European Partnership for Democracy

A closer look at the Defence of Democracy Directive and the controversy surrounding it

JANUARY 2024

Table of Contents

Background

The Defence of Democracy Package, promised by the President of the Commission, Ursula von der Leyen, in her 2022 State of the Union speech, includes the following:

1. Proposal for a Directive establishing harmonised requirements in the internal market on transparency of interest representation activities carried out on behalf of third countries,
2. Recommendation on inclusive and resilient electoral processes in the Union and enhancing the European nature and efficient conduct of the elections to the European Parliament; and
3. Recommendation on promoting the engagement and effective participation of citizens and civil society organisations in public policy-making processes.[1]

The Package, as adopted by the Commission on 12 December, is supposed to bring transparency and accountability for the activities carried out on behalf of third country actors, to improve electoral processes in view of the 2024 European elections while also fostering civic space and encouraging the engagement of civil society organisations (CSOs). This analysis will specifically focus on the interest representation Directive that concerns individuals and entities funded from abroad and the transparency requirements imposed on them.

Key issues emerging from such legislation involve the onerous burdens on CSOs (e.g., stigmatisation by governments, disincentivizing donors), the geopolitical consequences (how the EU deals with similar laws in other countries), and finally, a failure to address threats to democracy from within the Union.

Developing so-called "foreign agent" laws e.g., in Hungary ("LexNGO", 2017)[2] or in the US ("Foreign Agents Registration Act", 1938)[3] is not uncommon and has different historical and/ or contextual underpinnings

1 The interest representation Directive can be found here, the Recommendation on elections here and the Recommendation on civic space here.

2 On 12 December 2023, Hungary approved a new law officially titled "Sovereignty Protection Act" - also known as LexNGO 0.2 (see here).

3 The US has been looking recently to revamp its FARA according to Politico (see here).

for each country.[4] These laws, which often require organisations to register as "foreign agents" if they receive funding from abroad, have faced criticism not only from civil society, but also from the European Union itself.[5] The EU's reasoning for regulating this space under the aforementioned Directive is similar to the reasoning presented by various governments around the world aiming to justify limitations on CSOs funded from abroad, as will be explored in the following section. The EU asserts, however, that the Directive will ensure safeguards to, among others, prevent the negative labelling and stigmatisation of CSOs.

In other countries with similar laws, the initial reaction to the EU proposal has been to say that the objectives advocated by the EU in support of this Directive closely resemble their own objectives when enacting laws against foreign interference.[6] It is evident that the interest representation Directive will only trigger additional (and similar) reactions in the future, greatly affecting the EU's geopolitical standing as an advocate for democracy and human rights globally.[7]

After all, as emphasised by the Commission President in the same 2022 State of the Union speech:

"*Today we all see that we must fight for our democracies. Every single day. We must protect them both from the external threats they face, and from the vices that corrode them from within.*"

The statement clearly affirms that challenges to democracy arise not solely from external actors and foreign states but can also originate from domestic actors within the European Union. In working on this Package, EPD has consistently stressed that a transparency register focused solely on foreign-funded entities will do more harm than good.

4 For a detailed analysis on a number of countries with foreign influence legislations, see The Good Lobby study: Alberto Alemanno and Felix Sames, *Foreign Influence Legislations: A Comparative Analysis and Critical Evaluation*, SSRN, December 2023, available here.

5 European Parliament, Resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)), 17 May 2017. The Commission was also the one that brought the Hungarian Bill (also called "LexNGO") to the CJEU seeking a declaration that Hungary had introduced discriminatory, unjustified and unnecessary restrictions on foreign donations to CSOs, in breach of its obligations under Article 63 TFEU and Articles 7, 8 and 12 of the EU Charter (CJEU (Grand Chamber), C-78/18 - *Commission v Hungary* (Transparency of associations), ECLI:EU:C:2020:476, 18 June 2020).

6 Regarding Georgia (here and here) or the Republika Srpska (here).

7 Art. 2 TEU for its internal relations and Article 21 para. 1 TEU for its external ones.

Breaking down the interest representation Directive: A quick guide

The basic requirements

The Directive brings forward the creation of national transparency registers in the EU Member States for all interest representation activities carried out on behalf of "third-country entities" that aim at influencing policy-making or the development/ implementation of legislation. The proposal encompasses all entities providing interest representation services,[8] including *inter alia* consultancies, CSOs, academic institutions, think tanks and lobbying companies. These entities are required to disclose, among others, their funding sources if they originate from governments or affiliated entities of third countries. Third countries are to be understood as the countries that are not members of the EU or the European Economic Area (EEA).

Registration in a national register (Art. 10)

Entities engaging in such activities must register in (one of) the national registers of the Member States. The registration process involves providing detailed information about the entity, the conducted activities, and the actors on whose behalf the activities are performed in case they are considered "third-country entities".

Public access (Art. 12)

Information contained in the register will be accessible to the public. This includes elements such as the aggregated annual amounts of funding received, the involved third countries, and the primary objectives of the activities. Limited exceptions allow for the withholding of information from public access in specific and justified cases (Article 12(3)).

Record-keeping (Art. 7)

Entities are required to maintain information, including the identity of the actor for which the activity is conducted, a description of the purpose of the interest representation activity, contracts and key exchanges with the actors to the extent that they are essential to understand the nature and purpose of the interest representation carried out. These records should be kept for 4 years after the activity in question has ceased.

8 Interest representation, to the extent that it is normally provided against remuneration, constitutes a service following Art. 57 TFEU.

Other transparency obligations (Art. 14)

Entities engaged in these interest representation activities, along with their subcontractors (Art. 6), are required to provide their registration number, called "European Interest Representation Number" (EIRN), when directly interacting with public officials.

Safeguards

One of the Commission's objectives is to enhance the transparency of foreign-funded entities and foster public awareness and scrutiny through open transparency registers. Unlike certain foreign interference legislations, such as the Russian one, the Commission's aim is not to impose a form of "censorship" on these entities or constrain civil society and human rights in an unjustified and disproportionate manner.

The envisaged system also includes independent supervisory authorities with the ability to request the aforementioned records from registered entities in specific cases. According to the Commission, this follows the principle of proportionality found in the EU treaties. It also brings forward safeguards (and obligations for Member States) to prevent the negative labelling and stigmatisation of CSOs. In the field of sanctions, the Directive only provides for administrative fines, contingent upon the issuance of a prior warning to the relevant entity.[9]

An additional safeguard is the legal instrument itself, a full harmonisation Directive, which is expected to *effectively* prevent Member States from introducing different, more, or less stringent measures that would hinder the right of CSOs to receive foreign funds from abroad.

EPD's position and gaps in the current proposal

Foreign interference is an unfortunate reality and real danger to democracies. Various foreign actors or governments aim to manipulate EU political processes (see the Qatargate scandal[10]), intending to sow discord within the EU and, in some instances, even compromise democratic decision-making processes. Disinformation campaigns and cyberattacks

9 Except in the case of Art. 22(4) of the Directive.

10 Additional details about the Qatargate scandal can be found, among others, on Politico's dedicated page (here) or on the official website of the European Ombudsman (here).

from third countries have also become a regular occurrence.[11] Additionally, third countries might utilise EU Member States as proxies to influence decision-making across the EU.

However, the current proposal will not be able to effectively tackle foreign interference and is likely to cause more harm than good. EPD, along with various other actors, has expressed a number of key concerns regarding the Commission's proposal. The concerns presented refer to the current version and include: a) the "harmonisation of the internal market" argument, b) effectively capturing malicious interference, c) the negative geopolitical consequences, d) the legal instrument i.e. a Directive, e) the risk of stigmatisation, f) burdensome requirements and administrative costs, g) reliance on unrealistic assumptions and lastly, h) how the Directive ignores internal threats emerging within the Union. Additionally, one broader observation is provided at the end: i) the use (or lack thereof) of a foreign interference definition by the EU institutions.

Harmonisation of the internal market

A first concern pertains to the rationale for employing the "harmonisation" argument. While the recitals of the Directive acknowledge the considerable divergence in Member States' measures regulating transparency of interest representation activities, it remains ambiguous how harmonisation rules exclusively focused on third-country entities will effectively address the cross-border obstacles identified by the Commission and enhance the overall functioning of the internal market in this sector. Furthermore, the proposal does not provide an explanation of how targeting entities receiving financial support from abroad will resolve the issue of EU Member States' governments acting against the interests of the Union.

Capturing malicious interference

On the contrary, this new attempt is unlikely to effectively expose malicious actors and could have significant negative geopolitical consequences. It is our concern that the current proposed legislation will not counter malign foreign interference efficiently, as only entities already complying with the law would register, while those seeking to remain covert could exploit existing loopholes in the Directive. For instance, the exemption of operating grants from the reporting obligations, according to the

11 See also, European Parliament, Special Committee on foreign interference in all democratic processes in the European Union, including disinformation (INGE 2), Resolution of 10 October 2019 on foreign electoral interference and disinformation in national and European democratic processes (2019/2810(RSP)), 10 October 2019.

Commission's statement,[12] could be easily used by third countries wishing to fund entities within the EU to advance their agenda in influencing EU decision-making. In this context, the provision of non-circumvention (Art. 20) still does not provide adequate mitigating measures to capture this loophole.

Negative geopolitical consequences

Regarding the geopolitical consequences, the Directive will undermine the EU's future diplomatic efforts addressing restrictive foreign-funding legislation. In the past, the EU has been critical of the "foreign agent" laws adopted in other countries, such as in Georgia[13] and in Republika Srpska.[14] Adopting this Directive means the EU will lose the ability to legitimately criticise discriminatory laws around the world. What's more, other authoritarian regimes could take inspiration from the EU Directive, making it the basis of their own future restrictive regulations. We recognise that the EU proposal is not as restrictive as other laws around the world but it is impossible to ignore the fact that it will be weaponised by those seeking to undermine independent media and civil society.

Wrong legal instrument

Another concern pertains to the use of a Directive as the main legislative instrument in this Package. The Commission asserts that the interest representation Directive, requiring full harmonisation, will effectively prevent Member States from adopting different, more, or less stringent measures. A directive, as a legal instrument, needs to be transposed into national law, unlike a regulation that is directly enforceable (Art. 288 TFEU). A regulation would leave no room for Member States to continue with their own problematic registers until the transposition deadline, and would eliminate the chance of transposing the Directive's provisions inadequately.

In this regard, the Hungarian government adopted a so-called "Sovereignty Protection Act" on 12 December 2023 using the same logic of tackling foreign interference to justify harsher measures on both political opponents and civic groups. The law clearly took inspiration

12 See the Commission's statement here.

13 See here the statement by the High Representative on the adoption of the "foreign influence" law in Georgia.

14 See here the statement on the "foreign agent" law in Republika Srpska. Other cases include Kenya and Kyrgyzstan. See Nora Berger-Kern, Fabian Hetz, Rebecca Wagner and Jonas Wolff, *Defending Civic Space: Successful Resistance Against NGO Laws in Kenya and Kyrgyzstan*, Global Policy Volume 12, July 2021, available here.

from the EU Directive currently under discussion.[15] This, coupled with the envisaged transposition period, provides the opportunity for the Hungarian government to potentially cause irreversible damage to democratic watchdogs such as media and CSOs.

Risks of stigmatisation

Serious alarms equally arise when it comes to the Commission's assertion about balancing transparency with human rights. When it comes to avoiding stigmatisation, it is not far-fetched to say that the information required in the national registers could be easily exploited by Member States aiming to suppress and censor civil society. There is an imminent risk that these states could manipulate or leak information to their advantage, initiating smear campaigns and consequently, severely stigmatising civil society.

Furthermore, the ongoing challenges related to democratic backsliding and concerns about the rule of law in various European Member States diminish the likelihood of the national supervisory authorities maintaining true independence. This is especially troubling when these supervisory authorities have the power to demand the kept-records from the registered entities, which include additional documents, as well as have access to information that has not been disclosed publicly.

Clear administrative burden and risks

Requiring entities to identify the specific activities that they target in each case (such as legislative proposals or policies) as outlined in Annex I, may result in additional burdens and administrative costs. This includes factors such as increased staff involvement, time consumption, and allocation of resources, especially for SMEs. This obligation, coupled with all the other registration requirements and without clear guarantees in the Directive to prevent these burdens,[16] will surely create a challenging environment for the registered entities. Moreover, there is a concern about the efficacy of this obligation. Effectively identifying the exact legislation in each case may prove challenging (and in some instances, prove impossible) due to the difficulty of precisely pinpointing all the proposals or policies in those Member States where the entities carry out interest representation activities.

15 See the following Hungarian article which mentions how Hungary's "Sovereignty Law" was inspired by the EU's efforts in the field of foreign interference (here).

16 Only a general reference can be found in Recital 64 of the Directive, namely that Member States should seek to minimise the administrative burdens of registered entities, particularly regarding SMEs.

Unrealistic assumptions

Analogous challenges arise when entities are obliged to disclose funding from public or private entities *ultimately attributed* to a third country, for which they have the right to ask the entity on whose behalf the service is provided to declare whether it is a "third-country entity" (Art. 5). This option assumes that malign actors will truthfully respond to such inquiries, relying on a chain of integrity between various actors. The same applies in the case of the subcontractor chain, where each subcontractor must pass the information on to any further subcontractor about whether an activity falls within the provisions of the Directive (Art. 6).

Ignores threats from within

It is crucial to note that threats to democracy - and to transparency - not only originate from third countries but can also emerge internally. While the Directive aims to address the former scenario (influence exercised by third countries), it does not cover the latter (threats within the EU).

Firstly, there is a concern regarding "indirect involvement". Third countries could establish entities within Member States with no apparent connections to them so as to pursue their interests covertly. The lack of any apparent connection makes it difficult to identify these entities as being *ultimately attributed* to the third countries that established them (as per the definition of Art. 2(4)(b)). Besides employing this technique, third countries may also use Member States as proxies, serving as intermediaries in activities that align also with their own national priorities (e.g., to restrict minorities or LGBTIQ+ persons' rights), adding another layer of complexity to this issue. Apart from third governments, private actors operating across the EU also interfere and disrupt legislative processes using illicit practices to advance their own interests. This case is equally concerning as these actors benefit from the absence of transparency of funding in the Union.

In several Member States, restrictions have been imposed with the explicit intention of constraining civil society and media.[17] These states could easily use the Directive as a tool to further suppress critical voices funded from abroad. Not to mention the rule of law and corruption challenges across the Union, as highlighted in the country chapter's of

17 This includes, among others, the criminalization of human rights defenders and journalists for their activities, as well as the propagation of a negative narrative against them in the public sphere. Such actions not only result in the shrinking of civic space but also to the shrinking of democracy itself. In this context, see European Parliament, Committee on Civil Liberties, Justice and Home Affairs, REPORT on the shrinking space for civil society in Europe (2021/2103(INI)), 22 February 2022.

the annual Rule of Law reports.[18] In the face of these challenges, it is not hard to imagine that certain Member States will implement the Directive's transparency and accountability measures while manipulating them for their own advantage.

Foreign interference definition

Lastly, while the EU institutions have discussed "foreign interference" in a general manner using negative language for various forms of interference (e.g., meddling with elections, disinformation campaigns, lobbying activities),[19] the two European courts, the ECtHR and the CJEU, have adopted a more nuanced stance.[20] They have emphasised that receiving foreign funding should not be prohibited outright. Transparency, the Courts have argued, can be a legitimate aim to impose restrictions on funding, but these restrictions must be proportionate, assessed on a case-by-case basis, and should avoid stigmatising the entities involved.[21]

Interestingly, the Commission's proposal has again missed the opportunity to develop a detailed definition of "foreign interference" with only sporadic references found in the Directive. Instead, it states that the main objective is to "*introduce common transparency and accountability standards in the internal market for interest representation activities carried out on behalf of third countries*". This strategic move places the focus squarely on establishing uniform standards for the proper functioning of the internal market while leaving the specifics of foreign interference deliberately open.

One possible explanation for this could be the EU's approach on its foreign policy in support of human rights, coupled with its critical view on transparency measures adopted by other countries - as mentioned previously. Adopting an overly restrictive approach to foreign interference would be contradictory (and would also present political challenges) for the EU, as it conflicts with its own previous actions.[22]

---

18 See the website of the Commission's Rule of Law annual reports.

19 EP resolution (*supra* 11) and European Parliament, Special Committee on foreign interference in all democratic processes in the European Union, including disinformation (INGE 2), Resolution on foreign interference in all democratic processes in the European Union, including disinformation (2022/2075(INI)), 1 June 2023.

20 ECtHR, Ecodefence and others v. Russia, Applications nos. 9988/13 and 60 others, 14 June 2022, as well as the CJEU, LexNGO case (*supra* 5).

21 For a more detailed analysis, see Lukas Harth, Florian Kriener and Jonas Wolff, The EU Response to Foreign Interference: Legal Issues and Political Risks, Heidelberg Journal of International Law, 2023, available here.

22 *Supra* 21, p. 201-202.

Our proposed way forward

Given the existing threats to democracy and the above arguments, it would have been the right time to introduce an instrument that safeguards democracy from both external and internal threats by adopting a general transparency act, imposing registration requirements for all entities regardless of whether they receive funding from abroad or domestically. These registration requirements should respect previous European court decisions by setting proper thresholds when restricting the freedom of association ("*genuine, present and sufficiently serious threat*").[23] In this way, the EU would ensure a level-playing field, avoid misuse and discriminatory treatment between foreign-funded entities and those included in the EU Transparency Register, as well as cover regulatory loopholes. Put plainly, the EU should propose a transparency register on both external and internal actors active in interest representation with well-defined thresholds to respect fundamental rights.

The general transparency act aligns with the harmonisation argument by encompassing all entities (to capture also those with malign intentions), irrespective of their funding sources. It helps prevent regulatory arbitrage by mitigating the risk of implementation inconsistencies, such as in cases where the actual criteria for classifying an actor as a "third-country entity" are interpreted differently in one Member State. In this regard, it would also not depend on a complex process to determine the foreign actor to which public or private entities are *ultimately attributed* and would not rely on national supervisory authorities that are not truly independent (if the register is managed at the EU level).

Additionally, it could address geopolitical concerns associated with the current version by demonstrating that the EU's approach is not disproportionately focused on funds from abroad; instead, it offers a comprehensive solution, projecting also a positive global image of commitment to general transparency and public oversight. By including both foreign and domestically funded entities, the register promotes equal treatment and avoids singling out organisations based on their funding sources, thereby limiting the stigmatisation cases. Lastly, this register will provide clearer data presentation on foreign principals than what exists in the current EU Transparency Register.

23 According to the CJEU in the LexNGO case (para 92-95), "(Hungary's) Transparency Law [...] do(es) not appear to correspond with the scenario of a sufficiently serious threat to a fundamental interest of society, which those obligations are supposed to prevent."

Conclusion – Next steps

The ball is now in the court of the co-legislators, the European Parliament and the Council of the EU, to reach an agreement on this Package after adopting their respective positions. It will take a legislative miracle for the Directive to become effective before the upcoming European elections in June 2024. What is more likely is a protracted negotiation that is undertaken during the Hungarian Council Presidency in the second half of 2024, led by a country with a brand-new sovereignty act featuring not only criminal sanctions for foreign-funded actors but also the establishment of a Sovereignty Office with broad investigative powers and limited democratic oversight.

Given these circumstances, we urge the co-legislators to thoroughly assess the Directive and propose necessary amendments that will effectively address the issues outlined above by adopting a general transparency act. Safeguarding and promoting democracy stand as key priorities for the EU not only within its institutional framework but also in its external actions.[24] However, the proposed Directive is set to adversely impact democracy, resulting in unintended and disproportionate consequences for foreign-funded entities while not efficiently capturing the real threats to democracy. This is a case of *liberal* democracies employing the notion of state sovereignty, which, while in harmony with international norms, is being used to justify *illiberal* policies.[25]

24 The EU introduced in 2020 the European Democracy Action Plan which aims to promote free and fair elections, strengthen media freedom and counter disinformation. Additionally, the Conference on the Future of Europe (CoFoE) marked a significant democratic initiative in Europe where citizens discussed current challenges and proposed recommendations. Following CoFoE, the EU institutions remain committed to take tangible actions to address the citizens' concerns and recommendations. Regarding the EU's external action see, for example, the Council conclusions on democracy adopted in 2019.

25 This comment is inspired from: Annika Elena Poppe and Jonas Wolff, *The contested spaces of civil society in a plural world: norm contestation in the debate about restrictions on international civil society support*, Contemporary Politics, vol. 23, no. 4, 469–488, 2017 available here.

European Partnership for Democracy

Rue Froissart 123-133, 1040 Bruxelles

info@epd.eu | +32 2 733 2282

www.epd.eu

Cover image credits: João Marcelo Martins, Unplash