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Aleksandra Milićević*

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THE MANDATORY TRANSPARENCY REGISTER INITIATIVE – TOWARDS A BETTER GOVERNANCE OF LOBBYING IN THE EU?

Abstract

Lobbying practice is undoubtedly an important part of the decision-making process in the EU and due to that multiple measures are taken in order to create the adequate legal framework to ensure transparency and accountability of the lobbyist's actions. In view of the author's intention of assessing the development of the rules governing lobbying as well as the prospects and challenges of the potential transfer to the mandatory register, the scope, disclosure levels and enforcement mechanisms of the lobbying rules introduced so far at the EU level will be compared and analyzed. Even though these rules gradually became more coherent, providing greater transparency and improving the EU lobbying framework, the voluntary character continued to be threat for full transparency and consequently accountability of non-registrants and because of this the newest initiative aims at mandatory registration of those trying to influence the

* milicevicalex89@gmail.com, Department for legislative affairs, Ministry of Trade, Tourism and Telecommunications Belgrade Serbia.

EU institution and policy-making, including the Council for the first time. First challenge concerning the proposed measure, which is discussed, is the issue of the legal basis for legislation and in case of absence of such base, an inter-institutional agreement as a potential appropriate alternative will be examined. Finally, since the mandatory registration would have a significant impact on lobbyists, the content of the existing rules will probably require some adjustments potentially resulting in a narrower scope of the register, more detailed disclosure and stronger enforcement that could lead to a better governance of the EU lobbying, following the example of the USA federal framework.

K**eywords**: lobbying, transparency, register, regulation.

I Introduction

Lobbying is a dynamic phenomenon which is to the different extent part of every decision-making process[1] and recently has been object of many reforms, especially in Europe.[2] Since the lobbying significantly depends on political and institutional environment, the European Union due to its complexity constitutes a special ground for interest representation.[3] The integration process has created a unique decision-making procedure with a significant influence on the national legislation of MS.[4] This results in the vast number of lobbyists operating in Brussels. Statistically, the accurate estimation of lobbyists engaged in the EU policy-making and policy implementation is a challenge itself, nevertheless, according to the estimation of Corporate Europe Observatory there are around

[1] H. Hauser, European Union Lobbying Post-Lisbon: An Economic Analysis (2011) 29(2) *Berkeley Journal of International Law* 680, 682 <*http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1411&context=bjil*> accessed 24 February 2015.

[2] C. Holman and W. Luneburg, Lobbying and transparency: A comparative analysis of regulatory reform (2012) 1(1) *Interest Groups & Advocacy* 74, 77 <*http://www.palgrave-journals.com/iga/journal/v1/n1/full/iga20124a.html*> accessed 14 March 2015.

[3] J. Greenwood, *Interest representation in the European Union* (Palgrave Macmilian, Basingstoke, 2003) 29.

[4] M. A. Balosin, *The evolution of lobbying in the European Union - Is EU lobbying important for the European Public Space?* (Lambert Academic Publishing, Saarbrücken, 2013) 5; V. Miller, How much legislation comes from Europe? (*Research paper 10/62*, House of Commons Library, 2010) 1 <*http://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP10-62*> accessed 2 August 2015.

30,000 lobbyists in Brussels, comprising a billion euros worth industry.[5] Simultaneously with the increase of lobbyists operating in the European capital, the EU institutions recognize the need for a regulatory framework in order to ensure transparency, public scrutiny and trust in policy-making. The control system in place at this moment is on a voluntary basis and due to that carries a risk of being disproportionate in comparison to the above-mentioned size and influence of the industry.

The main focus of this article will not be the "art of lobbying",[6] but the law of lobbying and gradual development of the regulation of interest representation towards greater transparency, openness and accountability as ultimate objectives and democratic standards of good administration that the EU itself has considered important for lobbying regulation.[7] The special attention will be devoted to the initiative for a mandatory Transparency Register, which has been already considered on the several occasions at the EU level but it is now finally put high on the political agenda. In order to come to the conclusion whether this step could positively affect EU lobbying framework, the starting point will be the brief presentation of the historical development of EU lobbying regulation. Furthermore, the current voluntary system will be discussed in comparison to envisioned rules in light of their scope, level of disclosure, incentives and sanctioning system in order to assess evolution of the lobbying framework and identify its potential shortcomings. Additionally, the legal issues regarding potential transfer to the mandatory regime and uniform rules for the lobbyists who intend to influence the EU institutions, in particular European Commission (hereinafter: COM), European Parliament (hereinafter: EP) and the Council will be analyzed. Namely, the issue of legal basis, the potential and envisioned scope and content of mandatory framework will be examined with the special consideration of USA federal lobbying rules. Firstly, in order to properly understand the legal issues, the philosophy behind lobbying practice will be explained to the extent necessary.

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[5] I. Traynor, 30,000 lobbyists and counting: is Brussels under corporate sway? *The Guardian* (London, 8 May 2015) <*http://www.theguardian.com/world/2014/may/08/lobbyists-european-parliament-brussels-corporate*> accessed 10 December 2014.

[6] R. Van Schendelen, *The art of lobbying the EU: more Machiavelli in Brussels* (Amsterdam University Press, Amsterdam, 2013).

[7] European Parliament Legal Service, "Re: Possibility and modalities of mandatory registration of lobbyists" (Legal opinion) SJ-0662\13, 5 November 2013, (on file with author) [34].

The methodology of this article is primarily a legal analysis of relevant rules on the basis of the previous EU experience, various empirical researches conducted by different authors and examples of the good practices. However, due to the fact that lobbying requires the interdisciplinary approach since it combines legal and political aspects, political science literature on lobbying practice will be consulted. Additionally, in order to examine and recommend potential directions of development of the lobbying rules at the EU level, the comparative method will be applied in close relation to the USA federal system.

II Lobbying – a Sophisticated Game?

In order to understand the legal issues of lobbying regulation and monitoring, in the first place it is important to determine what is lobbying and how it is conducted along the policy cycle.[8] Defining the notion of lobbying is generally a complex issue and sometimes even controversial since there is a high diversity of actors and methods, making the task of creating one universal definition a challenge itself. Considering that there are many available theoretical definitions, only as a starting point in this article, lobbying will be defined as "an attempted or successful influencing of legislative-administrative decisions made by public authorities through the use of interested representatives".[9] Even though this definition is complementary to the legal definition used by the EU, it should be noted that legal definitions, differ considerably and should be custom-made since they are influenced by factors such as a particular political system and the aim of concerned regulation.[10]

The aim of the article is not the estimation of the pros and cons of lobbying as a phenomenon or its justification, instead the interest representation will be assessed legally as already existing practice. However, in order to understand how interest representation at the EU level works, especially since lobbying the

[8] D. Coen, Business lobbying in the European Union, in D. Coen and J. Richardson (eds.), *Lobbying the European Union: Institutions, actors, and issues* (Oxford University Press, Oxford, 2009) 146.

[9] Hauser (n 1) 682.

[10] M. Sady, The Legal Determinants of Lobbying in the United States and European Union (2012) 1(11) *Cracow University of Economics Discussion Papers*, 3, 14 <*http://uek.krakow.pl/files/common/dwm/stair-discussion-papers/CUEDP_011_SADY.pdf*> accessed 7 August 2015.

EU is a "moving target",[11] the different approaches to the main legislative EU institutions will be briefly explained.

1. Lobbying the European Commission

The COM became the primary target after the Single European Act (hereinafter: SEA)[12] due to its central role in policy initiation, formulation and implementation as well as its multiple access points.[13] Another very important incentive for lobbyist to follow this path is the fact that COM is "known to be approachable", partly because of its obligation to carry out broad consultations according to the Article 11 (3) TEU.[14] On the other hand, the COM's limited human and financial resources, which can be relatively disproportionate to its responsibilities in some policy areas,[15] can benefit from communication with entities which are able to provide technical policy input and details on feasibility.[16] The typical way in which contact and communication is performed *vis-à-vis* the COM are participation in the consultative committees, expert groups, issue-related events, direct lobbying through written communication and policy documents, informal meeting and phone calls.[17]

2. Lobbying the European Parliament

The lobbying activities towards the EP increased in 1979 with the first direct elections of the representatives and even more after the introduction of the co-decision procedure, elevating the EP to the same level as the Council.[18] Channels

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[11] The Brussels office s.a, Lobbying the EU – a practical guide to EU decision-making (Brussels, 2009) 30.

[12] eLabEurope - HEC-NYU Regulatory Policy Clinic, *The EU Transparency Register in 2014 and beyond* (Policy Report, 2014) 2 <*http://elabeurope.eu/transparency-register-review/*> accessed 25 Jun 2015.

[13] N. Nugent, *The Government and Politics of the European Union* (7th edn., Palgrave Macmillan, Basingstoke, 2010, 250.

[14] *Ibid*.

[15] K. Joos, *Lobbying in the new Europe, Successful representation of interests after the Treaty of Lisbon* (WILEY-VCH, Weinheim, 2011) 102; The Brussels office s.a, (n 11) 40; Greenwood (n 3) 180.

[16] Greenwood (n 3) 46; W. Chalmers, Trading information for access: informational lobbying strategies and interest group access to the European Union (2012) 20(1) *Journal of European Policy* 39, 49; S. Mazey and J. Richardson, Effective business lobbying in Brussels (1993) 5(4) *European Business Journal* 14, 16.

[17] Nugent (n 13) 250.

[18] Joos, (n 15) 109.

of interest communications focus mostly on MEPs, in particular, the rapporteur and shadow rapporteur, but also on members of relevant committees, political parties and intergroups. Other available routes include administrative staff and assistants, the secretariats of political groups or the EP's research services.[19] In the process of lobbying the EP as a directly elected institution, information about compressing public opinion and social impacts are frequently added,[20] linking the specific issue with wider public good via broader social or economic alliances.[21]

3. Lobbying the Council

The impression is that the Council receives less attention from lobbyists despite its crucial role in legislative procedure since it leaves little room for a direct approach.[22] It owns its reputation of the least accessible EU institution to several organisational reasons such as confidentiality of meetings, variety of configurations and lack of willingness or hesitation to make itself available for regulated or intensive interest representation.[23] However, the Council as the "guardian of national interests"[24] could be accessed through national routes via bottom-up process more easily.[25] However, there are still relevant entry points for interest representation including the Committee of Permanent Representatives of the Member States (hereinafter: COREPER), Ministers and civil servants, the Secretariat and the Presidency.[26]

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[19] W. Lehmann, The European Parliament, in D. Coen and J. Richardson (eds.), *Lobbying the European Union: Institutions, actors, and issues* (Oxford University Press, Oxford, 2009) 52; The Brussels office s.a (n 11) 48-54.

[20] D. Coen and J. Richardson, Learning to lobby the European Union: 20 years of change in D. Coen and J. Richardson (eds.), *Lobbying the European Union: Institutions, actors, and issues* (Oxford University Press, Oxford, 2009) 9; Greenwood (n 3) 46; Chalmers (n 16) 49.

[21] Coen and Richardson (n 20) 10.

[22] Nugent (n 13) 249.

[23] *Ibid*.; Mazey and Richardson, (n 16) 17.

[24] The Brussels office s.a (n 11) 50.

[25] Joos (n 15) 99.

[26] The Brussels office s.a (n 11) 61.

4. The Significance of Lobbying Diversity for its Regulation

Overall, it can be concluded from this brief presentation that the supply of the information to the decision-makers is a legitimate instrument. However, lobbying in practice depends on many factors, for example: issue at stake, national or European perspective, access point, procedural phase, size of the lobbyist, resources and ability to produce adequate information.[27] Legally, on the other hand, the above-mentioned specificities and variables are important elements when it comes to the determination of the directions of lobbying regulation. Namely, different organisational structure of the EU institutions, level of the openness and general attitude towards external inputs and their different role in decision-making should be reflected through regulation making at the same time the adoption of the uniform rules at the EU level and their implementation a challenge which keeps reoccurring through the process of development of the EU rules, as it will be pointed out in this article.

III The EU Entered the Lobby of Lobbying Regulation Palace

1. Why Regulate?

The lobbying regulation aims at building trust in the policy-making, ensuring level-playing field and accuracy of the provided information on the mutual benefit, giving citizens the possibility to know about lobbyists' interactions with the decision-makers.[28] In that the respect, when it comes to the legitimacy of lobbying and its role in decision-making, the central normative issues are transparency and accountability.[29]

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[27] H. Klüver, Informational Lobbying in the European Union: The Effects of Organizational Characteristics (2012) 23(3) *West European Politics* 491, 502; P. Bouwen, A Comparative Study of Business Lobbying in the European Parliament, the European Commission and the Council of Ministers *(MPIFG Discussion Paper* 02/7, 2007) 10-11 <*http://www.mpifg.de/pu/mpifg_dp/dp02-7.pdf*> accessed 4 February 2015.

[28] V. R Johnson, Regulating Lobbying: Law, Ethics, and Public policy (2006) 16(1) *Cornell Journal of Law and Public Policy* 1, 13-16 <*http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1103&context=cjlpp*> accessed 4 August 2015.

[29] S. Smismans, Regulating Interest Groups Participation in the European Union: Changing Paradigms between Transparency and Representation (2014) 39(4) *European Law Review* 470, 472.

However, the question whether the particular regulation will indeed produce desired effects in practice can be answered definitely once it is enforced. Nonetheless, there are certain empirically confirmed advantages of the regulatory approach to lobbying identified worldwide. Firstly, in the USA the major developments of the lobbying framework in the mid-70s and 90s were caused by scandals, which reinforced the theory that in this case transparency and accountability are ensured by strong lobbying legislation.[30] Additionally, the Council of Europe, which itself has an accreditation system, considers the regulation of lobbying as one way to combat potential negative impacts of lobbying, particularly the accountability and transparency concerns.[31] Furthermore, the OECD also underlined that "effective rules and guidelines for transparency and integrity in lobbying should be an integral part of the wider policy and regulatory framework that sets the standards for good public governance".[32]

On the other hand, the lobbying regulation might create an unnecessary administrative burden or a barrier for the citizens to approach their representatives.[33] From the economic point of view, lobbying regulation produces costs for lobbyists and public authorities in charge of implementation,[34] which is usually used as a justification not to introduce any rules or for a low-regulation.[35] Finally, the absence of lobbying regulation is also justified by the limited lobbying amount within the particular jurisdiction, sufficiency of lobbying self-regulation and by stakeholders' or political opposition.[36] The two former are no longer applicable at the EU level, due to the high concentration of lobbyists and the fact that idea of self-regulation was abounded as insufficient at

[30] R. Chari, J. Hogan and G. Murphy, *Regulating Lobbying: a global comparison* (Manchester University Press, Manchester, 2010) 113.

[31] European Commission for democracy through law (Venice Commission), "Report on Role of Extra-institutional Actors in Democratic Systems (Lobbying)" CDL-AD(2013)0119, 22 March 2013, 13.

[32] OECD, "Recommendation of the Council on Principles for Transparency and Integrity in Lobbying" C(2010)16, 18 February 2010, [7] <*http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=256&InstrumentPID=%20250*> accessed 25 March 2015.

[33] Chari, Hogan and Murphy (n 30) 144.

[34] *Ibid*. 130.

[35] Venice Commission, Report on Role of Extra-institutional Actors in Democratic Systems (n 31) 15.

[36] Chari, Hogan and Murphy (n 30) 139-140.

certain point. However, political support, especially from the Council, is a constant challenge.

All of this leads only to *a priori* conclusion that regulation of lobbying has the potential to enhance transparency and accountability. Nevertheless, there are examples of a slow start after the adoption of lobbying rules, even in some Member States (hereinafter: MS).[37]

2. History of the EU Lobbying Regulation

Even though interest groups have been part of the EU policy-making since the beginning of the integration, they relatively recently were structurally incorporated into the EU policy formulation.[38] However, the EP and COM had quite different approaches, adapted to their special roles in the decision-making.[39]

a) Lobbying Rules Introduced by the European Commission

The COM's effort started in 1992 with the Communication called "An Open and Structured Dialogue between the Commission and Special Interest Groups" which contained a non-binding list of minimum requirements for lobbyists' behavior that will become a leitmotif and foundation for all the subsequent rules.[40] The Communication strongly encouraged lobbyists to develop their own codes.[41]

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[37] J. Greenwood and J. Dreger, The Transparency Register: A European vanguard of strong lobby regulation? (2013) 2(2) *Interests Group & Advocacy* 139, 155.

[38] D. Obradovic, Good Governance Requirement Concerning the Participation of the Interest groups in EU Consultations, in D. Coen and J. Richardson (eds.), *Lobbying the European Union: Institutions, actors, and issues* (Oxford University Press, Oxford, 2009) 299; D. Obradovic and J. M Alonso Vizcaino, Good Governance Requirement Concerning the Participation of the Interest groups in EU Consultations (2006) 43 *Common Market Law Review* 1049, 1049.

[39] Greenwood (n 3) 72-73.

[40] Commission (EC), "An Open and Structured Dialogue between the Commission and Special Interest Groups" (Communication) SEC (92) 2272 final, 2 December 1992.

[41] E. Bony, Lobbying the EU: the search for the ground rules [1994] 3 *European Trends -Key Issues and Development for Business* 73, 76.

Later, at the beginning of 2000 the COM issued the Communication "European governance - A white paper" (hereinafter: EGWP)[42] and in the implementation phase of the EGWP, the COM through the Communication[43] formalised consultations with civil groups by adopting minimum standards including clear and concise communication, inclusion of all relevant parties, the awareness-raising publicity and adequate communication channels, sufficient time for planning and replies, acknowledgment of receipt of contribution and the publication of consultation results on the website.[44] Furthermore, the COM upgraded its existing database of interest groups by establishing an optional register named "the Consultation, the European Commission and Civil Society".[45]

Additionally, these non-binding rules were complemented with the self-regulation in order to ensure the effectiveness without discouraging engagement of external interests.[46] This resulted in two voluntary codes of conducts administrated by Society of European Affairs Professionals (SEAP) and European Public Consultancies Association (ESPAC) which were similar in character and scope.[47] In principle, these suffered from serious shortcomings, since none of these covered the majority of active lobbyists in Brussels, leaving under the radar players such as in-house lobbyists or those occasionally engaging in lobbying activities, especially law firms and think-tanks,[48] nor they addressed the issue of transparency towards general public[49] or established complaint mechanisms.[50]

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[42] Commission (EC), "European governance - A white paper" (Communication) COM(2001) 428 final, 25 July 2001, 1-2.

[43] Commission (EC), "Towards a reinforced culture of consultation and dialogue: General Principles and minimum standards for consultation of interested parties by the Commission" (Communication) COM (202)704 final, 11 December 2002.

[44] Obradovic and Alonso Vizcaino (n 38) 1049, 1055.

[45] Greenwood (n 3) 72.

[46] *Ibid*. 70.

[47] *Ibid*.

[48] *Ibid*.

[49] Obradovic and Alonso Vizcaino (n 38) 1068.

[50] Greenwood (n 3) 70.

b) Lobbying Rules Introduced by the European Parliament

The first serious attempt of the EP to regulate lobbying was in 1991,[51] but it was unsuccessful since the consensus could not be reached on the matter of definition of interest groups and discloser of financial interests, thus, along with the pressure of the following EP elections, the proposal was not even discussed at the plenary.[52] The second attempt in 1997 was more successful. The rapporteur Glyn Ford proposed as a solution in his report to simply avoid the above-mentioned definitional conflicts.[53] The lobbyists were described as "private, public or non-governmental bodies which can provide parliament with the knowledge and specific expertise in numerous economic, social, environmental and scientific areas" without mentioning their aim to influence the outcome of decision-making process or trying to clearly define who could be targeted by lobbying activity.[54] The EP's Rules of Procedure were amended in order to grant interest representatives a one-year pass in exchange for the acceptance of a ten-point code of conduct and registration making the EP the first EU institution which established an accreditation system in order to promote professional lobbying.[55] Even though this system was, legally speaking, also voluntary, in its effects it was often characterized by the EP as a *de facto* obligatory system.[56] Practically, this would be the case only when lobbyists wanted to have physical access to the EP's buildings, on the contrary, this did not prevent persons who are not registered to accede to MEPs or other officials outside the EP's premises or on case by case basis.[57]

Regarding the content of the above-mentioned rules, the Register of Accredited Lobbyists provided public alphabetical list of names of badge-holders as individuals and organisations they represent without further distinction of

[51] European Parliament, "Lobbying in the European Union: current rules and practices" (2003) Working Paper AFCO 104 EN, 36<*http://www.europarl.europa.eu/RegData/etudes/etudes/join/2003/329438/DG-4-AFCO_ET(2003)329438_EN.pdf*> accessed 15 May 2015.

[52] *Ibid*. 37.

[53] *Ibid*. 37.

[54] Chari, Hogan and Murphy (n 30) 52.

[55] European Parliament, Lobbying in the European Union: current rules and practices (n 51) 37.

[56] European Parliament Legal service, "Possibility and modalities of mandatory register of lobbyists" (Legal Opinion) SJ-0012\10, 25 March 2010, (on the file with the author) [7].

[57] *Ibid*.

different groups of lobbyists, detail about objectives, clients and financial information.[58] The EP's Code of conduct imposed several duties for lobbyists, namely, stating the represented interest, refraining from obtaining information dishonestly and claiming any formal relation with the EP in any dealing with third parties or circulating for profit copies of documents obtained from the EP to third parties as well as respecting internal rules, especially Staff Regulation when recruiting former MEPs.[59]

3. The European Transparency Initiative

Overall, the explained initial phase was itself a development and as an adaptation period, its main contribution was a preparation of lobbyists for the gradual introduction of more systematic rules.

The milestone of lobbying regulation was the European Transparency Initiative (hereinafter: ETI), launched on 5 November 2005. The COM's Vice-president, Siim Kallas during the announcement of the ETI highlighted the influence of the apparently 15,000 lobbyists in Brussels underlining that the problem was not the lobbying itself but the lack of adequate regulation, resulting in too deficient transparency in comparison to lobbyists' impact on policy-making.[60]

The suggested solution was a voluntary online registration system for all interest groups who wished to be consulted on the EU initiatives.[61] There were no privileges attached to registration, the proposed system was based on incentives, primarily, automatic notification about consultations in those areas indicated as lobbyist's specific interests.[62] Additionally, there are other advantages, such as boosted reputation and certain recognition of representativeness for specific, sector since the contributions from the non-registrants would be treated as of the

[58] European Parliament, Lobbying in the European Union: current rules and practices (n 51) 37 and Legal Opinion SJ-0012\10 (n 56) [13].

[59] R. Chari and G. Murphy, *Examining and Assessing the Regulation of Lobbyists in Canada, the USA, the EU institutions, and Germany* (Report, Department of the Environment, Heritage and Local Government, Dublin, 2007) 47, 48 <*http://www.environ.ie/en/Publications/LocalGovernment/Administration/FileDownLoad,14572,en.pdf* > accessed 28 July 2015.

[60] Balosin (n 4) 132.

[61] Commission, "European Transparency Initiative" (Green Paper) COM(2006) 194 final, 3 May 2006, 8.

[62] *Ibid*.

private individuals.[63] However, many considered that incentives were insufficiently strong to be the driving force behind the voluntary register, especially with such a high share of the Brussels-based lobbyists that follow the COM's activities on a daily basis anyway.[64]

According to the envisioned solution, upon the registration, the applicants needed to provide more information in comparison to the EP's register, in particular: who they represent, what is their mission and how they are funded as well as to subscribe to a code of conduct.[65] The COM correctly considered that declaration of relevant budget figures and breakdown on major clients and funding was proportionate and necessary for identification and assessment of the decisive forces behind lobbying activity, but it left the accurate calculation to the lobbyists.[66] The financial disclosure requirements were adapted to specific categories of registrants to reflect their nature.[67] The major problem with this approach is that the players themselves decide to which group they belong, what they consider as the interest representation expenses and how lobby expenditures or revenues are calculated and due to this arbitrariness reliability and comparability of otherwise very useful financial information are undermined.[68]

At the end of the process, the COM issued the Communication announcing the launch of the Register which officially started on 23 June 2008.[69] There were several exemptions, namely of the activities concerning the legal and other professional advice; activities of social partners and the activities in response to the COM direct request.[70] The subjects to registration were instead of individuals

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[63] M. Godowska, Democratic Dilemmas and the Regulation of Lobbying – the European Transparency Initiative and the Register for Lobbyists [2011] 14 *Yearbook of Polish European Studies*, Centre for Europe University of Warsaw 181, 190.

[64] Commission (EC), "The Follow up to the Green Paper European Transparency Initiative" (Communication) COM(2007) 127 final, 21 March 2007, 4.

[65] Commission, European Transparency Initiative (n 61) 8.

[66] Commission, The Follow up to the Green Paper European Transparency Initiative (n 64) 4.

[67] Obradovic (n 38) 308.

[68] W. Dinan, The Battle for Lobbying Transparency, in H. Burley *et al*. (eds.), *Bursting the Brussels Bubble* (ALTER-EU, Brussels, 2010) 145.

[69] Commission (EC), "ETI - A framework for relations with interest representatives (Register and Code of Conduct)" (Communication) COM(2008) 323 final, 27 May 2008.

[70] *Ibid*. 3.

as in EP's register, entities regardless of their legal status who are engaged in the interest representation with the exception of the local, regional, national and international public authorities.[71] Otherwise, rules governing the lobbyist's behavior resembled a lot to the EP's rules requiring beyond that provision of "the unbiased, complete, up-to-date and not misleading information to the best of lobbyist's knowledge".[72]

The exclusive self-regulation of lobbyists was no longer seen as a viable option since it would be difficult for the COM to outsource the responsibility for the implementation and monitoring of its code of conduct to external bodies.[73] Nevertheless, the registrants were still left with choice to comply alternatively with a comparable professional code, provided that they agree to hand it over to the COM on its request.[74] However, this polyphony was not followed with necessary rules on the functioning and coordination of these parallel systems.

Finally, the COM was entitled to apply corrective measure in case it established one or more violations of these rules.[75] If the infringement was found, the COM could impose temporary suspension from the Register for a set period or until the correction, as well as exclusion from its register for severe and persistent failures.[76]

In the past the EU policy-making and interaction with the interest representatives was depending sufficiently successfully on the trust policy and "naming and shaming" mechanism to constrain those who sought to abuse their insider status, but with increase of the number of lobbyists the informal regulatory system became less capable of ensuring effective monitoring and sanctioning.[77] The established system has been criticized from the start for being insufficient to ensure neither the high level of transparency nor the equal access to the COM and was perceived more as the beginning of the long journey to proper regulation.[78] Overall, despite the lack of details about operationalisation,

[71] *Ibid*.

[72] *Ibid*. 7.

[73] *Ibid*. 5.

[74] *Ibid*. 4.

[75] *Ibid*.

[76] Commission, ETI - A framework for relations with interest representatives (n 69) 5.

[77] Balosin (n 4) 137.

[78] Godowska (n 63) 196.

this was a very valuable step, especially for building the political support.[79] At this stage of development, the attention was drawn to the potential inter-institutional collaboration on lobbying regulation and creation of the COM's and the EP's joint register and code of conduct as one stop shop and an additional incentive for registration.[80]

IV The Positive Lobbying Framework in the EU - It is up to Lobbyist?

1. The Joint Transparency Register

The implementation of the COM's voluntary system faced certain challenges. Beside a slow-paced increase of registrants, the qualitative assessment showed that significant number of entries were inaccurate or had highly tenuous links with EU lobbying.[81] The monitoring system was relying on the limited official resources equivalent to just part of time of one Secretariat's employee and largely on external watchdogs and media.[82] The good example of external supervision was the famous case involving, apparently, one of the biggest lobbyists in Brussels, the European Chemical Industry Council (CEFIC) which declared an absurdly low figure, less than 50,000€ spent on EU lobbying and as a consequence of subsequent complaints it was temporarily suspended from the register for 2 months.[83] Even though this brought attention to the quality of the entries, it also manifested the insufficiency of sanctions and incentives, namely punishment in practice was more a reward, relieving those not listed in the register from reporting they key clients and generated revenues, leaving them completely out of any effective control.[84]

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[79] J. Greenwood, The lobby regulation element of the European Transparency Initiative: Between liberal and deliberative models of democracy [2011] 9 *Comparative European Politics* 317, 323-324.

[80] Commission, The Follow up to the Green Paper European Transparency Initiative (n 64) 6.

[81] J. Greenwood, *Interest representation in the European Unio*n (Palgrave Macmillan, Basingstoke, 2011) 60.

[82] *Ibid*. 61.

[83] W. Dinan, The Battle for Lobbying Transparency, in H. Burley *et al*. (eds.), *Bursting the Brussels Bubble* (ALTER-EU, Brussels, 2010) 145.

[84] O. Grimm, Transparenz und Lobbyismus *Die Presse* (Vienna, 21 July 2009) <*http://diepresse.com/home/meinung/kommentare/496840/Transparenz-und-Lobbyismus?direct=496847&_vl_backlink=/home/politik/eu/496847/index.do&selChannel=&from=articlemore*> accessed 3 August 2015.

In order to improve the existing registers, the High-Level Working Group was composed of the COM's and the EP's representatives. Even though the EP strongly argued for the mandatory framework to be agreed between the Council, COM and itself, since the Council did not join negotiations despite the reiterated invitations, the Working Group proposed a new common voluntary scheme for the EP and the COM, which was introduced through the Inter-institutional Agreement[85] (hereinafter: IIA).[86]

The scope of the Joint Transparency Register (hereinafter: JTR) was determined by the general definition of lobbying activity which was on the trace of the older COM's definition developed in the ETI, but it was followed by extensive *exampli causa* list of covered activities leaving less space for doubts and interpretation.[87] This was a step in a right direction since previously many denied being engaged in activities "carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions".[88] This time lobbying explicitly and irrespectively of the "channel or medium of communication used" included: contacting Members, officials or other staff of the EU institutions; preparing, circulating and communicating letters, information material or discussion papers and position papers; organizing events, meetings or promotional activities and social events or conferences, invitations to which have been sent to Members, officials or other staff of the EU institutions; voluntary contributions and participation in formal consultations.[89] These clarifications did not change the broad-based nature of registration, quite the contrary, all organisations and self-employed individuals, including academia, research institutions and representatives of sub-territorial public authorities, even networks, platforms or other forms of collective activity which had no legal status or legal personality but are source of organized

[85] Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policymaking and policy implementation OJ L 191/29, 22 July 2011.

[86] High-level Working Group on a Common Register and Code of Conduct for Lobbyists, "Joint statement regarding the progress achieved to date", 22 April 2009, 2 <*http://www.aalep.eu/sites/default/files/documents/Towards%20a%20Common%20Lobbyists'%20Register%20EC-EP.pdf*> accessed 21 March 2015.

[87] Balosin (n 4) 5.

[88] Agreement between the European Parliament and the European Commission OJ L 191/29 (n 85) [7].

[89] *Ibid*.

influence engaged in these activities were expected to register.[90] Furthermore, the activities excluded from the register's scope are also clarified, especially provision of legal and other professional advice.[91]

Although the JTR through registration of both, organisations and self-employed individuals, combined two prior approaches, it leaned more towards the COM's legacy by focusing on lobbying entities.[92] Registration of lobbyists as individuals, which was applied in case of the EP, could be more transparent solution because the public has the information about who is the person that lobby and is due to that responsible to comply with rules, but, on the other hand, it lacks the information concerning concrete interest represented and needs to be complemented by extensive reporting about clients. For example, according to the USA federal rules, lobbyist is an individual who needs to register either individually or, if one or more employees of organisations are lobbyists, by organisation on behalf of them.[93] On the other hand, organisations can be very complex entities, especially associations, which can blur lobbying activities of their constituencies. However, the problem is that this might be the only possibility in case of low specialization within the organisations, which is a possible scenario in the EU since the lobbying as a profession is still developing.[94] In general, the EU system is conditioned by its voluntary character, therefore the registrants are actual addressees of the provided incentives.

As a positive novelty, upon registration, the registrant should provide more details about their area of interest than before, including main legislative proposals covered by the lobbying activity in the preceding year.[95] In addition to this, all registrants should also declare amount and source of funding received from EU institutions.[96] Lastly, more elaborate rules on financial discloser required that professional consultants and law firms, besides the lobbying turnover, also provide the relative weight attached to their clients according to

[90] *Ibid*. [14].

[91] *Ibid*. [10].

[92] Greenwood and Dreger (n 37) 144.

[93] The lobbying Disclosure Act 1995 (USA) Sec. 4 (a) (1)-(2).

[94] Klüver (n 27) 505.

[95] Agreement between the European Parliament and the European Commission OJ L 191/29 (n 85) Annex II.

[96] *Ibid*.

the determined grid.[97] In spite of the possible resistance of clients, this could be beneficial, not only for those who are lobbied because they have more information about who contacts them, but also for general public to see real dimensions of lobbying, which otherwise could be exaggerated or undermined.

The Code of conduct annexed to IIA was basically a compilation of already existing EP's and COM's codes. The enforcement of the rules and a common complaint procedure was competence of the JTR Secretariat (hereinafter: JTRS) as team of officials from the EP's DG EPRS and the COM's Secretariat General operating under the coordination of the COM's Head of the Transparency Unit.[98]

The JTRS could in case of the upheld complaint impose measures ranging from temporary suspension pending the steps to address the problem to other stronger measure including the long-term suspension and removal from the JTR.[99] A persistent non-compliance with the code without change of behavior resulted in one year removal, while the serious, deliberate non-compliance led to two years removal, both also triggering the withdrawal of the EP access badge and ban on registration for the set period of time.[100]

Nevertheless, it is challenging to apply these rules since they are broad and based on legal standard such as "persistent or serious non-compliance", leaving unanswered the question whether the particular code's clause, such as "prohibition of obtaining information dishonestly", is a "serious breach" whereas, according to wording of provision, only one proven infringement would be enough for removal or it falls in the category of the "persistent non-compliance", which is repetitive and continuous?

Since the system is only as strong as its enforcement, there are some weak points as well as advantages of this institutional arrangement. Namely, from the perspective of public confidence in the lobbying process it would probably be a better solution to have an independent body in charge of the compliance

[97] *Ibid*.

[98] Secretaries General of the European Parliament and the European Commission, "Annual Report on the operations of the Transparency Register 2013", 2013, 6 <*http://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do?locale=en&reference=ANNUAL_REPORT*> accessed 27 July 2015.

[99] *Ibid*.

[100] *Ibid*.

monitoring while the existing system has some degree of impartiality.[101] On the other hand, it is certainly beneficial that control authority is familiar with the lobbying in practice.[102] However, the JTRS needs permanent and fully dedicated staff instead of a fluid structure made up of a team of officials from the EP and the COM, which meets on a weekly basis with apparently only the equivalent of four full-time staff mobilised at any one time to carry out its duties.[103] Furthermore, the available sanctions and their limitation only to suspension or removal from the register, which is on voluntary basis, is the biggest weakness of this system and was already identified along with two possible solutions, which were not just yet applied in this phase of development of the EU lobbying framework. Namely, there is the option either to have the mandatory registration, which would be prerequisite for lobbying or to have really strong incentives, which could compensate the legal order. In case of the voluntary system introducing stricter sanctions as a *prima facie* solution would have only counter effect, because the lobbyists would be motivated to stay out of the sight since the price would be simply too high for them. So far the only sanction that creates a realistic obstacle for lobbyists is the withdrawal of the EP's access pass as a consequence of the removal from JTR which is predicted only for the most serious breaches and not often imposed in practice.[104] In order to enhance the accountability and transparency, without introducing the additional sanctions, the voluntary scheme could be upgraded by greater visibility of the fact that the particular sanction is imposed, especially in case of the deliberate violation, since the sanctions anyway rely heavily on the importance of the good reputation for registrants.

2. The New Rules in Force from January 2015

During the review process in 2013 further steps were undertaken in order to eliminate the identified deficiencies and provide additional registration incentives. As a result, starting from 1 January 2015 the modified system was

[101] Homan and Luneburg (n 2) 101.

[102] Chari, Hogan and Murphy (n 30) 159.

[103] Secretaries General of the European Parliament and the European Commission, "Annual Report on the operations of the Transparency Register 2013", 2013, 6-8 <*http://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do?locale=en&reference=ANNUAL_REPORT*> accessed 27 July 2015.

[104] For statistics see*:* Annual Report on the operations of the Transparency Register 2013 (n 103) 6.

introduced by the new IIA. The scope of the register and covered activities are for the most part only specified and reorganized in more logical manner, introducing the definition of the direct influencing as "a direct contact or communication with the EU institutions or other action following up on such activities" and indirect influencing "through the use of intermediate vectors such as media, public opinion, conferences or social events, targeting the EU institutions".[105] This distinction does not trigger a different set of applicable rules, but it clarifies the already far-reaching definition. How exactly comprehensive is definition of lobbying, illustrates the inclusion of special sub-section for event-organising entities regardless of their profit or nonprofit character, interest-related media or research oriented entities linked to private profit-making interests as well as ad-hoc coalitions and temporary structures with profit-making membership.[106]

The minimum response of the law firms justified by the indecipherable nature of the lawyer-client relationship resulted in more detailed rules and an additional exception under the provision of legal and other professional advice.[107] Namely, analysis and studies preparation for clients "on the potential impact of any legislative or regulatory changes with regard to their legal position or field of activity" are not considered as lobbying, even though they could be marginal and otherwise considered as the first step of a lobbying strategy, which normally would fall under the scope of the JTR.[108] This apparently more favorable attitude towards law firms, aiming at greater registration and better understanding of the covered activities, could, if not applied uniformly, raise some issues in future regarding the transfer to the mandatory register, because it might exclude part of law firm's lobbying from disclosure requirements.[109]

Additionally, in order to encourage the adherence of the Council which has participated in the JTRS meetings as an observer since June 2012,[110] the

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[105] Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, OJ L 277/11, 19 September 2014, [7], [9].

[106] *Ibid*. Annex I.

[107] eLabEurope, The EU Transparency Register in 2014 and beyond (n 12) 4.

[108] *Ibid*.

[109] *Ibid*.

[110] Secretaries General of the European Parliament and the European Commission, "Annual Report on the operations of the Transparency Register 2014", 2014, 7. <*http://www.europarl.europa.eu/pdf/divers/ar_201pdf4*> accessed 30 July 2015.

exemption of MS's and third country's governments, intergovernmental public organisations and their diplomatic missions from the JTR was emphasized and followed by a new exclusion of activities aimed at MS structures including also permanent representations to the EU as ineligible for the registration, which could have an impact on the establishment of a mandatory register. [111]

Regarding financial disclosure, the same adjustments are still made for specific categories of lobbyists but as an improvement all registrants shall provide now estimation of the annual costs related to activities covered by the register.[112] Despite the criticism of previous arrangements of brackets for annual turnover for representation activities (i.e. turnovers in euro: 1. 0-499,999; 2. 500,000-1,000,000; 3. >1,000,000) for being less favorable for organisations with a lower turnover since they were giving more specific information than the organisations with the highest turnover; an additional category of overall turnover of up to 99,999 € was introduced, instead of extension of the list to ranges beyond the current limit of 1,000,000 €,[113] as it was argued in the past.[114] The same logic is implemented in case of disclosure of revenues received from clients by introducing 11 new categories which are very indicative and transparency-oriented, provided that the numbers are accurate and controlled.[115] However, this piece of information is very sensitive, especially for clients who could due to that be motivated under the voluntary system to avoid providing it by choosing a non-registrant.

The Code of Conduct has undergone some technical changes, but it is still outlined in a broad manner,[116] although slightly clearer. The change is also introduced in respect to the JTRS competence, it actually decides about sanction now, while the concerned registrant has a possibility to redress the measure before the Secretaries-General of the EP and of the COM as a quasi-second

[111] List of measures and elements to take into account in the event of a review of the Transparency Register (n 195); Agreement between the European Parliament and the European Commission OJ L 277/11 (n 105) [11].

[112] *Ibid*.

[113] *Ibid*.

[114] Commission (EU), "European Transparency Initiative: the register of interest representatives, one year after" COM(2009) 612 final (Communication), 28 October 2009, 7.

[115] Agreement between the European Parliament and the European Commission OJ L 277/11 (n 105) Annex II.

[116] eLabEurope, The EU Transparency Register in 2014 and beyond (n 23) 6.

instance making the system more efficient, without jeopardizing registrant's right.[117]

The sanction system is not substantially improved, continuing to rely on one or two years removal from the register and formal withdrawal of the EP access badge as the most severe retribution which could be imposed in case of the repeated inappropriate behavior, the serious non-compliance and, as positive novelty, the repeated and deliberate non-cooperation with JTRS, which should encourage the resolution of the issue in a collaborative manner.[118] In order to give more substantial meaning to these terms, the EP's report for the first time depicts the acceptable and non-acceptable lobbying techniques, clarifying otherwise broad notion of the "inappropriate behavior". The given examples of such a behavior include: an interference in the private sphere or personal life of decision-makers (e.g. by sending gifts to a decision-maker's home address) or performance, or any active promotion, of activities in the communication with the EU institutions and their Members or staff which are liable to impair the functionality of the EU institutions' communication systems, particularly anonymously performed activities, failing to declare the represented interests or clients, employing "front groups" and lastly, offering or granting financial support or in terms of staff or material to MEPs or their assistants.[119] These improvements can be helpful in overcoming some of the mentioned shortcomings and indirectly seal some loopholes. What is even more important, the effects will be multiplied and transmitted on the COM on the basis of the common system and joint competence of JTRS, despite their interpretative nature and the fact that these provisions are not in the IIA.

In general, despite of certain useful changes, especially regarding the financial disclosure and clarification of the scope, the voluntary character as the main issue is inherited from the past. Unless the new incentives prove to be strong enough, "the naming and shaming" approach could rather be an incentive not to register in the first place.[120]

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[117] Agreement between the European Parliament and the European Commission OJ L 277/11 (n 105) [12]-[15].

[118] *Ibid*.

[119] European Parliament decision of 15 April 2014 on the modification of the interinstitutional agreement on the Transparency Register 2014/2010(ACI), 15 April 2014 [10].

[120] eLabEurope, The EU Transparency Register in 2014 and beyond (n 12) 5.

3. The Evolution of the EU Lobbying Regulation

Overall, the evolution of the EU lobbying framework through the adoption of the more detailed rules is evident. Accordingly, the Centre for Public Integrity Index, which is based on the statutory definition of a lobbyist, frequency and quality of disclosure and enforcement of regulation, categorized the EU lobbying framework in the early stage of development, before JTR, as low-regulation systems.[121] The elements of this category could have been identified at the EU level in the initial phase, namely, existence of the rule on individual registration with a weak online system including some paperwork without mentioning of the cooling-of period, requiring only few details without disclosure of the lobbyist's spending, where the lists of lobbyist are available to the public but not all details are necessarily collected or given as well as insufficient enforcement capabilities.[122] However, current rules in force at the EU level go beyond this and they are closer to the medium-regulation systems which are characterized by: tighter rules on individual registration, for example lobbyists must generally state the subject matter and institution to be lobbied, definition also includes lobbying aimed at executive powers, the regulation demands, though not necessarily complete, disclosure of and limits on individual spending but there are clear loopholes, such as free consultancy given by lobbyist, lack of regulation for the employer's spending reports, generally there is system of online registration which is accessible to the public and frequently updated, but spending disclosure are not in the public domain, theoretically, a state agency can conduct the mandatory reviews although it will infrequently prosecute violations, and lastly the cooling-of period is included.[123] As it can be noticed, the EU lobbying framework goes even further when it comes to transparency, since there is no in principle limiting public access to the information contained in the register, including even the complete spending disclosures of those who register voluntarily. It can be concluded that defining the problem is behind us and that focus is on the implementation of solutions in order to make lobbying transparency (*de facto)* obligatory.[124]

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[121] Chari, Hogan and Murphy (n 30) 105.

[122] *Ibid*.

[123] *Ibid*. 106.

[124] Balosin (n 4) 136.

V Why not Mandatory Register?

The mandatory system has been the ultimate goal for the EP, which repeatedly called for mandatory register through the secondary legislation.[125] On the other hand, the COM argued for more natural and gradual development of lobbying regulation. Even during ETI the COM, striving to cover a broad assortment of stakeholders by its register, assumed that mandatory register would require legislation implying narrower definition of lobbying, which could create loopholes and uneven playing field.[126] In this initial phase of lobbying regulation, the voluntary system offered lobbyists legitimacy and the recognition as a profession, which the COM was ready to trust before considering the possibility of more binding rules.[127] The transfer to the mandatory system from the COM's perspective would depend on success of the voluntary system. One possible way of measuring the achievement is through estimated number of registrants.[128] Although this as the determining criteria of success is objective and easy to follow, it can be misleading since it is also important who the registrants are and how existing rules are enforced. The approximation of the number of registrant to alleged number of individual lobbyists in Brussels ranging between 15,000 to 30,000 is hard to estimate since the JTR does not provide for registration of individual lobbyists within the organisation, instead, it requires only the indication of number of registrant's employees involved in lobbying. The certain estimation shows that roughly three-quarters of relevant business-related organisations and 60 % of NGOs have already signed in the JTR.[129] The simple comparison of the current 11,313 JTR[130] registrants with, for example, 5,952 registrants as of 31 October 2013 shows a significant increase.[131] However, the

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125 EuroActive.com. "EU lobbyists register to become mandatory until 2017" <*http://www.euractiv.com/sections/public-affairs/eu-lobbyist-register-become-mandatory-2017-301581*> accessed 23 March 2015.

126 Chari, Hogan and Murphy (n 30) 57.

127 *Ibid*. 56.

128 Obradovic (n 38) 306.

129 Greenwood and Dreger (n 37) 159.

130 Transparency Register Website, Statistics as of 26 Jun 2017 <*http://ec.europa.eu/transparencyregister/public/homePage.do*> accessed 26 June 2017.

131 Secretaries General of the European Parliament and the European Commission, "Annual Report on the operations of the Transparency Register 2013", 2013, 4 <*http://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do?locale=en&reference=ANNUAL_REPORT*> accessed 27 July 2015.

demystification of reality of "the money and influence peddling" is conditioned upon uniform registration and disclosure across sectors and among actors.[132] Nevertheless, there are many unregistered groups that are known for lobbying the EU institutions, especially among law firms and think tanks, while, on the other hand, many entries are unreliable or implausible and under-reported leaving the space for further advancements of the system.[133] The mandatory registration might be able to solve the first part of the problem while the second part depends on the content and the scope of adopted rules.

1. Legal base for Mandatory Register

In order to reach the mandatory system several legal challenges need to be overcome. The first very complex question to be answered is whether the adequate legal base for such legal act is provided, bearing in mind the aim and content of the envisioned measures.[134] The debate started when the EP in its Resolution of 8 May 2008 argued for the mandatory register under the presumption of the legal basis provided by the Treaty of Lisbon without specifying concrete provision.[135]

It seem that this particular issue has not been yet overcome and despite the fact that several option were discussed, only the Article 352 (ex-Article 308) as a direct legal basis could be used if this action by the Union should prove "necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties and the Treaties have not provided the necessary powers".[136] The Article 352 in comparison to previous formulation introduces change, potentially limiting its scope of the application by the reference to the existing framework of the policies defined in the Treaties, opening the question

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[132] Homan and Luneburg (n 2) 99.

[133] ALTER-EU, "New and Improved? Why the EU lobbying register still fails to deliver", January 2015, 3 <*http://www.altereu.org/sites/default/files/documents/Why%20EU%20Lobby%20Register%20still%20fails%20to%20deliver%20-%20web%20version_0.pdf*> accessed 27 March 2015.

[134] Case C- 62/88 *Helenic Republic v. Council* [1990] ECR 1-01527 [13]

[135] M. Krajewski, "Legal Study – Legal Framework for a Mandatory EU Lobby Register and Regulation", 2013, 4 <*http://alter-eu.org/sites/default/files/documents/1806%20legal%20framework%20for%20mandatory%20EU%20lobby%20register.pdf*> accessed 30 July 2015.

[136] European Parliament Legal service, "Possibility and modalities of mandatory register of lobbyists" (Legal Opinion) SJ-0012\10, 25 March 2010, (on the file with the author) [32].

of the interpretation, since issue of lobbying is not a separate EU policy.[137] Even if this proves to be flexible enough to be applied in this context, potentially going beyond the literal interpretation, by relying on the similar practice of the ECJ towards the former Article 308, implementation of the idea would require lengthy procedure with the Council's unanimity and the consent of the EP but also the involvement of the national parliaments.[138] In this case, the wider context and political climate play crucial role, namely the Council was not for a very long time willing even to participate in negotiations for the voluntary system and the MS are entering the unfamiliar grounds since most of them do not have any kind of lobbying register while mandatory registration currently exists only in some MS, namely Austria, Lithuania, Poland, Slovenia, Ireland and UK.[139] So it is very challenging to establish firm positions about how EU lobbying regulation should be formulated based on national experiences as well as from the MS perspective.

As a consequence, embracing all difficulties regarding the adequate legal base, the EP asked the COM to include in potential forthcoming comprehensive reform of the Treaties an amendment of Article 298 TFEU or any other appropriate specific legal basis allowing a mandatory register to be set up in accordance with the ordinary legislative procedure, but in the meanwhile it called on the COM to prepare the legislative proposal for mandatory registration based on Article 352 by the end of 2016.[140]

In that regard, the initiative towards mandatory register is brought by the new president of the COM, Mr. Juncker, announcing, as a part of his strategy, the commitment "to enhance transparency when it comes to contact with stakeholders and lobbyists" by proposing on the basis of previously used Article 295 a new binding IIA to the EP and the Council to create mandatory register for three institutions which is already included in the COM Working program for

[137] Legal Opinion SJ-0012\10 (n 136) [40].

[138] *Ibid*. [42].

[139] PER.GOV.IE <*http://www.per.gov.ie/en/regulation-of-lobbying/*> accessed 12 March 2016 and European Parliament Research Service, "Lobbying Regulation in EU Member States" (Table) <*http://epthinktank.eu/2014/12/04/eu-transparency-register/transparency_table1/*> accessed 28 March 2015.

[140] European Parliament decision of 15 April 2014 on the modification of the interinstitutional agreement on the Transparency Register (n 206) [2]-[6].

2015[141].[142] Concretely, the EP, the Council and COM "shall cooperate with each other and by common agreement make arrangements for their cooperation" and according to Article 295 (2) "to that end they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature".[143] This as an alternative to legislation is based on the institutions' right to self-organisation and is underpinned by the obligation of the EU institutions to conduct their work openly and promote good governance and participation on the basis of Article 15 TFEU.[144]

The possibility for a IIA to have the binding effect is formalized with entering into the force of Treaty of Lisbon although the nature and the extent of such legal effect still seems to be unclear, particularly whether IIA as any agreement has binding effect for the parties (*inter pares*) or goes further and it also can have such legal effect on third parties.[145] The matter is highly relevant since the content of the IIA regarding obligations and possible sanctions imposed on lobbyists depends on the interpretation. Previously, this issue was brought before the ECJ in context of the external relations in the "FAO case" where taking into account the terms of the agreement, the effects were assessed on case by case basis and the intention of the two institutions to enter into a binding commitment towards each other.[146] Nonetheless, the question of such effect on external actors is not definitely resolved, but it is evident that the primary aim of the Article 295 is to

[141] Commission, "Working program for 2015" COM(2014) 910 final, 16 December 2014, Annex I <*http://ec.europa.eu/atwork/pdf/cwp_2015_new_initiatives_en.pdf*> accessed 27 March 2015.

[142] J.-C. Juncker, "A New Start for Europe: My agenda for Jobs, Growth, Fairness and Democratic Change, Political Guidelines for the next European Commission", 5 July 2014, 11 <*http://www.eesc.europa.eu/resources/docs/jean-claude-juncker---political-guidelines.pdf*> accessed 2 August 2015.

[143] TFEU Art 295.

[144] Legal Opinion SJ-0012\10 (n 136) [47]

[145] N. Ferreira, The European Parliament's Practice in the Adoption of International Trade Agreements: The Creation of Institutional Parallelism to the Unilateral Dimension? (2015) *MCEL Master Working Paper* 2015/2, 26-27 <*http://www.maastrichtuniversity.nl/web/Institutes/MCEL/Publications1/MasterWorkingPapers.htm*> accessed 7August 2015.

[146] Case C-25/94 *Commission of the European Communities v Council of the European Union (FAO)* [1996] ECR I-01469 [49].

facilitate the cooperation between the EU institutions supporting the narrower interpretation.[147]

However, taking into account all the mentioned difficulties, the COM took the alternative road to greater transparency, and on 1 March 2016 started a 12-week two-part public consultation on the Transparency Register, inviting stakeholder views on a future mandatory system for all EU institutions.[148] After the public debate and drafting, on 28 September 2016 the COM put on the Proposal for the IIA on a mandatory Transparency Register (hereinafter: Proposal) covering all three EU institutions.[149]

In the following part, the IIA will be discussed further in the context of its proposed scope and content of concrete rules, bearing in mind the proclaimed goal. In respect to this debate, the USA federal lobbying framework, as one of the most elaborated in the world, will be assessed in finding balanced solution for the EU, since the lack of transparency is not for the most part among shortcomings of the USA system.[150] The USA has the longest history of lobbying regulation which was developed gradually in several phases starting with few relevant provisions in the Utilities Holding Company Act from 1935, which were advanced in more general rules through the Legislative Reorganization Act and Federal Regulation Lobbying Act of 1946 (hereinafter: FRLA).[151] Currently, after the significant reform caused by the serious scandals, the USA federal system is based on the Lobbying Disclosure Act of 1995 (hereinafter: LDA) which was amendment and supplemented by the Lobbying Transparency and Accountability Act of 2006 and the Honest Leadership and Open Government Act of 2007.[152] Before going into details, it is important to take into account that,

[147] Legal Opinion SJ-0012\10 (n 136) [48].

[148] Commission, Press release 1 March 2016 <*http://europa.eu/rapid/press-release_IP-16-462_en.htm*> accessed on 25 March 2017.

[149] Commission, "Proposal for a Interinstitutional Agreement on a mandatory Transparency Register", COM (2016)627 final *http://ec.europa.eu/info/content/proposal-mandatory-transparency-register_en#how_to_submit* accessed on 26 March 2017.

[150] Homan and Luneburg (n 2) 76.

[151] R. Chari and G. Murphy, *Examining and Assessing the Regulation of Lobbyists in Canada, the USA, the EU institutions, and Germany* (Report, Department of the Environment, Heritage and Local Government, Dublin, 2007) 31-33.

[152] C. Holman, Obama and K Street: Lobbying reform in the USA, in H. Burley *et al*. (eds), *Bursting the Brussels Bubble* (ALTER-EU Brussels,, 2010) 127-128.

even though the USA and the EU share similarities,[153] there are fundamental differences among the regulatory systems caused by the historical importance of the interest groups, particularly in elections, and scandal visibility, which both have longer tradition in the USA, as well as all the specificities of the EU *sui generis* nature.[154] Different legal approaches are also reflection of different lobbying styles caused by the dissimilar political systems, while Washington lobbying style is usually characterized as direct and aggressive, the Brussels lobbying is softer and consensus-oriented.[155]

2. Content of the Mandatory Rules

The first dilemma arising from the transfer to the mandatory system is the scope of its application and whether the definition of the lobbyist needs to be more precise in comparison to one applied for the voluntary system?[156] Currently, lobbying definition and due to that the scope of the JTR is "status-based" and without restriction, for example to a particular process, phase or the type, degree and frequency of lobbying activities.[157] Beside explicit exceptions, everyone "engaged in activities carried with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions" is deemed to be a lobbyist in its entirety.[158] To the contrary, the USA in the past tried to impose lobbying minimum entitled for registration and experienced a problem since the FRLA required anyone whose "principle purpose" was to influence the passage or defeat of legislation in Congress to register, relying on subjectively determined threshold.[159] Nowadays, in the USA the "principle purpose" is objectively quantified in regard to each

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[153] Ch. Mahoney, *Brussels versus the beltway: advocacy in the United States and the European Union*, (Georgetown University Press, Washington, 2008) 207.

[154] Chari, Hogan and Murphy (n 30) 113.

[155] C. Woll, The brash and the soft-spoken: Lobbying styles in a transatlantic comparison (2012) 1(2) *Interest Groups and Advocacy* 193, 202, 203, 209. <*http://www.mpifg.de/pu/mpifg_ja/IGA_1_2012_Woll.pdf*> accessed 30 July 2015.

[156] Legal Opinion SJ-0662\13 (n 7) [24].

[157] M. Nettesheim, "Interest representatives' obligation to register in the Transparency Register: EU competences and commitments to fundamental rights" (In-Depth Analysis), Directorate General for Internal Policies Policy Department C: Citizens' Right and Constitutional Affairs, 2015, 12-13.

[158] *Ibid*.

[159] Holman (n 152) 125.

client, therefore lobbyist means "any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a six month period".[160] Even though it might seem that USA approach compromises transparency, otherwise, it would be unreasonable and overburdening for those engaged in lobbying in a smaller amount due to serious reporting demands. The key notion of this system is the "lobbying contact" which means any oral or written communication to a covered executive or legislative branch official that is made on behalf of a client with regard to: the formulation, modification or adoption as well as administration or execution of the enumerated acts and the nomination or confirmation of a person for a certain positions.[161] This term constitutes the core of the lobbying activities together with the efforts in support of such lobbying contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, as well as coordination with the lobbying activities of others.[162] In spite of the great significance of the outside lobbying in the USA, which is partially caused by the different democratic accountability of policy-makers and direct electoral consequences,[163] in comparison to similar way of indirect lobbying in the EU,[164] the USA definition is narrower than EU definition, excluding for example the grassroots lobbying.[165] Unlike the EU system, the link to the officials is decisive, even the ancillary activities imply the eventual contact, while in the EU even without a direct

[160] Lobbying Disclosure Act of 1995 (USA) Sec 3 (10).

[161] *Ibid*. Sec 3 (8) A.

[162] *Ibid*. Sec 3 (7).

[163] K. M. Goldstein, *Interests Groups, Lobbying, and Participation in America* (Cambridge University Press, Cambridge, 2003) 4.

[164] Mahoney (n 153) 3.

[165] L. Mihut, Lobbying in the United States and the European Union: New Developments in Lobbying Regulation' (2008) 8(2) *Romanian Journal of European Affairs*, 2 <*http://poseidon01.ssrn.com/delivery.php?ID=513103103009120007099097087093111074097042014048023025121115066117001098113096064124027012010041026121034090071019112112121008017009044015049098025114077080017066026085015005120120083085094096093001112079126018027115123070107090024124115085017105&EXT=pdf&TYPE=2*> accessed 31 July 2015; J. Maskell, "Lobbying Law and Ethic Rules Changes in 110th Congress" (Report for the Congress) RL34166, Congressional Research Service, 17 September 2007, 2 <*https://file.wikileaks.org/file/crs/RL34166.pdf*> accessed 6 August 2015.

contact with a decision-maker, lobbying is possible via media and public opinion as long as it aims to influence the EU policy-making. For instance, the LDA exempts "speech, article, publication or other material that is distributed and made available to the public" as examples of the protection of freedom of speech, while in the EU the use of the media as an intermediary can be characterized as lobbying activity.[166]

Comparing the voluntary rules in force with the new definition in Article 3 of the Proposal, the main impression is that there is no substantial difference regarding activities covered by the rules and prescribed exception, other then technical adjustments and reorganization. Furthermore, it seems that some important provisions are omitted, such as those defining ways of direct and indirect lobbying. However, the step in right direction is the fact that now it is determined that activities, in order to go under the scope of the register, can be directed towards any officials of three institution, covering all categories of staff, not just, for example, high appointed functionary. Additionally, the exception regarding the provision of legal advice is now considerably smaller, carving out those controversial elements which were criticized above. Interestingly, it seems that new rules now treat slightly differently MS in comparison to third states and their public authorities.

The EU existing approach to definition of lobbying activities, which is now only slightly modified, could be problematic in case of mandatory system, since even a minor and single or *ad hoc* activity that falls within its broad definition of lobbying triggers the registration.[167] The minimum threshold which is quantifiable could prevent the disproportional and unnecessary burden.[168]

On the other hand, the issue of the indirect lobbying raises the question of the meaning of the term "mandatory register" and whether the obligation to register will be *condition sine qua non* only the communication and direct contacts with the decision-makers. Provided this is the case, the control and sanctioning of those engaged in the indirect lobbying would be a challenge under the regime of the IIA, especially in the respect of the non-Brussels based lobbyists, indirectly

[166] The Lobbying Disclosure Act, 1995 (USA) Sec 3. (8) B iii).

[167] The Joint Transparency Register Secretariat (JTRS), "Transparency Register Implementing Guidelines", 21 January 2015, 6 <*file:///C:/Users/Administrator/Downloads/guidelines_en%20(4).pdf*> accessed 26 March 2015.

[168] Holman and Luneburg (n 2) 100.

affected by the EU legislation, for example international NGOs, associations or research centers. Since the desired outcome is the enhanced transparency of contact of the COM, the EPs and the Council with lobbyists in context of legislative procedure,[169] it could be argued that it would not be necessary then to include activities that are already public and open to scrutiny.

Regarding this issue, in Article 5 of the Proposal it is for the first time stated that certain interaction with the EP, the COM and Council that are conditional upon registration. This provision being a back bone of the new rules is, as a matter of fact, the result of individual action that the EP and the COM have already voluntary implemented regarding their top officials.[170] It is obvious that commitments regarding the Council are very limited, since the main, and practically the only, conditional interaction refers to meetings between interest representatives and the Ambassador of the current or forthcoming Presidency of the Council of the EU, as well as their deputies in the Committee of the Permanent Representatives of the Governments of the Member States to the European Union, the Council's Secretary-General and Directors-General.

Furthermore, since it takes two for lobbying, the reference to non-exhaustive list of potential targets, as in USA system,[171] would be helpful and needed, especially in case of the Council where it might be difficult to pinpoint which part could be covered, since the current rules exclude the lobbying aimed at MS's government services and their diplomatic missions, excluding the Permanent Representatives fully and irrespectively of their role in COREPER.[172] The COM's Proposal did not change the setting, even though it predicted in the Article 13 that MS may, on a

[169] Jean-Claude Juncker (n 142) 11.

[170] Commission Decision of 25.11.2014 on the publication of information on meetings held between Members of the Commission and organisations or self-employed individuals C(2014) 9051 final, 25 November 2014, Art 1; EuroActive.com, "EU lobbyists register to become mandatory until 2017", 17 April 2015 <*http://www.euractiv.com/sections/public-affairs/eu-lobbyist-register-become-mandatory-2017-301581*> accessed 23 March 2015 and European Parliament decision of 15 April 2014 on the modification of the interinstitutional agreement on the Transparency Register 2014/2010(ACI), 15 April 2014, [15]

[171] The Lobbying Disclosure Act of 1995 (USA) Sec 3 (3)-(4).

[172] General Secretariat of the Council, "The Joint Transparency Register − Overview of the main developments during the participation of the GSC in the Joint Transparency Register as an observer and report on the review of the Register" 17208/13, 5 December 2013, [5], and Agreement between the European Parliament and the European Commission OJ L 277/11 (n 197) [19].

voluntary basis, notify the JTS that they wish to make certain interactions of interest representatives with their permanent representations to the EU conditional upon registration in the Transparency Register. This could have as a result the exclusion of a considerable amount of lobbying activity because one of the access points for lobbyists to approach the Council is the COREPER due to its preparatory role and the strategic position "vertically placed between the experts and the ministers and horizontally situated with the cross-Council policy responsibilities".[173] Unless there are national rules of MS, which govern the lobbying activity directed towards Permanent Representatives, mandatory register applied elsewhere could create in this case the loophole, leaving this particular niche unregulated. Consequently, register's scope could be limited to the Council's General Secretariat or the rotating Presidency.[174]

The central issue, when it comes to transparency, is the amount of required information upon registration and subsequently. The USA federal regulation focuses on clients, requiring extensive amount of information regarding each client including the statement of the general issue areas in which the lobbyist expects to engage in lobbying activities on behalf of the client as well as specific issues that have already been addressed or are likely to be addressed in lobbying activities.[175] The EU could follow the USA example since one of the current weaknesses of the EU system, despite the imposed requirement, is the lack of relevant information in real time on the main EU initiatives, policies and legislative files currently followed by the registrants, because there is only obligation to annually renew the entry.[176] Additionally, besides the guidelines, the detailed binding rules should provide more consistency regarding the provision of the information since there are significant differences among registrants in practice today, while some declare specific regulations, many also use too general statements or acronyms. Furthermore, in the USA, the quarterly

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[173] J. Lewis, The Janus Face of Brussels: Socialization and Everyday Decision Making in the European Union (2005) 59(4) *International Organization* 937, 945 <*http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=346231&fileId=S0020818305050320*> accessed 31 July 2015.

[174] N. Copeland, "Review of the European Transparency Register" (Library Briefing) 130538REV1, Library of European Parliament, 18 June 2013, 4 <*http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130538/LDM_BRI(2013)130538_REV1_EN.pdf*> accessed 6 August 2015.

[175] The Lobbying Disclosure Act of 1995 (USA) Sec 4 (3), (4), (5).

[176] JTRS, Transparency Register Implementing Guidelines (n 167) 5.

reporting is obligatory and includes information about income earned by commercial lobbyist or the expenses in case of in-house lobbyists, the list of lobbying activities in each area and naming specific issues, which House of Congress or federal agency was contacted, even though there is no obligation to mention the lobbied officials.[177] Currently neither at the EU level the information about targeted decision-maker is not provided, nevertheless in the EU system there are already rules which require that some official, such as the COM's Members, publish information about meetings held with external interest representatives as well as the practice of the some EP's rapporteurs to include the legislative footprint,[178] therefore the introduction of this piece of information in reports would not jeopardize the integrity of the lobbied person, but could bring more transparency and elevated this practice from occasional to mandatory. Furthermore, inclusion of the list of the represented interests, the specific issues as wall as related financial information in the reports without revealing the lobbying strategy, could be justified for the purpose of efficient control conducted by competent authority and public.[179] In order to minimize the burden upon the registrants without compromising the fulfillment of the regulatory goal, the report should be limited to the most important dynamic matters and be probably less frequent than in the USA. Additionally, in connection with the EU internal rules on revolving door, besides the introduction of this prohibition in the Code of conduct, the identification of former EU positions held by lobbyist upon registration could reduce the negative connotations regarding this practice and enhance transparency revealing the actual instead of the speculated gravity of the problem, as it is the case at the USA federal level.[180]

However, the new rules in the Proposal do not contain major changes regarding the disclosure issue, only the disclosure of the financial information, is now divided in significantly more grids, and due to that provide more precise information. Interesting positive novelty is that now online registration does not necessarily lead to automatic registration, since in the Article 6. 3) and 4) of the Proposal, it is stated that Applicants may be requested to present supporting

[177] Holman and Luneburg (n 2) 84.

[178] Transparency International EU, "EU legislative Footprint - What´s the real influence of lobbying?" 2015, 9-10 <*http://www.transparencyinternational.eu/wp-content/uploads/2015/03/The-EU-Legislative-Footprint.pdf*> accessed 6 August 2015.

[179] Holman and Luneburg (n 2) 100.

[180] The Honest Leadership and Open Government Act of 2007 (USA).

documents demonstrating their eligibility and the accuracy of the information submitted, and that Applicants are entered into the register as registrants once their eligibility has been established and the registration is considered to satisfy the provisions of Annex II regarding information to be provided.[181]

The efficiency of the system is very dependent on the enforcement and sanctioning mechanisms. In case of the USA the implementation of the rules is not vested in one independent body, but in two legislative offices, namely the Secretary of Senate and Clerk of the House of Representative, who are competent to review, verify and where necessary inquire entries in order to ensure the accuracy, completeness and timeliness of registration and reports without competence of investigative authority to conduct general audits.[182] Many argue that the fact that monitoring compliance is left to the officers directly employed by Congress is a significant handicap of the enforcement of LDA and propose as a solution an independent agency instead of those who are lobbied.[183] However, even though at this point the envisioned EU solution is not in line with this idea, it could be a good moment to take this direction within the EU, because the coordination of three different actors could be too complicated, provided that the rules in the new IIA do not impose fundamentally different approaches towards different EU institutions, in particular, the Council. This option in the past was declined by the COM on the grounds that this would blur the lines of its accountability for the relation with the interest groups.[184] Undoubtedly, the mandatory system will require more staff if possible permanently and exclusively devoted to proper functioning of the mandatory register,[185] and due to that the Proposal in Article 11 regulates resources, making all three institutions responsible for the ensuring of human, administrative and financial support.

When it comes to sanctions, in case the violation of the LDA is discovered the competent authorities need to notify the US Attorney for the District of Columbia who has the sole power to seek court sanctions for violations.[186] Sanctions for

[181] Commission, "Proposal for a Interinstitutional Agreement on a mandatory Transparency Register" (n 149).

[182] Holman and Luneburg (n 2) 85.

[183] *Ibid*. 101.

[184] Greenwood and Dreger (n 37) 144.

[185] *Ibid*.

[186] Holman and Luneburg (n 2) 85.

knowingly failing to correct a defective filing within 60 days after notice of such a defect or to comply with any other provision, may be subject to a civil fine of not more than $200,000 whereas in case of knowingly and corruptly failing to comply with any provision of LDA, lobbyists may be imprisoned for not more than 5 years or fined under the title 18 of the US Code.[187] While the prison is usually avoided by negotiated undisclosed financial settlements, the financial sanctions play the important part, for example in 2013 a judgment of $200,000 against a consulting firm for violations of the LDA was adopted. [188]

In comparison to the voluntary system, the mandatory character of the registration requires stronger sanctions than those already existing at the EU level. Theoretically, there are several measures considered in the USA federal framework which could be applied alternatively or cumulatively, including the pecuniary fine, prohibition or restriction of lobbying activity and imprisonment. Nevertheless, their implementation in the EU system could be problematic due to *sui generis* nature of the EU. Namely, the criminal procedure and the imprisonment are precluded since the EU generally does not have the jurisdiction in the criminal matters. The furthest it goes regarding the regulation of criminal sanctions is in light of the cooperation and harmonization of the rules where certain offences and potential sanctions could be indicated, as for example in case of requirement for the MS to impose criminal penalties on persons committing environmental offences.[189] Accordingly, the ECJ in case C-176/03 *Commission v. Council* took the view that criminal law as such is not a separate EU policy and the EU action in criminal matters may be based only on implicit powers associated with a specific legal basis and only at sectoral level on condition that there is a clear need to combat serious shortcomings in the implementation of the Union's objectives and to ensure the full effectiveness of the EU policy.[190] Furthermore, the implementation of these measures is the exclusive competence of the MS and the Treaties do not transfer on the EU the

[187] eLabEurope, The EU Transparency Register in 2014 and beyond (n 12) 14.

[188] *Ibid*.

[189] Directive of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law OJ L 328/28, 6 December 2008, Art 3; Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law OJ L 29/55, 5 February 2015, Art 5.

[190] Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 *Commission v Council*) COM(2005) 583 final/2, 24 November 2005, [7]; TFEU Art 83.

competence to itself conduct the criminal prosecution making this particular sanction inapplicable at the EU level.

To the contrary, the EU and its institutions are authorized in certain circumstances by the EU law to impose fines on entities, as an illustration, the COM in case of the infringement of the antitrust rules.[191] Nevertheless, bearing in mind the limited binding effect of the IIA already discussed, the pecuniary sanction could not be foreseen through an IIA, since the institutions are not authorized to impose obligations and sanction directly *vis-à-vis* third parties on basis of their right of internal self-organisation.[192] Consequently, this type of "sanction-based regime" would probably require legislation, namely Regulation or Directive.[193]

In order to compensate this shortcoming the imposition of the lobbying ban for non-registrant as a sanction is taken into consideration.[194] The mandatory register could take current incentives a step further, prohibiting the enjoyment of these advantages in principle instead of only partial restriction in the case of non-registrants. The IIA seems to be an appropriate instrument for taking this "privileged access" approach.[195] Nevertheless, measures of this nature could also have some negative connotations as it was the case in the USA. Namely, in the USA, the legitimacy of lobbying activity is guaranteed by I Amendment obliging the Congress to respect the freedom of speech and of the press, as well as "right to petition the Government for a redress of grievance".[196] As a consequence, the possibility of prohibiting lobbyist to engage in communications with the public office holders for a certain period of time was abounded due to its unconstitutionality.[197] Therefore, the LDA focuses on disclosure and

[191] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, Art 23.

[192] Legal Opinion SJ-0012\10 (n 136) [29].

[193] Commission, "Roadmap on Establishment of a mandatory Transparency Register for interest representatives", February 2015, 2 <*http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2015_sg_010_transparencyr_04022015_updated_fvp_en.pdf*> accessed 30 July 2015.

[194] Legal Opinion SJ-0012\10 (n 136) [29].

[195] Roadmap on Establishment of a mandatory Transparency Register (n 193) 2.

[196] Holman and Luneburg (n 2) 78, 80.

[197] *Ibid*. 85.

transparency to avoid the restrictions or prohibitions which would violate the citizens' rights.[198]

Similarly, the EU could also face certain obstacles regarding this, since according to the Proposal Annex IV 10. 1. the Secretariat can impose suspension of individual or multiple types of interaction available to the registrant for a period between 15 days and 1 year; as well as removal of the registration from the register for a period between 15 days and 2 years. Even though these are already known measures they now for the first time have restricting effect. Therefore, it is the question of the proportionality whether the temporary prohibition of direct lobbying activity in case of serious breach of rules could go against protected rights, access to the EU institutions and participation in decision-making.[199] According to principle of proportionality and the Article 5 TEU, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties and it is applied by the ECJ when it "balances legislative and administrative measures against private interests, individual rights and fundamental freedoms".[200]

The COM expressed its indicative view that such "privileged accessed" regime respects proportionality principle.[201] Indeed, the main objectives of increasing transparency and fostering trust of citizens and stakeholders in the EU decision-making process[202] could be achieved through mandatory registration based on privileged access since general public could get a complete information about all those involved in policy-making, their resources and expenses which could improve understanding and accountability as well as prevent corruption by creating possibility to react in timely manner in case of inappropriate behavior.[203] Additionally, from the lobbyist's viewpoint this could bring a level-playing

[198] Maskell (n 165) 2.

[199] M. Nettesheim, "Interest representatives' obligation to register in the Transparency Register: EU competences and commitments to fundamental rights" (In-Depth Analysis), Directorate General for Internal Policies Policy Department C: Citizens' Right and Constitutional Affairs, 2015, 8.

[200] T.-I. Harbo, The Function of the Proportionality Principle in EU Law, (2010) 16(2) *European Law Journal* 158, 164, 171 <*http://www.jus.uio.no/ifp/om/aktuelt/arrangementer/2010/vedlegg/harbo.pdf*> accessed 6 August 2015.

[201] Roadmap on Establishment of a mandatory Transparency Register (n 193) 3.

[202] *Ibid*. 2.

[203] Nettesheim (n 199) 8; Holman and Luneburg (n 2) 78.

field[204] while politicians as a lobbied party could also benefit from the important piece of information regarding the authorship and motives behind a communication.[205]

However, the COM also correctly notices that the final answer to the question of proportionality equally depends on the specific configuration of the obligations and the sanctions imposed in case of violation.[206] The potential restrictive effects upon Articles 11 TEU and 15 TFEU as well as fundamental freedoms and rights contained in the Charter of Fundamental Rights, namely freedom of expression and information (Article 11) or freedom to engage in work and conduct business (Article 15, 16) and right to privacy (Article 7), although these are not absolute rights, require justification.[207]

The ECJ assesses the issue of proportionality on case by case basis and in *Fedesa* case[208] the ECJ firstly stated the principle point that a regulation or prohibition for an economic activity is subject to conditions that it is appropriate and necessary and when choosing between several measures recourse must be to the least onerous one, after, the ECJ nevertheless applied less demanding standard "concluding that legality of the measure could be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue".[209] Consequently, there is possibility that the mandatory registration will be able to pass this test depending on the concrete and finale content, scope and the wording of the rules.[210]

Furthermore, in case that this kind of lobbying restriction is foreseen for non-registrants and that suspension from the register is imposed as a sanction in particular case of the non-compliance, as a consequence of the mandatory register, this could produce the legal effects *vis-à-vis* third parties which is susceptible to juridical review allowing any natural or legal person to institute

[204] Chari, Hogan and Murphy (n 30) 131-132.

[205] Nettesheim (n 199) 8.

[206] Roadmap on Establishment of a mandatory Transparency Register (n 193.) 3.

[207] Nettesheim (n 199) 25-30.

[208] Case C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* (CFI, 13 November 1990) [14].

[209] Harbo (n 200) 177.

[210] Nettesheim (n 199) 26-27.

proceedings against the act addressed to that person.[211] The Proposal equipped the registrant who was subject to these measures with the possibility to lodge a reasonable request for a review of the Secretariat decision to the Management Board which consist of the Secretaries-General of the three institutions. Registrant that is not satisfied with decision may now by the words of the Proposal submit an application to the Court of Justice. Based on this, the addressee of the concerned suctions would be entitled to lodge an action for annulment before General Court.[212] Nevertheless, the EU Ombudsman as the only option which has been available so far would continue to be a complementary path.

Taking into account the legal challenges identified above, especially the fact that an IIA might not be capable to directly impose legally binding obligation on third parties, the potential solution could be this *de facto* mandatory system based on strong incentive such as privileged access that can motivate lobbyists on the basis of cost-benefit assessment to opt for obligations instead of a free ride.[213] The obligation imposed through internal rules on lobbied not to interact in relation to their EU engagements with non-registrants, including also contacts outside of the official premises of the EU institutions, is the solution worth considering.[214]

VI Conclusions

Ever since the question of lobbying regulation was raised for the first time in the 1990s and the idea of registration of external actors involved in policy-making embraced, it continued to occupy the EU political arena. The impression is that lobbying regulation in the EU developed in several directions and on several levels.

Firstly, at the EU level efforts of the individual EU institutions to regulate access and to structure consultation process paved the way for future initiatives and inspired similar actions at the national level of MS. The EP's and COM's parallel systems reflected the complexity of the EU institutional framework but were seen only as a temporary solution. Creating JTR from the outset has positively affected

[211] TFEU Art 263.

[212] TFEU Art 256.

[213] R. Patz, Reviewing the EU Transparency Register: How to register EU lobbying?, *Transparency International* <*http://www.transparencyinternational.eu/2013/10/reviewing-the-eu-transparency-register-how-to-regulate-eu-lobbying/*> accessed 25 March 2015.

[214] eLabEurope, The EU Transparency Register in 2014 and beyond (n 12) 7.

the lobbying framework not only from the technical and efficiency perspective, since it enabled more coherent rules and implementation, but more importantly, bearing in mind the ultimate goal, it brought stronger incentives which multiplied the entries in the voluntary register and enabled easier public scrutiny. On the other hand, although the Council plays the important role in the lobbying chain, it has not yet been part of any of the arrangements which had as their aim regulation of interest representation. In spite of the fact that JTR as such is not limited only to lobbyist's action towards the EP and the COM, designated staff of these institutions is at the moment in charge of its implementation without any counterpart in the Council and due to that it can be concluded that Council is a missing piece necessary for the complete regulation.

Secondly, when it comes to scope and content of the rules it is evident that they become more sophisticated in time in order to address the issues and shortcomings identified in practice. Initial rules of the EP and the COM were less ambitious and specific, using broad definitions and leaving a lot of room for interpretation and self-regulation. This was result of several factors, in particular, the EU was stepping on unfamiliar grounds trying to regulate phenomenon fluid as lobbying while the trend of lobbying regulation just started to develop even on international level and as a consequence the EU needed to learn from its own mistakes. Later, as it was already explained, rules gradually evolved through the more precise definition of their aim, scope and exceptions, comprehensive disclosure and joint incentives of the EP and COM to accelerate the registration. Nevertheless, despite the fact that the registrants are required to declare upon registration a great amount of information in the name of transparency, which does not fall significantly behind some of the most regulated systems, there is still space for improvements when it comes to performance of such obligations and the constant control of their accuracy. Furthermore, even if all required pieces of information are provided, the system in place does not secure timely information necessary for the assessment by interested parties, especially general public, but this could be achieved through regular reporting.

Last but not least, the fact that issue of lobbying is despite the pessimistic predictions longer than two decades "on air" and that we are now speaking about potential mandatory register in Brussels louder than ever, is the greatest development. The assessment of the mandatory register initiative shows that it could have multiple positive effects on lobbyists, the general public and the lobbied. It could overcome some deficiencies which voluntary system attempted but could not resolve, by closing loopholes. Namely, although the EU system is

in some segments very detailed and advanced resembling significantly to the USA federal system, there are fundamental grounds missing, allowing lobbyists to bypass all of them, which negatively affects transparency of the whole process.

However, the establishment of the mandatory system is a tremendous challenge not only politically or financially but also legally very complex issue. Capturing a fluid nature of the lobbying activity and finding the balance of the right amount of required information capable of ensuring transparency and accountability without putting too much burden on stakeholders or jeopardizing participation is a constant struggle. Through the process of creating its own lobbying framework, the EU should continue to pay attention to developments of the USA federal rules, especially regarding the amount of the disclosure, since the USA is more experienced when it comes to the issue of transparency which the EU is trying to tackle.

Overall, under the current setup of the EU objectives seeking for the greater transparency, the mandatory register is the next step which complements efforts that the EU has undertaken so far. Even though the most straightforward solution would be a legislative act enabling pecuniary fines instead of lobbying restriction, the effect of mandatory registration could be achieved through the IIA as a second best solution, provided that in the case of the most serious violation of the rules the registrant concerned is denied of privileged access to the decision-maker without unnecessarily affecting principle of the proportionality and the rights and freedoms guaranteed in the EU. Under those circumstances, the mandatory system would have the far-reaching consequences for the lobbyist and due to that in comparison to the voluntary system the scope should be narrower, enforcement mechanism and sanctions stronger and supervisors specialized. Overall, based on the previous experience of the EU institutions and taking into account the USA federal lobbying framework, it seems that the mandatory register could lead to better, more transparent governance of the EU lobbying than the voluntary system currently in place.

The Mandatory Transparency Register Initiative – Towards a Better Governance of Lobbying in the EU?

Summary

The lobbying practice in the EU nowadays has established itself as a legitimate part of decision-making process with the significant influence on the regulatory outcome. Consequently, the need for its regulatory framework cannot go unnoticed anymore. In the beginning, the EP and the COM tried by the separate measures and incentives, on voluntary base, to implement some rules and create order in interaction with the lobbyists. First important steps were Codes of conduct, stating desirable behavior of the lobbyists and the voluntary register, containing the list of entities engaged in interest representation, with the limited details on financial resources and clients. Furthermore, the EP and the COM built on these grounds the online voluntary Joint Transparency Register, which is basically still in force. The main shortcomings of this system, which the EU is trying to combat right now, are the voluntary nature and the fact that at this moment the Council is not part of the equation. As a consequence, the system in place leaves space for manipulation, and due to that, there are unregistered groups and individuals that are known for lobbying the EU institutions. This has tremendous negative effect on the transparency and the mandatory registration, without which there is no interaction with the COM, the EP and the Council, could improve the situation. However, the transfer to mandatory register is facing certain legal and political obstacles, therefore it is matter of balancing, since the non-registrants would be denied of privileged access to the decision-maker. Bearing in mind the above-mentioned, it seems that the definition of the covered activities should be narrower, enforcement mechanism and sanctions stronger with the specialized supervision.