IN-DEPTH ANALYSIS

Requested by the IMCO Committee

European Parliament

Analysis of the proposal for a directive on transparency of third-country interest representation

Policy Department for Economic, Scientific and Quality of Life Policies
Directorate-general for Internal Policies
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Analysis of the proposal for a directive on transparency of third-country interest representation

Abstract

This analysis discusses specific issues regarding the proposal for a Directive on the transparency of third-country lobbying. It highlights complex questions in relation to civil society organisations and the need for uniform implementation and effective judicial protection. If designed and implemented well, the Directive could establish a transparent framework for foreign governments to engage in lobbying within the EU.

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LIST OF ABBREVIATIONS

EP	European Parliament
EU	European Union
EUTR	European Union Transparency Register
FITS	Australian Foreign Influence Transparency Scheme
INGE	Special Committee on foreign interference in all democratic processes in the EU, including disinformation
INGE2	Special Committee on foreign interference in all democratic processes in the EU, including disinformation
LDA	US Lobbying Disclosure Act
MNC	Multinational corporation
NGO	Non-governmental organisation
OECD	Organization for Economic Co-operation and Development
PR	Public relations
SMEs	Small- and medium-sized enterprises
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

Aims

This in-depth analysis examines the European Commission's proposal for a Directive on the transparency of interest representation carried out on behalf of third countries (hereinafter referred to as "the Directive" or "the proposal")[1]. The proposal aims to increase the transparency of third countries' attempts to influence European Union (EU) institutions and Member States.

Third countries – those outside the EU and European Economic Area (EEA) – work on various objectives, from enhancing their global image to securing EU trade relationships and campaigning against EU regulations. The Directive proposes that Member States create transparency registers to track these lobbying efforts. Transparency regarding these efforts emerges indirectly, since the Directive does not propose that third-country governments themselves register. Key to the proposal is that third-country governments may not lobby the EU institutions and Member States directly and must arrange for an entity based in the EU to lobby on their behalf. It is these entities, who provide services to third countries, that will be captured by the proposal's requirement to register.

The analysis is organised to address the nine questions which were included in the commissioning brief of the IMCO Committee. These questions are included (*in italics*) at the beginning of each main section to increase the user-friendliness of the present study.

Key Findings

The proposed Directive is a foreign transparency law. While foreign transparency laws may share some similarities with domestic transparency laws (lobbying laws), the former present distinct challenges[2]. Drafting such legislation is complex because interest representation activities tend to want to remain in the shadows. This complexity is further amplified in the context of foreign lobbying, where the baseline information needed for regulatory intervention is frequently lacking. The limited understanding of foreign influence activities can lead to a legal framework that may not fully capture the realities of lobbying by foreign actors. The implementation and enforcement of these laws is challenging due to their broad applicability, which may unintentionally cause unforeseen consequences. Moreover, these laws are often difficult for the public to understand, as they do not target foreign governments directly but those who act on their behalf. Because foreign transparency laws do not differentiate between countries, this can lead to increased public confusion, as citizens may think that the laws unhelpfully conflate sinister governments with those that are not.

This in-depth analysis does not aim to address every detail of the Directive but instead focuses on the key issues outlined in the commissioning brief. While a detailed analysis of these key issues is provided below, here are some general observations in relation to certain questions, indicated by their numbers (Q).

Foreign transparency laws need to apply to a broad range of entities to effectively capture all the activities they intend to regulate. Although this broad applicability helps minimise potential loopholes, it is not without drawbacks. **The most complex issues arise concerning civil society organisations (CSOs)**. While it is necessary for the Directive to apply to them, this should be done in a way that

[1] Proposal for a Directive of the European Parliament and of the Council establishing harmonised requirements in the internal market on transparency of interest representation carried out on behalf of third countries and amending Directive (EU) 2019/1937, COM(2023) 637 final.

[2] For such laws, see Korkea-aho, E., 2023, The End of an Era for Foreign Lobbying? The Emergence of Foreign Transparency Laws in Washington, Canberra and Brussels, 61(6) *Journal of Common Market Studies*, 1529-1546.

preserves the distinctiveness of the sector as a whole.

Q6. Small- and medium-size enterprises (SMEs) and similarly sized CSOs need be treated similarly. The legal representation requirement in Article 8 of the proposal should be reconsidered, because it will cause problems both for SMEs and CSOs.

Q7. All CSO funding that is not related to interest representation activities should be exempted. The exemption should be incorporated in the articles of the Directive, not solely mentioned in the recitals.

The Directive leaves many matters to the sovereign decisions of Member States. **While this aligns with the subsidiarity principle and the Directive's legal form, it raises questions regarding uniform implementation and regulatory enforcement as well as effective judicial protection**.

Q1. The Commission should provide harmonised guidelines to assist the attribution process and coordinate the exchange of information between the relevant officials at both EU and national levels.

Q3. Additional guidance is needed on the types of activities that constitute circumvention and criteria for assessing whether the effect or object of certain activities is circumvention. The Commission should consider whether national authorities should be given the power to register an entity *ex officio* and/or place information on the register in case of non-compliance.

Q4. The relationship between the Directive and the existing domestic lobbying registers as well as the European Union Transparency Register (EUTR) and proposed national registers must be assessed and clarified.

Q5. Further clarification should be given on what obligations Member State authorities have in terms of setting up and maintaining their national registers, as well as how the national authority can handle the risk management tasks assigned to it.

Q9. The non-applicability of the diplomatic exception when governments hire interest representation services in the EU should be clarified. Additional guidance on how to address situations when business and foreign policy interests (of authoritarian regimes) are combined is needed.

In the best-case scenario, the Directive emerges as a golden route for providing a "legal channel" for foreign governments to lobby in an open, lawful and transparent manner in the EU and Member States. However, this requires that the Directive is understood and supported by the public, understood and expertly implemented by Member States, and understood and *bona fide* complied with by the entities involved.

INTRODUCTION

Popular discourse in the EU often links foreign governments' efforts to influence to the so-called Qatargate, which brought the issue to public attention in December 2022. However, as a public policy phenomenon and a subject of regulatory intervention, foreign interest representation (lobbying) is not new[3]. The US Congress stated nearly 50 years ago that foreign attempts "to influence governmental policies and programs is neither new nor necessarily evil and, by no means, the monopoly of sinister governments"[4]. All governments try to influence important issues and policies around the world. These activities, when conducted in an open and transparent manner, are usually positive and welcomed.

The US adopted foreign influence legislation in 1938, but it is no longer alone in addressing and regulating foreign governments' efforts to influence. In 2021, the Organization for Economic Co-operation and Development (OECD) stressed that while interest representation activities, also known as lobbying, are a feature of democracies, the increasing complexity of policymaking is blurring the lines between lobbying and diplomacy[5]. Its globally influential Recommendation on Lobbying, first adopted in 2010, was amended in April 2024 to include, for the first time, references to "foreign state interest actors" and recommends "the disclosure of lobbying and influence activities conducted on behalf of foreign state interests"[6]. In 2022 and 2023, the European Parliament's (EP) Special Committee on foreign interference in all democratic processes in the EU, including disinformation, recommended greater transparency to better monitor lobbying coming from outside the EU[7].

These global and local initiatives provide the context in which the Commission's proposal for a Directive on the transparency of interest representation carried out on behalf of third countries has evolved[8]. This analysis examines experiences from the US and Australia.

Foreign lobbyists have been separately categorised and regulated in the US under the Foreign Agents Registration Act of 1938 (FARA) and in Australia under the Foreign Influence Transparency Scheme Act of 2018 (FITS Act). Both Acts are intended to make foreign influence on the relevant country's political and governmental processes more transparent. By reducing the scope for foreign influence to be conducted covertly, the Acts also aim to deter corrupt, deceptive and clandestine activities[9].

The FARA requires foreign entities to hire agents based in the US if they wish to engage in lobbying activities, and those hired agents are mandated to submit semi-annual lobbying disclosure forms detailing all lobbying contacts along with information on payments made by foreign entities to agents

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3 Foreign "influence", "interest representation" and "lobbying" are used interchangeably.

4 See the first paragraph of point B of the Introductory Statement to the FARA, US Congress, 1977, *Senate Foreign Relations Committee*. Available at: https://www.fara.us/assets/htmldocuments/uploads/24416_1977_-_crs_report_-_fara_-_senate_committee_on_foreign_relations_comm._p_-_secured.pdf.

5 OECD, 2021, *Lobbying in the 21st century – Transparency, Integrity and Access*. Available at: https://www.oecd-ilibrary.org/governance/lobbying-in-the-21st-century_c6d8eff8-en;jsessionid=2dts1OwNXxJH3drXSHNEaoOJq3mxe0S7PU0ABpR5.ip-10-240-5-27.

6 OECD, 2024, *Recommendation on Transparency and Integrity in Lobbying and Influence*. Available at: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0379.

7 European Parliament resolution of 9 March 2022 on foreign interference in all democratic processes in the European Union, including disinformation (2020/2268(INI)) (INGE), OJ C 347, 9.9.2022, p. 61, and European Parliament resolution of 1 June 2023 on foreign interference in all democratic processes in the European Union, including disinformation (2022/2075(INI)) (INGE2), OJ C 1226, 21.12.2023, p. 1.

8 Proposal for a Directive of the European Parliament and of the Council establishing harmonised requirements in the internal market on transparency of interest representation carried out on behalf of third countries and amending Directive (EU) 2019/1937, COM(2023) 637 final.

9 FARA's distinct focus has been on propaganda busting. It was hoped that FARA would "lift the veil of secrecy from the methods used by representatives of foreign principals in swinging American public opinion in favor of political ideas and programs by using every conceivable device of publicity and public relations", Ettinger, K. E., 1946, Foreign Propaganda in America, 10(3) *Public Opinion Quarterly*, 329–342, at 329.

in the US. Since May 2007, the Department of Justice has maintained a website (www.fara.gov) that posts image files of FARA disclosure reports. The Australian FITS Act deals with persons and entities who lobby on behalf of foreign principals and requires them to be registered as foreign agents[10]. Details of individuals and entities lobbying Commonwealth public officials or seeking to influence political or governmental processes on behalf of foreign principals are required to be published on a public register administered by the Attorney-General's Department (https://transparency.ag.gov.au). Requirements concerning elections and referenda are more stringent than those otherwise applied.

This analysis pays special attention to the Australian FITS Act, because it is more recent and because the European Parliament's INGE report particularly singled it out as a model to be followed[11]. In Australia, the first five years of experience with the FITS Act have recently been reviewed. The parliamentary committee considered the administration and effectiveness of the FITS Act and made a total of 14 recommendations, which focus on enforcement and oversight[12]. The Australian Government announced its commitment to overhauling the legislation[13].

[10] Former Cabinet ministers and recent senior public officials have additional registration obligations because of the special nature of the positions they have held.

[11] European Parliament resolution of 9 March 2022 on foreign interference in all democratic processes in the European Union, including disinformation (2020/2268(INI)) (INGE), OJ C 347, 9.9.2022, p. 61, and European Parliament resolution of 1 June 2023 on foreign interference in all democratic processes in the European Union, including disinformation (2022/2075(INI)) (INGE2), OJ C 1226, 21.12.2023, 118.

[12] Parliament of Australia, Parliamentary Joint Committee on Intelligence and Security, 2024, *Review of the Foreign Influence Transparency Scheme Act 2018*. Available at: https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000097/toc_pdf/ReviewoftheForeignInfluenceTransparencySchemeAct2018.pdf.

[13] Australian Government, June 2024, *Government response to the Parliamentary Joint Committee on Intelligence and Security report: Review into the operation, effectiveness and implications of the Foreign Influence Transparency Scheme Act 2018*. Available at: https://www.ag.gov.au/integrity/publications/government-response-parliamentary-joint-committee-intelligence-and-security-report-foreign-influence-transparency-scheme-act-2018.

1. ATTRIBUTION

KEY FINDINGS

Sometimes it is unclear who or what is behind lobbying. In certain cases, the Directive enables a Member State to decide that although lobbying is conducted by a public or private entity, including those established within the EU, its activities are to be attributed to a third-country government. There are no clear criteria in the Directive for making such a decision. The Directive notes (see recital 23) that such determinations must be made on a case-by-case basis.

For the sake of legal clarity, the Commission should provide harmonised guidelines to assist the attribution process and coordinate the exchange of information between relevant officials at both EU and national levels.

IMCO Committee: *The proposal claims that one acts on behalf of a third country when a public or private entity action can be attributed to the central government and public authorities at all other levels of a third country: Is there more guidance in EU law that will help governments decide when to attribute such acts to third countries? When is such action "linked to or substitute activities of an economic nature"?*

This question relates to the two key issues in the Directive. First, who or what constitutes a third-country entity? Second, what activities does the Directive cover? This section begins with the analysis of the first one, before considering the issue of the activities covered.

According to **Article 2(4)**: "'third country entity' means: **(a) the central government and public authorities at all other levels** of a third country, with the exception of members of the European Economic Area; **(b) a public or private entity whose actions can be attributed to an entity referred to in point (a)**, taking into account all relevant circumstances;".

Sometimes determining who is lobbying is simple. For instance, a third-country government seeks the service of a consultancy firm within the EU, which then discloses this government as a client and itself as acting on this government's behalf. The third-country government is an entity within the meaning of point (a) of Article 2(4).

Yet at other times, the origin of lobbying is more difficult to determine. Let us envisage a professional association operating within the EU seeking to set up a meeting with an EU Member State authority. Although the contact is made by the association, there may be a third-country government behind the association's decision to seek the meeting. The government may exercise control over the association through economic rights, contractual arrangements, or any other means. Or a third-country government may control the association by giving instructions or imposing conditions. In any of these situations, the association can be defined as a third-country entity within the meaning of point (b) of Article 2(4).

The **attribution mechanism (the determination of the origin of lobbying) is an intrinsic part of foreign transparency laws**, both the US FARA and Australian FITS Act include such a mechanism[14]. Without the attribution mechanism, a third-country government would be able to engage in interest representation without anyone knowing.

In Australia, the authorities can, in certain cases, declare an entity to be a "foreign government related entity" and an individual to be a "foreign government related individual". Consequently, the entity or

[14] See US FARA § 611.(c)1 and § 612.(a)3 and 7, and FITS Act, Sections 10 and 11.

individual named is considered to be a foreign principal under the FITS Act and those undertaking lobbying activities on their behalf must register. **The FITS Act includes specified criteria for when an entity or an individual can be defined as being foreign government related**[15]. When the decision is made, the Secretary of the Attorney-General's Department has the power to issue a transparency notice. The entity or person must be given the opportunity to be heard. Transparency notices are available to the public on the website. So far, two transparency notices have been issued: one concerning the Confucius Institute at the University of Sydney and the other concerning the Australian Council for the Promotion of Peaceful Reunification of China (ACPPRC) Incorporated[16].

There is no general principle of attribution in EU law, although the idea of attributing (unlawful) acts arises in areas as diverse as state liability, state aid, competition law, public procurement law, and the provision of internet services[17]. In these situations, the act of attribution is contingent on several overlapping and similarly present facts. Another **comparison can be made to cyberattacks**[18]. If the EU wants to impose legitimate cyber sanctions, it first needs to determine who or what is behind the cyberattacks[19]. At EU level, the process of attribution, i.e. the technical, legal and political assignment of individual responsibility for cyberattacks, is incoherent. This is mainly because "attribution is a sovereign act of the Member States which have varying technical and intelligence capabilities"[20]. The EU has only a coordinating role to collect forensic evidence and share intelligence with the Member States and EU institutions[21]. There are no harmonised criteria at EU level for guiding an attribution decision in the context of cyberattacks[22].

The decision to attribute interest representation to a third-country government falls within the competence of a Member State. There is very little in the Directive to guide the Member State's decision-making or their level of discretion. **Article 2(4)(b) only refers to "taking into account all relevant circumstances**". **Recital 23** states that "Whether the actions of a public or private entity are to be attributed to a third country government or authority should be **determined on a case-by-case basis with due regard to elements such as the characteristics of the relevant entity and the legal and economic environment"**. Unlike in the FITS Act, there are **no specific thresholds in the Directive for assessing when, for instance, a third-country government controls a company**. It is also unclear

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15 For instance, in order to define a company as a foreign-related government entity, one or more of the following needs to apply:
(i) the foreign principal holds more than 15% of the issued share capital of the company;
(ii) the foreign principal holds more than 15% of the voting power in the company;
(iii) the foreign principal is in a position to appoint at least 20% of the company's board of directors;
(iv) the directors (however described) of the company are accustomed, or under an obligation (whether formal or informal), to act in accordance with the directions, instructions or wishes of the foreign principal;
(v) the foreign principal is in a position to exercise, in any other way, total or substantial control over the company, see Section 10, Definitions, of the FITS Act.

16 Attorney-General's Department website. Available at: https://www.ag.gov.au/integrity/foreign-influence-transparency-scheme/transparency-notices.
The review of the Act included a recommendation to amend the attribution criteria to make it easier to define an entity or individual as foreign government related.

17 In these fields, the attribution of the conduct of person A to person B as if it were person B's own conduct can follow from the nature of A's conduct and capacity, viewed against the background of relevant acts, omissions, and circumstances within the sphere of responsibility of B, see Sieburgh, C., 2016, The Attribution of Acts: Towards a Principled Assessment under EU and National Private Law, 24(3) *European Review of Private Law*, 645-671.

18 It should be emphasised that the purpose of the comparison is not to compare lobbying to organising and conducting cyberattacks but to compare the criteria that exist for attributing an action to a third-country entity.

19 The cyber sanctions regime currently explicitly targets individuals and entities, not states.

20 Bendiek, A. and Schulze, M., 2021, *Attribution: A Major Challenge for EU Cyber Sanctions. An Analysis of WannaCry, NotPetya, Cloud Hopper, Bundestag Hack and the Attack on the OPCW*. SWP Research Paper 2021/RP 11, 16.12.2021, 1-42. Available at: https://www.swp-berlin.org/10.18449/2021RP11/.

21 Ibid: The EU's own attribution capacity is highly dependent on intelligence sharing with international partners. While the Five Eyes intelligence alliance (consisting of the US, the UK, Canada, Australia and New Zealand) coordinates its attribution and public naming and shaming in a manner which has a high media impact, the coordination processes between the EU-27 tends to have a lower public profile.

22 Ibid.

whether funding from a third-country government would sufficiently link the entity to this government under the Directive[23].

Nor is there a clarification in the Directive of whether the decision of a national authority can be appealed or judicially reviewed, and whether a decision concerning a specific entity or individual should be made publicly available. Article 13 only requires that Member States gather aggregated data on the total number of third-country entities that can be attributed to a specific third country. This aggregated data must be published and transmitted to the Commission.

The **criteria for attribution are very general, and the decision-making process is not specified**. These issues need to be addressed, because the attribution decision is a particularly stigmatising part of the proposal. First, the **Commission should provide criteria that are clear, easy to apply, and comparable even when the assessment must be made individually in each case**. This is important given the implications of the attribution decision on an entity and/or an individual. For instance, the entity whose actions have been attributed to a third-country government is subject to additional information-provision obligations[24]. **Member State authorities should also be required to provide an entity with both an opportunity to be heard before making a final decision, and the right to appeal that decision**. Second, cross-border administrative cooperation should be strengthened. **Information and data indicating that attribution (attribution evidence) has occurred must be shared between Member States, not just between a Member State and the Commission**. Furthermore, individual decisions should be made publicly available. The publicity of these decisions is important to interest representation service providers, who, as explained below, need to verify whether the entity they are representing is a third-country entity.

The second part of the question asks, "When is such action 'linked to or substitute activities of an economic nature'"?

This concerns **Article 3(1)**, which defines the activities covered by the Directive: "This Directive applies to entities, irrespective of their place of establishment, carrying out the following activities: (a) an interest representation service provided to a third country entity; (b) an interest representation activity carried out by a third country entity referred to in Article 2(4), point (b), that is linked to or substitutes activities of an economic nature and is thus comparable to an interest representation service as referred to in point (a) of this paragraph."

The Directive covers, in point (a) of Article 3(1), **situations where, for instance, a third-country government or an association that is controlled by a third-country government purchases interest representation services from a consultancy firm**. In both cases, the consultancy firm must disclose the client as a third-country entity in the proposed register. What if the relevant association does not use the services of a consultancy firm but proceeds to directly lobby a Member State government minister? Point (b) is intended to cover such situations. **If the entity, controlled and/or directed by a third-country government, seeks to lobby in the EU, its activities (on behalf of this third-country government) are treated in the same way as interest representation services that**

[23] The FITS Act clarifies that funding that an entity receives from a foreign government can never be the sole reason for defining an entity as foreign-related, see Factsheet 3 on the issue of foreign principals (emphasis mine): "Where an entity receives funding from a foreign government or foreign political organisation, this is not a sufficient link for the purposes of the scheme. *If funding is the only link between the entity and the foreign government or foreign political organisation, then the entity would not be a foreign government-related entity*." Available at: https://www.ag.gov.au/integrity/publications/factsheet-3-foreign-principals.

[24] Article 16 of the proposal.

a consultancy company provides for a fee[25]. The association's activities are, in other words, regarded as providing interest representations services to the third-country government and thus comparable to services provided by consultancy firms in the market.

Consultancy firms and other lobbying service providers[26], such as law firms, offer services to a wide range of clients, including third-country governments and entities like the professional association mentioned above. As service providers, these firms will be required to disclose such clients in the proposed registers. How do service providers know that their client is either a third-country government or a third-country entity controlled or directed by a foreign government? A recent report from the UK highlights several concerns about the role of public relations (PR) and communication agencies when representing clients from kleptocratic jurisdictions, posing risks to both the industry and society at large. According to the report, PR firms may find themselves engaged in projects that initially appear innocuous but are part of a broader strategy aimed at improving the reputation of a particular regime[27].

The Directive imposes obligations on Member States to ensure that lobbying service providers may request the entity they represent to declare whether it is a third-country entity[28]. In the PR industry, these are commonly referred to as "Know Your Client" requirements. Some major firms appear to have already implemented these standards. In an interview with Politico EU, a representative from Rasmussen Global confirmed that they always vet their sovereign clients, only working with "the good guys"[29].

There are **no further rules or guidance in the proposal determining what level of verification lobbying service providers must conduct**, what they can do if a particular entity does not provide the required information or if they think that it has not given them accurate information, or whether they need to alert the national authorities if they have reason to believe that the entity they are representing is a third-country entity. The Commission should consider whether such vetting should be regulated by Member States or if it would be more prudent to allow industry professionals to standardise practices themselves.

[25] Recital 3 of the proposal states: "The market for interest representation also includes interest representation activities carried out by third country entities themselves in a way that is comparable to services and are linked to or substitute activities of an economic nature. These activities should be treated in the same way as interest representation services."

[26] For the notion of "provider of interest representation services", see Recital 20 of the proposal.

[27] Mayne, T., 2023, *What's the Risk? PR & Communication Agencies and Kleptocracy*. The Foreign Policy Centre, March 4, 2024. Available at: https://fpc.org.uk/publications/whats-the-risk-pr-communication-agencies-and-kleptocracy/.

[28] See Article 5 of the proposal.

[29] Bayer, L., 2021, *POLITICO EU Influence: Pesticide push — Croatia criticism — Renewables rumpus*. Available at: https://www.politico.eu/newsletter/politico-eu-influence/politico-eu-influence-pesticide-push-croatia-criticism-renewables-rumpus/.

2. DEFINITION

KEY FINDINGS

The legal basis of the Directive is Article 114 of the Treaty on the Functioning of the European Union (TFEU). Due to the choice of legal basis, the Directive regulates the EU market in interest representation services. The standard case of a market transaction is a consultancy firm selling interest representation services to a third-country government. However, the Directive must also apply to cases where, for instance, an association conducts interest representation services for a third-country government without receiving any compensation.

The Directive thus uses the definition of "economic activities of interest representation" to ensure that the legal basis holds even when the third-country government is not purchasing services in the internal market for interest representation but is relying on public and private entities to do so on its behalf.

IMCO Committee: *What is the difference between "economic activities of interest representation" and "interest representation services" (both included in the proposal)?*

The notion of "economic activities of interest representation" (or "activities of an economic nature") arises twice in the proposal. The first mention is in **Article 1**: "This Directive lays down harmonised requirements in relation to *economic activities of interest representation* carried out on behalf of a third country entity, with a view to improving the functioning of the internal market by achieving a common level of transparency across the Union." The second citation is in **Article 3(1)(b)**: "an interest representation activity carried out by a third country entity referred to in Article 2(4), point (b), that is linked to or substitutes *activities of an economic nature* and is thus comparable to an interest representation service as referred to in point (a) of this paragraph."

The concept of "interest representation services" is a key notion and **is defined in Article 2(2) as meaning "an interest representation activity normally provided for remuneration…"**. Usually, such services are provided **by consultancy and law firms**, which provide services to clients for a contractually agreed fee. Such professional firms' clientele is diverse, including third-country governments. **These firms and their clients form the backbone of the internal market in interest representation activities**. This market dimension of the proposal is emphasised in Article 1 when speaking of "economic activities of interest representation".

However, as explained above in relation to the attribution mechanism (Q1), **a third-country government may choose not to buy services in this market from professional market actors** such as consultancy and law firms. Instead, it may rely on public or private entities to provide these services and carry out interest representation activities on its behalf. Such activities may occur without there being an agreement between the third-country government and this entity, nor any financial reward or any other remuneration[30]. One possible example could be a CSO that "provides services" to a third-country government by writing a position paper.

To ensure that these cases also fall within the scope of the proposal, the Directive uses the term "activities of an economic nature". By using this term, **the Directive defines situations where non-**

[30] See recitals 26 and 28 of the proposal, specifically the latter: "…and where no remuneration is received...". The existence of remuneration is not necessary for the activity to fall within the scope of the Australian FITS Act. According to Factsheet 4 on Acting on behalf of foreign principals: "The foreign principal does not need to pay the person to undertake the activity, or provide any other advantage to the person". Available at: https://www.ag.gov.au/integrity/foreign-influence-transparency-scheme/fits-resources.

professional, non-market actors lobby on behalf of a third-country government as situations involving activities of an economic nature, and **"*thus comparable* to an interest representation service"**[31]. For instance, a CSO is not a professional service provider like a consultancy firm, but lobbying may be its principal or occasional occupation[32]. The classification of the latter situation (CSO advocacy for a third-country government's benefit) as an economic transaction enables it to be seen as part of the market for interest representation services and thus subject to legal regulation that is given using the internal market basis of Article 114 TFEU.

In sum, the notion of "interest representation services" refers to the standard scenario in which lobbying services are obtained in the market. However, since this definition may not fully encompass cases such as when a professional association or CSO lobbies on behalf of a third-country government, the term "economic activities of interest representation" has been introduced as a supplementary concept to reinforce the legal basis.

[31] Recital 24 of the proposal, italics mine.

[32] Recital 21 of the proposal.

3. CIRCUMVENTION

KEY FINDINGS

Given the Directive's broad scope, potential loopholes for evading its obligations are likely to emerge. The Directive requires Member States to ban and enforce any attempts to circumvent it in their national laws. However, the Directive does not provide a list of activities constituting circumvention, nor does it offer criteria for assessing whether the effect or object of activities is circumvention. Complicating matters is the requirement for a Member State authority to demonstrate intention ("knowingly and intentionally").

The Commission would need to reconsider the anti-circumvention clause and assess whether direct enforcement powers, such as the power of national authority to ex officio register an entity, would be more effective.

IMCO Committee: *To what extent does the proposal ensure that obligations cannot be circumvented (i.e. by third country actor establishing an entity in an EU MS)?*

The aim of ensuring compliance with the obligations imposed by the Directive is evident within its provisions. First, this aim is reflected in the subsidiarity assessment. According to the EU Commission, disparate national rules for interest representation services are easier to circumvent. Acting as a deterrent to circumvention thus serves as a justification for regulatory action at the EU level[33]. Second, **the Directive contains a specific anti-circumvention clause**. According to **Article 20**, "Member States shall **ensure that it is prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the obligations set out in this Directive**". National authorities bear the responsibility for prohibiting behaviour that seeks (or leads) to circumvent the provisions of the Directive[34].

What activities amount to circumvention? According to the proposal's recitals, these activities include covert remuneration for a representation service, the setting up of companies to obfuscate links to third-country governments, or the artificial distribution of activities across multiple entities to fall short of the thresholds established by this Directive[35]. The list is not exhaustive, and other activities may also be deemed to contribute to circumvention. There are **no criteria in place for helping Member States to decide what amounts to circumvention or what constitutes "intention" in this context**. This creates challenges when enacting domestic legislation. The anti-circumvention prohibition is also difficult to enforce. **How can it be proven that the entity's aim is to circumvent the provisions?** Is it the national authority's task to prove intention or the entity's duty to prove that there is no intent? The vagueness of the anti-circumvention prohibition is problematic, because the violation of the anti-circumvention clause is sanctioned in special terms. In the event of a breach, sanctions may be imposed without a prior early warning[36].

The Directive has anticipated potential issues, and **an advisory group will be established to advise the Commission. One of its tasks will be to clarify the content of Article 20**[37].

[33] See page 10 of the Explanatory Memorandum, COM(2023) 637 final.

[34] Ibid, page 11.

[35] Recital 58 of the proposal.

[36] Article 22(4) of the proposal.

[37] Recital 55 of the proposal.

How likely is it that a foreign government, for instance, would set up a company in a Member State and obfuscate its links to it or pay covertly for lobbying services? This is difficult to anticipate but, in both scenarios, it will be challenging for Member State authorities to determine and prove circumvention, that is, to show that a third-country government, knowingly and intentionally, acted to circumvent requirements. **Demonstrating an intention becomes nearly impossible in situations involving subsidiaries**. For example, consider a large company established outside the EU/EEA, controlled or directed by a third-country government. This company (which is a third-country entity) sets up a subsidiary in the EU to avoid the Directive's registration requirements[38]. In this scenario, it may be easier to rely on an attribution mechanism (the activities of an EU subsidiary are attributed to a third-country entity) than to try to prove the parent company's intention to circumvent[39].

In Australia, there is no general anti-circumvention clause. However, as the FITS Act contains several exemptions, the vulnerability of the Act to circumvention efforts needs to be taken seriously. The Secretary of the Attorney-General's Department has broad powers to require a potential registrant to provide information if it reasonably suspects that person to be liable to registration. Furthermore, the Department may require *any* person to give them information and documents if it reasonably believes the person (whether a registrant or not) has information that is relevant to the operation of the scheme. It is not an excuse to claim that the information may incriminate the person. Failure to comply with these notices may result in six months' imprisonment, while providing false or misleading information may lead to three years' imprisonment[40].

Parliamentary review suggests new tools to promote compliance and address non-compliance with the FITS Act. First, there would an option enabling the Secretary of the Department to ex officio register an entity when it is liable to register but has failed to do so. Second, the authority may place information on the register about any entity that the Secretary considers should be registered but that has not registered voluntarily or has otherwise not complied with the Act[41].

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[38] According to a study, majority-owned subsidiaries of foreign multinational corporations (MNCs) account for nearly 20% of corporate lobbying spending in 2015–2016 in the US. Domestic subsidiaries of foreign MNCs are found to lobby more frequently and spend more on lobbying than American multinationals. These subsidiaries actively lobby on issues/areas that clearly benefit their foreign parent company. The study concludes that foreign MNCs actively influence US policies through their domestic subsidiaries, see Lee, J., 2024, Foreign lobbying through domestic subsidiaries, 36(1) *Economics & Politics*, 80–103. Available at: https://doi.org/10.1111/ecpo.12232. Note that FARA (US Foreign Agent Registration Act) does not apply to foreign companies or their US subsidiaries, which are regulated under the domestic lobbying law (Lobbying Disclosure Act, LDA).

[39] The Directive would not apply to foreign multinational corporations' interest representation activities in Member States or lobbying undertaken by domestic subsidiaries in Member States. The Directive (and its anti-circumvention clause) would only become applicable in the scenario described in the text.

[40] Ng, Y-F., 2020, Regulating the Influencers: The Evolution of Lobbying Regulation in Australia, 41 *Adelaide Law Review*, 507-543, at 533. Penalties for failure to apply for or renew registration are imprisonment from 12 months to 5 years, depending on whether the omission was intentional or reckless, if the person knew they had to register, and whether the registrable activity was actually undertaken. Similar penalties apply for informing the Secretary that the person ceases to be liable when this is not true. Penalties for failure to fulfil one's responsibilities under the FITS, such as by failing to keep or destroy records, range from 60 penalty units (AUS$13,320) to 2 years' imprisonment respectively.

[41] Recommendation 7 of the *Review of the Foreign Influence Transparency Scheme Act 2018*. Available at: https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000097/toc_pdf/ReviewoftheForeignInfluenceTransparencySchemeAct2018.pdf. The Secretary must be required to invite a submission within a reasonable timeframe from the person regarding their apparent liability to register, and if still satisfied after considering any submission that registration is required, then the Secretary is required to register that person.

4. NATIONAL TRANSPARENCY REGISTERS

KEY FINDINGS

The Commission assumes that Member States will implement the Directive by amending and expanding their existing national transparency registers (if any) to accommodate both national interest representation and lobbying conducted on behalf of third-country entities. The proposal does not sufficiently consider situations where the Directive either goes beyond the scope of the national register or where the national register imposes stricter rules than the Directive, an oversight that is particularly problematic given that the Directive aims to achieve full harmonisation.

To avoid undermining existing transparency arrangements, the relationship between the Directive and the existing domestic lobbying registers as well as the European Union Transparency Register (EUTR) and proposed national registers must be assessed and clarified.

IMCO Committee: *Does the proposal contradict or undermine existing transparency obligations in EU Member States?*

Existing transparency obligations in the Member States are diverse, which makes it impossible to map out all the possible situations where the Directive would impact on the existing domestic arrangements. Therefore, this analysis focuses only on existing interest representation (lobbying) laws.

Out of the 27 Member States, about half have passed legislation to regulate domestic lobbying, while some have non-legislative instruments in place to increase transparency around influencing activities. **Most of the Member States with regulations have created transparency registers, but these vary in nature**, as they have been tailored to national contexts. Will the proposal contradict or undermine these existing lobbying regulations? The answer to this depends on the extent to which Member States with existing lobbying rules can reconcile their domestic laws with the proposal's requirements. **The Commission seems to think that Member States will** – to the extent that the national register meets the requirements of the Directive – **implement the proposal's requirements by creating some form of "super register" that covers both domestic lobbying and that done on behalf of third-country entities**. However, while the impact assessment attached to the proposal elaborates on national registers, **the final proposal does not adequately address the implications of the diverse national transparency registers when Member States implement the Directive**. This is of particular concern given that the Directive mandates maximum harmonisation (Article 4), preventing Member States from adding provisions beyond those required by the Directive.

First, consider a **situation where national legislation imposes stricter rules compared to the Directive**. For instance, Finland's Transparency Register Act[42] and Ireland's Regulation of Lobbying Act 2015[43] for domestic lobbying do not allow registered entities to request that all or part of their information be kept confidential due to overriding interests that justify withholding publication. It seems inconsistent that **interest representation activities on behalf of third countries might allow for withholding information, while domestic lobbying does not** – especially if both types of lobbying will be registered in the same "super register". National laws may also be highly specific and complex. In Austria, for instance, lobbyists are divided into four categories, with the level of detail

[42] The Finnish Transparency Register Act (Avoimuusrekisterilaki) 430/2023. Available at: https://www.finlex.fi/fi/laki/ajantasa/2023/20230430.

[43] The Regulation of Lobbying Act 2015. Available at: https://www.irishstatutebook.ie/eli/2015/act/5/enacted/en/html.

required varying by category[44]. Integrating this system with the Directive's requirements into a single register, while ensuring that lobbyists understand which rules apply in each situation, will be challenging.

Second, there will be **situations where the Directive imposes more stringent requirements than national transparency registers**, leading to **uncertainty about how to reconcile the two sets of provisions**. For instance, the Directive applies to **interest representation targeting all levels of government**, including regional and municipal authorities[45], which are not typically covered by national registers. Another example is financial information. The Directive requires that registered entities provide information on annual amounts covering interest representation activities[46], while registrants do not provide financial information under the Irish Regulation of Lobbying Act. Moreover, the proposal imposes **obligations on natural persons, unlike most national laws**, raising further questions about the feasibility of creating a unified "super register".

Finally, the Directive does not address **the relationship between the EUTR and the proposed national registers**, despite both covering some of the same actors. Specifically, the Directive defines public officials targeted by lobbying as including both EU and Member State officials[47]. Both the EUTR and the proposed national registers consequently cover the staff of the EP, the Commission, and the Council. Consider, for example, Belgium, which currently lacks a transparency register for domestic lobbying. Suppose a third-country government contacts a consultancy firm in Brussels to purchase services aimed at influencing officials at a Commission Directorate-general (DG), without intending to lobby Belgian national authorities. Under Article 4(2)(d) of the EUTR, the Brussels-based firm must disclose the third-country government as a client[48]. However, it remains unclear whether the consultancy firm would also need to disclose the third-country government in a future Belgian register or if registering the client in the EUTR would suffice.

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44 Austria's Lobbying-und Interessenvertretungs-Transparenz-Gesetz 2012. Available at: https://www.ris.bka.gv.at/eli/bgbl/i/2012/64/P4/NOR40141401.
Austria's law also exempts law firms, meaning they would be required to disclose third-country clients but not domestic ones, potentially creating loopholes.

45 Article 2(13) of the proposal.

46 Annex 1, point 2(c).

47 Article 2(11)-(12) of the proposal.

48 Interinstitutional Agreement of 20 May 2021 between the European Parliament, the Council of the European Union and the European Commission on a mandatory transparency register, OJ L 207, 11.6.2021, p. 1.

5. STIGMATISATION

KEY FINDINGS

The concern with the Directive is that registration will carry the stigma of being in a "foreign lobbying" register. The best antidote would be to ensure that the Directive and the registers established to implement the Directive become known as a golden route for providing a "legal channel" for foreign governments to lobby in the EU and Member States. Achieving this aim and managing the risk of stigmatisation is left to the Member States.

Further clarification should be given on what obligations Member State authorities have in terms of setting up and maintaining their national registers, as well as how the national authority can market the register as the "legal channel" and handle the risk management tasks assigned to it.

IMCO Committee: *The Member States, under the proposal, should ensure a neutral, factual and objective presentation of the information that will be contained in their national registers. Is the proposal providing a clear enough set of obligations to that aim or is further clarification needed?*

One of the concerns related to the Directive, which was much discussed in public in the months leading up to the publication of the proposal, is stigmatisation. This means **the risk of the registered entity becoming negatively branded as a "foreign agent"**. The proposal acknowledges the risks that the Directive may have in this regard but leaves risk management to national authorities.

The main obligation for the Member States is to set up and maintain the register. **Article 1** emphasises **avoiding a climate of distrust** and ensuring transparency and not deterring interest representation activities. According to **Article 9(3)**, national authorities must **ensure a neutral, factual and objective presentation of the information** that will be contained in their registers. However, the proposal does not clarify what this concretely means. The risk of stigmatisation related to the information contained in national registers can be illustrated through three scenarios, each of which provides authorities with different opportunities to intervene and manage risks.

First, **the information contained in the register may be discussed in the media**. Authorities have no control over this, as national authorities do not regulate public debate in democratic societies. Second, **Member States may create registers that present the information in a scandalous or partisan manner or contain incorrect information**. These kind of issues can and must be rectified by national authorities by improving the way the information is presented in the register or correctly enforcing the information provision requirements. When assessing the set of obligations that the Directive creates for Member States in this respect, it is important to bear in mind that **transparency registers always reflect the bona fide attempts of the registrants to provide the required information**. This means that the proposed registers can only contain and provide "factual" information if entities fulfil their registration requirements and provide correct and "factual" information to the authorities.

Third, Member States may apply the registration requirements in a manner that creates a stigma through the authority's use of discretion. For instance, in Australia, former Prime Minister Tony Abbott was asked to join the register because he participated in the inaugural Australian Conservative Political Action Conference, an organisation founded by the American Conservative Union and linked to the US Republican Party, in August 2019. Abbott refused to register. While the Attorney-General decided in Abbott's favour, announcing that he "expect[s] [the Department] to demonstrate a focus on the most

serious instances of noncompliance"[49], the case of a prominent opposition politician as a "foreign agent" was discussed in the media for weeks[50]. This shows how **the authority's use of discretion may result in register-related reputational harm even when the register itself is organised in a neutral way**.

The best approach would be to ensure that the Directive and the national registers established to implement it are recognised as the preferred "legal channel" for foreign governments to lobby within the EU. To reduce potential stigmatisation and encourage the use of this legal channel, one practical step would be to create "super registers" (as discussed earlier in relation to Q4) that encompass both domestic lobbying and lobbying on behalf of third-country entities. Such combined registers would reduce the focus on individual registered entities. However, before this can happen any potential incompatibilities between the Directive and national transparency (lobbying) laws must be addressed.

[49] Ng, Y-F., 2020, Regulating the Influencers: The Evolution of Lobbying Regulation in Australia, 41 *Adelaide Law Review*, 507-543, at 541.

[50] The Australian example also emphasises the importance of steering clear of partisan preferences when devising and applying these kinds of laws. The EU's proposal does not appear to be associated with party-political views.

6. IMPACTS ON CIVIL SOCIETY ORGANISATIONS

KEY FINDINGS

The Directive's impact on CSOs is difficult to anticipate given the diverse ecosystem of various CSOs. The size and resources of different CSOs are not considered in the Directive, unlike those of for-profit entities (SMEs). Nor does the Directive make any concessions regarding small and/or volunteer-based organisations. SMEs and similarly sized CSOs need to be treated similarly in the Directive.

The legal representation requirement in Article 8 must be reconsidered. It requires entities or individuals without a permanent address in the EU to appoint a legal representative in the EU Member State where interest representation is taking place. This requirement creates costs and barriers for smaller CSOs and firms operating outside the EU/EEA. There is no comparable requirement in the US or Australia to appoint a legal representative. While the reason for this provision likely relates to the enforcement of the Directive's requirements, it is necessary to assess the implications for smaller CSOs and companies, as acquiring and maintaining legal representation in the EU Member State is costly.

IMCO Committee: *How are different types of civil society organisations (big and small, professional and volunteer based, different thematic field…) going to be impacted and able to respect the obligations? Does a distinction in this regard make sense (lighter obligation for SMEs) or could this lead to loopholes in the Directive?*

The Directive regulates a specific type of activity – interest representation carried out in the internal market on behalf of third-country governments – regardless of the nature of the entity (actor) carrying out that activity. **The transparency requirements apply equally to all actors, including CSOs**.

The impact of the proposal on CSOs has been debated at the EU level[51]. By capturing activities and sources of funds in a public register and requiring a special registry number to be displayed by registered entities, the proposal is seen as leading to unintended consequences for civil society, such as authorities refusing to engage in dialogue, stigmatisation, and harassment, including of citizens who are members of CSOs. After core funding was removed from the Directive's scope (see the next section for more details), the debate abated. This **public debate did not distinguish between different types of CSOs**, although, **logically, the administrative burden is greater for smaller organisations**. The size of a CSO tends to correlate with fewer dedicated administrative resources and volunteer members.

When assessing the Directive's impacts on CSOs, a **comparison could be made with domestic lobbying registers**. **Some Member States have exempted CSOs from registration requirements**. For instance, in Ireland CSOs (issue-based bodies) with no paid employees do not have to register[52]. In Austria, public interest groups and social partners must register, but their disclosure requirements are less stringent compared to those applicable to consultancy lobbyists[53]. In Finland, the register applies to CSOs. Its applicability across the board is justified as proportionate. The burden of registration grows in proportion to the volume of interest representation activities, so if an organisation is small, its

[51] See a Statement of CSOs against 'an EU FARA law', 2023. Available at: https://civilsocietyeurope.eu/wp-content/uploads/2023/07/230-Civil-Society-Organisations-Statement-on-EU-Foreign-Interference-Law-7-2.pdf.

[52] Section 5 of Ireland's *Regulation of Lobbying Act* 2015. Available at: https://www.irishstatutebook.ie/eli/2015/act/5/enacted/en/html.

[53] Article 12 of Austria's Lobbying-und Interessenvertretungs-Transparenz-Gesetz 2012. Available at: https://www.ris.bka.gv.at/eli/bgbl/i/2012/64/P4/NOR40141401.

interest representation activities are small and consequently, the burden is also small.

The Directive does not offer any concessions for small CSOs, unlike the accommodations provided for SMEs. **Article 19(2)** states that one of the advisory group's tasks is to **facilitate exchanges and sharing of information and best practices regarding the specific needs of micro, small, and medium-sized enterprises**. The recitals also note that Member States should minimise the administrative burden on the entities concerned, particularly micro, small, and medium-sized enterprises, when implementing the Directive[54]. However, there is no clarification on what this entails or why only SMEs are given special consideration. The focus on SMEs seems unjustified, and **SMEs and similarly sized CSOs should be treated equally**. That said, exemptions and concessions can create loopholes, so the necessity of any such measures for CSOs or SMEs must be carefully evaluated in the light of their nature and potential consequences. Some concessions may not necessarily involve exemptions from registration requirements but could instead impact the ability of registered entities to comply with the provisions. For example, **providing additional support with the registration process to SMEs and similarly sized CSOs could be a practical approach**.

There is one provision in the proposal that will create major barriers for CSOs and SMEs operating outside the EU/EEA. **Article 8** requires **organisations without a permanent address in the EU to appoint a legal representative in one of the EU Member States where interest representation is taking place**. This representative would have to accept liability for the organisation's lobbying. For instance, an organisation established in Northern Ireland (outside the EU/EEA) and seeking to influence decision-making in the Republic of Ireland (inside the EU) would have to find and pay for the services of a legal representative in Dublin[55]. While the rationale for the requirement likely relates to the enforcement of the Directive, it is necessary to assess the implications of this provision for CSOs and SMEs, as **maintaining legal representation (most likely through a law firm) in an EU Member State is expensive**. There is **no comparable requirement in the US or Australia** to appoint a legal representative. Nor does the EUTR require that only those with a permanent address in the EU can register.

[54] Recital 64 of the proposal.

[55] Complex questions may also arise with respect to Cyprus.

7. FUNDING MECHANISMS

KEY FINDINGS

The Directive does not require transparency regarding the funding of operating expenditures ("core funding") unrelated to interest representation activities, such as structural grants or donations. This is mentioned only in the recitals, not in the Directive's main text. The exemption should be included in the Directive itself. Even if the funding is core funding, the CSO must demonstrate that it is not related to interest representation activities. Other types of CSO funding (projects, service contracts) presumably fall within the Directive's scope even where they are unrelated to interest representation activities.

The distinction between types of funding is problematic for several reasons. First, the Directive does not define different types of funds, nor are types of funding defined in EU law. Second, it creates problems in terms of the burden of proof. Who is responsible for demonstrating what, exactly? Third, it creates an incentive for donors and CSOs to move funding to the core funding budget.

All CSO funding that is not related to interest representation activities should be exempted. The exemption should be part of the Directive's text, not solely referred to in the recitals.

IMCO Committee: *Is there a definition in EU law in terms of different funding mechanisms (e.g., project-based vs service contract or core funding)? Does such definition demonstrate "interest representation" of their donor (or absence thereof) rather than interest representation of their statutory mission?*

While the Directive captures many kinds of organisations, including CSOs, its applicable scope is determined with regard to activity. It imposes requirements related to interest representation activities and does not impose requirements on entities merely because they receive funding from abroad. Therefore, if a CSO receives funding from a third-country entity, the question arises as to whether it has to register? The answer depends on two conditions: the type of funding and the funding's relationship to a CSO's lobbying activities. With regard to the type of funding, it is to be noted that, according to the Directive's recitals, **no transparency is needed for the funding of operating expenditure ("core funding") unrelated to interest representation activity, such as structural grants or donations**[56]. Other types of CSO funding (projects, service contracts) presumably fall within the Directive's scope. CSOs are not bound by any single funding mechanism, but regularly receive three types of funds: core funding (also called operating grants or expenditure to pay for rent, personnel costs and office costs), project-based funds for specific project (such as to raise awareness of animal rights), and service-contract funds to run specific services (such as a helpline for teenagers). Most of the funding of CSOs relates to projects, and there are fewer funding mechanisms to cover the organisational costs of running CSOs[57]. **None of these terms appear in the Directive itself, and the term "core funding" only appears in the Explanatory Memorandum and the recitals**[58].

The above terminology regarding the funding of CSOs is not defined in EU law, however. These terms are all widely used both by EU institutions and among CSOs themselves. For instance, in the recent

[56] Recital 27: "Contributions to the core funding of an organisation or similar financial support, for example provided under a third country donor grant scheme, should not be considered as remuneration for an interest representation service where they are unrelated to an interest representation activity, that is, where the entity would receive such funding regardless of whether it carries out specific interest representation activities."

[57] https://www.accesseurope.ie/funding-guides/characteristics-of-eu-funding. Some foundations particularly focus on core or unrestricted funding, see, for instance, in the UK, the Esmee foundation. On philanthropy and environmental CSOs, see Lee, M. and Abbot, C., 2024, Philanthropy and Environmental Law, 51(3) *Journal of Law and Society*, 413-434.

[58] Explanatory Memorandum, p. 11, and recitals 19 and 20.

open call by the Commission to health CSOs, core funding was defined to mean "financing required for the basic structure of an organisation, including salaries of fulltime staff, facilities, equipment, communications and direct expenses of its day-to-day work"[59].

However, **the fact that a grant constitutes core funding does not exempt the organisation from registration**. The exemption also requires that the relationship between the funding and the CSO's interest representation activities must be considered. **Core funding – to avoid falling within the Directive's scope – must be unrelated to a CSO's interest representation activities**. Table 1 illustrates the different ways in which the type of funding impacts the registration requirement.

Table 1: The impact of the type of funding on the registration requirement

Type of funding	Unrelated to lobbying	Related to lobbying
Core funding	No registration	Registration
Project-based	Registration?	Registration
Service contract	Registration?	Registration

Source: Author's own elaboration.

One question is **why project-based or service contract funding that is not related to lobbying requires registration**. Consider a CSO that receives funding with no strings attached. It would receive this funding "regardless of whether it carries out specific interest representation activities" as specified in recital 27. The literal interpretation of recital 27 would mean that a CSO that receives funding to run a soup kitchen (project-based) needs to register, but a CSO that receives funding to rent an office does not. The Commission seems to assume that the donor giving core funding to a CSO is not interested in impacting policy or legislation. While this may sometimes be the case, it is difficult to determine the donor's true intentions. Therefore, the distinction between types of funding seems unjustified, especially when the funding is received without any expectation of lobbying or influencing activities being performed in return for the funding. The adjusted Table 2 illustrates the argument with the suggested changes in italics.

Table 2: The suggested impact of the type of funding on the registration requirement

Type of funding	Unrelated to lobbying	Related to lobbying
Core funding	No registration	Registration
Project-based	No registration	Registration
Service contract	No registration	Registration

Source: Author's own elaboration.

Another question is **how to show that the funding is unrelated to lobbying**? According to the Commission, a CSO receiving foreign funding does not need to register if the entity would receive such funding regardless of whether it carries out specific interest representation activities[60]. How can the CSO demonstrate that it has received the funding without strings attached? Or is the burden of proof on the national authority to show that the donor has attached strings to the funding?

[59] https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/eu4h/wp-call/2023/call-fiche_eu4h-2023-og_en.pdf. Point 1(11) of an opinion by the EU Economic and Social Committee on CSO funding shows that in financial Regulation the term "operating grant" is used to refer to funding under direct management, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023IE1399.

[60] Recital 27 of the proposal.

8. ATTRIBUTION OF CIVIL SOCIETY ORGANISATIONS

KEY FINDINGS

There is no guidance in the Directive on how to determine when a CSO's activities demonstrate a link to interest representation on behalf of a particular country and should be attributed to a third-country government and when the CSO is simply conducting interest representation of its own mission.

This determination must be made on a case-by-case basis, which should enable consideration to be given to the CSO's statutory mission. However, the role of funding from a third-country government in the attribution decision must be clarified.

IMCO Committee: *Given a CSO's statutory mission to represent a diffuse interest of certain groups – or in some cases, even of civil society/civic space in general or their own interest – when could any of their activities be attributed to a 'third country entity' to demonstrate a link of "interest representation" of that country rather than an interest representation of those groups or their own CSO mission?*

The above text contains two distinct questions:

First, how do we know that a CSO is engaging specifically in interest representation and is not simply doing other activities? The Directive states that "**A clear and substantial link** should exist **between the activity and the likelihood that it would influence the development, formulation or implementation of policy or legislation, or public decision-making processes**, in the Union"[61]. To determine the existence of such connection, the Directive says that **all relevant factors should be considered**, such as the content of the activity, the circumstances in which it is conducted, its objective, how it is carried out, and whether it is part of a systematic or sustained campaign[62].

It seems difficult for a CSO (or any other entity, for that matter) to argue that its activities are not interest representation. Although there is a requirement for a "clear and substantial" link, **almost any activity has the potential to impact policymaking**.

Second, if the CSO is conducting interest representation, how do we know that it is doing so on behalf of a third-country government and is not simply collaborating with a third-country government in another way? For example, if a human rights CSO (whose statutory mission is to improve girls' lives worldwide) coordinates with a non-EU government to stop female genital mutilation and publishes a policy paper online, is it conducting interest representation activities on behalf of this foreign government?

This is where we return to the attribution process, which was discussed in detail above (Q1). The attribution mechanism means that in certain cases, a CSO does not act in its own statutory mission but acts as an intermediary for the third-country government. As argued above, **there are no clear criteria for when a CSO's or any other entity's interest representation activities can be attributed to a third-country government**. The Commission notes that this determination must be made on a case-by-case basis. Although this case-by-case approach was criticised above for its vagueness, it does at least allow **authorities to consider various factors, including the statutory missions of CSOs, when making attribution decisions**.

61 Recital 17 of the proposal.

62 Ibid.

Does the assessment change if the non-EU government has given the CSO both a structural grant and a project grant to raise awareness about female genital mutilation? As noted above, structural grant as core funding falls outside the scope of the Directive if the CSO's interest representation activities are unrelated to funding[63]. However, the project grant, particularly if used by the CSO to raise awareness, seems to fall within the Directive's scope.

Are CSOs going to be (disproportionately) impacted in potential attribution cases, more so than, for instance, SMEs? The Commission acknowledges that **the Directive "could restrict the freedom of expression of entities whose action can be attributed to a third country government** (such as a private entity controlled by a third country)"[64]. Whether CSOs' statutory mission to represent diffuse interests could lead to their activities to being more often attributed to third-country governments than those of SMEs is hard to predict, but given the case-by-case determination, a CSO's statutory mission could be given special regard when making an attribution decision. However, the role of funding from a foreign government in the attribution decision needs to be clarified[65].

[63] If the grant is used to pay a human rights officer's salary and this officer prepares a policy paper for the CSO, is the funding related to interest representation activities?

[64] Explanatory Memorandum, p. 22.

[65] As noted above with reference to Q1, in Australia, funding can never serve as the sole reason for attribution.

9. DIPLOMATIC ACTIVITIES

KEY FINDINGS

Most foreign governments conduct diplomatic work through their respective embassies and missions in Brussels and national capitals, relying on formal structures and bureaucratic procedures associated with state-run diplomacy. The Directive does not concern such diplomatic activities.

When third-country governments outsource (part of) their diplomatic activities by hiring consultancy firms to promote their interests within the EU, this outsourcing falls within the Directive's scope. A potentially more complex situation arises when interest representation combines industrial interests and foreign political goals, making it difficult to distinguish whether firms are acting on their own behalf, on a third-country government's behalf, or in cooperation with, or as co-opted forces for, a third-country government.

The non-applicability of the diplomatic exception when foreign governments hire interest representation services in the internal market should be clarified. Additional guidance on how to address situations when business and foreign policy interests are combined is needed.

IMCO Committee: *There is a difference, in the proposal, between interest representation activities on behalf of third countries and diplomatic activities, which are excluded from the scope. Those diplomatic activities are set out in the Vienna Convention on Diplomatic Relations and include activities to promote friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations. For these diplomatic activities other tools are available in the context of relationships among States (such as the declaration of persona non grata). Is the line between interest representation activities on behalf of third countries and activities related to the exercise of diplomatic relations clearly drawn up or further description should be sought in the proposal?*

Most foreign governments carry out diplomatic work through their respective embassies and missions in Brussels and national capitals. They rely on formal structures and bureaucratic procedures commonly associated with state-run diplomacy[66]. States lobby other governments on trade[67], foreign policy (for instance to improve their human rights ratings)[68], and, increasingly, to mitigate economic sanctions. US research has shown that States experiencing US sanctions for security and political issues will lobby the US government less than other States because this scenario suggests that lobbying is unlikely to influence US policies. States experiencing sanctions for economic issues, on the other hand, will lobby the US more as these targets would see a negotiated settlement as more feasible[69].

These **activities where governments try to sway other governments' decisions through lawful and legitimate means, such as official diplomatic negotiations, are excluded from transparency provisions**, including domestic transparency registers and the EUTR. Both the Australian FITS Act and

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66 Tidwell, A., 2017, The role of 'diplomatic lobbying' in shaping US foreign policy and its effects on the Australia–US relationship, 71(2) *Australian Journal of International Affairs*, 184-200, looking specifically at the Australian Embassy's lobbying of the US Congress.

67 You, H. Y., 2023, Dynamic lobbying: Evidence from foreign lobbying in the U.S. Congress, 35 *Economics & Politics*, 445–469. Diplomats are effective trade and investment promoters. By gathering information from interest groups, they engage with the goal of supporting the commercial interests of their home states' firms operating abroad, see Thrall, C., 2024, Informational lobbying and commercial diplomacy, *American Journal of Political Science*. Available at: https://doi.org/10.1111/ajps.12873. Diplomats receive information on a range of non-commercial issues such as human rights protection, environmental sustainability, and development aid from NGOs that are active in the host state.

68 Pevehouse, J. C. W., and Vabulas, F., 2019, Nudging the Needle: Foreign Lobbies and US Human Rights Ratings, *International Studies Quarterly*, 63(1), 85–98.

69 Peksen, D. and Peterson, T. M., 2023, US Sanctions and Foreign Lobbying of the US Government, *Political Research Quarterly*, 76(1), 444-59.

the US FARA also exempt diplomatic relations. Such a diplomatic exception does not appear to have caused any problems. Like its national and international peers, the Directive also excludes "activities carried out directly by a third-country entity […] that are connected with the exercise of official authority, including activities related to the exercise of diplomatic or consular relations between States or international organisations"[70].

It is not clear how many diplomatic missions have an in-house lobbying capacity to take care of diplomatic relations, and **diplomats may outsource their activities to paid lobbyists**[71]. For instance, research shows that foreign governments often hire US lobby firms to promote their trade related interests[72]. Another recent study shows that US-based lobbying firms are in high demand with authoritarian regimes who seek to maximise publicity and stabilise support. This seems to pay off, because the use of PR firm increases subsequent US state visits to the country[73].

When a foreign country operates outside official diplomatic channels, by using a third-party representative, their attempt to influence may be concealed. This is why it is important that **the diplomatic exception does not cover the outsourcing of diplomatic relations**. By including third-country governments who act outside diplomatic channels, the Directive aligns with the US FARA, the Australian FITS Act and the EUTR. As of 2021, consultancy firms must register any third-country government clients with the EUTR[74]. The fact that the diplomatic exception does not extend to **situations where diplomats hire services in the internal market should be spelled out in the Explanatory Memorandum or the Directive's recitals**.

Foreign governments seeking lobbyists in the EU have contributed to the creation of a marketplace. There is no information on how common it is for *lobbying firms to proactively seek* foreign governments as clients. What is, however, clear is that some interests are, for the time being at least, banned from this marketplace on the basis of security and strategic interests. For instance, according to a 2022 Council decision, lobbying firms are prohibited from providing business and management consulting or public relations services to the Government of Russia or legal persons, entities or bodies established in Russia[75].

A potentially more complex situation occurs when **interest representation combines industrial interests and foreign political goals** (of an authoritarian regime)[76]. A foreign government may combine its own political goals and business interests under the diplomatic exception. There is little that can be done about this in the context of the Directive. **It thus becomes difficult to clearly distinguish whether firms, for instance, speak on their behalf, on a third-country government's behalf, or act in cooperation with, or as the co-opted forces of, a third-country government**[77].

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70 Article 3(2)(a) of the proposal.

71 Tidwell, 2017, 185. While professional lobbyists have an in-depth understanding of the host country's decision-making system, they have limited knowledge about their client country. They do not typically hold a security clearance for the country they represent, which makes it more difficult to engage in in-depth discussions regarding particular pieces of legislation.

72 Gawande, K., Krishna, P., and Robbins, M. J., 2006, Foreign lobbies and U.S. trade policy, *Review of Economics and Statistics*, 88(3), 563–571.

73 Scharpf, A., Gläßel, C., and Dukalskis, A., 2024, *Dictatorships and Western Public Relations Firms*, Working Paper. Available at: https://www.dropbox.com/scl/fi/xk6b6ykobnxv9yiyg0ttn/Dictators_PR_Firms.pdf?rlkey=iq7kxl7z3qwv43u67pnaeqpfn&e=1&dl=0.

74 Article 4(2)(d) of the 2021 Interinstitutional Agreement.

75 Article 1(7) of Council Decision (CFSP) 2022/884 of 3 June 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 153, 3.6.2022, p. 128. In the US, see the 2006 Global Terrorism Sanctions Regulations by the Office of Foreign Assets Control under the US Treasury Department which strictly restrict lobbying and other official dealings on behalf of sanctioned entities by law firms and other lobbyist group, see Peksen and Peterson, 2023.

76 European Parliament, 2022, European Parliament resolution of 9 March 2022 on foreign interference in all democratic processes in the European Union, including disinformation (2020/2268(INI)), 118, OJ C 347, 9.9.2022, p. 61.

77 Hägel, P. and Peretz, P., 2015, States and Transnational Actors: Who's Influencing Whom? A Case Study in Jewish Diaspora Politics during the Cold War, 11(4) *European Journal of International Relations,* 467-493; Koinova, M., 2012, Autonomy and Positionality in Diaspora

For instance, as illustrated in Table 3, if a foreign firm hires a consultancy firm in Brussels to lobby in select national capitals, the firm can represent a) its own interests, b) those of the third-country government, or 3) both. In the first case, the Directive would not apply, although the consultancy firm would have to require their clients to specify whether they are a third-country entity (Article 5). In the second case, the activities of the firm should be attributed to the third-country government. In the third case, it is not clear whether the criteria for attribution would be fulfilled, and the context in which the company acts needs be taken into account.

Table 3: The impact of the types of interest on the Directive's applicability

Type of interests	Registration	Service provider
Own commercial interests	N/A	Art 5 verification
Those of third-country government	Attribution	Disclosure
Both	Possible attribution	Possible disclosure

Source: Author's own elaboration.

Politics, 6(1) *International Political Sociology*, 99-103; Walt, S. and Mearsheimer, J., 2006, *The Israel Lobby and U.S. Foreign Policy*, KSG Faculty Research Working Paper Series RWP06-011.

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This analysis discusses specific issues regarding the proposal for a Directive on the transparency of third-country lobbying. It highlights complex questions in relation to civil society organisations and the need for uniform implementation and effective judicial protection. If designed and implemented well, the Directive could establish a transparent framework for foreign governments to engage in lobbying within the EU.

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