



Comments on the Commission proposal for an Inter-Institutional Agreement on a mandatory Transparency Register from the Law Society of England and Wales and the Law Society of Scotland

Introduction

1. The Law Society of England and Wales is the professional body for the solicitors' profession in England and Wales, representing over 160,000 registered legal practitioners. The Society represents the profession to the European Parliament, European Commission and representations of the EU governments as well as relevant EU agencies. It has a public interest in the reform of the EU law.
2. The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. It sets and upholds standards, promotes the provision of excellent legal services and ensures that public can have confidence in Scotland's solicitor profession. It has a statutory duty to work in public interest.
3. The Law Societies would like to provide several comments on the proposal for the mandatory Transparency Register which we feel would help the legislators in agreeing on the final shape of this new instrument.
4. This paper has been prepared by the EU Committee of The Law Society of England and Wales (LSEW) and the Law Society of Scotland (LSS).

General remarks

5. The Law Societies share the Commission's view that the EU decision-making process should be as transparent as possible to allow for proper scrutiny and to ensure that the Union's institutions are accountable. We think that lobbying is a vital part of the democratic process, as it helps inform politicians and decision-makers of key concerns and the potential impact of proposed policies and legislation as well as options that may not have been considered.
6. We firmly believe that the responsibility for transparent policy making should be shared between those who lobby and those who make decisions on matters of policy. Any new legislation must be proportionate to its intended objectives and cannot hamper open and equal access to government by the citizens. In addition, we wish to point out that a lobbying register is not the only means of providing accessible and accurate information on lobbying activities.
7. We generally support the idea of a mandatory Transparency Register covering the European Commission, the European Parliament and the Council of the EU. We also think that the proposed Inter-institutional Agreement¹ (IIA) is an improvement on the current IIA.²
8. We would, however, like to draw attention to several outstanding issues which, in our view, need to be addressed to ensure the new system is efficient and achieves its intended goals.

¹ COM(2016) 627 Proposal for a Inter-institutional Agreement on a mandatory Transparency Register

² Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, 19.9.2014



Legal basis of the mandatory lobbying register

9. We understand the practical reasons behind choosing Article 295 of the TFEU as the legal basis for the new mandatory register. Nevertheless, we would like to reiterate our doubts as to why that provision is not an appropriate one. The precise legal nature of IIAs varies considerably from one to another. What is clear, however, is that they cannot bind third parties and as such cannot impose sanctions on them.³
10. A statutory legal basis would help address problems faced by European lawyers with regard to their professional rules on client confidentiality.

Scope of the register

11. We support that under the definition contained in Article 3(1), only direct interactions would fall within the scope of the proposed register. In our view, such a definition is capable of providing greater legal certainty for all registrants.
12. We would suggest that Article 2 be considered as a better place to include a list of interactions conditional upon registration, i.e. 'relevant interactions.'
13. We recommend clearly defining the 'officials' from the three signatory institutions with which interactions are conditional upon registration. Article 2(g) defines 'officials' as '*all categories of staff of any of the three institutions*' but Article 5 limits the scope to only relevant officials. It is therefore unclear who the agreement actually applies to. We would suggest that Article 5 follows the correct approach and that this definition should be clearly consolidated in the IIA.
14. We urge the Commission, Parliament and the Council of the EU to properly define the scope of the Register as:
 - a. Article 5(3) allows the institutions to decide to make other types of interactions conditional upon registration, and;
 - b. Article 12 allows other EU institutions to join the register.
15. Such widening of the scope of the register, which would *de facto* constitute an amendment of the agreement, should be accompanied by a public consultation or a review of the register's operations. It should also follow the relevant legislative process. The lack of such a process would generate uncertainty for registrants. Such provisions indeed exist in other Member States' lobbying legislation. In Ireland, the review or amendment to the lobbying regulations, including the code of conduct, includes a consultation process with the parliament, ministers and the lobbyists themselves.⁴

Exemption of legal work

16. Legal advice should be clearly exempted from the scope of the register if it does not involve an 'interaction' the three signatory institutions. The present wording of Article 3(2)(a) implies that legal advice, which does not fall under the list of exempted activities as defined in Article 3(2), is covered under the scope of the register.

³ See: Herwig C.H. Hofmann, Gerard C. Rowe, Alexander H. Türk (eds), *Administrative Law and Policy of the European Union*, pages 582-584

⁴ Sections 2 and 16 of the Regulation of Lobbying Act 2015



17. We invite the Commission, Parliament and the Council of the EU to clarify the provisions concerning legal advice to better reflect the scope and nature of legal advice. This will provide greater clarity to law firms, lawyers and their clients as to which activities fall under the scope of the register.
- a. In our view, Article 3(2)(a) does not include some important elements of legal advice, for example complaints (State aid and infringement proceedings).
 - b. We also suggest that Article 3(2)(a) include the reference to assistance to client in the framework of the activities falling within the scope of Article 3(2)(b).
 - c. Moreover, the current wording of Article 3(2)(a) does not provide clarity as to whether any pre-litigation activities are covered in its scope. At the moment, Article 3(2)(a) refers to 'administrative proceedings' but these usually start when the Commission opens a relevant investigation. However, it may take several years from the moment of filing the complaint to the opening of an investigation and during that time the lawyers would provide advice to their clients and liaise with relevant case officers at the Commission. We therefore propose that Article 3(2)(a) refer to 'submissions [...] in the framework of an actual or future legal or administrative procedure.'
18. To illustrate the scope and nature of the work undertaken by the legal profession, we prepared the attached Annex, which contains a list of scenarios highlighting which activities should and should not fall under the scope of the register.
19. It is important to note that the duty of confidentiality is one of the core principles of the legal profession and therefore needs to be taken into consideration when applying transparency rules to lawyers. We would like to point out that the English and Irish lobbying legislation refers to the legal professional privilege and the need to protect it.⁵
20. We acknowledge that a client may waive confidentiality so that a solicitor could continue to represent the client in their lobbying activities under a registration scheme.
21. We would like to recall that for lawyers and law firms established in Brussels, both the Flemish-Speaking Brussels Bar (*Nederlandse Orde van advocaten bij de balie te Brussel*) and the French-speaking Brussels Bar (*Ordre français des avocats du Barreau de Bruxelles*) have also recognised the possibility for the client to waive confidentiality.

Internal consistency and coherence

22. We invite the Commission, Parliament and the Council of the EU to consider checking the text of the agreement for internal consistency and coherence and modifying it accordingly.
- a. For example, Article 5 lists the types of interactions conditional upon registration. However, these could potentially be included in Article 2 (see point above).
 - b. The text should refer only to 'interactions.' At the moment, the text switches between referring to 'interactions' with the institutions to 'activities' in Article 3.

⁵ Section 19 of the [Regulation of Lobbying Act 2015](#) (Ireland), Section 24ZK of the [Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014](#) (England and Wales)



- c. We also suggest that several elements be removed from Article 5 as they do not constitute interactions. These include:
 - 'sending of automatic alerts [...]' or
 - 'sending of alerts by means of mailing lists [...]'
- d. We suggest that Article 7 is reduced to stating that the registrants need to abide by the principles and rules set out in the code of conduct and that the code of conduct only applies to activities covered by the register. The remaining text is a repetition of the provisions of the code and is thus redundant.

Enforcement and due process

23. The IIA should impose binding deadlines and procedures on the Secretariat both in relation to the registration stage and during the investigation stage. These could be modelled on the provisions of Article 7 of the 1049/2001 Regulation⁶. In our view this is essential for the efficiency and certainty for the registrants. The current wording does not indicate how long it would take for the Secretariat to decide if an organisation is eligible to register or not.
24. We suggest that it is compulsory for the Secretariat to draft implementing guidelines rather than optional as in Article 9(4) where the Secretariat 'may propose' rather than 'shall propose.'
25. We are concerned that the current proposal does not refer to the possibility of a professional body to support its members should they become subject to the Secretariat investigation. Such a provision exists in the current IIA (Article 7 of Annex IV). We think it is important for regulated professionals to be able to seek assistance of their representative bodies.
26. We are concerned with the proposal extending the registrants' liability for the actions of third parties. Point (i)(i) of the Code of Conduct requires that registrants ensure that their clients or intermediaries, whichever is relevant, are also registered. In our view, this obligation would be difficult to enforce in practice. We propose that instead the point refers to 'reasonable best endeavours' to ensure that a client is registered and vice versa.
27. We are concerned that, under Annex IV of the Proposal, the Secretariat would be responsible for conducting investigations into potential breaches of the code of conduct, as well as deciding whether a breach has occurred and imposing measures in response. In this scenario, the Secretariat would essentially be acting as both the prosecution and judge and would therefore lack impartiality and contravene the rules of natural justice.
28. Instead, we recommend the Commission, Parliament and the Council of the EU consider setting up a separate body that is tasked with judging whether a breach has occurred on the basis of the evidence gathered by the Secretariat. The same body should then be the one responsible for and imposing measures.
29. We are pleased to see the provision on the protection of confidential information in Article 4.5 of Annex IV which refers to the Article 4 of the 1049/2001 Regulation.

⁶ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents



ANNEX: Activities covered and not covered by the IIA

1. Activities covered and not covered by Article 3(1):

Scenario 1

A law firm is instructed by one of its clients to draft a paper on the introduction of new EU legislation and/or potential changes to existing EU legislation in the context of the Digital Single Market. It is intended that the paper will be shared with MEPs and Cabinet of the Commissioner for Digital Economy & Society.

Analysis: This activity falls under the definition in Article 3(1) because it involves interactions with one of the three signatory institutions.

Scenario 2

The Commission publishes a public consultation on the review of Regulation 1/2003. The law firm decides to submit comments, either on its own volition or on the behalf of a client. The law firm was neither directly nor specifically approached by the Commission and is merely responding to a consultation published online.

Analysis: This activity falls under the definition in Article 3(1) because it involves interactions with one of the three signatory institutions. See Scenario 9 below for circumstances in which this could be exempted.

Scenario 3

A law firm is commenting on a document drafted by a Bar Association on the draft text for the new Transparency Register. The Bar Association intends to use the document to highlight to the European Parliament Secretariat the shortcomings in the draft.

Analysis: The law firm's activity does not fall under the definition in Article 3(1) because it does not involve interactions with the institution in question. The Bar Association's activities, however, do fall under the definition in Article 3(1), because the Association will use the document in its interactions with the European Parliament.

Scenario 4

A law firm is requested by one of its clients to analyse the pros & cons of lobbying one or more of the MEPs and/or officials of the Commission with regard to Digital Single Market issues.

Analysis: This activity does not fall under the definition in Article 3(1) because it does not involve interactions with one of the three signatory institutions.

Scenario 5

A lawyer is well-known for her expertise on the digital agenda. She decides to write an article for a prominent law journal on the implications of the Commission's Digital Single Market Strategy, the potential challenges and her views on how best the strategy could be implemented.

Analysis: The activity does not fall under the definition in Article 3(1) because it does not involve interactions with the three signatory institutions.



2. Activities exempted under Article 3(2):

a) Ensuring that activities comply with the existing legal framework (Article 3(2)(a) Second Bullet):

Scenario 6

A client is considering entering into a non-full function joint venture with a competitor. It requests a meeting with the Head of Unit of the relevant Case Team at the Directorate General for Competition to discuss the potential joint venture, with a view to seeking to obtain a no-action letter from the Commission or a similar communication.

Analysis: This activity is exempted under Article 3(2) because it is of the purpose of helping a client to ensure that their activities comply with the existing legal framework.

b) Representation of clients and safeguarding their fundamental or procedural rights, such as the right to be heard, the fundamental right of a client to a fair trial, including the right of defence in administrative proceedings, such as activities carried out by lawyers or by any other professionals involved therein (Article 3(2)(a) Third Bullet)

Scenario 7

Some 18 months ago, a law firm filed a complaint on the behalf of its client in the context of an alleged breach of the EU competition rules. Although the complaint has been acknowledged by the Commission, the Commission has not yet formally initiated official proceedings in the case and the Commission does not appear to have begun any investigations, having not provided the client with satisfactory indications of the steps it has taken so far. The law firm approaches an MEP about its client's concerns that it is not being "kept closely associated" with the proceedings, under EU procedural rules. The law firm would like the MEP to put pressure in some form or other on the Commissioner for Competition to formally initiate proceedings.

Analysis: This activity is exempted under Article 3(2) because it is for the purpose of safeguarding the procedural rights of a complainant ("being kept closely associated with the proceedings").

C) Submissions made as a party or a third party in the framework of a legal or administrative procedure established by EU law (Article 3(2)(b))

Scenario 8

In the same case in Scenario 7 above, a third party submits a "non-paper" to officials at the Directorate General for Competition as regards its concerns relating to an alleged breach of the EU competition rules. This is not a formal complaint, but raises issues relating to the same subject matter of the complaint in Scenario 7 above. The Commission has still not formally initiated proceedings.

Analysis: This activity is exempted under Article 3(2) because it is made by a third party in the context of a legal procedure established by EU law, which may possibly result in formal administrative proceedings.



D) Submissions made in response to direct and specific requests from any of the three signatory institutions (Article 3(2)(d))

Scenario 9

The Commission is considering amending EU legislation which impacts on a particular sector. The Commission directly contacts some of the key players in the industry with an informal information request seeking specific information about the operation of the current legislation and questioning what changes (if any) industry members would like to see and why. The Commission includes a deadline to respond. The law firm is instructed to draft the response on the behalf of the client.

Analysis: This activity is exempted under Article 3(2) because the request was addressed directly to the lawyer's client and included specific questions.