

Civil Society Europe Contribution to the 2021 Rule of Law Report - targeted stakeholders consultation

This contribution has been prepared within the Civil Society Europe Civic Space and Fundamental Rights working group.

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1. Introduction

1.1 Civic space and the Rule of Law - an essential link

Civil society represents constituencies from a wide range of sectors; its organisations contribute to enhancing and promoting the effective access to civic, political, economic, social, cultural and environmental rights for many as well as mobilise through campaigning, advocacy and judicial proceedings when these are not respected.

1. A free civil society is essential for a democratic society based on the rule of law and fundamental rights

The Treaties and EU institutions acknowledge that a free civil society is essential for making the values enshrined in Article 2 TEU, including democracy, human rights and the rule of law, a reality, and for raising public awareness about their significance and existing challenges. This has been reaffirmed in the Commission Communication on Further strengthening the Rule of Law within the Union COM(2019) 163, as well as the European Parliament resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights (2018/2886(RSP)). EU institutions should act accordingly and envisage a concrete role for civil society actors as both contributors and beneficiaries of EU initiatives aimed at monitoring and strengthening the rule of law. This is all the more urgent against the background of a worrying trend of restrictive measures in a number of Member States negatively affecting civic space and the ability of civil society actors to carry out their legitimate tasks.

2. A shrinking space for civil society is one of the indicators of a weak rule of law environment

A shrinking and threatened civic space with legal or practical restrictions to the freedom of assembly, association and expression is an important indicator of a weak rule of law environment.

As the Council of Europe stated in its Recommendation on the need to strengthen the protection and promotion of civil society space in Europe, the existence of a pluralist civil society, and of an enabling environment allowing it to thrive, is the basis of the principles of democratic pluralism and commitment to the rule of law. As such, civil society as well as civic space are integral parts of the system of checks and balances supporting democratic systems based on the rule of law.

3. Civil society actors (including philanthropic actors) are key supporters of rule of law.

In turn, the role played by civil society is integral to efforts to promote and, when needed, safeguard the rule of law at European, national and local levels. An informed, active, diverse and skilled civil society is vital to protect the rule of law when it is threatened, as evident in the rule of law crises in several EU Member States. In times of crisis, civil society organisations with other actors are often among the first to inform public opinion, advocate and take action for the respect of the rule of law

in national and international fora. For these reasons, civil society activists, in particular human rights defenders, are themselves often one of the first targets of those who aim to undermine the rule of law. Measures restricting civic space (particularly the freedom of expression, assembly, association and right to participation) not only impact on the functioning of civil society organisations (such as NGOs, not for profit associations, philanthropic organisations), but also inhibit civic participation and public debate as well as media pluralism.

4. Civil Society actors play a watchdog role and often inform the public about rule of law issues

Civil society actors play an essential role in improving and protecting a free and pluralist media environment through education, training and watchdog functions, as recognised, among others, by the EU High Level Group on Media Freedom and Pluralism . Also, both in countries where the rule of law is under threat and countries where it is respected, there is a need for continuous civic education about the importance and meaning of a free and strong civic space to democracy and the rule of law, and the crucial role of civil society actors in promoting and advocating for the respect of these values.

For all of these reasons above, we believe that the 2021 rule of law report should include a dedicated section on civic space and we call for a methodology review.

We would like to make the following remarks and suggestions responding to the questions you have included in your communication.

1.2 Civic Space in 2020

2020 has been characterised by the COVID-19 health emergency that produced consequences on our societies, economies and democracies that are unprecedented in Europe in times of peace. We have changed our life to protect ourselves and others. We have all been expected to act responsibly as individuals and as a community. The need to provide a quick and strong response in a short time has increased the use of exceptional powers by the Governments at the expenses of democratic checks and balances. Some Governments took advantage of this exceptional situation to legitimate their attempt to concentrate powers in their hands but, even in countries where governments have been praised for their balanced approach, the situation of exception has exposed serious risks for European democracies, adding to the trend of deterioration documented in previous years.

The analysis showcases the challenges civil society faced throughout the year 2020, with a particular focus on how the public measures triggered by the COVID-19 pandemic affected civic space, and how civic actors responded. Our review is mainly based on the Report # activizenship - stories from the lockdown - a civic space report¹.

¹ <https://civic-forum.eu/publication/activizenship>

The first part of the analysis focuses on the challenges civil society faces along four elements we believe are crucial for civil society to enact its full potential:

1. A conducive political, cultural and socio-economic landscape;
2. Respect of civic freedoms;
3. Meaningful dialogue between civil society and governing bodies;
4. A supportive framework for CSOs' financial viability and sustainability.

The second part looks at civil society's responses. The third part proposes recommendations.

2. A conducive environment for shrinking civic space

2.1 As the socio-economic situation deteriorates, societal vulnerabilities increase

Decades of insufficient public investment in and privatisation of the healthcare sector and social protection infrastructures have debilitated Europe's capacities to respond efficiently to the health crisis. As a consequence, many states have restricted freedom of movement and the access to public space in order to decrease the pressure on the health system - struggling to meet the demands of the population and to keep the limited available means accessible to the highest risk groups.

The health crisis developed quickly into a social and economic crisis, with tens of millions of people put out of work, many losing partially or in total their sources of income and, in large numbers becoming unable to meet the basic needs of their families for food, housing and health protection. The economic shock triggered by the consequences of the health emergency is exacerbating societal needs and existing inequalities. Adding to those who were already fragile, entire groups were exposed to socio-economic difficulties. States did implement measures trying to compensate, at least in part, the disrupting effects on households and businesses, showing a willingness to act unseen in the last decades. But these economic measures have often been insufficient and limited.

2.2 A crash test for the effective functioning of democracy and rule of law

The question of how to guarantee the democratic life in a situation of emergency has been a challenge in the context of the COVID-19 crisis. In order to take shift decisions, a general tendency to concentrate powers at the Government level while limiting the role of institutions in charge of checks and balances has been reported across Europe. In countries where the functioning of democracy and the rule of law was already strained, authorities have taken advantage of the situation to further concentrate their powers and to pass controversial legislation unrelated to the COVID-19 emergency. As we move towards a normalisation of the virus in our lives, in the long-term, the danger is to normalise emergency and coercive practices that have emerged.

In this context, where institutional mechanisms of separation of powers and accountability are shrinking, civic actors' role as checks and balances become more crucial. However, these have

been critically weakened with the narrowing of civic space and downsizing of their capacities to act due to the impact of the economic shock on their resources.

3. The deterioration of civic freedoms continues

In 2020, some of the challenges to the exercise of civic freedoms are generated by the democratic test posed by the COVID-19 pandemic, which reproduced and magnified some of the trends already emerged in previous years. Others happen in parallel to the health crisis. All of them accumulate with the ones documented in previous years and create an extremely testing environment in which civil society operated in 2020.

3.1 Restricting freedom of association and free flow of capital

Following the footsteps of the Hungarian law on the transparency of organisations supported from abroad dubbed “Lex NGO” that was ruled a breach of the right to association by the European Court of Justice, in 2020 four countries (PL, BG, EL, NL) have proposed or introduced legislation officially aimed at improving transparency, but the facto discriminately overburdening and stigmatising (parts of) the sector. The use of transparency legislation to restrict freedom of association is a trend already emerged in previous years. While these pieces of legislation present differences, they raise similar concerns and potential threats to the civic sector, including double reporting requirements draining CSO resources; disproportionate sanctions in case of non-compliance; discrimination of CSOs vis-a-vis other entities (like private companies) that are not subject to the same requirements; vilification of the sector in the eyes of the public. This kind of legislation contributes to negatively affecting CSOs capacity to focus on their mission in contexts where freedom of association is also challenged by smear campaigns, difficult dialogue with public authorities and reduced financial resources.

Other forms of restriction of freedom of association include: new legislation increasing interference of public authorities (passed in CY, currently under discussion in FR), arbitrary disbanding of civic organisations (dissolution in FR, de-registration in CY), new restrictive rules aimed at targeting particular categories of associations (including organisations working on asylum and migration, such as in EL, or religious based organisations, concerned by bills under discussion in FR and AT), the persistence of burdensome reporting requirements, also linked to disproportionate implementation of the anti-money laundering framework (LT, LV, CY, LU, RO).

3.2 Closing the public space, restricting the freedom of peaceful assembly

As the COVID-19 virus spread across the region, national authorities started to restrict the public space and limit the possibility for gatherings of people. During the first wave of the pandemic, in most EU countries freedom of assembly was restricted as a byproduct of restrictions on movement and gatherings, without specifically mentioning the right to peaceful assembly, and leaving certain ambiguity as to what activities were permitted and which were restricted due to the “*broad and*

vague” wording. Often, the vagueness in addressing the right to peaceful assembly resulted in excessive discretion left to competent authorities to decide whether to allow assemblies.

In a general tendency across Europe, **the requirement to notify authorities of planned assemblies has started to *de jure* or *de facto* function as an authorisation system**, even in case of small gatherings of a handful of participants. As a result, even where a total ban was not in place, often local authorities restricted the right to freedom of assembly on the basis of public health concerns. In several instances, **peaceful protesters have been dispersed, fined or arrested on the grounds of not having notified or received authorisation** from competent authorities. Additionally, public authorities have often shifted the responsibility to guarantee compliance with social distances during public demonstrations on the organisers rather than see it as a shared responsibility.

As the numbers of hospitalisations and infections started to be under control and governments slowly lifted COVID-19 related restrictions, some states that maintained limitations on large gathering of people made exceptions for demonstrations that were safeguarded during following waves of lockdowns (i.e. IT and FR). However, freedom of assembly remained restricted in some countries even as other areas of public life were opening (i.e. RO, HU, EL, CY). Additionally, **in several states, while demonstrations are allowed, authorities have introduced other forms of restrictions** in addition to the respect of hygienic measures (social distancing and wearing of protective masks), **such as on the form of the assembly (static v. marching) and limitations to the number of participants.**

It is important to note that throughout the year, regulations and attitudes of authorities concerning the right to peaceful assembly have changed rapidly inside member states, creating uncertainty on the exercise of this right. Additionally, in some countries, while the right was protected *de jure*, public officials have discouraged the use of public demonstration as a means for political participation. The public discourse has also sometimes blurred the lines between people gathering for the purpose of protest and for other socialising purposes.

3.3 Securitising the public space, policing dissent

The COVID-19 pandemic has been framed as a matter of public security. Especially in the first phase of the pandemic, the public discourse described the efforts to slow down the spread of the virus as a “war” against the virus and shifted the responsibility to “fight” the pandemic on the individual citizens. In most states, the aggressive security narrative went hand in hand with the use of coercive methods to enforce the COVID-19 related restrictions and the closing of public space. In this context, citizens lost confidence in using the public space for the most basic everyday needs, let alone occupying it for the purpose of public participation and protest. Even when the deployment of the security apparatus to enforce the restrictions and the security discourse were not directly targeting civic freedoms, they created a climate of mistrust and terror that affected people’s ability to make use of the public space and exercise their fundamental rights. In some

cases, the sole act of gathering in the streets and living the public space became an act of protest and resistance.

3.3.1 Deploying the coercive apparatus to police the pandemic

In most countries, the enforcement of the restrictions was carried out by the police patrolling the streets. In some countries, governments also deployed the military to enforce the restrictions on freedom of movement. Some states introduced harsher sanctions and granted (or attempted to grant) police forces new powers to enforce them (i.e., IE, PL). For example, some member states granted police officers the power to inflict on spot fines (i.e., AT, LT, LV). In some countries, the police were granted additional powers to manage or sanction content deemed fake by the authorities (i.e., HU, RO) or in access to private data for the purpose of tracking the spread of the virus raising issues of surveillance (i.e., BG, PL, SI, HR).

In many countries, police forces have been questioned for abuse of their powers in imposing fines (i.e., AT, RO, PL, ES) as well as for the use of force against the public (i.e. HR, RO, ES, BE, FR, EL). Fines and policing abuses across Europe disproportionately impacted racialised groups, including Black people, Roma and people on the move and migrants, as well as homeless. In this sense, the pandemic amplified a tendency of police abuse against these groups that in many countries already existed.

3.3.2 Heavy-handed policing of freedom of assembly and protests

In some cases (i.e., examples documented in HU, PL, SI, FR), the coercive apparatus in place to police the COVID-19 rules were applied against people exercising their right to peaceful assembly, with peaceful protesters facing administrative and criminal sanctions for breaking the COVID-19 restrictions raising concerns on the intent of authorities to curtail dissent. A number of arbitrary arrests of peaceful protesters not linked with the COVID-19 restrictions, in some instance with violence, was also reported (i.e., in FR, BG, PL, ES), including during the Black Lives Matter demonstrations (i.e., FR, BE, DE, EL). Prosecution of protesters was coupled with surveillance including through drones and the monitoring of social media profiles to track down protesters, such as in FR and SI.

3.3.3 Policing freedom of expression and association

Since the outbreak of the global pandemic, across Europe, several governments have restricted access to information, locked out the media and displayed a general intolerance against criticism. This was also showcased by the records of smear campaigns against civil society countries (i.e., CZ, EL, PL, SI, HU). In some countries (i.e., HU, BG, RO, PL, FR, ES), authorities have made moves to control and sanction citizens, activists and journalists that are critical of their actions. The gravity of the actions changes greatly in terms of repercussions on the activists, but all contribute to creating a chilling effect on citizens and activists holding public authorities accountable. In a few countries, records have shown police interference with journalists and citizens covering their

actions (i.e., FR, BE, BG, HR). These interferences include arrests and physical assaults. Reports (FR, EL) also showcase the use of coercive power against associations working with migrants.

3.4 Legislative changes restrict freedom of assembly beyond COVID-19

In recent years, a number of countries have toughened their approach to public demonstrations by restricting the space accessible to protests and increasing sanctions. In 2020, a new restrictive law on public demonstrations was introduced in Greece. Currently, laws potentially restricting freedom of assembly are under legislative process in France and Denmark.

3.5 Data gathering and surveillance

As “tracking the virus” has become the mantra in the tackling of the health crisis, concerns about the expansion of surveillance technologies and the right to privacy have been voiced by civil society and human rights bodies across Europe. These warnings have become especially pressing with moves providing or attempting to provide law enforcement agencies with additional powers to collect and use private data, including on cellphone, tracing apps and other technologies (i.e., BL, PL, SI, HR). These powers can be extremely intrusive and not proportional to the need.

Additionally, there is a serious risk that these data could be used beyond the tracking of the spread of the virus, for example, in criminal proceedings enforcing COVID-19 restrictions and others.

These developments could have serious consequences on civic space. For example, when data are collected in the context of public demonstration (i.e. DE, ES). Privacy is an important prerequisite for the exercise of fundamental rights, including the right to peaceful assembly and expression. Being identified in the context of public demonstrations can have a deterrent effect on public participation, especially for communities that are most at risk of marginalisation. These concerns are magnified by the expanding use of artificial intelligence to monitor the respect of COVID-19 rules, as well as to provide faux security following recent terrorist attacks, in many cities in Europe in a context of legal vacuum and lack of public oversight. Examples of using surveillance technologies and social media to track protesters and sanction them have also been documented (i.e. SI, FR) and reinforce the worry that data collected can be used beyond health purposes.

4. The dialogue between civic organisations and government bodies deteriorates during the crisis

Civic and social organisations are in a privileged position to understand the impact of policies and lack thereof on the wider population and specific groups. Thus, they can be important allies for authorities that want to tackle societal vulnerabilities and environmental concerns by providing data and proposals. However, **the exceptional circumstances triggered by the COVID-19 health emergency created huge obstacles for the proper functioning of civil dialogue.** Institutions needed to act quickly and effectively to slow the spread of the virus and reduce the heavy impact that the restrictions had on the economy and the population. The increased workload, coupled with

social distancing and telework, greatly affected the capacities of institutions to respond to the increased number of requests for dialogue and consultation.

Generally, **across Europe, the emergency procedures reduced the opportunities for consultation and influence by shifting the power from the legislative branch to the executive one.** Additionally, the closing of the public space together with the overwhelming presence of COVID-19 news on the media made it difficult to get other messages across and created new challenges for civil society to put pressure on governments when institutional frameworks for dialogue were not respected, not available or restricted.

Even in countries with a relatively open dialogue between civil society and governments, the quality and the impact of the exchanges depended on the Ministry as well as on previous relations between the individual civic organisation and authorities. Bigger networks of civic organisations were in a better position to be taken into account, while smaller or more critical organisations found additional difficulties to influence policy making. Additionally, **consultation processes at national levels did not always lead to a concrete impact on policies and sometimes civic organisations were left with a feeling that the civil dialogue was a mere ticking-the-box exercise.** Nevertheless, while there were several challenges and limits, in Ireland and Latvia, positive steps were announced to strengthen the civil dialogue.

In some countries, **civil society reported that the time available for consultation was shortened (i.e. BG, EE, LV) or suspended (i.e. RO, HU)** in disregard of institutional frameworks of civil dialogue on some policies adopted. Lack of meaningful dialogue with the sector is deemed to be an important factor for lack of reactivity of the government to many societal emergencies (i.e. DE, EL). Additionally, as a general trend, civil dialogue is particularly rare on European matters. This was true also during the pandemic.

In some countries, **authorities not only disregarded civil society but also made moves that will affect the quality of public participation in the future (HR, SI, BG).**

Among the issues that made civil dialogue and civil society's advocacy more challenging in times of crisis was access to information, especially concerning fast-track, continuously changing legislation. In some countries, governments suspended transparency legislation or parts of it (i.e. HU, IT, ES, BG).

5. Economic difficulties of the sector soar during the crisis

The COVID-19 crisis had a huge economic and financial impact on many parts of the civic sector, against the background of an already challenging funding landscape. This issue has a short-term impact, with many organisations at risk of being forced to stop or downscale their operations. It also has long-term consequences: the landscape of civic organisations is undergoing a fast and profound change as many will stop existing or completely change their activities, in the absence of meaningful support from public institutions.

Public support for the sector often arrived quite late, with many governments prioritising funding for businesses first. Only a minority of the European countries created specific funding for the sector fit for its specificities (i.e. AT, IE, IT, LT). Many other countries included NGOs in some of the measures supporting employers and businesses (i.e. BE, BG, FR, DE, EE, RO, SI, ES). However, in most cases, only a part of civic organisations was actually eligible for this support, and this funding was unfit for the specific needs of the sector.

In some countries, the economic difficulties caused by the lockdown implemented in most EU countries have been exacerbated by the decision of public authorities to shift the priorities of national and EU funding for NGOs to tackle the health emergency. In some cases, these moves raised suspicion that they were aimed at disadvantaging specific sub-sector of NGOs that are critical of the authorities (i.e., HU, SI, HR, CZ).

6. Civil society unlocks its potential

Civil society organisations and movements, as well as philanthropic actors play an essential role in supporting communities and in promoting and protecting the rule of law, democratic principles and fundamental rights. From one country to another, civic actors have different status and modus operandi. The tasks and functions they perform also vary. But everywhere they are in the front line to witness the precarious situations people suffer from, trying to respond to people's needs for effective access to rights, to alert on the limitations and adverse consequences of public policies.

From the onset, the crisis has shown how diverse and fundamental civic actors' roles are. 2020 has been characterised by an awakening of active citizenship to ensure at the widest possible scale effective access to basic rights that the crisis has put at risk. Many have found creative ways to be useful to their communities, to offer social and cultural tools against isolation, to volunteer for providing support to the weak and vulnerable which often happen to be the poorest, to act as watchdogs vis a vis the consequences of the democratic and social crises, and to propose societal alternatives. Many foundations and philanthropic organizations have also adapted their way of working by being more flexible about beneficiaries' use of funding, extension of reporting deadlines, providing more core support and collaborating with new partners. including public actors². However when acting across border barriers continue to exist such as foreign funding restrictions or the lack of implementation of the non-discrimination principle).

Everywhere, organised civic actors, as well as citizens and people spontaneously, have been and are in the front line to witness the precarious situations people suffer from, trying to respond to people's needs, to alert on the limitations and adverse consequences of implemented public policies, to react against abuses of power, to put solidarity for all at the centre of the response to the crisis. Civic space under the lockdown has been narrowed but, even under detrimental conditions, has shown a high level of dynamism.

² See EFC members responses to the Covid Pandemic:
<https://www.efc.be/blog-post/keeping-dialogue-open-working-together-and-building-back-better/>

7. Recommendations

These are our main recommendations³:

1. Civil society organisations should be part of a regular, meaningful and structured dialogue with the EU institutions on the rule of law, as well as considered a key partner to identify violations, promote democracy and fundamental rights and raise awareness to rights of redress and litigation. Ensure a meaningful involvement of civil society actors and a more effective monitoring process including by:
 - a. enabling CSOs to provide timely and pertinent information on the rule of law situation in the Member States, including information on civic space;
 - b. requesting civil society feedback on the information received from Member States to make sure the input is complete or merits a request from the Commission for further clarification from national authorities;
 - c. requesting suggestions from civil society as to the most appropriate measures Member States could take to address issues identified by the Commission. The Commission should also use its assessment of the situation in a given Member State to inform decisions about where to focus (additional) financial support, e.g. under the new Citizenship, Equality, Rights and Values programme to civil society organisations promoting Article 2 values. For example, if the Commission considers that litigation, or public education measures would help to remedy issues identified by the Commission, it should then make funding available to organisations carrying out such activities in the relevant Member State;
 - d. Support a structured dialogue with civil society organisations both at EU and national level
 - e. encourage more expert exchange at EU level among different actors such as the judiciary, Member States and civil society organisations, instead of compartmentalizing such dialogue. The Commission should create a “rapid response system mechanisms” on violations to the rule of law, in cooperation with relevant national and European stakeholders.
2. Review the methodology for the preparation of the annual report by establishing a clear link between the respect of the rule of law and the existence of enabling civic space in Member States, by integrating indicators related to civic space in the monitoring, through the recognition of civic space as a Rule of Law Pillar ;
3. Identify and adopt a comprehensive framework for assessing the civic space realities in each Member State that takes into consideration its diverse and interrelated components and its effect on the political system and the rule of law. Such framework should include, at

³ Please also read: Civil Society on the Frontline - 5 points for EU Action 2019-2024:
<https://civilsocietyeurope.eu/wp-content/uploads/2019/08/CIVIL-SOCIETY-ON-THE-FRONTLINE-2019-FINAL.pdf>

least, a regular review of the legislative and policy framework and its implementation, relating to the exercise of civic space fundamental freedoms (freedom of association, assembly and expression, enshrined in Articles 11 and 12 of the EU Charter of Fundamental Rights) in Member States, as integral part of the rule of law periodic monitoring exercise (see illustrative example below); The Commission needs to include in its impact assessment on fundamental rights civic space in order also to prevent transposition problems of EU legislation at national level.

4. Establish an alert mechanism to allow civil society actors to promptly signal to the European Commission serious issues and/or threats regarding civic space fundamental freedoms. Such alert mechanism should lead to a rapid (re)assessment of the situation allowing for timely and concrete reaction at EU level, the impact of which should be regularly reviewed. The creation of a a EU Coordinator on the rule of law and civic space is a stepping stone to ensure monitoring, verification and analysis on civic space.
5. Make sure that when governments unduly restrict civic space, they face sanctions including political sanctions in the framework of Art 7
6. Make better use of EU law to protect civic space (eg internal market, propose new rules to close gaps eg on SLAPPs)
7. Any future strategy to strengthen the rule of law must include measures to promote and enable civic space including through adequate funding. Use funding instruments such as the CERV programme to support more effectively the civil society sector.

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