unintended consequences on fundamental rights and the ability of civil society actors to counter foreign interference.

The EU has to be a standard setter in terms of fundamental rights, rule of law and democracy and should use exactly these tools and values to defend threats to these very principles. The vast majority of NGOs are defenders of these values and part of the solution to defend them.

European Elections are coming and such proposals also risk creating an adverse reaction by public opinion as many people living in Europe volunteer or are members of associations.

2. Key Recommendations

We call the European Commission:

to include a separate pillar in the European Democracy Action Plan on building resilience and empowering civil society next to election integrity, media pluralism and fight against disinformation

- to give substance to the implementation of art. 11.2 of the Treaty of the EU in the Defence of Democracy package. It should include a clear commitment to develop a European policy framework for European civil dialogue, on equal footing with social dialogue, as well as clear wording and standards in its recommendations on civic engagement.
- to establish a protection mechanism to allow civil society to report on attacks and receive direct assistance which will strengthen its ability to defend democracy.
- Review relevant EU budget in dialogue with civil society, ensuring that it provides support to ensure sustainability of civil society organisations.
- Support the capacities of civil society organisations to monitor the use of EU funds from abuse.
- Remove regulatory and fiscal obstacles to access to funding and donations including across borders.
- Promote civic education at all levels.

- to reconsider proposing a directive on covert foreign interference as described in the call for evidence and ensure that whatever proposal is in line with international human rights standards, the CJEU ruling (C-78/18) and European council conclusions on civic space.
- to develop a fully-fledged fundamental rights impact assessment to be carried out given the concerns on civic freedom. It should also address compatibility with EU treaties and legislation in force. The proposal cannot be prepared as indicated in the call for evidence without a proper impact assessment.
- to ensure an open and structured dialogue covering all stages of the proposal development until its possible adoption.
- Remove administrative and legal barriers for CSOs including foundations to operate across-border
- Address equality, inclusiveness, representativity and transparency of elections. This includes the right to vote for all people living in the EU, including persons with disabilities, prisoners, refugees, asylum seekers, etc.
- Develop election observation missions in the EU and support fact checking civil society organisations in tackling disinformation.

3. The proposal for a legal instrument to protect the EU from covert outside interference

The call for evidence indicates that a legal instrument (directive) would introduce *common transparency and accountability standards for interest representation services directed or paid for from outside the EU, to contribute to the proper functioning of the internal market, and to protect the EU democratic sphere from covert outside interference. Doing this would support awareness in the context of the provision of these services. A recommendation on covert interference from non-EU countries would complement the directive establishing harmonised transparency requirements for the provision of services from outside the EU. Specifically, it would provide for additional non-binding measures to tackle the issue, including awareness raising, and promoting best practices.*

We understand that the proposal would include and cover not only the harmonisation of rules for transparency registers across Member States but also a Foreign Agent Registration Act (FARA) on the model of the US/Australian legislation.

We question whether such an approach would be fit for purpose and effectively address the problems at stake as regards to foreign covert interference. To date it is unclear what is the extent of covert foreign interference and its impacts, whether the proposed directive would actually be effective to protect democracy or rather divert attention and resources away from the root causes of democratic decline. The balance of the cost-benefit of the current approach is uncertain at best. The call for evidence does not give sufficient elements to understand this, as it will always be possible for external private entities, whatever their legal form, to operate outside such registers. Therefore, organisations which are transparent regarding their funding sources and comply with regulations are in fact, disadvantaged. In addition, the way in which such information is presented can lead to misuse by malicious actors. Finally, in the absence of an impact assessment, we do not dispose of any substantial and recurrent evidence of use of interest representation services, and in particular of civil society organisations for undue foreign interference.

Moreover, the call for evidence does not refer to an analysis of existing tools at National and EU level to address risk of abuses, such as finance and tax obligations, company and association registers, anti money laundering provisions, and mechanisms for controls. In addition the Package does not include measures to address vulnerabilities within national and EU institutions to corruption and influence from foreign governments, including developing a culture of accountability, and this despite repeated calls by the European Ombudsman.

Furthermore such a proposal has a potential to stigmatise legitimate foreign funding whether public or private, and organisations that benefit from it, creating a chilling effect on civil society. It can also contribute to limiting sources of funding, including funding from democratic countries such as the US, Canada, the UK, while societal issues at national, European, and global level are constantly increasing and public funding is diminishing.

We emphasise that access to finance for civil society organisations across borders must not be unduly restricted. Civil society organisations receiving foreign funding, as well as those non-EU philanthropic organisations that give grants and support to EU - based organisations, must not be stigmatised or put under suspicion. If the legislative initiative goes beyond public foreign government funding/interference to also include private philanthropy foreign funding, it would have a chilling impact on cross-border philanthropy and potentially be in conflict with the free flow of capital and freedom of association. It is also worth noting that some Member States either ban or restrict intra-EU funding for NGOs, e.g. Ireland. We call on the Commission to ensure that in the first instance the ruling of Case C-78/18 Commission v Hungary is implemented before attention is turned to non-EU funding sources.

The US FARA has been contested by civil society in the US because it includes vague definitions of what constitutes a foreign agent and political and other activities, and even collection of funds that would basically encompass all CSOs activities. It also creates a negative labelling of CSOs funded through foreign funding and obstacles to philanthropy. Finally the law includes disproportionate sanctions and penalties including imprisonment.

In recent years, the US FARA has been used as a model by several Governments inside and outside the EU.

The Court of Justice ruled against the Hungarian Lex NGO in June 2020 (C-78/18) following an infringement procedure initiated by the European Commission as guardian of the Treaties. In this landmark judgement, the Court set out a substantive element of freedom of association—the right to access funding (including foreign). It found the Hungarian law “discriminatory and unjustified”. In its ruling, the CJEU found that “the restrictions imposed by Hungary on the financing of civil organisations by persons established outside that Member State do not comply with EU law”¹.

The EU has recently condemned the proposal by the Georgian Government to introduce a similar provision: *“The proposed draft law on “transparency of foreign influence” raises serious concerns. Creating and maintaining an enabling environment for civil society organisations and ensuring media freedom is at the core of democracy. It is also key to the EU accession process and part of*

¹ <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-06/cp200073en.pdf>

priorities, notably priority 7 on media freedom and priority 10 on the involvement of civil society. The European Union is supporting Georgia in its reform efforts, responding to the country's own aspirations for continued development and EU membership, as enshrined in Georgia's Constitution. The draft law's adoption would be inconsistent with these aspirations and with EU norms and values". The EC intervention was instrumental in the withdrawal of the draft law.

In Bulgaria², a proposal for an anti-foreign agent law was submitted to parliament on 27 October 2022 by the nationalist political party Vazrazhdane (Revival). The draft law is entitled "Foreign Agents Registration Act", it is clearly inspired by the Russian anti-foreign agent laws, and it is also very similar to the Hungarian one of 2017. In addition, we have seen similar trends in other non-EU countries such as the Republika Srpska, BiH, which was also challenged by the EU, and even by the US³. The development of a Foreign Agents law at EU level would legitimise these laws. It could potentially have a snowball effect and lead to governments in other parts of the world copying these measures.

Also the Council in its conclusions on civic space "Acknowledges that civil society actors at all levels need appropriate and sufficient human, material and financial resources to carry out their missions effectively and that the freedom to seek, receive and use such resources is an integral part of the rights to freedom of association".

Legislation must be consistent with international human rights standards, particularly relating to civic freedoms and human rights defenders. Any transparency and reporting obligation regarding civil society should be tailored to the sector and in line with international human rights standards. They should not contribute to creating suspicion and restricting its action. Such obligations should be necessary and proportionate to the size, resources, and income of the organisations, in line with the joint guidelines of freedom of association adopted by the Venice Commission and the risk posed.

The [OSCE/Venice Commission Guidelines on Freedom of Association](#), principle 7, paragraph 221 states that "The right to freedom of association would be deprived of meaning if groups 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".

Although the right of associations to seek resources cannot be qualified as an absolute right, it can only be restricted under strict conditions foreseen in articles 11 (2) of the European Convention on Human Rights and Article 22 (2) of the International Covenant on Civil and Political Rights. Restrictions must pursue at least one of the legitimate aims mentioned in International Law and the restrictions shall be necessary in a democratic society to achieve that legitimate aim., in addition to all other existing means to pursue that legitimate aim and the existence of the proportionality between the effectiveness of the measures and the restriction of freedoms. The existence of a real

²

<https://www.google.com/url?q=https://www.parliament.bg/bg/bills/ID/164424&sa=D&source=docs&ust=1680777842735928&usg=AOvVaw39EB2rzGzy0a6Xa9hNax5i>

³ https://www.google.com/url?q=https://balkaninsight.com/2023/03/13/us-eu-slate-bosnian-serb-push-to-designate-ngos-as-foreign-agents/&sa=D&source=docs&ust=1680777842760903&usg=AOvVaw2_V2k6150I5ugN9o0Gzq_p

threat

must be demonstrated, and evidence must also be brought that less intrusive measures would be ineffective.

We support transparency and transparency registers. We are nonetheless concerned about the latest evolution of the EU Transparency Register which does not address equally all registered entities. NGOs have to disclose all sources of funding contrary to all interest groups that have just to declare with no control an estimation of their lobbying expenses. It gives a false impression to the public that NGOs are the main vector of interest representation, while they are the least represented entities on the Transparency Register, after corporate representatives and consultancies. Instead of a tool of control of corporate influence, the Transparency Register is turning into a tool of control of NGOs. It also devalues our work as contributing to the public interest and tools for participation of citizens/people in democracy, as well as our role as watchdogs. Whatever is proposed at national level needs to include equal provisions for all. While NGOs have a legitimate and critical role to play in the policy formation process, they are only one of many interest groups in a wider matrix. It is critical that justifiable and commensurate transparency standards are applied to all actors within these processes.

We are also concerned that Civil Society Organizations are increasingly confined into a lobbyists or interest representation role, which affects their legitimate role of bringing together people and empowering them to participate in democracy as well as their watchdog role. CSOs do not provide (paid) interest representation services to private parties and the funding that they receive to sustain their actions cannot be considered as remuneration, just as the EU does not direct organisations that are funded by them.

Moreover, CSOs even when they provide services, often to fulfil gaps from the State, are not covered by the services directive as indicated in its article 2 because of their non-profit nature. This exclusion is also consistent with Member States legislation.

We would also express caution that the use of a Directive as a legal instrument would amplify the negative impact of the legislation through transposition. Some countries would use it to transform it into an anti-NGO law, in particular those Member States that have already unsuccessfully proposed similar restrictive provisions for civil society.

At best these new rules would increase red tape and create uncertainties for the operations of CSOs weakening both their operational and watchdog role. The restriction of civic space and democratic participation, is in the interest of foreign authoritarian countries such as Russia, China, etc., so such legislation risks actually amplifying their influence in the European Union.

We urge the Commission to reconsider proposing such a directive and ensure that whatever proposal is in line with international human rights standards, the CJEU ruling (C-78/18) and European council conclusions on civic space.

We call for a fully-fledged fundamental rights impact assessment to be carried out given the concerns on civic freedom. It should also address compatibility with EU treaties and legislation in force. The proposal cannot be prepared as indicated in the call for evidence without a proper impact assessment.

We call for an open and structured dialogue covering all stages of the proposal development until its possible adoption.

4. Communication identifying areas of action and recommendation on civic engagement.

This proposal “starts from the premise that civic participation, understood as engagement of civil society actors and citizens on matters of public interest, is only effective in an enabling, safe and supportive environment. The recommendation is aimed at helping Member States to frame the promotion of civic engagement in connection with the protection of democracies and respect for fundamental rights. It would therefore reflect the need to ensure a common level of protection and engagement with these actors in our democracies across the Union (and beyond), as the existing challenges cannot be addressed solely at Member States level. This Recommendation will also draw on the experience of the Conference on the Future of Europe”.

CSE has called for a Civil Society Strategy, a call that was supported by over 350 organisations in Europe and also included in the conclusions of the Conference on the Future of Europe as part of the review of the European Democracy Action Plan. We plea for the development of a strategic approach to building resilience and empowering civil society organisations on the basis of EU values.

Building resilience and empowering civil society should become the fourth pillar of the European Democracy Action Plan next to promoting free and fair elections, strengthening media freedom, and countering disinformation.

The proposals below aim at giving content to this fourth pillar.

4.1 Key principles

Civic engagement relies on thriving civic space and the Communication must therefore give a coherent framing to enabling civic space:

1. A **conductive institutional, political and socio-economic landscape**: the historical legacy of political culture, together with socio-economic structures and contingent events, profoundly shape the public's understanding of the role of civil society and the values it embodies, the activities it pursues, thus influencing public trust and support.
2. **The respect of civic freedoms**: a supportive legal and regulatory framework for civic freedoms, in particular freedoms of association, peaceful assembly and expression, and its effective implementation ensure the protection of civil society space.
3. **Safe space and state duty to protect**: public authorities have a duty to protect civil society actors and human rights defenders from physical, verbal and judicial attacks linked to their human rights' work by taking action against perpetrators. There should also be more investment and support on cyber security, as harassment online is becoming an increasing issue.

4. Further action should be holistic by protecting all areas of civic space including digital. **Digital civic space** has become more vital considering shrinking of traditional civic space and limited resources through which civic space actors can conduct their vital work. Different current and upcoming EU policies and legislation should include this dimension. This includes for instance the proposal for political ads, Digital Services Directive, etc.
5. **A supportive framework for CSOs' financial viability and sustainability:** supportive legislation on core funding, including foreign and international funding, and availability of sufficient and predictable resources are crucial to civil society's capacities, independence and long-term strategic planning. Free flow for philanthropic and humanitarian support should be guaranteed given also that there are checks and balances in place for philanthropic organisations in national legal frameworks including the Anti Money Laundering and Counter terrorism frameworks.
6. **The dialogue between civil society and governments:** Governments must pursue policies and narratives that empower citizens and their representative organisations to be meaningfully engaged in the public debate and policymaking.
7. **Civil society's sustainability and resilience.**

4.2 Legal and non-legal measures for a thriving civic space

Here are some concrete areas of actions to ensure the protection, participation, funding and cross border work of civil society organisations:

Protection

- Put in place **an EU mechanism to protect civil society and human rights defenders also inside the EU.**
- Ensure **consistency between Internal and external approach in defending civic space and the role of civil society organisations.**
- Reinforce CSR on civic space in the Rule of Law Annual Review Cycle by adding a **standalone chapter on civic space**, which would allow for further recognition and subsequent protection of specific civil society sectors e.g. women's rights, youth organisations, LGBTQI+ organisations, minority organisations etc. Attention should also be paid to the civic space for youth organisations, as they have additional challenges (mostly volunteer-based, high turnover and young people often without established support networks)

Participation

- Beyond public consultations, **recognise civil dialogue on equal footing with social dialogue.** The recommendations need to have **clear wording on civil dialogue and how to implement it both on domestic and EU level frameworks and legislation.** Additionally, it should provide a **framework for EU civil dialogue.** Such a framework should include legal frameworks to support (including financially) the development of civil society, training and capacity building of public administration services to dialogue with civil society, co-programming and participatory designing of public policies, access to information and proper timeframes for engagement, focal points in different ministerial and inter ministerial services.

- **Develop a Commission staff working document on the functioning and potential of European civil dialogue as per Art. 11 TEU**, to bring coherence in the engagement practices and standards across all DGs;
- The Commission should engage in dialogue with civil society before submitting policy proposals on the possible direction of Union action and on the content of the envisaged proposal, similarly to the social partners, as well as the feasibility and impact assessment.
- The EU should establish an **annual summit enabling civil society to contribute to the political dialogue** on the direction of EU action and policies, in the context, for example, of the state of the union.
- **The EU institutions should coordinate to ensure the structured involvement of civil society across all phases of the policy cycle.** For this purpose, permanent civil dialogue structures should be established in the European Parliament and European Council, regulated by a coherent policy framework.
- Give content to the Vice President in charge of relations with civil society (beyond bilateral meetings!). Basic coordination structures (focal points) for civil dialogue should be developed within each DG and Executive Agency of the European Commission, formalising and structuring the involvement of CSOs on sectoral policy issues beyond online consultation along all phases of policy making, including its implementation and evaluation phase.
- **Develop further the role of the European Commission representations in the different countries on dialogue and engagement with civil society, and of the European Parliament Liaison Offices**, for example by providing access and support to contribute to a national perspective on the development of EU policies and legislation.
- **Reinforce access to (government) information at EU and national level, including transparency of EU decision making.**
- **Promote civic education at all levels** and in all spheres of learning (formal, non-formal and informal learning). The European Commission should issue guidelines for Member States on the minimum standards and best practices of citizen education on the national level based e.g. on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education. Ensure access to independent and nonpartisan Education for Democratic Citizenship and Human Rights (EDC/HRE).
- **Invest in mainstream quality citizenship education** with particular attention to the most marginalised or underrepresented groups in society, with programmes designed also in cooperation with civil society organisations.

Funding

- **Review relevant EU grants in dialogue with civil society**, in order to further improve their positive support to civil society and its work, especially ensuring that it provides long term core support to ensure sustainability of civil society organisations;
- **Establish a structured dialogue mechanism between representative civil society platforms and relevant DGs/Executive Agencies** on the implementation of EU programmes as a whole and related grants and funding streams in particular.
- **Support the capacities of civil society organisations to monitor the use of EU funds from abuse** should by reserving a part of the Technical support instrument for NGOs. The European Commission should also monitor actual participation of civil

society

both during programming and use of EU funds, and step up in case of deficiencies, or where consultation was just a “tick-box exercise”.

- **Involve CSOs in the early stages of the review of the Multiannual Financial Framework and Financial regulations.**
- **Remove regulatory and fiscal obstacles to access to funding and donations including across borders.** National and EU policies should facilitate cross-border philanthropy. **There should be no foreign funding restrictions** and access to formal banking channels must be enabled.
- **Ensure that EU funds provided through shared management are accessible to civil society organisations and that open and transparent procedures are in place.**

Cross-border work

- Administrative and legal barriers for CSOs including foundations to operate across-border should be removed including elements around recognition of legal personality and enabling philanthropic flows across borders.

5. Safeguarding Elections & tackling disinformation

- Address equality, inclusiveness, representativity and transparency of elections. This includes the right to vote for all people living in the EU, including persons with disabilities, prisoners, refugees, asylum seekers, etc. Historically marginalised groups are disproportionately impacted by lack of access/representation, and this diminishes access to their right to vote. The accessibility of elections and political campaigns and debates for all marginalised groups, transparency of political party and campaign finance, as well as issuing guidelines for elections in emergency contexts such as pandemics.
- Develop election observation missions in the EU and support civil society organisations to carry their work within the observation missions, as well as further review of elections and online campaigns towards elections.
- Require social media platforms to open data for researchers, journalists and NGOs and to ensure content moderation to address disinformation and hate speech towards civil society and activists.
- Ensure that social media platforms do not create obstacles to legitimate, civil society led campaigning online across the EU on political topics, including before and during elections.
- Support fact-checking civil society organisations with funding opportunities and official partnerships for elections and beyond but also ensure that there is an enabling legislative framework for those activities.

Acknowledgments

This paper has been prepared together with the members of Civil Society Europe working Group on Civic Space which includes a variety of Civil Society Organizations beyond its members.

Civil Society Europe Transparency Register number: 520775919740-63



Co-funded by
the European Union