

LOCKING DOWN CRITICAL VOICES

How governments' responses to the Covid-19 pandemic are unduly restricting civic space and freedoms across the EU

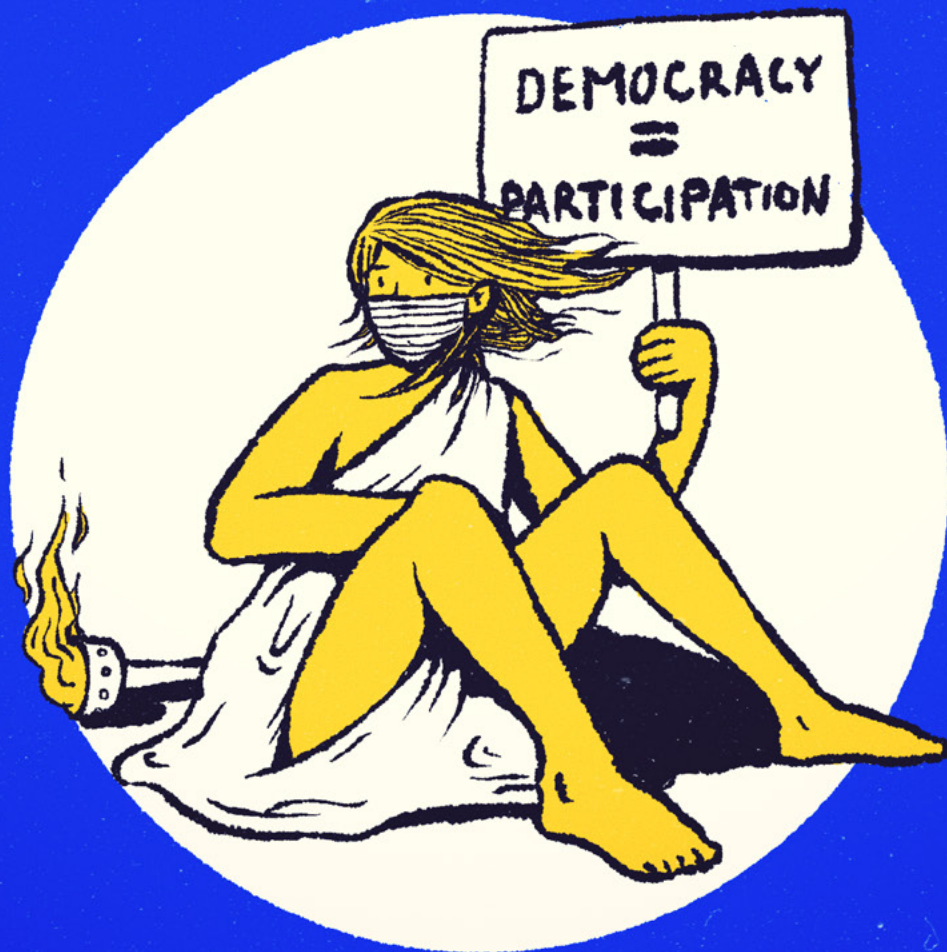


Table of contents

Executive summary	3
About this report	5
Introduction	6
What is civic space and why does it matter?	6
Restrictions on civic space date from well before the pandemic	7
Governments have used COVID-19 to further deepen restrictions on civic space	9
The right to peaceful protest	11
Social distancing rules turning into blanket bans on protests	11
Vague wording, arbitrary enforcement	14
Tracking protestors	15
Hefty sanctions	16
Physical protests decline, online protests are no substitute	17
Freedom of expression	19
Novel tools of censorship	19
Stifling criticism by locking out the media	21
Smears and harassment to silence watchdogs	22
Democratic oversight & freedom of information	23
The risk of unconstrained powers	23
Police and surveillance overreach	26
Dark times for freedom of information	26
Shrinking space for public participation	27
Capitalising on the pandemic to weaken environmental and rights standards	28
Reopening our civic space: the way forward	30
Governments should review, revise or reverse existing measures	30
The European Parliament needs to step up its role	31
The European Commission should play its part, too	32
Notes	34

Executive summary

To protect public health, governments have adopted measures that radically change the way we live. Temporary restrictions on certain freedoms may be necessary to save lives and protect at-risk groups. But many governments have adopted problematic measures in the name of protecting public health. In some cases, government measures simply go further than is necessary. In other cases, governments are deliberately taking advantage of COVID-19 to undermine individual freedoms and democracy in ways that actually endanger public health. In particular, they imposed unnecessary and disproportionate restrictions on the right to protest, free speech, access to information and freedom of association that allow the public to participate in decision-making. These rights are essential as they provide citizens with the tools they need to ensure that their governments act in their best interests when navigating the pandemic.

Whilst not claiming to be exhaustive, this report records some of the most striking developments in EU countries. It exposes how governments' responses to the pandemic have led to unnecessary and disproportionate restrictions on civic space and freedoms, unduly hampering activism and democratic participation.

While certain countries stand out, worrying trends concern several states across the EU. Evidence compiled shows that more than half of EU countries failed to safeguard people's right to peaceful assembly. Instead of putting

measures in place to enable people to protest while protecting public health, governments misused physical distancing rules to create blanket or quasi-absolute bans on peaceful demonstrations – as reported for example in Belgium, France, Germany, Italy, Romania and Slovenia. Those who nevertheless claimed that right were subjected to invasive surveillance (such as in Slovenia) and hefty sanctions (such as in Belgium, Germany, Greece, Italy, Slovakia or Spain). Several peaceful protests were violently disrupted by police, as reported for example in France and Sweden. In a number of countries, tight restrictions on assemblies have remained in place even when social distancing measures began to be scaled back and malls, shops and restaurants opened again. It is the case, for example, of Romania, where the ban on assembly is still in force.

In many states, expedited law making and changes to parliamentary procedures have severely limited opportunities for citizens, activists and civil society organisations to have their say on governments' actions. Examples illustrate this trend in countries like Germany, the Netherlands, Poland, Romania, Slovenia and Spain. The emergency situation was also taken advantage of by certain governments, in particular in Hungary, Poland and Slovenia, to further weaken environmental and rights standards. At the same time, restrictions on the right to access public interest information made it more difficult to scrutinise how authorities have been using their reinforced executive powers – as reported for example in

Austria, the Czech Republic, Hungary, Italy, the Netherlands, Romania and Slovenia.

This repression of democratic participation was exacerbated in some states by a veritable crackdown on freedom of expression. In a number of countries governments tried to use the need to prevent the spread of misinformation as a pretext to censor free speech, with Hungary and Romania as the most staggering examples, which Bulgaria attempted to replicate. Authorities also reportedly refused to engage with journalists, activists and civil society organisations, sometimes even discrediting, and harassing them when they questioned or criticised governments' actions. Worrying episodes of smears and threats were reported in particular in Slovenia.

In a number of countries, these pandemic-related restrictions are merely the latest in a series of measures governments have put in place over recent years, which already revealed a dangerous roll back for civic freedoms and democratic participation across the EU. Some national governments instrumentalised COVID-19 to accelerate their efforts to inhibit activism, limit the people's ability to participate in their democracy and hamper the work of watchdogs such as civil society organisations.

Unfortunately, early warnings by international monitoring bodies from the UN and the Council of Europe and by watchdogs turned out to be justified also in the context of the EU. The fact that our governments failed to safeguard civic freedoms to the extent possible is a cause of concern, and particularly worrying during a pandemic, when the public

needs tools of civic engagement to ensure their representatives are doing their best to protect their health.

Citizens look to the EU to help their governments bring citizens through the pandemic as safely as possible. Many EU leaders have recognised that the EU needs to do more to prevent populist authoritarians capitalising on public discontent to stoke Euroscepticism. But it is equally important for the EU to safeguard civic freedoms across its member states, and to act strongly against those governments that exploit the crisis to silence critics and erode democratic checks and balances. EU institutions should use the options available to them to restore and promote civic space and freedoms — so that citizens can ensure that their governments answer to and work for them, during the pandemic and beyond.

About this report

This report is a joint publication of Greenpeace European Unit and Civil Liberties Union for Europe

Greenpeace European Unit is part of the international Greenpeace network, active in over 55 countries worldwide. Through its work in Brussels and around Europe, Greenpeace European Unit campaigns for a European Union that works for people, nature and the planet.

Civil Liberties Union for Europe (Liberties) is a non-governmental organisation (NGO) headquartered in Berlin promoting the civil liberties of everyone in EU. Building on a network of national civil liberties NGOs from across the EU, Liberties carries out research, advocacy, campaigning and public education activities to explain what civil liberties are and press leaders at EU and national level to fully respect, promote and protect them.

The report focuses on measures put in place by EU countries that affect the ability of citizens and civil society actors to engage and participate in the democratic process, in particular on matters related to human rights and environmental protection. It illustrates and critically examines selected examples of restrictions to the fundamental freedoms of peaceful assembly, of expression, of information and of association and limitations to democratic oversight in decision-making. The reference period for

the research runs from the point when the World Health Organisation (WHO) declared a global pandemic in early March until late July 2020.

The report is primarily based on information and evidence collected and analysed by NGOs that are part of Greenpeace's and Liberties' networks. Information on developments in Germany, the Netherlands, Romania, Slovenia and Spain is based on targeted research carried out by Liberties' members in those countries¹ with the support of Greenpeace national offices. Examples taken from this national research are highlighted throughout the report. The report also draws on previous research, including the submissions of Greenpeace European Unit² and Liberties³ to the European Commission's public consultation in view of its first upcoming report on the rule of law in the EU.⁴

The report further draws from relevant reports by other NGOs and by international and regional organisations and bodies, as well as credible news sources and publicly available documents, which are referenced in the text.

Introduction

What is civic space and why does it matter?

Democracy is not just about people voting for their representatives every four or five years. Participatory democracy complements representative democracy, by allowing public interest issues to be brought into public debate in between elections, while elected representatives are in power and taking decisions.

‘Civic space’ is the bedrock of participatory democracy. It is commonly referred to as the environment that enables citizens to organise, participate and express their views to influence and shape the political, economic and social life of their societies.⁵

Civic space builds on the enjoyment of what are referred to as civic freedoms: the freedom to work together through associations, to assemble in peaceful demonstrations and to express views and opinions and receive information freely. These are the tools through which citizens can keep track of what is going on, help shape policy and make their voice heard if those in power do things they are not happy about. Their importance is reflected by the fact that these civic freedoms are protected under national constitutions and international treaties, to which all EU Member States are party.⁶

Civil society actors like rights defenders, activists and civil society organisations (CSOs)

are crucial because they help people make effective use of their civic freedoms and ensure regular dialogue between citizens and their governments. Restrictions and attacks to the work of these actors impact on people’s ability to exercise their civic freedoms and to connect with their governments and representatives.

The importance of an open and thriving civic space to democracy, where the state supports rights defenders, activists, CSOs and the public to exercise their civic freedoms, was recently reaffirmed by the EU Court of Justice and the European Commission.⁷

Threats and attacks to civic space are even more worrying in times of emergency, such as the current public health crisis. In such situations the enjoyment of civic freedoms and the role played by civil society actors is particularly important, because it helps to shape governments’ choices by making sure leaders respond effectively and appropriately – and where they are not, that authorities are held accountable.⁸

Restrictions on civic space date from well before the pandemic

“ Although the EU remains the region of the world with the largest number of countries with open civic space, the conditions for civil society continue to deteriorate. A worrying trend is emerging.”

- CIVICUS Monitor, December 2019

Independent research shows that over the past decade governments in many EU countries have imposed increasingly severe restrictions on people’s rights to organise and mobilise collectively, protest, freely express their opinions and have their say in governments’ decision-making.

Monitoring conducted by the international watchdog CIVICUS, which has been measuring civic space globally since 2016, exposes a deterioration of civic space across EU countries. According to the findings of its latest report, from December 2019, civic space and civic freedoms are dwindling. This is so even in EU countries with a well-established rights record, and is partly due to the rise of right-wing and far-right parties.⁹ CIVICUS now classifies civic space in 12 EU countries¹⁰ as “narrowed” and as “obstructed” in one EU country, Hungary, – while also finding serious challenges in the other EU countries where civic space is viewed as “open”.

The nature, extent and impact of restrictions on civic space varies from one country to another. Nonetheless, there are certain patterns that recur across the EU. According to infor-

mation previously compiled by Greenpeace European Unit¹¹ and by Liberties,¹² and as reflected in various reports and surveys including by the Civic Space Watch platform,¹³ Civil Society Europe,¹⁴ and the EU Agency for Fundamental Rights (FRA),¹⁵ common issues include:

- increasing restrictions on the right to protest, including the excessive use of force by police to dispel peaceful demonstrations and the imposition of sanctions and charges, also of criminal nature, on protesters;

Several EU countries tightened laws or stepped up repressive practices to stifle protests. Hungary’s government passed a law in 2018 which severely limited the space for public protests and assembly, by allowing authorities to arbitrarily ban demonstrations and extending the power of police to check and search protesters.¹⁶ Italy recently re-introduced the crime of “road blocking”, which had been decriminalised in 1999, as part of a so-called Security Decree drafted by former interior minister Matteo Salvini. The crime can now be punished with up to 12 years in prison.¹⁷ In March 2019, a non-violent Critical Mass cyclist assembly was blocked and assaulted by riot police.¹⁸ In Poland, for example, systemic changes were made to the law on public assemblies, under which protesters face the risk of criminal proceedings.¹⁹ An estimated 740 criminal cases were initiated under such laws in the past three years.²⁰

- overregulation and excessively burdensome bureaucratic requirements, to hinder existing organisations as well as impede the

creation and registration of new associations and CSOs' access to funding;

In recent years, laws were proposed in a number of EU countries to impose new, excessively burdensome, reporting obligations on CSOs concerning their sources of funding. The EU Court of Justice recently ruled against Hungary over a law adopted in 2017, by which the government sought to discredit and defund rights and democracy groups by portraying them as foreign agents. This was found to violate CSOs' freedom to association and their donors' privacy.²¹ Despite the judgment, a proposal for a similar law was shortly after introduced in Bulgaria.²²

- increasing labelling of CSOs carrying out advocacy on issues such as environmental or human rights protection as being “political”, with governments reducing funding for these organisations, instead of supporting them as important contributors to the promotion of public interest;

In Germany, tax authorities are withdrawing the charitable status of campaigning organizations on grounds that their activities would be political and not have a charitable purpose, preventing them from benefiting from tax deductions on their donations and therefore endangering their funding. Among others, the German organisation Campact and the German branch of the French organisation Attac, which campaign for climate protection and fundamental rights, had their charitable status revoked in 2019 on these grounds.²³

- censorship and other restrictions on free speech, through disproportionate measures supposedly aimed at countering disinformation or hate speech or the misuse of security and counterterrorism laws;

According to the Council of Europe Commissioner on Human Rights, “the misuse of anti-terrorism legislation has become one of the most widespread threats to freedom of expression in Europe”.²⁴ For example, Spain has seen since 2015 a sharp rise in the number of prosecutions for the crime of “glorification or justification” of terrorism.²⁵ A large number of twitter users, rappers, journalists and lawyers have been targeted under this provision, whose broad and vague formulation is having a severe chilling effect on freedom of expression.²⁶

- smear campaigns and harassment to discredit and silence rights defenders, activists and CSOs, including the misuse of legal action in the form of abusive and meritless lawsuits brought by corporations and powerful individuals, sometimes connected to state authorities or political leaders;

A recent report by Greenpeace European Unit illustrates how abusive litigation, known as SLAPPs – Strategic Lawsuits against Public Participation, is being used across the EU against rights defenders, activists and CSOs.²⁷ In Spain, for example, Spanish meat producer Coren is demanding €1 million in damages from environmental activist Manuel García who accused the company of illegal livestock waste management practices. In France, construction company

VINCI has brought a defamation case against the NGO Sherpa which accused the company's Qatari subsidiary of human rights violations. Together with a coalition of more than one hundred CSOs, Greenpeace European Unit and Liberties are calling for the adoption of EU wide anti-SLAPP rules.²⁸

- shrinking opportunities for those CSOs representing the public's interests to participate in decision-making, due to the lack of meaningful consultations and restrictions on access to information.

A number of EU governments are portraying environmental organisations as an obstacle to economic development in order to justify a limitation of their involvement in environmental assessments and other consultation and monitoring mechanisms. In Germany, CSOs have been blamed for slowing down planning and construction periods of large infrastructure projects. The country passed a controversial law in January making it harder for citizens and environmental groups to stop such projects in court.²⁹

A substantial amount of evidence has been collected on the particularly serious impact of constraints and attacks on civil society actors and movements active in the fight for human rights³⁰ and the protection of the environment.³¹

Governments have used COVID-19 to further deepen restrictions on civic space

The measures adopted by EU governments over the past six months to respond to the outbreak of the COVID-19 pandemic have further worsened the situation.

Since the global pandemic was declared by WHO on 11th March 2020, countries around the world, including across the EU, have put in place a slew of unprecedented restrictions on people's freedoms, arguing that this is necessary to curb the spread of the virus. Authorities limited the possibility to move around and travel, meet up, organise or participate in cultural or sports events, mobilise and take part in public protests. To allow them to act promptly, many governments triggered states of emergency. This made decision-making easier and quicker, but it also reduced the space for democratic debate, participation and access to information.

International monitoring bodies and watchdogs warned early on about the risk that certain measures imposed as part of states' responses to the pandemic would result in unnecessary and disproportionate restrictions on people's freedoms and democratic oversight, beyond what was needed to counter the spread of the virus.³² Indeed, when a community is in danger, extraordinary measures which may restrict people's rights, including civic freedoms, may need to be adopted to protect everyone's safety. According to general principles of law, however, any such measures are to be considered legitimate only as long as they do not go

beyond what is needed to address the actual emergency.³³ But this has not always been the case.

Despite the warnings, alarming trends soon started to be recorded, pointing at unnecessary and disproportionate limitations on civic freedoms, public participation and the work of rights defenders, activists and CSOs.³⁴ Sometimes this was an unintended consequence of governments not properly evaluating how to respond to the pandemic. Sometimes it was a result of conscious attempts by governments with authoritarian tendencies to exploit the emergency to further erode individual freedoms and the democratic process.

Restrictions stifling activism and civic freedoms have taken many forms, with bans on protests and demonstrations, censorship of free speech, denial of access to information and the weakening of democratic oversight on a range of governments' actions reported as the most pressing concerns.

The right to peaceful protest

“ The fundamental human right of peaceful assembly enables individuals to express themselves collectively and to participate in shaping their societies. (...) A failure to respect and ensure the right of peaceful assembly is typically a marker of repression.”

- UN Human Rights Committee, [July 2020](#)

Since the outbreak of the pandemic, all EU countries have introduced different degrees of restrictions on free movement and assembly, limiting or banning public gatherings for weeks and even months.³⁵ Certain limitations aimed at preventing large and uncontrolled gatherings appeared reasonable as a means to contain the spread of the virus.³⁶ However, the way restrictions were designed and applied in many countries, including in the EU, raises concern that governments have gone beyond what was necessary, failing to fulfil their duty to safeguard the right to peaceful protest while protecting public health.³⁷

Holding peaceful demonstrations is a crucial form of collective democratic expression, allowing people and civil society actors representing them, including rights defenders, activists and CSOs, to mobilise around shared concerns and demands towards their governments, for them to get visibility and gather support. The free exercise of the right to protest becomes even more important in times of crisis, when governments should be keen to hear the views of the public on the serious de-

isions it has to take. Arguably, states have an even more stringent duty to facilitate peaceful protests during the public health emergency and to provide support so these can be carried out safely.³⁸

Needless to say, governments should facilitate the right to protest in accordance with public health needs.³⁹ There are many options available: introducing special authorisation procedures, limiting the choice of time and places for demonstrations, putting caps on the number of participants, imposing the precautionary measures such as physical distancing, the wearing of face masks and the minimisation of physical contacts. Even more importantly, to remain proportionate, safeguards should be tailored to the facts of each case.

Instead, many countries have put disproportionate restrictions in place, which severely limit the possibility to organise and hold peaceful demonstrations. This may produce a long-lasting chilling effect on civic participation that hampers the reconstruction of our social and democratic fabric also in the aftermath of the pandemic.

Social distancing rules turning into blanket bans on protests

“ Every year since the 1950s, thousands of people have marched at Easter through the streets of German cities to demand

world peace and global disarmament. (...) Because large assemblies are prohibited, peace activists and concerned citizens are denied the opportunity to articulate demands and exert pressure on politicians.”

- Greenpeace Germany and Gesellschaft für Freiheitsrechte (GFF), April 2020 (unofficial translation)

Few EU countries weighed in the importance of the right to protest when introducing bans on public events and gatherings. This is, for example, the case of Denmark, where demonstrations for political or other purposes were exempted from the ban on assemblies. Similarly, in the Czech Republic, the special measures prohibiting public events did not apply to gatherings under the Act on the right to assembly, including demonstrations.⁴⁰

An exemption for demonstrations was initially introduced in the ban on public gatherings introduced in the Netherlands, too, but decrees adopted after 28 April 2020 no longer stipulated it explicitly, casting doubt about as to whether the ban did or not apply to demonstrations.⁴¹

Conversely, some national and local governments have decided to impose blanket bans on any assembly and demonstration, such as in some federal states in Germany, but also in Belgium, Italy and Slovenia.⁴²

In Germany, at first, federal states authorities interpreted strictly the steps taken by the government to contain the spread of COVID-19 as a de facto

ban on public assemblies, with no or very limited consideration of the state's obligations to protect and promote the right to peaceful protest. The states of Thuringia and Bavaria, for example, came very close to outright and unconditional bans. In Neustadt, authorities banned a demonstration consisting of just two people willing to wear protective masks and maintain the requisite distance from one another – which the administrative court upheld.⁴³

Courts had to intervene to clarify that the prohibition on demonstrations cannot be absolute and prompt the authorities to reassess overly broad restrictions.

In Germany, the Federal Constitutional Court ruled to clarify that public health concerns cannot automatically outweigh freedom of assembly and urged local authorities to refrain from applying blanket restrictions.⁴⁴ This approach was broadly followed by lower courts in subsequent cases, while laws were also revised in the meantime to restore a general freedom of peaceful assembly, which may be subject to restrictions and conditions only in specific cases and for duly motivated reasons.⁴⁵ Courts intervened again to overturn the attempt by Berlin authorities to stop one of the biggest protests organised to demonstrate against the COVID-19 restrictions in late August.⁴⁶

Similarly, in France, restrictions were revised after France's highest court, the Council of State, ruled that the prohibition of demonstrations with more than 10 people is disproportionate, that it constitutes a serious breach

to the freedom of peaceful assembly and that “barrier measures” are sufficient to protect participants.⁴⁷ Elsewhere, such reactions by the courts were openly criticised by state authorities, casting doubt over the real motivations behind such disproportionate restrictions.

In Slovenia, when the Constitutional Court questioned the necessity and proportionality of lockdown restrictions, including the ban on assemblies, and urged the government to carry out weekly assessments of whether they remained justified,⁴⁸ the prime minister posted a tweet accusing the Court of being politically biased.⁴⁹

Even in those countries where governments did appear to make an effort to strike a balance between protecting public health and the right to protest, restrictions turned out to be designed or applied as quasi-absolute bans. For example, rules restricting the number of people assembling provided for as few as three people gathering, such as in Romania.⁵⁰

The duration of bans on assemblies is also a matter of concern. The requirement that restrictions be proportionate to the public interest they serve imposes an obligation on governments to regularly review whether such measures continue to be necessary and appropriate and lift them when they are no longer proportionate. However, governments did not relax the bans on assemblies even when the steady decrease of the infection rate allowed authorities to significantly ease restrictions. For example, in Belgium, while shops and malls were allowed to reopen in May and bars

and restaurants in June, the absolute ban on assemblies was only revised in July.⁵¹ Elsewhere, bans on assemblies have no sunset clause: it is the case of Romania.

In Romania, the ban on gatherings of more than 3 people, which amount to a de facto ban on public protests and demonstrations, has been introduced in March 2020 remains place at the time of writing. While many restrictions are being scaled back, the government has not yet lifted the ban on public gatherings at the time of writing.⁵²

The incoherence that characterised the application of these bans in many countries is in itself a sign of their overly restrictive nature. In fact, many demonstrations have been held across the EU under lockdown, including protests against governments’ responses to the pandemic and a wave of anti-racism protests connected with the Black Lives Matter movement which followed the death of George Floyd on 25 May 2020.

In certain cases, protests were organised and held despite the bans in force and were tolerated by governments. In France, for example, after a number of protests against racism and police violence took place in Paris, the Interior Minister stated that further demonstrations would be tolerated despite the ban and participants would not face sanctions.⁵³

In other cases, protest movements prompted local authorities to derogate from the bans in force and grant permission to hold demonstrations. For example, in Belgium, the Brussels

municipality authorised a Black Lives Matter march on 7 June 2020, to which more than 10,000 people participated.⁵⁴ Similar demonstrations were also authorised by the municipalities of Madrid and Barcelona in Spain.⁵⁵

By contrast, on other occasions, protests were violently disrupted by the authorities adducing the lack of respect of existing rules. In France, despite the statement reported above, the police intervened to forcefully block and disperse a big anti-racist demonstration in Paris.⁵⁶ Police in Sweden broke up in the past months several protests in large cities, noting that they exceeded the applicable 50 person limit.⁵⁷

Vague wording, arbitrary enforcement

In cases where rules provide for the possibility to hold protests and demonstrations under certain conditions, the exercise of the right to protest has still been hampered by the vague language and criteria used to define what is permitted and what is not.

The use of undefined concepts like gatherings of ‘large numbers’ (such as in Cyprus),⁵⁸ or the discretion left to the authorities to carry out assessments as to the expected number of participants or the likelihood of participants abiding by precautions (as is the case, for example, in Ireland and the Netherlands), has led to a number of arbitrary decisions.

In the Netherlands, a ‘ghost protest’ launched by Extinction Rebellion was refused authorisation, raising doubts as to the reasonable nature of the authorities’ assessment. Organisers planned to arrange for demonstrators to put their shoes at the location of the protest, with two people staying to watch the shoes. Authorities banned the protest because, in their view, the shoes would have attracted people, causing a risk of COVID-19 infection.⁵⁹

There are also examples of authorities in the same country interpreting the same rules very differently.

In Spain, a “caravan-demonstration” took place in Zaragoza for the May 1st celebrations, while a similar demonstration was forbidden in Vigo.⁶⁰ The lack of clarity of relevant provisions and their interpretation is also demonstrated by the different positions expressed by the Constitutional Court, on the one side, and by the Prosecutor General’s Office, on the other side, on the extent to which the state of emergency, declared in Spain by Royal Decree, constitutes sufficient legal grounds to ban public protests and demonstrations.⁶¹

Such inconsistency in the application of the restrictions may create uncertainty and discourage protests even where existing rules allow for it. In Ireland a planned anti-racist march was reportedly cancelled in June due to fears of prosecution after police intervened during another anti-racist protest in Dublin: in that case, the police had argued that although organisers had attempted to put in place social

distancing measures, the turnout had substantially exceeded expectations.⁶²

Tracking protestors

Arbitrary stops and searches of people participating in peaceful demonstrations is contrary to international standards on freedom of assembly⁶³ and can have a very serious chilling effect on the exercise of the right to protest.

In Germany, judges have questioned state-imposed obligations to document the identity of people participating in demonstrations in the context of the COVID-19 pandemic. Some courts considered any such obligation to be unconstitutional⁶⁴, others deemed it incompatible with fundamental rights where such data are passed on to (health) authorities with no justified reason, for example regardless of proven infections.⁶⁵

This is even more worrying as governments around the world, including in the EU, are looking to maximising the ability of public authorities to use digital technology, including drones, facial recognition and internet and social media data, for law enforcement purposes.⁶⁶ Increasing the use of new surveillance techniques at the same time as restricting free movement and gatherings, is likely to further dissuade people from exercising their right to protest.

In Slovenia, where anti-government and anti-lockdown protests have been held across the country since the new government came into power in March 2020, the Interior Minister has encouraged police to track down protesters through internet and social media and press charges on them.⁶⁷ Media also reported that the Minister visited police premises to view the police records of demonstrations.⁶⁸ Although police stressed their independence from political pressure,⁶⁹, several instances show that law enforcement has not hesitated from systematically using surveillance to track down protesters to enforce the government's ban on free movement and assembly adopted during the COVID-19 emergency.⁷⁰ The use of facial recognition technology is common practice by the Slovenian police even outside the context of the pandemic.⁷¹

Drones have been used by local authorities and the police in several countries including Belgium, Bulgaria, Greece, France, Italy, Lithuania and Spain to warn people off on the need to respect social distancing and quarantine rules, monitor compliance, issue orders and safety instructions at a distance, and even measure people's temperature.⁷² In a legal challenge brought by an activist group the French Council of State has ruled that the use of drones by the police in the context of monitoring compliance with COVID-19 lockdown measures was unlawful.⁷³

As such practices become increasingly widespread, some fear the risk that governments use such technology to stifle activism and put critics and watchdogs under surveillance even

outside the context of the COVID-19 pandemic.⁷⁴

Hefty sanctions

Bans on free movement and public gatherings came with newly created offences punishable by severe sanctions for those who violate them: in Italy, non-compliance with the restrictions risked at some point a fine of up to €3,000; in Greece, a €1,000 fine; in Slovakia, a fine of up to €10,000.⁷⁵ In some countries, like certain federal states in Germany, breaking the rules regarding assembly was criminalised;⁷⁶ in Belgium, it was subjected to detention for between 8 days and 3 months.⁷⁷

Certain countries introduced new offences that are not temporary in nature. New provisions of the Polish Misdemeanour Code, which came into force on 31 March 2020, introduced a new minor offence of insubordination towards police or border guard orders, punishable by detention or a fine.⁷⁸ This could be misused in the context of freedom of assembly even after the pandemic is over.

In other countries, like Spain, enforcement of the new restrictions is based on existing repressive laws, further exacerbating their chilling effect on people's freedom of assembly and expression.

In Spain, during the state of emergency, which was established on 14 March⁷⁹ and ended on 21 June 2020, law enforcement agencies were given

powers to impose sanctions on those who did not comply with the restrictions agreed by the authorities by virtue, among others, of what is known as the Spanish 'Gag Law'.⁸⁰ Since its proposal, back in 2013, the Gag Law has been the object of harsh criticism by NGOs⁸¹ as well as international monitoring bodies⁸² for penalising a wide range of actions and behaviours that are essential for the exercise of the right to protest. Due to the overly broad interpretation provided for by the Ministry of Interior,⁸³ the offence of disobeying law enforcement officers pursuant to the Gag Law – with minimum fines up to as much as €600 – has been used frequently during the lockdown imposed to contain the COVID-19 outbreak. Nearly 1.1 million sanctions were reportedly imposed within the first 75 days of lockdown.⁸⁴ The much needed reform of the Gag Law seems now to be extremely low on the government's list of priorities.

Sanctions were not, in certain cases, applied evenly to protesters, raising doubts over authorities' impartiality and pointing to the risk of such restriction being misused for political purposes. In Hungary, for example, participants of an unauthorised car protest against the government's management of healthcare structures to prepare for the outbreak were fined with sanctions of up to €750.⁸⁵ In contrast, no fines were handed to participants of an unauthorised anti-Roma rally.⁸⁶ Similar episodes were reported in Italy: police was said to forcefully disperse and sanction protesters demonstrating in solidarity with inmates or workers on strike, while deploying officers to escort participants and guarantee the regular exercise of the right to protest in demonstrations organised by political parties.⁸⁷

In Cyprus, police declared protests against Cyprus’s immigration policies unlawful and issued fines of €300 to participants, whereas another demonstration by the main opposition party did not face similar restrictions.⁸⁸

Physical protests decline, online protests are no substitute

Inevitably, even in those countries where public assemblies remained possible under certain conditions, the COVID-19 outbreak and restrictions adopted to respond to it seem to have resulted in a severe decline in the number of protests and demonstrations organised.

In the Netherlands, data from the municipality of The Hague show that the number of protests held between March and July 2020 dropped significantly compared to previous years, signalling a halt to the steady increase in the number of protests registered between 2015 and 2019.

At the same time, rights defenders, activists and CSOs turned to online channels, such as social media, and developed creative and

innovative forms of digital protests as a way to promote activism while safeguarding public health. In France, 1st May demonstrations were organised “depuis chez soi”.⁸⁹ Large online protests were organised in Germany, including an online climate protest as part of the ‘Fridays for Future’ movement⁹⁰ and a protest in solidarity with refugees which attracted 6,000 viewers.⁹¹ In Spain, the climate movement organised a successful “demonstration of shadows” to which more than a hundred organisations participated.⁹² In Hungary, the **first online protest** ever attended by nearly 40,000 viewers was held on social media to oppose the Hungarian government’s law authorising rule by decree – until it got mysteriously shut down after half an hour.⁹³ In Poland, people held **virtual protests** against the proposed abortion bill under the #ProtestAtHome hashtag.⁹⁴

The magnitude of the phenomenon of online protests even prompted the UN Human Rights Committee to clarify that the freedom of assembly also protects demonstrations entirely held in the online space.⁹⁵

The fact that online protests are gaining visibility and recognition is a positive development. It is also a sign that civil society actors are managing to reshape civic space in

Year (reference period: 12 March – 1 July)	2015	2016	2017	2018	2019	2020
Number of demonstrations	334	352	390	441	514	183

Source: municipality of The Hague

the face of current challenges. As experts have underlined, activism should however not be restricted to social media and online channels, where it does not have the same capacity to attract public attention and spark debate.⁹⁶ Online channels can be a useful platform to broaden civic participation, but are no substitute in-person protests.

Freedom of expression

“ In a “war” against a public health threat, dissenting voices that question the official version can be portrayed as enemies of a nation in danger”

- Reporters Without Borders, [March 2020](#)

Critical voices, including independent journalists, rights defenders, activists and CSOs, are especially vital in times of crisis. They verify information, uncover corruption and wrongdoing and help shape opinions. The free flow of information and ideas and access to a plurality of views enables people to build balanced positions on challenges and possible responses, scrutinise governments for their actions, and hold them accountable if their responses are inadequate, ineffective or illegitimate. This ultimately contributes to making sure everyone is effectively protected and gets the support they need.⁹⁷

Yet, some governments have used the public health emergency caused by the COVID-19 pandemic as a pretext to introduce measures essentially aimed at silencing critics. Over the past months, international monitoring bodies and watchdogs have been reporting arbitrary and severe restrictions on free speech all over the world, including in the EU.⁹⁸

Instead of facilitating balanced reporting and increasing transparency, some EU countries have taken a number of repressive measures, such as: prosecuting those critical of state responses, including by misusing laws designed

to tackle disinformation; limiting possibilities for independent media and watchdogs to question authorities on their actions; initiating smear campaigns against journalists, rights defenders and activists. As a result, people in those countries have enjoyed fewer opportunities to draw informed conclusions on whether governments have been telling the truth and doing the right things to combat the pandemic. These restrictions have produced a further chilling effect on free expression, often leading to self-censorship. Adding to existing problems with freedom of expression in a number of EU countries, the restrictions adopted during the public health emergency may have a broad and long-lasting impact on free and pluralist expression in the EU.

Novel tools of censorship

When the pandemic broke out, an unprecedented flood of information about the virus – including false and inaccurate information – invaded the internet and social media. The WHO referred to the phenomenon as an “infodemic”. Misinformation, disinformation and rumours spread during an emergency, the WHO warned, can create confusion and distrust, leading people to engage in risky behaviour and making it difficult for governments to elaborate and implement effective public health responses.⁹⁹

It is each government's duty to prevent and counter this dangerous phenomenon to avoid it causing harm. In providing guidance for an effective and coordinated European approach to the issue, the European Commission underlined that any actions should fully respect shared democratic values, including free expression and free and plural media, as "keystones to the resilience of open societies to the challenges of the COVID-19 pandemic".¹⁰⁰ The Commission encouraged governments to tackle disinformation by: proactively providing clear and accessible information about the pandemic and action they were taking to address it; ensuring greater transparency and allowing for scrutiny of decision-making; and by supporting critical journalism, watchdogs, researchers and fact checkers.¹⁰¹

EU governments did make efforts in this direction. These included some creative measures such as targeted guidance for journalists on COVID-19 factual reporting (in the Czech Republic), partnerships with search engines and social media (in France and Poland), joint initiatives with independent fact checkers (in Portugal).¹⁰²

However, some EU countries also introduced criminal provisions, or made use of existing ones, to impose arbitrary and disproportionate sanctions based on accusations of spreading 'fake news' and disinformation. This attracted harsh international criticism for curtailing free speech.¹⁰³

Hungary introduced a criminal offence of spreading 'fake news' and 'fearmongering', punishable with up to five years in jail. The authorities proceeded to take advantage of the law's deliberately broad and vague wording to crack down on those critical of the government's handling of the pandemic.¹⁰⁴ While similar legislative proposals have so far been blocked elsewhere (in particular, in Bulgaria¹⁰⁵), other EU governments ratcheted up the enforcement of existing laws, raising concerns over the proportionality of sanctions and arrests. In Poland, two activists were charged with offences carrying up to ten years of imprisonment for a poster campaign challenging government's statistics about the spread of the pandemic.¹⁰⁶ Similar episodes were reported in other countries.

In Romania, a student was fined merely for having criticised the town mayor for failing to adequately respond to the crisis.¹⁰⁷ In Spain, social media tracking is said to have intensified greatly during the pandemic after police forces were instructed by the Guardia Civil to identify fake news and hoaxes with the potential to generate public anxiety and alarm and distrust and hostility towards state institutions.¹⁰⁸ Cases were reported of people temporarily put in custody for posting jokes on social media about the spread of the virus.¹⁰⁹

In Romania, the government simply gave itself the power to moderate the internet, by removing what it considered to be 'fake news' and blocking users' access. A comparable proposal in Bulgaria was not adopted.¹¹⁰

When declaring the state of emergency,¹¹¹ the Romanian government provided that online content promoting false news about the evolution of the epidemic had to be removed from the source or, alternatively, that users' access to it had to be blocked. The measure, implemented by the National Authority for Management and Regulation in Communications, led to the blocking of 15 news websites between 15 March and 15 May.¹¹² CSOs and media, which have witnessed the deterioration of media freedom in Romania for some time,¹¹³ accused the government of censorship.¹¹⁴ They also criticised the overly broad definition of 'fake news', and the independence and professionalism of the assessment body (which was created within the Ministry of Interior), and the absence of rapid and effective appeal mechanisms.¹¹⁵

Stifling criticism by locking out the media

“Independent professional journalism, transparency of sources and accurate, fact-checked information are the best weapons to combat the pandemic. To protect the lives of their people, governments must put in place a credible and trustworthy information policy and foster instead of limiting the scrutiny of free media”

- Lutz Kinkel, Director of the European Centre for Press and Media Freedom, [March 2020](#)

Instead of boosting access to information for the public, some governments substantially disrupted or restricted opportunities for watchdogs such as independent journalists and activists to question the authorities' mea-

asures to curb the pandemic and the decisions being taken to address it. Several governments moved press conferences online, restricting physical access, as well as the possibility to ask questions.

In Spain, several of the country's leading media outlets accused the government of "censorship" for obliging them to ask questions during the prime minister's press conferences via a Whatsapp group moderated by the State Secretary for Communication.¹¹⁶ The practice was later amended by the government so that journalists could directly put their questions to officials.¹¹⁷

Access restrictions to government press conference were also reported, for example, in Austria,¹¹⁸ the Czech Republic and Italy.¹¹⁹

In some countries, these moves are part of a clear pattern of restrictions aimed at obstructing the ability of independent watchdogs to question and critically report on the government's actions. In Hungary, the government has long pursued measures to silence and isolate independent media and watchdogs.¹²⁰ The ruling party capitalised on the pandemic to further increase pressure on critical voices. Authorities actively refused to release information to independent and critical journalists about the evidence on which the government's response to the pandemic was based. Questions during online press conferences could only be asked in writing and were filtered by government authorities upon receipt.¹²¹ Worrying developments are reported elsewhere, too.

In Slovenia, the newly elected government has been using the pandemic to crack down on criticism.¹²² Media outlets reported being unable to get accurate information on COVID-19 infections or on measures taken to limit the spread of the virus among at-risk groups. Journalists, banned from physically attending press conferences, complained they had very few opportunities to ask questions.¹²³ In addition, after Slovenia's public broadcaster (RTVS) exposed extensive political interference in the procurement of personal protective equipment,¹²⁴ the government reacted by proposing worrisome changes to media legislation in July 2020.¹²⁵

Smears and harassment to silence watchdogs

In a number of EU countries, restrictions on free speech have been accompanied by an upsurge in smear campaigns and attacks aimed at intimidating and silencing criticism.¹²⁶

In Slovenia the authorities reportedly threatened and attacked a prominent independent journalist after he filed an information request on the authorities' response to the COVID-19 pandemic.¹²⁷ This is illustrative of more general government hostility towards media and NGOs raising concerns about the authorities.¹²⁸ In May, the prime minister, for example, posted an essay entitled "War with the media" on the government website.¹²⁹ He also attracted criticism for his attacks to the public broadcaster RTVS¹³⁰, whose supervisory board was then reshuffled.¹³¹ Smears against activists are said to have increased, too.

The current government has attempted to claw back grants made under the previous administration, in what is seen as an attempt to cut funding for rights and democracy groups. The government has justified this as the diversion of resources to fight the pandemic. The government later accused NGOs protesting the cuts of enriching themselves at the cost of public health.¹³² The prime minister also pressured the Prosecutor General to file criminal charges against anti-government protestors for incitement to hatred and death threats.¹³³

In Hungary, some journalists who voiced criticism of the government's response to the pandemic were accused by pro-government media of spreading fake news and received death threats via email and social media.¹³⁴

Legal harassment of journalists has also been reported. In Poland, two journalists from the independent media outlets Gazeta Wyborcza and OKO.press were accused of violating physical distancing rules while covering an anti-government protest, threatening fines of more than €13,000.¹³⁵ In Romania, a prominent editor was threatened with a criminal investigation for publishing a government working document concerning the declaration of the state of emergency.¹³⁶

Democratic oversight & freedom of information

“ This is a time when... governments need to be open and transparent, responsive and accountable to the people they are seeking to protect”

- António Guterres, UN Secretary-General, [April 2020](#)

The exceptional circumstances caused by the outbreak of the pandemic prompted governments, also in the EU, to resort to special legal regimes allowing them to deviate from normal decision-making processes. Shifting the balance of powers to the executive branch and limiting democratic scrutiny of the executive can be considered a necessary measure to react to the pandemic as quickly and efficiently as possible.

Nevertheless, international monitoring bodies have pointed out that this can be done while maintaining respect for democratic principles, as enshrined in the national constitutions and international standards. Parliamentary scrutiny of executive action, facilitating access to official information and documents and maintaining opportunities for public consultation remain essential elements of any free and democratic order.¹³⁷

At the EU level, the EU Ombudsman did not hesitate to set the record straight: she launched a series of inquiries into the work of EU institutions, agencies and bodies, drawing attention to the need to maintain transparen-

cy despite the challenges of the COVID-19 emergency.¹³⁸ The same strict scrutiny should apply to EU countries: no government should use the crisis to lower the level of transparency and weaken democratic oversight.

The risk of unconstrained powers

“ Restrictions of some fundamental rights are inherent to emergency measures. This is why it is important that those measures include democratic safeguards. Any emergency measure must be limited to what is necessary and strictly proportionate and cannot mean “switching off” national constitutions or EU law”

- Věra Jourová, European Commission Vice-President, [May 2020](#)

The majority of EU governments – as many as 16 between January and March 2020¹³⁹ – declared some form of “state of emergency”.¹⁴⁰ Other countries did not declare a state of emergency, but used other accelerated procedures (for example, regulating by governmental decrees) to pass restrictive laws and regulations.¹⁴¹

While the features of the legal regimes resorted to varied greatly from country to country,¹⁴² the result in all cases was an empowerment of the executive branch of government and the

erosion, to various degrees, of the democratic scrutiny exercised by the other branches and the public on the government action.

Hungary stands out as example where the government gave in to the temptation of unconstrained powers. Through the “Authorisation Act”,¹⁴³ the Hungarian prime minister gave himself and his government a ‘carte blanche’ mandate to rule by decree, derogating from certain laws, suspending their application and taking other extraordinary measures until the end of the “state of danger” declared by the government – without the need for parliamentary approval and oversight and without any sunset clause.¹⁴⁴ The special regime, which remained in place until mid-June, was criticised by international monitoring bodies and NGOs¹⁴⁵ as a dangerous weapon the government would use to accelerate the progressive erosion of democracy, the rule of law and fundamental rights pursued by the prime minister during his 10 years in power.¹⁴⁶

No other EU government followed Hungary’s extreme example. Nonetheless, concerns emerged in a number of countries as to the legality of emergency powers. An issue raised was the lack of a clear and sufficient legal basis for governments to adopt measures restricting freedoms to such a degree.

In Germany, experts questioned whether the Protection against Infection Act¹⁴⁷ constituted an appropriate legal basis for measures restricting fundamental rights adopted by federal states¹⁴⁸. In Spain, some argued that sanitary ministerial decrees were not an appropriate instrument to

impose similar restrictions.¹⁴⁹ In the Netherlands, the Advisory Division of the Council of State examined the constitutional aspects of the Covid-19 measures, concluding that the municipal emergency decrees issued by the presidents of the security regions were an insufficient legal basis.¹⁵⁰ This confirmed concerns raised by other constitutional experts¹⁵¹ that such decrees, used for the entire emergency period until its termination on 1st July, should not have been used to impose restrictions on rights because they were not subject to democratic scrutiny.¹⁵²

Other governments have been criticised for failing to respect the requirement of legal certainty when triggering emergency powers.

In Spain, the several executive orders, decrees, ministerial orders, resolutions and instructions passed by the government during the state of emergency and covering all kinds of urgent economic, legal, labour and social measures prompted criticism from experts due to open-ended and vague wording used as well as for overlapping with other pieces of legislation.¹⁵³ In Romania, 13 military ordinances were issued with no consultation under the state of emergency declared in March.¹⁵⁴ The lack of clarity and predictability of the emergency legislation were harshly criticised, including by the Ombudsman Institution.¹⁵⁵ The state of emergency was replaced in mid-May by a state of ‘alert’, which was instituted and prolonged through 4 different normative acts,¹⁵⁶ also using expedited procedures and without consultation.

A number of governments did acknowledge the validity of criticism and acted to remedy contested flaws. For example, in Italy, the government scrapped a controversial open clause that initially allowed the prime minister to adopt by decree “any necessary measure” to counter the spread of the pandemic, establishing a more precise perimeter of government powers.¹⁵⁷ The Dutch government acted upon critics over the use of municipal emergency to impose restrictions on rights and worked on a new emergency law meant to serve as future legal basis for measures against the further spread of COVID-19.¹⁵⁸

In some countries, emergency laws were challenged before constitutional courts. This is notably the case in Romania, where many of the measures taken were challenged by the Ombudsman Institution and later declared unconstitutional by the Constitutional Court. Constitutional challenges against laws and their implementation were also brought before constitutional courts in Austria, Croatia and Slovenia.¹⁵⁹

With some exceptions (like Italy, which decided to prolong its state of emergency at least until mid-October),¹⁶⁰ states of emergency, started to come to an end as the pandemic slowed down. But democratic checks and balances have not always been completely restored as things progressively come back to normal.

In Slovenia the government passed new rules on law-making in April, to accelerate the entry into force of new laws.¹⁶¹ According to the new rules, in case a law cannot be challenged in a referendum,

the upper chamber (the National Council) no longer disposes of seven days prior to its promulgation to veto it and ask the lower chamber (the National Assembly) to reconsider it: the law can now be promulgated and take effect immediately. While such change was meant to speed up the implementation of laws designed to alleviate consequences of the epidemic, it remains, in fact, of general application.

While formally terminating the states of emergency, some governments also appeared keen to consolidate changes to law-making processes and maintain the possibility to quickly re-impose limitations on rights and freedoms. Hungary has yet again set a bad example. The government repealed the controversial “Authorisation Act”¹⁶² in mid-June, but then adopted a new “Act on transitional rules”.¹⁶³ The move, referred to as a “masquerade” and an “optical illusion”,¹⁶⁴ was criticised by watchdogs as a way to allow the government to substantially extend, for a potentially indefinite amount of time, its power to rule by decree without parliamentary approval.¹⁶⁵ Pursuant to the new rules, the government proceeded to declare a state of epidemiological preparedness —lasting six months — the following day.¹⁶⁶

Criticism over the risk of substantial extension of exceptional powers granted to governments during the state of emergency were also voiced in Bulgaria, Estonia, France, Luxembourg and the Netherlands, prompting governments to change their approach.¹⁶⁷ For example, in Luxembourg, the government gave up plans of a broad general law to follow the end of the country’s state of emergency, criticised by the

parliament for giving too much power to the executive.¹⁶⁸

Police and surveillance overreach

A number of EU governments granted new powers to the police and strengthened surveillance measures to enforce the measures taken to contain the pandemic. The role and powers of the police and the army was a matter of debate in a number of countries such as Bulgaria, Denmark and Slovenia.¹⁶⁹

In Slovenia, the first set of emergency measures gave new powers to the police in relation to the collecting and processing personal data from internet platforms for the purpose of prosecuting criminal offences (including violations of the ban on assemblies – see above).¹⁷⁰ This was met with criticism from the Information Commissioner who warned against disproportionate restrictions on privacy and the lack of safeguards including court oversight.¹⁷¹ Attempts – promptly contested by rights and democracy groups¹⁷² – were also made by the government to give the military policing powers to tighten border control, on the pretext that the virus was likely to spread among migrants.

The use of drones, the conclusion of data sharing agreements between online platforms and police and the introduction of compulsory tracing and quarantine enforcing apps also prompted a heated debate in many EU countries including Austria, Belgium, Bulgaria, Cyprus, Czech Republic, France, Germany,

Ireland, Italy, Poland, Romania, Slovakia, Slovenia and Spain.¹⁷³

Dark times for freedom of information

“ During the coronavirus pandemic, access to information is... important... as the public need to know exactly what their governments are doing to tackle the crisis. (...) Above all, governments must not use the pandemic as an opportunity to cover up incompetence, corruption or wider human rights abuses”

- David Banisar, Transparency International, [May 2020](#)

Commitments to ensure transparent, timely and fact-based communication about their actions to respond to the pandemic seem to have remained a declaration of intent for many EU governments.¹⁷⁴ In certain cases, governments did not facilitate or were even accused of deliberately obstructing access to public interest information. In Austria, the government's crisis unit was criticised by the opposition for its lack of transparency.¹⁷⁵ Cases of journalists prevented from obtaining information from health authorities or documenting the operations of law enforcement officials were reported in the Czech Republic and Italy.¹⁷⁶ In Hungary, front-line experts were reportedly threatened with retaliation if they provided information about the fight against the epidemic.¹⁷⁷

The hectic situation caused by the pandemic was also used as a pretext to introduce arbitrary extensions of the deadlines for authorities to reply to freedom of information requests.¹⁷⁸

Similarly to Hungary,¹⁷⁹ the Romanian government doubled the delays by which institutions have to answer to freedom of information requests.¹⁸⁰ This resulted in local institutions refusing to disclose even basic information about the situation in the country, citing the new rules.¹⁸¹ The lack of transparency in the way the government released official information about the spread of the epidemic and the authorities' responses, was labelled by watchdogs as an "unprecedented information blockade".¹⁸² In Slovenia, the government's emergency laws passed in March 2020 suspended the seven day deadline by which public authorities are obliged to provide requested public interest information.¹⁸³ Authorities also temporarily stopped filling in the online registry of transactions between state institutions and state-owned companies, used among others by the national anti-corruption body, prompting a public outcry.¹⁸⁴ In the Netherlands, the handling of freedom of information requests was also suspended, although the measure only concerned COVID-19 related requests and was revoked on 1st June.¹⁸⁵

Concerns were also raised in connection to discussions around the development of tracing, symptom-tracking and quarantine enforcing apps. Such apps were reportedly implemented in many countries without a proper assessment of their impact on privacy and data protection as it would have been required by fundamental rights standards and EU data protection law.

In response to the opaque decision-making in this area, Liberties launched a campaign asking governments to release their impact assessments of such applications.¹⁸⁶

Shrinking space for public participation

“ No country or government can solve the crisis alone; civil society organizations should be seen as strategic partners in the fight against the pandemic”

- Clément Voule, UN Special Rapporteur on the rights to freedoms of peaceful assembly and of association, [April 2020](#)

International monitoring bodies encouraged states to maintain or expand channels of public participation at local, national and international levels while adapting existing mechanisms to the context of COVID-19.¹⁸⁷ Instead, mechanisms for participation and opportunities for democratic debate were essentially suspended by a number of EU governments as decision-making shifted to remote mode. In Poland, for example, the law adopted to respond to the pandemic included new provisions authorising the prime minister to dismiss members of the Social Dialogue Council – the most important social dialogue institution in the country – during the state of emergency.¹⁸⁸ This sparked concern over the government's intention to leave out rights defenders, activists and CSOs' working on public interest issues, including rights and freedoms and the protection of the environment, from

the design and the assessment of governments' measures to address the pandemic.¹⁸⁹

In the Netherlands, activists and CSOs have complained about the challenges they encountered in bringing to the government's attention to their concerns about emergency measures adopted to counter the spread of COVID-19. CSOs were not given the opportunity to offer meaningful input on crucial decisions such as the development of a contact-tracing app.¹⁹⁰ Similarly, the government's consultation on the new emergency bill was also said to be very limited and selective.¹⁹¹ In Romania, the government provided that, during the state of emergency (between 16 March and 15 May 2020), existing rules on transparency and social dialogue in decision-making would not apply.¹⁹² This meant, in essence, that no emergency measure was subject to a public debate or to consultation with representatives of civil society, trade unions or employers' associations – as the law would normally provide.¹⁹³

Serious concerns over very limited opportunities granted to civil society actors to convey people's views on governments' proposed measures to counter the pandemic were voiced in several other countries. Such concerns were reflected in the national research conducted for the purpose of this report on Germany, Slovenia and Spain.

In Germany, participation of CSOs in government decision-making processes is said to have been severely disrupted, particularly because of the use of accelerated procedures.¹⁹⁴ While government's

efforts to make available expanded digital participation formats to meet current challenges are to be welcomed, CSOs are drawing attention to the fact that digital participation models must offer equivalent opportunities as their analog channels. They are therefore urging the government to continue working on access to digital infrastructure for everyone and keep in place for the time being analog forms of participation alongside digital alternatives.

Capitalising on the pandemic to weaken environmental and rights standards

The closing down of the space for democratic participation and debate is having detrimental consequences that go beyond the lack of scrutiny over the restrictions directly connected to the pandemic. A number of EU governments are taking advantage of the emergency circumstances, including expedited decision-making procedures and weakened democratic oversight, to push through controversial laws that have little if anything to do with the spread of the virus. Rights and freedoms and environmental protection standards are a deliberate target.

The "Authorisation Act"¹⁹⁵ which remained in force until mid-June allowed Orban's government to take retrogressive measures on rights and environmental protection. Within the first week of adoption, the government used the emergency law to table a bill (which later became law¹⁹⁶) to strip transgender and intersex people of their right to legal recognition of

their gender. The government also overruled the freezing of controversial building permits in Budapest's City Park,¹⁹⁷ bypassing previous decisions of the elected local government (held by the opponent green party), which had considered the planned constructions detrimental to the environment.¹⁹⁸ In Poland, the government tabled a unilateral two-year extension of the ruling party president's term amidst disarray around presidential elections in the middle of the pandemic.¹⁹⁹ The government also tried to tighten abortion rules while having banned public protest, thus preventing the public from expressing their opinion on this controversial move.²⁰⁰ While these are striking examples, evidence shows they are not isolated cases.

In Slovenia, the government used COVID-19 emergency measures to introduce important limitations on the involvement of environmental NGOs in administrative and court proceedings related to the issuing of building permits, which are meant to be in force at least until the end of 2021.²⁰¹ Such restrictions are part of a broader plan to hinder access to public participation and justice for environmental NGOs, which the government is further pushing through taking advantage of the pandemic.²⁰² The government is also proposing controversial changes to media laws, which are said to be aimed at cracking down on media freedom and pluralism by progressively shifting media ownership into the hands of owners affiliated to the ruling majority.²⁰³ It was only thanks to widespread protests²⁰⁴ and criticism from international bodies²⁰⁵ that the government accepted to subject the bills to a meaningful public consultation.

Reopening our civic space: the way forward

“ If we fail to make the right choice, we might find ourselves signing away our most precious freedoms, thinking that this is the only way to safeguard our health”

- Yuval Noah Harari, *The world after coronavirus*, March 2020

As this report shows, governments have not hesitated to impose, as part of their responses to the COVID-19 outbreak, severe restrictions on civic freedoms that are not directed at protecting our societies against the pandemic. For governments with clear authoritarian tendencies, like Hungary and Poland, the public health emergency was a free pass to accelerate a deliberate erosion of civic space and democracy that has been going on for some time. But the evidence compiled shows that disproportionate measures were introduced in many other EU countries — be it the result of erroneous decisions or conscious attempts to exploit the emergency to silence critics. More than half of EU governments failed to safeguard the right to peaceful protest. In many states, the introduction of reinforced governments' powers came at the cost of meaningful democratic scrutiny, including by means of severe limitations to public debate on government's action and restrictions on access to information. Some EU governments significantly curtailed free speech and media freedom. This is all the more worrying given that the pandemic has also put under increasing pressure civil

society actors through practical and financial constraints.

National governments and EU institutions could reverse these trends and nurture a more open and vibrant civic space to improve the state of our democracies.

Governments should review, revise or reverse existing measures

Each EU government should conduct an audit of national legislation and practices against constitutional and international standards on civic freedoms and public participation, having regard to reports and evidence gathered by watchdogs such as international monitoring bodies, rights defenders, activists and NGOs. Restrictions imposed to respond to the COVID-19 pandemic should be reassessed on this basis and should be lifted or revised if found to be disproportionate. Governments should genuinely engage in finding suitable solutions, in consultation with civil society actors, to restore and facilitate the exercise of civic freedoms and provide meaningful opportunities for public participation in full respect of public health requirements.

Such engagement should be matched by a collective commitment by EU governments to have regular joint discussions on the state of civic space at the EU level, including in connection to measures adopted to contain the pandemic. Each country assuming the rotating Presidency of the Council of the EU should make sure that issues around civic space are addressed as part of broader discussions on how to better prevent and respond to possible breaches of the values set out in Article 2 of the Treaty on European Union – which include democracy, rule of law and respect for fundamental rights and freedoms.

As members of the Council of the EU, governments should:

- *make EU funding conditional on respect for the rule of law, by finalising negotiations on the Commission's proposal in that regard.²⁰⁶ Governments should agree on an effective mechanism to suspend funds that can be triggered by the Commission without the need for qualified majority support by EU member states. They should also ensure that end beneficiaries, including NGOs, can benefit from alternative distribution channels;²⁰⁷*
- *review funding priorities within the revised EU long-term budget and the COVID-19 recovery fund,²⁰⁸ allocating adequate resources to the civil society sector as a means to revive civic space across the EU in the aftermath of the pandemic, as already urged by experts,²⁰⁹ donors and civil society actors²¹⁰;*

- *establish a regular peer review system on the respect for EU values and include in its focus the safeguard and protection of civic freedoms such as freedom of assembly, freedom of expression and of information as well as the existence of channels for effective public participation, including in the context of the pandemic.*

The European Parliament needs to step up its role

The European Parliament is, like the other EU institutions, under a duty to promote and protect EU values through its powers.

The Parliament has not refrained from voicing concerns over EU countries attacking EU values. It consistently denounced since 2016 the deteriorating situation in Poland²¹¹. It also used its power to activate the Article 7 procedure in relation to Hungary, based on evidence of an increasingly shrinking civic space, among other issues.²¹² A recent Parliament resolution also raised concern over the impact on democracy, rule of law and fundamental rights of measures taken by EU countries in response to the pandemic. It denounced measures taken by Hungary and Poland as “totally incompatible with European values” and called on the European Commission and on the Council of the EU to urgently address the matter.²¹³

However, the success of the Parliament's initiatives has relied heavily on the Council and the Commission's willingness to take action.

In addition, the possible suspension or expulsion of national member parties of EU political parties, should they breach EU values, is currently a matter for the EU political parties to deal with, in accordance with their own internal rules. As the long debate about the expulsion of Hungary's ruling party Fidesz from the centre-right alliance of the European Parliament — the European People's Party (EPP) —²¹⁴ shows, this leaves the respect for EU values fall prey to political games.

But there could be ways for the Parliament to gain a stronger and more credible role at both EU and national level.

The European Parliament should:

- *launch a reflection on how to ensure a stricter adherence to EU values by EU political parties and their national member parties, in line with the general conditions and requirements governing the registration and funding of EU political parties²¹⁵. Such a reflection should also address options to make sure that EU political parties take action in case of a serious breach of EU values by one of their national member parties, including possible sanctions such as the suspension of EU funding;*
- *push for the conclusion of an inter-institutional agreement on reinforcing EU values, by adopting the proposal tabled by the Committee on Civil Liberties, Justice and Home Affairs to that effect.²¹⁶ Such agreement should establish an annual monitoring cycle integrating existing policy initiatives to facilitate the sincere cooperation and the coordination of the European*

Parliament, the European Commission and the Council of the EU in this area;

- *organise a regular interparliamentary dialogue with national parliaments on the state of civic space in each country, as part of a broader effort to promote and safeguard the respect of EU values in all EU countries.*

The European Commission should play its part, too

The European Commission is the guardian of EU laws and values. Besides being able to take legal action against member states violating EU rules,²¹⁷ the Commission can initiate its Rule of Law Framework which provides for structured dialogue with governments endangering democratic checks and balances.²¹⁸ For serious and persistent problems, it can trigger the Article 7 procedure.²¹⁹

The Commission has in the past launched infringement proceedings against legislation hampering the work of civil society organisations in Hungary²²⁰ and against steps taken by the Polish government to subject judges to political control.²²¹ As regards Poland, the Commission also activated the Rule of Law Framework in 2016²²², triggering the Article 7 procedure in 2017.²²³

The Commission recently initiated a systematic monitoring of the state of the rule of law in all EU countries. The extent to which these reports include an assessment of civic space is unclear at the time of writing.²²⁴ The

Commission has also announced its intention to monitor the application of emergency measures as regards their impact on rule of law, democracy and fundamental rights,²²⁵ although this has not yet led to any concrete action.²²⁶

Further, the Commission also has powers to propose new EU legislation and to set out priorities for how EU funds are spent, which can include support for CSOs.

These powers offer the Commission a range of opportunities to monitor and address restrictions on the civic space.

The European Commission should:

- *include a thorough assessment of civic space and freedoms in its new annual rule of law reports and its COVID-19 dedicated monitoring. Where problems are identified the Commission should include clear recommendations to governments to remedy the situation, and verification that recommendations are implemented;*
- *allow CSOs to take part in the Commission's process for identifying steps to remedy existing concerns and verifying whether its recommendations have been implemented;*
- *react swiftly and decisively to identified shortcomings, using all tools available. The Commission should pursue legal, diplomatic and political sanctions as soon as it becomes clear that a member state is unwilling to fulfil its duty of sincere cooperation.*

- *make full and strategic use of EU legislation that can protect civic space by opening infringements on grounds of the breach of EU rules in fields such as competition, internal market freedoms, public procurement standards or data protection;*
- *include meaningful financial support for grassroots CSOs among the priorities of relevant EU funding programmes under the Multiannual Financial Framework and COVID-19 recovery fund. Funding should serve to strengthen CSOs' long-term financial sustainability, build their capacity to promote support for EU values and better resist attacks and restrictions, including through coalition building, litigation and effective communication strategies.²²⁷*

Notes

- 1 These are the Gesellschaft für Freiheitsrechte (GFF), the Nederlands Juristen Comité voor de Mensenrechten (NJCM), the Association for the Defense of Human Rights in Romania – the Helsinki Committee (APADOR-CH), the Peace Institute – Institute for Contemporary Social and Political Studies in Slovenia and Rights International Spain (RIS).
- 2 Greenpeace European Unit (May 2020), [Erosion of Civil Society Space across the EU](#).
- 3 Liberties (May 2020), [EU Has Many Tools on the Table to Promote Rights and Democracy - Liberties Report](#).
- 4 More information at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-report_en.
- 5 See for example UN Office of the High Commissioner on Human Rights, [What is civic space?](#) and CIVICUS Monitor, [Civic space](#).
- 6 E.g. Articles 11 and 12 of the EU Charter of Fundamental Rights, Articles 10 and 11 of the [European Convention on Human Rights](#), and Articles 19, 21 and 22 of the [International Covenant on Civil and Political Rights](#).
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