

How to Define a Lobbyist: Experience of Poland and Lithuania

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The article analyses what aspects should be considered when deciding on the subjective scope of application of lobbying regulation in a country. Any country defining a lobbyist should first of all take into account its political and legal context, and theoretical insights about the types and activities of lobbyists that may exist. Furthermore, good practice and lessons from the experience of other countries should be evaluated. The legal definitions of the terms *lobbyist* and *lobbying activities* in Lithuania and Poland – the first EU member states to start regulating lobbying activities – are analysed in the article in order to highlight the main shortfalls of the existing legislation. The article provides guidelines on defining a lobbyist for countries planning to adopt legal regulation of lobbying activities, as well as countries wishing to improve existing regulation.

Keywords: lobbyist, lobbying activities, regulation, legal definition

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1. Introduction

In 2015, Transparency International (TI) published a study about lobbying in Europe, where it raised serious concerns about the level of transparency, integrity, and equality of access in lobbying activities in the region. Research results suggest that attempts by both governments and lobbyists to promote open and ethical lobbying standards are ineffective because much of the influence remains hidden and informal, there are conflicts of interest, and certain groups have privileged access to the decision makers. Such a situation leads to far-reaching consequences for the economy, environment, social cohesion, public safety, and human rights (Transparency International, 2015, pp. 6-7). Furthermore, in 2014, the European Committee on Legal Cooperation (CDCJ) of the Council of Europe (CoE) started preparing a draft recommendation of the Committee of Ministers to the member states on the legal regulation of lobbying activities. This document will provide guidelines on the establishment of legal frameworks in national legal systems regarding lobbying, based on best practices in different countries, as well take into account the shortcomings faced in those countries which have already enacted national rules on lobbying.¹

In the European Union, only about half of the member states currently have such national rules (European Parliamentary Research Service Blog, 2016). Croatia, Czech Republic, Italy, Latvia, Romania, and Spain are considering the adoption of such a law, whereas Scandinavian countries (Denmark, Finland, and Sweden) do not actively see it as necessary and rather strongly oppose the initiative of the CoE. However, even states with quite long-standing specific laws on lobbying activities face many problems regarding the effectiveness of regulations, because much of the influencing effort occurs outside of any formal participatory or consultative channels (Transparency International, 2015, p. 7). As relations between business and politics grow stronger, larger amounts of money are brought to circulate in lobbying activities, creating potential conflicts of interest, resulting in undue or hidden influence of business interests, and similar problems.

Poland and Lithuania were the first EU countries to adopt laws on lobbying activities and have been applying these for more than 10 years. The

¹ For more information, see information from the European Committee on Legal Co-operation of the Council of Europe. http://www.coe.int/t/dghl/standardsetting/cdcj/Lobbying/Lobbying_en.asp

application of these laws clearly displays the advantages and disadvantages of the construction of provisions, as well as helps to identify the main issues to be taken into account. The experience and challenges of Poland and Lithuania as regards the legal regulation of lobbying activities may be useful for countries which will do this in future.

One of the main questions arising in countries which are considering the adoption of legal regulation of lobbying activities is how legislation on lobbying should be drafted in order to be effective. European countries which already have such legislation point out a complex set of reasons why legal rules on lobbying activities do not work properly. These include: lack of clarity or an overly narrow scope of definitions, enabling the vast majority of lobbyists to evade the application of the regulation; inadequacy of definitions of lobbying activities regarding the target of lobbying (whether it is solely legislative or includes the executive branch as well); lack of motivation to register as a lobbyist because this only brings about difficulties and no benefits (an improper application of the carrot and stick approach); and many others. This article analyses in detail only one aspect of the regulation of lobbying activities, which is usually referred to as one of the reasons for the inefficiency of the laws regulating lobbying activities; i.e., what groups of actors should be defined as lobbyists in legal acts.

The article aims to draw attention to some important issues, which, based on the experience of Poland and Lithuania, should be evaluated prior to the establishment of a legal definition of a lobbyist. The paper is based on the inductive approach: it draws conclusions from the experience of two European countries with rather long-standing experience in the regulation of lobbying activities. The main methods used in the paper are the following: descriptive analysis, used to present the context of adopting the rules on lobbying in Poland and Lithuania, as well the result of regulation; content analysis, used to explain the definitions used in national laws; comparative analysis, used to compare the context, regulation, and outcomes of regulation in both countries; and logical induction, used for the aggregation of ideas.

The article consists of four main parts. The first part, dedicated to the rationale of the definition of a lobbyist, provides a broad view of the necessity and peculiarities of defining the term *lobbyist*. The second part discusses the different approaches towards the actors of lobbying activities seen from different perspectives in specific political and cultural contexts. The third part deals with the particular cultural and political contexts of the adoption of lobbying regulation in Lithuania and Poland. The fourth

part presents the practical regulation of lobbying activities in these two countries, concentrating on the definition of a lobbyist and its effect, and briefly discusses the possible reasons for the regulation functioning in an unsatisfactory manner. Finally, the conclusions provide a list of circumstances drawn up based on the experience of Poland and Lithuania, which countries planning to regulate lobbying activities could take into account.

2. Rationale of Defining a Lobbyist

First of all, legal regulation of lobbying activities has to stipulate whom it will address. It is necessary to determine who is most often engaged in exerting, or trying to exert, influence upon politics. This would help define to whom the regulation applies and ensure a level playing field for all the participants of lobbying activities, making it clear who has certain obligations and is subject to liability for a breach of rules, as well as, in certain cases, decide upon the legality or illegality of lobbying activities. Therefore, policy makers who are considering regulation of lobbying stress the critical importance of defining who is “in” and who is “out” of the regulation (Mihut, 2008, p. 6).

With this in mind, the first step of the country willing to introduce legal regulation of lobbying is to decide the subjective scope of the regulation. The definition of a lobbyist must be one which best captures the actual lobbyists within the state. This implies that every country must carefully evaluate the channels of transmission of interests from the civil society, including business enterprises, to politics, according to the country’s national specifics. As will be seen later on, the argument of political culture is a decisive one for models of lobbying activities, and, at the same time, decisive regarding the legal regulation fitted to a particular situation.

Naturally, the definition of a lobbyist embedded in law should encompass the types of actors in the political field who attempt to exert influence upon decision makers in a particular country. Polkowska and Czapla note that it is important to decide whether legal regulation on lobbying should cover only persons who are professional lobbyists, or if it should also apply to actors that perform a task assigned to them in the strategic programme of lobbying agencies (the media, public affairs and public relations agencies, or legal firms). Moreover, it is necessary to consider whether the regulation should capture “interest groups whose representatives engage in professional lobbying in their activity in the public life spheres that are of

interest of those groups, but they do not deploy permanent efforts targeted at desired goals (associations, social foundations, civic movements)” (Polkowska & Czaplá, 2015, p. 3).

The OECD observes that “wording, as always in legislation, determines its effectiveness. Experience has shown that vague or partial definitions of who is to be covered by legislation, or what activities are encompassed, leads to non-compliance or inadequate compliance.” Therefore, the OECD proposes the introduction of clear and unambiguous descriptions of lobbyists and lobbying activities to ensure that exclusions are precise, and to define lobbyists in such a way that the definitions are clearly understood by lobbyists, office holders, and members of the public, and robust enough to support legal changes (OECD, 2007, p. 32). TI reiterates the idea expressed by the OECD. It claims that “the definition of a lobbyist and what constitutes lobbying are crucial to the effectiveness of any lobby register, and indeed any form of lobbying regulation”. Their study implies that in European countries lobbyists are “often too narrowly defined in law, which results in weak registers that fail to capture those seeking to influence laws and policies” and adds that “in some cases the result is that only a small fraction of lobbyists fall within the net of the register”. The study provides an example of the UK Lobbying Act of 2014, which was described as “glaringly inadequate” and “deliberately evasive” and declared by the Association of Professional Political Consultants in the UK as able to capture only about 1 per cent of those who engage in lobbying activities (Transparency International, 2015, p. 31).

3. Different Approaches Towards Actors of Lobbying Activities

It is rather common for a definition of a lobbyist to involve different groups of persons who participate in lobbying activities. The research literature uses different classifications in respect of actors who aim to exert influence upon policy makers. However, in practice, lobbyists differ from state to state depending on the cultural and legislative background of the country.

Analysing types of lobbyists in the United States, Thomas noted that it was common to see two types of lobbyists in the US, i.e., independent lobbyists and professional lobbyists, both of which were also called “hired guns”, as they were paid for their activities. Later on, “hired guns” were

contrasted to “amateur” lobbyists; however, the latter definition never made it clear whether it was describing lobbying actors who were not paid, or actors who were not well-versed in lobbying techniques. In 2003, Thomas and Hrebner provided possibly the widest typology of lobbyists, including five groups: (1) contract lobbyists (who work under a contract to perform lobbying activities, may work for several contractors at the same time, and usually work in companies together with other lobbyists); (2) in-house lobbyists (presidents, executive directors, and employees of companies, organisations, or corporations representing only one subject, i.e., their organisation); (3) government legislative liaisons (employers of government agencies and local governments representing their agencies or local governments to the legislative branch or government, e.g. heads and senior staff of (central and local) government agencies, as well elected and appointed local officials); (4) citizen, cause, or volunteer lobbyists (members of small non-profit organisations, social welfare groups, or community organisations); and (5) private individuals, “hobbyists”, and self-appointed lobbyists (who form a small minority, as in the United States they constitute only about 1-2 per cent of all lobbyists. They lobby for personal benefits, ideologically acceptable issues, or proposals which they find very objectionable) (Thomas, 2004, pp. 152-153).

Many authors compare the European and the US models of lobbying contexts and traditions. According to Mihut, European countries and the US have different political lobbying environments from a historical point of view. Specific elements of political culture in the US and in European countries lead to differences in lobbying activities. While US politics is polarised around two major parties, European countries usually have multi-party systems, and the procedure of electing representatives is different as well. Very important differences arise from the styles of involvement of interest groups and civil society in the election process (e.g. the tradition of collecting money from interest groups in the US is rather alien in Europe). The US system of interest group involvement may be characterised by a competitive system of interest groups without privileged associations, whereas in European countries it is common that some associations (e.g. trade unions, business associations) usually work together with governments on tripartite arrangements, thus resulting in a number of interest groups with privileged rights (Mihut, 2008, pp. 7-8). Furthermore, a number of researchers claim US lobbying is confrontational, aggressive, specialised, and based on financial contributions and legal tactics, whereas European lobbying is more consensus-oriented, constructive, soft-spoken, and rooted in long-term relations and trust among different

stakeholders (Woll, 2012, p. 193, 203). Besides, US lobbyists rely more on outside tactics, targeting the media and public issues over individual ones, whereas European lobbyists are more inclined to rely on inside lobbying tactics, trying to access policy makers through the provision of information and expertise (Hanegraaff, Poletti & Beyers, 2016, pp. 4-5). Even the tradition of lobbying is different: professional lobbying as such is typical in the US, and rather alien in European countries; there are multiple access points to policy makers in European countries, leading to the need to reach multiple targets performing lobbying activities; the way of raising and using money for electoral campaigns is different, and there are also other disparities caused by pluralist and corporatist systems. Thus in order to be effective, lobbying regulation should first of all capture all or at least the major operators who try to influence public decision making. Hanegraaff, Poletti, and Beyers analysed the relationship between lobbying styles in different political cultures and different institutional contexts. The research results show that “there is a substantial difference between European and American lobbyists concerning the strategies they deploy within their country of origin (the predicted outcome for American lobbyists is substantially higher compared with European lobbyists)”. However, this difference disappears when these lobbyists become active at a similar venue. This means that political culture is a highly significant determinant of the lobbying style used in a country, but both American and European lobbyists are capable of adapting their lobbying strategies to institutional circumstances (Hanegraaff, Poletti & Beyers, 2016, p. 21).

However, there is no single model describing lobbying patterns in Europe. Here, much attention is paid to the variety of interrelations between interest groups and the state (or parliaments, in particular). Even what is understood by an interest group varies among research papers. Beyers, Eising, and Maloney have analysed research on interest group politics in Europe and elsewhere (Beyers, Eising & Maloney, 2006) and they draw attention to the problem that there are many interrelated definitions which sometimes describe the same category: interest groups, political interest groups, interest associations, interest organisations, organised interests, pressure groups, specific interests, special interest groups, citizen groups, public interest groups, non-governmental organisations, social movement organisations, and civil society organisations. They conclude that the main characteristics of defining an actor as an interest group are organisation, political interest, and informality. Interest groups differ from other actors of the political process in that they are “largely focused on influencing policy outcomes, trying to force issues onto, or up the po-

litical agenda, and framing the underlying dimensions that define policy issues” (Beyers, Eising & Maloney, 2006, pp. 1106-1107). It is important to note from empirical research papers that Campos and Giovannoni, as well as Beyers, Eising, and Maloney, point out that both private and public companies are involved in national lobbying activities (Campos & Giovannoni, 2006, p. 16; Beyers, Eising & Maloney, 2006, p. 1108).

In addition, the practice of relations between interest groups and states are different in various European countries. Fink Hafner has analysed the politics of interest representation and parliaments in seven post-communist countries in Eastern Europe, and suggests that these variations are determined by the constitutional system, the strength of civil society, and the institutionalisation of social partnership, as well as by international organisations (Fink Hafner, 2011, p. 215). In their empirical research Campos and Giovannoni noticed that in countries with parliamentary systems firms are more likely to join lobby groups (sectoral associations) (Campos & Giovannoni, 2006, p. 18-19). According to Fink Hafner, European countries sense economic pressures from international organisations, e.g. the IMF, the World Bank, and others, which push governments towards liberalisation reducing state involvement, thereby reducing the space for parliamentary opposition to influencing economic policy, and, at the same time, EU integration, which “intervened in executive-parliament and interest group-parliamentary communication” and “contributed to both the weakening of national legislatures and (...) interest group involvement in legislative decision-making” (Fink Hafner, 2011, p. 216). She also points out that a strong system of social partnership may lead to the weakening of parliament and vice versa, depending on whether final socio-economic decisions are passed as laws in parliament or result from agreements within social partnership institutions (Fink Hafner, 2011, p. 216). Similarly, differentiation has been noticed among the “old” EU states. Having analysed forms of lobbying in different states, Liebert provides a classification of lobbying regimes: the model of liberal pluralism (the Netherlands and Italy), post-liberal pluralism (Scandinavian countries and Germany), statist anti-pluralism (Spain, Greece, France, and Denmark), and personalised clientelism (Ireland, Luxembourg, and Portugal) (Liebert, 1995, pp. 438-439). The new member states also have their peculiarities in the interest group – parliament relations. As McGrath points out, “new” EU member states share some general trends: civil servants have close working relations with major interest organisations (e.g. over 95 per cent in Lithuania, 80 per cent in Poland) and interest groups are often consulted informally; interest groups place a relatively high emphasis on building

relationships with party leaders, clientelism is flourishing, and the practice of “fixers” or “contacts” is commonly used, i.e., when a person who knows public officials and is willing to influence them is called on (McGrath, 2008, p. 16-17). Besides, as Campos and Giovannoni note, in transitional countries the percentage of foreign investment in a firm increases the use of transparent lobbying activities and reduces the likelihood of informal and corruption-related contacts between companies and politics (Campos & Giovannoni, 2006, p. 21). This implies that national firms in transitional states are more inclined towards informal contacts with politics.

In Europe, especially in post-communist countries, the notion of professional lobbyists is a quite new one, although the practice of lobbying has a long-standing tradition. An example of research into Slovenian circumstances perfectly illustrates the situation: research shows that in 2013 only about 3 per cent of politicians had lobbying contacts with professional lobbyists, and in 2014 nearly 4 per cent did so. Lobbying activities are more frequently carried out through interest groups which place a relatively high emphasis on building relationships with politics (McGrath, 2008, p. 17). According to McGrath, a particular consequence of the emergence of democracy in Eastern and Central Europe was that business associations, which were not permitted under communism, began to be established, developing business associations which exert influence upon the state (McGrath, 2008, p. 18).

The analysis of understanding of what a lobbyist is in the US as opposed to European countries discloses different patterns of understanding lobbying actors: whereas the US emphasises the distinction between professional and unprofessional lobbying, European countries concentrate on interest group activities, whether formally or informally seeking to exert influence on politics.

4. Cultural and Political Context of Lobbying Regulation in Lithuania and Poland

Both in Lithuania and Poland people used to have a very negative attitude towards lobbying. According to various research findings, lobbying was perceived as a phenomenon consisting of networks of informal relations, through which private interests, on the basis of “reciprocity of mutual services”, penetrate contacts between business groups and political elites (Galkowski, 2008, p. 3).

The initiatives to draft laws on lobbying in Poland and Lithuania followed different paths. In Poland, society is permanently discontent with the situation in the decision-making procedure, whose irregularities could be tracked by certain research. As Galkowski points out, research commissioned by the National Chamber of Commerce of Poland in 1998 revealed that local councillors believed that one out of three politicians “accommodated” the interests of a particular firm and conducted “business prospecting” on its behalf, as part of his or her official public activity. The same study showed that members of parliament believed the number to be almost one out of four politicians. In a report on corruption in 1999, the World Bank described the “pathological” forms of lobbying in the Lower House of Polish Parliament as including the practice of providing financial benefits in return for the “favours” of blocking or modifying the provisions to be included in laws (Galkowski, 2008, p. 3).

One of the accelerators of the introduction of legal regulation on lobbying was possibly the largest political scandal in Polish political history. This was the result of a bribery attempt by famous film producer Lew Rywin, who in 2002, on behalf of an anonymous group of politicians, tried to convince the executives of the Agora Group Company to pay \$17 million to have favourable legal regulation on the media market adopted (Makowski, 2009, p. 3). The “Rywin Affair” disclosed irregular practices in the decision-making procedure, which eventually led to the proposal of the law on lobbying.

The Law on Lobbying Activities in the Legislative Process was adopted in 2005 as a result of a heated debate about the low standards of Polish democracy and political institutions (Jasiecki, 2006, p. 1). Actually, there were three regulatory proposals on the lobbying model in Poland. The first proposal placed an emphasis on the regulation of conduct of high-ranking state officials, the second proposal promoted legal regulation of lobbying activities, and the third called upon the self-regulation of lobbyists (Polkowska & Czaplá, 2015, p. 4). However, it was finally decided to concentrate on the legal regulation of lobbying activities. The discussions on the draft law raised serious concerns among business associations. Their statutory objectives usually include lobbying on behalf of their members, while members’ contributions serve as a fee for such activities. Thus the business community exerted pressure during the preparatory activities, seeking that the draft specify *expressis verbis* that the chambers of commerce and industry cannot be affected by the law on lobbying. Moreover, the business associations wanted this exclusion to apply to all non-governmental associations as well. The basis for such claims was the following: if

lobbying activities cannot be conducted by political parties, other organisations, including business associations, should also be excluded by analogy (Galkowski, 2008, p. 4). The draft law prepared in 2003 contained exceptions relating to persons who carry out lobbying activities. However, as a result of several convictions to a number of deputies who were members of the Extraordinary Committee, and a strong ideological fight between opposing parties, the draft law was changed and all exceptions relating to the operators of the lobbying activity were removed.

As regards timing, the first draft of the Law on Lobbying Activities in the Legislative Procedure was drawn up in about a year, and presented to the *Sejm* in October 2003. During the deliberations on the draft law, a sanction-oriented approach to the proposed legislation shifted to a good governance approach aimed at increasing transparency and accountability (OECD, 2009, p. 141). Thus the main goal of the adopted law turned to be the promotion of good governance by enhancing the transparency of the legislative process (Olejnik, 2014, p. 118). The law was passed on 7 July 2005 and came into force in March 2006.

The need for lobbying regulation was caused by the change of the political and economic system after the collapse of communism, when new players such as business organisations, private companies, the media, NGOs, international organisations, and others joined the public sphere. The appearance of new players in the light of the old communist practices, rooted in governmental structures, introduced serious problems: first of all, relating to corruption issues. This called for a review of the regulatory system and the introduction of new rules for better regulation (Jasiecki, 2006, pp. 2-4). However, although legal regulation of lobbying was caused by political corruption scandals, it looks as if the final draft of the law, which had the biggest impact on the scope of application and the real effect of the law, was subject to political pressure and reflected a settlement of accounts between political parties (Galkowski, 2008, p. 5; Jasiecki, 2006, pp. 8-12).

In Lithuania, contrary to the Polish situation, the first attempts to regulate lobbying activities came along with the negotiations for EU membership, rather than being induced by political scandals. Therefore, the introduction of the idea to regulate lobbying was not intrinsic: first there was external demand, and only later was it discussed what regulation model to adapt. Although the OECD study states that the regulation and the definitions used should “reflect the broad constitutional and political realities of the country for which they are devised. Therefore, they cannot be transferred from one political system to another without careful consideration

and modification” (OECD, 2007, p. 32), this issue was not duly taken into account while drafting the Lithuanian law. According to Ragauskas, it is one thing to frame real processes occurring in society, and a completely different thing to create new processes. This could also be said about lobbying regulation in Lithuania, as the drafters of the law searched for “an ideal model” of lobbying in the experience of countries which already had both lobbying traditions and regulations. Thus the drafting of the law on lobbying activities in Lithuania concentrated on the analysis of different foreign legal models, and the US model was selected for further analysis because it had the longest tradition (Ragauskas, 2011, p. 81). In parliamentary debates former member of the Parliament of Lithuania, A. Grumadas, accurately pointed out that while the lobbyists of Capitol Hill would probably “envy the working conditions of those actually influencing decision-making in Lithuania”, the new law aims to “prepare cosmonaut suits and then see if there would be cosmonauts willing to try them on” (TI Lithuanian Chapter, 2015, p. 6).

The fact that the actual situation of lobbying practices in Lithuania was not duly assessed before the adoption of the law is evidenced by the astonishingly short period between the submission of the law to the Parliament and its adoption: the draft project was submitted on 27 April 2000 and the law was passed after only 2 months – on 27 June 2000.

The examples of drafting the laws on the legal regulation of lobbying in Poland and Lithuania suggest that the drafting of laws did not include a thorough evaluation of the cultural and legal contexts of the two states nor the actual practices used to exert influence during the law-making procedure and/or executive work.

5. Definition of a Lobbyist and its Effect in Practice

5.1. Definition of a Lobbyist in Lithuanian and Polish Laws

According to the Law on Lobbying of the Republic of Lithuania, the term *lobbyist* refers to a natural or legal person, for or without compensation, attempting to exert influence to have, in the interests of the client of lobbying activities, legal acts modified or repealed, or new legal acts adopted or rejected. However, the Lithuanian law includes a long list of persons who are not entitled to be lobbyists. These include the following: persons un-

der the age of 18; state politicians, state officials, civil servants, or judges; former state politicians, state officials, civil servants, or judges (if less than one year has elapsed from the expiry of their powers or term of office, or from their dismissal, until the filing of an application to be included in the register of lobbyists); and persons convicted of a deliberate crime, provided that the conviction has not expired or has not been annulled. A legal person is also not entitled to be a lobbyist if the employee of the legal person who will be or is carrying out lobbying activities meets at least one of the conditions applicable to a natural person, or if the legal person is a state or municipal institution. Moreover, it is very important to stress that the Lithuanian law provides exceptions, listing activities which are not considered lobbying. These include: activities or work of owners, publishers, or employees of the mass media related to information about legal acts and their drafts: publication of the whole text or a part of it, review, and comments. This provision does not apply when owners, publishers, or employees of the mass media means receive remuneration for lobbying activities; activities of persons who at the invitation of state and municipal institutions or establishments participate as experts or specialists for or without compensation in the preparation, consideration, or explanation of draft legal acts; activities carried out by state politicians, state officials, or civil servants with the aim of initiating, preparing, considering, adopting, and explaining draft laws and other legal acts, when such activities are carried out in accordance with their official powers granted to them by legal acts; activities of non-profit organisations aimed at exerting influence in the common interests of their members to have legal acts modified or repealed, or new legal acts adopted or rejected; activities of scientists (pedagogues), except in cases when they act in the interests of a client of lobbying activities; and an opinion expressed by a natural person regarding the modification or repeal of legal acts, or the adoption or rejection of new legal acts, except in cases when that natural person acts in the interests of a client of lobbying activities.

As may be seen from this, Lithuanian legislation sharply restricts the definition of a lobbyist, and includes only “contract lobbyists” or “professional lobbyists”, although European research literature and the data on lobbying contacts from Slovenia supports the idea that European countries should first concentrate on the activities of non-professional lobbyists. Moreover, the exceptions of persons who are not entitled to be lobbyists and exceptions of activities not considered lobbying support the idea that such was the intention of the legislator. Exceptions clearly state that the activities of persons acting on their own, as well the activities of experts,

scientists, and non-profit organisations shall not be regarded as lobbying activities. In fact, the last category comprises the most influential lobbyists in Lithuania (Ragauskas, 2011, pp. 87-88). Non-profit organisations usually seek to exert influence in the interest of their members. These are various associations, unions, religious organisations, and similar subjects. The removal of this group from the definition of a lobbyist was made deliberately, as may be seen from the public discourse in Lithuanian media.² Thus “in-house” lobbyists, acting on behalf of either corporations or organisations in Lithuania, are not captured by the lobbying regulation. Government legislative liaisons are removed from the list of lobbyists as well, as activities of state politicians, state officials, or civil servants are not regarded as lobbying activities. However, this provision should not apply to the municipal level, at least not in theory. However, in practice, there is a recent case where a mayor of a town, at the same time president of the Association of Local Authorities of Lithuania, tried to exert pressure upon the Minister of Environment and the Prime Minister in order to accelerate the adoption of a government resolution governing issues relevant to particular members of the municipality (Organised Crime and Corruption Reporting Project, 2016). However, the investigators only mentioned “undue influence” rather than illegal lobbying activities.

Finally, the law does not recognise either citizen, cause, or volunteer lobbyists, or private individuals, “hobbyists”, and self-appointed lobbyists, because it provides an exception not only for non-profit organisations, but also for an opinion expressed by a natural person regarding the modification or repeal of legal acts, or the adoption or rejection of new legal acts.

The exceptions provided for in Lithuanian law regarding experts, scientists, and advisors is also an increasingly important issue, at least at the regional level, because a few years ago the participation of experts in EU institutions came to be at stake. For example, the Alter-EU organisation noticed corporate dominance at the expense of civil society in a number of powerful expert groups at the EU level. They documented that as of 2013, in the Data Retention Experts Group, all seven non-governmental members represented the interests of telecommunications corporations. Acknowledging this problem, the European Ombudsman, Emily O’Reilly, opened an investigation on the formation and activities of the European Commission’s (EC’s) expert groups (Transparency International, 2015,

² E.g. the article “Industrialists shake off being called lobbyists” on one of the most popular news portals in Lithuania („Pramonininkai kratosi lobistų vardo”. Delfi.lt, 21-09-2004. <http://www.delfi.lt/verslas/verslas/pramonininkai-kratosi-lobistu-var-do.d?id=5152737>.

p. 55). Furthermore, some organisations expressed their concern about the activities of the Chief Scientific Adviser (CSA) to the President of the EC. In their opinion, the creation of the CSA position undermined the entire structure of EU legislation by introducing the possibility of reintroducing personal opinion in an official manner at the very end of the process, i.e., when scientific assessments have reached the top of the EC for decision-making. According to Corporate Europe Observatory (CEO), a combination of weakness (one person with a small office) and power (privileged access to the most senior decision makers of the EC) makes it a perfect channel to bypass whatever scientific assessment the rest of the EU system produces (CEO, 2014). Later on, at the end of 2015, the EC initiated the creation of the High Level Group (HLG) of scientific advisors within a “Scientific Advice Mechanism”, which is intended to replace the position of the CSA. It is still doubtful whether the advisors will do their job appropriately, as, according to the CEO, advisors “must resist politicians’ demands to provide scientific justifications of the policy options they’re pushing, resist the temptation to influence the political agenda themselves, and accept that politicians sometimes ignore their advice because science is only one of the many dimensions politicians must take into account when making a decision” (CEO, 2015). Although a very robust procedure is laid down for the appointment of the group members,³ the appointment of the first group was still followed by discontent on part of certain organisations regarding the objectivity of submitting the candidatures (CEO, 2015). Therefore, the appointment of experts and their capacity to provide impartial and unprejudiced information must be strictly observed. In this case, the sole ground for declaring a person an expert rather than a lobbyist, and removing all the duties relating to lobbying activities, is the invitation “of state and municipal institutions or establishments”. This is surely a big gap which enables a legal exertion of influence in the legislation process.

As TI has noticed about Lithuania, “most de facto lobbyists in the country, including companies acting in their own interests, business associations, trade unions, religious organisations, various public institutions, and non-profits do not have to officially register, meaning that the vast majority of lobbying activities remain off the record” (Transparency International, 2015, p. 31). Besides, the Chief Official Ethics Commission, the designated oversight body of the register, has repeatedly called on the

³ Commission Decision of 16 October 2015 on the setting up of the High Level Group of Scientific Advisors.

Seimas since 2005 to address the law, noting that it is leading to the overall failure of the regulation (Chief Official Ethics Commission, 2010).

It is worth mentioning that in 2014 a new draft Law of the Republic of Lithuania on Lobbying Activities was prepared. However, the definitions of lobbying and lobbying activities were not effectively broadened. A lobbyist is described as a natural person or a participant of a legal person, member of a management board or employer, who pursues lobbying activities under the assignment and in the interests of the client. The definition of a “client of lobbying activities” reveals that the assignment may be given not just in the form of a contract, but also in the form of a command by a legal person to their employer, member of the board, or participant. However, as the assignment of the lobbying task is still to be objectively existent, the definitions leave outside the scope of application cases where the owner or another decision maker within the organisation is pursuing lobbying activities himself or herself, which is usually the case in Lithuania. Moreover, the definition of the term *lobbying activities* is much more narrow: according to the draft, lobbying activities should mean only activities which “exert influence” rather than “attempt to exert influence”, as is provided for in the currently applicable law, although as a general rule, the core of the definition of “lobbying activities” is “an effort to affect what the government does” (Nownes, 2006, p. 5; Hunter, Wilson & Brunk, 1991, pp. 488-503). It may be predicted that in case the formulation of the draft law on lobbyists and lobbying activities is not changed, the new law will be of no effect, as is the case with its predecessor.

To sum up, although both the law in force and the draft law on lobbying activities in Lithuania provide only a single definition of a lobbyist, they capture only a small number of the persons who might act seeking to influence politicians either in the legislative or the executive branch.

In Poland, according to the Law on the Lobbying Activity in the Legislative Process, the lobbyist is a person who pursues lobbying activities. Although the original draft of the Polish law, which was submitted by the government to the *Sejm* in 2003, specified which groups and organisations were not subject to its provisions, expressly listing representatives of diplomatic missions, political parties, trade unions, as well as associations of employers, the law in force does not contain any exceptions (Cocirta, 2006/2007, p. 8). However, the Polish law makes a difference between “lobbying activities” and “professional lobbying activities”, levying higher duties on persons who participate in professional lobbying activities as regards transparency, registration, and integrity rules.

“Lobbying activity” is “any activity conducted by legally allowed means, which leads towards the exertion of influence upon the organs of public authorities in the law-making process” (Makowski, 2009, p. 4). Lobbying activity is generally aimed at influencing the public authorities in the law-making process, and professional lobbying activity is a specific form of lobbying activity, carried out for payment, for the benefit of third parties. “Professional lobbying activity” is “gainful lobbying activity conducted on behalf of third parties in order to arrive at the interests of such third parties being taken into account in the law-making process” (Makowski, 2009, p. 4). This activity may be carried out either by an entrepreneur, or by a natural person under a civil contract with a client (Polkowska & Czaplá, 2015, p. 5). However, professional lobbying activity may be pursued only if the person is included in the register of lobbyists. A person working for his or her own interest does not have such an obligation (Jasiecki, 2006, pp. 7-8).

Whereas the Lithuanian law receives much criticism due to the exceptions of lobbying activities allowing the most active lobbyist to evade the application of the law, the Polish law, on the contrary, is much criticised due to its vagueness of definitions, and it is stated that failure to properly define lobbyists and lobbying activities leads to non-compliance or inadequate compliance (Cocirta, 2006/2007, p. 8). As Makowski states, on the one hand, the general definition of lobbying in Poland is too broad; on the other hand, the definition of professional lobbying is too narrow. So, both are imprecise (Makowski, 2009, p. 7). First of all, criticism of the definition of lobbying activities is directed at the fact that every person is entitled by the constitution to participate in the process of law-making (e.g. the right to receive information or a right to petition) and these rights are scrutinised in other laws. Therefore, it is at this point that lobbying legislation enters the area regulated by other laws, unreasonably restricting their use. Furthermore, press or research articles, public statements, and other actions relating to the legislative procedure must be regarded as lobbying activities, because these are intentional actions which at any time may lead “towards the exertion of influence upon the organs of public authorities” (Makowski, 2009, pp. 7-8). Another group of practical problems lies within the definition of professional lobbying activities. First, it is unclear whether the persons working under contracts in NGOs should fall under the category of professional lobbyist. The same problem arises with lawyers, barristers, and legal advisers, who literally would also fall under the notion of professional lobbyists, as part of their activities is participation in the legislative process. In addition, it is unclear whether representatives

of trade unions should register as professional lobbyists, although, as in the Lithuanian case, relations between the parliament, the government, and trade unions have different patterns than regular lobbying activities and are subject to special procedures, such as a tripartite council, and others. Finally, the definition of professional lobbyists in Polish law is criticised as being limited to the activities based on commercial activities or under civil contracts. This means, that regular “in-house” lobbyists, who are employees of the organisation, fall outside the scope of the definition of professional lobbyists (Makowski, 2009, pp. 8-9).

A comparison of the legal notions of a lobbyist in Lithuania and Poland shows that these countries, although they use different methods to construct the definitions (e.g. in Lithuania “lobbying activities” mean only what is meant by “professional lobbying activities” under Polish law), have similar problems in covering the persons who are actually involved in lobbying activities. Lithuania is mostly criticised for having too many exceptions, which allows the “real” lobbyists to bypass the application of the law, whereas Poland (besides the defectively described relation of lobbyists with the clients of lobbying activities failing to include employment relations) is blamed for an overly vague definition, whereby, without the provision of exceptions, it is unclear whether the law should be applicable in respect of all the participants in the law-making procedure.

5.2. Effect of the Law: Situation of Official Lobbying

Although Lithuania and Poland have had laws on lobbying for over a decade,⁴ both available statistics and research in a broader context imply the weakness of legal regulation of lobbying, resulting in its inefficiency.

Researchers analysing lobbying in Lithuania claim that the official statistics display a very low level of lobbying, and that the rules of liability for a breach of lobbying-related requirements are not properly enforced; therefore, there are no preconditions to speak about the actual effect of the legal regulation of lobbying activities (Ragauskas, 2011, p. 78).

In 2016 the register of lobbyists in Lithuania contained 36 registered lobbyists; however, in 2014 only 8 lobbyists were officially active, and participated in the drafting of 43 laws. Taking into account that in 2014 the

⁴ In Poland, the Law on the Lobbying Activities in the Legislative Process, adopted in 2005, in force from 2006 (Journal of Law, 2005, No 169-1414); in Lithuania, Law on Lobbying Activities, adopted in 2000, in force from 2001 (Official Gazette, 2000, No 56-1644).

Parliament of Lithuania (*Seimas*) adopted 621 laws, this amounts to less than 7 per cent of total laws. 100 per cent of the declared objects of lobbying were laws; no official lobbying was registered in respect of acts of the government, the ministries, or other state institutions. Rūta Mrazauskaitė, representative of the TI Lithuanian Chapter, states that in Lithuania “politics seem to be made at the backstage. We know that there are many interest groups affecting legislation, but we only see the lead actors on the stage” (TI Lithuanian Chapter, 2015, p. 4). Having in mind the fact that various associations representing business (both those acting in a broad interest field, such as the Lithuanian Business Employers Confederation or the Lithuanian Confederation of Industrialists, and those in particular fields, like the Association of Lithuanian Banks or the Lithuanian Small Brewers Association) are permanent guests of the parliament and the government, and bearing in mind that some of them even have their names on the offices in the government building, it is clear, that the forms of exerting influence not officially declared as lobbying activities under the existing law are incomparable to official lobbying activities, either in respect of volume or their real effect (Ragauskas, 2011, p. 95).

Although the purpose of the law of the Republic of Lithuania on lobbying activities is to regulate lobbying activities, their control and liability to violations, as well as to ensure publicity and transparency and to prevent illegal lobbying activities, the rules on liability have not in fact been enforced, corruption in the legislation procedure has not been precluded, nor has the transparent drafting of laws been activated.

Researchers explain the ineffectiveness of the law on lobbying activities by a number of reasons. These include the overly narrow personal scope of lobbyists, the non-existence of differentiated legal regulation to separate groups of lobbyists, failure to preclude illegal lobbying activities, ineffective legal liability for the breach of lobbying regulation, and failure to provide positive stimulus for the acquisition of lobbyist status (Ambrauskaitė, 2015, p. 5).

Very similar things may be said about Poland. Although the number of registered professional lobbyists is increasing every year, the officially declared activity of lobbyists is very vague. Olejnik, who has examined official lobbying activities in Poland for the period 2006-2010, stresses that the number of entities performing professional lobbying activities during this period was very small. The number of participants registered and exercising has been increasing; however, their activities such as submitting notifications of interests to draft legal acts, and taking positions and appealing in particular matters or proposing legal amendments, have been

very few (Olejnik, 2014, pp. 131-133). In Poland, in 2015 the register of professional lobbyists contained 310 entries; however, in 2014 only 35 lobbyists were involved in professional lobbying on parliamentary premises, and 22 lobbyists declared having taken actions aimed at the *Sejm* (the lower house of the Parliament). In total, only 9 professional lobbyists participated in 31 meetings of the *Sejm* committees (among these in 21 health committee meetings). During the same year, professional lobbying activity in the Senate (the higher house of the Parliament) was limited to 4 bills, where lobbyists participated in 5 Senate committee meetings (Polkowska & Czaplá, 2015, pp. 9-10).

As in Lithuania, researchers blame this situation on the defective construction of the Polish law on lobbying. First, it is said that the Law on Lobbying Activities in the Legislative Process only fragmentarily creates an illusion of control, does not cover all fields of the legislative process (does not include legislation of the president and at the local level) (Makowski, 2009, p. 14). Secondly, the subjective and objective scope of the law is very narrow, as many lobbying activities performed by different actors are not captured by the law. It is interesting to note that, whereas the Lithuanian law on lobbying activities is criticised due to its failure to embed different regulation regimes based on the professionalism of a lobbyist, the Polish law is attacked because it differentiates between lobbyists and professional lobbyists. It is said that the legislative process leads to an uneven status of lobbyists, different access to the decision makers, as well as different obligations to join the register and supervision of their activity. Furthermore, as there is a difference between the two groups, it is repressive for professional lobbyists but not repressive for other lobbyists, who are formally non-professional, such as business associations and NGOs (Jasiecki, 2006, p. 8).

Although there is a complex set of reasons for the improper effect of the law on lobbying activities both in Poland and in Lithuania, in both cases one of the main problems is a deficient definition of a lobbyist.

6. Conclusion

Differences in lobbying models imply the need to take into account some aspects calling for a differentiated, country-specific definition of a lobbyist. It would not be a mistake to state that each country has to evaluate country-specific issues; first of all, regarding the context of lobbying reg-

ulations. However, the analysis of the context of adoption of lobbying regulation, the formulations of a lobbyist in the law, and the outcome of the regulation in Poland and Lithuania – the first two EU member states to adopt lobbying regulation – all provide some implications on specific issues for countries planning to regulate lobbying in future.

First of all, a country seeking to regulate lobbying activities should define the targeted field of policy making: whether it is only the legislative branch, or both the legislative and executive branches. Nowadays, many government policies are formulated or at least shaped at administrative levels; therefore, an increasing number of countries tend to employ a broader definition of where lobbying is carried out (Pross, 2007, p. 5). It is highly plausible that the latter case involves more contact points and more operators acting in a different manner.

Secondly, the definition of a lobbyist should be constructed in such a way that it captures the actual relations of influence exertion in respect of policy makers, and the legislator must be cautious in making exceptions so as not to have any ambiguities remain. Referring to the experience of Poland and Lithuania, lobbying organisations are extremely active in the procedure of defining a lobbyist. Therefore, in order to be successful, the adoption of a law regulating lobbying needs to overcome considerable resistance from factual lobbyists.

A number of researchers claim that it is very difficult to properly define a lobbyist in European countries, due to the uneven status of interest groups in the policy-making procedure. In most, the participation of business associations and trade unions has historically been quasi-institutionalised within the public decision-making processes (Transparency International, 2015, p. 15). However, in the process of globalisation, as the OECD states, “the intrusion of multinational corporations and international social movements has challenged corporatist policy-making systems, and encouraged authorities in those systems to consider adopting North American-style lobby regulation. Such a project, however, must deal with the challenge of adapting regulatory frameworks that assume no prior privileged position for any group, to one that has for decades incorporated certain groups into policy deliberations” (OECD, 2007, p. 29). Thus countries with inclinations towards corporatist structures have to consider which path to choose – to equalise the participation rights of all operators, or to stay connected to the corporatist model and to adjust accordingly the provisions on lobbying activities, including the definition of a lobbyist. However, what is important for most European countries is that they have different parliamentary lobby regimes, depending on var-

ious contextual circumstances. Thus a formal reception of best practices used in other countries, even EU member states, may lead to failure of regulation. Therefore, the national specifics of interest group interactions with parliaments (as well as the government) must be assessed in every particular case.

Both Lithuania and Poland have unsuccessfully tackled professional lobbying, thus omitting factual lobbying relations between major interest groups (especially business associations). Professional lobbying, determined by the tradition of lobbying, is inherent to the US model. Thus countries such as Lithuania and Poland, as well as a number of other European countries, when concentrating on the regulation of professional lobbying, may – considering it has no roots in the political tradition of European countries – omit factual influence-exerting relations performed by other operators who never register or engage in “professional” or paid lobbying activities.

Going into detail, it must be taken into account that the application of lobbying regulation is a burden both for the government and at the individual level. Although it is possible, at least theoretically, to capture under regulation all the persons who may seek to exert influence on politicians, each particular country should decide on the balance of persons to be regulated, having in mind that a number of operators may only accidentally seek to contact politicians, or do this very rarely as part of their profession. One such example in Poland and Lithuania is the consideration whether lawyers and advocates should be regarded as lobbyists, as a (usually rather small) part of their practice involves sometimes contacting politicians with certain suggestions on law-making. For instance, in Poland, according to the law, advocates and legal advisers are obliged to engage in the process of improving the legal system, which naturally involves participation in the legislative procedure (Makowski, 2009, p. 9). Similarly, in Lithuania, advocates satisfy all the requirements for a lobbyist who is subject to registration under the Lithuanian law on lobbying activities. However, in Lithuania this issue is solved by stating in the Law on the Bar of the Republic of Lithuania that advocates may provide services of a lobbyist in the manner prescribed by the law. This means that advocates wishing to provide services which fall under the regulation of lobbying activities must register as lobbyists, and only then provide lobbying-related services. In practice, this provision is implemented, as the register of lobbyists contain several entries of advocates.

In connection with what has been said before, it is important to consider that the levying of an additional administrative and transparency burden

on lobbyists may be the reason why persons try to evade the requirement to register as a lobbyist, or to fall outside the scope of lobbying regulation. This again calls for a very clear definition of lobbyists and suggests that in order for the regulation of lobbying activities to be effective, it is indispensable to confer on lobbyists not only duties but also rights, which are not granted by the general rules for public participation in public decision-making.

Moreover, the dangers of including persons with the potential to exert influence on decision makers (e.g. “experts”, “advisers”, etc.) in the scope of application of lobbying regulation must be duly considered.

Finally, it must be remembered that lobbying activities are only one form of the wider concept of public participation in public decision-making. Other laws regulate rights such as the right to meet with members of parliament, right to petition, right to receive and submit information to public authorities, and others. The drafting of regulation of lobbying activities should include an adequate evaluation of the existing legal framework on the right to participate in public decision making in a particular country and the elimination of possible duplications and gaps, which as a rule lead to legal uncertainty and problems regarding the proper implementation of the regulation.

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HOW TO DEFINE A LOBBYIST: EXPERIENCE OF POLAND AND LITHUANIA

Summary

The article analyses what aspects should be considered when deciding on the subjective scope of application of lobbying regulation in a country. Any country defining a lobbyist should first of all take into account its political and legal context and theoretical insights about the types and activities of lobbyists that may exist. Furthermore, good practice and lessons from the experience of other countries should be evaluated. The legal definitions of the terms lobbyist and lobbying activities in Lithuania and Poland – the first EU member states to start regulating lobbying activities – are analysed in the article in order to highlight the main shortfalls of the existing legislation. The article provides guidelines on defining a lobbyist for countries planning to adopt legal regulation of lobbying activities, as well as countries wishing to improve existing regulation. It must be remembered that lobbying activities are only one form of the wider concept of public participation in public decision making. Other laws regulate rights such as the right to meet with members of parliament, right to petition, right to receive and submit information to public authorities, and others. The drafting of regulation of lobbying activities should include an adequate evaluation of the existing legal framework on the right to participate in public decision making in a particular country and the elimination of possible duplications and gaps, which as a rule lead to legal uncertainty and problems regarding the proper implementation of the regulation.

Keywords: lobbyist, lobbying activities, regulation, legal definition

KAKO DEFINIRATI LOBISTA: ISKUSTVO POLJSKE I LITVE

Sažetak

U radu se analiziraju aspekti koje je potrebno uzeti u obzir prilikom određivanja subjektivnog dosega primjene zakonske regulacije lobiranja u pojedinoj državi. Prilikom definiranja pojma lobista svaka država mora uzeti u obzir vlastiti politički sustav i zakonodavni kontekst, kao i teorijske spoznaje o mogućim vrstama lobista i aktivnostima kojima se oni bave. Također, posebno je sagledati dobru praksu i iskustva drugih zemalja. U radu se analiziraju zakonske definicije pojmova lobista i aktivnosti lobiranja u Litvi i Poljskoj – prvim državama članicama EU-a koje su uvele zakonsku regulaciju aktivnosti lobiranja – kako bi se naglasili glavni nedostaci postojećeg zakonodavstva. Također, ističu se smjernice o tome kako definirati pojam lobista u onim državama koje namjeravaju zakonski regulirati aktivnosti lobiranja, kao i u onim državama koje žele unaprijediti postojeće zakone. Potrebno je imati na umu kako aktivnosti lobiranja čine samo dio šireg pojma sudjelovanja javnosti u javnome odlučivanju. Postoji niz drugih zakona kojim se reguliraju razna prava, npr. pravo na sastanak s članovima parlamenta, pravo na podnošenje peticije, pravo na pristup informacijama i podnošenje informacija javnim vlastima te druga prava. Nacrt zakona o aktivnostima lobiranja trebao bi sadržavati procjenu postojećeg zakonskog okvira kojim je uređeno pravo na sudjelovanje u javnome odlučivanju te bi trebao ukloniti sva moguća preklapanja i praznine koje u pravilu imaju kao posljedicu zakonsku nesigurnost i poteškoće kod pravilne implementacije zakonskih odredbi.

Ključne riječi: lobist, aktivnosti lobiranja, regulacija, zakonska definicija