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## SUNRISE OVER BRUSSELS?

An Assessment of the European Transparency Initiative

Bachelor Thesis Sunrise over Brussels?  
An Assessment of the European Transparency Initiative

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## **SUMMARY**

This paper seeks to assess whether the ETI which is due to be implemented this spring is likely to bring transparency into European lobbying activities and further the legitimacy of lobbyists' involvement in European policy-making. By linking the concepts of legitimacy and transparency it will be argued that the ETI could indeed achieve its goals. Transparency can help to assure that a political system is not only representative but effective as well, i.e. that it possesses input as well as output legitimacy. Based on these insights, a 'the more transparency the better' rule will be deducted. At the same time, it will be pointed out that full transparency generally is not a viable option which will lead to the adoption of a partial transparency model. An analysis of the general European transparency policy as well as of the European lobbying system will furthermore show that lobby groups are a central and vital element of EU policy-making but that transparency of their involvement is lacking. Therefore it can be argued that the ETI can be based upon a theoretical as well as a practical rationale.

The actual assessment of the ETI will primarily take into account experiences from other countries that have already enacted a lobbying regulation. An investigation of five key-issues that are believed to critically affect the effectiveness of lobbying regulation schemes will reveal that the ETI is in fact a rather flawed piece of policy. The lobbying regulation scheme proposed as a central part of the ETI suffers from imprecise definition, insufficient enforcement mechanisms and contains a Code of Conduct that is even weaker than the already existing ones. Furthermore the focus on financial disclosure does not only mismatch the European lobbying system but might also re-strengthen widely held prejudices. As a consequence the ETI will not only bring little transparency into lobbying activities but could even further delegitimize lobbying.

The ETI is mainly focused on lobby groups. Thus it will, moreover, be analyzed whether this narrow approach is justified by an already strong regulation of the official side? The answer will be negative. Therefore, the paper will be concluded by giving recommendations for improving the European transparency regime. However, it will also be argued that the multi-level, multi-actor structure of the European Union designates narrow limits of what can be achieved by establishing transparency in European Union lobbying. As a result transparency can only be a vital but insufficient element of a more coherent approach towards structuring the relationship between lobby groups and European Institutions.

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## LIST OF ABBREVIATIONS

ALTER-EU	Alliance for Lobbying Transparency and Ethics Regulation
CCBE	Council of Bars and Law Societies of Europe
CPI	Center for Public Integrity
CONECCS	Consultation, the European Commission and Civil Society
CSCG	Civil Society Contact Group
EP	European Parliament
EPACA	European Public Affairs Consultancies' Association
ETI	European Transparency Initiative
IPRA	International Public Relations Association
LDA	Lobbying Disclosure Act
MEP	Member of the European Parliament
NGO	Non Governmental Organization
OLAF	The European Anti-Fraud Office
PAC	Political Action Committee
SEAP	Society of European Affairs professionals
TI	Transparency International

## INTRODUCTION

*“The relationship between special interests, acting through lobbyists, and legislators is central to understanding much of the legislative process.”  
(McChesney 1997 in Johnson 2007: 111).*

While this statement is valid for all modern political systems, it is even more valid for the political system of the European Union as it is argued that there is no place other than Brussels where lobbying is an as integral part of the policy making process (Biedermann, 2005).

The role of lobbying is an ambivalent one. While lobbying played and still plays an elementary functional role in the process of European integration, it is also a part of what is nowadays known as the democratic dilemma of the European Union. Especially the understaffed Commission heavily relies on the incorporation of lobby groups. It perceives the integration of outside interests as a means to improve the quality of EU legislation, but also to bring Europe closer to its citizens and to increase its acceptance among the European publics. However, lobbying is not only part of the solution; it is also part of the problem. The Commission’s style of policy making is hardly accepted among its citizens and heavily criticized by lobby critical NGOs. Lobbying is perceived as an intransparent part of the policy making process in which representatives of powerful interests strive for concentrated benefits by offering checks in smoke filled rooms to induce public officials to sell the public good for some private pleasures. Some questionable practices like the (in)famous revolving door do exist in Brussels. Nevertheless, it has to be pointed out that so far there has not been any big lobbying scandal that would even come close to the crisis that Jack Abramoff brought about Washington. Still the simple belief or impression that Commission officials or lobbyists engage in undue behavior is sufficient enough to create negative effects such as low trust and confidence in the European institutions (Johnson 2007).

It must have been similar thoughts and concerns that induced Commissioner Kallas to propose the European Transparency Initiative (ETI) in November 2005 and to justify it by complaining that

*‘Brussels’ is regarded [as] a far away rainy place, as an inaccessible political ‘black box’ where all sorts of obscure measures are taken.’*

The ETI is then not the first attempt to bring some sunshine into Brussels and to at least draw a rainbow over the black box. It is, however, the most recent one since the Commission started to engage in a more coherent transparency policy in 1992. Although being only the latest in a succession of policies, the ETI sets itself apart from its predecessors as it is the first transparency measure that puts the focus almost

exclusively upon lobby groups. In the respective Green Paper the Commission proposed to implement a voluntary registration system for all lobby groups which are engaged with the institution. This register is supposed to be combined with the requirement for lobby groups to apply a code of conduct to assure their ethical behavior as well as with the necessity to reveal information about funding sources, lobbied issues, clients and methods. Additionally, the Commission proposed to review its own consultation procedure and the rules that govern the officials' ethical behavior.

Apart from directly preventing undue lobbying behavior, it is the primary aim of the ETI to provide the public (as well as the European institutions) with information on the input (or influence) that is provided by lobby groups in the European policy making. This new information should enable the public to better scrutinize the work of the Commission. It should furthermore convince the public that lobbying is not to be condemned but that is a legal, vital and necessary part of European policy making. While the general aims of the ETI are widely shared, its proposed methods and structure initiated a heated debate among the Brussels community<sup>1</sup> of interest representatives. While citizen interest lobby groups<sup>2</sup> consider the ETI only as a first but insufficient step, commercial lobbyists, especially public affairs agents, argue that the ETI is going too far: they maintain that they are not ready to disclose sensitive commercial data such as clients or detailed financial information. Within the framework provided by the still ongoing debate this paper will assess whether the measures that are proposed by the ETI are an effective means to

- a. increase the transparency of the European policy-making,
- b. legitimize lobbying or the relations between interest representatives and the Commission.

The research will be guided by the following research question:

*Is it likely that the European Transparency Initiative will achieve its goal i.e. is it likely that the European policy-making becomes more transparent and more legitimate?*

which is further split into sub-questions:

Sub-question 1:

*Is the lobby register that is proposed within the framework of the ETI an effective means to bring transparency into lobbying activities in the European Union?*

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<sup>1</sup> An interviewed NGO lobbyists pointed out that there is no such thing as a coherent community of lobbyists (Interview 4). The remainder of the paper will nevertheless use terms like 'lobbying community' to refer to the collectivity of lobby groups or lobbyists, but it does not imply that there is also a common identity.

<sup>2</sup> The standard term for this kind of group is public interest group but the word public easily leads to confusion with the public of official groups and institution that can also engage in lobbying. Thus the term citizen interest group was chosen as a replacement.

Sub-question 2:

*Will the lobby register increase or decrease the public perception on legitimacy of lobbying in the European Union?*

Sub-question 3:

*The measures that are proposed in the ETI are mainly focused on the lobbyists. Is this one-sided or narrow approach justified by an already strong regulation of the official side?*

The answers to these questions will be provided in the remaining four sections. The first section will investigate the theoretical underpinnings of transparency. Furthermore it will describe the European system of interest representation and give an overview about the Commission's transparency policy. After all, an ETI that fails to improve the Commission's transparency policy, does not fit the European lobby system and neglects to take into account theoretical considerations would necessarily be ineffective and not worth being put to an investigation at all. It will be shown that transparency is worth to strive for and that transparency within European Union lobbying is lacking. The second section will thus analyze the ETI to assess whether it will actually further transparency and legitimacy within lobbying. The assessment will take into account the experiences from other countries that have already enacted a lobby regulation and will come to a rather negative conclusion. The third section will then shift the focus to the official side to answer sub-question 3. The fourth section will finally provide an overall assessment as well as some recommendation for improving the European transparency regime. Additionally it will be argued that the improvement of transparency within lobbying is important and necessary, but that it faces some severe limitations within the European Union and that it should be incorporated into a more coherent approach.

## **PART 1: TRANSPARENCY, LEGITIMACY AND LOBBYING IN THE EUROPEAN UNION**

### **TRANSPARENCY (NOT) JUST A VOGUE WORD**

In an abstract sense of the word transparency simply describes that something is transparent, i.e. that something, for example a process, allows

*“[...] light to pass through so that [...] the composition in question can be seen and understood.” (Curtin & Meijer, 2005, p. 4)*

This general definition helps to identify the basic components of transparency. It points to both a condition (making an object in question more visible) and an effect (facilitation of the understanding of the object in question). In a political context transparency as such describes the characteristic of political processes being easy to follow as information about them is made available for a broader audience. By providing information about an otherwise secretive process transparency creates publicity and might facilitate understanding (if the information is used appropriately) (Naurin, 2004).

In its abstract understanding it is quite easy to determine how much transparency is needed: as much as is needed to make the object in question visible. Yet, in a political context it is hardly possible to define transparency in an absolute manner. It is simply debatable whether a low or a high degree of transparency is sufficient for facilitating the understanding of the political process in question (Naurin, 2004). Thus, for a meaningful discussion of the term transparency it is of primary importance to determine how much transparency is actually necessary. Furthermore, transparency as such is only a condition. It can never be a goal in itself but only the means to achieve higher objectives. Accordingly, stating that transparency is necessary leaves us with the question – for what? Thus, the optimal degree of transparency can only be demarcated in relation to the purpose which is meant to be achieved by establishing transparency in the first place (Sobotta, 2001). In doing so, it has to be taken into account that transparency is a buzzword nowadays and that it could, “[a]s a term of art, [...] well win the prize for most increased usage of any word in English in the past decade.” (Curtin & Meijer, 2005, p. 2) Especially in the EU the extremely positively connoted term is frequently used by academics, politicians and representatives of civil society alike to demand reforms for more openness in various policy areas from environmental policy to financial markets. The fact that this paper seeks to assess the effectiveness of the ETI nevertheless proves helpful in limiting the scope of analysis.

The ETI constitutes part of the Commission's transparency policy and is framed by broader concerns of democracy and legitimacy. In declaration Nr. 17 of the Maastricht treaty already, transparency was seen as a means to strengthen the democratic character of the institutions as well as public confidence in the EU administration. The Green Paper on the ETI then emphasizes the "importance of a *'high level of transparency'* to ensure that the Union is *'open to public scrutiny and accountable for its work'*." (European Commission, 2006, p. 2) In this context it seems to be reasonable to discuss transparency in the framework of legitimacy as all mentioned justifications are components of this construct – at least if one follows Beetham and Lord (1998).

## LEGITIMACY

### *THE GENERAL CONCEPT OF LEGITIMACY*

Beetham and Lord (200?) define legitimacy as a "heuristic tool [or] abstract framework [whose] specific form is variable [and] has to be 'filled in' for each historical society or political system" (4). In the context of the EU the authors argue that liberal democracy is the prevailing form of rule. Accordingly they consider the criteria of liberal democracy as adequate to guide the completion of the legitimacy framework. For being legitimate and thus right, the EU should comply with

1. Performance,
2. Identity and
3. Democracy.

Identity could also be translated as 'government of the people'. It prescribes that there should be coherence among the people of a political system as well as between the people and their leadership, including an understanding of ownership for taken decisions (Dobson & Weale, 2003; Gosau, 2004; Beetham & Lord, 1998). Performance in turn is understood as 'government for the people' and stipulates that a government has to "pursue appropriate purposes and be sufficiently effective in that performance" (Dobson & Weale, 2003, p. 161). While the first two criteria are easy to follow, the third and central one requires further clarification; not only because it is actually debatable whether the term democracy is a well chosen one<sup>3</sup>, but also because it is a more complex and in the case of the EU unusual construct. Regarding the matter of wording, Scharpf's terminology of input-legitimacy might be less confusing. Input-legitimacy is concerned with the procedures through which the people can participate in the policy-making of a political system, i.e. it is concerned with 'government by the

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<sup>3</sup> It is actually debatable whether the term democracy is well a well chosen one as democracy becomes the dependent variable (liberal democratic legitimacy) as well as the independent variable (democracy as a criterion of legitimacy) and as all the three criteria are needed to achieve liberal democratic legitimacy. However, Gosau (2004) who shares this opinion maintains that this rather awkward construction is chosen to normatively accentuate the democratic (or input) criterion.

people' (Gosau, 2004). Within the concept of liberal democracy this is expressed in the principle of popular sovereignty which states that the "only valid source of political authority lies with the people." (Beetham & Lord, 1998, p. 6)

Beetham and Lord further subdivide the criterion of democracy into three elements: authorization, accountability and representation. It is the interplay of these three elements that should assure the adherence to the principle of popular sovereignty. An ideal model of liberal democracy would primarily rest upon parliamentary elections. Elections would not only form the primary mode of authorization but also the primary means of accountability. The people's representatives would be selected via elections and their representational character would be assured by the danger of being voted out of office. The central element of input-legitimacy thus is representation. Nonetheless, it is important to point out that representation itself is merely an effect of both authorization and accountability which puts the latter two in the focus of analysis.

#### ***LEGITIMACY IN THE EUROPEAN UNION***

The just described model with its nice and sleek chain of legitimacy represents the ideal liberal democracy model which the European Union simply does not adhere to. Within the Union, the authorization of power does not only rest upon the direct mode of electoral authorization but also upon an indirect mode. Accordingly, it is possible to speak of a modified version of liberal democracy. This becomes clear by looking at Article 8 of the not yet ratified Lisbon Treaty which provides the 'Provisions on Democratic Principles' of the European Union.

Similarly to the ideal model it states that "[t]he functioning of the Union shall be founded on representative [liberal] democracy" (Art. 8a/1) and that "[c]itizens are directly represented at Union level in the European Parliament" (Art. 8a/2). However, it also postulates that "Member States [which] are represented [...] in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens." (Art 8a/2). The main departure from the standard model, however, comes with the subsequent paragraphs of Article 8. They introduce elements of participatory democracy and lead to the fact that the EU not only rests upon a modified but on a hybrid form of democracy. It is proclaimed that "[e]very citizen shall have the right to participate in the democratic life of the Union" (Art. 8a/3) and that "[t]he institutions shall, by appropriate means, give citizens and representative

associations the opportunity to make known and publicly exchange their views in all areas of Union action“ (Art. 8b/1).<sup>4</sup>

These quasi-constitutional stipulations seem to put Beetham and Lord’s provision of liberal democracy criteria being the most appropriate for EU legitimacy at odds. However if one looks more closely at the Member States it becomes clear that the only fact that sets the Union apart from most of its Member States is that a variety of participatory opportunities, especially with regard to interest groups, are constitutionally fixed.

Not only in the Union but in the Member States as well participation of the people within government does not solely rest upon electoral authorization. Electoral authorization is a mighty weapon, yet it is one that can only be drawn infrequently. It is for that reason that it is accompanied by additional means of participation (Rieman, 2004). Via the form of public opinion, the media and especially interest groups additional links between the people and their representatives are provided, thus enhancing the possibility of exerting accountability and finally strengthening representation. The liberal modes for assuring representation (i.e. authorization and accountability) are thus accompanied by the mode of participation. As a result, it can be concluded that the legitimacy of the European Union rests upon the following 4 criteria

1. identity
2. performance (output legitimacy)
3. Representation (input legitimacy) embodied by
  - a. Direct and indirect authorization of and participation within government
  - b. Accountability

This multilayered and multifaceted legitimacy structure does induce difficulties and it would be worth a while to engage in a normative discussion about whether and how it could or should be improved. However, a lot of other authors have already taken up this issue and contributed to an extensive body of literature on the democratic dilemmas of the Union.

Instead of repeating their arguments, this paper will take the legitimacy structure as a fact (which does also imply that lobbying as a primary method of participation is accepted as a constitutionally fixed part of the policy-making process) and analyze whether and how transparency might contribute to different modes of legitimacy. The analysis will concentrate on the two central criteria of performance or output legitimacy and input legitimacy, thus omitting the identity criterion. While it is acknowledged that

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<sup>4</sup> Furthermore, “[n]ot less than one million citizens [...] may take the initiative of inviting the European Commission, [...] to submit any appropriate proposal on matters [...] required for the purpose of implementing the Treaties.

a political system must necessarily rest upon all legitimacy components, the issue of a European identity is such a delicate one that it seemed reasonable to focus exclusively upon output and input legitimacy. These aspects are not only less contested but their relationship to transparency is more strongly pronounced as well. It is for that reason that the analysis will test positive as well as negative effects of transparency upon the selected legitimacy components to build three general models of transparency and to test how much transparency is (theoretically) needed to further legitimacy.

### **TRANSPARENCY**

Transparency in a political understanding has been introduced as describing the characteristic of political processes as being easy to follow because information about them is made available for a broader audience. Phrased differently, transparency provides or facilitates access to information.

### ***AUTHORIZATION AND PARTICIPATION***

The access to information should then be regarded as a necessary condition for authorizing a political system. The decision to give or withhold consent and to withdraw support requires that the people – the ‘only valid source of political authority’ – are able to judge political behavior and to take reasonable and rational decisions based upon this judgment (Rieman, 2004; Naurin, 2004). Likewise, informed decisions about whether to become active and participate in the process of will formation in a more concrete manner requires that information is available about where, how and why one should participate (Hart, 2003). A political process about which no information is available, i.e. which is not transparent, impedes this judgment process.

While being vital, the access to information constitutes a necessary but not a sufficient condition as other factors like financial resources, knowledge and time have a significant effect upon the applicability of information. Under otherwise equal conditions it can be argued that the richer or more competent part of the people is likely to have better chances of using the information in a relevant way than the less competent or poorer part. Nonetheless or even for that exact reason, the access to information is of primary importance for both authorization and participation. Information as such is a hardly monopolizable source of power and can help to attenuate inequalities (Rieman, 2004). Even more importantly, knowledge and financial resources will remain useless if there is a lack of information about where and how they should be employed (Rieman, 2004).

## *ACCOUNTABILITY*

Accountability has inherently been included into the above discussion as the possibilities to sanction representatives or to participate were deemed the primary means of assuring accountability. However, transparency brings an additional *two-sided side-effect* into play. Generally speaking, there is no way to create full accountability. That is why the consequences of transparency are especially relevant for this aspect of legitimacy: transparency can help to curb corruption as well as contribute to facilitating trust that is vested in the political system.

Usually, political processes are characterized by a competition of divergent and often egoistic interests. Even though political behavior is not necessarily corrupt it often operates close to the permeable boarder between due and undue behavior. While transparency cannot per se prevent corrupt behavior, an intransparent environment tends to foster it as "[...] bad practices thrive in contexts where there are reduced risks of detection and exposure." (Johnsen, 2007, p. 113). Transparency then works on a psychological level. It creates a "preventive and disciplining effect" (Rieman, 2004, p. 65)<sup>5</sup> because it raises the awareness among officials that their behavior, could (but not necessarily has to) be scrutinized by an audience. Overall transparency increases the risk of detection and as such not only establishes a 'psychological threshold' but also raises the potential costs of undue behavior (Warner, 2003; Magnette, 2006; Hart, 2003).

From the people's point of view, it can be argued that transparency helps people to establish trust in the political system and is closely related to acceptance. Acceptance of (generally binding) political decisions can of course be achieved by means of coercion. Yet, a democratic political system should rather rest upon the perception among its people that the decisions taken for them are just, necessary and right (Rieman, 2004). Ideally, the people would be able (and willing) to scrutinize and control every political decision. As this is hardly possible, it is even more important that their perception rests upon a general level of trust. In this context, it shall be emphasized once again that people's simple *belief* that political actors *might* engage in undue behavior is sufficient to lower these general levels of trust, even though political decisions are in fact taken just and rightful (Johnsen, 2007). It is at this point where the inversed effect of transparency's two-sided impact comes into play. Transparency does not only raise the psychological threshold for engaging in corrupt behavior, it also raises the psychological threshold for believing that others are actually doing it. It is easier for

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<sup>5</sup> Own translation

people to have trust in a transparent political system because even if they do not scrutinize political behavior, they would always have the chance to do so. They are thus more likely to accept political decisions and to support the political system (Rieman, 2004). This aspect becomes especially important when considering the phenomenon of lobbying in the European Union. As has been mentioned in the introduction, even though the EU is rather dependent on lobby groups' input in order to pass high-quality legislation, this style of policy-making is hardly accepted among the people.

### ***PERFORMANCE***

The probably most extensive theoretical contribution to the criterion of performance is the theory of publicity's civilizing effect. It has a deliberate backdrop and rests on the preposition that "politics is assumed to be public in nature" (Naurin, 2004, p. 23). As a consequence, political decisions should not be taken on the basis of self-interest. Furthermore, it is assumed that each decision usually creates external effects which can only be internalized via "collective decision-making [...] and its explicit attention to considerations of the common advantage." (Cohen 1989 in Naurin, 2004, S. 25).

Basically, the theory assumes that there are different spheres within society each of which has its own norms according to which (political) actors should behave. The logic of the market sphere is dominated by self-interest and competitive bargaining. The forum (i.e. the political sphere) on the contrary is dominated by 1. *the force of the better argument* norm and 2. *the non-selfishness* norm. According to the theory, the norms of the forum make it neither acceptable to engage in bargaining (i.e. to further one's own interest by the means of promises and threats) nor to use only self-regarding justifications. In the forum, these kind of arguments are not only perceived as unconvincing but also as illegitimate (Gargarella, 2000; Naurin, 2004). However, the theory separates the forum into a private backstage and a public frontstage. Within the backstage, actors must not adhere to the norms of the forum because a "curtain of secrecy" (Naurin, 2004) secludes them from public scrutiny. As such, actors "who are aware of the norms of the forum but [...] treat them as 'regulative' rather than 'normative' " (Naurin, 2004, p. 29) can transfer their market behavior and the accompanying negative effects into the forum. This is where publicity (as a potential result of transparency) comes into play. Similarly to the above mentioned psychological effects it "brings the norms of the forum to the formerly private backstage and raises the cost of norm violation" (Naurin, 2004, p. 28). Resultant, potential scrutiny forces the actors to adhere to the norms of the forum. This in turn should reduce production of

external effects as the actors are forced to call upon public regarding arguments and refrain from self-interested bargaining.<sup>6</sup>

The theory of publicity's civilizing effects provides for a strong link between transparency and performance. However, this kind of support for transparency loses much of its attractiveness if one does not accept the prepositions of deliberative thinking. It is in fact rather debatable whether the consideration of public-regarding arguments necessarily leads to a better quality of decisions. As it is possible to create additional linkages which do not fall in the deliberative school of thought, however, these considerations do not necessarily make transparency less appealing. Its effects, i.e. the increased ability to hold representatives accountable and the decreased likelihood of corrupt behavior, do not only promote input legitimacy, but are relevant for the performance of a political system as well as corrupt behavior externalizes costs and is generally detrimental for a society.<sup>7</sup> Moreover, (transparency-induced) increased access to information and heightened levels of trust in the political system make it more likely that a right political decision is supported even if it is not in the average individual private interest of the people.

So far then the arguments in favor of transparency seem to be tremendously persuasive. Nonetheless, transparency cannot be regarded as an absolute value. One should not be tempted to deal with the issue of transparency in an unreflected manner or to demand reforms based on a simple 'the more – the better' rationale. Moreover, particular caution is required: despite of transparency's popularity among scholars and politicians alike there are only very few studies which test whether transparency really lives up to the expectations it raises (Curtin & Meijer, 2005; Naurin, 2004; Stasavage, 2005). Even though there are also very few studies which test or affirm the contrary, there are a number of arguments, most of them coming from a negotiation theoretical background, that call upon transparency's negative effects, especially with regard to the effectiveness and efficiency of decision-making and thus the performance of the political system.

#### ***PERFORMANCE (NEGATIVE EFFECTS)***

With regard to decisions in general it is argued that transparency leads to more predictable and less reform oriented outcomes (Sobotta, 2001). As a side-effect of the increasing likelihood of public scrutiny, decision-makers are not only less likely to

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<sup>6</sup> The theory of publicity's civilizing effects further argues that in the long run publicity brings even those actors that only comply in a hypocritical manner completely into the forum, i.e. that publicity even changes in the long run even beliefs and behavior. See Naurin (2004) for further details.

<sup>7</sup> In the first place, this sounds similar to the theory of publicity's civilizing effects yet the cause is not a change in the mode of communication and the type of justification but simply the fear of prosecution, i.e. the fear to be held accountable for the actions/decision as such.

engage in corrupt behavior but they are also less likely to take risky decisions in sensitive matters. As a result of the increased chance of being held accountable for a decision their willingness to announce unpopular but progressive projects is reduced (Sobotta, 2001).

The main critical thrust, however, does not concentrate on decisions as such but on an integral element of those, i.e. on negotiations. In general, it is argued that open-door negotiations (as opposed to closed-door negotiations) are less effective and efficient because the presence of an audience makes negotiators less willing to compromise and increases the “degree of finality” (Naurin, 2004, p. 35; Rieman, 2004). Negotiators are usually expected to represent positions that are close to their constituency. They should furthermore be principled and confident as well as consistent in their argumentation (Naurin, 2004). Overall, the public expects its representatives to be tough negotiators. Transparency increases the opportunities to actually control whether a representative lives up to these expectations. It thus creates an “incentive for representatives to adopt uncompromising positions during negotiations” (Stasavage, 2005, p. 673). Closely related to this insight is the fact that open-door negotiations tend to provoke representatives to engage in emotional rhetoric that is based on broad and appealing values instead of valid facts (Sobotta, 2001). And even if the arguments that are brought forward are based on stated facts, they are likely to be presented in a rather vague manner as representatives try to elude the risk of being tied down to one position by their constituency (Curtin & Meijer, 2005; Naurin, 2004).

In closed-door negotiations, that exclude the constituency, however, the representatives have room to maneuver. They have the possibility of self-correction, a frank exchange of ideas is possible and representatives can strike package deals. The lack of audience leads to a depoliticization of the issues at play because representatives are able to engage in actual problem-solving instead of having to play theatre for public observers. A breakdown of negotiations therefore is less likely (Stasavage, 2005; Meyer, 2002; Naurin, 2004). In this context, a number of interesting insights are provided by Stasavage (2005) who developed a game theoretic model of bargaining<sup>8</sup> that differentiates between unbiased representatives, i.e. representatives who are close to the preferred position of their constituency, and biased representatives, i.e. representatives that for some reason (e.g. lobbying) deviate from public opinion. His key conclusion is that a constituency could be better off under closed-door negotiations. While open-door

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<sup>8</sup> The term ‘bargaining’ should in this case not be understood in the deliberative interpretation and could be replaced by ‘negotiation’.

bargaining does discipline biased representatives, this comes at the price of increasing the likeliness of unbiased representatives starting to posture (to satisfy the expectations of their constituency) as well. As an overall consequence, bargaining breakdown becomes more likely leading to the least optimal outcome in the end (Stasavage, 2005).

From a deliberative point of view one might regard all these negative effects as side-line objections. The fact that transparency facilitates the use of public regarding arguments would outweigh the mentioned detrimental effects by far. However, the findings of Naurin (2004) who conducted the first empirical test of the theory of publicity's civilizing effect make it much less appealing as basic assumptions are questioned. By analyzing the behavior of business lobbyists in the European Union and Sweden, Naurin validated the basic differentiation between a sphere of the market and the forum. However, he found that lobbyists do get "dressed for politics" (p. 173), i.e. that they change their mode of communication and their style of justification once they enter the forum even without being subjected to transparency. Moreover, rather than inducing its civilizing effect, transparency leads to politicization. Naurin found that publicity forces lobbyists to integrate their constituency and to use arguments other than those ideal-regarding ones if they are to be taken seriously. Due to the fact that the same publicity equally challenges them to show consistency<sup>9</sup> between their front and backstage arguments, Naurin concluded the private backstage to be the more civil part of the forum. He argued that even in the backstage, threats of lobbyists are not convincing. It rather are those arguments that take other actors' positions into account while nevertheless representing own true interests, that are likely to be successful. On the basis of these insights, it has to be stated that while it does not make lobbyists true deliberatists, it also shows that any means of transparency will not contribute to changing the situation.

Despite few drawbacks, Naurin's findings are very valuable for this thesis. They give proof of the fact that lobbyists behave better than usually expected and call the deliberative effects of transparency into question thus supporting the negative assumptions of negotiation theorists. The difficulty at this point, though, is that the thesis has arrived at contradictory conclusions that seem to be incompatible with each other. On the one hand, transparency has been identified as vital source of democracy or input legitimacy; on the other hand, it has also been argued that its negative effects decrease the performance of the political system as negotiation breakdown becomes

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<sup>9</sup> Naurin argues that lobbyists should play a 'committed partner role' which inter alia involves refraining from threats and showing consistency between the front- and the backstage, between different parts of the backstage and across time.

more likely. Consequently, there are strong arguments in favor of transparency as well as of secrecy.

### **THREE GENERAL MODELS OF TRANSPARENCY**

In this context, it is possible as well as necessary to construct different models of transparency. Three models, a zero, a partial and a full transparency model, can be differentiated. They will be tested against the legitimacy criteria in order to determine the degree of transparency that is best suited to achieve the objective of increasing legitimacy in European Union policy-making processes.

#### ***THE ZERO TRANSPARENCY MODEL***

One might be tempted to assume that the zero transparency model would score high in performance and low in input criteria. However, this assumption does not withstand a second look. Complete secrecy facilitates the freedom of negotiators, yet it deprives the people from almost any means to hold their representatives accountable, furthers corruption, jeopardizes the representative character of delegates and insulates the political system from participation. It thus has to be rejected right away.

#### ***THE FULL TRANSPARENCY MODEL***

The full transparency model resembles open-door negotiations. It maximizes the public's ability to control government. While it would score high with regard to authorization, participation and especially accountability, it would almost completely fail the performance test because it minimizes the leeway of representatives in negotiations. By borrowing Stasavage's differentiation between biased and unbiased representatives it can be argued that full transparency is only desirable if there are justified and serious doubts about the representatives' ethical behavior. Apart from this extreme case, full transparency achieves a potentially positive effect of binding the usually minor number of biased representatives to the public's position at the cost of decreasing the flexibility of the greater unbiased number. Despite the negative image of the European Union and its problematically stretched chains of legitimacy it can be argued that such an extreme case is not present within the Union, so that this model has to be abandoned as well.

#### ***THE PARTIAL TRANSPARENCY MODEL***

Manifested by the rejection of the two extreme models, it becomes obvious that the relationship between transparency and legitimacy results in a clear trade-off situation. Moreover, the critics of transparency do not dispute the positive effects of transparency at all. They simply argue that transparency has some detrimental side-effects as well.

When looking closely, it is in fact the same underlying mechanism that creates most of the positive as well as the negative effects of transparency. As a result, it is impossible to have one without the respective other so that the most adequate solution would be to balance positive and negative effects as good as possible. Yet, how much transparency is actually needed to further authorization, participation and accountability without putting performance at risk?

It might be helpful to reconsider the above discussion of transparency. Unlike the discussion of the positive effects which did not made any reference to the quality and the quantity of information, the discussion of the negative consequences took place under the heading of open-door negotiations or full transparency. It thus seems reasonable to make the following general assumptions:

- a. Full transparency is not needed to activate positive effects
- b. If full transparency is avoided, a ‘the more transparency/information, the better’ rule applies

However, these assumptions still represent rather dim rules. Therefore, it might be more informing to stipulate some general transparency requirements with regard to each legitimacy criterion.

In the case of performance it can be argued that also transparency situations closely resembling open-door negotiations have detrimental effects. The provision of full transcripts in the follow-up to a negotiation process would, for example, constitute a full-transparency model in disguise. Apart from such cases, however, performance benefits from transparency and it can be argued that a minimum requirement would be that there has to be a fear of detection, which would be ensured by accountability.

For holding representatives accountable it has to be transparent *who decides, what is decided, why it is decided and what the consequences of this decision are*. If information about these questions is available, the people are enabled to link decisions or their outcomes to the activities of decision-makers. As such, they are enabled to hold either decision-makers or other controlling bodies accountable by sanctioning or reauthorizing them.

Participation rests upon a similar body of information. For making a reasoned decision about whether and how to participate in the political process it has to be transparent *who decides, what is decided, when it is decided and how it is decided*. It is of primary importance whether the issue in question is of interest and whether other actors who participate in the decision-making process have a contrary opinion on that issue because the interest might then be put at stake. Moreover, having information about the applied

procedure of decision-making is likewise relevant in order to organize one's own activities accordingly.

**Table 1: Transparency requirements**

<b>Legitimacy criteria</b>	<b>Transparency requirements</b>				
Performance	Fear of detection				
Accountability	Who decides	How it is decided	What is decided	Why it is decided	What are the consequences
Authorization & Participation	Who decides	How it is decided	What is decided	Why it is decided	When it is decided

Own compilation

Even though these stipulations are still rather general in nature, it can be argued that a specification would only be possible on a case to case basis. Before it can now be decided whether the European Commission is transparent enough and fulfills the stipulated transparency requirements in its relations with lobby groups, it is necessary to embed the analysis in the general transparency policy of the European Union.

## **TRANSPARENCY AND LOBBYING IN THE EUROPEAN UNION**

### **TRANSPARENCY IN THE EUROPEAN UNION**

For quite some time, the issue of transparency was not an issue at all for the European institutions. During the time of Monet, the Commission even tried to prevent the media from reporting about the undertakings of the Commission (Meyer, 2002). A different framing of the issue, i.e. concerns about “the democratic nature of the institutions and the public’s confidence in the administration” (Declaration Nr. 17 Maastricht Treaty) induced the European institutions to set the issue on the agenda and it remained there since. The broader aim is to bring the Union closer to its citizens; the means to do so is a dual strategy that especially the Commission employed since transparency was firstly demanded in declaration Nr. 17 to the Maastricht Treaty (Rieman, 2004; Sobotta, 2001). This strategy consists of information and communication measures “with a view to informing the general public [...] about the workings of the institutions and the policies carried out at Community level” (European Commission, 1999) as well as of measures assuring their openness and thus their accessibility (Sobotta, 2001). As the former is of only marginal importance in the framework of this paper, this section will focus exclusively on the latter set of measures.

### ***GENERAL MEASURES REGARDING TRANSPARENCY***

A striking feature of the European Union's transparency policy is that it "does not have overarching legally binding regimes [...] but relies instead on the 'soft law' of internally enforced codes of conduct, guidelines and standards" (Bermann, 2007, p. 9).

Apart from two exceptions<sup>10</sup>, the transparency measures do not have the force of law but constitute self-imposed obligations which may be understood as binding "but controversy over the fact or extent of compliance with them cannot be brought before any outside authority with power to render a dispositive judgment" (Bermann, 2007, p. 12). Moreover, they rest upon a variety of procedures, e.g. Communications, inter-institutional declarations, rules of procedures and annexes thereof, which render the regulation of transparency as a whole a complex and even confusing issue (Schlotmann, 2006). Despite being rather opaque in its structure, the European transparency policy has continuously progressed since 1992.

Nowadays it can be regarded as rather reasonable. In general, the people of the Union should be able to find out that a policy is subjected to the decision-making process, and they should be able to monitor its progress, i.e. they should obtain information about the time, stages and procedures of the decision-making as well as the consequences. Each newly constituted Commission draws up five-year strategic objectives stipulating the mid- and long-term goals of its term in offices, but more important are the annual policy strategies and working programs in which the major policy initiatives are listed. From thereon it is possible to follow a policy through the entire policy-making process by using the various policy-tracking services<sup>11</sup> provided by each institution on the web (Bermann, 2007). It is also possible to obtain information about meetings or participate as a spectator even though the accessibility as well as the scope of information available differs across the institutions. In terms of information, at minimum agendas and (concise) minute are available. In terms of meetings, the EP's plenary and committee debates are held in public while the Council's meetings take place in secrecy unless it is acting in its legislative capacity under the co-decision procedure.<sup>12</sup> The Commission's meetings, on the contrary, are always confidential.

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<sup>10</sup> The one is the Aarhus Convention which entered into force in June 2007 and obliges all EU institutions and subsequent bodies to guarantee judicially enforceable information and participation rights in the policy area of environment, the other access to document legislation which will be covered later on.

<sup>11</sup> Additionally to the general legislative information and tracking-service Eur-lex each institutions operates its own service: PreLex (European Commission), OEIL (European Parliament), Conselium (Council of Ministers). These services, as well as the general presentation in the web vary in quality and accessibility, whereby the Council's services can be regarded as "the least effective" (Bermann, 2007, p. 36).

<sup>12</sup>

These general accessibility provisions and tools are furthermore accompanied by the Public Access to document Regulation which has been in place since 1993 but did not become a legally enforceable right until the Amsterdam Treaty. It was specified further in Regulation 1049/2001 which stipulates that “[i]n principle all documents of the institutions should be accessible to the public “. In general, also documents originating from third parties are covered by regulation 1049/2001. However, the regulation enumerates several limitations which allow the institutions to partly deny the access to documents. These limitations are rather extensive if third party documents but also ‘documents of internal use’ are to be accessed.

Taking the transparency measures in general and the Access to Documents regulation in particular into account it can be concluded that the transparency regime of the European Union is quite comprehensive. However, this conclusion is based on facts as they are presented on paper and a serious analysis would have certainly revealed numerous shortcomings. Bermann (2007) for example reports that some of the websites are not working properly. Moreover, the Ombudsman of the Union received several complaints about the (unjustified) denial of access to documents and some complaints even made it to the courts. A recent ruling of the Court of First Instance then is of special relevance for this paper because it obliged the Commission to reveal the participants of a meeting which led to detrimental effects for the plaintiff. The plaintiff (a German brewery) correctly argued that the participants were engaging as lobbyists for competitors (Court of First Instance, 2007). Accordingly, it has to be pointed out very clearly that the above mentioned general transparency measures are of utmost relevance for increasing transparency in the European Institutions’ relations with lobbyists. Nevertheless, the remainder of the paper will exclusively focus upon the specific transparency regulations with regard to lobbyists.

#### **THE EUROPEAN SYSTEM OF INTEREST REPRESENTATION OR THE ART OF LOBBYING THE EU**

It was already argued that lobbyists do participate in policy making and in fact, having a *“legislative process without lobbyists is like having a road map with only interstate highways. The lobbyists are the access ramps, back roads, short cuts, cutoffs and detours”* (Long, 2005, p. 3)

Being this central to the role of policy-making makes it unlikely that lobbyists should not be subjected to dedicated transparency measures, yet in order to determine how these measures should be structured, it is necessary to find out *who* actually lobbies *why* and *how* the lobbying is done. Lobbying as such is thereby understood as the attempt of

third parties to influence decision makers or policy-making processes with the aim to achieve a certain outcome (Fischer, 1997).

### **WHO LOBBIES...**

A third party or interest respectively lobby group

*“may be the Siemens company, a NGO like Animal Welfare, the EuroFed CIAA (food industry), the London local government, the Regional Affairs Ministry of Italy, Am Cham in Brussels, [or] the Commission [...]” (van Schendelen R. , 2005, p. 190)*

This means that third parties can be private (e.g. Siemens, Animal welfare) or public in nature (e.g. the Commission). They can be a collective entity that represents other interest groups (e.g. CIAA) or an individual entity that represent just its own (e.g. Siemens). Moreover, they can represent citizen interests (e.g. Animal Welfare) as well as economic interests (e.g. AmCham). The only condition is that they are not a (constitutionally) specified actor of the part of the policy process that they try to influence. Accordingly, it can be argued that almost everyone who has an interest in influencing policy-making could potentially engage in lobbying. so that it is helpful to distinguish between the lobby groups as such and the lobbyists (Michalowitz, 2007a). The former are entities having an *interest* in influencing policy-making, while the latter are those who are actually influencing policy making. These entities must not necessarily be members or employees of a lobby group but can also be hired externally which is usually done by employing a Public Affairs consultancy.

### **...WHY...**

Why then do lobby groups decide to hire a consultancy or to employ one of their own lobbyists? Lobby groups decide to lobby because policy processes put their interests at stake, either in positive or in negative ways. They are “[...] usually driven [...] by their ambition to win or not to lose a desired outcome” (van Schendelen R. , 2005, p. 336) and can thus be regarded as strategic actors acting for egoistic purposes (Wright, 2003; Ahrens, 2007; Broscheid & Coen, 2007). Accordingly they only start to engage in lobbying activities if their potential gains outweigh their potential costs. They also use their resources strategically which, in the case of information, leads to an incentive to exaggerate or distort information for their own purposes (Broscheid & Coen, 2007; Wright, 2003).

What then determines whether lobbyists are successful in furthering a particular interest? Phrased differently, why do institutions agree to being influenced by potentially (although not necessarily) distorted information?

*... IN WHAT KIND OF SYSTEM...*

The nowadays widely accepted perception of lobbying systems, i.e. “the way in which contacts between lobby groups and government officials and decision-making institutions are structured” (Karr 2007: 153), is that of an exchange relationship or demand and supply pattern (Coen, 2007; Hart, 2003; Mahoney, 2004; Mazey & Richardson, 2006; Michalowitz, 2004; Bouwen, 2002; Bouwen, 2003; Karr, 2007; Buholzer, 1998). The basis of this pattern is formed by resource dependencies between the official institutions or their representatives on the demand side and the lobbyists on the supply side. Neither the one nor the other “[...] can autonomously pursue and achieve their goals” (Eising, 2007, p. 386). The institutions on the one hand, are in command of the policy-process. They possess insider information about the policy process, and control the access to it. The lobby groups on the other hand have an informational advantage in terms of policy relevant information that is hardly obtainable otherwise, but needed by the institutions to fulfill their regulatory tasks, i.e. delivering good, efficient and effective policies (Woll, 2007; Eising, 2007). Despite being mutually dependent upon each other, it is the demand side which can be regarded as the decisive factor in this exchange relationship. Usually the institutions shape the operational environment of interest groups by providing support to certain groups, by giving negative and positive<sup>13</sup> incentives through their policy-making activities, but especially by providing opportunities for exerting influence (Coen, 2007; Mazey & Richardson, 2006; Mahoney, 2004). Ultimately, the institutions decide which lobby groups obtain access to policy-making and thus gain the possibility to exert influence. The whether or not of access then depends on the ability to provide certain resources or ‘access goods’ which can generally be treated as a sufficient proxy indicator to indirectly reveal whether influence might have been exerted (Woll, 2007; Bouwen, 2002)<sup>14</sup>: “access is not a sufficient condition to achieve influence, [but] it is clearly a necessary one – without it advocates never have a chance to sound their case [...]” (Mahoney, 2004, p. 448). Access goods can take various forms, but many authors point to the central importance of information in gaining access to Brussels.

Information is a broad term and the type of demanded information varies across lobbied institutions as well as policy-making stages. It can be technical in nature to enable the institutions to fine-tune their policies. It can also be more general to enable getting an

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<sup>13</sup> Negative incentive, if the institutional activity might put interests at risks. Positive incentive, if the institutional capacity allows the lobby group to foster a certain interest (which would be difficult to achieve by other means) (Mazey & Richardson, 2006)

<sup>14</sup> It is common practice to analyze the potential of exerting influence by studying access (Michalowitz, 2004) or access goods (Bouwen, 2002; Bouwen, 2003; Woll, 2007) instead of assessing influence directly for which the causal links are hard to establish.

impression of the “aggregated needs and interests” (Bouwen, 2003, p. 3), to assess the potential likeliness of (critical) reactions of relevant constituencies and possibilities of reaching consensus. Access, however, is not only based upon the possession of quality information which differs from lobby group to lobby group, but also upon additional group characteristics. These could be perceived as access goods on their own but are treated as modifying conditions here. They do not change the content of information but primarily influence its credibility. The first of these conditions is a group’s representativeness. It does not only reduce the workload of the institutional side but also enhances the validity of the provided information because it rests upon a broader aggregated base of experience. The second one is a group’s reputation. The image of being a committed partner, for example, results in a good reputation. According to Naurin (2004), that means that a group should engage in a constructive dialogue, listen to concerns and try to change a policy for its own good instead of obstructing it. The importance of reputation reduces the incentive to distort information and diminishes the appropriateness of pressure strategies. It therefore does not only have an effect upon the quality of information but also upon the lobby system in general because only established groups can have a good reputation.

Information is the primary access good in Brussels and some authors, e.g. Bouwen (2002, 2003) even focus exclusively upon it. Still it is important to point out that access goods are a “multidimensional entity” (Mahoney, 2004, p. 451) in which information plays a central, yet not a solitary role. Additional factors include legitimacy, the ability to *trade votes*, *i.e.* to influence the voting behavior of a relevant constituency and the ability to give or withhold support by exerting economic power, but the most delicate one probably is capital.

In contrast to the widely held public opinion that capital is the central lobbying resource, scholars engaged in lobbying research usually treat financial resource as a supporting and not as a direct access good.

Whether supportive or not, capital is central to the lobbying process: “from it all things flow” (Mahoney, 2004, p. 451). Capital does not replace expertise or representativeness and it is also hardly possible to purchase a reputation, yet it certainly does help in getting one’s message through. Being a convertible resource, it helps to build up other resources. Having a Brussels office and a sufficient number of staff allows being closer to politics to engage in research and monitoring. Capital permits to generate qualitative information that can then be employed at the right point in time to (simultaneously) lobby the right targets within the multi-level multi-actor structure of European Union

policy-making (Interview 4). This is not to say that lobbyists do not use their financial resources in a more direct way and engage in bribery but the literature does suggest that the direct transfer of capital is not the primary way of achieving access and exerting influence. The primary effect of capital thus results to be a general structuring of the lobby system as wealthy groups are more likely to be successful because they can engage in more comprehensive strategies.

**...AND HOW DO THEY DO IT?**

Having access goods at its disposal does not necessarily make a lobby group successful. A basic precondition also is that a lobby group has done its homework, i.e. that it either has its own or employs external lobbyists who should not only be well informed but also efficient communicators and possess an extensive network. Having good lobbyists enables a lobby group to approach the right institutional actor at the right point in time with the right amount of access goods in order to achieve a maximum amount of impact. However, it has to be emphasized that “[...] lobbying is not just about influencing or changing public policy – it is also about minimizing [...] surprises” (Mazey & Richardson, 2006, p. 249). This is true for the information that is gained via engaging in lobbying and that can be helpful, even if the lobbied policy as such is not really influenced. It is even more true for the broader lobbying process as such which begins well ahead of the actual exertion of influence. Lobbyists engage in monitoring to observe political developments and analyze the potential impact on or opportunities for their clients or employer. If the potential gains of participating in the political development are considered to outweigh the costs, they begin to develop strategies and gather more detailed information, they identify contact persons and look for potential allies as well as opponents (Beck, 2007; Michalowitz, 2007a). It is these processes then that first enable lobbyists to start their undertaking of exerting policy-relevant influence and their means to do so is communication.

Communication can be direct and indirect.<sup>15</sup> Direct communication involves personal as well as written communication, with the former usually being the basis for the latter. Personal communication, thereby, can take many forms, ranging from intensive meetings to lunch, dinner, as well as other evening events (Geiger, 2006).

Depending on the financial resources and the issue at stake lobbyists might furthermore complement their lobby strategy by indirect communication techniques. This involves the exertion of influence on or through the personal surroundings of policy-makers but also activities which are aimed at a broader audience. The latter can be grouped under

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<sup>15</sup> Other terms used are inside and outside lobbying (Thunert, 2003)

the term of issue-management, i.e. upon the active shaping and framing of societal issues and debates. This involves the use of the media (including websites) and of PR but also the organization of Grassroots campaigns (Beck, 2007; Geiger, 2006).<sup>16</sup>

Lobbyists thus have various ways of influencing policy-makers, but whom do they actually try to influence at what point of time in the policy-making process?

*“Experienced organizations know that they have to build up their influence: from the first phase of issue formation, through that of decision-making, to the phase of inspection” (van Schendelen, 1998, S. 11).*

For that reason, it would be appropriate to apply the concept of the policy cycle to identify which institutional actor is the primary lobbying target in a certain stage of the policy-making process and should thus reassure transparency in its dealings with lobbyists. Since the ETI is targeted only at the European Commission, however, the analysis will focus exclusively upon that institutional actor as well. Moreover, it has to be emphasized that, in any case, the Commission constitutes the prime target for lobbyists.

Generally speaking, successful lobbyists should shoot where the ducks are, i.e. they should concentrate their efforts on those actors and institutions that are most influential. While the Commission is involved throughout the whole policy-making process, its special relevance stems from its determinative role in agenda-setting and policy formation.

Its draft does not only set the general framework of a policy but it also is, more often than not, subjected to only minor changes during the rest of the policy-making process.<sup>17</sup> Hence, it helps his cause a great deal if a lobbyist manages to integrate his views into the draft. However it needs to be pointed out that the special multi-level, multi-actor nature<sup>18</sup> of the EU in which no actor clearly dominates the procedure requires lobbyists to engage in multi venue shopping and follow a policy through the decision-making process instead of focusing on a single actor at a single point in time. (Mazey & Richardson, 2006) In that context, it is possible to use the often “tried and tested ground” (Greenwood, 1997, p. 32) and lobby via the national route. This implies convincing national representatives to lobby for one’s cause in the Council, but also in the other institutions. On the other hand, it is just as reasonable to follow the Brussels

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<sup>16</sup> The treatment of Grassroots campaigns as a part of issue management is usually not found in the lobbying literature. This is probably due to the fact that issue management that stems from the literature on public affairs which represents broader and more comprehensive approach of engaging with lobbying, both in practice as well as research.

<sup>17</sup> Additionally it should be taken into account that the Commission usually plays the role as a mediator between the Council and the EP that can propose amendments to the proposal and can decide to discontinue the proposal of the Council or the EP deviate too much from its decision. These powers combined with the Commissions role in implementation increase the value of lobbying the it even further.

<sup>18</sup> Mazey and Richardson (2006) describe the EU as a multi-arena, multi-level nested games system

route via lobbying the institutions directly (Greenwood, 1997). Most comprehensive, but also most expensive is of course to use both methods.

A lobbyist using the Brussels route, while coming at the right point in time with the right mix of access goods, will usually knock on open doors as the European Institutions are known for their openness as a result of their resource dependencies.

His first place to go usually is the Commission which is by no means a coherent actor. Below its “political ‘head’” (Cini, 2003, p. 15), constituted by the college of Commissioners and their cabinets, it is divided into specialized *Directiones générales* (DG). These DGs are then separated in several Directorates which in turn consist of specialized units. It is in these units, where most of the work is done, as the drafting of a policy proposal is usually left to a mid-ranking official in the relevant unit. It is this *chef de dossier* and potentially the head of the unit who are the most promising lobby targets. The main content of the policy is decided in the early drafting phase within their responsibility and “[i]n general, the higher a proposal goes within the Commission, the more reduced is the capacity of interest representation [...]” (Greenwood, 2007, p. 33). Moreover, the *chef de dossier* is usually open to outside input, furthermore leaving various ways for lobbyists to supply their information (Teuber, 2001). For one thing, there are officially and timely announced public and focused consultations that take place via the web or via meetings and hearings. Consequently, lobbyists have a formal way of getting into touch with the Commission. However, these publicly announced consultations are usually based on a consultation document or on a Green- or White Paper that already defines the basic elements of a policy draft. Additionally, the draft will be subjected to changes after the public consultation is finished so that it is not sufficient to rely on the public consultation procedure (Geiger, 2006). Lobbyists should therefore use other lobbying tools to influence the *chef de dossier*, as well as surrounding staff in a more direct way. Personal but informal contacts make it more likely that influence can be exerted in a far more flexible way (Interview 1). A third major way of trying to influence the policy draft lies between the two and is described as “semi-formal” (van Schendelen & Scully, 2003, p. 8). The term semi-informal, however, seems to be more fitting as the tremendous number of expert groups and consultative committees that mushroom under the supervision of the Commission seem to be tilted to informality.<sup>19</sup> Having a seat in one of these highly specified committees

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<sup>19</sup> A different kind of committee system, i.e. the Comitology is involved in policy implementation. This overseeing body, initiated by the Council to assure that the Commission does not deviate too much from the Council’s proposition, is then another important access point for lobbying the Commission. Van Schendelen (2005) points out that the most comprehensive lobby strategy is to get a lobbyist in each of the Committee system which involves the Commission’s expert groups and Comitology committees but also the working groups who do the most of the work for the Council.

constitutes an important opportunity for each lobbyist. The committees are used as testing grounds for a policy proposal, but they frequently draft the complete proposal or parts of it while the *chef de dossier* is left with a merely moderating role.

To conclude, lobbyists have various ways of accessing the Commission and they usually lobby the “relevant DG bottom up” (Geiger, 2006, p. 98) as it is the working level that needs information. Success is not guaranteed as other lobbyists are active as well and the Commission stays in more or less permanent contact with the other competitive institutions. However, even if success is not guaranteed each lobbyist should take into account that once a proposal has left the Commission it usually gets harder to influence it. For lobbyists, this means that they have to start” as early as possible” (Interview 1, 2). For those, in turn, who are eager to scrutinize the ongoing political developments, this means that they should be able to see what exactly it is that the lobbyists are doing. Lobbying is such a central part of European policy-making that it should not be left to a handful of investigative people to find out about.

**Table 2: Summary - The European system of interest representation or**

<b>Who lobbies?</b>	Everyone who seeks to influence decision-makers or policy processes without being an constitutionally specified actor of the relevant decision-making process
<b>Why?</b>	To further their own (egoistic) interest, based upon a cost-benefit analysis
<b>In what kind of system?</b>	Exchange relationship between the (institutional) demand and the (lobbying) supply side. Based upon: <ul style="list-style-type: none"> <li>- Information (modified by reputation, representativeness)</li> <li>- Capital</li> <li>- (Economic power, legitimacy, votes)</li> </ul>
<b>How</b>	Lobbyists use <ul style="list-style-type: none"> <li>- Direct forms of communication via personal or impersonal contacts</li> <li>- Indirect forms of communication via lobbying the direct environment of decision-makers or via issue management (organization of grassroots campaigns, general PR)</li> <li>- formal and informal opportunities</li> <li>- use national as well as European access routes</li> </ul> Lobbyists shoot where the ducks are and lobby <ul style="list-style-type: none"> <li>- Each institution form the bottom-up→concentrate on the working level</li> <li>- Follow a policy through the policy-making process (from agenda setting to implementation and reformulation/termination)</li> </ul>

Own compilation

## **THE EUROPEAN COMMISSION AND ITS RELATION TO LOBBYISTS**

Even though it is agreed that the Commission is a highly competent authority that usually recruits the best of the best, it has been brought forward that it nevertheless depends on the input of lobby groups. It thus is not surprising that, despite the efforts since 1992 to structure its relation to lobbyists, the Commission has always "[...] wanted to maintain a dialogue which is as open as possible with all interested parties without having to enforce an accreditation system" (European Commission, 1992, p. 1). The presentation of the ETI in November 2005 seems to depart from this initial approach at first sight. By taking a closer look, however, one can detect that the ETI de facto continues rather than paradigmatically changes the way the Commission engages with lobbyists. Including the post-Nottingham period four broad phases can be identified.

The first phase, ranging from 1951-1992, is rather unremarkable, although the Treaty of Paris establishing the ECSC already prescribed that the Commission shall consult associations, thus giving lobby groups a role from the beginning on. Up to the 1990s, however, there was no overall or even coherent Commission policy towards lobby groups. The Single European Act then led to vastly increasing competencies of the European Institutions inducing lobbyists to follow on their heels and step up their game as well (Greenwood, 1998). Nonetheless, the European Institutions struggled with their new popularity which did not only show in the lack of a systematic and efficient approach towards consultation but also manifested itself in a wider set of concerns about the

1. level playing field of interest representation between 'powerful economic interests and 'weak' citizen interests
2. overcrowding of lobbyists and an overflow of information
3. appropriateness of standards of public life

For that reason, the Commission adapted a new approach towards lobby groups along with its new interest for transparency and it is important to point out that both the general transparency policy as well as the policy towards lobby groups are closely embroiled. They are, in fact, part of a European transparency debate that is concerned with the Union's remoteness and the lack of legitimacy and trust vested in it.

The Commission's new approach was based on a two-folded assessment. The lack of an organized policy regarding the relation to lobby groups increased the problem of information overload. Moreover, there was outside pressure demanding the assurance of proper and transparent procedures. On the other hand, however, there also was the dependency upon outside input and the importance of being accessible for outside

interests which would have conflicted with any tight regulation. In this context the Commission did in fact reject all of the more formalizing initiatives of the European Parliament (which was in a similar situation). In line with the heading “maintain a dialogue which is as open as possible” it opted for a voluntary or self-regulatory approach that proposed the following measures:

1. commitment to remind its own staff of their obligations and rights stipulated by official Staff Regulations
2. encouragement of all groups engaged in lobbying to draft and adopt a code of conduct (for which the Commission provided minimum standards)
3. commitment to set up a voluntary register for nonprofit making organizations
4. encouragement of the profit making sector to draw up a similar register<sup>20</sup> (European Commission, 1992)

From a general point of view, these measures can neither be regarded as being of a substantive character, nor was the Commission keen in implementing them. A (friendly) reminder of its staff to stick to its own rules cannot be regarded as a serious effort of coming to terms with transparency or potentially undue behavior of officials in their relation to lobbyists. Regarding the Code, the Commission failed in convincing the reluctant lobbying community, though it did manage to convince or threaten the Public Affairs community to found an umbrella organization and draw up a Code of Conduct. It has to be emphasized, however, that this Code barely adhered to the minimum standards and that the Public Affairs sector at that time neither constituted a large part of the lobbying community nor was a prime partner of the Commission.<sup>21</sup> A similar reluctance among lobbyists could be observed with regard to the voluntary register of profit making organizations, as there is none existing until this date, even though the Commission did initiate the promised register for nonprofit making organization in 1997. Its content was very basic in nature, generally being a tool for the Commission rather than the public, as had been intended.<sup>22</sup>

Some new momentum<sup>23</sup> came along with the White Paper on European Governance in which the Commission again expressed its renewed and increased concerns about the

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<sup>20</sup> The Commission justified the outsourcing of the responsibility of drawing up a register by pointing out that “[...] it is difficult for the Commission to define exactly who should or should not be included in a directory.” (Commission, 1992, pp. 2-3). It remains obscure why the profit making sector should not have encountered the same problem (if it would have tried to draw up a directory at all).

<sup>21</sup> Public Affairs agencies mainly work in the background and the prime contacts of the Commission (in the 1990s even more so than nowadays) were representative organizations or large firms (Naurin 2004). With reference to the discussion of access good one can argue that Public Affairs agencies do neither possess representativeness nor economic power and the type of information they can deliver may be of qualitative nature but has no direct connection to a constituency.

<sup>22</sup> The Commission more or less centralized information and databases it already had in one directory to enable itself to get a better overview about whom to consult or engage with. For the public the information provided was rather useless as detail and scope were only minimal.

<sup>23</sup> Between 1997 and 2001 there was not much activity with regard to the issue. Two contributions of Greenwood (1997, 2003) are probably the best proof. While Greenwood covered the regulatory efforts of the Commission (and the EP) rather extensively in his first contribution he simply maintained in the successor of 2003 that “[...] little of much significance has arisen since [and that] the focus here is upon summarizing the initiatives that are in place[...].” (Greenwood, 2003, p. 70)

EU's legitimacy and aimed to put stronger emphasis on input legitimacy. The result of these efforts can be seen in the newly 'invented' "principles of good governance", i.e. openness, participation, accountability, effectiveness and coherence (European Commission, 2001, p. 10). While the White Paper further proposed a whole range of measures, it were the lobby groups, or as the White Paper puts it, civil society that did play an important role. In this context, the following measures were of primary relevance:

1. Establishment of a "comprehensive on-line database providing details of civil society organizations active at European level" (European Commission, 2001, p. 15)
2. Drawing up of a code of conduct to specify minimum standards for consultation

The similarities between these measures and those that were proposed nine years earlier is rather striking and point to the fact that little progress has been made since 1992. A closer look at the Communications of the Commission then unsurprisingly reveals that the Commission's assessment of the matter has not actually changed, even though slight differences do exist.

#### CONECCS

The proposed on-line database was named CONECCS<sup>24</sup> and opened in 2002 and replaced the already established register for non-profit making organizations. Like its predecessor it did not provide for much content apart from the names of non-profit lobby groups. Still, its primary purpose was to assist the Commission in finding appropriate partners and in structuring the consultations in a more equal manner. However, admission to CONECCS was made dependent upon the fulfillment of a set of criteria<sup>25</sup> that reflected the concerns about the potentially questionable accountability, openness and representativeness of lobby organizations. Registration is however voluntary and there is no overseeing body that would assure the validity of information. An additional service was added in 2005 that further sets CONECCS apart from its predecessor. After pressure from the European Parliament, especially from MEP Bonde, the Commission published a list of its advisory committee system and later integrated this so called 'Bonde's list' into CONECCS. For the first time in EU history the Commission thus provides basic information (no individual names of participating organizations) about the presence and structure of expert groups and advisory committees and therefore about lobbyists' participation in early stages of policy making.

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<sup>24</sup> Consultation, the European Commission and Civil Society

<sup>25</sup> 1. Non-profit, 2. formally established on European level, 3. active and having expertise in a Commission's policy area, 4. having authority to speak for members, 5. operate in open and accountable manner, 6. willing and to provide further information

The information contained within CONECCS is nonetheless limited. Still it can be argued that CONECCS did constitute an improvement compared to its predecessor. The same is true for the proposed Code of Conduct for consultations.

#### GENERAL PRINCIPLES AND MINIMUM STANDARDS FOR CONSULTATION

The announced Code of Conduct for consultations was introduced in the form of ‘general principles and minimum standards for consultation of interested parties’ that were proposed in 2003. The rationale of the new approach on consultation was that “[c]onsultation processes run by the Commission must [...] be transparent, both to those who are directly involved and to the general public” (European Commission, 2002a, p. 17). Like the adoption of CONECCS, the new approach to consultation was not only directed at the Commission itself but also at lobby groups. Consequently the Commission did not only argue that “it must be clear

1. what issues are being developed
2. what mechanisms are being used to consult
3. who is being consulted and why
4. what has influenced decisions in the formulation of policy” (European Commission, 2002a, p. 17),

but also tried to incorporate lobby groups in a more active manner and required that each contributor to a consultation indicates

1. which interest he represents and
2. how inclusive that representation is.

Within the framework that is set by these general principles<sup>26</sup>, the minimum standards provide rough guidelines for the Commission staff on how consultations should be executed. In general terms, they should assure that the relevant target groups are covered in a comprehensive and equitable manner, that there is enough time to contribute to the consultation, that the ability to participate is publicly known and that the contribution to a consultation is acknowledged and a feedback is given.

The application of the minimum standards is limited to those policy initiatives that are subjected to an impact assessment procedure<sup>27</sup> and the Commission further differentiates between public and focused consultations. Public consultations are subjected to the full minimum standards and usually conducted by using the ‘Your Voice in Europe’ web portal. Focused consultations (with a limited and selected set of participants) in turn are not necessarily subjected to all minimum standards. The results

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<sup>26</sup> The general principles are directly deducted from the White Paper (see above) and link the new consultation approach to the greater concerns about legitimacy and accountability.

<sup>27</sup> Whether or not a policy is subjected to an impact assessment is normally decided when the Commission drafts its annual policy strategy.

of these consultations, for example, are published only as far as possible (European Commission, 2002a).

In a general assessment, the general principles and minimum standards should be regarded as an improvement of the consultation procedure. Overall they should provide for a more coherent, more equitable and more transparent consultation process, at least for a part of the policy initiatives. Yet, it should be taken into account that the minimum standards merely constitute guidelines and are not legally binding. Moreover, the ability to participate and to scrutinize who has influenced the policy making is diminished in the case of focused consultation and almost nonexistent in ad hoc consultations which are not bound by the standards at all.

The policy framework in which the European Transparency Initiative was proposed in 2005 still complied with the Commission's objective of 'maintaining a dialogue which is as open as possible'. The post-White Paper measures brought along a slightly more structured incorporation of lobby groups and partly increased the transparency of the consultation process. Yet, neither the lobby groups nor the Commission are greatly limited in their usual conduct. Lobbyists do not have to register, they do not have to adhere to a code of conduct and they can engage freely in ad hoc consultations with the Commission. On a general level, the Commission has adopted a low key approach. Put in clearer words, it even "[...] worked hard behind the scenes to resist formal regulation of lobbying" (Greenwood, 2003, p. 70). Accordingly, it valued its own accessibility for outside interests higher than clearly regulated and transparent procedures. Phrased differently, the Commission preferred output over input legitimacy. This assessment is furthermore supported by the fact that the Commission seemed to be quite satisfied with its failures concerning the Code of Conduct and the register for the profit making sector (Buholzer, 1998). In this context, the propositions of the ETI seem to be completely at odds with the traditional approach of the Commission.

#### **THE EUROPEAN TRANSPARENCY INITIATIVE**

The central aim of the ETI is to "strengthen personal integrity and institutional independence".<sup>28</sup> However, it is not this general objective that creates the impression of a deviation from the traditional policy but the arguments that are used to justify it.

*"The issue of integrity should not only be limited to public institutions. Organisations, groups or persons in the ambit of European institutions which offer advice, represent clients, provide data or defend public causes should also be*

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<sup>28</sup> The second thematic focus is to increase financial accountability by closing the "information gap" (Kallas, 2005, p. 5) with regard to recipients of agriculture and structural funds. It is tremendously important, yet not of much interest for the paper.

*accountable. People are allowed to know who they are, what they do and what they stand for.”*

This central argument, brought forward in Kallas’ Nottingham speech, was then further stressed by pointing out that

*“[t]here is nothing wrong with lobbies [...]” but that “[...] their transparency is too deficient in comparison to the impact of their activities.”*

Accordingly it was criticized that

*“[t]here is no mandatory regulation on reporting or registering lobby activities. Registers provided by lobbyists’ organisations in the EU are voluntary and incomprehensive and do not provide much information on the specific interests represented or how it is financed.”*

It is remarkable that Commissioner Kallas presented both the strengthening of personal integrity and institutional independence within the ETI as being almost completely dependent upon the conduct of and the reporting about lobbying. More remarkable or even striking is further that Commissioner Kallas in fact complained about general deficits and poor implementation of the Commission’s own policy approach. The register he mentioned is neither provided by lobbyists (but by the Commission itself) nor incomprehensive because it was purposively limited to non-profit making organizations and simply did not require the disclosure of tangible information. “At that time, we were pretty amazed” stated an interviewed lobbyist after being asked about the underlying reasons for the ETI and this surprise does not come out of nowhere (Interview 1). It thus remains rather unclear why the Commission decided to focus upon lobbyists.

Unlike in the US, the European lobbying system has not been shattered by an encompassing lobbying scandal. There are, however, traditional concerns about the Union’s legitimacy and transparency and no doubt can be raised that lobbying in the EU has to fight its usual bad connotation. It was in fact this aspect that Kallas called upon in his Nottingham speech when complaining that “Brussels is regarded a far away rainy place, as an inaccessible political ‘black box’ where all sorts of obscure measures are taken.” (p. 3). From that point of view, it is only reasonable to perceive the new focus upon lobbyists and the related provision of new information about policy processes as an appropriate option to deal with the problem. In later speeches, Kallas maintained, that even if there had not been any big lobby scandals in the Union so far, there always was the potential of undue lobbying and that the ETI should help in preventing these scandals from taking place at all. A further plausible reason for focusing largely upon lobbyists might relate to the involvement of politics: “[s]imilar to a ‘garbage can’ model of policy making, where the solutions search for problems [...]” (Greenwood, 1997, p.

588) – lobbyists were identified as an easy target to increase the legitimacy of the Union or at least improve the outside recognition of a Commissioner<sup>29</sup> (Interview 1; 2). A closely connected third option could then be that the focus upon lobbyists itself is the result of lobbying. Informal campaigning by the lobby critical group Corporate Europe Observatory (CEO)<sup>30</sup> who criticized the offering of well paid lobbying positions to former officials and condemned privileged access for particular groups might have at least partly prompted the Commission to take up the issue (Interview1). Whether or not this last assumption is true is not only a matter of speculation but also of no great importance. Nevertheless, the fact that *there is speculation at all* shows that increased transparency in the relations between the Commission and lobbyists might not be the worst thing to strive for.

The publication of the Commission’s Green Paper in 2006 launched a consultation procedure on its Transparency Initiative. Considering the results that are now summarized in the ETI, it becomes striking that even though the ETI focuses upon lobbyists, as has been expected, the proposed measures fall somewhat short if compared to Kallas’ (posturing) Nottingham speech. In fact, they appear to be closer to those 1992 and 2001 proposals, thus prompting the conclusion that the ETI might not provide that big of a change of direction after all, but rather continue the well-known Commission transparency policy. Based upon a review of the existing measures as well as upon the assessment that “lobbying is a legitimate part of the political system” (European Commission, 2006, p. 5) that can also be improper, the Commission proposed the following measures:

1. Creation of a voluntary register for all kinds of lobby groups
2. Drafting of a common Code of Conduct for lobbyists
3. Reinforcing the application of the minimum standards for consultation
4. Initiating a debate with other European Institutions on the rules and standards of public office holders.

The last two measures are hardly worth mentioning as they do not imply any changes but rather constitute intangible stipulations. This in turn confirms the assumption that the Commission tried to achieve transparency and legitimacy by focusing almost exclusively upon lobby groups. Thus, it are the first two measures which constitute the heart of the ETI. Those should not be seen as individual but as closely intertwined measures. The Code of Conduct is aimed at consolidating and replacing the already existing ones (i.e. those that were criticized by Kallas). It is supposed to be a common code, therefore applicable to all lobby groups, that is furthermore to be accompanied by

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<sup>29</sup> Kallas is primarily responsible for internal affairs and the fight of fraud. Both have in general little outside appeal.

<sup>30</sup> CEO is of course a lobby group as well.

a formal sanctioning system.

Like the Code, the lobbying register as well is open for all lobby groups. Entry is going to be voluntary but dependent upon the acceptance of the Code as well of the registrants' willingness to disclose "[...] who they represent, what their mission is and how they are funded" (p. 8).

In that context, the voluntary character in general, but especially the combination with the disclosure of (sensitive) financial data was perceived as a potential disincentive for registrations. It is for that reason that the Commission promised to offer automatic e-mail alerts for registrants. The mentioned matter became the hot topic in the consultation process that was initiated by the Green Paper to which the Commission responded by proposing an additional (negative) incentive. According to the follow-up document to the consultation, each non-registered participant in public or focused consultation processes will now be considered an individual contributor (European Commission, 2007a). Furthermore, the Commission restated that it would adopt a mandatory register if the compliance with the proposed register would be low (European Commission, 2006; 2007a). Even though the follow-up document specified and clarified the structure of such register, it has to be emphasized that the provided information is still rather vague so that, among others, only little is known about the monitoring and sanctioning system.

## PART 2: ASSESSMENT OF THE LOBBYING REGULATION SCHEME

This paper primarily seeks to analyze whether the ETI can help to make the European policy making more legitimate. So far it was argued that transparency can in general contribute to legitimacy and that – although the transparency level of the Union is rather advanced – there is not much information about the interaction between lobby groups and policy-makers available. This lack of information is accompanied by the belief that lobbying is an undue practice and corrupts the political system. Thus, and this is also the plan of the Commission, the ETI should improve the transparency of the interactions between lobbyists and the Commission and it should prevent undue behavior. The question though is, whether Commission's approach, i.e. the setting up of a lobby regulation and registration scheme is likely to be efficient. Once the Commission establishes its register, it will be one of the very few political (sub-) systems that will have enacted a lobbying regulation scheme at all. The issue is advancing on the agenda and several states have recently implemented some sort of regulation, yet it is still true that

*“[...] countries with specific rules and regulations governing the activities of lobbyists and interest groups are more the exception than the rule.” (Malone, 2004, p. 3).*

Likewise, it is rather exceptional that scholars have an interest in investigating lobby regulations and the body of literature is rather small. Nevertheless, vital insights can be gained from this limited set of existing evaluations. The experiences made in already regulated countries and the (summarizing) conclusions and analytical concepts of scholars help to focus the assessment of the ETI on those issues that are likely to be critical for its effectiveness. In terms of analytical concepts, the literature provides classifications of regulatory approaches and framework checklists as well as indices for (comparatively) assessing lobbying regulation schemes.

The classifications are rather general in nature but help to demarcate the potential approaches that are available for regulating lobbying. The most basic classification is delivered by Ahrens (2007) who simply differentiates between formal and informal measures. The classification of Malone (2004) is a bit more elaborate as she includes the regulation of the lobbied, e.g. by rules and standards of public officials, as well. Greenwood and Thomas (1998), but also Thunert (2003) in turn point to existing self-regulation by lobby groups. In terms of direct and formal lobby regulation Johnson (2007) and Thomas (1998) further differentiate between rules aimed at *monitoring* and rules that concern the *regulation* or the *prohibition of behavior*. Drozd (2006, p. 80)

then maintains that political systems can choose from a “five course menu”<sup>31</sup>. It seems more appropriate, however, to refer to the entire matter as a buffet as there are multiple options to choose from (Table 3).

**Table 3: Classification of approaches to lobby regulation**

<b>Indirect regulation</b>	Self-regulatory / voluntary approaches	
	General rules and standards (ethics, corruption etc.)	
<b>Direct regulation</b>	Informal rules	
	Lobbying laws	Monitoring
		Regulation

Adapted from Drozd (2006)

Political systems that decide to actively regulate lobbying (i.e. that do not just rely on informal rules) usually combine these various approaches which is also true for the European Commission. Thus, even if the subsequent analysis will focus almost exclusively on the direct and formal regulation of lobbying – the “lobby laws” as Drozd (2006) termed it – it should not be forgotten that indirect and informal rules are often at work as well.

The framework *checklists* provided by the literature are generally similar in nature and can be subsumed under five key-issues that can be found in all of the reviewed lists in one form or the other (Table 4). Taking up these central issues, the analysis will concentrate upon the aspects of definition, disclosure, regulation of behavior, procedures and enforcement.

**Table 4: Key-issues**

	<b>Pross (2007)</b>	<b>Drozd (2006)<sup>32</sup></b>	<b>(CPI, 2003b)</b>
<b>Definition</b>	Who is to be regulated?	Definition of lobbyists and lobbied entities	Definition of lobbyists
<b>Disclosure</b>	What should be required to be disclosed?	Restrictions <sup>33</sup>	Individual and employer spending disclosure
<b>Regulation (behavior)</b>	Codes of Conduct	Restrictions (Codes of Conduct)	(Individual registration) Revolving door provisions
<b>Procedures</b>	How can the integrity of lobby regulation be ensured?	Rules on oversight and control	Electronic filing Public access
<b>Enforcement</b>	How can compliance be obtained?	Sanctions	Enforcement

Own compilation

<sup>31</sup> Own translation

<sup>32</sup> Drozd (2006) has an additional category of ‘special rules’ but these rules (e.g. revolving-door provisions) are in fact already contained within the other categories

<sup>33</sup> Drozd (2006) perceives also the requirement to register and disclose information as a restriction of behavior.

Some authors have also developed indices. Opheim (1991) for example used 22 (mainly) dichotomous indicators organized in three dimensions (definition, disclosure, oversight and enforcement) to assess the stringency of lobby laws. However, the lack of any details about the coding and the indicators render the index fairly useless. In contrast, the already mentioned Center for Public Integrity (see Table 4: CPI) provides sufficient details about its index that is based on 48 indicators that are structured into eight key areas (CPI, 2003b). The CPI-index seeks to assess the effectiveness of lobby laws in terms of transparency and accountability. On that basis, it appears to be a readymade approach for this paper, as long as one disregards the fact that it is aimed at the provision of quantitative and comparative data. For that reason, the CPI-index has to be rejected as the basis of the subsequent assessment. This, instead of generating numerical scores, will take into account the experiences made in and by other countries. As such, the analysis will be qualitative in nature, while the measure of effectiveness is deducted from the transparency framework in combination with the Commission's aim of the ETI.

The Green Paper on the ETI stipulates that

*“When lobby groups seek to contribute to EU policy development, it must be clear to the general public which input they provide to the European institutions. It must also be clear who they represent, what their mission is and how they are funded.”*

The proposed lobbying regulation scheme will thus be deemed to be potentially effective if it furthers the transparency of lobbyists' involvement in policy making. In the terminology of the framework, the regulation scheme should provide information about *whether, how, and where* lobbyists participate in policy-making and *what effects* this participation might have upon policy-makers and decisions. A provision of this kind of information could increase the potential to hold policy-makers accountable and open up opportunities for participation. It could also increase the overall performance of the political system as a heightened fear of detection renders undue behavior less likely. An additional potentially performance improving component of the regulation scheme is the proposed Code of Conduct, which will be a part of the assessment, although it is not a measure that is directly related to transparency.

Admittedly, this measure of effectiveness is rather intangible but there seems to be no better option. The common problem of social science (which is usually not conferred to the laboratory) is at play because it is impossible to establish counterfactual claims. The effectiveness of lobby regulation schemes always depends upon other factors and “[...] it is virtually impossible to isolate their effect from other influences on the conduct of

politics [...]” (Thomas, 1998, p. 511). By basing the subsequent analysis upon the experiences of those countries that have already enacted a lobby regulation it is nevertheless hoped to derive meaningful inferences about the potential effectiveness of the ETI.

The assessment will be structured along the five identified key-issues of regulating lobbying all of which will be discussed separately. Each discussion consists of four stages. A description of the Commission’s proposal will form the basis of the discussion while an exemplary reconstruction of the debate that evolved among representative organizations of the lobbying community will point to matters of concern that deserve greater elaboration. The data set of the organizations to be included here is limited and was compiled through a process of purposive sampling. Out of more than 160 participants in the consultation on the Green Paper, seven organizations were chosen in a manner to represent the most important stakeholders that have an interest in the proposed regulation scheme. Their positions are mainly deducted from their contributions to the consultation. The positions of the three most active organizations (ALTER-EU, SEAP, EPACA) were moreover complemented by taking into account statements made on their websites. Furthermore, EurActiv.com was used as a back up source.<sup>34</sup> In the third stage the experiences of other countries will be considered in order to provide comparative insights for the analysis. The set of reviewed countries was created by integrating all those countries which are already looking back on a *history* of formally and directly regulating lobbying. Several Eastern-European countries have recently enacted lobby regulation schemes, but insights that could be gained from a regulation scheme that has only been enacted a year or two ago were not considered relevant enough to be included. Moreover, it were only taken into account lobbying regulations on the federal level, leaving aside numerous North American state level schemes. Finally, the fourth stage of the discussion will provide a general issue-related assessment of the lobbying regulation scheme. The third and the fourth stage will primarily be based upon secondary literature review but also draw open a set of semi-structured interviews that were conducted with various stakeholders. The semiformal-interviews took place in a late stage of the research process and thus were mainly used as a back up source to validate information gained from the literature analysis.

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<sup>34</sup> A simple keyword-search with the term ‘transparency initiative’ was done to reveal the most relevant articles. Occasionally links to other EurActiv articles were followed as well.

**Table 5: Sample of representative organizations**

<b>Name</b>	<b>Represented constituency</b>
Society of European Affairs professionals (SEAP)	Public Affairs Consultants <sup>35</sup>
European Public Affairs Consultancies' Association (EPACA)	Public Affairs consultancies
Council of Bars and Law Societies of Europe (CCBE)	Lawyers
Business Europe	Corporate / in-house lobbyists / business NGO
Civil Society Contact Group (CSCG)	General (umbrella) NGO
Transparency International (TI)	Transparency forwarding NGO
The Alliance for Lobbying Transparency and Ethics Regulation (ALTER-EU)	lobby critical (umbrella) NGO

Own compilation

**Table 6: Sample of reviewed lobbying regulation schemes**

<b>Country</b>	<b>Year of enactment</b>	<b>Major amendments</b>
United States of America	1946	1995, 2006/7
Germany	1972	-
Australia	1983	1996 (abolishment)
Canada	1989	1995, 2005, 2007/8
European Parliament	1997	-

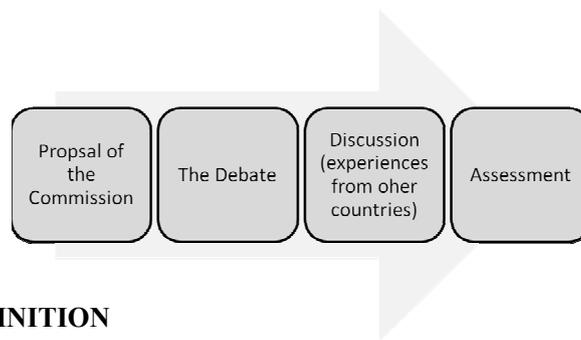
Own compilation

**Table 7: Sample of interviewed stakeholders**

<b>Interview</b>	<b>Stakeholder</b>	<b>Date</b>	<b>Method</b>
Interview 1	Lobbyist (industry association)	29.02.08	Face to face
Interview 2	Lobbyist (public affairs consultancy)	29.02.08	Face to face
Interview 3	Public servant (Commission)	04.03.08	phone
Interview 4	Lobbyist (consumer NGO)	25.04.08	phone

Own Compilation

<sup>35</sup> Usually SEAP is considered as a representative organization of individual Public Affairs consultants, but the organization is keen in underlying that it represents individuals engaged in Public Affairs that work in a variety of organization including corporation and NGOs. Nevertheless, the subsequent analysis will consider SEAP as a representative organization of Public Affairs consultants or for-profit lobbyists. This is not done out of disrespect but simply for the sake of readability and conciseness.



## KEY-ISSUE 1: DEFINITION

*“It is an essential part of any good statute, whenever there is the least doubt, to define the terms included in it, and since there is considerable difference of opinion about the term “lobbyist,” a definition is very necessary” (Pollock, 1927, p. 340).*

This statement is as plausible nowadays as it has been 90 years ago and in fact, definitions constitute the basis of each regulation scheme.

### PROPOSAL OF THE COMMISSION

The Commission proposed to define ‘lobbying’ as

*“all activities carried out with the objective of influencing the policy formulation and decision-making processes of the European institutions.” (European Commission, 2006, p. 5)*

From the publication of the follow-up document onwards, the Commission has tended to replace ‘lobbying’ with ‘interest representation’ but failed so far in applying the new terminology in a consistent manner (European Commission, 2007a; 2008a). For this reason, and to maintain consistency, at least within this paper, the term ‘lobbying’ will still be used in the remainder of the analysis. The same is valid for ‘lobbyists’ which the Commission defines as

*“persons carrying out such activities, working in a variety of organisations such as public affairs consultancies, law firms, NGOs, think-tanks, corporate lobby units (“in-house representatives”) or trade associations.” (European Commission, 2006, p. 5).*

The follow-up document differentiated lobby groups into three categories:

1. Professional consultancies and law firms
2. In-house lobbyists and trade associations
3. NGOs and think-tanks

The draft of the Code of Conduct added an exemption from this definition, consequently excluding

*“activities performed by independent members of professions providing legal advice, such as lawyers, in so far as such activities relate to the exercise of the fundamental right to a fair trial of a client, including the right of the defence in administrative proceedings” (European Commission, 2008a, p. 1).*

So far, no other definitions have been provided and the Commission has stated several times already that it does not intend to publish guidelines or other explanatory documents (Kallas, 2007a).

## THE DEBATE

The debate regarding the definitions focused on three issues. First, the use of the usually<sup>36</sup> negatively connoted term ‘lobbying’ was criticized and found its reflection in the already mentioned change of terminology (European Commission, 2007b; SEAP, 2006; Business Europe, 2006). Second, the scope of the regulation scheme constituted a conflictive issue to which mainly representatives of public affairs consultancies and law firms voiced their concerns.

Albeit applying a different angle, both claimed that the definition proposed by the Commission was too wide. The latter especially criticized that even activities that should be considered as traditional of the profession rather than lobbying would be covered by the definition (CCBE, 2006). As a result, it was feared that the lobbying regulation would conflict with the standards and rules of the legal profession, “in particular professional secrecy” (CCBE, 2006, p. 3).<sup>37</sup> SEAP (2007) and EPACA (2006) in turn criticized that the Commission failed in providing clear guidance on what constitutes a lobbying activity and what does not. They did, moreover, reject CCBE’s calls for a special treatment of lawyers fearing that law firms who are heavily engaged in lobbying could gain a comparative advantage. EPACA (2006) argued accordingly that “[...] lobbying is conducted by a variety of actors, and transparency must apply equally to all those who lobby the European institutions” (p.2). Third, various participants of the debate argued for the establishment of thresholds that would exempt particular groups or actors from the need to register. Different arguments were put forward to sustain these claims. While TI (2006) and CSCG (2006) pointed out that the need to register as a lobbyist should not prevent individuals or small groups from engaging with public institutions, the CCBE declared that the burden of registration should not be imposed on firms for which ‘lobbying’ constitutes no more than a minor part of the work for a client.

## DISCUSSION

As always in legislation, the wording of a definition determines a law’s effectiveness and in our case the effectiveness of the entire regulation scheme as well (Pross, 2007). Imprecise definitions that allow misinterpretations or lack in scope open up loopholes

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<sup>36</sup> The connotation of lobbying differentiates across the member states. The United Kingdom perceives the term as a rather neutral concept, while other countries like France associate negative and undue practices with the term. In other countries like Germany, the term has an ambivalent connotation. Often, the media or the public complain about the privileged access of the ‘*pharma lobby*’ or the ‘*tobacco lobby*’, yet at the same time also complain that some (underprivileged) groups ‘*do not have a lobby*’.

<sup>37</sup> CCBE commented the Green Paper in which did not contained the exemption for lawyers. A statement of the ‘Law Society of England and Wales’ indicates however that even the exemption that was introduced with consultation on the draft Code of Conduct is not perceived as going far enough (The Law Society, 2008).

and permit the subjects of regulation to adhere to the *letter* but not to the *spirit* of the law (Pross, 2007). This is shown by various examples from other countries.

The most extreme case is probably constituted by Australia, the only country that has abolished its lobby regulation scheme so far. The Australian scheme was extremely limited in terms of defining ‘lobbyists’ as well as ‘lobbied’ (Warhurst, 1998).<sup>38</sup> There were huge discrepancies between the lobbying taking place in Canberra and the lobbying that was covered by the regulation. The Australian approach was flawed in many other respects as well but the lack of a precise definition surely contributed to the almost complete lack of acceptance among lobbyists and policy-makers that ultimately resulted in the complete lack of effectiveness (Warhurst, 1998).

Besides drastic shortcomings, problems resulting from the wording of a definition can also have more subtle causes. From 1946 till 1995 the US-lobby act defined ‘lobbying’ as direct communication with Members of Congress by a person

*“who ‘, collects, or receives’ money or anything of value for lobbying” and “whose principle purpose is to influence legislation” (Thomas, 1998, p. 507).*

Many lobbyists simply circumvented this definition by stating that ‘lobbying’ was not their ‘principal purpose’ or that they used their own resources instead of ‘collecting or receiving money’ (Thomas, 1998). Similarly, the Canadian regulation stipulated until 2005: to

*“‘lobby’ means to communicate with a public officer in an attempt to influence [...] the development of any legislative proposal [...]” (Chari & Murphy, 2006, p. 109)*

The clause ‘attempt to influence’ made the conduct of lobbying dependent upon a purely subjective proof. The reformulation to communication ‘in respect’ of the development of a government decision was able to add an objective proof which effectively hindered lobbyists to simply claim that they did not try to exert influence (Chari & Murphy, 2006).

Consequently, it seems to be important that a regulation elaborates broadly on the definitions on which it is based. Since the 1990s, North American regulation schemes contain extensive chapters on definitions. Almost each word of the important provisions is further explained. As a result, it is not even a problem anymore that the US lobbying act still contains the usually narrowly defined term ‘client’ which would exempt in-house lobbyists from being considered as lobbyists. The act simply stipulates that “[a]n organization employing its own lobbyists is considered its own client for reporting

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<sup>38</sup> A ‘lobbyist’ was defined as a person (or company) who, for financial or other advantage, represents a client in dealings with Commonwealth Government ministers and officials.” (Malone, 2004, p. 6). This definition excluded the majority of lobbyists, i.e. employees of associations or corporations as well as potential targets, e.g. standard MEPs (Warhurst, 1998).

purposes” (U.S. Senate, 2008, p. 4). Agreeing with Pross (2007) it can thus be argued that definitions should be precise in terms of what to include and what to exclude from regulation but that they should be broad and encompassing in terms of defining lobbyists, lobby activities and the lobbied. These guideline principles naturally leave finding a definition an ungrateful activity to perform – Greenwood and Thomas (1998, p. 491) refer to it as a” definitional maze”. Nonetheless, a closer look at present definitions of the reviewed countries might be helpful in finding a way through as the four countries provide three general approaches to defining ‘lobbying’.

The German approach is limited to the Bundestag. It was established in the 1970s and reflects the corporatist *zeitgeist* of this time (Ronit & Schneider, 1998). Its special features becomes visible in the fact that the German regulation manages to avoid the struggle of finding a definition by simply not defining ‘lobbying’ or ‘lobbyists’ at all. This, however, comes at the price that only peak associations (who want to participate in official hearings) are allowed to register so that the German register extremely lacks in scope. Especially after the government’s move to Berlin, that initiated the so called process of “*Berlinization*” (von Alemann, 2000)<sup>39</sup>, it is by no means an appropriate solution anymore.

In its essence, the approach of the European Parliament is similar to the German one. Both regulations are limited to the parliaments and rely upon an “incentivized access system” (Greenwood, 2007, p. 47).<sup>40</sup> However, while the German register completely fails to provide a definition, the EP tries to circumvent the ‘definitional maze’ by relying on the self-definition of lobbyists. Each person who frequently wishes to enter the Parliament

*“with a view to supplying information to Members [...] in their own interests or those of third parties.” (Rule 9(4) Rules of Procedure)*

should register. This person then receives an entry pass and defines himself as a lobbyist. This self-definition approach is praised “ingenious” (Greenwood, 1998, p. 594) as well as an “innovative strategy” (Malone, 2004, p. 10), but it can be argued that it is fairly limited. In real life, lobbying is neither conferred to the premises of the EP nor is a pass a precondition for entering the EP.<sup>41</sup> The self-definition approach thus

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<sup>39</sup> Although von Alemann acknowledges the changes in the German lobbying landscape he is not of the opinion that a regulation of lobbying is necessary. He does not make out an ‘*Americanization*’ of the German lobbying i.e. neither corporations nor consultancies play a central role. However the validity of this assessment can be questioned (nowadays even more so than eight years ago) and it is furthermore puzzling while a lobbying system that is dominated by associations should not be subjected to transparency or should be left unregulated.

<sup>40</sup> In Germany, registration is in theory a precondition for the participation in parliamentary hearings. In the EP lobbyists can apply for a pass that allows them to enter the Parliament without waiting in the cue.

<sup>41</sup> The regulation scheme of the EP covers only lobbying that takes place within the premises of the European Parliament and a pass is not needed for meeting an MEP outside of the Parliament or for having a conversation on the phone. Moreover,

surely was helpful for bringing the regulation scheme through the parliament as it avoided the struggle for finding a common definition, yet it does not necessarily provide a correct map of the actual lobbying taking place in the context of the EP. It therefore can be considered to be “inherently flawed” (Pross, 2007, p. 12; Greenwood, 1998).

In consequence, it seems to be almost impossible to avoid a definition if one has the objective to set up an effective regulation scheme. In fact, the regulation approaches of Canada and the USA do rely upon a different system. Remuneration is used as a trigger for identifying lobbyists and a ‘lobbyist’ is a person who engages in paid lobbying activities for a third party (Pross, 2007).<sup>42</sup> Consequently, it is important to define what actually counts as such an activity. Principally both schemes understand lobbying as communication with public office holders, whereby the schemes cover the executive as well as the legislative branch.<sup>43</sup> In their most recent version the schemes also take indirect communication and grass-roots lobbying into account (U.S. Senate, 2008; Holmes, 2007). The US regulation scheme additionally considers preparatory work for ‘communicating with public office holders’ as lobbying.

Moreover, both schemes have implemented financial and time thresholds that exempt those groups and individuals from the need to register that lobby only occasionally. These thresholds are especially important in the US as the first federal lobby regulation was even declared unconstitutional because it conflicted with the First Amendment (Thomas, 1998; Zeller, 1958). The underlying concern i.e. the protection of basic constitutional rights such as the right to petition or free speech that led to the unconstitutionality are valid for all countries wanting to regulate lobbying. Accordingly, an open and public debate should not be constrained by requiring each participant to register as a lobbyist (Johnsen, 2007).

## **ASSESSMENT**

The Commission’s lobbying regulation scheme is still in the making but it is very likely that the definitions of ‘lobbying’ and ‘lobbyist’ will not be subjected to any further changes (Interview3). Based on the present characteristics, however, it is rather probable that the Commission’s definitions will result in low compliance or at least open up opportunities thereof.

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even without a pass (or after the withdrawal of the pass) a lobbyist must not wait in the cue for applying for a day pass if he provides an invitation of an MEP (Pohl, 2006).

<sup>42</sup> It was already stated for the US that the third party can also be the employer or the lobbyist himself. The same counts for Canada.

<sup>43</sup> Up to 1995 the US scheme did only cover the Congress.

Generally speaking, the experiences made show that even mandatory regulation schemes like in the USA, Canada and Australia can suffer from low compliance due to unclear, badly worded definitions. In this respect, the central element of the Commission regulation scheme is 'lobby activities' as 'lobbyists' equaling 'persons carrying out such activities' are defined in relation to that term. However, unlike the North American regulation schemes, the Commission fails in clearly defining what constitutes a lobby activity and what does not. In relation to this, two major problems can be detected. The one is a matter of wording, the other one a matter of content.

The wording 'all activities carried out with the objective of influencing the policy formulation' is quite similar to the Canadian pre-2005 definition. Even though it might be possible to identify slight differences in stringency between the Commission clause 'objective of influencing' and the Canadian clause 'attempt to influence', it is still obvious that the definition's wording is prone to exploitation and circumvention because it depends upon a subjective proof. The Commission could close this loophole by exactly defining what constitutes an 'objective to influence', but so far it has not really tried to clarify its definitions and sometimes even rejected to provide further clarifications (Kallas, 2007a).

A clearer definition, however, would likewise be necessary for the term 'all activities'. This is especially important in a regulatory system that relies upon financial disclosure as the main indicator for revealing lobbying efforts. Mimicking the US approach, EPACA (2006) proposed to focus the definition "on lobbying contacts and efforts in support of such contact" (p.2)<sup>44</sup>. Considering preparatory work as 'lobby activities' is indeed reasonable because successful lobbying does depend on doing one's own homework and the expenses on that preparatory work are thus important as well. Nevertheless, the question of "when does a standard activity becomes a 'lobby activity', i.e. where does lobbying start?" remains. Should the development of a strategy, the setting up of a meeting or the organization of a conference be considered as a (preparatory) 'lobby activity'? Monitoring as an act of 'minimizing surprises' has already been described as an important preparatory activity and it is probably mentioned in every book on lobbying strategies. Yet, one interviewee argued that

*"monitoring is not lobbying .It is looking at what is going on and informing your client about it. It is the other way round" (Interview 2).*

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<sup>44</sup> The position paper of EPACA is however contradictory. They recommend to adapt a lobbying definition from the Institute of Public Relations and the Public Relations Consultants Association which is defines 'lobbying' "as the specific efforts to influence public decision-making [...]" (EPACA, 2006, p. 2)

If one estimates roughly, lobbying might take up 10% (Michalowitz, 2007b), 15% (Spencer, 2007), or under 50% (Interview1) of the work a lobbyist usually executes. The differences in these estimates show that there are many different understandings of the terms ‘lobbyist’ and ‘lobby activities’. It is thus tremendously important that the Commission comes up with clear definitions to determine what *should and not could* be understood as ‘lobbying’.

Unclear definitions create a leeway that allows the subjects of regulation to adapt the definitions to their needs. In this context it is also important to define the ‘lobbied’. Even though the Commission regulation scheme is aimed at covering only lobbyists lobbying the Commission, its definition contains the phrase ‘activities [...] influencing the policy formulation and decision-making processes of the European institutions’ (Interview 2). This again leads to the difficulty of deciding consistently which lobby activity should be disclosed and what activity should be considered when estimating lobbying expenditures.

Overall, the current Canadian and US legislation with their extensive elaborations would provide for a good example to follow after.

### **KEY-ISSUE 2+3: PROCEDURES AND ENFORCEMENT**

Definitions are important, but if it is too burdensome or complicated to adhere to them or if there is no control of compliance, it is unlikely that even the most carefully worded lobbying regulation regime will be effective. For that reason, the issues of procedure and enforcement will be discussed in the following.

### **PROPOSAL OF THE COMMISSION**

So far, the Commission was not very active in providing information about the procedures and enforcement of its regulation scheme, so that only cornerstones are publicly known.

Concerning its structure and usability, the new register will be similar to the present CONECCS, both for registrants as well as users (Interview3).<sup>45</sup> Registration will be voluntary. It should be carried out on an annual basis, for which an online registration system will be used. The act of registering itself should not take much time as preformatted data entry forms will be used to enter the relevant information for each group (Interview3). Similar to online-shopping or software installation for which one has to consent to the general terms and conditions of sale, registrants complete their

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<sup>45</sup> Probably for this reason, the CONECCS register is not accessible anymore which is from a viewpoint of transparency a clearly negative issue because the new register will probably not be enacted before the end of spring and in the meantime there is no possibility to derive information about lobby groups.

registration process by reading, accepting and thus binding themselves to the Code of Conduct that was proposed within the framework of the ETI (Interview 3). The registered information will not be confirmed by any upfront checks. Moreover, each registrant can decide under which of the three mentioned categories he would like to be registered. In lack of a regular review, audit or control of the provided information, the Commission will provide a web-based form for issuing complaints about breaches of the code or the provision of false or misleading information (Interview3; European Commission, 2006). While this possibility is not restricted to a particular set of actors, complainants are demanded to supply a material proof for their accusation (Interview3). The accused will be given room to defend themselves, but generally there will be no publication of complaints and also no blacklisting. “As a measure of last resort, the Commission can exclude registered lobbyists [...] from the register.” (European Commission, 2007a, p. 5; Interview 3).

In order to promote compliance, however, positive as well as negative incentives are part of the system. Registrants can indicate areas of interest on which the Commission will provide automatic e-mail alerts, while non-registered groups will be treated as individuals if they participate in official consultations (European Commission, 2007a).

#### **THE DEBATE**

Almost all of the described cornerstones were subjected to debate and received criticism as well as support. Consent, however, was achieved in terms of critics’ opinion on the incentives.<sup>46</sup> The positive incentive of providing automatic e-mail alerts was deemed to be too weak to be of meaningful substance (EPACA, 2006; SEAP, 2006; CSCG, 2006). Even more important, the measure of creating incentives was also deemed to be working against the aims of the ETI. The basic argument in that respect reads that the incentive creates privileged access to information, benefiting those that already have better access to EU institutions and information (CSCG, 2006; SEAP, 2007). CCBE (2006) goes as far as to demand that “[...] such alerts should be considered no less than a right for all in a transparent governmental system” (p.3). The negative incentive has not been part of the initial Green Paper. Accordingly, the majority of reviewed documents did not comment upon it. However, it can be argued that considering unregistered participants in public consultations as individual contributors creates a privileged access situation as well. This issue then prompted TI (2006) and CSCG

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<sup>46</sup> Not all reviewed representatives elaborated upon this issue but if they did, they criticized it. Moreover, Spencer (2006) states that “[t]he only broad agreement to be found amongst the contending parties is condemnation of the Commission proposal to give automatic alerts of new consultations as an encouragement to those who register.”

(2006) to demand the implementation of the above mentioned thresholds to exempt small or occasionally lobbying organizations from being affected by the register.<sup>47</sup>

The controversial issue among the reviewed organizations started to manifest itself in the consideration of a *voluntary* register. Public affairs representative were generally supportive of the Commission proposal and argued for an approach that avoided new red tape and heavy burdens (SEAP, 2006; Business Europe, 2006).<sup>48</sup> Especially SEAP (2007) warned that a too demanding or too complicated register might function as a disincentive, leading to low compliance. In contrast, representative of citizen groups strongly favored a mandatory system (TI, 2006; ALTER-EU, 2006b; CSCG, 2006). The critique's focus was put on "enforceability" (TI, 2006, p. 2) as well as on the fact that "[...] those lobbyists involved in deceptive and illegitimate lobbying practices, and thus eager to avoid public scrutiny, are unlikely to register and report voluntarily" (ALTER-EU, 2006, p.3). Naturally, the same organizations also called for tougher sanctions and pointed out that there was not much room for the application of strong sanctions within in a voluntary system (ALTER-EU, 2006). Business Europe (2006, p. 2) on the contrary called for a naming and shaming of wrongdoers but commented as well that "[s]anctions should only be the ultimate recourse." EPACA (2006) furthermore criticized the unclear position of the Commission on sanctions and demanded additional clarifications. As a matter closely connected to the issue of sanctions, the appointment of an overseeing body was brought to the table as well. In this context, the reviewed organizations did not only demand further details, but already proposed strongly an independent body; several mentioned the European Ombudsman as an adequate option.

## DISCUSSION

The Commission clearly follows its own path by combining elements of several approaches to regulation. By making the register voluntary it takes Germany as well as the European Parliament as an example, while the combination with a code of conduct can be found in the Canadian and the EP system. Albeit relying as well on an 'incentivized' voluntary system, the experiences made in Germany and the EP are not really transferable to the ETI. In both schemes, registration and provided incentives come more or less for free as there are no demanding disclosure requirements. Accordingly, lobbyists do not really have to be convinced to actually register. This matter is a different one with regard to the Commission scheme where registrants have

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<sup>47</sup> Under the condition of existing thresholds, it is likely that the CSCG (2006) is supportive of the disincentive. In its contribution to the Consultation it proposed that all unregistered lobby groups (above a certain threshold) should be excluded from consultation and thus even went beyond the Commission proposal in the follow-up .

<sup>48</sup> In the beginning of the debate EPACA (2007b) was in general supportive of a voluntary system, but the inclusion of financial disclosure prompted it to demand a mandatory system (see below).

to disclose (partly) sensitive financial data. Registration thus becomes a matter of carefully considering the pros and cons, respectively the in- and disincentives.

Within the direct incentives the provisions of automatic e-mail alerts can be dismissed due to their complete lack of attractiveness. Moreover, lobbyists have repeatedly confirmed that “Brussels is a village” (Interview 1) and there are many formal and informal as well as official and unofficial ways to find out what is going on (Interview 4). In this respect, it is vital to remind ourselves that “[l]obbyists, after all, are in the business of knowing what is going on” (Pross, 2007, p. 33). On the contrary, the second direct incentive, i.e. the downgrading to individual contributors, could probably be more effective. SEAP (2007), at least, attributed some relevance to it, even though it is unlikely to really *further* compliance. Official consultations are only one of the many options to choose from and it is usually easier to convince the other side in more private contacts (Interview 1). Moreover, “[a] lot of lobbyists in Brussels are not even bothering with these online consultations anymore” (Interview 2).

The only meaningful incentive to register then is an indirect (although still intended one) Peer pressure as well as naming and shaming campaigns of lobby critical organizations could establish the register as a ‘must have’ among ‘good lobbyists’. However, the Commission does not intend to draw up a black list, which makes a naming and shaming of the ‘bad guys’ more difficult. In any case, it remains to be seen whether this kind of incentive is sufficient enough to convince the majority of lobbyists to register. In the end, registering (or not) does depend on lobby groups’ individual decisions. It is the thus created leeway that can be considered to be the most severe disadvantage of the voluntary approach. In fact, the entire meaning of the ETI is to make formerly secretive processes known to the public. In this context, however, it has to be clear that especially those groups that do not want be brought to public light, i.e. those that have something to hide or are even engaged in undue behavior, will simply stay out of the register or provide incomplete information (Interview 2). It is unlikely that the maximum sanction of being excluded from the register will change anything about this. Like in the EP, where lobbyists can lobby without a pass, the Commission can still be lobbied without registration. It is also unlikely that those groups that want to stay out of the register are going to be persuaded by the threat of Commissioner Kallas to make the register mandatory if an insufficient number of lobby groups fail to register. The outcome of balancing the pros and the cons of registration ultimately renders it improbable to be positive for the ‘bad guys’ of the lobby community. Additionally, the

lack of clear incentives makes it likely that even some ‘good guys’ come to similar conclusions.

Albeit these multifold criticism, there are also arguments in favor of a voluntary approach. The first and foremost is that a voluntary system is easier to set up. Especially Commissioner Kallas maintains that it would take at least three years to enact a mandatory and statutory lobby regulation (ALTER-EU, 2007). Such an argumentation, however, can hardly be called convincing and it surely does not make a system that is likely to be inefficient more promising. Another argument in favor of a voluntary approach then states that a mandatory system would create the impression that the only way to approach one’s own government would be to make use of registered lobbyists (Malone, 2004).<sup>49</sup> However, a register would only confirm an already existing situation of privileged access of lobbyists (Pross, 2007) thus leaving this argument a rather questionable one that becomes even more questionable in the case of the Commission as the direct incentives do create an additional privileged access system. Only the establishment of a threshold system could potentially change that, but so far there are no plans to do so.

Overall, there seems to be no substantial reason to opt for a voluntary register. However, one should not naively praise a mandatory system as “the value of the law depends almost entirely upon the effectiveness of its enforcement” (Pollock, 1927, p. 340). The Australian regulation scheme was abolished albeit being mandatory and also the Canadian and the US schemes were deemed to be ineffective for a long time. While the causes were multifaceted, the lack of clear provisions on monitoring, enforcement and sanctioning undoubtedly played a major role. The US lobby act from 1946 lacked a clear definition as well as provisions on a special enforcement agency (Zeller, 1958). No government agency seemed to be responsible or at least there was no sufficient and dedicated budget allocation to a particular agency. The Justice Department simply denied being responsible for the law from the 1960s onwards (Thomas, 1998). A lack of enforcement then also deprives sanctions of their deterring character. Despite the presence of hefty financial fines and even imprisonment, many lobby groups in the US (but also in Canada) denied complying with the law as there was no fear of enforcement (Rush, 1998; Thomas, 1998).<sup>50</sup>

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<sup>49</sup> This frequently cited argument can be traced back to the so called Nolan Committee that investigated the potential for regulating lobbying in the United Kingdom during the 1990s. The Committee dismissed the option and opted instead to a regulation of the lobbied (Jordan, 1998).

<sup>50</sup> In the US, the National Association of Manufactures needed 29 year to finally decide that it was engaged in lobbying and an estimation states that overall just between a sixth and third of the lobbyists in Washington registered and that only 1% of the money spend on lobbying was reported (Thomas, 1998).

Overall, a “[...] reporting regime makes little sense unless someone scrutinizes the content and truthfulness of the information that has been disclosed” (Johnsen, 2007, p. 158). With that in mind, it is commonly<sup>51</sup> argued that the responsibility cannot be left to the media or the public but has to be assigned to a dedicated and independent enforcement agency that is vested with sufficient powers to audit reports, require clarifications and issue sanctions (Zeller, 1958; Johnsen, 2007; Pross, 2007; Thomas, 1998; Pollock, 1927).<sup>52</sup> However, until recently, there was no country that lived up to these demands and even the latest amendments to the US and Canadian lobbying act do not fully comply. It seems that often there is a lack of political will to establish a fully enforceable regulation instead of a regulation that only exists on paper and has symbolic value (Lane, 1964; Pross, 2007). Accordingly, it remains to be seen whether the most recent improvements in the North American lobby regulations will lead to a more effective enforcement but at least in Canada such a development is not completely unlikely.

Until 2005 to the ‘Canadian Office of the Registrar of Lobbyists’ was strangely located within the Department of Industry and thus subordinated to and dependent on the respective ministry. The Federal Accountability Act that was enacted in 2006 will establish a new ‘Office of the Commissioner of Lobbyists’ who will have the position of an officer of parliament and be elected instead of appointed which should increase its independence (Holmes, 2007). The powers of investigation are to be strengthened as well. Taking old and new powers together, the Commissioner will be able to:

1. Ask office holders to verify the accuracy and completeness of the information provided by lobbyists
2. Conduct (expanded) investigations including the ability to summon and compel person to produce documents
3. Publish the names of violators in his reports to parliament (the office issues at least one report per year)
4. Undertake (expanded) outreach, education and communication activities to foster understanding and awareness (among the public, the lobbyists and clients and the public office holders)
5. prohibit any lobbyist convicted of any offence from communicating with the federal government as a paid lobbyist for up to two years (Office of the Registrar of Lobbyists, 2007)

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<sup>51</sup> However, Drozd (2006) believes that an enforcement agency is not necessary. In his opinion it would be sufficient to rely on the trust that is vested in public office holders who should report any breaches of rules by lobbyists. This view is rather naïve as public office holders are always a part of the game.

<sup>52</sup> This is not to say that the media and the public and also legislators and lobbyists themselves are not important. In fact a lobby regulation does not have an independent voice but depends on the widespread support among the mentioned groups (Lane, 1964)

Apart from the prohibition of contact, the Canadian Lobby Act includes also the possibility to impose fines ranging up to \$200.000<sup>53</sup> or two years imprisonment (Government of Canada, 2006). However, the power to execute these sanctions is not vested within the Office of Commissioner so that their ultimate enforcement is still left to an external body (Holmes, 2007).

It was argued already that it is questionable, although not unlikely, whether the new provisions will make the enforcement of the lobbying regulation more effective. Nonetheless, it can be taken for granted that they will not prevent actors, who are willing to, from breaking the law and from not complying with the rules (Warby, 2006). This is probably best shown by the widely known Abramoff scandal in the US which involved lobbyists and public officials and took place albeit the presence of tough sanctions.

However, while the rather soft character of a voluntary scheme is not necessarily an argument in favor of a mandatory register, the fact that a mandatory scheme cannot prevent undue behavior is also not necessarily an argument in favor of a voluntary register. In any case it is wrong to conclude that “[t]he Abramoff affair [...] shows that mandatory rules alone are potentially worthless” (Kallas in ALTER-EU, 2006a).

#### ASSESSMENT

*“For the Commission, full transparency means first and foremost covering the landscape of European interest representatives as comprehensively as possible.”*  
(European Commission, 2007a, p. 3).

It is rather puzzling why the Commission still opted for a voluntary register instead of a mandatory one. A mandatory register does not prevent undue behavior but it would make this kind of behavior clearly unlawful so that it could be punished (if there are the means to enforce the regulation). On the contrary, a voluntary register only asks or even begs for registration and every group has the right of not doing so without having any serious doubts about it. To be clear, the really ‘bad guys’ will not register or just provide wrong information, no matter what kind of register will be established, but a voluntary register makes it likely that all the groups which achieve a comparative advantage by staying out of the register, will stay out as well. Lobbying (even for the common cause) is an egoistic business after all. Overall, it can be argued that it is hardly possible to achieve full transparency even in a mandatory register. However, in a voluntary system it is not only hardly possible but very unlikely to come even close to full transparency and the Commission seems to be another bit further away from achieving its ETI objectives.

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<sup>53</sup> = € 126242, 4 (20.04.08)

A voluntary system limits the ability to impose sanctions and to meaningfully implement the regulation in a general manner, yet even within this limitation the proposed enforcement system of the Commission is weak.

The Commission will not proactively monitor the register and there will not be, unlike as in the North American schemes, any regular audits. Instead, the Commission will rely upon external complaints. Yet, even if the Commission reacts to these complaints and even if it does expulse an organization from the register there is no way to prevent the wrongdoer from further engaging in lobbying. Nevertheless, having a good reputation is an important access good and does count in the Brussels village. An exclusion might thus still have an impact in terms of decreasing opportunities of exerting influence as well as in terms of decreasing turnover in the case of consultancies. However, an expulsion is only the matter of last resort and the lack of a black list makes it less likely that the misdeeds of an organizations are so wildly known, that their reputation will be damaged meaningfully.

Whether stronger sanctions like a complete ban on communication with the ‘bad guys’ or unregistered groups are in the end enforceable,<sup>54</sup> then is another matter. In his Nottingham speech, Commissioner Kallas chided the representative organizations of the lobbying community (i.e. SEAP and EPACA) for the lack of “serious sanctions” for their Code of Conducts, even though it has become clear that the sanctioning mechanism proposed by the Commission is even less serious. If one takes into account the lack of clear incentives as well, one must conclude that the regulation proposed by the Commission is even unlikely to reach a level of transparency that could theoretically be reached by a voluntary system. The only meaningful argument against a mandatory register would then be that it is a matter of time but this can only lead to the conclusion that the Commission has already lost almost two years in developing a mandatory one. Especially, because it would have widespread support, reaching from the lobby critical ALTER-EU to the hired guns of EPACA for doing so.

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<sup>54</sup> Admitting only registered groups to official or unofficial consultations is not only questionable due to negative effects upon the open, public and accessible debate of public issues but also because a political system might become dependent upon a smaller set of actors. However the first problem can be solved by establishing a threshold system and the second problem is a matter of considering the pros and the cons. It seems, however, more justified to rely upon a smaller set of opinions than to include those opinions that try to achieve their cause by unlawful or undue measures.

#### **KEY-ISSUE 4: REGULATION OF BEHAVIOR**

Even though the ETI primarily aims at establishing monitoring measures, it does propose a Code of Conduct that would be linked with the register. Apart from taking advantage of the indirect effects that transparency has on actors' behavior, the ETI thus seeks to influence that directly as well.

#### **PROPOSAL BY THE COMMISSION**

The draft Code of Conduct proposed by the Commission consists of 'principles', 'rules' and 'other provisions'.

With regard to the 'principles', the Commission stipulates that citizens in a democratic system expect lobbyists to behave in line with the principles of, 'openness, transparency, honesty and integrity' (European Commission, 2008a). Accordingly, lobbyists should adhere to the following 'rules' that will require them to:

1. Identify themselves by name and organization
2. Declare the clients and interest they represent
3. ensure that information provided to the EU institutions is accurate, complete and up-to date to the best of their knowledge
4. not obtain or try to obtain information dishonestly from the EU institutions
5. not induce EU officials to contravene standards of behavior applicable to him or her
6. if employing former EU officials, respect their obligation to abide by the rules and confidentiality requirements which apply to them.

The 'other provisions' link the code to the register and its mechanisms for sanctions and complaints. It should also be mentioned here that the Commission hinted on the website dedicated to the consultation process that it would be willing to admit also those groups to its register that abide to a similar code.

#### **THE DEBATE**

The proposal of the Commission received a lot of criticism which clearly shows in the responses of lobby critical groups. While Transparency International (2008) explained that

*"we are [...] very disappointed by the weakness of the suggested code." (p. 1),*

CSCG (2008) found

*"[t]he proposed code of conduct for interest representatives [...] weak and unlikely to improve the current situation." (p. 1).*

ALTER-EU (2008) similarly exclaimed its disappointment by issuing that

*"[r]egrettably, the requirements in the proposed Code of Conduct are less exacting than the existing voluntary codes of conduct" (p. 1).*

Taking these statements into account it does not come as a surprise that none of the reviewed organizations from either side perceived the proposed Code as too demanding.

On a more general level, most of the organizations used the opportunity during the official consultation to restate basic claims, proposals and demands regarding the register and the definitions used. In that respect, it was particularly criticized that the Commission did not clarify the monitoring and sanctioning mechanisms discussed above that are of interest for the Code of Conduct as well (ALTER-EU, 2008c; CSCG, 2008; EPACA, 2008; SEAP, 2008; TI, 2008; Business Europe, 2008).

Regarding the Code itself, citizen group representatives criticized its limited scope while public affairs representatives (particularly SEAP) proposed slight amendments in the wording here and there. Regarding the scope, more detailed and explicit rules were demanded. As such, a number of additional rules were proposed to cover conflicts of interest, a duty for officials to report breaches under the code or the prohibition of improper influence in the code (ALTER-EU, 2008c; TI, 2008; CSCG, 2008). Furthermore, detailed rules were proposed to cover those kinds of behavior that are only indirectly covered in the draft Code of Conduct (e.g. making gifts, financial inducements, revolving doors) more explicitly (ALTER-EU, 2008c; TI, 2008). With regard to the wording, SEAP (2008) criticized the rule stating to ‘not induce EU officials to contravene standards of behavior applicable to him or her’ because “interest representatives can commit to not exert improper influence on staff and officials, but cannot be held responsible for [the staff’s] behavior” (p. 2), to name only one of many other examples. Others criticized that the Commission will also accept organizations in its register that abide to similar codes. Those critics questioned whether, how and by whom these other codes should or would be enforced or monitored (ALTER-EU, 2008c; CSCG, 2008).

## **DISCUSSION**

None of the reviewed political systems does not have some sort of Code of Conduct for lobbyists, yet in most systems it is part of the voluntary and self-regulatory regulation of lobbying. Only Canada and the European Parliament directly combine a lobbying register with a code. However, instead of comparing the Commission’s draft Code with these numerous counterparts, the codes of SEAP and EPACA that already govern the conduct of lobbying the Commission will be used as a reference point. While both codes are rather similar in nature, it will not be referred to their individual details. Instead, the “Core Principles for a common Code of Conduct” that SEAP, EPACA and IPRA<sup>55</sup> proposed to the Commission in 2007 will serve as the actual point of reference. As it can be seen in Table 8 there are a lot of similarities between these common

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<sup>55</sup> International Public Relations Association

principles and the draft Code. Differentiations, moreover, usually occur within the core principles as these contain a greater quantity of, as well as more detailed provisions. In fact, a lot of the elements that were demanded during the consultation period can be found in the common principles. Apart from provisions on confidentiality which are not mentioned by the draft Code, the most prominent differentiation exists within the category of improper influence. While the core principles elaborate on that issue, the draft Codes only makes a general statement. With regard to financial and other inducement, however, the draft Code does not fall behind the core principles: it simply prohibits the acceptance of such inducement. A slightly different story, then, can be told with regard to the provisions on conflicts of interest which are neither part of the draft Code nor regulated in the Staff Regulation of the Commission. Conflicts of interest do moreover not only arise if there are close relationships between lobbyists and lobbied but also if a lobbyist represents conflicting clients at the same time (Demke et al, 2007)

More differences exist in the procedures for enforcing the codes. The general principles do not contain any respective provisions as the organizations have different procedures which are explained on their websites (Table 9).

In general, any lobby group could adhere to one of the existing or any other code of conduct. However, in case a lobby group commits any breaches, it could only be punished as long as it is officially subjected to the Code. While the coverage of all codes is limited, it is likely that the number of groups participating in the Commission register is higher than the cumulated membership of SEAP and EPACA.<sup>56</sup> It is furthermore positive that the Commission system will not limit the ability to file complaints and moreover proposes the investigations to be carried out by an unbiased and independent body that is, unlike as in the system of SEAP, not recruited from the profession itself. Nonetheless, it has to be criticized that the Commission does not intend to create a blacklist and that, unlike under the EPACA system, there will not be any publication of misbehavior.

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<sup>56</sup> Each member of SEAP and EPACA has to subscribe to the respective code.

**Table 8: Comparison of codes of conduct**

Category	Provisions	
	Draft Code	Common principles
Transparency (and openness)	identify themselves by name and organization	identify themselves by name and organization and the interest they represent;
	Declare the <b>clients</b> and interest they represent	
	ensure that information provided to the EU institutions is accurate, complete and up-to date to the best of their knowledge	not intentionally or otherwise disseminate false or misleading information, and correct any such act promptly
	not obtain or try to obtain information dishonestly from the EU institutions	neither intentionally <b>misrepresent their status</b> nor the <b>nature of their inquiries</b> to EU institutions nor create any false impression in relation thereto
Confidentiality	X	honor confidential information given to them
		not sell for profit to third parties copies of documents obtained from public institutions
Improper Influence	not induce EU officials to contravene standards of behavior applicable to him or her	not offer any financial or other inducement which would constitute improper influence on EU institution
		<b>avoid any professional conflicts of interest</b> ; disclose such conflicts when they occur; and take swift action in order to resolve any conflict which arises
Employment of former EU personnel	if employing former EU officials, respect their obligation to abide by the rules and confidentiality requirements which apply to them.	only employ personnel from EU institutions subject to the rules and confidentiality requirements of those institutions
Other provisions	X	recognize the rights of all parties involved to state their case and express their views

Based upon: European Commission, 2008a; EPACA/IPRA/SEAP, 2007; SEAP, 2006b

**Table 9: Comparison of enforcement procedures**

Category	Organization		
	Draft Code of Conduct	EPACA	SEAP
Monitoring / implementation	Commission	Management Committee comprised of members from EPACA	Code of Conduct Committee (CCC) comprised of members of SEAP
Ability to file complaints	Not limited	Not limited	Confined to members of SEAP, EU officials, MEPs, member state representatives
Complaint procedure	No details available	Based upon the investigation of a panel which is comprised of persons outside from the professions, the Management Committee decides by majority about whether and which sanctions should be imposed	Based upon the investigation and recommendation of the CCC, the board of SEAP decides about whether and which sanctions should be imposed
Sanctions	Minimum ?	Minimum: reprimand	Minimum: reprimand
	Maximum expulsion	Maximum: expulsion	Maximum: expulsion
	Publicity: no	Publicity: yes	Publicity: no
Coverage	Registered lobbyists	Members	Members

Based upon (European Commission, 2008a; EPACA, EPACA Code of Conduct, no year)

## ASSESSMENT

Being asked about the content, acceptability and effectiveness of the draft Code, one of the interviewed lobbyists replied rather frankly that “[a]nyone who would say that the code is not acceptable would really be a dumb person” (Interview 2). Indeed, the existing codes of SEAP and EPACA are more encompassing than the general principles which were used as a reference point which, in turn, are still more encompassing than the draft Code proposed by the Commission. In 2006, Friends of the Earth Europe critically reviewed the code of SEAP and EPACA and came to the conclusions that they

1. lack clear definitions
2. cover only a small part of the lobbying sector and lobbyists can avoid them by not signing up
3. complaint procedures lack in independency, accessibility and (mainly) in publicity
4. lack strong sanctions for non-compliance (Pohl, 2006)

These critical remarks can easily be transferred to the draft Code of Conduct. First of all, the problem of unclear or even not existing definitions has not been solved by making the code shorter and less comprehensive. Especially the so-called principles merely constitute cants and anyone can interpret honesty, transparency or integrity in a different fashion. The problem of defining ‘financial inducements’ or ‘conflicts of interest’ which was also addressed by Pohl, in turn, does not exist, simply because the draft Code does not bother to directly regulate these matters. Second, while the coverage of the Code is higher, anyone who does not register is not forced to abide the Code. Third, the Code will be enforced by an independent body with everybody being able to file complaints. Even though this is generally positive, the lack of publicity clearly constitutes a drawback. Fourth, the sanctions are as weak as in the existing Codes and can moreover even be avoided at all by not signing up in the first place. Overall, the disadvantages of a voluntary system discussed above naturally apply to the draft Code just as well.

The only major improvement then is that there will be a common Code of Conduct that covers the lobby sector as a whole, including NGOs. But again, the bad guys are likely to stay bad guys which means that they are unlikely to subject themselves to the Code. What is more, the Commission itself jeopardizes the positive aspect of the Code’s scope by potentially accepting those organizations that have established similar codes. Furthermore, a code of conduct should also clearly stipulate what is appropriate and what not, so that lobbyists know when they breach the rule and everybody else as well can assess whether they did it or not. A clear and meaningful code would also be a

symbol to the public as it would signal that lobbying is not usually as bad as it seems to be.

### **KEY ISSUE 5: DISCLOSURE**

The flawed Code of Conduct, though being part of the ETI, does not constitute its primary concern. Primarily, the Commission did not have the objective of regulating behavior in mind when drafting the ETI; it were the considerations of bringing more transparency into lobbying processes that were the driving force behind all activities. Consequently, it can be argued that provisions on disclosure form the heart of an effective lobbying regulation scheme (Wilson, 2005 in Pross, 2007). If properly defined, they require that otherwise secretive information is to be made public and create transparency in its essence.

### **PROPOSAL OF THE COMMISSION**

The lobbying register of the Commission will primarily provide two types of information: basic information about the registrant and financial information.

The main aim of the former is to identify the organizations engaged in lobbying. Accordingly it demands the disclosure of:

1. the name of the organization
2. the website (if applicable)
3. the contact address
4. a name of contact person and/or executive director (boss)
5. a description of aims and goals of the organization (level of detail is freely definable)
6. an indication of specific policy interests (by ticking of check boxes) (Interview3)

The last aspect serves two purposes. On the one hand, it used for the automatic e-mail alerts, on the other hand, it points out potential areas of lobbying activity. It is for that reason, too, that, apart from the name of the contact person, all data will be made publicly available (Interview3).

While these basic disclosure requirements are the same for all three categories of lobby groups, the financial disclosure requirements, in contrast, differentiate between them.

The general objective of disclosing financial information is to reveal how lobbyists are funded and to enable the public as well as the policy-makers to “identify and assess the strength of the most important driving force behind a given lobbying activity” (European Commission, 2007a, p. 4). The differentiations in revelations, then, correspond to the groups’ different characteristics in terms of how they obtain their funds:

1. Professional consultancies and law firms have to disclose
  - a. their turnover linked to lobbying EU institutions and
  - b. the relative weight of each client in this turnover by allocating each client to a margin<sup>57</sup>
2. In-house lobbyists and trade associations active in lobbying have to disclose
  - a. ‘an estimate of the cost associated with the direct lobbying of EU institutions’
3. NGOs and think-tanks have to disclose
  - a. Their overall budget as well as
  - b. Breakdown per main source of funding (amount and source)

This information is again publicly available as well and all the information has to be reported on an annually basis.

### THE DEBATE

In a letter to Commission President Barroso from February 2008, ALTER-EU expressed its “grave concern over the development of an EU lobbying transparency register” and threatened “to reconsider its support for the European Transparency Initiative” (2008a). The alliance based its criticism on the analysis that the register would fail in providing meaningful information because it neither contained the names of individual lobbyists nor provided for a sufficient level of financial disclosure. The former criticism can be regarded as a sidelining objection as it does not play a major role in the contributions from the reviewed actors. Moreover, a spokeswoman of Commissioner Kallas plainly rejected the claim by stating that “[t]he Commission never intended to ask for individual names of people working for lobbying groups” (“ALTER-EU, 2008b).

The latter criticism, though, constitutes the heart of the ‘disclosure debate’. Especially Transparency International (2006) and, above all, ALTER-EU (2006b; 2008a) call for a detailed disclosure of ‘who spends what’ on lobbying and thus argue for a reporting of budgets, fees and expenditures. In this context, they refer to the Abramoff scandal to back up their calls (EurActiv, 2006). As only consultancies and law firms<sup>58</sup> work for clients, it is rather obvious who these demands are targeted at. Being under attack in the course of the debate, the consultancies’ position changed from total opposition to support for the disclosure of *general* financial data (EurActiv, 2005; 2007a). However, generally speaking, they still reject *detailed* financial disclosure, and largely criticize its integration in the register. From a general point of view, the underlying assumption of financial disclosure is called into question. It is pointed out that Brussels “is not Washington” (EPACA, 2007c, p. 1), that the lobbying practices are completely different

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<sup>57</sup> The interval of these margins is not yet finally determined (Interview 3)

<sup>58</sup> In this section only the position of the consultancies will be discussed, but in general the representatives of law firms have in general similar opinion.

and that “money cannot be equated with influence” (SEAP, 2007, p. 6). More particularly, procedural problems and the potentially distorting effects of detailed financial disclosure are put forward. With regard to procedural problems it is argued that it might be difficult to calculate lobbying turnovers in an exact manner and to isolate them from turnovers made with other services (SEAP, 2007). In this context, Lyn Trytsman-Gray, president of SEAP, warned (or threatened) that the present “disclosure rules may result in individual lobbyists accounting for their budgets differently, creating a register with "non-comparable" figures (EurActiv, 2007a).

The concern about the potentially distorting effects is two-folded. On the one hand, the differentiating disclosure requirements are perceived as a “discriminatory treatment” (EPACA, 2007c, p. 1) of consultancies in relation to other categories of lobbyists. Accordingly, “[a] non -discriminatory system, which applies a level playing field to all” (p. 2) is demanded. On the other hand, it is pointed out that a system of detailed financial disclosure creates potentially distorting effects within the consultancy market as such. For one thing, clients who do not want to disclose their financial contributions can simply choose an unregistered consultancy, which is detrimental for competitors as well as for transparency (EPACA, 2007a). Additionally, consultancies might become stigmatized because contractual agreements do not allow them to join the register (EPACA, 2007a). EPACA therefore issued the warning that its members might boycott the register in its present structure and called for mandatory register with-, or a voluntary register without financial disclosure (Financial Times, 2007).

In a speech before the EP Committee on Constitutional Affairs Commissioner Kallas presented his opinion regarding the complaints. He defended his approach of financial disclosure by stating rather bluntly,

*"[i]f spending money on lobbying gives no influence, I wonder what the lobby professionals say to their clients when they bill them?" (Kallas, 2007b, p. 4).*

Even though he has also acknowledged that money should not be equalized with influence, he still considers financial disclosure to be a

*“useful rough indicator for the forces at play” (p. 4).*

He also rejected the accuses concerning a discriminatory treatment and pointed out that all lobby actors have to disclose financial information and ‘that the proposed register should be considered as

*“very light self-regulation, compared to the reporting requirements that some of [the] same companies are subject to when lobbying in Washington DC.” (p. 4).*

## **DISCUSSION**

The focus of both, the register and the debate that evolved around it might suggest that financial disclosure is the only way to go. However, there are other possibilities to choose from and the question that really needs to be answered is what kind of information is actually necessary to achieve transparent lobbying processes. By publishing information about one or more of the following areas<sup>59</sup>, the reviewed regulation schemes provide different answers to this question:

1. Lobby actors
2. Beneficiaries of lobby activities
3. Financial resources
4. Objects of lobbying
5. Lobby targets
6. Methods of lobbying

Each of these shall be shortly discussed.

### ***LOBBY ACTORS***

Information about lobby actors basically allows identifying who is actually lobbying. All regulation schemes provide this basic type of information. The register of the European Parliament just contains the names of lobby groups and of the lobbyists employed by these groups, while the other systems also provide information about business addresses, board membership or composition. The Commission register seems to fall short on those aspects as it does not provide names of individual lobbyists; however, it can be argued that information about lobby actors as such is not of great value anyways. Apart from the individual names, all other information is usually available on the internet and it is also commonly known that associations, Public Affairs consultancies and trade unions are engaged in lobbying.

Matters change, however, if the lobbyist or lobby group employee had formally been employed in government. The Canadian and the US scheme require that former government positions should be indicated to reveal potential conflicts of interest and to assure that no former official violates revolving-door provisions. These concerns did not only lead ALTER-EU to the above mentioned demand of a full disclosure of names, but they are also commonly found among the public and in fact quite substantial. After all, it is easily imaginable that a former government employee turned lobbyists will use his old contacts for his own benefit or for the benefit of the new employer. It could thus be argued that the Commission should follow the advice of ALTER-EU and ask for a full disclosure of individual names. However, it might be more helpful to do without a full

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<sup>59</sup> Partly based upon Pross (2007).

list but simply require that each lobby group indicates whether it employs former officials, and if it does, lists their names and their former positions. In doing so, the register would be limited to a convenient size and enable everyone to adequately use the information. A full list would only be informative if one already knew where to search, i.e. if one had the name of a former official. Still, as is the case with the general information about lobby actors, these kind of insights are not very helpful if they cannot be linked with potential issues or beneficiaries of the lobbying activity.

### ***BENEFICIARIES OF LOBBY ACTIVITIES***

The North American regulation schemes are the only ones requiring the disclosure of beneficiaries of lobbying activities. Similarly to the Commission proposal, both schemes differentiate between three categories of lobby actors and put more severe disclosure requirements upon consultant lobbyists. For a long time, the focus with regard to beneficiaries lay even almost exclusively upon consultant lobbyists who usually do not lobby for themselves but for a client. Accordingly, disclosure of the consultancy's or the consultant's name does not reveal which groups, individuals or interests they represent. The requirement to disclose clients thus is the logical consequence in order to identify those who seek to benefit from lobbying activities. Recently, the North American schemes have extended this principle to organizations and corporations, that is, in ETI terminology, to in-house lobbyists and NGOs. US registrants (including consultants) have to disclose each 'affiliated organization' that contributes more than \$5.000 per quarterly period and is more or less actively involved in a lobby campaign (U.S. Senate, 2008).<sup>60</sup> Canadian registrants (including consultancies) have to disclose members, subsidiaries or parent organizations, respectively corporations, that are likely to benefit from the lobby activities (Holmes, 2007; Government of Canada, 2006).

The rationale behind this detailed disclosure requirement is to prevent potential beneficiaries from hiding themselves in larger entities (Pross, 2007). It can be argued that both schemes are more effective in their efforts on this issue than the Commission's scheme is likely to be.

Within the Commission system, it is not possible at all to identify the beneficiaries of in-house lobbyists as these only have to give an 'estimate of the costs associated with the direct lobbying of EU institutions'. This is different for NGOs which have to

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<sup>60</sup>“An organization “actively participates” in the planning, supervision, or control of lobbying activities of a client or registrant when that organization (or an employee of the organization in his or her capacity as an employee) engages directly in planning, supervising, or controlling at least some of the lobbying activities of the client or registrant.” (U.S. Senate, 2008, p. 4)

disclose their funding sources. However, an indication of funding sources only gives a rough estimate of who might benefit from the lobbying activities. Moreover, NGOs are usually not only engaged in direct lobbying. As a result, the amount of money spent on lobbying in general is not revealed by disclosing the NGO's funding sources and it is surely not revealed who donated money for a particular activity. The most relevant benefit that can be gained from the disclosed NGO funding sources then is that it will be easier to discover 'astroturf lobbying' or front groups but other than that, not much information can be obtained about beneficiaries (Johnsen, 2007; Thunert, 2003). In contrast to the North American schemes, the disclosure of beneficiaries is moreover limited to the first level of funding sources. Corporations or organizations that do not want to be disclosed as donors can still bypass the regulation by making a donation to an (artificially created) proxy organization, which is then listed as the funding source. This 'first level limitation' also exists for the disclosure requirement for consultancies which are supposed to disclose their clients (allocated to margins). These clients can either hide behind a proxy client or simply join a coalition. The latter was quite common before the amendment of the US 'Lobby disclosure Act'. Organizations or corporations formed coalitions (sometimes for particular sections of lobbied acts) and invented rather cryptic names (Thunert, 2003).<sup>61</sup> Without further investigation, the content of information disclosed by these coalitions was close to zero.

Overall, the Commission lobbying regulation scheme is unlikely to reveal the real beneficiaries, at least, if they do not want to be revealed.<sup>62</sup> Whether the US or the Canadian approach should be preferred as a model for disclosing beneficiaries then basically is a matter of taste. Both are prone to exploitation and would have to be improved.<sup>63</sup> The common characteristic of financial disclosure, however, seems to make the US system more appropriate.

### ***FINANCIAL DISCLOSURE***

Both North American regulation schemes use remuneration as a trigger for registration, but only the US regulation requires the disclosure of financial information that exceed those proposed by the ETI. Consultant lobbyists have to file individual reports for each client and give good faith estimates of the income generated from them while

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<sup>61</sup> The ability to form coalition is of course not limited to lobbying via consultancies. Coalition formed by corporation, NGOs are a mixture of both can also lobby directly or use they can used as proxy for funding other organizations.

<sup>62</sup> See below for a discussion of the voluntary character of the scheme which aggravates this problem.

<sup>63</sup> In the US system each organization spending less than \$ 5.000 must not be revealed, while the Canadian system only includes organization likely to benefit from an activity. The Canadian system is thus dependent on a subjective proof while US system exempts those organizations that are likely to profit but do not spend enough money. A combination of both system might be the best solution.

corporations and organizations have to report their expenses (LDA SEC 5/b/3)<sup>64</sup>. Those can be rounded to the nearest \$10.000<sup>65</sup> and have to be announced quarterly (LDA SEC 5/b/4). Additionally, all registrants have to file semi-annual reports which *inter alia* include

1. “the name of each federal candidate or office holder, leadership PAC, or political party committee to whom aggregate contributions equal to or exceeding \$200 were made”
2. the date, recipient, and amount of funds contributed or disbursed by the registrants or political committee controlled or established the registrant
  - a. to an entity established, financed, maintained, or controlled by an official covered by the act
  - b. To pay the costs of meetings, retreats conferences or similar held by an official covered by the act (LDA SEC 5/d/1ff)

The emphasis on detailed financial disclosure within the US system can be explained with a political system that is heavily dependent upon campaign contributions even though money should still not automatically be equated with influence. However, the dependence of public office holders upon external financial resources makes capital at least a more fitting indicator than in the European Union in general, and in the European Commission in particular. Commission officials have to survive a tough selection process and are, as long as they are not corrupt, independent from external contributions. As a result, the decision of the Commission to focus the register upon financial disclosure can be questioned. Commissioner Kallas perceives money as a ‘useful rough indicator for the forces at play’. Nevertheless, it is questionable how informative the disclosure of financial resources really is. If, unlike as in the ETI, financial disclosure is properly arranged, it can help to identify potential beneficiaries of lobby activities, but it is hardly possible to derive any additional information from it. At first sight, this conclusion seems to be at odds with the discussion of access goods. Financial resources were identified as a central, although only supportive access good. This does not make financial disclosure a perfect indicator, but at least it seems to touch upon an important aspect of lobbying that facilitates the use of direct access goods and allows engaging in more coherent lobby activities. However ‘money does still not equal influence’. The information that lobby group A spends twice as much as lobby group B in a reporting period does not say anything more than that one group spends more than the other. A linkage of expenditures with certain policies might indicate that A had a higher interest in this policy than B (and if the position of A could be found in the final version of this policy one might perceive this as undue influence), but the ETI does not

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<sup>64</sup> Read: Lobbying Disclosure Act section 5, paragraph b, phrase 3

<sup>65</sup> The good faith estimates only have to be made if the income exceeds \$5.000. Below this threshold only a statement that the income or expenses totaled less than \$5.000 has to be included in the report (SEC 5/c/2).

provide for this kind of information. Even if it did, it would be necessary to compare the lobbying expenditures of A and B across multiple policies to get a relative estimate of the individual spending behavior which could then be compared. Additionally, it should also be taken into account that B might use its resources more efficiently or that the lobbied institution is more accessible for the arguments of B, due to ideological convergence. Accordingly, financial disclosure of lobby groups is unlikely to reveal much information about the “[...] input they provide to the European institutions” (European Commission, 2006, p. 5).

Commissioner Kallas might still respond that money is sufficient enough as a ‘rough indicator’, and others might follow him on that opinion. If one is willing to do so, it is necessary to look more closely at what kind of financial information has to be disclosed by the three categories of lobby actors. A more detailed consideration then reveals that the information provided by each category is only comparable within and not across the categories. While consultancies and in-house lobbyists have to give some information about their spending related to lobbying, NGOs have to reveal their overall budget and thus do not give an indication of their lobby expenditures at all. Yet, not even the information disclosed by consultancies and in-house lobbyists is comparable. While consultancies have to disclose their turnover linked to lobbying EU institutions, in-house lobbyists have to give an estimate of the cost associated with the direct lobbying of EU institutions. Turnover usually includes a profit margin and even if a consultancy and a Public Affairs department of a corporation would spend the same amount on lobbying activities, the consultancy would have to disclose a higher sum. Moreover, and this is another proof for the difficult wording of the ETI, consultancies have to disclose information regarding ‘lobby activities’, while in-house lobbyists only have to disclose information regarding ‘direct lobby activities’. So far, there is no information available whether and what kind of differences exist between the two definitions, but it is likely that the leeway that is opened up by them will be used to adapt the disclosure requirement to the needs of the lobby actors.

Clear guidelines on how to interpret the definitions would surely help in this context and they would also lead to an improved comparability of the disclosed information. However,

*”[t]he Commission is neither competent nor willing to provide an “accounting manual” for how you [lobby actors] should do this.” (Kallas, 2007a, p. 3).*

Commissioner Kallas calls this a “self-regulating mode” (p. 3) and advises umbrella organizations to provide guidelines for their members. The problem though is, that the

comparability of the disclosed information will be close to zero, if each lobby actor can decide individually what it is that he wants to disclose. Because incomparable financial disclosure does not provide for a “meaningful indicator for the issue at stake” (2007a, p. 3), there will not be any increase in transparency at all (not even under the condition that capital as such is a sufficient indicator). In its present characteristic the ETI will thus provide for a minimum possibility to reveal potential beneficiaries, but apart from this kind of information the financial disclosure requirements remain fairly useless.

### ***OBJECTS OF LOBBYING***

It has already been hinted at the fact that financial disclosure might be more helpful if it could be linked to a particular issue and in fact, lobbying is all about influencing political decisions in one’s own interest. The objects of lobbying, e.g. policies, regulations and contracts thus become interesting objects of disclosure themselves. Apart from the European Parliament which does not have any corresponding disclosure requirements, two approaches can be identified among the reviewed countries. Within the German system, registrants have to give a short description of their general area of interest. These descriptions usually resemble a basic mission statement of the associations and are thus rather general in nature. Accordingly, it is hardly possible to infer the associations’ particular lobbying interest. Likewise, it would probably be possible as well to derive the information from the website of the association.

The same criticism applies to the ETI as the disclosure requirements of the Commission scheme are quite similar. For the description of the organizations’ aims and goals, the level of detail is freely definable and the indication of specific policy interests is limited to a box-ticking exercise and therefore fairly general in nature (Interview3). The information provided by the US and the Canadian registers is more informing as registrants have to list specific bill or issue numbers (U.S. Senate, 2008; Holmes, 2007).<sup>66</sup> Accordingly, it is possible to link lobbyists or particular beneficiaries to particular policies.

While being good in its intentions, the problem in this context is that the North American approach might be too specific. The general interest approach, admittedly, makes it possible to shroud the objects and interests of lobbying in abstract mission statements. The specific issue approach, on the other side, allows heaping up an obscuring pile of issues (Johnsen, 2007; Pross, 2007). Accordingly, a linkage of lobbying efforts, beneficiaries and lobbied issues is possible in theory. This, however, applies only when the lobby actors are willing to provide the information and do not list

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<sup>66</sup> The Canadian system even advises registrants to indicate the purpose of their lobbying activity (Pross, 2007).

bogus issues. A rather burdensome solution then would imply the requirement of an estimate of the share of lobby activities that is allocated to each issue, as this prevents the listing of bogus issues and policies.

### ***LOBBY TARGETS***

The disclosure of the objects of lobbying is related to the disclosure of lobby targets. This kind of information is provided by all reviewed regulation schemes, repeatedly, however, to a varying degree. The European Parliament and the German regulation schemes disclose the issues in a restrictive and passive fashion. Both schemes are limited to lobbying taking place in parliament, thus making it the one and only potential target of lobbying. Accordingly, both schemes lack in scope. For one thing, this is due to structural limitations as lobbyists are not restricted to lobby exclusively at the parliament. The other aspect refers to limitations in content as the registers do not indicate which departments of the parliaments are lobbied. Being limited to one single institution as well, the Commission approach shares these disadvantages from top to bottom. In contrast to their European counterparts, the North American schemes do cover all government branches and therefore require that lobbyists disclose which government branch in general, and which department or agency in particular they lobby. Additionally, Canada even goes as far as to demand the individual disclosure of prearranged contacts with senior public office holders (Government of Canada, 2006).

In theory, it is quite appealing to be able to identify exactly where and when lobbying took place, but it can be argued that in its present structure, the Canadian system is unlikely to provide meaningful information. The limitation to prearranged contacts seems to call for circumvention; moreover, the officials integrated are rather top level actors who are usually not the prime lobby targets (Pross, 2007). Nevertheless, even the more general disclosure of lobby targets helps to identify where lobbying takes place and should be an essential part of any regulatory regime. Within the Commission system it would thus be helpful if the lobbyists would at least have to disclose which DG they have lobbied in the reporting period. However, a disclosure of each lobby contact is, even if it would be arranged in a proper manner, a questionable issue. It would have to be strictly defined when a contact between lobbyists and officials would have to be disclosed, whereby the Canadian approach already points to potential problems. A limitation to prearranged meetings calls for circumvention as there are many other ways to make contact, yet an inclusion of (potentially accidental) encounters at reception, bar or conference might lead to an obscuring pile of disclosed contacts

once more in which the important meetings are hidden among a vast amount of superficial information.

### ***METHODS USED***

An indication of the lobbying methods that are used is only required in the Canadian system. It is moreover not going to be required in the Commission system. Registrants have to report whether they used formal methods like meetings or telephone calls or whether they used informal methods such as events or debates to communicate with public office holders. They also have to indicate whether they used grass-roots methods, i.e. whether they “seek to persuade those members of the public to communicate directly with a public office holder in an attempt to place pressure on the public office holder to endorse a particular opinion.” (Office of the Registrar of Lobbyists, 2007) However, it is not of much relevance whether lobbyists and policy-makers communicate formally or informally as the only important information in that respect is that they do communicate with each other. The disclosure of grassroots lobbying then probably is the only meaningful type of information with regard to lobbying methods. Grassroots campaigns might create “a false appearance of public approval [or disapproval] for a particular government action.” (Johnsen, 2007, p. 123) Information about lobbyists’ grassroots efforts might help accordingly to differentiate the “genuine article” (Pross, 2007, p. 23) from an artificially initiated campaign. This, however, would require that each particular grassroots campaign had to be disclosed instead of indicating that grassroots methods have been used in general. The disclosure of beneficiaries might thus be a more helpful in this context. Additionally it can be criticized that none of the regulation schemes requires the disclosure of indirect communication methods. However indirect communication can closely resemble standard PR measures. Consequently it would be a constant matter of contestation whether lobby services like the designing and maintaining of website are in fact lobby activities or not.

### ***ASSESSMENT***

If provisions on disclosure are considered the heart of a lobbying regulation scheme, one has to attest that the Commission scheme suffers from cardiopathy. Disclosure provisions could prescribe that otherwise secretive information is to be made public. They could create transparency in its essence – but – they would have to be properly defined and structured in order to be able to live up to these expectations. Furthermore, they should not be treated separately like it was done in the preceding section, but be seen as a coherent entity that develops its usefulness only in mutual linkage. Yet, even if the Commission’s disclosure provisions are viewed as such an entity it will hardly be

possible to derive some useful information from the Commission's register once it is established. An interviewed public affairs practitioner pointed to the core of the argument when arguing that

*“the register is something static, where they [i.e. the Commission] just want to make a big picture of who is what and not even of who is doing what in Brussels.”*  
(Interview 2)

In fact, the information that is going to be provided by the register says only little about the actual lobbying that is going on in Brussels. Within this paper ‘lobbying’ was defined as ‘the attempt of third parties to influence decision makers or policy-making processes with the aim to achieve a certain outcome’. The register then basically reveals who is lobbying the Commission, what their general interest is and (depending on the category) how much they spend or could spend on lobbying. It therefore delivers (broad) information about the ‘third parties’ and ‘decision makers’, yet it fails in providing insights on the policy processes and outcomes that are meant to be achieved. There is no indication of particular lobby targets or methods used and the primary indicator for revealing lobby efforts is the disclosure of financial information which completely disregards that the actual exchange good is information.

Nonetheless, like the heart of a body that is unable to survive on its own, the disclosure requirements should not be assessed on their own and the further discussion about what kind of and how much information should be provided *must* also take the other key-elements of a lobbying regulation scheme into account

For a general assessment it seems to be helpful to restate the measure of effectiveness. The Green Paper itself stipulates that

*“When lobby groups seek to contribute to EU policy development, it must be clear to the general public which input they provide to the European institutions. It must also be clear who they represent, what their mission is and how they are funded.”*  
(p. 5)

In the terminology of the transparency framework the regulation scheme should provide information about

*whether, how, and where lobbyists participate in policy-making and what effects this participation might have upon policy-makers and decisions.*

After having considered the proposed measures of the ETI in detail, it is possible to state that it is unlikely that the regulation scheme answers even one of these questions in a sufficient manner. The register will provide information about lobby groups who lobbied the Commission, yet this information neither answers whether nor where nor how lobbyists participated in policy making. The register simply concludes that lobby group A tried to lobby the Commission; it fails in indicating which part of the Commission was lobbied and whether the Commission even reacted to the efforts at all.

Each level of the Commission is important for a different stage in the policy making process and it does make a difference whether the chef de dossier, a working group, the Comitology or even a Commissioner is lobbied.

The register also reveals that lobby group A spends *a certain amount* of money on lobbying, yet this does not answer the question of what effects a potential participation might have: it is still unclear 'which input they provide to the European institutions'. The measures used by the Commission simply do not or only unsatisfactorily provide the relevant data. Financial disclosure would give vague clues if the spending decisions could be linked with particular issues, acts or policies but this kind of linking is not possible within the Commission system. Even if the register would provide such linkable information, the differential disclosure requirements and unclear definitions make a comparison across the different categories impossible. The lack of clear definitions, then, even makes the comparison within a category a haphazard exercise because disclosure is left to individual decisions. It should moreover be taken into account as well that reports have to be filed on an annual basis only, which blurs the big picture that the Commission is trying to paint a bit further. The ability to scrutinize the activities of lobbyists and to link them with ongoing politics is (even in the limited Commission scheme) lost almost completely if the information is not available in a timely manner (Johnsen, 2007; Pross, 2007; Pollock, 1927).

Yet it is not only about (financial) disclosure and unclear definitions, it is also about the voluntary character and the system for monitoring and enforcing the scheme. Even the little information that is likely to be given by the register is limited to those groups that register and to be sure about that, "[t]hose who don't want to register, they are the Jack Abramoffs" (Holman in ALTER-EU, 2007b). Moreover, even the groups that do register can use the leeway that is opened up by unclear definitions, missing guidance and the lack of a clear monitoring and sanctioning system to disclose what they *want* and not what they *should*. Canada, Australia and the US have shown that (egoistic) lobby groups have no interest in complying more than they need to and in the end nobody can blame them for doing so.

If the Commission really wants to bring transparency into its relations with lobbyists by setting up a lobbying regulation scheme, it would surely have to improve its proposal. In fact, it is rather puzzling why the Commission stepped back from its initial plans to propose such a weak initiative. Most of the subsequently described considerations have been known for many years and in fact, Pollock in 1927, Zeller in 1958, Lane in 1964

but also Johnson and Pollock in 2007 elaborated upon these issues and made similar considerations. A meaningful register would surely have to be mandatory and it would need more carefully worded definitions, respectively a guiding document, that explains what is meant by terms like ‘lobbying activities’. The register would also need a dedicated institution that actively monitors and furthers compliance as well as require the disclosure of the right type and the right amount information. Surely, financial disclosure is an inappropriate indicator, especially in the way the Commission intends to structure it. Lobbying is a dynamic activity, so why should one try to capture it in a badly drawn picture instead of a film or at least a flip-book? Lobbying furthermore mainly is about the exchange or the intermediation of information. There has to be a linkage with lobbied policy issues or even policy-makers to reveal where lobbying takes place and what effects it might have.

The establishment of full transparency has been deemed to provoke negative side effects. There is, however, no need to worry about this as the proposed lobby register is far away from getting close to this condition. In that context, it must be taken into account that neither too little nor too much information is helpful. This problem has already been hinted at in the discussion of the lobby objectives and targets and it has to be emphasized again that the requirement to disclose too much information offers opportunities to hide the important among the superficial. Moreover, it is also questionable whether the average citizen or even journalist, lobbyist or politician is competent enough to use massive databases in which lobbyists list the 50 issues they are lobbying and the 150 person respectively 450 contacts they have had with a person (Johnsen, 2007; Long, 2005; Pross, 2007).

It might thus be helpful to look more closely to the official side. Doing so could be more informing in order to receive an idea of which policy was influenced by which lobby groups instead of knowing which lobbyist tried to influence which policy. Lobbying, after all, is “[...] driven by both supply and demand. It is naïve to concentrate on the suppliers of information while ignoring the role and motives of recipients” (Spencer, 2006, p. 2).

The following section, however, should only be treated as a supplement to the assessment of the lobbying regulation scheme. Its main focus is not to assess stringency or effectiveness but to point out potential areas for improvement

### **PART 3: IS THE COMMISSION TRANSPARENT ENOUGH?**

The Green Paper on the ETI did not only propose a lobbying regulation scheme, it also suggested to initiate

1. a debate with other European Institutions on the rules and standards of public office holders and
2. to reinforce the application of the minimum standards for consultation.

The respective provisions, however, are rather brief, and in the case of the rules, standards of public office holders have not even been subjected to public debate. This rather intransparent way of dealing with these matters strongly contrasts the extensive elaboration on the lobbying register and the Code of Conduct. It reflects two underlying considerations:

First, the Commission seems to be of the opinion that it has fulfilled its share of the work and that it now is the responsibility of the lobby groups to step up their (transparency) game. Second, the rules on ethics and consultation standards are mainly perceived as being of internal concern. This is supported by the fact that the rules, standards and codes in these areas are not legally binding.

#### **RULES AND STANDARDS GOVERNING THE BEHAVIOR OF OFFICIALS**

The introduction to the second part described rules on standards on public ethics as a possibility to indirectly regulate lobbying. However, the linkage of the lobbying register with the Code of Conduct for Interest Representatives leaves them with a more directly influencing role. The draft Code of Conduct concludes that lobbyists should neither induce EU officials to contravene standards of behavior applicable to him or her nor should they disrespect their obligations if they intend to employ them. A potential misdeed of the official which normally would be attributable only to him is thus conferred upon the lobbyist as well. In that respect, it is rather interesting to have a look at the Communication ‘on enhancing the environment for professional ethics in the Commission’ which was published recently. With this Communication, the Commission did not intend to create new or tougher rules for its staff, but “to give guidance and assistance [...] particular in case of doubt.” (Commission, 2008b, p. 3).<sup>67</sup> The Communication thus proposes several measures like the ‘Statement of Principles of Professional Ethics’ that basically is a summarizing document of the Staff regulation, the ‘Ethics Website’, the revision of training programs or the clarification of existing

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<sup>67</sup> The Communication is mainly based upon the investigation of an internal working group that was set into force in 2006. The mandate of these working group determined however the outcome to great deal, as it “stressed the importance of streamlining, explaining and, wherever possible, simplifying the existing rules and principles rather than creating new constraints.” (European Commission, 2008b, p. 3)

rules. The insights leading to these suggestions were that the “staff wanted more information on ethical issues, clearer rules, easier access to them and better guidance” (2008b, p. 2). This self-assessment of the Commission leads to the question of how lobbyists shall know whether they potentially ‘induce EU officials to contravene standards of behavior’ if even the staff itself is not fully aware of the rules. There thus is a lack of precise rules. This imprecision is even intensified by the fact that each DG seems to have its own standard for interpreting them (Pohl, 2006; Commission, 2008b). In any case, it remains to be seen whether the measures proposed by the mentioned Communication will bring along more knowledge about and clarification of the rules. It would also be worth to discuss whether it is justified that the Commission does not reconsider its rules to discover a potential for strengthening them. However, instead of entering a complete new debate, a quick glance shall be taken at how the rules are enforced.<sup>68</sup>

There is no explicit regulation of who can file a complaint with whom, but Pohl (2006) assumes that anyone can do so by turning to the relevant agency, i.e. the relevant DG. Complaints are either being investigated by the appointing authority<sup>69</sup> or by OLAF<sup>70</sup>. While OLAF cannot impose sanctions, its (potential) participation in investigations is to be appreciated as it introduces a certain degree of independence to the procedure. Responsible for the issuing of sanctions<sup>71</sup> is a ‘Disciplinary Board’ which is mainly made up of high ranking Commission officials but must include at least one member from outside the institution. Overall, the enforcement system is only marginally independent which is, according to a study<sup>72</sup> carried out on behalf of the Commission, common standard rather than the exception of the rule among official institutions and governments (Demmke et al., 2007). However, the same study also revealed that the effectiveness of an ethics regulation regime is primarily dependent upon its enforcement (Demmke et al., 2007).<sup>73</sup> Furthermore, another finding of the study was that the enacting of a tough regulation regime might be detrimental for the image of an institution due to various reasons, e.g. a negative cost-benefits analysis or negative side effects upon public trust.

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<sup>68</sup> The following discussion covers the enforcement of ‘Staff Regulations’ only.

<sup>69</sup> Appointing authorities are probably the DGs but the quoted Communication also maintains that even Commission staff has problems identifying the competent appointing authority (European Commission, 2008b).

<sup>70</sup> The European Anti-Fraud Office

<sup>71</sup> The sanctions can then reach from a written warning up to a removal from post and a reduction or withholding of the pension.

<sup>72</sup> The study investigated the regulation of Conflicts of Interest for public office holders and should thus not be directly transferred to rules governing standard officials.

<sup>73</sup> The statements on the effectiveness of the lobby regulation scheme are mainly also valid for ethics regulation regimes of officials as both regimes are similar in nature.

However, the arguments of the study can be questioned. The mere fact that the EU institutions, and in particular the Commission, are better regulated than its member states does not justify any leaning back and not even considering whether or not measures with regard to a due and transparent behavior of the people working in them should be taken. Admittedly, the preceding reasoning gave no substituted argument for assuming that the rules and standards on public ethics in the Union are not comprehensive enough but still a reconsideration of the Commission's relation to lobby groups should not only be limited to the latter. It would be inappropriate to reconsider the interpretation of ethics rules as purely internal matters. Moreover, the establishment of an external or at least more independent overseeing body should at least be considered.

### **CONSULTATION AND TRANSPARENCY**

Although the Commission did put its general principles and minimum standards to a public debate, it was clear from the start that it did not intend to rethink or even restructure its approach to consultation with lobbyists. The minimum standards have already been described as 'an improvement of the consultation process [because] they should provide for a more coherent, more equitable and more transparent consultation process'. It is now the time to go beyond this general statement and look a bit more closely at the transparency of the consultation procedure. The focus shall thereby be put on the transparency of the results. The fact that the consultation process itself becomes more transparent by a timely awareness raising publication of consultation plans and by the intention to draft consultation in an accessible manner will thus be left aside.

The general principles and minimum standards for consultation are only applicable if the respective policy initiative is subjected to an impact assessment; phrased differently, consultation according to the standards is usually a part of the impact assessment procedure, but the Commission can also use other consultation methods (European Commission, 2002b).<sup>74</sup> The results of the impact assessment are incorporated in the Commission proposal. Additionally, the leading DG draws up an accompanying 'extended impact assessment report' as well, that will, once the proposal is sent to the other institutions, maintain to accompany the proposal as a working staff document that is also available on the web. This document is one of the three primary sources to become informed about the policy specific relations between lobby groups and the

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<sup>74</sup> The Commission did also publish Communication with principles and guidelines for the collection and use of expert advice (see COM (2002) 713 final). These principles and guidelines are also of relevance for lobby groups because lobby groups can be such experts but still they will not be considered in this paper and lobbyists will be treated as lobbyists or if they are a member of an expert group as a respective group.

Commission. The proposal itself is the second of these sources. Within the proposal, the relevant information can be found within the introductory ‘explanatory memorandum’. With regard to consultations, the following standard points are usually covered

1. Consultation methods, main sectors targeted and general profile of respondents
2. Summary of responses and how they have been taken into account

The information provided under these headings is concise and allows getting a general overview about the consultation procedure. A quick and unrepresentative review of ten Commission proposals and accompanying impact assessment reports yielded the following insights.

The coverage on consultations carried out is in general brief with an outlying maximum of two DIN A4 pages. As a general rule, the impact assessment report gives more information and the proposal itself more or less contains a summary thereof. Sometimes, not only the depth but also the scope of information differs slightly so that only the reading of both gives an encompassing overview. Regarding the consultation methods covered by the reports, it can be said that public and focused consultations according to the general principles and minimum standards are always included in both documents (if they were carried out). The degree of information varies across the documents. In general, however, only little feedback or rather general summaries of the consultation results are given. Instead, the documents usually refer to the consultation website. In that context, it should thereby be taken into account that the conducted review of documents looked at the dedicated consultation parts only and that other parts like the justification of policy choices could refer to the consultation as well. Still, the feedback that is provided is usually minimized. All reviewed documents moreover refer to other consultation methods like expert groups, workshops, surveys or studies. The scope and depth of information is less profound and there do not seem to be any rules on whether and how these other consultation methods should be reported about.

Regarding the actors that were consulted, the documents usually refer to member states and stakeholder groups such as consumers, industry or NGOs in general. Individual names of organizations were only mentioned in three cases (proposal and/or impact assessment report) and then only partly. In five cases (proposal and/or impact assessment report), a reference was made to informal consultations, either with member states or stakeholders. These references were rudimentary in nature and did not exceed statements like “[f]urther consultation took place [...] in bilateral meetings with interested parties” (European Commission, 2008c, p. 3). Thus, no detailed information on informal lobbying contacts is available.

An additional matter that should also be taken into account concerns the fact that the drafting DG can freely decide which information or which opinions of consulted lobbyists it includes in the documents. In the case of a public consultation, the third source of information comes into play because all contributions to such a consultation are published on the ‘Your voice in Europe’ portal. An assiduous seeker of information could thus assess which position might have made it into the proposal. Sometimes, the portal also leads to a site on which more information about the policy or consultation process is given. In general, however, the link from the portals leads to the news site of the relevant DG.

As a preliminary assessment, it can be concluded that the Commission does provide general information about the participation and input of lobbyists. Still, one should look a bit more closely at what types of consultation, phrased differently, what types of lobbying are covered. In this context, it seems useful to restate that lobbyists can lobby directly and indirectly and that they can use formal, informal as well semi-informal ways of accessing the Commission. As a result, it is a questionable finding that even the information that is provided is focused upon formal and direct lobbying via public/focused consultation.

The Commission (2002a) defines consultations as “[...] processes through which [it] wishes to trigger input from outside interested parties for the shaping of policy prior to a decision by the Commission” (p. 15). However, it has to be pointed out that lobby groups do not have to be ‘triggered’ and that lobbyists are not limited to the direct and formal lobbying via public or focused consultations. It has already been mentioned that the value of these consultations rather questionable<sup>75</sup> and that it is easier to convince the other side in a more personal conversation. Additionally, one should take into account that one of the most powerful (and also most difficult) lobbying strategies is to set the agenda. Another very powerful strategy, although similarly complicated, then is to influence the drawing up of the consultation. The way the Commission puts forward the questions already influence the outcome and thus constitute a great potential for influencing the direction in which the proposal is likely to go. The information that is provided about these (and other) contacts is even less extensively covered. At best, one might be able to derive that informal contacts have taken place.

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<sup>75</sup> There is no representative information available and the interviews conducted for this thesis yielded diverse results. While one lobbyist (Interview 2) put not much relevance to public consultations, another (Interview 1) described them as an important part of his lobby strategy. A Commission official (Interview 3) then pointed out that even if a public consultation would not be important, one should take into account that the Commission somehow binds itself to the outcome as it cannot easily deviate from its position taken in the consultation.

It might then be argued that it is rather burdensome, if possible at all, to give detailed information about informal contacts but this argument loses its limited credibility in the case of expert groups and consultative committees. Only a few of the reviewed documents mention that the Commission used the advice of a committee, but the quality of information does not live up to the importance of the committee system for the policy making process. Van Schendelen (2003), one of the few scholars<sup>76</sup> who has investigated the role of experts groups so far, maintains that the committees are likely to be involved in almost 100% of EU legislation. The importance of the expert groups can especially be underlined by referring back to the statements made about informal contacts, because they are involved in the Commission policy-making from start to finish. Apart from being a testing ground and knowledge base for the Commission, the committee system prepares proposals for rubberstamping, carries out impact assessments or even initiates initiatives (van Schendelen, 2003; European Commission, no year). The committee system does not dominate the policy-making and the influence of each group can vary, but they can be influential nevertheless and are usually involved (van Schendelen & Pedler, 1998). It is thereby important to point out that the committees are not an ad hoc part of the Commission policy making but that they are an integral and partly institutionalized<sup>77</sup> component. It is this instance, that calls particular attention to the lack of transparency in these proceedings. Transparency is lacking in two ways. First, the involvement of expert groups in the policy-making is neither really published nor officially acknowledged by the Commission. Second, the Commission is not very forthcoming in providing information about the existence and composition of the expert groups. In 1998 van Schendelen and Pedler (p. 288) complained that “[t]ransparency is often so dim that for many researchers of this book [...] minutes and membership list were hard to acquire “ (van Schendelen/Pedler 1998: 288).

Since then the situation has changed slightly. CONECCS provides some basic and very general information about the Commission’s Committee system, but the Commission has not fulfilled its promise to publish names of members as well as the organizations they represent so far. The fulfilment of the promise is due this year, but it remains to be seen whether the Commission will actually live up to it this time.<sup>78</sup> In any case,

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<sup>76</sup> Scully and van Schendelen (2003) point out that even the most prominent (introductory) textbooks on the EU do not even consider the role of expert groups, or as the authors term it ‘unelected legislators’.

<sup>77</sup> The are either created by a formal decision or by an informal decision of a Commission servive. According to Gornitzka and Severdrup (2007, p. 22) ” [...] a considerable part of this system has become institutionalized and is an important element of a routinized and rather stable administrative structure.” They estimate that the halves of the experts groups are permanent.

<sup>78</sup> The disclosure of names was already promised as the Commission published its first list but later canceled due to confidentiality and data protection concerns (CEO, 2007)

knowing the names enables to scrutinize who might have influenced a decision, but it remains to be important to know of what kind this influence was, too. For that reason, the Commission should provide more details about the influence that expert groups have upon its policy making. The same is true for its informal contacts with lobbyists as well as for consultations according to the minimum standards. A good place to start doing that would be the explanatory memorandum; worthwhile the Commission should also improve the content of 'Your voice in Europe'.

#### **PART 4: GENERAL ASSESSMENT OF THE ETI AND CONCLUSIONS**

This thesis commenced by asking whether it is likely that the implementation of the ETI makes the European policy-making more transparent and more legitimate. Now is the time to ultimately answer this question and to risk a glance at the future as well.

The first part of the paper revealed that transparency and legitimacy are in fact closely connected so that, in theory, the ETI could indeed further the legitimacy of the European policy-making.

In a political understanding, transparency describes the characteristic or condition of political processes being easy to follow because information about them is made available for a broader audience. Phrased differently, transparency provides or facilitates access to information. It helps to enable the people of a political system to authorize their government, participate in policy-making and hold political actors accountable. As a result, transparency helps to assure that the political system is not only representative but effective as well, i.e. that it possesses input as well as output legitimacy. Based on these insights, a ‘the more the better’ rule could be deduced. At the same time, it was pointed out that full transparency generally is not a viable option which led to the adoption of a partial transparency model.

Furthermore, it was argued that the European Union, from a general perspective, *is* a transparent system, but that transparency might be lacking with regard to lobby activities. In that context, lobbying was described as a demand and supply scheme in which egoistic lobbyists and (hopefully impartial) representatives of the political system are engaged in an exchange relationship. Each side of this relationship is dependent upon the other. While the latter controls the access to policy-making, the former possesses hard to come by information. Information then also is the primary access good for lobbyists. Especially the Commission has an ‘appetite’ for information which gives lobbyists a central although not dominant role within the policy-making process of the Union.

However, despite this and albeit concerns about a lack of transparency and potentially undue behavior, the Commission has never really been in favor of regulating its relationship to lobbyists. Under the heading of maintaining a dialogue which is as open as possible it did propose and also implement several measures but overall neither limited itself or the lobbyists in engaging in consultation, nor did it provide much information about its relationship with them. As a matter of fact, scrutinizing this relationship was (and still is) hardly possible, but would be a precondition for

generating trust and enabling reasoned decisions about whether to participate or to give or withhold consent.

Commissioner Kallas who was probably following a similar line of reasoning justified the proposition of the ETI by complaining in 2005 that

*“[t]here is no mandatory regulation on reporting or registering lobby activities. Registers provided by lobbyists’ organisations in the EU are voluntary and incomprehensive and do not provide much information on the specific interests represented or how it is financed.”*

However, while holding his speech in Nottingham, he must have had something different in mind than those measures that are finally going to be implemented in the end of this spring. Accordingly, one could also transfer another judgment that Kallas made in the same speech.

*“There is [still] nothing wrong with lobbies because each decision-making process needs proper information from different angles [...] [b]ut transparency is [still] lacking.”*

Throughout the assessment it was shown that the Commission paid only little attention to the ETI-consultation and pretty much ignored a great deal of the experiences that were made in other countries. However, while pointing to other countries, two facts have to be taken into account

First, even if the flawed regulations of the EP and Germany are left aside, none of the existing regulation schemes has proved itself to be satisfactorily effective. It is true that the lobby regulations were usually badly worded and loophole ridden, yet apart from Australia, which simply abolished its regulation, the schemes were continuously improved (at least within the last two decades). Of course, they are still far from being perfect, but at least the newest reforms are quite promising. Second, being a central element of the political system, lobbying does not only influence but also is influenced by the political culture of the respective system. As a result “there is [...] no ‘boiler-plate’ legislation available” and each political system requires its own carefully adopted lobbying regulation scheme (Pross, 2007, p. 34; Greenwood & Thomas, 1998; Long, 2005). Certainly, both facts seem to knock the bottom out of the chosen approach and call the provided assessment of the ETI into question. A short consideration of both arguments is thus required.

Not having a ‘boiler-plate’ legislation does not necessarily make experiences and concepts non-interchangeable. It seems trivial to refer to the infamous process of globalization, yet the lobbying landscapes around the world are changing and the differences across the systems might not be as big as they seem to be (Malone, 2004; Pross, 2007). In addition, issues like coming up with clear definitions or installing a

meaningful enforcement system are simply a necessity. They have to be adapted and should not be simply omitted. However, not having a 'boiler plate' legislation does imply that it should be carefully considered which parts of other regulations might be adaptable. Thus it is puzzling why the ETI adopted the US system and focuses heavily on financial disclosure. Instead of revealing money flows, the Canadian approach, on the other hand, is more concerned with revealing contacts and the exchange of information. As a consequence, it would not only provide for a more fitting approach but also avoid a re-strengthening of widely held prejudices. The focus on financial disclosure as well as the objections voiced by lobby groups might in fact create the impression that lobbying is all about money. This could further delegitimize lobbying instead of convincing the people that it is a legitimate and vital part of the Union's policy-making process.

Like its counterparts, however, the Canadian regulation scheme is far from being perfectly effective. Nevertheless, the fact that only low degrees of effectiveness have been achieved so far, does not imply that there is no room for doing it better. "In the end, it is politics, not theory that determines the extent and enforcement of regulations" (Thomas, 1998, p. 514). As a consequence, the decision to adopt a 'paper tiger' is a conscious one. Furthermore, blueprints for an effective lobbying regulation scheme are not confidential documents but have already been offered by the literature for many years (e.g. Pollack, 1927). The lack of effectiveness thus results from lobbying efforts from within as well as outside the parliaments that managed to water down each lobbying reform so far.

On the other hand, a low degree of effectiveness does not mean that there are no effects at all. Rush (1998, p. 523), writing about Canada, maintains that:

*"Nonetheless, the original Lobbyists Registration Act and, more particularly, its amended version have undoubtedly thrown much more light on the activities of professional lobbyists in Canada, providing systematic data."*

And Thomas (1998, p. 514), writing about the US, points out:

*"Evidence does suggest, however, that the growth of lobby regulations and other disclosure provisions have had a positive effect on the conduct of public policy making in the American states."*

He further adds that regulation has also led to the professionalization of lobbyists and to a greater concern about transparency among lobbyists, as well as officials.<sup>79</sup> Admittedly, both assessments are far from being enthusiastic. Indeed, one should be clear about the

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<sup>79</sup> A professionalization of the European lobby community is badly needed. Usually they are experts in representing the interest of others but usually fail in representing their own. The debate that evolved around the ETI is probably a great example as it is dominated by ALTER-EU, a great lobbying organizations that lobbies, however, against and not for a good reputation of lobbyists.

fact that the regulation of lobbying does not constitute a panacea for the many ailments of the Union. Nevertheless, properly structured lobby laws, i.e. a mandatory regulations with clear definitions, a meaningful enforcement and adapted to the cultural environment, can still be a remedy, but “[...] the refinement of lobby regulation must be seen as only a part of a process of enhancing an integrated and interdependent body of laws” (Pross, 2007, p. 43). Thus, it should be carefully weighed whether it is more important to require that lobbyists disclose which issues and policy makers they have tried to influence or whether policy makers should disclose which and how issues have been influenced by lobbyists. In any case, an exclusive focus upon lobbyists certainly is not the best option. A regulation that does not enable to link issues to lobbyists but only to link lobbyists to issues merely provides for a naming and shaming device, for a big picture of ‘who is what’. Generally speaking, there is no reason why lobbyists should not be required to register. In fact, a proper registration and a code of conduct are even desirable, but only if they accompany a tough regulation of the official side. Due to the mentioned flaws, the ETI will neither establish the one nor the other thus likely yielding not much more than limited benefits.

An additional drawback of the ETI is that it is limited to just one institution within a ‘multi-level’, ‘multi-arena’ policy-making system (Mazey & Richardson, 2006). On the seventh of March, the EP Committee on Constitutional Affairs finally decided that it would propose a mandatory one-stop-shop lobbying register to the plenary of the EP.

It is puzzling that the EP is going to propose an alternative registration system merely a few weeks before the Commission register is finally going to be opened. Additionally, it has to be emphasized that even if the Commission and the EP could agree on a common register and even if they could convince the Council of their venture, there would still be the national level that would not be covered by the regulation. Even lobbying the Commission is not conferred to the European level and a comprehensive regulation would have to cover the national level as well. At least national government officials who are acting on the European level would have to be required to register themselves as lobbyists, to disclose their funding sources as well as the interests and clients they represent. Unfortunately, such a requirement is not included in the ETI and no doubt, it is very likely that the member states would never be willing to agree to such a treatment of their officials. Moreover, it is questionable whether a pan-European lobbying registration system could be structured in a practical manner.

Taking all these limitations into account, it is tempting to put the definitely insufficiently structured and limited ETI back into the drawer and to continue with

business as usual. However, this would even more definitely be perceived as a victory of secretive Brussels bureaucrats and lobbyists. It would further delegitimize the Union's policy-making and neglect that a regulation of lobbying can still yield positive (but limited) effects. The recommendations for the future Commission's policy towards lobbyists are thus two folded and can broadly be paraphrased by

1. Turbo-charging the transparency within lobbying policy
2. Embedding this re-strengthened focus on transparency in an encompassing strategy of structuring consultation and lobbying in a fair and equal manner

Full transparency does not constitute a viable option, but even the achievement of limited transparency is restricted within the multi-level structure of the European policy-making system. However, within these restrictions there is still room for improvement. First, the Commission should follow the path which is set by the European Parliament and establish a mandatory register. This should however be focused on information, contacts and beneficiaries instead of capital.<sup>80</sup> Second, the Commission should start to take transparency of lobbying activities seriously, i.e. publish (in an accessible manner) at least part of the information on the involvement and influence of lobbyists that it already has. For the Commission, the lobbying register will reveal little new information. Lobbyists *do* in general reveal who they are and whom they represent if they want to be taken seriously by their official contacts. It is moreover hardly imaginable that the additional information on financial resources will induce officials to reconsider the value of the information that is provided by lobbyists. Accordingly, the Commission could already provide much of the information that would be revealed by the register. A good starting point for making this kind of information accessible for the public would be 'Your Voice in Europe'. At the moment, the portal looks nice and sleek but it does lack a searching tool and provides only little information apart from links to the public/focused consultation sites of the relevant DG. 'Your Voice in Europe' could become a one stop shop for all interested citizens. The Commission would have to extend the strengthened<sup>81</sup> general principles and minimum standards for consultation to focused, informal and semi-formal consultation. Furthermore it would have to come up with guidelines for its staff that assure that the newly generated information is provided in a structured and accessible manner. The Commission could, of course only be the starting point of the venture. The EP<sup>82</sup>, but especially the Council would have to follow, but in any case,

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<sup>80</sup> The EP's proposal also focuses on capital as a main indicator.

<sup>81</sup> They would have to be strengthened with regard to the quality and scope of the feedback that has to be provided.

<sup>82</sup> Additionally to the proposed lobbying register, the Committee on constitutional affairs also proposed recommended that MEPs add a so called 'legislative footprint' to policy documents. This footprint should list all the lobbying organizations

even perfectly structured transparency measures will not be able to give a fully adequate picture of the lobbying that is going on in the Union. Transparency should thus be embedded in an encompassing approach to assure an equal and fair consultation and lobbying process. The rationale behind this proposal is the following: The general necessity of maintaining a degree of secrecy and the particular structural as well procedural limitations of the multi-level policy-making designate narrow limits of what can be achieved by establishing transparency in European Union lobbying. It should thus be tried to organize the process of consultation in a manner that assures beneficial, sound and just outcomes that are close to the common good even without the presence of a sufficient degree of transparency. In this context, several authors, most remarkably van Schendelen (2005), but also Wright (2003) point to a self-regulating capacity of lobbying systems. In its essence, the approach of these authors represents blunt Madisonian theory. They propagate a simple ‘the more groups the better’ rationale, but still, there is some truth in it. An open system in which as many groups as possible compete with and check each other would make the policy-making process more representative as well as more discursive (van Schendelen, 2005). Decisions would be based on the consideration of both sides of an argument rendering undue and unrepresentative influence unlikely.

However, such an open and equal lobbying system is not reality and scholars and organizations alike point to a business bias. Part of the problem is that socio-economic inequalities translate into political inequalities (Wright, 2003). Some interests are easier to organize than others and it was already argued that the distribution of capital structures a lobbying system as well. Additionally, however, the political system is an integral part of the process. It can reinforce or attenuate inequalities by structuring its consultation process in an open and equal or in a closed and discriminatory manner. It is thus the responsibility of the Commission, but also of the other European Institutions to assure more equality in consultations. Thus, the efforts should not be limited to the financial support for weak lobby groups<sup>83</sup> but should also include a broadening of horizons among political actors and limitation of privileged access, a situation which is mainly reported for business lobbyists but does exist for citizen lobbyists as well.<sup>84</sup>

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that were consulted during the policy-making process. Initially the footprint should have become a mandatory part of policy-making, but many MEPs considered it to be an excessive administrative burden. For that reason it will be a voluntary option.

<sup>83</sup> Many European lobby groups depend on the contributions of the European Commission and some even generate half of their budget from Commission funding.

<sup>84</sup> Common knowledge among academics is that the European Union still ‘suffers’ from a business bias or from an unlevel playing field for interest representation, but it is also reported that citizen groups are catching up (Buholzer, 1998; Coen, 2007; Eising, 2007; Woll 2007). It is moreover not only business that gains privileged access but also citizen lobby groups, can – although to lesser degree - have privileged access which is inter alia reported for European Parliament .

Overall, lobby groups take up such a prominent place in the European Union policy-making system, that a coherent and encompassing policy approach is necessary. The initial and very general first steps have been presented. Transparency is a minor but still an important part of this approach. Regarding the perception of lobbying among the public, it remains to be seen how the register is communicated by the media, i.e. whether the fact that there is register at all is emphasized or whether the weakness and complaints about financial disclosure are in the focus. Regarding transparency, however, the ETI will bring only little sunshine into an already sunny village and it will not drive away those rainy clouds that hover above the many places where lobbying takes place.

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**ANNEX**

**Table 10: Set of reviewed policy proposals and impact assessment reports**

#	Document number	Leading DG	Ad opted	Style	Consultation	Ad hoc / informal consultation	Other consultation	Identification of individual lobby groups
01	SEC(2008) 192	Enterprise and industry	14.02.08	Extensive (narrative)	Not conducted/mentioned	Not mentioned	Studies	Member states, general stakeholder groups <sup>85</sup> and partly mentioning of individual organizations
	COM(2008) 80 final			Very brief summary	Not conducted/mentioned	Not mentioned	conference	“
02	SEC(2008) 242	Education and culture	27.02.08	Brief	Public, description of process	Not mentioned	forum	General stakeholder groups
	COM(2008) 106 final			Very brief summary	Public and focused Brief coverage of average opinion, no reference to website	Not mentioned	Not mentioned	General stakeholder groups
03	SEC(2008) 38	Enterprise and industry	25.01.08	Brief	Public no reference to results, reference to website	Not mentioned	Expert group	Member states, general stakeholder groups
	COM(2008) 9 final			Brief summary	Public, superficial consideration of content, reference to website	Not mentioned	“	“

<sup>85</sup> The term ‘general stakeholder group’ means that the Commission referred to consumer groups, industry, etc.

04	SEC(2008) 273	Enterprise and industry	04.03.08	Extensive	Targeted and public consultation, summaries provided in annex, reference to website	Not mentioned	Questionnaires, workshops, roundtable & bilateral meetings	General stakeholder groups
	COM(2008) 123 final			Very brief	Reference to the impact assessment report, reference to website	Not mentioned	“	“various stakeholder groups” and member states
05	SEC(2008) 12	Health and consumer affairs	14.01.08	Brief	Public consultation on own website, link to summary report; IPM (results in annex)	Informal discussions with various stakeholders	Stakeholder meeting organized by stakeholders or Commission, working groups (consultation of member states)	“
	COM(2007) 872 final			Brief	Reference to the impact assessment, reference to website	Bilateral meetings with interested parties	“	Member states and general stakeholder groups
06	SEC(2008) 92	Health and consumer affairs	30.01.08	Extensive	Public, description of process reference to website	Mentioned in a general manner	Advisory groups, forums, consultative groups, focus groups	Member states and general stakeholder groups
	COM(2008) 40 final			Brief	Grouped short summary of opinions, reference to website	Not mentioned	Surveys	“
07	SEC(2008) 351/2	Energy and transport	19.03.08	Extensive (narrative)	Public consultation (+ subsequent stakeholder meeting), short summary as well as more extensive summary in annex, reference to website	Bilateral meetings (mainly with member states)	Study, survey, expert group, questionnaire (results in annex)	Member states and general stakeholder groups
	COM(2008)151 final			Brief-extensive summary	reference to website	“	Stakeholder meetings, questionnaire	“

08	SEC(2007) 1661	Employment, social affairs and equal opportunities	12. 12. 07	brief	Focused, general description of consultation process	Not mentioned	Not mentioned	General stakeholder groups (key or relevant stakeholders)
	COM(2007) 797 final			Brief summary	Similar but shorter	“	“	“
09	SEC(2007) 1237	Enterprise and industry	02. 10. 07	Extensive (narrative)	Not conducted/mentioned	Not mentioned	Working group (+ reference to participating stakeholders)	General stakeholder groups and partly mentioning of individual organizations
	COM (2007 559 final)			Brief Summary	Not conducted/mentioned	“	“	“
10	SEC (2007) 1593	Enterprise and industry	05. 12. 07	Brief-extensive	Public, general description of results		Studies, interviews, workshops	General stakeholder groups
	COM(2007) 765 final			Very brief summary	Reference to website	Close contact with a variety of stakeholders	“	General stakeholder groups and partly mentioning of individual organizations