

be conducted in the first half of 2013. One question to be considered in this process concerns whether and how the current register could be developed into a binding register.<sup>2</sup>

Transferring the current voluntary regime into binding rules has been a demand of the European Parliament since a number of years. In this context reference can be made to the European Parliament's Resolution of 8 May 2008 on the development of a Framework for the activities of lobbyists in the EU institutions<sup>3</sup> and the decision of the European Parliament accompanying the Interinstitutional Agreement establishing the Transparency Register of 11 May 2011.<sup>4</sup> In the latter decision the European Parliament "[r]epeats (...) its call for the mandatory registration of all lobbyists on the Transparency Register and calls for the necessary steps to be taken in the framework of the forthcoming review process in order to prepare for a transition to mandatory registration." It should be noted that the decisions of the European Parliament did not specify which legal basis could be used to adopt such a mandatory regulation.

The present study provides an overview of the pertinent legal issues involved with a mandatory EU lobby register, discussing the legal basis, form and potential contents of such a register. The study assesses if there is a legal basis in current EU primary law to establish a mandatory lobby register. The question of the legal basis is of special interest, because the apparent lack of such a legal basis is a common argument against a mandatory register. In particular, the opposition of the European Commission against a binding register seems to be partly based on the assumption that the current treaties do not contain a sufficient legal basis for a register.<sup>5</sup> The study will therefore also discuss how such a legal basis could be established if the treaties in their current form are not deemed to be sufficient. In addition, the study also addresses other possibilities to make the current regime more effective through stricter staff rules or codes of conducts of the European Commission or Parliament.

## **2.1. Approaches towards regulating lobbying**

Generally, three types of regulating lobbying can be distinguished in international practice: Professional self-regulation, institutional registers and mandatory legislation or other legally binding standards.<sup>6</sup>

Self-regulation refers to codes of conducts developed by professionals and their associations which contain voluntary standards of behavior.<sup>7</sup> Compliance with these standards is ensured

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<sup>2</sup> Annual Report on the operations of the Transparency Registry 2012, p. 14, available at [http://europa.eu/transparency-register/pdf/transparency\\_register\\_report\\_20121029\\_en.pdf](http://europa.eu/transparency-register/pdf/transparency_register_report_20121029_en.pdf).

<sup>3</sup> OJ, 12 November 2009, C 271 E/48.

<sup>4</sup> OJ, 7 December 2012, C 377 E/176.

<sup>5</sup> Maroš Šefčovič, *Lobbyismus braucht Transparenz – Das neue Transparenz-Register des Europäischen Parlaments und der Europäischen Kommission*, *Recht und Politik* 2011, 198 (201).

<sup>6</sup> See also Valts Kalniņš, *Transparency in Lobbying: Comparative Review of Existing and Emerging Regulatory Regimes*, 2011, p. 15, available at <http://www.pasos.org>.

through peer-pressure or exclusion from the professional association<sup>8</sup>, but there is typically no external or independent control of the quality of the standards and their implementation. Apart from the general problems associated with voluntary standards of self-regulation, one particular problematic aspect in the context of lobbying concerns the lack of a coherent professional organization. For example, the Society of European Affairs Professionals (SEAP) which claims to be the relevant professional organization has only about 300 members<sup>9</sup> compared to about 15.000 to 20.000 lobbyists estimated to be active in Brussels.<sup>10</sup>

An OECD publication on lobbying concluded that “the open nature of the business and public ignorance of professional codes has rendered their efforts [i.e. the efforts of self-regulation] largely ineffective.”<sup>11</sup> Furthermore, the same study suggested binding governmental regulations have a better chance of securing compliance than voluntary codes of conducts of professional organisations.<sup>12</sup>

Institutional registers require registration of lobbyists wishing to access the premises of parliaments or other institutions and / or wishing to engage with representatives or officials of that institution. Usually, these registers are based on the competence of the respective institutions to regulate their own internal affairs, to control access to their buildings and to regulate the behavior of their members or staff. The oldest example of this type of lobbying regulation are the rules of the German Federal Parliament (Bundestag) on lobbyists which provide that representatives of interest groups will only be heard and issued badges if they are included in the register.<sup>13</sup> In practice, this register has been of little relevance as it contains merely minimal information, only applies to associations, does not contain sanctions and has been circumvented in Parliamentary practice.<sup>14</sup>

Institutional registers contain the requirement to register in exchange for access to the institution and sometimes also include standards of conduct. Compliance with the registration requirement and the standards is not strictly mandatory, because lobbyists are not formally bound by these rules. However, if they intend to interact with staff or members

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<sup>7</sup> Rogier Chorus, Lobbying ethics versus corruption, in: Council of Europe Octopus Programme (ed), Corruption and democracy, 2008, p. 151 (152-153).

<sup>8</sup> Jablonski, above note 6, p. 378

<sup>9</sup> Information taken from SEAP's website <http://www.seap.be/index.php/home/members>.

<sup>10</sup> Dieter Plehwe, Measuring European relations of lobby power, February 2012, <http://www.arbeiterkammer.at/bilder/d179/MaterialienMuG113.pdf>.

<sup>11</sup> OECD, Lobbyists, Governments and Public Trust, Volume 1 - Increasing Transparency through Legislation, 2009, p. 80.

<sup>12</sup> OECD, op. cit., p. 92

<sup>13</sup> See Geschäftsordnung des Deutschen Bundestages, Anlage 2 - Registrierung von Verbänden und deren Vertretern, available at [http://www.bundestag.de/bundestag/aufgaben/rechtsgrundlagen/go\\_btg/anlage2.html](http://www.bundestag.de/bundestag/aufgaben/rechtsgrundlagen/go_btg/anlage2.html). See also Tilman Hoppe, Transparenz per Gesetz – Zu einem künftigen Lobbyisten-Register, Zeitschrift für Rechtspolitik (ZRP) 2009, 39 (39). The rules originate in 1972.

<sup>14</sup> Hans-Jörg Schmedes, Mehr Transparenz wagen? Zur Diskussion um ein gesetzliches Lobbyregister beim Deutschen Bundestag, Zeitschrift für Parlamentsfragen 2009, 543 (544 et seq).

of the institution or enter its premises, lobbyists are factually required to adhere to these rules.<sup>15</sup> The rules could therefore be characterized as de facto binding. It should be noted, however, that the regulatory impact of an institutional register depends on the actual implementation. For example, if access to an institution can also be granted to individuals who are not registered on an ad hoc basis as in the case of the German Bundestag or the European Parliament, the impact of the register can be weakened.

Mandatory legislation on lobbying encompasses binding laws and regulations which are applicable to all individuals or institutions engaging in lobbying activities. The approaches in the United States and Canada are the usual reference points in this context, but recently similar approaches have been taken in a number of European countries such as Austria, Lithuania, Poland and Slovenia.<sup>16</sup> Even though these laws differ in terms of their scope and regulated activities, they share a binding and mandatory nature which is imposed on all individuals engaged in the relevant lobbying activity. Compliance with these laws can be enforced through the standard forms of regulatory sanctions including fines and in some cases even imprisonment.

## **2.2. THE TRANSPARENCY REGISTER OF THE EUROPEAN PARLIAMENT AND THE EUROPEAN COMMISSION OF 2011**

The current approach of the European Commission and the European Parliament belongs to the second group of institutional registers. It is a non-mandatory register based on an interinstitutional agreement between the EP and the Commission.<sup>17</sup> Interinstitutional agreements have similar legal consequences as Rules of Procedure of the respective institutions. They are binding on the institutions and can therefore have similar factual binding effects on lobbyists if they interact with the respective EU organs. However, an interinstitutional agreement cannot establish any formal binding obligations on individuals in the same way as mandatory legislation. It should also be noted that the Transparency Register does not extend to the Council and lobbying activities towards this institution.

The Transparency Register of the EP and the Commission can be compared to the voluntary registers in some EU Member States such as Germany, but it is unique as it covers two institutions (Commission and Parliament) and not just one as in the case of the German Bundestag's register.

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<sup>15</sup> Report on conclusion of an interinstitutional agreement between the European Parliament and the Commission on a common Transparency Register, A7-0174/2011, 26 April 2011, p. 23

<sup>16</sup> Kalniņš, above note 6, p. 4

<sup>17</sup> The legal basis for interinstitutional agreements is Art. 295 TFEU.