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Lobbying in the European Union and Interinstitutional Agreement on a Mandatory Transparency Register for Lobbyists

Abstract

The article presents the effects of an attempt to ascertain to what extent the Interinstitutional Agreement on a mandatory transparency register affects the phenomenon of lobbying in the European Union (EU). In order to examine the issue, the concept and essence of lobbying in the EU were introduced. Legal regulations concerning EU lobbying were also identified. A further portion of the article analyses the Interinstitutional Agreement of 20 May 2021 between the European Parliament, the Council of the European Union, and the European Commission on a mandatory transparency register (IAMTR) in relation to the previously binding Agreement between the Parliament and the European Commission on the transparency register for organisations and self-employed individuals in EU Policy-making and Policy implementation (ATR). The article uses the formal-dogmatic method. As a result of the analysis, it was concluded that the Interinstitutional Agreement on a mandatory transparency register contains numerous exclusions, both subjective and objective, to registration in the Transparency Register. One positive aspect is the application of the IAMTR to the EU Council also.

Keywords: European Union, Lobbying, Regulations, Transparency Register, Interest Groups

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Introduction

In the political guidelines for the next term of the European Commission (2019–2024), Ursula von der Leyen stressed the need to reinforce the transparency of the entire legislative process in the European Union and announced a partnership with the European Parliament and the EU Council to enhance transparency (European Commission, Directorate-General for Communication, Leyen, 2020). According to the words of the President of the European Commission, “as institutions, we serve citizens, so they should know with whom we meet in our work, with whom we conduct talks, and what position we hold in them” (Ibidem). In 2021, the Eurobarometer survey demonstrated that 49% of Europeans trust the European Union, while the level of trust of Europeans in relation to individual EU institutions is as follows: the European Commission 50%, the European Parliament 53%, and the European Council 47% (European Commission, Directorate-General for Communication, 2021). Time and again, articles appear in the press which concern lobbying in the European Union. To give one example, there was an article published by the French daily “Libération” at the end of 2021, or publications concerning the disclosure of internal Google documents regarding campaigns against lawmakers in the EU on the proposed provisions of the Digital Markets Act (DMA) and the Digital Services Act (DSA) (Quatremer, 2021; Espinoza, 2020). Meanwhile, the technology sector is the largest lobbying sector in the EU, ahead of sectors such as pharmaceuticals, fossil fuels, finance, and chemicals. Despite the diverse structure of lobbyists for digital economy policy in the EU, there is a domination of ten key players, whose expenditure on lobbying activities amounts to over €32 million annually (Corporate Europe Observatory, LobbyControl, 2021, p. 6).

Lobbying in the European Union – An Outline of the Issue

Lobbying should be interpreted as a form of participation in the decision-making process, which consists in representing positions by various interest groups and other entities with legal means (Wiszowaty, 2021; Bionti, Hogan, 2021). Article 11 of the Treaty on European Union (hereinafter: TEU) expresses the principle of the so-called participatory democracy, whereby EU institutions are open to participation in the decision-making processes of citizens and their organisations. For a longer time period, the indicated provision was the only one relating to the functioning of interest groups and the right of lobbying (Wiszowaty, 2018, p. 81).

Pursuant to Art. 11 para. 1 TEU: “the 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” (Treaty on European Union, 2016). This phrase provides the legal basis for horizontal civil dialogue, but the legislator should further identify the specific measures which it deems necessary to meet the resource requirement (EESC, 2010).

The activity of the various kinds of entities that operate in the sphere of lobbying has become an essential part of the EU decision-making process (Coen, Richardson, 2009, p. 3; Doliwa-Klepcka, 2011). Article 11 para. 2 TEU provides: “the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society” (Treaty on European Union, 2016). The reference to representative associations primarily alludes to organised interest groups that lobby in an attempt to influence economic and political decisions made by EU institutions (Blanke, Mangiameli, 2013). Lobbying, as a phenomenon, is a fully accepted and legal action in democratic systems (Greenwood, Thomas 1998). The openness and transparency of the lobbying process, laid down in art. 11 para. 2 TEU, comprises an important step towards controlling associations and avoiding non-transparency (Grad, Frischhut, 2019). All the more so as a large majority of pressure groups represent economic and commercial interests, and their ultimate objective is to gain economic advantages (Blanke, Mangiameli, 2013).

In the European Union, considering the specificity and the very broad range of decision-making competences, information is perceived as a critical commodity (Doliwa-Klepcka, 2014). It also plays an indicated role in lobbyists’ activities, as access to information marks the beginning of all lobbying activities (Coen, Katsaitis, Vannoni, 2021, p. 176; Graniszewski, Piątkowski, 2004, p. 32). A vital element of the regulation of lobbying activities is to ensure the transparency of the decision-making process in the European Union and access to all documents related thereto, especially the so-called trialogues – formal trilogue meetings (Wisowaty, 2018, p. 94; Brandsma et al., 2021). Trialogues are a particular form of the decision-making process in the Union which involves representatives of the Council, Parliament, the Commission, and representatives of the Member States. The documents exchanged during informal trialogues are not made available to the public in a proactive manner, which is an expression of a lack of transparency (Brandsma, 2019). The founding treaties include the citizen’s right to access information, which is currently expressed in Art. 15 sec. 3 TFEU and Art. 42 of the EU Charter of Fundamental Rights (Treaty on the Functioning of the European Union, 2016;

Charter of Fundamental Rights of the European Union, 2016). As the notions of lobbyist and lobbying are sometimes perceived pejoratively in the public opinion, official documents of the European Union have adopted neutral wording, based on the terms: representative of interest groups and representing interest groups (Doliwa-Klepcka, 2011).

The Conditionality Principle in the IAMTR

Four years of negotiations have resulted in the adopting of the Interinstitutional Agreements of 20 May 2021 between the European Parliament, the Council of the European Union, and the European Commission on a mandatory transparency register (hereinafter: IAMTR). Interinstitutional agreements represent an instrument of the EU's internal law and a common way of establishing the principles of cooperation between EU institutions in selected areas (Kenig-Witkowska, Łazowski, 2019, p. 217; Obradovic, 2009, p. 318). The signatory institutions of the IAMTR have committed to make the register compulsory for certain interest representation activities (Interinstitutional Agreements, 2021). Pursuant to Art. 2 h IAMTR, the conditionality principle means that an interest representative must be entered in the register in order to carry out some activities covered by this document (Ibidem). By the end of 2021, over 13,000 entities were registered, and in order to meet the new requirements resulting from IAMTR, the entries are to be updated by March 19, 2022 (Transparency Register, 2021).

The conditionality principle and supplementary measures adopted in the document are intended to set transparent and ethical high standards for the representation of interest groups in the EU. Accordingly, registration is voluntary, but if representatives of interest groups are seeking to carry out specific activities against the institution that have introduced such a measure, they must obtain an entry in the register (Secretariat of the Register, 2021b). Pursuant to Art. 5 IAMTR, individual signatory institutions implement the principle of conditionality by means of individual decisions made on the basis of their internal organisational powers (Interinstitutional Agreements, 2021). Signatory institutions may also adopt complementary transparency measures, encouraging registration and strengthening the common registry framework. The purpose of these measures is to promote adherence to registry rules and the code of conduct by offering benefits in exchange for entry. The conditionality and complementary transparency measures taken by the European Parliament, the Council of the European Union, and the European Commission are made public on a regularly updated register website.

As distinct from the previously-binding Agreement between the Parlia-

ment and the European Commission on the transparency register for organisations and self-employed individuals in EU Policy-making and Policy implementation from 2014 (hereinafter: ATR), IAMTR includes the Council of the European Union. Pursuant to Art. 3 sec. 1 of the EU Council Decision 2021/929, registration in the Transparency Register is a condition for holding a meeting of interest representatives with the Secretary-General and the Directors-General of the General Secretariat of the Council (Council Decision EU, 2021). The regulation excludes permanent representative offices of the Member States, which, according to Emilia Korkea-aho, are the most obvious addressees of lobbying (Korkea-aho, 2021b).

Pursuant to Art. 11 IAMTR, conditionality measures and complementary transparency measures may be taken by EU institutions, bodies, offices, and agencies other than the signatory institutions, as notified by the register management and published on the register's website. Based on Art. 12 IAMTR, Member States may also adopt conditionality measures and complementary transparency measures with regard to their permanent representations in the EU, in accordance with national law (Interinstitutional Agreements, 2021). An evaluation of the performance adopted pursuant to Art. 5 IAMTR will be made by the signatory institutions by 2 July 2022 and at regular intervals thereafter.

An applicant is eligible for entry in the register if that applicant, as an individual or legal person, or formal or informal group, association or network, carries out activities falling within the scope of the register and adheres to the code of conduct set out in Annex I to the IAMTR. It is the duty of the registered entity to conduct activities in accordance with sixteen balanced provisions and principles which make up the code of conduct. Moreover, the registered entity is obliged to inform the personnel and their representatives about the rules and regulations. Information reported to the register by entities shall be complete, up-to-date, correct, and not misleading (Ibidem). In 2020, monitoring activities included quality control carried out on almost 5,000 entries, as a result of which, 27% of the registered entities subject to control were removed from the register due to ineligibility or failure to update the entry (Secretariat of the Register, 2021a).

Activities of Interest Representatives in the IAMTR

Pursuant to Art. 2 a) IAMTR “interest representative means any natural or legal person, or formal or informal group, association or network, that engages in covered activities” (Interinstitutional Agreements, 2021). The document assumes that representing interest groups, in accordance

with Art. 3 sec. 1, “shall cover activities carried out by interest representatives with the objective of influencing the formulation or implementation of policy or legislation, or the decision-making processes of the signatory institutions or other Union institutions, bodies, offices and agencies, without prejudice to Article 4” (Ibidem).

In 2016, the European Commission brought forward an Interinstitutional Agreement on a Mandatory Transparency Register, proposing to understand advocacy as “activities which promote certain interests by interacting with any of the three signatory institutions, their members or officials” (European Commission Proposal, 2016). The ATR defines advocacy as covering “all activities carried out with the objective of directly or indirectly influencing” (Agreement, 2014). Indirect influence was understood as influencing by using funds such as the media, public opinion, conferences or social events addressed to EU institutions (Ibidem). The definition brought forward by the European Commission excludes indirect lobbying, which would be a significant step backwards towards the optimal regulation of lobbying activities in the European Union (Oluwole, 2019). Thus, tactical and strategic advice from, among others, law firms, consulting companies or former EU officials, was omitted (Ibidem).

The activities covered by the agreement include, for example: a) organising and participating in meetings, conferences or events as well as engaging in any similar contact with EU institutions; b) contributing to or participating in consultations, hearings or other similar initiatives (e.g., expert groups or intergroups); c) organising communication campaigns, platforms, networks, and grassroots initiatives; d) preparing or commissioning the preparation of political documents and positions, amendments, polls and analyses, open letters and other types of communication or information materials, and commissioning and carrying out research (Interinstitutional Agreements, 2021).

The activity of most entities engaging in representing interest groups is characterised by great variety and often goes beyond *strictly* lobbying activities (Doliwa-Klepcka, 2014, p. 111). The definition of an interest representative in the IAMTR is derived from the performance criterion. The activities of an interest representative are included in the scope of the register, regardless of the means or channel of communication used for this purpose and where they are undertaken. Non-influencing activities that monitor changes in EU law or policy for scientific or journalistic purposes, personal interests or law enforcement purposes fall outside the scope of the register (Secretariat of the Register, 2021b). Both the ATR and IAMTR contain several problematic exemptions to registration that may undermine transparency (Ammann, 2021).

Objective Exclusions in the IAMTR

Under Art. 4 sec. 1, IAMTR cannot be deemed to represent interest groups: providing legal advice or other professional advice when: “1 it consists of representing clients in the context of conciliation or mediation procedure aimed at preventing a dispute from being brought before a judicial or administrative body; 2 the advice is given to clients to help them ensure that their activities comply with the existing legal framework; 3 it consists of representing clients and safeguarding their fundamental or procedural rights, such as the right to be heard, the right to a fair trial, and the right of defence in administrative proceedings, and includes activities carried out by lawyers or by any other professionals involved in representing clients and safeguarding their fundamental or procedural rights” (Interinstitutional Agreements, 2021). The term “client” is defined in Art. 2 d IAMTR as “any interest representative that has entered into a contractual relationship with an intermediary for the purpose of that intermediary advancing that interest representative’s interests by carrying out covered activities”. On the other hand, “intermediary” in accordance with Art. 2 e IAMTR means “any interest representative that advances the interests of a client by carrying out covered activities” (Ibidem).

Entities providing legal advice or other professional advice, which are not covered by the above-mentioned exemptions, and carrying out activities related to the representation of interest groups towards the EU institutions on behalf of their clients, are treated as representatives of interest groups, engaged in activities covered by the register and qualify for entry (application for entry) in the register (Secretariat of the Register, 2021b). One of the leading law firms, not registered in the Transparency Register, describes itself as “the power of political lobbying in the EU”, employing, among others, former EU officials and politicians (Law Firm, 2021). On its website, it provides information about, inter alia, addressing EU lawmakers to emphasise Huawei’s compliance with EU standards and strengthening the company’s credibility at risk, due to concerns about its product cyber-security, or other lobbying activities undertaken, for example, in the case of the so-called Panama Papers (Ibidem).

In the ATR, the exclusions relating to legal advice and other types of specialist advice are contained in para. 10. The aforementioned regulation exempts from registration, among others, activities consisting in “advisory work and contacts with public bodies in order to better inform clients about a general legal situation”, or preparing analyses and research for clients on “potential impact of any legislative or changes with regard to their legal position or field of activity” (Agreements, 2014). The ATR

indicates that it is subject to entry in the register of legal and other specialist advisory services consisting in “the provision of support via representation or mediation, or of advocacy, including argumentation and drafting” and “the provision of tactical or strategic advice, including the raising of issues the scope of which and the timing of communication of which are intended to influence the EU institutions, their Members and their assistants or their officials or other staff” (Ibidem). Emilia Korkea-aho indicates that the scope of the activities which are exempt and non-exempt from registration, and related to legal advice in the ATR, has not been clearly delimited (Korkea-aho, 2021a). In addition, Korkea-aho has identified the restriction on the preparation of analyses of legislative or regulatory changes for clients as being problematic, as the preparation of the indicated analyses comprises the focal point of the activities of non-lawyer lobbyists (Ibidem). According to the ATR, lawyers who prepared the above-mentioned analyses were not subject to entry in the register, unlike other entities providing the services in question (Ibidem).

In response to a public consultation of the European Commission on the proposal for a mandatory transparency register, the Council of Bars and Law Societies of Europe made a postulate referring to the need to clearly define the activities leading to registration and to cover only activities in which there is direct contact with officials of the EU institutions (CCBE, 2016). Pursuant to para. 7 of the ATR, “preparing, circulating and communicating letters, information material or discussion paper and position papers” (Agreement, 2014) was recognised as an activity subject to registration (Ibidem). In a CCBE assessment, the preparation of the indicated documents is subject to professional secrecy, and the indicated activity is confidential in relation to third parties (CCBE, *op. cit.*).

The final draft report of the European Parliament’s Committee on Constitutional Affairs, prepared under the supervision of Sven Giegold, formed the basis for the adoption, by the European Parliament, of a resolution on countability, transparency, and reliability in EU institutions (European Parliament Resolution, 2018). The document includes, among others, recommendations regarding the legal regulation of lobbying. Item 17 underlines the obligation to impose upon consulting companies, law firms, and advisers running their own businesses, the commitment to define the exact scale of activities covered by the register, while item 18 indicates in the register all clients on whose behalf they conduct business representing interests in order to ensure transparency (Ibidem). The Parliament also concludes that it “welcomes the decisions taken by various bars and law societies in recognizing the differences between court-related activities of lawyers and other activities falling within the scope

of the Transparency Register” (Ibidem). This distinction is a major issue, and the regulation should be specific and exclude any gaps that could be exploited by lobbyists-lawyers to avoid registration (Wiszwaty, 2018, p. 90). Marcin Wiszwaty claims that the decisions of legal self-governments and the institutional agreement between EU bodies are acts of too low rank to modify the provisions on the practice of legal professions and professional secrecy (Ibidem).

IAMTR indicates that registration excludes the activity of “making submissions as a party or a third party in the framework of a legal or administrative procedure established by Union law or by international law applicable to the Union”, e.g., in EU competition law proceedings or trade (Interinstitutional Agreements, 2021). It is not considered as interest representation to take a position on the basis of a contractual relationship with the Commission, Parliament or Council or on the basis of a grant agreement from Union funds (Ibidem). The indicated exclusion also encompasses circumstances where, on the basis of a public procurement contract (concluded with the Commission, Parliament, Council) or a contract for granting subsidies from EU funds, the position on behalf of this entity is taken by an intermediary based on the power of attorney granted (Secretariat of the Register, 2021b). Another limitation concerns the activities of social partners participating in the social dialogue in accordance with Art. 152 TFEU; a similar exclusion is contained in para. 11th ATR (Interinstitutional Agreements, 2021; Agreement, 2014). The activities of organisations which represent the interests of employers and employees and which act as social partners in the European Social Dialogue are excluded from the register, but when employers’ or employees’ organisations conduct bilateral discussions to promote their own or their members’ interests, they are subject to registration (Secretariat of the Register, 2021b).

Exemption from registration is subject to “making submissions in response to direct and specific requests from any the Union institutions, their representatives or Staff, for factual information, data or expertise” (Interinstitutional Agreements, 2021; Agreement, 2014). Thus, an expert in a specific policy or scientific field does not act as a representative of interest groups when he is contacted by a representative or staff member of the EU institutions with a concrete request (Secretariat of the Register, 2021b). A similar exclusion was contained in para. 12 ATR, and, as Stijn Smismans notes, “the Register has thus strong limitations since most formal consultation mechanisms do not fall in its field of application” (Smismans, 2014).

The scope of agreement fails to include “activities carried out by natural persons acting in a strictly personal capacity and not in association

with others”. However, activities of natural persons associating with others aimed at representing common interests, for example grassroots or other movements of civil society, are subject to registration (Interinstitutional Agreements, 2021; Secretariat of the Register, 2021b). The activities covered by the registration excluded “spontaneous meetings, meetings of a purely private or social character and meeting taking place in the context of an administrative procedure established by the TEU or TFEU or legal acts of the Union” (Interinstitutional Agreements, 2021). The guidelines clarify that spontaneous meetings should be understood as meetings that are unplanned and unsettled (Secretariat of the Register, 2021b).

Subjective Exclusions in the IAMTR

The registration excludes activities performed by the following entities: “public authorities of Member States, including their permanent representations and embassies, at national and subnational level” and “associations and networks of public authorities at Union, national or subnational level, on condition that they act exclusively on behalf of the relevant public authorities” (Interinstitutional Agreements, 2021). Public authorities at the sub-national level are federal states, regional, municipal, and other local authorities as well as national regulatory authorities and independent administrative bodies established by Member States (Secretariat of the Register, 2021b). The aforementioned resolution of the European Parliament contained a demand in relation to Art. 4 sec. 2 and art. 5 sec. 2 TEU to exclude democratically elected state institutions at the national, regional, and local level from registration (European Parliament resolution, 2018). This postulate was justified by the multi-level nature of the governance system in the European Union (European Parliament resolution, 2018; Kurczewska, 2021).

The agreement also excludes activities performed by “intergovernmental organizations, including agencies and bodies emanating from them” and “public authorities of third countries, including their diplomatic missions and embassies, except where such authorities are represented by legal entities, offices or networks without diplomatic status or are represented by an intermediary” (Interinstitutional Agreements, 2021). Thus, registration is required for law firms and professional consulting companies hired by governments and public authorities of non-EU countries, acting on their behalf, aimed at representing interest groups towards the EU institutions (Secretariat of the Register, 2021b). An entity that is a legal person, an entity or a network with no diplomatic status is considered

to be a representative of interest groups (e.g., a public-private partnership or a government investment fund or investment agency, without diplomatic status) carrying out activities related to the representation of interest groups towards the EU institutions on behalf of the government or public bodies outside the European Union (Ibidem). In accordance with para. 15 TRA, registration was not applicable to “Member States’ government services, third countries’ governments, international intergovernmental organizations and their diplomatic missions” (Agreement, 2014). This implies that, among others, corporations or associations based in third countries were subject to registration, which in practice sometimes led to a joining forces of third-country governments with entities from these countries, representing industry interests (Korkea-aho, 2016). The indicated practice took place, for example, regarding Big Tech’s activities towards provisions of the Digital Markets Act (DMA) and the Digital Services Act (DSA) (Clarke, Swindells, 2021).

The exemption from registration also covers political parties (except for organisations established by or associated with political parties) and churches, associations, religious communities (also philosophical and non-confessional organisations, referred to in art. 17 TFEU), with the exception of offices, legal entities or networks established to represent those entities in relations with the Union’s institutions (Interinstitutional Agreements, 2021).

Conclusions

Lobbying in the European Union is determined through the prism of its institutional model. Lobbying activities are seen as something integral which influences strategic decisions taken in the European Union. Entities undertaking lobbying activities in EU institutions impact the decision-making processes in (among others) the European Commission, the European Parliament, and the Council of the European Union. A number of EU entities undertake lobbying activities, which are varied in terms of their internal structure, forms of lobbying, and the methods and strategies used.

In the EU, lobbying is a fully accepted and legal action. In legal systems where lobbying is normatively regulated, regulations are aimed at enhancing the transparency of the decision-making process and law-making. Controlling the exertion of influence of specific interest groups on decision-makers is expected to result in restricting unlawful practices.

The effectiveness of legal regulations on lobbying is determined by their consistency and the absence of loopholes. The previous TRA regulation took into account numerous exclusions, both subjective and ob-

jective, to registration in the Transparency Register. A number of exclusions were also included in the current IAMTR regulation, although the positive aspects of IAMTR should be indicated by the application of the Transparency Register also to the EU Council, and the lobbying activities of non-EU countries when they are run by intermediaries without diplomatic status. Furthermore, meetings of lobbyists with the Secretary-General and the Directors-General of the General Secretariat of the Council of the EU have been made conditional on an entry in the Transparency Register, and the register will be open to the voluntary participation of other EU institutions, bodies, offices, and agencies.

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