

Why should we fix something if it is not broken? - A case study of the lobbying regulations in the European Institutions

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Introduction

‘Why should we fix something if it is not broken?’ is a quote from Mr. Alexander Stubb, the reporter of the Lobbying regulations report in the European Parliament (EP) and present foreign minister of Finland. His deep conviction that the lobbying rules are actually working fine in Europe was reflected in the first draft of the report requesting for the creation of a voluntary based lobbying register in the European institutions.

Coming from a citizen, belonging to one of the least corrupt countries in the world¹, these words seem fine, but yet strange to many eastern Europeans that due to the political background of their countries are probably more cynic and skeptical about the voluntary schemes in an area where millions of Euros are spend annually in attempts of influencing the European institution decisions. This skepticism is unfortunately backed up with the latest data, published by the Eurobarometer showing that on average, two out of three European Union citizens are of the view that there is corruption in the European institutions². The results are indicative for the crisis of trust that the European Institutions are facing fifty years after the establishment of the Union.

The lack of public trust in both national and European institutions³ has brought again the anticorruption policies high in the European political agenda. Enforcing effectively the good governance principles has become crucial for overcoming the widespread euro skepticism and finding the way out of the Lisbon Treaty deadlock. In the last years, it has been recognized both

1 According to the annual indexes of Transparency International

2 2 Special Eurobarometer 291, April 2008, The attitudes of Europeans towards corruption

3 See 2007 and 2008 Special Eurobarometer for European Social Reality

by the European Parliament and the European Commission (EC) that one of the best ways of regaining people's trust is by bringing more transparency and accountability to the citizens. Transparency and accountability however are not commonly associated with lobbying.

From the business prospective, lobbying activities are significant tool for distributing and reallocating huge amounts of money throughout the Union and a tool for benefiting one or another sector of the European economy. From the citizen's prospective, lobbying is usually associated with a 'convenient' tool for enriching politicians and 'securing' the economic welfare of their future generations. Thus the lobbying activities if not executed properly can lead not only to a wrong allocation of the taxpayers' money but to corrupt practices that threaten the foundation of the political system and the democracy as a whole. Deriving from this perspective, the bigger the resources are, the largest the harm can be if a preventive measures are not undertaken within the due course.

As the major policymakers, handling a budget of around 134 billion Euro⁴ and representing 492 million citizens from 27 member states, the European Parliament and the European Commission are *the* European institutions most exposed to pressure and influences – a fact supported by the presence of about 15 000 lobbyists and 2 500 lobby organizations, registered only in Brussels⁵. These figures are though just indicative as the number of the unregistered lobbyists and pressure groups is unknown. With the current loose regulations of the lobbying activities in the European Institutions, it is practically impossible for the European citizen to know if the EU policies are adopted solely in public benefit or in the interest of some economic groups and organizations.

Having said that, we acknowledge that lobbying organizations should not be considered by default as 'viruses' that bring shadows of suspicion on the European policy making process but rather as partners that bring positive impact and contribute to the work of the European Parliament and the Commission. Lobbying activities however are marked as a highly sensitive process having a high corruption risk profile and potentially endangering the founding principles of the Union. The urge for regulating the lobbying activities is examined in the present paper as

4 The Budget of the EU for 2009 available at <http://eur-lex.europa.eu/budget/www/index-en.htm>

5 European Parliament, Report on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions(2007/2115(INI))

a preventive measure that aims at strengthening the institution's integrity, transparency and accountability and as a tool for regaining public trust. The paper outlines the main differences between lobbying, trading in influence and corruption. In this light it overviews the anticorruption policy of the Union that deals with lobbying activities and examines the debates in the European Parliament and the European Commission on the new lobbying regulatory framework. It further analyzes the different points of views of the state actors in the debates while making in the same time comparative analysis of the EU and US regulations of the activities of interest representatives.

The paper uses the terms 'lobbyist and interest group representative' applying them to all organizations/individuals representing both public and private interests. The commonly used division of the interest groups according to the kind of interest they represent (public and private) can't be applied for the purposed of the analysis as it is based on the hypothesis that the public interests groups represent solely the interest of the society while private interests serve only the needs of the respective clients. This assumption however proved not to be true in all cases and in order to distinguish the two groups, the European parliament⁶ uses the terms 'producer and civic' interests applying them to the general term of interests representatives/lobbyists.

Lobbying - trading in influence – corruption: or why should we regulate the lobbying activities

Is trading in influence the same as lobbying? Do they both indicate corruption or not? How can we differentiate the three of them?

The difference between these terms is often blurred in the perceptions of the general public and the media, using them interchangeably while describing huge local or international scandals (e.g. Oil-for-Food Programme or the Elf-Aquitaine affair).

In order to clarify the differences between the three terms, the present paper is using the most common definitions bound in European strategic and legal documents. When applied in the

⁶ Lobbying in the European Union: Current Rules and Practices working paper,(2003) Constitutional Affairs Series, AFCO 104 EN, European Parliament

polymaking procedure, in all three situations we have an Agent A (person entrusted with power of taking decisions on somebody else's behalf or person who can influence these decision) and Agent B (participant/s, outside the institution that want to influence the policy making process) that interacts and gets involved in different relationships. The three different situations and approaches of policy influence can be presented in the following way:

- **Lobbying** : The common definition for lobbying agreed between the European Parliament and the Commission states that these are "activities carried out with the objective of influencing the policy formulation and decision-making processes of the EU institutions"⁷

In this hypothesis: Agent B performs activities in order to influence Agent A and thus to influence the policy-making process. There is no clear definition on what kind of activities Agent B may perform in order to achieve the desired result. The definition practically excludes Agent A from its scope focusing more on the major aim of the activities of Agent B.



- **Trading in influence** is defined in the Criminal Law Convention on Corruption⁸ as “promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to *exert an improper influence over the decision-making* of any person referred to in Articles 2, 4 to 6 and 9 to 119 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result”.

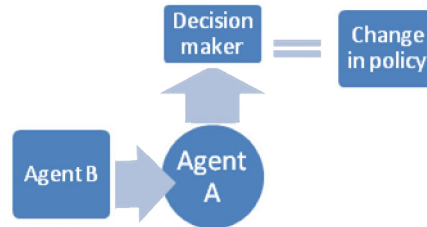
In this case Agent B performs activities in order to influence Agent A who in his turn will exercise or try to exercise influence over a third party and thus will influence the policy-making process.

⁷ Report on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions, A6-0105/2008 Committee on Constitutional Affairs, European Parliament

⁸ Article 12, Criminal Law Convention on Corruption, Council of Europe

⁹ Articles 2, 4,6,9 and 12, Criminal Law Convention on corruption refer to both domestic and foreign officials and members of domestic and foreign assemblies, officials in international organisations, judges and officials in international courts

The main component of the equilibrium is the undue advantage that Agent A will receive for his/her actions.



- **Corruption:** The Council of Europe's Multidisciplinary Group on Corruption, defines corruption in its Action plan¹⁰ as " bribery and any other behavior in relation to persons entrusted with responsibilities in the public or private sector, which violates their duties that follow from their status as a public official, private employee, independent agent or other relationship of that kind and is aimed at obtaining undue advantages of any kind for themselves or for others".

In this hypothesis *Agent A and agent B (passive or/and proactive participants) 'close a deal' according to which Agent A obtains undue advantages for the violation of his official duties.*



As seen from the diagrams, the three hypothesis of policy influence have very similar structure and most importantly can lead to one and the same result. So in order to additionally outline the major difference between the three approaches, I'll apply to each one of the three hypotheses/definitions the following major elements of the interrelation:

- Who are the parties involved?
- Who is the proactive party?
- What aims does the proactive party have?
- What are the means for achieving the goal?
- What are the potential consequences for the domain?

10 Programme of Action against corruption, 1996, Council of Europe

Activity	Parties involved	Proactive party	Aims of the proactive party	Means for achieving the aim	Impacts for the domain	Result
Lobbying	Agent A Agent B	Agent B	Public benefit	Provision of information	Positive	Policy change
Trading in influence	Agent A Agent B Third party	Agent A or Agent B	Private benefit	Money or other undue advantage	Negative	Policy change
Corruption	Agent A Agent B	Agent A or Agent B	Private benefit	Money or other undue advantage	Negative	Policy change

The question that has been broadly discussed in the political science literature is where the boundaries are and what differentiate the one from the other. Campos and Giovannoni¹¹ for example observe that lobbying can substitute or complement corruption as it can be ‘both an activity that makes bribing irrelevant if it succeeds in influencing policy and an activity that makes bribing easier if it succeeds in undermining law enforcement. In their paper „From Corruption to Lobbying and Economic Growth” Harstad and Svensson argue that the difference between corruption and lobbying lies on the subject of the influence. They argue that when there are bureaucrats involved, the companies usually bribe them to bend the rules, while in the cases they want to change the rules, they lobby politicians.

Harstad and Svenson however built their argument on two hypotheses that are not necessary true if we apply them at European level policy making: the first hypothesis is that lobbying affects broad specter of actors while bribing is firm specific; and secondly that lobbying has more permanent effect then bribing. On the European playground though we have completely

11 Campos Nauro and Giovannoni Francesco (2006), Lobbying, Corruption and Political Influence, Discussion Paper Series 2313, Institute for the Study of Labor, Germany

different settings where the bureaucrats as Mazey & Richardson¹² and Miller¹³ observe are often the people behind the curtains that set the agenda and shape the real policy process. These observations are backed up with the European Parliament briefing paper¹⁴ revealing that 84% of the firms surveyed consider the most successful lobbyist those who manage to establish 'good relations' with the respective heads of Unites and Directorates within the Commission. Given the role the bureaucrats play in EU, the difference outlined by the growth model of Harsad and Svenson is mostly irrelevant.

Campos and Giovannoni¹⁵ on the other hand distinguish the two phenomenons by examining the 'place' where the influence is sought. They consider 'all the actions taken to obtain influence with rule-makers'¹⁶ lobbying, and corruption the same actions if the actions seek to influence those who exercise the rules. While this concept can be as well challenged, the other findings from their research backed the notion that stronger lobbying regulations are needed in Europe. Based on the presented and discussed systematic evidences, they argue that lobbying is usually robustly associated with higher political and economic pay-offs than corruption. The findings significantly increase the risk of transforming lobbying into corruption or trading in influence taking into consideration the very broad and unclear definitions of the activities that might be carried out in the process of influencing the policy formulation. Currently the only safeguard for preventing this to happen is the own integrity of the lobbyists and the respective politicians and public servants who have been subjects to lobbying. Relying on the integrity of the party that is paid to achieve certain policy change is very questionable however. It is undoubtedly clear that we should not put all lobbyists under the same umbrella, stating that all of them are corrupt by default. A lot of efforts have been put in place to create an ethical environment and ensure that some basic standards are observed by those who are lobbying. The Association of the Accredited Lobbyist in the European Parliament for example has elaborated 'EU Principles for the Ethical Conduct of Lobbying' and called for elaborating an unified code, that will gather the best practices implemented by the codes elaborated by other major professional lobbying

¹² Sonia Mazey and Jeremy Richardson, 1993, *Lobbying in the European Community*, Oxford University Press

¹³ Charles Miller, 1990, *Lobbying : understanding and influencing the corridors of power*, Oxford : Basil Blackwell

¹⁴ *Lobbying in the European Parliament briefing paper (2007)*, Policy Department C, Citizen Rights and Constitutional Affairs, European Parliament, Brussels

¹⁵ Campos Nauro and Giovannoni Francesco , 2008, *Lobbying, Corruption and Other Banes*, discussion paper series, Institute for the Study

¹⁶ Ibid

associations as the European Public Affairs Consultancies' Association, the Society of European Affairs Professionals etc. Still these efforts remain partially effective and can't grant the objectivity of the lobbying process.

As far as the ethics of some politicians is concerned, the latest Eurobarometer¹⁷ surveys have explicitly shown that 46% EU citizens are not convinced in it either. The possible way out of this deadlock is elaboration of clear lobbying regulations that will protect the democratic process, stimulate broader and more transparent consultation procedures and will regain the trust of people in the policy elaboration.

European lobbying policies regulations

- “the gunship’ aggressive lobbying including threats of relocation if policy proposals are not dropped (only to be used if other tactics do not work);
- ‘the Kofi Annan’ (also known as ‘the Trojan horse’) constructive engagement, offering decision-makers a mutually acceptable compromise(a strategy very commonly used in Brussels);
- ‘good-cop bad-cop’ one company or lobby group takes a hardline position, which allows others to take centre-stage with what may be presented as constructive compromise solutions;
- ‘the dentist’ first ‘pull out the worst teeth’ from a disliked piece of legislation and then come back for further ‘treatment’;
- ‘the third party’ reaching out to NGOs and unions to find a compromise on a disputed issue;
- ‘the donkey’ winning over decision-makers by capitalising on their interests and preferences, *but stopping short of seduction and bribery*”.¹⁸

These lobbying techniques were among the best practices presented on a lobbying training in Brussels where according to the estimations of the Parliamentary Committee on Economic and

17 According to the Special Eurobarometer 2008, Attitudes of Europeans towards Corruption , 46% of the Europeans consider their national politicians are the group that is most prompt to corruption. The politicians at regional and local level are far behind with ‘only’ 37%. It should be however noted that there is a significant improvement of since 2005 when 54% of the citizens considered the national politicians corrupt.

18 Corporate Europe Observatory, 2005, Lobby Planet Guide

Monetary Affairs¹⁹, 75 % of economic and social policy measures which concern European citizens are prepared. Despite their aggressiveness and the strong psychological elements embedded in them, yet the borderline between the lobbying and bribery is clearly underlined. Lobbying as knowledge brokering mechanism for closing the information gap between the citizens and the European politicians is ultimate tool for supporting the adoption of evidence based decisions and policy introduction. It clears the way to civil partnerships building that facilitate the interactions between the different stakeholders.

Looking back at the development of the international anticorruption framework, the EU had always had a strong stand on the prevention policies. This became even more explicit during the negotiations on the adoption of the UN Convention against corruption where after long debates the EU managed to defend its position and to include a separate prevention chapter in the Convention. In the lobbying regulatory framework however this was not the case and the problem was for a long time underestimated Bouwen²⁰ argues that until the major revision of the Treaties and the transformation of the European institutions into highly interesting policy arena for business interest, the pressure for lobbying regulations was merely existing. After the fifth enlargement however that subsequently led to about 30% increase²¹ of the EU budget and the introduction of many new stakeholders on the playing field of European policy making, regulation of lobbying activities was brought again to the political agenda. Here it should be noted that apart from the European enlargement process, the widening gap between the politicians at national and European level manifested by the low level of election turn outs and the low level of trust have definitely had an impact on boosting the lobbying regulation framework in EU.

Based on the collection of many empirical evidences and interviews held with lobbyists and policymakers both in Europe and USA, McGrath²² argues that the actual direct advocacy is just an element of the lobbying activities. The other common elements are: the atmosphere setting,

19 Opinion of the Committee on Economic and Monetary Affairs for the Committee on Constitutional Affairs on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions (2007/2115(INI)), 28.2.2008, Brussels, European Parliament

20 Pieter Bouwen, 2003, A Theoretical and Empirical Study of Corporate Lobbying in the European Parliament, European Integration online Papers (EIoP) Vol. 7 (2003) N° 11

21 In 2003 the EU budget was nearly 100, where in 2009 it grew to 134 billion euro. See http://ec.europa.eu/budget/index_en.htm

22 McGrath, Conor, 2002, Comparative Lobbying Practices: Washington, London, Brussels;

monitoring, communication with policy makers, advocacy and influencing, application of pressure, coalition building.

While the European institutions can hardly influence the atmosphere setting, monitoring and other methods for coalition building, they can surely have an impact on the channels of communication and the advocacy regulation. In 2002, following the principles embedded in the White Paper on European Governance²³, the European Commission adopted a Communication on the general principles and a minimum standard for consultation²⁴. The Communication was the first initiative of the EC to unify its methodology for carrying out consultation procedures. It aims at achieving better understanding of the consultation process while at the same time improving its transparency and accountability. Following the principles of subsidiarity and proportionality²⁵ the elaborated minimum standards were broadly discussed and EC received contributions from different governments, regional and local authorities, individual citizens, business and NGO sector from the Member states and abroad (USA in particular). Openness and accountability as the major guiding principles of the consultation procedure are ensured by obliging the interested parties who wish to submit comments on European Commission's proposals to clearly state which interests they represent and how inclusive that representation is.

While the Communication gives comprehensive guidelines on the Commission's subunits how to carry out a consultation procedure, it merely touches the advocacy standards of behavior. These standards are broadly discussed in another strategic document adopted four years after the minimum standards were set in place. In 2006 the European Commission published its Green Paper on European transparency initiative²⁶ where the need for developing a new approach towards the lobbying activities is stated as one of the three main priorities of the initiative. The Green paper underlines that in order to identify and safeguard the general interest of the Community the European institutions should be able to take their decisions without any pressure and unlawful interference from outside interests. The EC took into consideration the

23 European Governance White Paper, (2001), European Commission, COM(2001) 428 final, Brussels

24 Communication from the European Commission Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM(2002)704.

25 Protocol (N° 7) on the application of the principles of subsidiarity and proportionality, annexed to the Amsterdam Treaty

26 Green Paper, 2006, European Transparency Initiative, COM(2006) 194 final

criticism coming from the citizens and the NGO sector about the general lack of transparency mechanisms regarding the lobbying activities at EU level.

In order to reinforce the external scrutiny of the lobbying initiatives and reflect the public concerns, the Commission proposed the following main directions of work:

- Improvement of information delivery;
- Creation of a voluntary register and voluntary code of conduct for lobbyists;
- Development of monitoring and sanctioning system.

The document stated the clear vision of the European Commission that obligatory register should not be introduced and more emphasis should be paid on the self-regulation rules. The EC however left a door for further considerations on these issues with the option for reexamining its position after a certain period.

Not surprisingly the Commission's approach was welcomed by the corporate lobbying groups and law firms and severely criticized by the major organizations in the NGO sector. The major organizations representing the lobbyists interests as the Society for European Affairs Professionals, the European Public Affairs Consultancies Association and the Council of Bars and Law Societies of Europe defended the thesis that mandatory requirement for registering the client's names and financial information will go against the rule of confidentiality and privacy, will be burdensome and won't reflect the real situation as the 'money does not equate influence'. The NGO sector on the other hand, speaking mainly through the Alliance for Lobbying Transparency and Ethics Regulation (ALTER-EU)²⁷ and the Corporate Europe Observatory considered the EC approach too weak and incapable of ensuring that the decisions will be taken solely in public benefit with no external undue interference. The main points of criticism were that:

- Due to the voluntary nature of the register, no effective sanctions can be set in place in case of inaccuracy of the data, entered in the register;
- The requirements for financial disclosure are insufficient and inconsistent and do not provide information how much money are spent on lobbying for a particular case and

²⁷ The Alliance for Lobbying Transparency and Ethics Regulation is a coalition of over 160 public interest groups, trade unions, academics and public affairs firms (www.alter-eu.org)

how much funding the interest's group representatives are getting from their donors/clients.

In order to overcome the shortcomings of the introduces system, the EU Civil Society Group and ALTER-EU encouraged their members while registering to provide additional information to the Commission's register thus fostering the inclusion of additional elements in the registry database during the scrutiny of the register's efficiency²⁸.

The debate on the lobbyist registration continued at the discussions organized by the European Parliament within the framework of the consultations carried out in regard to the regulating of interests representatives activities report in 2008. The debate in the European Parliament on the lobbying regulations was fostered by the European Commission's Transparency Initiative and it's reflections on one hand and by the increase of the EP's powers the Lisbon Treaty is foreseeing on the other. There were two main factors of utmost importance to be outlined in this debate. The first is the expected change in the lobbying pattern in the EU due to the new architecture of the Union's institutional structures. It was acknowledged that the new role of the European Parliament as co-legislator throughout almost the entire legislative process will undoubtedly bring 'new' lobbyists to the European Parliament and will increase the lobbying pressure. The second main driving force was the need to respond to the citizen's expectations for greater transparency and accountability. It was noted that the different regulatory approaches to lobbyist activities used so far had created additional uncertainty on the ways the decisions are taken in the European institutions. While the EP introduced in 1996 lobbyist's register and obligatory Code of Conduct, the European Commission has been so far insistent on the voluntary nature of the lobbyist frame, relying on additional incentives for registering. This position was once more outlines in the speech that the Commission Vice-President Siim Kallas gave at the General Meeting of the European Public Affairs Consultancies' Associations in Brussels in March 2009²⁹. In his address he criticized the change of UK's approach from self-regulatory to regulatory, stating that "perceptions" must be acted upon, but they should not be

28 How to make a transparent registration in the European Commission Register of Interest Representatives, (2008), EU Civil Society Contact Group in co-operation with the Alliance for Lobbying Transparency and Ethics Regulation in the EU, Brussels

29 Commissioner Kallas is responsible for administrative affairs, audit and anti-fraud

given the role of facts”³⁰. He commented the results of the House of Commons report on lobbying³¹ as appealing and pointed out that that strict US rules have not prevented scandals. Despite the Commission’s conviction, the voluntary system however did not meet many supporters in the European Parliament. Commenting on the Commission’s Transparency Initiative, the British MEP Richard Corbett argued that ‘the people that you want to register are those that don’t want to’. He explained the concern stated in the European parliament’s report³² that any voluntary framework will lead to potential non compliance from lobbyists that are working in the ‘gray’ zone between corruptions and lobbying. The report³³ adopted on the 8th of May 2007 by the European Parliament introduced the following major new steps in the lobbying regulation of the Union:

- It welcomed in principle the European Commission’s proposal for creating a common register for lobbyist based on the principle of ‘one-stop-shop’ that will include full financial disclosure, common rules of removal from the register and common code of conduct. The European Parliament remained on the view however that the register should be mandatory and include the EC, EO and the Council. It stressed that the Lisbon treaty is clearly paving the road towards a mandatory regulation on lobbying and noted that due to the constant changes in the lobbying practices the result of new regulations should be examined three years after their adoption.

Despite the fact that the EP backed up the proposal of the EC in the common register part, the European Parliament agreed with it only ‘in principle’ and left the door open for future considerations awaiting the finalized vision of the Commission on the issue and the conclusion of the joint working group³⁴ by the end of 2008.

³⁰ Siim Kallas, "Why put off to tomorrow what you can do today"?, Speech/09/131 Annual General Meeting of the European Public Affairs Consultancies’ Associations, Brussels

³¹ Lobbying: Access and influence in Whitehall, (2008), House of Commons, Public Administration Select Committee

³² Report on the development of framework for the activities of interest representatives (lobbyists) in the European Institutions, (2007/2115(INI), European Parliament

³³ Ibid

³⁴ The working group was planned to comprise from the Council representatives, Commissioners and Members of the European Parliament with the task of examining the implications of a common register for all lobbyists and drawing-up of a Common Code of Conduct on lobbyists for the three institutions

- The European Parliament backed up and broadened the Commission’s proposal for introducing detailed financial disclosure rules for all interest representatives joining the register including mandatory submission of the following information:
 - the turnover of professional consultancies and law firms attributable to lobbying the EU institutions, as well as the relative weight of their major clients;
 - an estimate of the costs associated with direct lobbying of the EU institutions incurred by in-house lobbyists and trade associations;
 - the overall budget and breakdown of the main sources of funding of NGOs and think-tanks.

The requirement for including much more detailed financial information in the register than the current rules in the Commission and the EP prescribe is driven from the need to provide comparable and easily accessible information to decision-makers and the public on how much money is paid by whom and to whom to lobby on which issue. This information will as well reveal the cases where big corporate interests are ‘hidden’ behind the mask of NGO representation claiming to defend the public interests rather than the corporate one.

- Called for a strong sanctioning system in cases of non-compliance. The sanctions proposed in the report vary from suspension to removal from the register and denial of access to all institutions to which the register applies. These sanctions however should be laid on tightening the monitoring mechanism over the lobbyist conduct and on strengthening the ex-ante controls by allocation of enough resources to grant the verification of the data, entered in the register. One of the possible monitoring mechanisms, proposed by the Committee on Civil Liberties, Justice and Home Affairs that didn’t get into the body of the adopted document was the establishment of a parliamentary Committee, comprising of Members of the European Parliament not holding any other significant positions in Parliament to scrutinize and ensure the accuracy of the information in the register.
- The EP introduces the concept of the voluntary use of "legislative footprint"³⁵ and strongly advised both the rapporteurs from the EC and the Commission to use it as a mean for insuring greater transparency and accountability to the citizens.

³⁵ The ‘legislative footprint’ is an indicative list, attached to a Parliamentary report, of registered interest

Unlike the bitter experience that the predecessors of the Constitutional Affairs Committee (AFCO) in the EP have had in the past with one report on lobbying regulations that didn't get in the plenary at all³⁶ and one that was heavily amended in the plenary session and then referred back to the Committee in 1996, the proposals of the AFCO was adopted with majority of 547 votes to 24 no votes and 59 abstentions. The plenary vote was preceded by strong support for the AFCO's proposals coming from all European Parliament's Committees involved in the debate and all political parties. Table 1 illustrates the voting behavior on the lobbying report in the Committees.

Table 1: Votes on Lobbying report in the Agent's Committees of the European Parliament

<i>Consulted Committees</i>	<i>Political affiliation of the rapporteur</i>	<i>+</i>	<i>-</i>	<i>abstained</i>
Constitutional Affairs Committee (responsible)	EPP-ED	18	1	3
Committee of Budget Control	EPP-ED	23	0	0
Committee on Economic and Monetary Affairs	PSE	39	1	1
Committee on Environment, Public Health and Food Safety	Verts/ALE	41	0	0
Legal Affairs Committee	ALDE	17	0	1
Civil Liberties, Justice and Home Affairs Committee	GUE/NGL	52	1	0

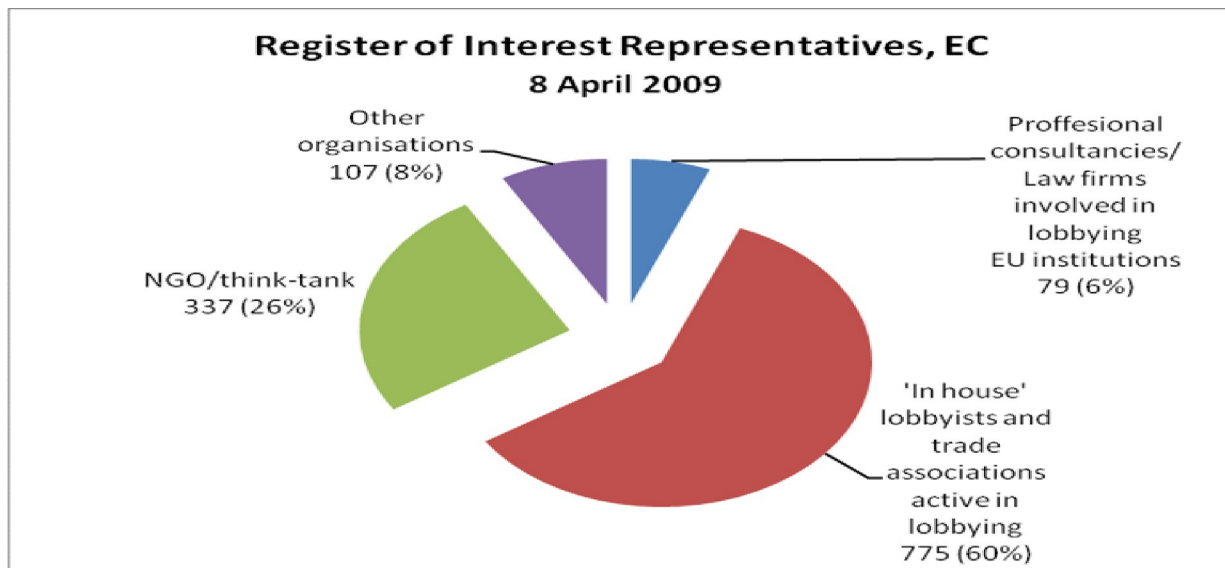
The Environment Committee as one of the most intensely lobbied Committees in the European Parliament was the biggest proponent of the mandatory register and vigorously requested for urgent measures to be taken for increasing the transparency of the legislative procedures within the Commission and solving the potential conflict of interest situations. Having suffered from sleazy lobbying pressure, the Committee members underlined the need of joint measures to be taken by the EP, EC and the Council in order to rise the public trust and bring more accountability in the European decision making process. The skepticism towards the Commission's voluntary approach derived from the understanding that if an EP Committee that

representatives who were consulted and had significant input during the preparation of the report

³⁶ In 1991 the Committee on Committee on the rules of procedure, the verification of the credentials and immunities drafted a proposals for a code of conduct and a register of lobbyists but after strong internal opposition within the Committees the proposals were not submitted to the Plenary.

is relatively less 'attractive' for the lobbyists compared to the European Commission, is experiencing a heavy lobbyist pressure and can point out 'irregularities' in the lobbyists actions, the EC cannot rely on 'soft' measures. The voluntary bases of the European Commission's Code of Conduct for Interest Representatives, that was adopted in May 2008 and the nonobligatory character of the lobbying register launched the same year have been criticized both by the parliamentarians and the NGO sector. A brief review of the statistical data from the voluntary register of interest representatives after 10 months of its existence can easily prove the serious concerns about the effectiveness of the introduced measure. As seen from the chart below, out of roughly estimated more than 17 500 lobbyists and lobbying organizations in Brussels, only 1278 have registered in the Commission's register until 8th of April 2009.

Chart 1



The low level of registration can be sought in many different directions. On one hand it proves the legitimate expectations that the lobbyists, working on the 'edge' and beyond the allowed practices won't be willing to register at all. On the other hand, the voluntary system threatened to create a marked distortion where the unregistered lobbyists can potentially benefit from commercially sensitive information regarding their competitors. The minimal share of registration of major legal companies with combined legal and lobbying practices additionally increases the tension within the sector. Thus the 'carrot and stick' voluntary system according

to the European Public Affairs Consultancies' Association (EPACA)³⁷ lead to a situation in which some are suffering because they have registered and some are suffering because they haven't registered. The question about the mandatory base of the lobbyist registration managed to bring on the 'same side of the table' stakeholders that have had traditionally opposing views. Both EPACA and ALTER-EU that in practice represent the majority of the interest representatives' organizations both from the commercial and the NGO sector agreed that a mandatory lobbyist register is needed to create a level of playing field and to regain the public trust in the EU legislative process and the integrity of lobbying activities. A survey undertaken by EuroActive³⁸ in the end of 2008 showed that the majority of the participants in the survey supported the Commissions Transparency Initiative and acknowledged the need for more accountability in general. Nevertheless the figures showed that interest groups representatives are divided in two basic categories: over half of them have already registered, suggesting that they may consider registration a reputational necessity, but at the same time the other half of the respondents do not intend to register at all.

Following the public opinion and the measures prescribed in the EP's report on lobbying, on the 18th of February 2009 a high-level group bringing together the European Commission and the European Parliament agreed to launch a website connecting the two institutions' lobbying registries before June 2009. This launch coincides not only with the planned review of the Commission's register³⁹ but with deepest financial crisis that has hit the world after the Second World War. Getting the 'real and full' picture of the lobbyists activities and their role in the European policy making from this point of view will be crucial as it may help identifying some of the reasons that lead to financial crisis in Europe. This is of particular importance as the financial sector lobbying has been already suggested to be among the main engines that enabled the crisis in USA. In a report⁴⁰ published in March 2009, a US watchdog reveals that in a 10 years period (1998-2008), the financial sector invested more than 5 billion USD in political influence purchasing in Washington, with 3.4 billion on officially registered lobbying of federal

³⁷ EPACA represents lobbyist organizations with approximately 75% of the market share

³⁸ The survey was conducted in collaboration with EPACA, European Center for Public Affairs and SEAP in the period October 2008-November 2009 among 170 Federations, 75 consultancies and 67 corporate lobbyists

³⁹ The Commission decided to review the effectiveness of the voluntary register one year after its launch

⁴⁰ Sold Out -How Wall Street and Washington Betrayed America, (2009) ,Essential Information and Consumer Education Foundation, Washington

officials. The report argues that these billions are spend on winning deregulation and other policy decisions that led directly to the current financial collapse. The report came a month after the European Commissioner for Internal Market and Services Charlie McCreevy expressed similar concerns. In a speech⁴¹ given at the Institute of International and European Affairs in Dublin he noted that the EU should not become captive of the rich lobbying organizations and should remember that ‘it was many of those same lobbyists who in the past managed to convince legislators to insert clauses and provisions that contributed so much to the lax standards and mass excesses that have created the systemic risks.’ These concerns have been reflected in the Daniel’s Kaufmann article “Corruption and The Global Financial Crisis”⁴² where he argues that one neglected dimension of political corruption is the ‘state capture’⁴³, typically gained through high-level bribery, lobbying or influence peddling. Observing the new expanded role of the governments that became owners of the largest financial institutions after the crisis and in the prospect of establishing ‘new market economy’, Kaufmann urges for enhanced accountability and transparency measures to be taken both in USA and the rest of the world in order to prevent new crisis and further spread of corruption. His observations are particularly true for Europe as well, where according to the last EuroActive survey⁴⁴ the majority of industry federations and business representatives (85 and 86% respectively) agreed that at a time of economic crisis, their ability to influence EU policy by lobbying is the biggest added value for business.

Lobbying in the EU and in USA

⁴¹ Charles McCreevy, February 2009, The Credit Crisis-Looking Ahead, Speech 09/41, Institute of International & European Affairs, Dublin

⁴² Daniel Kaufmann, “Corruption and The Global Financial Crisis” ,01.27.09, Forbes (available at http://www.forbes.com/2009/01/27/corruption-financial-crisis-business-corruption09_0127corruption.html)

⁴³ According to Kaufmann, in he capture economy, the policy and legal environment is shaped to the captor firm's huge advantage, at the expense of the rest of the enterprise sector.

⁴⁴ Public Affairs Memberships survey,(March 2009), EuroActive

"We don't want to be Washington. We want to be Europe when it comes to lobbying"

Diana Wallis, UK MEP

'Being' Washington instead of Brussels when it comes to lobbying is hardly possible. Languages and national culture, the institutional structure and mechanisms, the consensus based versus the more confrontational approaches in USA are part of the reasons that broaden the gap. In addition the stability of the EU administration contrasts a lot to the mobility of more than 4000 political appointees that 'inhabit' the USA administration every three years. This stability prerequisites completely different lobbying techniques, as the 'good connections' with the people behind the scenes are among the main assets of every successful lobbyist in Brussels.

Nevertheless when it comes to lobbying regulations the first country to think about is the USA. Having more or less about 600 pages of regulations and 70 years of experience has undoubtedly made the country the first example to compare and share good practices with. Back in Europe, the legal basis of lobbying are not deeply rooted in the tools for providing transparency and accountability to the general public. The majority of the Member states have not adopted any rules for lobbyists and in this respect the European Commission and the European parliament have become flagships of the change.

Because of the scarce regulatory framework and the need for adopting some practices that have proved to be efficient, the process of the elaboration of the European lobbying regulatory policy was accompanied by different debates of the effectiveness of the USA model and a lot of 'pros' and 'cons' for the adaption of some best practices have been discussed. While the mandatory system of registration has been acknowledged as a good source of information and transparency mechanism, the low rate of trust in the honesty and ethical standards of the lobbyists has been pointed out as a downside. Being at the threshold of new lobbying regulatory framework in EU and identifying that the loose/ineffective lobbying regulations in USA and EU might have been one of the reasons for the global economic crisis leaves a lot room for thought and a common ground for discussion what should be the next steps to be undertaken in order to prevent the same happening again and to ensure transparency in the policymaking process.

Despite the differences, if we look at the general founding principles of the lobbying framework, lot similarities can be found between the EU and the USA systems (see table 2). They are mostly visible in the following areas:

- General understanding of the lobbying as a social activity;
- Regulatory bases;
- Mandatory of registration;
- Disclosure of information and identification of lobbyists;
- Sanctions in case of non-compliance;

Exploring these principles, the following similarities have been identified:

- Lobbying in the States is intertwined with the fundamental First Amendment right of speech, association and petition. In Europe, the right of expression, information and assembly are stipulated in the articles 11 and 12 of the Charter of Fundamental Rights⁴⁵,
- In both EU and USA lobbying is considered an important tool for exchange of ideas and information between the policymakers and the other stakeholders;
- Financial disclosure is a common element in the two systems. The main differences are rooted in the reporting system built in USA (semiannually and quarterly) and the yet unclear system of updating the financial estimates in the lobbying registers in EU;

Table 2
EU –USA Lobbying regulations’ principles-comparative table

	EU	USA
Regulatory framework	Green Paper European Transparency Initiative 2005, European Commission; European Parliament resolution on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions 2008	Lobbying Disclosure Act 1995, amended substantially by the Honest Leadership and Open Government Act 2007
Founding	Article 11 and 12 of the Charter of	First Amendment right of speech,

⁴⁵ Charter of Fundamental Rights of the European Union, (2000), Official Journal of the European Communities C 362/01

principles	Fundamental Rights	association and petition
Lobbying as a concept	Lobbying activities play an essential role in the open and pluralistic dialogue on which a democratic system rests, and are an important source of information.	Lobbying is an important tool for exchange of ideas and bridging the gap between the stakeholders
Lobbying activities	Lobbying is defined as "activities carried out with the objective of influencing the policy formulation and decision-making processes of the EU institutions"	Lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.
Lobbying contact		Any oral or written communications(including an electronic communication) to a covered executive branch official or covered legislative branch official that is made on behalf of a client with regard to formulation, modification or adoption of Federal legislation(including legislative proposals); the formation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy or position of the United States Government; the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit or license)' or the nomination or confirmation of a person for a position subject to confirmation by the Senate.
Registration	Mandatory for the EP – applicable to all as the registration is a precondition for entering the premises; Voluntary for the EC	Obligatory for all organisations and lobby groups/firms that go above the de minimis expense and a de minimum income threshold. (11 500 USD quarterly expenses for the in-house lobbyists and 3000 USD quarterly income for the lobbying companies)

Financial disclosure	<ul style="list-style-type: none"> - The turnover of professional consultancies and law firms attributable to lobbying the EU institutions, as well as the relative weight of their major clients; - An estimate of the costs associated with direct lobbying of the EU institutions incurred by in-house lobbyists and trade associations; - The overall budget and breakdown of the main sources of funding of NGOs and think-tanks; 	<p>Quarterly and semi-annually reports on:</p> <ul style="list-style-type: none"> - Estimate of lobbying expenditures or income from clients in excess of 5000 USD; - Payments for events or to entities connected with governmental officials; - Payments of presidential libraries or for inaugurations; - Certifications concerning House and senate gift rules
Identification of the lobbyists	<p>According to the EC's Code of Conduct, the interest representatives shall always:</p> <ul style="list-style-type: none"> - identify themselves by name and by the entity(ies) they work for or represent; - not misrepresent themselves as to the effect of registration to mislead third parties and/or EU staff; - declare the interests, and where applicable the clients or the members, which they represent; 	<p>Provide upon request of the official being lobbied an identification of his/her client, whether or not the lobbyists is registered and disclose any interests of foreign affiliates</p>
Penalties in case of non compliance	<p>EP proposal: Suspension from the register, in more serious cases removal from the register; deprivation of access to all institutions to which the register applies;</p>	<p>Criminal penalties for knowing and corrupt failure to comply with the law; Civil penalty for failure to rectify a defective filing after notice or to knowingly fail to comply with any provision of the law- up to 200 000 USD</p>

Despite the similarities, the major differences between the two systems in the same areas can be easily noticed. The broad and slightly vague definition on lobbying that the European Parliament and European Commission have adopted contrasts sharply to the USA one, where the Lobbying Disclosure Act prescribes that lobbying constitutes only 'direct communication to policy and decision makers and does not cover indirect or 'grass roots' activities and behind-the-scene activities. The mandatory registration system in USA on the other hand grants that those who are considered lobbyists will definitely register as this is absolute prerequisite and can lead to severe sanctions in case of non-compliance. No such

guarantees are prescribed by the European Parliament and Commission. Even after the adoption of the EP report of lobbying in 2007, the envisaged penalties remain relatively modest and don't create sufficient incentives for compliance. The criminal and civil liability that may reach up to 200 000 USD sharply contrasts to the 'milder' European versions including suspension or removal from the register and in some cases deprivation of access of the institutions.

Having outlined these major differences, it is worth asking how effective is this strong regulatory system and is it actually working. One of the attempts to answer the question was made by the United States Government Accountability Office (GAO) which in 2009 published its report on the Lobbyists' Compliance with Disclosure Requirements⁴⁶. Among the main tasks that GAO had were to determine the extent to which lobbyists can demonstrate compliance with the registration requirement and identify the challenges lobbyists cite in complying with the regulation after the amendments made with the Honest Leadership and Open Government Act 2007. What is of particular interest for the present research is the compliance of the newly registered lobbyists with the new tightened regime. The GAO surveys showed that 93% of the newly registered lobbyists⁴⁷ managed to comply with the requirements and filed the disclosure report correctly. The research showed as well that 99% of the total number of lobbyists could provide some form of written documentation for income or expenses. While these numbers are extremely high, the GAO found out that only 35% of the lobbyists can provide documentation for other five reporting elements - entities lobbied, lobbyists who had held covered official positions, foreign entities with interest in the client, individuals no longer lobbying for the client, and member organizations of a coalition or association that lobbied on behalf of the client. The presented results from the GAO report are giving some very important signals if a parallel is to be made with the new lobbying regulations in EU. First that the price of imposing additional 'administrative burden' to the lobbyists is not that high compared to the benefits it will bring to the citizens and that complying with the new lobbying regulations is not impossible and that difficult. As a result of all interviews conducted for the analysis of the regulation

⁴⁶ 2008 Lobbying Disclosure, Observations on Lobbyists' Compliance with Disclosure Requirements, (April 2009), United States Government Accountability Office, Washington

⁴⁷ The figures differ for the quarters of the 2008 and go down to 79% in the third quarter.

systems in USA, Canada, Germany⁴⁸ and EU, Chari and Murphy note that the respondents in highly or medium regulated systems consider registration worth doing regardless of the 'burden' it may impose for three main reasons: the registry legitimizes lobby groups as actors in the political process; it prevents undue influence from other competing lobbyists and it allows members of interest groups and civil society sector to see what their organizations are doing. Secondly that the financial disclosure is the relatively 'easiest' part of the equilibrium, the most difficult part of disclosure are the clients names and the 'targets' being lobbied. The Chari and Murphy's findings reject the suggestion of the Nolan's report⁴⁹ that creating a mandatory register will give a reason for the citizens to think that the best way to forward their petitions/needs to an elected representative is through lobbyists. While the reasons stated in the Nolan's report have reflected the public attitudes in 1995, now the public perceptions in Europe have been considerably changed with the strong conviction from the European NGO's and some business actors that a regulatory system is needed to wash away the perceptions of undue influence over the policy-making process in Europe.

We should acknowledge however that the establishment of a strong lobbying regulatory system not a panacea by its own. The Abramoff⁵⁰ case in 2006 and the reports of the USA watchdogs on the impact of the financial lobbyists on the global financial crisis are the most resent and striking examples. The lobbying regulations should be a part of a broader anticorruption policy ensuring along with the accountability and transparency mechanisms, a strong and effective monitoring and sanctioning system. And to some extent the EU's task in this direction is a bit easier because of a reason that was explicitly pointed out by Richard Corbett⁵¹: the EU politicians are less dependent on campaign funds, compared to their USA colleagues and thus making the conflict of interests much lower.

48 Chari Raj and Murphy Gary,(2006) Examining and Assessing the Regulation of Lobbyists in Canada, the USA, the EU institutions, and Germany: A Report for the Department of the Environment, Heritage and Local Government, Trinity College / Dublin City University

49 Standards in Public Life., (1995), First Report of the Committee of Standards in Public Life, London

⁵⁰ Jack Abramoff was considered among the most influential lobbyists in USA until 2006 when he was convicted guilty for fraud, tax evasion and conspiracy to bribe public officials

⁵¹ In October 2007 the Constitutional Affairs Committee in the European Parliament organized a workshop "Lobbying and the European Union" to discuss the EC's Transparency Initiative

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