

# Democratic lobbying

Is the Transparency Register enough to ensure  
democratically sound lobbying within the EU?

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Master thesis, 30 hp, LL.M. programme

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## 1.1 Introduction

The European Union (EU) consists of 27 Member States which have surrendered part of their power to the politicians in Brussels. The EU affects trade, economics, energy, social policies, environment, consumer protection, research, foreign- and security policy, tourism, education, human rights and more within Europe; making a heavy impact on life in Europe and beyond.<sup>1</sup> Despite the immense importance of EU politics the citizens have not been eager to cast their votes. Since the first European Parliament (EP) election in 1979 with a turnout of 61.99% the turnout has steadily fallen for each election. Even though the EP is the only directly elected institution the participation in the latest election dropped to 43% in 2009.<sup>2</sup> The declining turnouts have been explained as a result of several problems; the citizens are unaware of the benefits with the EU and the EU's impact on the citizens' lives, citizens find the EU's system complex and difficult to understand, citizens lack confidence in the EU and there is a feeling of disconnection between citizens and the EU. The EU recognizes that it needs to present improvements and strategies that are credible and show insight in current European issues in order to restore confidence and interest. In order to achieve policies with high quality and relevance the EU believes that increased and improved participation is necessary.<sup>3</sup> Developing policies that will strengthen the citizens' belief in the EU is a difficult task when citizens are unwilling to participate in the political process and make their voices heard.

With a political system in need of input the majority of the citizens have turned away and lobbyists are replacing them. While the EU's competences expanded throughout the years lobbying activity has grown in Brussels, a natural reaction to the EU's increasing impact on European regulations. Claims that the institutions are lacking resources to keep up with the increasing assignments are likely to make the lobbyists' information and input even more valuable and important.<sup>4</sup> Frequently quoted numbers estimates that there are about 15 000 professional lobbyists in Brussels providing expert information and participating in the EU's

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<sup>1</sup> Europa, Gateway to the European Union, [europa.eu/index\\_en.htm](http://europa.eu/index_en.htm)

<sup>2</sup> European Parliament, Results of the 2009 elections, [www.europarl.europa.eu/parliament/archive/elections2009/en/turnout\\_en.html](http://www.europarl.europa.eu/parliament/archive/elections2009/en/turnout_en.html)

<sup>3</sup> Strategic objectives 2005-2009, COM(2005) 12 final, page 2, and European Governance: A White Paper, COM(2001)428 final, page 3.

<sup>4</sup> Coen, The evolution of the large firm as a political actor in the European Union, pages 94-95, European Parliament, Directorate-General for Research, Lobbying in the European Union, pages 2-3, and European Parliament, Resolution on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions, point A.

policy-making process.<sup>5</sup> Lobbyists are supplying a part of the solution to better policies by contributing to the process with information, manpower and experts. To some extent they are also contributing with input from the citizens.<sup>6</sup> However, lobbying is not an unquestioned activity and adds problems to the EU's policy-making process. There have been reports of lobbyists using methods that are considered to be in conflict with the EU's policy of openness and democratic standards. Serious doubts about the state and effect of EU lobbying were raised by claims and allegations that lobbyists were supplying misleading information, MEPs' assistants were accepting money from lobbyists and allegations were made that politicians were acting as interest representatives. There was also uncertainty about how accurately the citizens' concerns were being represented by the lobbyists.<sup>7</sup>

The existence of questionable lobbying methods and the lack of confidence in the EU called for action. The White Paper on European Governance (WPG) was introduced in 2001 and set out to improve governance, strengthen democratic values and restore faith in the EU and its system.<sup>8</sup> Building on the WPG the European Transparency Initiative (ETI) was launched in 2005; the ETI improved the lobbying framework that was established by the WPG and resulted in the launch of the Transparency Register in June 2011.<sup>9</sup> The Transparency Register is supposed to contribute to a transparent and democratic policy-making process and increase the citizens' faith in the process and the EU. This leaves no room for improper lobbying.<sup>10</sup> The question is, can a voluntary register with minimum standards guarantee a democratic process and restore confidence in the EU?

## 1.2 Purpose

The purpose of this essay is to answer the question: is the Transparency Register enough to ensure democratically sound lobbying within the EU? To answer this question a set of democratic standards need to be established. These standards will be used to analyse if the Transparency Register complies with the EU's democratic standards and if the regulation

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<sup>5</sup> Corporate Europe Observatory, Brussels the EU Quarter, page 9, and European Parliament, EU lobbying under spotlight, [www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20080414FCS26495](http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20080414FCS26495)

<sup>6</sup> Van Schendelen, More Machiavelli in Brussels, pages 331 and 340, Karr, Democracy and lobbying in the European Union, page 73.

<sup>7</sup> Green paper on European Transparency Initiative, COM(2006) 194 final, pages 5-6, and European Parliament, Directorate-General for Research, Lobbying in the European Union, page 36.

<sup>8</sup> Harlow, Accountability in the European Union, page 53.

<sup>9</sup> Green paper on European Transparency Initiative, COM(2006) 194 final, pages 3-4.

<sup>10</sup> Transparency Register, Why a transparency register?, [europa.eu/transparency-register/about-register/transparency-register/index\\_en.htm](http://europa.eu/transparency-register/about-register/transparency-register/index_en.htm)

encourages lobbying that complies with those standards. In the case that the regulation does not comply with democratic standards suggestions for improvement will be presented. The Transparency Register will also be compared with the USA's federal lobbying regulation. This comparison will be used to supply concrete suggestions for an alternative method of regulating lobbying.

### 1.3 Choice of subject

This essay belongs to the field of constitutional law. The EU's Treaties will be the foundation for the democratic standards that the lobbying regulation will be compared to. Constitutional subjects such as transparency, equality of voice and accountability are all important aspects in this essay. The essay is juridical but will enclose literature from the field of political science which is closely connected to constitutional law.

### 1.4 Method

In this essay classic judicial methodology, comparative analysis and critical method will be combined to answer the question at hand. The judicial methodology will be present throughout the entire essay. When analysing the Transparency Registers compliance with democratic standards the critical method will be used. Comparative analysis is used when comparing the EU's Transparency Register with the USA's lobbying regulation. The USA's federal regulation was chosen as a comparison for several reasons. Of all the modern democracies, the USA has the longest history with regulation of lobbying. The American regulation began as state legislations and the first federal legislation was introduced in 1935. Today US federal lobbying laws are the most highly regulated at a national level.<sup>11</sup> This makes the American lobbying regulation very different from the EU's voluntary Transparency Register and a valuable example of an alternative method for regulating lobbying.

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<sup>11</sup> Chari *et al*, Regulating lobbying: a global comparison, pages 20 and 153.

## 2.1 Lobbyists and lobbying

When using terms as lobbying and lobbyists it is important to be aware that there are several different definitions in research, literature and regulations.<sup>12</sup> In this essay the term lobbyist is used for interchangeably with civil society, interest representatives and lobbying groups. Just like with the EU's use of the words lobbyist and lobbying there is no implication made that lobbying is considered as an illegitimate or negative activity.<sup>13</sup>

Lobbying can be defined as activities performed when someone seeks to affect the policy-making process to the represented interest's advantage. Lobbyists can either seek to suggest regulation, prevent regulation or change regulation. Lobbying can take place from the outside by influencing decision-makers or from the inside by participating in committees or projects. This involves the entire policy process, from suggestion of legislation to implementation and enforcement. An important part of lobbying is monitoring the political process. Lobbyists that are well-informed about the political agenda can influence a proposed legislation from the start.<sup>14</sup> The gathering of that information is preferably done indirectly and quietly to avoid alerting opponents. After the information is gathered the lobbyists can prepare their input which is usually supplied by providing information or support.<sup>15</sup>

## 2.2 The need for lobbying

Considering the possible negative implications that surround lobbying, the earlier mentioned reports about improper lobbying and the public's uncertainty about lobbying's legitimacy one might wonder why it is not banned. In academic literature there are varying theories and opinions about lobbying, resulting in different approaches to lobbying. Pluralists, neo-pluralists and neo-marxists all have different opinions of lobbying and the effects of lobbying. Another point of disagreement is whether or not lobbyists have equal opportunities to influence the political system. This generates multiple suggestions on how lobbying should be regulated, if at all. Currently there are several academics regarding lobbying as a legitimate activity that is beneficial to the political process in democracies.<sup>16</sup> The lobbyists contribute to the policy-making process by providing input, feedback, expertise and support. Support in

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<sup>12</sup> Chari *et al*, Regulating lobbying: a global comparison, page 3.

<sup>13</sup> Follow-up to the Green Paper 'European Transparency Initiative' COM(2007) 127 final, page 3.

<sup>14</sup> European Parliament, Directorate-General for Research, Lobbying in the European Union, page iii, and European Parliament, Resolution on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions, point B.

<sup>15</sup> Van Schendelen, More Machiavelli in Brussels, page 49.

<sup>16</sup> Chari, Regulating lobbying: a global comparison, pages 1-2.

forms of mobilizing voters or creating a public opinion can of course also be used as opposition to a proposed legislation that lobbyists do not want. Either way a public debate is created which gives the politicians a chance to show that they are not separated from their constituents and listens to them between elections. Certain lobbying groups can also provide legitimacy to the political system by showing that all interests and concerns are treated with respect by the system.<sup>17</sup> The positive opinion about lobbying's contribution to the policy-making process is shared by the EU and lobbying is believed to be beneficial for the EU's future.<sup>18</sup> Improved European integration is believed to be an EU-specific positive effect. The interest groups can initiate co-operation with groups in other Member States and lobbying could spark public debates in the EU. This is believed to increase understanding between the Member States and thereby improve the forming of a European identity.<sup>19</sup>

## 2.3 Negative effects of lobbying

There is a strong belief today that lobbying is needed in modern democracies and that lobbying has a positive effect on the policy-making process, but there are negative aspects of lobbying that some think should be addressed. The concern mentioned in chapter 1.1 regarding the level of representativeness achieved by the lobbyists' input is a threat to trust and confidence in political systems.<sup>20</sup> It is of course difficult to guarantee that lobbying takes all relevant interests into consideration but one solution would be to allow all interests to participate, leaving the balancing between different interests to the politicians and not to active lobbyists. Nevertheless there are concerns that lack of interference would give unfair advantages to business interest with vast resources.<sup>21</sup> There are also examples of lobbyists trying to block other groups out of the policy-making process. This could lead to a system where certain interests would get an excessive amount of influence. These issues in combination with a disconnection between political systems and citizens could damage the democratic legitimacy of the system and its policy-making process.<sup>22</sup> The informal measures

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<sup>17</sup> Karr, Democracy and lobbying in the European Union, pages 43 and 72.

<sup>18</sup> High-level Working Group on a Common Register and Code of Conduct for Lobbyists, Joint statement regarding the progress achieved to date, page 3, European Governance: A White Paper, COM(2001)428 final, page 19, and European Parliament, Directorate-General for Research, Lobbying in the European Union, page 36.

<sup>19</sup> Van Schendelen, More Machiavelli in Brussels, page 340, and Green paper 'European Transparency Initiative', COM(2006) 194 final, page 5, Strategic objectives 2005-2009, COM (2005) 12 final, pages 4-5, and European Governance: A White Paper, COM(2001)428 final, page 14.

<sup>20</sup> Bertók, Lobbyists, governments and public trust, page 15.

<sup>21</sup> Karr, Democracy and lobbying in the European Union, page 172.

<sup>22</sup> Van Schendelen, More Machiavelli in Brussels, pages 334-335 and 340, and Karr, Democracy and lobbying in the European Union, page 171.



of lobbying can add to criticisms of lacking accountability and transparency in a political system. This can result in the public distrusting the policy-making process.<sup>23</sup> Lobbying that crosses the line into illegal activities, such as bribery, makes the public question the actions of all the lobbyists and discredits both lobbying and the political system.

## 2.4 Regulating lobbying

Since the EU has decided that lobbying is a legitimate activity that should be regulated this essay will focus on theories about how lobbying regulation should be formulated.<sup>24</sup> The purpose of creating a lobbying regulation is usually not to guarantee that illegal activity will not take place; there are criminal laws forbidding bribery or extortion which will make it possible to punish those who cross the line. Instead the purpose of lobbying regulation is usually to create trust in the policy-making process and the role the lobbyists play in it. Through transparency the citizens can be made aware of what interests are behind proposals and what interactions there are between lobbyists and the political system. With transparent lobbying and public scrutiny the citizens are supposed to be assured that no one has improper amount of influence on the politicians.<sup>25</sup> Throughout the world there are different approaches to lobbying regulation, at national-level there are everything from high to low regulated systems. In this essay both the high-regulated and the low-regulated system is represented, by the US and the EU solutions.<sup>26</sup> Lobbying regulation usually results in the creation of a register meant to improve transparency of the lobbyists' actions. It also results in the politicians being accountable for their interactions with special interests. The register seldom affects which interests are strong and capable of influencing the policy-making process.<sup>27</sup> In the case when increased integrity and changes in lobbyist behaviour is wanted a Code of Conduct can be established that clarifies accepted interactions for both politicians and lobbyists.<sup>28</sup> The definition of lobbyists in the regulation usually focuses on professional lobbyists that are paid to influence but the definition can be made wider in order to address the public's concern.<sup>29</sup>

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<sup>23</sup> Karr, Democracy and lobbying in the European Union, page 172.

<sup>24</sup> Green paper – European Transparency Initiative, COM(2006) 194 final, page 5.

<sup>25</sup> Chari *et al*, Regulating lobbying: a global comparison, pages 6 and 156-157, and Bertók, Lobbyists, governments and public trust, page 2.

<sup>26</sup> Chari *et al*, Regulating lobbying: a global comparison, page 109.

<sup>27</sup> Chari *et al*, Regulating lobbying: a global comparison, page 6.

<sup>28</sup> Bertók, Lobbyists, governments and public trust, page 16.

<sup>29</sup> Bertók, Lobbyists, governments and public trust, page 10.

## 3.1 European democracy

Despite the fact that democracy is well-established in Europe there is no accepted definition or structure that defines what a democracy is or how it should function. The Member States have diverse democratic structures, traditions and history; making it difficult and sensitive to specify what a democracy is because it is necessary to give room for the Member States varying notions of democracy. Defining democratic principles and standards are made even more complicated by the fact that the terms are not written in stone and are often given different meanings by the EU as well as the academics.<sup>30</sup> The terms transparency and openness are often used interchangeably by the EU and the terms will be used in the same way in this essay.

The democratic debate regarding the EU is fairly young. Demands for improved democratic legitimacy were first heard in the 1990s and have resulted in progress regarding citizens' rights and democratic improvements of the EU's organisation.<sup>31</sup> There is no doubt that democracy is a fundamental principle of the EU. The Union's values are founded on the respect for democracy and its functioning is based on representative democracy (TEU, articles 2 and 10). The TEU does not specify what democracy is which is understandable considering the above mentioned difficulties. However, the state of democracy in the EU is often criticised and it is argued that the EU suffers from a democratic deficit; lacking in democratic principles such as transparency, accountability and legitimacy. The EU's democratic state and development is further complicated by its position as a *sui generis*, a unique entity, with characteristics that make it different from national states. Therefore any democratic principles modelled on Member States must be applied with caution on the EU.<sup>32</sup>

This essay will not aim to formulate a perfect or complete account of democratic principles and standards valid within the EU. The democratic principles and standards which lobbying needs to comply with will be based on statements from the Commission and the EP. This means that the Transparency Register and its Code of Conduct will be compared against goals and democratic standards that the EU itself has considered important for lobbying regulation. The WPG and the ETI are especially important sources because they have been vital for several of the processes that have resulted in a more democratic EU.

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<sup>30</sup> Van Schendelen, *More Machiavelli in Brussels*, pages 320-321, and Harlow, *Accountability in the European Union*, page 7.

<sup>31</sup> von Bogandy, *A disputed idea becomes law: remarks on European democracy as a legal principle*, page 33.

<sup>32</sup> Eriksen and Fossum, *Post-national integration*, page 5 and von Bogandy, *A disputed idea becomes law: remarks on European democracy as a legal principle*, page 35.

## 3.2 Democratic principles for lobbyists?

The WPG resulted in several improvements that enhanced the democratic quality of the policy-making process. The democratic initiatives and improvements were not confined to the EU's organisation or people employed by the EU. The changes made for a more democratic EU would require efforts from civil society as well. Processes initiated by the WPG increased the possibilities to influence and participate in the EU's policy-making process. According to the WPG better involvement meant that the lobbyists would have to accept greater responsibility. The Commission did not hesitate in demanding that civil society must follow principles of good governance and specifically mentioned the democratic principles of accountability and transparency. The ETI repeated the importance of lobbyists taking responsibility, openness regarding lobbying activities, public scrutiny and a wide range of stakeholders participating in the policy-making process.<sup>33</sup> These are examples of the principles of transparency, participation and accountability that are valued as important to the process of making the EU more democratic.<sup>34</sup> The statements in the WPG and the ETI make it clear that the EU is expecting the lobbyists to adhere to these democratic principles if they wish to influence the EU.

The opinion that the political system and the lobbyists should share the responsibility for keeping interactions democratically sound is not unique for the EU. The argument is that if the lobbyists want lobbying to remain welcome and legitimate in the policy-making process they have to comply with democratic standards to ensure that citizens feel comfortable with the lobbyists' participation.<sup>35</sup> Asking all those who participate in the policy-making process to contribute to rather than to undermine belief in the political system is logical and reasonable. The ETI identified two measures already in use that could help stimulate lobbying to comply with democratic principles. The external method focuses on enabling public scrutiny through transparency and making information about interactions between the EU and lobbyists publicly available. The internal measure establishes rules that control the behaviour of lobbyists and the people working for the EU.<sup>36</sup> The Transparency Register uses both these measures as it has a Code of Conduct as well as a public register. The purpose of the register is to encourage legitimate lobbying, minimize the use of lobbying activities that are improper,

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<sup>33</sup> European Governance: A White Paper, COM(2001)428 final, page 15, and Green paper – European Transparency Initiative, COM(2006) 194 final, pages 2 and 4.

<sup>34</sup> European Governance: A White Paper, COM(2001)428 final, page 10.

<sup>35</sup> Bertók, Lobbyists, governments and public trust, pages 8-9.

<sup>36</sup> Green paper – European Transparency Initiative, COM(2006) 194 final, page 6.

stimulate discussion about current political issues and involve more lobbyists and individuals in the policy-making process.<sup>37</sup>

### 3.3 Transparency

Transparency is acknowledged as an important democratic principle within the EU and there have been several initiatives to enhance the EU's transparency. Amongst the initiatives of the WPG was a process that aimed to achieve an open policy-making process within the EU.<sup>38</sup> This process is of course connected to the fact that all decisions within the EU should be taken as openly as possible (TEU, articles 1 and 10.3). The importance of openness does not only apply to decision-making, all work within the EU should be conducted as openly as possible which will "ensure the participation of civil society" (TFEU, article 15). Transparency is considered to have several valuable and positive effects, it is said to create understanding for complicated systems and increase confidence in policy-making processes. The principle of transparency is a prerequisite for accountability, without knowledge about actions taken it is difficult to hold anyone accountable.<sup>39</sup> With all these claimed beneficial aspects transparency has become an important part of the solution to the challenges facing the EU. Specifically the disinterest from citizens and lack of confidence in the system are problems that transparency could help to solve.<sup>40</sup> The ETI, that resulted in the launch of the Transparency Register, specifically focused on enhancing transparency and the Commission has stated that the aim should be a "high level of transparency" in order to achieve public scrutiny and openness within the EU.<sup>41</sup>

In chapter 3.2 it was established that the lobbyists need to comply with the principle of transparency if they want to lobby the EU. Transparency is closely connected to lobbying because the institutions are supposed to have an open and transparent dialogue with lobbyists (TEU, article 11.2). The article is directed towards the institutions but if the EU's dialogue between the two parties is supposed to be transparent this of course affects the way lobbying is conducted. Furthermore if the EU sees a need to improve transparency in their policy-making process it is not unreasonable to expect the lobbyists to adapt to more transparency.

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<sup>37</sup> European Governance: A White Paper, COM(2001)428 final, pages 15 and 33, Green paper "European Transparency Initiative, COM(2006) 194 final, page 6.

<sup>38</sup> European Governance: A White Paper, COM(2001)428 final, page 3.

<sup>39</sup> Dyrberg, Peter, Accountability and Legitimacy: What is the Contribution of Transparency?, pages 82-83, and European Governance: A White Paper, COM(2001)428 final, pages 10-12.

<sup>40</sup> Neyer, Discourse and order in the EU, page 703.

<sup>41</sup> Green paper "European Transparency Initiative, COM(2006) 194 final, pages 2.

Participation is a valued democratic principle but that does not mean that lobbyists have a right to influence the EU behind closed doors.

The purpose of the Transparency Register is to increase transparency and openness about lobbying activities. According to the ETI public information is a prerequisite for public scrutiny, which would deter lobbyists from activities that are considered questionable or improper.<sup>42</sup> Examples of information that would be beneficial for enabling public scrutiny are data that clarifies who is lobbying, how lobbying is performed, which interests are being represented and information about the funding of lobbying groups. Another purpose with increasing transparency through the Transparency Register is to provide a comprehensive "landscape" of lobbyists active within the EU. The width of the interests represented in the register would show that the EU receives input from a great variance of sources which would enhance confidence in the policy-making process.<sup>43</sup> This purpose is best served if as many lobbyists as possible are registered. Ways of creating a comprehensive register, what information about lobbyists and their input should be made public in order to live up to a high level of transparency is discussed below. The ETI cautions against measures of transparency which are ineffective or disproportionate.<sup>44</sup> This means that there should be a balance struck between the burden of information and the positive effects of the information.

### 3.3.1 Information about lobbyists

It has been stated repeatedly that there is a need for the public and the EU to know who the lobbyists are, which interest they represent, what their mission or objective is and who is funding them. According to the Transparency Register's website the citizens can get information about "who is engaged in activities aiming at influencing the EU decision-making process, which interest are being pursued and what level of resources are invested in these activities"<sup>45</sup> Concerning financial disclosure the Commission has stated that it is "necessary and proportionate" to ask for relevant budget numbers and separate disclosure of spending for larger clients or funding sources. The purpose of financial disclosure is to give the citizens and the EU information about the financial strength of various lobbyists. Requiring information about active lobbyists is justified according to the Commission because without

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<sup>42</sup> Green paper "European Transparency Initiative, COM(2006) 194 final, page 6.

<sup>43</sup> Follow-up to the Green Paper "European Transparency Initiative" COM(2007) 127 final, page 3, and European Transparency Initiative: the register of interest representatives, one year after, COM(2009) 612 final, page 2.

<sup>44</sup> Green paper "European Transparency Initiative, COM(2006) 194 final, page 5.

<sup>45</sup> Green paper "European Transparency Initiative, COM(2006) 194 final, pages 5-6 and 8, and Transparency Register, Why a transparency register?, [europa.eu/transparency-register/about-register/transparency-register/index\\_en.htm](http://europa.eu/transparency-register/about-register/transparency-register/index_en.htm)

sufficient information about the lobbyists the value and relevance of their input cannot be assessed.<sup>46</sup>

If the Transparency Register lives up to the goals and purposes established by the EU the register will provide information about who the lobbyists are, whom they are representing, what mission or objective they have for themselves or their clients, where the funding comes from and how much resources are used for lobbying. In the case of lobbyists representing several clients they should have to state separate spending for the larger clients. The required information needs to be balanced against the risk of demanding too much information. Excessive information demands could result in non-compliance and might damage the value of the information by overburdening the register.<sup>47</sup> Public scrutiny should not be hampered by the register being overloaded with information or presenting information in an incomprehensible way. The Transparency Register should therefore refrain from requiring information that is unnecessary. This is important to keep in mind when formulating the articles regarding required information and designing the register. The register needs to supply citizens with relevant information that is easy to understand and compare.

### 3.3.2 Input from lobbyists

The ETI stated that the public must know what input the lobbyists provide and it was suggested that it should be public which positions lobbyists take when lobbying the institutions.<sup>48</sup> The possibility for public scrutiny is connected to the Regulation regarding public access to European Parliament, Council and Commission documents (Regulation regarding public access). When registering in the Transparency Register the lobbyists acknowledge that the EP and the Commission might have to grant the public access to documents or correspondence from the lobbyists.<sup>49</sup> This is a less effective solution than information about activities in the Transparency Register because the lobbying contributions would be mixed with all sorts of documents held by the EU; it would be more difficult to get a clear overview of the participation of individual actors and would require more effort from the citizens. The Transparency Register requires information about lobbyists' activities that are

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<sup>46</sup> Follow-up to the Green Paper 'European Transparency Initiative' COM(2007) 127 final, page 4.

<sup>47</sup> Bertók, Lobbyists, governments and public trust, page 10.

<sup>48</sup> Green paper 'European Transparency Initiative, COM(2006) 194 final, pages 5-6.

<sup>49</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, article 17.

defined as "main legislative proposals covered in the preceding year"<sup>50</sup> This indicates that the public should be able to find out which initiatives that have been influenced by specific lobbyists. That assumption is supported by the ETI suggesting that the Commission's public consultations would benefit from more extensive information about which lobbyists have contributed to the development of certain policies.<sup>51</sup> This statement is reminiscent of the EP's suggestion of "legislative footprint" were those responsible for reports or legislative suggestions voluntarily attach lists of lobbyists that have contributed to the process.<sup>52</sup> Even though these statements do not concern the Transparency Register it indicates a trend of increasing transparency regarding lobbyists' input in the policy-making process. With that background it is reasonable to expect that the Transparency Register provides information about which legislations that lobbyists have been actively working on.

### 3.3.3 Comprehensive register

When establishing a register for lobbyists the EU had a choice to make between voluntary and mandatory registration. The Commission continuously suggested a voluntary register with incentives to register. Initially the incentives amounted to automatic alerts from the EU on topics that the lobbyists have declared interest in. The EP on the other hand wanted a mandatory register.<sup>53</sup> In discussions following the ETI the Commission was convinced that the proposed incentive of automatic alerts was not going to be an effective incentive, especially not for lobbyists in Brussels who pay close attention to the policy-making process. Nevertheless, it should not be underestimated that the automatic alerts can have a positive effect for lobbying groups that lack enough resources to follow the daily policy-making process. For the second incentive the Commission was inspired by its own consultation standards which demand that for contributions made through the Internet the source organisation must provide the public and the Commission with information about their objectives and organisation structure, otherwise the contribution will be considered as input from an individual. The incentive is to connect the Transparency Register with a new standard template for internet consultations. Lobbying organisations sending in contributions to the on-line public consultations will be "systematically invited" to register in the Transparency

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<sup>50</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, annex II, articles I and II.A.

<sup>51</sup> Green paper "European Transparency Initiative, COM(2006) 194 final, page 8.

<sup>52</sup> European Parliament, Resolution on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions, point 3.

<sup>53</sup> European Parliament, Resolution on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions, point 11.

Register.<sup>54</sup> To summarize, in order to achieve a comprehensive register the Transparency Register should strive to reach a high registration rate. The easy solution for this would have been a mandatory register. However, it is possible that a voluntary approach in combination with incentives will be enough to claim that the Transparency Register is a "one-stop shop" where citizens can learn who is engaged in lobbying and influencing the EU.<sup>55</sup>

### 3.4 Participation

Participation is believed to ensure relevance, quality and effectiveness of EU policies. These positive effects of participation are believed to increase confidence in the EU and its regulations. The principle of participation is enhanced by applying transparency measures, with information about current policy processes it is easier for lobbyists to get involved at an early stage. Because of the many positive impacts of participation the EU tries to increase the input and contributions from lobbyists.<sup>56</sup> Amongst other things the EU conducts its work openly in order to stimulate the lobbyists' participation (TFEU, article 15). The ascribed positive effects of lobbyist participation is a result of several impacts that the lobbyists have on policy-making processes. Participation between elections is assumed to give feedback to the system without the need of elections and the politicians could be alerted to issues that need addressing. When the lobbyists co-operate with interests organisations in other Member States in order to increase the weight of their contribution it is believed to further the European integration and identity. Lobbyists can also engage citizens in their lobbying which means that those citizens gain experience in being active during terms.<sup>57</sup> EU's positive approach to lobbyists participating in the policy-making process is related to the European citizens' right to participate in what is referred to as the EU's democratic life (TEU, article 10.3). This means that citizens' participation between elections is encouraged and valued within the EU and is proof of openness to input in order to improve the quality of EU regulations. There is also a close connection to the citizens' freedom to assembly or create associations to protect their interests (European Charter of Fundamental Rights, article 12).

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<sup>54</sup> Follow-up to the Green Paper "European Transparency Initiative" COM(2007) 127 final, pages 3-4.

<sup>55</sup> European Parliament, Resolution on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions, point 11, and Transparency Register, Why a transparency register?, [europa.eu/transparency-register/about-register/transparency-register/index\\_en.htm](http://europa.eu/transparency-register/about-register/transparency-register/index_en.htm)

<sup>56</sup> European Governance: A White Paper, COM(2001)428 final, page 10.

<sup>57</sup> Karr, Democracy and Lobbying in the European Union, pages 73-75.



According to the Commission the participation in associations representing interests is an example of how the citizens can engage in the EU's political life.<sup>58</sup>

As mentioned in chapter 2.3 the participation of lobbyists is appreciated but there are negative impacts of lobbying that can diminish the value of participation. There are risks that lobbyists already affecting the system try to block out other lobbyists, by creating coalitions or thresholds for rivals, in order to secure their own impact on the system. Another aspect is the concerns about well-funded lobbyists having a greater capability to respond to the EU's need for information and therefore getting an excessive amount of influence.<sup>59</sup> Certain groups also seem to have more problems with organising themselves and influencing the politics, increasing even further the gap between the capabilities of different lobbying groups. These inabilities often strike groups that are underrepresented, such as groups representing women's rights or protection of the environment.<sup>60</sup> On the other hand, the Commission and the EP distribute funds to groups that lobby the EU. The groups that receive the most are citizen organisations and youth or education groups. The funding has been questioned and the ETI initiated an improvement of information available about the funds. Studies have been done measuring perceived success of lobbying from both the politicians point of view and the lobbyists.<sup>61</sup> For the purpose of this essay it is enough to know that there are discussions about how level the playing-field is and that the positive effect of participation would be diminished if it turned out that only a limited aspect of the interests managed to influence the policy-making process.

### 3.4.1 Level playing-field

According to the EP equal access to the EU is "an absolute prerequisite" for the EU's legitimacy and the citizens' trust in the system. With a more level playing-field the sources of information available to the EU increases by giving more lobbyists the opportunity to influence the EU.<sup>62</sup> The focus on a level-playing field is connected to the theory of equality of voice. Equality of voice refers to the right to be treated equally when participating in democratic life during terms. It means that there should be equal opportunities to influence the

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<sup>58</sup> Towards a reinforced culture of consultation and dialogue, COM(2002) 704 final, page 5.

<sup>59</sup> Van Schendelen, More Machiavelli in Brussels, pages 332.

<sup>60</sup> Naurin, Den demokratiske lobbyisten, pages 34 and 55.

<sup>61</sup> Chari *et al*, Regulating lobbying: a global comparison, pages 49-50, Van Schendelen, More Machiavelli in Brussels, pages 40-41, Karr, Democracy and lobbying in the European Union, page 178, and Green paper "European Transparency Initiative, COM(2006) 194 final, page 3.

<sup>62</sup> European Parliament, Resolution on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions, point 1.

political system and proportional representation on non-elected bodies.<sup>63</sup> This is of course related to the principle of citizens' equality. The EU is bound by the TEU to give its citizens equal attention and this is valid no matter what action the EU is executing (TEU, article 9). The equality of voice is one of the foundational principles for the Transparency Register and binds the Commission and the EP to treat all lobbyists equal. This only applies when the lobbyists are "engaged in similar activities in a similar manner"<sup>64</sup> This means that the Transparency Register needs to be careful when regulating the lobbyists and demanding information, any differences made between lobbyists have to be carefully motivated. The regulation should also refrain from diminishing the variety of interests that seek to influence the EU.

### 3.5 Accountability

The EU has on several occasions acknowledged accountability as an important democratic principle that will contribute to enhancing democracy within the EU.<sup>65</sup> Typically the principle is described as democratic accountability which refers to politicians being held accountable by their constituents. Within the EU only the EP is elected directly by the citizens and the Council is held accountable by national governments or citizens (TEU, article 10.2). In terms of accountability the EU has been heavily criticised for a democratic deficit in this aspect, the means of holding the Council accountable is accused of being indirect and ineffective. The Commission cannot be held accountable at all but is at least more transparent than the Council which is accused of secrecy and decision-making behind closed doors.<sup>66</sup> This critique is part of the reason why improved democratic standards are necessary within the EU and have contributed to the democratic developments initiated by the WPG and the ETI.

As explained above in chapter 3.2 the EU has declared that lobbyists will have to accept more accountability and responsibility when they decide to influence the EU. The EU does not explain what is meant by accountability and responsibility for lobbyists. To argue that EU citizens should be able to punish lobbyists and remove them from their employment as lobbyist would be farfetched. The principle of accountability has developed several meanings over the years connecting the term with responsiveness, which refers to politicians

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<sup>63</sup> Karr, *Democracy and Lobbying in the European Union*, page 23.

<sup>64</sup> European Parliament and European Commission, *Agreement on establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation*, article 6.

<sup>65</sup> See: *European Governance: A White Paper*, COM(2001)428 final, page 3, and *Green paper "European Transparency Initiative"*, COM(2006) 194 final, page 2.

<sup>66</sup> Karr, *Democracy and Lobbying in the European Union*, pages 99-100.

being motivated to consider the public's concerns and wishes because of their accountability.<sup>67</sup> But it is not reasonable to demand that lobbyists should take the entire society's interest into consideration, the balance between conflicting interests should be struck by the politicians. The very purpose of lobbying is to represent interests and convey the interests' opinions in the policy-making process, no matter if the interest is held by the majority or the minority. Instead accountability for lobbyists should be understood in the light of accountability that is imposed on corporations when the EU establishes rules or standards for them, which means that lobbyists are going to be held accountable if they breach established rules or standards. The accountability for lobbyists is also reminiscent of professional accountability which refers to public servants accountability for the work they perform. Public servants often provide expert knowledge and information that is necessary to solve the complex political issues of today. The public servants are held accountable both by their superiors and their peers.<sup>68</sup> There are clear similarities between professional accountability and the improvements suggested in the WPG and the ETI. Lobbyists have a similar function when they supply expertise information about complicated or technical issues. It is also important to stimulate scrutiny from other lobbyists due to the often complex political issues. The alternative would be that the EU would have to treat all input with caution and scepticism. Researching the accuracy of the information would be too costly and time-consuming. This would result in an ineffective policy-making process which would diminish the positive democratic impacts that participation from civil society has; such as presenting varying interests that improve the accuracy and effectiveness of EU laws and regulations.<sup>69</sup> Simply put, lobbyists should be accountable for their input into the policy-making process which is a reasonable and proportionate demand.

### 3.5.1 Responsibilities and rules

Through the Transparency Register lobbyists supply the EU with information about themselves, the interest that is being represented, objectives of their lobbying and also their funding. Legitimate lobbying means supplying the register with information that is correct and not misleading. Since the lobbyists are providing the information it is natural to demand that they take responsibility for the accuracy of the content. It is also reasonable to demand that the lobbyists will be responsible for keeping their information in the Transparency

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<sup>67</sup> Harlow, *Accountability in the European Union*, pages 8-9, and Mulgan, *Accountability: an ever-expanding concept?*, pages 555-556.

<sup>68</sup> Mulgan, *Accountability: an ever-expanding concept?*, pages 558-559.

<sup>69</sup> Green paper – European Transparency Initiative, COM(2006) 194 final, page 2.

Register up-to-date, with the risk of being held accountable otherwise. This assumption is supported by the Commission that considers it the lobbyists' responsibility to 'accurately and objectively' calculate the numbers and describe the way they are funded. According to the Commission this applies to all information that is submitted by the lobbyists into the Transparency Register.<sup>70</sup> The responsibilities put upon lobbyists should be formulated in clear rules to avoid uncertainty. According to the WPG responsibilities imposed on the lobbyists will be identified in the Code of Conduct.<sup>71</sup> The rules and responsibilities should be clearly formulated and leave little room for misinterpretation. The rules need to include provisions that discourage improper lobbying such as misleading information or concealing which interest is being represented.<sup>72</sup>

### 3.5.2 Monitoring and sanctions

Arguments have been made that compliance with responsibilities should be monitored and controlled by an agency; which in the best case scenario is independent from both those being lobbied and the lobbyists. An independent agency enhances public confidence in the lobbying process and strengthens the lobbyists' belief in the regulation which leads to increased compliance.<sup>73</sup> In order to hold anyone accountable there needs to be some sort of sanction that stimulates compliance and motivates rectification were breaches against the responsibilities have been made.<sup>74</sup> Sanctions suggested by the Commission are encouragements to rectify incorrect information in the register and exclusion from the register. There is also the possibility of publicly naming lobbyists that fail to comply with the regulation of the Transparency Register.<sup>75</sup> Although an independent agency responsible for monitoring and sanctioning undoubtedly would increase confidence in the system it also sets very high demands and is a description of a best-case scenario. In the ETI it is established that enforcement should be credible and transparent which is a reasonable standard.<sup>76</sup> Lobbyists also monitor each other and would not hesitate to complain if another lobbying group were breaching the Code of Conduct.<sup>77</sup>

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<sup>70</sup> Follow-up to the Green Paper 'European Transparency Initiative' COM(2007) 127 final, pages 4-5.

<sup>71</sup> European Governance: A White Paper, COM(2001)428 final, page 33.

<sup>72</sup> Green paper 'European Transparency Initiative, COM(2006) 194 final, page 9.

<sup>73</sup> Chari *et al*, Regulating lobbying: a global comparison, page 159.

<sup>74</sup> Mulgan, Accountability: an ever-expanding concept?, page 556.

<sup>75</sup> Follow-up to the Green Paper 'European Transparency Initiative' COM(2007) 127 final, page 5.

<sup>76</sup> Green paper 'European Transparency Initiative, COM(2006) 194 final, page 8.

<sup>77</sup> Van Schendelen, More Machiavelli in Brussels, page 337.

## 4.1 Lobbying regulations in the EU

Currently the only Member States that have mandatory lobbying regulations are Germany, Lithuania, Poland and Hungary.<sup>78</sup> The EU is venturing out into fairly uncharted territory by creating the Transparency Register, which can be considered a good thing because the Member States have not established firm positions about how lobbying regulation should be formulated based on national experiences. On the other hand lobbying is a politically sensitive topic, there is not much experience of regulation to draw from and there are different opinions about the legitimacy of lobbying making it hard to reach consensus.<sup>79</sup>

The recently launched Transparency Register is not the first lobbying register created on the EU-level. In 1996 the EP established an accreditation system that made registration necessary if a lobbyist wanted to enter the EP's buildings five or more days a year. The information available on the website was the name of the lobbyist, employer and the represented organisation. In response to the WPG the Commission started up a voluntary register called the CONECCS. That register provided information about financing, objectives, policy areas and which countries the organisation is active in.<sup>80</sup> During the process of preparing for the launch of the Transparency Register the Commission's CONECCS was replaced by the Register of Interest Representatives. Prior to the launch of the Transparency Register the EP and Commission launched a "new transparency portal page" That initiative was criticized for being nothing more than a page linking to the two separate registers of the EP and the Commission without making any improvements on the state of transparency regarding lobbying activities within the EU.<sup>81</sup> In this context it is also relevant to mention that public office holders at the EP and the Commission are bound by Codes of Conduct that regulate their behaviour.<sup>82</sup>

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<sup>78</sup> Chari *et al*, Regulating lobbying: a global comparison, page 71.

<sup>79</sup> Bertók, Lobbyists, governments and public trust page 8, and Van Schendelen, More Machiavelli in Brussels, page 330.

<sup>80</sup> Green paper "European Transparency Initiative, COM(2006) 194 final, page 7, and Report of the Inter-Departmental Working Group on a possible European Transparency Initiative, SEC(2005) 1300 final, pages 12-13.

<sup>81</sup> Friends of the Earth Europe, Press release from Alter-EU, [www.foeeurope.org/press/2009/Apr23\\_Lobbying\\_Transparency\\_Still\\_Out\\_Of\\_Sight.html](http://www.foeeurope.org/press/2009/Apr23_Lobbying_Transparency_Still_Out_Of_Sight.html)

<sup>82</sup> High-level Working Group on a Common Register and Code of Conduct for Lobbyists, Joint Statement regarding the progress achieved to date, page 3.

## 4.2 Democratic standards

The three democratic principles established in chapter 3 are based on the EU's own statements about important principles when regulating lobbying. These chosen democratic standards will be used to analyse the Transparency Register and its regulations.

### 4.2.1 Information about lobbyists

The Transparency Register provides information regarding the lobbyists' identity such as the name of the organisation, contact information, which person is legally responsible for the organisation, names of all the individuals that have been granted access badges by the EP, number of staff involved in lobbying and, if applicable, the number of members in forms of individuals or organisations. The register also points out the organisation's director or managing partner or the person responsible for lobbying activities. Just as in the CONECCS the organisations are asked to state in which countries the organisation 'carries out operations'. Furthermore the organisation is asked to leave information about 'affiliations to networks' and 'general information that falls within the scope of the register'.<sup>83</sup> By searching the Transparency Register it is possible to find plentiful data regarding the identity of lobbyists. The information is presented clearly on each registrant's page and a link is provided to the organisation's website. Why lobbyists are asked to supply 'general information' relevant for the Transparency Register can be questioned. It does not damage the quality of the information provided by the register but it also does not add to it unless the lobbyists choose to supply information that increases transparency. If 'general information' is to be interpreted as an encouragement to lobbyists to add information that they feel is relevant it would have been better if the article stated just that. Lobbying organisations are also asked to supply information about their 'goals/remit' and 'fields of interest'.<sup>84</sup> Fields of interest are chosen from a number of set topics and they are easily searchable through the website. However, even if a lobbyist is interested in environmental questions it does not necessarily mean that that specific lobbyist is actively influencing the latest piece of environmental legislation. The goals/remit is written by the lobbyists and therefore has varying levels of information.

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<sup>83</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, annex II, article I.

<sup>84</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, annex II, article I.

The register asks for financial information regarding all those activities aimed at influencing the EU. This includes lobbying directed at the Members States' bodies that participate in decision-making at the EU-level.<sup>85</sup> The financial numbers will be based on accumulated spending for a complete financial year. All the registrants are asked to declare any funding received from the EU's institutions. Professional consultancies, self-employed consultants and law firms have to supply information about the turnover for each client. Professional associations, trade associations and in-house lobbyists are asked for an estimate of lobbying costs. The remaining organisations; such as think tanks, academic institutions and NGOs, are required to provide an overall budget with specification of funding from the main sponsors of the organisation. In the case of hired lobbyists their financial disclosures do not exempt their clients from supplying information about the money spent, which results in so called double counting.<sup>86</sup> This likely leads to overestimation of the total funds spent on lobbying in the EU. According to the Commission the purpose of the Transparency Register is not to provide an estimate of the total spending on lobbying the EU. The aim with the register is to provide information about the spending of the individual registrants.<sup>87</sup> As stated in chapter 3.3.1 the purpose of financial disclosure is to give the citizens and the EU information about the financial strength of various lobbyists. This is best done by allowing double counting which allows the citizens to look up financial figures for a specific lobbyist without needing knowledge of connections between clients and lobbying firms. Nevertheless, numbers on the total funds for lobbying in the EU would also be interesting for the citizens. Financial disclosure can be criticised of causing a higher amount of work and bureaucracy. However, it is reasonable to assume that hired lobbyists keep track of work done for clients and that organisations keep track of their spending.<sup>88</sup> In relation to the increased transparency achieved by financial disclosure the spending reports should be considered necessary and worth the extra effort.

The Transparency Register is claimed to provide information about who tries to influence the decision-making process, interests pursued and the level of resources invested in

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<sup>85</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, article 15.

<sup>86</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, annex II, article II B.

<sup>87</sup> European Transparency Initiative: the Register of Interest Representatives, one year after, COM (2009) 612 final, page 7.

<sup>88</sup> Chari *et al*, Regulating lobbying: a global comparison; page 141.

lobbying.<sup>89</sup> Through the register citizens are able to get plentiful information about the identity of the lobbyists and their financial spending. In this regard the Transparency Register is a success. The register presents information in a way that is easily understandable and with clear statements of when the last update was made. But the Transparency Register is disappointing when it comes to user-friendliness for citizens. The search engine can be used with the criteria of company name, type of organisations, areas of interest for the lobbyists and more. However, citizens cannot search the register on the basis of financial disclosures. Therefore the only way to find out which lobbyists spend the most, or the least, on EU lobbying is to go through each individual registrant's information.<sup>90</sup> It is possible that the regular publications of statistics will provide more information about spending in comparison with other registrants.<sup>91</sup> Even if the reports of statistics compare spending this is a flaw of the Transparency Register. The citizens cannot independently use the register to retrieve information comparing lobbyist's spending. The public scrutiny would be dependent on researchers, journalists or the EU publishing reports on the lobbying costs; unless the citizens themselves decide to compare each individual registrant, on 30<sup>th</sup> October 2011 the number of registrants amounted to 2035.<sup>92</sup> Naturally the spent amount does not necessarily indicate the lobbyist that is the most successful but it is a part of the puzzle. If all the other supplied data is searchable there should not be a reason to deny using financial disclosure as a search criterion.

## 4.2.2 Input from lobbyists

In the register lobbyists are asked to give information about "main legislative proposals covered in the preceding year"<sup>93</sup> The information about "main legislative proposals" are covered under the heading "Activities" The registrants are "advised" to state legislations that they have in some form worked on for the last year and recommended to use the same terms as the institutions. The information is presented as "main EU initiatives covered" and

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<sup>89</sup> Transparency Register, Why a transparency register?, [europa.eu/transparency-register/about-register/transparency-register/index\\_en.htm](http://europa.eu/transparency-register/about-register/transparency-register/index_en.htm)

<sup>90</sup> Transparency Register, Search register, [ec.europa.eu/transparencyregister/public/consultation/search.do?locale=en&reset=](http://ec.europa.eu/transparencyregister/public/consultation/search.do?locale=en&reset=)

<sup>91</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, article 26.

<sup>92</sup> Transparency Register, Statistics for register, [ec.europa.eu/transparencyregister/public/consultation/mainstatistics.do?action=prepareView&locale=en#en](http://ec.europa.eu/transparencyregister/public/consultation/mainstatistics.do?action=prepareView&locale=en#en)

<sup>93</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, annex II, articles I and II.A.



registrants are allowed to freely describe their activities. The guideline on activities is supposed to be reviewed later on.<sup>94</sup> Based on the information found in the register registrants have chosen different approaches. Searching the register you will find everything from registrants declaring specific regulations, to general statements and acronyms.<sup>95</sup> Depending on the information supplied the public could either get an answer to what specific legislations the lobbyist has been working on to no more than general information. The guideline should be reviewed quickly in order to heighten the quality of the information and actually provide the public with information about lobbyists' activities. One clear improvement would be that instead of recommending that lobbyists use the terms used by the institutions provide the registration page with a list of EU initiatives, thus creating consistency with the terms used. Furthermore such a system could be linked to the EU's webpages about the specific initiative so that the public easily can get information about what stage the initiative is at. This would create a register that is both effective for the lobbyists to use and a register that supplies information that increases transparency and the possibility of public scrutiny. The information about activities that does refer to specific legislation is however of limited value. According to the article regulating the information about activities the data can be up to a year old.<sup>96</sup> This means that the Transparency Register cannot guarantee to provide current information about legislations being lobbied. A more effective public scrutiny would be achieved by making the frequency of reporting activities shorter. This would also benefit the European public debate; the citizens are more likely to get involved in the policy-making process if they still have a chance to make a difference.

### 4.2.3 Comprehensive register

When trying to establish a comprehensive register the definition of lobbying and lobbyists is important, just as with the earlier registers the definition is wide. Lobbying includes direct or indirect activities that try and influence the policy-making process. It is not possible to get around the definition by using intermediaries such as the media, forums or grass-rot initiatives. Activities directed at the Member States or the EU's institutions, officials or other staff is considered as lobbying. Even participation in formal consultations is enclosed by the

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<sup>94</sup> Joint Transparency Register Secretariat, Transparency Register Compliance Guidelines, pages 2-3.

<sup>95</sup> See as an example registrants: Dr. Koch Consulting, Deloitte LLP and Wasser & Wasser.

<sup>96</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, annex II, article II.A.

Transparency Register's definition of lobbying.<sup>97</sup> Activities that do not fall into the scope of lobbying are those that can be defined as actions taken in order to provide legal or other professional advice, such as mediation or contacts with the authorities to clarify regulation for a client. Activities in response to a request from the EU's institutions or MEP are also excluded from the definition as well as actions from social partners, such as employer's organisations, performing their a role assigned to them in the Treaties.<sup>98</sup> The definition of lobbyist is someone engaging in what the Transparency Register defines as lobbying, irrespective of their legal status.<sup>99</sup> This definition includes lobbying groups such as professional lobbyists, trade associations, in-house lobbyists, law firms, think-tanks, trade associations, trade unions, employers' and employees' organisations, public affairs consultancies and NGOs.<sup>100</sup> Exempt for the definition are churches, political parties and municipal, regional or local authorities.<sup>101</sup> One of the goals with the Transparency Register is to provide the citizens with a register showing the wide range of interests that the EU is influenced by and in this sense the definition has been successful in enclosing most of the interest influencing the EU.<sup>102</sup> With this very wide definition the Transparency Register is successful in creating a wide range of interests that could register.

Just like the Commission proposed the Transparency Register was launched with voluntary registration with incentives to motivate registration. As mentioned earlier the EP wanted a mandatory register, just like their own register, and the EP kept their mandatory approach for lobbyists that want to enter their building five days or more per year.<sup>103</sup> The issuing of access badges remains with the EP and a registration in the Transparency Register is a precondition for being granted an access badge.<sup>104</sup> However, the EP's claim of a mandatory register is misleading. A registration in the Transparency Register is only

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<sup>97</sup> European Parliament and European Commission, Agreement on establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, article 8.

<sup>98</sup> European Parliament and European Commission, Agreement on establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, article 10.

<sup>99</sup> European Parliament and European Commission, Agreement on establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, article 9.

<sup>100</sup> European Parliament and European Commission, Agreement on establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, annex I.

<sup>101</sup> European Parliament and European Commission, Agreement on establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, articles 11-13.

<sup>102</sup> Follow-up to the Green Paper 'European Transparency Initiative' COM(2007) 127 final, page 3.

<sup>103</sup> European Parliament, Resolution on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions, point 11.

<sup>104</sup> European Parliament and European Commission, Agreement on establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, article 22.

necessary for those lobbyists wishing to physically enter the EP's buildings. Lobbyists who prefer to hold meetings on other locations are not facing demands to register, for them the register is voluntary. According to some Commissioners the reality of this "mandatory" register's loophole was that several lobbyists actively influencing the EP were not registered.<sup>105</sup> Claiming to uphold a mandatory register when the reality is that the regulation has a wide-open loophole for those willing to use it can be considered misleading. If the EP wants to enhance the citizens' confidence in the policy-making process the institution would do best to refrain from using the word mandatory and be clearer about how the lobbyists are motivated to register.

As mentioned in chapter 3.3.3 the Commission decided to enforce two incentives for motivating lobbyists to register. Sending out alerts about processes within the EU was considered too weak, especially for motivating established lobbying firms in Brussels who closely follow the EU. The second incentive was described as "systematically inviting" lobbyists and has turned out to be more than an invitation. Any lobbyist wishing to make use of the on-line public consultations will have to register if their contribution is going to be considered as an input from their organisation. Contributions from unregistered lobbyists will be considered as contributions from an individual.<sup>106</sup> During the discussion following the ETI it was obvious that the participants were divided in those supporting a voluntary register and those arguing that it was necessary to introduce a mandatory register in order to ensure a comprehensive register.<sup>107</sup> The Register of Interest Representatives passed 2 000 registrants when the follow-up was done a year after the launch. The Commission's register experienced resistance to registration from especially two lobbying groups. Law firms resisted registration claiming that a registration would violate clients' right of confidentiality. The Commission stated that the only clients that should be registered are those clients who hire lawyers as lobbyists and in the Commission's experience most of the Brussels law firms participate in lobbying for their clients. For the sake of a level playing field the Commission has specified how the law firms should distinguish between clients that are protected by confidentiality and clients that should be registered in the Transparency Register. Think-tanks were also unwilling to register because they consider their input to be academic research rather than attempts to influence the EU. According to the Commission some think-tanks offer membership with "networking opportunities" and help their members to "voice their

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<sup>105</sup> Chari *et al*, Regulating lobbying: a global comparison, page 53.

<sup>106</sup> European Commission, Your voice in Europe, Open Consultations, [ec.europa.eu/yourvoice/consultations/index\\_en.htm](http://ec.europa.eu/yourvoice/consultations/index_en.htm)

<sup>107</sup> Follow-up to the Green Paper "European Transparency Initiative" COM(2007) 127 final, pages 3-4.

opinions—and therefore they were participating in lobbying activities. Commission’s register was not complete a year after its launch but the Commission still considered it promising enough to continue with the voluntary approach.<sup>108</sup> The positive outlook on the growing number of registrants was not shared by Alter-EU who researched the number of registered lobbying consultancies a year after the Commission’s positive statements. According to their findings 60% of the lobbying consultancies were not registered in the register two years after its launch.<sup>109</sup> Alter-EU’s findings focuses on one group meant to register and the result could of course be off but it still puts focus on an important topic. What percentage of registered lobbyists is sufficient for the Transparency Register to be referred to as a comprehensive register that is the one-stop shop for anyone wanting to know who lobbies the EU? For the sake of transparency the EP and the Commission should publish estimates about the percentage of lobbyists registered. With those numbers the public could decide for themselves if the voluntary register can be considered sufficient for supplying them with information regarding lobbyists active at EU-level or if they need to complement the Transparency Register with other sources. If the lobbyists remain hesitant about registering despite incentives from both the EU and the EP the discussion about introducing a mandatory register should be brought up again.

#### 4.2.4 Level playing-field

As stated in chapter 3.4.1 the Transparency Register and its Code of Conduct should not treat lobbyists differently if they are performing the same activities. The registration for the registrants should allow a level playing-field.<sup>110</sup> The lobbying groups are asked for different kinds of information when it comes to the financial disclosure.<sup>111</sup> Concerning the financial disclosure the Commission has stated that it will ask for relevant figures.<sup>112</sup> Asking for different sorts of financial information from different organisations does automatically result in an unequal treatment of the registrants. If the varying information keeps the registrants at an equal amount of information disclosure and transparency the differences would be

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<sup>108</sup> European Transparency Initiative: the register of interest representatives, one year after, COM(2009) 612 final, pages 2-3.

<sup>109</sup> Alter-EU, Which lobby firms are on the European Commission’s Register of Interest Representatives, which ones are not?, page 1.

<sup>110</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, article 6.

<sup>111</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, annex II, article II B.

<sup>112</sup> Follow-up to the Green Paper ‘European Transparency Initiative’ COM(2007) 127 final, page 4.

motivated. When discussing the varying information it is important to remember that the organisations themselves choose type of organisation when registering and thereby what information they are asked for.<sup>113</sup> Here peer review will likely play an important role, especially among the established lobbying groups on EU-level. Any questionable categorisation will probably be questioned by other groups. As an example NGOs today are not just NGOs since an organisation is under constant development and can have traits that make them more difficult to categorise.<sup>114</sup> But there still is a risk that less-known groups or groups in the gray-zone between to different groups can find advantages from the different information requirements. If trouble arises it is likely that attention will be called to the problem. Nonetheless it would be beneficial for the reputation of the register to proactively establish guidelines for how the registrants choose their category.

Concerns for a level playing-field were raised in the development of the Transparency Register within the different categories. Initially the two highest brackets for turnovers were "950 000-1 000 000" and "1 000 000". These brackets meant that the organisations with a lower turnover were giving more specific information than the organisations with the highest turnover. The Commission stated that "the list of ranges should be extended beyond the current limit of 1 000 000". This would increase the chances of a level playing-field for the registrants with a large turnover.<sup>115</sup> Since the Transparency Register has paid attention to the range of brackets before it should be assumed that the range of the brackets will be increased if any registrants are within the highest bracket.<sup>116</sup>

## 4.2.5 Responsibilities and rules

When registering the lobbyists agree to act in compliance with the Code of Conduct and guarantee that the information provided by them in the Transparency Register is correct.<sup>117</sup> According to the Code of Conduct the lobbyists are responsible for ensuring that the information provided to the Transparency Register and the contributions made during activities that falls within the scope of the register is "complete, up-to-date and not misleading". The provision also acknowledges that the registrants cannot guarantee this so

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<sup>113</sup> Joint Transparency Register Secretariat, Transparency Register Frequently Asked Questions, question 12.

<sup>114</sup> Van Schendelen, More Machiavelli in Brussels, pages 40-41.

<sup>115</sup> European Transparency Initiative: the register of interest representatives, one year after, COM(2009) 612 final, page 7.

<sup>116</sup> Transparency Register, How to complete the registration form, [europa.eu/transparency-register/your-organisation/how-register/index\\_en.htm](http://europa.eu/transparency-register/your-organisation/how-register/index_en.htm)

<sup>117</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, article 17.

gives room for honest mistake with the formulation "to the best of their knowledge"<sup>118</sup> However, the registrants only have to update their information once a year. The registrants are urged to update the information if they feel that there have been any "significant" changes. Failure to update the information once a year will eventually lead to the registrant's removal from the register.<sup>119</sup> The minimum review of the registrants' information is enough for registrants that do not experience any big changes within their organisation or line of business. Since it is only a recommendation to update the information when significant changes occur and the changes are not exemplified it is possible that information about changes will not be available for the public and other lobbyists until a year after. This of course decreases the value of the information from the Transparency Register. It would not be unreasonable to ask the registrants to review their information two or three times a year this could be done by an automatic reminder that asks the registrant to validate that the information on the register is still correct.

The Code of Conduct also establishes that the lobbyists should respect the rules applicable to EU officials and staff and not try to induce them to break these rules, always identify themselves and the interest they represent and inform interests they represent of the rules in the Code of Conduct.<sup>120</sup> The Code of Conduct is considered to be a minimum standard of behaviour. Some of the provisions have been criticised for being either too broad or impossible to trace.<sup>121</sup> This could easily be improved by exemplifying behaviours that fall within the scope of the provision, either through guidelines or annexes to the Code of Conduct. It is important that the rules in the Code of Conduct are capable to use for sanctioning behaviour that is considered improper. If a breach of the Code of Conduct would go unsanctioned due to a weak formulation of the rules it would likely damage the confidence in the Transparency Register.

The minimum standards for behaviour are chosen because the EU wants the lobbyists to develop Codes of Conduct and contribute to pushing the improvement of standards forward.<sup>122</sup> The Commission has stated that there are positive signs of improving

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<sup>118</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, annex III, provision d.

<sup>119</sup> Joint Transparency Register Secretariat, Transparency Register Frequently Asked Questions, question 15.

<sup>120</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, annex III, provisions a, c, f and i.

<sup>121</sup> Chari *et al*, Regulating lobbying: a global comparison, page 53.

<sup>122</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, article 16.

ethical standards. Some organisations are committed to standards that go beyond the Code of Conduct and other registrants provide information that is not required.<sup>123</sup> The stimulation of a development of standards among organisations lobbying the EU is commendable. It increases awareness of legitimate lobbying activities, enhances confidence in the policy-making process and compliance of the Transparency Register should rise. But relying too much on the lobbying organisations ability to develop Codes of Conduct is not wise. The EU initiated discussions about Codes of Conduct in 1992 which did result in new codes. However the codes were coherent with the EU's minimum standards and were only applied to consultants, leaving a large amount of the lobbyists unaffected by the standards.<sup>124</sup>

#### 4.2.6 Monitoring and sanctions

Registered lobbyists have accepted that complaints will be handled according to the rules in the Code of Conduct. The lobbyists accept any measures determined on the basis of them not complying with or infringing on the Code of Conduct.<sup>125</sup> Responsible for monitoring and sanctioning the system is the Joint Transparency Register Secretariat. The Secretariat consists of officials from both the Commission and the EP.<sup>126</sup> The monitoring will be based on complaints that can be filed by anyone about possible breaches of the Code of Conduct and random monitoring performed by the Secretariat. However, complaints filed will not be considered if they are anonymous and it is "in principle" necessary to provide some sort of proof supporting the complaint.<sup>127</sup> If a complaint is deemed inadmissible the complainant will be informed by the Secretariat's decision and reasons for not pursuing the complaint.<sup>128</sup> Any measure deemed necessary to address incompliance with the Transparency Register's regulations will be preceded by an investigation made by the Secretariat. The concerned registrant will be informed about the investigation and asks the registrant to submit a response

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<sup>123</sup> European Transparency Initiative: the register of interest representatives, one year after, COM(2009) 612final, page 4.

<sup>124</sup> Green paper "European Transparency Initiative, COM(2006) 194 final, pages 9.

<sup>125</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, article 17.

<sup>126</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, article 21.

<sup>127</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, article 19, and annex IV, articles 1 and 3, and Joint Transparency Register Secretariat, Transparency Register Frequently Asked Questions, question 11.

<sup>128</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, annex IV, article 5.

to the complaint. The Secretariat also has the possibility to hear the complainant or the registrant if necessary.<sup>129</sup> Possible sanctions ranges from temporary suspensions to removal from the register which is combined with a prohibition to register for another one or two years.<sup>130</sup> The sanctions may also be made public on the Transparency Register's website.<sup>131</sup> The ETI established that enforcement of the Transparency Register should be credible and transparent which is a reasonable standard.<sup>132</sup> During the development of the Transparency Register the Commission made it clear that it did not believe in leaving enforcement to the lobbyists because of their varying opinions and difficulties to reach consensus. According to the Commission they would always be responsible for their interactions with lobbying groups which would make it difficult to outsource the monitoring.<sup>133</sup> The monitoring and sanctioning system seems to be well composed with contacts with both complainants and registrants throughout the complaint process. The Secretariat also has a wide range of sanctions to choose from which makes it possible to adapt the measures to the situation. If a registrant needs extra time to update information and it is reasonable, then it is reasonable that they can be granted extra time.<sup>134</sup> The benefit of the Secretariat consisting of officials from the EP and the Commission is that they know how lobbying is performed and are familiar with the EU system. They are unlikely to make mistakes because of misconceptions or lack of knowledge. On the other hand they could be criticised for being impartial. The EP and the Commission wants the Transparency Register to be a success. Therefore they might refrain from harsher sanctions and posting eventual sanctions on the webpage. Besides that the Secretariat might be faced with complaints that concern improper behaviour from a colleague which is a delicate situation. This critique could be fuelled by the fact that it is unlikely that the public will receive information about sanctions. Honest mistakes that are sanctioned would cause the registrants negative publicity so the Secretariat will likely only post sanctions on the website that are clear violations. Although this is good for the registrants since they should have some

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<sup>129</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, article 18 and annex IV, articles 6 and 8.

<sup>130</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, annex IV, articles 10 and 15.

<sup>131</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, article 18.

<sup>132</sup> Green paper □European Transparency Initiative, COM(2006) 194 final, page 8.

<sup>133</sup> Follow-up to the Green Paper □European Transparency Initiative□ COM(2007) 127 final, page 5.

<sup>134</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, annex IV, article 13.



room for mistakes, especially for minor faults in the beginning, the public will receive little information about the monitoring and sanctioning system. The lack of transparency might cause lower confidence in the enforcement system. To outsource the monitoring and sanctioning seems to be excessive but the introduction from members outside of the EP and the Commission could be beneficial for the system. Another alternative would be to increase the level of transparency into the complaints system but that might risk damaging registrants who have only made minor mistakes.

Parallel to the register's monitoring of the compliance of the Transparency Register's regulations is monitoring from peers, media and the public. Established lobbyists have an interest in monitoring each other to make sure that no groups abuse the system, get unfair advantages or creates scandals. It is believed that established and professional groups have more to lose by becoming scandals and therefore behave increasingly correct. It is likely that groups with resources enough to keep track of their opponents will provide a useful additional monitoring system. The media at EU-level is currently fairly underdeveloped and might not be able to provide effective monitoring of the lobbyists.<sup>135</sup> Weaker groups could use the Transparency Register but the success of monitoring through the register will be dependent on the quality of the information and how frequently the register is updated. As discussed in chapter 4.2.5 the information on registrants can be up to a year old which would not provide useful information for monitoring.

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<sup>135</sup> Van Schendelen, *More Machiavelli in Brussels*, pages 337, 343 and 346.

## 5.1 Lobbying regulations in the USA

This brief chapter on the USA lobbying regulations is an introduction to the regulation of the world's largest centre for lobbying when it comes to diversity and number of lobbyists.<sup>136</sup> Despite declining numbers of lobbying firms lobbying spending at federal level reached an all-time high in 2010 of \$3.51 billion spent in the US.<sup>137</sup> The comparison between the EU's and the USA's regulations should be seen as a basic comparison between the two regulations and not a complete comparative analysis.

As mentioned in chapter 1.4 the US first lobbying regulation on state level was introduced in 1935. The Public Utilities Holding Company Act and the following legislations, Merchant Marine Act and Foreign Agents Registration Act, were all laws focusing on specific types of lobbyists. The legislations were the result of scandals and rising concerns about lobbyists in specific industries. The first general lobbying regulation was passed in 1946 with the Federal Regulation of Lobbying Act. The law was seen as a failure since it only covered the Congress, the legislation was not enforced properly and the financial disclosure was ineffective. Still the Federal Regulation of Lobbying Act lasted for nearly fifty years until it was replaced by the current law.<sup>138</sup>

The current federal regulation the Lobbying Disclosure Act (LDA) was enacted in 1995 and adopted unanimously in the House. One of the improvements was a wider definition of lobbyists; the former legislation only regulated lobbyists hired by others to influence the Congress.<sup>139</sup> Following lobbying scandals, amongst other things suspicions of undue influence for certain groups, the legislation was amended in 2007 with the Honest Leadership and Open Government Act (HLOGA). The focus for the amendment was to give more detailed information about activities of paid lobbyists, restriction on offering and receiving gifts, restrictions on the revolving door, greater transparency in the legislative process and more.<sup>140</sup> The HLOGA was adopted in order to restore confidence in the policy-making process. The focus was to increase fairness of the process and convince the citizens of the integrity of the US institutions. The importance of making sure that decision-makers are not isolated from the views and concerns of the society was emphasized.<sup>141</sup>

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<sup>136</sup> Karr, Democracy and lobbying in the European Union, page 175.

<sup>137</sup> Center for Responsive Politics, [www.opensecrets.org/lobby/index.php](http://www.opensecrets.org/lobby/index.php)

<sup>138</sup> Chari *et al*, Regulating lobbying: a global comparison, pages 20-22.

<sup>139</sup> Chari *et al*, Regulating lobbying: a global comparison, page 22.

<sup>140</sup> Maskell, Lobbying law and ethics rules changes in the 110<sup>th</sup> Congress, pages 1-2.

<sup>141</sup> Maskell, Lobbying law and ethics rules changes in the 110<sup>th</sup> Congress, page 2.

## 5.2 Comparison with US regulation

Even though the reasons for implementing lobbying regulation in the US and the EU are strikingly similar it is important to remember that regulation cannot be easily transferred from one system to another, since regulation often is adjusted to that system's specific needs.<sup>142</sup> It is therefore necessary to be careful when comparing two different regulations, especially since the EU is basically a voluntary system and the USA has a mandatory system.

### 5.3.1 Information about lobbyists

As mentioned above in chapter 5.1 the LDA introduced a wider definition of lobbyists. The former Federal Regulation of Lobbying Act was only applicable to hired lobbyists influencing the Congress.<sup>143</sup> Lobbying is protected by the First Amendment which states that the citizens have a right to assemble and "petition the Government for a redress of grievances" (The Constitution of the United States, first amendment). US lobbying regulation needs to respect freedom of speech and association. Therefore the regulations are limited to disclosure and transparency, restrictions or prohibitions would violate the citizens' rights. The less interfering approaches used can however also go too far but cannot be deemed unconstitutional in general, instead the provisions have to be tried for each separate situation (United States vs Harriss).<sup>144</sup> This reasoning is similar to the arguments made in chapter 3.4 that the EU's positive approach to lobbying is connected to the citizens' right to participate in democratic life.

US lobbyists are asked to provide information similar to the ones in the EU. They have to provide data on their identity, funding, clients and the names of every employee that acts or is expected to act as a lobbyist (LDA, Sec 4.b). The HLOGA introduced demands that lobbyists who have held "executive or legislative branch positions" the last twenty years have to disclose this information.<sup>145</sup> The LDA only demanded disclosure on positions held two years earlier (LDA, Sec 4.b.6). This is in place partly to monitor what is referred to as the "revolving door" where former officials become lobbyists.<sup>146</sup> In the Transparency Register's Code of Conduct it is stated that lobbyists who hire former EU officials or staff have to respect that they are bound by rules and confidentiality agreements. There is no requirement

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<sup>142</sup> Bertók, Lobbyists, governments and public trust, page 9.

<sup>143</sup> Chari *et al*, Regulating lobbying: a global comparison, page 22.

<sup>144</sup> Maskell, Lobbying law and ethics rules changes in the 110<sup>th</sup> Congress, pages 2-3.

<sup>145</sup> Lobbying Disclosure Act Guidance, page 2.

<sup>146</sup> Chari *et al*, Regulating lobbying: a global comparison, page 24.

to supply information about the hiring in the register.<sup>147</sup> The concerns about “revolving doors” is that former staffers have connections that give them unfair advantaged, there is also a slight unsettling feeling if politicians leave office to join firms that have benefited from proposals that the politician has supported. The issue of the “revolving door” is acknowledged at EU-level. As an example former Commissioners are forbidden to lobby the Commission or former colleagues for a period of 18 months on matters which belonged to their portfolio.<sup>148</sup> Considering that the “revolving door” regulation in the EU is criticised for being too weak, it would be beneficial for transparency if the register stated lobbyists that are former EU officials or staffers.<sup>149</sup> In comparison between non-existent information and information that goes back 20 years it does not seem like an unreasonable request.

In the US lobbying firms file a separate registration for each individual client. If the assignment from a client does not bring in revenue of over \$3 000 during a quarterly period the firm does not have to report the client. There are other financial limits such as the total expenses for in-house lobbyists that have to be reached before a filing is necessary.<sup>150</sup> This reporting system differs from the Transparency Register. The amount of information is actually increased in the Transparency Register because there is no lower limit on how much needs to be sent or brought in as profit. The solution in the US is likely appropriate for a register consisting of hired lobbyists rather than the Transparency Register that has varying organisations.

### 5.3.2 Input from lobbyists

The requirements for US lobbyists regarding their input are very different from the EU’s demands. The lobbyists supply information about their lobbying activities four times a year. The lobbying activities are divided into general areas under which the lobbyists declare which specific issues they have lobbied including to the “maximum extent practicable” a list of bill numbers or references. Including data about House of Congress or Federal agencies contacted during the lobbying (LDA, Sec 5.a-b, and HLOGA, Sec 201.a). This is a dramatic increase of information compared to the inconsequent reporting that currently is seen in the Transparency Register. As suggested in chapter 4.2.2 transparency would be improved if the lobbyists

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<sup>147</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, annex III, article g.

<sup>148</sup> European Commission, Code of Conduct for Commissioners, C(2011) 2904, page 4, paragraph 3.

<sup>149</sup> Alter-EU, Revolving door provides privileged access, page 3.

<sup>150</sup> Lobbying Disclosure Act Guidance, page 5.

clearly stated EU initiatives lobbied. The US solution is a concrete example of a working system of supplying information on lobbying activities.

### 5.3.3 Comprehensive register

As mentioned in chapter 4.2.3 one of the purposes of the Transparency Register is to establish a comprehensive register. Compared to the EU's definition of lobbyists it is obvious that the LDA has a narrower definition. Only so called professional or hired lobbyists are defined as lobbyists by the legislation. The lobbyist has to be hired for more than one "lobbying contact" and be compensated for the assignment. But that the individual's lobbying activities have to amount to 20% or more of the services provided to a specific client over a three month period (LDA, Sec 3.10, and HLOGA Sec 201.b.1).<sup>151</sup> That means that individuals whose majority of assignments are not lobbying activities are not considered as lobbyists. The Transparency Register's definition states that anyone, no matter their legal status, involved in activities classified as lobbying is a lobbyist.<sup>152</sup> For the purpose of the register to provide the public with a comprehensive register the EU's definition is preferable. When it comes to the definition of lobbying the US regulation presents a wide definition similar to the EU's definition. Lobbying contacts are defined as written or oral communication aimed at influencing federal legislation, federal rules or even the position of the United States Government (LDA, Sec 3.8.A). The definition also has exemptions and these are wider than the exemptions in the Transparency Register. The exemption of statements "made in a speech, article, publication or other material" is an example of the protection of freedom of speech (LDA, Sec 3.8.B). The use of the media as an intermediary is specifically mentioned in the Transparency Register as an example of lobbying activity.<sup>153</sup> Since public opinion can influence the policy-making process the EU's wider definition once again contributes to a more comprehensive register compared to the US definition.

### 5.3.4 Level playing-field

Discussing a level playing-field for the lobbyists against the background of the US regulation is complicated because it is focused on what can be described as a professional lobbying

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<sup>151</sup> Chari *et al*, Regulating lobbying: a global comparison, page 23.

<sup>152</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, article 9.

<sup>153</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, article 8.

industry. For those lobbyists falling within the scope of the regulation the same rules apply. The only difference is that some reports are not triggered due to low amounts of either expenses or income (LDA, Sec. 4.a.). One might argue that this makes the lobbyists with lower financial figures less transparent. At the same time it is important to remember that the US regulations are highly demanding to fulfil. Even to the extent of not having enough time to update the information correctly and a lot of resources have to be put into complying with the regulations.<sup>154</sup> Therefore it would be unreasonable not to have a lower financial limit as this would otherwise overburden smaller lobbying firms.

### 5.3.5 Responsibilities and rules

The HLOGA increased the frequency of reporting for certain information from two to four times a year (HLOGA, Sec. 201). Lobbyists have to file quarterly reports of information regarding lobbying activities and semi-annual reports for certain contributions (LDA, Sec. 5.a, and HLOGA, Sec. 203.a). The high frequency of updates and new reports mean that it is possible for the US register to be used as a monitoring device for the public, other lobbyists and politicians. The register of the filings is not especially user-friendly but there are excellent websites providing information on US lobbying.<sup>155</sup> The US regulation shows that it is not unreasonable to increase the reporting frequency for the Transparency Register to more than once a year. The suggestion of more frequent reporting mentioned in chapter 4.2.5, especially for important information such as EU initiatives that the lobbyist has tried to influence, would enhance the use of the Transparency Register. The US regulations do not have a Code of Conduct; this is instead supplied by the American League of Lobbyists' Code of Ethics. According to an EU report that code is equivalent to the EU's Codes but more detailed.<sup>156</sup> Besides this Code of Ethics the lobbyists are bound to state the name of their client and whether or not they are registered when the person they are talking to asks (LDA, Sec. 14.a). The difference is that the EU lobbyists have to supply all the information that can be found in the US register directly.<sup>157</sup>

### 5.3.6 Monitoring and sanctioning

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<sup>154</sup> Chari *et al*, Regulating lobbying: a global comparison, pages 129-130.

<sup>155</sup> See as an example [www.opensecrets.org](http://www.opensecrets.org).

<sup>156</sup> Report of the Inter-Departmental Working Group on a possible European Transparency Initiative, SEC(2005) 1300 final, page 19.

<sup>157</sup> European Parliament and European Commission, Agreement on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, annex III, article a.

One of the proposed improvements with the LDA was to establish an enforcement agency, but the proposition was removed after defeat in the House.<sup>158</sup> The Secretary of the Senate and the Clerk of the House of Representatives are responsible for supplying support to the registrants, monitoring and notifying any registrant of non-compliance. If a registrant does not reply to the non-compliance of the act the United States of Attorney for District of Columbia is notified (LDA, Sec. 6). For knowingly not complying with the act or failing to correct a filing the lobbyist can be fined with up to \$50 000 (LDA, Sec. 7). There is no removal from the register or ban from the register because that would violate the citizens' rights established by the first amendment of the US Constitution. The use of fines would not be advisable for the Transparency Register since it is a voluntary register and registrants might decide not to register to avoid the risk of fines.

There are obviously different approaches taken by the US and the EU. The reason the US has a more detailed and robust systems of regulation have been speculated to be the country's long history of lobbying and the openness surrounding their participation. Lobbying is a professionalised industry in the US and the policy-making process is scrutinized by a critical press. The fact is that a lot of the US regulation has come after various scandals have been uncovered.<sup>159</sup> With the amount of updated information available in the US register it should come as no surprise that the register is more effective as a monitoring system for the public and media than the Transparency Register.

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<sup>158</sup> Chari *et al*, *Regulating lobbying: a global comparison*, page 23.

<sup>159</sup> Chari *et al*, *Regulating lobbying: a global comparison*, pages 112-113.

## 6.1 Conclusion

The recently launched Transparency Register is one of the measures meant to improve the EU's transparency, level of participation and accountability. Through several EU initiatives, such as the WPG and the ETI, a searchable register has taken form that is user-friendly. Today anyone wanting to learn more about the registered EU lobbyists can search information on the basis of name, interest area or type of organisation. The definitions of both lobbyists and lobbying are wide and thus enhance the possibility of reaching the EU's goal of a comprehensive register.

Concerning the EU's promise to make monitoring of lobbying activities possible, the promise is not close to being fulfilled. The lobbyists are currently registering everything from concrete information about EU initiatives lobbied to general statements about their business and the statements can be up to a year old when posted. This prevents the public from effectively monitoring the lobbyists' activities. The provisions regarding the statements on lobbying activities need to be reformulated to guarantee relevant information. In line with the US regulations the frequency of reporting should be increased for important information, such as lobbying activities, to help stimulate a public debate. Unfortunately the financial information provided by the lobbyists is currently not searchable in the register. This is disappointing considering the amount of effort put into providing clear rules and guidelines for financial disclosures, a feeling that is likely shared by both the citizens and the lobbyists who have put effort into providing correct figures. The Transparency Register can best be described as a voluntary register with incentives. Despite several organisations urging for a mandatory register for the sake of transparency and for creating a truly comprehensive register, the Commission has remained positive to the voluntary solution. The basis for a debate on the success of the voluntary register should be an estimation of the percentage of lobbyists registered. This way it will be clear if the voluntary approach is working and citizens can make their own decision about whether or not the Transparency Register supplies satisfying information about who is lobbying the EU.

The Transparency Register is currently not enough to ensure democratically sound lobbying within the EU. But it is a first step that hopefully is followed by more.



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