



TECHNIUM
SOCIAL SCIENCES JOURNAL

Vol. 25, 2021

**A new decade
for social changes**

www.techniumscience.com

ISSN 2668-7798



9 772668 779000

European lobbying between transparency and the battle for influence

Dragoș Mihail Mănescu

The Bucharest University of Economic Studies

dragos.manescu@drept.ase.ro

Abstract. Lobbying is regulated at European level by permissive legal provisions but, at the same time, disparate or lacking in legislative and application coherence. The state of the European decision-making process reveals the need to bring about changes that require more rigorous, applied and, why not, severe regulation of lobbying and interest representation.

Keywords. public affairs, lobby, The Transparency Register, representation of interests

1. General considerations

The main feature of public affairs or lobbying, as it is rather known, is that of the permanent and inevitable interaction between the public and private sectors. At the same time, it must be borne in mind that, in essence, and simplifying the notion as much as possible, the lobby is limited to the activity of legally representing the interests of an entity. This notion is used by the European Transparency Register¹ but also at the level of the European institutions which are, in fact, the primary point of interest of public and private actors in the EU Member States. It should be noted that registration in the above-mentioned register, a one-stop shop system, is mandatory in order to apply for access to the European Parliament².

As the doctrine³ states, "while the emphasis in the European institutions is on the transparency of lobbyists' interests, in American law the emphasis is on the transparency of revenue and expenditure, as well as the interests represented by the lobby." Since 1995 when the "Law on the Transparency of Lobbying" was enacted and until 2014, subsequent US legislation has undergone several changes that have generated detailed regulation of this type of activity.

The United Kingdom, in turn, regulated the activity both through the Code of Conduct for Parliamentarians adopted in 1996 and through other similar acts. For example, "The Ministerial Code prohibits former ministers from lobbying the Government for two years after the end of their term"⁴. They are also required to obtain a mandatory, non-consultative opinion

¹https://ec.europa.eu/info/about-european-commission/service-standards-and-principles/transparency/transparency-register_ro

² <https://www.europarl.europa.eu/at-your-service/ro/transparency/lobby-groups>

³ Elena Simina TĂNĂSESCU (Coordonator), Miruna Andreea BALOSIN, Cosmin DIMA, Cristian DUCU, Ștefan-Ilie OANȚĂ, Ramona-Delia POPESCU, *Lobby în România vs. Lobby în UE*, Institutul European din România, București, 2015, p. 38

⁴<http://efaidnbmnnnibpcajpcgclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Feur-lex.europa.eu%2Fresource.html%3Furi%3Dcellar%3A058aecf0-d9b7-11e3-8cd4->

from the Independent Advisory Committee on Private Sector Employment (ACOPA). This committee shall approve any appointment which takes place within two years of the end of the term of office of a minister. A similar regime applies to senior civil servants both for appointments and for the intention to carry out lobbying activities in the same period of two years from the end of the term.

2. Background analysis: Lobby and representation of interests at European level

It should be noted from the outset that there is no legal act at European level to regulate lobbying per se. There are disparate references in the TEU⁵ and the TFEU⁶, but several elements can be found in European Commission communications⁷ concerning rules of conduct or organization of the activity carried out by persons practicing such activities in relation to the European institutions. We can say that, through these communications, the European Commission wanted to facilitate its work, as well as that of the other European institutions involved in the legislative process, and to place it on a clear and coherent basis in relation to lobbyists and interests. This is because this type of document (Commission Communications) is not of a normative nature, so it is not binding and does not produce legal effects but rather comes as a Commission point of view on a certain issue.

Unfortunately, the European body did not want to dare to regulate these activities rigorously and coherently by a legal act of superior force and mandatory to apply uniformly in the Member States and in relation to national institutions. This is despite the fact that it is increasingly difficult to separate national economic and social interests from those of the Community, as well as the fact that the trend to be imprinted on European construction is to integrate legislation and interests more and more. Member States, beyond the 3 established European principles (principle of attribution of powers, principle of proportionality and principle of subsidiarity) which govern the areas in which the EU is allowed to act and how it can do so⁸.

To these are added the provisions of the Agreement between the European Parliament and the European Commission on the transparency register referred to above. At the same time, it should be remembered that today, the European Parliament is facing an avalanche of draft legislation targeted by serious lobbying actions but also a Council that wants to engage in an informal dialogue with stakeholders as early as possible in the legislative process⁹.

Analyzing briefly the regulation of the approached field, we find that:

- **The Treaty on European Union** provides in Article 11 para. 2 that "the Union institutions shall maintain an open, transparent and constant dialogue with representative associations and civil society" with the aim of ensuring the coherence and transparency of the Union's actions. In this sense, para. 3 establishes the right but, we consider, that also the obligation, the European Commission to proceed to ample consultations of the interested parties of the problematic one and the fields within its competence. Although Article 11 refers specifically to the European Commission, however, para. 1 of this article uses the phrases "Institutions grant to citizens and representative associations" as well as "in all areas of action".

01aa75ed71a1.0005.01%2FDOC_29%26format%3DPDF: Raportul anticorupție al UE, Bruxelles, 3.2.2014 COM(2014) 38 final, ANNEX 28, p. 4

⁵ Treaty on European Union, <https://eur-lex.europa.eu/legal-content/ro/TXT/?uri=CELEX:12012E/TXT>

⁶ Treaty on the Functioning of the European Union, <https://eur-lex.europa.eu/legal-content/ro/TXT/?uri=CELEX:12012E/TXT>

⁷ The Commission Communication is a non-normative policy document. The Commission takes the initiative to publish a communication when it wishes to set out its views on a topical issue. The communication does not produce legal effects.

⁸ See Ovidiu Ioan Dumitru, Andreea Stoican, European Union Law, Lecture Notes, Editura ASE, București 2020, p. 41.

⁹ Maja Kluger Dionigi, Lobbying in the European Parliament. The Battle for Influence, Palgrave Studies in European Union Politics, Palgrave MacMillan, Copenhagen 2017, pg. 162

Hence we conclude that the other European institutions also have the right and obligation to organize consultations with stakeholders with the necessary but also sufficient condition that they be organized "publicly". The same article mentions in para. 4 the mechanism whereby "at the initiative of at least one million citizens of the Union, nationals of a significant number of Member States, the European Commission may be invited to submit, within the limits of its tasks, an appropriate proposal in matters a legal act of the Union is required for the application of the Treaties. Obviously, the initiative will materialize through representatives of these citizens (representatives of interests), who will make, practically, the necessary steps to mobilize and materialize it, will dialogue with the competent institutions, will mobilize the necessary energies. The conditions of such an initiative are detailed by Article 24 of the TFEU as well as by Regulations (EU) no. 211/2011 and (EU) 2019/788, respectively Rules 222 and 230 of the Rules of Procedure of the European Parliament. The same Article 24 of the TFEU regulates the right of any citizen of the Union to petition the European Parliament, to address the Ombudsman or to address in writing to any institution or body referred to in Article 13 of the TEU. We consider that the European legislator refers both to individual requests and to requests coming from several individuals who associate or make an organized approach, including when appointing a representative of interests.

- In its turn, **The Treaty on the Functioning of the European Union**, establishes, in Article 17 some important elements regarding the regulation of the lobby and the representation of interests. Thus, under national law, churches and religious associations or communities, philosophical and non-denominational organizations in the Member States are recognized and maintain an open, transparent dialogue (the condition of public dialogue mentioned above is mandatory) and constant with them. We consider that this enumeration is not limiting but, rather, exemplary, and that it may include those professional organizations, associations and foundations, as well as other forms of organization of interest representatives carrying out specific activities. At the same time, Article 154 of the same treaty unequivocally establishes the obligation of the Commission (referred to by the European legislator with the phrase "mission to promote"), regarding the consultation of the social partners. The principles of social consultation and dialogue at European level and, at the same time, of the representation of interests are established. At the same time, we consider that the opinion or, as the case may be, the recommendation presented by the social partners to the Commission is part of the specific procedure for consultations in Economic and Social Councils and not for consultations and dialogue. Moreover, the fields listed in Article 153 of the same treaty are specific to the field of social dialogue. Likewise, the result of the consultations materialized in contractual relations, including agreements, between the parties is specific to the social dialogue but not to the lobbying activity.

- At the level of 2001 we find rather references to social dialogue and consultations between institutional and social actors in the so-called "**White Paper of the European Government**"¹⁰. The document sets out guidelines for the composition and functioning of the Economic and Social Council but at the same time recalls the need to know the needs of various interest groups¹¹ with the stated aim of "considering more critically the demands of institutions and interest groups for a new political initiative"¹².

¹⁰ European governance - A white paper /* COM/2001/0428 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52001DC0428>.

¹¹ Idem, pct. 12: Such consultation helps the Commission and the other Institutions to arbitrate between competing claims and priorities and assists in developing a longer term policy perspective. Participation is not about institutionalizing protest. It is about more effective policy shaping based on early consultation and past experience.

¹² Idem, cap. IV: will allow it to consider much more critically the demands from the Institutions and from interest groups for new political initiative.

- **Green Paper "European Transparency Initiative"** (COM (2007) 127 final¹³, followed by "Communication from the Commission of 21 March 2007 - Actions taken in implementation of the Green Paper" discuss lobbying / representation of interests, on which occasion). The Commission recalls that the definition of the term *lobby* does not include any negative value judgments and that lobbying activities are essential in the democratic process"¹⁴. It was proposed to establish the "Register of Interest Representatives" as an optional register in which to enter information on the interests of lobbyists, their mission and sources of funding. It should be noted that the final decision to set up the register under the name of the European Transparency Register will be taken four years later by the Agreement between the European Parliament and the European Commission¹⁵. At the same time, the terms "representation of interests (lobbying activities)"¹⁶ and "representatives of interests (lobbyists)"¹⁷ were defined and a code of conduct was proposed whose implementation, monitoring and sanctioning in case of violation would be carried out by the representatives of interest.

- Last but not least, the year 2008 brought the Commission Communication COM (2008) 323 entitled "**European transparency initiative - A framework for relations with interest representatives (Register and Code of Conduct)**"¹⁸. It provided further details on the optional register of interest representatives as well as the above-mentioned code of conduct.

These are the main regulations on lobbying and representation of interests at European level and have outlined a legislative framework characterized by the concerted action of professional organizations specific to lobbying in parallel with a European regulatory regulation considered rather permissive and lenient.

More than that:

1. The regulation of lobbying activity is likely to allow the protection of European political or institutional decision-makers through the very transparency of the influencing activity and the public affirmation of the interests and approaches carried out by lobbyists. When we refer to protection, we are, of course, also referring to the protection, on the one hand, of public authorities from the financial and political force of certain interest groups, and on the other hand from the decision-making process itself and national or group interests.

2. It must be accepted and understood that, by the nature of the specific activity, certain professional categories carry out lobbying activities. Thus, how could a lawyer or legal adviser not lobby under the conditions provided for in point 10 of the Agreement between the European Parliament and the European Commission on the Transparency Register for organizations and self-employed persons involved in the process of the development and implementation of Union policies, they shall carry out certain activities¹⁹ aimed at influencing the Union institutions, their

¹³ <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=LEGISSUM:114521>

¹⁴ See the summary document of the consultations on the European Transparency Initiative, <https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=LEGISSUM:ai0003&from=EN>

¹⁵ Agreement between the European Parliament and the European Commission on the Transparency Register for organizations and self-employed persons involved in the development and implementation of Union policies

¹⁶ Representation of interests (lobbying): any activity aimed at influencing the policy-making and decision-making processes of the European institutions.

¹⁷ Interest representatives (lobbyists): people who carry out lobbying activities and work in organizations such as consulting companies specializing in public affairs, law firms, NGOs, think tanks or professional groups.

¹⁸ https://eurlex.europa.eu/search.html?DTA=2008&SUBDOM_INIT=ALL_ALL&DB_TYPE_OF_ACT=comJoin&DTS_SU BDOM=ALL_ALL&typeOfActStatus=COM_JOIN&DTS_DOM=ALL&type=advanced&excConsLeg=true&qid=16309124 55770&DTN=0323

¹⁹ [https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32014Q0919\(01\)&from=ro](https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32014Q0919(01)&from=ro) : Agreement between the European Parliament and the European Commission on the Transparency Register for organizations and self-employed persons involved in the development and implementation of Union policies, point 10 para. 3:

members and their assistants, officials or other servants of those institutions. As we can see, the sine qua non condition is that of the intention to influence the representatives of state institutions in the sense desired by the legal person whose interests are represented by the legal professional (lawyer, legal advisor, etc.).

3. At European level, the focus of lobby group action is more on the Council and the specific institutions of the European Commission and less on the European Parliament, although the latter, after the 2009 Lisbon Treaty, has gained real powers to co-decision with the Council. As a result, there is a demand to reaffirm the need to regulate the influence and impact of the main practitioners of lobbying who are increasingly acting to influence the European Parliament's decision. This influence is most often exercised throughout the European Parliament's legislative process through the process of including or excluding amendments in the report of the committee responsible (rapporteur) as well as influencing the decision-making process between first reading and second reading in the process of legislative decision. As a result, it is not only the final number of votes of the parliamentarians in favor or against an initiative that is important, but, especially, the way in which these solutions proposed for voting were reached.

4. We believe that the strategic direction of the long-term lobby for the construction and development of the network within the European institutions, both at the level of the Commission, the Council and the European Parliament, but also at the level of secondary institutions, must be taken into account for transparency, such as commissions, working groups, cabinets of dignitaries.

5. In the context of the lack of vision, cohesion and divergent interests manifested at the level of the European Union and of the lobby practiced both to promote business or social interests but also to promote state interests contrary to the European vision, there is an increasing need to change the option. Regulatory framework that has so far favored a soft law approach, by promoting self-regulation in parallel with the voluntary declaration of interests and actors concerned and the legislative reorientation towards the so-called hard law, specific to the North American area characterized by clear legal rules, precise and rigorous, which, in case of non-compliance or violation, can lead to the application of a sanctioning regime not to be ignored.

6. Last but not least, it should be noted that there is a constant revision of existing rules in European legislation. This means that interest groups and lobbyists can often change or try to change legislation even when they have failed in the first phase. The constant process of adjusting EU law implies that the winners and losers in the lobbying process can change at any time as, ultimately, any gains or losses from the point of view of the professional lobbyist are only temporary until the next review.

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However, the following activities for the purpose of providing legal advice and other specialist advice shall be subject to the register if they are intended to influence the institutions of the Union, their members and their assistants, officials or other servants of those institutions:

- providing support, through representation or mediation, or providing promotional materials, including in terms of argumentation and writing; and
- providing tactical or strategic advice, including by addressing issues which, through their scope and timing of communication, are intended to influence the institutions of the Union, their members and their assistants, or officials or other servants of those institutions.

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