

April 29, 2016

Submission to CDCJ on the Draft Recommendation on the legal regulation of lobbying activities in the context of public decision-making

This document sets out recommendations by the undersigned civil society organisations to the Council of Europe's Committee on Legal Co-operation (CDCJ) on its *Draft Recommendation of the Committee of Ministers to Member States on the legal regulation of lobbying activities in the context of public decision-making*.

We welcome the Draft Recommendation, which contains various elements that will contribute to enhance transparency of lobbying and decision making in Council of Europe Member States.

In particular, the Draft Recommendation contains a clear and comprehensive definition of lobbyist, recommends creation of a lobby register, which should be accessible to the public in a user-friendly manner and free of charge.

We also welcome the inclusion of core standards on ethical behaviour; of an oversight body, and of sanctions for non-compliance with lobbying regulation. It is positive that the Draft Recommendation makes clear that lobbying regulation should in no way infringe upon the rights to freedom of expression and participation in public life, given that engaging in lobbying activity is derived from these rights.

At the same time, there are elements of the Draft Recommendation that could be improved upon in order to ensure that there is adequate control of and transparency of information about lobby activity, something which is essential to guaranteeing a level playing field when it comes to participation in decision-making and legislative processes

This submission is based on the **International Standards for Lobbying Regulation** which are the result of two years of collaborative work with civil society led by Access Info Europe, Transparency International, Sunlight Foundation, and Open Knowledge Foundation. This initiative drew on the experience of a broad coalition of civil society organisations active in the field of lobbying transparency and open governance, along with consultations with lobbyists and government officials. Launched in October 2015, it is the first comprehensive framework for regulation and transparency of lobby activity.

The Lobby Regulation standards build on best practice from existing lobby regulations and also reference various existing international standards on the matter. They address three critical and inter-related areas of effective regulation of lobbying: transparency, integrity and participation, with the aim of setting internationally applicable standards that can be tailored to the specific national context.

For more information about the standards, including guidelines and detailed explanations that are outlined in this submission please go to: <http://lobbyingtransparency.net/standards/>

Analysis and Recommendations

The comments in this section along with the recommendations contained in this section are based on the structure of the CDCJ's Draft Recommendation.

Definitions

a) 'Lobbying': The proposed definition of lobbying is good in that it is concise and comprehensive. We do however have a concern that it restricts lobbying to "structured or organised actions", since there maybe instances where it is not obvious whether the actions of a particular lobbyist are structured, part of an organised campaign, or whether the lobbyist is working on behalf of a client. For the international standards we have opted for the nature of the activity in and of itself, describing it as "any direct or indirect communication with a public official that is made, managed or directed with the purpose of influencing public decision-making," and make clear that the definition should ensure that it includes indirect lobbying such as mobilising other stakeholders or to represent an organisation's views or hire consultancy firms to do lobbying work on their behalf.

We recommend that the CDCJ remove "*as part of a structured or organised actions*" and reword the definition as follows: "Lobbying" means promoting specific interests by direct or indirect communication with a public official ~~as part of a structured and organized action~~ aimed at influencing public decision-making.

We note that below we have inserted an exception for communications from members of the public (see paragraph B.3 in the section on Scope)

c y d) 'public decision-making' and 'public official': We welcome the inclusion of the legislative and executive branch. Lobbying is directed, however, at decision making in all branches of government, "*including the administrative functions of the judicial branch, as well as decision making in independent government bodies, agencies, and private bodies performing public functions*". We therefore recommend the extension of the definition to all such bodies.

e) Legal regulation: The proposed Draft Recommendation considers that some countries may consider self-regulation as an equivalent to legal regulation. This is unacceptable and inconsistent with the other elements of the Draft Recommendations as makes it impossible to have independent oversight and sanctions. Hence we strongly believe that there must be mandatory regulation, both when it comes to a lobby register and with respect to the transparency provisions. We therefore propose that the CDCJ eliminate *self-regulation* from the legal regulation definition.

A) Objective

1. Access Info Europe recommends including in the objectives section a reference to the goals of transparency of lobbying activity. Lobby regulation should aim to ensure a level playing field for all actors to participate in the decision-making process on an equal footing, and there should be specific mechanisms in place to prevent potential conflicts of interest that may arise from attempts to influence the decision-making process.

The amended article would read as follows: "*The legal regulation of lobbying should ensure transparency of the impact of lobbying on the decision-making process, as well as accountability of decision-makers for policies and legislation enacted*".

B) Scope

2. It is positive and consistent with the International Lobby Regulation Standards that the current scope is broadly framed. We are nevertheless concerned that the definition of the scope risks limiting the broad definition of lobbyist set out in Section A.

We are particularly concerned that there is no specific mention of lawyers who often try to fend off lobbying regulation requirements by referring to the need to protect attorney-client privilege. However, this privilege should only apply to legal advice and representation in formal legal procedures. Wherever lawyers do not represent a client's legal interest in a concrete ongoing case, but rather political interests, aimed at changing general laws, rules, or policies, lobbying regulations need to apply. Otherwise lawyers would have an unfair advantage vis-à-vis other lobbyists.

We therefore recommend modifying article 2.a so that it reads: "Consultant lobbyist acting on behalf of a third party; *including law firms*".

3. We welcome the inclusion of the need to define and justify exceptions to the legal regulation of lobbying. Nevertheless, we recommend including greater detail in order to guard against possible excessively broad interpretations of the exceptions.

We propose to amend the current article as follows: "*The exemptions to regulation of lobbying may include citizen interactions with public and elected officials. Exceptions to the legal regulations of lobbying should be clearly defined and justified.*"

D) Transparency

5. In order to ensure transparency of lobbying, it is important (and more efficient for the public institutions) to include proactive disclosure of key information. Hence, we propose to add the word "proactively" to the provision on information that should be disclosed and define a list of the minimum information that should be disclosed in this way: "*(...) proactively. Information disclosed proactively should include at a minimum: agendas and diaries of public officials, minutes of meetings, and third party documents submitted around a particular decision-making process.*"

Information should be clustered around particular decision-making or legislative processes, thus producing a 'decision-making footprint' or 'legislative footprint', outlining the history, public engagement, and the overall process. The footprint should also link to lobbying register data".

New point: In order to ensure that, where information is not released proactively, it is possible for the public to request it, we strongly recommend addition of a new article in the Transparency section which states that "*A comprehensive access to information law should guarantee the public's right of access to information, including information about lobbying.*"

New point in the preamble: It would also be opportune if the regulation made a specific reference to the Council of Europe Convention on Access to Official Documents, which is pending further ratifications so that it can enter into force. Hence we recommend adding to paragraph H of the preamble: "*bearing in mind the Council of Europe Convention on access to official documents (CETS No.205).*"

E) Public Registers of Lobbyists

7. The Draft Recommendation requires that register of lobbyist be maintained by public authorities. We recommend adding to this point: *"This register should be mandatory, with timely registration rules and procedures, and with clear reporting mechanisms"*.

11. In order to ensure that the register contains the essential information needed for public oversight of lobbying, we recommend adding to this article the following: *"The register should include at a minimum information on:*

- a. Lobbyist identity*
- b. The subject matter of lobbying activities and outcomes sought*
- c. The ultimate beneficiary of lobbying activities (where relevant)*
- d. The targeted institution and/or the public official concerned*
- e. The type and frequency of lobbying activities*
- f. Any supporting documentation shared with the public officials*
- g. Lobbying expenditure, including in-kind (calculated to set criteria, in cost bands, if need be)*
- h. Sources of funding, per client and per dossier*
- i. Any political contributions, including in-kind*
- j. Any prior roles as public official held by the individual and/or family members*
- k. Public funding received"*

F) Standards on Ethical Behaviour for Lobbyists

14 It is positive that the CDCJ has included core standards on ethical behaviour in the Draft Recommendation.

Nevertheless, it is important to ensure that there be firm rules on how lobbyists may behave. We propose to include **a new point:** *"Regulation should include a statutory code of conduct for lobbyists, developed in close consultation with all stakeholders and interested parties.*

Supplementary measures should be taken to encourage lobbyists to voluntarily adopt, publicise, and report on additional ethical commitments, including through collective action".

H) Standards on Ethical Behaviour for Public Officials

Similarly we recommend including Codes of Conduct for Public Officials as a measure to complement legal regulation of lobbying and to avoid risks to public sector integrity.

New point: "Codes of Conduct. *All public officials shall have an applicable set of rules laying out the key standards of conduct, including for their dealings with third parties. Such rules may be institution dependent, but should include:*

- a. Key behavioural principles including those of transparency, integrity, responsiveness, impartiality, fairness, accountability and serving the public interest*
- b. The duty to keep a true and detailed record of their actions, including of meetings with lobbyists*
- c. The duty to avoid lobbying contacts with unregistered lobbyists, and to report any violations of the lobbying rules to their superiors or relevant bodies*
- d. The duty of confidentiality, subject to the public access to information regime*

- e. *A comprehensive mechanism for dealing with any real, potential or apparent conflicts of interest, including the incompatibilities of being a lobbyist*
- f. *A comprehensive guidance for dealing with gifts and hospitality, including their registration or decline*
- g. *A system for assets and interests disclosure by the public official, as well as by their family and business partners depending on the scope of the decision-making power of the official."*

I) Oversight, Advice and Awareness

18. We welcome the inclusion of an oversight body which offers advice, analysis, and awareness raising. We recommend including: *"The oversight body or coordinated mechanism should be independent, with binding powers, and should be well-resourced."*

19 a) We propose adding at the end of the current bullet point: *"(...); including proactive verification of the accuracy of the lobbyist register"*.

K) Additional comments:

New point: Given the right to participate in public life (which this Draft Recommendation has already referenced) we strongly recommend the inclusion of a specific provision requiring Council of Europe member states to take proactive measures to ensure a level playing field by establishing mechanisms for public participation in decision-making processes.

To this end, we propose a new Section K, which would read as follows:

"Public authorities should establish mechanisms aimed at providing an equal opportunity for participation by various interest groups and the public at large in public decision making."

These comments are submitted for the following organisations: Access Info Europe, Spain; Gong, Croatia; Vouliwatch, Greece ; and Rural Women Development Initiative (RUWODI), Tanzania.

