

Summary of Legal Opinion by Alberto Alemanno

There is an ongoing debate, in the context of the inter-institutional agreement on the lobby register, about the extent to which additional transparency measures might affect the free mandate of MEPs. As the EP legal services prepare their assessment, we commissioned a legal opinion from Professor Alberto Alemanno, Jean Monnet Chair of EU Law at HEC Paris, to get some clarity on the issue. His full legal opinion can be downloaded here <http://extranet.greens-efa-service.eu/public/media/file/1/5204>

This is a summary of its key points. The conclusion is that the “freedom of the mandate” is actually reinforced, rather than impaired, by lobby transparency obligations. In addition, the proposed lobby register is needed to implement the existing transparency obligations in the Treaties.

1. What is the “free mandate” and how does that relate to the lobby register, legally speaking?

The free and independent mandate of MEPs is recognised in both primary and secondary law. Since the proposed Inter-institutional agreement on the Transparency Register complements and implements various Treaty provisions by giving full meaning to them, it primes – as a matter of principle – secondary law, including the Members' Statute and the Staff Regulations, as well as the Rules of Procedure.

In any event, the proposed IIA does not actually conflict with any of the provisions of these acts. In addition, the proposed IIA operationalises rather than extending the existing transparency obligations stemming from the Treaty. Indeed, it develops and complements obligations of primary law (e.g. obligation of transparency) that already govern the Statute and its interpretation.

However, the Transparency Register IIA must comply with the provisions of primary law on the free mandate. The specific provisions are worth quoting directly, for the sake of clarity:

- Article 6(1) of the 1976 Act concerning the election of Members by universal suffrage stipulates that “*Members of the European Parliament shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate.*”
- Article 8 of the Protocol on Privileges and Immunities states that “*Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.*”

As can be read above, the free mandate is designed to allow for Members to freely express their opinions and to vote and exercise their mandates without external interference. But this does not exempt them from any obligations. For instance, they still have to fill in an assets declaration and they still have to abide by certain standards of behaviour. Nothing in those provisions prevents the institutions from regulating to introduce better transparency obligations. On the contrary, the Treaty obliges the institutions to aim at high standards of transparency (articles 1, 10 (3), 11 (1-2) TEU and 15 (1 and 3) TFEU). A “free mandate” is therefore not an absolute freedom, nor should it mean freedom from accountability.

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2. Transparency is a proportional and necessary part of the free mandate of MEPs

As argued above and in the legal briefing, legally speaking, greater transparency measures cannot be considered a violation of the laws on the freedom of the mandate of MEPs. Even considering that lobbying transparency could be a limit or “instruction” on the freedom of the mandate, this would not mean that it cannot be applied at all: limits can always be applied, as long as they are proportional.

The following criteria therefore have to be fulfilled:

1. **Suitability:** is the measure appropriate for attaining the legitimate objective of lobbying transparency?
2. **Necessity:** if there is a choice between several appropriate measures, the least onerous one should win.
3. **Advantages v disadvantages:** There must not be disproportionate disadvantages caused by the measure that would run counter to the aims pursued.

3. It is not a violation of the free mandate if MEPs must refuse meetings with unregistered lobbyists

Some consider that it would be a violation of the free mandate of MEPs to enact a policy so that MEPs must refuse invitations from lobbyists that are under the scope of the transparency register but have failed to fill in the online form.

On the contrary: The proposed Transparency Register is **needed** to implement the existing transparency obligations in the Treaties. Plus, the European Parliament has already adopted in its Rules of Procedure the “systematic practice of only meeting interest representatives that have registered in the Transparency Register”.

The table below summarises the main arguments why obliging lobbyists to register before meeting MEPs is not a disproportionate violation (if at all) of the freedom of the mandate of MEPs.

Refusing meetings with unregistered lobbyists	
Suitability	<ul style="list-style-type: none"> • The adoption of a mandatory lobby register is necessary to fulfil the objectives of the Treaty on transparency and openness. It has been demonstrated that the current voluntary system is not delivering, hence the recognition by the Commission of the need to make it ‘mandatory’. • An online register that can be filled in from anywhere, which provides information about who is lobbying, on what, and with which budgets, is a suitable tool not only for enhancing transparency for citizens, but also for ensuring that MEPs can easily identify the identity of interest representatives they meet, so they know exactly who they’re talking to and what their interests are. It increases the level of information for MEPs about the interest representatives they discuss with. The proposed IIA would therefore enhance – rather than limit – Members’ ability to inform themselves. It would therefore help MEPs in the exercise of their free mandate.
Necessity	<ul style="list-style-type: none"> • The EP legal services suggested in 2013 that a mandatory legislative footprint might be less burdensome on the free mandate of MEPs. However, this would not be sufficient to achieve the objectives of openness and transparency because it applies only to rapporteurs, whereas the Treaty obligations apply to all MEPs. A mandatory register is therefore legally necessary. • It should be remembered that we are talking only about certain types of interaction (cfr. Article 5 of the proposed IIA). There is no onerous proposal to ban all communications, or to ban all meetings, simply a requirement that the lobbyist fill in an online form prior to certain types of interaction.
Advantages v. Disadvantages	<ul style="list-style-type: none"> • The disadvantages for MEPs are minimal. Members would remain entirely free to meet the interest representatives they consider appropriate as long as the latter fulfil the requirements imposed by the proposed IIA. The Members’ free and independent mandate remains unaffected: Members do still decide entirely independently to what extent they will take account of opinions originating from stakeholders’ encounters. • One must once again observe that these requirements are required for certain types of interaction only. • The registration process takes roughly only 4 hours to fill in, and is updated only once a year. In case of absolute need, if 4 hours a year to deliver transparency is seen as overly burdensome, a “light” registration form could also be put in place for small lobby groups, or an exception introduced to exclude those that spend little time on lobbying or who have a small annual budget.

As a result, the requirements imposed by the proposed IIA must be deemed proportionate with the aims they pursue and therefore compatible with the exercise of the Members' free and independent mandate. The requirements do not fall under the "instructions" forbidden by Article 6 (1) of the 1976 Act. Such limitation respects both acts of primary law at stake that are the 1976 Act and the PPI.

4. Lobby transparency measures can also be applied to informal groupings of MEPs and their assistants

Article 295 TFEU allows institutions to organise their internal functioning. An IIA based on this article would also bind the political groups in the European Parliament, and legally speaking it primes over the Rules of Procedure. This means that, since the conditions of the IIA would apply to individual Members, it would logically also extend to informal groups and intergroups without the need to amend the Rules of Procedure. The same conclusion can be drawn for political groups.

As for Parliamentary Assistants and group staff, here again, the Staff Regulations belong to secondary law, and hence the IIA would prime over them. As the Parliament legal services already determined in 2013, it is very straightforward to apply lobby transparency obligations to EP staff and assistants.

CONCLUSION

The conclusion is that the "freedom of the mandate" is actually enhanced and reinforced by better lobbying transparency, and that lobby transparency measures are actually required in order to fulfil the objective of the Treaty. Since the measures are clearly necessary and proportional, MEPs should take steps to ensure that the new lobby register is indeed as mandatory as possible. Improved lobby transparency is all legally possible, assuming there is political will.

Obliging lobbyists to register before they meet MEPs is not only necessary and proportionate in order to achieve the Treaty objectives of transparency, of a regular and open dialogue and of a public exchange of views, but it is also legally required by the very same Treaty provisions.

Members would remain entirely free to meet the interest representatives they consider appropriate, as long as the latter fulfil the requirements of the proposed IIA. They would still decide entirely independently to what extent they will take account of opinions originating from stakeholders' encounters, and would be better informed to do so. Finally, the requirements introduced by the IIA are required for certain – not all - types of interaction.

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