Proposals for the Regulation of Lobbying in Malta: A Summary

Introduction

Article 13(1)(f) of the Standards in Public Life Act obliges the Commissioner for Standards in Public Life to make recommendations on the regulation of lobbying.

In partial fulfilment of this obligation, the Commissioner issued a consultation paper on 28 February 2020 setting out proposals for the regulation of lobbying. This document presents a summary of the proposals. The full consultation paper is available at https://standardscommissioner.com/other-documents/.

The consultation period is being extended to 31 May 2020. After the end of this period, the Commissioner may revise his proposals in the light of public feedback. He will then present them to the government as formal recommendations under article 13(1)(f) of the Standards in Public Life Act.

What is lobbying, and why regulate it?

The term "lobbying" refers to efforts by private individuals and entities to influence government decision-making in their favour. Lobbying is a concern in many countries because, if it is not regulated, it can result in private interests gaining excessive influence over government decision-making, to the detriment of the general public. Effective regulation of lobbying will result in greater transparency and a better standard of governance. It should also serve to minimise trading in influence, which is a crime.

A new law to regulate lobbying

The Commissioner is proposing that lobbying should be regulated through the enactment of a new law to be entitled the Regulation of Lobbying Act.

Key definitions and provisions in this Act should be set out in schedules. The Act should provide for the schedules to be amended by means of legal notices, in keeping with normal legislative practice in Malta. This would make it possible to fine-tune the Act and to gradually extend its scope over time as experience is gained in its administration.

A brief overview of the proposed Act

The Commissioner's proposals can be briefly summarised as follows.

- Ministers, parliamentary secretaries, and the heads and deputy heads of their secretariats should be required to compile a *Transparency Register* setting out details of their contacts with lobbyists. This register should be accessible to the public.
- Some lobbyists should be required to register in a *Register of Lobbyists* and to submit regular returns about their lobbying activities. This register too should be accessible to the public.
- All lobbyists, including those who are not required to register, should be subject to a *code of conduct for lobbyists*.
- Any person who makes *relevant communications* on *relevant matters* to *designated public officials* is a lobbyist for the purposes of the Act. See the detailed explanation of these terms below.
- This definition includes not only lobbyists who act on behalf of third parties (the classic understanding of the term "lobbyist") but also persons who lobby on their own behalf or on behalf of an organisation of which they form part. However, it excludes persons who communicate with public officials on their own private affairs, unless those affairs relate to development permits, the zoning of land, or the use of public funds, land and other resources.

Who should administer the law?

There should be a minister responsible for the administration of the Act, in accordance with normal practice. However, the operation of key aspects of the Act and its enforcement should be entrusted to the Commissioner for Standards in Public Life, who is an independent officer appointed on the basis of a parliamentary resolution with the support of at least two thirds of all MPs.

The Commissioner for Standards should maintain the Register of Lobbyists and enforce the requirement for lobbyists to register and submit regular returns in line with the Act. The Commissioner should also enforce the requirement for designated public officials to list details of communications with lobbyists on relevant matters.

Power to amend the schedules of the Act should be assigned to the minister, acting on the Commissioner's advice. The Commissioner should also keep the whole Act and its implementation under review and make recommendations from time to time for its improvement.

The definition of lobbying in detail

The Act should define lobbying as any *relevant communication* on a *relevant matter* to a *designated public official*.

A *relevant communication* is a communication that:

(a) may be written or oral;

(b) deals with a relevant matter; and

(c) is made personally (directly or indirectly) to a designated public official.

Relevant communications can include informal meetings, correspondence using unofficial email accounts, and messages by SMS, WhatsApp, and similar applications.

A *relevant matter* means any matter relating to –

(a) the initiation, development or modification of any public policy, action or programme;

(b) the preparation or amendment of any law or other instrument having the force of law;

(c) the award of any grant, loan or other form of financial support, and any contract or other agreement involving public funds, public land (including concessions of public land) or other public resources;

(d) the grant of any license, permit or other authorisation; and

(e) the award of development permits and the zoning of land.

Relevant matters include the implementation or non-implementation and the enforcement or non-enforcement of a policy or decision that falls within the above-mentioned categories.

Relevant matters do *not* include:

(a) communications by or on behalf of an individual concerning his or her own private affairs;

(b) formal applications for grants, loans, contracts, authorisations, licenses or permits to officials whose duty it is to handle such applications in accordance with normal procedures, and communications with those same officials concerning the applications, once made;

(c) diplomatic relations (communications by or on behalf of other states and supranational organisations);

(d) requests for factual information;

(e) submissions as part of a public consultation process or on summons by a public body in the course of its duties, where such submissions are made public either immediately or on the conclusion of the process;

(f) trade union negotiations;

(g) communications which, if disclosed, would pose a risk to the safety of any person or the security of the state;

(h) communications by public bodies or by public officials (including members of official boards) in their official capacity;

(i) communications by or on behalf of religious entities and organisations;

(j) communications by or on behalf of political parties; and

(k) communications that are already in the public domain.

All these exceptions, apart from (b), should not include communications concerning development permits, the zoning of land, concessions of public land, and the use of public funds, land and other resources. So, to take an example, if a private individual were to speak to a designated public official about a development permit concerning his or her own private property, it would still be considered lobbying. The same applies to religious bodies and political parties. Submitting an application for a development permit through the normal channels does not count as lobbying, but speaking to a minister in the hope of getting the permit approved does.

The following are *designated public officials*:

(a) the Prime Minister, ministers, and parliamentary secretaries;

(b) other members of the House of Representatives;

(c) the heads and deputy heads of the secretariats of ministers and parliamentary secretaries;

(d) the Principal Permanent Secretary, permanent secretaries and directors general in the public service of Malta;

(e) mayors, other local councillors, and executive secretaries in local councils;

(f) chairpersons and chief executive officers in companies owned by the state, government agencies, and government entities as defined in the Public Administration Act;

(g) members of the Executive Council, the Planning Board and the Planning Commission within the Planning Authority; and

(h) members of the board of the Environment and Resources Authority.

Registration as a lobbyist

Any person who makes a relevant communication on a relevant matter to a designated public official is thereby a lobbyist. "Person", in this context, means both a natural person (an individual) and a legal person (a group or organisation).

However, not all lobbyists should be obliged to register in the Register of Lobbyists. The requirement to register should apply only to the following:

(a) persons engaged by third parties to make relevant communications on relevant matters to designated public officials on their behalf (that is to say "professional lobbyists");

(b) non-government organisations that exist primarily to take up particular issues ("pressure groups"); and

(c) representative bodies, that is to say bodies whose primary aim is to represent the interests of their members.

Such persons (again, understood to include both individuals and groups) must register in the Register of Lobbyists within fourteen days from engaging in an initial lobbying activity. The registration is a prerequisite for their engagement in lobbying activities after this period.

Any registered person may file a statement that it has ceased to engage in lobbying activities in order to deactivate their registration in the Register. However, such a person must reactivate its registration before engaging in further lobbying activities in future.

The Register of Lobbyists should be maintained by the Commissioner for Standards in Public Life. It should be online and open to the public for viewing free of charge. It should contain each registrant's name, contact details, business or main activities, and company registration number (where applicable). It should also include returns by registrants setting out the following details on a quarterly basis:

(a) the type and extent of the lobbying activities undertaken;

(b) the clients on behalf of whom such activities were carried out;

(c) the designated public officials who were contacted;

(d) the subject matter of these communications and the results they were intended to secure;

(e) if the registrant is a body, the name of the individual who had primary responsibility for carrying out the lobbying activities; and

(f) the name of any individual who is or has been a designated public official and who is carrying out lobbying activities on behalf of the registrant.

The Standards Commissioner should be empowered to direct registrants to make corrections or supply missing information, either in their basic data or in their quarterly returns, where this is necessary. Failure to comply should give rise to the possible application of sanctions.

However, the Commissioner should have the power to withhold from the public any personal data in the Register of Lobbyists to prevent such data from being misused or to protect the safety of any individual or the security of the State. In this context, "personal data" refers to information about natural persons only, not legal persons. The Commissioner should also have the power to withhold information that, if disclosed, could have serious adverse effects on the financial interests of the state, the national economy, or the business interests of any person including the registrant's own interests.

A code of conduct for lobbyists

The Act should include in its schedules a code of conduct for lobbyists. The code should apply to all lobbyists, not only those who are obliged to register in the Register of Lobbyists. The code should require lobbyists to:

(a) demonstrate respect for public bodies;

(b) act with honesty, integrity and good faith;

(c) ensure the accuracy of information communicated to designated public officials;

(d) disclose information about lobbying activities as required by law, while otherwise preserving confidentiality as appropriate; and

(e) avoid improper influence (such as giving gifts, benefits and hospitality to designated public officials).

There should be appropriate and proportionate sanctions for breaches of the code.

Restrictions on lobbying by former public officials

The Act should bar certain designated public officials from carrying out lobbying activities for a set term after they cease to hold office, as follows.

Ministers, parliamentary secretaries and the Principal Permanent Secretary should not be permitted to carry out lobbying activities for a period of three years after they cease to hold office.

Members of the House of Representatives, permanent secretaries, directors general in the public service, and the chairpersons and chief executive officers of government companies, foundations and other entities should not be permitted to carry out lobbying activities for a period of one year after they cease to hold office.

Transparency Register

The Act should oblige ministers, parliamentary secretaries, and the heads and deputy heads of their secretariats to establish a Transparency Register in which they should list details of all relevant communications as defined above. Thus if (for example) an individual or body holds a meeting with the head of a minister's secretariat, and that meeting deals with a relevant matter as defined by the Act, the head of the minister's secretariat would be obliged to record it in the Transparency Register.

The Transparency Register should be freely accessible to the public. It should include the following details:

(a) the name of the persons (including legal persons) with whom each relevant communication was held;

(b) the subject matter of the communication;

(c) in the case of a meeting, the date and location, the names of those present, and who they were representing; and

(d) any decisions taken or commitments made through the communication.

This proposal builds on the recent commitment by Dr Aaron Farrugia, Minister for the Environment, Climate Change and Planning, to publishing a register of his meetings with stakeholders.[1]

As with the Register of Lobbyists, the Commissioner for Standards in Public Life should have the power to direct that corrections should be made, or missing information added, to the Transparency Register. There should similarly be the possibility of sanctions in the case of non-compliance.

It should also be possible for information in the Transparency Register to be withheld from the public in the same circumstances that information in the

[1] "New environment minister plans to log and publish all stakeholder meetings", *Malta Today*, 19 January 2020. Available at https://www.maltatoday.com.mt/news/national/99831/new_environment_minister_plans_to_log_and_publish_all_stakeholder_meetings#.XlfcX6hKiUl.

Register of Lobbyists can be withheld, provided that the Commissioner for Standards gives his consent.

Related changes to the code of ethics for ministers

As noted earlier, relevant communications can include informal meetings, correspondence involving unofficial email accounts, and messages through other applications. However, the Commissioner for Standards intends to propose that the code of ethics for ministers and parliamentary secretaries, which is set out in the second schedule of the Standards in Public Life Act, should include the following requirements:

(a) where possible, meetings with persons who have an interest in obtaining permits, authorisations, concessions or other benefits from the state should be held in the presence of officials; and

(b) ministers and parliamentary secretaries should not conduct official business through unofficial email accounts.

These amendments will be proposed by the Standards Commissioner as a separate initiative in terms of the Standards in Public Life Act.

Sanctions for non-compliance with the Act

The Act should provide for two levels of sanctions: administrative fines to be levied by the Commissioner, and criminal penalties imposed by the courts.

The Act should set out the range of penalties which can be imposed by the Commissioner and ensure that the person or body subject to the penalty is given the opportunity to make representations before the penalty is imposed. The Act should also give the person or body recourse to the courts as an alternative to paying the administrative penalty.

The Act should also provide for the possibility of criminal action against persons and bodies who fail to settle an administrative penalty once it becomes definitive. This would, however, be without prejudice to the possibility of action being taken under ordinary criminal law in cases where noncompliance with the Act also constitutes an offence in terms of such law.

Office of the Commissioner for Standards in Public Life
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