

Guidance Note for Assessing the Civic Space Impact of EU legislative Proposals

December 2024

1. Introduction

Civil society organisations (CSOs)¹ and the EU Fundamental Rights Agency (FRA)² have consistently emphasized the need for ex-ante impact assessments of EU legislative proposals to ensure that EU laws avoid disproportionate restrictions on civil society activities and promote consistent inclusion of civil society in policy making.

The European Commission's existing practice of conducting fundamental rights impact assessments³ already offers a foundational framework for evaluating legislation's impact on civil society. However, introducing specific guidance on civic space impact assessments could inspire further advancements, as well as encourage the co-legislators European Parliament as well as the Council of the EU to develop its own guidelines, in line with the latter 2023 conclusions on civic space⁴ and its existing practices of fundamental rights checks^{5,6}.

2. What are the key elements of civic space?

These are the elements that we believe are crucial for an open and vibrant civic space⁷:

1. A conducive institutional, political and socio-economic landscape

The institutional culture and legacy must contribute to 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: Association, Assembly and expression

A supportive legal and regulatory framework for civic freedoms and its effective implementation ensure the protection of civil society space. Institutions have the duty to protect the civic space by investigating and acting against threats to civic freedoms.

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 acting against perpetrators.

¹ <https://civilsocietyeurope.eu/wp-content/uploads/2024/09/Open-letter-Ensuring-a-vibrant-civic-space-in-the-EU.pdf>

² <https://fra.europa.eu/en/publication/2023/civic-space-2023-update?page=1&pid=396f1a21-2ab8-431f-bb41-f394cc23b07d#read-online>

³ https://commission.europa.eu/document/download/df03a2b7-0319-41bf-9707-a0eb24fa75eb_en?filename=operational-guidance-fundamental-rights-in-impact-assessments_en.pdf

⁴ <https://data.consilium.europa.eu/doc/document/ST-7388-2023-INIT/en/pdf>

⁵ <https://data.consilium.europa.eu/doc/document/ST-5377-2015-INIT/en/pdf>

⁶ It is noteworthy that in its [2022 annual report on the implementation of the Charter of Fundamental Rights](#), the Commission highlighted the example of **Germany** where all regulatory impacts of legislative drafts prepared by the federal government have to be assessed, including their impact on civic space.

⁷ European Civic Forum: Assessing the impact of policies on civic space and identifying solutions

4. A supportive framework for CSOs' financial viability and sustainability

Supportive legislation on 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.

5. The dialogue between civil society and institutions

institutions must pursue policies and narratives that empower citizens and their organisations to be meaningfully engaged in the public debate and policy-making.

6. Civil society's resilience

to challenges to democracy, rule of law and fundamental rights.

3. Why civic space Impact assessments are necessary

A focused approach to civic space impact assessments is warranted given civil society's critical role in democratic societies. CSOs contribute at all stages of the law-making process, from informing legislative proposals to ensuring effective implementation. Their work spans diverse activities essential for promoting democracy, protecting fundamental rights, and fostering accountability.

The crucial role of civil society organisations and rights defenders⁸

<i>Advocating for fundamental rights in legislation and policy making.</i>
<i>Monitoring the respect for fundamental rights on the ground, functioning as watchdogs</i>
<i>Providing support to rights holders and victims of violations, helping them understand and enforce their rights</i>
<i>Ensuring effective implementation of laws by performing specific tasks, such as those outlined in the Consumer Protection Cooperation Regulation.</i>

4. Consultation with civil society

The Commission's existing guidelines on fundamental rights impact assessments⁹ recognise civil society as an essential resource for assessing legislative impacts. The Commission has also developed guidance on stakeholder identification as part of the Toolbox for Better Regulation¹⁰To enhance this, the guidance should:

- Reference EU-wide civil society networks explicitly—e.g., Civil Society Europe (CSE) - the coordination of Civil society organisations at Eu level- as a key resource for accessing expertise on civic space.
- Include contact details for these networks in an annex, with prior agreement from the organisations.

⁸ [Commission's 2022 report on the implementation of the Charter:](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0716)

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0716>, (pages 7-12)

⁹ see footnote 2

¹⁰ See in particular the six tests for stakeholders identification, Better Regulation toolbox, page 465.

5. Addressing civic space in EU law

To uphold the EU's principles of democratic participation and accountability, legislative proposals must avoid undue restrictions on civic space while ensuring the involvement of CSOs in implementation.

Key rights to protect

The fundamental rights of freedom of expression, association, and assembly are essential cornerstones of a democratic society. Impact assessments should:

- Identify potential interference with these rights.
- Analyse the necessity and proportionality of such interference
- Utilise and expand the Commission's fundamental rights checklist¹¹ and jurisprudence, such as the 2020 Court of Justice of the European Union (CJEU) ruling on Hungary's NGO law¹², as substantive guides.

Guidance from Commission and Court on Freedom of Association

The CJEU ruling in *Commission v Hungary (C-78/18)* has highlighted how stigmatising regulations, such as labeling foreign-funded NGOs, violate the right to freedom of association enshrined in Article 12(1) of the Charter on Fundamental Rights, by creating a 'generalised climate of mistrust vis-à-vis the associations'.

On October 3, 2024, the European Commission referred Hungary to the Court of Justice of the European Union, citing concerns over its national "Defence of Sovereignty" law. This law grants a newly established office extensive investigatory powers, including probing activities funded from abroad that might influence elections or public opinion. The Commission argued that the law's broad scope and discretionary powers of this office disproportionately impact civil society organisations, media, and journalists, thereby violating fundamental rights such as freedom of association.¹³

6. Mitigating collateral damage

Unintended negative effects of legislation on CSOs' operations should be thoroughly examined. For example, counter-terrorism regulations (e.g., FATF Recommendation 8¹⁴) have inadvertently justified restrictive NGO rules globally.

At EU level, anti-money laundering directives and their implementation or transposition at national level may also impose burdensome and onerous compliance requirements on CSOs and foundations, risking administrative burdens and public mistrust.

¹¹ See footnote 2

¹² CJEU judgment in *Commission v. Hungary (Transparency of associations) (C-78/18)*:

<https://curia.europa.eu/juris/document/document.jsf?docid=227569&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=624252>

¹³ The Commission decided to refer Hungary (INFR(2024)2001) to the Court of Justice because it considers its national law on the 'Defence of Sovereignty'; https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4865

¹⁴ In response to the 9/11 terrorist attacks, the Financial Action Task Force (FATF) leading global action to tackle money laundering, terrorist and proliferation financing, adopted **recommendation 8** which identified non-profit organisations as "particularly vulnerable" to be used for the financing of terrorism. In the following years this guideline served to justify the implementation of overly restrictive NGO rules all over the world. See Ted Talk by B. Hayes in Annex 2.

Over-Compliance with EU AML/CFT Directives

The EU's AML/CFT Directive led some Member States to include foundations and to a certain extent associations in the scope of "obliged entities." This imposes costly compliance obligations, such as identifying beneficiaries and monitoring transactions, despite foundations often not having conventional "customers".¹⁵

7. *Civil Society as partners in implementation*

A comprehensive approach to civic space impact assessments must secure CSOs' involvement in legislative implementation. Civil society engagement during this phase ensures:

- Identification of real-life challenges and adjustments for effective enforcement.
- Legitimacy of laws through participatory practices.

Structured Dialogue in the Media Freedom Act

The Media Freedom Act establishes structured dialogue between stakeholders, including CSOs, to monitor practices like content moderation on large platforms and protect media independence.¹⁶

8. *A proposal for a civic space checklist*

The proposal below aims to identify some key questions to be considered when developing civic space impact assessments. It also includes some examples of EU legislation in which such impact should be considered

Aim of the proposal

- What is the problem that the legislation is trying to address? What is the scope of the problem?
- What are the arguments and key assumptions underlying the presentation of the problem?
- What is the context in which the legislation is developed and how will it affect its real impact?
- How do 'race', ethnicity, class, sexuality, geography interact in relation to the policy problem?
- Does the proposed legislation address, maintain or create inequalities between different groups?
- How can I access knowledge/evidence gaps about this problem? How can I ensure that the relevant civil society organisations within their scope and diversity have been consulted?

Requirements

- What are the requirements foreseen by the legislation (reporting, public disclosure...)? Are they defined clearly and precisely?
- Do the requirements respond to a legitimate aim according to international human rights law?
- Are the requirements necessary, proportional, and non-discriminatory in nature?

¹⁵ Updated Handbook on How to Use EU Law to Protect Civic Space, Second edition 2023, ECLN and Phil ea, page 41: <https://ecnl.org/sites/default/files/2024-04/ECNL%20Philea%20EU%20Law%20Handbook%20Second%20Edition%202023.pdf>

¹⁶ See Article 19 of the Media Freedom Act: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401083

Restrictions

- What are the restrictions foreseen by the legislation? Are they prescribed by the legislation clearly and precisely?

Sanctions

- What is the nature and severity of the sanction? Is it proportionate?

Impact

How are different civil society organisations going to be impacted (positively or negatively) by the legislation and its requirements or sanctions according to?

- types (Associations, foundations...),
- sizes (small, medium, big)
- composition (volunteers, employed people, membership based or not), activities (service provision, advocacy, fight against corruption..)
- area of work (social, environment, culture, education, migration, international cooperation, consumers, human rights, health, etc),
- and constituency (youth, elderly, women, LGBTIQ, racial, socially excluded, people with disabilities)

Civic Freedoms

Are any of the civic freedoms affected? Freedom of Association? Freedom of peaceful Assembly? Freedom of expression?

Freedom of Association:

- Is the right to establish a (non-profit) association or to register it through legal or administrative provisions affected ?

Example: the proposal for cross border activities of associations (or its amendments)

- Does the proposal challenge or affect the right to participation in policy making through structured and effective mechanisms?

Example: provisions on better law making

- Does the proposal restrict access to funding for civil society organisations from domestic or foreign funding sources?

Example: Proposal for a Directive on interest service representation on behalf of third countries

- Does the proposal or its implementation limit access to banking or financial services for associations?

Example: anti money laundering and countering financing of terrorism legislation

Freedom of peaceful Assembly

- Does the proposal affect the existence or imposes limitations on the freedom of assembly of CSOs' representatives both individually and through their organisations, without discrimination (including stateless persons, refugees, foreign nationals, asylum seekers, migrants and others) and without prior notification?
- Is the proposal affecting this right by introducing measures or tools that could lead to the surveillance of participants to peaceful assemblies or restrict media access ?

Example: Artificial Intelligence Act

Freedom of Expression

- Does the proposal limit the right to receive and impart, as well as to access freely information, including through the internet?

Example: Media Freedom Act

- Is the proposal diminishing standards for equal opportunities for participation in decision making by for instance giving further access to other stakeholders or restricting access to certain organisations or groups?
- Does the proposal restrict the right for critical speech or the right to participation in public policy making?

Example: EU Transparency Register

Are these rights absolute?

According to Article 10 and 11 of the European Convention on Human Rights (ECHR), limitations of the right to freedom of expression are allowed if: 1) they are prescribed by law; 2) pursue a legitimate aim; and 3) are necessary in a democratic society.

ECHR considers the following aims as legitimate: 1) in the interests of national security, territorial integrity or public safety; 2) for the prevention of disorder or crime; 3) for the protection of health or morals; 4) for the protection of the reputation or rights of others; 5) for preventing the disclosure of information received in confidence; and 6) for maintaining the authority and impartiality of the judiciary.

9. Conclusion

Civic space impact assessments are essential for maintaining democratic accountability and safeguarding fundamental rights in the EU. By building on existing tools and consulting civil society comprehensively, the European Commission can ensure its legislative proposals support an enabling environment for civic space.

Annexes

1. European Commission 2011 staff working paper - Operational Guidance on taking account of Fundamental Rights in Commission Impact

¹⁷Fundamental Rights 'Check-List'

1. What fundamental rights are affected?
2. Are the rights in question absolute rights (which may not be subject to limitations, examples being human dignity and the ban on torture)?
3. What is the impact of the various policy options under consideration on fundamental rights? Is the impact beneficial (promotion of fundamental rights) or negative (limitation of fundamental rights)?
4. Do the options have both a beneficial and a negative impact, depending on the fundamental rights concerned (for example, a negative impact on freedom of expression and beneficial one on intellectual property)?
5. Would any limitation of fundamental rights be formulated in a clear and predictable manner?
6. Would any limitation of fundamental rights: - be necessary to achieve an objective of general interest or to protect the rights and freedoms of others (which)? - be proportionate to the desired aim? - preserve the essence of the fundamental rights concerned?

2. 2014, TED Talk: 'Counterterrorism' used to crackdown on civil society by Ben Hayes:

<https://fatplatform.org/stories/ted-talk-counterterrorism-used-to-crackdown-on-civil-society-by-ben-hayes/>

3. European Commission webpage *A thriving civic space to protect fundamental rights*:

https://commission.europa.eu/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/thriving-civic-space-protect-fundamental-rights_en

4. How to Evaluate Foreign Influence Legislation? A Comparative Analysis , The Good Lobby, June 2023:

<https://www.thegoodlobby.eu/wp-content/uploads/2023/11/TGL-Study-How-to-Evaluate-a-Foreign-Influence-Legislation-A-Comparative-Analysis.pdf>

5. Civil Society Europe

Impact Assessment and structured dialogue of Civil Society on the Defence of Democracy Package: Letter to the President of the Commission, June 2023:

<https://drive.google.com/file/d/1FHrqLmLjoghnaRkfbgsWLQcHvTzD-81L/view>

¹⁷ See Footnote 2

Guidance note for civil society organisations' monitoring and participation in the European Commission's annual Rule of Law Cycle at the national level:

<https://civilsocietyeurope.eu/wp-content/uploads/2023/12/CSE-guidance-note-on-RoL-report-18.12.2023.pdf>

Introduction to Civil Dialogue - Training Manual (Entrust Project):

https://civilsocietyeurope.eu/wp-content/uploads/2024/06/EnTrust_Introduction_Civil_DialogueTraining_Manual_EN_2024.pdf



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