

FREEDOM TO PROVIDE LOBBYING SERVICES IN THE INTERNAL MARKET

A REGULATORY CHALLENGE FOR EU MEMBER STATES

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I Context



Lobbying as scientific area

- Interdisciplinarity: economics, law, political sciences, sociology...
- Extensive literature : economic and political dimension
- E.g. in 2011 in German National Library one could find 230 titles on lobbying, most of them were case studies in sectors like agriculture, banking, energy, health, tobacco...
- More than 80 % from 1990s
- Not so many legal literature: **regulating lobbying by law is not European tradition**
- In Europe: system of representation of interests is rooted in medieval feudalism – social dialogue

History of professional lobbying

- 1830s – USA
- Stable political environment
- Pluralism as political culture
- Common language, common political and legal values
- Significant role of corporations and civil society in election processes – direct funding of political campaigns
- Less obstacles to reach political structures – relationships between interest groups and governments
- Competitive system of interests groups

USA LDA 1995

- Lobbyist is:
 - A person who makes more than 1 contact with covered official
 - Receives compensation of 2.500 \$ for a contract lobbyist, or expends 10.000,00 \$ for a lobbying organisation, within 3 months
 - Spends at least 20 percent of work time per client or employer on lobbying activities

Europe and lobbying

- Traditional European skepticism towards the legitimacy of lobbying
- Different cultural context and legal traditions
- Different role of corporations and civil society in election processes than in the USA
- Eurocorporatism and interests intermediation

Comparison – EU&USA models

- **USA** – less social dialogue, less official channels, substantial resources spent but **STRONGER REGULATION**
- **EU** – more social dialogue, more official channels of influence, less funds spent but **SOFTER REGULATION**

Why has lobbying the EU expanded?

- Lobbyists play significant role due to lack of developed civil society networks and social movements at the EU level
- Lack of true experts in Brussels administration leads to relying on outside advice and information
- Multiple access points in the EU
- Key addressee of “lobbying pressure” – EC (legislative initiative) and the EP

The increasing role of lobbyists in at the EU level

- From the mid – 1980s – development of single market
- Organisations and individuals, most of them “in-house lobbyists”
- 1985 – 654 lobbyists in Brussels
- 1992 – 3,000,00 lobbyists in Brussels
- In 2005 estimated turnover of corporate “lobbying the EU” was between 750 milion and 1 bilion euros
- Now 30.000,00 (influence 75% of EU legislation)
- Vast majority of them work for corporate interests
- Brussels “the lobbying paradise”, M. Fischer Boel

II Legal aspects

- **Is it allowed to lobby the EU?**



Legal development

- EP in 1989 – first proposal for regulating lobbying
- 1996-97 – set of rules annexed to Rules of Procedures
- Two set of rules: code of conduct for the MPs and Lobbying in the Parliament
- Accreditation system adopted
- Register of lobbyists – only names of pass holders and organisations they represent, no information on interest they represent
- 1992 – EC: dialogue with interests groups
- 2002 – interested parties, general principles and minimum standards for consultation adopted
- Lobbyists not specifically mentioned but supposed to follow those principles and standards
- EP Resolution, EC Green Paper on European Transparency Initiative 2006.

ETI definition

- *LOBBYING DEFINED AS “ALL ACTIVITIES CARRIED OUT WITH THE OBJECTIVE OF INFLUENCING THE POLICY FORMULATION AND DECISION-MAKING PROCESSES OF THE EUROPEAN INSTITUTIONS*
- Legitimacy and usefulness of lobbying acknowledged
- But lobbying becomes **self-regulatory industry**

Voluntary register 2005

- New register of IR plus binding code of conduct
- Launched by the Commission
- Those who register certain informations will be informed about consultations in areas of their interests
- Self-regulatory approach still present. Registrants are responsible to disclose data on funding
- But: subscribing to the Code as prerequisite to be included in the Register
- In line with EP
- “One-stop- shop” principle

Mandatory register

- In November 2013 > 10000 people said “yes” to mandatory register
- 2013. Inter-institutional working group (EC and EP) - Register of Transparency as most efficient way towards regulation of lobbying
- Idea: to force EU lobbyists to register – transparency
- Those who evade this obligation would face decreased influence and limited possibility to participate at EU Parliaments meetings

Stronger cooperation but...

Idea of common register and code of conduct failed

EC - voluntary register and budget disclosure

EP – idea of common mandatory register and full financial disclosure

Is ECs approach softer than it should be?

Consequence: in the EU there are **no formally binding rules!**

Register of Interests Representatives

- Includes less than 1/3 of lobbyists
- Automatic alert
- Lack of complete and liable data on expenses
- Aim: more transparency

ALTER-EU says...

- The Alliance for Lobbying Transparency and Ethics Regulation
- Key elements for credibility of registry of transparency:
 - By 31 December 2014 – moving from volunteer registration to binding
 - Includes companies, lobbyists and consultants, law firms
 - Encouraging registration: if not, sanctions would be:

staff of the EC and commissioners would refuse to meet non-registered lobbyists

no registration – no participation at EC and EP's working and consultative groups

EU staff will not participate at events (co)organised by non – registered lobbyists

non-registered lobbyists would face prohibition to hold debates, conferences and other events in EC premises

Concrete demands (November 2013)

- Mandatory lobbying register (by 2015)
- Improved investigation capacities and enforcement of rules
- Improved penalty mechanism
- Improved lobbyists' code of conduct
- improved financial disclosure
- Improved funding disclosure
- Improved lobby issue disclosure
- Improved staff disclosure
- Declaring expenses and client lists
- Full transparency on any lobby work
- Proactive transparency provided by the EC

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Problems with mandatory register

- Art 352 TFEU – legal basis – principle of subsidiarity
- Unanimous consent in the Council – obstacle for adopting binding register
- Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.
- Article 84 TFEU: The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.

National solutions

- Mandatory register exists in:
 - Austria
 - Denmark
 - France
 - Netherlands
 - Slovenia
 - UK
- in the world: Australia, USA Congress Register, Canada

Single definition of lobbying



- Controversial term but relevant from the legal point of view (practical not only academic)
- The most substantive problem in attempt to reach consensus among MSs
- OECD – importance of clear definition who are “in” and who are “out”
- Profession
- Issues of registration
- Freedom to provide lobbying services
- Typical or atypical commercial contract
- Acc. to Opheim, 1991, statutory definition of lobbyists – one dimension of lobbying regulation requirements

Regulation of lobbying

- Set of formally binding rules which lobbyists must follow when pursuing their activity
- Codes of conduct are starting point
- E. g. rules on mandatory registration and financial disclosure, scrutinisation of lobbying lists, ensuring “cooling off period”
- **PROBLEM:** modern democracies have lack of regulation in the field of lobbying
- The question is: **WHY?**
- Rare examples: Lithuania (2001.), Australia (1983.), USA (1830.), Canada (1989.), Germany (1951.), Hungary (2006), Poland (2005.), Taiwan (2008)...

- *Seeking to influence legislation , policy or regulation, usually in return for payment – commercial activity*
- ***Chari, Hogan & Murphy:*** *Act of individuals or groups each with varying or specific interests, attempting to influence decisions taken at political level (corporate interests, professional interests, civil society interests)*

Positive examples

- Rare examples: Lithuania (2001.), Australia (1983.), USA (1830.), Canada (1989.), Germany (1951.), Hungary (2006), Poland (2005.), Taiwan (2008)...
- Lithuania, Hungary, Poland – former socialist countries and new entrants to the EU
- What about old democracies?
- Interesting problem for both legal scholars and political scientists

‘Hired guns method’

- Analysis of lobbying disclosure laws
- Centre of Public Integrity, in 50 US states in 2004
- Key areas of disclosure:
 - **Definition of lobbyists**
 - Individual registration
 - Individual spending disclosure
 - Electronic filing
 - Public access to register of lobbyists
 - Enforcement
 - Revolving doors provisions

- CPI scored EU, Poland, Germany as lowly regulated systems:
 - Little details on individual registration
 - No definition of executive branch lobbying – lobbying targets are only legislature and staff
 - No rules on individual spending reports
 - Weak system of on-line registration
 - Lack of details on lobbying lists
 - Little enforcement capacities
 - No cooling off period

III Services directive

- Art 4(1) Services directive: “service is **any self-employed economic activity for remuneration**”
- Art 16 (1) Services directive: **obligation to respect cross-border provision of services and ensure free access and free exercise of services**

- Art 16(2) Services directive: prohibition on imposing requirement of obtaining authorisation from national authority, **including registration with a professional body or association in their territory, except where provided in directive or elsewhere in EU law**

Is this applicable to provision of lobbying services?

- Lobbying is self- conducted activity for remuneration – element of professionalism
- Free exercise of lobbying must be respected – EU has acknowledged lobbying as legitimate profession
- Directive applies to wide-range of services including services of legal advisors who might act as consultants
- Non - registration must not be an obstacle – no EU law on lobbying and mandatory lobbying registration exists



Provision of lobbying services

- What is lobbying service?
 - No uniform definition
 - Arising out of definition of lobbying
- problem – no special mandatory rules on provision of lobbying services
 - Under some data, USA companies lobby the most
 - E.g. Philip Morris spented 5,25 milion euros on lobbying against Directive on reducing smoking
 - But, there is no EU or in most cases national legislation on lobbying on which USA companies are used to
 - Is thus EU really a “lobbying paradise”?

Conclusion



- In case of lack of supranational EU laws on lobbying, general framework for lobbying should apply
- But specific nature of this activity demands thorough regulation in separate sources of law to suspend current uneven level of national lobbying regulation

Importance – legal point of view

- Legal certainty
- Foreseeability of applicable law
- Uniform definition as prerequisite for uniform interpretation
- Single definition as prerequisite for further legislative actions towards harmonised laws on lobbying profession



Efforts towards reconciling different legal approaches

- Mandatory disclosure *vs* voluntary disclosure
- Differences between professional lobbyists and others
- Level of transparency – expenditures, customers
- Codes of conduct or statutory provisions
- Lobbyists and their addresses – all institutions or just some (parliaments)

What is so challenging?

- No specific requirements for development of national lobbying regulation
- No supranational examples
- No harmonised rules
- National examples in few MS are not encouraging
- No “good model” or “bad model”
- **CHALLENGE:** each MS has to make its own way and create its own model of development of framework for lobbying, bearing in mind EU dimension of lobbying activities

For whom?

- For MS
- But for EE and CE Europe too – those states traditionally follow EU patterns
- Now they have to decide on their own how to approach it
- EE and CE states started to regulate lobbying profession: **MANDATORY LOBBYING DISCLOSURE**

EE, CE, SE states

- Showed will to face problems of definition and regulation of lobbying
- Why?
 - Gradual changes of legacy of communism
 - Fight against corruption and crime prevention
 - More transparency
 - Better control on lobbying activities
 - Appearance of business associations of SMEs

Development lobbying at fast rate

- EU – voluntary disclosure/self-regulation
- EE and SE states – mandatory disclosure/statutory regulation

Are SE and EE states one step ahead EU regulation?

Case of Poland

- Negative image of lobbying
- March 2006– regulation of lobbying activity in the legislative process
- Part of indirect impact of EU accession process
- Under criticism
- Especially addressed to professional lobbyists
- Objective scope: covers Parliament and ministries
- Definition: **any activity** conducted by **legally allowed means**, which leads towards the **exertion of influence upon the organs of public authorities in the lawmaking process**

Case of Poland

- Professional lobbyist
 - Legal or natural person on basis of **civil law contract, on behalf of third party**
 - Must notify interest in observing legislative works
- **Register of professional lobbyists (cca. 25 EUR fee)**
- **Certificate**
- **If not registered, fines cca. 800-10000 EUR**

Case of Poland

- Shortcomings:
 - **Broad definition:**
 - Literally, it includes petitioners, people protesting, anybody exercising constitutional rights, scientists, journalists...
 - Border line between professional and unprofessional lobbyist unclear – are professors or lawyers considered to be lobbyists?
 - Unclear definition of professionals leads to unclear interpretation of registration rules

Case of Poland

- Shortcomings:
 - Lack of practical help to professional lobbyists
 - Prohibition to take part in parliamentary subcommittees as one of the most important stages in legislative procedure!
 - Public hearing – good institution for other models of citizen participation but not for lobbyists
 - Narrow subjective scope (President, local governments excluded), narrow objective scope (licensing, concessions, administrative procedures not covered)

Lack of harmonised regulation as an obstacle

- Lack of proper oversight and scrutiny of lobbying
- Lack of mandatory rules which would force MS to establish mandatory disclosure
- The fact that some MS have this stricter rules and others do not leads to uneven conditions to pursue lobbying activity
- Issue of fair competition
- Issue of foreseeable pursuing lobbying as commercial activity



Practical issues...

- Austrian professor of law under civil law contract engages in action to improve certain act of Polish legal system. He thus takes part in legislative work. Is he professional lobbyist in terms of Polish law? If so, failure for her/him to register might expose her/him to severe fines!

And more...

- Polish environmental NGO employes French biologist who takes part in consultations or gives experts comments in legislative draft on behalf of NGO – is he professional lobbyist since he **a.** receives fee, and **b.** acts on behalf of third party under civil contract?

Lobbying from the neighbourhood

- **Macedonia (2008)**
 - Rules on lobbying principles, registration, rights and duties, non-lobbying activities, control mechanisms
 - Contract on lobbying, power of attorney for lobbyists, remuneration
- **Slovenia (2011)**
 - Registration, definition of “interested organisation” – legal person of private law on whose behalf of and for whose account lobbyists act – principal – agent relation!
- **Montenegro (2011)**
 - Lobbyist can be natural or legal person, company, business association
 - Contract on lobbying
 - Licence

And Croatia?



- Still no legislation
- Efforts permanent
- Croatian Register of Lobbyists (natural and legal persons) – not institutional
- emphasis put on importance of legislative framework
- There is a need for Act on Lobbying/Interests Representatives, especially in regional context
- Future: in line with tendencies at EU level

Croatian Society of Lobbyists

- active role in promotion of lobbying (events, library, initiatives on legislative framework...)
- Idea of making lobbying activities in Croatia professional, legitimate and legal
- One of the youngest professional lobbying associations in Europe
- Code of Ethics as self-regulatory document
- Court of Honour composed of five members
- Sanctions for misconduct: reprimand by the board of directors, exclusion, public recognition of the violation and violator on Society's webpage

Conclusion

- Lobbying – legitimate profession
- Need not just for rules on disclosure but also basic legal framework as a startpoint in dealing with status of lobbyists in the internal market: who, under which conditions, contractual issues: rights and duties, liabilities, tax issues, penalties, relation principal – lobbyist, chambers, crime prevention...

- Importance of building consistent body of law for lobbying as professional commercial activity
- Lobbying as activity which has to be considered in light of fundamental economic freedoms, in particular, providing services

**THANK YOU FOR YOUR
ATTENTION!**





Q&A

“I am now ready to give the answers I have prepared for your questions”

Charles De Gaulle

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