

CCBE response to the Public Consultation on a proposal for a mandatory Transparency Register (TR)

20/05/2016

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers.

QUESTIONNAIRE

The European Commission seeks the views of all interested parties on the performance of the current Transparency Register for organisations and self-employed individuals engaged in EU policy-making and policy implementation and on its future evolution towards a mandatory scheme covering the European Parliament, the Council of the EU and the European Commission.

Are you responding as:

The representative of an organisation registered in the Transparency Register

Please provide your Register ID no:

4760969620-65

Name of the organisation:

Council of Bars and Law Societies of Europe (CCBE)

The organisation's head office is in:

Belgium

Your organisation belongs to the following type:

Trade unions and professional associations

Contact for this public consultation:

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A. GENERAL PART (7 questions)

1. Transparency and the EU

1.1 The EU institutions interact with a wide range of groups and organisations representing specific interests. This is a legitimate and necessary part of the decision-making process to make sure that EU policies reflect the interests of citizens, businesses and other stakeholders. The decision-making process must be transparent to allow for proper scrutiny and to ensure that the Union's institutions are accountable.

* a) Do you agree that ethical and transparent lobbying helps policy development?

Fully agree

Partially agree

Disagree

No opinion

Comments or suggestions (Optional)

* b) It is often said that achieving appropriate lobbying regulation is not just about transparency, i.e. shedding light on the way in which lobbyists and policy-makers are operating. Which of the below other principles do you also consider important for achieving a sound framework for relations with interest representatives?

More than one answer possible

Integrity

Equality of access

Other (please elaborate in the comments box below)

No opinion

Comments or suggestions (Optional)

Recognition of the legitimate interests, concerns and specificities of the various professions engaged in lobbying.

* c) In your opinion, how transparent are the European institutions as public institutions?

They are highly transparent

They are relatively transparent

- They are not transparent at all
- No opinion

Comments or suggestions (Optional)

Transparency should be a shared obligation of the EU institutions and stakeholders. The EU institutions do not always assume their responsibilities in this regard, e.g. in relation to the legislative footprint and trilogues as currently inquired by the European Ombudsman.

- * 1.2 The Transparency Register provides information to politicians and public officials about those who approach them with a view to influencing the decision-making and policy formulation and implementation process. The Register also allows for public scrutiny; giving citizens and other interest groups the possibility to track the activities and potential influence of lobbyists.

Do you consider the Transparency Register a useful tool for regulating lobbying?

- Very useful
- Somewhat useful
- Not useful at all
- No opinion

Comments or suggestions (Optional)

2. Scope of the Register

- * 2.1 Activities covered by the Register include lobbying, interest representation and advocacy. It covers all activities carried out to influence - directly or indirectly - policymaking, policy implementation and decision-making in the European Parliament and the European Commission, no matter where they are carried out or which channel or method of communication is used. This definition is appropriate:

- Fully agree
- Partially agree
- Disagree
- No opinion

Comments or suggestions (Optional)

The scope of the activities that lead to registration should be more clearly defined. That is of particular relevance for lawyers, as, unlike professional lobbying organisations, they meet EU officials for many reasons unrelated to lobbying, such as in the context of legal disputes or legal notifications (e.g., under the merger regulation), and often never meet with such officials except for such reasons.

The term advocacy and policy implementation are ambiguous in that context as they cover such activities as well. Also the word 'indirectly' significantly widens the scope and could lead to a situation where virtually all contacts with the EU institutions are perceived to be covered by the rules of the register. The CCBE would be strongly opposed if e.g. lawyers interacting with the EU institutions for the sole purpose of seeking information on future legislation would be bound by these rules. According to the CCBE, therefore, more clarity should be provided about the exact meaning of the word 'indirectly', in particular with regard to lawyers providing advice to a client on future legislation. Such clarifications should include that activities falling within the scope of the Register always involve some form of contact with a European institution or one of its representatives, be it through correspondence, a phone call or a meeting ("exteriorisation"). Activities not having such a character are covered by professional secrecy or legal professional privilege and not disclosable under lawyers' ethical rules and cannot, therefore, require disclosure by lawyers.

Furthermore, paragraph 7 of the Interinstitutional Agreement considers even the preparation of letters, information material or discussion papers and position papers as an activity falling within the scope of the Register. The mere preparation of such documents is clearly covered by the professional secrecy obligation and this activity, which is inevitably confidential as regards third parties, cannot justify joining the Register and give rise to information requests. As noted above, only activities in which there is direct contact with EU institutions' officials should lead to such registration.

The CCBE acknowledges that the Guidelines have attempted to address those concerns, but in the form of an administrative interpretation of the Interinstitutional Agreement and not in the Agreement itself. This creates legal uncertainty, which is unsatisfactory, in particular in the context of a mandatory Register.

The CCBE considers that a satisfactory definition of "lobbying" that addresses the abovementioned concerns is formulated in the Council of Europe *Draft recommendation of the Committee of Ministers to member states on the legal regulation of lobbying activities in the context of public decision-making*: "Lobbying" means promoting specific interests by communication with a public official as part of a structured and organized action aimed at influencing public decision-making".

* 2.2 The Register does not apply to certain entities, for example, churches and religious communities, political parties, Member States' government services, third countries' governments, international intergovernmental organisations and their diplomatic missions. Regional public authorities and their representative offices do not have to register but can register if they wish to do so. On the other hand, the Register applies to local, municipal authorities and cities as well as to associations and networks created to represent them. The scope of the Register should be:

- Changed to exclude certain types of entities (please elaborate in the comments box below)
- Changed to include certain types of entities (please elaborate in the comments box below)
- Preserved the same as currently
- No opinion

Comments or suggestions (Optional)

As a rule, any activity falling within the scope of lobbying should lead to registration without regard to the nature of the entity engaging in such activity, provided that specific rules may be appropriate in certain circumstances to reflect the specificities of such entities.

3. Register website

3.1 What is your impression of the Register website?

	Good	Average	Poor	No opinion
*Design and structure	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
*Availability of information / documents	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
*Ease of search function	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
*Accessibility (e.g. features for visually impaired persons, ease of reading page)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
*Access via mobile devices	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Comments or suggestions (Optional)

4. Additional comments

Final comments or ideas on any additional subjects that you consider important in the context of this public consultation (Optional)

A supposedly non-binding TR resulting from a mere interinstitutional agreement between the EU institutions which is made de-facto mandatory through the imposition of disincentives for not registering, is unsatisfactory. The TR should be made either genuinely voluntary or mandatory as a matter of law. A proper legal basis should be found for making the TR legally obligatory. The CCBE believes that attempting to achieve a mandatory TR without a legal basis to do so, opens the door to potential legal challenges.

If you wish you may provide additional information (position papers, reports, etc) in support of your answers to this public consultation. Please upload no more than three files of up to 1Mb each. Attachments above this number will not be considered.

Attach files

Part B includes questions that require a certain knowledge of the Transparency Register. Proceed to Part B (optional).

* **Do you want to proceed to Part B?**

Yes

No

B. SPECIFIC PART (13 questions)

1. Structure of the Register

- * 1.1 The Register invites organisations to sign up under a particular section, for example, professional consultancies, NGOs, trade associations, etc (Annex I of the Interinstitutional Agreement).

Have you encountered any difficulties with this categorisation?

- Yes
- No
- No opinion

Comments or suggestions (Optional)

2. Data disclosure and quality

- * 2.1 Entities joining the Register are asked to provide certain information (contact details, goals and remit of the organisation, legislative dossiers followed, fields of interest, membership, financial data, etc) in order to identify the profile, the capacity of the entity and the interest represented (Annex I of the Interinstitutional Agreement).

The right type of information is required from the registrant:

- Fully agree
- Too much is asked
- Too little is asked
- No opinion

Comments or suggestions (Optional)

As mentioned before, the CCBE believes that the specificities of certain professions should be recognized, e.g. the obligation for a lawyer to provide information on the legislative dossiers followed may conflict with his/her obligations under the rules of professional secrecy or legal professional privilege.

The breadth and detail of the financial information required to be disclosed bears no relationship to the legitimate objective of transparency that is being pursued and results in the disclosure of information that should remain private, such as the structure of the internal organization of the entity engaging in lobbying, its cost structure and profit.

- * 2.2 It is easy to provide the information required:

- Fully agree
- Partially agree

- Disagree
- No opinion

Comments or suggestions (Optional)

A balance should be achieved between the burden imposed on the registrants and the objective of transparency. The requirements currently imposed do not achieve such a balance and impose too heavy a burden on the registrants without corresponding benefits from a transparency perspective.

* 2.3 Do you see any room for simplification as regards the data disclosure requirements?

- Yes
- No
- No opinion

Comments or suggestions (Optional)

* 2.4 What is your impression of the overall data quality in the Register:

- Good
- Average
- Poor
- No opinion

Comments or suggestions (Optional)

3. Code of Conduct and procedure for Alerts and Complaints

* 3.1 The Code of Conduct sets out the rules for all those who register and establishes the underlying principles for standards of behaviour in all relations with the EU institutions (Annex III of the Interinstitutional Agreement).
The Code is based on a sound set of rules and principles:

- Fully agree
- Partially agree
- Disagree

No opinion

Comments or suggestions (Optional)

3.2 Anyone may trigger an alert or make a complaint about possible breaches of the Code of Conduct. Alerts concern factual errors and complaints relate to more serious breaches of behavioural nature (Annex IV of the Interinstitutional Agreement).

* a) The present procedure for dealing with alerts and complaints is adequate:

Fully agree

Partially agree

Disagree

No opinion

Comments or suggestions (Optional)

While the CCBE agrees that the Code of conduct is based on a sound set of rules and principles, the procedure for its enforcement does not meet the principles of due process and fair trial.

Under the Interinstitutional Agreement, violations of the Code of Conduct are both investigated and sanctioned by the Joint Transparency Register Secretariat (JTRS), which is an instrumentality of the Commission and of the Parliament, and therefore acts both as a judge and a party. This violates the principles of fair trial and due process, as recognized by the ECHR. Moreover, the fact that such a body can impose disciplinary sanctions on a lawyer is inconsistent with the principle of professional self-regulation, and of independence of the members of the legal profession towards public authorities. This principle is based on the consideration that lawyers may oppose such authorities to defend clients who are in a dispute with them, and that one could not conceive, in a democratic society, that lawyers may suffer any pressure from public authorities against which they may have to act or even that there could be the slightest suspicion that any such pressure could be exerted. This is particularly true in the case of the Commission, since lawyers who are engaged in lobbying activities involving the Commission generally do so in the context of a broader EU practice that also involves defending clients in proceedings in which the Commission is the opposing party. The Interinstitutional Agreement should therefore be amended to provide for an independent body to rule on alleged violations of the Code of Conduct, such as a judge or a retired judge of the General Court or the Court of Justice.

Furthermore, the enforcement authority should have sufficient resources to monitor compliance with the regulatory framework on transparency so as not to rely on other stakeholders to discharge its responsibility in this regard.

* b) Do you think that the names of organisations that are suspended under the alerts and complaints procedure should be made public?

Yes

No

No opinion

Comments or suggestions (Optional)

Suspension before a final decision should never be made public. Suspension resulting from a final decision could at most be made public when the gravity makes such publication indispensable in the public interest. For instance in case of corruption or repeat violations.

4. Register website – registration and updating

4.1 How user-friendly is in your opinion the Register website in relation to registration and updating?

	Straightforward	Satisfactory but can be improved	Cumbersome	No opinion
*Registration process	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
*Updating process (annual & partial)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Comments or suggestions (Optional)

5. Current advantages linked to registration

5.1 The European Parliament and the European Commission currently offer certain practical advantages (incentives) linked to being on the Register. The Commission has also announced its intention to soon amend its rules on Expert groups to link membership to registration. Which of these advantages are important to you?

In the European Parliament (EP)

	Very important	Somewhat important	Not important	No opinion
* Access to Parliament buildings: long-term access passes to the EP's premises are only issued to individuals representing, or working for registered organisations	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Committee public hearings: guests invited to speak at a hearing need to be registered	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

<p>*Patronage: Parliament does not grant its patronage to relevant organisations that are not registered</p>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
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In the European Commission

	Very important	Somewhat important	Not important	No opinion
<p>*Meetings: organisations or self-employed individuals engaged in relevant activities must be registered in order to hold meetings with Commissioners, Cabinet members and Directors-General</p>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
<p>*Public consultations: the Commission sends automatic alerts to registered entities about consultations in areas of interest indicated by them; it differentiates between registered and non-registered entities when publishing the results</p>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
<p>*Patronage: Commissioners do not grant their patronage to relevant organisations that are not registered</p>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
<p>*Mailing lists: organisations featuring on any mailing lists set up to alert them about certain Commission activities are asked to register</p>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
<p>*Expert groups: registration in the Transparency Register is required in order for members to be appointed (refers to</p>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

organisations and individuals appointed to represent a common interest shared by stakeholders in a particular policy area)				
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Comments or suggestions (Optional)

The system of incentives, which are in reality disincentives for not registering, is inappropriate. The objective of forcing entities whose activities fall within the scope of the TR to register should result from a proper legal framework and not from unilateral decisions from the EU institutions that, without legal basis, deny rights to some entities which others enjoy.

Furthermore, it should be ascertained that the restrictions imposed on non-registered lobbyists, such as the inability to meet with EU officials, should only apply with respect to activities falling within the scope of the Register.

6. Features of a future mandatory system

* 6.1 Do you believe that there are further interactions between the EU institutions and interest groups that could be made conditional upon prior registration (e. g. access to MEPs and EU officials, events, premises, or featuring on specific mailing lists)?

- Yes
- No
- No opinion

Comments or suggestions (Optional)

* 6.2 Do you agree with the Commission's view that the Council of the EU should participate in the new Interinstitutional Agreement on a mandatory Register?

- Yes
- No
- No opinion

Comments or suggestions (Optional)

The CCBE is in favour of equal treatment both in relation to entities engaged in activities falling within the scope of the TR and in relation to institutions to which such activities are directed.

7. Looking beyond Brussels

* 7.1 How does the Transparency Register compare overall to 'lobby registers' at the EU Member State level?

- It is better
- It is worse
- It is neither better, nor worse
- No opinion

Good practices or lessons learned at the EU Member State level to be considered, or pitfalls to be avoided. (Optional)

8. Additional comments

Final comments or ideas on any additional subjects that you consider important in the context of this public consultation (Optional)

The protection of professional secrecy/legal professional privilege, principles of due process and fair trial (nulla poena sine lege) – which postulate clear definitions and scope – are essential values to the legal profession and raise concerns under the current framework. Only a mandatory TR with a proper legal basis will be able to address these adequately.

* Publication of your consultation

- I agree to my contribution being published.
- I do not agree to my contribution being published.

[Specific privacy statement](#)