Transparency International Anti-Corruption Helpdesk Answer

Lobbying regulations and civil society organisations

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Lobbying regulations can impose significant administrative burdens on civil society organisations (CSOs) as they typically have lower technical and financial capacities compared to for-profit organisations. One potential solution is a tiered system that can alleviate some of the burden on CSOs by implementing different registration/disclosure requirements for CSOs compared to for-profit actors, establishing different reporting requirements for direct lobbying and indirect influence activities, or even excluding certain actors from the scope of legislation.

However, this system also carries risks, such as failure to achieve transparency and equal access for all actors, as well as the abuse of lower disclosure requirements/ exceptions by corporate actors and those outside the scope of legislation. To mitigate these risks, various strategies could be considered, such as introducing disclosure obligations for public officials, incentivising voluntary registration of CSOs, using objective criteria for exceptions or lower disclosure requirements, and applying stronger disclosure rules for contributions to front groups.

Query

How can lobbying regulation negatively affect civil society and not-for-profit organisations and what are the possible mitigating provisions to reduce or eliminate this impact?

Contents

Main points

- Tiered systems are one potential model to alleviate the negative effects of lobbying regulations on CSOs.
- Tiered systems can involve different registration/disclosure requirements for different types of actors or the complete exclusion of certain actors from the scope of lobbying legislation.
- Risks of tiered systems include difficulties in achieving transparency and equality for all actors, as well as abuse of lower disclosure requirements by corporate actors who can try to advance their interests through non-profit front groups.
- Some mitigation strategies may include disclosure requirements for public office holders, incentives for voluntary registration of CSOs, objective criteria for exceptions from disclosure rules, and stronger disclosure rules for contributions to front groups.

Caveat

The negative impact of lobbying regulations on civil society organisations (CSOs) can manifest through burdensome registration/disclosure requirements and/or the selective enforcement of regulations to suppress civil society.

While research into these topics continues to be scarce, this Helpdesk Answer refers to several existing expert evaluations of lobbying regulations in different jurisdictions. It also draws on empirical studies on the effects of lobbying regulations on CSOs, as well as studies on other laws that limit the activities of CSOs (for example, foreign agent laws, counterterrorism). Together, these materials provide some insights into how onerous lobbying regulations could negatively affect the functioning of CSOs.

Introduction

Lobbying is defined by Transparency International as "any direct or indirect communication with public officials, political decision makers or representatives for the purposes of influencing public decision-making, and carried out by or on behalf of any organised group" (Devitt 2015: 6).

The way in which various interest groups wield influence reveals much about the power dynamics in a given polity as well as the health of its decision-making processes (Bitonti and Harris 2017). In particular, where corporate actors exercise disproportionate influence over political decision-making, this can result in the systematic prioritisation of narrow private gains over the public interest (OECD 2017; Jenkins and Mulcahy 2018; Mullard 2021; Nest and Mullard 2021; Resimić 2022a).

This is particularly visible in climate policy, where oil and gas multinational corporations spend huge sums of money to block climate action (McCarthy 2019). In the three years following the 2015 Paris Agreement, for instance, oil and gas companies reportedly invested over US$1 billion on misleading climate related branding and lobbying (Influence Map 2019: 2; Resimić 2022b). The sheer scale of financial resources at the disposal of corporate actors is unmatched by any other type of stakeholder who engages in lobbying activities, including CSOs.

Informal networks between big business and political office holders can also lead to illicit influence on the decision-making process. For example, a study on interest groups' lobbying strategies found that business associations are more likely to use an "inside strategy" through direct contacts with decision makers behind closed doors, rather than public relations campaigning, which is typical for NGOs (Dür and Mateo 2013; Jenkins 2017: 6).

Further, big business actors may exploit weak lobbying legislation by using loopholes, such as masquerading behind front groups that are not captured by the relevant legislation or deploying tactics like "astroturfing", which are covered in more detail below (Mulcahy 2015: 7). If lobbying is weakly regulated and opaque, it can lead to administrative bribery, political corruption and even state capture (Jenkins 2017).

Numerous scandals throughout Europe, including the recent Qatargate incident (Corporate Europe Observatory 2022), indicate that clear and enforceable rules are necessary to prevent actors with greater resources from dominating political decision-making (Mulcahy 2015: 6). The risk of policy capture by big corporations and foreign states calls for strict regulation of lobbying activities.

While such regulations are needed to minimise the risk of undue influence while promoting transparency, integrity and equal access in lobbying activities (Mulcahy 2015), they can also have negative effects on CSOs.

These deleterious effects can arise as unintended consequences or through selective enforcement of lobbying regulations by authorities.

Unintended consequences

Experts believe that detailed information on the identity of lobbyists, who they represent, who they lobby, what resources they use, and the purpose of lobbying is essential to deter undue influence and promote ethical lobbying (Mulcahy 2015: 10).

Nonetheless, lobbying regulations that impose a duty on entities engaged in lobbying to register with authorities and/or disclose organisational and operational information tend to have a disproportionate administrative burden on CSOs compared to corporate actors (Greco and Grigus 2021). Particularly for smaller non-governmental organisations with limited budgets and capacities, the cost of complying with such regulations can be prohibitive. For example, research conducted by the Sheila McKechnie Foundation (2018) found that the UK's lobbying act[1] (2014) had a "chilling effect" on charities. Among other provisions, the lobbying act requires charities to register as non-party campaigners in cases where their spending during an election time exceeds a certain threshold. The study identified the following impacts (Sheila McKechnie Foundation 2018: 6-7):

- negative effects on organisations' capacity to represent their beneficiaries' interests due to the administrative burden of the lobbying act
- higher perceived risks reported by organisations working on sensitive issues, such as disability, welfare, migration
- the diversion of significant time and money from core work towards compliance with the lobbying act

The UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association similarly noted that the 2014 lobbying act had a "chilling effect" on CSOs in the UK, which became less willing to campaign during election periods to avoid accusations that they were attempting to influence the outcome of the election (CIVICUS and the Irish Council for Civil Liberties 2018: 3).

Moreover, in countries characterised by a weak rule of law, the disclosure of sensitive financial and personal information may put CSO staff involved in sensitive political work at risk. In recent years, foreign funding has been used as a pretext by governments to limit the activities of CSOs (Wilson 2016). For example, in Ethiopia, legislation that prohibited foreign funded NGOs from working on politically sensitive issues led to the disappearance of some CSOs and local human rights groups. Those that survived, rebranded or switched their area of work from restricted topics (Dupuy et al. 2014).

Multiple studies have shown that organisational capacities and political context influence whether and to what extent non-profits engage in lobbying (Child and Grønbjerg 2007; Mosley 2010; Suarez and Hwang 2008).

For this reason, some commentators have called for different (less demanding) registration/ disclosure requirements to be applied to CSOs due to the inequality in financial and technical resources between the private sector and civil society (Greco and Grigus 2021: 29).

Selective enforcement

Authorities hostile to CSO participation may decide to selectively enforce the rules to crack down on perceived opponents and exclude them from public policy processes. The potential punitive use of administrative sanctions to marginalise civil society voices in political debates has been discussed in Australia as part of the #OurDemocracy and Stronger Charities Alliance campaigns.

While most jurisdictions with lobbying regulations only stipulate administrative sanctions for failure to comply with the rules, criminal sanctions exist in some countries including Canada, France and Ireland (OECD no date; High Authority for Transparency in Public Life. 2020). Where criminal sanctions exist, the potential implications of any selective enforcement by authorities against perceived political adversaries are even more severe.

One potential model to mitigate the disproportionately negative consequences of lobbying regulation on civil society groups is the introduction of a tiered system, with different obligations for different actors.

[1] *The full name of the Act is the Transparency of Lobbying, non-Party Campaigning and Trade Union Administration Act.*

This Helpdesk Answer provides an overview of different types of tier systems in different jurisdictions. The paper then assesses the integrity risks associated with tiered systems, relying on assessments of implementation and expert evaluations of these models.

The final section considers various strategies to counter the negative effects of tiered systems while also minimising the administrative burden on CSOs.

Limiting the negative impact of lobbying regulations on CSOs – a tiered system

Corruption risks associated with the lobbying activities conducted by corporate actors are generally agreed to be more significant than those related to the lobbying carried out by non-profit entities (Jenkins 2017). This is due both to the sums involved and the fact that many corporations prioritise direct contact with decision makers behind closed doors over public relations campaigning (Dür and Mateo 2013). In addition, CSOs tend to have more modest technical and financial capacities to deal with complex registration and disclosure requirements compared to big corporate actors.

Consequently, measures have been introduced in some countries to differentiate between the types of entity in their lobbying regulation frameworks.

One such modality is a tiered system, which can involve different registration and/or disclosure requirements for different categories of actors (primarily commercial vs. non-profit organisations). A tiered system may entail different disclosure requirements at different stages, including:

- Registration in a lobby register which enables access to decision makers (registration requirements may include obligations to disclose certain financial, ownership and governance information about the lobbying actor prior to being allowed to initiate lobbying activities)

- Regular, ongoing reporting requirements, which can be imposed on entities after initial registration or independently of registration where no lobby register exists. The details required on a periodic basis vary from one jurisdiction to another, but can include personal information on lobbyists, records of each contact made, financial gain from lobbying activities over a certain period, the goal of each lobbying activity and so on. Ongoing reporting requirements may also distinguish between:

    - Direct lobbying (personal meetings with decision makers)
    - Indirect influence activities (public relations campaigns, events hosted, advocacy campaigns, social media, etc.). Typically, if indirect influence activities are excluded from the scope of lobbying regulation, they tend to be excluded for all types of entities engaged in lobbying.

Finally, in some countries, the tiered system completely excludes certain groups of actors from the scope of lobbying regulations.

Varieties of tiered systems in lobbying regulations – country examples

This section provides an overview of different models of tiered systems in various countries.

Austria

In Austria, before engaging in lobbying activities, lobbyists are required to register in the Lobbying and Special Interest Group Register operated by the Ministry of Justice (LobbyG 2012; Reinberg-Leibel 2014: 8; Bauer et al. 2019: 2).[2] The

[2] *Political parties, legally recognised churches and religious communities, the Austrian Association of Municipalities and the Austrian Association of Cities, social security institutions and interest groups that do not have employees as interest representatives are excluded from the scope of legislation (LobbyG 2012: Section 1, Article 2; Bauer et al. 2019).*

Lobbying and Special Interest Group Transparency Law (LobbyG), which came into force in 2013, defines lobbying activity as structured and organised contacts with officials to exert influence on decision-making.[3]

Only direct influence is covered by the legislation, while informal activities, such as pressure through media or chance encounters during public events, are not captured by the law (LobbyG 2012: Section 1 Article 2; Federal Ministry of Justice no date).

Different categories of actor covered in the register are subject to different disclosure obligations. Specifically, LobbyG (2012) differentiates between four categories of lobbying actors:

- Lobbying companies, referring to those entities "whose business includes taking on and fulfilling a lobbying assignment, even if not of a permanent nature" (LobbyG 2012: Section 1 Article 4).
- Companies employing corporate lobbyists, provided that no more than 5 per cent of their time is allocated to lobbying activities (Reinberg-Leibel 2014: 8).
- Self-governing bodies, referring to the bodies that "look after the professional or other common interests of its members as well as an association of self-governing bodies to look after these interests nationwide" (LobbyG 2012: Section 1 Article 4). These include chambers of commerce and professional associations (Federal Ministry of Justice no date).
- Interest groups, which refer to associations of several people who engage in the protection of common interests but are neither a lobbying company nor a self-governing body (LobbyG 2012: Section 1 Article 4). Lobbying should be their sole or predominant activity (more than half of their working hours) (Reinberg-Leibel 2014: 8; Federal Ministry of Justice no date).

Thus, the scope of the legislation does not encompass lobbying by NGOs and interest groups provided these organisations do not have specialised staff whose predominant focus is on lobbying (Reinberg-Leibel 2014: 11). The intention of this legislative provision was to exempt small associations (Federal Ministry of Justice no date: 8).

These four categories have different obligations for reporting to the register; notably lobbying companies and those with in-house lobbyists are treated in a stricter manner than collective interest representatives (Federal Ministry of Justice no date: 6). Specifically, before they can conduct their work, lobbying companies need to provide the following information in the lobby register (LobbyG 2012: Section 3 Article 10):

- company data, including name, registered number, registered office, business address and the beginning of the financial year
- a brief description of the professional or business activities
- a reference to the code of conduct
- the website, if applicable

In addition, they need to announce the personal data of their lobbyists before they take up their duties, the total revenue from lobbying as well as the number of lobbying requests processed for the previous financial year within nine months of the end of the financial year (LobbyG 2012: Section 3 Article 10). Finally, after the conclusion of the lobbying contract, lobbying companies also need to disclose a client's data (company name, registry number, registered office, business address and an agreed scope of work) in the register (LobbyG 2012: Section 3 Article 10).

Companies with in-house lobbyists have similar obligations to lobbying companies before starting their lobbying activities for the first time. The difference is in their financial disclosure obligations, as they only need to report whether their expenses for lobbying activities for the previous financial year exceeded €100,000 (LobbyG 2012: Section 3 Article 11). In addition, they are not required to provide information about their clients (LobbyG 2012: Section 3 Article 11).

[3] *At the federal, state, municipal and municipal association levels (LobbyG 2012: Section 1, Article 1).*

The least demanding disclosure requirements are set for self-governing bodies and interest groups. Self-governing bodies are required to disclose:

- basic information: name, registered office, address, the legal basis of establishment
- website, if applicable
- within nine months of the end of the financial year, they need to disclose the total number of those who work for them who are primarily employed in public relations, as well as the estimated cost of advocacy, confirmed by their auditor or other statutory controlling body (LobbyG 2012: Section 3 Article 12)

Interest groups have similar obligations, except that they need to provide a description of their contractual or statutory area of responsibility and not the legal basis of their establishment (LobbyG 2012: 5).

When it comes to administrative fines, LobbyG (2012) does not treat every category of lobbyists equally. Specifically, the fourth section of the law ("Sanctions and other legal consequences") applies administrative penalties only to lobbying companies and companies employing corporate lobbyists, while interest groups and self-governing bodies are not subject to any administrative fines (LobbyG 2012: Section 4 Article 13).

This solution has been criticised by Transparency International Austria (Reinberg-Leibel 2014: 3) as it fails to guarantee equal treatment of every actor involved in lobbying and opens loopholes for corporate actors to misrepresent the nature of their activities. This will be discussed in more detail in the following section on risks of the tiered system.

Canada

The Canadian lobbying act came into force in 2008 after updating and renaming the previous lobbyists registration act of 1989 (Bélanger 2021). It only applies to lobbying in return for payment, while it excludes from the scope of legislation lobbying by volunteers and private individuals (High Authority for Transparency in Public Life 2020). The law captures both direct communication (oral or written) and indirect (grassroot) activities.

The law distinguishes between consultant lobbyists (those lobbying on behalf of a client) and in-house lobbyists, who are employed by corporations or organisations (Lobbying Act 2008; High Authority for Transparency in Public Life 2020; Bélanger 2021; OECD no date).

Different categories of lobbyists have different disclosure requirements. While corporations are not defined in the Canadian lobbying act (2008), organisations include the following actors:

- a business, trade, industry, professional or voluntary organisation (including NGOs)
- a trade union or labour organisation
- a chamber of commerce or board of trade
- a partnership, trust, association, charitable society, coalition or interest group
- a government, other than the Government of Canada
- "a corporation without share capital incorporated to pursue, without financial gain to its members, objects of a national, provincial, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional, or sporting character or other similar objects" (Bélanger 2021: 10; see Peters 2021).

For in-house lobbyists to come under the scope of legislation, lobbying activities must comprise a "significant part of [their] duties". While the 2008 lobbying act does not define what a "significant part" entails, the Office of the Commissioner of Lobbying issued a guidance that the threshold is 20 per cent of their time[4] (Bélanger 2021: 2; OECD no date).

Once the threshold is reached, the responsible officer must file an in-house registration return within two months in the Federal Registry of Lobbyists (Bélanger 2021: 2). Consultant lobbyists, on the other hand, must register within 10 days of entering an agreement to lobby (Lobbying Act 2008; OECD no date).

[4] It refers to a significant part of duties of "one employee or would comprise a significant part of duties of one employee if they were performed by only one employee" (Bélanger 2021: 2).

Registration requirements differ between corporations and organisations that fall within the in-house lobbyists category. Namely, organisations are required to list in their registration the names of employees engaging in in-house lobbying activities on their behalf, regardless of their status or the amount spent on lobbying. Corporations are only required to disclose senior officers[5] or anyone reporting directly to them who engage in any amount of lobbying activity and any employee whose lobbying activities constitute a "significant part of their duties" (Bélanger 2021: 11).

Lobbying activities with a designated public office holder must be disclosed monthly via communication reports. The difference exists between reporting obligations of consultant lobbyists and in-house lobbyists. The former have to report the communication in which they participated,[6] while the latter are not required to be identified in reported communications with designated public office holders (Bélanger 2021: 19).

Australia

A specific type of tiered model involves a complete exclusion of certain categories of actors from the scope of lobbying regulations. This is the case in jurisdictions such as Australia, Lithuania, Montenegro, Serbia, Slovenia, among others.

In Australia, the lobbying code of conduct (2008) defines lobbyists as any person, company or organisation lobbying for a third party or whose employees lobby for a third party (McKeown 2014: 7). The law excludes certain activities from its scope, such as "communication with a committee of the parliament" and "petitions or communications of a grassroots campaign nature in an attempt to influence a government policy or decision" (Lobbying Code of Conduct 2008: Article 5). As will be discussed in the following section, there is thus a risk in Australia that corporate actors attempt to hijack grassroot campaigns to advance their private interests.

Further, the law excludes from its scope companies, professional associations, organisations and trade unions that lobby on their own behalf and these actors do not have an obligation to be recorded in the register of lobbyists (OECD no date; McKeown 2014: 7). These include non-profit associations, charities, foundations, thinktanks and religious organisations.

This exclusion only applies to these actors provided that they do not engage in lobbying on behalf of paying clients (OECD no date). Additionally, if they hire consultants to lobby on their behalf, the consultant would need to register the lobbying activity and disclose the name of the client (OECD no date).

Germany

In Germany, the lobbying register act (2022) came into force with the goal of increasing transparency in lobbying activities by establishing a mandatory lobbying register. While there is a wide range of exceptions, CSOs fall under the scope of the legislation.

Under the lobbying register act (2022: Section 1, Article 3; Wilhelm 2022), lobbying (or "representation of special interests" as defined in the act) refers to any contact made for the purpose of directly or indirectly influencing the process of formulating aims or taking decisions by the members, parliamentary groups or groupings of the Bundestag or by the federal government. The act considers lobbyists to be natural persons, legal entities, third parties or other organisations that carry out lobbying directly or by commission (Kaufmann et al. 2022). NGOs are covered by the act (Wilhelm 2022).

The obligation to register is mandatory when:

- lobbying is done on a regular basis
- lobbying is established on a permanent basis
- lobbying is carried out commercially for third parties

[5] These include chief executive officer, chief operating officer or president of the corporation.

[6] The exception is when they arrange a meeting between a designated public office holder and another person, but they themselves do not participate in the conversation. In that case, they do not have to report communication between a client and a political office holder (Bélanger 2021: 19).

- more than 50 separate contacts have been made in the course of the past three months for the purpose of lobbying (Lobbying Register Act 2022: Section 2)

Once any of these conditions are met, there is an obligation to register (Lobbying Register Act 2022: Section 2).

However, the act includes a number of exceptions to mandatory registration. For example, representatives of special interest groups who "possess no permanent representation in Germany but campaign for human rights, democracy, the rule of law, humanitarian causes or sustainability issues and focus their work primarily on other countries or regions of the world" are excluded from the obligation to register (Lobbying Register Act 2022: Section 2).

For those who are required to register, it is mandatory to provide information on:

- the summary of lobbying activities
- the identity of the client on whose behalf the lobbying is carried out
- annual financial expenditure for lobbying activities
- individual allowances and grants from public funds and individual gifts from third parties, where a donor has gifted more than €20,000 in a calendar year
- and "annual accounts or management reports from legal persons not subject to disclosure obligations under commercial law"

Additionally, general information[7] is required, such as the names of representatives, the legal form of the organisation, contact details, the names of authorised representatives and the names of staff members directly involved in lobbying (Lobbying Register Act 2022: Section 3; Kaufmann et al. 2022).

Ireland

In Ireland, the regulation of lobbying act (2015) defines lobbying activities as communication by any "person" that falls within the scope of the act with a designated public official (DPO) about a relevant matter. The categories of "persons" falling within the scope of the act include:

- employers with more than 10 employees
- representative body that has one or more full-time employees and primarily exists to represent its members' interests
- advocacy body with one or more full-time employees that primarily exists to advocate for particular issues
- any "person" lobbying with regards to development or zoning of land which is not their principal private residence
- a "professional lobbyist" or third party who is paid to carry out lobbying activities on behalf of a "person" fitting one of the above categories (Regulation of Lobbying Act 2015; Standards in Public Office Commission 2021: 23)

The act excludes employers with fewer than 10 employees (Bauer et al. 2019: 6). This means that following actors are excluded from the scope of the act:

- many NGOs, small businesses
- representative bodies with no full-time employees

Anyone engaging in lobbying must register and disclose information every four months, including details on:

- who was lobbied
- the subject of lobbying activity
- the results they were aiming to obtain
- the type and extent of activity
- the name of any person in the lobbying organisation who is or was a DPO and carried out lobbying
- information on clients in whose name lobbying is done (Bauer et al. 2019: 6)

Lithuania

[7] *There are differences depending on whether the lobbyists are natural persons or legal entities.*

The Lithuanian law on lobbying activities came into force in 2001 and underwent several amendments, with the last changes taking effect in January 2021 (Bauer et al. 2019; GRECO 2020).

The previous version of the law defined lobbying activity narrowly, including only natural persons conducting lobbying activities as a service to third parties, thus excluding in-house lobbyists and non-profit organisations (High Authority for Transparency in Public Life 2020).

The amended version of the law on lobbying activities (2020: 2) expands the definition of lobbyists to include "a natural person, a legal person, another organisation or a division thereof engaged in lobbying activities".

The amended version nonetheless excludes "activities of non-governmental organisations of public benefit"[8] from the scope of the legislation (Law on Lobbying Activities 2020: 7).

Slovenia

In Slovenia, lobbying is regulated under the integrity and prevention of corruption act (2010: Chapter VIII, Articles 56-74). Lobbying activities are defined as non-public contacts by consultant lobbyists with the lobbied persons, with the goal of influencing decision-making (Bauer et al. 2019: 12).

According to the legislation, lobbyists can be professional consultant lobbyists listed in the lobby register as well as non-professional lobbyists who lobby on behalf of an organisation in which they are employed (TI Slovenia 2014: 19).

Anyone wishing to engage in lobbying activities is required to register in the lobbyist register, with the exception of in-house lobbyists lobbying for an organisation in which they are employed, and legal or elected representatives of an organisation (Bauer et al. 2019: 12; Integrity and Prevention of Corruption Act 2010: Article 58 para 4).

Both professional lobbyists and organisations for which employees lobby are required to submit regular lobbying reports (Integrity and Prevention of Corruption Act 2010: Article 63, para 1, 3 and 4). However, non-profit private organisations without employees are exempt from this obligation (KPK no date).

Exceptions to lobbying regulations in Slovenia are defined in the Article 56a of the Integrity and Prevention of Corruption Act 2010:

> "Activities of individuals, informal groups or interest organisations with the aim of influencing the public decision-making of state bodies and bodies of self-governing local communities and holders of public authority in the consideration and adoption of regulations and other general acts, in the field that directly relates to systemic issues of strengthening the rule of law, democracy and protection of human rights and fundamental freedoms, does not fall under lobbying according to the provisions of this law."

Thus, organisations such as NGOs, trade unions, ethnic minorities and academics are excluded from reporting obligations (TI Slovenia 2014: 14). These exemptions stem from the constitutional guarantees of the right to participate in public affairs in Slovenia (TI Slovenia 2014: 21).

Risks of tiered systems

As previously discussed, there are two main types of tiered systems in comparative practice:

1. those that impose lower registration and/or disclosure requirements for CSOs and/or other actors
2. those that completely exclude certain actors from the scope of lobbying legislation

Both types of tiered systems in lobbying regulations can create loopholes that may be exploited by corporate actors.

[8] A public benefit NGO is viewed as one whose activity benefits not only its members but the wider public, as per the Lithuanian law on NGO development (Olendraitė 2021: 4). The law specifies that NGOs will be recognised as public benefit NGOs in line with the procedure "laid down by an institution authorised by the government" (Law on NGO development 2013: Article 8).

This section identifies two main groups of risks associated with tiered systems. These risks are based on the evaluation of practical experiences of countries implementing tiered systems or on expert assessments of the relevant legal provisions in lobbying regulations.

First, as illustrated above, tiered systems can add considerable complexity to lobbying regulations, given they often entail multiple categories of actors subject to different reporting requirements and processes. This can negatively affect the transparency of the lobbying process and undermine equal access to all, which are considered to be two of three key elements of effective lobbying regulations (Mulcahy 2015).[9] As will be discussed below, tiered systems have been criticised for creating an uneven playing field.

Where different disclosure requirements exist for different categories of lobbyists, or some types of actors that engage in lobbying are excluded from the scope of lobbying regulation, this can be abused by corporate actors. Astroturfing refers to the practice of using NGOs as a front for lobbying to advance private interests, typically by big corporate actors (Greco and Grigus 2021). Big businesses may even set up a bogus NGOs to create a perception of public support for their cause while hiding their ultimate source of funding (Jenkins 2017: 5; Jenkins and Mulcahy 2018: 10).

Different disclosure requirements

Austrian lobbying regulation has different disclosure requirements and distinct administrative sanctions for different categories of lobbyists. Köppl (2014) has criticised both these features, arguing they create different transparency requirements for different actors. Likewise, Reinberg-Leibel (2014: 3) notes that the provision that interest groups and self-governing bodies are not subject to any administrative fines fails to guarantee equality for everyone involved in lobbying. In this view, the activity itself should be the criterion and not the status or function of lobbyists.

In Canada, in-house lobbyists (a category into which most CSOs fall) need to register their lobbying activities only when these occupy more than 20 per cent of their employees' time. Complying with this provision is burdensome as it requires monitoring employees' time to assess whether they pass the threshold after which the registration is mandatory (Bélanger 2021: 3). Policing the rule is also problematic given that the data is provided by organisations themselves, who might have an incentive to under-report the time they spend on lobbying to avoid falling within the remit of the law.

Additionally, different disclosure requirements for corporations and organisations engaging in in-house lobbying in Canada exist with regards to reporting controlling interests, subsidiaries and membership (Bélanger 2021). Corporations need to list every subsidiary and parent corporation with a direct interest in the outcome of the lobbying activity. Organisations, on the other hand, only need to include the description of their membership (Bélanger 2021). This provision has been criticised as it complicates disclosure requirements and lowers transparency (Bélanger 2021: 13).

The different timeframes for registration that apply to consultant lobbyists (10 days) and in-house lobbyists (two months) in Canada have also been criticised on the grounds that this delays the transparency of the process (Bélanger 2021: 7-8).

Another difference in disclosure requirements between consultant lobbyists and in-house lobbyists in Canada is that the latter have no obligation to be identified in reported oral communication with DPOs (Bélanger 2021: 19). Thus, in the case of in-house lobbyists, it is not possible to know who participated in any reported communication (Bélanger 2021: 19). Transparency is at stake here too since the register will be much less comprehensive than it could be (Bélanger 2021: 19).

[9] *Transparency International considers transparency, referring to interactions between lobbyists and public officials, integrity, referring to clear and enforceable rules of ethical behavior, and equal access, referring to the level of openness of public decision-making to a variety of voices, as three core elements of effective lobbying regulations (Mulcahy 2015: 6).*

Negative effects of overly restrictive definitions of lobbyists/lobbying activities

This section focuses on risks related to a narrow definition of lobbyists and lobbying activities.

Exclusion of lobbying actors

In Australia, the practice of astroturfing by big tobacco, fossil fuel companies and the gambling industry reportedly poses a considerable challenge to the lobbying regulations, given these currently do not cover so-called grassroot campaigns. Specifically, Drury (no date: 17) claims that these industries have funded front groups to appear as grassroots campaigns of consumers or workers and avoid the obligations to declare their financial contribution to the issues. This practice has reportedly been used in Australia by mining companies to block tax reforms and by gambling companies to block a proposal on bet limits (Drury no date: 17).

Further, evidence from Lithuania and Slovenia offers some useful lessons on the potential risks of tiered systems in which only a narrow sub-set of entities that engage in lobbying are subject to obligations to register and disclose information (Kergueno and Vrushi 2020: 5).[10]

When one looks at Slovenia, it becomes clear that the sweeping exceptions to the supposed obligation for lobbyists to register is a real problem (TI Slovenia 2014: 20). Only 1 per cent of the 4,353 lobbying contacts reported by the Slovenian government and parliament in 2018 were held with registered lobbyists, suggesting that the vast majority of meetings were held with actors who do not have an obligation to be transparent about their meetings (Kergueno and Vrushi 2020: 25).

This neatly demonstrates how an overly restrictive definition of lobbying leaves ample room for undue influence by actors who remain outside the scope of the regulations (TI Slovenia 2014: 16). Indeed, in 2019, media reporting and a subsequent investigation by the authorities into a proposal by 38 politicians to postpone the introduction of uniform tobacco packaging revealed that lobbyists had involved former representatives of political parties who had gone on to work for multinational tobacco corporations (SHH 2019). In addition, the tobacco industry financed an NGO to lobby on their behalf, in a clear example of astroturfing (Čepič 2020; Kergueno and Vrushi 2020: 28).

Lithuanian lobbying regulations also suggest that an overly narrow definition of lobbying enables many actors to circumvent transparency obligations (Kergueno and Vrushi 2020). Until the recent amendment of the law, a restrictive definition of lobbying meant that in 2020 there were only 107 registered lobbyists in the country, and most de-facto lobbyists, such as business associations, fell outside of the scope of the law (Kergueno and Vrushi 2020: 25). In fact, only 1.8 per cent of 3,597 voluntarily published meetings by MPs between 2017 and 2020 were held with registered lobbyists (Kergueno and Vrushi 2020: 25; TI Lithuania 2020).

This data indicates the need for changes to the law to bring more transparency to the lobbying practices in Lithuania. The official intention of amendments to the 2020 law on lobbying activities was to increase transparency and prevent illegal lobbying by big business (CIVICUS 2019; BNS 2020). However, the proposed revision to the law in Lithuania generated concern among CSOs that extending lobbying regulation to include them would create a serious administrative burden that would hamper their work (CIVICUS 2019).

They argued that any attempt by NGOs to influence decision makers could result in administrative sanctions if they are not registered as lobbyists (CIVICUS 2019). They agreed that tighter regulations to improve transparency and limit illegal lobbying made sense but proposed that a distinction be made between NGOs protecting the public interest and human rights on the one side and for-profit businesses and lobbyists on the other (CIVICUS 2019).

The new law on lobbying activities in Lithuania indeed exempts NGOs of “public benefit” from its

[10] This assessment applies to Lithuanian lobbying legislation prior to 2020 amendments, which expanded the definition of lobbying (please refer to the previous section for more details).

scope. Unsurprisingly, therefore, an assessment by GRECO (2022: 23) concluded that there are serious loopholes in the new legislation as actors who are outside the scope of lobbying regulations continue to exercise influence on decision makers. Given the experience of Australia and Slovenia, it seems plausible that organisations with "public benefit" status may be instrumentalised by corporate interests seeking to obscure their lobbying activities.

Exemptions to lobbying regulations have been criticised in Ireland as well. Transparency International Ireland (2014) have pointed out that the exceptions may be abused by lobbyists to keep their activities out of the public eye. One particularly problematic exemption was the exclusion of employers with fewer than 10 employees from the scope of legislation, which would exclude many non-profit interest groups, trade associations and small businesses (TI Ireland 2014). TI Ireland (2014: 32) argued this exemption could be abused by companies through the creation of smaller subsidiaries with a handful of employees.

Another problem in Ireland is that only representative bodies with at least one employee fall within the scope of legislation. The concern here is that there are some bodies whose primary purpose is to advocate for their members but have no full-time employees, and therefore are not covered by the act. As a result, certain bodies that regularly communicate with DPOs are not captured by the act (Standards in Public Office Commission 2019: 3).

Exclusion of indirect lobbying

Indirect influence activities, such as public outreach in the form of advertisements, funding advocacy organisations and public relations campaigns can also be used to exert pressure on public officials (Mulcahy 2015). Given that a case study from Slovenia illustrates how corporate actors may abuse these activities, such lobbying tactics should arguably therefore also fall within the remit of lobbying regulations.

TI Slovenia (2014: 19) has reported how in 2011 it emerged that the biogas lobby, Keter Group, had placed paid advertisements in major newspapers promoting biogas projects, often without explicitly stating that these items were paid advertisements. A series of these projects then received state funding without undergoing environmental impact assessments, and ultimately resulted in high costs to the taxpayer.

Towards minimum standards

It can thus be seen that tiered systems have a number of shortcomings that can result in the failure of lobbying regulation to achieve transparency and equal access for all actors engaging in lobbying activities. Moreover, provisions that establish different disclosure requirements for different categories of lobbyists in practice exempt many interest groups from the need to report their lobbying activities and are prone to abuse by corporate interests.

Furthermore, even when countries have centralised registers in which lobbyists register and disclose information, there is a danger of creating a highly bureaucratic system that would be difficult to monitor and manage given the wider range of reporting requirements for different actors.

To address these shortcomings, Transparency International suggests implementing minimum basic standards for registration and disclosure that would be applicable to every category of lobbyists (Kergueno and Vrushi 2020). These standards include:

- a comprehensive regulatory framework for lobbying activities based on a broad definition of direct and indirect lobbying that captures every organised group that aims to influence decision-making
- a mandatory lobby register that at minimum provides information on the identity of actors engaged in lobbying activities, the interests that the lobby organisation represents, the beneficiary and sources of funding for lobbying activities, and any contributions to political parties or candidates
- setting up a mandatory, public legislative footprint that captures all lobbying interactions, including legislation discussed (Kergueno and Vrushi 2020: 32; see also Transparency International 2022).

Mitigating risks

Considering the challenges that come with tiered systems, a variety solutions have been proposed to try to mitigate the risks while also addressing the burdens that lobbying regulations may have on CSOs.

Disclosure obligations for public officials

Mandating all lobbying actors to declare their organisational and operational information in a centralised register as a prerequisite to gain access to policymakers is an increasingly common practice in many jurisdictions (Kergueno and Vrushi 2020; Transparency International 2022). However, public office holders may also be assigned an obligation to disclose all their meetings. This solution may ease the burden on small non-profits by shifting the responsibility to public officials.

In Lithuania, the recently amended version of the law on lobbying activities (2020) introduces an obligation for lobbied persons to declare their interactions with lobbyists. Specifically, lobbied persons are obliged to report lobbying activities electronically to the Chief Official Ethics Commission (COEC)[11] for every draft legal act within seven days from the beginning of the lobbying activity (Law on Lobbying Activities 2020: Article 5; GRECO 2020: 22).

While this legislative solution shows how lobbied persons can be assigned responsibility to disclose their lobbying activities, it does not necessarily ease the burden on CSOs as they still need to provide information to the COEC on their lobbying activities. It does, however, increase the transparency of the lobbying process as the COEC now has a new tool for cross-checking the declarations and can detect discrepancies in reporting by lobbyists and lobbied persons (GRECO 2020: 23).

Incentivising voluntary registration of CSOs

The latest law on lobbying activities (2020) in Lithuania exempts NGOs of "public benefit" from the scope of legislation, but it also introduces a provision that aims to incentivise NGOs to voluntarily register. Specifically, entities that are not covered by the law have the possibility to voluntarily register in the list of persons influencing law-making (GRECO 2022: 23). This would enable them to receive information on draft legal acts in their area of interest (which they indicate in their registration) and, in return, they would be obliged to report on their activities once a year. If they fail to report, they are removed from the list (GRECO 2022: 23).

It is still too early to assess how well this solution works in practice but it offers less burdensome declaration requirements to voluntarily registered entities and it provides them with useful information on legislation in the making.

A limited exception rule

Canadian lobbying regulations, as discussed in detail earlier, require in-house lobbyists to register their lobbying activities once they constitute a significant part of their duties. This model has been criticised as it is burdensome to track whether the significant part of duties threshold has been passed. On the other hand, requiring registration from every employee may put an additional burden on CSOs that lobby infrequently. To address this, the Commissioner of Lobbying in Canada proposed a compromise solution (Bélanger 2021: 5). This implies that everyone must register their lobbying activities by default, except if they qualify for a so-called limited exception rule based on objective criteria. The intention is to establish a balance between maximising transparency and mitigating the administrative burden of compliance.

The proposed objective criteria that could be used to assess whether a corporation or an organisation

[11] This obligation applies to the president, MPs, ministers, vice-ministers, chancellors of ministries and other political officials, while public officials report to the head of the institution where they work or their authorised representatives (Law on Lobbying Activities 2020: Article 5; GRECO 2020: 23).

qualifies for an exemption include that an entity (Bélanger 2021: 5):

- has less than six employees and is not a subsidiary of/controlled by any other corporation or organisation which employs six or more people
- its employees spend cumulatively and collectively less than eight hours over the preceding three months on lobbying related activities (which includes preparation for communicating with federal public office holders)
- its main purpose is not representing the interests of its members nor opposing/promoting issues (Bélanger 2021: 5)

Stronger disclosure rules for contributions to front groups

As discussed in the case of Australia, exempting grassroot movements from the scope of lobbying legislation has been occasionally abused by corporate interests who hijack these movements to promote their own interests.

One potential mitigation strategy here is to establish stronger disclosure rules regarding contributions to third party front groups, which may help the public to distinguish between genuine grassroot groups and corporate astroturfing, while at the same time avoiding excessive administrative burdens on these movements (Drury no date: 18).

A public interest test

In Slovenia, lobbying in the public interest, with the goal of strengthening the rule of law and improving human rights, is exempted from lobbying regulations due to a constitutional guarantee of the right to participate in public affairs (TI Slovenia 2014: 20).

Nonetheless, due to the integrity risks discussed above, TI Slovenia (2014: 21) has argued it is important to acknowledge that not every lobbying activity conducted by CSOs is necessarily in the public interest. They therefore propose analysing each contact between lobbying entity and public official and applying a public interest test.

However, the feasibility of conducting this test for each and every contact, as well as whether this would be done before or after, remains unclear.

Avoiding excessive reporting requirements for foreign funding

Over the past few years, the adoption of laws and regulations that restrict CSOs' ability to register, operate and access resources has become more prominent (Musila 2019; France 2021). Legal restrictions that limit NGO activity have in some countries been deployed as part of a broader strategy by non-democratic regimes to restrict democratic space and prevent challenges emerging to the power of entrenched strongmen and political parties (Musila 2019: 3). For example, CSOs can be subject to excessive anti-money laundering and countering the financing of terrorism (AML/CFT) reporting requirements when they receive foreign funding, typically under the pretext of protecting national security (France 2021).

The practice of branding CSOs who receive funding from abroad as foreign agents or imposing additional administrative burdens on them has become a widespread practice in autocratic countries like Russia (Russell 2022), as well as countries characterised by democratic backsliding, such as Hungary (Reuters Staff 2020) and Serbia (Amnesty International 2020). While there is no evidence supporting the claim that strict foreign funding regulations lower the number of terrorist attacks (Koo and Murdie 2018), these and similar regulations can be instrumentalised by regimes looking to quell dissenting voices.

Avoiding selective enforcement of administrative or criminal sanctions

In contexts characterised by a weak rule of law, the danger of selective enforcement of administrative or criminal sanctions against CSOs is heightened.

One way to limit the space for abuse is to assign the monitoring and sanctioning role to an independent body, preferably independent from the executive branch. Many jurisdictions have established a separate body in charge of monitoring compliance with registration and disclosure requirements as well as with

sanctioning. These include, for example, COEC in Lithuania, High Authority for the Transparency of the Public Sector (HATVP) in France, and the Standards in Public Office Commission in Ireland. In France, HATVP's members serve a six-year term that is non-renewable and non-revocable. In addition, they cannot seek nor receive orders or instructions from the government (Bauer et al. 2018: 3).

The impact of lobbying regulations beyond tiered systems

Many countries that regulate lobbying do not have a tiered system based on different registration/ disclosure requirements for different types of actors. However, most of these countries do exclude at least some actors from the scope of lobbying legislation (see Bauer et al. 2019).

A uniform registration and/or disclosure requirement for different types of actors can arguably place disproportionate administrative burden for actors with lower technical/financial capacities, and the lobbying legislation could be used to crack down on CSOs in contexts with a weak rule of law, as discussed at the beginning of this Helpdesk Answer (Mosley 2010; McKechnie Foundation 2018; Greco and Grigus 2021).

There are few empirical studies that document evidence of the negative effects of lobbying regulations on CSOs in countries that do not have tiered systems. Some evidence of these deleterious effects can be found in expert assessments of specialised bodies (notably GRECO) and legal experts' assessments of the lobbying legislation in a particular country. In addition, studies on legislation that restricts CSOs (such as foreign agent laws, counterterrorism) provide insights into how overly strict registration requirements can limit CSOs' activities (see Musila 2019).

Existing empirical research suggests that lobbying regulations can negatively affect CSOs. For example, the UK lobbying act (2014) was found to result in a degree of self-censorship among charities due to a provision requiring them to register with the Electoral Commission if they spend over £20,000 on activities that may be considered as influencing election outcomes (Boswell 2016). Charities reportedly expressed fear of breaking the rules and felt pressure to "play it safe" (Boswell 2016).

Further, research on various pieces of legislation that restrict CSOs' activities and operations offer useful lessons on how lobbying regulations may negatively affect CSOs. For example, a Freedom House study on anti-NGO legislation in Africa showed that these legislative acts[12] aim to strengthen government control and reduce NGOs' access to financial resources (Musila 2019: 8). These measures include onerous registration requirements subject to bureaucratic discretion, limits on foreign funding, improper state interference into the operations of CSOs and exclusion of organisations from activities considered political (Musila 2019: 8).

NGOs have tried to resist by using different strategies, including appealing to legislators and the international community to protect their interests, organising protests, building cross-border coalitions, relying on technical experts to develop lobbying strategies and preparing draft legislation (Musila 2019: 17).

In addressing the negative effects of lobbying regulations on CSOs, some stakeholders have focused on strategies to level the playing field between CSOs and community groups on one hand and big business on the other in terms of resources available for lobbying. For example, the New South Wales Council of Social Service (2019) conducted grassroot consultations with various community groups, expert advisory groups, and the broader social service sector to propose solutions to the problem of uneven access to decision makers. Their conclusion following these consultations was that there is a need to distinguish between lobbying by for-profit interest groups and advocacy activities by NGOs in the public interest; in other words, the introduction of some form of tiered system (NSW Council of

[12] These include overly broad national security measures (counterterrorism and finance sector laws, etc.), anti-NGO framework legislation and amendments to existing laws (Musila 2019: 8).

Social Service 2019: 3). Specifically, one suggestion mentioned in this report was that NGOs advocating in the public interest could be bound by a code of conduct but exempt from registration requirements (NSW Council of Social Service 2019: 6).

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