

# Comment

## The EU Response to Foreign Interference: Legal Issues and Political Risks

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### I. Introduction<sup>1</sup>

With the major corruption scandal dubbed ‘Qatargate’, the calls for restrictions on foreign interference in the democratic processes of the European Union (EU) have further intensified. While discussions had already gained momentum in the context of the Russian aggression against Ukraine, allegations that several members of the European Parliament (MEPs) accepted bribes from the government of Qatar in exchange for favourable voting behaviour and statements have given an additional boost to ongoing discussions on how to prevent foreign governments from unduly interfering in EU affairs. In the wake of ‘Qatargate’, observers and political groups in the European Parliament (EP) have suggested, inter alia, the need to increase transparency regulations, to introduce a registration obligation for foreign interest groups along the lines of the United States (US) Foreign Agents Registration Act (FARA), or to entirely ban foreign funding of lobbying efforts.<sup>2</sup> Currently, the European Commission (EC) is working on a ‘Defence

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<sup>1</sup> This comment follows up and draws upon an online blog post written by the authors: Florian Kriener, Lukas Harth and Jonas Wolff, *Responding to Foreign Interference in the EU: Beware of Unintended Consequences*, European Democracy Hub, <<https://carnegieeurope.eu/2022/10/12/responding-to-foreign-interference-in-eu-beware-of-unintended-consequences-pub-88101>>. We thank Carolyn Moser, Pedro Villareal, and Richard Youngs for most helpful comments. All links to external websites were revised on 5 June 2023.

<sup>2</sup> European Parliament, Amendments adopted by the European Parliament on 2 February 2023 on the proposal for a regulation of the European Parliament and of the Council on the transparency and targeting of political advertising (COM(2021)0731 – C9-0433/2021 – 2021/0381(COD)), P9\_TA(2023)0027, 2 February 2023; Toby Vogel, ‘Why EU Needs a US “Foreign Agents Registration Act” Post-Qatargate’, euobserver, 10 January 2023, available at: <<https://euobserver.com/opinion/156586>>; Tilman Hoppe, ‘Tougher Integrity Rules for the European Parliament’, Verfassungsblog, 13 January 2023; Emilia Korkea-aho, ‘The Qatar Scandal and Third Country Lobbying’, Verfassungsblog, 15 December 2022; Alberto Alemanno, ‘Qatargate: A Missed Opportunity to Reform the Union’, Verfassungsblog, 2 February 2023.

of Democracy’ package that explicitly aims at protecting ‘European democracy against covert foreign interference’. At the heart of this package is a FARA-like legislative initiative that would ‘introduce common transparency and accountability standards for interest representation services directed or paid for from outside the EU’.<sup>3</sup>

This recent surge in attention to foreign interference into the EU’s political process ties into longer standing debates within the EP. Russian meddling in electoral processes throughout Europe and during the 2016 US presidential election had triggered debates on the EU’s vulnerability to such foreign influence. In 2020, the EP set up a ‘Special Committee on Foreign Interference in all Democratic Processes in the European Union, including Disinformation’ (INGE 1). Its work led to the adoption of an EP resolution in March 2022 that strongly condemns foreign interference in the political process of the EU.<sup>4</sup> Russian and Chinese influence measures are qualified as elements of a ‘hybrid warfare strategy’ that ‘constitute a serious threat to EU security and sovereignty’.<sup>5</sup> This assessment is shared broadly within EU institutions, particularly since the start of Russia’s full-scale invasion of Ukraine.<sup>6</sup> In this context, for example, the EC banned the Russian state-owned media outlets RT and Sputnik for their ongoing contribution to the Russian aggression against Ukraine.<sup>7</sup> In its judgment on the matter, the EU’s General Court confirmed that RT and Sputnik implemented an information campaign within the EU to undermine the EU’s support to Ukraine.<sup>8</sup>

However, the March 2022 EP resolution and the current ‘Defence of Democracy’ initiative of the EC go significantly beyond such targeted and limited measures. In this comment, we argue that the ways in which EU institutions are currently dealing with foreign interference are highly problematic. As we will show, the EU approach, as laid out in the respective documents, is characterised by an expansive understanding of foreign

<sup>3</sup> European Commission, Call for Evidence for an Initiative (without an impact assessment), Ref. Ares(2023)1121991, 16 February 2023; Nicholas Vinocur, ‘EU “Foreign Agents” Law Spooks NGOs’, Politico, 13 March 2023, available at: <<https://www.politico.eu/article/eu-ursula-von-der-leyen-ngo-qatargate-foreign-agents-law-disturbs-ngos>>.

<sup>4</sup> European Parliament, Resolution of 9 March 2022 on Foreign Interference in all Democratic Processes in the European Union, Including Disinformation, P9\_TA(2022)0064, 9 March 2022.

<sup>5</sup> European Parliament, Foreign Interference (n. 4), Preamble E.

<sup>6</sup> EU External Action Service, Strategic Compass for Security and Defence, 2022, 34. One of its goals is to establish an EU Hybrid Toolbox to counter foreign interferences.

<sup>7</sup> Council of the EU, ‘EU Imposes Sanctions on State-Owned Outlets RT/Russia Today and Sputnik’s Broadcasting in the EU’, 2 March 2022, available at: <<https://www.consilium.europa.eu/en/press/press-releases/2022/03/02/eu-imposes-sanctions-on-state-owned-outlets-rt-russia-today-and-sputnik-s-broadcasting-in-the-eu/>>.

<sup>8</sup> CJEU, *RT France v. Council of the European Union* (T-125/22), 22 July 2022, paras 55 ff.

interference and the overly broad use of legal concepts. Thereby, the approach is strikingly similar to arguments put forth by some governments around the world seeking to justify harsh restrictions on the foreign funding of civil society organisations (CSOs)<sup>9</sup> and their delegitimation as ‘foreign agents’. If implemented, thus, the planned regulations risk contributing to a stigmatisation of foreign-funded Non-Governmental Organisations (NGOs) in the EU. In addition, they could be used by other actors both within and outside the EU that very deliberately aim at restricting civic space. Finally, they would undermine the EU’s diplomatic efforts against restrictive foreign-funding regulations. Instead, we propose, the EU should adopt an approach to foreign interference that is more targeted, better anchored in international and EU law, less vulnerable to misuse, and in line with the EU’s own activities in the area of international democracy and human rights support.<sup>10</sup>

We start by analysing the legal framework for restricting foreign interference, in particular by considering recent judgments by the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) that limit the range of legitimate restrictions (II.). Then, we discuss the political risks associated with an overall broad and vague EU approach to restricting foreign interference (III.). In the concluding section, we summarise our criticism and suggest a more cautious approach to foreign interference (IV.). Throughout this comment, we focus on foreign interference through the funding of domestic organisations and, thus, do not touch upon other forms of interference, such as the bribing of politicians and public officials or strategies of information manipulation.<sup>11</sup>

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<sup>9</sup> We use the term CSOs to refer to the broad range of formal and informal organisations that are neither part of the state nor the market economy. The term non-governmental organisations (NGOs), in contrast, usually refers to the subgroup of formally established not-for-profit organisations that claim to represent some general public interest.

<sup>10</sup> The EC’s ‘Defense of Democracy’ initiative has already provoked widespread criticism from CSOs and a group of MEPs that regard it as a threat to civic spaces in the EU and beyond. Civil Society Europe, ‘EU Foreign Interference Law: Is Civil Society at Risk? Why We Are against an EU FARA Law’, 3 May 2023, available at: <<https://www.politico.eu/wp-content/uploads/2023/05/03/Letter-to-VDL-EU-Foreign-Interference-Law-Civil-Society-EMBARGO-ED.pdf>>; Civil Liberties Union for Europe, ‘The Defence of Democracy Needs Free NGOs’, 2023, available at: <<https://www.liberties.eu/f/ulsf37>>; Sergey Lagodinsky et al., ‘Open Letter to the President of the European Commission, Ursula von der Leyen’, 3 May 2023, available at: <[https://lagodinsky.de/wp-content/uploads/2023/05/20230503\\_Letter\\_von\\_der\\_Leyen\\_Defence\\_of\\_Democracy\\_Package.pdf](https://lagodinsky.de/wp-content/uploads/2023/05/20230503_Letter_von_der_Leyen_Defence_of_Democracy_Package.pdf)>.

<sup>11</sup> For a thorough account on information manipulation and international law’s prohibition of war time propaganda, Björnstjern Baade, ‘EU Sanctions Against Propaganda for War – Reflections on the General Court’s Judgment in Case T-125/22 (*RT France*)’, *HJIL* 83 (2023), 257-280.

## II. Legal Framework for Countering Foreign Interference

Before we turn to the substantive limitations, some observations on the concept of foreign interference are necessary. None of the available documents from the EU defines ‘foreign interference’. Yet, the EP resolution of March 2022 as well as a December 2022 draft report from the follow-up committee (INGE 2)<sup>12</sup> associate a wide array of measures taken by foreign state actors with this concept, including election meddling, funding of lobbying groups or other civic or political organisations, disinformation campaigns, tampering with critical infrastructure, and influence on elite networks. These forms of interference will not violate international law if they occur in an isolated manner. General international law only prohibits intervention, which according to the International Court of Justice requires coercive interference.<sup>13</sup> Coercion can only be assumed when a state (or in this case the EU) is effectively deprived of its sovereign will with regard to a domestic affair. This can either be achieved through one significant individual influence measure or multiple influence measures that target the same aspect of a state’s domestic affairs. However, this high threshold is not reached by isolated attempts to influence the policy of a state on a limited issue.

As a manner of general international law, states and international organisations are allowed to place restrictions on organisations or parties that participate or benefit from these interference efforts.<sup>14</sup> In fact, the last two decades have seen a steep rise in the number of countries that limit the access of NGOs to foreign funding.<sup>15</sup> The recent jurisprudence of ECtHR and ECJ highlights, however, that at least some of these restrictions violate international human rights law.

In *Ecodefence and Others v. Russia*, for instance, the ECtHR declared Russia’s Foreign Agents Law in violation of Art. 11 of the European Convention on Human Rights (ECHR).<sup>16</sup> Under the law, the Russian Ministry of

<sup>12</sup> European Parliament, Special Committee on Foreign Interference in all Democratic Processes in the European Union, Including Disinformation (INGE 2), Draft Report on Foreign Interference in all Democratic Processes in the European Union, Including Disinformation, 2022/2075(INI), 14 December 2022.

<sup>13</sup> ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, judgment of 27 June 1986, ICJ Reports 1986, para. 205.

<sup>14</sup> See ECtHR, *Case of Parti Nationaliste Basque – Organisation Régionale D’Iparralde v. France*, judgment of 7 June 2007, no. 71251/01, para. 43; ECtHR, *Case of Ecodefence and Others v. Russia*, judgment of 14 June 2022, nos 9988/13 and 60 others, paras 119-122.

<sup>15</sup> Suparna Chaudhry, ‘The Assault on Civil Society: Explaining State Crackdown on NGOs’, IO 76 (2022), 549-590.

<sup>16</sup> ECtHR, *Ecodefence* (n. 14), para. 199.

Justice declared any organisation a ‘foreign agent’ that received even limited amounts of non-Russian funding. This status entailed an increase in auditing obligations and effectively cut-off the organisation from receiving funding from the Russian state. Moreover, a severe stigma is associated with ‘foreign agents’ in Russia. Therefore, NGOs labelled as such saw their advocacy work significantly restricted.

More generally, the ECtHR held that NGOs have a right to receive foreign funding based on their freedom of association enshrined in Art. 11 ECHR.<sup>17</sup> The Court acknowledged that this right could be restricted for the legitimate aim of increasing transparency.<sup>18</sup> Yet, transparency obligations must be commensurate to the pursued goal and actually contribute to raising transparency. The auditing obligations levied by the Russian Foreign Agents Law did not reach this standard. They did not improve the level of accessible information and therefore did not contribute to a transparent understanding of the funding schemes behind the NGOs in question. Moreover, the financial and time burden associated with the increased auditing requirements were considered disproportionate towards the pursued aim.

Similarly, the ECJ held a Hungarian transparency law for NGOs to be incompatible with the EU’s Charter of Fundamental Rights.<sup>19</sup> The law had required Hungarian NGOs receiving funds from foreign sources to declare these incomes each year vis-a-vis the Hungarian state and to include a disclaimer in their publications that they received foreign funding.<sup>20</sup> The Hungarian government also published a list of organisations falling under this definition and threatened penalties and dissolution in cases of non-compliance. The ECJ found that taken together these measures had a deterring effect on NGOs.<sup>21</sup> While increasing transparency is a legitimate aim, states must establish why certain increases in auditing and publicity requirements for NGOs actually contribute to transparency. According to the ECJ, Hungary was not able to advance convincing arguments to this end.

The case law of the ECtHR and the ECJ on foreign funding of NGOs is thus well established. Foreign funding of NGOs should generally be permitted by member states. Restrictions thereon to increase transparency can

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<sup>17</sup> Florian Kriener, ‘Ecodefence v. Russia: The ECtHR’s Stance on Foreign Funding of Civil Society’, EJIL:talk!, 21 June 2022. However, restrictions may be placed on the foreign funding of political parties, see ECtHR, *Parti Nationaliste Basque* (n. 14).

<sup>18</sup> ECtHR, *Ecodefence* (n. 14), paras 119-122.

<sup>19</sup> CJEU (Grand Chamber), *Commission v. Hungary (Transparence associative)*, (C-78/18), judgment of 18 June 2020.

<sup>20</sup> CJEU, Hungary (n. 19), paras 54 ff.

<sup>21</sup> CJEU, Hungary (n. 19), para. 118.

be permissible. Any increased regulations concerning auditing or publicity must however be commensurate, detailed, and not used to intimidate or deter civil society activities.

Furthermore, enhancing democracy and human rights are fundamental values of the EU both in its internal (Art. 2 Treaty on European Union [TEU]) as well as external affairs (Art. 21 para. 1 TEU). Establishing and promoting free civil societies, which are considered a backbone of functioning democracies and crucial to enabling human rights, is therefore deeply rooted in the EU's primary law and mandated by Art. 3 para. 5 TEU.

Moreover, Art. 21 para. 3 TEU requires the EU's foreign policy to be coherent with its other policy fields. If the EU adopted an overly restricted approach towards foreign influence measures, it could not advocate without self-contradiction against such restrictions in non-EU states. However, this has been a central theme of EU foreign policy during the recent decades, notably in its relationship to accession candidates. Most recently, for instance, the EU took an extremely critical stance towards a draft law on 'transparency of foreign influence', which was passed in the first reading by the Georgian parliament on 7 March 2023. In a statement, the high representative of the EU for Foreign Affairs and Security Policy, Josep Borrell, claimed that the law was 'incompatible with EU values and standards' and, therefore, going 'against Georgia's stated objective of joining the European Union'.<sup>22</sup> The law was quickly withdrawn both in reaction to domestic protests and the criticism from the EU. Such criticism, while arguably successful in the case at hand, would become legally problematic in terms of Art. 21 para. 3 TEU and be certainly undermined politically, if the EU adopted an overly restrictive legal framework against foreign interference.

### III. Foreign Interference as a Justification of Civic Space Restrictions

In contrast to these standards of international and European law, both the EP resolution and the draft INGE 2 report suggest, in very general terms, that any foreign interference is illegitimate and needs counter efforts. The resolution very explicitly argues that 'foreign interference constitutes a serious violation of the universal values and principles on which the Union is

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<sup>22</sup> EEAS, 'Georgia: Statement by the High Representative on the adoption of the "foreign influence" law', 7 March 2023, available at: <[https://www.eeas.europa.eu/eeas/georgia-statement-high-representative-adoption-%E2%80%9Cforeign-influence%E2%80%9D-law\\_en?s=221](https://www.eeas.europa.eu/eeas/georgia-statement-high-representative-adoption-%E2%80%9Cforeign-influence%E2%80%9D-law_en?s=221)>.

founded’, including democracy and human rights standards; classifies foreign interference as an ‘abuse of the fundamental freedoms of expression and information’; and emphasises that such ‘tactics to interfere in democratic processes in the EU [...] constitute a violation of international law’.<sup>23</sup> The draft report, while more cautious in terms of characterising foreign interference as per se violating universal values and international law, similarly suggests that foreign interference in general constitutes a practice that needs ‘fighting’, ‘countering’, and collective efforts ‘to counteract it’.<sup>24</sup> The available outline of the planned ‘Defense of Democracy’ package, finally, more specifically aims at preventing ‘covert foreign interference’ and explicitly acknowledges the need to have ‘strong safeguards to prevent abuses against foreign entities with a legitimate agenda’.<sup>25</sup>

In terms of foreign funding of NGOs, the EP resolution contains far-reaching demands for increasing transparency. It aims to ensure ‘that all non-profit organisations, think tanks, institutes and NGOs that are given input in the course of parliamentary work into the development of EU policy or any consultative role in the lawmaking process are fully transparent, independent and free from conflicts of interest in terms of their funding and ownership’.<sup>26</sup> The meaning of ‘transparency’ and ‘conflicts of interest’ are, again, not defined. Yet the wording of the resolution suggests that any foreign funding of CSOs would have to be made transparent and should be considered as signalling a conflict of interest, in particular when it comes from Russia or China. Consequently, the resolution expounds that it should ‘be made illegal in all Member States to engage in any covert activity financed by foreign actors that aims to influence the process of European or national politics’.<sup>27</sup> Thereby, even minor covert funding could be outlawed. The draft INGE 2 report ‘reiterates’ such ‘calls for updated transparency rules’, including for ‘funding for non-profit organisations’, and also demands ‘to identify common EU standards prohibiting foreign funding of political activities’.<sup>28</sup> Similarly, the planned ‘Defense of Democracy’ package seeks to establish ‘common transparency and accountability standards for interest representation services end covert interest representation services directed or paid for from outside the EU’<sup>29</sup> – with the implication that all entities, including CSOs, that ‘pursue lobbying activities and are recipients of a certain amount of funding

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<sup>23</sup> European Parliament, Foreign Interference (n. 4), paras A., B., and E.

<sup>24</sup> European Parliament, Special Committee Draft Report (n. 12), paras B., J., 10.

<sup>25</sup> European Commission (n. 3).

<sup>26</sup> European Parliament, Foreign Interference (n. 4), para. 91.

<sup>27</sup> European Parliament, Foreign Interference (n. 4), para. 87.

<sup>28</sup> PE736.601v02-00, paras 68 and 54.

<sup>29</sup> European Commission (n. 3).

from third countries’, would most likely be subjected to ‘a number of transparency – registering and reporting – requirements’.<sup>30</sup>

As mentioned in the introduction, this use of concepts such as ‘foreign interference’, ‘abuse’, and ‘covert funding’ bears striking similarities to the justifications put forward by governments that have, during the last two decades, adopted harsh NGO laws restricting the foreign funding of domestic NGOs and/or discriminating against foreign-funded NGOs as ‘foreign agents’.<sup>31</sup> As Douglas Rutzen from the International Center for Not-for-Profit Law noted back in 2015, the argument that states have to protect themselves ‘from foreign interference in domestic political affairs’ constitutes a prominent justification of foreign funding restrictions.<sup>32</sup> The individual statements Rutzen cites echo the EP resolution’s notion of a ‘conflict of interest’: According to Russian President Vladimir Putin, for instance, Russia’s so-called foreign agents law merely aimed at ensuring ‘that foreign organisations representing outside interests [...] would not intervene in our domestic affairs’. Along similar lines, Hungary’s Prime Minister Viktor Orbán in 2014 justified the monitoring of NGOs as a means of ensuring transparency when it comes to foreign influence that is exercised through supposedly domestic NGOs. And just as the EP wants to make sure that NGOs and think tanks that give input on EU policy ‘are fully transparent, independent and free from conflicts of interest,’ Rutzen quotes the sponsor of a draft foreign agents law in the Israeli Knesset who emphasised that organisations should have an ‘obligation of proper disclosure, in which they have to present themselves as clearly representing foreign interests’.<sup>33</sup>

In fact, another major argument made to justify restrictions on foreign-funded NGOs has been the need to ensure transparency and accountability. In response, the then special rapporteur on the rights of freedom, peaceful assembly, and of association, Maina Kiai, argued in a 2013 report to the UN Human Rights Council that transparency requirements were only permitted if necessary to prevent illegal activities and should, at most, consist in ‘a mere notification procedure of the reception of funds and the submission of reports on their accounts and activities’.<sup>34</sup> Kiai’s fairly maximalist interpreta-

<sup>30</sup> Civil Liberties Union for Europe (n. 10), 2.

<sup>31</sup> See Douglas Rutzen, ‘Aid Barriers and the Rise of Philanthropic Protectionism’, *International Journal of Not-For-Profit-Law* 17 (2015), 1, 5-44; Human Rights Council, ‘Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association, Maina Kiai’, A/HRC/23/39, 24 April 2013, 7-13; 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* 23 (2017), 469-488.

<sup>32</sup> Rutzen (n. 31), 21.

<sup>33</sup> Rutzen (n. 31), 21-22.

<sup>34</sup> Kiai (n. 31), 12.

tion of NGOs' right to seek and use foreign funding', while very much contested, was explicitly endorsed by the EU.<sup>35</sup> Indeed, just one day prior to the adoption of the report on foreign interference, on 8 March 2022, the EP passed the resolution 'Shrinking space for civil society in Europe', which notes that 'restrictions imposed on CSOs receiving foreign funding is contrary to Union law' and emphasises 'a presumption in favour of CSOs' freedom to seek and receive funding from any source'.<sup>36</sup>

The other way around, in its own response to the global shrinking civic space phenomenon, the EU, along with EU Member States and other state and nonstate donors,<sup>37</sup> has deliberately tried to circumvent restrictions imposed on the foreign funding of CSOs, such as using 'more covert' means to support human rights defenders under threat.<sup>38</sup> In its response to civic space restrictions, for instance, the EU has been relying increasingly on the European Endowment for Democracy (EED), which is formally independent of the EU and has less rigid funding rules and more room to operate in politically difficult contexts.<sup>39</sup> In line with the EP resolution analysed here, critics may well argue that the EED is precisely an instrument that provides covert funding to interfere in the political processes of other countries. In a similar vein, the wording of the EP resolution risks undermining the criticism of civic space restrictions, including of foreign funding restrictions of CSOs, as contained in documents like the EC's Rule of Law Reports.<sup>40</sup>

Looking at the recent debates within the special committee (INGE 2), there are signs for an incipient awareness about this ambiguity that would accompany new legislative measures against foreign interference. In addition to the above mentioned, more cautious sound of the newest draft report, an in-depth analysis by an external expert, Kate Jones, that was requested by the Committee and presented to it on 12 January 2023, points out certain risks in the legislative efforts against foreign interference that could lead to unintended consequences.<sup>41</sup> While on the one hand arguing in favour of new measures to close legal loopholes, Jones also explicitly identified the potential

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<sup>35</sup> Poppe and Wolff (n. 31), 475.

<sup>36</sup> European Parliament, Shrinking Space for Civil Society in Europe, P9\_TA(2022)0056, 8 March 2022, para. Y, 49.

<sup>37</sup> See Thomas Carothers, 'The Closing Space Challenge. How Are Funders Responding?', Carnegie Endowment for International Peace, 2 November 2015.

<sup>38</sup> Richard Youngs and Ana Echagüe, 'Shrinking Space for Civil Society: the EU Response', 2017, available at: <[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578039/EXPO\\_STU\(2017\)578039\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578039/EXPO_STU(2017)578039_EN.pdf)>, 23.

<sup>39</sup> Youngs and Echagüe (n. 38), 6.

<sup>40</sup> See European Commission, 2022 Rule of Law Report, 13 July 2022.

<sup>41</sup> See Kate Jones, 'Legal Loopholes and the Risk of Foreign Interference', EP/EXPO/ING2/FWC/2019-01/LOT6/1/C/22, 2023.

misuse of such new legislations by authoritarian governments that could take restrictive EU policies as precedents for own measures. To avoid such misuse, the study explicitly warns of the possible ‘impact of shrinking civil space’,<sup>42</sup> should fundamental human rights not be respected properly.

#### IV. Conclusions and Recommendations

Policymakers, civil society activists and experts seeking to work against the global spread of restrictive NGO laws frequently emphasise the problem of overly vague language that designates political activities by foreign-supported NGOs as intrinsically problematic and thus to be restricted or even prohibited.<sup>43</sup> When it comes to the nature of those restrictions, registration and reporting requirements have been identified as key mechanisms used to ensure state control over NGOs.<sup>44</sup> Fortunately, there is no reason to assume that the EP resolution on foreign interference is part of a deliberate attempt by EU institutions to adopt similar regulations with the aim to restrict civic space across the countries of the European Union.

Yet, even if not intentionally so, our analysis shows that the ways in which the EP and the EC are currently dealing with foreign interference as well as the legal and political claims they are making in this regard are highly problematic in different regards. First, they may indeed give rise to overly broad foreign-funding restrictions within the EU that would, at the very least, contribute to stigmatising foreign-funded CSOs. What is particularly problematic in the case of the EC’s ‘Defence of Democracy’ package is that the key legal instrument – a directive – would give substantial leeway to EU member states when implementing the corresponding norms. Second, the arguments and norms put forward by the EU institutions can well be used by other actors that very deliberately aim at restricting civic space in order to justify (further) limitations on foreign funding. Third, the EU’s current approach against foreign interference will weaken the EU’s diplomatic efforts against restrictive foreign-funding regulations vis-à-vis both Member States such as Hungary and on the international stage.

Taking these risks into consideration will certainly not be easy. It is hard to deny that some forms of foreign interference exist, including from countries that do have an interest in weakening democracy within the EU, that call for

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<sup>42</sup> Jones (n. 41), 9.

<sup>43</sup> Rutzen (n. 31).

<sup>44</sup> See Thomas Carothers and Saskia Brechenmacher, ‘Closing Space: Democracy and Human Rights Support under Fire’, Carnegie Endowment for International Peace, 2014.

a more systematic response. Yet, our analysis suggests that the EU needs an approach to foreign interference that is more targeted, better anchored in international law and compatible with EU law provisions, less vulnerable to misuse, and in line with the EU's own activities in the area of international democracy and human rights support. Therefore, the EU should consider at least two major issues while reviewing its planned regulations on foreign interference. First, as seen, concepts like 'foreign interference', 'covert funding', and 'conflict of interest' should be defined more precisely, and criteria would have to be established to demarcate, for instance, foreign-funded NGOs from organisations that are effectively controlled or directed by a foreign actor. Second, we see a clear need for a thorough impact assessment that systematically considers the negative consequences for fundamental rights in general and civic freedoms in particular.<sup>45</sup> In fact, at the time of finalising this comment, the EC announced the decision to postpone the presentation of its 'Defence of Democracy' initiative in order to, first, do precisely such an impact assessment.<sup>46</sup> While this is certainly good news, the Commission should make sure that it also examines the consistency between the planned norms and regulations on foreign interference and the EU's policies abroad.

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<sup>45</sup> See also Civil Liberties Union for Europe (n. 10), 8-9; Civil Society Europe (n. 10), 1-2.

<sup>46</sup> Sarah Wheaton and Clothilde Goujard, Under Pressure, Commission Delays Foreign Funding Disclosure Plan, Politico, 1 June 2023, available at: <<https://www.politico.eu/article/european-union-election-foreign-interference-vera-jourova>>.

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