

# Enhancing Transparency in EU Lobbying? How the European Commission's Lack of Courage and Determination Impedes Substantial Progress

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The intermediation and evaluation of societal interests is a core feature of representative democracies. Within that process, the roles of the different actors involved in decision-making must be defined unambiguously. On the one hand, actors in parliament and government must keep an eye on the common good and try to balance different, possibly even conflicting interests. Different definitions of both the common good and the rules for balancing conflicting interests are key features of different political formations and ideologies. On the other hand, interest representatives – commonly referred to as »lobbyists« – formulate interests and mediate between their principals and decision-makers in parliament and government. As the decision-makers in the political arena have to know whose interests they are confronted with, transparency of both lobbying organizations and lobbyists is a must.

In a democratic political system, interest organizations play an essential role in mediating between policy-makers and society. It is not only a matter of their expertise; the very existence of open and pluralistic dialogue can enhance the quality of political decision-making. Even more so, this is the case with regard to the European Union (EU), whose institutions have historically sought to narrow the »structural remoteness«<sup>1</sup> at which they supposedly stand from Europe's citizens via organized interest groups, conceiving them as a »bridge between state and civil society«<sup>2</sup> and a potential source of political legitimacy.

Over the past few decades, the variety of interest representatives in Brussels and the intensity of their activities in relation to EU institutions have increased significantly. According to some estimates, interest representatives in Brussels numbered about 2,500 organizations with about

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1. Greenwood, Justin (2003): *Interest Representation in the European Union*. Basingstoke: Palgrave Macmillan: 5.
  2. Greenwood, Justin and Clive S. Thomas (1998): »Regulating Lobbying in the Western World,« in: *Parliamentary Affairs* 51 (4): 487.

15,000 individual lobbyists in 2001,<sup>3</sup> not to mention the multitude of organizations that lobby EU institutions without having an office in Brussels. In view of what has been described as an »unprecedented expansion of lobbying in Brussels,«<sup>4</sup> it can be assumed that the number of both individual lobbyists and lobby organizations has risen even more since then, resulting in an »extreme pluralization of organizations and a remarkable richness of forms of interest representation at the European level.«<sup>5</sup> As a consequence, lobby groups arguably exert significant influence on European decision-making processes at all stages of the policy process.

## Transparency Bestows Legitimacy

As a result of the proliferation of both interest organizations and forms of interest representation over the past few decades, questions of lobbying transparency are increasingly coming to the fore. If unregulated, the activities of interest representatives can have a negative effect on political processes. For policy-makers in parliament and government, both the identity and the income sources of lobbyists and lobby organizations should be disclosed in order to locate their claims and put their demands into context. Furthermore, in the eyes of the general public, lobbying secrecy can undermine the legitimacy of a political system and public trust in its institutions. In June 2009, a Committee Report of the Council of Europe's Parliamentary Assembly asserted »a dramatic decline in public confidence in politics in many Council of Europe member states« and concluded that »[t]he lack of transparency in political lobbying activities can be deemed to constitute one of the causes of this phenomenon.«<sup>6</sup>

3. Cf. Hix, Simon (2005): *The Political System of the European Union*. Basingstoke: Palgrave Macmillan: 212.
4. European Parliament (2007): *Lobbying in the European Union*, Briefing Paper, Directorate-General Internal Policies, PE 393.266: 3; <http://www.europarl.europa.eu/activities/committees/studies/download.do?file=18208> (accessed November 9, 2009).
5. Grande, Edgar (2003): »How the Architecture of the EU Political System Influences EU Business Associations,« in: Justin Greenwood (ed.): *The Challenge of Change in EU Business Associations*. Houndmills: Palgrave Macmillan: 54.
6. Council of Europe, Parliamentary Assembly (2009): *Lobbying in a Democratic Society (European Code of Conduct on Lobbying)*, Report, Committee on Economic

The question of whether and how the EU institutions should structure their relations with interest organizations and increase their level of transparency has been under discussion for two decades.<sup>7</sup> Already in 1992, a Commission Communication on »open and structured dialogue between the Commission and special interest groups« strove for relations between both sides, »useful though they are, (...) [to] be more clearly defined,«<sup>8</sup> calling for a directory of lobby organizations and a code of conduct. In 2001, the Commission's White Book on »European Governance« ambitiously placed »more effective and transparent consultation at the heart of EU policy-shaping.«<sup>9</sup> Eventually, a voluntary register of lobbying entities was established. As early as 1989, the European Parliament had devoted attention to the issue of whether and how to regulate lobbying, ultimately amending the Parliament's Rules of Procedure and establishing a voluntary registration system of its own.<sup>10</sup>

When the debate on lobbying transparency began, both the European Parliament and the Commission were at the cutting edge in this regard. Within Europe, only the German Bundestag had created a register of associations that lobby parliament and government.<sup>11</sup> And outside

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Affairs and Development, Doc 11937 (June 5, 2009): 2; <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc09/EDOC11937.pdf> (accessed October 13, 2009).

7. For an overview of the debate, see, for example, Hans-Jörg Schmedes (2008): *Wirtschafts- und Verbraucherschutzverbände im Mehrebenensystem. Lobbyingaktivitäten britischer, deutscher und europäischer Verbände*, Wiesbaden: vs Verlag für Sozialwissenschaften: 198–206, as well as European Parliament (2003): *Lobbying in the European Union: Current Rules and Practices*, Working Paper, Constitutional Affairs Series, AFCO 140 EN, 04–2003. Luxembourg: European Parliament, Directorate-General for Research: 33–41; [http://ec.europa.eu/civil\\_society/interest\\_groups/docs/workingdocparl.pdf](http://ec.europa.eu/civil_society/interest_groups/docs/workingdocparl.pdf) (accessed November 9, 2009).
8. European Commission (1993): *An Open and Structured Dialogue between the Commission and Special Interest Groups*, Official Journal C 63, Brussels (March 5, 1993): 2; [http://ec.europa.eu/civil\\_society/interest\\_groups/docs/v\\_en.pdf](http://ec.europa.eu/civil_society/interest_groups/docs/v_en.pdf) (accessed October 12, 2009).
9. European Commission (2001): *European Governance. A White Paper*, COM (2001) 428 final, Brussels (July 25, 2001): 15; [http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001\\_0428en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf) (accessed October 12, 2009).
10. See, for example, Raj Chari, Gary Murphy and John Hogan (2007): »Regulating Lobbyists: A Comparative Analysis of the United States, Canada, Germany and the European Union,« in: *The Political Quarterly* 78 (3): 422–38.
11. See Ronit, Karsten and Volker Schneider (1998): »The Strange Case of Regulating Lobbying in Germany,« in: *Parliamentary Affairs* 51 (4): 559–67.

Europe, only Canada and the United States had, at that time, established lobby disclosure laws, with registration obligations and tiered sanction mechanisms.<sup>12</sup> In the meantime, however, the EU's edge has been rather blunted. While Germany<sup>13</sup> is currently discussing, along with other European countries such as France, Hungary, Lithuania, Poland, and the United Kingdom<sup>14</sup>, how to establish regulations or to refine existing approaches into mechanisms that ultimately generate a sufficient level of transparency with regard to interest intermediation in political decision-making processes, the EU's institutions are failing to meet this challenge – most notably due to the Commission's lack of courage and determination.

In several respects, the Commission's »register of interest representatives«<sup>15</sup> that emerged on June 23, 2008<sup>16</sup> out of its allegedly seminal transparency initiative<sup>17</sup> is going in exactly the wrong direction.

12. See House of Commons: *Lobbying: Access and Influence in Whitehall. First Report of Session 2008–09, Volume I: Report and Appendix, together with formal minutes*, Public Administration Select Committee, London, The Stationery Office Limited (published January 5, 2009): 35–38 and 68–75; <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmpubadm/36/36i.pdf>] (accessed October 14, 2009), as well as Council of Europe (2009), cf. note 6, pp. 5–7.
13. See Schmedes, Hans-Jörg (2009): »Mehr Transparenz wagen? Zur Diskussion um ein gesetzliches Lobbyregister beim Deutschen Bundestag.« in: *Zeitschrift für Parlamentsfragen* 40 (3): 543–60.
14. See, for example, Council of Europe (2009), cf. note 6, pp. 9–11, as well as Marcin Michal Wiszowaty (2006): »Legal Regulation of Lobbying in New Member States of the European Union.« in: Heiko Pleines (ed.): *Participation of Civil Society in New Modes of Governance. The Case of the New EU Member States, Part 2: Questions of Accountability*: 46–56; <http://www.forschungsstelle.uni-bremen.de/images/stories/pdf/ap/fsoap74.pdf> (accessed May 28, 2009).
15. The register can be found online at: <https://webgate.ec.europa.eu/transparency/regrin/welcome.do> (accessed October 14, 2009).
16. See the Commission's statement *Shining a Light on EU Lawmaking* on the register's launch; [http://ec.europa.eu/news/justice/080623\\_1\\_en.htm](http://ec.europa.eu/news/justice/080623_1_en.htm) (accessed October 12, 2009).
17. The Commission's transparency initiative was initiated by a *Communication to the Commission from the President, Ms Wallström, Mr Kallas, Ms Hübner and Ms Fischer Boel proposing the launch of a European transparency initiative*; [http://ec.europa.eu/commission\\_barroso/kallas/doc/etik-communication\\_en.pdf](http://ec.europa.eu/commission_barroso/kallas/doc/etik-communication_en.pdf) (accessed October 14, 2009) and the annexed *Report of the Inter-Departmental Working Group on a possible »European transparency initiative«*, Commission Staff Working Document, SEC (2005) 1300 final; [http://ec.europa.eu/commission\\_barroso/kallas/doc/transp\\_report\\_en.pdf](http://ec.europa.eu/commission_barroso/kallas/doc/transp_report_en.pdf) (accessed October 14, 2009). The initiative was advanced by

The register is completely voluntary in nature without sufficient incentives to register; its financial disclosure requirements are rather confusing and not precise enough; and registrants are obliged to accept a code of conduct – with unclear sanction mechanisms in case of inaccurate or incomplete declarations or breaches of the code of conduct. In fact, the only sanction consists of temporary removal or complete exclusion from the register – with no indication of how this measure could possibly be an appropriate step towards effectively improving the offending registrant's transparency.

According to its one-year review of the register, the Commission intends both to clarify the scope of activities to be taken into account upon registration and to adjust disclosure requirements for professional consultancies and law firms.<sup>18</sup> The latter are to move away from the current practice of having a choice between declaring income in actual amounts or as a percentage of total income towards establishing a single grid of euro values with more differentiated bandwidths. While this measure would, as such, increase both the transparency and the comparability of the required information, the Commission has not succeeded in defining the disclosure requirements more clearly and concisely, despite its explicit claim to have done so. Rather, the Commission's one-year review indirectly concedes how imprecise its demands still are by calling on professional associations to propose guidelines on, for example, »the items to be covered for financial disclosure« as »a key element of the system,« leading »in time to a consistent implementation of the system.«<sup>19</sup> Why is the Commission unable to establish a sound arrangement of more clearly and concisely defined requirements on its own?

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the Commission's *Green Paper European Transparency Initiative*, (COM (2006) 194 final; [http://ec.europa.eu/transparency/eti/docs/gp\\_en.pdf](http://ec.europa.eu/transparency/eti/docs/gp_en.pdf) (accessed October 14, 2009); the Commission's *Follow-up to the Green Paper »European Transparency Initiative,«* COM (2007) 127 final; [http://ec.europa.eu/transparency/eti/docs/com\\_2007\\_127\\_final\\_en.pdf](http://ec.europa.eu/transparency/eti/docs/com_2007_127_final_en.pdf) (accessed October 14, 2009); and the Commission's *Communication European Transparency Initiative. A framework for relations with interest representatives (Register and Code of Conduct)*, COM (2008) 323 final; [http://ec.europa.eu/transparency/docs/323\\_en.pdf](http://ec.europa.eu/transparency/docs/323_en.pdf) (accessed October 14, 2009).

18. European Commission (2009): *European Transparency Initiative: The Register of Interest Representatives, One Year After*; COM (2009) 612 final, Brussels (October 28, 2009): 5–7; [http://ec.europa.eu/transparency/docs/communication\\_2009\\_en.pdf](http://ec.europa.eu/transparency/docs/communication_2009_en.pdf) (accessed November 4, 2009).

19. Cf. note 18, p. 4.

## Renouncing a Compulsory Mechanism?

When examining whether the register should be a voluntary or an obligatory mechanism, the current system's deficiencies emerge even more clearly. Looking at the progress of the transparency debate, it is obvious that the Commission is backtracking from previous intentions. Before setting up the current register, the Commission opted for a mandatory approach in case the voluntary mechanism proved ineffective. While the mandatory approach was never regarded with much enthusiasm, it was deliberately and explicitly left open as a potential way to proceed. In the 2006 Green Paper on the »European transparency initiative,« the Commission emphasized it »does not consider that a compulsory registration system would be an appropriate option. A tighter system of self-regulation would appear more appropriate. However, after a certain period, a review should be conducted to examine whether self-regulation has worked. If not, consideration could be given to a system of compulsory measures – a compulsory code of conduct plus compulsory registration.«<sup>20</sup> This statement was reiterated in the Green Paper's Follow-up in March 2007: »In spring 2009, the Commission will conduct a review to examine whether the new system has produced the desired results, including in terms of coverage of the target group for registration. If not, consideration could be given to stricter measures, in the form of compulsory registration and reporting.«<sup>21</sup>

In April 2009, though, Siim Kallas, the Commissioner responsible for the register stated, astonishingly, that the register »will never be mandatory.«<sup>22</sup> As preceding and succeeding remarks by the Commissioner indicate, Kallas himself can nevertheless be considered to be indecisive on that issue. In a comment for the *EUobserver* on January 8, 2009, Commissioner Kallas was still taking a tough stance in support of an obligatory mechanism: »We have (...) clearly announced mandatory registration if our gentle persuasion to join us voluntarily is not heard.«<sup>23</sup>

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20. Cf. note 17, p. 10.

21. Cf. note 17, p. 6.

22. EurActive (2009): »EU Lobby Register ›Will Never Be Mandatory‹« (April 22, 2009); <http://www.euractiv.com/en/pa/eu-lobby-register-mandatory/article-181390> (accessed June 1, 2009).

23. Kallas, Siim: »The Year of Transparent Lobbying,« in: *EUobserver.com* (January 8, 2009); <http://euobserver.com/9/27362> (accessed October 13, 2009).

His clear rejection of a mandatory register in April 2009<sup>24</sup> came out of the blue. In September 2009, Kallas was quoted as having indirectly, but more cautiously argued against a mandatory scheme, insisting that he was »quite satisfied and ready to develop the present register further at the moment.«<sup>25</sup> More recently, however, according to an article in the *EUobserver*, Siim Kallas characterized the mandatory approach as an option that »has not been abandoned.«<sup>26</sup>

As expected, the initiative's hitherto voluntary approach has been largely ineffective and its results disappointing with regard to the enhancement of transparency in EU lobbying. According to a study conducted by the Alliance for Lobbying Transparency and Ethics Regulation (ALTER-EU), only 1,488 lobby entities had registered by May 25, 2009, of which only a minority had offices in Brussels. Taken together, less than 23 percent of Brussels-based lobbyists had registered, the study concludes, with registration levels »being low for all categories of ›interest representatives‹« as well as »large law firms (...) and most Brussels-based think tanks (...) boycotting the register completely.«<sup>27</sup> The low take-up confirms MEP Richard Corbett's prediction in October 2007 in response to the Commission's renunciation of the mandatory approach: »A voluntary system is not going to work. The people that you want registering are those that don't want to.«<sup>28</sup> The same conclusion is drawn in a report by the Organisation for Economic Co-operation and Development (OECD) on »building a legislative framework for enhancing transparency and accountability in lobbying«: »The early history of registration (...)

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24. Cf. note 22.

25. »Law Firms, Think-Tanks ›Boycotting‹ Lobby Register: Kallas,« in: *EurActive* (September 10, 2009); <http://www.euractiv.com/en/pa/law-firms-think-tanks-boycotting-lobby-register-kallas/article-185282> (accessed October 15, 2009).

26. Phillips, Leigh: »Fancy Lobby Receptions Don't Work, Say Brussels Politicians,« in: *EUobserver.com* (October 12, 2009); <http://euobserver.com/9/28813> (accessed October 13, 2009).

27. Alliance for Lobbying Transparency and Ethics Regulation (ALTER-EU) (2009): *The Commission's Lobby Register One Year On: Success Or Failure?* (June 4, 2009): 4 and 10; <http://www.alter-eu.org/en/system/files/%252Fvar/www/corporate-europe.org/www/sites/www.alter-eu.org/files/publications/register-assessment-after-one-year.pdf> (accessed October 14, 2009).

28. European Parliament: »Shedding (More) Light on Brussels Lobbies,« Press Info 20071012ST011624 (October 16, 2007); <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20071012ST011624> (accessed October 14, 2009).

shows that where lobbyists are not clearly identified and demonstrably required to register, they will not do so.«<sup>29</sup> The rationale for this is quite simple: A voluntary system leaves the question of registration directly with the lobby organizations that trade transparency with supposed competitive disadvantages. Accordingly, ALTER-EU asserts that there is »a very serious problem for the credibility of the register that cannot be overcome without a mandatory approach.«<sup>30</sup>

## **An Illusion of Transparency Impedes Real Transparency**

Evidence from the Commission's recent attempt, together with the experience with obligatory mechanisms in Canada and the United States, suggests that the success of any lobby registration scheme hinges upon clearly defined and mandatory registration and disclosure requirements, including straightforward complaints and sanctions mechanisms. Furthermore, it is vital to eliminate undermining exceptions, for example, for lawyers. Nevertheless, the Commission claims enormous progress: due to its initiative, at least some transparency has been achieved where previously there was no transparency at all, seems to be the argument. Or, in the Commission's own words: »[T]he coverage of the Register, though already quite significant at this stage (...) has not yet achieved its full potential.«<sup>31</sup> Indeed, the Commission's one-year review admits that the participation rates of both law firms and think-tanks in particular are low. Nevertheless, the Commission concludes: »Overall, the Commission considers that the Register has come a long way in both quantitative and qualitative terms in its first ›pilot‹ year. As the system is still in its expansion phase, it is not possible to draw a final conclusion purely on the basis of quantitative data. The universe of interest representation is itself volatile and unlimited. Overall, the voluntary approach is working and should therefore be maintained.«<sup>32</sup>

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29. Organisation for Economic Co-operation and Development (OECD) (2008): *Lobbyists, Government and Public Trust. Building a Legislative Framework for Enhancing Transparency and Accountability in Lobbying*: 42 (accentuation omitted); <http://www.oecd.org/dataoecd/5/41/41074615.pdf> (accessed June 2, 2009).

30. Cf. note 27, p. 4.

31. Cf. note 18, p. 2.

32. Cf. note 18, p. 3.

By persisting with that logic, however, the Commission is maintaining an approach that claims transparency but, as a result, impedes *real* transparency. Or, as ALTER EU puts it, »[t]he overall effect is a piecemeal register that only creates an illusion of transparency around the lobbying process: beneath this surface impression there are serious deficiencies that the Commission must repair if this important transparency initiative is not to fall into disrepute.«<sup>33</sup> This verdict cannot even be mitigated by the Commission's assessment that the number of registrants had »achieved a respectable critical mass,« providing evidence of the effectiveness of »peer pressure,« which is seen as having »worked very well in this exercise.«<sup>34</sup> As long as the register does not create a level playing field with regard to both the coverage and the disclosure requirements of the lobbying entities at the EU level, the initiative will inevitably fall flat. A level playing field, however, can be achieved only by means of an obligatory registration scheme with precisely and concisely defined disclosure requirements.

Disappointingly, the European Parliament has sided with the Commission's voluntary approach, after it had originally declared itself in favor of a common mandatory register between the EU institutions, including, among other things, full financial disclosure. In a widely considered resolution in May 2008, Parliament called »for an interinstitutional agreement between the Council, the Commission and Parliament on a common mandatory register (...) that would be applicable in all institutions and include full financial disclosure, a common mechanism of removal from the register and a common code of ethical conduct.«<sup>35</sup> The resolution also expressed the Parliament's concern »that a purely voluntary system will allow less responsible lobbyists to avoid compliance.«<sup>36</sup>

Apparently, however, there is no legal base at the EU level of the kind necessary for an obligatory solution, as the High Level Working Group

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33. Cf. note 27, p. 8.

34. King, Tim: »Testing the Commission's Register,« in: *European Voice* (September 3, 2009): 12.

35. European Parliament, Resolution of May 8 2008 on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions (2007/2115 (INI)), Document P6\_TA (2008) 0197, paragraph 11; <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0197+0+DOC+XML+V0//EN> (accessed May 23, 2009).

36. Cf. note 35, paragraph 16.

on a Common Register and Code of Conduct for Lobbyists has elaborated in the meantime.<sup>37</sup> In an internal discussion paper of February 25, 2009, outlining the European Parliament's negotiating position, Parliament acknowledges »the Commission's position that, currently, there is no specific legal base for mandatory regulation of lobbyists, and it is far from certain that the Lisbon Treaty, if ratified, could provide such a base. Parliament is willing to proceed in the negotiations on the basis that a common system would, for the time being, remain voluntary.«<sup>38</sup>

## **Only a Piecemeal Register after Two Decades?**

After two decades of discussions on lobbying transparency, this is a somewhat surprising and disheartening conclusion. But instead of initiating the seemingly necessary legal base – for example, in line with the procedure stipulated in Article 308 of the Nice Treaty or, rather, Article 352 of the Lisbon Treaty – and raising public awareness to put pressure, along with the European Parliament, on the Council to approve the corresponding proposal, it is in particular the Commission that has drawn the wrong conclusion and buckled before the Council's presumed rejection. Council may, at this stage, have good reasons for resisting a lobby register for itself that would also have to be implemented in all the Member States, if it was to be an effective mechanism. But even if Council does reject a lobby register for its own premises, both Commission and Parliament could ask Council to at least enable them to create their own obligatory mechanism by approving the necessary legal base. Why would Council deny this step? The Commission, however, continues to avoid this consideration. Rather, it defends the voluntary mechanism contrary to the facts.

The Commission's actions indicate that little of the boldness which characterized the Delors era is still to be found wafting through the corridors of Berlaymont. A more courageous Commission would initially

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37. High Level Working Group on a Common Register and Code of Conduct for Lobbyists: Joint statement regarding the progress achieved to date (April 22, 2009); [http://ec.europa.eu/commission\\_barroso/kallas/doc/joint\\_statement\\_register.pdf](http://ec.europa.eu/commission_barroso/kallas/doc/joint_statement_register.pdf) (accessed June 1, 2009).

38. High Level Working Party on a Common Register and Code of Conduct for Lobbyists, Discussion Paper – EP negotiating position, Working Paper 04 (February 25, 2009): 2 (internal document).

acknowledge the voluntary approach as ineffective and strive, first, along with Parliament, to establish the necessary legal base and, second, to implement and enforce an obligatory registration mechanism with clearly defined disclosure requirements among Brussels' interest representation community, even against the fierce resistance that can be expected. Yet if the Commission sticks to the voluntary approach, its effort to effectively enhance transparency in EU lobbying will be rendered null and void.