One Step Forward, Two Steps Back

The EU's 'Defence of Democracy' Package

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This blogpost unpacks some of the 'democratic paradoxes' that come with the 'Defence of Democracy' package (*DoD package*), which the European Commission published on Tuesday, 12th of December. While a Recommendation on promoting civic engagement and citizen participation (*Civil Society Recommendation*) reflects positive changes in the Commission's conception of democracy, the 'Directive establishing harmonised requirements in the internal market on transparency of interest representation carried out on behalf of third countries' (*Foreign Funding Directive*) directly contradicts this emphasis on a more citizen-centred model. It threatens to harm precisely the civil society organisations that are considered to be "one of the main pillars of a functioning democracy" in the Civil Society Recommendation. Contrary to the Commission's assertions, the legal safeguards in the Directive would be largely ineffective in preventing an adverse impact on civil society organisations as agents of European democracy. In this regard, the Foreign Funding Directive is illustrative of a broader dilemma: how to defend democracy in the EU's multi-level constitutional space, while keeping the sensitive legal tools for doing so out of the hands of the enemies of democracy that are already – and for the time being irreversibly – on its inside.

Questionable Timing

Already infamous before its adoption (the proposal provoked fierce opposition amongst civil society organizations around its initially planned adoption in early Summer 2023), the timing of the DoD package's eventual publication could hardly have been more ironic. After presenting the package's measures as countering "[…] Putin or any other autocrat covertly interfer[ing] in our democratic process", the very same Commission released 10 billion Euros in funds for Hungary that were withheld due to non-compliance with the rule of law and democratic principles only twenty-four hours later (see Farkas and Kádár and Kovács on this blog for why this is problematic). Adding insult to injury, the Hungarian parliament adopted its controversial 'Defence of Sovereignty' law on the very same day. The Hungarian law can be perceived as the 'evil twin' of the DoD package's legislative centerpiece: the Foreign Funding Directive. While the Commission finds that "[i]nstilling transparency and openness in the way that foreign interests are represented is the best way to protect the integrity of our democratic space […]", critics consider the proposal to be little different from the kind of 'foreign agent' laws which the EU has previously condemned as incompatible with democratic principles, both in its own legal space (see the *Lex NGO judgment* against Hungary) and in third countries like Russia.

Giving with One Hand…

On the bright side, the DoD package's Civil Society Recommendation recognises the crucial role of citizens, civil society organisations and political participation in building resilient democratic societies. It calls upon Member States to create more and more meaningful opportunities for participating in policy-making processes on all levels. Member States should *inter alia* introduce a transparent and inclusive 'framework for participation' (Points 5-7) that ensures "participation on topics of public interest in a continuous and regular manner and not only during electoral periods" (Point 5a). In particular, the Commission stresses the potential of deliberative and participatory processes like citizens assemblies in addressing the fading trust in democracy across Member States. Moreover, the

Commission recommends a number of measures "to support and protect the civic space to enable the effective participation of civil society organisations".

In doing so, the Civil Society Recommendation reflects a positive move away from a formalistic, institution-centred conception of democracy that equates the latter with its representative form, perceives elections as the main channel of political participation and takes state institutions as the central indicator for a society's democratic nature. This one-sided view of democracy characterized the Commission's accession policy, especially in the context of the EU's Eastern enlargement, and was widely criticised. Regarding the defence of democracy, the Recommendation reflects an approach of 'protection through promotion'. Most importantly, the Recommendation seems to take citizens seriously as the central agents of democracy: On the question of who ought to defend democracy, a Eurobarometer accompanying the DoD package yields that European citizens' trust is greatest in citizens themselves.

…and Taking with Another

While the Civil Society Recommendation reflects a welcome development regarding the Commission's approach to defending democracy, civil society organisations are worried that "the potential positive impacts of this [Recommendation] are likely to be overshadowed by the foreign funding directive." In a nutshell, the proposed Foreign Funding Directive mandates Member States to establish national transparency registers whereby any legal or natural person engaging in a form of interest representation on behalf of third-country entities would have to publicly disclose such activities. The responsible Member State authorities may request additional information in several cases where the registered entity's foreign funding exceeded a certain amount of money in a given year (e.g. one million Euros from a single third-country entity, Art. 16). Non-compliance with these registration requirements or information requests can lead to administrative fines (Art. 22).

Several features of the proposed Directive render the worries of civil society organisations regarding its potential impact more than valid.

To begin with, both the type of activity that needs to be disclosed and the link to a third-country entity that triggers the disclosure obligation are extremely broad in scope (Art. 2). Virtually all 'interest representation activities' which are carried out with the objective of influencing policy-making processes – the very *raison d'être* of civil society organisations – would fall within the scope of the Directive. The non-exhaustive list of 'interest representation activities' in Art. 2(1) even comprises "organising networks and grassroots initiatives." Moreover, to fall under the declaration requirement, it is sufficient if there is a link between any such activity and funding by a third-country entity, be it public or private, whose actions can in some way be attributed to the government or public authorities of a third country (Art. 2(4)). This means, for example, that funding from USAID, which the European Civic Forum describes as "a lifeline for civic groups protecting the rule of law and democracy in Eastern Europe", would be covered by the reporting requirements under the Directive. This is likely to strengthen the smear campaigns against civil society organisations that are already common practice in several Member States – the only change being that it would henceforth happen under the seal of European legality. The Civil Society Recommendation's call to "create and maintain a safe and enabling environment for civil society organisations" (Point 2) sounds hollow if, in the same breath, the Foreign Funding Directive gives Member States the very tool to (further) undermine such an environment.

Insufficient Safeguards

The breadth and vagueness of its scope also defy one of the safeguards that the Commission invokes to assuage concerns with the Directive: the fact that it provides for "full harmonisation" (Art. 4) is supposed to prevent Member States from 'gold-plating' or otherwise abusing this legal tool to make the life of civil society organisations harder. However, the very fact that the instrument is a Directive means that Member

States have a notable degree of leeway regarding its implementation. Moreover, as seen above, it is not like harmonisation in this case entails a clear, narrow circumscription of the activities which trigger the obligation for an NGO to register them and disclose how they were funded – on the contrary. To put it bluntly: Nothing good is going to come from harmonisation based on poorly drafted law.

The other ostensible safeguards in the Directive are independent (national) supervisory authorities responsible for overseeing and enforcing compliance with the registration requirements (Art. 15) as well as the obligation to provide judicial redress for any registered entity to challenge disproportionate or otherwise unjustified actions in enforcing the transparency requirements (Arts. 10-12). Here, it seems like the focus on threats to European democracy from the outside has led to (not so blissfully) ignoring the threats that already exist on its inside. Given the present state of autocratic entrenchment in Hungary, it is virtually impossible to imagine that a public authority in charge of administering the transparency register would be independent from the Orbán regime and its strategy to disable pro-democratic civil society actors. On the contrary, making the lives of civil society organisations harder under the veil of European legality might even be a welcome addition to the sweeping powers of the newly established 'Office for the Defence of Sovereignty'. Along the same lines, judicial redress is a meaningful safeguard only insofar as there are independent courts. This is not the case in Hungary. And as much as the new Polish government is committed to restoring judicial independence, it is not something that can be taken for granted for the foreseeable future in Poland, either.

The Paradox of the EU's Democratic Self-Defence

Hence, the Directive's provisions on an independent supervisory authority and judicial redress can act as meaningful safeguards only in Member States whose institutions respect the rule of law and democratic principles – and in which abuse is, therefore, less likely to begin with. However, this cannot be taken for granted even for Member States that are not among the usual 'rule of law suspects.' Consider Member States like France, which have an increasingly doubtful record when it comes to respecting freedom of association and assembly (notably that of religious associations).

At the end of the day, preventing tools for democratic self-defence from being employed in a self-serving manner by political incumbents depends more on political ethos than on legal design – absent the former, the latter can always be circumvented. In this regard, the Foreign Funding Directive recalls a deeper dilemma of defending democracy, one that applies in particular to 'militant-democratic' instruments, which are characterised by restrictions of core democratic freedoms and political participation rights: Those polities which, supposedly, need militant democracy (because their institutions and popular support for democracy are fragile), cannot have it (because the rules and norms that would protect militant-democratic instruments from being misused are not established enough) [p. 253]. On the other hand, those polities that can have it (because they are established democracies with robust institutional safeguards and a strong democratic ethos) do not need it – for the very same reason.

Regarding the EU, this dilemma is exacerbated by its nature as a compound polity in which Member States are at once the agents and objects of its democratic self-defence. However, these two roles are mutually exclusive. Where actors hostile to democratic principles are at the helm of Member State governments – which threatens to become less and less exceptional, just look at the Netherlands – European legal tools that provide for restricting freedom of association are likely to be used for (further) eroding democracy, rather than defending it. Hence, the package wrapped as 'defence of democracy' against threats from the outside might in effect be a welcome pre-Christmas gift for the very enemies of democracy on the EU's inside.

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