

The Austrian Transparency Act 2013 for Lobbying and Interest Representation

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1. History of the Lobbying Act

The Austrian Transparency Act 2013 for Lobbying and Interest Representation (hereinafter Lobbying Act) was published in the Federal Gazette I N° 64/2012, and entered into force on 1 January 2013. With this project, politicians reacted to some ignoble incidents - mainly in connection with the discovery of questionable practices in the European Parliament - which have recently been the subject of loud criticism and vigorous discussions on the political level and among the interested public.

The public has critically discussed this project in spite of the efforts to provide legal status for a politically and socially sensitive area. This was already shown during the evaluation process in which an unusually large number - i.e. more than 100 - comments were received by the Federal Ministry of Justice. Under pressure from public criticism the government bill presented by the Federal Ministry of Justice was amended in the justice committee of, and adopted by the National Council with those amendments.

2. Objectives of the Act of Law

2.1. Openness and Transparency

The Lobbying Act aims to achieve several goals. The Act is mainly concerned with **more openness and transparency** when asserting interests by influencing legislative and executive authorities. In principle, the assertion of individual or collective interests by influencing government authorities is neutral in terms of values. In general, public representatives and functionaries of the executive branch are well advised to gain an overview as comprehensive as possible of the consequences and effects their decisions will have. There will be a problem, however, if such influence is exerted in a clandestine and secretive manner, if it is unclear, which decisions are being influenced by which interests - i.e. if "wheeling and dealing" prevails. International lobbying rules are supposed to counteract such developments which are dubitable from a legal-democratic point of view, and violate the rule of law; such counteraction is also the objective of the present Lobbying Act.

2.2. Good Governance

Transparency is supposed to contribute to **increasing the quality** of legislative and administrative processes. If public representatives and administrative functionaries can rely on a comprehensive level of information, and broad discussions have been conducted prior to their decisions, this will certainly have a positive effect on the content and acceptance of acts of law and administrative acts. This is the goal of comparable international activities, and such goal shall also be achieved by the Lobbying Act. So the Austrian Act is in line with international trends: compared with regulations abroad a middle course is adopted, since on the one hand not only

registration obligations are foreseen, but also certain rules of conduct, and on the other hand sanctions foreseen are rather moderate.

2.3. Regulation and Legitimation

To enhance the trust in political and administrative decision processes, lobbying activities shall be regulated. At the same time, the Act aims at extricating **such activities from obscurity** and giving them the significance they deserve. Lobbying and interest representation must not be reduced just to the assertion of economic interests on behalf of companies. The regulations of the Act cover more than just economic interests: they also cover the representation of social, cultural or ecological concerns; Moreover, it also aims at establishing the manner in which civil society shall be involved in decision-making processes by the Government.

2.4. Corruption

What the Lobbying Act **cannot** achieve, is to **fight corruption**. This is a matter of criminal law, with penalties for abuse of office and giving or taking bribes having recently been increased. So the rules of conduct and registration obligations are not aimed at preventing abuse relevant to criminal law. They come in much earlier: the general question is raised how interests of individuals or entire groups may be articulated towards public authorities and which formalities have to be observed in the process. Obviously, such rules also serve to prevent criminal acts of corruption. But this is not their primary goal.

3. Lobbying and Representation of Interests

3.1. Overview

In simple terms, the Lobbying Act rests on **three pillars**. Firstly, it sets forth some **rules of conduct** when asserting and enforcing individual and collective interests. Such rules set forth specific minimum standards when dealing with public authorities. Secondly, the Act obliges certain companies and institutions to be entered in the **Register of Lobbyists and Interest Representatives**. The Register is maintained electronically in the Ministry of Justice, and is mostly accessible to the public on the Internet and free of charge. Thirdly, these rules of conduct and registration obligations carry **appropriate sanctions** when violated, i.e. administrative penalties, the possibility to be deleted from the Register, and contractual consequences in case of non-compliance.

3.2. Direct Influencing

The Lobbying Act covers all activities, by which **direct influence** is exerted to Austrian legislature or administration through structured and organised contacts. This applies

irrespective of whether the outcome of an on-going decision process is to be influenced, or whether such decision process is to be put in motion yet. However, the Act only covers direct influence on functionaries of public authorities. If a legislator or public official is not contacted directly, but pressure is exerted on the functionaries only through the media without direct contact, such conduct is not covered by the Act.

Nor does the Act cover **preparatory work** to exert such influence. As a case in point, research or studies about who is responsible in which function or which authority for specific decisions are not defined as lobbying. The situation is different, however, if a specific intervention is being prepared on the basis of such preparatory work: This would be the case, if a list of demands is put together and a specific appointment has been made with a decision maker, if a to-do-list or a position paper has been prepared, which is to be presented. The result of the intervention is irrelevant, though: The Lobbying Act also applies, if an act of law is not adopted as desired by the lobbyist, or if an administrative decision is taken against his wishes.

3.3. Organised and Structured Contacts

Only **organised and structured contacts** are being regulated. Chance encounters with public functionaries during public events, on a social level or in private, and any discussions there are not covered, nor are spontaneous reactions to specific statements by politicians or public officials at public meetings or on the Internet. Nor is the general complaint of a businessman about the problems of his company raised in front of a legislator or functionary considered as an organised and structured contact, even if the underlying expectation exists to obtain a public contract.

3.4. Contract Offers

Lobbying or Representation of Interests must take direct influence on a decision by public authorities. **Contract offers** by a company or the presentation of goods or services by a (sales) representative **are not covered**. Nor can contract negotiations dealing with prices and the legal relationship between public authorities and the respective company be considered as lobbying.

4. Which areas are covered by the Act? - Lobbying towards Public Authorities

4.1. The Federation, Provinces, Local Authorities and Associations of Local Authorities

The Act does not cover each and every conceivable manner of influence on public authorities. It only applies to activities directly influencing legislation or administration of the **Federation, the Provinces, of Local Authorities and Associations of Local Authorities**. This would mainly mean contacts with legislators, their staff or with parliamentary clubs on the one hand, and interventions with Ministers, Provincial Governors, and Provincial legislators, mayors, members of the cabinet or other government employees on the other hand.

4.2. Lobbying with outsourced companies

Today, public functions have frequently been **outsourced** to autonomous **companies** or **institutions**. Influencing their decisions is not covered by the Lobbying Act, even if such companies or such institutions are in full public ownership. Only if an entity does not act as a private enterprise, but as an entity of sovereign power, lobbying activities towards such entities are covered by the Act.

4.3. Lobbying Abroad and from Abroad

The rules of the Lobbying Act are being applied in all cases in which a member of an Austrian legislative body (National or Federal Council, Provincial Diet, local council) or any other Austrian functionary, such as a politician, public official or other deciding organ is to be influenced. They also apply to foreign companies lobbying with Austrian functionaries. Interventions with Austrian Members of the European Parliament are not governed by the Lobbying Act, however; here European rules apply, the same as for lobbying with Austrian Members of the European Commission. But if Austrian functionaries are being contacted so that they should influence a specific decision in the Council of Europe or in the European Council, such contacts are subject to the Lobbying Act.

In the **diplomatic and consular field** it is customary and legitimate, that States assert and articulate their interests, and the interests of their citizens. Such activities are explicitly exempted from the Lobbying Act. So when a diplomat of another State accredited in Austria stands up for the interests of his country, the rules of conduct and registration requirements find no application.

5. Which actions are not covered by the Act? - Exempted Activities

5.1. Activities of a Functionary

If **public functionaries** act in their sphere of competence, they are **not** subject to the Act. This exemption e.g. applies to legislators who stand up for interests in their sphere of competence, or to public officials who favour a specific solution in front of their superiors.

5.2. Legal Counsel and Representation in Proceedings

Also the **representation** of interests of a party in or in connection with **administrative or court proceedings** is exempted from the Lobbying Act. When such proceedings are on-going or pending, and a party asks to be represented, there is no need for increased transparency. This exemption covers any kind of representation. It applies mainly in cases, when lawyers, notaries public, public accountants or any other authorised persons intervene on behalf of their clients. Such interventions are not subject to the Lobbying Act: But they are indeed subject to the respective professional and disciplinary rules.

The exemption for representation in proceedings is not only valid when proceedings have already been initiated, but also for **preliminary discussions**. It is quite usual that authorities meet with the parties concerned beforehand, and discuss any outstanding questions. And it frequently happens, particularly in complicated proceedings that companies want to sound out the situation in advance, ask for a meeting and appoint a representative.

But if a **lawyer intervenes with a legislator or public official** on behalf of a company, to have a legal provision adopted or altered, this is no longer a question of legal counsel or representation. Here, the lawyer **must observe the rules of conduct and the registration obligations** of a lobbyist.

6. Who does the Act apply to? - Specialist Lobbying Companies, In-House Lobbyists, Self-Governing Bodies and Stakeholder Associations

6.1. Companies and Institutions

Generally speaking, the rules of the Lobbying Act are relevant for all companies, institutions and associations asserting **individual interests of single persons or companies** or **collective interests** of multiple persons or companies towards public authorities (Federation, Province, local authorities and associations of local authorities). But the rules of conduct and registration obligations do not apply to all intervening parties in the same extent. The Act distinguishes between asserting individual interests by specialist lobbying companies or in-house lobbyists on the one hand, and asserting collective interests on the other: Collective interests usually are represented by legally established self-governing bodies or stakeholder associations under private law. Specialist lobbying companies and companies with in-house lobbyist are treated in a stricter manner than collective interest representatives.

6.2. Specialist Lobbying Companies

With this term the Act defines a company, whose business object is to take over **lobbying contracts** against payment from a client, i.e. practices lobbying on behalf of a third party's individual interests towards a public authority. It is irrelevant in this connection, whether lobbying is the only business of the company, or whether it carries out other tasks alongside. Nor is it relevant, what kind of company it is, whether lobbying is its official business, which legal form it has (corporation or single enterprise), and whether it is operating for the long term. The only important fact is that the company's business is to take over lobbying contracts against payment. This means lobbying contacts in accordance with the Lobbying Act, i.e. direct, structured and organised influence towards public authorities. Persons, who are employed in such a specialist lobbying company, are called **lobbyists** by the Act.

Lobbying companies and lobbyists are subject to **all obligations and sanctions of the Lobbying Act**. They have to comply fully with the rules of conduct, and they are subject to wide-ranging registration obligations. If they don't abide by the Act, they could be

threatened with severe sanctions: This includes deletion from the Register, nullity of contracts concluded and forfeiture of fees. Under certain circumstances, even administrative penalties may be meted out against them.

6.3. Companies with In-House Lobbyists

The Act further applies to companies not appointing specialist lobbying companies to assert their interests towards public authorities, but entrusting such tasks to their own organs or employees. Such employees or company organs are called **company lobbyists** by the Act. They are also called "in-house lobbyists", as they are employed in-house, in their own company. This term covers all employees and organs who lobby on behalf of their company or on behalf of an affiliated company towards public authorities, unless such lobbying activities are rather negligible.

The Act provides a **threshold** for company lobbyist which triggers compliance with the legal provisions when exceeded. It is a question of the percentage of the (pure) lobbying activity in relation to the annual total working hours of the respective employee. If lobbying activities account for **less than five per cent of the total work performance of the respective employees**, they are not yet company lobbyists. This is the threshold which triggers the rules of the Act.

But not only employees, but also **company organs** (executive and supervisory boards) are subject to the Lobbying Act, if they directly and in a structured and organised manner influence decisions of the legislation or administration, and such actions exceed the above de minimis threshold.

Employees of a company who perform **statutory professional duties** are not considered company lobbyists. They include court-appointed experts, translators or employees of the judicial support agency.

Company or in-house lobbyists have to observe **more rules of conduct** than others. They are also subject to the **sanctions** of the Lobbying Act. When breaching specific obligations they may be subjected to administrative penalties, they may be deleted from the Register, and also here certain agreements may become null and void under civil law.

6.4. Self-Governing Bodies with Interest Representatives

With such **self-governing bodies** the Lobbying Act means entities established by law, by a regulation or by a decision, and asserting the professional or other interests on behalf of their members. They are mainly chambers, including regional chambers, professional organisations and associations.

Such institutions do not assert individual interests, but **collective interests** on behalf of their members. For their employees and organs - who in relation to their annual working hours are active predominantly (**with more than half of their working hours**) in this area - the term **interest representatives** is used in the Lobbying Act, in differentiation to lobbyists and in-house lobbyists. When assessing whether persons are

predominantly (with more than half of their working hours) active as interest representatives, such assessment shall not include activities exempted by law. For such self-governing bodies, the rules of the **Lobbying Act** only apply **within limits**. Above all, no sanctions can be imposed against their interest representatives.

6.5. Stakeholder Associations with Interest Representatives

Stakeholder associations also assert collective interests on behalf of their members. They are different from self-governing bodies, since they have not been established by law, but are private associations or else operate under private law. The decisive factor is, whether their **interest representatives - in relation to their annual working hours - are predominantly active (with more than half of their working hours) in this field**. Also the representatives of such stakeholder associations (organs and employees) are **interest representatives** in the meaning of the Lobbying Act.

7. Who does the Lobbying Act not apply to? - Exempted Institutions

7.1. Total Exemptions

Some organisations and institutions are **totally exempted** from the Act. Firstly, this applies to **political parties** (also their subdivisions, such as confederations, political sections, Provincial organisations, etc., but not to "front-end" organisations or companies owned by a party) and to **legally recognised churches** and religious societies. Furthermore, associations of municipalities and local authorities asserting interests of local authorities towards the Federation and the Provinces are totally exempted, as are social security institutions (statutory pension, health and accident insurance institutions) and their Main Association.

Finally, a very important total exemption relates to **stakeholder associations**. The Act is not applicable to them if they have **no employees**, who are predominantly active - relative to their annual working hours - as interest representatives in this field. It is a matter of whether such employees use more than half of their annual working hours to influence public authorities directly and in an organised and structured manner, or whether that percentage is below this threshold. The fact that members of the executive board or other organs are active for the stakeholder association does not affect this exemption. If stakeholder associations don't have any employees in this field, or if such employees are not predominantly active as interest representatives, they are totally exempted from application of the Lobbying Act. It was the legislature's intention to exempt **small associations**.

7.2. Social Partners and Institutions competent for Collective Bargaining

Only the registration obligations of the Act apply to these institutions and bodies. Rules of conduct and the system of sanctions (administrative penalties, deletion from the Register, and nullity under civil law) are irrelevant for them. Social partners include the Chamber of Economy, the Chamber of Labour, the Chamber of Agriculture,

including its Conference of Presidents, as well as the Austrian Federation of Trade Unions. Partial exemptions are also valid for their subdivisions, such as Provincial chambers, political sections, professional associations and institutions and individual trade unions. The list of these collective bargain partners can be looked up at the Internet address www.bmask.gv.at.

7.3. Other Self-Governing Bodies and Stakeholder Associations

Other self-governing bodies and stakeholder associations have only **registration obligations** and very specific rules of conduct, i.e. they must observe the **principles of lobbying and interest representation**. Otherwise, the rules of the Lobbying Act are irrelevant for them. Above all, they are not subject to the system of sanctions provided by the Act. Therefore, no administrative penalties can be imposed upon their employees or organs, nor can they be deleted from the Register.

8. What must be done? - Rules of Conduct

8.1. Principles of Lobbying and Interest Representation

For all persons active in the field of lobbying and interest representation, for companies and institutions (except social partners and institutions competent for collective bargaining) the Act for Lobbying and Interest Representation sets forth specific **minimum standards**. For instance, they shall, when exercising any lobbying activity and when first contacting a public official, specify their tasks and the identity and specific interests of their respective employer; they shall present their available information in a truthful manner and be aware about limitations and incompatibilities of their counterparts. They shall refrain from obtaining information by dubious means, and from exerting unfair and improper pressure on their counterpart. But this does not mean that they cannot highlight their activities, for instance by stressing the repercussions of a certain decision on jobs and labour market or by organising a demonstration.

8.2. Prior Registration

There is a specific limitation for lobbying companies, companies with in-house lobbyists and for employees and organs operating on their behalf. They may only **operate** when they have been **named for entry into the Register**. Only after such nomination for registration they may take up contacts with public authorities and influence their decisions. If they don't comply with this obligation, at least an administrative penalty could be imposed on them, but also the contracts concluded with them could become null and void under civil law.

The Lobbying Act foresees a special registration obligation for lobbying companies. They may execute a **lobbying contract** only after having reported such contract for entry into the Register. But it will not do any harm, should the examination and entry

process last for a longer period of time; they may already become active once the contract has been reported for entry into the Register.

8.3. Special Obligations to be observed by Lobbying Companies

Lobbying companies (and only they) are subject to additional obligations towards their contract partners and client. They must provide their clients with a written or oral **estimate of the expected fee**, and inform them without delay if such estimate is likely to be exceeded. They must also point out to their clients, which **registration obligations** have to be observed when executing such contract. Nor may they boast in their contact with their clients about contacts and relationships with public functionaries they actually don't have.

8.4. Code of Conduct

Lobbying companies and companies with in-house lobbyists have to base their activities **on a code of conduct**. They have to specify such code of conduct on their Internet presence. The Lobbying Act does not contain any requirements as to the content of such code of conduct. Yet it would be insufficient for such code of conduct to simply state, that the company shall comply with the legal regulations without giving any specific information. Each company may establish such code of conduct on their own and according to their own needs.

8.5. Incompatibility of Certain Functions

The rules of conduct of the Lobbying Act also include **incompatibility rules for certain functions**. Functionaries, such as legislators, mayors, ministers, Provincial governors, Provincial councillors or public officials may not at the same time operate as - paid - lobbyists in their field of competence. But it is permissible that such functionaries operate as company lobbyists or interest representatives, if their activities don't cover their field of competence as a functionary, and if their statutory duties allow such activities.

9. How and where must Registration be entered?

9.1. The Register of Lobbyists and Interest Representation

The second pillar of the Lobbying Act is the **obligation to be registered** in a specific Register maintained by the Ministry of Justice and mostly accessible to the public on

the Internet. Similar to the rules of conduct, the registration obligations are ranked in relation to which company or which institution performs the lobbying or the interest representation. Again, lobbying companies are subject to the most comprehensive registration obligations. Registration obligations for companies with in-house lobbyist are less far-reaching. The rule for these two categories is that any lobbying activities may only be taken up, once the respective data for entry into the Register have been communicated. With statutory self-governing bodies and private stakeholder associations the story is different: Here, registration obligations require only a minimum of data. If there are any changes in the registered data, such changes have to be communicated to the Register within 3 weeks.

9.2. Lobbying Companies and their Contracts

Before starting their proper lobbying, **lobbying companies** must be registered in the Register for Lobbying and Interest Representation, i.e. communicate their data for entry. They are not allowed to execute any lobbying contract before having registered the same in the Register. The registration obligation does not apply when such companies are founded, for that matter, but only when they want to start lobbying activities. Apart from communicating their general basic data, lobbying companies are also obliged to register without delay additional data when a **lobbying contract** has been concluded and before such contract is being executed: Such data include the name of their client with all key data and the task area agreed.

9.3. Fees

Entry into the Register is subject to charges, with fees only being incurred **for the first entry** of a company or a legal entity. Should further entries be necessary later, such entries are free of charge. The entry fee amounts to € 600 for lobbying companies, to € 200 for companies employing company lobbyists or in-house lobbyists, and to € 100 for self-governing bodies and stakeholder associations.

10. Sanctions

In order to secure observance of the rules of conduct and registration obligations the Lobbying Act foresees sanctions for non-compliance as a third pillar: They include administrative penalties, deletion from the Lobbyist Register and nullity of contracts. **When registration obligations are violated** - for instance if lobbying activities are being performed without registration, a fine of up to € 20,000 may be imposed, in cases of repeat violations even up to € 60,000.

In the event of serious and continuous violations of rules of conduct and registering obligations, the Federal Ministry of Justice shall be entitled to delete certain persons from the Register, but always in compliance with the principle of proportionality. **Deletion from the Register is possible for a period of up to 3 years.** If lobbying

activities are continued in spite of such deletion from the Lobbyist Register, an administrative fine of up to € 20,000 may be imposed.

Finally, breaching the rules of conduct may also cause **certain contracts to become null and void**. This would subsequently also result in invalid fee agreements: if a fee for lobbying activities was already paid in the knowledge of a violation of rules of conduct by the lobbyist, the remuneration agreed shall be forfeited in favour of the Government.

11. Evaluation

As the Lobbying Act has only entered into force on 1 January 2013, and sanctions can only be imposed after a transition period of two months as per 1 March 2013, little can yet be said about the effectiveness of this piece of legislation; relevant evaluation procedures are on-going. So far, more than 600 companies or persons have requested to be entered into the Register. Moreover, the Act makes an important contribution towards highlighting the challenge of transparent decision-making: Therefore, it would be legitimate to speak of successful implementation measures.