

Mandates of the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders and the Independent Expert on human rights and international solidarity

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(Please use this reference in your reply)

2 September 2024

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the situation of human rights defenders and Independent Expert on human rights and international solidarity, pursuant to Human Rights Council resolutions 50/17, 52/9, 52/4 and 53/5.

We are independent human rights experts appointed and mandated by the United Nations Human Rights Council to report and advise on human rights issues from a thematic or country-specific perspective. We are part of the special procedures system of the United Nations, which has 60 thematic and country mandates on a broad range of human rights issues. We are sending this letter under the communications procedure of the Special Procedures of the United Nations Human Rights Council to seek clarification on information we have received. Special Procedures mechanisms can intervene directly with Governments and other stakeholders (including companies) on allegations of abuses of human rights that come within their mandates by means of letters, which include urgent appeals, allegation letters, and other communications. The intervention may relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. The process involves sending a letter to the concerned actors identifying the facts of the allegation, applicable international human rights norms and standards, the concerns and questions of the mandate-holder(s), and a request for follow-up action. Communications may deal with individual cases, general patterns and trends of human rights violations, cases affecting a particular group or community, or the content of draft or existing legislation, policy or practice considered not to be fully compatible with international human rights standards.

In this connection, we would like to bring to your attention our comments **regarding 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 carried out on behalf of third countries and amending Directive (EU) 2019/1937.**

While we appreciate the objective of enhancing transparency, we would like to underline that there is a risk the proposed Directive, as currently drafted, may negatively impact on civic space within the European Union and could be used as an example by some States in other regions of the world to justify restrictions on civil society organizations. On the other hand, a comprehensive measure that aims to strengthen the transparency of interest representation entities in line with international human rights standards, and does not target only foreign funded entities, could

Permanent Delegation of the European Union

enhance accountability and public trust, while also setting good practice for other parts of the world.

Given the EU's role in promoting human rights globally, we encourage it to continue to 'lead by example' and ensure that its legislation complies with international human rights norms and standards relating to freedom of expression, peaceful assembly and association.

Relevant standards under international human rights laws

Before commenting on the proposed EU Directive, we would like to recall the relevant international human rights norms and standards and best practices in relation to funding of civil society organizations and transparency of such funding.

International human rights law and standards amply recognize the freedom to access resources as part of the right to freedom of association. Article 22 of the ICCPR protects all activities of an association, including activities directed at accessing resources or funding, subject to restrictions consistent with ICCPR article 22(2). As stated in the report of the Special Rapporteur on the rights to freedom of peaceful assembly and association, this includes the freedom to seek, receive and use resources from natural and legal persons, whether domestic, foreign or international, without prior authorization or other undue impediments – including from individuals, associations, foundations and other civil society organizations, foreign Governments and aid agencies, the private sector, the United Nations and other entities (A/HRC/50/23, para. 64a). Consequently, undue limitations on associations' freedom to access funding violate states' obligations under article 22 of the ICCPR (A/HRC/53/38/Add.4, para. 11).

In resolution 22/6, the Human Rights Council has called on States to ensure that reporting requirements placed on individuals, groups and organs of society should not inhibit their functional autonomy. The Human Rights Committee has also consistently expressed concern over foreign funding restrictions as an impediment to fully realising the right to freedom of association. For example, in the review of a legislation which required non-governmental organizations (NGOs) receiving foreign funding to register with the government, the Committee stated that: '*The State Party should review its legislation and practice in order to enable non-governmental organizations to discharge their functions without impediments, which are inconsistent with the provisions of article 22 of the Covenant, such as prior authorization, funding controls, and administrative dissolution*' (CCPR/CO/76/EGY, para. 21).

Other international human rights instruments also recognize associations' right to access resources. For instance, the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the Declaration on Human Rights Defenders) has recognized in article 13 that everyone has a right, individually and in association with others, to solicit, receive and utilise resources for promoting and protecting human rights through peaceful means.

States must ensure that any restriction on civil society organizations' right to access funding and resources complies with international human rights requirements of legality, legitimate aim, necessity and proportionality in a democratic society, as set

out in article 22(2) of the ICCPR.

Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) guarantees everyone's right to freedom of expression, including the freedom to seek, receive, and impart information and ideas through any media, regardless of frontiers. This includes the right of access to information held by public bodies, which may also include entities performing public functions. Furthermore, it includes the media's right to access information on public affairs and the general public's right to receive media output (general comment 34, paragraph 18). Restrictions on access to information must adhere to the conditions outlined in article 19(3) of the ICCPR, that is, they must be provided by law, pursue a legitimate aim, and be necessary and proportionate. When withholding information of public interest, there must be a balance between the public interest in disclosure and the right to privacy, as highlighted in the report of the Special Rapporteur on Freedom of Expression (A/HRC/53/25, para. 28). Laws and policies that seek to enhance transparency are fundamental for the promotion of respect for the right to information.

European Union Defence of Democracy Package

On 12 December 2023, the European Commission adopted a Defence of Democracy package, with the stated aim of tackling the threat of foreign interference by increasing transparency and encouraging civil engagement and public participation in European democracies. The central piece of the Defence of Democracy package is a [proposed Directive](#) of the European Parliament and the Council establishing harmonised requirements in the internal market on transparency of interest representation carried out on behalf of third countries and amending Directive (EU) 2019/1937 ('the proposed Directive').

Aim and key components of the proposed Directive

The stated aim of the proposed Directive is to contribute to the proper functioning of the internal market for activities aimed at influencing the development, formulation or implementation of policy or legislation, or public decision-making processes, in the European Union ('interest representation activities'), which are conducted on behalf of third countries.

A key component of the proposed Directive is the obligation of the establishment of a national registry by each European Union Member State, mandatorily listing all entities carrying out 'interest representation activities' on behalf of third countries. These registries would be public, established and managed by relevant public authorities in each of the Member States.

Comparison with foreign agent laws

The Explanatory Memorandum for the proposed Directive states that it 'differs radically' from so-called 'foreign agent laws' found in other jurisdictions. We ourselves have commented on such laws in various countries,¹ and appreciate that the

¹ See [JOL SLV 8/2021](#), [JOL BIH 3/2023](#), [OL KGZ 4/2023](#), and 'Georgia: UN experts condemn adoption of Law on Transparency of Foreign Influence' ([15 May 2024](#)).

European Union has also condemned them.²

We agree that there are some positive differences between the proposed Directive and foreign agent laws, including that the proposed Directive would not prohibit foreign funding, and it would not allow criminal sanctions for breaches of the proposed obligations. Furthermore, Member States' supervisory authorities may only impose administrative fines below a certain ceiling based on the entity's economic capacity, or EUR 1000 for natural persons.

We acknowledge the goal of promoting transparency as a commendable endeavour, aimed at fulfilling the public's right to be informed and countering possible illegitimate influence by foreign State and non-State actors. However, there are some aspects of the proposed Directive that could have a chilling effect on civil society organizations carrying out advocacy work in the European Union. In particular, publicly naming entities carrying out 'interests representation activities on behalf of third countries' may equate to laws in other countries, which publicly label civil society organisations and media organisations receiving foreign funding as 'foreign agents', 'agents of foreign influence', or 'organizations advocating the interests of a foreign power'.

We note that, like foreign agent laws, the proposed Directive may unduly restrict the rights to privacy, freedom of expression, freedom of peaceful assembly, and freedom of association, as protected by articles 17, 19, 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR), and articles 8, 10, and 11 of the European Convention on Human Rights (ECHR).

Stigmatisation and self-censorship of civil society associations

Publicly labelling civil society organisations, activists, human rights defenders, journalists, and media outlets as entities conducting 'interest representation activities on behalf of third countries' risks obstructing and stigmatising the legitimate work of these actors, with a damaging effect on the right to freedom of association and freedom of expression in the European Union. This may also risk exacerbating the pressure on self-censorship that some civil society organisations have been subjected to in some EU Member States particularly when criticizing Governments or working on certain legitimate human rights issues like sexual and reproductive rights. These national registries could be misused to discredit and stigmatise civil society actors and/or label them as 'spies' or 'foreign agents' in an attempt to silence them and limit their impact. This would also contradict the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the Declaration on Human Rights Defenders), which states that "Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international

² See, for example, 'Russia: Declaration by the High Representative on behalf of the EU on the 10th anniversary of the introduction of the Law on Foreign Agents' available at: <https://www.consilium.europa.eu/en/press/press-releases/2022/07/20/russia-declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-10th-anniversary-of-the-introduction-of-the-law-on-foreign-agents/>, 'Georgia: Statement by the High Representative on the adoption of the Georgian "foreign influence" law' available at: https://www.eeas.europa.eu/eeas/georgia-statement-high-representative-adoption-%E2%80%9Cforeign-influence%E2%80%9D-law_en, and 'EU in BiH on recent developments in the RS' available at: https://www.eeas.europa.eu/delegations/bosnia-and-herzegovina/eu-bih-recent-developments-rs_en?s=219

levels” (article 1) and that States have a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms (article 2).

We acknowledge that the proposed Directive includes a specific requirement that the information in Member States’ national registers is presented in a neutral and factual manner and in such a way that it does not lead to stigmatisation of registered entities. The information should not be presented with or accompanied by statements or provisions that could create a climate of distrust with regard to the registered entities or that are likely to deter natural or legal persons from Member States or third countries from engaging with them or providing them with financial support. However, we question the effectiveness of this ‘safeguard’ in preventing stigmatisation. The mere existence of a separate registry risks creating stigmatisation, regardless of how neutrally the information is presented, especially by politicians, government officials, State Agencies, affiliates and others who are seeking to discredit the entities listed in the register to further their own political interests.

Furthermore, we fear that civil society associations may self-censor or decline international support for fear of such stigmatisation or other adverse consequences of being labelled as ‘foreign agents’. This in turn could curtail their rights to freedom of expression, peaceful assembly and association and undermine their ability to carry out vital activities including the protection and promotion of human rights and democracy, which are the very aims of the Defence of Democracy Package.

As mentioned earlier, we appreciate the EU’s efforts to enhance transparency and access to information regarding funding and affiliations of representation interest entities. Therefore, we take this opportunity to strongly urge the EU to apply appropriately designed transparency measures to all interest representation entities, regardless of whether they are resourced from foreign or domestic funds. Such a measure would both enhance the goal of transparency and avoid the risks of stigmatization and related negative consequences.

Scope and definition of ‘interest representation activities’

We note that the proposed Directive defines ‘interest representation activities’ as:

‘an activity conducted with the objective of influencing the development, formulation or implementation of policy or legislation, or public decision-making processes, in the Union, which could in particular be performed through organising or participating in meetings, conferences or events, contributing to or participating in consultations or parliamentary hearings, organising communication or advertising campaigns, organising networks and grassroots initiatives, preparation of 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’.

This definition appears to cover many activities that civil society associations, including human rights organizations, conduct as part of their advocacy work. It does not seem to differentiate between political lobbying as a professional remunerated activity and the advocacy activities of civil society. In the Venice Commission’s 2019 Report on Funding of Associations, the Commission expressed its view that ‘such a drastic measure, as “public disclosure obligation” (i.e. making public the source of

funding and the identity of the donors) may only be justified in cases of political parties and entities formally engaging in remunerated lobbying activities’ (para. 106). The Commission also opines that: ‘Lobbying as a professional remunerated activity should be clearly defined in the legislation and be clearly distinguished from ordinary advocacy activities of civil society organisations, which should be carried out unhindered’ (para. 150).

We note that under the proposed Directive there is risk that a civil society association advocating for human rights, which is an issue of universal interest, could be viewed as performing an interest representation activity on behalf of a third country. The proposed Directive does not seem to adequately recognize the situation where the interests of a national entity align with the interests of a third country donor, but the entity is not performing advocacy or lobbying *on behalf of* that third country. An alignment of interests should not be treated as an entity representing third country interests. This is all the more reason to either clarify the definition in a way that it differentiates between professional remunerated political lobbying entities and civil society organizations funded from abroad, or applies the transparency provision to all such entities, regardless of their source of funding, as we recommend.

The proposed Directive could also affect some journalists and media outlets. While the Explanatory Memorandum of the proposed Directive states that the provision of media services will not fall within the scope of the Directive, media providers can be mentioned in relation to listed entities providing foreign interest representation activities if they engage in disseminating advertisements for the listed entity. Mentioning media providers in connection with entities listed in the register could unduly put into question their credibility and independence and may affect their willingness to provide such services, thereby negatively impacting freedom of expression and access to information.

Furthermore, the proposed Directive does not provide clarity on how to assess and determine without reasonable doubt when the actions of certain entities can be attributed to third countries, and should register, therefore leaving it up to the discretion of the responsible Member States’s authorities when implementing the provision. The proposed Directive emphasizes that the "supervisory authority" needs to be "independent public authority responsible for the supervision of the compliance with and enforcement of the obligations” of the Directive. However, there are not yet specific safeguards requiring the independence of the authorities directly responsible for the national registers in Member States, hence carrying the possible risk of politically influenced and biased decision-making of which entities to be registered. This could expose particular entities that may be seen as critical of the authorities to be specifically and/or disproportionately targeted, contributing to their stigmatization.

We acknowledge that the proposed Directive provides as a safeguard the possibility for the entity, subject to the registration, to apply for a derogation from the publication in the register, before it is made public, under certain circumstances. However it seems to be putting the burden on the requesting entity to demonstrate that this request is justified “on grounds of a legitimate interest”, including that the publication in the register would expose an individual to a serious risk of violation of their fundamental rights, in particular of their rights to human dignity, right to life, to the integrity of the person, prohibition of torture and inhuman or degrading treatment or punishment, and right to liberty and security.

Increased administrative burden

The proposed Directive would establish 27 different registries, which would be in addition to those imposed on all civil society associations by national governments and donors. Fulfilling such obligations may require civil society associations to dedicate a substantial portion of their resources, including human resources and financial resources. The burden could be particularly heavy for smaller civil society associations with limited funding.

We also note that the proposed Directive places reporting responsibilities and legal liability on legal representatives of entities not established in the European Union. These legal representatives may be held liable for non-compliance with the Directive. It may be difficult for entities to find a legal representative willing to take on this responsibility and liability, at least without significant financial remuneration from the entity.

Consultation process

We positively recognise that the Defence of Democracy package intends to be built on the results of a ‘*call for evidence, a public consultation, targeted consultation events and Eurobarometer survey results*’. In this regard, we encourage you to hold extensive, in-depth dialogue and active consultations that would allow civil society associations to take part in the creation of a joint risk assessment. We also encourage you to guarantee access to information, including to the assessments made by the Commission to clarify the specific characteristics and real scale of the covert foreign interference, the role that the civil society associations are currently playing in it, and the rationale behind Commission’s conclusion that the Directive’s provisions are the best solution to address the issue.

Adopting measures that have the potential to seriously impact civil society without its relevant and effective involvement is contrary to the right to participation.

Alignment with European Union guidelines

Finally, we would like to remind the European Union about its own guidelines for member states, including the ‘[Guidelines for civil participation in political decision making](#)’ and the [Commission Recommendation \(EU\) 2023/2836](#) of 12 December 2023 on ‘promoting the engagement and effective participation of citizens and civil society organisations in public policy-making processes’. Both documents insist on recognising the importance of ‘*civil society organisations working on the promotion and protection of fundamental rights as vehicles for channelling the voices of diverse individuals and groups in society, including of those in the most vulnerable situations, contribute to addressing societal challenges and economic development, foster pluralism and accountability of decision-making, enhancing the quality of representative democracy*’.

The Guidelines present a clear definition of civic participation as ‘*the engagement of individuals, NGOs and civil society at large in decision making processes by public authorities*’, clarifying that ‘*civil participation in political decision-making is distinct from political activities in terms of direct engagement with political parties and from lobbying in relation to business interests*’.

Furthermore, the justification for the Commission's Recommendation 2023/2836 states that: *'Member States should create and maintain a safe and enabling environment for CSOs and human rights defenders to enhance their effective engagement and ensure they can actively participate in public policy-making processes'*. It also recognises that inclusive participation *'is only possible when civil society organisations can work in a safe and enabling environment where their fundamental rights and those of their members are upheld (...and when they are) able to pursue [their] activities and operate without unjustified interference by the State'*. The recommendations establish clearly that: *'Member States have to ensure that civil society organisations have access to financial resources and are free to use them (... because) only adequately resourced civil society organisations can effectively participate in the public policy-making processes'*.

Conclusions

In our opinion, the proposed Directive is neither a proportionate, nor an effective means to achieve the desired aims of reducing foreign interference and increasing civil engagement and public participation in European democracies. On the contrary, it may have the undesired effect of reducing the ability of civil society associations to play their vital role in ensuring transparency and democracy. Furthermore, while the proposed Directive does not expressly ban foreign funding, the risks of stigmatisation caused by such registries may effectively prevent the flow of funding from third countries to entities delivering essential services within the European Union and reduce their work.

We urge you to consider revising the proposed Directive into an EU Transparency Act that ensures transparency of interest representation without discrimination on the basis of the origin of funding.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned analysis of the proposed Directive.
2. Please provide your observations on how your Excellency intend to ensure compatibility of the proposed Directive with international human rights norms and standards, highlighted in the present communication.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

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