

Amnesty International submission to the European Commission public consultation on a proposal for a mandatory EU Transparency Register

Amnesty International is hereby submitting extended written answers to general part A of the public consultation questionnaire on a proposal for a mandatory EU Transparency Register.

A. GENERAL PART

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?

For people to play a full and meaningful part in decision-making that is likely to affect their rights, access to information is vital. It is also critical to enabling them to hold governments and other public actors accountable for any negative impact on their rights.

The United Nations Human Rights Committee responsible for overseeing compliance by states parties with the International Covenant on Civil and Political Rights (ICCPR) has noted that the right to freedom of expression, guaranteed by article 19 (2) ICCPR, also embraces a right of access to information held by public bodies. The committee has also asked states parties to proactively put in the public domain government information of public interest. (See Human Rights Committee: General Comment No. 34 on Article 19 ICCPR, paras. 18-19).

Transparency over lobbying activities – allowing public scrutiny of who is influencing the political process, by what means, and when, and through timely access to information on how decisions are made – is therefore essential for the full exercise of individual rights, but also to support ethical lobby practices and decision-making done in the public interest and which ensures the protection of human rights.

Information on lobbying and on legislative and policy-making processes not only needs to be available, however, but also accessible in formats that can be easily understood and interrogated by people likely to be affected by public decisions. Information that is disclosed must be timely, accurate and as comprehensive as possible. In line with the UN Convention against Corruption, procedures and regulations put in place by EU institutions to ensure transparency should allow 'members of the general public to obtain, where appropriate,

information on the organization, functioning and decision-making processes of its public administration and... on decisions and legal acts that concern [them]'.¹

Lobbying and interest representation should ultimately be understood as legitimate and necessary elements in public decision-making and policy development, and elements that enable those affected by public decisions, policies and legislation to engage in the political process and hold decision-makers accountable. Public authorities must be open to the views and input of citizens and interest groups alike, to inform and enhance their decision-making. Article 11 of the Treaty on European Union (TEU) indeed compels the EU institutions to 'give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action' and to 'maintain an open, transparent and regular dialogue with representative associations and civil society'. In addition, the European Commission has to ensure coherence and transparency in EU actions through 'broad consultations' with concerned parties.

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?

Equality of access

a) To information

Despite the transparency provisions that exist at the EU level, it is clear that privileged access to information, and the unauthorised disclosure of information to certain interested parties, continue to be a real risk. The EU Ombudsman has indeed pointed to EU institutions providing privileged access to information to selective external stakeholders in the context of TTIP negotiations,² and highlighted the concerns that such practices can bring to the legitimacy of EU decision-making.

For Amnesty International, equality of access for all interested parties to information on (draft) EU legislation, policies and actions, and to timely information on who is seeking to influence decision-making, is particularly necessary so that human rights organisations and rights-holders themselves can make assessments on how human rights might be affected, and can participate in a timely manner, to raise concerns and propose human rights-compliant alternatives. Alongside the role that access to information plays in ensuring accountability, it also contributes to rights-holders' confidence that their rights are being upheld and protected by the EU institutions, and that decision-making is being legitimately done in the public interest.

b) To decision-makers

More broadly, cooperation and engagement by decision-makers with rights-holders, affected communities and civil society is an important element in developing legislation and policies that respect human rights, thereby enabling the EU and member states to meet their human rights commitments. The EU has itself already recognised the vital role of Civil Society Organisations (CSOs) in the defence of human rights, stating '*CSOs stand out thanks to their capacity to reach out to, empower, represent and defend vulnerable and socially excluded groups, and trigger social innovation*'.³ With regard to the current situation of asylum-seekers, refugees and migrants in Europe, who represent a particularly vulnerable group due to their migratory status and lack of constituency in states of arrival, in order to ensure better protection of their rights and those of other vulnerable groups, full access and meaningful participation with civil society must be recognized as being of urgent importance. This extends also to the EU's role as a human rights actor globally. Through its external

¹ https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf

² <http://www.ombudsman.europa.eu/en/press/release.faces/en/54636/html.bookmark>

³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0492:FIN:EN:PDF>

action, the EU can and does play a part in ensuring third countries respect, protect and fulfil human rights. The EU's own strategic framework on human rights and democracy underlines that 'effective engagement with civil society is a cornerstone of a successful human rights policy'.⁴ Lobby regulation at the EU level should therefore not obstruct civil society from engaging with EU decision-makers in this regard and should not entrench privileged access for third country governments and those lobbying on their behalf.

The principles of equality and non-discrimination furthermore underpin all international human rights law. Weak lobby regulation can result in unethical and corrupt practices, and the exercise of undue influence, which in turn may weaken and indeed jeopardise the protection of rights. This can result in discrimination and unequal treatment both in terms of civil and political rights – e.g. shutting out rights-holders from intervening in a timely manner on draft legislation affecting them – as well as in economic, social and cultural rights – e.g. the adoption of housing policies which discriminate against certain communities.

Equality of access in the EU system could be strengthened by, for example:

- approving legal requirements that allow citizens, interest groups and corporate bodies to input equally into decision-making processes on draft legislation. This means for example that clear targets for balanced composition of European Commission expert groups should be set;
- introducing a legal requirement on public bodies to publish the results of consultation processes, including the views of participants. This means for example that deliberations of European Commission expert groups should be published;
- making open all calls for applications to sit on advisory/expert groups and introduce selection criteria to ensure a balance of different interests.⁵

Accountability

Lobby regulation is also necessary to strengthen the accountability of decision-makers - a necessary cornerstone to ensuring that duty-holders (i.e. the EU and its member states) fulfil their human rights commitments and are free from impunity when failing to do so. As elaborated above, both transparency over lobbying activities and equality of access to information in particular, contribute to public scrutiny of executive and legislative decision-making processes, supporting ethical lobby practices and decision-making done in the public interest and which ensures the protection of human rights.

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

Despite the strides made in increasing transparency at the EU level, including through the introduction and evolution of the joint EU Transparency Register, there remain serious concerns about the opacity of much institutional activity. Two specific issues are highlighted below.

Trilogues

Treaty-based obligations compel the institutions to make decisions as openly and as closely to citizens as possible and for EU laws to be considered and adopted in public (see, for example articles 1, 10, 11 TEU; article 15 TFEU). Despite this, inter-institutional trilogue negotiations have become a regular, central and *de facto* standard element in EU law-making - taking place behind closed doors, free from any public scrutiny. In addition, almost no

⁴ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf

⁵ The European Commission should ensure that Commission decision [C(2016) 3301 final] of 30.5.2016, establishing horizontal rules on the creation and operation of Commission expert groups, is implemented to realise these aims.

information is made systematically available to the public on trilogue negotiations: whether on general, procedural issues; on the content of negotiations; when they are taking place; or on who is involved, for example. The opacity and confidentiality surrounding trilogues undermines the right for individuals to access information and to effective and meaningful consultations in decisions that affect them. - an intrinsic component of the right to freedom of expression (see Human Rights Committee: General Comment No. 34 on Article 19 ICCPR, paras. 18-19).

Amnesty International believes that for the principle of article 1 TEU - reflected in the right of access to documents enshrined in article 42 of the Charter of Fundamental Rights of the European Union (CFR) – to be meaningfully realised, the principles of maximum and proactive disclosure should be applied by the EU institutions to trilogue negotiations.

In view of the intense lobbying of EU decision-makers that takes place in Brussels around trilogue negotiations, the ongoing lack of public trilogue transparency contributes to an inequality of access and does not allow the full participation of rights holders, and civil society more broadly, in the EU law-making process. (E.g. organisations with established contacts to EU decision-makers may have privileged access to information on trilogues, and thereby greater possibilities to lobby, as compared with a small organisation with a legitimate interest in the draft legislation being discussed.) As such and at a minimum, the full impact of draft EU legislation on human rights cannot be fully considered. Accountability for the negative impact of adopted laws may, in turn, also be comprised.

Infringement procedures

Jurisprudence from the Court of Justice of the European Union mainly on state aid concerns, allows scope for the European Commission to invoke a general presumption of non-disclosure of documents relating to pre-infringement and formal infringement procedures (under the exception laid out in article 4(2) of Regulation 1049/2001).

Amnesty International considers that it is not possible to draw a comparison between infringement procedures relating to alleged fundamental rights abuses and State aid review proceedings: in the latter case the interest in disclosure, and so the exercise of the right to information, may clearly affect information pertaining to private entities and serving private interests; whereas in the former case the exercise of the right to information exclusively relates to the objective of raising awareness and providing public acknowledgement of alleged human rights abuses, with the ultimate view of advocating for the end of such violations.

In such circumstances, the interest in disclosure, which reflects the fundamental right to access to information may, in line with the aforementioned jurisprudence, be disregarded only where relevant and sufficient reasons provided by the public authorities can justify a refusal to disclosure in the name of the protection of other legitimate and objective interests.

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?

The introduction and evolution of the EU Transparency Register have done much to support scrutiny of lobbying activity in Brussels. Nevertheless, improvements could still be made to increase its usefulness, such as:

- Ensuring all lobbyists are covered by the register: the register does not currently apply to third countries' governments and their diplomatic missions, despite the fact that they regularly engage in direct and indirect lobbying of the EU institutions. This activity may often include representation of specific national industry sectors or even

individual companies, aimed at influencing the design of draft EU legislation, for example. This influence on EU decision-making should be made subject to the same transparency provisions as those regulating the activities of civil society and private sector actors.

- Improving the quality of data held in the register: civil society organisations such as Transparency International have highlighted serious concerns with the quality of data held in the Transparency Register, undermining its usefulness as a tool to support scrutiny of EU lobbying. The EU institutions must improve efforts to ensure registrants provide accurate, up-to-date and comprehensive data, and minimise the possibilities for misleading, missing or false information to be submitted – including through improving tools and procedures for verifying, swiftly, data quality upon submission. To maximise the utility of the Transparency Register as a monitoring tool, information must be presented in as accessible a format as possible, allowing for information to be easily understood and interrogated by users. Suggested improvements include gathering data on institutions’ meetings with lobbyists in a centralised manner on the Transparency Register website. In addition, all efforts should be made to limit the administrative burden on registrants as far as possible without compromising essential information and by employing technological solutions such as the introduction of drop-down menus where relevant to ensure consistency in field entries and facilitate (updates of) registrations. Drop-down menus could, for example, be integrated to enable registrants to indicate easily the legislative files on which they are lobbying, with synchronisation to EUR-Lex or the European Parliament Legislative Observatory.

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.*

Amnesty International partially agrees that this definition is appropriate:

Despite the breadth of the definition above, the scope of the Transparency Register does not extend to all actors engaged in lobby activity. The application of the register should be extended to third countries’ governments and their diplomatic missions, given the fact that they regularly engage in direct and indirect lobbying of the EU institutions (see below).

In addition, as a co-legislator, the Council of the European Union should join the Inter-Institutional Agreement and become a full member of the EU Transparency Register. Lobbyist access to Council premises and meetings with Council secretariat officials should be dependent upon registration on the register. The rotating presidency should meet only with registered lobbyists and disclose these meetings at senior levels. Permanent Representations of member states should also pledge to meet only with lobbyists registered on the Transparency Register.

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.*

Should the scope of the Register be changed to include/exclude certain types of entities, or preserved the same as currently?

Third countries

The register does not currently apply to third countries’ governments and their diplomatic

missions, despite the fact that they regularly engage in activities covered by the scope of the register: namely, activities with ‘the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions’. This activity may often include representation on behalf of specific national industry sectors or even individual companies, and may be done actively to influence draft legislation/decisions with an impact on human rights. This influence on EU decision-making should be made subject to the same transparency provisions as those regulating the activities of civil society and private sector actors, particularly given the risk that such lobbying can pose to the fulfillment of the EU’s own human rights commitments.

Human Rights Defenders

Amnesty International defines human rights defenders (HRDs) as individuals who take non-violent actions to defend and protect human rights, following the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms. To be a human rights defender, a person can act to address any human right (or rights) on behalf of individuals or groups. Human rights defenders defend the universality of human rights as laid out in the Universal Declaration of Human Rights, seeking the promotion and protection of civil and political rights as well as the promotion, protection and realization of economic, social and cultural rights. The actions taken by human rights defenders are always non-violent.

The Transparency Register does not currently require the registration of individual HRDs who may not formally be representatives of an interest organisation, and who are seeking to influence EU decision-making. **This practice should be maintained, and explicitly safeguarded in any future, mandatory regime.**

The EU’s own guidelines on HRDs acknowledge that their work often involves criticism of governments’ policies or actions, and that this carries the risk of reprisal and intimidation. The EU also recognises the important role that HRDs can play in public decision-making. Where individual HRDs meet with the EU institutions, accompanied by a human rights organisation registered on the Transparency Register, it is essential that consideration is given to the specific and direct harm that may be caused to the HRD by public disclosure of their names, and, in certain cases, the subject of the meeting. As such, a balance must be struck on a case-by-case basis between the presumption of disclosure – necessary for transparent and accountable public decision-making – and the legitimate need to protect the safety and rights of HRDs. This should be done in consultation with the HRD and the organisation accompanying them. This is particularly critical should *ex ante* disclosure of information on meetings be introduced in the future.

3. Register website

3.1 *What is your impression of the Register [website](#)?*

No further comments.

4. Additional comments

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

Incentives and implementing measures must not undermine rights

In the course of the evolution of the Transparency Register, a number of incentives have been introduced to encourage registration, in part to offset the limited scope of enforcement of a voluntary lobby regulation system. These include the requirement to register for all lobbyists seeking to meet with European Commissioners, members of their cabinets, or Commission Directors-General, or for any organisation wishing to speak at European Parliament hearings.

In addition, the Commission has, since late 2014, disclosed information on meetings held between lobbyists and Commissioners, cabinet members, and Directors-General. While welcoming these steps as contributing to a meaningful implementation of existing EU lobby regulation, it is essential that any rules put in place do not undermine or unduly restrict rights to freedom of expression and information, to non-discrimination, to good administration, and the right to petition the European Parliament, all of which are guaranteed by the EU Charter of Fundamental Rights.

Incentives and implementing measures should not be designed to restrict unduly or undermine non-discriminatory access, either to decision-makers or to information. All categories of registrant in compliance with the code of conduct should therefore be afforded the same access to the institutions, its representatives, and information. Furthermore, incentives should not entrench special privileges to organised interests above those of individual citizens.

Proactive support of those defending human rights

Across the globe today crackdowns on civil society are taking place, and the rights to freedom of expression and of association are increasingly under threat, it is particularly critical that the EU institutions demonstrate proactively the necessity and value of engaging with civil society. This indeed follows the EU's commitments and Union recognition of the important role that individuals and organisations defending human rights can and must play in public decision-making.

It is important to underline explicitly that increased transparency should, furthermore, not limit civil society access and the opportunities for civil society to engage with EU decision-makers through a 'chilling effect': registration and disclosure requirements should not lead EU institutions or EU officials to restrict or unduly obstruct civil society access, e.g. through blanket instructions to officials not to meet with (registered) civil society organisations, or through disclosure requirements on meetings held, which put individuals at direct risk of human rights violations/abuses (see above comment on HRDs).

Civil society organisations working in the public interest, and human rights organisations in particular, play a vital and legitimate role in supporting human rights compliant policy-making, which can necessarily entail regular and extensive engagement with the EU institutions. This legitimacy must not be undermined by lobby regulation and accompanying implementing measures but rather, the latter must be designed to support EU institutions in complying with article 11 of the Treaty on European Union and article 15 of the Treaty on the Functioning of the EU. As such, any limitations on the ability for civil society to engage should be objective, non-discriminatory and reasonable. It is up to the institutions themselves to ensure 'broad consultation' with interested parties, and civil society access should not be restricted in an effort to prevent disclosure of the extent of institutional engagement with these actors.