European Center for Not-for-Profit Law

THE good LOBBY

Defence of Democracy

Questionnaire on Policy Options for an Impact Assessment

Joint Submission by

The European Center for Not-for-Profit Law Stichting (ECNL) and The Good Lobby

The European Center for Not-For-Profit Law Stichting (ECNL) and The Good Lobby welcome the opportunity to provide additional feedback on the European Commission's Defence of Democracy package.

The Commission invited stakeholders to reply to a set of questions on policy options, in response to several requests to conduct a fully-fledged impact assessment of different policy scenarios prior to releasing the package.

We recognize the EU's legitimate concerns about the lack of transparency of certain activities and their potential effect on the EU democratic process, especially ahead of the forthcoming European Parliament elections. ECNL and The Good Lobby aim to support the Commission to consider best approaches and hence, we will address some of the issues tackled in the questionnaire and provide constructive recommendations. Our input is based both on our legal and practical experience and on comparative research of regulatory initiatives addressing specifically the topic of "foreign influence" and its impact on democracy.[1]

[1] See: Korkea-aho E, *The End of An Era for Foreign Lobbying? The Emergence of Foreign Transparency Laws in Washington*, Canberra and Brussels.' [2023] Journal of Common Market Studies;
Ng Y-F and Draffen C, *Foreign Agent Registration Schemes in Australia and the United States: The Scope, Risks and Limitations of Transparency* (2020) 43 The University of New South Wales Law Journal 1101;
Robinson N, *Foreign Agents in an Interconnected World: FARA and the Weaponization of Transparency* (2019) 69 Duke Law Journal 1075;
Vize J, *The Danger of the Foreign Agents Registration Act to Civil Society at Home and Abroad* (ICNL, 25 March 2021), available at https://www.icnl.org/post/analysis/the-danger-of-the-foreign-agents-registration-act-fara-to-civil-society-at-home-and-abroad, accessed 27 March 2023;
Vize J, *FARA's Double Life Abroad* (ICNL, 27 May 2021), available at https://www.icnl.org/post/analysis/faras-double-life-abroad, accessed 6 February 2023;
US Department of Justice FARA Unit, *The Scope of Agency Under FARA*, https://www.justice.gov/nsd-fara/page/file/1279836/download, accessed on 22 September 2023;
Court of Justice of the European Union (ECJ), Case C-78/18 *Commission v Hungary*, 18 June 2020: https://curia.europa.eu/juris/documents.jsf?num=C-78/18; accessed 19 June 2023;
ECHR, *Ecodefence and Others v. Russia*, 14 June 2022, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-217751%22]}, accessed 23 September 2023;
ECNL, *How can EU law safeguard CSOs' access to funding: a landmark decision*, 19 June 2020, available at https://ecnl.org/sites/default/files/files/CJEU-HUNGARY-analysis.pdf;
ECNL/ICNL, *Review of the [second] Draft Law of Georgia on Registration of Foreign Agents and On Amendments to the Criminal Code of Georgia*, 7 March 2023, available at https://ecnl.org/sites/default/files/2023-03/03.2023%20Briefer%20of%20Second%20Draft%20of%20Georgia%20Foreign%20Agents%20Law.pdf

However, whilst we welcome this consultation, we regret that the Commission has not clearly defined the declared object of the proposed policy interventions – namely, **"interest representation activities carried out on behalf of third countries and seeking to influence the formulation or implementation of policy or legislation or public decision-making processes in the EU"**. This makes it difficult to answer those questions in particular (e.g., Q1 to Q3) that ask us as stakeholders to provide practical examples of how these activities take place and their potential problematic impact. Equally, an appropriate reply to the follow-up questions (e.g., Q5-Q7) would depend on how we define the scope of intervention and what we intend, e.g., by "interest representation activity", when it is carried out "on behalf of third countries" and when its purpose is "seeking to influence the formulation or implementation of policy or legislation or public decision-making processes." At the same time, neither the Questionnaire nor any other documents provided so far clearly define the specific risks for EU democracies that any such activities could cause or provide concrete examples of past "malign interference," either from within or outside the European Union. For this reason, it is simply *not* possible to provide nuanced answers which consider specific contexts and assess all potentially harmful impacts without previously agreeing on risks, definitions, scope and clear justification of why the anticipated response by the Commission is the only possible response to such threat to democracy.

Therefore, our answers are limited only to those questions that we can provide constructive feedback on, considering the limitations above. We thank the Commission for this opportunity and remain available to engage in further consultations as the initiative evolves.

Background

On 14 September 2022, the European Commission President announced a "Defence of Democracy" initiative to "better shield ourselves from malign interference" and "bring covert foreign influence and shady funding to light." The European Commission 2023 Work Programme published in October confirmed an upcoming "Defence of Democracy package" and in its first online consultation on the package launched in February-April 2023, the Commission called for views on a legal instrument (regulation or directive) to "provide transparency of foreign interference."

A preliminary definition of "interest representation" as a necessary precondition for an impact assessment of policy options

The Questionnaire does not define the specific, actual and concrete threats to EU democracies (whether past or current, internal or external) to help understand what the most suitable potential responses to the identified risks would be. Considering

that the proposed package will affect fundamental rights, the proposal must approach any solution with the nuance necessary to ensure that restrictions to freedoms are legitimate, proportionate, and necessary in a democratic society.

Instead, the Commission has identified three main alternative policy options to respond to the broadly defined threats identified - ranging from "low intensity" (a combination of various non-legislative solutions promoting common standards) to "medium intensity" (a limited set of legislative harmonising measures) and "high intensity" (more extensive mandatory measures). All three options have the same purpose: to regulate "transparency of interest representation activities carried out on behalf of third countries and impacting the formulation or implementation of policy or legislation or decision-making processes in the EU." The Commission reiterates that one of these policy options needs to be adopted to address "the challenges for democratic processes associated with such activities."

We respectfully submit that without knowing in advance (1) what specific risks for democracy are being considered (and the evidence of such risks), (2) what would exactly fall under the definition of a) "interest representation activity", b) "on behalf of third countries" and c)"seeking to influence the formulation or implementation of policy or legislation or public decision-making processes", it is impossible to assess which of the policy options is the most impactful to address the potential risk, nor the impact that any of such policy options will have on the rights to freedom of association, expression and participation.

Furthermore, it is also unclear why the problem identified – that is, "shielding ourselves from malign interference" – should be tackled exclusively by addressing influence from third countries. "Malign interference", which is already a dangerously overbroad definition, may originate from activities carried out on behalf of entities both outside and inside the EU and can take many forms. Ultimately, influence is multifaceted, potentially stemming from various sources, including corporations, within and outside the EU boundaries.

The Commission itself (Q4) acknowledges that there is not an unequivocal definition for "interest representation services carried out on behalf of third countries" and when/how they would impact the formulation or implementation of policy or legislation or decision-making processes in the EU. All the activities listed as examples in Q4 are legitimate activities undertaken on a day-to-day basis by many entities both public and private. The questionnaire fails to clarify what criteria will be used to prove that such activities in specific cases **represent** a third-country interest and, even more, an interest that is harmful to the democracy of the EU.

Providing a definition for the purposes of this proposal is crucial for transparency in both domestic and foreign contexts, as influence is not solely wielded by public entities; private intermediaries also represent both domestic and foreign interests.

Problems with FARA/FIL laws exclusively addressing foreign influence

Overbroad scope and lack of clarity:

Without a comprehensive definition of "interest representation", significant legal gaps emerge, especially regarding the relationship between interest representation and foreign funding: e.g., **how does one prove that a certain amount of foreign funding automatically implies representation of a country's interest**?

The US Foreign Agents Registration Act (FARA), e.g., has been criticised as excessively broad on this, since even a casual relationship in which a foreign principal[2] makes a simple "request"[3] of an entity could be construed as that entity acting as an "agent". Moreover, in subsequent US court cases and FARA guidance documents fail to give clear elements on what can be considered as a "request", stating more that it depends on the circumstances rather than on specific elements.[4] Overall, this gives broad discretion to the US Government on what it considers a request in order to determine if an entity is a foreign agent or not.

Even in the Australian Foreign Influence Transparency Scheme (FITS), it is difficult to determine what is meant by "acting under the obligation (formal/informal) to act in accordance with the wishes of a foreign principle."

The same lack of clarity appeared in the recently proposed (and withdrawn) Draft Law On Registration of Foreign Agents and On Amendments to the Criminal Code of Georgia[5], which defined foreign agency as being "under the control, order or request of a foreign power, acting under the control, order or request of a person directly or indirectly, in whole or in major part controlled or financed by a foreign power,..."

Overall, proponents of Foreign Influence Laws (FILs) claim that they are crucial for maintaining transparency and safeguarding domestic interests from undue foreign influence. However, FILs come with challenges that warrant urgent attention. Issues like ambiguous language, as in the UK's Foreign Influence Registration Scheme (FIRS), create compliance hurdles and call for clearer definitions.

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[2] Foreign principal is defined under the US FARA as "a foreign government, a foreign political party, any person outside the United States (except U.S. citizens who are domiciled within the United States), and any entity organised under the laws of a foreign country or having its principal place of business in a foreign country."

[3] According to the US Department of Justice FARA Unit guidance document, it indicates that a request falls "somewhere between a command and a plea" and that "the surrounding circumstances will normally provide sufficient indication as to whether a "request" by a "foreign principal" requires the recipient to register as an "agent". Accordingly, these circumstances must evince some level of power by the principal over the agent or some sense of obligation on the part of the agent to achieve the principal's request."

[4] See Attorney General of U.S. v. Irish Northern Aid, 668 F.2d 159 (2d Cir. 1982).

[5] See ECNL/ICNL analysis of the [second] draft: https://ecnl.org/sites/default/files/2023-03/03.2023%20Briefer%20of%20Second%20Draft%20of%20Georgia%20Foreign%20Agents%20Law.pdf

Enforcement inconsistencies:

Significant discrepancies in the way these laws are enforced in countries like the U.S., Australia and Israel ultimately diminish their effectiveness. A comparative look across jurisdictions reveals varying concerns: the U.S. faces criticisms of politicising FIL enforcement post-2016, Australia grapples with limited enforcement and countries like Canada and the UK deal with undefined scope and broad classifications. These challenges are coupled with regulatory burdens, particularly affecting smaller organisations and the risk of legal conflicts with existing laws. The FIL framework is problematic as till now, no model has successfully balanced its objectives with clarity and proportionality to avoid unintended consequences and better achieve its aim of upholding democracy and national sovereignty.

Stigmatisation of foreign funding:

Further, the labelling of entities as "foreign agents" in some FILs can ***stigmatise*** organisations and impact their operations (see further discussion on this point below).

Potential impact on fundamental rights:

The "foreign agent" type of legislation has already been found to be **contrary to the EU Charter of Fundamental Rights and the European Convention on Human Rights**.[6] Indeed, just a few days before the introduction of the EU Defence of Democracy package, Josep Borrell (EU High Representative for Foreign Affairs) issued a public statement about the incompatibility of the Georgian draft law with EU values.[7] The European Court of Justice recognized by its landmark decision that Hungary's law on the transparency of organisations supported from abroad is in breach of EU law, including provisions of the Charter of Fundamental Rights of the EU. [8]

In reply to other Commission's questions regarding the impact of the proposed policy options on certain types of organisations (Q6-7), we fear that policy options replicating all or part of the FIL models may have unintended but harmful consequences for CSOs, as already occurred in a variety of countries globally.

As epitomised by the Russian and Hungarian examples, laws that seemingly purport to limit the creation or dissemination of foreign interference have in fact a drastic

[6] See ECJ, Case C-78/18 *Commission v Hungary, 18 June 2020* and ECHR, *Ecodefence and Others v. Russia*, 14 June 2022.
[7] See https://www.eeas.europa.eu/eeas/georgia-statement-high-representative-adoption-%E2%80%9Cforeign-influence%E2%80%9D-law_en
[8] See ECNL analysis of ECJ, Case *C-78/18 Commission v Hungary*, 18 June 2020, available at https://ecnl.org/sites/default/files/files/CJEU-HUNGARY-analysis.pdf

impact on the legitimate activities of civil society actors acting both locally and transnationally.

One of the worst problems with FARA/FILs is the fact that their **underlying premise is that foreign funding is automatically linked to foreign interference** (or the assumption that the source of foreign funding somehow controls the organisation financed). This is fundamentally untrue. Moreover, it leads to inevitable stigmatisation which is especially problematic in the case of civil society organisations (CSOs) whose good name is their key asset. In many countries, being labelled as a "recipient of foreign funding" is equal to being a "foreign agent" or a spy. In Australia, e.g., there are fears that the government could potentially weaponise FITS to create a stigma around the labelling of actors as foreign-related, as the government issuance of a "Transparency Notice" can declare an entity as "foreign-related". Furthermore, the government is considering the possible tightening of existing exemptions for charities, which may cause extra regulatory burdens for them. All of this potentially limits their ability to exercise their right to association.

It is also crucial to underline that CSOs do not represent the interests of other countries even when they receive funding or request for technical assistance from countries. CSOs represent the interests of broader groups of people and communities based on their statutory mandate and mission. Therefore, a loophole in defining what activities are considered as representing a third country's interest only leaves room for misinterpretations and potential abuse. This is especially concerning since there is not even a commonly agreed legal definition of "civil society organisations" in the EU and beyond.

The need for transparency has been used by far too many authoritarian regimes or countries – including within the EU – wishing to suppress civil society and introduce restrictions on CSOs and specifically on foreign funding for CSOs (one of the few income sources that they have difficulty to control). Most recently, the Hungarian government announced a potential "sovereignty protection bill" to target journalists and NGOs who receive foreign funding.[9] Adding the example of the EU effort to regulate foreign interest representation would only give such attempts new energy and excuse not only to limit, but also to potentially criminalise the work of legitimate CSOs.

The way forward - What policy option the EU should focus on instead of any FARA type regulation

Establishing a framework that exclusively addresses foreign influence will not effectively fortify EU democracy nor bolster its resilience. The efficacy of such an initiative is contingent upon the EU first establishing **a comprehensive legal**

[9] See https://telex.hu/english/2023/09/21/a-sovereignty-protection-bill-to-be-tabled-in-autumn-against-left-wing-journalists-pseudo-ngos-and-dollar-politicians-in-hungary

foundation that mandates strictly necessary and proportionate EU transparency standards for all forms of interest representation, both domestic and foreign and uniform across EU countries. In the absence of such a basic foundation, external entities will invariably discover avenues to wield their influence, notably through private entities registered within EU member states. This vulnerability is further underscored by the fact that the EU Transparency Register is currently operating not as a legally binding mandate, but merely as an inter-institutional agreement amongst EU institutions.

First and foremost, it is important to develop a **clear, unequivocal and narrow definition of what is meant by "interest representation"**. Such a definition should specifically respect fundamental rights and freedoms and ensure that they are not automatically conflated with the exercise of the right to freedom of association, expression and participation of CSOs as they carry out advocacy activities in compliance with their publicly declared mission. Such a definition should also take into consideration the nature of how CSOs are financed and ensure that any source of funding is not restricted as a result of regulating interest representation.

Secondly, any regulatory initiative on transparency of interest representation activities should be **risk-based** and **consider specifically what is the proportionate response to that risk** on the basis of the different nature of diverse sectors, including the civil society sector. It is extremely important to avoid stigmatising CSOs receiving foreign funding (e.g., portraying them as representing foreign interests). There should be a clear distinction, e.g., between receiving foreign funding to carry out the mission of an organisation and the receipt of funding to represent someone as a service. Legitimate CSO funding should not be considered as income for interest representation unless it is provided specifically under such a contract. Also, any potential regulation should not impose overly burdensome and additional financial or narrative reporting on CSOs. In many cases, CSOs already provide information to the governments about the sources of their financing. A review of the existing CSO reporting should be made to understand what type of information CSOs currently provide to authorities and how this existing information could be used.

Transparency requirements should also take into consideration the right to privacy. Two specific aspects are very important with regard to CSOs: the first one relates to maintaining privacy with regard to members of an organisation. This is especially important in sensitive environments (e.g., human rights defenders) or on sensitive topics (e.g. cancer patients). The second aspect is maintaining privacy with regard to individualising donors, especially donors of organisations promoting contested topics such as LGBTIQ, anti-corruption, etc. This is important because in restrictive environments such donors could face retaliation for supporting such organisations.