

## JOINT CIVIL SOCIETY RESPONSE TO THE QUESTIONNAIRE ON THE EU DEFENCE OF DEMOCRACY PACKAGE

*At the end of July, the European Commission shared a questionnaire with several civil society organisations to seek input on the Defence of Democracy Package.<sup>1</sup> This follows a decision to postpone the package and conduct an impact assessment.<sup>2</sup> This paper is a joint response to the questionnaire that seeks input on a proposed measure to address foreign interference in EU decision making. It sets out concerns, likely implications, and possible alternative solutions.*

### 1. AIM OF THE EUROPEAN COMMISSION'S PROPOSAL AND LIMITED SCOPE OF THE QUESTIONNAIRE

In the state of the Union speech on 14 September 2022, President von der Leyen announced a Defence of Democracy package stating that *"we need to better shield ourselves from malign interference... [the Democracy Package] will bring covert foreign influence and shady funding to light [...]. We will not allow any autocracy's Trojan horses to attack our democracies from within."*

The Commission Work Programme for 2023 states that *"to step up the fight against disinformation and to support media freedom and pluralism, including by developing civic space and citizen participation to bolster democratic resilience from within. In particular, it will include proposals to protect our democracies and strengthen trust by defending our democratic system from outside interests."*

The current plans respond to the above concern. However, while the questionnaire states that it will support the Defence of Democracy package, it focuses on a specific measure to protect democracies from outside influence. There are no questions related to other measures under the Defence of Democracy package that might support democracy. For example, the Commission has indicated in previous consultations that it plans to put forward a proposal on civic engagement – but there are no questions on this. Thus, the questionnaire appears only to be about one part of the whole package.

Neither the questionnaire, nor any other documents, further define the specific threats to EU democracies. Nor do they provide examples of past interference. There is also no recognition of the potential for malign interference of interest representation activities from within the European Union.

### 2. PROPOSED OPTIONS

The questionnaire sets out three policy options. They differ primarily in their approach and level of intensity from a set of policy recommendations to a binding instrument. But they all focus on:

*'the provision of interest representation activities carried out on behalf of third countries conducted with the objective of influencing the formulation or implementation of policy or legislation, or decision-making processes in the EU'.*

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<sup>1</sup> An initial deadline of 11 September was set, leaving only one month for a response at a time when most civil society organisations take a summer break – mirroring the recess of the European Parliament. A limited extension was given until 25 September.

<sup>2</sup> See concerns expressed by civil society, including in a [joint statement](#).

All options focus on the **transparency of interest representation services on behalf of third countries and assume that those engaging in malign interference will register their activities to allow the EU or member states to monitor them.**

The questionnaire does not consider other policy options and thus appears to limit the scope of the impact assessment to one proposal – albeit one that varies in intensity. From the limited information available all three policy options outlined in the questionnaire are in essence similar and vary primarily in the degree to which they are legally binding.

According to this group of civil society organisations **all options suffer from the same flaws**, including an imprecise objective and legal basis and the fact that they all draw an unnecessary and discriminatory distinction between foreign funding and funding from within the Union.

The **first** option only addresses non-legislative measures through sets of recommendations. This proposal risks encouraging member states to enact legislation that limits civic space but fails to address the issue. The **second** relies on the harmonisation of measures at member state level but fails to identify the existing challenges within the member states and the types of representation services that exist but have not been caught by member state authorities. Below we further set out some of the challenges. The **third** is the same as the second but with binding sanctions attached. This option also calls for mechanism for “prior authorisation/licencing” for interest representation services/activities which is contrary to international standards on freedom of association and expression. All of these requirements would restrict access to policy making for civil society especially grassroots movements<sup>3</sup>.

### 3. CORE CONCERNS

As civil society organisations in favour of transparency and accountability, our core concern is that all current proposals **place an increasing burden on legitimate and open civil society organisations without tackling in any way 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.**

Several related concerns stem from this overarching concern:

- The European Union has, rightly and outspokenly, critiqued laws that governments around the world have proposed or enacted under a pretext of transparency, but with the aim of limiting the space for civil society and critical debate. A similar law, even if proposed with good intentions, **undermines the EU’s foreign policy.**
- In line with the Charter of Fundamental Rights the EU must ensure that all measures to ensure transparency are **necessary and proportionate** and comply with the [Court of Justice of the European Union’s \(CJEU\) judgment of 18 June 2020 in \*European Commission v Hungary\* \(C-78/18 – the “Judgement”\)](#).

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<sup>3</sup> The Council of Europe Guidelines on civil participation in political decision making clearly state that authorities should “seek to avoid unduly burdening individuals, NGOs and civil society at large in the course of civil participation” and should ensure that this is carried out “without undue administrative obstacles”

- From a practical perspective, any measure will only be effective if the EU and member states have the **ability to monitor** and take appropriate action. Gathering huge amounts of data won't serve a useful purpose without a commensurate ability to monitor and spot concerns.
- The **legal base under article 114 TFEU** requires that legislation contributes to the removal of barriers in the single market and not the creation of new ones. Free movement of capital might be restricted and the market for all representation services diminished.

As noted by Carnegie in a [2022 paper](#) responding to the European Parliament's resolution on foreign influence, the '*EU should revise its approach to foreign interference so that it is more targeted, better anchored in international law, less vulnerable to misuse, and in line with the EU's own activities in the area of international democracy and human rights support.*'

#### 4. DEFINITIONS AND DATA

The questionnaire does not define covert or malign foreign influence which can be broken down into three component parts:

- The terms **covert and malign** are not defined yet have very different implications and appear to be used interchangeably. The deployment of a transparency measure to address covert activities will likely have a limited effect.
- The **foreign nature** of the influence is not addressed, and no explanation is provided regarding acceptable foreign influence, or the possibility that governments within the EU may act against the interests of the Union.
- Thirdly, there is also no **definition of influence** or the levels of acceptable influence under international law.

A second undefined term is that of an **interest representation activity**. The questionnaire suggests a list of activities including:

*Organising or participating in meetings, conferences, or events, contributing to or advertising campaigns, organising networks and grassroot activities, preparing policy and position papers, legislative amendments, opinion polls, surveys or open letters, or activities in the context of research and education, where they are specifically carried out with that objective.*

These are all regular activities for civil society organisations and necessary to ensure information and debate in society, as well as of the right to '*make known and publicly exchange their views in all areas of Union action*' and have '*an open, transparent and regular dialogue with EU institutions*'. The focus should rather be on the nature of the interest behind such activities, than on the activities themselves.<sup>4</sup>

No data has been presented to support the proposal and the only example cited in the 2022 State of the Union speech regarding a Chinese Cultural Institute in the Netherlands would likely not fall within the scope of the proposed measures.

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<sup>4</sup> Article 11 Treaty of the European Union

## 5. STANDARDS UNDER INTERNATIONAL AND EU LAW

International law recognises a certain acceptable level of foreign interference. The International Court of Justice (ICJ) held in its *Nicaragua v. United States of America* judgement that, to be in violation of international law, interferences must be ‘coercive,’ which is the ‘very essence of prohibited intervention.’ Coercion can only be assumed when a state is prevented from exercising its sovereign will due to the external pressure from another state. In its case law, the ICJ has only assumed coercive intervention when a state supports violent insurgents in a foreign state or uses military force. Generally, this is also the case if the election infrastructure of a state is tampered with – but less direct influence is generally considered permissible<sup>5</sup>.

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) of the Treaty of the Functioning of the European Union (TFEU)) 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)

The policy options under consideration are incompatible with the Treaties and the Charter on Fundamental Rights. They cast a net unsuitable to the task and that can be easily misused by Member States in expansive transposition – previously deemed unlawful under the Treaties by the Court in the *Hungary Judgement*. Rather, where the Commission decides to introduce legislative proposals, they should be focused on protecting CSOs, targeting specifically the threat from foreign government interference it has identified, and strictly within the limits of the Treaties.

### Legal basis

Article 114(1) TFEU enables the EU to « 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”<sup>6</sup>.

The reference to the internal market objective opens a potentially broad scope of application, but there are still limits on the Commission’s powers to propose legislation under Article 114 TFEU. A measure can only be adopted if it is a) “for the approximation of” national law or administrative practice; b) and aimed at “establishing or ensuring the functioning of the internal market”.

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<sup>5</sup> <https://www.icj-cij.org/case/116> and <https://www.icj-cij.org/case/70/judgments>

<sup>6</sup> Article 114(2) specifies that Article 114(1) does not apply to fiscal provisions, or provisions related to the free movements of persons or the rights and interests of employees.

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It is apparent that the Commission's aim in restricting the rights of interest representatives is not to foster the internal market by removing potential obstacles to trade or effective competition. conversely, it will introduce them insofar as CSOs' funding is concerned.

Contrary to removing potential obstacles to the functioning of the internal market it could be argued that the proposed measures introduce additional obstacles to the functioning of the market by limiting the ability of organisations to seek and receive funds.

### Compliance with the CJEU decision C-78/18 Commission v Hungary

In the 2020 judgment in case of the [European Commission v. Hungary](#) the court clearly articulated that transparency restrictions on foreign funding must not have a deterring effect on civil society and that foreign funding should not be seen as intrinsically suspect.

Accordingly, transparency requirements must remain minimal, unless there is a specific threat that requires further oversight and control. The proposed measures risk creating an intrinsic suspicion of foreign funds. The judgment set out important elements including:

- the **stigmatising impact** of requiring '*organisations in receipt of support from abroad*' to declare themselves and present themselves to the public as such, subject to penalties which may extend to their dissolution (para 58); and
- the **deterrent effect of the law** '*on the participation of donors resident in other Member States or in third countries in the financing of civil society organisations falling within the scope of the Transparency Law and thus to hinder the activities of those organisations and the achievement of the aims which they pursue*' (para 118).

The ensuing climate of mistrust and stigmatization will likely have a deterrent effect on the willingness of donors from third countries to provide (financial) support, thus distorting the market and preventing non-profit organizations from doing work which is essential to the functioning of democracy.

## 6. WHO WOULD LIKELY FALL WITHIN THE SCOPE?

Overall, the more open and transparent an organisation, the more likely they will provide detailed and accurate information. Those engaged in malign and/or covert activities are more likely to provide vague/aggregated information and use loopholes in the instrument to disguise their funding or activities.

From the limited information available our understanding is that any proposed measure will cover:

- interest representation services;
- funded by third countries;
- with a possible exclusion for operating grants.

Unfortunately, while preferred from a civil society perspective, very few government donors, including the EU itself, regularly provide operating grants. The EU and other governments generally provide project-based funding with clear objectives - many of which aim at legal or policy change.

Civil society organisations, lobby firms, public relations firms, law firms, academics and others may all fall within the scope. The below are two examples.

- An **EU civil society organisation** that receives funds from the UK or Canada for research and advocacy on a range of issues including, for example, on proposed EU laws and policies on artificial intelligence and digital rights.
- An **EU law firm or public relations** firm contracted by a state, to provide services related to ongoing trade negotiations and related EU policies or contracted to provide information on a particular area of EU law such as digital services.

Currently all the above entities are required to register in an EU member state and comply with core reporting requirements including submission of their annual accounts. If they engage in lobbying activities with the EU institutions, they need to register in the EU Transparency Register and provide information on their activities and estimated lobbying budget. Only civil society organisations are required to provide information on the different sources of funding. The information is accessible if the entity provides sufficient detail about their activities and funding.

## **7. WHO WOULD LIKELY NOT FALL WITHIN THE SCOPE?**

One of our core concerns is that there are numerous ways in which organisations / governments might seek to influence and undermine the EU that will not be captured under any of the three options / proposed measures. This might be through financial influence – but it is also important to note that there are many disinformation campaigns that do not necessarily require significant funding.

There are different ways to exert influence on the EU yet remain covert or circumvent the proposed measures. Different options include:

- where a non-EU **state wants to exert influence**, they could **set up an intermediary structure such as a company** in their own state and channel the money to an organisation in the EU through that entity. The funding would then not be seen as state funding but funding from a private entity.
- **Influence may be exerted by non-state actors** who either have individual crowd-sourced funding or private funding. Both may be quite significant and would again fall outside the scope of the proposed measures yet could still influence the EU.
- **Influence may be exerted in different ways** that do not obviously focus on the laws and policies of the EU. This could include cultural institutes that have a more generic influence but are not engaged in interest representation services.
- **Surveillance and other activities carried out by intelligence services** or affiliates either to exert influence, gather information or intimidate dissidents and human rights defenders.



For example, since 2009, more than USD 700 million have been spent in Europe on anti-gender campaigns against the rights of women and LGBTI people.<sup>7</sup> USD 430 million came directly from European-based sources, USD 180 million from Russia and USD 80 million from the US. The vast majority came from within the EU and would not fall within the scope of the proposed measures. The US funding has been reported as coming from a variety of Christian Right fundamentalist groups.<sup>8</sup> While they had links to the Trump administration the funding was not state funding and would again not fall within the scope of the proposed measures. This funding represents a very **deliberate attempt to challenge EU values and rights set out under the Charter of Fundamental Rights - yet none of the funding would fall within the scope of the proposed measures.**

Another example centres on the recently established network of centres opened across the EU by the Mathias Corvinus Collegium (MCC), a conservative Hungarian institution funded by Orban's government. In 2020 MCC had more than 1.5 billion Euros of Hungarian state funding. According to the EU Transparency Register<sup>9</sup>, the annual budget for 2022/23 for the Brussels entity is listed as just over 50 million Euros of which approximately 10 million is from a pharmaceutical company and 20 million from an oil and gas company. The rest of the budget is unaccounted for. A review of the events organised by MCC in Brussels shows a pattern of questioning and twisting EU policies. However, despite clearly **seeking to influence EU policy it would also fall out of the scope of the proposed measure.**

It is also important to note that organisations, whether from the EU or outside the EU, are free to express themselves and comment on EU policies. Thus, equal responsibility must also lie with policy makers to assess whether the influence contravenes the EU treaties and the Charter of Fundamental Rights, thus raising their concern.

## 8. FOREIGN VERSUS EU FUNDING AND THE IMPACT ON THE EU AS A DONOR

As held in the CJEU judgement against Hungary, foreign funding should not be seen as intrinsically suspicious. It is and should continue to be seen as normal that civil society organisations, especially those engaged in advocacy, receive funding from a wide variety of sources including sources outside the EU. Similarly, organisations in other regions should be able to receive EU funding without being seen as suspicious or labelled a 'foreign agent'.

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

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<sup>7</sup> See EPT Tip of the Iceberg <https://www.epfweb.org/sites/default/files/2021-08/Tip%20of%20the%20Iceberg%20August%202021%20Final.pdf>

<sup>8</sup> See Open Democracy <https://www.opendemocracy.net/en/5050/revealed-trump-linked-us-christian-fundamentalists-pour-millions-of-dark-money-into-europe-boosting-the-far-right/>

<sup>9</sup> See <https://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=441902548040-49>



In some instances, the EU's support is also relatively covert. For example, to protect the security of individual human rights defenders, individual funding is not always advertised and, in response to closing civic space across the globe, the EU has [increasingly](#) relied on the [European Endowment for Democracy \(EED\)](#), which is formally independent of the EU and with less rigid funding rules; therefore able to operate more flexibly in politically difficult environments.

A law that appears to be a similarly blunt instrument in tackling unwanted influence will do immeasurable damage to the EU's global role and reputation as a protector of rights.

## **9. CHALLENGES AND UNINTENDED CONSEQUENCES**

The sources of influence that the EU is likely most concerned about either fall outside the scope of the law or will be exercised by circumventing the law. Consequently, those most affected will be civil society organisations – who already operate in a more fragile environment, with low budgets and, as regularly reported by the [EU Agency for Fundamental Rights](#), increasing threats..

Several OECD countries have had foreign interference laws for some time – the oldest being the Foreign Agents Registration Act (FARA) adopted in the US in 1938. However, none have proven to be particularly effective in curbing foreign influence. A recent review by the Good Lobby<sup>10</sup> articulated three core concerns common to the laws reviewed. Firstly, most of the laws have been drafted with limited clarity, creating a regulatory burden and risking misapplications. Secondly there has been limited and unpredictable enforcement and thirdly negative democratic implications.

The EU should not follow the tools of the autocratic playbook, which relies on discriminatory designations of foreign versus EU actors, and rather focus on a tailored route that allows for democratic oversight of attempts to undermine democracy. A blunt instrument risks doing more harm than good both to our democracies and the EU's role globally.

## **10. POSSIBLE ALTERNATIVE OPTIONS/ RESPONSES TO THE PROBLEM**

As civil society we recognise the threats to democracy within the EU as evidenced for example by the trends identified in the annual Rule of Law reports and the surveys of the EU Fundamental Rights Agency. We are also concerned about some of the targeted and more covert ways in which disinformation and other means are being used to undermine democracy and fundamental rights within the EU. However, as the problems identified by the Commission are complex and multi-dimensional, they cannot be addressed by one measure.

As indicated in the announcement of the Defence of Democracy package, measures should be adopted *'to step up the fight against disinformation and to support media freedom and pluralism, including by developing civic space and citizen participation to bolster democratic resilience from within'*.

Civil society has made clear recommendations<sup>11</sup> (see also attached) some of which we believe are under consideration by the Commission – however no proposals have been made. Those recommendations are premised on the EU ensuring a leadership role and unequivocally standing for democracy and human rights within the EU and globally. In this context, we would also like to highlight

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<sup>10</sup> Professor Alberto Alemanno and Felix Sames, How to Evaluate a Foreign Influence Legislation? A comparative analysis, June 2023

<sup>11</sup> [https://civilsocietyeurope.eu/wp-content/uploads/2023/09/Joint-Civil-Society-Contribution-to-the-Defence-of-Democracy-Package\\_April.pdf](https://civilsocietyeurope.eu/wp-content/uploads/2023/09/Joint-Civil-Society-Contribution-to-the-Defence-of-Democracy-Package_April.pdf)





the *Opinion on Democracy in the Digital Age* requested by the EC President to the European Group on Ethics in Science and New Technologies (EGE)<sup>12</sup>. Specific recommendations from Civil Society Europe included:

- **standards promoting civil society participation** at all levels of governance including a structured framework for civil dialogue and a review the regulation on access to documents.
- sustained action and funding to **monitor and act on dis-information and corruption** both around elections and more broadly.
- the **creation of a protection mechanism for human rights defenders** within the EU including emergency support and if needed, temporary relocation.
- **EU recommendation on the upcoming Council of Europe guidelines on the minimum standards and best practices for citizen education.**
- **Adopt the proposed reform on the funding of political parties currently blocked in the Council**<sup>13</sup>

On the specific measure to address undue interference the forthcoming impact assessment needs to be based on:

- a clear definition in line with standards under international law;
- a clear analysis of the problem supported by data; and
- an assessment of the existing measures both within member states and at EU level.

Based on this information our tentative proposal would include the following elements. A full consultation with partner organisations and detailed legal analysis is needed before providing more information:

- The European Commission could be considering the harmonisation of rules regarding interest representation, **covering interest representation services performed by entities both from the EU/EEA and outside the EU/EEA**. Such rules would have equal applicability to EU and non-EU entities and a **requirement for all entities to provide the appropriate information based on strict criteria of necessity and proportionality**.
- There should be minimum thresholds for entities- this will prevent all CSOs from having to register (especially the smaller and grassroots ones that do not have many resources). Some examples of thresholds can be drawn from national legislation as well as proportionate reporting obligations.
- **Incorporation of best practice at national level**, for example distinguishing when organisations are engaging in a 'structured civil dialogue' as opposed to standard

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<sup>12</sup> [https://research-and-innovation.ec.europa.eu/news/all-research-and-innovation-news/democracy-peril-commissions-ethics-group-stresses-need-and-ways-deepen-democracy-face-novel-risks-2023-06-20\\_en](https://research-and-innovation.ec.europa.eu/news/all-research-and-innovation-news/democracy-peril-commissions-ethics-group-stresses-need-and-ways-deepen-democracy-face-novel-risks-2023-06-20_en)

<sup>13</sup> <https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-statute-and-funding-of-the-european-political-parties-and-foundations>

lobbying activities. It is also important to note that the EU Transparency Register introduces already a distinction between interest representation and social dialogue and dialogue for churches or non-confessional groups<sup>14</sup>.

- **Exceptions should be made for civil society organisations and human rights defenders to protect them from persecution and abuse** as it is the case for the EU Transparency Register<sup>15</sup>
- If possible, **links to national legal entities online registers** which often contain more detailed and accurate information, should be established ensuring that they are also available in other EU languages.
- Such a proposal would have to be **built in close cooperation with civil society organisations with close attention to fundamental rights implications**.
- There should be an **adequate monitoring and training** of policy makers to identify activities that are likely to undermine EU values.
- **The EC should also consider an oversight body at EU level** that includes different stakeholders including civil society organisations and the EU Agency for Fundamental Rights.

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<sup>14</sup> Please note that meetings held with social partners in the context of social dialogue are excluded from the Transparency Register.

<sup>15</sup> See article 4.2 of the publication of the information may be withheld where such publication could undermine the protection of the Commission Decision of 25 November 2014, on the publication of information on meetings held between Members of the Commission and organisations or self-employed individuals, in particular as regards the protection of the life, the integrity or privacy of an individual, of the general interest.