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(CDCJ)**

LOBBYING

A study on the feasibility of a Council of Europe legal instrument
on the legal regulation of lobbying activities

prepared by

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Disclaimer: The views expressed in this study are solely those of the author and do not necessarily reflect the views of the Council of Europe or its member States.

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1 EXECUTIVE SUMMARY

1.1 This study goes back to several Council of Europe Parliamentary Assembly Recommendations leading to the call for “a feasibility study on lobbying in the light of which further standard-setting work could be considered” 2019 (2013). The study reviews the regulatory bandwidth in laws of Council of Europe member States and selected other countries specifically targeting lobbying. It also highlights the importance of reviewing general rules, which do not target lobbying specifically, but are of particular relevance. Within this comparative assessment, the study tries to draw conclusions for a possible European standard, taking into account international recommendations as well as general constitutional and regulatory principles.

1.2 The common ground shared by several national regulations shows that regulation of lobbying is possible from a European perspective. It also shows the discretion any European standard would have to leave for differing constitutions and realities of member States.

1.3 A European standard would need to address the following issues:

- A clear definition of lobbying, in order to distinguish it from forms of influencing public officials, which should neither be considered lobbying nor be subject to respective regulation;
- Mechanisms of enhancing transparency of lobbying, including tools such as a register and reporting obligations by lobbyists and/or public bodies;
- Ethical lobbying, including honesty regarding the lobbying assignment, prohibition of undue influence on public officials and management of conflicts of interest;
- Rules for public officials touching on the incompatibility of being a public official with lobbying private interests, cooling-off periods before a public official can become a lobbyist or before a lobbyist can serve in a public body; the duty to report violations of lobbying rules, disclosing conflicts of interest;
- The fair and equal access of all stakeholders from the private sector and the public at large to public decisions and their right to participate in the development of such public decisions;
- Effective, proportionate and dissuasive sanctions for the violation of regulations on transparent and ethical lobbying;
- An oversight mechanism for monitoring compliance and promoting good practice;
- A review of the regulatory framework as far as it relates to lobbying (political finance, gifts and hospitality, media sponsoring, access to public information, etc.).

1.4 A Council of Europe recommendation seems to be the most practical and swiftest means of translating existing documents and principles into a legal instrument; this would not rule out the formulation of a convention in the longer term.

1.5 The “Preliminary Proposal on a Legal Instrument” at the end of the study illustrates the feasibility of a European legal instrument and could serve as a basis for further work.

2 SCOPE OF THE STUDY

2.1 The European Committee on Legal Co-operation (CDCJ) of the Council of Europe commissioned this study in February 2014 for completion by 31 May 2014. The study's objective is to explore the feasibility of a Council of Europe legal instrument on the regulation of lobbying activities.

2.2 One origin of the feasibility study is the Parliamentary Assembly Recommendation 1908 (2010) on lobbying in a democratic society (European code of good conduct on lobbying). Two additional texts of the Parliamentary Assembly followed this Recommendation: Resolution 1744 (2010) on extra-institutional actors in the democratic system and Recommendation 2019 (2013) on corruption as a threat to the rule of law, both supporting the idea of a Committee of Ministers recommendation to member States on the legal regulation of lobbying. In particular, Recommendation 2019 (2013) stated:

“Having regard to the growing need for a Europe-wide regulatory framework in respect of lobbying, the high level of expertise of the Council of Europe's specialised bodies, the extensive studies already carried out and the solid data collected by them on lobbying, the Assembly invites the Committee of Ministers to launch a feasibility study on lobbying in the light of which further standard-setting work could be considered.”

2.3 In addition to the Assembly reports accompanying these texts (Doc. 12278, Doc. 13228), the Venice Commission has adopted two reports (CDL-AD(2013)011 on the Role of Extra-Institutional Actors in the Democratic System (Lobbying) and CDL-DEM(2011)002) on the legal framework for the regulation of lobbying in the Council of Europe member States. These reports provide comparative information, an analysis of existing legal regulatory systems, and an assessment of competing arguments for and against regulation.

2.4 The purpose of the feasibility study is to explore what standards a Committee of Ministers instrument (Council of Europe convention, Committee of Ministers recommendation, Committee of Ministers guidelines) might possibly include in order that it might target relevant regulatory needs and enjoy a consensus amongst the member States in light of their diverse legal systems and existing laws, policy or practice.

2.5 The study does not repeat the comparative information and analysis in the already existing reports by Council of Europe and other international organisations. However, the study updates the information contained in those reports wherever appropriate.

3 SOURCES OF INFORMATION

3.1 There is a myriad of documents by academics as well as national and international organisations including the Council of Europe mentioning the issue of lobbying. Many documents do not directly target lobbying, but inform on the larger regulatory environment surrounding lobbying. The following explains the selection of documents, which found the main basis for this study:

Case law of the European Court of Human Rights

3.2 There is no jurisprudence directly dealing with lobbying. Some decisions marginally touch on the issue without setting any precedent or allowing any other legal conclusion (see for example *Dochnal v. Poland*, no. 31622/07, 18 September 2012; *OOO Ivpress and Others v. Russia*, nos. 33501/04, 38608/4, 35258/05 and 35618/05, 22 January 2013).

Council of Europe documents

3.3 Several Council of Europe documents directly deal with the issue of lobbying. Among the more recent are:

- Parliamentary Assembly Recommendation 1908 (2010) on lobbying in a democratic society;¹
- Parliamentary Assembly Resolution 1744 (2010)² on extra-institutional actors in the democratic system, and accompanying Report Doc. 12278;³
- Parliamentary Assembly Recommendation 2019 (2013)⁴ on corruption as a threat to the rule of law, and accompanying Report Doc. 13228;⁵
- Venice Commission Report CDL-DEM(2011)002 on the legal framework for the regulation of lobbying in the Council of Europe member States;⁶
- Venice Commission Report CDL-AD(2013)011 on the Role of Extra-Institutional Actors in the Democratic System (Lobbying);⁷
- Criminal Law Convention on Corruption (ETS No. 173), Explanatory Report.⁸

The Group of States against Corruption (GRECO) Evaluation Reports, 4th Round, more or less all touch on the issue of lobbying with regards to parliamentarians.⁹

European Union documents

3.4 The European Union (EU) Anti-Corruption Report 2014 elaborates on the necessity of “transparency of lobbying” (page 20).¹⁰ In addition, a European Parliament Working Paper on “Lobbying in the European Union: current rules and practices”, April 2003,¹¹ provides a comparative overview of the national laws (and not of internal regulations of the EU) – see below Section “national laws” (page 7).

¹ <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17832&lang=en>.

² <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17884&lang=en>.

³ <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=12514&lang=EN>.

⁴ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19951&lang=en>.

⁵ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19769&lang=en>.

⁶ [http://www.venice.coe.int/webforms/documents/?pdf=CDL-DEM\(2011\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-DEM(2011)002-e).

⁷ [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)011-e).

⁸ <http://conventions.coe.int/Treaty/EN/Reports/Html/173.htm>.

⁹ http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/ReportsRound4_en.asp.

¹⁰ Of 3 February 2014, COM(2014) 38 final, http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf.

¹¹ [www.europarl.europa.eu/RegData/etudes/etudes/join/2003/329438/DG-4-AFCO_ET\(2003\)329438_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2003/329438/DG-4-AFCO_ET(2003)329438_EN.pdf).

OECD documents

3.5 To help address concerns surrounding lobbying, OECD member countries adopted in 2010 a “Recommendation on Principles for Transparency and Integrity in Lobbying” as guidance to decision-makers on how to promote good governance in lobbying (the “10 Principles for Transparency and Integrity in Lobbying”).¹² The OECD also issued two comparative reports: “Lobbyists, Government and Public Trust, Volume 1” (2009) reviews the experiences of Australia, Canada, Hungary, Poland, the United Kingdom and the United States of America with government regulations designed to increase scrutiny of lobbying and lobbyists; the report “Lobbyists, Government and Public Trust, Volume 2” (2012) examines regulation and self-regulation of lobbying.¹³ In addition, the OECD is expected to publish a Report on “Progress Made in Implementing the Recommendation on Principles for Transparency and Integrity in Lobbying” in September 2014.

Transparency International and other civil society organisations

3.6 Among the publications by Transparency International and other civil society organisations are the following: Lobbying in the European Union: Levelling the Playing Field, EU Policy Paper, Transparency International (TI), November 2012; Code of conduct for responsible representation of interests [“Verhaltenskatalog für verantwortliche Interessenvertretung“], TI-Germany, April 2009; Position paper: Regulating representation of interests in Germany in a more transparent and fairer way [“Positionspapier: Interessenvertretung in Deutschland transparenter gestalten und fair regeln“], TI-Germany, December 2008;¹⁴ Policy Paper: Towards transparent and democratic lobbying, TI-France, December 2012;¹⁵ Policy Paper: Fixing the revolving door between Government and Business, TI-United Kingdom, April 2012;¹⁶ Valts Kalniņš/Centre for Public Policy PROVIDUS, Transparency in Lobbying: Comparative Review of Existing and Emerging Regulatory Regimes, 2011;¹⁷ Sunlight Foundation, International Lobbying Disclosure Guidelines, 2013;¹⁸ Access Info Europe, Lobbying Transparency via Right to Information Laws, 2013.¹⁹

National laws

3.7 The above mentioned comparative reports by the Venice Commission (2011 and 2013) and the OECD (2009) provide an overview on national laws in Europe and selected other countries. Some of the following seven laws or regulations enacted in Council of Europe member States since 2008 and specifically targeting lobbyists are missing from one or more of these reports:

¹² <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=256&InstrumentPID=+250>.

¹³ <http://www.oecd.org/gov/ethics/lobbying.htm>.

¹⁴ <http://www.transparency.de/Lobbyismus.737.0.html> (German).

¹⁵ http://www.transparency-france.org/e_upload/pdf/policypaper_lobbying_en.pdf.

¹⁶ <http://www.transparency.org.uk/our-work/publications/200-policy-paper-series-2---fixing-the-revolving-door-between-government-&-business>.

¹⁷ http://pasos.org/wp-content/uploads/2011/10/Comparative-report_lobbying-PASOS.doc.

¹⁸ <http://sunlightfoundation.com/policy/lobbying/guidelines/>.

¹⁹ <http://www.access-info.org/en/lobbying-transparency/526-lobbying-report>.

- “The former Yugoslav Republic of Macedonia”: Law on Lobbying of 23 July 2008;²⁰
- Slovenia: Integrity and prevention of corruption act 2011 of 26 May 2010;²¹
- Montenegro: Law on Lobbying of 2 November 2011; Rules on the ethical conduct of lobbyists of 26 December 2011;²²
- Austria: Law on Lobbying and Transparency of Representation of Interests of 27 June 2012;²³
- Hungary: Government regulation of the integrity management system of state administration bodies and lobbyists of 25 February 2013;²⁴
- France: Code of conduct (National Assembly) of 26 June 2013;²⁵
- United Kingdom: Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act 2014 of 5 February 2014.²⁶

Subnational regulations,²⁷ or regulations by individual ministries,²⁸ are not part of this study.

3.8 There are two comprehensive legal commentaries available on the new Austrian law:

- Gabriel Lansky, Alexander Egger, Peter Köppl, Lobbying und Recht [Lobbying and Law], Vienna 2013, 250 pages (German);
- Christian Eggenreiter, Alexander Latzenhofer, Lobbying-Recht [Lobbying-Law], Vienna 2013, 377 pages (German).

3.9 In place of the many academic publication available, one should mention in particular the following: Raj Chari, John Hogan, Gary Murphy, Regulating Lobbying: a global comparison, Manchester 2010, 192 pages.

4 COMPARATIVE ASSESSMENT OF EXISTING REGULATIONS

4.1. The above mentioned international documents either list reasons for (or against) regulating lobbying, or extrapolate the main structural components of lobbying regulations. There is yet no assessment available as to the regulatory feasibility of each component from a European perspective. This chapter intends to close this gap.

²⁰ www.dksk.org.mk/en/images/stories/PDF/law/law_on_lobbying.pdf (English).

²¹ <https://www.kpk-rs.si/upload/datoteke/ZintPK-ENG.pdf> (English).

²² http://antikorupcija.me/index.php?option=com_phocadownload&view=category&id=27:&Itemid=195
(Montenegrin).

²³ http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=BgblAuth&Dokumentnummer=BGBLA_2012_I_64 (German).

²⁴ <http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK13030.pdf> (Hungarian).

²⁵ http://www2.assemblee-nationale.fr/14/representant-d-interets/repre_interet#rub1-onglet2 (French).

²⁶ <http://services.parliament.uk/bills/2013->

[14/transparencyoflobbyingnonpartycampaigningandtradeunionadministration.html](http://services.parliament.uk/bills/2013-14/transparencyoflobbyingnonpartycampaigningandtradeunionadministration.html).

²⁷ See, for example, for the Tuscany region, Law No. 5 of 18 January 2002, which establishes a mandatory register for lobbyists, <http://www.consiglio.regione.toscana.it:8085/politica/gruppi-di-interesse/default.asp> (Italian).

²⁸ See, for example, the Decree No. 2284 of 9 February 2012 by the Italian Ministry of Agriculture on transparency of decision-making and lobbying contacts, <https://www.politicheagricole.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/5732> (Italian).

4.2. The following comparison first tries to show the general bandwidth of possible regulatory options available for each issue. In a second step, this chapter tries to draw conclusions for a possible European standard. In principle, only regulations in force are subject of this study.

4.3. This chapter primarily looks at laws specifically targeting lobbying. However, it also highlights the importance of reviewing general rules which do not target lobbyists specifically, but are of particular relevance (e.g. regulations on political finance donations).

4.4. The objective of this study is not a toolkit on the technicalities of how to best draft a national regulation; it rather tries to show what framework a European legal instrument could provide. It would go beyond the scope and means available for this study to show for each issue all nuances of existing regulations or to show statistically how many countries in total comprise of a similar provision. For the same reason, the study mostly confines itself to enacted laws and leaves aside past or current draft laws. However, in order to link the comparison to concrete country examples and in order to allow the reader to examine original legislative material, the study regularly mentions at least one out of possibly several country examples for further reference to enacted laws. However, in order to facilitate readability of the study, a reference to the country replaces the full source citation of the relevant law, article, and paragraph. Furthermore, the following comparison mostly rephrases or simplifies the complexity of national laws in order to emphasise the relevant point.

Definition

4.5. All national laws describe lobbying as a form of representation of interests towards public officials. Based on this common ground, the variations are as follows:

- a. **Lobbying activity:** This can be any activity, or written or verbal communication with a public official, or a contact. For example, the Austrian law speaks of “contacts” with civil servants, whereas the Polish law includes any “activity directed toward the legislative and executive branch”. Some American States explicitly include gift giving into the lobbying definition.²⁹
- b. **Third party interest:** Lobbying can be limited to the representation of third party interests (Poland) or include own interests (Austria). Lobbying for own interests can fall outside regulation as long as it is not related to (own) **business interests** (Austria).
- c. **Targeted branch:** National definitions usually describe lobbying as an activity targeting representatives of the legislative and executive branch (Montenegro) or do not define the targeted branch at all (Lithuania); none of the enacted definitions includes the judiciary.
- d. **Targeted decision:** All national laws define lobbying as an activity targeting legislative decisions. It should be kept in mind that targeted *branch* and targeted *decisions* are two different things; for example, the Macedonian law defines

²⁹ See, for example, Kansas Statutes, Chapter 46, Article 2, 46-225: “LOBBYING means: [...] entertaining any state officer or employee or giving any gift, honorarium or payment to a state officer or employee in an aggregate value of \$40 or more within any calendar year [...]” <http://ethics.ks.gov/statsandregs/46-225.html>.

lobbying as “an activity directed toward the legislative and executive *branch*” but targets only legislative *decisions*, and leaves out administrative decisions. The Austrian law by contrast includes “executive decisions”.

- e. **Targeted level of state:** Lobbying can explicitly include the central, provincial, and local level (see, for example, the Austrian law). Sometimes, provincial Parliaments, such as in Germany, adopt their own lobbying regulations.³⁰ None of the regulations includes international organisations.

4.6. There is no internationally recognised definition of a lobbyist, neither linguistic nor legal. Above variations are by and large a question of national priorities and needs. However, a proper definition is key to any regulation for two reasons: In a democratic society, several forms of influencing public officials exist, which should neither be considered lobbying nor be subject to respective regulation because of an imprecise definition. At the same time, lobbying shows many forms and any definition needs to prevent possible circumventions. From a European perspective, the following points seem essential:

- a. **Lobbying activity:** The key element of any definition is the influence intended by the lobbyist. How, and to what extent this is translated into a definition depends on the factual and legal framework of a country.
- b. **Third party interest:** It is a key feature of professional lobbying that it is done in the interest of a third party. Otherwise, all citizens contacting their Member of Parliament would be lobbyists. It is an essential part of democracy, though, that citizens can influence public officials. A number of human and constitutional rights, such as freedom of expression, freedom of assembly, or, as in some countries, the confidentiality of communication with Members of Parliament protect exercising this influence. Lobbyists in a lobbying firm act in the interest of their client, whereas in-house lobbyists lobby in the interest of their organisation, may this be a corporation or a civil society organisation.

National regulations may certainly go further, and include lobbying for one’s own interest as is the case in Austria for **business interests**. This would include a one-man business trying to convince the member of Parliament in his/her constituency to vote for a new tax law. Such exchanges of thoughts are also an individual expression of a political opinion (protected inter alia by the European Convention on Human Rights (hereafter “ECHR”) or constitutional confidentiality clauses), and any law has to be careful to not impose undue administrative burdens on expressing such opinions. A counterbalance to such a rather wide definition can be an exception for activities of insignificant level (United States of America) or to exempt such representatives of own interests from the obligation to register (as is the case in Austria).

The criterion of “third party interest” serves also to include lobbying through **front organisations** which only act in the interest of the party behind. However, whenever these front stakeholders primarily act in their own interests, they are not acting for a third party. For example, a corporation might try to mobilise numerous citizens to “write to their member of Parliament”; if citizens follow the

³⁰ Parliament Rhineland-Palatinate, <http://www.landtag.rlp.de/icc/Internet-DE/nav/dcc/dcc60493-6163-e631-f0cc-7c07086d35f8.htm> (German); the lobbying register is more or less identical with the one of the Bundestag.

call, they act in their own interest – in such a case neither the corporation nor the citizens are lobbyists (for third parties).

- c. **Targeted branch:** The executive and legislative branches of power are a regular target of lobbying. In a democratic society, the executive branch includes by definition regulatory, independent, or private bodies performing public functions. Decision of (upper) courts can be economically as important as legislative decisions;³¹ none of the specific lobbying laws includes the judicial branch, though. However, it should be noted that the Council of Europe’s Committee of Ministers recommends that “the law should provide for sanctions against persons seeking to influence judges in an improper manner”.³² In this sense, a draft law on lobbying in Bulgaria explicitly foresaw inclusion of the judiciary and the Constitutional Court.³³ Furthermore, the Austrian Association of Judges criticises the new Austrian Lobbying Law for not including the influencing of judges.³⁴ It goes without saying that sanctions for undue influence of judges can be subject of non-lobbying specific laws such as on the status of judges. On this note, the OECD “Principles for Transparency and Integrity in Lobbying” are “primarily” directed at decision makers in the executive and legislative branches (Scope of the Principles), but not exclusively.
- d. **Targeted decision:** All national laws define lobbying as targeting legislative decisions. Two points are important in this context:
- 1) Parliaments know more forms of action than adopting laws; they nominate high public officials, pass resolutions, adopt public policies, or oversee the executive. Therefore, the OECD “Principles for Transparency and Integrity in Lobbying” relate fair lobbying not only to the adoption of laws but more generally target “the development and implementation of public policies” (Principle 1).
 - 2) Decisions by the executive branch can be politically or economically equally important to decisions by Parliament. The examples of an anti-trust decision on a big company or the nationalisation of a troubled bank illustrate this importance. In this sense, the Recommendation 1908 (2010) of the Parliamentary Assembly speaks not only of “members of Parliament” (no. 9), but also of “government authorities” (no. 9), and “political decision makers” (no. 10).
- e. **Targeted level of government:** Decentralised levels of government take economically and politically important decisions. On that note, the Council of Europe supports the reinforcement of local self-government inter alia through its 1985 “European Charter of Local Self-Government” (ETS No. 122), and the OECD

³¹ See, for example, a decision by the German Supreme Court in 2002 affecting real estate deals worth 9.5 billion €, <http://www.n-tv.de/archiv/Haustuer-Widerruf-auch-bei-Immobilienkauf-article129661.html> (German). See also: Tilman Hoppe, “Transparenz per Gesetz? Zu einem künftigen Lobbyisten-Register”, Zeitschrift für Rechtspolitik 2009, 39 (40), http://tilman-hoppe.de/ZRP_2009_39.pdf (German).

³² Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities, <https://wcd.coe.int/ViewDoc.jsp?id=1707137>.

³³ <http://www.parliament.bg/en/news/ID/1545>.

³⁴ http://www.parlament.gv.at/PAKT/VHG/XXIV/SNME/SNME_07005/imfname_226745.pdf (German).

“Principles for Transparency and Integrity in Lobbying” are explicitly “relevant to both national and sub-national level”. Therefore, in general lobbying regulations should address both levels.

- f. **International organisations** regulate their internal matters themselves (access to the premises, freedom of information, conduct of public officials, etc.). However, they cannot subject lobbyists to any law having effect outside their own premises. This opens a regulatory gap: lobbying of an international organisation can take place outside the organisation itself. There, any regulation on ethical lobbying or on transparency of activities would have no effect. At the same time, the power of international organisations to enforce obligations and to administer sanctions is confined to denying lobbyists access to its premises. Sovereign states by comparison can administer civil, administrative, or criminal sanctions. For this reason, the Council of Europe Criminal Law Convention on Corruption (ETS No. 173) explicitly includes offences involving international public officials (articles 9-11). In order to avoid a significant regulatory gap, it is recommendable to include lobbying of international organisations into a regulation as well, as far as obligations of lobbyists are concerned. In practice, this might mean that some lobbyists might have to follow report to more than one register. However, this is already the case: for example, there are registers with regional Parliaments in Germany, its national Parliament, and in addition with the European Parliament and European Commission.

Exceptions

4.7. One way of summing up above definition criteria would be: “Lobbying is any influence by an individual on a public official in the interest of a third party in order to be reflected in legislative, administrative or judicial decisions”.

Privileged stakeholders and activities

4.8. Such a definition would be incomplete: there are stakeholders whose representation of third party interests is conditional for a democratic society; in addition, there are stakeholders whom national legislators privilege for their prominent role in the political process and reflect this in constitutional values; or, stakeholders enjoy exemption for general policy reasons. National laws either exclude the respective groups from the definition of “lobbyists” or largely exclude them from some or all obligations, such as the duty to register. The exceptions include in particular the following:

- a. Public officials (Austria);
- b. Foreign diplomats (Austria);
- c. Political parties (Austria);
- d. Lawyers (Austria);
- e. Media information (Lithuania);
- f. Witnesses and experts in formal proceedings (United States of America);
- g. Religious organisations (United States of America);
- h. Scientists (Lithuania);

- i. Social insurance associations (Austria);
- j. Trade unions (Austria);
- k. Members of foreign trade delegations (Australia);
- l. Self-administrative organizations (United States of America);
- m. Petitions or communications of a grass-roots campaign nature (Australia);
- n. Civil society stakeholders lobbying on issues of “rule of law, democracy and the protection of human rights and fundamental freedoms” (Slovenia);
- o. Responses to requests by Government representatives for information (Australia).

4.9. From what is essential in a democratic society according to European standards, above exceptions seem to fall into two categories: necessary and optional exceptions. The first six categories (lit. a to lit. f) would appear to be necessary exceptions.

4.10. Public officials including foreign diplomats will try to influence each other, such as members of Parliaments try to convince each other to vote in a certain way. This is an inherent exercise of their functions in a democratic society, unless a private party additionally remunerates them for lobbying purposes. Similar is true for political parties whose integral function in a democracy is to channel political will from civil society to public power.

4.11. Lawyers also represent third party interests, but normally do so in a relationship that is protected by confidentiality, privileged by constitutional and human rights principles, subject to separate documentation and transparency rules, and thus exempt from any lobbying regulation. Therefore, legal advice and representation in formal procedures, needs to be excluded from the definition of lobbying. This means at the same time, wherever lawyers do not represent a client’s legal interest in a concrete case towards executive or judicial officials, but political interests towards legislators in changing general legal rules, lobbying regulations apply (Australia).

4.12. The media enjoy special protection under Article 10 of the ECHR. Normally, the media seek to inform and influence the general public; they also act in their own interest, rather than in the interest of a third party. By definition, they are normally not lobbying in a technical sense. To be sure, some national laws still make it a clear point that the media are exempted. Similar applies to scientists.

4.13. As for formal proceedings (trials, hearings, procurement procedures, etc.) it would seem contradictory for a state of law to subject citizens to such mechanisms in order to represent their interests, and at the same time require them to register as lobbyists.

4.14. Exceptions lit. g to lit. o may hold justification for policy reasons at national level, but it is worth noting that the broader the coverage of a lobbying regulation, the greater transparency, accountability and public understanding of decision-making it achieves.

De minimis clause

4.15. Exceptions are also possible and recommended whenever the cost of the regulation would not outweigh its benefits. Lobbying activities of insignificant level might not be required to fall under the (full) regulation (Austria, United States of America); this can concern independent consultant lobbyists as well as in-house lobbyists.

Lobbying in public

4.16. Similar can be true for public lobbying activities (Slovenia), such as public hearings or placement of ads in the media; they are transparent by themselves and might not require additional disclosure.

Remuneration

4.17. Lobbying is sometimes limited to remuneration (United Kingdom), or also includes not-for-profit activities (Lithuania). The Macedonian law explicitly “excludes activities of citizens associations [...] if they are performed without compensation”. In Australia, the lobbying definition excludes “individuals making representations on behalf of relatives or friends about their personal affairs”.

4.18. Recommendation 1908 (2010) of the Parliamentary Assembly calls for “differentiating between lobbying as a professionally compensated activity and the activities of civil society organisations” (11.1). However, this distinction does not appear as to call for per se excluding civil society organisations from lobbying regulations. Several country chapters of Transparency International – a civil society organisation itself – call for including civil society organisations into a lobbying regulation.³⁵ This makes sense, as civil society organisations lobby themselves and often employ lobbyists to this end. Furthermore, civil society organisations may serve as vehicles for corporate lobbying. For example, media reports pointed to incidents where pharmaceutical companies sponsored patient encounter groups to lobby the companies’ interests (with their members all working pro bono).³⁶ To mitigate the deceit in this, several options are possible, such as obliging businesses to disclose indirect lobbying activities done through sponsoring of civil society organisations, or to include non-remunerated activities into lobbying regulations. In this context, one should note the following statement by OECD under Principle 4 of the “10 Principles for Transparency and Integrity in Lobbying”:

“Rules and guidelines should primarily target those who receive compensation for carrying out lobbying activities, such as consultant lobbyists and in-house lobbyists. However, definition of lobbying activities should also be considered more broadly and inclusively to provide a level playing field for interest groups, whether business or not-for-profit entities, which aim to influence public decisions.”

³⁵ See, for example, Transparency International-France, http://www.communication-publique.fr/wp-content/uploads/PDF/policypaper_lobbying_en.pdf

³⁶ New York Times, 14 December 2013, The Selling of Attention Deficit Disorder, <http://www.nytimes.com/2013/12/15/health/the-selling-of-attention-deficit-disorder.html>; SWR, Pharmasponsoring von Selbsthilfegruppen, 13 March 2008, <http://www.swr.de/odyssso/-/id=1046894/nid=1046894/did=3116990/1a6hfrm/> (German); taz, Mit den Mitteln der Pharmaindustrie, 12 October 2012, <http://www.taz.de/1/archiv/print-archiv/printressorts/digi-artikel/?ressort=in&dig=2012%2F10%2F12%2Fa0142&cHash=32c6b6a7ed8498df240de5011dca5eeb> (German).

4.19. No matter how lobbying is defined, obligations from a regulation can target not only the physical person lobbying, but also other people, in particular his/her employer, the third party whose interests the lobbyist represents, the contacted public officials, or the public entity they belong to.

Transparency

4.20. The main objective of a lobbying regulation is transparency. For this purpose, mainly three tools are discussed:

- Reporting by lobbyists through a public register and/or regular public reports;
- Reporting by public officials (e.g. “legislative footprint”);
- Citizens’ access to public information.

Lobbyists: Register and reports

4.21. A public register for lobbyists is probably the most widely used tool of ensuring public oversight of lobbying activities. All national lobbying laws include a publicly accessible register. Lobbying is only permitted once lobbyists are registered. Regular reports complement the information available on the register. The content of the registers and related reports in the different jurisdictions varies providing more or less some or all of the following data:

- a. Lobbyist
 - i. Name of lobbyist (Austria);
 - ii. Contact details (Austria);
 - iii. Employer of lobbyist in case of in-house lobbyists (United States of America);
 - iv. Details of third parties in case of independent consultant lobbyists (United States of America);
 - v. Description of the lobbyist’s or employer’s business or activities (Austria);
- b. Lobbying activity
 - i. Subject-matter of lobbying contacts with public officials (Australia);
 - ii. Financial compensation received for third party lobbying (Australia);
 - iii. Financial expenses for in-house lobbying (United States of America);
 - iv. Legislation or other proposal that was the subject of lobbying (Lithuania);
 - v. State institutions that were contacted (“The former Yugoslav Republic of Macedonia”);
 - vi. Communication techniques, including grass-roots communication (Canada);
 - vii. Political finance donations (Slovenia);
- c. Lobbying structure
 - i. Employees: number and names (Austria);
 - ii. State funding of the employer or third party (Canada);

- iii. Internal code of conduct of lobbyist (United Kingdom);
- iv. Employees being former public officials (Australia).

4.22. The above range of data represents something close to the maximum of transparency in lobbying. It is found more or less in the North-American regulations, whereas none of the European states register all of these data. It should be noted that recommendations by civil society organisations on lobbying transparency go further and call for publication of agendas of meetings, documents shared between lobbyists and public officials, and other relevant information.³⁷ Obviously, there are some constitutional limits (privacy, business secrets, confidentiality of communication with deputies). However, information would only be meaningful if it goes beyond the mere name and address of the lobbyist. Recommendation 1908 (2010) of the Parliamentary Assembly states: “transparency in the field of lobbying should be enhanced” (11.2) and “entities involved in lobbying activities should be registered” (11.4). It appears as a minimum, that any register would contain at least data on each of the three above main categories: the lobbyist itself, the lobbying activities, and the lobbying structure. This aligns with Principle 5 of the OECD’s “10 Principles for Transparency and Integrity in Lobbying”:

“Subject to Principles 2 and 3, core disclosure requirements elicit information on in-house and consultant lobbyists, capture the objective of lobbying activity, identify its beneficiaries, in particular the ordering party, and point to those public offices that are its targets. Any supplementary disclosure requirements should take into consideration the legitimate information needs of key players in the public decision-making process. Supplementary disclosure requirements might shed light on where lobbying pressures and funding come from. Voluntary disclosure may involve social responsibility considerations about a business entity’s participation in public policy development and lobbying. To adequately serve the public interest, disclosure on lobbying activities and lobbyists should be stored in a publicly available register and should be updated in a timely manner in order to provide accurate information that allows effective analysis by public officials, citizens and businesses.”

4.23. Any regulation would need to define time limits and the frequency of registering the data. Exceptions to the registering obligation are possible if the total income generated through independent lobbying or expended on in-house lobbying does not exceed a certain threshold.

4.24. The interest of the public in publication of the data needs to be balanced with the interest of the lobbyist in protecting commercial and personal secrets, in particular with regard to contractual and financial data. The freedom of access to information standards can provide some guidance in this, including on the mitigating measures such as redacting certain private information. Access to the database should be available electronically and for free, and should

³⁷ Sunlight Foundation, International Lobbying Disclosure Guidelines, <http://sunlightfoundation.com/policy/lobbying/guidelines/>; Access Info Europe, Lobbying Transparency via Right to Information Laws, <http://www.access-info.org/en/lobbying-transparency/526-lobbying-report>, 12 December 2013.

allow the user to work with the data in an efficient manner.³⁸ The OECD stated in this context under Principle 5 of its “10 Principles for Transparency and Integrity in Lobbying”:

“Disclosure of lobbying activities should provide sufficient, pertinent information on key aspects of lobbying activities to enable public scrutiny. It should be carefully balanced with considerations of legitimate exemptions, in particular the need to preserve confidential information in the public interest or to protect market-sensitive information when necessary.”

4.25. It seems at least questionable whether voluntary registers would serve the aim to “restore public confidence in government authorities’ democratic functioning” (Parliamentary Assembly Recommendation 1908 (2010) at no. 9). Transparency International reviewed lobbying regulations in EU member States and came to the following conclusion:

“Overall, voluntary registers are a poor substitute for their mandatory counterparts. A mapping by Transparency International France and Regards Citoyens published in 2011 revealed that between July 2007 and July 2010, 9,300 hearings (between ministries and lobbyists) took place involving nearly 5,000 organisations, represented by more than 16,000 people. These numbers differ greatly from the 127 lobbyists registered in March 2011 in the Official Register of the National Assembly. Germany’s register has likewise been criticised as being extremely weak, because of its voluntary nature [...]”.³⁹

4.26. One should also note in this context the following issue: Even though national laws and academic publications rarely mention this point, if at all, any organisation or professional is usually subject to some reporting obligations not necessarily targeted at lobbying. This applies to commercial entities as well as to pro-bono associations, which all have to file regular reports to public bodies. The information of these reports varies under different national regulations, but could provide some information on lobbying activities as well. In Germany in the 1970s, a draft law aimed at enhancing transparency of associations representing interests. The draft never reached Parliament, though. One should also note that Transparency International Germany makes voluntary reporting on lobbying activities part of its “code of conduct for responsible representation of interests”.⁴⁰ Notwithstanding mandatory public regulation, member States could encourage corporations to voluntarily report on lobbying activities as part of their Corporate Social Responsibility commitment.

4.27. There are several shortcomings of any reporting outside lobbying regulations: The information is usually very limited. Enforcement of reporting obligations is difficult, as each entity publishes the information in a decentralised manner. Interested citizens or journalists have no overview on how many lobbyists exist and would have to hunt down information scattered around possibly thousands of web pages.

³⁸ See, in this context, for example, the United Kingdom Cabinet Office’s Policy paper “G8 Open Data Charter and Technical Annex”, 2013, <https://www.gov.uk/government/publications/open-data-charter/g8-open-data-charter-and-technical-annex>.

³⁹ Transparency International, Money, Politics, Power: Corruption Risks in Europe, 2012, page 29, www.transparency.de/fileadmin/pdfs/Wissen/2012_CorruptionRisksInEurope_EN.pdf.

⁴⁰ Transparency International, “Verhaltenskatalog für verantwortliche Interessenvertretung”, 2009, no. 9, http://www.transparency.de/fileadmin/pdfs/Themen/Politik/Verhaltenskatalog_09-04-27.pdf (German).

Public bodies: Legislative footprint, documentation

4.28. The OECD recommends in its “10 Principles for Transparency and Integrity in Lobbying” that governments

“should also consider facilitating public scrutiny by indicating who has sought to influence legislative or policy-making processes, for example by disclosing a ‘legislative footprint’ that indicates the lobbyists consulted in the development of legislative initiatives” (Principle 6).

Civil society organisations such as Transparency International Germany include this proposal in their recommendations as well.⁴¹

4.29. The European Parliament endorsed a proposal in 2011 for a “legislative footprint annex” to reports drafted by its members: “This annex would list all the lobbyists whom lead MEPs met while a legislative report was being drafted”.⁴² However, members of Parliament were quite split over the usefulness of this measure.⁴³

4.30. There are already countries in Europe which practice some form of legislative footprint.⁴⁴ In Denmark, for example, it is reportedly part of the parliamentary practice to publish on the Parliament’s homepage all written documents (including e-mails), which interest groups and lobbyists sent to the competent parliamentary committee. In Estonia, according to Cabinet and Parliament rules, the official reasoning of a law must give an overview on all opinions and positions of all involved public entities as well as of all interest groups and lobbyists. This includes information on the extent to which the legislator fed any proposal into the draft law. Reportedly, it is a challenge though, to correctly reflect the actual influence of all stakeholders.⁴⁵ The National Assembly in France has adopted a new regulation in 2013, obliging its members to include, at the end of official reports, a list of all organisations consulted.⁴⁶

4.31. One should be aware, though, that the practicability and bureaucratic burden of this tool would be quite different in Council of Europe member States. In a federal republic such as Germany for example, lobbyists could influence the same draft law in Parliaments and ministries in 16 provinces (Länder), and in a bi-cameral Parliament and ministries at the

⁴¹ Transparency International, *Lobbying in the European Union: Levelling the Playing Field*, EU Policy Paper, November 2012, http://www.transparency.de/fileadmin/pdfs/Themen/Politik/ENIS_Regional_Policy_Paper_Lobbying.pdf.

⁴² European Parliament, Press release 20110510IPR19128, www.europarl.europa.eu/pdfs/news/expert/infopress/20110510IPR19128/20110510IPR19128_en.pdf.

⁴³ Alexander Stubb (former member of the European Parliament and rapporteur on lobbying in the EU), “Regulating Brussels’ legion of lobbyists”, in: *Europe’s World*, 2008, <http://europesworld.org/2008/02/01/regulating-brussels-legion-of-lobbyists/>.

⁴⁴ Internal expertise by the Research Services of the German Bundestag (Parliament), “Legislativer Fußabdruck” [legislative footprint], WD 3 – 3000 – 056/11, unpublished, based on a survey conducted through the European Centre for Parliamentary Research & Documentation, <https://ecprd.secure.europarl.europa.eu/ecprd/>.

⁴⁵ Internal expertise (ibid); see also the general criticism about the lacking effectiveness of publishing all lobbying contacts: Hans-Jörg Schmedes, *Mehr Transparenz wagen? Zur Diskussion um ein gesetzliches Lobbyregister beim Deutschen Bundestag*, *Zeitschrift für Parlamentsfragen (ZParl)*, 40 (2009) 3, page 548 (German).

⁴⁶ <http://www.assemblee-nationale.fr/representants-interets/igb.asp> (French).

national level, whereas in Monaco or San Marino the picture would probably be different. In addition, some constitutions grant special confidentiality to communication between members of Parliament and citizens.⁴⁷ Obliging members of Parliament to divulge who contacted them or who they contacted might not work under all constitutions.

4.32. Some laws oblige public officials to document information on contacts with lobbyists and to keep records on such contacts for a minimum time (Slovenia).

Citizens: Freedom of information

4.33. Freedom of information is a value shared among Council of Europe member States. The adoption of the Council of Europe Convention on Access to Official Documents (CETS No. 205)⁴⁸ is an expression of this value, despite the fact that its entry into force has been pending since 2009. National laws on freedom of information allow citizens to gain access to ministerial or parliamentary documents. It is therefore an indispensable tool for tracking lobbying influence in public records.

4.34. However, often access to parliamentary documents is restricted. Regrettably, Convention CETS No. 205 is an example of this restriction itself, as its Article 1 exempts Parliaments in their legislative functions from the scope of the Convention. Furthermore, freedom of information still depends – in practice – largely on individual requests by citizens, rather than proactive publication of government data. Much more importantly, though, without additional lobbying regulation there might not be much information available in public files on lobbying contacts. Freedom of information – in its current European legal standard – therefore can only complement a lobbying regulation.

4.35. Ideally however, public entities will make much more information available online in the future,⁴⁹ as is for example the visitor's record of the Executive Office of the President of the United States of America ("White House").⁵⁰ The trend towards more openness includes also Parliaments, supported by an initiative of the OSCE Parliamentary Assembly among other.⁵¹

⁴⁷ See, for example, Article 47 German Constitution: "Members may refuse to give evidence concerning persons who have confided information to them in their capacity as Members of the Bundestag, or to whom they have confided information in this capacity, as well as evidence concerning this information itself." https://www.gesetze-im-internet.de/englisch_gg/. According to legal commentaries, this right extends to all public procedures.

⁴⁸ <http://conventions.coe.int/Treaty/en/Treaties/Html/205.htm>.

⁴⁹ See, for example, the proposals by Access Info Europe, Lobbying Transparency via Right to Information Laws, 2013, <https://www.access-info.org/ogs/12369>; <http://www.opengovpartnership.org/about/open-government-declaration>.

⁵⁰ <http://www.whitehouse.gov/briefing-room/disclosures/visitor-records>.

⁵¹ <http://www.openingparliament.org/organizations>.

Ethical lobbying

4.36. National laws all contain rules on ethical obligations of lobbyist. Such obligations include the following:

a. Honesty

- i. To disclose to public officials at first encounter for which client they are working for (Australia);
- ii. To refrain from disguising their client, referring to non-existent clients, or providing false information on the nature of their assignment (Australia, Lithuania);
- iii. To submit correct data to the public official (“The former Yugoslav Republic of Macedonia”);
- iv. To refrain from misleading the public official (France – National Assembly);
- v. To refrain to use the logo of the lobbied public institution (France);
- vi. To display their badges of access (France);

b. Undue influence

- i. To refrain from exerting undue pressure on public officials, unless such pressure is socially accepted (Austria);
- ii. To refrain from encouraging public officials to violate the law;
- iii. To refrain from offering any financial advantage to public officials (Montenegro) or from gift giving in violation of public officials’ rules (Slovenia);
- iv. To familiarize themselves with all incompatibilities and ethical rules of public officials (Austria);
- v. To refrain from claiming to be capable of (successfully) influencing the public official (Australia);
- vi. To refrain from agreeing on success fees (Austria);
- vii. To refrain from financial contributions in exchange for opportunities to speak at events in Parliament (France);
- viii. To refrain from entering rooms not covered by the badge of access (France);

c. Conflicts of interest

- i. To lobby related to the lobbyist’s own interest in being appointed to a public position (Lithuania);
- ii. To represent clients with opposing interests (Austria);
- iii. To represent public officials (Lithuania);
- iv. To mix duties and activities as lobbyists with political party involvements (Australia);

d. **Confidentiality of data**

- i. To refrain from collecting information from public officials in undue ways (Austria);
- ii. To refrain from using information obtained in violation of the law (Montenegro).

4.37. In terms of ethics, Recommendation 1908 (2010) of the Parliamentary Assembly calls for “honest lobbying [...] so as to improve the public image of persons involved in these activities” (11.6); furthermore, “rules applicable to [...] members of pressure groups and businesses should be laid down, including the principle of potential conflicts of interest” (11.3). Under Principle 8 of its “10 Principles for Transparency and Integrity in Lobbying”, the OECD refers to “illicit influence”, “honesty”, and avoidance of “conflict of interest” in order to specify integrity in lobbying. It seems, as if any European regulation should address all three issues in order to provide a framework for integrity in lobbying. As for confidentiality and the use of state information, this should normally be subject of general confidentiality of data on the one hand, and freedom of information laws on the other hand; if need be, any lobbying legislation is free to amend these general laws.

4.38. National laws often make ethical rules subject to by-laws or self-regulation (e. g. Austria, Montenegro). In these cases, the legislation lays out core ethical principles, whereas further details and rules are subject to by-laws decreed for example by an anti-corruption body (Montenegro) or to self-regulation of a lobbying association (Slovenia). Additional voluntary measures are sometimes adopted by individual bodies and coalitions of interests,⁵² including on the alignment of lobbying activity with corporate social responsibility commitments and the compliance with international standards on corporate social responsibility.⁵³ Such self-regulation also encourages ownership of the ethical rules. Any code of conduct should be public, possibly through the register (see above at 4.21.c.).

4.39. Some national laws exclude lobbyists from the profession (as long as it is a profession for them), if they fail to meet a minimum standard of integrity. This exclusion is usually based on criminal convictions and can be temporary (Austria) or permanent (Australia, Slovenia).

4.40. It should not go unmentioned that, in addition to above mentioned ethical principles, the Code of Conduct of the French National Assembly requires “information provided by representatives of interests to members of Parliament should be opened without discrimination to all members of Parliament regardless of their political affiliation” (No. 7). Such a regulation would not work in all other European countries. For example in Germany, the constitution guarantees members of Parliament an independence, which includes the

⁵² “Déclaration commune des entreprises membres de Transparency International France sur le lobbying”, http://www.transparency-france.org/ewb_pages/div/Declaration_commune_lobbying.php (French).

⁵³ Vigeo, Transparency and Integrity in Lobbying: A New Challenge for CSR, <http://www.vigeo.com/csr-rating-agency/en/etude-lobbying-062013>, and UN Global Compact, Towards Responsible Lobbying, 2005 http://www.unglobalcompact.org/docs/news_events/8.1/rl_final.pdf

freedom to seek and receive information, that other parliamentarians in other states may not necessarily have.⁵⁴

Rules for the public sector

4.41. Recommendation 1908 (2010) of the Parliamentary Assembly requests that “rules applicable to politicians, civil servants [...] should be laid down, including the principle of potential conflicts of interest and the period of time after leaving office during which carrying out lobbying activities should be banned” (11.3). One should also note the recent observations by GRECO during its 4th Evaluation Round, such as:

“Lobbying involves the actions of both the person who lobbies and the public official who is lobbied. For the process to be properly beneficial, both sides of the process need to act appropriately with regard to one another.”⁵⁵

The relevant issues cited in national laws and international recommendations fall into the following categories:

- a. **Incompatibility:** Probably all national lobbying laws define the position of a public official as incompatible with being a lobbyist (remunerated by a third party). In addition, under Principle 7 of its “10 Principles for Transparency and Integrity in Lobbying”, the OECD mentions the possibility for establishing restrictions to avoid “switching sides’ in specific processes in which the former officials were substantially involved”. One should also note in this context that public officials lobbying (in exchange for money or similar favours) run risk of committing the crime of trading in influence, wherever criminal codes include this offence.⁵⁶
- b. **Cooling-off period (outgoing):** Frequently, there are cooling-off periods for public officials – in general or certain categories – before they can become a lobbyist (Canada: five years; “The former Yugoslav Republic of Macedonia”: one year after receiving salary; United Kingdom: two years), or before they can “lobby their past organisations” (OECD, explanation of Principle 7).
- c. **Cooling-off period (incoming):** Principle 7 of the OECD’s “10 Principles for Transparency and Integrity in Lobbying” calls on countries to “consider a [...] temporary cooling-off period restriction on appointing or hiring a lobbyist to fill a regulatory or an advisory post.” Discussions around integrity and lobbying sometimes include the cases of lawyers working for ministries on legislative drafts concerning highly technical issues such as financial regulation. The lawyers in such cases might otherwise work for corporate clients such as banks. This could easily entail conflicts of interest and impartiality problems. Nonetheless, these are integrity issues not in the course of lobbying, but in the course of providing legal

⁵⁴ Article 38 German Constitution: Members of Parliament shall “not [be] bound by orders or instructions, and responsible only to their conscience”, http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0228.

⁵⁵ Evaluation Report on the United Kingdom, 6 March 2013, Greco Eval IV Rep (2012) 2E, paragraph 53, http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/ReportsRound4_en.asp.

⁵⁶ Council of Europe, Criminal Law Convention on Corruption (ETS No. 173), Explanatory Report, paragraph 65: “Improper’ influence must contain a corrupt intent by the influence peddler: acknowledged forms of lobbying do not fall under this notion”, <http://conventions.coe.int/Treaty/EN/Reports/Html/173.htm>.

advice to the State, and thus potentially fall under other regulations.⁵⁷ Obviously, this in-house advice in ministries is a lobbying issue if the advisors used to be or still are on the payroll of a certain business.

- d. **Documentation:** Public officials have to document contacts with lobbyists (Poland).
- e. **Reporting violations:** Public officials have to report unregistered or unlawful lobbying to hierarchical superiors (Australia, Slovenia).
- f. **Conflict of interest:** Disclosing relevant private interests and avoiding situations with prohibited conflicts of interest as stated in Recommendation 1908 (2010) of the Parliamentary Assembly (11.3). In existing lobbying laws, one does not find these rules but only in general legislation on public officials.
- g. **Confidentiality:** Public officials should “share only authorised information” (OECD, Principle 7); in existing lobbying laws, one does not find this rule but only in general legislation on public officials or on data protection.

The last two obligations would normally seem to fall under general public service rules and protection of classified information in any given country. It should be noted that it might be necessary in some countries to clarify explicitly that staff of members of Parliament are also “public officials” and are thus included in lobbying rules (Canada, Australia).

Access and participation

4.42. As a general principle, the right of the public at large – including lobbyists – to participate in the development of legal drafts and public policies, goes without saying. Principle 1 of the OECD’s “10 Principles for Transparency and Integrity in Lobbying” notes in this regard:

“Countries should provide a level playing field by granting all stakeholders fair and equitable access to the development and implementation of public policies: Public officials should preserve the benefits of the free flow of information and facilitate public engagement. [...] Allowing all stakeholders, from the private sector and the public at large, fair and equitable access to participate in the development of public policies is crucial to protect the integrity of decisions and to safeguard the public interest by counterbalancing vocal vested interests [...]”

4.43. The main tools supporting public participation seem to be an active outreach to citizens, consultative mechanisms and procedures, transparent decision-making processes, and the availability of supporting documents and drafts. In this context, one should also note the need for a balanced composition of consultative bodies (such as expert or advisory groups of ministries).⁵⁸

⁵⁷ Tilman Hoppe, Public hearing on lobbying, Regional Parliament Hesse, 16 April 2013, Protocol ÄR/18/70, page 35 (German)

⁵⁸ A counter-example to such public participation would be to classify a formal draft of an adopted lobbying regulation as confidential together with the respective parliamentary legal expertise, as done in one of the German regional Parliaments; see Tilman Hoppe, Written expertise for the public hearing on lobbying, Regional Parliament Hesse, Committee submission ÄR/18/1, 16 April 2013, page 20, <http://starweb.hessen.de/cache/AV/18/AER/AER-AV-001-T1.pdf> (German).

4.44. Some lobbying laws only lay out the obligations of lobbyists, without including a framework for their rights (Austria, Canada, and United States of America). In such jurisdictions, lobbyists are inherently subject to the general legislation and constitutional principles, when it comes to their access to public information and participation in public consultations. This equal treatment of lobbyists and all other citizens ensures fair and equal access to public decision-making.

4.45. Several national laws also explicitly mention the rights of lobbyists. One of the possible rationales behind this approach is obviously the intent that regulation should perceivably not only “take away” from lobbyists, but also “give” to them:

- **Access to information:** The relevant provisions refer to already existing legislation on freedom of information (“The former Yugoslav Republic of Macedonia”, Slovenia).
- **Presentation of positions:** Partly, lobbying laws grant lobbyists the right to “request to present their positions and opinions on the lobbying subject in the working bodies of the legislative and executive branches” (“The former Yugoslav Republic of Macedonia”; see also Georgia, Slovenia). It is assumed that under general constitutional or sub-constitutional principles, all citizens will have the same right as lobbyists.
- **Meetings with public officials:** Whenever legal provisions mention that lobbyists “may meet” with a public official (“The former Yugoslav Republic of Macedonia”), it seems as if this rather permits the lobbyists to seek bilateral meetings, but does not oblige all public officials to grant the request to such meetings. In Lithuania, the law entitles lobbyists only “to organise meetings of legislators with representatives of clients of lobbying activities”, but does not include bilateral meetings of lobbyists with public officials in the long catalogue of lobbyist’s rights.
- **Invitation to public consultations:** Lobbyists sometimes enjoy the explicit right to be invited to public consultations with regard to the areas in which they have “registered an interest” (Slovenia).
- **Other rights:** In some countries, the list of lobbyist’s rights is even longer (Lithuania): It can contain the right to review legislative drafts, to address the public at large, to organise public events, to conduct an opinion poll, or to collect data/information and submit it to clients.

There is in principle no harm in listing any of the above rights in a lobbying regulation. However, such approaches carry the risk of regulatory confusion as to whether lobbyists have more rights in public consultation and direct access to decision-makers than any other citizen, or are at least perceived to do so. Such a list might also have the unintended effect of limiting any of the larger constitutional freedoms and rights lobbyists enjoy as any other citizen.

Sanctions

4.46. There is practically no regulation which would not contain sanctions – if only in the form of disadvantages – in case lobbyists do not comply with regulations. The range of disadvantages and sanctions comprises:

- Written reminder (Slovenia);

- Loss of privileged access to parliament (France, Netherlands);
- Invalidity of lobbying agreement (Austria);
- Ban from lobbying for a specified period of time (Slovenia);
- Ban from specific or all lobbying activities, possibly in the form of a removal from the register (“The former Yugoslav Republic of Macedonia”);
- Fine (Montenegro, Slovenia);
- Imprisonment (Canada, United States of America).

4.47. The Hungarian regulation conditions lobbying contacts with ministry representatives to the approval of hierarchical superiors. There are no further conditions laid out but it is assumed that as some form of sanction superiors will forbid or discontinue inappropriate contacts.

4.48. Sanctions can be administrative (Poland, Slovenia) or criminal (Lithuania, United States of America) and target one or all of the above mentioned obligations of lobbyists as regards to transparency and ethical conduct.

4.49. The Parliamentary Assembly Recommendation 1908 (2010) does not explicitly call for sanctions; however, one could see sanctions as one part of a system which would “[encourage] well-defined, transparent, honest lobbying [...] so as to improve the public image of persons involved in these activities” (11.6). The OECD’s “10 Principles for Transparency and Integrity in Lobbying” are more straightforward:

“Visible and proportional sanctions should combine innovative approaches, such as public reporting of confirmed breaches, with traditional financial or administrative sanctions, such as debarment, and criminal prosecution as appropriate.” (Principle 9)

4.50. From a European perspective, it would certainly go too far to call for criminal sanctions as a new standard in an area which most Council of Europe member States until now do not even regulate at all. At the same time, only effective, proportionate and dissuasive sanctions – be they criminal or non-criminal – are an effective tool to “restore public confidence in government authorities’ democratic functioning”; lobbying regulations that are ineffective in practice, would only nurture public cynicism. In this context, one could mention the example of Germany’s national Parliament. According to its rules of procedure, “associations of trade and industry representing interests vis-à-vis the Bundestag or the Federal Government shall be entered” into a public list kept by the Parliament’s President and “shall be heard only if they have entered themselves in this list”.⁵⁹ However, the competent committee on rules of procedures rendered a decision in 1979 that even without being registered such associations representing interests could take part in hearings.⁶⁰ This decision not only contradicts the clear wording of the rules of procedure, it is – other than the rules of procedure – not published on the Parliament’s website and in this respect creates an impression of something rather furtive, exposing the whole system to criticism, if not even ridicule in the eye of the public.

⁵⁹ Rules of Procedure, Annex 2, no. 2, <https://www.btg-bestellservice.de/pdf/80060000.pdf> (English), page 106.

⁶⁰ Tilman Hoppe, “Transparenz per Gesetz? Zu einem künftigen Lobbyisten-Register”, Zeitschrift für Rechtspolitik 2009, 39 (41), http://tilman-hoppe.de/ZRP_2009_39.pdf (German).

Oversight, advice and awareness

4.51. Different models are in place for overseeing compliance of lobbyists with regulation:

- Integrity body (Lithuania, “The former Yugoslav Republic of Macedonia”, Montenegro, Slovenia);
- Commissioner of Lobbying (Canada);
- Institution targeted by the lobbying – Parliament (France, Germany, United States of America); ministry (Montenegro).

4.52. Possible functions are:

- Advice to lobbyists and public officials on the application of the law (United Kingdom);
- Maintaining the register (Slovenia);
- Verifying disclosures (Lithuania);
- Following-up on public complaints (Austria);
- Analysing trends (Lithuania);
- Reporting on lobbying activities (Canada);
- Raising awareness and promoting good practices (Canada);
- Drafting and adoption of a code of conduct (Lithuania);
- Enforcing compliance and imposing sanctions (Austria).

4.53. All national lobbying regulations entrust a public body with oversight of lobbying and do not leave oversight to the private sphere alone. However, there are always additional stakeholders involved in the oversight: for example, with regard to their compliance with lobbying regulations, public officials are subject to general disciplinary procedures. As for private stakeholders, such as corporations or lobbying firms, they are also in charge of overseeing compliance themselves, notwithstanding monitoring by a public oversight body.

4.54. The Parliamentary Assembly Recommendation 1908 (2010) does not provide guidance on any particular mechanism for oversight. In a similar sense, the OECD only calls to “involve key actors in implementing a coherent spectrum of strategies and practices to achieve compliance” (Principle 9), without referring to any specific structure, but rather “a coherent spectrum of strategies and mechanisms, including properly resourced monitoring and enforcement.” Among the tasks of these “mechanisms” would be to “raise awareness of expected rules and standards; enhance skills and understanding of how to apply them; and verify disclosures on lobbying and public complaints.” Any European legal instrument would have to leave it up to the discretion of national legislators to find an adequate and effective way of ensuring implementation.

Regulatory framework

4.55. First of all, one has to distinguish two types of regulation:

- Public law regulation (Germany, Lithuania);
- Private self-regulation, such as by a professional association of lobbyists (Croatia).

4.56. Sometimes, both forms are combined when public law on lobbying refers for matters of ethical conduct to private self-regulation (Austria). However, leaving the regulation of lobbying activities entirely up to private self-regulation of lobbyists seems problematic:

- The call of Parliamentary Assembly Recommendation 1908 (2010) and of Committee of Ministers Recommendation 2019 (2013) for drawing up a legal instrument would seem without point if its implementation would be left to the uncertainty of self-regulation;
- According to surveys by the OECD, a majority of lobbyists themselves believes in mandatory rules,⁶¹ something which private self-regulation cannot achieve;
- Lobbyists are in a conflict of interest when regulating their own business;
- Self-regulation by lobbyists cannot cover all stakeholders: for example, proper conduct of civil servants or access and participation of lobbyists in public consultations require regulation in public law;
- A law needs to define who is a lobbyist; otherwise many individuals and organisations would probably not consider themselves lobbyists.

4.57. Public law regulation can follow two approaches:

- Specific lobbying legislation, such as a law on lobbying (“The former Yugoslav Republic of Macedonia”);
- Non-targeted regulation in different laws (civil servant laws on conflicts of interest, rules of procedures of Parliament for a lobbying register, government decrees on contacts with lobbyists in ministries, etc.).

4.58. In addition, one can find provisions relevant for lobbying on four regulatory levels:

- Constitution: regulation on incompatibilities (Montenegro) or on transparency of the legislative process (Germany);
- Sub-constitutional formal laws: civil service laws on conflicts of interest (Poland);
- Self-regulation of public bodies, such as parliamentary rules of procedure (France, Germany) or government decrees for ministries (Hungary);
- By-laws: a code of conduct issued by the anti-corruption commission (Montenegro).

4.59. In terms of sectors, one regulation might cover all sectors, or specific regulation might target the executive (Hungary) and legislative branch (France).

⁶¹ OECD, Transparency and Integrity in Lobbying, 2013, page 2, <http://www.oecd.org/gov/ethics/Lobbying-Brochure.pdf>.

4.60. Within above limits, countries enacting lobbying regulations will have to each find their own way and combination of legal instruments. As lobbying regulations are a comparatively new tool for most countries and as the forms of lobbying will change over time, the effectiveness of the legislation should be subject to periodic assessments by an independent body (see for example Canada: periodic reviews every five years).

4.61. No matter how member States regulate lobbying, they will need to review the larger regulatory framework. There are several regulations available in all Council of Europe member States, which – without specific reference to lobbying – already regulate certain aspects of lobbying, for example:

- Political finance: Prohibition of donations in exchange for legislative favours; transparency on or prohibition of donations from businesses through interest groups to political parties.⁶²
- Freedom of information: Access of citizens to public documents allows also to detect any possible influence on draft laws or other decisions by interest groups or lobbyists. This is one of the regulatory aims of introducing such public access.
- Bribery of public officials including members of Parliament: this criminal offence covers a particularly egregious form of ethical misconduct where a citizen – possibly a lobbyist – tries to influence a public official. Similar is true for the offence of trading in influence (Article 12 Criminal Law Convention on Corruption – ETS No. 173).
- Conduct of public officials: Ethical rules for public officials cover many possible situations related to lobbying. One example is restrictions on post-employment in areas on which the public official has done prior work.
- Media laws: prohibition of sponsoring news broadcast or emissions on current political events,⁶³ or independence of media from outside financial influences.⁶⁴

4.62. In all five areas, the Council of Europe has set standards through conventions and recommendations: Recommendation Rec(2003)4 of the Committee of Ministers to member States on common rules against corruption in the funding of political parties and electoral campaigns;⁶⁵ Council of Europe Convention on Access to Official Documents (CETS No. 205);⁶⁶ Criminal Law Convention on Corruption (ETS No. 173);⁶⁷ Recommendation No. R (2000) 10 of

⁶² See the examples at Christian Humborg, Gutes tun und "schlechtes" Lobbying – Zum Verhältnis von CSR und Lobbyismus, in: Scheinwerfer 50, 2011, page 12, <http://www.transparency.de/Gutes-Tun-und-schlechtes-Lob.1884.0.html> (German).

⁶³ See, for example, the German Interstate Broadcasting Treaty [Rundfunkstaatsvertrag] of 31 August 1991, paragraph 8: Sponsoring, <http://www.lmk-online.de/service/rechtsgrundlagen/rundfunkstaatsvertrag/> (German).

⁶⁴ Ethics code of German Journalists, <https://www.dfjv.de/ueber-uns/ethik-kodex> (German).

⁶⁵ <https://wcd.coe.int/ViewDoc.jsp?id=2183>.

⁶⁶ <http://conventions.coe.int/Treaty/EN/Treaties/Html/205.htm>.

⁶⁷ <http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm>.

the Committee of Ministers to member States on codes of conduct for public officials;⁶⁸ Declaration of the Committee of Ministers on Public Service Media Governance (2012).⁶⁹

4.63. The larger regulatory framework goes beyond above mentioned points. It also concerns amongst others the issues of the independence of judges and data protection. It may be also useful to review the possible benefit of regulating the legal relation between lobbyist and client. There is no need to address such issues, though, from a European perspective.

5 A NEW COUNCIL OF EUROPE INSTRUMENT

The need for a new instrument

5.1 The Parliamentary Assembly has already come to a decision for a European regulation. It recommended in 2010 “that the Committee of Ministers of the Council of Europe elaborate a European code of good conduct on lobbying” (Recommendation 1908 (2010) on lobbying in a democratic society, reiterated by Resolution 1744 (2010) on extra-institutional actors in the democratic system). Furthermore, Recommendation 2019 (2013) states:

“Having regard to the growing need for a Europe-wide regulatory framework in respect of lobbying, the high level of expertise of the Council of Europe’s specialised bodies, the extensive studies already carried out and the solid data collected by them on lobbying, the Assembly invites the Committee of Ministers to launch a feasibility study on lobbying in the light of which further standard-setting work could be considered.”

5.2 Several arguments support the above mentioned development of a European legal instrument:

Links to Council of Europe values and work

5.3 Lobbying touches on basic values the Council of Europe stands for, in particular fair and equal access of citizens to political decision makers. Already the definition of lobbying requires balancing the rights, which various stakeholders enjoy in a democratic society. Through a legal instrument, the Council of Europe could provide guidance for lobbying regulation to be in line with democratic principles.

5.4 There are examples where national stakeholders have not always (fully) implemented an existing lobbying regulation.⁷⁰ In any case, possible gaps between laws and their implementation should be no argument for avoiding regulation at all. For example, one can observe a certain implementation gap with corruption offences in some member States; but nobody would use this as argument for the abolishment of such offences. A European legal instrument would provide an incentive for reviewing and implementing regulations and could enjoy the support of monitoring exercises, such as the one by GRECO. In any case, during the

⁶⁸ <https://wcd.coe.int/ViewDoc.jsp?id=353945>.

⁶⁹ <https://wcd.coe.int/ViewDoc.jsp?id=1908241>.

⁷⁰ See, for example, a related observation on Hungary in Venice Commission Report CDL-DEM(2011)002, page 23, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-DEM\(2011\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-DEM(2011)002-e).

current 4th Evaluation Round, GRECO has recommended introducing rules wherever lobbying remains an unregulated issue.⁷¹

5.5 Several Council of Europe member States criminalise trading in influence in line with Article 12 of the Criminal Law Convention on Corruption (ETS No. 173). GRECO has called on some member States to introduce the offence. The offence hinges on the notion of “improper” influence of public officials. According to the Explanatory Report to the Convention, “acknowledged forms of lobbying do not fall under this notion”.⁷² A European legal instrument could provide guidance on possible legal forms of lobbying and could thus help delineating criminal and non-criminal forms of trading in influence.⁷³

Feasibility of a legal instrument

5.6 Examples of national laws show that legal regulation of lobbying is technically possible. There are no apparent national restrictions, such as constitutional principles, which would oppose any regulation of lobbying.

5.7 There are good points in many countries’ lobbying regulations, but no single model brings them all together. A European legal instrument could provide common direction for a comprehensive framework.

Current lack of an international legal instrument

5.8 Regulating lobbying has been subject to numerous national and international exchanges in academic and political forums. The OECD has adopted “10 Principles for Transparency and Integrity in Lobbying” in 2010. Nonetheless, so far no international body developed a legal instrument which would provide legal guidance on developing national regulations. The Council of Europe could take the lead in this area by adopting a legal instrument.

5.9 According to a survey by OECD conducted in 2013, a majority of legislators (74 %) and of lobbyists (70 %) believes that transparency of lobbying activities should be mandatory for all lobbyists.⁷⁴ Professional lobby groups often request to set up a register.⁷⁵ A Council of Europe

⁷¹ See, for example, Evaluation Report on Estonia, 8 January 2013, Greco Eval IV Rep (2012) 5E, paragraph 30; for this Report and similar observations see http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/ReportsRound4_en.asp.

⁷² Council of Europe, Criminal Law Convention on Corruption (ETS No. 173), Explanatory Report, paragraph 65: “Improper’ influence must contain a corrupt intent by the influence peddler: acknowledged forms of lobbying do not fall under this notion”, <http://conventions.coe.int/Treaty/EN/Reports/Html/173.htm>.

⁷³ On this relation see: Willeke Slingerland, The Fight against Trading in Influence, Public Policy and Administration 2011, p. 53-66, www.vpa.ktu.lt/index.php/PPA/article/download/228/189.

⁷⁴ OECD, Transparency and Integrity in Lobbying, 2013, page 2, <http://www.oecd.org/gov/ethics/Lobbying-Brochure.pdf>.

⁷⁵ See, for example, Germany, where the lobbyists association “de’ge’pol” calls for a lobbying register, <http://www.degepol.de/ethik-und-transparenz/> (German); in Denmark, Parliament did not respond yet to similar calls by professional lobby groups, Annex Denmark to the EU Anti-Corruption Report, COM(2014) 38 final Annex 4, page 5, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_denmark_chapter_en.pdf.

legal instrument would facilitate national legislators to respond to this perceived regulatory need.

5.10 The OECD Principles represent valuable work and clearly should be drawn on in formulating a recommendation. However, part of the Principles might be too general as to serve as a source for drawing up regulations. Furthermore, the Principles apply only to OECD member States, whereas a Council of Europe recommendation would have a wider application, and might also enjoy monitoring by GRECO.

Transnational aspect of lobbying

5.11 According to the OECD, transnational lobbying practices raise new global concerns.⁷⁶ A Council of Europe instrument could ensure a level playing field not only on a national level, but also on a European level. This is in particular true for lobbying of international organisations, which these organisations by nature can only address to a quite limited extent: they lack the normative reach and power of sanctions which sovereign states have.

A convention

5.12 Adopting a convention is the strongest and most positive measure that the Council of Europe can take. It is not a statutory act but is a binding legal instrument; it owes its legal existence to the consent of those member States that sign and ratify it. Most conventions of the Council of Europe make provision for non-member States to become Parties; most conventions also include a monitoring mechanism for ensuring compliance. However, the negotiation of a convention is a laborious and time-consuming process. This is particularly likely to prove true in the very broad field of lobbying, where only some member States have adopted a targeted regulation. Also, even once a convention is adopted, the process of ratification takes many years, and would probably take particularly long for a convention on lobbying.

A recommendation

5.13 A recommendation seems to be the most practical and swiftest means of translating existing documents and principles into a legal instrument. This would not rule out the formulation of a convention in the longer term, though. A recommendation can set out principles and encourage member States to take action, including legislative change, whilst leaving a wide margin of discretion to them. The result would be not uniformity, but guidance on minimum standards. Nonetheless, it might also trigger a review of each national regulatory framework and whether it adequately responds to the comprehensive range of issues around lobbying. This seems a reasonable approach on this issue, as each jurisdiction will need to take into account existing mechanisms – for example on the transparency of the legislative process, on public consultations, and on ethical conduct and incompatibilities in public office.

⁷⁶ OECD, Draft Report to Council, Progress Made in Implementing the Recommendation on Principles for Transparency and Integrity in Lobbying, GoV/PGC(2013)16, page 10 (published, November 2014).

Guidelines

5.14 Article 15 of the Statute of the Council of Europe explicitly mentions only conventions, agreements, common policies, and recommendations. However, the Council of Ministers does adopt texts also in the form of guidelines (see for example the Guidelines on child-friendly justice of 17 November 2010). There is no official definition of guidelines in delineation of a recommendation. In general, guidelines are more appropriate where there is already an established legal framework in member States. In this case, guidelines are limited to policy advice on the implementation and rounding out of existing rules. However, such established legal framework is missing for lobbying.

Conclusion

5.15 As most Council of Europe members do not have a specific lobbying regulation in place yet, a recommendation is more fitting than a set of guidelines. Moreover, a recommendation provides the possibility for the Committee of Ministers, under Article 15.b of the Statute of the Council of Europe, to request the governments of member States to inform it of the action taken by them with regard to the implementation of its recommendations. This constitutes a practical tool for assessing the implementation of a recommendation in member States and a means for further promotion. Securing agreement on a convention on the other hand would seem too complex and lengthy a task at this stage. Thus, a recommendation seems to be the preferable option.

6 PRELIMINARY PROPOSAL ON A LEGAL INSTRUMENT

PROPOSAL (1st DRAFT)

PRELIMINARY DRAFT RECOMMENDATION ON LOBBYING

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Recalling that the aim of the Council of Europe is to achieve a greater unity between its members, *inter alia*, for the purpose of safeguarding and realising the ideals and principles which are their common heritage,

Considering that promoting the adoption of common rules in legal matters can contribute to the achievement of the aforementioned aim,

Considering that the right to participate in the conduct of public affairs is one of the democratic principles that are shared by all member States of the Council of Europe,

Recognising that regulating lobbying can further strengthen its legitimacy and integrity by providing a transparent and fair framework for all stakeholders,

Recognising the fact that the lack of transparency in political and economic lobbying activities can be deemed to constitute one of the causes of the decline in public confidence in politics in many Council of Europe member states,

Recognising that the European Court of Human Rights has established a right of access to information as an inherent part of the right to freedom of expression protected by Article 10 of the European Convention on Human Rights, reflected in the Council of Europe Convention on Access to Official Documents (CETS No. 205),

Bearing in mind the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) and the relevant case law of the European Court of Human Rights, in particular in relation to Article 10 (freedom of expression),

Bearing in mind the Criminal Law Convention on Corruption (ETS No. 173), the Civil Law Convention on Corruption (ETS No. 174), Recommendation No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials, and, in particular, the evolving practice of the Group of States against Corruption (GRECO),

Recalling Recommendation 1908 (2010) of the Parliamentary Assembly – reiterated by Resolution 1744 (2010) and Recommendation 2019 (2013) – in which the Assembly acknowledges it as perfectly legitimate for members of society to organise and lobby for their interests and recommends that the Committee of Ministers of the Council of Europe elaborate a European code of good conduct on lobbying,

Recognising and valuing the work of Transparency International and other civil society organisations in this area,

Taking note of the OECD's "10 Principles for Transparency and Integrity in Lobbying", in particular Principle 1 according to which "countries should provide a level playing field by granting all stakeholders fair and equitable access to the development and implementation of public policies",

Having consulted with lobbying organisations on earlier drafts of this recommendation,

Noting that most member States of the Council of Europe have no comprehensive laws for the regulation of lobbying, though many have rules covering different aspects related to lobbying, governing conflicts of interest, access to ministry officials and members of Parliament, and transparency of the legislative process,

Considering that there is a need to encourage the adoption of relevant legislation in the member States and provide a framework for common principles,

Recommends that governments of member States establish, in accordance with the principles contained in the appendix hereto, a coherent and comprehensive legal framework for lobbying activities.

Appendix to Recommendation

GENERAL PRINCIPLES

A. CONCEPT

Representation of interests is an integral part of any legislative, administrative or judicial process in modern democracies. Regulating lobbying should not hinder any technical expertise or individual opinion from feeding into public decision processes. On the contrary, it should further strengthen the actual and perceived legitimacy and integrity of this input by providing a transparent and fair framework for the participation for all stakeholders in a democratic society.

B. DEFINITION

B.1 Not all forms of interest representation are lobbying and should not fall under a regulation. Therefore, a clear definition of lobbying is necessary. In formulating a definition, legislators need to consider the following elements:

Lobbying activity

B.2 The key element of any definition is the influence intended by the lobbyist through contact with a public official.

Third party interest

B.3 It is a key feature of professional lobbying that it is done in the interest of a third party, may this be a client, the employing corporation, or any other real beneficiary. Otherwise, all citizens contacting their Member of Parliament would be lobbyists. Including lobbying for one's own interest into a lobbying regulation requires a careful balance with constitutional guarantees of citizens: It is an essential part of democracy that citizens can influence public officials. A number of human and constitutional rights, such as freedom of expression or freedom of assembly protect exercising this influence.

Targeted branch

B.4 All three state branches of power (legislative, executive, judicial) can be subject to lobbying. In this sense, this Recommendation uses "public official" as a synonym for anybody performing a public function in any of these three branches of power including persons employed by private organisations performing public services.

B.5 Regulation can be different for each power. For example, lobbying of judges outside a trial is regularly prohibited already as an undue interference with the independence of courts. In addition, at lower instances the judiciary might not be a probable addressee of lobbying in all member States. By contrast, the executive and legislative branches of power are regular targets of lobbying.

Targeted decision

B.6 Legislators need to give due consideration to the possible wide range of decisions and other actions targeted by lobbyists. This includes not only legislation, but also nominations, resolutions, the adoption of public policies, administrative decisions, or the exercise of control functions.

Targeted level of state

B.7 Definitions should not a priori focus only on the national level but should also relate to sub-national levels of public power.

International organisations

B.8 As far as international organisations are concerned, it falls within their exclusive competency to regulate their internal matters including lobbying. However, obligations and sanctions under national laws targeting transparency and ethical conduct of lobbyists should extend to lobbying of international organisations.

Necessary exceptions: public officials, political parties, lawyers

B.9 Lobbying aims at influencing public officials in their legislative, administrative, and sometimes judicial decisions. At the same time, some forms of influencing public officials exist in a democratic society, which should neither be considered lobbying nor be subject to respective regulation.

B.10 Lobbying requires a private stakeholder influencing a public official. Whenever Members of Parliament or other public officials try to influence each other, or diplomats represent the interest of their State, the influence does not come from civil society. Thus, anybody representing third party interests as is necessary in the exercise of his or her public functions is not a lobbyist, unless a private third provides undue advantage in order to

influence public decision-making. Similar is true for political parties which, in any democratic society, are located between public power and civil society.

B.11 Lawyers represent third party interests, but normally do so in a relationship that is protected by confidentiality, privileged by constitutional and human rights principles, and thus exempt from any transparency. Legal advice and representation, in particular in formal procedures, needs to be excluded from the definition of lobbying. This means at the same time, wherever lawyers represent a client, but not in a concrete legal case lobbying regulations can apply.

Indicative definition

B.12 In light of above points, for the purposes of these general principles, and notwithstanding the possibility of differing approaches, lobbying is any contact of an individual with a public official in the interest of a third party in order to influence legislative, administrative or judicial decisions, unless it takes place in a formal procedure, as part of a public position, through legal counselling, or through activities of political parties.

C. EXCEPTIONS

C.1 To ensure better transparency, accountability and public awareness of decision-making, regulations should avoid exemptions from the lobbying regime for certain interest groups, such as religious associations, trade unions, or other civil society groups. Whenever such exemptions are inevitable in order to reflect constitutional or cultural particularities, such exemptions still need to align with the constitutional and human rights principle of equal treatment, and to prevent these groups being used as a cover for regulated activities.

C.2 Exceptions are also possible and recommended whenever the cost of the regulation would outweigh its benefits. Lobbying activities of insignificant level – measured for example by its frequency or economic scale – might not require (full) regulation. Similar can be true for certain lobbying activities, such as public hearings or open letters to legislators, which are transparent by themselves and might not require additional disclosure. Proportionate regulation needs to be considered in particular for volunteer and not-for-profit lobbying efforts.

C.3 No matter how lobbying is defined, legislators should consider how the regulation will appropriately target not only the physical person lobbying, but also other people, in particular his/her employer, the third party whose interests the lobbyist represents, the contacted public officials, or the public entity they belong to.

D. TRANSPARENCY

D.1 One of the main objectives of a lobbying regulation is transparency. A mandatory register and regular reporting by lobbyists (or their employers) and public entities on lobbying contacts are the main tools targeted at enhancing transparency. Preferably, information on lobbying should be available from only one or a few sources, instead of a multitude of sources. Timely release of lobbying data is critical, in order to allow for meaningful public oversight and intervention.

D.2 Any register and reporting should contain comparable, meaningful information which goes beyond the mere name and address of the lobbyist. Such data would include – if applicable – staff, customers, fees or costs, and targeted legislation. It may also encompass further information such as documents or positions shared between a lobbyist and public officials. The regulation needs to define time limits for and the frequency of submitting the data. Lobbying should only be permitted once lobbyists are registered. If there is no register, similar rules should establish transparency through reporting obligations on lobbyists and on public bodies.

D.3 There should only be exceptions to the report of lobbying activities, where it is necessary to protect data as it would be with any other matter of freedom of information. The freedom of access to information standards can provide some guidance in this, including on the mitigating measures such as redacting certain private information. A useful public database requires in particular electronic and free access, and data in searchable, machine-readable format. Member States could encourage corporations to do further voluntary reporting on lobbying activities as part of their Corporate Social Responsibility commitment.

E. ETHICAL LOBBYING

E.1 Lobbyists need to adhere to ethical rules including in particular the following obligations: honesty regarding their lobbying assignment, refraining from undue influence on public officials, and avoiding conflicts of interest.

E.2 Lobbying regulation itself should lay out at least the core ethical principles for lobbyists, whereas further details can be subject to by-laws or self-regulation. In any case, member States should encourage enterprises engaged in lobbying and professional bodies of lobbyists to adopt and publish codes of conduct for lobbying. Any code of conduct should be public, and entered into the register where applicable. Corporations should be also encouraged to report on their ethical commitments.

F. RULES FOR THE PUBLIC SECTOR

The overall regulatory framework needs to ensure that public officials meet the necessary standards of integrity when dealing with lobbyists. Member States need to pay attention in particular to: incompatibility of being a public official with lobbying private interests; cooling-off periods before a public official can become a lobbyist or before a lobbyist can serve in a public body; the duty to report violations of lobbying rules; disclosing conflicts of interest; refusing and declaring undue gifts and hospitality; preserving confidentiality of data.

G. ACCESS AND PARTICIPATION

All stakeholders, from the private sector and the public at large, enjoy fair and equal access to public decisions and the right to participate in their development. For this, open, consultative processes of public decision-making, access to information, and a balanced composition of consultative bodies (such as expert or advisory groups of ministries) are essential. Within this general framework, all citizens seeking to represent an interest may present their positions, meet with public officials, or receive invitations to consultations.

H. SANCTIONS

Lobbyists, including the body they lobby for, and public officials shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions, for violating regulations on transparency and ethical conduct. Lobbyists, who commit ethical offences of serious nature, such as corruption and similar criminal offences, or repeatedly violate regulations, should be (temporarily) excluded from exercising lobbying. Lobbying contracts concluded in violation of essential regulations should be null and void.

I. OVERSIGHT, ADVICE AND AWARENESS

A public oversight body with an adequate number of trained personnel should monitor compliance with rules on transparency and on ethical lobbying; follow-up on complaints; advise lobbyists and public officials on the application of the law; maintain a possible register; analyse trends; and raise awareness amongst the public and the profession on developments in lobbying. In addition, several other public and private stakeholders will be involved in monitoring and enforcing compliance, may it be with regards to disciplinary liability of public officials, or with regards to professional self-regulation.

J. REGULATORY FRAMEWORK

J.1 No matter whether it is subject of one targeted legislation or amendments of several miscellaneous regulations, regulating lobbying requires adoption and/or revision of a number of laws for different sectors and on different regulatory levels; otherwise the entirety of lobbying regulation efforts may prove futile. This concerns, among others, general laws on the status and obligation of public officials, on legislative procedures and transparency, on access to public information, on media sponsoring, or on political finance.

J.2 Self-regulation can complement public laws, in particular in the area of ethical lobbying. However, the main ethical principles should be the prerogative of public law.

J.3 The lobbying regulation should be subject to periodic assessments of its effectiveness undertaken.

Annex 1 – ABBREVIATIONS

CDCJ	European Committee on Legal Co-operation
ECHR	European Convention on Human Rights
ETS	European Treaty Series (www.conventions.coe.int) - (ETS No. 001 to 194 included)
CETS	Council of Europe Treaty Series (CETS No. 194 and following)
EU	European Union
GRECO	Group of States Against Corruption (Council of Europe)
OECD	Organisation for Economic Co-operation and Development
OSCE	Organization for Security and Co-operation in Europe

Annex 2 – CONSULTATIONS

The author is grateful for the advice of the following on an earlier draft of this study (though they may not necessarily agree with the outcome):

- Helen Darbshire, Executive Director, Access Info Europe.
- Heiko Kretschmer, Ethics Commissioner of the German Association of Political Consultants (de'ge'pol), Chief Executive Officer at Johanssen + Kretschmer Strategic Communications.
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