The Current Lobbying Regulation in the European Union and its Future Development

Thesis for LLM International and European Public Law

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Abstract

The main topic of the thesis is the regulation of lobbying on the European level. In particular, the thesis is aimed at answering the question ‘to what extent lobbying should be regulated’. The author believes in the importance of taking lessons from the existing practice. Therefore, the relevant legislation from seven countries (USA, Canada, Lithuania, Poland, Hungary, Germany and Great Britain) is compared and analyzed. Furthermore, the thesis depicts the present legal framework in which lobbying at the European Union works and identifies its shortcomings. The thesis is interdisciplinary, since it includes both legal and political aspects, seeking to find balance between two different but closely related disciplines. The conclusion contains an overview of the analytical results on which future lobbying regulation at the EU level could be modelled. Based on this, recommendations for the future development of the lobbying regulation are proposed.
Introduction

Currently lobbying is an important issue on the European agenda. It directly relates the principle of transparency, which is named as a priority principle in the Commission’s White Paper on Good Governance and it is the core on which the Strategy of Better regulation is build. Statistically, depending on the policy area, from 30 up to 60 percent of national legislation in the Member States is ‘made’ on the European level.\(^1\) However, there is no comprehensive lobbying regulation, yet it plays an essential role in the European policy-making process. Therefore, the discussion on lobbying, its merits and the need for the legislative regulation has long been a major concern at the national and international level. Nevertheless, it is hard to set a coherent framework because most of the time presented positions differ. The legislators seek stricter regulation in order to enhance transparency in their actions, whereas private actors seek openness and better access to the legislative institutions.

Based on this, the main challenge of this thesis is to analyse the current state of lobbying related regulation and to provide an answer to the question to what extent does the EU need to set up a legal framework for it and what should this framework look like. In order to answer the central question, it is divided into the following sub-questions:

I. How are the definitions of lobbying and lobbying activities perceived in the countries, which have passed regulation on lobbying?

II. What is the current legal framework of lobbying in the EU and how does it work via the European institutions?

III. Why is lobbying a politically sensitive topic?

IV. What lessons could the EU learn from existing practices?

Every sub-question is the core question for the respective chapter. Therefore, the thesis consists of four chapters and each of them elaborates on a specific topic. Although they can be seen as separate parts, it is necessary to discuss all of them in order to provide answers to the central questions of the thesis.

The first chapter analyzes the definitions of a ‘lobbyist’ and ‘lobbying activities’. The analysis is based on the method of comparative law and therefore the author looks

\(^1\) W. Dinan, S. and E. Wesselius, ‘Brussels- a lobbying paradise’ ( Alter-EU Bursting the Brussels Bubble 2010), P.23.
at the legislation regarding lobbying activities in different countries. This short case study will focus on the USA, Canada, Lithuania, Poland, Hungary, Germany and Great Britain. This comparative analysis will help to depict the existing definition and practices concerning lobbying regulation. In doing this, the chapter aims at revealing the framework in which these definitions work.

The second chapter covers three key points. First, the current legal basis for the lobbying activities at the EU level is described. Then the lobbying of the main European actors is illustrated. Although this part has a wide scope as it seeks to mention all major players on the European level, it focuses especially on the European Commission, the European Parliament and the Council. The third key issue of the chapter is the EU’s voluntary interest representation register. Due to its recent launch in 2008, only one annual report regarding its evaluation is examined.

The third chapter includes the approach towards lobbying from a political science perspective. The chapter will provide analytical reasons for the hypothetical statement that 'lobbying' might be a politically sensitive topic for the Member States. In addition to this, the chapter weighs this sensitivity with the importance and benefit of lobbying as part of the policy-making process.

The fourth and the final chapter will point out the lessons that the EU could learn from the existing lobbying regulation. Therefore, the findings of other chapters are used to provide answers to the second part of the central questions of the thesis. The author provides possible solutions to the present situation, concluding with personal recommendation regarding future regulation of lobbying at the EU level.
CHAPTER I

LOBBYING FROM THE COMPARATIVE VIEW PERSPECTIVE

Chapter overview

The central challenge of this chapter is to depict and define concepts of ‘lobbyist’ and ‘lobbying’. Beyond a doubt, the clear definitions of the main thesis objects have significant importance for research development regarding the thesis. Therefore, the chapter introduces definitions, which are found in the legal acts of several countries, namely the United States of America, Canada, Lithuania, Poland, Germany and Great Britain. Based on the similarities and differences of the listed countries, three groups can be established, the Northern American, Eastern European, and Western European. The reasoning behind the choice of these countries is well founded. Although countries are located in different parts of the world, they stand out compared to the other countries, because they have chosen to regulate lobbying.

The chapter consists of three parts. In the first part, the regulation on lobbying is defined in each of the countries. In particular, the chapter elaborates more on the definitions in existing legislation. The emphasis is put on the legal definitions because they are formalized legal language on which syllogism, legal reasoning and practise can be built. The second part follows with a comprehensive comparison. In the conclusion part the self-sufficient definition is provided.

The comparative method is valuable in this chapter because it shows that the same words might have different meaning in different legal systems. Moreover, the concept of legal tool can be understood better by scrutinizing and analysing it in different legal arrangements. Nonetheless, comparative view leads to the development of understanding of what is essential for a legal instrument to operate and what is not.

Above all, the chapter is aimed at understanding a present approach towards lobbying in the developed world. The understanding of the existing approach is essential

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to the EU, since it seeks to regulate lobbying in the most beneficial way for all parties involved.

**The Northern America: USA and Canada**

**USA**

The first country, which provided an explicit regulation on lobbying, was the USA, although the linguistic roots of lobbying are found in Great Britain. The legal scholars as well as lobbyists explain that the concept of lobbying derives from the right to petition. The right to the petition was established as the part of the first amendments to the USA Constitution in 1789, which are better known under the name of The Bill of Rights. Since then the concept of lobbying was officially used by the Congress in its documents. Initially, the word lobbyist was not used; other alternatives sought to be more popular, such as legal representative, agent and officer of public relation. Nevertheless, the lobbyist concept rooted in the 1830’s. The Congress accepted lobbying practise and realised its contribution to the legislation. In order to maintain transparency in lobbying activities it set up a mandatory requirement for registration in 1876.

However, first lobbying regulation was developed on the state level. In the 1890’s Massachusetts launched the first anti-lobbying act. After this initiative, the notion to regulate lobbying spread to other states. Despite the regulation at state level and requirements in the secondary legislation, the first federal act regarding lobbying regulation was launched only in 1946.

This legal act was warmly greeted by lobbyists, interest groups, politicians and members of society, because the concepts of lobbyist and lobbying were clarified. Consequently, a framework for lobbying on the federal level was created. Although it was the first attempt in the world to regulate lobbying, it should be recognized as a success because it was used as an example in other countries. Obviously, acts and practices at states’ level contributed to a successful implementation and performance of the federal act regarding lobbying. The act was not changed for a-half-century. This stability proves that this act was a big step forward and covered all aspects of lobbying in detail. Nevertheless, the act was revised in 1995.

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5 The corridor or hall that is open to public and used for people to meet and talk to Members of Parliament of Parliament in middle of XVI Century (according the Oxford Dictionary, 2008).
6 The official website on the USA Constitution. Links: [http://www.usconstitution.net/xconst_Am1.html](http://www.usconstitution.net/xconst_Am1.html), [http://www.usconstitution.net/constamrat.html#BoR](http://www.usconstitution.net/constamrat.html#BoR)
Although the new regulation was not innovative and did not introduce new procedures, it clarified the old ones in the present context. Therefore, the Secretary of the Senate and the Clerk of the House of Representatives received responsibility for registration procedures. Moreover, the penalties for infringements of the obligatory requirements became stricter; the imprisonment was added as a form of punishment. Before the revision, it included only financial fines and suspension of activities.

The Lobbyist Regulation Act defined lobbying as an attempt to influence any official action, which is made on the legislative or executive branches, which include the government and legislative committees. Whereas the concept of lobbyist was desired to mean ‘any individual who is compensated for the specific purpose of lobbying; is designated by an interest group or organization to represent it on a substantial or regular basis for the purpose of lobbying; or in the course of his employment is engaged in lobbying on a substantial or regular basis’. After analysing the above-mentioned definition, some features can be excluded and a simplified definition can be shaped. Therefore, the lobbyist is a person, who represents and acts on the behalf of client’s interests and gets remuneration for his job.

It is worth noting that in the initial Lobbying Act of 1946, in addition to the definition of a lobbyist, follows an explicit paragraph explaining who is not considered as a lobbyist. It included persons, who act in their own interest; whose actions are part of their ‘official capacity’; who are members of legislator or members of staff working for the official; who are experts providing research information; and the ones who work in any media service. The fact that this notion is not found in the revised act regarding lobbying might imply both, that this information has become a common sense, or that the definition of lobbyist is much broader.

However, with the economic and technological development the need to update the document became self-evident. Therefore, the Lobbying Disclosure Act was launched in 1995. This act gave birth to the innovative and very explicit definition. According to its provisions, a lobbyist is ‘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.

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7 USA. Lobbying Disclosure Act of 1995, Section 3, Paragraph 10
8 USA. Lobbyist Regulation Act 1946 [http://www.sos.state.nm.us/pdf/tra2.pdf]
over a six month period. As it appears, the new definition concentrates on lobbying as communication and even sets a minimum number of required contacts.

Within the revised act, the legislator provides a wide scope for lobbying activities. It is interesting to investigate the way in which it is done. It is surprising that the legislator gives a short definition of lobbying activities, rather than giving extensive list of actions, which might be perceived as lobbying activities. Therefore, the definition includes all research works, contacting and networking regarding the represented interest. Nevertheless, the legislator elaborates on the concept of ‘lobbying contact’. This might mean that the legislator attempts to guide the lobbyist in understanding, whether a contact is considered as a lobbying contact.

In addition to this complementary act, there is guidance on Lobbying Disclosure Act, which is updated annually. This guidance derives from the Section 6 in the Lobbying Disclosure Act. In particular, it is aimed to have two purposes. First, it has to ‘provide guidance and assistance on the registration and reporting requirements of [Lobbying Disclosure] Act and develop common standards, rules and procedures for compliance with [Lobbying Disclosure] Act’. Second, the guidance is endeavouring to maintain the interpretation of legal act, which is accurate and up-to-date.

**Canada**

Beyond a doubt, Canada has very close economic and political links with United States. Canada’s executive branch consulted the government of the USA for the adoption of lobbying regulation. However, the legal definition of lobbying in Canada differs from the one in the USA.

The public authorities of Canada established a definition of lobbying in the Lobbyists Registration Act. Although this act was adopted in 1985, it came into force only in 1989. The significance of this document is that it not only defined the lobbying activities, but also, established the types of lobbyists. This was a step ahead of all the other countries. Nevertheless, the act was updated with several amendments in 1996. The most important input was the inclusion of the Code of Conduct. Since the lobbying

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activities are developing in parallel with technological and economic improvement, the Canadian authorities seem to keep needs up-to-date and therefore, try to catch up with every change. The latest amendments were done in July 2008. They were aimed at enhancing transparency and accountability of lobbyists, and also, it foresees mutual obligations for lobbyists and public officers.\(^\text{13}\)

In its preamble it confirms that there is a ‘free and public access’ to the government and that lobbying is a legitimate activity.\(^\text{14}\) The Lobbying act establishes three types of lobbyists, namely consultant lobbyists, in-house lobbyists for corporation and in-house lobbyist for organisations. Consultant lobbyist is a person, who is lobbying on a particular matter as a one time task. He acts in the interest of his client.\(^\text{15}\) In addition to this, he is not required to be a professional lobbyist, as long as he fulfils the client’s requirements. The main difference between the in-house lobbyist for a corporation and in-house lobbyist for an organisation is that the first one represents a profit-oriented entity and its interests and the other one has the responsibility to act on the behalf of a non-profit organisation. Both of them are persons, who are in permanent employment relation with the entities. Finally, both of these types of lobbyists are obliged to be officially registered.\(^\text{16}\)

Finally, it should be noted that there is no distinctive definition of lobbying activities, although the act sets exemptions and exceptions, which are not perceived as lobbying. This leads to a statement that the legislator’s strategy is better to depict actions, which are not considered as lobbying than describing activities which are seen as lobbying.

\(^{13}\)Canada. Lobbying Act of 2008.
Eastern European Countries: Lithuania, Poland and Hungary

The Eastern European Countries can be categorised in many different aspects: geographical, political and economic. The term ‘Eastern European Countries’ in the thesis includes countries, which are members of the EU as of 2004. The following paragraphs analyse the existing regulation on lobbying in Lithuania, Poland and Hungary.

Lithuania

Lithuania is a Baltic State, which has a relatively novel legislation base. Therefore, the areas of regulation are still growing by following the best practices.

The Parliament launched an act regarding lobbying regulation, namely the Act of Lobbying Activities in 2000. The transition period was one year. It was beneficial for both, the public authorities, which were responsible for the implementation matters and for members of the society, who received a possibility to become a lobbyist or to use services of lobbyists. The legal and political science scholars were first to criticise this act due to its vague definitions. As a direct consequence of the negative reaction, the Parliament adopted a new legal act in 2003. However, the initial name of the act was not changed.

The second act in comparison to the first one has a wider scope but straightforward definitions. The present definition of lobbying includes natural and legal persons whereas previous definition included natural persons, entities, organisations and agencies. This change reflects the position of legal entities, which felt mistreated and left out from the possibility to lobby. However, this change has to be evaluated critically. The emphasis should be put on the fact that lobbying is done by persons.

The vital matter in order to operate as a lobbyist is the obligatory registration procedure. The Chief Official Ethics Commission is responsible for its transparency. The current act covers only lobbying activities and not all actions made by lobbyists. This alteration might be seen as a realization of wrongful understanding of lobbyist. In addition to this, while defining lobbying activities it is acknowledged that activities

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might be both, paid or unpaid, and these activities are aimed to influence legislation process on the behalf of the client.\textsuperscript{19} Furthermore, the national authorities have to ensure legal access to the state officials and officers.\textsuperscript{20}

However, the necessity of this act can be doubted. According to the annual reports, there were only six active lobbyists out of twenty officially registered in 2008.\textsuperscript{21} At the present, there are twenty-one officially registered lobbyists in Lithuania. \textsuperscript{22}

\textit{Poland}

Poland is one of the most politically active and influential countries on the European level. Therefore, its attempt to regulate lobbying activities received international attention and was evaluated as one of the best examples by the OECD.

Although the first initiatives to adopt the regulation regarding lobbying activities emerged in 2003, it was launched only after the accession to the EU. This document is known under the name of Act on Legislative and Regulatory Lobbying.\textsuperscript{23} The name of the act implies that it is aimed at enhancing transparency during the legislative procedures. According to the document, lobbying is understood as ‘any legal action designed to influence the legislative or regulatory actions of a Public Authority’.\textsuperscript{24} This act makes a distinction between two types of lobbying: lobbying in particular and professional lobbying. The last one is defined as ‘any paid activity carried out for or on the behalf of a third party with a view to ensuring that their interests are fully reflected in legislation or regulation proposed or pending’.\textsuperscript{25} Apparently, the legislator puts emphasis on the professional lobbying activities. This attitude has dual consequences. First, it ensures that lobbying is performed on a professional level. Second, this distinction has a negative effect on lobbying activities organised by the non-governmental organisations, which usually cannot afford hiring a professional lobbyist. Nonetheless, the specificity of this

\textsuperscript{21} Information from the website on the Chief Official Ethics Commission. Link: http://www.vtek.lt/vtek/index.php?option=com_content&view=article&id=372&Itemid=42
\textsuperscript{22} Information from the website on the Chief Official Ethics Commission. Link: http://www.vtek.lt/vtek/index.php?option=com_content&view=article&id=371&Itemid=41
\textsuperscript{24} Poland. Act of 7 July 2005 on legislative and regulatory lobbying. Article 2.
\textsuperscript{25} Poland. Act of 7 July 2005 on legislative and regulatory lobbying. Article 2.
act is the establishment of public hearing procedure, in which lobbyists are welcome to participate.

**Hungary**

Lobbying regulation in Hungary was enacted in 2006. It has to be read together with the Government Decree on the Implementation. Therefore, it seems that this regulation is explicit and meticulous.

The act in the beginning focuses on two points. First, it distinguishes the right to petition from the right to lobby, and then states that the act is aimed at controlling the attempts to influence legislative or administrative actions.\(^{26}\)

The definitions of lobbying and lobbying activities are not more precise or more detailed in comparison with other Eastern European Countries, although the act is relatively new. Therefore, the definition of lobbyist means any person, who performs lobbying tasks and is registered as lobbyist.\(^{27}\) Lobbying activity is described as ‘any activity or conduct aiming to influence executive decisions or to fostering interests under a commercial contract, as a business activity for economic consideration’\(^{28}\).

Nonetheless, this act is innovative in comparison to the Lithuanian and Polish ones because it includes the Code of Ethics.

**Western European Countries: Germany and Great Britain**

The following paragraphs analyse the approach towards lobbying in two Western European countries, namely Germany and Great Britain. The countries have been chosen due to several reasons. First, countries operate in different legal systems. Second, in both countries the legislative machine is based on two parliamentary houses.

**Germany**

Although Germany has a long practise of group involvement in the legislation process,\(^{29}\) it is still among a large number of European countries, which do

\(^{26}\) Hungary Act XLIX of 2006 on Lobbying Activities. Section 1.

\(^{27}\) Hungary Act XLIX of 2006 on Lobbying Activities. Section 5, paragraph a.

\(^{28}\) Hungary Act XLIX of 2006 on Lobbying Activities. Section 5, paragraph c.

\(^{29}\) The Department of the Environment, Heritage and Local Government, 'The Regulation of Lobbyists in Canada, the USA, the EU institutions, and Germany' (Report 2006) P. 52.
not have specific regulation on lobbying. However, there is a reference to the lobbying activities in Annex 2 of the Bundestag’s Rules of Procedures. Germany is a bicameral parliamentary system, yet only the lower house, which is directly elected, requires the interest groups to register in order to consult legislator at the stage of drafting.\(^{30}\)

However, registration is not valuable, since it is not the most important criteria to participate in the discussion. The Bundestag can invite any interest group regarding the legislation matter to participate and give opinion ad hoc. The Bundestag admits that ‘consulting with interest groups is very important when it comes to drafting legislation’,\(^ {31}\) because they provide specific knowledge regarding the field in question.

Nevertheless, lobbying in Germany is understood in a very limited context as an interest representation of associations of trade and industry. Therefore, mostly the interests and opinions of industrial sector are represented.

**Great Britain**

It is valuable to look at the approach towards lobbying in the United Kingdom because it is different from the above-mentioned ones. This country does not have any specific regulation concerning lobbyists and their activities.\(^ {32}\) Nonetheless, lobbying is regulated. There is a section regarding lobbying activities in the Code of Conduct for the members of the Parliament.\(^ {33}\) Therefore, attitude towards lobbying appears to be different, since the regulation puts responsibility on the ones who are lobbied.

Therefore, ‘in the UK lobbying is a very difficult profession to research because (by its very nature) it is a relatively quiet and discreet’.\(^ {34}\) However, the Parliament is the core lobbying place. According to the information available on the official Parliament’s website, there is no limitation or criteria for the one who wants to lobby. ‘Anyone can lobby a member of the Parliament (lower house) or Lord (upper house)’.\(^ {35}\) The

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30 A Report for the Department of the Environment, Heritage and Local Government, ‘The Regulation of Lobbyists in Canada, the USA, the EU institutions, and Germany’ P. 53.
31 The Department of the Environment, Heritage and Local Government, ‘The Regulation of Lobbyists in Canada, the USA, the EU institutions, and Germany’ (Report 2006) P. 53.
35 The official website of the UK Parliament. Link: [http://www.parliament.uk/get-involved/have-your-say/lobbying/] (http://www.parliament.uk/get-involved/have-your-say/lobbying/)
recognition of lobbying in both houses implies a wider approach towards lobbying compared to the German practice.

Moreover, the Parliament names possible examples of the lobbyists ‘individual members of the public, groups of constituents, local businesses organised pressure groups/campaigners, commercial organisations’.\(^{36}\) This list is not a finite one. Although, the lobbyists are not limited to the methods, which they can use in order to influence legislation, they are prohibited from bribing the legislative branch.

This approach towards lobbying sets a framework with a minimum regulation. Nonetheless, it should receive a positive evaluation because the legislative branch carries responsibility for the lobbying procedures. Although, this requires more effort from the legislators, it brings public trust to the legislation procedure.

**Comparison**

Apparently, every country has a specific regulation towards lobbying. The analysis of legal acts proves the OECD statement that there is no single lobbying definition.\(^{37}\) The analysis also confirms a rule that the same words have different meaning in different legal systems.\(^{38}\)

It is evident that different countries come up with different descriptions that lead to the popular comparative law explanation. According to it, countries have chosen the most appropriate society approaches towards the lobbying regulation. Certainly, no one can better reflect the needs of a society than the legislator, who knows the particular internal problems.

It is an ambitious task to compare all three groups at once because big differences in regulation are found among every legal system. Nonetheless, the rules of lobbying in the Northern American countries can be evaluated as very strict and precise ones. Restrictions and penalties stress the attitude that transparent lobbying activities are important part of democratic governance. The Eastern European countries establish common frameworks for lobbying, which provide possibilities for lobbyists to perform a wide range of activities. Nonetheless, some attitudes have to be stressed out.

\(^{36}\) The official website of the UK Parliament. Link: [http://www.parliament.uk/get-involved/have-your-say/lobbying/](http://www.parliament.uk/get-involved/have-your-say/lobbying/)


According to the Lithuanian regulation, all state officials can be lobbied and have to ensure access to them. Hungarian regulation is significant in comparison to the European lobbying regulations due to being the first one to include the provisions regarding lobbying ethics in the act. The last group, which consists of two Western European countries, namely Germany and the United Kingdom, could be called a group of ‘whatever works’. Germany has a provision in the secondary legislation, whereas UK has chosen to regulate the ones, who are lobbied.

Nevertheless, several common features can be distinguished. First of all, a lobbyist is considered to be a natural person, though in Lithuania it might be a physical person, or in other words an entity. In all cases, a lobbyist acts on the behalf of clients’ interest. In addition to that, they receive remuneration for their job. Generally, a lobbyist seeks to influence the adoption of legislation. The most important similarity is that in all countries lobbyists stand as an essential link between the interest groups and the public authorities.

However, there are many differences regarding definition and regulation of lobbying. Differences might be implied by the purposes, which they aim to achieve. While the American countries seek disclosure of the relationship between the officials and the lobbyists, the European countries seek to bring the legislation closer to the interest groups. Therefore, the European lobbyists seek to be heard rather than to influence legislation. There is a clear trend in the Northern American countries to have clear and distinctive definitions, whereas Eastern European countries have uncertain definitions. The most interesting finding is that the countries, distinguish different types of lobbyist, though the necessity for doing so might be questioned, since the distinct types have to obey the same regulation.

**Conclusion**

Defining lobbying is an ambitious task due to the existing different frameworks in every country. Nevertheless, analysis reveals already existing practices, from which the European Union could learn.

In fact, most of the analysed legal acts start with legal definitions. Although legislators seek the clarity in the scope of its wordings in order to ensure proper
implementation, the definitions tend to be very wide. Despite the existing similarities, the comparisons are hard to make, because the regulations are country specific.

In order to bring clarity, the comparative table is presented in Appendix 1. The table shows that in order to compare the lobbying legislation it is not enough to consider only the definition of lobbying. The common framework has to be seen as coherent with the legal and political system of a particular country and most importantly follow the aims of legislation.

On the basis of this theoretical part, the further research is be built. The following chapters will refer to already analysed lobbying regulations. The third chapter adds information regarding lobbying connotation in Lithuania, Poland and Germany.
CHAPTER II
THE LEGAL FRAMEWORK OF LOBBYING

Chapter overview

This chapter focuses on the present legal basis and practices of lobbying in the European institutions. It also elaborates on the voluntary interest representation register, which is already running. The chapter starts with a brief introduction to the lobbying in the EU, and then depicts its present legal framework. After this, the second part follows, which examines lobbying of the main European actors, namely the Commission, the Parliament, the Council, the European Council, the European Court of Justice, the European Social and Economic Committee and Committee of the Regions. However, due to the limits of the thesis, the lobbying process is analysed particularly in the Commission, the European Parliament, and the Council. The European Social and Economic Committee and Committee of Regions are put in the group of consultative bodies. The final section of the chapter examines the existing register system and alternative solutions to improve it.

Coverage of lobbying in the EU

The EU is the sui generis legal order with a democratic tradition, which it inherited from its Member States. Therefore, the EU follows democratic political systems and acknowledges lobbying as an important part of its legislation process.39

Initially, lobbying started as a 'diplomatic lobbying' with some representative officers and trade unions in the 1970’s. The main lobbyists were country delegates. The Council was the most influential authority, since it was the body responsible for both making decisions and representing national interests. Nevertheless, the Commission has been the most lobbied body, since according to Article 289 of the Treaty on Functioning of The European Union (TFEU) it has the right to initiate the legislation. The first impetus for the growth in number of lobbyists occurred in 1979 with the first direct election of the representatives to the European Parliament, although the Parliament role did not increase significantly. However, the real change in lobbying industry was brought by the Single European Act (SEA), which was adopted in 1986 with the purpose

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of completing the single market. With the introduction of the co-decision and strengthened consultation procedure, the SEA made some structural changes in the legislation process and shifted powers among the EU institutions. The Treaty of Maastricht (ToM) was a step forward, because it introduced an approach that decisions should be taken as closely to persons as possible in compliance with principles of subsidiarity and proportionality. These principles led to the growth of regional representation.\textsuperscript{40} The Treaty of Amsterdam (ToA) in the annex regarding the explanation of the above-mentioned principles emphasizes that the Commission has to consult as widely as possible during the legislation process. To sum up it can be said that from 1993 onwards there were two clear tendencies regarding lobbying. The first one seeks to enhance transparency in the decision making process.\textsuperscript{41} The second one makes a blurred distinction between the industrial and social interest representation.\textsuperscript{42}

Referring to the statistical data, in the decade 1984-1995 the number of lobbyists was steadily increasing every year; almost 200 entities decided to have direct lobbyists in Brussels.\textsuperscript{43} The next decade followed with a significant increment and by the end of 2005 this number reached 15 000. The most recent data states that number of lobbyists is fluctuating from 15 000 to 20 000.\textsuperscript{44} Conversely, to the numbers mentioned above, the number of lobbyists, who have registered in the voluntary Register of Interest Representatives, has only exceeded 2000.\textsuperscript{45}

One might ask why there is such a discrepancy between these numbers. The following paragraphs examine the legal basis for lobbying and try to show possible explanations. However, before that let us have look at the definition of lobbying in the European Union.

**The definition of ‘lobbying’ and ‘lobbyist’ in the context of the European Union**

For a long time European Union was struggling with the definition regarding lobbying. The most explicit definition of ‘lobbying’ and ‘lobbyist’ can be found in the

\textsuperscript{44} The official website of the European Public Health Alliance. Link: http://www.epha.org/a/1842
Green Paper on European Transparency Initiative, which was adopted in 2006.\textsuperscript{46} Regarding it, lobbying is understood as any activity, which is aimed to influence legislation process in the European institutions.\textsuperscript{47} Whereas lobbyists are defined ‘as persons ... [carrying lobbying activities], working in a variety of organizations such as public affairs consultancies, law firms, NGOs, think tanks, corporate lobby units (‘in-house representatives’) or trade associations.’\textsuperscript{48}

Nevertheless, it follows from the observation of recent legislation that nowadays there is a trend to use the concept of ‘legal representation’\textsuperscript{49} or ‘interest representation’\textsuperscript{50} instead of lobbying. The reason behind it might be that there are several Member States in which lobbying as a word has a negative connotation. Moreover, only some countries have an appropriate legal regulation.\textsuperscript{51} As far as lobbying activities are concerned, there are various and contradictory opinions held in the public debate. On the one hand, there is a view that all these different names cover the same activities, but on the other hand, the difference between lobbying and legal representation can be achieved by separating interests into private and public, and by defining the final goal of the participation in the legislative procedure. In the framework of the thesis, the legal representation is intended to represent interest, in other words, to be heard in legislation process, whereas lobbying is aimed to influence in the decision-making process.

**The present legal framework for lobbying**

According to Daniela Obradovic, there is no coherent or uniform framework regarding lobbying in the EU.\textsuperscript{52} Nonetheless, there is a wide range secondary legislation, which refers to lobbying. In addition to this, it is in the interest of the European institutions to ‘provide formal rules which structure the relationships with interest groups’,\textsuperscript{53} due to the mutual benefit it can bring for both sides.

It would seem that present regulation regarding lobbying has been directly affected by the astonishing scandal in Santer's Commission, which led to the resignation of all Commissioners. In order to enhance the public trust in the European institutions, the program of Better Regulation was launched. According to J. M. Barroso, better regulation is the main concern of the EU.\textsuperscript{54} Therefore, the EU is seeking to improve the level of democracy while implementing the strategy of Better Regulation,\textsuperscript{55} which covers the approach of good governance and better law making in the context of globalization. As part of this strategy, the European institutions adopted a number of acts in the secondary legislation. The following paragraphs examine the legislation, which is relevant to the lobbying activities.

In 2001, The Commission adopted the White Paper on Good Governance. This document is the core document on which the Strategy of Better Regulation is built. It is also known for introducing five principles of good governance, namely openness, participation, accountability, effectiveness and coherence, and the identification of the main challenge, which is the modernisation of the political process. As for lobbying, it is important to the extent it talks about the openness and participation in the decision making process. Regarding the openness, it stresses out that ‘with better involvement comes greater responsibility’ and that ‘democracy depends on people being able to take part in public debate’.\textsuperscript{56} Both of these statements lead to mutual obligations for the civil society and for the European institutions. Therefore, institutions have to ensure access to them and to provide members of the society with sufficient information, whereas members have to contribute to the legislation process while giving opinions on the issue. Moreover, the Paper on Good Governance promotes enhancing effectiveness and transparency in the consultation process. Since this document is a provisional framework, it was accompanied by several other documents.

Therefore, the Commission passed a ‘Communication Towards a reinforced culture for dialogue and consultation’ in 2002. This document is aimed at improving the consultation procedures via the creation of transparent and coherent framework by setting the minimum standards for the consultation. However, these standards are legally binding towards the interest groups and not towards the Commission. This is due

\textsuperscript{54} European Commission, \textit{Better regulation- simply explained} (Luxembourg: office for official Publications of the European Communities 2006); P.1.
\textsuperscript{55} \url{http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2003:321:0001:0005:EN:PDF}
\textsuperscript{56} The Commission, White Paper on Good Governance (2001); P.13-16.
to the reasons that ‘a clear dividing line must be drawn between consultations launched on the Commission’s own initiative and [...] compulsory decision making process according to the treaties’. Moreover, the Commission wants to escape a situation in which it’s ‘proposal could be challenged in the Court on the grounds of alleged lack of consultation of interested parties’. Nevertheless, this communication proposes that ‘all relevant interests in society should have an opportunity to express their views’. However, this does not mean that participants get a vote regarding the subject matter. Furthermore, this document refers to the White Paper on Good Governance and expresses concerns regarding tricky definition of ‘civil society organisation’. It stresses out that this definition plays an essential role while forming civil groups. Their ‘involvement in the EU policy conception and implementation’ can be regarded as new form of governance, which initially is aimed ‘to enhance efficiency and legitimacy of the European law’.

Since the competence of creating the law is shared among the institutions, the European Parliament, the Council and the Commission entered into an inter-institutional agreement on better law making in 2003. This agreement emphasised that the general coordination of their legislative activities has to be increased. In addition to this, greater transparency and accessibility have to be ensured at every stage of the legislation. However, the significance of this document is that it not only confirms the principles of subsidiarity and proportionality, but also, promotes alternative methods of regulation, namely self-regulation, co-regulation. According to this document, it lays in the Commission’s responsibility that the alternative forms meet ‘the criteria of transparency and representativeness of parties involved’. Additionally, the document states that the pre-legislative consultation, impact assessment and consistency of texts

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are the three methods of quality of legislation improvement. Above all, ‘communication is an essence of policy making’. 63

Despite the consistent call for transparency in the above-mentioned documents, the Commission adopted a distinct Green Paper ‘European Transparency Initiative’. Obviously, this document was aimed at drawing attention to the need for transparency in legislation process. It indicates three major issues. The first component, which might improve transparency, is the creation of ‘a more structured framework for the activities of interest representatives (lobbyists)’. 64 Furthermore, this framework is aimed to ‘open to outside scrutiny’ the relations between the Commission and the lobbyists. 65 The second concern is the feedback on the application of minimum standards for consultation, which could lead to the developments in consultation process. The third aspect seeks to improve European citizens’ common knowledge about the EU and its budget. 66

The follow-up of the green paper ‘European Transparency initiative’ is a proof that this document has not been a temporary declaration. It describes how the voluntary register and the code of conduct should look like and what information should be covered.

All these documents together provided a basis for another European Transparency initiative in 2008. It set a framework governing the relations between the European institutions and interest representatives. Following this document a voluntary register was established in June 2008. With signing up for this register, the code of conduct becomes obligatory.

Although the above-mentioned acts have legal effect and influence the behaviour of lobbyists and the ones, who are lobbied, those rules are not legally binding. 67 Nevertheless, it cannot be denied that there is a clear trend in strengthening legal ground for the lobbying activities.

What does happen when lobbying comes to practise?

Lobbying becomes more complicated when it comes to practise. It is mostly due to the unique structure of the European institutions. While being a sui generis legal system it has very specific legislation procedures, in which institutions are obliged by the treaties to interact with each other in order to adopt a legal act, for e.g. Article 289 of the TFEU. Moreover, the competences and responsibilities are shared among the institutions and have a tendency to be shifted. Moreover, the institutions have highly fragmentised inside structures.

However, in order to understand lobbying in practise, first, the multi-layer decision making process has to be understood. The multi-layer decision-making seeks to involve the largest possible number of institutions in the legislation in order to ensure the representativeness of society's interests. According to W. Lehmann, ‘the European governance structure has given birth to a multi-layered system of different levels and sectors of organized and aggregate interest representation’.68 Despite being complicated, multi-layered legislation increases public trust and reduces the level of ‘democratic deficit’.

The following paragraphs examine lobbying in each of the institutions. However, before going into details, it should be emphasised that regarding the institutional setup, every institution maintains its autonomy and takes care of its own inside rules and management.69

Lobbying in the Commission

Commission is ‘a hot bed of lobbying activity’.70 This factual situation is directly linked with its functions and obligations towards the Treaties. The Commission is an agenda setter, since it has an initiative power regarding the proposals of legislation.71 This implies that Commission is ‘a crucial target for private interests’,72 though up to 80

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69 TFEU Articles 232, 218(2), 240, 253(6).
70 ‘The Department of the Environment, Heritage and Local Government,’The Regulation of Lobbyists in Canada, the USA, the EU institutions, and Germany’ (Report) P. 49.
71 TFEU Article 289.
percent of its proposals are changed.73 Furthermore, it manages implementation of the EU policy. In addition to this, it is a ‘watch dog’ of the Treaties and has a right to initiate infringement procedures. The Protocol on the Application of Principles of Subsidiarity and Proportionality requires that ‘before proposing legislative acts, the Commission shall consult widely’, unless unpredicted circumstances occur.74

The structural organisation of the Commission is tremendously fragmentised.75 Work is organised in 38 Directorates General, a number76 of committees and expert groups, which are aimed to present ‘specialized and technical know-how in various policy sectors in which the Commission is active’.77

However, the Commission remains lobbyists’ favourite target due to the convenient access to it. The officials in the Commission have lower ranks as in the Council; therefore, their schedules are not so stretched. Moreover, the Commissioners realize that the Commission not only has a responsibility to mediate consultation process, but it has a need to do that, since it needs accurate research regarding the topic of legislation. ‘Expert knowledge is the critical resource for the Commission’s legislative work’. Moreover, the information is valuable for the Commission because it can forward to other institutions only well-prepared proposals.78 Therefore, it appears that lobbying is a balanced activity. It takes two and it benefits two as well.79

In the framework provided by the Commission’s White Paper on Governance a consultation platform between the Commission and civil society named CONECCS was established. It is based on voluntary participation. However, the aim of this platform can be argued due to the uncertain meaning of the civil society. The White Paper on Governance regarding this definition refers to the opinion, which was released by the Economic and Social Committee on ‘The role and contribution of civil society organizations in the building of Europe’. According to it, the ‘civil society’ includes the social partners; organizations representing social and economic players, which are not

76 According to the Parliament report on Lobbying in the European Union: Current rules and practices (P.2) the number is over 1000.
social partners in the strict sense of the term; NGOs\textsuperscript{80}; CBOs\textsuperscript{81}. Due to a wide scope of the proposed definition, the distinction between lobbyists and interest representatives is blurred. A research should be held in order to evaluate, whether it is an appropriate notion. Nonetheless, it can be said that this notion reflects the Commission’s interest to get additional information regarding the issues from as many sources as possible.

Above all, the Commission has a voluntary register, which was launched in June 2008. This register allows ordinary citizens to find information regarding the interests, which influence the decision making process. Moreover, the Code of Conduct applies as an additional obligation for every representative who signs up.

**Lobbying in the European Parliament**

Although in the original institutional setup, the Parliament did not play a significant role, with every new treaty its significance was increasing. The remarkable change in Parliament’s role was brought by the SEA, which introduced the co-decision and consultation procedures. Eventually, this growth in legislation power put the Parliament at the same importance level as the Council. Therefore, presently the Parliament participates in the legislation process and takes responsibilities of a legislation authority.\textsuperscript{82} Nevertheless, it remains a platform for discussions.\textsuperscript{83}

The Parliament provided more points of access for lobbyists with the growth of its competences. This led to the difficulties while managing lobbying activities. Therefore, the discussion was initiated in 1994. However, due to the difficulties in defining the concept of a lobbyist and upcoming elections, this attempt had failed.\textsuperscript{84} However, the Parliament was the first institution, which established an accreditation system. This system was designed to promote professional lobbyism. Moreover, the Parliament as a body for lobbying is beneficial because every parliamentarian can be a subject of lobbying, especially, if he plays an important role in any of the committees.

\textsuperscript{80} Non-governamental organisations, which bring people together in a common cause, such as environmental organisations, human rights organisations, consumer associations, charitable organisations, educational and training organisations, etc.

\textsuperscript{81} Community-based organisations, i.e. organisations set up within society at grassroots level which pursue member-oriented objectives), e.g. youth organizations, family associations and all organizations through which citizens participate in local and municipal life; and religious communities

\textsuperscript{82} D. Coen, J. Richardson, ‘Lobbying the European Union: Institutions, Actors and Issues (Oxford University Press, 2009) P. 55

\textsuperscript{83} The Department of the Environment, Heritage and Local Government, ‘The Regulation of Lobbyists in Canada, the USA, the EU institutions, and Germany’ (Report 2006) P.57.

Although the Parliament does not initiate proposals on its own, there is no reason to assume that it cannot be lobbied. The Parliament contributes to the legislation process by proposing amendments. Therefore, it is a place of strategic lobbying.

The Parliament has its own accreditation system for all the persons, who want access to this institution. Nevertheless, it can be said that the Parliament follows the Anglo-Saxon tradition and requires the members of the European Parliament to declare their activities.

**Lobbying in the Council**

According to the Article 4 in the Treaty on the EU, ‘The Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof’. Its work is arranged in four sessions per year, which are attended by official authorities of the Member States. Authorities agree on the policy line. Therefore, indeed, the Council is de facto ‘the place to deal’.\(^{85}\)

However, some argue that lobbying in the Council happens rarely because of the difficult access to the ministers and the high-level setup fragmentation. The Council meets in nine different compositions. Furthermore, as the state authorities visit Brussels only for a few days, they have tense schedules and have no time for additional meetings with lobbyists.

Despite ministers being busy all the time, the Council performs well because of its structural arrangement. It consists of the General Secretariat, Coreper I and Coreper II, which are assisted by Mertents and Anticiti groups.

The Coreper is ‘a committee consisting of the Permanent Representatives of the Governments of the Member States’.\(^{86}\) Although its main responsibility is to prepare and coordinate the work of the Council,\(^{87}\) the Coreper can adopt procedural decisions. This all leads to that the Coreper is defined as ‘the strategic point in-road to the Council’.\(^{88}\) The Coreper is ‘vertically placed between the experts and the ministers and horizontally

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\(^{86}\) TFEU Article 240 paragraph 1

\(^{87}\) TFEU Article 240 paragraph 1

situated with cross-Council policy responsibilities’. This specific location enables permanent representatives to see a broad, though coherent overview of the Council. Although permanent representatives in Coreper I and Coreper II are instructed by the national capitals, the negotiations reach consensus most of the time due to the culture of compromise.

Therefore, lobbying in the Council works in a different manner than in the Commission or in the European Parliament. However, being a target for the interest representation cannot be denied.

Lobbying in the European Court of Justice

According to the bi-polar constitutional structure, judicial branch is separated from the legislative and executive branches. This ensures that the judicial system is fully independent. The European constitutional setup also followed this concept and established the European Court of Justice as an autonomous institution from the Commission, the Parliament, and the Council. Although the Court does not participate directly in the legislation, it affects and makes impact on it. Therefore, it falls under the umbrella of lobbying.

‘The Court has been a major site of integrative institution building the EU’. It interpreted and explained treaty provisions as well as other Community’s legislation. Through its case law, it formulated and established principles and tests, which became an essential part of the EU law.

Certainly, lobbying in the European Court of Justice cannot be performed directly, since judges have to maintain independency. It can be done through litigation. According to M. McCown, lobbying in the Court can be achieved via interest groups, since they ‘can open an issue and test both jurisdictional waters and the ripeness of the Question’. Even, if an interest group who supports and promotes case loses, the decision

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94 Such as Casis de Dijon, Mars, Bosman and etc.
beneficial because the initiating party receives additional information regarding the particular issues from the Court.

Nonetheless, it should be asked, whether the interest group action can be evaluated as lobbying. If it was the case, then how can it be controlled?

**Lobbying in the consultative bodies**

Behind the main European actors, which are discussed above, there is a wide range of consultative bodies. The reason behind it is that the European institutions are not capable of ‘knowing all’. Competent and skilled specialists, representing a particular area, should make the legislation proposal. Therefore, the European institutions delegate some powers to the consultative bodies on which they rely. The two most important ones are the Economical and Social Committee and the Committee of the Regions; the European institutions are obliged to consult them while adopting the legislation.\(^\text{96}\) Additionally, there are twenty-two specialised agencies.

Since there is a human factor involved, there is a probability of lobbying in all of consultative bodies. Moreover, lobbyists know that in pre-legislative stage lobbying is the most effective. However, there is no regulation regarding lobbying in these bodies.

**The voluntary register**

It is important to clarify that at present there are two registering systems, one for the Commission and the other one for the Parliament.

The establishment of the register system for the interest representatives was met with vigorous, however, contradictory opinions. S.Kallas, the Administration and Anti-Fraud Commissioner, named it as a ‘remarkable moment’ in the interview given soon after the register started running. She also added that a register is ‘a testing ground’, therefore, the lobbyists have a possibility to prove the transparency of their profession.\(^\text{97}\) Certainly, the register being voluntary led to the tenders of the mandatory one.\(^\text{98}\) The reasoning for this was based on the several factors, such as the need for ‘full

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\(^{96}\) TFEU Article 100.


financial disclosure’ and ‘common (for European Parliament, Council and Commission) code of ethical behaviour’. However, in the Communication on the annual report of the register, the Commission appears to be satisfied with the outcomes of the voluntary register. Therefore, neither the fact that big law firms are proceeding without entering the register plays a role, nor the distinct definition of lobbying seems to be enough demanding for any changes.

While Berkhout and Lowery claim that the Commission established the register in order to reduce individual lobbying, other argumentation can be done as well. First, the Commission declared a position regarding which ‘the register will preserve openness and will prevent the accessibility of the EU institutions from being abused by irresponsible lobbyists’. In addition to this, the register was a move towards organization of feedback information from the civil groups. However, most importantly, the establishment of the register was aimed ‘to boost legitimacy of [the Commission’s] proposals’.

Due to a replication of registering procedures in the Commission and the Parliament institutions, it was agreed that it would be beneficial to have one common register. The management of the register would be easier. Moreover, interest representatives would not have to complete registration questioners twice. However, it appears that institutions have different attitudes towards registration. The Commission stands on a position that registering is a voluntary opportunity to gain better access, whereas the Parliament promotes registering as a part of professional lobbying.

Although the common registration would benefit all the legislation partners, interest groups, and society members, it would be a big step in reducing institutional autonomy. It would also confirm a trend of fading lines among the European institutions.

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Conclusion

Despite the great difference in numbers between the latest data and the register, all those people, who are mostly located in Brussels, have the same goal to represent various interests groups and to influence particular legislative process. Every interest group can use lobbying as a tool at different stages of the legislation and in different institutions. However, big companies prefer staying ‘in the shadow’ of public affairs companies and professional organisations.\(^ {103}\)

The EU institutions have unanimously recognized ‘that pluralism of interests is an important feature of democracy and it is perfectly legitimate for members of the society to organise and lobby for their interests’.\(^ {104}\) Obviously, this enables lobbyists to become an essential link between the authority institutions and the society.

At the moment, the EU is trying to improve the level of democracy by implementing the strategy of Better Regulation,\(^ {105}\) which covers the approach of good governance. The aim of this approach is to enhance transparency and accountability in the legislation process on the European level. Therefore, ‘over the past decade, the EU has been developing a new regulatory policy’.\(^ {106}\) It resulted in a shift from traditional regulation tools (regulations, directives) to alternative ones (co-regulation, self-regulation) in a vast range of policy areas.

However, although lobbying is one of them, it seems to have developed in an opposite direction. A trend in strengthening legal ground for the lobbying activities cannot be denied. The establishment of a voluntary register can be perceived as a proof of it. Nevertheless, the main question remains as to what degree and how lobbying has to be regulated in order to maintain profitable for all the parties involved.

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\(^ {103}\) Friends of the Earth Europe, ‘Lobbying in Brussels: How much do the top 50 companies in the EU spend?’ (Report 2010) P.3.


CHAPTER III

IS LOBBYING A POLITICALLY SENSITIVE TOPIC FOR THE EU?

Chapter overview

Lobbying can be analyzed from different perspectives. In the following paragraphs lobbying is perceived in an alternate aspect than in the previous chapters. Therefore, lobbying is considered not only an activity in order to influence decision-making but as a policy area.

The chapter is based on the hypothesis that lobbying as a policy area is a politically sensitive topic in the EU context. Hence, the reasons for confirmation or denial ought to be found. Although the chapter initially relates political science issues, the legal approach is not forgotten and taken into account. Therefore, the chapter is interdisciplinary, since it analyses the relationship between law and politics. However, the emphasis of this chapter is put on the decision-making or, in other words, on the legislation.

Introduction to lobbying as a policy area

Currently, it is universally acknowledged that the EU is a democratic system, which follows and promotes democratic principles and which realizes lobbying as a useful tool in the legislation process. However, ‘shocking though it might seem, the Community was never intended to be democratic organization’.107 Initially, establishing the Treaties trusted decision-making to the institutions in which members are appointed by the Member States. Moreover, the Parliament was not a reflective voice of the European society, since it was not directly elected. Its aim was to consult the Commission and the Council.

The original EU institutional setup was confronted with the classical view towards the separation of powers. Following ‘the classical tradition, the law making authority is vested in the legislative authority (...), which will adopt all the necessary laws’.108 In addition to this, legislative, executive and judicial branches are separated. Yet

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in the EU, the main decision-makers were the Council, which work was and continues to be based on the intergovernmental meetings, and the Commission. The Parliament (Assembly) had only the right to consult. However, the Community has been subject to an on-going development process, which brought many changes in the law making structure and in the relations between the EU and its Member States.\textsuperscript{109} One of the major changes is the shift from the state orientated policy making to the European. The European law influences today approximately 80 percent of national legislation.\textsuperscript{110}

Since the creation of the EU, lobbying has been actively performed in the law making process, though it did not have any legal basis. In 1992, the Commission in its report brought lobbying to the agenda as a policy area due to the rapid growth of number of actors, who were practicing it. This led to discussions in the Parliament, which unfortunately ended fruitlessly in 1994. The failure of the first attempt was caused by an inability to come up with a solid definition of lobbying and the upcoming elections.

This could mean that the Parliament lacked the inspiration or just was not motivated enough to take action. No further interest about the lobbying regulation was expressed until the White Paper on Good Governance was published in 2001. Since then it is a top issue as it affects the level of the public trust in the European Institutions. In the period of ten years, a coherent framework of lobbying was created. However, the main input in the creation of this framework was made by the primary goals of the good governance transparency and openness. Therefore, a statement that the EU institutions are interested in lobbying as a policy is incorrect because this interest is limited to the extent it can benefit the EU legal system.

**The position of the Member States**

Although lobbying has its own specificity due to linking political process with the law, the main proof for lobbying being a politically sensitive topic is the position taken by the Member States. When the topic of lobbying comes on the agenda, the Member States assume an ambiguous position. On the one hand the Member States agree that lobbying has to be regulated in the European institutions, but on the other hand the


strict decisions are rarely made due to lack of unanimity. This leads to the assumption that Member States seek transparency in the European institutions, but they also prefer to maintain open access to them in order to gain the benefit. Yet the scale swings, it goes to both sides, but it cannot find the balance. The Member States cannot make a unanimous decision while choosing what is more important: transparency or open access.

Above all, the unanimity seems to be improbable because Member States act individually. They seek to maintain access to the EU system at all legislation stages. Every country seeks the most profitable regulation for itself in order to help its business sector to influence decision-making. The Member States are interested in keeping open gates for the lobbying on the behalf of the business sector, since in the end the Member States can gain from successful policy regarding the businesses. This all results in that the Member States follow an inconsistent policy. However, this inconstancy is beneficial for them; since it ensures that by the time, the Member States want to control decision-making they can do it by intervening in the legislation process.

Moreover, there are only several Member States, which have chosen to have a specific regulation regarding lobbying activities, the other ones do not have specialized provisions, although all of them are fighting corruption. The Southern countries, such as Spain and Greece, maintain a position that lobbying is an illegal activity, whereas the Northern and Western States admit the necessity of lobbyists in the legislation.

The structure of the European institutions

The second reason, which might prove that lobbying is a sensitive topic in the European Context, is the institutional structure. Due to a specific institutional structure of the European Union every institution remains autonomous in a way it has a possibility to adapt its own operational rules. Therefore, the inside rules differ in all institutions. Since they are different, it becomes very challenging to establish a common framework for lobbying. The best examples are the Commission and the Parliament. While the Parliament seeks to create an accreditation system, the Commission is promoting a voluntary register.

112 Procedural rules according to the TFEU Articles 232, 218(2), 240, 253(6).
Fragmentation of interests

The fragmentation of interests is the main issue, which makes lobbying hard to conceptualize in the European context. Referring to the recent statistical data, the most influential players while lobbying the Commission and the Parliament are individual actors.\textsuperscript{113} There are over 35000 firms, which have developed direct lobbying in the EU institutions.\textsuperscript{114} They constitute 40 percent of the lobbying body, whereas the Member States account for a smaller share of 11 percent.\textsuperscript{115} Different from the American practice think tanks do not have significant influence in the decision-making and take only 4 percent in total. This survey leads to the embarrassing findings. It appears that in practice interest representation embodies only actors, which are able to fund their activities. Therefore, this kind of interest representation does not reflect wide interest groups. The actors who are responsible for the legislation should be aware of this distribution in order to realize the real value of represented opinions.

Furthermore, ‘lobbying landscape is extremely fragmented’.\textsuperscript{116} The main reason for this is due to the involvement of both, the public sector, which mainly consists of NGOs; and the private sector, which includes profit-seeking organizations. A distinction between the sectors can be made by the goals, which they aim to achieve. The interest groups, who belong to the public sector, look for the positions in which ‘the society as a whole’ could benefit, whereas private sector concentrates on realizing their own goals. The clear picture is depicted in the Parliament’s report on the lobbying in the EU. The report claims that there are over 1000 trade associations, about 750 NGOs, 150 regional offices and 130 specialized law firms.\textsuperscript{117} However, this division does not reveal a real picture of players in lobbying field because the number of people who are represented is not apparent.

To make the picture more complicated several things can be added. First, the non-profit organizations represent 27 different policy areas, which cover issues regarding agriculture and development, competition, consumer protection, education, employment, environment, human rights, information society and etc. Secondly, from the Commission’s database it occurs that there around 950 business associations, over

\textsuperscript{113} D. Coen, J. Richardson \textit{Lobbying the European Union: Institutions, Actors and Issues} (Oxford University Press, 2009) P. 304.
1300 European level groups and about 300 transnational firms, which participate in the process of policy shaping.\(^\text{118}\)

**Human factor**

The other reason why lobbying is a politically sensitive topic on the European agenda is because of the multilevel governance and the extensive scope of people who participate in lobbying activities. As it was mentioned before the lobbying activities involves two parties, the one, who lobbies, and the other one, who is lobbied. Obviously, these two sides are represented by human beings. Therefore, the human factor in lobbying is unavoidable.

Certainly, the EU does realize the presence of human factor. People run all the institutions and committees. Since the concept of lobbying does not exclude any category of people, who are not lobbied in the legislation process, everyone who directly or indirectly participates in the legislation process can be lobbied. Therefore, lobbyists are not only interested in the people who have the highest ranks and positions, but also in the civil servants.

The first attempt to manage the process of interest representation followed the practice in the United Kingdom. The provisions regarding the lobbying in the Parliament were incorporated in the Parliament’s Rules of Procedure. Emphasis should be put on the fact, that the Parliament is obliged to adopt such rules.\(^\text{119}\) Therefore, rules maintain a lot of freedom, since the provisions do not have to be reconciled with other institutions. Therefore, the Parliament included provisions on lobbying activities. Furthermore, the civil servants have to work under framework, which is compatible with the General EU Staff Regulation (2004), and have to follow the provisions of the European Code of Good Administrative behaviour (2005).\(^\text{120}\)

However, it is still a challenging task to control and indicate all attempts of lobbying. There are many situations, in which it is not clear, whether the person should declare that he was lobbied. Let us look at several examples to illustrate the high probability of confusion.

\(^{119}\) Treaty on the Functioning of the European Union, Article 232.
First example: The minister of transport and communication from the country A receives a proposal (regarding the recent attempt to harmonize the rules in the public transport at the EU level) from the transport service provider in countries A and B. The transport provider has dominant position in country B. The proposal is handed in country C. The framework under which the minister should work becomes uncertain. Although the service provider and the minister represent country A, the attempt to make influence is on the European level, since it involves two countries. Moreover, the lobbying activity took place in country C. The question rises, under which jurisdiction the action should be evaluated: country A, country B or country C.

Second example: The Executive Agency for Health and Consumers was asked to give an opinion regarding safety requirements of food products. The entity X is the biggest fruit importer in the EU. However, in order to maintain permanent flow of products to the distributors it sprays fruits with liquid, which in big quantities might cause health risks. Therefore, the entity seeks to achieve the establishment of the highest permissible dose. In order to do that, the entity provides supporting research results. According to them, the liquid does not cause any health risks. Two main questions arise: is it lobbying activity, if yes, how such actions should be registered.

Both examples are valuable, since they are related to different problems regarding lobbying. The first example raises the issue of possibility to lobby regarding the European matters at the state level. This example raises the question of jurisdiction, in particular, under which lobbying regulation the minister and company should work. The second example illustrates the possibility of lobbying the consultative bodies. Nonetheless, it should be asked, whether this example is considered as lobbying.

**The connotation of lobbying**

Lobbying faces another issue, which adds weight to it as being a politically sensitive topic. Lobbying has a negative connotation in the most of the Members of the EU. The following paragraphs examine existing situation in Eastern European countries, namely Lithuania and Poland. However, older Member States are also not an exception.
As in Germany, 'lobbying has always been and still is considered a foreign word with strong connotations of secretive policy process where illegitimate influence is sought'.

Lithuania is the first European country, which adopted a specialized legal act on lobbying. However, most members of the Lithuanian society cannot define lobbying and additionally link 'lobizmas' with 'lubizmas'.

'Lubizmas' derives from the surname of B. Lubys who is one of the richest entrepreneurs in Lithuania. His surname became publicly known after the scandalous privatization of ‘Azotas’, in 1994. The state owned company was sold for a comparatively low price. After the privatization, it was branded under the name of ‘Achema’ group and at the present it is one of the most profitable undertakings. Moreover, in his speeches and interviews he promotes lobbying. According to his opinion, lobbying should be done by all undertakings, which can afford it, and the legislative branch should take this activity seriously.

Poland is another good example of a country in which lobbying has negative associations, although the law fully regulates it. The Act on Legislative and Regulatory Lobbying was introduced in 2005. However, the number of registered lobbyists is surprisingly small. There are only 16 officially registered lobbyists. This means that for almost 12 times larger population than in Lithuania, Poland has less officially registered lobbyists. One might ask why the situation is like that and how legislation process works without any interest representation.

Although there is no critique regarding the present situation on the international level, some information is available in the Polish media, which portrays lobbying in a negative light. It appears that the Members of both houses, namely Sejm and Senat, see lobbying as a threat to the reputation status and some of them are not even introduced to the fact that lobbying activities are legal. Therefore, the legislative branch prefers to receive advice from independent experts regarding a particular field, who most of the time, receive remuneration for their task. Essentially, these independent experts can be categorised as lobbyists, since while giving an advice they usually represent the position of a particular organization.

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121 The Department of the Environment, Heritage and Local Government, “The Regulation of Lobbyists in Canada, the USA, the EU institutions, and Germany” (Report 2006) P.56.
123 K. Jasiecki, ‘Regulating lobbying in Poland: Background, scope and expectations’(Cracow 2006).
trend to rename lobbyist under more sophisticated title of ‘independent expert’. Moreover, the distinction between two categories is hard to make. The official number of contracts made by the government and independent experts is not found.

**Interest representatives versus lobbyists**

The principal confusion while discussing lobbying activities occurs due to the lack of clarity in the definition of lobbying. In most of the recent legal documents, lobbying is used in brackets next to interest representation. Some scholars use lobbying in the context of interest representation, which is made by the industrial sector and the others use lobbying as talking about all kind of interest representation. Therefore, the usage of the same words in different contexts causes puzzlement. For example social partners in the context of social dialogue, regarding labour law issues, consist of workers and employers’ associations, whereas the civil dialogue includes all actors, who want to participate in the legislation’s shaping process. Moreover, sometimes the latter dialogue is also called the social dialogue.

**Conclusion**

As it appears, there are many factors, which influence the perception of lobbying. All of them confirm the hypothesis that lobbying, as a policy area is a politically sensitive topic in the EU context. Obviously, the position of the Member States has a major impact on lobbying regulation due to the reason that the creation of policy line is in the capacity of the Member States during the Council meetings. Nonetheless, the European institutional structure, the fragmentation of interests and human factor are also the aspects, which make lobbying hard to conceptualize and regulate. Therefore, at present lobbying stays the ‘meta-game of triple P’, this involves persons, positions and procedures. In detail, this ‘game’ consists of finding mindful and the most engaging person in the most influential position at the right procedural stage.

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CHAPTER IV

WHAT CAN THE EUROPEAN UNION LEARN FROM THE LOBBYING PRACTICES PRESENT IN OTHER COUNTRIES?

Chapter overview

This is the final chapter of the thesis. Therefore, this chapter aims at completing and bringing coherence to the thesis, while providing the answer to the second part of the thesis’s central question, which is ‘to what extent does the EU need to set up a legal framework for it and what should this framework look like’. However, the main challenge of this chapter remains to answer the questions ‘what can the European Union learn from the lobbying practices in other countries’ and whether the EU can do so. Seeking for the answer to the latter question, the following paragraphs point out strong and weak points of existing regulations. Furthermore, the chapter considers the possibilities of the upcoming regulation and proposes recommendations for the future development of the lobbying regulation.

A smart one is learning from the mistakes of others.

Why and what lessons should the EU learn from others?

There are two main reasons why the EU should learn from existing practice regarding lobbying. In the following paragraphs, both of them are evaluated.

Although initially the six founding Member States signed the Treaty of Rome as the international treaty, it has become a sui generis legal order. Therefore, the EU has specific institutional settlement, yet the institutional structure has some similarities with traditional separation of powers. However, these ‘similarities’ melt away after every actor is analyzed. Moreover, there is no single institution, which is responsible for the legislation. According to the TFEU, in the ordinary legislative procedure the European Parliament, the Commission and the European Council are obliged to interact
with each other in order to adopt the legal acts.\textsuperscript{129} Despite the differences, the EU policymaking works in the same manner as the policymaking on the national level. It works throughout the adoption of legal acts. Therefore, the EU could learn some lessons from the existing practice regarding the lobbying regulation.

Moreover, the EU is already taking advantage of the best practice while the policymaking process is guided by the method of open coordination. This method was introduced in order to implement the Strategy of Better Regulation. Due to this, the strategy policymaking shifted from the top-down approach to bottom-up. This trend became more visible after the Lisbon agenda, which was set in the European Council meeting in 2000, introduced the open method of coordination.\textsuperscript{130} According to the Presidency Conclusion, the method is aimed at ‘spreading best practice and achieving greater convergence towards the main EU goals’.

Furthermore, this method should help the Member States to adopt ‘appropriate quantitative and qualitative indicators and benchmarks (...) tailored to the needs of different Member States and sectors as means of comparing best practice’.\textsuperscript{131} The method was developed further in the White Paper on Good Governance and in the Inter-institutional agreement on better lawmaking (2003). Although the method ‘concerns forms of non-binding policy coordination’, it is evaluated as a successful tool by the SOLIDAR. This network of NGOs\textsuperscript{132} argued that the method is successful due its involvement of public authorities and interest groups at national and European level. Therefore, the OMC could be used in order to establish common framework for lobbying activities.

**What lessons and from whom should the EU take?**

As it follows from Chapter 1 and 3, not all lobbying practices can be considered as successful ones. The adoption of legal acts does not ensure the implementation of its provisions. Therefore, the most obvious lesson can be learnt from the Eastern European countries. Their example illustrates that the adoption of legal acts regarding lobbying does not solve the problem of transparency and openness in the legislative branch.

\textsuperscript{129}The Treaty on the Functioning of the European Union, Article 289.
\textsuperscript{130}P.Craig, G. de Burca *EU Law: Text, Cases, Material* (Oxford University Press, 4th ed. 2008) P. 151.
\textsuperscript{132}SOLIDAR, ‘Evaluation of the Open Method of Coordination in the field of social inclusion and social protection’ (Report to the European Commission, June 2005).
Despite that, they are also worthy to take into consideration while trying to establish a common framework for lobbying activities on the European level.

Nonetheless, even the USA and Canada regulation can be criticised in several respects. The legitimacy of the activities does not enhance the public trust in the legislation process. Moreover, according to the Transparency International the corruption index did not significantly increase after the adoption of legal acts in any of the Easter European countries.\(^\text{133}\) Therefore, it can be declared that first a negative attitude towards lobbyists in the society has to be changed in order for the provided framework to precede.

The other important lesson is that strict penalties, which are common in the USA and Canada, prevent the abuse of access to the legislative branch and enhance responsibility and accountability among the lobbyists. The most recent fine in the USA reached $111,000.\(^\text{134}\) It was given due to a failure in disclosing the represented interests. In Lithuania, practice towards sanctions differs. During a ten-year period, no one has ever received a fine. Is it just a coincidence? Otherwise, is it a consequence of a vague provision in the regulation?\(^\text{135}\)

While regulating lobbying, one of the main concerns that countries struggle with, is the level of disclosure. How much disclosure of information is enough? There is no unanimous answer, since the gathered information from the lobbyists is used for different purposes. In Canada, other lobbyists use the information in order to follow the actions of their competitors, whereas in the USA legislators use the information in order to evaluate the strength and representativeness of the voice that is declared.

Furthermore, the definition of lobbying has to be sufficient in the sense that it would let exemptions due to which circumvention of rules could become possible. The definition balanced in a way it could ensure the uniform understanding without room for misinterpretation.\(^\text{136}\) ‘Good regulation says what it is and what it’s not’\(^\text{137}\). However,


\(^{137}\) The Department of the Environment, Heritage and Local Government, ‘The Regulation of Lobbyists in Canada, the USA, the EU institutions, and Germany’ (Report 2006) P.88.
before defining lobbying, the legislator should clarify the goals it aims to achieve with particular legislation.

Is the ‘copy-paste’ approach applicable in the case of the EU?

As it appears, most of the time new legal or political system is built on the examples of others. Lithuania is a very good case. The country was left without any relevant legal database after the rehabilitation of independence in 1990. It had to adapt the change as quickly as possible to keep stability in the country. There was no time for novel inventions in the legal regulation. Therefore, lawyers looked at the best practice from other countries. Certainly, the acceptance of best practice was not blind. First, it was examined, whether the norm complies with the expectations of the majority of the society. In this way, some of the good practices were rejected. Can this copy-paste example be applicable in the case of lobbying regulation in the EU?

As it is mentioned above, the Treaties provide a diffusive and, in this sense, a very specific framework for the decision-making in the EU. In addition to this, legislative procedure depends on the policy area and the purpose of the legislation. The issues regarding agricultural matters are solved in the European Council whereas the line of competition policy is in the hands of the Commission. The Council mostly adopts regulations, whereas directives and recommendations are in the competence of the Commission and the European Parliament. The specificity of the legislation process in the EU compared with the legislation process on the state level is obvious and cannot be denied. Since ‘there is no “legist”, nor even in fact one “legislator”, the process is dynamic and leads from the establishment of an initial text by one or two officials within the Commission, through consultation and rewriting, to a final political negotiation and decision by national ministers within the Council’.  

Due to the specificity of the European legislation procedure it is logical to consider, whether the EU can apply existing practice regarding lobbying. However, ‘in all innovations in public institution building, there is a degree of borrowing from past experiences’. Despite the specificity of the EU legislation process, the EU should apply the lessons learnt from the countries, which regulate lobbying.

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However, the copy-paste approach cannot be applied. The EU governance is a multi-level governance; it is based on the work of European institutions as well as on the work of national actors. Therefore, the EU has to find its own way to regulate lobbying activities. In order to do that the EU has to set clear goals, which are to be achieved by the lobbying regulation. However, the question has to be raised, whether it is all for the transparency and enhancement of the public trust in the legislation process, or is it for the involvement of a wider range of actors in the legislation process, in order to adopt the legislation, which would reflect the interests of the society? Although it might appear that the purpose of the regulation is different, the goal has to be set in order to guide legislators while establishing a common framework.

**What regulation possibilities does the EU have?**

There are many possibilities how the EU could regulate lobbying. Since the EU institutions seek to regulate lobbying activities on the EU level, they hold exclusive competence and responsibility regarding the issue.

According to the TFEU, in order ‘to exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions’.\(^\text{140}\) Certainly, the type of legislative act purely depends on the final goal, which it aims to achieve. Obviously, an opinion is an unsuitable legal tool to regulate lobbying activities, since it is not binding. The choice of regulation or directive also seems to be inappropriate, as the final goal is to regulate lobbying in the EU institutions and not in its Member States. Therefore, the option of provision’s regarding lobbying incorporation into the Treaty should be considered. At this moment it seems likely to happen, however, such possibility cannot be denied because the EU is still shaping its legal system. The best proofs are the establishment of Ombudsman, and sports inclusion to the Treaty. Nonetheless, at the present the inclusion of provision on the topic of lobbying to the Treaty seems to be too challenging due to the complicated and long ratification process, which threatens the functioning of the EU. Nonetheless, the EU could declare it as a future goal and start preparatory jobs.

Above all, the position of the Member States should not be set aside because lobbying activities are in the field of their interest. Moreover, the inclusion of the Member States in the decision-making regarding lobbying could benefit the EU. First, the

\(^{140}\) The Treaty on the Functioning of the European Union, Article 288.
Member States would be more motivated to follow the provisions, which they created themselves, and second, the participation of the Member States in the policy shaping could bring balance and promote bottom-up legislation approach.

Conclusion

As it appears, the EU has to make some hard choices. Obviously, regulation regarding lobbying is a challenging task for the EU because it is based on multi-level governance and European institutions are the same important actors at the EU level as its Member States. Moreover, it is expected to act fast because existing situation is rather awkward and both public and private actors are seeking for the clarity.

The EU has to remember that it seeks transparency in its legal system. The lobbying regulation could be one of the ways to achieve it. Despite that, the EU should realize that lobbying benefits three categories of people, namely lobbyists, legislators and citizens. The lobbyists represent client’s interests, the legislator receives explicit information regarding the topic of legislation, and citizens have a possibility to be heard.

The EU should take advantage of the existing practice regarding lobbying. Although the EU has a diffusive institutional structure and cannot use a ‘copy-paste’ approach, it has to look at the examples of others. The EU has a possibility to choose methods, which work. Therefore, it should avoid mistakes, which were done by others. The extent of lobbying regulation and the level on which it is done, directly depends on the goal that is aimed to be achieved with the regulation.

Nevertheless, the EU should follow the recommendations, which are presented in the OECD Report on Lobbyists Governments and Public Trust. Before establishing the regulation, the EU institutions and actors, which are involved in the legislation processes, should ask themselves: who is to be regulated, what is the level of disclosure needed, how can they be regulated and how the integration of lobbying regulation to overall legal system can be secured.
Recommendations

Based on the findings of the analysis, several recommendations can be made. However, most of my personal recommendations comply with the OECD report, which stresses out the elements, which might have an essential impact on the creation and implementation of the lobbying regulation.

According to it, first, ‘a clear and unambiguous definition of the regulatory target’ is needed. Otherwise, the circumvention of legislation is unavoidable. Therefore, the EU should think about clarifying the present concepts of lobbyists and lobbying activities. I do support the idea that the 'legislation should differentiate between paid lobbyists, ordinary citizens and representatives of sectoral groups'.

Furthermore, the disclosure requirements should be ‘meaningful and attainable’ in a sense that the purpose for which the information is used should be clarified. Moreover, the regulation should provide procedures, which are ‘realistic and attainable’ and would be proportional to the results. Above all, the regulation should find place among the present legal system and become an integral part of the legislation process. Nevertheless, the legislation should be aimed to achieve not a declarative goal but a practical one. Therefore, the EU should specify the role of lobbying in the process of decision-making.

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142 The Department of the Environment, Heritage and Local Government, ‘The Regulation of Lobbyists in Canada, the USA, the EU institutions, and Germany’ (Report 2006) P.88.
## Appendix 1: The comparison of different approaches to lobbying

<table>
<thead>
<tr>
<th>Country</th>
<th>Name of regulation</th>
<th>Year of adoption</th>
<th>Definition of Lobbyist</th>
<th>Definition of lobbying activities</th>
<th>Controlling body (confirms and evaluates)</th>
<th>Who can be lobbied</th>
<th>Sanctions/ penalties/ fines</th>
<th>Frequency of reports</th>
<th>Prohibition on lobbying</th>
</tr>
</thead>
<tbody>
<tr>
<td>USA</td>
<td>Lobbying Disclosure Act</td>
<td>1995</td>
<td>Individual who represents clients/employers interests and gets remuneration</td>
<td>Contacting, planning, research</td>
<td>The Secretary of the Senate and the Clerk of the House of Representatives</td>
<td>Legislative and executive branches</td>
<td>Not more than $50,000 or imprisonment (1-5 year);</td>
<td>Semi-annual</td>
<td>One year</td>
</tr>
<tr>
<td>Canada</td>
<td>The Lobbying Act</td>
<td>2008</td>
<td>Individual who for payment represents interest of the third party for the public office holder in order to influence his behaviour</td>
<td>No precise definition</td>
<td>the Office of the Commissioner of Lobbying</td>
<td>Public office holders</td>
<td>Up to $50,000 or imprisonment up to 6 months/ Up tp $200,000 or to imprisonment up to 2 years</td>
<td>Monthly</td>
<td>Five year</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Law on Lobbying Activities</td>
<td>2003</td>
<td>Legal or natural persons who is registered as a lobbyist</td>
<td>Representation of client’s interest for remuneration or without it</td>
<td>the Chief Official Ethics Commission</td>
<td>State officers</td>
<td>Suspension/ determination of activities</td>
<td>Annual</td>
<td>-</td>
</tr>
<tr>
<td>Poland</td>
<td>Act on Legislative and Regulatory Lobbying</td>
<td>2005</td>
<td>-</td>
<td>legal action aimed to influence the legislative or regulatory actions of Public Authority</td>
<td>Minister having jurisdiction over matters related to public administration controls the Register</td>
<td>Legislative bodies: Sejm, Senate</td>
<td>From PLN 3000 to 50,000</td>
<td>Annual</td>
<td>-</td>
</tr>
<tr>
<td>Hungary</td>
<td>Act on Lobbying Activities</td>
<td>2006</td>
<td>A natural person who is registered as lobbyist and runs lobbying activities</td>
<td>Activity or conduct aimed to influence executive decisions or fostering interests under economic consideration</td>
<td>the Central Office of Justice</td>
<td>Legislative or administrativ e actions</td>
<td>Withdraw the lobby license/ suspension for 2 years/ Up to 10 million forints, Proportional to the crime committed</td>
<td>Quarterly</td>
<td>-</td>
</tr>
<tr>
<td>Germany</td>
<td>Annex 2 of the Rules of procedure</td>
<td>2003</td>
<td>Representatives who are in public list</td>
<td>Interest representation regarding associations of trade and industry</td>
<td>The President of the Bundestag</td>
<td>Bundestag – legislative branch</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
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