“This Is Not a Foreign Agents Law”

The Commission’s New Directive on Transparency of Third Country Lobbying

Emilia Korkea-aho

19.12.2023 doi: 10.59704/0c3773dcac07f533

On Tuesday, 12 December 2023, the Commission adopted its long-awaited Defence of Democracy package, which includes a Proposal for a Directive on Transparency of Interest Representation on behalf of Third Countries.

During the plenary debate in the European Parliament on the same day, Věra Jourová, Commissioner for Values and Transparency and Dubravka Šuica, Commissioner for Democracy and Demography, presented the package to MEPs. Both seemed eager to clarify what the Directive is not. Šuica emphasised that the Directive “is not a foreign agents law”, a sentiment echoed by Jourová, who continued that it does not resemble the Georgian law, which was scrapped after much criticism including from the EU. Importantly, she emphasised that it does not stigmatise anyone nor involve criminal sanctions.

But the more a statement is repeated, the less credible it appears. Rather, the opposite appears to be true. And so, the devil is not in the name, it lies in enforcement. Despite the Commission’s assertion that full harmonisation of the Directive prevents Member States from gold-plating or potentially worse activities, the Commission has limited control over how Member States apply and enforce their national laws. This is the biggest risk of the proposal.

What does the Commission propose?

The focal point of the package is a proposal for a Directive aimed at enhancing transparency in interest representation (lobbying) activities conducted on behalf of third countries. This initiative is not unprecedented, as there is a growing global interest in regulating lobbying by requiring lobbyists to disclose their activities. My home country, Finland, enacted a law establishing a transparency register for lobbyists earlier this year.

The relevance of such a Directive is underscored by the one-year anniversary of Qatargate, where allegations surfaced of third-country governments paying for access and influence in the EP. However, the EU has long expressed concerns about foreign interference. There have been not one but two Special Committees on foreign interference in all democratic processes in the EU. The Defence of Democracy package of which the Directive proposal is the central piece was announced by Ursula Von Der Leyen in September 2022, months before Qatargate emerged.

Instead of seizing the opportunity to address its own system post-Qatargate, the EU opted to propose a Directive, indicating Member States as potential areas of concern. The justification to concentrate on Member States borders on unintended hilarity, with the Commission seeing the fragmented state of Member State lobbying regulations as “damaging to the Union’s reputation”.

The proposal has generated significant controversy. Originally intended for publication in June 2023, the Commission postponed its release following extensive opposition from NGOs dubbing it the “EU FARA law”. In response, the Commission conducted an impact assessment.

At the core of the Directive is the requirement for registration. Individuals engaged in lobbying activities on behalf of third-country governments and entities whose action can be attributed to them are obligated to register in a national register (Article 10). During the plenary debate, Commissioners reassured that the Directive will not impose anything on Member States that is not already in place at the EU level. Technically accurate, this assertion stems from the fact that, since

2021, registration in the EU's Transparency Register also applies to third-country actors (excluding governments), unless public officials of third-country governments are represented by entities without diplomatic status or intermediaries such as firms providing consultancy services. However, the assertion is formally incorrect, because in the Directive the EU asks Member States to table legislation on (foreign) lobbying while its own Transparency Register remains non-binding.

According to Article 9, Member States must establish or modify existing national registers for this purpose. This is a substantial change. Approximately a half of Member States have legislated on lobbying and set up registers, but most include a diplomatic exception exempting interactions with third-country officials. The rest do not have legislation on lobbying and many, including the otherwise transparency militant Nordic countries, generally regard lobbying registers with suspicion.

Once established or amended, the register must include data on lobbying activities, amounts received annually, third countries, and the primary objectives of activities. Different from "normal" lobbying registers, the Directive introduces a record-keeping obligation in Article 7. Registered entities must maintain records of key information or materials related to the lobbying activity for four years following its conclusion. Entities facing a "justified" risk in relation to violations of fundamental rights can request their information not to be made public (Article 12(3)). Independent supervisory authorities can request limited records in situations specified by Article 16.

Is the Commission proposing a Foreign Agents Law?

The most renowned foreign agents law is the US Foreign Agents Registration Act (FARA), enacted in 1938 to monitor and counter Nazi propaganda. Its objectives include promoting transparency in foreign influence within the US, enabling the government and the public to identify sources of information from foreign agents, and assessing their impact on policy-making. The law applies to individuals acting on behalf of foreign principals (governments, political parties, companies, NGOs, or individuals). Foreign agents must periodically make public disclosures of their relationship with the foreign principal and report activities and disbursements in support of those activities. Most of the information is available on the FARA register. Failures to comply with FARA are subject to sanctions ranging from fines to imprisonment.

A more recent yet influential foreign agents law is Australia's Foreign Influence Transparency Scheme (FITS). It requires individuals acting for the purposes of political or governmental influence on behalf of foreign principals to register in the public register. Foreign principals include governments, political organisations, government-related entities, or individuals. Unlike FARA, it does not apply to companies and NGOs as foreign principals unless they are controlled by a foreign government. Reporting on activities is mandatory and subject to sanctions ranging from monetary fines to a maximum of five years imprisonment.

US FARA remained largely unenforced for years, but after the 2016 elections, there has been a spike in enforcement cases. Due to increased enforcement activities, it is now perceived as posing risks of its illegitimate use against NGOs and media. In Australia, there have been a low number of registrations and enforcement cases since its adoption in 2018, but concerns exist about the use of FITS to create stigmas by labelling actors as foreign-related, especially those of Chinese origin. Both laws are strongly linked to national security and sovereignty concerns, as I have argued elsewhere.

Foreign agents laws have also been adopted elsewhere, including much-discussed laws in Russia and Israel. Other recent legislative initiatives encompass the UK's National Security Bill and Canada's Act to establish the Foreign Influence Registry and amend the Criminal Code which is at the second reading in Parliament. On the same day that the Commission proposed its Directive, Hungary adopted its controversial "sovereignty law", feared at disrupting foreign funding for NGOs and harrying opposition. This is not a hypothetical concern. In Australia, a country with stable democratic relations, former Prime Minister

Tony Abbott was asked to join the register concerning his participation at the inaugural Australian Conservative Political Action Conference in August 2019, co-organised by the American Conservative Union. Abbott refused to register, leading the Attorney-General to announce a need for "upskilling the personnel to increase the common sense".

A foreign agent law is a law that requires actors promoting the interests of foreign entities to register and report their activities. In this sense, the EU's draft Directive qualifies as a foreign agents law, with the Commission proposing a foreign agents law. At the plenary debate, Commissioner Jourová disputed this characterisation, highlighting that the EU's Directive lacks criminal sanctions and does not stigmatise anyone. However, the presence of criminal sanctions is not a necessary criterion for categorising a law as a foreign agents law. Israel's foreign agents law does not involve criminal sanctions either. The second criterion is even more debatable, as foreign agents laws inherently involve stigmatisation or, more nicely, labelling. This element is unavoidable, and despite the EU's best efforts, this regulatory design feature cannot be eliminated.

Existing international models of foreign agents laws suggest a risk of weaponisation, where the law is used to harass NGOs and opposition or target specific groups, especially those of foreign origin. The EU is attempting to minimise this risk through a maximum harmonisation model, preventing Member States from introducing additional requirements. But such model does not take into account application and enforcement. In Australia, while FITS does not expressly target any particular country or nationality, the government had Chinese influence in mind when drafting the legislation. The EU took care not to mention any specific third countries in its proposal. However, its neutral stance may not be shared by Member States, and the EU has limited insight (or control) into how the laws are applied and enforced in Member States and which communities become "targeted" or negatively "branded" as agents working foreign powers.

A case of noble intentions but unpredictable results?

The EU's draft Directive has noble intentions, with MEPs unanimously asserting the need to protect and strengthen democracy – a sentiment that few would contest. The plenary debate maintained a notably gentle tone, with Šuica's statement that openness cannot equate to "vulnerability and weakness" being a rare glimpse into the EU's tougher stance on the outside world. EU NGOs are also relieved that it does not cover foreign funding that is unrelated to lobbying activities. Due to the broad definition of lobbying in the proposal (essentially copy pasted from the EU Transparency Register), the impact of the proposal on NGO activities is, however, hard to assess.

The law carries two significant risks, which the Commission should openly acknowledge. First, the inherent design of foreign agents law involves stigmatisation. Merely labouring the point that the Directive is not a foreign agents law will not eliminate this aspect – it is, in essence, one. Second, the law poses potential dangers in the hands of autocratic, xenophobic, or otherwise vindictive leaders. While the Commission retains some control over how Member States implement it – a power it has been increasingly reluctant to use – it has significantly less influence over how Member States apply and enforce national laws in the years to come.

The Parliament's debate concluded with the two Commissioners pleading that "registration is a small cost of defending democracy". However, the administrative hassle of registration is not the sole conceivable cost associated with defending democracy. The Commission acknowledges this, requiring national authorities to ensure that no adverse consequences arise from registration. For those authorities committed to their responsibilities, this is easier said than done. For those who are less diligent, lacking common sense, or simply petty, this draft Directive could be likened to handing house keys to a burglar just days before the holidays.

ABOUT THE AUTHOR

Emilia Korkea-aho

Emilia Korkea-aho is Professor of EU Law and Legislative Studies at University of Eastern Finland (UEF) Law School, Finland. She heads an Academy of Finland Research Project on the revolving door and its regulation in Finland, France and Slovenia (REVOLVE, 2021-2025).Emilia Korkea-aho is Professor of EU Law and Legislative Studies at University of Eastern Finland (UEF) Law School, Finland. She heads an Academy of Finland Research Project on the revolving door and its regulation in Finland, France and Slovenia (REVOLVE, 2021-2025).

SUGGESTED CITATION

Korkea-aho, Emilia: "This Is Not a Foreign Agents Law": The Commission's New Directive on Transparency of Third Country Lobbying, Verfassungsblog, 19.12.2023, doi: 10.59704/0c3773dcac07f533.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20231219-111145-0.