Observation on EU law compatibility of transparency legislation on foreign funding for interest representation

Memorandum

1. Executive Summary

The proposal for a Directive of the European Parliament and of the Council establishing harmonised requirements in the internal market on transparency of interest representation on behalf of third countries (the "**Proposal**") in the form of either (i) legislative intervention harmonising the requirements in the internal market, targeting all third countries and establishing specific safeguards ("**Policy Option 1**") or (ii) extended legislative intervention harmonising the requirements in the internal market, targeting all third countries and establishing specific safeguards ("**Policy Option 2**"), in each case as outlined in a preliminary draft impact assessment available to us (the "**Impact Assessment**"), is likely in breach of EU law:

- We see legal arguments that the Proposal should not have been based on Article 114 TFEU in light of its objectives and the context in which it is being adopted.
- The Proposal is likely in breach of EU primary law, in particular the EU market freedoms of free movement of capital and establishment, and EU fundamental rights and human rights.

The below will focus on Policy Option 1, as the information provided so far indicates that the Commission is considering a legislative option or at least a combination of legislative and complementary non-legislative measures.

With regard to Policy Option 2, the Impact Assessment already raises doubt regarding the proportionality of these measures. These are thus treated as less likely options. However, it should be noted that the legal concerns about Policy Option 1 raised in this analysis apply all the more to Policy Option 2, which is the more invasive option. More specifically, Policy Option 2 additionally requires the entities carrying out interest representation activities, for example, to (i) keep records of all contracts and exchanges with the entity on whose behalf the activity is carried out, and (ii) obtain a licence for each new interest representation activity exceeding certain financial thresholds.

2. Viable and EU law compatible alternative: an effective screening mechanism

As a civil society organisation in favour of transparency and accountability, our core concern is that all current Policy Options place an increasing burden on legitimate and open civil society organisations without tackling those who seek to engage in malign influence. Ultimately the EU risks putting forward measures that fail to tackle the problem and inadvertently do more harm than good to our democracies. Beyond the political risk stemming from certain Member States' implementation of proposed transparency requirements, any additional administrative burdens, inherently costly, on non-profit organisations detracts directly and immediately from their core activities.

We recognise the Commission's ambition to adopt legislation vis-à-vis covert ex-EU influence within the Union. We equally see the risk, laid out in detail in Section 4, that such legislation would be incompatible with EU law and, in particular, the established jurisprudence of the Court of Justice of the

European Union.[2] To mitigate that risk and limit unwitting but serious restrictions to democratic NGOs, we propose to introduce a more effective screening mechanism:

- Build on the existing EU Transparency Register and extend its applicability, requiring interest representatives merely to register;
- Ensure a level playing field between the regulation of organisations providing interest representation in receipt of EU Member States funding vs funding from third countries to prevent any discriminatory treatment and distortions on the internal market;
- More targeted screening for potentially problematic funding upon request of the regulator only, provided that there is purported evidence of suspicion that the financing has not been declared and it might undermine the democratic processes in the EU or similar;
- Maintain thresholds for any detailed information requirements beyond registration, which would trigger the requirement to provide more information upon request only (not automatically). At a minimum the monetary threshold for ex-EU funding should be EUR 1 million from a single third country entity (preferably only a risk country), or EUR 1.5 million in a single Member State or EUR 8.5 million in the EU as a whole, in one of the last five years.

This would guarantee the efficacy of a screening mechanism, while not unduly burdening democratic interest representatives, like NGOs.

3. The Factual Context

3.1 The "Defence of Democracy" Package

The Proposal is part of the "Defence of Democracy" package (the "**Defence of Democracy Package**") announced by Commission President von der Leyen in her State of the Union speech on September 14, 2022[3] as part of the Commission Work Programme for 2023[4]. One aspect of the package is the initiative on the protection of the EU democratic sphere from covert foreign influence. This includes a legal instrument in the form of a directive that would introduce common transparency and accountability standards for interest representation services directed or paid for from outside the EU.[5] According to the call for evidence for a public consultation from February 2023 to April 2023, the initiative also provides for a recommendation on covert interference from non-EU countries, which would complement the directive establishing harmonised transparency requirements for the provision of services from outside the EU.[6]

The proposal was originally to be implemented without an impact assessment,[7] on June 7, 2023.[8] The Commission Vice President for values and transparency Věra Jourová, however, informed the European Parliament in June 2023 that the proposal has been delayed in order to consult more broadly, gather more information and conduct full impact assessment.[9] As a result, a questionnaire was shared with several civil society organisations at the end of July to seek input on the proposal in order to conduct the impact assessment.

3.2 The new measures to harmonise requirements in the internal market on transparency of interest representation

The general objectives of the Proposal are to:

- ensure the proper functioning of the internal market for interest representation activities carried out on behalf of third countries; and

- contribute to the integrity of, and public trust in, EU and Member State decision making processes, with regards to the influence of third countries.

In addition, the Impact Assessment considers the following specific objectives in line with the general objectives:

- facilitate cross-border interest representation services carried out on behalf of third countries when done transparently; and
- improve knowledge about the magnitude and trends of interest representation carried out on behalf of third countries.

Based on Policy Option 1, the Proposal would cover:

- any natural or legal person carrying out interest representation on behalf of third country governments and affiliates;
- different types of commercial entities (*e.g.*, consulting firms, law firms, individual businesses);
- non-commercial entities (*e.g.*, think tanks, education, research and academic institutions, business, trade or professional associations, or CSOs).

Entities carrying out interest representation activities would be required to register and keep certain records. In addition, interest representation service providers could be required to take measures (reasonable effort) to identify the recipients of the services.

- **Record-keeping**: Entities would be required to keep, for a reasonable period, information on the identity of the entity on whose behalf the activity is carried out, a description of the purpose of the interest representation activity, contracts and key exchanges with the entity to the extent that they are essential to understand the nature and purpose of the interest representation carried out or information or material constituting key components of the interest representation activity.
- **Registration**: Entities would be required to register in a national register and provide information on themselves, the activities conducted, and the entities they conduct the activities on behalf of.
- **Transparency**: Entities carrying out interest representation as well as their subcontractors would have to provide their registration number when in direct contact with public officials.

In addition to the above requirements, Policy Option 2 would require the recordkeeping of all contracts and exchanges, annual due diligence exercise to assess the impact of the activities of the relevant entity, prior authorization and licensing to conduct the interest representation activities and the provision of the licensing number when in direct contact with public officials.

4. Compatibility with European law

4.1 Article 114 TFEU as legal basis

Policy Option 1 propose an EU Directive with Article 114 of the Treaty on Functioning of the European Union ("**TFEU**") as its legal base.[10] We see legal arguments that the proposed Directive should not have been based on Article 114 TFEU in light of its objectives and the context in which it were to be adopted.

Article 114(1) TFEU provides that:

" […] The *European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market*" .

Article 114 TFEU is a residual legal basis, available only where no other legal basis is available.[11] Following settled case law, the legislator can only rely on Article 114 TFEU if harmonisation is the act's "*primary*" aim and not merely "*incidental*".[12] The Court of Justice has further held that, to rely on the harmonization of laws as a legal basis, the measures must be intended to improve the conditions for the establishment of the internal market.[13] The proposed intervention arguably does not satisfy either of these two conditions.

(a) The legislative intervention does not have a harmonisation objective

The Proposal is being adopted in the context of the wider initiative of a new Push for Democracy and a Defence of Democracy Package. In line with this initiative, the primary objective of the proposed Directive in reality is to protect "*the openness of European societies* [that] *is being exploited for covert interference from foreign governments to manipulate decision-making processes and public opinion in the European Union*".

In Chapter 4 (*Objectives: What is to be achieved?*), the Impact Assessment states that the general objectives of the intervention are two-fold to: (i) ensure the proper functioning of the internal market for interest representation activities carried out on behalf of third countries; and (ii) contribute to the integrity of, and public trust in, EU and Member State decision making processes, with regards to the influence of third countries.

The general as well as the specific objectives of this intervention in Chapter 4 (*Objectives: What is to be achieved?*) are at least partially at odds with the Impact Assessment's statement on page 4 that "[a]s *detailed below in Chapter 4, the primary objective of this intervention is to ensure the proper functioning of the internal market for interest representation activities carried out on behalf of third countries through harmonisation of regulatory approaches regarding the transparency of such activities*". However, Chapter 4 does not refer to such a harmonisation objective. We therefore consider that harmonisation is not the intervention's primary but merely an incidental objective.

(b) The legislative intervention does not aim to improve the functioning of the internal market

The intervention does not aim to improve the functioning of the internal market. The proposal is ambiguous and does not set a clear part as to how the functioning of the internal market in the area of interest representation activities can be improved and how obstacles to its functioning can be remedied. According to case law, an abstract improvement of the internal market is not sufficient to invoke Article 114 TFEU as a legal basis.[16]

The obstacles to the internal market are, according to the Impact Assessment, (i) uneven playing field across Member States for service providers (*i.e.*, associated costs and complexity of registration), and (ii) high costs for service providers of interest representation activities that wish to operate across Member States.

However, we can argue that the obstacle of unnecessary costs for service providers that wish to operate across Member States cannot be prevented by the proposed policy options. On the contrary, the proposed policy options could result in considerable additional administrative burdens and costs.[18] Such additional regulation could, in particular, affect smaller or non-profit organisations in

their interest representation activities that do not have the administrative and financial resources to fulfil the additional requirements.

Moreover, as the title of the Proposal indicates, the Directive should establish "*requirements in the internal market on transparency of interest representation on behalf of third countries*". It is however unclear how harmonization of rules regarding transparency of interest representation on behalf of third countries only – as it should be the case in view of the principle of proportionality – will effectively remove the identified obstacles across the interest representation activities sector and how it will improve the functioning of the internal market overall.

4.2 Violation of EU primary law

As a general principle under EU law, secondary law must be compatible with primary law, such as the free movement of capital, the freedom of establishment, the principle of non-discrimination and the rights enshrined in the Charter of Fundamental Rights of the European Union – including the freedom of association and freedom of expression. Beyond the justifications specific to the restricted rights, the principle of proportionality (Art. 5(4) Treaty on European Union ("**TEU**")) requires all acts of EU institutions to be (i) suitable to achieve the desired objective, (ii) necessary to achieve the desired objective, and (iii) to not impose a burden on the individual that is excessive in relation to the objective sought to be achieved (proportionality in the narrow sense).

(a) Impact of the Proposal on market freedoms

(i) Free movement of capital, Art. 63 TFEU

The free movement of capital protects private individuals or entities, including third-country nationals and entities. The material scope concerns movements of capital with a cross-border dimension.

The Proposal restricts the free movement of capital, which can be seen, in particular, in the form of prohibitions, authorization or notification requirements and procedural requirements potentially deterring investments. The registration and authorization requirements as well as the availability of sanctions in case of non-compliance constitute considerable administrative burdens for entities conducting interest representation activities and, therefore, potentially deter cross-border investments.

This would affect both organisations receiving funding for interest representation activities as well as investors.

We see arguments that the more stringent reporting duties for third countries, *i.e.*, foreign funding, are discriminatory and unjustifiable restrictions to the free movement of capital. The reporting duties target discriminatively organisations in receipt of support from abroad. Our argument is supported by the Court of Justice judgement in *Commission v Hungary (Transparency of associations*[19]. The Court found reporting duties for foreign funding to be discriminatory and unjustifiable restrictions to the free movement of capital. Specifically:

- Para. 58: "*In particular, those provisions single them out as 'organisations in receipt of support from abroad', requiring them to declare themselves, to register and systematically to present themselves to the public as such, subject to penalties which may extend to their dissolution. In thus stigmatising those associations and foundations, those provisions are such as to create a climate of distrust with regard to them, apt to deter natural or legal persons from other Member States or third countries from providing them with financial support.*" [emphasis added]

- Para. 82: "*Moreover, neither does it set out why that objective allegedly justifies the obligations at issue applying indiscriminately to all the organisations which fall within the scope of that law, instead of targeting those which, having regard to their aims and the means at their disposal, are genuinely likely to have a significant influence on public life and public debate.*" [emphasis added]

- Para. 118: "*the systematic* obligations *in question are liable and have a deterrent effect 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. They are furthermore of such a nature as to create a generalised climate of mistrust vis-à-vis the associations and foundations at issue, in Hungary, and to stigmatise them.*" [emphasis added]

(ii) Freedom of establishment, Art. 49 TFEU

The Proposal restricts the freedom of establishment of entities conducting interest representation. Art. 49 (1) TFEU prohibits all discrimination that specifically affects "*the taking up and pursuit of activities as self-employed persons and the establishment and leasing of businesses*", but also all discrimination related to establishment in general.

The additional costs and administrative burdens for entities conducting interest representation activities as outlined in section 6.2.1.3 (*Costs and administrative burdens for economic actors (+SMEs)*) of the Impact Assessment, would affect and could hinder the establishment of economic actors. In particular, SMEs would not be fully exempt from the requirements under the Proposal and could be even more affected by or not able to afford initial and recurring compliance costs.

While the Impact Assessment states that providing fully harmonised transparency requirements, "*would reduce the costs resulting from legal fragmentation and uncertainty for economic actors, thereby facilitating the offering of interest representation activities on behalf of third country entities across border*", it imposes additional recurring compliance costs that would impact the entities over the long-term.

(iii) Restriction on the market freedoms is unjustified and disproportionate

According to settled case law, a measure which restricts the fundamental freedoms of the EU internal market is permissible only if, in the first place, it is justified by one the reasons listed in the relevant provisions, or by an overriding reason in the public interest and, in the second place, it observes the principle of proportionality.[20] We have palatable arguments that the restrictions imposed by the Proposal are neither justified nor proportionate.

The Impact Assessment states that "*foreign interference poses a significant threat to the security and sovereignty of Member States*"[21]. However, the Impact Assessment does not substantiate this claim, but merely states that despite *"[t]he scale of covert interest representation activities carried out on behalf of third countries [being] largely unknown, […] diverse instances of such activities which are capable of having serious negative consequences on the democratic process are known."*[22] As the justification grounds of Art. 65 (1) (b) TFEU must be interpreted strictly, they cannot be relied upon unless there is a "*genuine, present and sufficiently serious threat to a fundamental interest of society*"[23] Therefore, the public security ground within the meaning of Art. 65 (1) (b) TFEU cannot be invoked as justification for the impact on market freedoms in the present case is unsubstantiated and does not meet the above-mentioned evidential standard.

The Draft Impact Assessment further claims that the proposal serves to create transparency and, therefore, enhances the values stated in Art. 1 and 10 TEU and Art. 15 TFEU.[24] The principles of openness and transparency by which the activity of the EU institutions must be is considered to be an overriding reason in the public interest.[25]

The ECJ rejected the existence of an overriding reason in the public interest in the similar case *Commission v Hungary (Transparency of associations)*,[26] stating that the question whether transparency constituted such a reason had to be assessed on a case-by-case basis, "*having regard to the content and the purpose of the provisions of that law*"[27]. In this case, the ECJ stated that "*[t]he 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 […] 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.*"[28]

In this assessment, the ECJ also considered that the restrictions on the free movement of capital from third countries may be more serious than the restrictions of the free movement of capital from other Member States provided that the third-country capital movements are not subject, in their country of origin, to the regulatory harmonisation and cooperation between national authorities which apply in all of the Member States.[29]

The Proposal provides a similar situation. It is merely based on the presumption that any financial support by a third country entity is intrinsically liable to jeopardise the political and economic interests of the Member States and the ability of their institutions to operate free from interference. In particular, the Impact Assessment's statement on why the initiative merely covers third country activities as opposed to also cover activities carried out by other Member States/EEA countries is insufficient. The Impact Assessment merely cites an OECD report, which states that "*the risks involved in lobbying and influence activities of foreign governments are higher than the risks posed by purely domestic lobbying and influence activities*". However, the cited OECD report only distinguishes between "foreign" and "domestic" influence and is not tailored to the specific situation in the EU and its internal market, where Member States could be classified as "foreign" and "domestic" at the same time. Furthermore, the possibility that governments within the EU may act against the interests of the Union is not elaborated on.

In addition, like Hungary, the EU has failed to make sufficiently clear whether the obligations in question only target "*those which, in view of their objectives and the means at their disposal, are actually capable of significantly influencing public life and public debate*" which, according to ECJ, is necessary to invoke an overriding reason of public interest.[31] In this regard, the draft Impact Assessment states that the Proposal would not cover any funding given by a third country entity, but only that which is related to an interest representation activity (structural grant, donation, etc. are therefore excluded)" and "[t]herefore, […] only focus[es] on the activities that are genuinely likely to have a significant influence on public life and public debate. It seems highly questionable how, in practice, a differentiation between mere funding in the form of a donation/structural grant and a "remuneration" for an interest representation activity is to be made. Furthermore, there is no data according to which it seems probable to assume that, *e.g.*, third country donations are less likely to interfere with democratic processes than such that constitute a "remuneration" for an interest representation activity.

Finally, the restriction on the free movement of capital and establishment is in any event disproportionate to attain its objective (see section 3.2(c)).

(b) Impact of the Proposal on EU fundamental rights and human rights

(i) Right to private life and to the protection of personal data, Art. 7, 8 CFR

The Impact Assessment assumes "*limited restrictions on the right to private life (Article 7 of the Charter), the right to the protection of personal data (Article 8 of the Charter), insofar as they require that entities keep and provide certain information to the national authorities and provides for the public access to a part of that information*".[33]

However, the accessibility of the data to a potentially unlimited number of persons, constitutes a serious interference with Art. 7, 8 CFR. The Proposal provides that *the information necessary to ensure public accountability would be made public. Information that would not be necessary to ensure public accountability, such as certain type of personal data, would only be accessible to supervisory authorities*. This includes the entity carrying out interest representation and the activity carried out on behalf of third country entities. Based on the settled case law of the ECJ, the general public's access to information on beneficial ownership constitutes a serious interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter.[35] The disclosure of the entity on which behalf the activity is carried out is comparable to the disclosure of beneficial ownership of corporate entities.

(ii) Freedom of association, Art. 12 CFR

Regarding the scope of the freedom of association, the European Court of Human Rights ("**ECHR**") stated that where the measures restrict "*an association's ability to receive grants or other financial contributions which constitute one of the main sources of financing of NGOs, the association may fail to engage in activities which constitute the main purpose of its existence […]. [T]he ability of an association to solicit, receive and use funding in order to be able to promote and defend its cause constitutes an integral part of the right to freedom of association*. […] *In order to ensure that NGOs are able to perform their role as the "watchdogs of society", they should be free to solicit and receive funding from a variety of sources. The diversity of these sources may enhance the independence of the recipients of such funding in a democratic society*."[36] [emphasis added]

Regarding the interference, the ECHR stressed the significance of measures taken by the authorities which, although not actually restricting the right of an association to carry out its activities, still result in adverse consequences for the associations' operations, *e.g.*, by using stigmatising language to describe that association. The Court thereby expressly refers to ECJ ruling in *Commission v. Hungary* that the designation of civil society organisations as "*organisations in receipt of support from abroad*" are capable of creating a generalised climate of mistrust towards those organisations and of stigmatising them.[37]

The Impact Assessment denies a stigmatising effect due to the fact that, *inter alia*, *the national public registers would have to be presented in a neutral manner and […] Member States would be prevented from requiring the entities that fall within the scope of the initiative to register 'as an organisation in receipt of support from abroad' or indicate on their internet site and in their publications and other press material the information that they are organisations in receipt of support from abroad*. However, the registers are nevertheless public, clearly linked to the issue of financing by third countries and contain data on the organisations that clearly identify them to the public. In this respect, the mere inclusion in the publicly accessible register is likely to result in stigmatisation.

Consequently, even if measures are not aimed at dissolution or do not necessarily or directly threaten the existence of the organisations, they may make it considerably more difficult to exercise their freedom of association. In the Proposal, the prior authorization requirements, the adding of a publicly available flag in the registration of entities who received a licence despite comments submitted by a Member State or the Commission as well as the sanctions and fines imposed in case of non-compliance

in themselves, but also in their "*cumulative effect* […] – *whether by design or effect* – […] [place] *a significant 'chilling effect' on the choice to seek or accept any foreign funding*".[39]

(iii) Freedom of expression and information, Art. 11 CFR

The draft Impact Assessment appears dismissive of the EU proposal falling within the scope of Art. 11 CFR as *none of the policy options require transparency in terms of funding of operating expenditure of which are unrelated to an interest representation activity like structural grants or donations*" which "*implies that the freedom of CSOs, and other concerned entities, to express an opinion on their own behalf would a priori not be affected by the different policy options*.

In order to determine the scope of Art. 11 CFR, reference can be made to the ECHR's statements on Art. 10 ECHR, as the ECJ has not yet made any separate statements on Art. 11 CFR. Accordingly, Art. 11 CFR protects freedom of opinion and expression as well as freedom of information and all activities specifically associated with media activities, from the procurement of information to its dissemination.[41]

The Impact Assessment does not consider the restrictions on the freedom of EU citizens to express their opinions by supporting certain NGOs of their political conviction, be it by donations. The EU citizens could themselves be restricted, depending too on the modalities of an eventual directive, (i) by virtue of having their information included in transparency registers because the same NGO they donated to also received ex-EU funding, and (ii) any restriction of an NGO's activities (see 3.2(a) above) would inadvertently also be a restriction of the EU citizens' right to freedom of expression and information by supporting a particular cause, e.g., in the form of donating to an NGO.

(iv) Freedom of arts and sciences, Art. 13 CFR

The Impact Assessment also refers to the funding of a research centre at the Free University of Amsterdam by the Chinese Communist party as well as think tanks in general as examples of alleged foreign interference through covert interest representation. The Proposal could, therefore, also have a direct impact on research institutions.

The Impact Assessment, however, argues that none of the policy options regulate the freedom to define research questions, nor the right to disseminate and publish the result. Except in the extended requirements included in the PO2.3.2+2.6 (and only in the specific situation where an interest representation activity is likely to seriously affect public security), none of the policy options would limit international collaboration.

Art. 13 CFR has not yet been the subject of ECJ case law; there is no corresponding provision in the ECHR, but there are parallels to Art. 10 ECHR. Accordingly, the freedom of science is not only restricted by measures against certain scientists, but also by an impairment of the independence of a research institution[44]. Thus, a directive could restrict Art. 13 CFR if its transparency obligations inhibit access to funding of a research institution, be it due to their stigmatising effect (with the consequence, *e.g.*, that funding is lacking because third country entities no longer participate and, accordingly, an entity is no longer able to define research questions or to disseminate and publish research results).

(v) Restriction on the freedoms is unjustified and disproportionate

There are legal arguments that the Proposal does not "meet objectives of general interest" within the meaning of Art. 52 CFR.

In principle, enhancing transparency is recognised as a legitimate aim within the meaning of Art. 52, but primarily when applied to public institutions, and in fact rejected in the similar case *Commission v Hungary (Transparency of associations)*[45].

Furthermore, *Luxembourg Business Registers* similarly concerned a requirement "*to ensure that publicly available national registers are in place*"[46]

- In this judgement, the ECJ held that the anti-money-laundering directive providing that Member States must ensure that the information on the beneficial ownership of legal entities incorporated within their territory is accessible in all cases to any member of the general public were neither necessary nor proportionate to the objective pursued, therefore constituting a violation of Art. 7, 8 CFR.[47] In particular, the ECJ stated that the principle of transparency does not constitute an "*objective of general interest*" if the disclosure measures lack the link to the "*use of public funds*" or the "*link with public institutions*" and rejected such a link in relation to the disclosure of beneficial ownership data.[48]

The Impact Assessment argues that the present case would not comparable to the Luxembourg Business Registers case since in contrast with the situation that gave rise to the judgement in Luxembourg Business Registers concerning the general public's access to information on beneficial ownership, ensuring transparency of activities affecting democratic decision-making is a priority for all citizens, and not just a matter for public authorities.

Nevertheless, the ECJ has set very strict requirements for public access to personal data and the necessary link to the use of public funds or link with public institutions. The statement by the Impact Assessment that the data collected by the Proposal ensures the transparency of activities affecting democratic decision-making is a priority for all citizens, and not just a matter for public authorities [50], is not sufficient for the establishment of such a "link" given that beneficial ownership registers also serve democracy and democratic decision-making. This can be seen when referring to the ECHR's ruling that money laundering and related activities "*constitute a serious threat to democracy*"[51]. A particularly clear link with the use of public funds cannot be demonstrated. The mere remote relevance for democracy and democratic decision-making does not suffice.

(c) The Proposal does not comply with the principle of proportionality

The Proposal is not suitable to reach its stated objectives. In particular, the Impact Assessment is too vague and missing terms and definitions, in particular with regard to the term "interest representation activity" and also with regard to the terms "foreign influence/interference"[52]. Such ambiguity in an eventual legislative measure can lead to the measures being misused or evaded. Additionally, the influence via non-Member State actors is not covered even though there are non-Member State actors and de facto regimes which are able and likely to exert state-like influence).

The Proposal is also not necessary and does not constitute the least invasive, equally suitable means regarding the stated objectives.

- Given that the magnitude of covert interest representation activities carried out on behalf of third countries is unknown, the proposal should reflect this uncertainty and consider a one-time data collection as a less severe means of assessing the risk and the extent of potential foreign interference.
- In addition, it should be considered whether civil society organisations could be generally excluded from the scope of application[53] or more far-reaching exceptions could be defined. Ultimately, the scope of application should only include organisations that are particularly close to risk areas and organisational structures that make harmful foreign influence particularly likely.

In addition, the ECHR's judgement confirmed the ECJ's ruling that "*the objective of increasing the transparency of the financing of associations, although legitimate, cannot justify legislation which is based on a presumption […] that any financial support by a non-national entity and any civil society organisation receiving such financial support are intrinsically liable to jeopardise the State's political and economic interests and the ability of its institutions to operate free from interference. A regulatory framework needs to correspond with the scenario of a sufficiently serious threat to a fundamental interest of society, which those obligations are supposed to prevent.*"[54] [emphasis added]

The Impact Assessment also concedes that "*deciding whether to refuse granting of a licence on the ground that the activity is likely to seriously affect public security*" would still place *de facto* prior authorisation obligations on the mechanisms by which associations use certain remunerations from third countries and might, therefore, be unjustified.[55]

Additionally, alongside the ECHR's ruling, the vague definitions and scope of the law are to be criticized, rendering the "*situation […] difficult for the applicants to foresee which specific actions on their part could lead to their registration […], registration which would entail a host of additional reporting and accounting requirements inhibiting their ability to function because of the substantial amount of staff time and resources such requirements would demand of an organisation.*"[56]

Regarding the interference in the form of sanctions/fines, it should be noted that, according to the ECHR, "*the nature and severity of the penalties imposed are important factors to be considered when assessing the proportionality of an interference*".[57]

- In particular, penalties and sanctions may not "*amount to a form of censorship and should not be such as to be liable to hamper NGOs in performing their task as independent monitors and 'public watchdogs'.*"[58] According to the ECHR, the nature of the offence (regulatory vs. criminal), the amount and frequency of the fines imposed and the fact whether an organisations is non-profit are to be taken into account when determining whether the sanctions can be regarded as proportionate.[59]

The Proposal refers to the fines of the General Data Protection Regulation and the Digital Services Act ("**DSA**") as a basis,[60] especially stressing the benchmark of the penalties under Art. 52(3) of the DSA which relates to failures to comply with transparency requirements, namely, penalties of 1% of the annual income or worldwide turnover. The Proposal, however, does not differentiate between entities that are not profit-oriented and entities whose main objective is to make a profit. It is not plausible why the same standards should be applied to both. Moreover, the fines seem at a relatively high level for what constitute essentially regulatory offences.

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[2] See judgement of 18 June 2020 in case C-78/18 *Commission v Hungary (Transparency of associations)*, EU:C:2020:476.

[3] European Commission, 2022 State of the Union Address by President von der Leyen, https://ec.europa.eu/commission/presscorner/detail/en/speech_22_5493.

[4] COM(2022) 548 final.

[5] European Commission/Dubravka Šuica, Keynote speech at the opening of the annual general assembly of the European Association for Local Democracy Agencies (ALDA), SPEECH/23/3466.

[6] European Commission, Call for evidence for an initiative (without an impact assessment), Ref. Ares(2023)1121991 - 16/02/2023.

[7] European Commission, Call for evidence for an initiative (without an impact assessment), Ref. Ares(2023)1121991 - 16/02/2023.

[8] European Parliament, Defence of democracy package, including an initiative on the protection of the EU democratic sphere from covert foreign influence, https://www.europarl.europa.eu/legislative-train/spotlight-JD%2023-24/file-defence-of-democracy-package.

[9] European Parliament, Defence of democracy package, including an initiative on the protection of the EU democratic sphere from covert foreign influence, https://www.europarl.europa.eu/legislative-train/spotlight-JD%2023-24/file-defence-of-democracy-package; European Commission/Dubravka Šuica, Keynote speech at the opening of the annual general assembly of the European Association for Local Democracy Agencies (ALDA), SPEECH/23/3466.

[10] It would have to be examined in more detail whether Art. 114 TFEU has to be complied with if Policy Option 1 (non-legislative measures) is chosen. The draft Impact Assessment seems to assume that Art. 114 TFEU does not play a role here; however, there may be doubts about this view as it is disputed in the literature whether the Commission has a "general competence to make recommendations" without an explicit legal basis set forth in the Treaty (as argued by Gundel, in: Schulze/Janssen/Kadelbach, Europarecht, 4th ed. 2020, § 3 Verwaltung para. 85; for an opposing point of view, see Nettesheim, Das Recht der Europäischen Union, Art. 292 AEUV para. 13.

[11] See Article 114(1) TFEU: "*Save where otherwise provided in the Treaties* […]." See also Judgment of the Court of 26 January 2006, *Commission v Council*, Case C-533/03, EU:C:2006:64, ¶45.

[12] Judgement of 18 November 1999, *Commission v Council*, Case C-209/97, EU:C:1999:559, 33-36.

[13] See judgement of 5 October 2000, *Germany v Parliament and Council (Tobacco 1)*, C-376/98, EU:C:2000:544, para. 83

[16] *See* judgement of 5 October 2000, *Germany v Parliament and Council (Tobacco 1),* C-376/98, EU:C:2000:544, para. 84.

[19] See judgement of 18 June 2020 in case C-78/18 *Commission v Hungary (Transparency of associations)*, EU:C:2020:476.

[20] *Commission v Hungary*, para. 76 and the case law cited therein.

[23] *Commission v Hungary (Transparency of associations)*, para. 91.

[25] *Commission v Hungary (Transparency of associations)*, para. 78 with further references.

[26] See *Commission v Hungary (Transparency of associations)*, paras. 140, 141; cf. also ECtHR, Ecodefence and others v. Russia, Applications nos. 9988/13 and 60 others, 14.06.2022, confirming, with regard to Art. 11 ECHR, the ECJ's ruling (for a further analysis, see D. II. 1. b)).

[27] *Commission v Hungary (Transparency of associations)*, para. 87.

[28] *Commission v Hungary (Transparency of associations)*, para. 86.

[29] *Commission v Hungary (Transparency of associations)*, para. 80.

[30] OECD (2021), Lobbying in the 21st Century: Transparency, Integrity and Access, OECD Publishing, Paris, https://doi.org/10.1787/c6d8eff8-en, p. 45.

[31] *Commission v Hungary (Transparency of associations)*, para. 82.

[35] Case C-37/20 and C-601/20, *Luxembourg Business Registers*, EU:C:2022:912, paras. 42-44.

[36] ECHR, *Ecodefence and others v. Russia*, Applications nos. 9988/13 and 60 others, para. 165 and 169.

[37] ECHR, *Ecodefence and others v. Russia*, Applications nos. 9988/13 and 60 others, para. 132.

[39] ECHR, *Ecodefence and others v. Russia*, Applications nos. 9988/13 and 60 others, para. 186.

[41] Cornils in: Gersdorf/Paal, BeckOK Informations- und Medienrecht, Art. 11 para. 32.

[44] Jarass, Charta der Grundrechte der EU, Art. 13 para. 11 with further references.

[45] See ECJ, Commission v Hungary (Transparency of associations), ECLI:EU:C:2020:476, paras.

[47] *Luxembourg Business Registers*, para. 86.

[48] Id., paras. 61, 62.

[51] See ECHR, Michaud v. France, Application no. 12323/11, para. 123.

[52] See, for a comprehensive overview regarding the vagueness of these terms and the differentiation between them, Berzina and Soula, Conceptualizing Foreign Interference in Europe, Alliance for Securing Democracy, https://securingdemocracy.gmfus.org/wp-content/uploads/2020/03/Conceptualizing-Foreign-Interference-in-Europe.pdf.