

LEGAL REGULATION OF LOBBYING ACTIVITIES IN THE CONTEXT OF PUBLIC DECISION MAKING



Legal instruments

Recommendation CM/Rec(2017)2
and explanatory memorandum

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

LEGAL REGULATION OF LOBBYING ACTIVITIES IN THE CONTEXT OF PUBLIC DECISION MAKING

Recommendation CM/Rec(2017)2
adopted by the Committee of Ministers
of the Council of Europe
on 22 March 2017
and explanatory memorandum

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Recommendation CM/Rec(2017)2

of the Committee of Ministers to member States on the legal regulation of lobbying activities in the context of public decision making

*(Adopted by the Committee of Ministers on 22 March 2017
at the 1282nd meeting of the Ministers' Deputies)*

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

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

Considering that adopting common rules in legal matters can contribute to the achievement of the aforementioned aim;

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

Recognising that lobbying can make a legitimate contribution to open government and well-informed public decision making;

Recognising that increasing transparency and accountability in lobbying can strengthen public confidence in political systems;

Recognising that regulating lobbying can strengthen its legitimacy and integrity and provide a transparent framework in which stakeholders can contribute to public decision making;

Recognising that regulating lobbying activities should not prevent the consideration of technical advice or individual opinions in the process of public decision making;

Recognising that the European Court of Human Rights has established a right of access to information as an inherent part of the right to freedom of expression protected by Article 10 of the European Convention on Human Rights (ETS No. 5);

Having regard to the Criminal Law Convention on Corruption (ETS No. 173), the Civil Law Convention on Corruption (ETS No. 174), Recommendation Rec(2000)10 of the Committee of Ministers to member States on codes of conduct for public officials, and the work of the Group of States against Corruption (GRECO);

Having regard to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) and the principles on protecting personal data contained therein;

Recalling Parliamentary Assembly Recommendation 1908 (2010) on “Lobbying in a democratic society (European code of good conduct on lobbying)” – reiterated by Resolution 1744 (2010) on “Extra-institutional actors in the democratic system” and Recommendation 2019 (2013) on “Corruption as a threat to the rule of law” – in which the Assembly recommends that the Committee of Ministers of the Council of Europe draw up a European code of good conduct on lobbying;

Taking note of the OECD’s “Recommendation of the Council on Principles for Transparency and Integrity in Lobbying” (C(2016)16);

Recognising and valuing the work of civil society organisations and other bodies seeking to promote transparency in lobbying;

Noting that many member States of the Council of Europe have rules governing conflicts of interest, access to public officials and transparency of the legislative process, but most of them have no comprehensive framework for the regulation of lobbying;

Bearing in mind that any national lobbying regulation should comply with national constitutional law;

Considering that there is a need to encourage the adoption of such frameworks, based on common principles, in the member States,

Recommends that governments of member States:

- establish or further strengthen, as the case may be, a coherent and comprehensive framework for the legal regulation of lobbying activities in the context of public decision making, in accordance with the guiding principles contained in the appendix hereto and in the light of their own national circumstances;
- ensure that this recommendation is translated and disseminated as widely as possible and more specifically among lobbying groups, business, trade unions, industry confederations, public bodies, regulatory authorities, civil society NGOs, politicians, academics.

Appendix to Recommendation CM/Rec(2017)2

Guiding principles on devising policy at national level to regulate lobbying

Definitions

For the purposes of this recommendation and its principles:

- a. “lobbying” means promoting specific interests by communication with a public official as part of a structured and organised action aimed at influencing public decision making;
- b. “lobbyist” means any natural or legal person who engages in lobbying;
- c. “public decision making” means decision making within the legislative and executive branches, whether at national, regional or local level;
- d. “public official” means any person exercising a public function, whether elected, employed or otherwise, in the legislative or executive branches;
- e. “legal regulation” means statutory regulation, a system of self-regulation or a combination of both.

A. Objective of legal regulation

1. Legal regulation of lobbying should promote the transparency of lobbying activities.

B. Activities subject to legal regulation

2. Lobbying activities in 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.
3. Exemptions to legal regulations on lobbying should be clearly defined and justified.

C. Freedom of expression, political activities and participation in public life

4. Legal regulation of lobbying activities should not, in any form or manner whatsoever, infringe the democratic right of individuals to:
 - a. express their opinions and petition public officials, bodies and institutions, whether individually or collectively;
 - b. campaign for political change and change in legislation, policy or practice within the framework of legitimate political activities, individually or collectively.

D. Transparency

5. Information on lobbying activities in the context of public decision-making processes should be disclosed.
6. The rules on disclosure should be proportionate to the importance of the subject matter of the public decision-making process and should reflect constitutional guarantees.

E. Public registers of lobbyists

7. A register of lobbyists should be maintained by public authorities or other designated bodies.
8. Information held in the register should be of a declaratory character. Lobbyists should be responsible for ensuring the information is accurate and up to date.

9. The register should be easily accessible and user-friendly. It should be available online with easy-to-use search facilities, open to the public, and consultation should be free of charge.

10. The processing of personal data from the register should comply with applicable standards on personal data protection.

11. Information held in the register should include as a minimum:

- a. the name and contact details of the lobbyist;
- b. the subject matter of the lobbying activities;
- c. the identity of the client or employer, where applicable.

12. In order to further promote transparency, registers may include additional information in accordance with national conditions and requirements.

13. In the case where a member State can demonstrate that alternative mechanisms guarantee public access to information on lobbying activities and ensure equivalent levels of accessibility and transparency, it may be considered that the requirement for a public register is satisfied.

F. Standards of ethical behaviour for lobbyists

14. Lobbyists should be guided by the principles of openness, transparency, honesty and integrity. In particular, they should be expected to:

- a. provide accurate and correct information on their lobbying assignment to the public official concerned;
- b. act honestly and in good faith in relation to the lobbying assignment and in all contact with public officials;
- c. refrain from undue and improper influence over public officials and the public decision-making process;
- d. avoid conflicts of interest.

G. Sanctions

15. Legal regulations on lobbying should contain sanctions for non-compliance. These sanctions should be effective, proportionate and dissuasive.

H. Public sector integrity

16. Appropriate measures tailored to national circumstances should be in place in order to avoid risks to public sector integrity that might be created by lobbying activities.
17. The measures referred to in the preceding paragraph could include:
- a. a “cooling-off” period, namely 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 lobbying activities;
 - b. guidance to public officials on their relations with lobbyists, in particular concerning:
 - refusing or disclosing the receipt of gifts and hospitality offered by a lobbyist;
 - how to respond to communications from lobbyists;
 - reporting violations of the regulations or rules of conduct on lobbying activities;
 - disclosing conflicts of interest;
 - preserving the confidentiality of data.

I. Oversight, advice and awareness

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 among lobbyists, public officials and the public.

J. Review

20. The framework for the legal regulation of lobbying activities should be kept under review.

Explanatory memorandum

Introduction

1. The objective of the recommendation is to promote and increase transparency of lobbying activities in public decision making. It goes beyond commercial lobbying and concerns all forms of lobbying on public decision making. Moreover, the premise is much broader, recognising lobbying as a legitimate, and certainly not an illicit, activity. Indeed, lobbying is considered as an important and legitimate part of the democratic process within political systems.¹ It concerns the activities of all social actors, public and private. This has important implications as it means that the recommendation is not only concerned with paid, professional lobbyists acting on behalf of private business interests. Rather, it encompasses the activities of civil society, and of any other person or body that lobbies public officials. As stated by the Parliamentary Assembly of the Council of Europe:

[E]xtra-institutional actors, including interest and pressure groups, trade unions and consumer organisations, are a part of a democratic society. Their lobbying activities are not illegitimate per se and can be beneficial for the functioning of a democratic political system. However, unregulated and non-transparent lobbying may undermine democratic principles and good governance. Citizens should know which actors influence the making of political decisions.²

-
1. A “political system” is defined by David Easton as having four main elements. The first is a set of institutions, each with defined responsibilities, such as the executive, legislature, and bureaucracies. The second refers to the “inputs” to such institutions, which are both political parties and interest groups. The third refers to “outputs” which emanate from the institutions, particularly public policies. The fourth is the feedback mechanism, where the “outputs” that have a social and economic impact on citizens ultimately impact on new “inputs” in the political system. See Easton D. (1953), *The Political System: An Inquiry into the State of Political Science*, Alfred A. Knopf, New York.
 2. Parliamentary Assembly Resolution 2125 (2016) on transparency and openness in European Institutions.

With this in mind, the definition of what constitutes lobbying activities for the purposes of the recommendation is of crucial importance in order to ensure that the legitimate rights to freedom of expression are fully respected and facilitated.

2. Lobbying activities appear to have been increasing in Council of Europe member States, certainly as concerns commercial lobbying. An attempt by lobbyists to influence public actors may take place in many ways, including, for example, written communications with individual public officials, presentations to groups of public officials, draft reports to public administrations, or even telephone calls. The aim of lobbying may be to seek to shape a new public policy with a view to benefiting a particular group or interest or, on the contrary, prevent the formulation or adoption of a new one in order to maintain the status quo. The attempt to influence may or may not be successful – it is the act itself, of private actors attempting to influence public actors, that is significant. It is well established that in all democratic political systems lobbyists exert a strong influence when public policy is formulated and public decisions are made.³ The number of lobbyists active in the political system will vary between States and their specific political cultures. Their importance lies in their intimate knowledge of national political processes and in their ability to harness this knowledge in the interest of their clients or of the interests they represent. Moreover, the complexity of the decisions that public officials must make in a modern democratic State in terms of their economic and social impact, sometimes concerning millions of people, often means that public officials may actively consult with and ask for submissions from various interest groups. As a result there is growing public concern over lobbying activities and a wish for the work of lobbyists to be transparent.

3. In light of the legitimate role of lobbying in public life, lobbying regulations should seek to strengthen its transparency and accountability. The challenges and the impact of lobbying on public decision making are significant and this inevitably requires regulation, which only a limited number of Council of Europe member States have adopted to date. Several authors have written

3. See, for example, Dahl R. (1961), *Who Governs? Democracy and Power in an American City*, Yale University Press, New Haven, CT; and Baumgartner F. R., Berry J. M., Hojnacki M., Kimball D. C. and Leech B. L. (2009), *Lobbying and Policy Change*, University of Chicago Press, Chicago.

on the theme of lobbying regulation⁴ and it is generally accepted that the term “regulation of lobbying” refers to the idea that political systems have established “rules” which lobbyists must follow when trying to influence public officials and the nature of public policy outputs. Such rules increase transparency. Democratic principles and good governance can be undermined in the absence of regulation. Attention is drawn to the fact that lobbying regulations envisaged in the recommendation do not concern corruption. Corruption is a criminal act, and so falls outside their scope. Moreover, Council of Europe member States already have specific rules in this respect.

4. By giving individuals greater awareness of the process of public decision making in particular cases and of what influences are brought to bear on the final outcomes, promoting transparency and accountability through lobbying regulations can also contribute to a more general strengthening of public confidence in political systems. Such regulations can bolster the legitimacy of the political system, counter the decline in public confidence in many States, and even serve as a basis for wider public participation in public life and public decision making. It is important to note that civil society organisations have themselves also worked and sought to increase transparency in lobbying activities.⁵

5. Lobbying regulations may also provide a more level playing field for everyone. Shining light on lobbying activity ensures that all actors – from citizens, to stakeholders, politicians and civil servants – are equally aware of when public policy is being shaped, about what, and who is lobbying whom. This will make political players even more accountable. This does not necessarily mean that all lobbyists will be able to exert the same influence.

6. The recommendation complements the OECD Principles for Transparency and Integrity in Lobbying, the first principle of which states that: “Countries

4. For various contributions to the lobbying regulation literature, see Zeller B. (1958), “Regulation of Pressure Groups and Lobbyists”, *Annals of the American Academy of Political and Social Sciences*, Vol. 319, pp. 94-103; Stark A. (1992), “Political Discourse’ Analysis and the Debate over Canada’s Lobbying Legislation”, *Canadian Journal of Political Science*, Vol. 25, No. 3, pp. 513-534; Bouwen P. (2003), “A Theoretical and Empirical Study of Corporate Lobbying in the European Parliament”, *European Integration online Papers (EIoP)*, Vol. 7, No. 11; Galkowski J. (2008), “Poland’s Experience: Developing and Implementing the Act on Legislative and Regulatory Lobbying” in *Lobbyists, Government and Public Trust*, OECD, Paris.

5. For a recent analysis by Transparency International, see “Lobbying Regulation in Europe” (2015). Another example of an organisation which has called for increased transparency in lobbying is Alter-EU, whose letter to the EU Commission in May 2015 also highlights the plethora of groups that are calling for full transparency.

should provide a level playing field by granting all stakeholders fair and equitable access to the development and implementation of public policies.” Principle 2 also stipulates that: “Rules and guidelines on lobbying should address the governance concerns related to lobbying practices, and respect socio-political and administrative contexts”.⁶

7. In 2010, the Parliamentary Assembly of the Council of Europe called for “honest lobbying [...] so as to improve the public image of persons involved in these activities”.⁷ At the same time it called on the Committee of Ministers to draw up a European Code on the good conduct of lobbying which would be based, *inter alia*, on the principle that “rules applicable to [...] members of pressure groups and businesses should be laid down, including the principle of potential conflicts of interest”. This recommendation is the response of the Committee of Ministers to that call.

8. The recommendation is addressed to member States of the Council of Europe and outlines guiding principles on devising policy at national level to regulate lobbying, having regard to freedom of expression, political activities and participation in public life, transparency, public registers of lobbyists, standards of ethical behaviour for lobbyists, sanctions, public sector integrity, oversight, advice and awareness, and review. It is for member States to decide how best to apply these principles in light of their specific national context and circumstances.

9. The recommendation was prepared by the European Committee on Legal Co-operation (CDCJ) at the request of the Committee of Ministers of the Council of Europe. This work included consultation with relevant stakeholders from among lobbying groups, regulators and civil society, the results of which were considered by the CDCJ before completing its work and submitting the recommendation to the Committee of Ministers for adoption. This consultation comprised two elements. Firstly, the CDCJ conducted a written consultation of over 500 persons from whom replies were received, covering a good geographical mix of 24 Council of Europe member States, from Transparency International national branches, lobbyists, trade unions and industry confederations, academics, regulatory authorities and civil society NGOs. Secondly, it held a one-day hearing of representatives of 12 key actors

6. OECD (2013), “Transparency and Integrity in Lobbying”, OECD, Paris, pp. 3-5 for a full list of the 10 principles, available at www.oecd.org/corruption/ethics/Lobbying-Brochure.pdf.

7. Parliamentary Assembly Recommendation 1908 (2010) on lobbying in a democratic society (European code of good conduct on lobbying), paragraph 11.6.

from civil society, business, lobbyists and public bodies. The meeting took place in Strasbourg on 14 June 2016. This event allowed key stakeholders to exchange views and experience in this area and provide input to the drawing up of the recommendation.

Definitions

Lobbying

10. There is no universally accepted definition of lobbying. Franck R. Baumgartner and Beth L. Leech have pointed out that “the word lobbying has seldom been used the same way twice by those studying the topic”.⁸ They define lobbying as “an effort to influence the policy process”,⁹ while A. J. Nownes states that “lobbying is an effort designed to affect what the government does.”¹⁰

11. The term “lobbying” is understood in this recommendation as promoting specific interests by communication with a public official as part of a structured and organised action aimed at influencing public decision making. A specific interest may represent a “private” interest, such as a corporation which may wish to see their public policy preferences reflected in legislation. Alternatively, a specific interest may be representative of a more “public” concern, for example regarding environmental issues. A “structured and organised action” can be understood as a deliberate, planned, methodical or co-ordinated strategy lobbyists pursue in order to influence policy and promote their policy position, usually supported by an infrastructural or organisational apparatus. It is this element that crucially distinguishes lobbying from other acts of influence, or attempted influence. Even though these acts may concern the process of public decision making, they are distinguishable from lobbying because they are isolated, unstructured and/or spontaneous; that is, they do not form part of a pre-determined plan.

12. It is important to note that the focus of the recommendation is on what constitutes lobbying activities rather than on identifying who is a lobbyist. This means that the recommendation covers both business-for-profit lobbyists and

8. Baumgartner F. R. and Leech B. L. (1998), *Basic Interests: The Importance of Groups on Politics and in Political Science*, Princeton University Press, Princeton, NJ, p. 33.

9. *Ibid.*, p. 34.

10. Nownes A. J. (2006), *Total Lobbying: What Lobbyists Want (and How They Try to Get It)*, Cambridge University Press, Cambridge, p. 5.

civil society organisations that lobby in the public interest. Take, for example, a highway construction project. The public authority is likely to be subjected to pressure from both business and civil society. Business lobbyists might include construction companies wishing to bid for the construction contract and local businesses that would benefit from the development. Both these business interests would lobby in favour of the road construction for their own economic interests. Civil society organisations, on the other hand, might include two opposing groups. Firstly, a group of local residents who might benefit from better transport links and who would therefore lobby in favour of the construction project. Secondly, environmental associations concerned about the impact on the environment or wildlife and who would lobby against the project. Both the construction companies and the residents and environmental associations would seek to influence the decision-making process, even though the companies' aim would be to increase their revenue while the civil society actors would be defending either public or private interest.

13. Lobbying may take many forms. Some examples are given below:

- offering advice or making presentations to officials, either on an occasional or a regular basis;
- submitting reports to public officials in which specific details for a proposed policy are drafted;
- pursuing informal contacts with politicians or civil servants (for example, lunch appointments, impromptu visits, telephone calls);
- sending directed messages via social media or otherwise sending solicited or unsolicited information or documents;
- participating in public (open) or restricted (closed) consultations;
- participating in formal consultation through institutionalised channels;
- participating in hearings, such as parliamentary committees;
- participating in a delegation or conference.

Lobbyist

14. There is no universally accepted definition of lobbyist. Academics such as K. G. Hunter et al. argue that a lobbyist is “someone who attempts to affect legislative action,”¹¹ while Raj Chari, John Hogan and Gary Murphy define

11. Hunter K. G., Wilson L. A. and Brunk G. G. (1991), “Societal Complexity and Interest-Group Lobbying in the American States”, *The Journal of Politics*, Vol. 53, No. 2, p. 490.

lobbyists as “individuals or groups, each with varying and specific interests that seek to influence decisions at the political level”.¹²

15. The term “lobbyist” is understood in this recommendation as any natural or legal person who engages in lobbying when public decisions are made. This definition covers lobbying activities whether for private, public or collective ends, whether for compensation or without, as specified by Transparency International in its international standards for lobbying regulation.¹³ Lobbyists and the interests they defend are innumerable. Everyday examples include: a consultant lobbyist acting on behalf of a third party that seeks increased liberalisation of the telecommunications sector; a corporation (with the support of an “in-house” lobbyist) directly lobbying to reduce corporate tax rates; a farming association lobbying to ensure maximum subsidies for agricultural goods; or an environmental group that lobbies for legislation to restrict carbon emissions.

16. It should be noted that in some cases public corporations, such as electricity companies, petroleum companies or airlines, which are under full or partial State ownership, may also be involved in lobbying when public decisions are made, such as on liberalisation initiatives in their sector or regarding approval of mergers and acquisitions. It will be for each State to determine whether it is appropriate for these interests to be covered by national legal regulations on lobbying.

Public decision making

17. The term “public decision making” in the recommendation refers to any decision made within the legislative and executive branches. In this context, the executive branch includes not only the government itself, but also the individual ministries along with regional and local authorities. Public decision making which is typically the object of lobbying includes, but is not limited to:

- the development of any legislative proposal;
- the introduction, amendment, passage or defeat of any bill or regulation;
- the preparation or amendment of any policy programme;

12. Chari R., Hogan J. and Murphy G. (2012), *Regulating Lobbying – A Global Comparison*, Manchester University Press, Manchester, p. 4.

13. Transparency International, “International standards for lobbying regulation: Towards greater transparency, integrity and participation”, available at lobbyingtransparency.net/.

- the award or withdrawal of a contract, grant, licence, contribution, or other benefit (for example financial or in kind, such as a nomination for a public body appointment).

18. Lobbying can take place in any policy area in which public decisions are made. These decisions can be made at national, regional or local level and lobbying can target different categories of public officials at these levels. At local level, for instance, there may be important decisions to be made with regard to land development or zoning.

Public official

19. For the purposes of this recommendation, the term “public official” refers to those who exercise a public function, whether elected, employed or otherwise. This is a large group and includes members of the executive branch, members of parliament or legislative assembly, civil servants, and advisors to elected officials (the latter being policy makers even though they are not civil servants).

Legal regulation

20. It is for each member State to determine the appropriate type of scheme and legislative approach for the regulation of lobbying activities in light of their specific national context and circumstances.

21. Schemes of “statutory regulation” comprise rules established by legislation and which are binding on lobbyists and, as appropriate, public officials who have contact with them. Such systems will include sanctions in the event of a breach of their rules, whether administrative or criminal, and may vary from warnings to fines and potentially, in some cases, prison. Statutory regulation schemes are the norm for those States that have introduced regulatory frameworks on lobbying.

22. “Self-regulation” schemes allow for lobbyists to regulate themselves and to provide for sanctions. The threat of sanctions imposed on members facilitates compliance with such schemes. Codes of conduct adopted by associations of professional lobbyists are a typical feature of political systems that have not opted for a regulatory scheme. Sanctions in a self-regulation scheme will generally be lighter than those of a statutory scheme, possibly in the form of restrictions in professional practice or suspension from the professional association.

23. In practice, in most States, there is a combination of both types of regulation with a varying mix of statutory and self-regulation. Even schemes with a high regulatory content usually include some voluntary components. This diversity is illustrated by the differing treatment of codes of conduct in different national schemes, as can be seen in the following examples.

- In the United Kingdom there is a combination of statutory¹⁴ and self-regulation governing lobbying. There are three self-regulatory bodies for public affairs practitioners – the Association of Professional Political Consultants (APPC), the Public Relations Consultants Association (PRCA) and the Chartered Institute of Public Relations – which include consultancies, trade associations, in-house public affairs and public relations teams and individual lobbyists.
- In Germany, on the one hand, there is a regulatory scheme for lobbying activities targeting the federal parliament. On the other hand, professional associations have implemented national-level voluntary codes of conduct for lobbyists. The Deutsche Gesellschaft für Politikberatung (German Association of Political Consultants) considers that lobbying is an essential part of the interaction between citizens and their government, and that it needs to be open and transparent. Accordingly, it requires all its members to sign up to its code of conduct.¹⁵
- In Austria, in order to encourage lobbyists to uphold ethical values, core standards are laid down by law and lobbyists are obliged to include these standards in their code of conduct.
- In Lithuania, the statutory regulation governs all lobbying rules, including the need for and content of codes of conduct.¹⁶

24. Regulation of lobbying by public law can follow one of two approaches. One approach is to have specific legislation, such as a law on lobbying (see for example, “the former Yugoslav Republic of Macedonia”). A second approach is for non-targeted regulation spread across relevant laws; for example, rules on conflicts of interest in legislation relating to civil servants, parliamentary rules of procedure including a register for lobbyists, and regulating contacts between government officials and lobbyists in ministerial rules. In addition, provisions relevant to the regulation of lobbying can exist at four levels: at

14. Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act (2014), available at www.legislation.gov.uk/ukpga/2014/4/pdfs/ukpga_20140004_en.pdf.

15. For information on the German Association of Political Consultants, see www.degepol.com/pageen/.

16. See Article 13(1)(4) of the Lithuanian Law on lobbying.

the constitutional level, for example with a regulation on incompatibilities (Montenegro) or on transparency of the legislative process (Germany); at the sub-constitutional level with laws, for example civil service laws on conflicts of interest (Poland); at the level of self-regulation of public bodies, such as parliamentary rules of procedure (France, Germany) or government decrees for ministries (Hungary); or at the level of rules issued by government agencies, for example a code of conduct issued by an anti-corruption commission (Montenegro). In terms of sectors, one regulation might cover all sectors, or there may be specific regulations for different sectors, for example the executive (Hungary) or the legislature (France).¹⁷

A. Objective of legal regulation

Principle 1

25. The main aim of the recommendation is to promote transparency in lobbying. This recognises the legitimacy of lobbying but also the need to ensure that, as far as possible, it does not take place “behind closed doors”. Transparency must enable the public to monitor contacts and communications between lobbyists and public officials and their involvement in the public decision-making process. As a result, it should be possible to clearly identify all interests that influence the outcome of the process. Transparency not only increases public officials’ responsiveness to public demands, but also helps to prevent misconduct and fight corruption. One of the main indirect benefits of transparency is to improve the democratic quality of life and equal access to public decision-making processes. The more engaged citizens are, the more likely they are to see public institutions as being legitimate. A mandatory register (as described in Part E), together with disclosure (as described in Part D), are the main tools for achieving transparency in lobbying activities. Together they represent the cornerstone of this recommendation.

B. Activities subject to legal regulation

Principle 2

26. Principle 2 identifies three categories of persons or organisations engaged in lobbying that should be the subject of legal regulation, namely consultant

17. See French Law No. 2016-1691 of 9 December 2016 on Transparency, the Fight against Corruption, and Economic Modernisation, which covers all public authorities.

lobbyists, in-house lobbyists and organisations representing professional or sectoral interests. Examples of what these categories might comprise are given below.

- a. Consultant lobbyists act on behalf of, and are paid by, a third party. Third parties that hire consultants include, for example, corporations, professional associations and NGOs. In some cases, a consultant lobbyist may waive their fee, for example to support a charitable cause, but any lobbying that might be done on behalf of the charity should still be subject to regulation.
- b. In-house lobbyists act on behalf of their employer or organisation. A typical example is a corporation that has a dedicated team of public relations and public affairs officials working in-house in order to directly lobby for the corporation. NGOs and civil society organisations may also have in-house lobbyists, whether staff members or volunteers, whose role may be either occasional or structural depending on the extent and nature of the organisation's lobbying activities.
- c. Organisations or bodies that represent different professions or other sectoral interests also engage in lobbying in order to protect or promote their interests. Such organisations include trade unions, employers' organisations, NGOs and civil society organisations more generally, including professional associations.

27. The three categories referred to in the recommendation cover the vast majority, if not all, of the different types of lobbyists, and reflect the broad range of their activities in democratic societies, including:

- professional consultancies, law firms, self-employed consultants;
- in-house lobbyists and trade, business and professional associations;
- NGOs and civil society organisations (such as human rights and environmental associations);
- think tanks, research and academic institutions;
- organisations representing religious institutions.¹⁸

Principle 3

28. Member States may establish exemptions from the legal regulations for certain categories of lobbying activities, provided that they are clearly defined

18. European Union Joint Transparency Register, available at <http://ec.europa.eu/transparencyregister/public/homePage.do>.

and justified. Under the recent Irish lobbying law, for example, the rules regulating lobbying do not apply to lobbying by or on behalf of another State, the European Union, and the United Nations, or to communications requesting factual information or those related to security issues.¹⁹ In Austria, Australia, Canada and the United States, diplomatic and consular activities (namely, communications made on behalf of a government of a foreign country) are similarly exempted from legal regulations.

29. Exemptions should be clearly laid out to prevent lobbyists and public officials from abusing them. For example, the laws used in a number of States provide that an invitation by a government to speak to officials is not considered as lobbying, and the person involved is therefore not required to register. However, there is a risk that this exemption may be abused by a person taking advantage of the invitation to speak with an official to also promote her or his own agenda. Should this happen the underlying reason for the exemption would be undermined and an act of lobbying would remain undisclosed under the pretence of an exempted communication with an official.²⁰

C. Freedom of expression, political activities and participation in public life

Principle 4

30. It is fundamental that regulations on lobbying should not in any way, form or manner infringe on the right of any citizen, as an individual or part of a collective, to express their opinions and petition public officials, bodies or institutions. Such a right also includes that of campaigning for or against change in legislation, policy or practice. This should be explicitly stated in the lobbying regulation. If not, people may be deterred from exercising their democratic right to express their opinions and participate in the political

19. See Section 5.5 of the Irish Regulation of Lobbying Act, available at www.oireachtas.ie/documents/bills28/acts/2015/a515.pdf.

20. This was observed, for example, in Canada where many lobbyists at the federal level stated that they did not need to register because the 1989 and 1995 acts stated that only lobbyists who "sought to influence were required to register, but that those asked by the government to give information were not. An obvious loophole in this regard was for a lobbyist to say that he/she was "asked" by the government to give information when a decision was being made; the lobbyist could then claim that he/she did not seek to influence per se. Bill C-15 closed this loophole in 2003 by amending the Lobbyists Registration Act to make all forms of communication, whether solicited or not by the government, subject to registration by all lobbyists.

activity of the State for fear that it is prohibited by the lobbying regulation. If these rights are not explicitly protected in legislation, this may undermine civil society participation and, more generally, democratic discourse and exchange of opinions on important matters.

D. Transparency

Principle 5

31. Disclosure of lobbying activities is fundamental to make the decision-making process transparent. Timely release of lobbying data is critical, in order to allow for meaningful public oversight and intervention. This information should be easily accessible. Member States are free to determine who bears the burden of disclosing information related to lobbying. Member States also have discretion to select the methods they consider most effective and appropriate for their national context and circumstances. Although Principle 5 does not specify the various ways in which the activities of lobbyists can be made transparent for the benefit of the public, they are possibly as important as the register of lobbyists (Part E).

32. Disclosure can take place in several ways, depending on the particular process and subject matter, and on the political culture and traditions. These include, for example, establishing “legislative footprints” that track all external interventions in the drawing up and adoption of new legislation, “open diaries” for public officials, registers of lobbyists, regular reporting by lobbyists and publication, usually on official websites, of all communications received by public bodies in relation to a particular decision-making process. In Germany, for example, the Ministry of Justice and Consumer Protection publishes all statements received in the course of public consultations on draft bills. In Switzerland, this is the case for all ministries. In Austria, all statements received in the course of public consultation on draft bills are published on the website of the Austrian Parliament. Not all these tools or mechanisms will necessarily be set out in lobbying regulations, although such regulations can represent an opportunity to recall their importance and, if necessary, clarify how they should work.

Principle 6

33. Most regulatory systems specify standard information that should be disclosed by the public authority or lobbyist. Member States may impose higher levels of disclosure in cases where the subject of the public decision-making

process is deemed of particular importance. Conversely, where the subject matter of the public decision-making process is considered to be secondary or of little importance – measured for example by the extent of its scope (numbers of persons concerned) or economic impact – the level of disclosure might be lower. The same can be true for certain lobbying activities, such as public hearings or open letters to legislators, which are transparent by definition and might not require additional disclosure. Proportionate regulation needs to be considered in particular for volunteer and not-for-profit lobbying.

34. The reference to constitutional guarantees takes into account some political systems, for example in Germany, where constitutionally guaranteed channels or “links” for communication between members of parliament and their electorate, without any State interference, have been established.²¹ The objective of these guarantees is to strengthen the democratic links between parliamentarians and the people in the constituencies they represent by protecting the confidentiality of the information exchanged between them. For the same reasons given in relation to Principle 4 (on freedom of expression), it is important that lobbying regulations do not indirectly undermine this democratic channel of communication between voters and their representatives.

E. Public registers of lobbyists

Principle 7

35. A register of lobbyists should be maintained by public authorities. Within the framework of a self-regulation scheme, a member State may also entrust a designated private body with the duties and responsibilities relating to the register of lobbyists. Principle 7 uses the plural “authorities” and “bodies” in order to reflect the reality of different political systems. This does not imply that they are required to maintain separate registers. In federal systems (United States, Canada and Australia), registers exist at federal and State or provincial level. This means that a lobbyist who is lobbying on a federal matter at the federal level is required to register with the appropriate federal authority and similarly with the State or provincial authority if it is a State or provincial matter. In unitary States such as the United Kingdom, a statutory register is

21. The German Basic Law on the Independent Mandate for MPs protects the confidentiality of communications between MPs and their party, associations and the “non-organised citizens”, particularly in their own constituency. On Germany, see Article 47 of the Basic Law, available at www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/09/rs20130917_2bvr243610en.html, paragraphs 91-99.

established by the government. Devolved administrations may establish their own lobbying registers; Scotland passed legislation in April 2016 to do so. Some States (Ireland, for example) have chosen to require a single registration for lobbying, whether it concerns central government, local authorities or national members of the European Parliament. What is important is to have as few registers as possible, both in the interest of lobbyists and of the people who wish to consult these registers.

36. Member States may decide which categories of lobbyists should register, and may draw upon the wide diversity of models in Europe. For example, and referring to the categories outlined in Principle 2, in the United Kingdom and Lithuania, only certain categories of consultant lobbyists are required to register. In Ireland, various categories of consultant lobbyists, in-house corporate lobbyists, NGOs or civil society organisations, and voluntary organisations are required to do so. In Germany, the register of the Bundestag is voluntary and incentives are given to register (such as the possibility of being invited to hearings if on the register), but only associations can register. In Poland, anyone (including a professional lobbyist) wishing to take part in the drafting of legislation is obliged to declare their interest in the form prescribed by law. Professional lobbying (acting on behalf of a third person against remuneration) is only allowed after making a declaratory registration. Lobbyists are responsible for the updating their information in the register. Every public institution is obliged to publish an annual report on professional lobbying with regard to that institution.

Principle 8

37. In all political systems which require lobbyists to register, lobbyists themselves are responsible for ensuring that information in the register is accurate and up to date, notifying the relevant registration agency of any changes that are made to their registration. Depending on the jurisdiction (and potentially the type of lobbyist), the frequency with which re-registration will take place may vary. In the United States, a lobbyist must register (with the Secretary of the Senate and the Clerk of the House) and subsequently file semi-annual reports. In Lithuania, registration of a lobbyist (who must file an annual report on lobbying activities) is a one-time act, valid until the suspension or termination of lobbying activities. The simplified, easy to use, registration process in Ireland is an example of good practice.²² Under the Austrian Lobbying Act, lobbyists

22. See www.lobbying.ie/umbraco/Surface/AccountSurface/Register.

are obliged to update information in the register within three weeks of any changes to their registered data. Even though lobbyists are responsible for registering and keeping information up to date, a public authority responsible for the oversight of the register should also be able to verify the accuracy of the information (see Principles 18 and 19).

Principle 9

38. Considering that the main objective of a register of lobbyists is to provide transparency regarding who is seeking to influence public officials, the register should be easily accessible and user-friendly. The Irish system is an example of good practice in this regard: it gives the public free online access to a searchable database of registrations and allows users to perform detailed searches of who is lobbying, and which officials they are lobbying.²³

Principle 10

39. The processing of personal data from the register should comply with applicable standards on personal data protection. In this regard, it is important to note the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) and the relevant legal instruments of the European Union.

Principle 11

40. Principle 11 refers to information which should, as a minimum, appear systematically in the register, being provided by the lobbyist upon registration and subsequently updated as necessary. This information could include:

Name and contact details of the lobbyist

- name of the lobbyist
- contact details (address, telephone, and the lobbyist's website)
- corporate designation
- legal form
- registration number
- fields of activity (including, if appropriate, a description of the business or activities of the lobbyist)

²³. See www.lobbying.ie/.

Subject matter of the lobbying activities

- subject matter of lobbying contacts and communications (namely, details of the targeted areas of public policy or legislation)
- interests represented or promoted
- public department contacted and, if appropriate, the relevant public official (the position, not the person)

Identity of the client or employer, where applicable

- identity of the client or employer represented (including, in the case of independent consultant lobbyists, details of the organisations for which they work).

41. Registers may be organised in various ways. Examples include distinguishing the types of lobbyists, as seen in the European Union's Joint Transparency Register (which distinguishes between consultant lobbyists, in-house lobbyists and NGOs on the register), or by the public policy area that the lobbyist seeks to influence, as indicated by the lobbyists on registering.

Principle 12

42. Member States are encouraged to consider whether additional information should be required when lobbyists register. For example:

- stating the number of lobbyists employed by the firm, in the case of consultant lobbyists;
- stating the name of former public officials (politicians or civil servants who have worked for the State) working as lobbyists for the firm, especially where the legal regulations include cooling-off periods or revolving-door measures (see Principle 17);
- providing financial information on the volume and the value of lobbying contracts in the case of consultant lobbyists, or declaring lobbying costs in the case of in-house lobbyists.

43. Austria is an example of a State that requires financial information to be indicated on the register of lobbyists. Lobbyists have to indicate, within nine months of the end of each financial year, the volume of their lobbying activities and the number of lobbying cases. In the case of in-house lobbyists, the employer has to indicate whether the costs for the lobbying activities of the previous financial year were higher than €100 000. Organisations or bodies

(see Principle 2.c) have to indicate the costs of representing their respective professional interests.

Principle 13

44. Principle 13 is an exception and concerns only those States that have well-established traditions of effective, open government, supported by relevant policies and a political culture of openness in public affairs. In these States, access to information held by public administrative bodies is regulated and facilitated by law, and anyone may access this information. For this purpose, there are rules concerning the keeping of official records and in most cases the public authorities will be required to register incoming and outgoing correspondence and documents. In these States, a register of lobbyists may be less important in achieving the goal of transparency in relation to external influences on public decision making. The register might still serve to provide the public with information on the existence of particular lobbyists operating in certain areas. However, the focus of the open government political system will be in making public the “footprint” of a particular public decision-making process rather than in merely identifying active lobbyists. In this context, it is recalled that for the recommendation, the register and disclosure are complementary principles, strengths in one compensating for weaknesses in the other.

F. Standards of ethical behaviour for lobbyists

Principle 14

45. Principle 14 sets out four core principles of the ethical behaviour for lobbyists (openness, transparency, honesty and integrity). These core principles and the examples of specific behaviour (“a-d”) are typical professional values. Specifically in relation to lobbying, these principles reflect the communication by the European Commission on 27 May 2008 entitled “A framework for relations with interest representatives (Register and Code of Conduct) {SEC(2008)1926},”²⁴ and which refers to the expectation that such persons “apply the principles of openness, transparency, honesty and integrity, as legitimately expected of them by citizens and other stakeholders.” In relation to conflicts of interest, Principle 14 is concerned with avoiding conflicts of

24. See document COM(2008)323 final, available at https://ec.europa.eu/info/about-european-union/principles-and-values/transparency_en.

interest between the lobbyist and the public official with whom they are in contact or communication. This principle is also concerned with ensuring that the lobbyist avoids conflicts with their client or employer.

G. Sanctions

Principle 15

46. In order to enhance public confidence in the democratic functioning of government authorities, lobbying regulations must be effective. For this, the legal regulations should contain effective, proportionate and dissuasive sanctions, be they criminal or non-criminal. Member States will determine the appropriate type of mechanism for dealing with non-compliance in light of their specific national context and circumstances. Examples of non-compliance include failing to register before making contact with public officials, or submitting false or misleading information when registering.

47. In States with lobbying regulations, the most common forms of sanction are fines, removal from the register and/or loss of privileged access, and imprisonment. Examples of national practice are given below.

Fines

48. Professional lobbying activities that contravene the applicable lobbying act are punishable by a fine of up to €60 000 in Austria and up to €16 000 in Poland, depending on the seriousness of the offence. In the United States, Officers of the US Congress inform the US Attorney's Office (District of Columbia) about violations of lobbying regulations occurring in either of the two legislative chambers. The Attorney's Office may decide to prosecute and ask for a fine of up to a maximum US\$50 000 to be imposed. In addition to fines for natural persons, in France, fines up to 1% of their turnover can be imposed on legal persons.²⁵

Removal from the register and/or loss of privileged access

49. In Austria, the registration authority may decide – as a sanction – to remove a lobbyist from the public register in the case of serious non-compliance with lobbying regulations.

25. See French Law No. 2016-1691 of 9 December 2016 on Transparency, the Fight against Corruption, and Economic Modernisation.

Imprisonment

50. In Ireland, failure to comply with lobbying regulations is punishable by a fine of up to €2 500 or a term of imprisonment of up to two years. At the federal level in Canada, violations of lobbying regulations are punishable by terms of imprisonment ranging from six months to two years. In the United States, a lobbyist might be sentenced to a term of imprisonment of up to five years for knowing and wilful failure to make a full disclosure.

H. Public sector integrity

Principle 16

51. National circumstances relevant to Principle 16 include, *inter alia*, the national legal framework on preventing corruption and consolidating integrity. This principle recalls the need to establish national standards on public sector integrity and leaves a margin of discretion to member States on determining the appropriate measures. This might include ensuring that the relevant codes of conduct for public officials include appropriate standards and advice on how to respond to contact or communications from a lobbyist, as well as putting in place mechanisms or procedures to which public officials can resort in complex situations where the appropriate response for the public official might not be clear or straightforward. Principle 17 provides more specific detail in this respect. In this context, it is worth recalling that public officials include not only civil servants but also ministers, parliamentarians or other elected officials, and their advisors (see paragraph 19).

Principle 17

52. Principle 17 complements Principle 16 by proposing the establishment of a cooling-off period and providing guidance to public officials.

Cooling-off period

53. This measure seeks to mitigate the possible negative impact on good governance of former public officials moving into lobbying activities once they have left their public employment or office. The justification of this is to prevent former public officials using their privileged knowledge of the public administration in which they have worked (including personal contacts and internal procedures) as a lobbyist for the benefit of a client or employer who wishes to influence decision making within that particular administration.

An example may include a minister of defence leaving their job and then immediately going to work as a lobbyist for a defence contractor that lobbies their former ministry. In Germany, every case of potential conflict of interest for public officials must be evaluated on an individual basis for both civil servants and former members of the federal government (chancellor, ministers, and parliamentary state secretaries). Where a cooling-off period is applicable for members of the federal government and parliamentary State secretaries it is generally 12 months, but it can be extended to 18 months in exceptional cases. The Lithuanian legislation requires former politicians to wait for one year before becoming lobbyists and registering with the register of lobbyists. Canada, given its federal structure, is an example of a State having varying cooling-off periods: the federal legislation states that public office holders have a mandatory cooling-off period of five years, whereas provinces such as Quebec, Ontario, and Nova Scotia have cooling-off periods of two years, one year, and six months, respectively. Restrictions on public officials taking up employment as lobbyists before the expiry of a specified cooling-off period may be included in more general regulations concerning the employment of public officials once they have left public service, as is the case in Norway.²⁶

Guidance to public officials on their relations with lobbyists

54. Public officials should be able to benefit from advice to guide them in their relations with lobbyists. This guidance should address, but not be limited to, how to respond to communications from lobbyists, how to report violations of the regulations or rules of conduct on lobbying activities and how to preserve the confidentiality of data (so that information is protected against unintended use). Public officials should also either refuse or disclose the receipt of gifts and hospitality offered by a lobbyist. In Germany, both the Bundestag and the Landtage (State legislatures) have such codes of ethics for their members, which require reporting of various gifts, travel expenses and campaign fundraising above certain thresholds, and also prohibit the acceptance of benefits if they are granted in the expectation of political advantage in return. In this regard, other States such as Ireland are developing “ethics legislation” where politicians and civil servants have to disclose, for example, gifts received if they are over a certain stipulated amount.²⁷

26. Post Public Employment Act of Norway (Act No. 70 of 19 June 2015).

27. See Press release of 18 June 2015, “Minister Howlin announces reforms to Ireland’s Public Sector Standards Regime”, available at www.per.gov.ie/en/minister-howlin-announces-reforms-to-irelands-public-sector-standards-regime/.

I. Oversight, advice and awareness

Principle 18

55. Oversight of the regulations on lobbying activities should be entrusted to designated public authorities to ensure compliance with the regulations. As some member States have several registers applying at different levels of governance, there may also be several public authorities within the member State responsible for oversight. Member States do not necessarily need to create a new public authority entrusted with oversight and the task may be entrusted to existing authorities.

Principle 19

56. This principle establishes possible tasks for the oversight of lobbying regulations. Member States may of course consider additional tasks. Even though lobbyists are responsible for providing accurate information (Principle 8), monitoring compliance means that public authorities should be able to verify that information provided at the time of registration is correct and, if there are unreported changes to the information initially provided, that these should be examined. Providing guidance to lobbyists and public officials on the application of the regulations may also be complemented by raising awareness via media campaigns among professionals and the public regarding what the regulations are about, to whom they are applicable (Principle 7), and potential penalties for non-compliance with the regulations (Principle 15). Such media campaigns may also help to better inform the public about the ability to search the register.

57. For example, France entrusts supervision of compliance with the regulations on lobbying to an existing independent authority: the High Authority for Transparency in Public Life.²⁸ This authority is entitled to request representatives of interest groups to provide it with any information or document within its field of competence without them being able to object on grounds of professional confidentiality. The High Authority may also be asked for its opinion on the nature of a natural or legal person's activity in order to determine whether the activity can be categorised as lobbying. Where the High Authority finds, on its own initiative or following a report, that there has been a breach of the obligations laid down by the regulations on lobbying, it issues the interest

28. See French Law No. 2016-1691 of 9 December 2016 on Transparency, the Fight against Corruption, and Economic Modernisation.

group representative with a notice, which it may make public, to honour the obligations by which they are bound, after having given them the opportunity to make comments.

J. Review

Principle 20

58. As lobbying regulations are a comparatively new tool for most States and as the forms of lobbying are likely to change over time, their effectiveness should be kept under review. Member States may decide on the periodicity and the type of review of the framework they would like to undertake and determine which authorities or bodies should be entrusted with it.

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Recommendation CM/Rec(2017)2, accompanied by its explanatory memorandum, aims to promote transparency of lobbying in public decision making. It outlines the principles that member States of the Council of Europe are invited to apply in the manner most appropriate to their specific national circumstances.

Lobbying is an important and legitimate part of the democratic process within political systems. It concerns all social and economic actors, public and private. Thus, public concern over lobbying activities is growing and there is a wish to make them transparent.

The challenges and the impact of lobbying on public decision making are significant and it is only right that lobbyists should follow certain rules when trying to influence public officials and the political decision-making process, whether they be business lobbyists or civil society organisations. The aim of these rules is to strengthen transparency, accountability and public confidence in political systems. They may even serve as a basis for wider public participation in public life and public decision making. Without proper regulation, democratic principles and good governance may be undermined.

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