

FREEDOM TO PROVIDE LOBBYING SERVICES IN THE INTERNAL MARKET – A REGULATORY CHALLENGE FOR EU MEMBER STATES

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ABSTRACT

Lobbying profession comes face to face with issue of its legal defining. Considering the increasing role of lobbyists in decision-making processes at the EU level, lack or heterogeneity of national legal solutions in the area of provision of lobbying services seems to be quite a problem for persons engaged in those activities. Paper deals with issues of single definition of lobbying. Paper analyses sources of EU law related to provision of lobbying services. Paper deals with problem of lack of harmonised regulation of lobbying profession in the EU Member States. Aim of the paper is to investigate are there any special provisions on lobbying services at the EU level. Aim of this paper is also to investigate how does lack of regulation of lobbying influence provision of lobbying services. Reconciling different legal approaches seems as a challenge for EU Member States. Paper concludes that lack of harmonised regulation at the EU level can be deterrent for provision of lobbying services and can decrease the level of transparency in decision making processes.

KEYWORDS: lobbying, freedom to provide services, EU, harmonisation

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1. INTRODUCTION

Legal regulation of lobbying is not part of European legislative tradition.¹ In Europe, system of representation of interests is rooted in medieval feudalism – social dialogue among different social groups.² History of professional lobbying³ started in 1830s⁴ in the United States of America⁵ and lobbying has become part of Anglo-Saxon political culture.⁶ The legal basis was the First Amendment to the USA Constitution.⁷ The socio-political context in the USA was rather different than the one in Europe. Stable political environment, pluralism as political culture, common⁸ language, common political and legal values are some of the most significant features of the USA society.⁹ In those circumstances, two factors played key role in development of lobbying as pro-

¹ Mihut, L., Lobbying in the United States and the European Union: New Developments in Lobbying Regulation, Romanian Journal of European Affairs, Vol. 8 (4) 2008., p. 2, available at <<http://ssrn.com/abstract=1299580>>, last accessed on 23/11/2014.

² Makowski, G., Regulation of Lobbying in Poland, Institut pro Evropskou Politiku/Institute for European Policy, 2010., p. 1., available at <http://www.europeum.org/doc/pdf/makowski_PL.pdf>, last accessed on 26/11/2014.

³ The term „lobbyist“ originates from expression „damn lobbyists“ which American President Ulysses Grant used to say when he was entering the hotel near White House, escaping from pressures of his post. In the hotel lobby people who took special interest on certain issue were waiting to approach him directly. Anastasiadis, S., Understanding Corporate lobbying on its own terms, International Centre for Corporate Social Responsibility Research Paper Series, no. 40-2006, 2006., p. 5-6. According to Charrad, „lobby“ comes from Latin word „labium“ meaning entrance hall, lounge. Charrad, K., Lobbying the European Union, Westfälische Wilhelms-Universität Münster, Nachwuchsgruppe Europäische Zivilgesellschaft und Multilevel Governance, 2005., p. 2.

⁴ Mihut, op. cit., n 1, p. 6.

⁵ Hereinafter referred to as the USA.

⁶ In the 17th century, lobbyists were representatives of various interests groups, who met Members of House of Commons in the lobby, seeking to persuade or dissuade them to act in certain direction. Vidačak, I., Lobiranje: interesne skupine i kanali utjecaja u Europskoj uniji, Zagreb, 2007., p. 11.

⁷ See First Amendment to the USA Bill of Rights, in which it is stated that „Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances (emphasis added).“ See Briffault, R., The Anxiety of Influence: The Evolving Regulation of Lobbying, Public Law & Legal Theory Working Paper Group, Columbia Law School, Paper Number 14-367, 2014., p. 13. The same Hitoshi Mayer, L., What is this „lobbying“ that we are so worried about?, Yale Law and Policy Review, Vol. 26, Legal Studies Research Paper No. 07-42, 2008., p. 486.

⁸ Mihut, op. cit., n 1, p. 5.

⁹ Mihut, op. cit., n 1., pp. 3-4.

fession – significant role of corporations and civil society in election processes.¹⁰ Corporations were then and are even today providers of direct funding of political campaigns.¹¹ That relationship has led to the situation in which there seems to be less obstacles to reach political structures. The relationship between interest groups and governments was born. Since only one or few of them can count on certain benefit arising out of engaging into political battle, system of competition¹² among interests groups has been developed. In different context and legal traditions two models of lobbying regulation have been introduced. In the USA there is less social dialogue and less official channels.¹³ Substantial resources are being spent on engaging professional lobbyists who should influence government decisions.¹⁴ More liberal approach towards freedom to provide lobbying services has led to necessity of introducing stronger regulation.¹⁵ The regulation of lobbying in the USA has been developed as barrier against unrestricted political action by, or on behalf of, private interests.¹⁶ On the other part, traditional European skepticism towards lobbying has led to establishment of social dialogue¹⁷ and more official channels of influence. Such conservative approach has resulted in softer regulation or even lack of any regulation. The growth of interests groups in the EU is considered to be a response to an increasing demand for specialised type of information.¹⁸ Due to decentralisation processes in the EU, the number of regional interest group has increased.¹⁹ The phenomenon of emergence of national interest groups and national business organisations, opening branches in Brussels,²⁰ arises as new method of representation.²¹ The EU is offering numerous access points²² and

¹⁰ Ibid., p. 4.

¹¹ Ibid.

¹² Ibid., p. 5.

¹³ Ibid., p 11.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Lane, E., *Lobbying and the Law*, Berkeley and Los Angeles, 1964., p. 3.

¹⁷ Mihut, op. cit., n 1., p. 11.

¹⁸ Vidačak, I., *Interest groups and lobbying in the European Union*, *Croatian International Relations Review*, vol. 9 (33) 2003., p. 178.

¹⁹ Ibid.

²⁰ Interests groups from Central and Eastern European Countries, due to lack of experience and knowledge about the EU institutions, as well due to lack of finances to operate in Brussels on their own, relate on large European associations. Charrad, op. cit, n 3, p. 17.

²¹ Vidačak, op. cit., n 18, p. 179.

²² Cirone, A., *Patterns of Interest Group Lobbying at the EU: Examining How Group Characteristics Affect Venue Choice*, 2011., p. 2, available at <https://www.princeton.edu/europe/.../Cirone_Princet...>, last accessed on 24/11/2014.

channels to interests groups²³ due to its complex institutional structure and fragmented process of policy making.²⁴ Lack of internal resources and experts in certain fields forces EU to seek inputs from interests groups in form of external expertise and information.²⁵ Information is basic „access good“ which private actors give in return for access to the EU agenda-setting and policy making.²⁶ Key addressees of “lobbying pressure” have become the European Commission²⁷ and the European Parliament.²⁸ In the mid 1980s the role of lobbyists increased due to development of single market²⁹ and afterwards started process of formalisation of relations with interests groups. Organisations and individuals, most of them “in-house lobbyists” started to lobby the EU. In 1985 there were 654 lobbyists in Brussels and in 1992 there were 3,000,00 lobbyists in Brussels.³⁰ In the beginning of the new millenium, in particular after 2004 enlargement, estimated turnover of corporate “lobbying the EU” was between 750 milion and 1 bilion euros.³¹ Now there are approximately 30.000,00 lobbyists who influence 75% of EU legislation.³² Vast majority of them work for corporate interests.³³ Considering the increasing role³⁴ of lobbyists in decision-making processes at the EU level, lack or heterogeneity of

²³ Vidačak, op. cit., n 18, p. 181.

²⁴ Ibid., p. 186.

²⁵ Charrad, op. cit., n 3, p. 15.

²⁶ Bouwen, P., Corporate Lobbying in the European Union: the logic of access, *Journal of European Public Policy*, vol. 9 (3) 2002., p. 368.

²⁷ Hereinafter referred to as the EC. The role of the EC in legislative procedure as a starting point for launching new legislative proposals makes it primary institution where the lobbying starts. Vidačak, op. cit., n 18, p 182. See Charrad, op. cit., n 3, p. 15. See *Burstling the Brussels Bubble: the battle to expose corporate lobbying at the heart of the EU*, Alter – EU, p. 23 (hereinafter as *Burstling the Brussels Bubble*), available at < <http://www.alter-eu.org/book/burstling-the-brussels-bubble>, last accessed 24/11/2014.

²⁸ Hereinafter referred to as EP. The role of the EP in terms of lobbying influence increased after Single European Act entered into force and reinforced EP’s authority in the decision making process at the EU level. Vidačak, op. cit., n 18, p. 182. After Lisbon Treaty entered into force, EP’s influence has been extended by increasing the role of co-decision and EP’s budgetary role. That is the reason why the EP becomes more and more attractive lobbying venue, in particular, its standing committees. See Cirone, op. cit., n 22, p. 5-6; Charrad, op. cit., n 3, p. 15.

²⁹ Vidačak, op. cit., n 18, p. 181.

³⁰ *Burstling the Brussels Bubble*, p. 23.

³¹ Ibid., p. 25.

³² Available at <<http://www.theguardian.com/world/2014/may/08/lobbyists-european-parliament-brussels-corporate>>, last accessed on 26/11/2014.

³³ Vidačak, op. cit., n 18, p. 187.

³⁴ Ibid., p. 177.

national legal solutions in the area of provision of lobbying services seems to be quite a problem for persons engaged in those activities. Thus there is a need to regulate professional lobbying at supranational level.³⁵

Current soft approach harms provision of lobbying services, in particular in cross border situations. In order to make substantial changes in EU legislation, there is a need to give a single definition of lobbying, to acknowledge lobbying as legitimate profession and to put it under mechanism of internal market for services. In second part of this paper, author reviews steps which have been undertaken so far in order to regulate lobbying at the EU level. In third part paper deals with strategic litigation as way of lobbying the Court of Justice of the EU.³⁶ In fourth part paper analyses relevant provisions of Treaty on the Functioning of the EU,³⁷ points out possible obstacles which have arisen in course of launching proposal for introducing mandatory register and seeks for plausible solution to this problem. In fifth part paper deals with issues of single definition of lobbying. After analysis of relevant provisions of Services Directive, thesis of lobbying as entrepreneurial activity which should be considered as service is presented. In sixth part problem of reconciling different legislative approaches is emphasized. In this paper available literature on legal aspects of lobbying and one CJEU case are analysed. Aim of the paper is to investigate are there any special provisions on lobbying services at the EU level. Aim of this paper is also to investigate how does lack of regulation of lobbying influence provision of lobbying services. Paper ends with conclusion.

2. INITIAL STEPS TOWARDS LOBBYING REGULATION

Over the past century, integration process and strengthening of the EU institutions have led to expansion of interests groups.³⁸ The establishing of legal framework of lobbying started with EP's first proposal for regulating lobbying in 1989.³⁹ In period from 1996 to 1997 set of lobbying rules were annexed to Rules of Procedures.⁴⁰ There were two set of rules: Code of Conduct for the

³⁵ Vidačak, *op. cit.*, n 6, p. 106.

³⁶ Hereinafter referred to as CJEU.

³⁷ Treaty on the Functioning of the European Union (consolidated version, OJ C 326, 26. 10. 2012., p. 47), hereinafter referred to as TFEU.

³⁸ *Cirone, op. cit.*, n 22, p. 4.

³⁹ Mihut, *op. cit.*, n 1, p. 9.

⁴⁰ See document titled „Key events“, p. 3, available at <<http://ec.europa.eu/transparencyregister/info/about-register/keyEvents.do?locale=en>>, last accessed on 28/11/2014. Hereinafter referred to as Key events.

Members of Parliament and for lobbying in the EP.⁴¹ The accreditation system was adopted.⁴² Institutionalization of lobbying resulted in establishment of Register of Interest Representatives in June 2008⁴³ with names of pass holders and organisations they represent but with no information on interest they represent. Further steps in lobbying regulation were undertaken by EP. In May EP adopted Resolution on development of the framework for the activities of lobbyists in the EU institutions.⁴⁴ Also EC issued Green Paper on European Transparency Initiative (ETI) in May 2006.⁴⁵ In this working document definition of lobbying was given. Lobbying was defined as „all activities carried out with the objective of influencing the policy formulation and decision making process of the European institutions.“⁴⁶ Lobbyists were defined as „persons carrying out such activities, working in variety of organisations such as public affairs consultancies, law firms, NGOs, think-tanks, corporate lobby units („in-house representatives“) or trade associations.“⁴⁷ This definition was supported by the EP.⁴⁸ Definition is problematic. It provides general⁴⁹ and wide⁵⁰ scope of application. It refers to „all“ activities what can be seen as a problem since it is not clear what activities are meant under this term.⁵¹ According to the definition, it could cover both public and private activities and latter seem most problematic from the legal point of view. Any private activity that would aim at influencing policy formulation or decision must be put under scrutiny of public authorities. This could include even grassroots lobbying.⁵² Term „in-

⁴¹ Mihut, op. cit., n 1, p. 9.

⁴² Cirone, op. cit., n. 22, p. 14.

⁴³ See Key events, p. 2.

⁴⁴ Parliament resolution on development of the framework for the activities of lobbyists in the EU institutions (2007/2115(INI) (2009/C 271 E/06).

⁴⁵ Green Paper, European Transparency Initiative, COM(2006) 194 final, Bruxelles, 3 May 2006.

⁴⁶ Ibid., ch. 2., 1.

⁴⁷ Ibid., ch. 2., 1. 1.

⁴⁸ Mihut, op. cit., n 1, p. 3.

⁴⁹ OECD Self-regulation and regulation of the lobbying profession, Global Forum on Public Governance, GOV/PGC/GF(2009)5 unclassified, p. 12, (hereinafter referred to as Self regulation...), available at <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/GF\(2009\)2&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/GF(2009)2&docLanguage=En)>, last accessed on 26/11/2014.

⁵⁰ Mihut, op. cit., n 1, p. 2.

⁵¹ „When lobbying is defined by its means, the problem is to keep the formulation narrow enough so that every act of intended political influence is not included, yet broad enough so that every substantial or consequential act of intended political influence will fall within it.“ See Lane, op. cit., n 16, p. 4.

⁵² Also OECD Self regulation..., p. 14.

fluencing the policy formulation“ also seems wide. There is a question of type of influence. At the EU level policies concerning business interests are considered to be interest group policies,⁵³ which include lobbyists. Does this include only discussion at some meetings of parliamentary boards or can it cover eg. right of lobbying groups to draft legislative proposals and send them via institutional channels to the EC or the EP? Both is possible in practice. Since „decision making process“ is common to wide range of the EU institutions, where are the limits and can it lead to influencing decisions given by the Council of Ministers⁵⁴ or even EU courts? This is interesting question due to the fact that the most literature on lobbying in past decades deals with lobbying the EC.⁵⁵

3. STRATEGIC LITIGATION BEFORE CJEU: LOBBYING OR NOT?

Direct lobbying pressure on court proceedings should be prohibited due to principle of impartial judiciary.⁵⁶ Nevertheless, courts can be venue for minority interests to challenge existing national rules or rules of the EU.⁵⁷ CJEU has been a target of strategic litigants seeking changes in national policies.⁵⁸ Strategic litigation is a way of lobbying the CJEU.⁵⁹ The reason can be found in fact that each court ruling constitutes a piece of judge made law. Creating „precedent“ or giving their best to avoid its creation is usually the goal of interests group litigation.⁶⁰ System of preliminary reference gives access to organized interests to bring cases before the CJEU. The CJEU becomes a venue for challenging national legislation with which litigants do not agree and claiming that Member States' law or practice violates some norm of EU

⁵³ Vidačak, *op. cit.*, n 18, p. 177.

⁵⁴ The influence on the decision making process within the Council of Ministers is primarily indirect and the Council of Ministers is considered as the least directly accessible institution in terms of lobbying pressure. *Ibid.*, p. 183. Same Charrad, *op. cit.*, n 3, p. 16.

⁵⁵ Bouwen, *op. cit.*, n 26. p. 366.

⁵⁶ As regards judges of the CJEU, see arts 2 and 4, as regards Assistant Rapporteurs see art 13 and as regards Advocates General see art 49 of Protocol No. 3 on the Statute of the Court of Justice of the European Union, as amended by Regulation (EU, Euratom) No. 741/2012 of the European Parliament and of the Council of 11 August 2012, OJ L 228 of 23. 8. 2012., p. 1.

⁵⁷ McCown, M. in Coen, D.; Richardson, J. (eds), *Lobbying the European Union: Institutions, Actors and Issues*, Oxford, 2009., ch. 5. 1.

⁵⁸ *Ibid.*

⁵⁹ Amado, Olivert, A. et al., *Lobbying at the European Court of Justice? Yes, we can!* Paper for Professor Guéguen's lecture "Interest groups and Lobbies in the European Union" (POLI-O505), Institute for European Studies, 2012., p. 3.

⁶⁰ *Ibid.*

law they prefer.⁶¹ Eg in case *Defrenne Sabena*⁶² Court of Justice interpreted Article 119 of the Treaty of Rome saying that „in fact, since Article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.“⁶³ Member States' concern was obvious since “the Governments of Ireland and the United Kingdom have drawn the Court's attention to the possible economic consequences of attributing direct effect to the provisions of Article 119, on the ground that such decision might, in many branches of economic life, result in the introduction of claims dating back to the time at which such effect came into existence.”⁶⁴ In addition to that “in view of the large number of people concerned such claims, which undertakings could not have foreseen, might seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy.”⁶⁵ From reactions of national governments one can see that this single case had extensive legal and socio-economic effects, which is one of the “advantages”⁶⁶ of strategic litigation. By using preliminary reference as a powerful tool, interest group represented by one single person can use CJEU as a venue for indirect influence on national governments, private undertakings and the EU legislation⁶⁷ itself. Courts rulings are mandatory for Member States. If CJEU rules that certain national norm or practice is not in line with legal provisions of EU law, it will become a signal for Member States to adjust national legislation or practice to CJEU's standpoints. If this led to changes in national regulations, it would be considered as „lobbyistic“ success of strategic litigants.

4. MANDATORY REGISTRATION AND ARTICLE 352 TFEU

Regulation of lobbying should enhance transparency and accountability as pre-requisites for reinforcement of public trust.⁶⁸ Idea of establishment of manda-

⁶¹ Ibid.

⁶² Case 43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455.

⁶³ Ibid., para 39.

⁶⁴ Ibid., para 69.

⁶⁵ Ibid., para 70.

⁶⁶ Amado, Olivert et al., op. cit., n 59, p. 4.

⁶⁷ Vidačak, op. cit., n 6, p. 84.

⁶⁸ OECD (2007) „Building a Framework for Enhancing Transparency and Accountability in Lobbying, unclassified, GOV/PGC(2007)17, p. 6, available at <http://search.oecd.org/officialdocuments/?hf=10&b=40&r=%2Bf%2Flastmodifieddate%2F2007&r=%2Bf%2Fofficial_do

tory lobbying register at the EU level is supported by stakeholders,⁶⁹ including lobbying professionals who recognise the need for such disclosure to protect the integrity of profession.⁷⁰ There are two problems when discussing issue of mandatory registration. According to some interpretations,⁷¹ Art 352 TFEU is a legal basis for possible mandatory regulation of lobbying profession. Under its provisions, unanimous consent in the Council of the European Union would be needed if the EU proposed regulation of lobbying. It must be pointed out that measures based on Article 352 TFEU shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation. Given that only few EU Member States⁷² have mandatory registers and statutes on lobbying, this seems as serious obstacle for adoption of mandatory register. In opposition to that interpretation, provisions of the Article 84 TFEU seem as solution to the problem, at least in terms of improving transparency and mandatory disclosure. According to that article, the EP and the Council may establish measures *to promote and support the action of Member States in the field of crime prevention*, excluding any harmonisation of the laws and regulations of the Member States. Although area of legal

cuments_theme%2Fpublic+governance+and+management&sl=official_documents&s=desc (document_lastmodifieddate)>, hereinafter referred to as Building Framework for..., last accessed on 23/11/2014.

⁶⁹ In November 2013 more than 10000 people said "yes" to mandatory register. Inter-institutional working group (the EC and the EP) found Register of Transparency as most efficient way towards regulation of lobbying. It aims to force EU lobbyists to register. Those who evade this obligation would face decreased influence and limited possibility to participate at EP's meetings. The Alliance for Lobbying Transparency and Ethics Regulation (ALTER-EU) pointed out some key elements for credibility of registry of transparency. According to their demands, by 31 December 2014 EU institutions should move from volunteer registration to binding registration. It would include companies, lobbyists and consultants, law firms. This idea encourages registration. In case of failure to register, sanctions would be the following: staff of the EC and Commissioners would refuse to meet non-registered lobbyists, no participation at the EC and the EP's working and consultative groups, EU staff will not participate at events (co) organised by non-registered lobbyists, non-registered lobbyists would face prohibition to hold debates, conferences and other events in the EC premises. This would lead to marginalisation of non-registered lobbyists. Concrete demands were proclaimed in November 2013. ALTER-EU seeks for establishing mandatory lobbying register (by 2015). Improved investigation capacities and enforcement of rules, improved penalty mechanism, improved lobbyists' code of conduct and improved financial disclosure, improved funding disclosure, improved lobby issue disclosure, improved staff disclosure, declaring expenses and client lists are some of most prominent demands among long list of requests.

⁷⁰ OECD Self-regulation..., p. 36.

⁷¹ See <<http://www.europeanvoice.com/article/mandatory-lobbyist-register-unlikely-under-current-law/>>, last accessed on 26/11/2014.

⁷² Mandatory registers exist in: Austria, Denmark, France, Netherlands, Slovenia, UK.

regulation of lobbying covers more than mere crime prevention, preventing crime in form of corruption and “trading on influence” could be promoted and supported by joint measures undertaken by the EP and the Council. Since lack of transparency often leads to unlawful conduct, one of the measures could be establishing of register under ordinary legislative procedure. In spite of the fact that this would not lead to harmonization of national laws, it could be a starting point, complementary measure to those which should be undertaken by the Member States.

5. SINGLE DEFINITION OF LOBBYING AS PREREQUISITE FOR FURTHER REGULATION

Clear definitions of who is a lobbyist and what activities are considered lobbying are prerequisites for effective application of regulation on lobbying.⁷³ Term „lobbying“ has been in use since the 19th century and it meant „face-to-face efforts by paid agents to influence legislators to vote in their clients’ behalf, often by corrupt and covert means.“⁷⁴ Due to pejorative connotations, lobbying is considered to be controversial term⁷⁵ but relevant from the legal point of view, not only academic but practical as well.⁷⁶ Eg. private-owned TV stations urge their viewers to write a petition to national agency for electronic media in order to repeal its decision which imposes limitations to quantity of commercial TV shows in prime-time. Is this (indirect) lobbying? Technically speaking, it might be considered as indirect exertion of influence on decision making process, if TV viewers prefer more commercial and less „serious“ TV content.⁷⁷ But for legal definition this is not enough since administrative agencies are not among those institutions which are commonly „recognised“ by national statutes as those which cope with lobbying pressure. Consequently, no lobbying in terms of enforced laws exists, although such petition could lead to further governmental or parliamentary debates. In such unclear situation, the most substantive problem is an attempt to reach consensus among Member States to settle an agreement on single definition of lobbying. Such definition should take into concern lobbyists as professionals and lobbying as providing services.

⁷³ OECD (2007) *Building a Framework for ...*, p. 11.

⁷⁴ Lane, *op. cit.*, n 16, p. 4.

⁷⁵ Mihut, *op. cit.*, n 1, p. 2.

⁷⁶ *Ibid.*

⁷⁷ In theory this attempt to influence specific legislation is known under term „grassroots lobbying“ or „call to action“. See *ibid.*, p. 7. See also Hitoshi Mayer, *op. cit.*, n 7, pp. 558-562.

5.1. REGULATION OF LOBBYING AS PROFESSION

The fact that during the 19th century lobbying was in principle individualized and acquisitive business⁷⁸ implies its commercial, entrepreneurial nature. Lobbyists acted as representatives of entrepreneurs who sought to obtain some value of government such as charters, loans, franchises etc.⁷⁹ In the second half of the 19th century, lobbying meant personal solicitation of legislative votes, usually through the agency of hired lobbyists.⁸⁰ Element of specialized knowledge and their skills were integral part of what they traded on.⁸¹ Lobbyists acted on behalf of private pecuniary interests.⁸² Thus origins of lobbying are of professional nature.⁸³ But in theory there are some who seek to make opposite argument and defend thesis that lobbying is mere occupation.⁸⁴ Eg. McGrath enumerates five key characteristics of profession: a set of professional values, membership in strong professional organizations, adherence to professional norms, an intellectual tradition and established body of knowledge and technical skills acquired through professional training.⁸⁵ As regards professional values, it has been pointed out the necessity of trust in relation client and lobbyist.⁸⁶ In addition to afore-mentioned, the insufficiency of education and training has been pointed out as one reasons less to qualify lobbying as profession⁸⁷ and need for formal educational qualifications is emphasized.⁸⁸ The importance of rigorous and meaningful professional codes of conduct is prerequisite for development of lobbying as profession,⁸⁹ as well as existence of relevant representative bodies.⁹⁰ Afore-mentioned objections to „profession-

⁷⁸ Lane, op. cit., n 16, p. 5.

⁷⁹ Ibid.

⁸⁰ Ibid., p. 8.

⁸¹ Ibid.

⁸² Ibid., p. 52.

⁸³ Angloamerican scholars support this thesis. See eg Grantham C.; Seymour-Ure, C., *Political Consultants in: Parliament and Pressure Politics*, Rush M (ed.), Clarendon Press Oxford, 1990; Berry, J. M., *The Interest Group Society*, 3rd edn. Longman, New York, 1997. Wolpe, B. C.; Levine B. J., *Lobbying Congress: How the System Works*, 2nd edn, Congressional Quarterly, Washington, 1996.

⁸⁴ McGrath, C., *Towards a lobbying profession: developing the industry's reputation, education and representation*, *Journal of Public Affairs*, vol. 5 (124-135), 2005., p. 124.

⁸⁵ Ibid., p. 125.

⁸⁶ Ibid., p.126.

⁸⁷ Ibid., p. 128.

⁸⁸ Ibid., p. 130.

⁸⁹ Ibid., p. 131.

⁹⁰ Ibid.

alism“ of lobbying must be put under criticism. These remarks were made almost ten years ago, prior to ETI in 2006 and establishment of voluntary register in 2008. Some European states (not only Member States) passed lobbying legislation: Germany (1951), Lithuania (2001), Poland (2005), Hungary (2006), Macedonia (2008), Slovenia (2011) and Montenegro (2011). In these laws there are statutory provisions on definition of lobbying, terms of doing lobbying, liabilities, registration provisions, sanctions for non-compliance etc.⁹¹ These trends undoubtedly indicate „waking“ the lobbyists as regulated profession. Where lobbying services are provided under civil law contract,⁹² all terms and conditions, including keeping professional secrecy,⁹³ shall apply. The ALTER-EU demands regarding disclosure of client lists at the EU level show how stubborn lobbyists are to preserve anonymity of their clients, what can be considered as keeping confidentiality. The number of registered lobbying offices in Brussels as well as tendency of establishment local lobbying associations show existence of networking among lobbyists.⁹⁴ Although step-by-step and not entirely and consistently but rather humble, lobbyist have become, in particular in new Member States, recognised profession regulated by statutes or at least codes of conduct, organised in national and supranational associations, which work on promotion of its aims. In other words, lobbying can be considered as profession *in statu nascendi*. By defining lobbying and by undertaking steps towards regulation of lobbying profession, the EU has recognised lobbying as a contemporary phenomenon and acknowledged its legitimacy.⁹⁵ But lobbying profession is still today a self-regulatory industry.⁹⁶

⁹¹ Eg Polish Act of Law on the Lobbying Activity in the Legislative Process (Journal of Law No. 169 of 2005).

⁹² For case of Poland see Makowski, op. cit., n 2, p. 4. According to Art 6 and 28 of Montenegrin Act on Lobbying (Official Journal of Montenegro no. 54/11, hereinafter referred to as MAL), lobbying shall be executed on basis of written contract concluded among lobbyist and its principal.

⁹³ See Art 8 para 1 MAL, „Principle of confidentiality“.

⁹⁴ Eg European Public Affairs Consultancies' Association (EPACA) is the representative trade body for public affairs consultancies working with EU institutions. EPACA promotes and provides training to all member companies on its Code of Conduct. *Public Affairs professionals* are a vital part of the democratic process, acting as a link between the world of business, civil society, and policymakers. These *professionals* must therefore undertake to observe *the highest professional and ethical standards* (emphasis added). See <<http://www.epaca.org/code-of-conduct/text-of-code>>, last accessed on 27/11/2014.

⁹⁵ Vidačak, op. cit., n 18, p. 179.

⁹⁶ Kallas, S., The European Transparency Initiative, speech held at Committee on Constitutional Affairs, European Parliament, Brussels, 16 July 2007, available at <http://europa.eu/rapid/press-release_SPEECH-07-491_en.htm>, last accessed on 23/11/2014.

5.2. LOBBYING AND SERVICES DIRECTIVE

Recognition of lobbying as profession is not of mere academic importance. When discussing about lobbying, it should be born in mind that lobbying entails „public law“ and „private law“ element. Public law element deals with relations among lobbyists and their targets, institutions eg. in terms of prevention of corruption. Private law element deals with internal relation lobbyist-client and typical issues such as contractual provisions on remuneration, costs, professional secrecy, damages etc. due to the fact that there is civil law contract as basis for professional lobbying.⁹⁷ It addresses practical issues: when lobbying for some client in the Internal Market, under which fundamental freedom shall it fall? From the afore-mentioned development of lobbying as profession two conclusions can be made. Lobbyists, acting on behalf of a client, provide intangible effort executed to fulfill clients demand – to obtain information, to take part in drafting of a bill or to promote, advocate or oppose certain act, and they do that usually in return for remuneration. Services Directive⁹⁸ stipulates that “service is any self-employed economic activity for remuneration.”⁹⁹ It imposes obligation to Member States to „respect cross-border provision of services and ensure free access and free exercise of services.”¹⁰⁰ It prohibits imposing „requirement of obtaining authorisation from national authority, including registration with a professional body or association in their territory, except where provided in directive or elsewhere in EU law.”¹⁰¹

Services directive applies to wide-range of services including services of legal advisors¹⁰² who might act as consultants or lobbyists. According to some authors,¹⁰³ lobbying activities are of service to the members or clients of an organisation. Acting „on behalf of“ arises out of fact that lobbyists act not for their own account but for the account of someone else, whose particulars are often not familiar to counterparty. Lobbyists act as sort of indirect representatives, not in terms of doing business with third parties, but in terms of negotiating legislative bills or policies. Element of remuneration arises out of

⁹⁷ See supra n 92.

⁹⁸ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27. 12. 2006, p. 36. Hereinafter referred to as Services Directive.

⁹⁹ Art 4(1) Services Directive.

¹⁰⁰ Art 16(1) Services Directive.

¹⁰¹ Art 16(2) Services Directive.

¹⁰² See also <http://ec.europa.eu/internal_market/services/services-dir/guide/index_en.htm>, last accessed on 27/11/2014.

¹⁰³ Vidačak, op. cit., n 18, p. 178.

element of professionalism. Professional lobbyists lobby for commission. Thus, it can be concluded that lobbying is self-conducted activity for remuneration. Element of professionalism is immanent to provision of lobbying services. If lobbying can be considered to be provision of specific kind of service, free exercise of lobbying must be respected. EU has acknowledged lobbying as legitimate profession¹⁰⁴ as well as many countries of Organisation for Economic Co-operation and Development.¹⁰⁵ Would it be a sort of obstacle to insist on registration or authorisation? The importance of this matter was addressed by the EC back in 1992.¹⁰⁶ Since there is no directive or any other mandatory source of EU law which would allow Member States to impose registration requirements, it seems that it would be an obstacle to require registration as a prerequisite for execution of lobbying service. But proper interpretation leads to conclusion that it wouldn't be an obstacle to insist on prior registration in lobbyists' *home country*. It arises out of stipulation „in their territory“ in the context of cross border provision of services, meaning in host country, in other Member State in which (lobbying) service is being performed. Once registered in country of primary establishment, they could freely execute lobbying services elsewhere within the EU. The problem with lack of harmonised rules on, among others, registration might lead to heterogeneity of national legislative approaches. If one Member State imposes such requirement for its domestic lobbyists – natural or legal persons, and other Member State does not impose similar requirement, lobbyists could easily start to establish their principle place of business in countries with no prior registration or authorisation requirements. As a consequence of such practice, this would lead to desintegration of internal market for services. Thus supranational mandatory rules must be enacted in this area of law to prevent such practice.

If this continues, lack of special mandatory rules on provision of lobbying services will undoubtedly become a problem for Member States. In particular in provision of cross-border lobbying services with non-EU element. Under some data, the USA companies lobby the most. Eg. well-known *Philip Morris* spented 5,25 milion euros on lobbying against Directive on reducing smoking.¹⁰⁷ There is no EU or in most cases national legislation on lobbying on which companies

¹⁰⁴ McGrath, C., The development and regulation of lobbying in the new member states of the European Union, *Journal of Public Affairs*, vol. 8 (15-32), 2008., p. 22.

¹⁰⁵ OECD (2007) „Building a Framework for ...”, p. 6.

¹⁰⁶ The EC was firmly against accreditation of organised interested groups back in 1992, on the grounds that this could create an obstacle to the open dialogue with civil society. Since all groups must be treated equally, there should be no registration, accreditation or code of conduct. Also Mihut, *op. cit.*, n 1, p. 9.

¹⁰⁷ Available at <<http://hdl.com.hr/na-lobiranje-najvise-trose-duhanska-i-naftna-industrija/>>, last accessed on 26/11/2014.

established in the USA are used to. The same lobbying company would be exposed to strong national regulation when lobby in the USA and to soft or even no legislation when lobbying in the EU or its Member States. Although this way the EU really seems as „lobbying paradise“¹⁰⁸ in fact it is not paradise at all. Lack of clear rules on conditions on lobbying, financial disclosure, remuneration policy, clear definitions what is permissible and what could be considered as unlawful „trading on influence“ seriously undermines the idea of free provision of lobbying services and contributes to high level of legal uncertainty. In current situation, general framework for lobbying should apply to fill in *lacunae legis*. But specific nature of this activity demands thorough regulation in separate sources of law to suspend current uneven level of national lobbying regulation.

6. TOWARDS RECONCILING DIFFERENT LEGISLATIVE APPROACHES

Bearing in mind above-mentioned overview of rather humble development of EU lobbying regulation, one can conclude that there is a need to reconcile two legislative approaches: mandatory disclosure and voluntary disclosure. Mandatory disclosure would introduce higher level of transparency. More transparency, if followed by severe penalties for non-compliance, would introduce more discipline. Mandatory nature of disclosure implies lobbying regulation by means of statutory provisions. One effort should be performed to reconcile differences between professional lobbyists and others. Experiences of some Member States¹⁰⁹ show that there is no clear distinction between those two types of lobbyists. The EC makes distinction among non-for-profit and profit interest groups.¹¹⁰ According to this classification, profit interests groups are law firms, public relations agencies, consultant (service providers) companies. The profit interest groups engage individuals who are paid to act according to principals instructions and they lobby for the interests of the third parties.¹¹¹ These professional lobbyists act for fee. These are corporate lobbyists. Due to wide definitions of lobbying, even civil society associations such as consumer associations can be treated as lobbyists since they influence national and EU policies and decision making process on daily basis. One *differentia specifica* of such interests groups is that they are non-profit organisations and they lob-

¹⁰⁸ Former EU Agriculture Commissioner called the EP „the lobbying paradise“. See <<http://www.ft.com/cms/s/0/8cd74a18-15e3-11df-b65b-00144feab49a.html#axzz3KE3btQF9>>, last accessed on 27/11/2014.

¹⁰⁹ Eg Poland. More on this issue see in Makowski, op. cit., n 2, pp 8-9.

¹¹⁰ Vidačak, op. cit., n 18, p. 178.

¹¹¹ Ibid.

by on behalf of public interests. They can be considered as non-professional lobbyists. Level of transparency in terms of disclosure of expenditures, incomes and client lists is another problem due to the fact that it comprises question of protection of personal data and professional secrecy. Wide definitions of lobbying open issue of lobbyists and their addressees. In Member States not all institutions are addressees of lobbying laws but just some (in most cases parliaments). What about regional and local authorities when deciding on some infrastructural projects? One should undoubtedly consider the need to extend lobbying laws to all levels of public administration.¹¹² This is an argument more to support above-mentioned statement on statutory regulation of lobbying which would provide basis for legal sources of minor degree – bylaws.

Lack of harmonised regulation is an obstacle. There is absence of mandatory rules which would force Member States to establish mandatory disclosure. The fact that some Member States have this stricter rules and others do not lead to uneven conditions to pursue lobbying activity. Issue of fair competition and issue of foreseeable pursuing lobbying as commercial activity are matters of „sound entrepreneurial climate.“ Such situation seems challenging for EU Member States. There are no specific requirements for development of national lobbying regulation ie no supranational patterns.¹¹³ No harmonised rules have to be implemented. There is no “good model” or “bad model.” Each Member State has to make its own way and create its own model¹¹⁴ of development of framework for lobbying, bearing in mind the EU dimension of lobbying services. Although there are common problems and similar issues to be regulate across nations, eg. differentiation among professional and non-professional lobbyists, client disclosure, financial disclosure, registration, defining limits of permissible influence etc., each state should bear in mind its own constitutional structure.¹¹⁵ Constitutional structure defines modalities of interaction among civil society, public and corporate interests groups and national governments.¹¹⁶ Beside Member States, such situation is even more challenging for states of Eastern Europe¹¹⁷ since those states traditionally follow EU patterns. Now they have to decide on their own how to approach it.

¹¹² In Polish and Lithuanian legislation, as one of the few in the EU, provisions are limited to regulation of lobbying as exertion of influence towards legislators and not towards executive, judicial and local authorities. This is significant distinction in comparison to the USA acts on lobbying which have wider scope of institutional application. See Vidačak, *op. cit.*, n 6, p. 119. On the other side, Art 2 of MAL explicitly mentions local level as possible target of lobbying pressure.

¹¹³ Also Mihut, *op. cit.*, n 1, p. 11.

¹¹⁴ *Ibid.*

¹¹⁵ OECD (2007) *Building a Framework for ...*, p. 9.

¹¹⁶ Cf. Vidačak, *op. cit.*, n 6, p. 45.

¹¹⁷ Mihut, *op. cit.*, n 1, p. 11.

Eastern European states started to regulate lobbying profession by statutes ie. mandatory legislation and imposing requirements for mandatory registration.¹¹⁸ These states have shown will to face problems of definition and regulation of lobbying. Reasons behind such trends can be found in gradual changes of legacy of communism,¹¹⁹ fight against corruption, appearance of business associations¹²⁰ and crime prevention. Moreover the fact that those states had to lobby the EU on numerous of issues during enlargement process¹²¹ must not be put aside when discussing increasing role of lobbying profession and accompanying legal reforms. As regards legislation on lobbying, new Member States are moving at a faster rate¹²² than was the case in old democracies.¹²³ Unfortunately, literature on interests groups from Central European countries and their lobbying activities is still rare.¹²⁴

7. CONCLUSION

Due to specific socio-political context, regulation on lobbying in the EU became relevant 25 years ago as a result of integration processes and strengthening of EU institutions. The EC and EP are considered to be the most directly accessible institutions in terms of lobbying, although indirect lobbying in form of strategic litigation is present even at the CJEU. During last decade humble steps have been undertaken in terms of establishing voluntary register. Current discussions on introducing mandatory register face legal difficulties in light of Article 352 TFEU. Such obstacles can be overcome by implementing complementary measures under Article 84 TFEU which might encourage Member States to establish national registers of lobbyists. Such measures would increase transparency and accountability as prerequisite for functioning

¹¹⁸ For case of Poland see Makowski, op. cit., n 2, p. 5. See also Art 11 MAL.

¹¹⁹ According to *McGrath*, “transition from communism to democracy both permitted and necessitated a substantial increase in number of interest groups and in the extent of their interaction with government (...)”. *McGrath*, op. cit., n 104, p. 15.

¹²⁰ *Ibid.*, p. 18.

¹²¹ According to *Vidačak*, during the enlargement process, the number of representation offices of the interests groups from Eastern and Central European States was increasing. The main reasons behind this tendency can be found in need to collect information on EU legislation, funding opportunities, relevant developments in the Member States, need to represent their members in EU associations, providing special services to their members at their request and preparing educational seminars with the purpose to improve members' knowledge on the EU enlargement process. *Vidačak*, op. cit., n 18, p. 184.

¹²² *Vidačak*, op. cit., n 6, p. 117.

¹²³ *McGrath*, op. cit., n 104, p. 28.

¹²⁴ *Charrad*, op. cit., n 3, p. 17.

of internal market for lobbying services. Considering its economic aspects, lobbying must be treated as market activity and thus subsumed under one of the market freedoms. Since features of lobbying activity comply with main features of profession, lobbying has to be treated as self-regulated provision of services. There are no special provisions on lobbying services at EU level. In such circumstances, general framework for provision of services under Services Directive shall apply to lobbyists. Lack of supranational rules which would harmonise this area of law, in combination with heterogeneity of national solutions, brings about two consequences. Lack of harmonised rules is an obstacle for cross-border provision of services, in particular for lobbyists established in the USA. Such „lobbying paradise“ is deterrent for provision of lobbying services and can decrease the level of transparency in decision making processes. For Member States, lack of EU harmonised rules on lobbying means that there are no patterns to be followed in drafting national lobbying statutes. Such state of play is challenging for Member States. They should decide on their own how to approach regulation on lobbying in terms of definition of lobbying, rights and duties, liabilities, taxation, registration, penalties for breach of law etc. Some new Member States have already undergone such processes and enacted national statutes. The EU has to make step forward by reaching a consensus on single definition on lobbying as a platform for development of future supranational legislation in this area of law.

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