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Activity 1.2: "Lobbying" (August 2016)

Legislative Toolkit on Lobbying

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The views expressed herein can in no way be taken to reflect the official position of the European Union and/or the Council of Europe.

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Content

1. INTRODUCTION

1.1. Main objective of regulations

In a democratic society, all citizens are constantly "lobbying" for what they want: they choose their representatives in parliament; take to the street for manifestations; or hold referenda. By this, they all participate in public decision-making and exercise human rights such as freedom of expression (Article 10 European Convention on Human Rights – ECHR), freedom of association (Article 11 ECHR), or free elections (Article 3, 1st Protocol ECHR). Organised groups – be they of business or not for profit nature – also participate in this influencing process, contributing to a "marketplace of ideas" and ideally providing for more informed and relevant government. As with any exercise of freedoms however, there are also risks. In the area of lobbying, these are in particular:

- **Resources**: Some stakeholders have more money and other resources available to put into lobbying activities. This creates the risk, that a fair political competition about democratic influence becomes distorted.
- **Access**: Some stakeholders have privileged access to decision makers. As with resources, this can distort the fair political competition about influence. Some stakeholders can also have access to more information than the general public. This asymmetry can constitute an unfair advantage.
- **Ethics**: Some lobbyists try to play foul by deceiving public officials or the general public on what they are doing, or are trying to influence public officials with improper means. Public officials can also act unethically, for example when they abuse their position for lobbying in the interest of private clients or succumb to illicit means of influence, for example, bribes by lobbyists.

Lobbying regulations address above challenges by creating more transparency on lobbying activities and by setting fair rules. Their principle aim is to secure a more open, effective and accountable interaction between all constituents and public officials.

1.2. Precondition: an open, participatory society

Obviously, lobbying regulations can only make a difference if they are part of a **larger framework** of limiting undue influence in politics. This includes laws on conflicts of interest, political financing, the status and organization of political parties, the status and obligations of public officials, access to public information, the freedom of the media, media sponsorship, and the guarantees of free and fair elections.

However, perhaps most critically to the success of lobbying regulation is the general opportunity for stakeholders to **participate** in the process of public decision making. Where public bodies have a closed shop mentality, they will seek or hear no alternative opinion or perspective. Only those with privileged access and connections will be successful. By contrast, where governments expand spaces for participation by the general public, disproportionate influence by privileged insiders diminishes.

Transparency of and participation in public decision by citizens is generally not the subject of lobbying laws, but of **separate legislation**, where it exists. There are several international standards and comparative publications on public participation.[1] The participatory approach of making policies and laws at the level of the European Union and its Member States, for example, is enshrined in the

[1] European Centre for Not-for-Profit Law (2010), *Comparative Overview of European Standards and Practices in Regulating Public Participation*, available at www.icnl.org; The European Institute of Public Participation – EIPP (2009), *Public Participation in Europe – An International Perspective*, available at www.participationinstitute.org, accessed 31 August 2016.

Lisbon Treaty.[2] More specifically, Article 10 prescribes that: "Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen." One should also note in this context the Council of Europe draft "Guidelines for meaningful civil participation in political decision-making".[3]

1.3. Existing regulations

As of July 2016, at least 22 countries worldwide have a **specific** lobbying regulation in place at the national level. The number depends on where one sets the threshold for counting a regulation. The density of regulations varies greatly. In Germany interest groups have to register under a sub-statutory standing order if they want to be heard by a parliamentary committee; no sanctions apply in case of non-compliance. By contrast, in Ireland and Canada, a wide variety of lobbyists (beyond interest groups) have to publicly report regularly on their activities, are subject to ethical rules, and face administrative or criminal sanctions in case of non-compliance.

This toolkit references mainly the following **national** lobbying regulations:

- **Australia**, *Lobbying Code of Conduct*, 2013
- **Austria**, *Lobbying- und Interessenvertretungs-Transparenz-Gesetz* (Law on Transparency of Lobbying and Interest Representation), 2012
- **Brazil**, *Presidential decree no. 4334*, 2002 (in Portuguese)
- **Canada**, *Lobbying Act*, 1985
- **Chile**, *Ley N° 20.730 regula el lobby y las gestiones que representen intereses particulares ante las autoridades y funcionarios* (Law regulating the lobby efforts and interest representation towards authorities and officials), 2014
- **France**, Assemblée Nationale, *Code de conduite applicable aux représentants d'intérêts* (Code of Conduct for Representatives of Interests), 2009 (see also for the Senat: *Code de conduite applicable aux groupes d'intérêt au sénat*, 2009; if not quoted otherwise, reference is made to the Assemblée Nationale); an English translation is available in the following GRECO Report on France: *Greco Eval IV Rep (2013) 3E*.
- **Georgia**, *Law of Georgia on Lobbying Activities*, 1998 (in Georgian)
- **Germany**, *Anlage 2 Geschäftsordnung Bundestag – Registrierung von Verbänden und deren Vertretern* (Annex 2 Standing Orders of Parliament, Register of Interest Groups and their Representatives), first time adopted in 1972
- **Hungary**, Government decree 50/2013 (II.25.) *on the system of integrity management within public administration*, 2013, in Hungarian (replacing a previous *Law of 2006 on Lobbying Activities*)
- **Ireland**, *Regulation of Lobbying Act*, 2015
- **Israel**, Knesset Law (Amendment No. 25), 2008 (*English summary*)
- **Lithuania**, *Law No. VIII-1749 on Lobbying Activities*, 2000
- **Macedonia**, *Law on Lobbying*, 2008

[2] Treaty *webpage*, available at www.lisbon-treaty.org, accessed 31 August 2016. See also Article 11: "1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. 2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society. 3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent. 4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties."

[3] CoE *website*, available at www.coe.int, accessed 31 August 2016.

- **Mexico**, *Reglamento de la Cámara de Diputados* [Regulations of the Chamber of Deputies](Chapter III), as amended in 2011
- **Montenegro**, *Law no. 52 on Lobbying*, 2014
- **Netherlands,** *Lobbyistenregister*, 2012 (without a separate regulatory basis)
- **Peru**, *Ley Nº 28024 que regula la gestión de intereses en la administración pública* (Law no. 28024 regulating the management of interests in public administration), 2003
- **Poland**, *Act on legislative and regulatory lobbying*, 2005
- **Slovenia**, *Integrity and Prevention of Corruption Act*, 2010
- **Taiwan**, Lobbying Act, 2007 (*English summary*)
- **United Kingdom**, *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act*, 2014
- **United States**, *Lobbying Disclosure Act*, 1995, replacing the Lobbying Act of 1946 (see also: *Honest Leadership and Open Government*, 2007; if not quoted otherwise, reference is made to the Act of 1995)

Lobbying laws exist on the national, federal, state, **regional**[4] and **city** level,[5] and sometimes specific institutions such as a **ministry**[6] have their own lobbying regulation. This legislative toolkit focuses mainly on national/federal lobbying regulations, complemented in some cases by regulations on the state level (Canada, United States). One should also mention in this context the joint European Transparency Register of the **European Commission** and Parliament. It is not based on a law, but only on an Interinstitutional Agreement.[7]

The level of **regulatory detail** varies starkly between different countries. The total number of characters used for a lobbying regulation is about 900 for Germany, 2,000 for Lithuania and Poland, 4,100 for the United States, and 5,700 for Canada.

In many countries, **draft** laws have been or are tabled with parliament regulating lobbying, such as for example in the Czech Republic,[8] Slovakia,[9] Ukraine,[10] India,[11] or the Russian Federation.[12]

In the following **timeline**, dates represent the adoption of the first regulation on a national level, notwithstanding further amendments or new versions:

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[4] See as one recent example: *Lobbying (Scotland) Act* of 10 March 2016, available at www.parliament.scot, accessed 31 August 2016; see also Legge regionale v. 18 1. 2002, Nr. 5, *Norme per la trasparenza dell'attività politica e amministrativa del Consiglio regionale della Toscana* (Tuscany Law no. 5/2002 on transparency in administrative and political activities), available at www.consiglio.regione.toscana.it, accessed 31 August 2016.

[5] City of New York, *website of the lobbying bureau*, available at www.cityclerk.nyc.gov, accessed 31 August 2016.

[6] See for example the Italian Ministry of Agriculture, OECD (2014), Volume 3, *Implementing the OECD Principles for Transparency and Integrity in Lobbying*, page 189, available at www.oecd.org, accessed 31 August 2016.

[7] See for further details: European Parliamentary Research Service (May 2016), *Briefing PE 581.950 EN*, EU Transparency Register, available at www.europarl.europa.eu, accessed 31 August 2016.

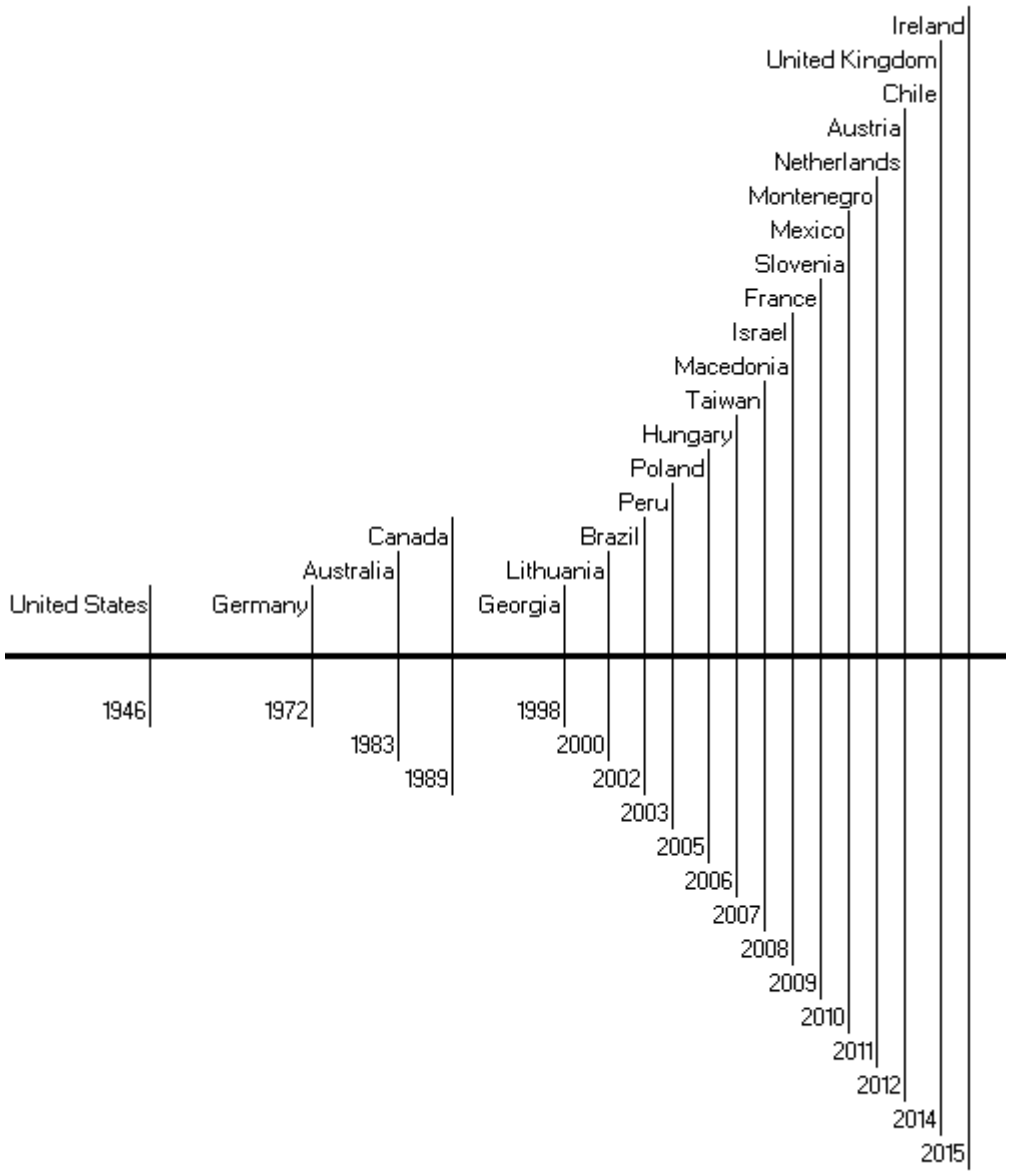
[8] Centre for Public Policy PROVIDUS/Valts Kalniņš, *Transparency in Lobbying: Comparative Review of Existing and Emerging Regulatory Regimes*, 2011, available at http://pasos.org, accessed 31 August 2016.

[9] PROVIDUS, ibid.

[10] PROVIDUS, ibid.

[11] Bill No. 208 of 2015, The Disclosure of Lobbying Activities Bill, Parliament of India, *Parliamentary Bills Information System*, available at http://164.100.47.4, accessed 31 August 2016.

[12] Institute of Lobbying (2013), *The Lobbying Law: the History of Rejection*, available at http://lobbyinst.org, accessed 31 August 2016.



1.4. Evolving international recommendations and standards

A number of publications in the last years are proof of the growing interest in lobbying regulation, for example:

- OECD "Lobbyists, Government and Public Trust", Volume 1 "Increasing Transparency through Legislation" (2009), Volume 2 "Promoting Integrity through Self-regulation" (2012), Volume 3 "Implementing the OECD Principles for Transparency and Integrity in Lobbying" (2014);[13]
- Centre for Public Policy PROVIDUS/Valts Kalniņš Transparency in Lobbying: Comparative Review of Existing and Emerging Regulatory Regimes, 2011;[14]
- Access Info Europe, Lobbying Transparency via Right to Information Laws, 2013;[15]

[13] OECD *website on lobbying*, available at www.oecd.org, accessed 31 August 2016.

[14] PROVIDUS, ibid.

[15] Access Info Europe, *website*, available at www.access-info.org, accessed 31 August 2016.

- Transparency International, Lobbying in Europe – Hidden Influence, Privileged Access, 2015.[16]

At the same time, international organisations have reviewed the need and options for more regulation in this field, as for example:

- Council of Europe, Parliamentary Assembly Recommendation 1908 (2010) on lobbying in a democratic society;[17]
- Council of Europe, Parliamentary Assembly Resolution 1744 (2010)[18] on extra-institutional actors in the democratic system, and accompanying Report Doc. 12278;[19]
- Venice Commission Report CDL-DEM(2011)002 on the legal framework for the regulation of lobbying in the Council of Europe member States;[20]
- Venice Commission Report CDL-AD(2013)011 on the Role of Extra-Institutional Actors in the Democratic System (Lobbying);[21]

Starting in 2010, the first international standards evolved:

- OECD member countries adopted in 2010 "The 10 Principles for Transparency and Integrity in Lobbying";[22]
- The Council of Europe's European Committee on Legal Co-operation (CDCJ) has commissioned a study in 2013 in order to determine the feasibility of preparing a European legal instrument on a framework for lobbying.[23] Following this study, the Committee adopted a draft Recommendation in 2016.[24]

International NGOs support the formulation of international standards:

- Sunlight Foundation, "International Lobbying Disclosure Guidelines", 2013;[25]
- Access Info Europe, Lobbying Transparency via Right to Information Laws, 2013;[26]
- Transparency International and others, International Standards for Lobbying Regulation. Towards greater transparency, integrity and participation, 2015 ("International NGO Standard").[27]

The "Group of States against Corruption" (**GRECO**) has chosen integrity of lobbying contacts as one of the issues of its 4th Round of Evaluations.[28]

1.5. User Instructions

[16] TI *website*, available at www.transparency.org, accessed 31 August 2016.

[17] Recommendation 1908 (2010), available at http://assembly.coe.int, accessed 31 August 2016.

[18] *Resolution 1744 (2010)*, available at http://assembly.coe.int, accessed 31 August 2016.

[19] *Report Doc. 12278,* available at http://assembly.coe.int, accessed 31 August 2016.

[20] *Report CDL-DEM(2011)002*, available at www.venice.coe.int, accessed 31 August 2016.

[21] *Report Doc. 12278*, available at www.venice.coe.int, accessed 31 August 2016.

[22] *10 Principles*, available at http://acts.oecd.org, accessed 31 August 2016.

[23] *Website* Council of Europe, available at http://assembly.coe.int, accessed 31 August 2016.

[24] Ibid.

[25] *Sunlight Foundation*, available at http://sunlightfoundation.com, accessed 31 August 2016.

[26] *Access Info Europe*, available at www.access-info.org, accessed 31 August 2016.

[27] *Standard* by Access Info Europe, Open Knowledge Foundation, Sunlight Foundation, and Transparency International, available at http://lobbyingtransparency.net, accessed 31 August 2016

[28] GRECO *website*, available at www.coe.int, accessed 22 August 2016.

It is already difficult to formulate an international standard on lobbying. It is all the more difficult, to translate one into a national legislation. For example, the Council of Europe Draft Recommendation states: “Exemptions to the legal regulation of lobbying should be clearly defined and justified.” This raises the question, what these exemptions could be, how they could be worded, and what possible examples of such exemptions are.

This toolkit intends to provide answers to these questions. It takes the following approach:

- **Regulatory guidelines** provide a starting point to users of the toolkit for their own draft law. They offer several options whenever appropriate. Obviously, this is not a prescriptive proposition. Rather, it is an attempt to illustrate concretely how one can formulate a law on lobbying.
- For each provision, **commentaries** clarify the rationale; illustrate the necessity of regulation with case examples; and point out what to pay attention to. This way, legal drafters will hopefully get a clearer picture of their room for manoeuvre when formulating draft provisions.

It is obvious that this legislative toolkit, including its regulatory guidelines, cannot replace a process of careful legal drafting: each national draft law will need **tailoring** to the needs, terminology, and legal framework of the given country. However, it is hoped that with this legislative toolkit **drafting** of laws on lobbying will become much easier.

This legislative toolkit models most of its provisions based on articles from various legislations. Using well-formulated provisions, or a part of them, from foreign laws, does not necessarily mean that the referenced law in other parts or in its entirety worked. One should also keep in mind that while some laws have been enacted many years ago, their **implementation** has been dormant or at least disputed. Obviously, for any law to work, including any future law drafted based on this legislative toolkit, sufficient will and capacity for implementation are conditional.

Reference to lobbying regulations included in the above list is done by simply referring to the country name, followed by the section or article, as for example “Article 16.1.a” meaning “Article 16 paragraph 1 subsection a”.

One should keep in mind that this legislative toolkit aims at creating an **ideal framework**. Countries who do not have any experience with lobbying regulation might want to consider introducing regulation in an incremental way. For example, one could start off by covering some narrower groups of lobbyists or some particular institutions, e.g. parliament. Introducing the full set of regulation could be put off until after the first step is taken.

Furthermore, it is important to keep in mind that lobbying regulation can be **abused** in autocratic systems without an independent judiciary. For example, a government could (mistakenly) argue that members of an NGO taking part in a public manifestation are lobbying the interests of the NGO. They could then take the lack of registering as the basis for sanctions for participants of this manifestation or for deterring participants of future manifestations. Such obvious legally faulty interpretations of lobbying regulations could be backed up by politically dependent courts. In the end, any integrity tool, such as transparency on campaign donations, could be abused by an autocratic regime. However, one needs to be aware of the particular risk of lobbying regulations in this context as well.

The toolkit aims at a **uniform** regulation of lobbying in any given country as opposed to different regulations for various institutions (Government, Senate, Lower House of Parliament, etc.). In principle, a uniform regulation makes it easier for (potential) lobbyists to understand one set of rules instead of a series of differing laws. A uniform regulation will also automatically lead to a uniform register instead of fragmented multiple registers. However, constitutionally, regulation of lobbying might fall into parallel competencies, for example for Federal institutions in the competency of the Federation, and for State institutions in the competency of the States (e.g. Canada, United States).

2. REGULATORY GUIDELINES AND COMMENTARIES

Chapter I: General provisions

Article 1 – Definition

(1) *[Lobbying]* **Lobbying is any direct or indirect communication with a public official in order to influence a legislative, executive, or administrative decision.**

(2) *[Public official]* **"Public official" means any person holding a legislative, executive, administrative or judicial office, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority, including their advisors. It also includes any other person who performs a public function, including for a public agency or public enterprise, or provides a public service.**

(3) *[Lobbyist]* **The following are "lobbyists" subject to this law:**

(a) *[Individual lobbyist]* **Any natural person lobbying in his or her own entrepreneurial interest;**

(b) *[Consultant lobbyist]* **Any natural or legal person in the course of a business lobbying in the interest of a third party;**

(c) *[In-house lobbyist]* **A natural person employed or similarly mandated by a third party and lobbying the third party's interests on occasion or regularly.**

(d) *[Other]* [to be defined]

(4) *[Entrepreneurial interest]* **"Entrepreneurial interest" has the meaning as defined in the law** [to be specified].

Commentary

Paragraph 1 – Lobbying
All members of society are constantly **influencing** each other. This not only takes place in the private sphere of all citizens, but also in public life. Citizens communicate with administrative bodies; organise in associations and political parties; hire lawyers to push through their interests in court; take to the street for manifestations or hold referenda; and of course create corporate bodies that start to pursue their own ends.

From this vast spectrum of constant influencing, a lobbying definition needs to carve out a part, where legislators feel **regulation** is required. This is why the definition of lobbying is probably the most disputed part of any draft legislation on lobbying: Who will be subject to regulation, and who can continue to influence society without regulation? Where exactly should one draw the line between both spheres?

Legislators in countries with a lobbying law by and large all see a need for regulation when the influencing is done in a **professional** manner in order to shape public policy. The following rationale is behind this: In real life not all members of society have the same capacity to make themselves heard and to participate. Some stakeholders have more money to put into lobbying activities; others have privileged access to decision makers. In other words: equal right-holders compete with unequal means for the attention of public officials. A lobbying regulation aims at balancing out this inequality to some extent through transparency, integrity, and participation.

Communication
There are various options of describing the relation between the lobbyist and the public official:

- **Communication**, e.g. Australia, Section 3.4; Canada, Section 5.1.b; Ireland, Section 5.1; United Kingdom Section 2.1.

- Any **oral** or **written** communication, e.g. United States, Section 3.8.A.
- Communication as part of a structured and **organised action**, e.g. Council of Europe, Draft recommendation, Definition a).
- **Contact**
    - Organised and structured contact, e.g. Austria, § 4.1.
    - Non-public contact, e.g. Slovenia, Article 4.11.
- Arranging a **meeting**, e.g. Canada, Section 5.1 (b).
- **Activity** (aimed at influencing), e.g. Montenegro, Article 2.

In principle, all above **terms** be used in a lobbying regulation, depending how they are understood and what exceptions apply. For example, the term "non-public contact" in Slovenia covers already several exceptions: Whenever there is a public hearing in parliament, or a public exchange of arguments, the lobbying law does not apply The apparent rationale behind this is that the lobbying activity is already transparent because of the public nature of the event. By contrast, the term, "activity" (Montenegro) is certainly the widest. A priest preaching to his congregation on political issues, or a media journalist writing an editorial carry out "activities aimed at influencing" public officials (through the congregation or readership). Thus, the Montenegrin law needs to list more exceptions in order to exclude activities it does not want to cover accidentally (such as media articles, or religious activities).

Between communication and contact as such, not much difference exists. It is hard to imagine, how a contact with the aim of influencing is not at the same time some form of communication with the public official. This legislative toolkit chooses the term communication simply for the reason that two of the oldest and strongest lobbying statutes use this term (Canada, United States), and two modern **European** laws do so as well.

The term "organised and structured contact" might not work in all countries. It would exclude spontaneous attempts of influence, which can play an important role. It also provides a rather easy **backdoor** out for lobbyists who want to cheat and claim that the contact was not "organised and structured". The term "non-public contact" has the disadvantage that it cuts out a big part of lobbying activities from the outset. As for transparency requirements, this might be justified. However, there are also ethical obligations on lobbyists, such as disclosing the true beneficiary of the lobbying activities. It seems thus preferable to aim for a larger definition of lobbying. If legislators want to exclude public lobbying activities from registering, they should do so with an exception to the registry obligation, not by leaving them out of the entire application of the law.

The Canadian alternative of "arranging a **meeting**" is an interesting clarification. Depending on the interpretation, arranging a meeting is already included in "communicating in order to [ultimately] influence" the public official. For example, where the lobbyist arranges for the director of a company to meet with an influential lawmaker, the arrangement itself could be viewed as lobbying under paragraph 1. Depending on the need for legal clarity, legal drafters may want to consider including in paragraph 1 a second sentence, such as: "This includes arrange a meeting between a public official and the third party". Other jurisdictions have taken the same stance. For example the New York State Joint Commission on Public Ethics (JCOPE) has recently issued an advisory opinion expanding the State's lobbying law to apply to "preliminary communications to facilitate or enable the eventual substantive advocacy." In other words, according to the JCOPE opinion, "when [an] individual communicates with a public official (or [the official's] staff) on behalf of a client – for the purpose of enabling the client to explicitly advocate before the public official – the lobbying has begun."[29]

[29] WileyRein Newsletter (March 2016), *New York State Expands Lobbying Law to Cover Consultants*, available at www.wileyrein.com, accessed 31 August 2016.

A press release, or an annual report, is not "communication" since they target the general public. The Irish Standards in Public Office Commission has pointed out in this context that "generally a communication that is aimed at a general audience or the public would not be considered lobbying. To be considered lobbying, a communication must be made to a Designated Public Official about a relevant matter."[30]

In practice, one of the main questions is, whether the terms "communication" or "contact" only apply to activities **initiated** by the lobbyist. For example, a minister might invite representatives of certain businesses to consult on matters of future legislation. The wording of paragraph 1 – as well as the wording of existing lobbying laws – "makes no distinction as to who initiated the communication".[31] It is also interesting to note, that at least one ethics commission in the United States took the position that the business matter does not need to be **explicitly discussed** in order to be "communication". In the case at hands, an engineering firm paid for a hunting trip that included "firm employees and state officials". The Texas Ethics Commission decided that the hunting trip "is communication to influence administrative action, even if the purpose of the trip is to influence agency action by the generation of goodwill and even if business is not discussed during the trip."[32]

Lobbying definitions are somewhat misleading. They almost all focus only on the contact with the public official, because it is the ultimate key for influence on public policy. However, it should be kept in mind that lobbyists spend most of their time on **preparatory** work such as research and monitoring. For example, regarding lobbying a draft law, lobbyists need to know inter alia: What are the substance issues involved? What is the history of existing legislation? What are policy positions of key stakeholders? How could the lobbying message be best conveyed and to whom? However, as long as these activities remain purely internal without any attempt to influence public policy, there is no need to make them transparent or set ethical boundaries (unless, of course, a former public official is involved). On the contrary, it would appear to be constitutionally challenging to regulate the basic freedom of everybody to research a question of interest. However, one should notice that some countries, such as Montenegro, even regulate these preparatory stages.[33] Preparatory work can also be relevant in countries using **thresholds** of time or money spent on lobbying (see below comments on Article 2, keyword "*de minimis*"). In the United States for example, the term ''lobbying activities'' is defined as "lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others." (Section 3.7). A similar approach has also been chosen for the EU Transparency Register (Article 7 of the Inter-Institutional Agreement).

Direct, indirect

The **direct** communication with a public official is the normal case, and is legally rather unproblematic. For example, a lobbyist writes to a lawmaker pointing out how a current law is not working well for his/her client, and how the situation should be solved.

The alternative of indirect communication covers situations, where a lobbyist stands behind other stakeholders. This mainly concerns so called "**grassroots**" lobbying. Grassroots lobbying does not convey the message to the legislators directly. Instead, it consists of a lobbyist asking the general public to contact legislators and government officials concerning the issue at hand. The Canadian law defines grassroots lobbying as follows: "Any appeals to members of the public through the mass media or by direct communication that seek to persuade those members of the public to

[30] *Standards in Public Office Commission*, available at www.lobbying.ie, accessed 31 August 2016.

[31] The conclusion by a state-owned bank on a meeting of its director with the minister representing the State's share, The Irish Independent (22/05/2016), *Banks differ on disclosure of meetings under new lobbying laws*, available at www.independent.ie, accessed 31 August 2016.

[32] Ethics Advisory *Opinion No. 89*, December 10, 1992, available at www.ethics.state.tx.us, accessed 31 August 2016.

[33] Montenegro, *Law on Lobbying*, No. 52/2014 of 16 December 2014, Article 32: "Lobbyists [...] shall prepare an expert opinion with the proposed solutions relating to the laws and other general acts, which are the subject of lobbying, and shall supply the lobbying client with it, along with scientific publications, feasibility studies, research findings and other relevant documents at their disposal, in the manner and timeframe specified in the contract on lobbying.", available at http://antikorupcija.me, accessed 31 August 2016.

communicate directly with a public office holder in an attempt to place pressure on the public office holder to endorse a particular opinion." (Section 5.2.j). An example are postcards distributed to customers of an energy company with the request to send it to lawmakers to convey the policy message printed on the postcard. As another example, a bar association may send an email to all its members to contact their senator or representative to oppose a draft bill that would reduce legal fees for lawyers. The Canadian Lobbying Commissioner has stated that grassroots lobbying can be done through any means, such as "advertisements, websites, organization of a letter writing campaign, or through social media tools such as (but not limited to) Facebook or Twitter."[34]

Legal drafters may find that "indirect" communication is too vague as a term to cover grassroots lobbying. An option in this context could be the wording of the Irish Law, which further specifies that the lobbyist needs to "**manage or direct**" the communication. In above example, this would be the concerted sending out of postcards to customers with the apparent intention to make them part of a larger lobbying campaign.

Grassroots lobbying is not to be confused with grassroots **campaigning**. Grassroots campaigns can be, but do not have to be lobbying. For example, where people on the local level join into collective action in order to protest against the construction of a shopping mall in their neighbourhood, they only promote their own interests together, without being lobbyists under paragraph 3. If in the same case the developer of the shopping mall hires a lobbyist in order to mobilize citizens in favour of the mall, this would technically be lobbying. For this reason, in Australia, "petitions or communications of a grassroots campaign nature in an attempt to influence a Government policy or decision" are explicitly excluded from the definition of lobbying (Section 3.4.d).

Grassroots lobbying is also not to be confused with "**astroturfing**". AstroTurf is a U.S. brand of synthetic carpeting designed to look like natural grass. Thus, "astroturfing" is a play of words for a fake version of "grassroots" lobbying. Usually, in grassroots lobbying it is somewhat transparent who mobilizes the masses, as for example in the mentioned case of postcards with a printed lobbying message. With astroturfing, a lobbyist hides behind grassroots efforts, but makes these appear as if being triggered only by the concerned citizens (=grassroots lobbying). For example, U.S. media report that pharmaceutical companies sponsored patient encounter groups which lobbied the companies' interests while the lobbying appeared only under the flag of this self-help group.[35]

Some lobbying laws use wordings instead of "indirect" that more directly address the grassroots and astroturfing forms of lobbying. For example, the Lobbying Law of the State of Providence defines this part of lobbying as "acting directly or **soliciting others** to act" in order to influence public policy.[36] The New York State Joint Commission on Public Ethics (JCOPE) has defined grassroots lobbying in one of its opinions as "an attempt to influence a public official through a **call to action**, i.e., [if it] solicits or **exhorts the public**, or a segment of the public, to contact (a) public official(s)."[37] To this end, the Irish Law chose the wording "make, manages or directs" in order to cover also such cases of indirect communication that are "directed" by the lobbyist.

In this regard, lobbying may exploit the **media**. This is the case, where the lobbyist hides behind a media communication without disclosing the professional lobbying behind it. The JCOPE addresses these cases by including the following into indirect lobbying: "A consultant who contacts a media outlet in an attempt to get it to advance the client's message in an editorial" and "paid media consultants who are hired to proactively advance their client's interests through the media".[38] However, many lobbying laws explicitly exclude the media from its application (see below at Article

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[34] *Lobbying Commissioner*, available at https://lobbycanada.gc.ca, accessed 31 August 2016.

[35] New York Times (14 December 2013), *The Selling of Attention Deficit Disorder*, available at www.nytimes.com, accessed 31 August 2016.

[36] Providence Journal (6 July 2016), *Raimondo: Lobbying law makes rules 'clear, simple, consistent and transparent'*, available at www.providencejournal.com, accessed 31 August 2016.

[37] WileyRein Newsletter (March 2016), *New York State Expands Lobbying Law to Cover Consultants*, available at www.wileyrein.com, accessed 31 August 2016.

[38] Ibid.

2). This approach may avoid constitutional complications regarding freedom of the press. Nonetheless, legal drafters need to review in this case whether media laws foresee sufficient restrictions and disclosures where commercial or other third interests are behind a publication (see Annex 2).

Lobbying laws, as all integrity rules, may lead to cases which are difficult to decide. For example: Are vendors engaged in lobbying if they make robocalls or live telephone calls delivering a grassroots lobbying message on behalf of a client to members of the public? Under the literal language of paragraph 1 this would seem to be the case. Such cases illustrate the need for an oversight body with the power of providing advice on such cases in the **grey area** of definitions (see below at Article 9).

Officials

In a democracy, **citizens** are constantly objects of "lobbying", i.e. attempts of influence. Election campaigns try to persuade them to vote for a political party, media articles try to shape their political opinion, churches try to promote religious values of their followers, businesses try to make citizens loyal to their products, etc. All of these activities manifest the basic freedoms in a democratic society. At the same time, various laws set limits against abuse of these freedoms (political finance laws, media laws, anti-cult laws, consumer protection laws, etc.).

Lobbying laws concern a different target of influence: **public officials**. They are responsible for public policy and for setting rules. Paragraph 2 defines the term widely, as promoted by the Group of States against Corruption (GRECO)[39] or the United Nations Convention against Corruption (UNCAC). The wording is taken from Article 2 paragraph (a) UNCAC. It aims at including the widest circle of public officials possible. National laws, which focus only on top level representatives of the central government, leave out important other decision makers on **regional** or local levels of the state (United Kingdom, Section 2.3: "Minister of the Crown or permanent secretary"). **Advisors** are an important addition, as in particular political staffs of members of parliaments do not necessarily count as public officials in all jurisdictions. Obviously, the definition will have to be adapted to the national context.

At first sight it seems odd to include **judicial** officials, since judicial decisions are not included in the definition. However, judicial officials also take administrative decisions. This includes appointments to judicial positions or the procurement of services and goods for judicial administration. In particular judicial appointments can have a significant influence on public policy and thus should be part of a lobbying law.

"**Grassroots**" lobbying aims at influencing citizens by mobilizing them on policy issues (see above under keywords "Direct, indirect"). However, the ultimate aim of such a campaign is always that these citizens exert pressure on public officials. Thus, the inclusion of "grassroots" lobbying does not deviate from the principle that public officials are the target of influence.

It is interesting to note that in the United States the following are included in the term "public official": "a national or State **political party** or any organizational unit thereof" (Section 3.15.E) or "a national, regional, or local unit of any **foreign** government." (Section 3.15.F).

For public officials working at **international organisations** see below Article 11. For public officials working at private entities, see below under keyword "Decision".

Influence

The majority of lobbying laws **include** the term "influence" into the lobbying definition: Australia (Section 3.4); Austria (§ 4.1); Lithuania (Article 2.3), Montenegro (Article 2), and Slovenia (Article

[39] "GRECO has placed a broad construction on the concept of a public official as embracing the staff of all public sector services. Thus ethical and anti-corruption requirements concern all staff who engage in an activity within the administration in a permanent or temporary capacity, whether or not exercising actual prerogatives of state authority.", GRECO (2012), *Lessons learnt from the three evaluation rounds (2000-2010)*, page 11, available at www.coe.int, accessed 31 August 2016.

4.11). Equally, the Council of Europe Draft Recommendation (Definition a) and the International NGO Standard (Definition 1) contain this element.

Canada, Ireland, and United Kingdom simply refer to "communication with a public official" regarding public policy matters, **without** making "influence" an **explicit** requirement. In these laws, the element of influence is introduced "through the backdoor" via exceptions. For example, in Ireland "any matter relating only to the implementation of [...] policy, programme, enactment or award or of a technical nature" is not considered lobbying (Section 5.9). In these cases, the basic policy matter itself cannot be influenced anymore. The United States law makes an even more explicit reference to "influence" by excluding from the lobbying definition "a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence" the public official (Section 3.8.B).

Both approaches are obviously viable and can lead to the same results, if worded accordingly. The advantage of the Irish law is that one does not need to prove that the lobbyist had any intent of influencing the public official. This reportedly proved to be difficult in some jurisdictions:[40] "Canadian officials were disappointed to discover that proposed prosecutions had to be abandoned because the Crown Prosecutor concluded that: … in light of the insufficiency of evidence establishing that an attempt to influence had taken place and given there was no probability of obtaining a condemnation, no criminal accusation would be filed… […] As a consequence of this determination, the references to attempts to influence were later deleted from the Canadian Act and lobbying was described in terms of communications 'in respect of' legislation, policies and so on." However, it appears as if it could still be possible to conclude the intent of influencing from the circumstances in other jurisdictions.

Both approaches need exceptions for actions that should not be considered attempts to influence public officials. **Requests for information** belong here. If for example a "member of an engineering firm asks a Department of Transportation official what highway construction projects are being planned by the department", this is "not a communication to influence administrative action" and is not considered lobbying.[41] Obviously, the case is different, where the engineering firm employee "spends much of the luncheon extolling the merits of the engineering firm."[42]

In practice, questions can arise as to what the requirements are for "influence". At first sight, the **discretion** of the public official could be a decisive criterion: How could a public official be influenced who has no decision power at all in a given case? However, discretion is not the only criterion. Public officials may have no decision power, but they may communicate or even promote certain ideas within the administration. An assistant of a lawmaker has no decision making power in terms of parliamentary powers. However, influencing the assistant can be key in ultimately influencing the lawmaker him/herself. In this sense for example, an advisory opinion of the Texas Ethics Commission clarified that the Texan lobbying regulation "governs any communication to officers or employees of state agencies intended to influence agency action, regardless of whether the communication is made to a person who has the actual authority to make the change."[43] On the other hand, the Colorado lobbying law confines its scope to a list of top-level officials (presumed to have discretion) and aside from this to "rule-making officials". These officials are defined as having "jurisdiction or authority" to adopt "a rule", "a rate", or "a standard" (each further defined).[44]

Decision

[40] See OECD (2009), ibid, page 55.

[41] Ethics Advisory Opinion No. 89, ibid.

[42] Ibid.

[43] Ibid.

[44] Colorado *Sunshine Law*, section 24-6-301, 1.7, in combination with Secretary of State Rules Concerning Lobbyist Regulation (8 CCR 1505-8), Rule 2.1, available at www.sos.state.co.us, accessed 31 August 2016.

Many lobbying laws **enumerate** the specific forms of decisions that are covered by the lobbying law (e.g. Canada Section 5.1.a; Ireland Section 5.9; United States, Section 8.3.A). Other lobbying laws contain only a **general clause** (e.g. Austria, § 1.1; Lithuania, Article 2.3; Slovenia, Article 4.11). Australia follows a middle-form by combining a general clause with a non-exhaustive enumeration: "decision-making, including the making or amendment of legislation, the development or amendment of a Government policy or program, the awarding of a Government contract or grant or the allocation of funding" (Section 3.4). When opting for the enumeration, legal drafters will have to make sure that the list is comprehensive enough. The above mentioned enumerations can serve as inspiration. Focusing only on **parliamentary** decisions would not seem to be sufficient (Poland, Article 2). There are important public decisions also taken by the **executive** branch (including independent bodies), such as anti-trust decisions, financial market oversight approvals, or bail-out guarantees. On a **regional/local** level, it is obvious that for example building permits, procurement, or land zoning can have a significant economic impact and thus would justify respective lobbying efforts. Influencing decisions should be construed in a way that covers also attempts to prevent decision making or entry of a matter into the decision-making agenda.

The element of "decision" is important to separate **general expression** of opinion by targets of lobbying. For example, a representative of a corporation may ask the prime minister at a reception to "put more emphasis on economic growth". This remark is in the interest of the corporation but does not aim at any concrete decision and is thus not lobbying (unless of course it is an allusion to a specific policy decision, such as an anti-trust decision pending on the corporation).

Obviously, public decision-making can also be done by **private organisations** carrying out public functions. In this sense, the term is understood functional ("Does the decision serve a public function?") rather than formally ("Was the decision reached by a private or public entity?").

Excursus: Judicial decisions

Judges and judicial decisions can be an interesting **target** of lobbyists. One only has to think of the far-reaching financial impact the decision of the European Court of Justice or any highest national court can have, for example in the area of banking, anti-trust, or labour law. Similarly would it be naive to assume that fights on highly disputed issues as abortion or immigration are only fought in the arena of administrative or legislative officials. Many times in the end it is judges deciding over the legality or constitutionality of such reforms. In the United States, researchers found that there is "support for the contention that interest groups engage in counteractive lobbying in the nation's highest court." Their "findings indicate that, like the elected branches of government, the Supreme Court is properly viewed as a battleground for public policy in which organized interests clash in their attempts to etch their policy preferences into law."[45] It is interesting to note in this context that the Austrian Association of Judges called for the new Austrian Lobbying Law to include judges in order to provide them with clear protection from lobbying.[46]

However, judicial decisions are yet **not included** as a target in the definition of lobbying in any existing lobbying regulation, nor do international recommendations call for such an inclusion. The main reason is probably that including them would send the wrong signal. It would appear to the reader of the law as if lobbying of judges could be a **legal** option, while it is not: International standards, constitutions, and many national laws prohibit any interference with the independence of judges. In particular limitations on *ex parte contacts* as found in many jurisdictions serve this purpose.[47] In other words, including judicial decisions in lobbying regulations could "open the floodgates" to legitimising lobbying in the judicial sector.

An alternative could be **prohibiting** lobbying entirely in the judicial sector if done by lobbyists. However, this might not work in all local contexts. For example, a human rights NGO might write an

[45] Solowiej L.A. et. al. (July 2009), *Counteractive Lobbying in the U.S. Supreme Court*, American Politics Research 37 (4): 670-699, available at http://apr.sagepub.com, accessed 31 August 2016.

[46] National Association of Judges (19 July 2011), *Position Paper on the Draft Lobbying Law* (German), available at www.parlament.gv.at, accessed 31 August 2016.

[47] Mayer L.H. (2008), *What Is This "Lobbying" That We Are So Worried About?*, Yale Law & Policy Review 26:485, 529.

opinion feature in a newspaper urging the Constitutional Court to consider the ramifications of a pending case and suggesting the direction of the future decision. Technically, this would probably count as lobbying. However, should such a **public debate** be prohibited? The same question applies where lobbying in the judicial sector would be prohibited for anybody, not only lobbyists.

It appears therefore, as if it is wiser to set restrictions to lobbying of judicial decisions in laws regarding the **judicial sector**. Legal drafters therefore need to review in particular the following:

- Judicial code of conduct (prohibiting discussing ongoing cases with outside stakeholders);
- Prohibitions on undue influence of judges;
- Procedural rules on third parties submitting legal opinions (e.g. *amicus curiae* letters).

Legal drafters need to be aware that sufficient **sanctions** for influencing judges are often missing (apart from bribery or trading in influence). Even if specific offences exist in this regard, it is debatable whether they would cover all forms of undue lobbying. The Czech Criminal Code, for example, criminalises "Interference with the Independence of a Court": "Whoever influences a judge to breach his duties in proceedings before a court shall be sentenced to imprisonment".[48] A lobbyist could always argue he/she did not intend the judge "to breach his duties".

As with parliamentarians, judges of higher courts often have **legal experts** preparing their decisions. This staff also need to be included in respective regulations prohibiting undue influence.

Paragraph 2 – Public officials
For the definition of this term see above comments on paragraph 1, keyword "officials".

Paragraph 3 – Lobbyist

Normal citizen interactions
Without the element "lobbyist", the definition in paragraph 1 would be **too wide**: It would include normal interactions of citizens with their lawmakers or with the state administration in their daily life. It is the function of paragraph 3 to exclude these normal interactions of citizens from the scope by defining the term "lobbyist", as all lobbying laws do in one way or other.

The **Council of Europe** Draft Recommendation states in this context: "Legal regulation of lobbying should not in any form or manner whatsoever infringe the democratic right of individuals: a. to express their opinions and petition public officials, bodies and institutions, whether individually or collectively; b. to campaign for political change and change in legislation, policy or practice within the framework of legitimate political activities." (C.4). The **International NGO** Standard recommends that lobbying regulation should "not impede on the individual rights of assembly, free speech and petition of government".

Citizens often come only forward with their individual concerns to their lawmakers, if there exists a certain degree of **confidentiality**. Constitutions sometimes protect this confidentiality. In Germany for example, the Constitution gives Members of Parliament the right to "refuse to give evidence concerning persons who have confided information to them in their capacity as Members of the Bundestag [Parliament], or to whom they have confided information in this capacity, as well as evidence concerning this information itself."[49] According to legal commentaries, this right extends to all public procedures. Exposing private petitions through lobbying transparency would deter citizens from making moves outside mainstream politics and would significantly reduce the diversity of interests feeding into the democratic process, something which runs counter to the objective of lobbying regulation. For example, would a citizen dare to ask his/her lawmaker to question a criminal law forbidding marriage between relatives, or dare to seek to criminalise religious circumcision of minors, if letters on these matters became public information under lobbying laws?

[48] Section 169a para. 1 *Czech Criminal Code*, available at www.coe.int, accessed 31 August 2016.

[49] Article 47 *German Constitution*, available at www.gesetze-im-internet.de, accessed 31 August 2016.

Third party interest
There are mainly **three options** of protecting the freedom of citizens:

- Listing all **activities** of citizens that are exempt from the scope of lobbying regulation.
- Limiting lobbying to **remunerated** activities
- Limiting lobbying to influences in the interest of a **third party**.

It is interesting to note that international standards follow rather the first approach (Council of Europe Recommendation, International NGO Standard), while no lobbying law does so. This seems to suggest that this approach is viable for the rather general level of international principles, but not when it comes to legislative technique. Trying to describe all possible **activities of citizens** is simply a task too broad. It entails the risk of omitting an essential aspect and thus unjustifiably limiting the freedom of citizens.

Another option could be to limit lobbying to **remunerated** activities. For lobbying in general, or some forms of lobbying, statutes word the reference to remuneration as follows: "in return for payment" (Ireland); "in the course of a business and in return for payment" (United Kingdom); "for financial or other compensation for services" (United States). However, if lobbying is limited only to remunerated activities, this entails two main risks. First, it is unclear if employees, owners, or board members of corporations always fall under remunerated activities. Similarly, a consultant lobbyist might not always ask a (potential) client for remuneration while already lobbying on his/her behalf. Second, the public also has an interest in knowing about lobbying influences where no remuneration is involved. This concerns for example *pro bono* associations or foundations and individual business people.

Most, if not all lobbying laws follow the third approach. This seems to suggest that the reference to a **third party** is the preferred option when it comes to legislative technique. There are various terms for referring to a third party: "client" (Austria, Canada, Lithuania, Montenegro, and United States), "third party" (Poland), "third party client" (Australia), "another person" (Ireland, United Kingdom).

The relation to the third party is either worded as "**on behalf** of" (Common law countries) or "in the **interest** of" (e.g. Austria). The terms are sometimes defined further in the national laws. The term "on behalf" is probably somewhat more precise: Lobbying on behalf of a big bank is probably also in the interest of other banks, but is not on their behalf. The term "in the interest of" could therefore be in some national contexts somewhat misleading as to presume that anybody is automatically a client or lobbyist in the process, whose interests also profit from the lobbying. On the other hand, "on behalf" might be too narrow: Where the lobbyist hides acting for a third party, one could try to argue that he/she is not acting "on behalf" (even though in the legal practice of probably all countries following this model, the acting "on behalf" would be undisputed in this case).

Subsection a
A particular challenge is **business** interests of **individuals**. The "third party" element does not work in this case. This concerns for example a wealthy business person lobbying regional parliament to pass a law that would rezone large parcels of (former) agricultural land he/she owns into building land. The businessperson does not lobby for a third party, nor does he/she receive remuneration for his/her own lobbying attempts. As such, it would not fall under the lobbying definition if such definition contained "third party" as a mandatory element. Paragraph 3 (a) addresses this problem. The "entrepreneurial interest" distinguishes the "individual lobbyist" from normal citizens interacting with the state. Paragraph 3 (a) is mirrored by an exception in Article 2 (a) (i) (see below) for private citizens acting in their own non-entrepreneurial interest.

Ireland defines the entrepreneurial interest through the employment of staff (Section 5.2), and by including anybody who "makes any relevant communications about the development or **zoning of land** under the Planning and Development Acts 2000 to 2014" unless it concerns the "individual's principal private residence" (Section 5.5.a and 5.5.c). The rationale of this provision is clear: Owners of land who have a commercial interest in a favourable zoning of their land pose a risk of distorting public policy in the interest of their business. In Australia, for example, researchers have quantified

the value of political connections to property developers in rezoning decisions worth "many billions of dollars" across Australia every year. They found that "developers connected to networks containing politicians and bureaucrats were 19% more likely – and those at the centre of networks 44% more likely – to win favourable decisions than 'outsiders'."[50] Austria takes a broader approach by making clear that "**entrepreneurial** interests" (§ 2.2) of individual citizens are not exempt from the lobbying definition.

The wording of subsection a in this toolkit combines both the Irish and Austrian law. The term "**entrepreneurial interest**" shall be defined in paragraph 4 by using a reference to relevant national legal provisions in tax or business laws (e.g. "planned activity for generating profit"). It is interesting to note that the International NGO Standard states the following in this regard: "Citizen interactions – the interaction of individual citizens with public officials concerning their private affairs shall not be considered lobbying, save for where it may concern individual economic interests of sufficient size or importance so as to potentially compromise public interest." (Definitions 5).

Subsection b

For above mentioned reasons, this toolkit uses the wording "in the interest of a third party" in subsection b. The element "in the **course of business**" distinguishes "consultant lobbyists" from normal citizens. For example, a family member might write a letter to a lawmaker "on behalf of" another family member who cannot take care of him/herself. If taken literally, the lobbying definition of paragraph 1 would apply. However, the letter is written in the interest of a third party, but the family member does not write it as part of a business. "In the course of business" does not necessarily mean remuneration for each activity, as mentioned already above. It thus covers also activities, where a professional lobbyist already contacts a public official in the interest of a (potential) client in order to secure future business.

While additional clarifications do not seem necessary regarding subsection b, one should note the following **variations** of further explicit exemptions: "communications by or on behalf of an individual relating to his or her private affairs" (Ireland, Section 5.5). Australia addresses this issue by excluding from the scope "individuals making representations on behalf of relatives or friends about their personal affairs" (Section 3.5 c). Lithuania makes an exemption for "an opinion expressed by a natural person [...], except in the cases when that natural person acts in the interests of a client of lobbying activities" (Article 7.6).

Subsection c

The in-house lobbyist is probably the easiest case: He/she lobbies in the interest of a third party, the employer, and does so in a professional context. While remuneration, the salary, is the rule, it is not a requirement. For example, board members might not always be remunerated but still act out of a professional motivation or obligation related to the legal person.

Subsection d

Subsections a to c cover all situations in which natural persons act as lobbyists. This includes those working *pro bono* in not-for-profit organisations (subsection c "similarly mandated"). However, subsections a to c do not cover all legal persons that are **behind** these natural person lobbyists. This includes NGOs, business associations, or industrial corporations. They are the actual driving force behind the lobbyists. Therefore usually three policy-arguments are raised for including these legal persons behind the lobbyists:

- They should also provide **transparency** on the lobbying;
- They have **information** which is unlikely to be available to individual in-house lobbyists (e.g. total lobbying expenditures);
- **Integrity** rules should also apply to them;

[50] The Guardian (27 May 2015), *Developers with strong political connections '44% more likely to win favourable decisions'*, available at www.theguardian.com, accessed 31 August 2016.

- They should be subject to **sanctions** in case they are co-responsible for violations.

None of the arguments are necessarily compelling. **Reporting** by the third parties would usually only double the information which the lobbyists "on the front" already report. However, it seems effective to oblige the third party to do a consolidated reporting in case they employ lobbyists (see below Article 4 paragraph 3). **Integrity** rules can only apply to natural persons who are actually contacting public officials. Still, legal persons are vicariously **liable** for violations (Article 10 paragraph 5). Focusing on the natural persons contacting the public official can bring clarity into a definition which is usually already complex enough in all lobbying laws.

Nonetheless, some lobbying laws define interest groups and other stakeholders, sometimes as lobbyists (Ireland, Section 5.2.c), and sometimes simply as a **separate category** (e.g. Austria, § 4.8). The motivation can be to subject them to special registration obligations (Austria, § 12). The motivation can also be to apply different thresholds for different stakeholders, as *de minimis* clauses (Article 2).

One should keep in mind that for one lobbying activity still **several** natural persons can be a lobbyist. For example, an in-house lobbyist might hire an external lobbying consultant and coordinate activities with him/her. If the consultant lobbyist does the actual contact with the public official, the in-house lobbyist will be conducting "indirect" lobbying through the consultant, while the consultant is the direct lobbyist.

Obviously, all above options indicated in subsections a-d can be **combined** into endless variations of one lobbying definition. For example, Ireland follows a combination of the third party and remuneration approach, and at the same time includes individuals acting for their own commercial land interests.

Paragraph 3 is in line with the **Council of Europe** Draft Recommendation: "Lobbying activities by at least the following categories should be subject to legal regulation: a. Consultant lobbyists acting on behalf of a third party; b. In-house lobbyists acting on behalf of their employer; c. Organisations or bodies representing professional or other sectoral interests." (at "B. Scope"). "Organisations or bodies" are covered in paragraph 3 through the consultant or in-house lobbyists that represent them.

Paragraph 4 – Entrepreneurial interests
Paragraph 4 links the definition of entrepreneurial interest (paragraph 3 subsection a) to existing definitions in the national law, such as in the tax or commercial law.

Article 2 – Exceptions

The following communications are exempt from the scope of Article 1 paragraph 1:

(a) *Stakeholders*

- **i.** *[Private citizens]* **By or on behalf of any natural person concerning his or her own non-entrepreneurial interests;**
- **ii.** *[Public officials]* **By public officials in their capacity as such;**
- **iii.** *[Diplomats etc.]* **By staff on behalf of a foreign country or territory or an international organisation;**
- **iv.** *[Media]* **By journalists and other media actors in their capacity as such;**
- **v.** *[Other]* [To be defined; see commentaries for possible options];

(b) *Activities*

- **i.** *[Legal representation]* **Legal counselling and representation as defined in the law** [to be specified];

ii. *[Formal proceedings]* **Which are made in proceedings of a committee of parliament, on the record in a public proceeding or in an established agency procedure** [applicable procedural laws to be defined];

iii. *[Labour negotiations]* **Which are made for negotiations on terms and conditions of employment undertaken by representatives of a trade union on behalf of its members;**

iv. *[Safety and security]* **The disclosure of which could pose a threat to the safety of any person or to the state, or the unauthorized disclosure of which is prohibited by law;**

v. *[Other]* [To be defined; see commentaries for possible options].

Commentary

As stated earlier in the comments on Article 1, there is an **interrelation** between the definition and its exceptions. Where the definition is rather wide, it may need exceptions already to avoid excessive application. For example, the United States lobbying definition simply refers to "communication with a public official" regarding public policy matters, without making "influence" an explicit requirement. Because of this **wide** definition, the law makes an exception for "a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence" the public official (Section 3.8.B). By contrast, **narrowing** elements in the definition will make some exceptions obsolete. For example, the Slovenian law defines lobbying including the term "non-public contact". This term covers already several exceptions: Whenever there is a public hearing in parliament, or a public exchange of arguments, the lobbying law does not apply (see already above comments on Article 1, keyword "communication").

If one compares existing foreign legislation, one can compile a seemingly **endless list** of stakeholders and activities one can exclude from the scope of a lobbying law. The following presents each option, which legal drafters can consider. The list distinguishes between rather **essential** exceptions, and rather **optional** exceptions. This legislative toolkit regards exceptions as essential if there are rather compelling reasons in a democratic society for excluding a stakeholder or activity from lobbying regulation (items i-iii in subsection a and items i-iv in subsection b). Optional are exceptions that appear to rather depend on policy and culture (item iv in subsection a and item v in subsection b).

However, in particular with regard to optional exceptions, one should keep them to a **minimum**. The Council of Europe Draft Recommendation states in this context: "Exemptions to the legal regulation of lobbying should be clearly defined and justified." (at "B. Scope"). The key question legal drafters need to ask in this regard is: Do I really need to exempt this stakeholder from the scope of the **entire** law, or would it be also sufficient to exempt the stakeholder only from **some** obligations? For example, an expert giving testimony in a public parliamentary hearing and on the record is exempt from many lobbying regulations. This seems only fair insofar registering the expert as a lobbyist would not provide the public with any additional information. However, when it comes to ethics, the obligation to disclose interests behind the expertise might be a concern. For example, a medical professor giving testimony to the health committee might in fact be at risk of lobbying for pharmaceutical interests, if he/she has a second income from a medical producer. Legal drafters will have to review if sufficient safeguards exist already in these cases (conflict of interest provisions, disclosure obligations, etc.), or if applying the ethical part of lobbying legislation to such a case could close gaps.

When looking at exceptions, it is also essential to distinguish "**stakeholders**" from "**activities**". Exceptions will be either excessive or insufficient, if both are confused. For example, one could consider excluding lawyers from the scope of the lobbying law. It is their job to influence public officials in the interest of third parties. This not only concerns judicial decisions, but also administrative procedures, for example where a lawyer negotiates the terms of a building permit with the respective agency. There is no need for a lobbying regulation to apply: It is clear and on the

record in whose interest the lawyer acts, and procedural law provides for transparency and ethics in the decision making. However, it would be the wrong conclusion to exclude lawyers entirely from the scope of lobbying laws. It is not their status as lawyers that calls for the exception, but the activity they are conducting. If the lawyer in the same case tries to persuade the members of the local council to pass a directive with new criteria for granting building permits, the lawyer is technically lobbying (see below comments under "Subsection b"). In order to underline this point, Article 2 makes the distinction between "stakeholders" and "activities" visible in two subsections, depending on where the focus of the exception lies.

Subsection a – Stakeholders

Private citizens
This exception is in essence only the flipside of Article 1 paragraph 3 (a). However, it would ensure that lobbying regulations are not abused to shield citizens from exercising their democratic rights. For example, there is a myriad of procedures, where citizens (or legal persons) have to push for their individual interests: asking the municipality to build a playground in their district, install traffic lights, applying for a building permit, housing subsidies, job applications, parliamentary petitions, etc. Individual citizens usually act in their own interest when doing so. It would seem odd, if this ordinary use of everybody's rights would be considered lobbying.

Public officials
Exceptions for **public officials** are a recurrent feature in lobbying regulations (Austria, § 2.1; Ireland, Section 5.5.j-l; Lithuania, Article 7.3; Montenegro, Article 5.4; United States, Section 3.8.B.i). The rationale behind this exception is simple: Influencing each other is an inherent exercise of public officials' function in a democratic society. Members of Parliaments try to convince each other to vote in a certain way, or a civil servant will try to convince the head of department or deputy minister of a certain policy position. By definition, they engage in this influence in the interest of third parties, i.e. the general public or parts of it. Unless a private party additionally remunerates the public official for lobbying purposes, he/she is only acting in "their capacity as such". The wording for this toolkit is taken from the Irish law. Legal drafters need to pay attention if the circle of public officials in Article 1 paragraph 1 (lobbying "targets") is narrower than the circle of public officials in Article 2, and if so, need to clarify the difference.

Some lobbying laws will not need an exception for public officials. This is the case, where the scope of the law **inherently** excludes public officials. For example, the United Kingdom law applies only to "consultant lobbyists". Since a public official is not in a consultant relationship to his/her employer, the law inherently excludes public officials from the definition.

Diplomats
As with public officials, exceptions for **diplomats** (and similar representatives) are a recurrent feature in lobbying regulations (Austria, § 2.5; Canada, Section 4.e and f; Ireland, Section 5.5.b-c; United States, Section 3.8.B.iv). The rationale behind this exception is the same as with public officials. The wording for this toolkit is taken from the Irish law.

Media

At first sight, media are in principle not acting in the interest of **third parties**, but pursue their own journalistic objectives. However, strictly speaking journalists can be viewed in some cases as lobbyists. For example, a journalist writing an open letter to the British prime minister urging him to ignore the outcome of the "Brexit" referendum is technically influencing a public official on a policy decision. One could argue that the journalist is also doing this in the interest of his/her employer in case the newspaper has taken already a stance on this policy issue. Thus, one could argue that the journalist acts "in the interest of a third party".

Some lobbying laws therefore **explicitly** exclude the media from their scope (Lithuania, Article 4.1.5; Montenegro, Article 5.1; United States, Section 3.8.B.ii-iii). Other laws do so **inherently**, for example by focusing on "consultant lobbyists" (United Kingdom) or by defining "interest groups" (Austria, § 4.8) in a way that excludes the media. The wording for this toolkit is based on the United States law. It uses the term "journalists and other media actors" based on the Council of Europe Recommendation "on the protection of journalism and safety of journalists and other media actors".[51] It is broader than the term "media", which might not cover for example bloggers. If the definition of journalists in a country does not cover academic publications, legal drafters need to make sure to extend the exception accordingly.

In any case, legal drafters need to draw the explicit or inherent exception wide enough: The media enjoy special protection under Article 10 of the European Convention on **Human Rights** (ECHR), and any unnecessary set of obligations on the media could be viewed as a disproportionate restriction.

Other (optional)

De minimis

This is probably the most frequent optional exception which probably has also the widest impact. It excludes lobbyists where the size of the lobbying does not exceed a certain volume. The following are the main measurements:

- Number of (lobbying) contacts;
- Number of staff employed;
- Amount of time spent on lobbying;
- Amount of money spent on lobbying.

Examples:

- **Contacts** (combined with time): "The term 'lobbyist' means any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a six month period." (United States, Section 3.10).
- **Staff**: "Interest groups which do not employ staff as interest representatives" (Austria, § 1.3); "The circumstances in which this subsection applies to a person are that – (a) the person has more than 10 full-time employees and the relevant communications are made on the person's behalf, (b) the person has one or more full-time employees and is a body which exists primarily to represent the interests of its members and the relevant communications are made on behalf of any of the members, or (c) the person has one or more full-time employees and

[51] *Recommendation CM/Rec(2016)4* of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors (Adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies), www.coe.int, accessed 31 August 2016.

is a body which exists primarily to take up particular issues and the relevant communications are made in the furtherance of any of those issues." (Ireland, Section 5.2).

- **Time**: "Lobbyist means any person who is specifically employed by another person for the purpose of and who engages in lobbying in excess of 8 hours in any calendar month, or any individual who, as a regular employee of another person, expends an amount of time in excess of 8 hours in any calendar month in lobbying." (Maine, Title 3, Chapter 15, § 312-A).
- **Money**: "Lobbyist means any individual who [...] spends more than $750 lobbying during any reporting period" (Hawaii, Revised Statute §97-1); A lobbyist is who "in connection with or for the purpose of influencing any executive action, spends a cumulative value of at least $100 for gifts, including meals, beverages, and special events, to one or more officials or employees of the Executive Branch, [...] spends at least $2,000, including expenditures for salaries, contractual employees, postage, telecommunications services, electronic services, advertising, printing, and delivery services, for the express purpose of soliciting others to communicate with an official to influence legislative action or executive action; or spends at least $2,500 to provide compensation to one or more entities required to register" (Maryland, General Provisions, § 5-702.2, .5, .6).

Legal drafters will have to decide, whether they want to exempt stakeholders with activities below a certain threshold. There are two considerations in this regard. First, it is difficult for the (potential) lobbyist, the public officials, and the public at large to **monitor**, who fulfils the threshold and who does not. However, the general number of employees (Ireland) seems to be a sufficiently transparent and easy way of defining a threshold. Second, the *de minimis* exception might be more appropriate in the context of **registry** obligations, since ethical obligations should also apply to lobbyists of minimal activity. In this regard, for example, the Maryland lobbying regulation exempts lobbyists with minimal activity only from the duty to register. Since registering in itself is a rather small administrative burden compared to periodical reporting, it may seem to be an alternative to apply the *de minimis* exception only to the reporting (see below comments on Article 4 paragraph 4). However, legislators should keep in mind that the *de minimis* exception can be quite problematic. It fails to cover pin-point interventions for example from influential corporate stakeholders (e.g. where a CEO places a call to a lawmaker). This interaction would not be covered given its singular nature and lack of expenditure, but would be the type of influence that should be of interest to the broader public and subject to regulation.

Political parties

Most lobbying laws **explicitly** or **inherently** exclude political parties from the scope of potential lobbyists. The Austrian law foresees an explicit exemption for political parties (Section 1.3). Other laws exclude political parties inherently, such as the Canadian law. The Canadian Commissioner of Lobbying gave the following clarifying statement: "Political parties, as defined in the Canada Elections Act, are organizations 'one of whose fundamental purposes is to participate in public affairs by endorsing one or more of its members as candidates and supporting their election.' They are governed by the Canada Elections Act, and the Commissioner is of the belief that communications between employees of political parties and their party's caucus members are not subject to the Lobbying Act. The Commissioner takes the view that the definition of 'organization' is not meant to include political parties. Therefore, federally registered political parties are not required to register under the Lobbying Act."[52] This rationale is somewhat similar to that for excluding public officials. For both, public officials and political parties, it is their task to "participate in public affairs". Political parties take on a constitutional role defined by public law and this role mainly consists of influencing public decision-making. In the United States, political parties are also defined as a potential lobbying target (Section 3.15.E) and by this logic cannot be lobbyists at the same time.

[52] Commissioner of Lobbying, Advisory Opinion "*Application of the Lobbying Act to Political Parties*", March 2014, available at https://lobbycanada.gc.ca, accessed 31 August 2016.

In this context it is interesting to note that Montenegro – as the only country known for this – explicitly **prohibits** political parties from lobbying (Article 14.3): "Conducting lobbying activities shall be prohibited to: [...] a member of a political party and party's officials". The rationale of this prohibition is probably that political parties should not exercise too much influence on individual decisions in the administration, such as hiring of staff, or by putting party policy above rule of law when deciding on building permits etc. However, the Montenegrin lobbying law does not protect individual administrative decisions from influence, but only "regulations and other general acts". It is difficult to see how political parties could be kept from influencing their lawmakers regarding the adoption of laws. Therefore this prohibition might only apply to engaging "members of political parties" as professional consultant lobbyists in the interest of a third party. In this constellation, there is a risk that the lobbyist would (ab)use his/her party connections in the interest of his/her client.

Religious organisations
Some countries exclude **legally** recognised religious organisations from the scope of their lobbying laws: Austria (§ 1.3), United States (3.8.B.xviii). Other countries did not opt for such an exemption (Ireland, Lithuania, Montenegro, and United Kingdom). Canada even explicitly includes organisations with a religious objective: "a corporation without share capital incorporated to pursue, without financial gain to its members, objects of [...] religious [...] character" (Section 2.1 "organisation" f).

Whistleblowers
A "whistleblower" can internationally be defined as "any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector".[53] It is thus imaginable that a whistleblower would urge a public official to change for example a certain safety policy related to the whistleblower's concern (e.g. an employee of the State train company urges a transportation ministry official to have two conductors per locomotive instead of one during night hours). Usually, the whistleblower should be excluded from the lobbying definition already by the element "in the interest of a **third party**" since they usually have a strong personal motivation to come forward. However, they are by definition relating to the public interest; therefore some legal drafters have decided to make an explicit exception for whistleblowers (United States, Section 3.8.B.xvii).

NGOs
Legislators of some countries feel they should exempt non-governmental organisations from the obligation to comply with lobbying regulations. In policy discussions, often the argument is made that there is no **commercial** interest behind these organisations and they thus do not pose a risk of distorting public decision-making by spending much money on professional lobbying. Slovenia exempts "individuals, informal groups or interest groups" lobbying on issues of strengthening the "rule of law, democracy and the protection of human rights and fundamental freedoms" (Article 56a). In Lithuania "activities of non-profit organisations aimed at exerting influence [...] in the common interests of their members" are not considered lobbying (Article 7.4). The Montenegrin lobbying law simply speaks of "civil initiatives" (Article 5.3). The Australian law refers to endorsed "charitable, religious and other organisations or funds" or "non-profit associations or organisations constituted to represent the interests of their members" (3.5.a).

There are two concerns in this regard. First, it seems difficult to **draw a line** between an interest group that protects "human rights" and other interest groups. A pharmaceutical interest group could easily argue that it protects the right to life (Article 2 ECHR) or protects the patents of its members (Article 27.2 Universal Declaration of Human Rights). Second, commercial interests may easily **abuse** the exception to hide behind NGOs. Examples could be not-for profit groups for the "promotion of non fossil energy" (being financed by the nuclear industry) or for "the interests of patients with lymph cancer" (being financed by a pharmaceutical company promoting the licensing of a new cancer drug). One should note in this regard that the **OECD's** "10 Principles for Transparency and Integrity in Lobbying" call under Principle 4 to include "not-for-profit entities, which

[53] Council of Europe/CDCJ (2012), *The Protection of Whistleblowers*, *Recommendation* CM/Rec(2014)7, available at www.coe.int, accessed 31 August 2016.

aim to influence public decisions". Notwithstanding the risk of abuse, there is a public interest in transparency of lobbying positions and activities of NGOs.

Various other exceptions
There are some exceptions which normally should follow from the interpretation of the law. Legal drafters may consider whether in their legal context it would be beneficial to clarify these further exemptions. In Lithuania, "activities of **scientists** (pedagogues)" are exempt from the lobbying law "except in the cases when they act in the interests of a client of lobbying activities" (Article 7.5). With the definition in paragraph 3 (a), this exemption would rather not be necessary. The same is true for the "participation in **public events**", such as demonstrations (Lithuania, 4.1.5). Such participations are in the own interest of each participant. This exception also shows the risk of listing "too many" exceptions: a lobbyist could argue that he/she took only part in a public event, for example a convention, and is thus exempt from registering.

There are also various exemptions for semi-public organisations, or organisations for which it is clear that they lobby and in which direction. The exemptions sometimes only concern certain parts of the lobbying law. Such exemptions include "**social insurance** associations" (Austria, § 1.3), "**trade unions**" (Austria, § 1.2), "members of [foreign] **trade** delegations" (Australia, Section 3.5.d), or "**self-regulatory** organization" (United States, Section 3.8.B.xix). A similar rationale applies to members of public sector **advisory boards**. Similar to public officials, its members have the task to influence each other and are governed by special rules. Therefore, the United States law makes an exemption for communications "made in the course of participation in an advisory committee subject to the Federal Advisory Committee Act" (Section 3.8.B.vi). However, one should keep in mind that this exception is only justified if a minimum of transparency and ethics applies to such advisory boards (see below at Article 11 – Advisory groups). In this context, legislators should also consider whether there are any other **standing forums** or roundtables which they consider worth exempting from lobbying regulations. This also concerns other **collective public persons** such as bar of lawyers or an academy of sciences. Each of these may be established or at least recognized by stand-alone legislation, have some public authority provided by law, or have special consultative rights.

State owned corporations are treated differently in various jurisdictions. In Ireland, "communications by or on behalf of a body corporate made to a Minister of the Government who holds shares in, or has statutory functions in relation to, the body corporate, or to designated public officials serving in the Minister's department, in the ordinary course of the business of the body corporate" are **not** considered lobbying (Section 5.5.m). Montenegro takes the opposite stance: "Conducting lobbying activities shall be **prohibited** to: [...] a member of the administrative or supervisory board of a company or legal entity in which the state or local government share property ownership" (Article 14.2). Legislators will have to consider if there is a risk that state owned companies abuse their privileged access to public officials in their own favour.

Subsection b – Activities

Legal representation
The most frequent argument by lawyers and their professional associations for excluding their profession from lobbying regulation is the attorney-client privilege.[54] This human rights principle protects communications between a client and his/her attorney as **confidential** (Article 6 ECHR).[55] This privilege applies only to legal advice and representation in formal legal procedures. Thus, where lawyers represent only a client's political interests towards legislators or other regulators, attorney-client confidentiality does not apply. In this context of general policy, there is no need for a fair trial and in fact **no trial** at all, triggering the attorney-client privilege. The following case serves as an illustration: A Texas lawyer had succeeded in exonerating a prisoner client. After release, though, the prisoner could not pay his legal bill. The lawyer lobbied the Texas state legislature to raise the state's payment for unfairly imprisoned prisoners from US$50,000 per year to US$80,000 per year.

[54] Transparency International (2015), Lobbying in Europe – Hidden Influence, Privileged Access, page 15, ibid.

[55] European Court of Human Rights, *Guide on Article 6*, Right to a Fair Trial (criminal limb), 2014, no. 296 following, available at www.echr.coe.int, accessed 31 August 2016.

His lobbying efforts were successful and enabled his freed client to pay his lawyer's fees.[56] Whereas the motion for compensation for his client for wrongful imprisonment falls under legal representation, the influence on the state legislator was technically lobbying.

It is important to underline that lawyers cannot be universally exempt from lobbying regulation. Otherwise lobbying business will simply **shift** from lobbyists to lawyers as the "regulation free haven". It is important to note in this context that in the United States, for example, several law firms have sizable departments devoted to so-called "government relations".[57] In 2011, one law-firm reportedly earned US$13 million from lobbying alone.[58]

The wording for this toolkit is modelled after the Austrian law (§ 2.4). Usually legal counselling and representation are defined in a **professional law**, clarifying who can provide these services and under what circumstances. For the sake of coherence, it is recommended to use the terms of such a law and to reference it. It is also important to keep in mind that non-professional legal representation as private or family favours should be exempt as well. Australia addresses this issue by excluding from the scope "individuals making representations on behalf of relatives or friends about their personal affairs" (Section 3.5 c).[59]

Formal proceedings

Since the key goal of lobbying regulation is to ensure the transparency and propriety of influence, there is less need to capture interactions that are already a matter of **public record** and are governed by formal rules. Thus, the following communications are exempt:

- "which are made in proceedings of a committee" of Parliament (Ireland);
- "required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of the Congress or an agency" (United States, Section 3.8.B.ix);
- "made to an official in an agency with regard to [...] a judicial proceeding or a criminal or civil law enforcement inquiry, investigation, or proceeding" (United States, Section 3.8.B.xii);
- "a written comment filed in the course of a public proceeding or any other communication that is made on the record in a public proceeding" (United States, Section 3.8.B.xiv);
- or "a petition for agency action made in writing and required to be a matter of public record pursuant to established agency procedures" (United States, Section 3.8.B.xv).

The wording for this toolkit is modelled by a combination of the United States law with the intention of including all possible constellations. Obviously, this wording would need tailoring to the local context, in particular by referencing applicable laws regulating the respective formal proceedings.

A point of note is that the participation in formal proceedings might still be of interest to calculating the **total income** and **expenditure** of influencing activities of various actors. After all, it is the better resourced groups that can track opportunities, prepare quality submissions, and participate in different fora. Accounting for and monitoring these differences may be in the public interest. If the drafters consider it so, they can either limit the application of the exception in the subsection b item ii to certain categories of persons, or else insert the obligation (of disclosing income and expenditures related to formal proceedings) in the transparency reporting requirements (see Article 3.2(g)). In either option, it would make sense to exclude the participation that was compelled by the authorities.

Labour negotiations

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[56] The New York Times (9 May 2011), *Exonerated Inmates Fight Lawyer's Lobbying Fees*, available at www.nytimes.com, accessed 31 August 2016. This case is taken from the explanatory notes on the International NGO Standard.

[57] The Washington Post (25 December 2011), *Lobbying practices leave law firms for more independence, equity for non-lawyers*. available at www.washingtonpost.com, accessed 31 August 2016.

[58] The Washington Post (14 December 2011), *Holland & Knight's lobbying group to shed traditional hourly billing*, available at www.washingtonpost.com, accessed 31 August 2016.

[59] See already the comments on Article 1 paragraph 3, keyword "Third party".

Trade unions are as lawyers: They represent the interests of a third party. However, there is no need in regulating their efforts as it is largely obvious what they are lobbying for, with whom, and in what interest. The wording for this toolkit is modelled after the Irish law, which exempts "communications forming part of, or directly related to, negotiations on terms and conditions of employment undertaken by representatives of a trade union on behalf of its members" (Ireland, Section 5.5.f). An alternative could be a larger exception, as done in the Austrian law, which exempts "interest representations by trade unions", but only in regard to register obligations (§ 1.2). The exception could be extended to cover also employers' organizations as long as they participate in formal labour negotiations within arrangements of the social dialogue and the like.

Safety and security

There are exceptional situations where the disclosure of the lobbying would threaten the safety of a person or the state. For example, a group of citizens might be taken hostage abroad. For safety reasons, the hostage taking is not communicated to the public. An insider might urge a public official to respond in a certain way to the hostage crisis. Disclosing this attempt of influence could threaten the safety of the hostages and should thus be exempt from public transparency. Canada (Section 4 (3)), Ireland (Section 5.5.g and h), and the United States (Section 3.8.B.xi) foresee respective exceptions. The wording for this toolkit is a combination of all three laws. It is noteworthy that all three laws exclude the communication on issues of safety and security concerns from the entire lobbying law and not only from disclosure requirements (Chapter II). It is important to keep in mind that the latter would still allow for integrity rules to apply (Chapter III).

Other (optional)

Requests

Public officials may request information or other input from citizens. In most cases, this will be covered by the exception on "formal proceedings". However, there are instances where such requests are outside of formal proceedings. For example, a lawmaker might invite an interest group to provide its viewpoint on how a specific piece of legislation works in practice. Some lobbying laws make an exception for such situations and exempt "providing factual information in response to a request for the information"; "communications requested by a public service body and published by it" (Ireland, Section 5.5.d and e); "activities initiated by public officials" (Austria, § 2.6); or "responses to requests by Government representatives for information" (Australia, 3.4.g). One should keep in mind two aspects in this regard. First, the exception could be **abused** as an excuse from hindsight for unregistered lobbying by claiming that the public official initiated it. Second, the exception could be nonetheless necessary in the **parliamentary** context. A lawmaker might want to make strategic reflections on a new piece of legislation. Automatically exposing such moves to his/her party colleagues or the media through the lobbying register might be problematic regarding the independence of lawmakers. The exposure could also complicate possibilities of a lawmaker to obtain information from private persons who do not wish to be exposed and would not respond to the request in such case.

Freedom of information

Requests made under freedom of information laws (access to information laws) must never be considered as lobbying activity. There are jurisdictions where requesters do not have to state explicitly that a request is being made under an access to information law. In particular in these cases legal drafters may find an exception a useful clarification (e.g. Ireland, Section 5.5.d: "communications requesting factual information"). If such a provision is to be included, it should not be limited to factual information but to any request for "information" or "documents".

Grass-roots campaigns

As stated earlier, grassroots **lobbying** is not to be confused with grassroots **campaigning** (see above comments on Article 1 paragraph 1, keyword "direct, indirect"). Grassroots campaigns can be, but do not have to be lobbying. For example, where people on the local level join into spontaneous collective action in order to protest against the construction of a shopping mall in their neighbourhood, they only promote their own interests together, without any lobbying in a technical sense. If in the same case the developer of the shopping mall hires a lobbyist in order to mobilize

citizens in favour of the mall, this would technically be lobbying. For this reason, in Australia, "petitions or communications of a grassroots campaign nature in an attempt to influence a Government policy or decision" are explicitly excluded from the definition of lobbying (Section 3.4.d).

Chapter II: Transparency

Article 3 – Register

(1) *[Register]* **The oversight body [to be specified, Article 8] shall establish and maintain a lobbying register.**

(2) *[Mandatory registration]* **Lobbyists shall not engage in lobbying unless being registered.**

(3) *[First time registration]* **Where lobbyists engage in lobbying for the first time, they may do so without registering for [a specified number of] days.**

(4) *[Registration]* **A natural or legal person is registered upon submitting the following information:**

(a) the person's name,

(b) the address (or principal address) at which the person carries on business or (if there is no such address) the address at which the person ordinarily resides,

(c) the person's business or main activities,

(d) any e-mail address, telephone number or website address relating to the person's business or main activities,

(e) any registration number issued to the person by other business or company registers, and (if a company) the person's registered office.

(f) the name of each person who is or has been a public official employed by, or providing services to, the registered person and who was engaged in carrying on lobbying activities,

(g) [other data to be defined]

(5) *[Unregistering]* **A registered person who has permanently ceased to carry on lobbying activities may notify the oversight body to be marked in the register as unregistered.**

(6) *[Consolidated registering]* **In case where more than one lobbyist is employed or similarly mandated by another person (Article 1 paragraph 3 subsections b and c), the latter registers on behalf of the lobbyists.**

(7) [*Unique identifier*] **A unique identifier shall be assigned to each registered lobbyist, and for other data as determined by the oversight body.**

(8) *[Public access]* **The register including reports shall be published online, through a single searchable website, free of charge, indexable and downloadable in full as machine-readable open data.**

Commentary

Mandatory registers are a **uniform feature** in national lobbying legislations. National lobbying legislations make registration usually a condition for lobbying. Further professional requirements, such as professional training, or absence of incompatibilities or criminal convictions, are dealt with by Article 6 (see comments under keyword "Excursus: Qualifications") and Article 7.

The Council of Europe's Parliamentary Assembly observed that "greater transparency of lobbying activities [...] can [...] restore public confidence in government authorities' democratic functioning".[60]

[60] Parliamentary Assembly Recommendation 1908 (2010) at no. 9, ibid.

Voluntary registers appear not to achieve this purpose. Regarding the voluntary character of the German lobbying register, GRECO[61] stated that "the legal framework presents several weaknesses. In particular, registration is only voluntary [...]. Moreover, the above-mentioned rules are interpreted in such a way that nonregistered associations are limited in their rights only in so far as they cannot claim the right to be heard in a committee meeting – but they may nevertheless be heard if they are invited by the committee in question."[62] Transparency International reviewed lobbying regulations in EU member States in 2012 with the following result: "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 [...]."[63] The Council of Europe's **Parliamentary Assembly** came to a similar conclusion in June 2016, regarding European institutions and called to "further improve the Joint Transparency Register, by expanding it to all institutions of the European Union, making registration of lobbyists obligatory [...]."[64] Therefore, registration under **paragraph 2** is mandatory.

The basic registration of lobbyists under paragraphs 2 to 6 is probably not the most important aspect of transparency in lobbying. More interesting is information falling under Article 4 which discloses the lobbying **activities**.

Still, the basic registration allows for public **officials** or the **public** at large to know that the registered person undertakes lobbying, even if the extent may vary from sporadic to full-time lobbying activities. Critically, it also lays the foundation for tracking of influence by matching it to specific individuals or entities. The wording for paragraphs 1 to 5 is toolkit is based on the Irish law.

The "grace period" allowed to **first time** lobbyists varies between 0 days (Austria, § 10.1; Lithuania, Articles 6.1 and 9.1; United Kingdom, Section 1.1), 10 days (Canada, Section 5.1.1 – including the time of "entering into the undertaking"), 45 days (United States, Section 4.a.1), or four months and three weeks (Ireland, Section 8.2).

Paragraph 4 subsection (f) allows monitoring to what extent lobbyists use "inroads" into the public sector via former public officials and whether there are any **conflicts of interest** resulting from the former position. In this context, the incompatibilities under Article 7 are relevant. Subsection (g) is a placeholder for any additional information that legal drafters might deem worth being requested, for example, owners, board members, of financial turnover. In some countries, personal identification numbers might be a standard use of in public registries.

Registers usually require the parallel sign up of several lobbyists: the natural person acting as the lobbyist, his/her employer (for example a legal person), and often also the lobbying client who directs the lobbying efforts. **Paragraph 6** tries to avoid uncoordinated registering in entities where several lobbyists would need to register. Placing the registration burden on the legal person has also the advantage that legal persons establish internal mechanisms for determining who is lobbying on their behalf and to what extent. The paragraph follows similar regulation for example in the new Ontario

[61] GRECO, *Eval4(2014)1*, Germany, para. 32, available at www.coe.int, accessed 31 August 2016.

[62] In a letter of 18 October 1979 to the Committee on the Labour and Social Order, the Committee on the Rules of Procedure communicated this interpretation which has since been followed in practice. On this practice see already Hoppe T., *Transparenz per Gesetz? Zu einem künftigen Lobbyisten-Register*, Zeitschrift für Rechtspolitik 2009, 39, 41, available at http://tilman-hoppe.de, accessed 31 August 2016.

[63] Transparency International (2012), *Money, Politics, Power: Corruption Risks in Europe*, p.29, available at www.transparency.de, accessed 31 August 2016.

[64] Resolution 2125 (2016), *Transparency and openness in European institutions*, at 10.2., available at www.assembly.coe.int, accessed 31 August 2016.

Lobbying law, in effect as of 1 July 2016: "The senior officer of an organization that employs an in-house lobbyist shall file a return with the registrar."[65]

Paragraph 7: Notably, a critical factor to enable meaningful analysis is the assignment of **unique identifiers** for each registered lobbyist and for other data points, such as lobbied institutions and public decision-making processes. This ensures the comparability and traceability of information, and avoids confusion and evasion.[66]

Paragraph 8 goes back to a similar provision in the United States law (2007, Section 209.a.3)[67] and the International NGO Standard (Lobbying Register no. 4). It is a **key norm** to any lobbying legislation. The entire effort of defining and registering lobbyists and their activities is only justified, if the public at large can access and use the data in a meaningful way. Long standing and well-maintained lobbying registers, such as the ones in Canada and the United States, are vivid examples of what such registers can achieve. For example, the **Canadian** register[68] opens with the following menu:

- 12-Month Lobbying Activity Search
- Advanced Registry Search
- Recent Registrations
- Recent Monthly Communication Reports
- Listing of All Registrants and Lobbyists
- Listing of Organizations, Corporations, Clients and their Beneficiaries
- Listing of Designated Public Officer Holders who are in Monthly Communication Reports
- Lobbying Statistics
- Data Extract from the Registry of Lobbyists Database

The "Advanced Registry Search" allows for combining an endless variety of search criteria (names, key words, clients, government institutions, etc.) in order to follow the "lobbying trail". The lobbying registers of the **United States** House of Representatives[69] or Senate[70] allow for similarly advanced searches and downloads.

Paragraph 8 aims for a freely accessible register. A number of international initiatives have made open data and its implementation principles the mainstay of current access to information dialogue.[71] Open data concerns also the absence of **usage fees**.[72] However, this prohibition of fees does not concern lobbyists. Some lobbying laws require lobbyists to pay a fee for entry into the registry (Poland, Article 11.6; the fee cannot exceed PLN 100 ≈ € 23).

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[65] Section 6. (1), *Lobbyists Registration Act*, 1998, S.O. 1998, c. 27, Sched., available at www.ontario.ca, accessed 31 August 2016.

[66] See for example: Sunlight Foundation (undated), *Municipal Lobbying Data Guidebook,* available at http://sunlightfoundation.com, accessed 31 August 2016, Chapter 2.IV: "Tracking lobbyists can be difficult even with detailed reporting requirements. Lobbyists may work for more than one client, or file paperwork under different names. Assigning unique identifiers to lobbyists and lobbying organizations increases the accuracy of the associated data […]."

[67] The Secretary of the Senate and the Clerk of the House of Representatives shall "maintain all registrations and reports filed under this Act, and make them available to the public over the Internet, without a fee or other access charge, in a searchable, sortable, and downloadable manner, to the extent technically practicable [...]."

[68] Register *webpage*, available at https://lobbycanada.gc.ca, accessed 31 August 2016.

[69] Register *webpage*, available at http://disclosures.house.gov, accessed 31 August 2016.

[70] Register *webpage*, available at http://soprweb.senate.gov, accessed 31 August 2016.

[71] See in particular: http://opendatacharter.net/; opendefinition.org; www.opengovguide.com/topics/open-government-data.

[72] International Open Data Charter, Principle 3 paragraph 3 lit. c: "Release data free of charge", available at http://opendatacharter.net/principles/, accessed 31 August 2016.

Legislators may want to consider whether phone numbers and addresses of **natural persons** can remain **non-public** information in some cases.

Article 4 – Reporting

(1) *[Frequency]* **A lobbyist shall submit to the register a report each period [to be specified] until [to be specified] days after that period, covering lobbying activities in this period.**

(2) *[Content]* **The report contains the following information:**

(a) *[Third party]* **where any of the communications concerned were made on behalf of a third party, information relating to the third party (Article 3 paragraph 4 applies *mutatis mutandis*),**

(b) *[Public officials]* **the public officials to whom the communications concerned were made and the body to which they belong,**

(c) *[Topic]* **the subject matter of those communications and the results they were intended to secure, including particulars to identify any relevant legislative proposal, bill, resolution, regulation, policy, program, decision, grant, contribution or financial benefit.**

(d) *[Extent]* **the type and extent of the lobbying activities carried on,**

(e) *[Individual lobbyists]* **the name of the individuals who carried on the lobbying activities,**

(f) *[Registration]* **any change during the period in the information under Article 3 paragraph 4,**

(g) *[Finances]* **remuneration received by a consultant lobbyist, or expenditures for lobbying including in-kind for all other lobbyists,**

(h) *[Public funding]* **if the lobbyist has received funds from a government or government agency, the origin and amount of funding received;**

(i) *[Political donations]* **the type and value of donations made to political parties or election campaigns, unless disclosure is already made under other legislation** [specific reference to political finance legislation to be added];

(j) *[Other]* [To be defined; see commentaries for possible options];

(3) *[Consolidated reporting]* **In case where more than one lobbyist is employed or similarly mandated by another person (Article 1 paragraph 3 subsections b and c), the latter reports on behalf of the lobbyists.**

(4) *[Exceptions]* **The obligation to report does not apply to the following lobbyists [or with the following modifications]:** [For options see commentary]

Commentary

A lobbying register is as **meaningful** as is the **data** it is being fed with. Key data in this regard are lobbying activities. Thus, most lobbying laws require regular reporting on lobbying activities. A few lobbying laws only require registration without any reporting. These laws have been widely criticised as weak.

One of these **weak** examples is **Germany** where only Parliament maintains a lobbying register. Since 1972, representatives of associations lobbying the Bundestag or the Federal Government have to enter themselves in a public list[73] kept by the President of the Bundestag, indicating the name and seat of the association, the composition of the board of management and the board of directors, the number of members, the names of the association's representatives and the address

[73] *Lobbyists List*, available at www.bundestag.de, accessed 31 August 2016.

of its Berlin office.[74] This set of data does not extend beyond the basic registration under Article 3. It does not reveal anything on the actual activities of lobbyists: Whom did the lobbyists contact? Which topics or draft laws were concerned? Which financial size does the lobbying campaign have? Did the lobbyist provide any draft law? But even if answers were given, the data could never be conclusive, as it would only show a small fraction of lobbying efforts: The list is in effect only voluntary, is only for lobbyists who want to be heard by Bundestag committees, and leaves out lobbyists contacting individual lawmakers, and it does not address consultant or in-house lobbyists for corporations. GRECO thus concluded that "the legal framework presents several weaknesses."[75] Similar is the situation in the **Netherlands**. In July 2012, the House of Representatives' introduced a register of lobbyists. Lobbyists not only have to declare for which company they work for but also for what purpose.[76] However, data entered remains vague. A frequent expression in the column on "interests represented" is "among other". Thus, lobbying firms representing clients frequently list a selection of their clients "among other". The vagueness in information is probably due to the fact that registering is not a statutory obligation, but only a precondition for access to the Parliament's premises.

By contrast, the thorough transparency in Canada and the United States on lobbying activities has **significantly influenced** public debate and enabled journalists and citizens to use this information for political discourse. One example: Media analysed data from the lobbying register of the State of New York and revealed in 2016 that the Catholic Church had spent 2 million US$ on major lobbying firms to block a bill that would make it easier for child sex abuse victims to seek justice.[77] Data from the lobbying register also revealed to what extent the hired lobbyists had been previously working for influential politicians or a specific political party. No matter how one stands on the policy issue in question, having access to the lobbying data can be beneficial as follows: Supporters of the bill know concretely about the size of efforts of their "opponents". Even if supporters may not have the same financial means as the Catholic Church in order to "outbalance" the influence, they can still use the information for their advocacy work to alert legislators and the general public on the professional influence made by "the other side". The transparency of the professional lobbying efforts could also entail the risk of a negative image, which another stakeholder not having the same financial means could use.

Several **NGOs** have specialised in analysing and interpreting the data available. One is the "Center for Responsive Politics". On its website, a "Lobbying Database"[78] shows accumulated spending in the United States by years, sectors, industries, lobbying firms, etc. The numbers for 2015 are:

Industry	Total
Pharmaceuticals/Health Products	$231,318,911
Insurance	$157,221,882
Oil & Gas	$129,836,004
...	
Education	$77,102,754
Defense Aerospace	$74,446,775

The **pharmaceutical** industry tops the ranking by far, while maybe somewhat surprisingly the **educational** sector spent more on lobbying than the **defence** sector.

[74] GRECO, *Eval4/2014)1*, Germany, para. 32, available at www.coe.int, accessed 31 August 2016.

[75] Ibid.

[76] Lobbyisten *Register*, available at www.tweedekamer.nl, accessed 31 August 2016.

[77] Daily Mail (30 May 2016), *Catholic Church spent $2M on major N.Y. lobbying firms to block child-sex law reform*, available at www.dailymail.co.uk, accessed 31 August 2016.

[78] Lobbying *Database*, available at www.opensecrets.org, accessed 31 August 2016.

The same database also discloses the total spending on Federal **lobbying** to be 3.31 Billion US$ in 2014. The total amount of money raised by all candidates for the congressional elections in the same year is only about half: 1.77 Billion US$. These overall figures could mean that by cash flows lobbying may have a more important function in influencing politics than **political financing**.

According to analysis by the media, the **ratio** of lobbyists employed by the healthcare industry, compared with every **elected politician**, was six to one in the United States in 2010.[79]

These few examples shall serve as illustrations for what is possible if data on lobbying is available through a lobbying register.

Some websites try to step in with transparency where lobbying registers do not yet provide official information. An example is "LobbyPlag",[80] (a pun with the words lobbyism and plagiarism): the platform provides tools to research to what extent the European Union legislator copy-pasted **draft laws** from lobbyists. "LobbyCloud" is a website, which in the manner of WikiLeaks, publishes **lobbying documents** found to be circulating among European Union officials.[81] One should also note that the OECD has called for "disclosing information on key aspects of lobbying such as its intent, beneficiaries and targets".[82]

Examples for the **period** in paragraph 1 are "without delay" (Austria, § 10.2), quarterly (United Kingdom, Section 5; United States, Honest Leadership Act, Section 201.a), every four months (Ireland, Article 12.1 and Article 7), or annual (Slovenia, Article 63). The number of **days** for preparing the report after the period is usually 20 or 21 days (Ireland, Article 7, United States). For corporate lobbyists employing in-house lobbyists, it is nine months after the end of each calendar year in Austria (§ 11.3), apparently in order to allow companies to finish their overall annual financial report first.

It is interesting to note that almost all lobbying laws require **lobbyists** to report on their lobbying activities, while they do not impose an equivalent obligation on public officials or their employers. The overarching rationale behind this is probably the costs-by-cause principle: Lobbyists cause the need for transparency; hence they have to provide it. More importantly, public officials cannot know the ultimate beneficiaries of lobbying activities nor the level of expenditure involved. One of the notable exceptions is the case of Slovenia, which has opted for a dual track of both lobbyist and **public officials** reporting, with greater obligations on latter. Under Article 68 of its law, the officials are required to make detailed record of any lobbyist contacts and to submit this information within three days to their supervisor and the anti-corruption commission. The reports are then subject to access to information requests, but the summaries are also proactively published as a matter of practice.[83] Another exception is the Peruvian "Law regulating the management of interests in public administration" of 2003. Its Article 16 obliges public officials to inform the "Public Interest Registry" in case they have been contacted by lobbyists and to summarise any information and documentation that lobbyists provided. It is not clear to what extent this provision is implemented in practice. The Polish law follows a similar approach. All public authorities are obliged to publish online information about lobbying activities. Where legal drafters would expect public officials to be more likely to comply with a lobbying regulation, they may opt for such a "public official"-model. A different case is Hungary, which obliges its public officials to report lobbying contacts internally. This obligation is not relevant in the context of (external) transparency reporting, but rather in the context of proper conduct of public officials (see below Article 7).

[79] The Guardian (19 November 2011), *'America is better than this': paralysis at the top leaves voters desperate for change*, available at www.theguardian.com, accessed 31 August 2016.

[80] *www.lobbyplag.eu*.

[81] *https://lobbycloud.eu*.

[82] OECD (2009), Volume 1, ibid, page 12.

[83] Transparency International (2015), Lobbying in Europe, ibid, page 29.

Paragraph 2: Subsections (a) to (f) follow respective provisions in the Irish legislation (with the last part of subsection (c) stemming from the Ontario law). Similar rules are also found in legislations of other countries.

Subsection (g) concerns **fees** and **expenditures**. It is based on the Slovenian and Austrian law (Article 64; § 10). Laws may include thresholds above which these amounts must be reported; however, the Austrian law contains no threshold for lobbying firms, while the Slovenian generally applies no threshold. The oversight body (see below Article 8) could be tasked with providing guidance on calculating properly the amounts to be reported. This concerns for example cases, where lobbying is a part of a service contract that also includes other activities and the value of lobbying cannot be determined at first sight (see in this regard the Slovenian law, Article 64). Where legal drafters regard the disclosure of exact amounts to be conflicting with commercial or trade secrets, they may want to consider disclosure in cost bands.

Subsection (h) stems from the Canadian law. Some legislators view lobbying from **government funding** problematic because of its circular dynamic: The lobbying entity receives public funding, and through the lobbying it may receive so even more. Therefore, some countries even prohibit lobbying from public funds: "An organization [for social welfare] [...] which engages in lobbying activities shall not be eligible for the receipt of Federal funds constituting an award, grant, contract, loan, or any other form" (United States, Section 18). If public funds are used for lobbying Congress, it is even a criminal offence.[84] However, this approach has significant downsides. For example, an NGO receiving funding from a municipality for a small project might be excluded from lobbying at the national level. Similar would be true for an entrepreneur or a business that have benefited from a subsidy. One also needs to keep in mind that many governments fund NGOs in their countries exactly for the purpose of lobbying (for example promoting new laws against corruption).There might also be constitutional issues in this regard, since the stakeholder would be excluded from exercising democratic rights such as freedom of speech.[85] Therefore, this toolkit does not include a prohibition in this direction, but suggests a respective reporting requirement.

Political contributions by lobbyists to support their lobbying cause are a highly relevant integrity risk. The internationally probably best known lobbyist, Jack Abramoff, said after having served several years in prison for a multi-million dollar lobbying scandal: "Political donations are the best way of illicit lobbying and they should be prohibited for lobbyists."[86] It is almost inevitable that a donation by a lobbyist is at least perceived to be in exchange for the recipient to promote the lobbyists interest. Therefore, *quid-pro-quo* donations are clearly prohibited under international standards and by political finance laws throughout Europe. In addition, political finance laws create transparency on financial donations through disclosure obligations. From this perspective, no additional transparency seems necessary. However, there are two more aspects in this regard. First, political finance laws often require transparency only above a certain threshold or only to a certain extent. Second, lobbyists may facilitate political fundraising without necessarily becoming donors themselves (depending on the political finance law). Subsection (i) addresses this additional regulatory need. It is based on the Slovenian law (Article 64). It only requires disclosure of donations that are not otherwise disclosed already. This avoids double reporting.

Subsection (j) is a placeholder for further reporting details legal drafters may want to consider. This could be for example "any supporting **documentation** shared with the public officials" (International NGO Standard, Transparency 3.f). As far as can be seen, none of the current lobbying regulations contain such reporting requirements. Another reporting detail could be the facilitation of fundraising events. The United States law (2007, Section 203.E) contains such a reporting requirement. Legal drafters will need to adapt this provision to their local context.

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[84] *18 U.S. Code § 1913*, "Lobbying with appropriated moneys", available at www.law.cornell.edu, accessed 31 August 2016.

[85] For example, Transparency International received a grant for advocating in member States for stronger lobbying regulation: "Lifting the Lid on Lobbying" project, http://eurlobby.transparency.org/.

[86] Huffington Post (11 May 2011), *Jack Abramoff Criticizes Reforms Implemented after Lobbying Scandal in New Autobiography*, available at www.huffingtonpost.com, accessed 31 August 2016.

It is important that the public registry provides easy to use **pull-down menus** and similar user-friendly features. This is not only important for the comparability of information, but also for the motivation of users to comply with reporting requirements. Systems requiring formulating long free-style texts could deter users.

The rationale for consolidated reporting under **paragraph 3** is the same as for Article 3 paragraph 6.

Paragraph 4 provides for exceptions to the reporting requirement in certain cases. It is one option to exclude lobbyists with activities of minimal size (see already comments on Article 2, keyword "*de minimis*"). Another option is distinguishing between different forms of lobbyists and subjecting them to different reporting requirements (Austria, §§ 10-12).

Article 5 – Public Access to Information

(1) *[Freedom of information]* **The law on freedom of information applies regarding all information, which is related to lobbying and is held by public authorities regardless of whether the authorities are the authors of the information**. **When deciding on an information request, the importance of the public interest in transparency of lobbying shall be taken into consideration.**

(2) *[Proactive publication]* **All public bodies** [term to be specified] **should publish proactively at a minimum the following information:**

(a) Draft regulatory acts, draft policies, and similar documents [further procedural details to be specified]**;**

(b) Minutes of meetings with lobbyists [further procedural details to be specified]**;**

(c) Documents provided by lobbyists [further procedural details to be specified]**;**

(d) [Other – to be specified]**.**

(3) *[Legislative footprint]* **All public bodies** [term to be defined] **should record all input received from lobbyists on draft policies, laws and amendments as a "legislative footprint" consisting of two parts:**

(a) Part 1 detailing all the lobbyists with whom those in charge of a particular file have had contact;

(b) Part 2 listing all substantive input received.

Commentary

Even in an ideal world, lobby registers could only make a portion of reality transparent. So far, existing registries go only so far as to show a summary of the lobbying activities, only from the lobbyist's perspective, and only to the extent the lobbyist actually reports on the activity. An actual file, for example on the development of a draft law, can be more informative than what a lobby register shows. **Freedom of information** under **paragraph 1** allows interested citizens or journalists to follow all trails of lobbying of a draft law in detail by going through public files.[87] It is for this reason that the OECD's "10 Principles for Transparency and Integrity in Lobbying" state that "freedom of information legislation" is one of the prerequisites to "support a culture of transparency and integrity in lobbying" (at Principle 3). Similarly, the General Court of the European Court of Justice has underlined, "if citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process [...] and to have access to all relevant information."[88]

[87] See for an overview: Access Info Europe (2013), *Lobbying Transparency via Right to Information Laws*, available at http://avada.access-info.org, accessed 31 August 2016.

[88] General Court of the European Court of Justice, *Case T-233/09*, Access Info Europe vs. Council of the European Union, Decision of 22 March 2011, paragraph 69, available at http://eur-lex.europa.eu, accessed 31 August 2016.

Legal drafters will have to review if and to what extent freedom of information laws already enable members of the public to "follow the lobbying trail". Paragraph 1 of this toolkit serves as a reminder in this context. Where necessary, it can serve as a provision to extend access under existing freedom of information laws to files relevant in the context of lobbying. These could be meeting schedules, documentation of interaction with lobbyists, documents submitted by lobbyists, etc. Should a country not have a comprehensive freedom of information law, it can refer to several international standards for drafting it.[89] In line with the Council of Europe Convention on Access to Official Documents,[90] all countries' access to information laws should contain only a limited list of potential exceptions. Only if it is likely that there is harm to a legitimate interest and no overriding public interest exists, access should be denied. Given the importance of transparency of lobbying in a democratic society, there is a strong presumption of a public interest in any information and documents related to lobbying and to decision-making and legislative processes more broadly.

Access to information under paragraph 1 has one disadvantage: The public has to request access to the documents and each time they wish so. Obviously, freedom of information has more impact where the data is **published** online **proactively** as foreseen under **paragraph 2**. In the context of lobbying, for example, the Executive Office of the President of the United States ("White House") publishes its visitor's record online.[91] By contrast, the UK Prime Minister's public visitors' record is limited to official guests.[92] On the level of the European Union, the Commission has undertaken to publish information regarding the meetings of the Commissioners, members of their cabinets and Directors-General with lobbyists.[93] Some parliamentarians publish their business schedule online on a voluntary basis, accounting for each working hour and disclosing all their meetings.[94] A different approach by other parliamentarians is voluntarily to publish all contacts with and invitations by lobbyists.[95] In individual cases, government entities make lobbying contacts public. An example is the Australian Government Department of Health, which continuously publishes information about its meetings with the tobacco industry,[96] implementing a respective guideline by the World Health Organisation (WHO).[97] The Polish law foresees a specific disclosure obligation for lobbying contacts. It requires "public authorities [...] to make immediately available, in the Public Information Bulletin, any information on actions pertaining to them and initiated by professional lobbyists with a description of the solution expected by these lobbyists." (Article 16.1).

Overall, proactive disclosure – in terms of practice – is still in its infancy. Nonetheless, the **OECD's** "10 Principles for Transparency and Integrity in Lobbying" note in this context: "The public has a right to know how public institutions and public officials made their decisions, including, where appropriate, who lobbied on relevant issues. Countries should consider using information and communication technologies, such as the Internet, to make information accessible to the public in a cost-effective manner." (at Principle 6). A recent paper by the **World Bank's** Access to Information Program points out, "proactive disclosure is integral to the transparency that underpins good government [...]. The precise standards for what information should be proactively disclosed are still being defined, but it is possible to identify common classes of information which should form the minimum of any national access to information regime."[98] Paragraph 2 serves as a reminder to legal

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[89] See the overviews at: *webpage* article19, available at www.article19.org; *webpage* right2info, available at www.right2info.org, accessed 31 August 2016.

[90] *ETS 205* of 18 June 2009, available at www.coe.int, accessed 31 August 2016.

[91] *Visitor's record*, available at www.whitehouse.gov, accessed 31 August 2016.

[92] *Visitor's record*, available at www.gov.uk, accessed 31 August 2016.

[93] European Parliamentary Research Service (May 2016), *Briefing PE 581.950 EN*, EU Transparency Register, page 6, available at www.europarl.europa.eu, accessed 31 August 2016.

[94] See for example one German lawmaker publishing a "*crystalline calendar*", available at www.christian-stetten.de, accessed 31 August 2016 (in German).

[95] *Website* "The Lobby-Ticker" of MP Martin, available at www.hpmartin.net, accessed 31 August 2016.

[96] *Website* "Public notification of meetings between the Australian Government Department of Health and the Tobacco Industry", available at www.health.gov.au, accessed 31 August 2016.

[97] See above at 1.3.

[98] Darbishire H. (2015), *Proactive Transparency: The future of the right to information?*, page 45, available at http://documents.worldbank.org, accessed 31 August 2016.

drafters to consider the potential of proactive disclosure in the context of lobbying. The **International NGO** Standard recommends that "public bodies and officials should proactively publish their organisational, programmatic, administrative, financial, and business schedule information, summaries of meetings and other interactions with third parties, as well as any background documentation and preparatory analyses received or commissioned in the course of their work. These obligations shall also extend to the operation of any expert and consultative bodies convened by the public sector." (Transparency, Principle 8). For an example of good practice, see the Law of 2014 for the region of Catalonia on Transparency.[99]

Pro-active publication entails further questions than are covered by paragraph 2 and which depend on the **local context**, for example: At which time are draft acts available to the public? How to proceed if meetings with a lobbyist are confidential at the time of the meeting, e.g. on an arms trade with a foreign country – at which time would the minutes become public? What happens if the documents by lobbyists are hundreds or thousands of pages as a ring binder not easy to be copied? Therefore, paragraph 2 needs further details possibly by referencing existing regulations on these questions.

Paragraph 3 reflects a growing international call to document influences during the legislative process in a "legislative footprint". The OECD defines the term as follows: "The legislative footprint is a document that details who lawmakers consulted, when and why, on what matter, and how the decision was reached."[100] The Council of Europe's **Parliamentary Assembly** acknowledged the need for legislative footprints in June 2016, in the context of European Institutions and recommended to "publish legislative footprints in order to track any input received from third parties aimed at influencing European Union legislation and policies".[101] As a result of the Fourth Round Evaluation of Germany, **GRECO** "is of the opinion that transparency could be significantly enhanced by providing a 'legislative footprint' i.e. a written trace of comments made by stakeholders that are taken into account in the drafting process. In this connection, the GET [GRECO evaluation team] was interested to hear from representatives of the Bundestag Administration that academics and other experts were discussing how such concerns could possibly be addressed. They were in favour of exploring technical possibilities to better map changes made during the legislative process. GRECO strongly encourages the authorities to take inspiration from such reflections and to seek ways to ensure timely disclosure of the involvement of third parties in the preparation and finalisation of draft legislation."[102] In 2011, the **European Parliament** endorsed a proposal for a "legislative footprint annex" to reports drafted by Members of the Parliament. This annex would list all the lobbyists whom lead MEPs met while a legislative report was being drafted.[103] However, so far the Parliament has not implemented this proposal. A Policy Paper by the EU Office of Transparency International has recently defined some standards of what the "EU Legislative Footprint" should look like.[104] The **OECD's** "10 Principles for Transparency and Integrity in Lobbying" call on governments to "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." (at Principle 6). In the sense of the OECD Principles, paragraph 3 does not only focus on legislative decisions, but decisions in a wider sense.

Until today, there is little **national practice** one can refer to as examples. National laws contain obligations to list organisations or experts (formally) heard in the legislative process. In Finland, for example, a government bill incorporates a description of why it has been proposed, an account of

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[99] Region of Catalonia (2 July 2015), *Press release*, available at http://web.gencat.cat, accessed 31 August 2016.

[100] OECD (2014), "Lobbyists, Government and Public Trust", Volume 3 "*Implementing the OECD Principles for Transparency and Integrity in Lobbying*", p.68, available at www.oecd.org, accessed 31 August 2016.

[101] Resolution 2125 (2016), *Transparency and openness in European institutions*, at 10.2., available at www.assembly.coe.int, accessed 31 August 2016.

[102] GRECO, *Eval IV Rep (2014) 1E*, Germany, at para. 30, available at www.coe.int, accessed 31 August 2016.

[103] European Parliament, Press release (2011), *MEPs back joint Parliament-Commission register of lobbyists*, available at www.europarl.europa.eu, accessed 31 August 2016.

[104] Transparency international EU Office (2015), *EU Legislative Footprint. What´s the real influence of lobbying?*, available at www.transparencyinternational.eu, accessed 31 August 2016.

the consultation process, and a brief summary of stakeholders' comments. However, as far as can be seen, no national legislation exists[105] that would go as far as the "legislative footprint" proposed by the Council of Europe's Parliamentary Assembly or by the European Parliament. Some parliamentarians have **voluntarily** provided "legislative footprints" concerning their own individual contacts.[106] In addition, some NGOs are trying to establish a legislative footprint *ex post* by combining information from various sources into one database.[107] It remains to be seen whether the scarcity of practical examples on a national level is because there are limits to technically implement this idea, or because this idea needs more time and political will to materialise in practice.

Depending on the extent to which **proactive publication** under paragraph 2 combines all information and links databases as appropriate (for example the register of legal drafts with the lobbying register), a separate legislative footprint might be obsolete.

Chapter III: Integrity

Article 6 – Lobbyists

(1) *[Principles]* **Lobbyists shall:**

(a) *[Openness]* **Provide accurate and correct information regarding themselves and the subject matter covered by the lobbying assignment to the targeted public official;**

(b) *[Honesty]* **Act honestly and in good faith in relation to the lobbying assignment and in all contacts with public officials;**

(c) *[Undue influence]* **Refrain from undue and improper influence over public officials and the public decision-making process;**

(d) *[Conflict of interest]* **Avoid conflicts of interest:**

i. Regarding more than one lobbying task; or

ii. Regarding public officials' public and private interests.

(b) *[Other]* [to be defined]

(2) *[Code of conduct]* **The oversight body issues a code of conduct for lobbyists based on the principles of paragraph 1 after having consulted with lobbyists, bodies representing them, and other interested stakeholders, and with approval by parliament.**

(3) *[Self-regulation]* **Lobbyists or their professional associations develop on a voluntary basis additional ethical commitments that are to be published by the Register.**

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[105] TI Helpdesk answer (1 February 2013), *What are international experiences with the introduction of a "legislative footprint"?*, p.2, available at www.transparency.org, accessed 31 August 2016: "[…] [L]egislative footprints have not, to the best of our knowledge, been implemented in any country […]."

[106] See for example the UK MEP Diana Wallis, *webpage*, available at http://dianawallis.org.uk, accessed 31 August 2016.

[107] See for example the platform being developed by Transparency International Slovenia and others, which has the purpose "to show the complete 'legislative path'", Presentation by TI Slovenia (1 October 2015), *Legislative monitor – Legislative footprint and use of legislation*, available at www.mju.gov.si; Project *website*, available at www.transparency.si, accessed 31 August 2016.

Commentary

Paragraph 1
All lobbying regulations contain **ethical** principles for lobbyists. They all revolve around the four principles contained in paragraph 1. 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). The OECD Principle 8 refers to "honesty", avoidance of "illicit influence", and avoidance of "conflict of interest" in order to specify integrity in lobbying. The four principles in this paragraph 1 are taken more or less verbatim from the Council of Europe Recommendation, no. 14.

Openness
The principle of openness touches mainly on two questions: Does the lobbyist announce him/herself as such, or does he/she pretend to be someone else, such as a concerned citizen, an NGO representative, or a grassroots activist? Does the lobbyist reveal the real lobbying client of his/her activities? For example, Slovenia requires lobbyists to "identify themselves to the lobbied persons and present the authorisation of the interest organisation for lobbying in a case. Lobbyists shall specify the purpose and objective of lobbying." (Article 69). In Austria, lobbyists have to "disclose at each first contact with a public official their task as well as the identity and specific interests of their clients/employers" (§ 6.1; similarly: Australia, Section 8.1.e; France, no. 2; Poland, Article 15). However, openness is not only relevant regarding contacts with public officials, but also regarding contacts with clients: In the context of conflict of interest, lobbyists need to disclose possible conflicting interests (see below comments on subsection d). In Austria, they also need to provide clients with an estimate of the probable fee and need to inform them that the lobbying will be registered (§ 5.3.1 and 5.3.2). Furthermore, openness applies to the public at large. Registry obligations are the main embodiment of openness. In addition, lobbyists may not deceive the public when conducting grassroots lobbying campaigns.

Honesty
As is the case with openness, honesty also applies towards public officials, clients, and the public at large, as the Australian Code of Conduct states: "lobbyists shall not engage in any conduct that is [...] dishonest [...]; lobbyists shall use all reasonable endeavours to satisfy themselves of the truth and accuracy of all statements and information provided by them to clients whom they represent, the wider public and Government representatives" (Section 8.1.a and 8.1.b). Honesty relates to a variety of aspects:

- to pass on information received truthfully (Austria, § 6.3);
- "to submit correct data to the official" (Macedonia, Article 18; similarly Slovenia, Article 70.2);
- to refrain from claiming non-existent relations to public officials (Austria, § 5.3.3);
- to "not make misleading, exaggerated or extravagant claims about, or otherwise misrepresent, the nature or extent of their access to Government representatives, members of political parties or to any other person" (Australia, Section 8.1.c);
- to refrain from using the "letterhead or logo of the National Assembly" (France, National Assembly, no. 5); to "to wear their badges prominently" (France, National Assembly, no. 3).

Honesty is compromised, where "the lobbyist directly or indirectly declares or states to be capable of influencing the legislative procedure, a state politician, public official or public servant" (Lithuania, Article 6.7); where "state politicians, public officials or public servants are deliberately misled or deceived by indicating facts or circumstances which may lead to a decision to amend, supplement, repel or adopt a legal act" or where lobbying activities "are carried out in the name of a non-existent client" (Lithuania, Article 6.4 and 6.6; Montenegro, Article 38.4.

Undue influence
Lack of openness or honesty is already a form of "undue influence". This aside, "undue influence" relates mainly to the provision of **gifts** and financial advantages (Montenegro, Article 33.4; Slovenia, Article 70.3). The following quote illustrates the relevance of gifts in the context of lobbying. United States' probably most famous lobbyist Jack Abramoff[108] said in a TV interview that "very few members" of Congress do not accept some form of bribery: "I am talking about giving a gift to somebody who makes a decision on behalf of the public and at the end of the day that's really what bribery is [...]. But it's done every day and it's still being done."[109] A 2014 report by the **European Parliament** illustrates the need for regulation. The report calls for an amendment of the Code of Conduct for lobbyists in order to prohibit "interference in the private sphere or personal life of decision-makers, e.g. by sending gifts to a decision-maker's home address".[110] Prohibitions on gift-giving by lobbyists can be complemented or replaced by respective prohibitions on acceptance by public officials (see below comments on Article 7 paragraph 1 subsection c).

In this context, some lobbying laws require lobbyists to familiarize themselves with all incompatibilities and ethical **rules** of public officials (Austria). Agreeing with clients on **success fees** creates the risk that lobbyists will exert undue influence for the sake of success; such success fees are therefore prohibited in Austria if they relate to lobbying the conclusion of public contracts (§ 15.2). The prohibition on success fees in Canada extends to all lobbying activities (Section 10.1 and 10.2): "any payment that is in whole or in part contingent on the outcome". The Austrian law also contains a general rule, under which lobbyists have to refrain from "undue or disproportionate **pressure** on public officials", unless such pressure is socially accepted (§ 6.5).

Conflicts of interest
Conflicts of interest occur regarding clients and regarding public officials. To this extent, lobbying laws prohibit the representation of "two lobbying clients with opposing interests" (Montenegro, Article 33.2; similarly Lithuania, Article 6.8). This issue is not necessarily a matter of purely private interest (of the two different clients involved). The targeted officials and the public want to know clearly whom the lobbyist represents not only formally but also in substance. This is obscured if the lobbyist has conflicts of interest between his/her various tasks. One should note, though, that conflicts of interest relating only to private clients were specifically excluded from regulation by the Canadian Lobbyists' Code of Conduct, as part of its recent review.[111] Private clients aside, a lobbyist can also have in parallel a service relationship with a government entity. Therefore, some regulations prohibit lobbying on a subject, for which the lobbyist is also paid to advise the public sector (Ontario, Section 3.3). This case is covered as well by Paragraph 1 subsection d (i) of this Article. Regarding public officials, the Canadian Lobbyists' Code of Conduct states: "A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest." (Canada Code, no. 6). The Code further details that the lobbyist shall not pursue activities where "the lobbyist and public office holder share a relationship that could reasonably be seen to create a sense of obligation". Furthermore, "to avoid the creation of a sense of obligation", the provision of gifts or other benefits is prohibited (unless the gift is allowed by other rules). Conflicts of interest involving public officials are also dealt with by Article 7 (see below).

Other
Depending on the risks in a local context, legal drafters may want to address other aspects of good conduct. Several lobbying laws address the question of obtaining and using **data**. The Austrian law prohibits "collecting information in undue ways" (§ 6.2). Montenegro forbids to "gather data and information contrary to [...] this Law or use information gathered in such manner for lobbying

[108] See already above at footnote 86.

[109] CBS (30 May 2012), Jack Abramoff: *The lobbyist's playbook*, transcript, available at www.cbsnews.com, accessed 31 August 2016.

[110] European Parliament, Report on the modification of the interinstitutional agreement on the Transparency Register (*2014/2010(ACI)*), at D.10, available at www.europarl.europa.eu, accessed 31 August 2016.

[111] Office of the Commissioner of Lobbying of Canada, *Report on the 2013 Consultation – Lobbyists' Code of Conduct*, available at https://lobbycanada.gc.ca, accessed 31 August 2016.

purposes" (Article 33.1). The following case illustrates the relevance of such provisions: "A lobbyist for a powerful pharmacy group is thought to have spied on Germany's Health Ministry for nearly two years in order to collect confidential information, a newspaper revealed on Wednesday. Draft bills, planned policy changes, and private emails from the inboxes of Health Minister Daniel Bahr and his predecessor Philipp Rösler were among the documents that, [...] the lobbyist obtained. [...] While the ministry refused to comment on the lobbyist, it did say that a member of IT staff was under investigation".[112] However, any prohibition in this regard is likely to be double to existing data protection and state secrecy laws.

In the French National Assembly, lobbyists "must refrain from any action designed to obtain information or decisions by **fraudulent** means" (no. 6). Further examples of "other" ethical obligations are: the prohibition on "selling [...] parliamentary documents or any other National Assembly document", to pursue "**advertising** [...] in the premises of the National Assembly", to use the fact of being registered "vis-à-vis third parties for commercial or advertising purposes"; or the obligation to provide information "open, without discrimination, to all members [of the Assembly], whatever their political affiliation" (France no. 4, 7, 9, and 10).

Another, rather odd constellation in this context is "**make-work** legislative proposals". In the United States, some lobbyists try to introduce disputed legislation solely for the purpose of securing future business. After the draft law is tabled, they hope to be hired either to ensure the law's passage or its defeat. In some states, such proposals are prohibited, comparing them to frivolous litigation: "The goal in both of these contexts is to avoid wasting valuable public and private resources on initiatives that do not further legitimate purposes."[113] However, in states that do not prohibit such proposals, the make-work proposal in itself could be interpreted as violating conflict of interest provisions.

It should be noted that all above comments focus only on rules contained in **specific lobbying** laws. Countries with or without lobbying laws always have other sets of regulations that limit what lobbyists are allowed. For example, political finance laws usually prohibit *quid-pro-quo* donations. While this prohibition is highly relevant in the context of lobbying, it is usually a restriction that not only covers lobbyists, but any citizen.

Paragraph 2

Rules of conduct depend on a variety of factors. As mentioned above in the comments on paragraph 1, the **local** context may contain risks that are particular to certain countries, but are not known in others, such as "make-work legislative proposals". Furthermore, **constitutional** limits may allow for some rules that may be unconstitutional in other countries. For example, as mentioned above (paragraph 1, keyword "Other"), there is a rule by the French National Assembly that requires lobbyists to provide all members of Parliament with the same information. As a consequence, a parliamentarian might not be able to request information from a lobbyist, without all other members becoming at least potentially aware of this. In some countries, this might raise questions of the individual independence of members of parliament. In addition, various **branches** of power may want to regulate lobbying rules independently, with particular rules applying for example in parliament as opposed to the government. It may be for this reason, that in Poland "the rules of conduct of professional lobbyists in the *Sejm* and the Senate shall be specified by the Standing Orders of the *Sejm* and the Senate, respectively." (Article 14.3). Lastly, codes of conduct may require a process closer to the **stakeholders** involved, than a formal legislative process may allow, and **changes** to these rules might be required more often. For example, in Texas, lobbyists circumvented the 90 US$ limit for expenses on meals with public officials. Several lobbyists would attend the dinner, and would split the public official's bill among the lobbyists.[114] Such circumventions may require flexible changes of the code of conduct (or respective guidance under Article 9).

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[112] The Local (12 December 2012), *Lobbyist suspected of spying on Health Ministry*, available at www.thelocal.de, accessed 31 August 2016.

[113] Office of State Ethics, *A.O. 2015-6*, 17 December 2015 Page 2 of 7, available at www.ct.gov, accessed 31 August 2016.

[114] The Dallas Morning News (7 February 2015), *State law allows for lobbying deep in the shadows of Texas*, available at www.dallasnews.com, accessed 31 August 2016.

It is for any or all of the above these reasons that many legislators **delegate** the task of drafting of a code of conduct to another body, such as: the Lobbying Commissioner (Canada, Section 10.2); Standards in Public Office Commission (Ireland, Section 16); Chief Official Ethics Commission (Lithuania, Article 12.2.4); Parliament as a self-governing body (Poland, Article 14.3). Paragraph 2 is based on the Canadian and Irish law. Stakeholder **consultation** is an explicit requirement in some provisions (Canada, Section 10.2.2; Ireland, Section 16.2), as is involvement of parliament (Canada, Section 10.2.3). The involvement of parliament in paragraph 2 legitimizes the code of conduct to be the basis of sanctions under Article 10. Depending on the national context, this parliamentary approval might not be necessary, as the core principles of the code are already laid out in Article 6 paragraph 1.

Paragraph 3

Some lobbying laws delegate the task of drafting a code of conduct to corporate lobbyists (Austria, § 7) or to professional associations (Slovenia, Article 57). The Austrian law also requires publication of the code on a website. This toolkit sees self-regulation not as an alternative, but as a complement to legal principles. This reflects OECD Principle 9: "Countries should involve key actors in implementing a coherent spectrum of strategies and practices to achieve compliance." Possible reference points for self-regulation are the "Woodstock Principles for the Ethical Conduct of Lobbying"[115] or the "Society of European Affairs Professionals Code of Conduct".[116] A recent report by Transparency International Ireland provides an overview of voluntary lobbying standards and practices based on consultations with the lobbying industry.[117]

Excursus 1: Qualifications of lobbyists

This legislative toolkit does not set any professional benchmarks for lobbyists, such as a training certificate or the absence of a criminal conviction. This is in line with the **Council of Europe Draft Recommendation** that does not foresee such a benchmark; neither do the OECD Principles nor the International NGO Standard.

However, legal drafters should keep in mind that some lobbying laws set out such requirements. In Slovenia, "a lobbyist may be any person having reached the **age** of majority who [...] has not been deprived of the **capacity** to enter into contracts, and has not been sentenced by way of a final judgment for an intentionally committed **criminal offence**, or prosecuted ex officio in the Republic of Slovenia to a prison sentence of more than six months." (Article 56.2). The Lithuanian (Article 3.1 and 3.4) and Macedonian (Article 7.2) laws contain a similar restriction for persons under age or convicts, as does the Montenegrin law regarding convicts (Article 15.2). One should keep in mind, though, such exemptions might only work for consultant lobbyists, but not where, for example, the member of an NGO conducts lobbying. Otherwise, any convict would be prohibited from advocating through an NGO, which might infringe constitutional freedoms. This holds particularly true for lobbyists representing their own individual interests (Article 1 paragraph 3 (a)).

Some regulations go even further and require certain professional **training** for conducting lobbying activities. Macedonia calls for "university level education in the lobbying field" (Article 7.2), while Montenegro requires "higher education, the seventh qualification framework level, sub-level VII-1(VII1)" (Article 15.1). Such qualification requirements raise questions in the constitutional context of free professional life. In particular the Macedonian restriction would exclude most people from lobbying and it is not even clear if there is a university education for all lobbying fields. What would be the required field of education for lobbying anti-abortion laws, or lobbying the right of same-sex marriage? Montenegro takes on a more general approach and universally requires "a certificate of having passed the examination for conducting lobbying" (Article 15.4).

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[115] *Woodstock Principles*, available at http://carmelitengo.org, accessed 31 August 2016.

[116] *Code of Conduct* of 2005 (revised), available at www.seap.nu, accessed 31 August 2016.

[117] TI Ireland (2015), *Responsible Lobbying in Europe, An overview of voluntary lobbying standards and practice*, available at http://transparency.ie, accessed 31 August 2016.

Excursus 2: Rights of lobbyists

Several lobbying regulations do not only foresee obligations, but also privileges or rights of lobbyists. This includes access badges for easy multiple entry to the premises of Parliament (Germany, Netherlands), the right to use the premises of public authorities for lobbying (Poland), and the right to be involved in the decision-making process (Lithuania). Such provisions can have the positive intention of setting an incentive for lobbyists to register by granting privileges. However, depending on their wording such provisions can also raise questions. In principle all citizens should have the same rights as lobbyists, and for example be able to meet and address members of parliament. This follows from the constitutional principle of **equal treatment**. Therefore, involvement in the legislative process should be regulated in general and for all citizens, not only lobbyists. Including such rights in a lobbying law might send the wrong signal depending on the local context, and perhaps even further entrench the imbalances of power.

Access badges

In Germany[118] and the Netherlands[119] registered lobbyists receive an access badge for the premises of Parliament. In France, registered lobbyists have "authorised access – at specified times – to designated parts of the [Assembly's] premises".[120] Citizens usually do not have the same right. The different treatment may be justified by the fact that lobbyists typically need to access the parliamentary buildings more often than ordinary citizens.

Use of premises

The Polish law entitles lobbyists "to perform their activities also in the premises of an office that serves public authority bodies. The manager of the office referred to in sec. 1 shall provide registered professional lobbyists with access to the office he/she manages in order to enable them to represent properly the interests of entities on behalf of which they lobby." (Article 14). Such a provision could become a challenge when lobbyists regard it as a right to be heard by public officials without discretion on the meeting.

Information

In Slovenia, "a lobbyist entered in the register of lobbyists [...] shall have the right to be invited to all public presentations and all forms of public consultations with regard to the areas in which he has registered an interest, and shall be informed thereof by the State bodies and local communities." (Article 67.2). This right might go without saying for any citizens under advanced standards of public participation (see above Introduction, 1.2).

Advocacy

The Lithuanian law lists a number of "rights of lobbyists". They are explicitly entitled inter alia "to submit proposals and explanations regarding the drafting of legal acts", to "conduct expert examinations of drafts", "to inform the public [...] about draft legal acts", "to make reports through mass media and to participate in public events", or "to conduct surveys" (Article 4.1). Such an exhaustive enumeration carries the risk that any right accidentally not enumerated could be seen as excluded. It raises also the question whether unregistered lobbyists or non-lobbyists are not entitled to exercise these rights, while it should be obvious that they are.

Article 7 – Public officials

(1) *[Conduct]* **Public officials shall:**

(a) *[Record]* **Keep communications and meetings with lobbyists on file;**

[118] Lobbyists *list*, available at www.bundestag.de, accessed 31 August 2016.

[119] Lobby *Register*, available at www.tweedekamer.nl, accessed 31 August 2016.

[120] GRECO, *Eval IV Rep (2013) 3E*, France, § 49, available at www.coe.int, accessed 31 August 2016.

(b) *[Reporting violations]* **Report violations of lobbyists' obligations under this law to their superior** [or to another body to be specified]**;**

(c) *[Other]* [to be defined]

(2) *[Incompatibility]* **Public officials cannot:**

(a) *[Secondary activities]* **Act as lobbyists lobbying in the field of their work or lobbying the public entity they works for.**

(b) *[Post-employment]* **Act as a lobbyist or advise lobbyists** [for a specified period of time] **after leaving office where it relates directly to the functions held or supervised by the public officials during their tenure, or otherwise constitutes a conflict of interest.**

(3) *[Pre-employment restriction]* **Anybody having acted as a lobbyist and intending to work as a public official in the field of his/her previous lobbying or at the public entity he/she lobbied shall be subject to a conflicts of interest vetting process that may necessitate recusal or supervision for certain tasks, or a disqualification from the potential position.**

Commentary

Good governance in lobbying is not only a matter of lobbyists. It also requires **public officials** to apply a number of good practices. Therefore, 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."[121] The **OECD's** "10 Principles for Transparency and Integrity in Lobbying" list inter alia the following duties of public officials: "cast no doubt on their impartiality to promote the public interest, share only authorised information and not misuse 'confidential information', disclose relevant private interests and avoid conflict of interest" (Principle 7). The **Council of Europe Draft Recommendation** calls for "'Cooling-off' periods that establish a period of time that has to elapse before either a public official may become a lobbyist after leaving public employment or office, or a lobbyist may become a public official after ceasing his or her lobbying activities" and for "Guidance to public officials on their relations with lobbyists, including: How to respond to communications from lobbyists; Reporting violations of the legal regulation of lobbying activities; Disclosing conflicts of interest; Refusing or disclosing the receipt of gifts and hospitality offered by a lobbyist." The **International NGO** Standard sets out similar but more detailed recommendations. Article 7 follows the rationale of this international guidance.

Paragraph 1
The obligations in paragraph 1 are probably already set out in most legal systems. Paragraph 1 is thus rather a reminder or **clarification** on obligations in the context of lobbying.

Subsection a – Records
As for record keeping, probably all countries have regulations in place that define what paper or electronic documents are consciously retained as evidence of an action. Once declared, a record cannot be changed and can only be disposed of within the rules of the system.[122] Legal drafters may want to review in this context to what extent they need to redefine obligations for record keeping. In Poland, the legislator delegated the rule setting in this regard to public authorities: "Managers of offices serving public authorities, each in his/her own capacity, shall define the detailed rules of conduct for their subordinated employees with reference to professional lobbyists [...] including the

[121] GRECO, *Eval IV Rep (2012) 2E*, United Kingdom, paragraph 53, available at www.coe.int, accessed 31 August 2016.

[122] See for example the *Directive* on Recordkeeping by the Canadian Government (2009), available at www.tbs-sct.gc.ca, accessed 31 August 2016.

procedure for documentation of commenced contacts." (Article 16.2). The disadvantage of this concept could be that a variety of rules will apply in different institutions leading *de facto* to different access to information standards in each entity. In any case, record keeping is important related to public access to information (Article 5) and to the internal accountability of the public sector.

In some countries, recording obligations go even **further**. In Montenegro, the lobbied public official "shall prepare an official note containing information about the lobbyist who contacted him/her, as follows: name, information whether the lobbyist presented a lobbyist identification card and acted in accordance with this Law, the area and subject of lobbying, name and surname or the name of the lobbying client, date and place of the lobbyist's visit and signature of the lobbied person." (Article 34.1). This provision is a virtual replica of the Slovenian legislation, which in addition also requires the official to include a "statement of any enclosures" received from the lobbyist (Article 68.2). A similar approach is found in Peru. Under Law No. 28024 "regulating the management of interests in public administration" public officials contacted by lobbyists have to "a) submit to the Public Interest Registry Management a summary of the information and documentation they received in the course of lobbying; and b) complete and submit a form to the SUNARP [Superintendencia Nacional de los Registros Públicos]." (Article 16). In Hungary, the Government decree "On the system of integrity management within public administration"[123] issued in 2013 obliges public servants to report back to their superiors on the contacts or outcome of meetings. However, there is no explicit statement in the decree to what extent these reports are kept on file. This legislative toolkit does not include similar obligations for the following reason: As sound as such obligations may sound in theory, it is questionable whether public officials can or will comply in practice. Non-compliance on a large scale, however, would undermine the overall confidence by all stakeholders in the usefulness of the lobbying law. Legal drafters may of course add such an obligation in their law, if they perceive it to be feasible in their local context, including publication of such contacts (see already above Article 4).

Subsection b – Reporting violations

As for reporting violations, the Council of Europe **Model code of conduct** for public officials[124] defines the obligation of public officials to report legal and ethical violations at their workplace (Article 12): "1. The public official who believes he or she is being required to act in a way which is unlawful, improper or unethical, which involves maladministration, or which is otherwise inconsistent with this Code, should report the matter in accordance with the law." Legislation and/or codes of conducts in most countries will probably contain similar obligations. Again, legal drafters may want to review in this context to what extent they need to redefine obligations for reporting violations. The Montenegrin legislator included an explicit obligation in the law: "The lobbied person shall notify the [Anti-Corruption] Agency about illegal lobbying and submit information on the natural and legal entity engaged in illegal lobbying or a lobbyist or legal entity conducting lobbying activities contrary to this Law." (Article 39.2).

Subsection c – Other

Some lobbying laws prohibit contacts with **unregistered** lobbyists: "A Government representative shall not knowingly and intentionally be a party to lobbying activities by: (a) a lobbyist who is not on the Register of Lobbyists" (Australia, Section 4.1). This legislative toolkit does not explicitly foresee such a provision for the following two reasons. First, lobbying is allowed for first-time lobbyists without registration (see above Article 3 paragraph 3). Second, public officials will have to report it under subsection c anyways, if they are contacted by lobbyists who violate their registration or other obligations.

Other possible rules of conduct concern situations where "the subject of lobbying is contrary to the **public interest** or constitutional principles [...] [or] is inappropriate or not viable in terms of financial effects and other circumstances" (Montenegro, Article 35). In Hungary, public servants have to ask

[123] 50/2013. (II. 25.) Korm., *Rendelet az államigazgatási szervek integritásirányítási rendszeréről és az érdekérvényesítők fogadásának rendjéről*, available at http://net.jogtar.hu, accessed 31 August 2016.

[124] Recommendation No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials. Appendix, *Model code of conduct* for public officials, available at www.coe.int, accessed 31 August 2016.

prior **permission** from their hierarchy to meet lobbyists.[125] Proactive **disclosure** by the public sector of information relevant to lobbying has already been discussed above under Article 5 paragraph 2 (see comments).

Other duties relevant for public officials in the context of lobbying relate to **confidentiality** of data, **conflict of interest**, or **gifts** (see above comments on Article 6 paragraph 1). Usually there are already comprehensive regulations for public officials concerning all three points. The same is true for declarations of finances and personal interests. As the Council of Europe Draft Recommendation states: "Appropriate measures tailored to national circumstances should complement the legal regulation of lobbying in order to avoid risks to public sector integrity that may be created by lobbying activities." (H.16).

The limits or prohibitions on **gift** acceptance by public officials are the mirror side of respective prohibitions for lobbyists to provide any gifts (see above comments on Article 6 paragraph 1, keyword "undue influence"). Peru (Article 17) and Wisconsin,[126] for example, set out an **absolute ban** to accept any generosity by lobbyists.

Paragraphs 2 and 3
Both paragraphs are based on the "Legislative Toolkit on Conflict of Interests".[127] Some of the following comments are also from that Toolkit, but are slightly updated.

Recent observations by **GRECO** document the practical relevance of incompatibility provisions: "The first [problematic area] concerns the use of parliamentary assistants and collaborators, an area in which there is considerable freedom, insufficient rules and a lack of statutes for the personnel concerned. [...] [I]t can happen that assistants are recruited from among lobbyists (who continue to carry out their normal activities part-time for instance)";[128] "Several interlocutors pointed out, however, that a significant number of former members of the House of Representatives and senators were employed by lobbies [sic] and that, as former parliamentarians, they still had free access to the premises of Parliament."[129] In this context, the notorious American **lobbyist** Abramoff claimed in an interview with the broadcaster CBS: "When we would become friendly with an office and they were important to us, and the chief of staff was a competent person, I would say or my staff would say to him or her at some point, 'You know, when you're done working on the Hill [Parliament], we'd very much like you to consider coming to work for us.' Now the moment I said that to them or any of our staff said that to 'em, that was it. We owned them."[130] In the **United States**, it is believed that about "5,400 former congressional staffers have left Capitol Hill to become federal lobbyists in the past 10 years" and about "400 former U.S. lawmakers" also became lobbyists.[131]

The incompatibility of being a public official and a lobbyist – **paragraph 2 (a)** – is a regular component of national lobbying regulations, such as in Austria (§ 8), Macedonia (Article 8.1), or Montenegro (Article 14). The OECD's "10 Principles for Transparency and Integrity in Lobbying" call in this context to "avoid post-public service 'switching sides' in specific processes in which the former officials were substantially involved. It may be necessary to impose a 'cooling-off' period that temporarily restricts former public officials from lobbying their past organisations. Conversely, countries may consider a

[125] Ibid.

[126] Wisconsin *State Statutes*, Chapter 13, Subchapter III, 13.625.1.b Prohibited practices: "No lobbyist may: [...] Give to any agency official or legislative employee of the state or to any elective state official or candidate for an elective state office, or to the candidate committee of the official, employee, or candidate: 1. Lodging, 2. Transportation, 3. Food, meals, beverages, money or any other thing of pecuniary value [...].", available at http://docs.legis.wisconsin.gov, accessed 31 August 2016.

[127] Council of Europe PCF-Project (2015), *Legislative Toolkit on Conflict of Interest*, available at www.coe.int, accessed 31 August 2016.

[128] France, *Eval IV Rep (2013) 3E*, available at www.coe.int, accessed 31 August 2016.

[129] Netherlands, *Eval IV Rep (2012) 7E*, available at www.coe.int, accessed 31 August 2016.

[130] CBS, Jack Abramoff, ibid.

[131] The Washington Post (13 September 2011), *Study shows revolving door of employment between Congress, lobbying firms*, available at www.washingtonpost.com, accessed 31 August 2016.

similar temporary cooling-off period restriction on appointing or hiring a lobbyist to fill a regulatory or an advisory post" (under Principle 7).

Paragraph 2 (b) concerns cases as the following: A former minister of transportation working as a lobbyist for carmakers immediately after leaving office is at least a perceived conflict of interest. Did he/she work in the interest of carmakers already before leaving office or is he/she using confidential information from the public office in his/her new job? The Council of Europe Draft Recommendation lists as a possible option in this context "'Cooling-off' periods that establish a period of time that has to elapse before either a public official may become a lobbyist after leaving public employment or office, or a lobbyist may become a public official after ceasing his or her lobbying activities" (H.17.a). As stated in the commentary under paragraph 2 (a), the OECD's "10 Principles for Transparency and Integrity in Lobbying" also call for measures to "avoid post-public service 'switching sides'" (under Principle 7). In Slovenia, the cooling off period is two years (Article 56.3). In some countries, such as Taiwan (Article 10) or Canada (Section 10.11), these periods can stretch even to three or five years post departure or even imply permanent conflict of interest restrictions as is the case for some positions in Canada[132] and the United States.[133] A publication by OECD of 2010 gives an overview on "Post-Public Employment Good Practices for Preventing Conflict of Interest".[134]

It is important to keep in mind that paragraph 2 addresses only the **lobbying** itself, i.e. the communication with a public official. It goes without saying that further conflict of interest restrictions usually apply to any other work former public officials do related to their previous field of work. Under these general restrictions, a former public official could for example be prohibited to advise the **preparatory** work of a lobbyist lobbying the public official's former employer.[135]

Paragraph 3 is closely related to paragraph 2 (a): it would at least be perceived as a conflict of interest where a former lobbyist later on were to supervise the clients he/she lobbied for. For example, in Germany, it created quite a scandal when "the Environment Ministry hired [...] one of the country's most influential nuclear lobbyists as the head of the reactor safety department."[136] It could be too far-reaching, though, to prohibit the lobbyist from working in any public position related to the lobbying field.[137] For example, a representative of an NGO in the health sector might want to work as an IT-administrator for the Ministry of Health. There is little likelihood of conflict of interest. Therefore, paragraph 3 calls for a vetting process. All in all, paragraph 3 follows above cited recommendation by the OECD, and the International NGO Standard.

Chapter IV: Oversight and sanctions

Article 8 – Oversight

(1) *[Oversight body]* **The [to be defined body] is the oversight body for this law.**

(2) *[Mandate]* **The oversight body has the following mandates:**

(a) *[Register]* **Managing the Register (Article 3);**

(b) *[Code of conduct]* **Issuing a code of conduct for lobbyists (Article 6 paragraph 2);**

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[132] Conflict of Interest Act 2006: section 34. "(1) No former public office holder shall act for or on behalf of any person or organization in connection with any specific proceeding, transaction, negotiation or case to which the Crown is a party and with respect to which the former public office holder had acted for, or provided advice to, the Crown. (2) No former public office holder shall give advice to his or her client, business associate or employer using information that was obtained in his or her capacity as a public office holder and is not available to the public."

[133] 18 U.S.C. § 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches.

[134] OECD *publication*, available at www.keepeek.com, accessed 31 August 2016.

[135] Legislative Toolkit on Conflict of Interests, ibid, Article 8 paragraph 1.

[136] The African Times (undated), *Who's governing Germany? The power and influence of corporations on political decisions*, available at www.african-times.com, accessed 31 August 2016.

[137] Thus, Article 7 of the Legislative Toolkit on Conflict of Interests (ibid) is mostly relevant to rather high-level executive positions.

(c) *[Advice and awareness]* **Raising awareness and providing training as well as guidance on the application of this law (Article 9);**

(d) *[Compliance]* **Monitoring compliance with this law and with the code of conduct;**

(e) *[Investigation]* **Investigating suspected violations upon detecting irregularities through monitoring or upon anonymous or open complaints;**

(f) *[Sanctions]* **Administering sanctions within its competence (Article 10);**

(g) *[Reforms]* **Developing proposals for enhancing the effectiveness of lobbying regulation;**

(h) *[Voluntary commitments]* **Promoting the adoption of further transparency and integrity commitments by lobbyists.**

(3) *[Powers]* **For monitoring compliance and investigating complaints under paragraph 2 (d) and (e) the oversight body has the following competencies:**

(a) *[Compliance]* **Reviewing the plausibility of the registered data by comparing it with data from open sources;**

(b) *[Complaints]* **If the oversight body reasonably believes that a person may have committed a contravention, it may require any person to provide information, produce documents, answer questions, or may inspect public premises and files in the same manner and to the same extent as [reference body to be defined] and as further detailed in the law [to be specified].**

(4) *[Reporting]* **The oversight body,**

(a) *[Annual report]* **shall within three months after the end of each fiscal year, prepare a report with regard to the administration of this law during that fiscal year and submit the report to the Speaker of Parliament;**

(b) *[Special report]* **may, at any time, prepare a special report concerning any matter within the scope of the powers, duties and functions of the Commissioner if, in the opinion of the Commissioner, the matter is of such urgency or importance that a report on it should not be deferred until the next annual report.**

Commentary

As with any integrity law, implementation remains weak if there is no sufficiently strong oversight body. The **Council of Europe Draft Recommendation** observes in this regard: "18. Oversight of the regulations on lobbying activities should be entrusted to designated public authorities. 19. Oversight may include the following tasks: a. Monitoring compliance with the regulations; b. Providing guidance to lobbyists and public officials on the application of the regulations; c. Raising awareness amongst lobbyists, public officials and the public." The **OECD's** "10 Principles for Transparency and Integrity in Lobbying" also call for lobbying regulations to provide for "Mechanisms for effective implementation, compliance and review" (Principle IV). The **International NGO** Standard calls in the context of "Management & Investigation" for "an independent, mandated and well-resourced oversight body or coordinated mechanism" tasked with a number of functions similar to the ones listed in paragraph 2. However, it is important to keep practical limitations in mind. Effective monitoring of compliance with lobbying laws would essentially entail continuous spying on who communicates with whom in a society. For example, a businessperson meeting with a member of Parliament – how would one know the meeting was not of private, but of a business nature? Thus, monitoring will depend to a large extent on complaints, whistle-blowing, media investigations, and the deterrence this risk of accidental detection entails.

Paragraph 1

There are basically three options for selecting an oversight body:

- A **specialized** lobbying oversight body: Commissioner of Lobbying (Canada); Registrar of Consultant Lobbyists (United Kingdom).

- An **integrity** or anti-corruption body: Standards in Public Office Commission (Ireland); Chief Official Ethics Commission (Lithuania); State Commission for Preventing Corruption (Macedonia); Agency for Prevention of Corruption (Montenegro); Corruption Prevention Commission (Slovenia).
- One or several **institutions** concerned by lobbying:
    - Parliament: France, Germany, Israel, Mexico, Netherlands, United States;
    - Executive bodies: Australia (Department of the Prime Minister and Cabinet); Austria (Ministry of Justice); Brazil, Peru, Hungary, Poland (public authorities).

The advantage of the first option is the visibility and specialisation of the oversight body. Creating an additional body might be a question of funds, though.

An already existing integrity body would normally require fewer funds to set up. Expertise on integrity issues such as conflict of interest already available might be another advantage. Usually, integrity or anti-corruption bodies are independent, which would come in useful in this regard. On the other hand, countries that wish to detach legitimate lobbying from perceived relation to corruption may prefer to avoid designating an anti-corruption body for the oversight of lobbying.

If institutions addressed by lobbying supervise their own compliance with rules, the public might at least perceive them to be in conflict of interest. For the sake of their own public image, they might have an interest in keeping possible scandals down. This risk is reduced, where for example one executive body oversees lobbying for numerous other executive bodies (Ministry of Justice, Austria). A possible, even if somewhat theoretical, advantage of self-supervising a body's own compliance is a greater sense of ownership regarding the implementation of lobbying policy.

Paragraph 2
This paragraph is based on the Canadian and Irish law. The functions of the oversight body all follow from the other provisions in this legislative toolkit. The inclusion of **anonymous** complaints into paragraph 2 (e) reflects Article 13 para. 2 UNCAC which calls for anonymous hotlines to be accessible to all relevant anti-corruption bodies referred to in the UNCAC, such as law enforcement or auditing agencies. In practical terms, it is hard to imagine why any country would want to forego to follow-up on complaints where an anonymous informant provides complete facts corroborated by documentation on a serious lobbying violation. Paragraph 2 (h) reflects the potential of the oversight agency to promote enhanced standards and best practice for supplementary self-regulation by lobbyists.

Paragraph 3
In many if not most countries it will not be sufficient if integrity bodies passively wait for a complaint to reach them. Often, stakeholders involved in integrity violations have no interest in reporting an incident. For example, if an unregistered lobbyist unduly influences a public official, the disclosure of the incident could harm the reputation of both sides. For similar reasons, oversight bodies for disclosure of finances and personal interests[138] or tax authorities[139] perform **random checks** on an objectively selected sample of cases. **Paragraph 3 (a)** serves this purpose and is mostly based on the Canadian law.

Conditions and procedures for investigations vary from country to country. Usually, there are already general procedures for the investigation of administrative infractions. Therefore, **paragraph 3 (b)** simply refers to such already existing laws. Paragraph 3 (b) is taken from the Irish law, which contains further details on how the investigation is carried out. The manner of checks and investigations by

[138] See for example GRECO, *Eval IV Rep (2015) 2E*, Bosnia and Herzegovina, Recommendation v: "coupling the disclosure system with an effective control mechanism (including random verifications)", available at www.coe.int, accessed 31 August 2016.

[139] See for example: OECD, *Use of Random [Tax] Audit Programs* (2004), 51 pages, available at www.oecd.org, accessed 31 August 2016.

the Canadian Lobbying Commissioner is described on its website as follows:[140] "Following the coming into force of the amended Lobbyists Registration Act in 2005, an Investigations Directorate was established within the Office of the Registrar of Lobbyists. Over time, the Investigations Directorate has increased in size in order to manage a growing caseload and the introduction of additional responsibilities related to the verification of monthly communication reports and reviews of exemption requests. It now has a budget of $1.1 million, including the salaries for the equivalent of nine full-time employees." In this regard, the recommendation of the International NGO Standard comes to mind that an oversight body should be "well-resourced". By contrast, the lobbying register of Colorado runs on an annual budget of US$27,000, which outside observers perceive as insufficient "to police lobbyists' reports".[141]

Paragraph 4
This paragraph is taken from the Canadian law. The requirement to report to parliament serves two purposes: It informs legislators and the general public on trends in lobbying. It also creates some accountability of the oversight body towards parliament. In countries, where reports to parliament are not in principle public, legal drafters need to specify that reports under paragraph 4 are published online.

Article 9 – Advice and awareness

(1) *[Guidance]* **The oversight body may issue guidance about the operation of this law and may from time to time revise it or re-issue it.**

(2) *[Advice]* **The oversight body may issue advisory opinions and interpretation bulletins with respect to the enforcement, interpretation or application of Chapters I-III of this law. The advisory opinions and interpretation bulletins are not statutory instruments.**

(3) *[Awareness]* **The oversight body may make available information and provide training with a view to promoting awareness and understanding of this law.**

Commentary

Paragraph 1
In particular where lobbying regulations are new to a country, all possible stakeholders are in need of guidance on questions of detail. This mainly concerns the definition of lobbyists and the entailing registering obligation; but it also concerns questions by public officials on how they have to respond to approaches by lobbyists. The websites by the Canadian,[142] Irish, or United States[143] lobbying oversight entities may serve as examples. The Irish website contains sections on: "Help & Resources; Frequently Asked Questions; Information for Lobbyists; Information for the Public; Information for Public Bodies; Information Videos".[144] Further subsections include: "Take the Three Step Test to see if you are lobbying; Quick Guide to the Act; Information on how to use the online system; Search the Register". The Canadian website furthermore provides "Compliance statistics" and "Reports and Publications" with "Reports on Investigation and other special reports" and "Annual Reports on the Office's activities". The United States Senate has issued a detailed 31-pages guidance paper on every aspect of the lobbying law.[145] The Canadian Lobbying Commissioner also issued "Guiding principles and criteria for recommending compliance measures".[146] It allows stakeholders to foresee how discretion in applying sanctions will be used. Sometimes oversight

[140] *Website*, available at https://lobbycanada.gc.ca, accessed 31 August 2016.

[141] The Denver Post (27 February 2016), *Colorado lobbying law offers murky picture of influence on politics*, available at www.denverpost.com, accessed 31 August 2016.

[142] *Website*, available at https://lobbycanada.gc.ca, accessed 31 August 2016.

[143] *Website*, available at http://lobbyingdisclosure.house.gov, accessed 31 August 2016.

[144] *Website*, available at www.lobbying.ie, accessed 31 August 2016.

[145] *Website*, available at http://lobbyingdisclosure.house.gov, accessed 31 August 2016.

[146] *Guidance Principles*, available at https://lobbycanada.gc.ca, accessed 31 August 2016.

bodies issue guidance on particular questions that have led to repeated questions in the past. An example is the "Joint Guidance on Casino Lobbying" in the State of New York.[147] Paragraph 1 is based on the Irish law.

Paragraph 2
In practice, questions arise, which neither the legislator nor the oversight body in its guidance material foresaw. Several lobbying laws therefore empower the oversight body to provide advice on concrete questions. Paragraph 2 is taken from the Canadian law. It will depend on the local context to what extent courts can and will take the advice of the oversight body into account. Legal drafters will have to adapt the provision to their context. Even if the advice is not binding, as in the case of Canada, recipients of the advice can use it as an argument in court for acting in good faith if they complied with the advice. Example for advisory opinions can be found on the website of most oversight bodies in the United States (State level), for example for New York on the website of the Joint Commission on Public Ethics.[148]

Paragraph 3
This paragraph is taken from the Irish law. The Canadian law contains a similar provision: "The Commissioner's duties and functions, in addition to those set out elsewhere in this Act, include developing and implementing educational programs to foster public awareness of the requirements of this Act, particularly on the part of lobbyists, their clients and public office holders." (Section 4.2.2).

Public awareness is provided through websites and guidance materials, including instructional videos (see above comments under paragraph 1). Training can be through written materials,[149] **online**,[150] or in person.[151] In some jurisdictions, trainings are **mandatory**: "Every individual who registers as a lobbyist in California must periodically attend a lobbyist ethics course conducted by the Assembly Legislative Ethics Committee and the Senate Committee on Legislative Ethics. The course is held at least twice each year and the course fee is $50."[152]

As for introducing new legislation, the first Annual Report by the Irish Standards in Public Office Commission provides a good overview on what information, guidance, advisory, and outreach measures can be necessary in preparing and accompanying the coming into force of a **new law**.[153]

Article 10 – Sanctions

(1) *[Offences]* **The following violations are sanctioned [criminally and/or administratively] offences:**

(a) *[Unregistered lobbying]* **lobbying without registering (Article 3);**

(b) *[Delayed reporting]* **failing to report as required under Article 4;**

(c) *[False reporting]* **knowingly making any false or misleading statement in the registration or in a report under Article 4;**

(d) *[Conduct]* **knowingly violating the code of conduct (Article 6 paragraph 2);**

[147] *Guidance*, available at www.jcope.ny.gov, accessed 31 August 2016.

[148] *Website*, available at www.jcope.ny.gov, accessed 31 August 2016.

[149] See for example in New York: *website*, available at www.jcope.ny.gov, accessed 31 August 2016.

[150] See for example in Wisconsin: *website*, available at www.gab.wi.gov; New York: *website*, available at www.jcope.ny.gov, accessed 31 August 2016.

[151] See for example in New York: *website*, available at www.jcope.ny.gov, accessed 31 August 2016.

[152] *Website*, available at www.fppc.ca.gov, accessed 31 August 2016.

[153] Standards in Public Office Commission (June 2016), *Annual Report 2015*, available at www.lobbying.ie, accessed 31 August 2016.

(e) *[Obstructing investigations]* **failing to supply the required information or providing information which is inaccurate or incomplete in a material particular, or otherwise obstructing an investigation under Article 8 paragraph 3 (b).**

(2) *[Consequences]* **Sanctions apply as specified in [referenced law]:**

(a) Warning;

(b) Publication of decision;

(c) Fines;

(d) Removal from register and prohibition to register [for a maximum time to be specified];

(e) Imprisonment for a term not exceeding [maximum period to be specified];

(f) [Other sanctions to be defined].

(3) *[Disciplinary liability]* **Violations under Article 7 constitute disciplinary offences for public officials covered by the disciplinary code [law to be specified].**

(4) *[Civil sanction]* **A lobbying contract becomes void once the lobbyist fails to comply with the duty to register; any remuneration knowingly given for such a contract is forfeited to the state.**

(5) *[Legal persons]* **Legal persons may also be found liable for offences in paragraph 1, pursuant to applicable legislation.**

Commentary

On the issue of sanctions, the **Council of Europe Draft Recommendation** states: "Legal regulation of lobbying should contain sanctions for non-compliance. These sanctions should be effective, proportionate and dissuasive." (G.15). Laws on administrative or criminal liability vary starkly from country to country in the manner how offences or sanctions are worded and embedded into specific procedures. Article 10 thus only outlines the basic offences. Legal drafters need to adapt these to the local context and to the **final wording** they choose for the obligations for lobbyists and public officials (Chapters II and III). This concerns in particular the required level of detail for the offence to comply with the constitutional principle of *nullum crimen sine lege* prohibiting ambiguous wording in the context of sanctions.

The offences in **paragraph 1** are based on the Canadian (Section 14), Irish (Section 20), United Kingdom (Section 12.4), and United States law (Section 6). These and other lobbying laws define it as offences where lobbyists violate rules of conduct (see e.g. Montenegro, Article 44, United States, Section 6). The offence of violating rules of proper conduct is not based on the obligations in Article 6 paragraph 1, as its wording would probably not be concrete enough for an offence. The code of conduct will have the necessary level of detail. Since the code of conduct requires approval by Parliament, it could be a sufficient legal basis for administering sanctions. However, legal drafters should also consider whether it is preferable in terms of constitutionality of the provision, to define the offences related to proper conduct of the lobbyist in the law itself (*nullum crimen sine lege*). Subsection (e) could raise an issue of self-incrimination. However, under the respective procedural law referenced in Article 8 paragraph 3 (b) this issue should be addressed appropriately.

Legal drafters need to review, whether **aiding, abetting, and instigating** the offences in paragraph 1 is punishable under general administrative or criminal legislation. If not, they need to adapt paragraph 1 respectively. This is important in particular, since clients or employers of lobbyists might often be the driving force behind violations, while technically they are not (always) lobbyists.

The sanctions in **paragraph 2** are based on the Austrian (§ 13), Canadian (Sections 14-14.02), and Irish law (Section 20). The sanctions are listed in the order of their usual **gravity**. The size of fines is capped at the equivalent of €11,500 in Poland, €60,000 in Austria, and $200,000 in Canada as

well as the United States (2007, Section 211). In light of these values, the United Kingdom opted for a rather small maximum of £7,500 (≈€8,900) in its new law.

The professional **prohibition** is probably more serious than a fine, as it will take away the lobbyist his/her professional foundation to earn money. This prohibition is foreseen inter alia in the Austrian (§ 14), Canadian (Section 14.01) or Slovenian law (Article 73.1). The maximum period for being removed from the register varies between 2 years (Canada, Slovenia) to a fixed period of 3 years in Austria. Obviously, **imprisonment** is the gravest sanction only applying to the most serious cases. Only the two North-American and the Irish laws foresee this sanction. The maximum term ranges from 2 years (Canada; Ireland) to five years (United States Code, Title 2, Chapter 26, § 1606). Subsection (f) may concern sanctions such as prohibition to occupy public office, community service, or confiscation of illegally earned fees.

Article 10 does not include any statement on which an institution has the competence of **applying sanctions**. The underlying assumption for this is that this question will be sufficiently dealt with under criminal law or the law on administrative misdemeanours. If not, it is important to include this feature.

Paragraph 3 states the obvious – violations of the obligations under Article 7 are **disciplinary** offences for public officials covered by the disciplinary regime. Usually, most of the obligations under paragraph 3 are subject to sanction regimes under separate laws, and sometimes even foresee more serious sanctions than only disciplinary. In this sense, paragraph 3 is rather a reminder for legal drafters to review whether all obligations of Article 7 are subject to sufficient sanctions. It is interesting to note that only the Montenegrin law so far provides particular sanctions for public officials in its lobbying law (Article 45).

Paragraph 4 is taken from the Austrian law (§ 15). It addresses the civil law side of unregistered lobbying and provides an additional deterrent.

Paragraph 5: This legislative toolkit obliges **legal persons** in some instances by including them in the definition of "lobbyist" (Article 1 paragraph 3 subsection b). However, one also needs to think of lobbying clients in this context, or employers of lobbyists who participate in or instigate a lobbying offence. They will often be legal persons. However, legal drafters would need to review whether in the context of their legal system they might need such a provision extending liability under paragraph 5 to legal persons, or whether this is already following from provisions in the administrative or criminal law.

Chapter V: Miscellaneous

Article 11 – International cases

(1) *[Public officials]* **This law applies to lobbying of**

- **(a) public officials of the State;**
- **(b) representatives and staff of supranational or international organisations by lobbyists residing in or formed under the law of the territory of the State, but only with regard to the obligations of lobbyists. If the lobbyist is already publicly registered and/or reporting at the supranational or international organisation, Articles 3 and/or 4 do not apply.**

(2) *[Territory]* **For lobbying in the case of paragraph 1 (a) and (b) it does not matter whether the public official lobbied, or the person lobbying, or both, are outside the State when the lobbying is made.**

(3) *[Foreign-based lobbyists]* **This law applies to a lobbyist residing in a foreign territory with regard to lobbying of the public officials listed under paragraph 1 (a).**

Commentary

Cross-border lobbying is a normal feature of nowadays world. Lobbyists from Non-EU countries lobby the EU Parliament and Commission.[154] Similarly, lobbyists from one country lobby public officials of another country.[155] Nonetheless, lobbying laws have been slow to adapt to this international perspective of lobbying. As far as can be seen, only the Irish (Section 6.1.c), Montenegrin (Article 15.3), and United Kingdom law (Section 2.4) recognise this international aspect. However, each law only addresses one aspect, and even if all three laws were taken together, it would not cover all aspects of international/cross-border lobbying.

Legal drafters need to think of the following possible international dimensions of lobbying:

i. Domestic lobbyists lobbying foreign public officials;

ii. Foreign lobbyists lobbying domestic public officials;

iii. Lobbying taking place abroad but being related to the state (domestic lobbyist or public official);

iv. Domestic lobbyists lobbying international organisations.

Case (i) is probably the easiest. Lobbying laws only concern the public officials of the state; they are not concerned about public officials of **foreign states**. The underlying rationale is that each state takes care of the lobbying regarding its own public officials. Regulating lobbying of foreign public officials would be considered interfering in the internal affairs of a foreign state.

Case (ii) is also relatively easy. Most laws make no difference where the lobbyist comes from. Thus, without any explicit provision on international cases, they require all lobbyists to register, if they want to lobby domestic public officials, no matter where the lobbyist resides. A rather unusual exception is Montenegro. It appears as if **foreign lobbyists** are exempt from registering within Montenegro, as long as they are registered in their home country: "A foreign natural and/or legal entity may conduct lobbying activities in Montenegro if it is registered for lobbying activities in the country whose citizenship it possesses and/or in which it has a seat and is registered in the Register of Lobbyists in accordance with the Law." (Article 15.3). There appear to be two problems with such an exemption: First, the Montenegrin register would give only an incomplete picture of lobbying of the State's public officials. Second, it seems there could be a risk that Montenegrin lobbyists circumvent disclosure. They could register pro forma in a foreign country with a lobbying register. Montenegrin citizens would not know in which country to look for information on the lobbyist, and even if their search is successful, they might not speak the language of the foreign register (e.g. in the case of Georgia). Furthermore, a Montenegrin public official would have difficulties knowing whether a lobbying regulation exists in the lobbyist's country of origin and what the law's requirements would be for the lobbyist having registered properly.

Case (iii) again is easy to solve. It makes no difference whether the lobbying of the public official takes place within the **territory** of the State or without. For example, a corporate executive accompanies a minister on a mission abroad and lobbies him/her during the travel. This would probably still fall under the lobbying regulation of most or all countries, even if the law is not explicit on the question of extra-territorial lobbying. Only the United Kingdom law foresees a provision for this case: "It does not matter whether the person to whom the communication is made, or the person making it, or both, are outside the United Kingdom when the communication is made." (Section 2.4). In Ireland, the question of extra-territorial lobbying was one of the key issues in the first Annual

[154] The Guardian (8 May 2014), *30,000 lobbyists and counting: is Brussels under corporate sway?*, available at www.theguardian.com, accessed 31 August 2016: "About 200 representatives of three of the biggest tobacco companies, Philip Morris International, British American Tobacco and Japan Tobacco, spent four weeks in the city [Brussels], hogging hotels and spending more than €3m (£2.5m) on an action plan to weaken future regulation in two parts: persuading the European commission, and trying to convince MEPs and national governments."

[155] Ibid.

Report since the commencement of the new law, "noting a great deal of interest in" this question.[156] The Standards in Public Office Commission took the position that "the Act makes no distinction regarding where a relevant communication takes place. [...] Ultimately, regardless of where a communication takes place, if a person within the scope of the legislation communicates with an Irish designated public official about a relevant matter, it is lobbying for the purposes of the Act. We would expect all those lobbying to register."

Case (iv) is the most challenging one. The power of **international organisations** such as the Council of Europe, the OECD, or the United Nations is limited in two regards. First, they have no power to administer administrative or criminal sanctions, but can only deny lobbyists access to their premises. Second, any of their regulations has only effect within the premise of the organisation itself, but not outside. However, lobbying of an international organisation can take place outside the organisation itself, for example in the member States. As a result, lobbyists can contact representatives within the premises of international organisations without real, deterring sanctions applying, or contact them outside the premises without even any rules applying at all. There are three ways of addressing this challenge:

- International organisations have the power to regulate the discipline of their **public officials**. Thus, they can oblige their public officials to stay within certain boundaries when being in contact with lobbyists. This would concern the issues listed in Article 7 of this legislative toolkit. However, integrity of lobbyists and transparency of lobbyists' activities would remain unaddressed. It should be noted in this context, that the International NGO Standard includes lobbying of public officials "within public international organisations domiciled or operational in the country concerned" (Definitions 2). This inclusion would not work coming from a national law, insofar it concerns obligations on public officials: They are subject to international, not national law.
- International organisations can call on their **member states** to regulate lobbying of international organisations. As far as can be seen, Ireland is the only country that has included at least some representatives of international organisations into the scope of its lobbying law: "members of the European Parliament for constituencies in the State" (Section 6.1.c). This provision misses several other cases: If an Irish lobbyist contacts an official of the European Commission or a member of the European Parliament for a constituency from outside Ireland, the lobbyist is free from any lobbying regulation. This gap seems questionable in light of the European Union's eminent role in policy and law-setting.[157] In this regard, the Council of Europe Draft Recommendation is in principle a call on member states to introduce new or review existing lobbying regulations. However, the Recommendation does – at least not explicitly – address the question of lobbying international organisations including the Council of Europe itself.
- Where international organisations have **law-setting powers**, they can oblige their member states to adopt lobbying regulations. In the case of the EU institutions, Article 298 of the Treaty on the Functioning of the European Union (TFEU)[158] would be the basis for adopting a binding regulation on lobbying transparency using the ordinary legislative procedure ("In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.").[159] However, this would allow the EU to regulate the issue of transparency only with respect to EU officials, not with regard to lobbyists. This aside, the flexibility clause of Article 352 TFEU would allow for a regulation to be adopted. The objective of the EU to be pursued in this

[156] Standards in Public Office Commission (June 2016), *Annual Report 2015*, p.21, available at www.lobbying.ie, accessed 31 August 2016.

[157] Hölscheidt S./Hoppe T., *Der Mythos vom 'europäischen Impuls' in der Gesetzgebungsstatistik*, Zeitschrift für Parlamentsfragen 2010, 543 [calculating that about 80% of German regulations go back to European Union provisions], available at www.tilman-hoppe.de, accessed 31 August 2016.

[158] TFEU *webpage*, available at http://eur-lex.europa.eu, accessed 31 August 2016.

[159] European Parliamentary Research Service (May 2016), *Briefing PE 581.950 EN*, EU Transparency Register, page 6, available at www.europarl.europa.eu; see also: Krajewski M. (2013), *Legal Study, Legal Framework for a Mandatory EU Lobby Register and Regulations*, 16 pages, available at www.lobbycontrol.de, accessed 31 August 2016.

context would be that of transparency (Articles 1 and 15 TFEU, 10 and 11 Treaty on European Union).[160]

It is still possible to subject lobbyists related to the State to the lobbying regulation, even if they "only" lobby public officials of a **supra- or international** organisation, no matter whether in- or outside the territory of the State. It seems not only useful to have information on such lobbying, but also necessary. International organisations have limited capacity to subject lobbyists to regulation. At the same time, the general public might want to know whether a pharmaceutical corporation is lobbying the Council of Europe regarding a health sector recommendation. Unfortunately, the Council of Europe Draft Recommendation does not address the issue of lobbying of the Council itself, since recommendations address only member States. Where international organisations already have a public lobby register and/or regularly reporting, it might be disproportionate to subject lobbyists to double registering and/or reporting – at the level of the international organisation and at the national level. The international register might not go as far as the national register. Complementing the lack of information through the national register might be an option legal drafters may want to consider and amend paragraph 1 (b) accordingly.

Article 12 – Judicial review

(1) *[Appeal to oversight body]* **A person aggrieved by a decision, action or inaction of the oversight body may appeal against the decision as foreseen in the law [to be specified].**

(2) *[Judicial appeal]* **Once pre-judicial appeal possibilities are exhausted, any person aggrieved by the decision, action or inaction of the oversight body may appeal to the court [to be specified].**

Commentary

Article 13 reflects a fundamental right all citizens have in a state of rule of law: In principle, they have the right to judicial redress whenever the state violated their rights. The competent courts in such cases are often the administrative courts, with the law of administrative court procedure applying. The referenced procedural law will define the various forms of judicial redress and the requirements for a complaint, including the need to appeal to the oversight body as a first instance (paragraph 1).

Article 13 – Parliamentary review

A comprehensive review of the provisions and operation of this Act must be undertaken, every five years after this law comes into force by the committee of the Parliament that may be designated or established for that purpose.

Commentary

Article 13 is taken from the Canadian law (Section 14.1). It follows Council of Europe Draft Recommendation J.20: "The framework for the legal regulation of lobbying activities should be kept under review." The rationale for this is clear. In particular where lobbying regulations are new, one cannot anticipate all possible gaps and practical shortcomings. While a certain lobbying regulation may work in one country, the same regulation might not work in another. Strong regulations, such as in Canada and the United States, are the result of decades of experience and evolvement, including on the state level.

Annex 1: Advisory groups

[160] Ibid.

An important entry point for lobbying influences and for distorting the political competition are expert and **advisory boards**. These allow for the potential influence from the inside rather than through ordinary channels available to the general public. The nomination procedures for such boards need to be clear and balanced as need the interests of their members to be transparent. The International NGO Standard contains further recommendations in this regard (under Participation & Access). The following proposed Article is based on a recent proposal by the EU Ombudsman related to this issue:[161]

(1) *[Balanced representation]* **When setting up advisory groups, public bodies should ensure a balanced representation of interests.**

(2) *[Definition]* **Public bodies should define this balance for each advisory group by taking into account:**

(a) the particular objective/tasks of the group;

(b) the expertise required;

(c) which stakeholders would most likely be affected by the matter;

(d) how those groups of stakeholders are organised;

(e) and what the ratio of the represented economic and non-economic interests should be.

(3) *[Transparency]* **The definition under paragraph 2, the list of members, and their interests shall be published online.**

(4) *[Open Call]* **Public bodies should publish a call for applications for every advisory group.**

If not part of a separate legislation, this Article could be added above under Chapter V "Miscellaneous". One should also keep in mind in this context that conflict of interest regulations should address members of advisory groups who participate in their personal capacity.[162]

Annex 2: Other regulatory issues

In addition to the issues mentioned above in the Introduction to this Toolkit (Chapter 1.2), legal drafters need to consider in particular the following:

Whistle blower protection laws would usually cover violations of lobbying laws. However, legal drafters should review whether a provision is necessary as is included in the Ontario Lobbying Law, according to which whistle-blower protection extends to persons reporting on violations of the lobbying law (Section 17.13).[163]

In the context of **media law** and lobbying, it is important to prohibit sponsoring of news broadcast or emissions on current political events,[164] or to preserve independence of media from outside financial influences.[165] General international standards[166] support such regulations. The Council of Europe Parliamentary Resolution 1636 (2008) inter alia calls for journalists to "disclose to their viewers or

[161] EU Ombudsman (29 January 2016), *Letter to the European Commission requesting an opinion in the European Ombudsman's own-initiative inquiry OI/6/2014/NF concerning the composition of Commission expert groups*, available at www.ombudsman.europa.eu, accessed 31 August 2016.

[162] EU Ombudsmann, ibid, at D.2: "that no individual with any actual, potential or apparent conflict of interest will be appointed to an expert group in his/her personal capacity".

[163] *Lobbyists Registration Act*, 1998, S.O. 1998, c. 27, Sched., available at www.ontario.ca, accessed 31 August 2016.

[164] See, for example, the German Interstate Broadcasting Treaty [*Rundfunkstaatsvertrag*] of 31 August 1991, paragraph 8: Sponsoring, www.lmk-online.de; Lesley Hitchens, *International Regulation Of Advertising, Sponsorship And Commercial Disclosure For Commercial Radio Broadcasting*, Research Report Prepared For The Australian Communications And Media Authority, 2009, 154 pages, available at www.acma.gov.au, accessed 31 August 2016.

[165] *Ethik-Kodex* [Ethics code of German Journalists], available at www.dfjv.de, accessed 31 August 2016.

[166] European Commission, *Media Freedom and Pluralism*, available at https://ec.europa.eu, accessed 31 August 2016.

readers any political and financial interests" and for media outlets to "have editorial independence from media owners".[167]

Trading in influence occurs when a person has real or apparent influence on the decision-making of a public official and exchanges this influence for an undue advantage.[168] The offence thus targets not the decision-maker, but "those persons who are in the neighbourhood of power and [who] try to obtain advantages from their situation" by influencing the decision-maker.[169] All international conventions criminalise the offence, but make it optional for member states to adopt it. The Council of Europe Criminal Law Convention on Corruption defines the offence as follows: "The […] offering […] of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any" public official.[170] A practical example for this offence is an influential party vice-chairman who has the necessary "connections" to ministers for making a foreign investment happen – if the foreign investor is willing to "reimburse" the party official for his/her "services". This example illustrates that trading in influence lines the border to lobbying: If the advantage to the lobbyist is "undue", lobbying becomes (criminal) trading in influence.[171] The question, of what is "due" and "undue" in these circumstances can be highly contested. Countries without a lobbying regulation thus put professional lobbyist at a constant risk of committing an offence under international anti-corruption standards. By contrast, countries with a clear lobbying regulation have a guideline of what "due" and "undue" advantages given to a lobbyist are. For example, if a public official accepts a fee for convincing another public official to render a decision in favour of the client, this is likely to be a violation of lobbying regulations – public officials are prohibited from lobbying in their field of work or using their position (Article 7 of this Toolkit). Another example would be a lawyer accepting a fee to "lobby" the judge outside formal procedures.

[167] *Resolution 1636 (2008)*, available at http://assembly.coe.int, accessed 31 August 2016.

[168] This chapter partially draws on the explanatory notes to the International NGO Standards, ibid.

[169] OECD (2008), *Corruption – A Glossary of International Standards in Criminal Law*, Chapter 3, page 29, available at www.oecd.org, accessed 31 August 2016.

[170] ETS 173, ibid, Article 12.

[171] 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", available at http://conventions.coe.int; see also: Slingerland W. (2011), *The Fight against Trading in Influence, Public Policy and Administration*, p. 53-66, available at www.vpa.ktu.lt, accessed 31 August 2016.