Position Paper

EU Defence of Democracy Package: Proposal for Directive 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

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Premise

The **problem** that the proposed Directive aims to address is "the need to **ensure transparency of interest representation activities carried out on behalf of third countries.**"

For this reason, the Directive's **objective** is to "introduce common transparency and accountability standards in the internal market for interest representation activities carried out on behalf of third countries."

We do not question that this is a perfectly legitimate goal to bring to light any unduly covert influence by third country administrations. However, there is **overall lack of clarity and legal certainty on key definitions** in the Directive. As we elaborate below, the lack of clarity and certainty of the proposed Directive casts **serious concerns on the necessity and proportionality of the obligations** imposed on the targeted entities, potentially resulting in an **undue interference with the fundamental rights to freedom of association and freedom of expression as well as the right to privacy.** Furthermore, as we have seen in other similar legal initiatives, such lack of clarity and legal uncertainty risk having **a chilling effect on the participation of civil society and associations** in the public exchange of views and consultations in the areas of Union action, thus compromising the implementation of Article 11 TEU.

Scope of the proposed Directive

This proposed Directive applies to entities (either natural or legal persons), irrespective of their place of establishment (with some exceptions for specific categories of professionals), which carry out certain types of activities. Three constitutive elements of the activities covered by the Directive must be present at the same time:

1) They must be **interest representation activities** (Recitals 8-14; Article 1, para 1; Article 3, para 1, b;)
2) They must be **of economic nature** (so they include, but are not limited to, interest representation services – Recital 24; Article 1, para 1; Article 3, para 1, b))
3) They must be **carried out on behalf of third country entities** (Recital 24; Article 1; Article 2 (4); Article 3).

Entities carrying out such activities are required to register in national registers set up by the EU Member States (Article 10). The proposed Directive provides specific rules for record-keeping information to be kept in case of any information requests by the supervisory authorities (Art. 7), recorded in the register (Articles 10-11) and made publicly accessible (Article 12 and Annex I). In particular, the **information for record-keeping purposes** subject to the supervisory authorities' information

requests (Art. 7 (1)) contains: (a) the identity or name of the third country entity on whose behalf the activity is carried out, as well as the name of the third country whose interests are represented; (b) a description of the purpose of the interest representation activity; (c) contracts and key exchanges with the third country entity essential to understand the nature and purpose of the interest representation activity, including, where applicable, the records of the means and extent of any remuneration; (d) information or material constituting a key component of the interest representation activity.

The **information to be made publicly accessible in the register also includes personal data**, such as: (a) the name of the entity (for natural persons: name and surname); (b) the address, email address and phone number of the entity (if a legal person, also of the person legally responsible for the entity; (c) same details for the entity's legal representative in the EU, if the entity is established outside the EU. Derogations to the publication of this information may be requested under certain circumstances (Article 12 (3)-(6)).

Finally, any infringements of the obligations laid down in this Directive should be punished by "effective, proportionate and dissuasive" administrative fines, which should be imposed by the competent national supervisory authority and should consider the nature, recurrence and duration of the infringement." (Article 22).
Below, ECNL analyses the three constitutive elements of the activities covered by the proposed Directive and their respective definitions – highlighting where such definitions lack clarity and legal certainty – and assesses how this lack of clarity and legal uncertainty may unnecessarily and disproportionately impact the activities of civil society organisations (CSOs) and their fundamental rights of freedom of expression, association and privacy. Finally, we provide recommendations on how the directive should be revised to take into consideration these concerns.

Broad definition of "Interest Representation Activities"

The Directive defines **interest representation activities** as "activities conducted with the objective of influencing the development, formulation or implementation of policy or legislation, or of public decision-making process, in the Union" and provides some examples, such as "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." (Article 2(1), and Recital 18).

The Directive takes pains to clarify that such activities are covered only "**where they are specifically carried out with that objective"**, i.e., of influencing "development, formulation or implementation of policy or legislation, or of public decision-making process in the Union". However, **the Directive omits to acknowledge the nuances and different levels of intentional or even unintentional influence amongst all the listed activities and does not clarify or exemplify which of them should not be considered as "interest representation".** For example: would a public debate organised by civil society individuals and/or organisations to brainstorm on what they would like to see prioritised as future policies in their territory fall under this definition? Would the individuals and CSOs taking part in such debates to exchange ideas or share their respective expectations on public policies be considered as carrying out "interest representation activities"?

The Directive's (Recital 21) clarifies that "**providers of interest representation services**" could be "legal persons governed by private law, **natural persons who individually engage in a professional lobbying activity, as well as other natural or legal persons whose principal or occasional occupation is to influence the public decision-making process**, including lobbying and public relations companies, think tanks, **civil society organisations**, private research institutes, public research institutes offering research services, individual researchers and consultants."

This list acknowledges that there is a difference between professional lobbying activities and the entities whose "principal or occasional occupation is to influence the public decision-making process" but **does not provide any guidance on how to differentiate concretely between the two.**

Therefore, even if we accepted that all the activities exemplified above are "interest representation activities", a **distinction should be drawn between professional "lobbying" activities and broader "advocacy" activities**, pointing to a **different extent of exercise of influence and therefore a different level of risk**, for which **a proportionate and differentiated approach to obligations should be envisaged** (risk-based approach) in terms of transparency and registration requirements.

Unclear definition of "activities of economic nature" and problematic definition of "remuneration"

The Directive lays down common transparency requirements for "**economic activities of interest representation carried out on behalf of a third country entity**" in the EU internal market (Article 1).

In Article 3 (Scope), the Directive further specifies that such requirements apply to entities that carry out for/on behalf of third country entities:

- interest representation **services** – defined as interest representation activities "normally provided against remuneration";
- interest representation activity "**linked to or that substitutes activities of an economic nature and are thus comparable to interest representation services.**

However, the Directive **does not provide a definition** of:

- activities that are "normally" provided against remuneration;
- activities of an economic nature;
- activities linked to activities of an economic nature;
- activities that substitute activities of an economic nature.

Furthermore, **the Directive does not explain in what way such activities would be "comparable to" interest representation services.**

For the purposes of this Directive, "any consideration received in return" for the interest representation service in question should be considered as "**remuneration**" – including, for example, "financial contributions, such as loans, capital injection, debt forgiveness, fiscal incentives or tax exemption, received in return of an interest representation activity" – but also include benefits in kind, such as the "provision, construction and maintenance of office space in return for an interest representation service." As a result, **any CSOs that carry out advocacy activities and receive funding or benefits in kind from a third country would likely be considered as interest representation service providers to a third country.**

Furthermore, in the Explanatory Memorandum (page 112) and Recital 27, the Directive states that "**contributions to the core funding of an organisation or similar financial support, for example provided under a third country donor grant scheme to a non-profit organisation, should not be considered as remuneration for an interest representation service**", but only "**where they are unrelated to an interest representation activity"**, that is, "where the entity would receive such funding regardless of whether it carries out specific interest representation activities for the third country providing such a funding." This caveat is far from reassuring for several reasons:

- It is provided only in the Recital as a recommendation **but it is not reiterated as a clear exemption in the provisions of the Directive**;
- **It does not provide any guidance on how the organisation should demonstrate that it would receive such funding "regardless of whether it carries out specific interest representation activities for the third country providing such a funding"**. This is highly problematic, since the Directive does not take into consideration the specifics of the different funding schemes and the heterogenous activities that they may cover, especially for CSOs. For example: state grants to CSOs are generally designed to fund the implementation of a given project that fulfils one or more of the overall

government's policy priorities (e.g., environment, or democracy promotion). In order to implement that project, the state sets out a certain amount of funding available for the CSO under certain conditions – e.g., for CSOs whose objectives are aligned with the governments' priorities based on their own organisational priorities and CSOs' mission – and invites those CSOs to apply for that funding. In other words: in a grant scheme, the state may outline some examples of activities through which the project could be implemented, but ultimately it is up to the CSOs to propose and describe what specific type of activities they intend to conduct to achieve the goals set by the state grant. Of course, those CSOs that win the grant are accountable to the government – as is the case with any other donor – but they remain independent in the implementation of the activities. However, it is equally true that the state ultimately assigns the grant to the CSOs that, in its view, implement the state's goals in the most effective and desirable way. So, if activities proposed by the successful bidder consist, all or even only in part, of influencing the development of policy-making, **how will it be possible to identify those cases where the third country would still have granted that funding to one CSO "regardless of whether it carries out specific interest representation activities for the third country providing such a funding"?** The directive does not shed any light on how to assess that and determine which grantees are still considered interest representatives of third countries, leaving it up to the discretion of the Member States when implementing this provision.

Finally, **even when funding is provided for a specific program or activity, that does not necessarily qualify it as a "remuneration"** for interest representation, as we explain below. Therefore, the same principle should apply that such funding should not be considered remuneration for interest representation services "where the entity would receive such funding regardless of whether it carries out specific interest representation activities for the third country providing such a funding".

Unclear definition of what constitutes "representation carried out on behalf of third countries"

Activities within a CSO statutory mission are not third-country interest representation. When CSOs receive funding for their activities, such funding should be used to support their mission and pursue their statutory purpose, regardless of the funding source. However, the wording of the Directive strongly implies that if a CSO receives funding from a third-country entity for an activity that aligns with the CSO's statutory purpose and this funding is not provided as contribution to core funding or similar financial support (for example provided under a third country donor grant scheme), such funding should be considered as the "return" or "remuneration" for "interest representation services" and therefore, the CSO is not acting on its own behalf, but representing the interests of such third-country entity.

As a result, **any natural or legal entity registered as a foreign-funded interest representation service provider would be considered as an "agent" of that country**, even when no formal "foreign agent" labelling is imposed by the Directive or national laws.

On the other hand, it is also worth noting that if we follow this rationale, **other non-EU countries would be perfectly entitled to consider any similar funding received from the EU by CSOs operating in their territory as an "interest representation service" provided to the EU** rather than simple interest alignment with their values (see, e.g., promotion of the rule of law in central/Eastern European countries, development in Global Majority countries, etc.).

Furthermore, the Directive defines as "third country entity":

- the central government and public authorities at all other levels of a third country, with the exception of members of the European Economic Area; or
- a public or private entity whose actions can be attributed to the central government and public authorities at all other levels of a third country, taking into account all relevant circumstances.

However, **it does not provide any clear guidance on what the "relevant circumstances" would be to determine when the actions of certain public or private entities can be attributed to third countries without reasonable doubt**. Oftentimes, for example, donors require a disclaimer on all activities carried out by their funding recipients to clarify that the opinions expressed by them do not necessarily represent those of the donor: would that be sufficient to exclude a relationship of "interest representation" between a third country entity and its funding recipient?

Interference with fundamental rights

Freedom of Association: Risks of stigmatisation

The Directive requires EU Member States to implement additional measures to prevent the stigmatisation of CSOs, especially by presenting the register in a neutral manner or ensuring that registered entities do not face any adverse consequences from national authorities simply because of their registration in this register (Explanatory Memorandum, Recitals 14 and 50, Articles 15(8) and Impact Assessment Report – subsection on freedom of association.[1]) However, **singling out**

[1] Commission Impact Assessment, p. 172, footnote 347: "Firstly, the national public registers would have to be presented in a neutral manner and in such a way that it does not lead to stigmatisation of the entities included in the register (e.g. Member States would be prevented from requiring the entities that fall within the scope of the initiative to register 'as an organisation in receipt of support from abroad' or indicate on their internet site and in their publications and other press material the information that they are organisations in receipt of support from

registered CSOs as providers of interest representation services on behalf of third country entities is intrinsically a form of labelling and stigmatisation: first, it disregards the clear indication of the Court of Justice of the EU that the systematic obligations to register and present themselves as organisations in receipt of support from abroad are "of such a nature as to create a generalised climate of mistrust vis-à-vis the associations and foundations at issue [...] and to stigmatise them."[2] As a result, as we have already seen, **in environments that are already biased against CSOs funded from abroad, this tool**, albeit having good intentions**, is highly likely to be misused for smear campaigns against CSOs**, which will be facilitated by the fact that the reported information would be publicly accessible as a rule.[3] In such contexts, relying solely on the Member State representatives to provide protections against stigmatisation is not only insufficient but naïve at best. Second, such potential for mistrust and stigmatisation may **render it more problematic for CSOs to receive funding from countries outside the EU and the European Economic Area**, thus limiting their right to seek and access financial resources as acknowledged by the international human rights standards.[4]

Freedom of expression: Negative impact on public participation in policy-making processes

One of the three elements of the EU Defence of Democracy Package is the Recommendation on promoting the engagement and effective participation of citizens and civil society organisations in public policy processes.[5] Public participation through regulated consultation channels is an essential element of democracy. However, **considering CSOs that receive any funding from third country entities as interest representatives of such countries rather than of their own interest/statutory mission may negatively impact their legitimacy when engaging in public participation** and again, it could be easily misused to stigmatise CSOs and negatively impact their public image.

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abroad). Secondly, Member States should ensure that when carrying out their tasks, the national authorities ensure that no adverse consequences arise from the mere fact that an entity is registered. Thirdly, the registered entities would be able to request that all or part of the information is not made publicly available where there are overriding legitimate interests preventing publication."

[2] See CJEU, Judgment of 18 June 2020, *Commission v Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, paras. 117-118.

[3] For example, in Hungary: "Orbán and his allies have often accused political opponents, NGOs and media outlets of serving foreign interests." More information: Hungary passes contested laws against foreign influence – Euractiv. In Slovakia: "After Fico and his partners, Danko and Hlas leader Peter Pellegrini, signed a coalition deal on October 16, promising to increase people's living standards, Fico yet again said that he would want to see all NGOs operating in Slovakia and funded from abroad labelled "foreign agents". More information: https://spectator.sme.sk/c/23236946/fico-slovakia-rule-2023.html.

[4] See, e.g., UN Human Rights Council Resolution 53/13 (Civil Society Space), https://undocs.org/A/HRC/RES/53/13

[5] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=pi_com:C(2023)8627

Examples of CSOs receiving funding from a third country (regardless of the amount) that might be required to register as "third country interest representatives" include:

- associations of people with disabilities that provide an opinion on a new law about the rights of people with disabilities;
- CSOs presenting publicly their opinion on a draft "foreign agent" law in their country which may restrict their funding sources;
- associations of donors that participate in a public debate on how to support philanthropy;
- think tanks that provide recommendations on how to prevent malign foreign (e.g., Russian or Chinese) influence and disinformation.

Right to privacy: Risk of unnecessary and disproportionate interference

As outlined above, the information **to be recorded** in the national registers on entities carrying out interest representation activities on behalf of third countries should also include personal data, among others, (a) the name of the entity (for natural persons: name and surname); (b) the address, email address and phone number of the entity (if a legal person, also of the person legally responsible for the entity; (c) same details for the entity's legal representative in the EU, if the entity is established outside the EU. Natural persons will have their names Derogations to the publication of this information may be requested under certain circumstances (Article 12 (3)-(6)). In addition, the **information to be kept and made available to supervisory authorities** upon request should include additional documents, such as "contracts and key exchanges with the third country entity essential to understand the nature and purpose of the interest representation activity" and "information or material constituting a key component of the interest representation activity." **These may include sensitive information, such as reports containing personal data of subgrantees and key stakeholders, emails and other communication exchanged between the third country entity and a CSO etc.**

Furthermore, according to the proposed Directive, **the States should grant the competent supervisory authorities the powers to request such information and also to exchange such information with other supervisory authorities from other EU Member States** (Articles 16-17).

At the same time, the proposed Directive includes some provisions intended as **safeguards** to ensure that "personal data made publicly available is limited to the minimum required for citizens to be informed about the entity carrying out interest representation and the activity carried out on behalf of third countries" (Explanatory Memorandum):

- First of all, the entities can apply for a **derogation** from the publication of the above information "by duly reasoned request" and the national supervisory authority "shall take a decision limiting partially or fully public access where the requesting entity demonstrates, taking into account the circumstances of the individual case, that to do so is justified on grounds of a legitimate interest, including a serious risk that the publication would expose an individual to a violation of their fundamental rights" (Article 12(3)). However, while the Directive emphasises the need for the States to ensure that supervisory authorities are impartial and independent from external intervention or political pressure (Article 15(6)), **no specific safeguards are provided for the independence of the authorities directly responsible for the national registers**.
- Secondly, Art. 16 (3) (b) (ii) sets a **fiscal threshold** below which such entities are not obliged to provide information requested by the supervisory authorities. The threshold – 8 500 000 EUR – is relatively high, but it is calculated as the total funding provided by the third country entity within a fiscal year to all entities within the EU. If such third-country entity paid a cumulative amount of 8 500 000 EUR to entities across the EU for the covered "interest representation services", all entities that received at least 25 000 EUR out of this amount for such services would have to respond to the information requests. As a result, **grantees of large country donors might be all subject to these requests as long as they are deemed to conduct "interest representation activities" and their total income for advocacy activities from third-country entities exceeds 25 000 EUR per fiscal year.** Once an entity falls within the scope of information requests under the above clause, **the supervisory authority of registration or a supervisory authority of another Member State can request all records of a registered entity listed under Art. 7 (as outlined above), going beyond what is necessary to ensure the transparency of interest representation activities carried out on behalf of third countries.** The Impact Assessment Report of the proposed Directive (Annex 8) explicitly acknowledges this,[6] but does not further address the issue and does not provide any adequate safeguards to mitigate it. Therefore, without the proper assessment and adoption of adequate safeguards to address this issue, there is a significant risk that **the implementation of this Directive will unnecessarily and disproportionately interfere with the right to private life and the right to protection of personal data of all affected entities** as protected by Articles 7 and 8 of the Charter of Fundamental Rights of the EU.

[6] Impact Assessment Report, Annex 8: Fundamental Rights Impact, subchapter 1: Right to private life and the right to the protection of personal data: "The requirement […] that entities falling within the scope of the risk-based approach are required to automatically share all of their records with the supervisory authorities could go beyond what is necessary to ensure the transparency of interest representation activities carried out on behalf of third countries."

Final recommendations

The proposal for a EU Directive establishing **harmonised requirements in the internal market on transparency of interest representation carried out on behalf of third countries** in its current form does not meet the criterion of legal certainty required by the Charter of Fundamental Rights of the EU.[7] The lack of sufficient clarity and legal certainty also casts serious doubts on the strict proportionality of its measures to justify its interference in the fundamental rights of freedom of expression through public participation in policy-making processes, freedom of association and right to privacy. The impact assessment report supporting the proposal fails to address the identified risks and to provide adequate safeguards to mitigate them. Therefore, we strongly recommend reviewing the whole proposal and its impact assessment, with a view to considering alternative policy options and assessing their respective impact on the fundamental rights of freedom of expression through public participation in policy-making processes, freedom of association and right to privacy of both individuals and organisations. In any case, should there be the political will by the EU institutions to pursue this or other policy options on interest representation in the EU, we recommend reviewing the following key elements:

- The proposal should indicate more clearly what type of activities "are specifically carried out" with the objective of influencing "*development, formulation or implementation of policy or legislation, or of public decision-making process in the Union:* in particular, **a clear distinction should be introduced between lobbying activities and broader advocacy activities** (and definitions thereof), pointing to a different extent of exercise of influence and therefore a different level of risk, for which a proportionate and differentiated approach to obligations should be envisaged (risk-based approach) in terms of transparency and registration requirements. **For example, as recommended by the Council of Europe Commission for Democracy Through Law ("Venice Commission"):**[8]
    - "Lobbying activities fall in between the political party activities and ordinary NGO activities." Therefore, "[L]obbying as a professional remunerated activity should be clearly defined in the legislation and be clearly distinguished from ordinary advocacy activities of civil society organisations."
    - "Public disclosure obligations" regarding the source of funding (either domestic or foreign) and the identity of donors pursue the aim of ensuring transparency of the political influence exerted by lobbying

[7] Article 52, Charter of Fundamental Rights of the EU.

[8] CoE Venice Commission, Study No. 895/2017 (2019) - Report on Funding of Associations, paras 105, 106: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)002-e

groups on the process of formation of political institutions and on the political decision-making process. Therefore, such obligations "may only be justified in cases of political parties and entities formally engaging in remunerated lobbying activities."

- Where the relevant entity does not perform any remunerated lobbying activities, "the imposition of a blanket 'disclosure obligation' concerning the financial sources and the identity of the donors cannot be justified with the broadly defined political nature of the activities conducted by the association." Where interest representation activities are carried out for self-interest representation (e.g., an individual or a CSO responding to policy initiatives directly affecting their statutory mission, the community that they represent or are part of, or fundamental rights in general), and are exercised through already transparent channels of participatory policymaking (e.g., in public consultations, debates, etc.), they should not be considered as interest representation of third country governments or entities on their behalf even if the latter provide funding for such activities. Equally, activities of legal/policy research and non-partisan analysis funded by third country entities should be unequivocally excluded from the definition of "interest representation" of third country entities.

A **clear definition/indication should be provided of interest representation activities linked to or that substitute activities of an economic nature** and are thus comparable to interest representation services.

A **clear indication/precise guidelines should be provided on what are the relevant circumstances that determine without doubt when the actions of certain public or private entities can be attributed to third countries**. Such guidelines should include unequivocal exemption for all entities that represent their own interests or the interest of their statutory mission.

Activities within a CSO statutory mission are not third-country interest representation activities: alignment of interests alone is not "interest representation". Therefore, **receiving foreign funding or other benefits in kind from a third country entity (even for a specific program or activity) should not be considered by default as a return (or "remuneration") for a service provision of interest representation,** especially where the entity would receive such funding regardless of whether it carries out specific interest representation activities for the third country providing such funding. The burden of proving otherwise should fall on the supervisory authorities, not on the entities themselves.

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