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Commentary

Should the European Commission enact a mandatory lobby register?

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Abstract

This article reviews the literature on the mandatory government regulation/self-regulation approaches to regulating interest group behaviour. The findings of the author suggest that the voluntary register of the European Commission is bound to fail. The European Commission should implement a mandatory register as soon as possible if the genuine aim of the incumbents is to overcome the Commission's accountability deficit.

Keywords

Accountability, democratic deficit, transparency, lobbying regulation

INTRODUCTION

Undue and opaque nature of influence of interest groups on the policy-makers may have serious implications for the democratic legitimacy of a polity, and not least the European Union where a crowded number of interest groups lobby Brussels intensely. Therefore, regulating lobbying should be put on the top of the agenda of policy-makers that are concerned with the democratic deficit of the EU. There is a growing pressure on the EU officials to do so as transparency organisations such as The Alliance for Lobbying Transparency and Ethics Regulation (ALTER-EU) vehemently tries to convince the policy-makers to increase the stringency of lobbying regulation in the EU by using inside and outside lobbying methods. Despite the calls for more transparency and accountability in the EU, only the European Parliament exercises mandatory lobby registration. During a mini plenary session in Brussels on 23/03/2011, Jerzy Buzek gave a speech about the scandal where some of the MEPs have been offered money as bait in return for policy influence and accepted this offer. Buzek's reaction came as a proposal to increase transparency and accountability by putting in effect a legally binding code of conduct for all European Union (EU) institutions. The joint working group of the European Parliament and the European Commission agreed on a common register which has been put into action in June 2011. Recently, the Council of Ministers has also communicated its will to join the transparency register in the case that it stays voluntary.

The aim of this article is to compare the arguments for mandatory registration and self-regulation. The author explains why the absence of lobbying regulation in the European Commission should be involved in the discussions about the democratic deficit of the EU. Such regulations are directly related with increasing transparency and accountability. Based on the international experience, one can argue that self-regulating lobbying is likely to fail for the EU. Thus, the European Commission should enact a mandatory register.

DEMOCRATIC DEFICIT OF THE EU

Democratic deficit of the EU has been studied for a long time by scholars but there is not yet any consensus on how to overcome the democratic problem of the EU. Apart from a few authors such as Giandomenico Majone (1998) and Andrew Moravcsik (2002; 2004) who argue that we should not be concerned with the democratic quality of the EU, most of the researchers working on democracy in the EU points to a serious problem.

Democracy is about popular control and political equality (Beetham, 1994: 4-5). Accountability is a necessity for both of these concepts. It is the central element in

modern democracy: "Modern political democracy is a system of governance in which rulers are held accountable for their actions in the public realm by citizens, acting indirectly through the competition and cooperation of their elected representatives" (Schmitter and Karl, 1991: 76). Sverker Gustavsson et al. defines accountability in the following way: "By accountability, we have in mind a relationship between two actors (X and Y) wherein X has the right to: 1) monitor the actions of Y 2) evaluate the actions of Y, and 3) impose sanctions on Y" (2009: 4). This definition implies that the existence of accountability first and foremost presupposes the existence of transparency (Persson, 2009: 144). A democratic audit of the EU points to limited accountability in the EU (Lord, 2004). Authors such as Yves Mény state that the accountability deficit applies to the European Commission, the European Parliament, and the Council of Ministers (2002: 11). Among these three institutions, the European Commission has been especially a target for criticism by many scholars for its unaccountable nature (Chrysochoou, 2003: 370-371). Some of the scholars who are more optimistic about the general state of democracy in the EU with regards to its institutional setup still argued that the accountability deficit of the Commission is an issue of concern (Crombez, 2003: 114). The problems surrounding the Commission today could be a consequence of the intention of Jean Monnet to keep this body as a technocratic and elitist institution with weak democratic legitimacy (Featherstone, 1994: 150-151). No wonder that the concern about the accountability of the European Commission has become a very hot issue after the 'permissive consensus' period of the EU has come to end and the European citizens started to demand that the EU meets the democratic legitimacy criteria.

Among a voluminous literature about the democratic deficit of the EU, many authors assess democracy in the EU by using the parliamentary democracy as an ideal model. On the other hand, more realistic scholars stated that the EU is far more different than European states where parliamentary democracy is the rule (Decker, 2002: 27). This does not mean that the EU does not have to meet democratic standards. Beetham and Lord (1998) successfully showed why the EU has to fulfil democratic legitimacy criteria. As the EU influences the legitimacy of democratic European states to a great extent, it also has to be democratic (Beetham and Lord, 1998: 22). Nevertheless, one can debate how to make the EU democratic.

Authors who try to find new yardsticks to assess democracy and legitimacy in the EU refer to the United States (US) as an ideal democratic model for the EU (Costa et. al., 2003: 671). One such work argues that the EU is not a parliamentary democracy but a pluralist democracy with interest groups having important influence on political decisions where political power is shared among various institutions, states, and actors (Coultrap, 1999). John Coultrap stresses that any form of democratic audit in the EU should take this into account (1999). He argues that this kind of analysis shows that the EU does not suffer from a grave democratic deficit problem as many scholars have argued. This argument can be strongly criticised. Unlike the US, the executive of the EU is not directly elected, the demos argument has not yet come to a conclusion, and the decline of national parliaments is still a problem. Nevertheless, Coultrap is right to argue that the EU resembles a pluralist democracy more than a parliamentary democracy. There is growing literature suggesting that the EU is a pluralistic advocacy community (Mahoney, 2008: 46).

Assessing democracy in the EU by using pluralist democratic criteria brings with it a less discussed but an important democratic problem. Lobbying in the pluralist US is regulated as a result of the long standing criticism of corruption, unfair influence, lack of transparency and accountability. In the EU, lobbying is regulated weakly in the European Parliament, but not the Council. Also, registering to the Commission's lobby register is voluntary. Using pluralism as an ideal model to assess the democratic legitimacy of the EU does not necessarily help it to evade the democratic deficit discussion but can add more problems to it with regards to interest representation.

Why regulate lobbying?

Regulation of lobbyists refers to the notion that there should be rules which the interest groups must abide by when trying to influence public decision-making. Following this logic, Raj Chari, et al. concluded that the voluntary nature of the register for lobbyists that has been created for the interest groups trying to lobby the European Commission does not count as regulation (2010: 4). The European Commission does not have regulation even though it is the most lobbied institution of the EU with plentiful lobbying activity taking place every day.

Among countries and institutions that have seen developments towards a pluralist system such as Argentine (Johnson, 2008), Denmark (Rechtman and Larsen-Leder, 1998) or the EP (Schaber, 1999: 219-210), lobbying gradually becomes an issue that has to be dealt with through regulation. Increasing number of lobbyists, concern about undue influence and lack of transparency are the prime reasons for regulating lobbyists (Yishai, 1998a: 574; Yishai, 1998b: 162-163; Pross, 173; Thomas, 1998; Rechtman and Larsen-Leder, 1998: 579; Warhurst, 1998: 538-539; Schaber, 1999: 210-211; Greenwood and Thomas, 1998: 488). According to Chari et al. "The basic rationale behind implementing regulations is that the public should have some insight into, as well as oversight of, the mechanisms that draw lobbyists into the policy-making environment, in order to better understand how they influence policy outputs" (2010: 2). Their research conducted in global comparative fashion supports the theoretical arguments about lobbying regulation's contribution to transparency and accountability even though loopholes can exist in the most robustly regulated environments (Chari et al., 2010: 133, 150 and 152-153; Chari et al., 2008; Chari et al., 2007). Showing who is lobbying, for what he is lobbying, how much he is spending on lobbying, together with penalising codes for unprofessional behaviour can increase transparency and accountability.

Apart from transparency and accountability, some also suggest that lobbying regulation has a positive effect on political equality. Democratic theory suggests that if interest group access is limited to only certain groups, the democratic legitimacy of this polity would be questionable because this may lead to biased politics (Steffek and Nanz, 2008: 10; Van Schendelen, 2010: 322; Persson, 2009: 145; Warren, 2002: 693; Coen, 1998). In the EU, access is restricted to few lobbyists (Coen, 1997: 98-99). Capacity to supply information to policy-makers is the main determinant for having access to EU policy-making (Bouwen, 2004; Bouwen, 2002; Eising, 2007a; Eising, 2007b; Broscheid and Coen, 2007: 349; Bouwen and McCown, 2007: 425). Not surprisingly, the situation is not much different with regards to the influence issue. Research suggests that possession of better resources makes a difference when the aim is to influence policy-making (Dür, 2008b: 1212-1215; Dür and Bièvre, 2007: 5). In overall, business interests have been more influential than other interests (Coen, 2007: 335), (Obradovic, 2009: 312; Woll, 2006: 459; Saurugger, 2008, 1283). The MEP Marc Galle involved equalisation of business and other interests in his report that strived for justifying why the EP needed lobbying regulation (McLaughlin and Greenwood, 1995: 144). The Australian experience suggests that the governors thought that regulating lobbyists can bring equality of access (Yishai, 1998b: 163). One NGO member argued that transparency can bring political equality to the lobbying game. He/she argued that without transparency, it is mainly the industrial lobbyists that win. When there is transparency, citizens win (Parks, 2009: 159). According to Sabine Saurugger, absence of access regulation exacerbates the inequality of power and influence among interest groups: "In the absence of regulation for interest groups, the action repertoires and strategies providing for efficient interest representation at the European level remain key elements for exercising influence. This absence of regulation seems to reinforce a situation in which groups possessing financial and social resources are privileged whereas the voices of small interest groups, be they general interest or small business groups, are not heard quite as loudly in the consultation process" (2008: 1283).

However, even the smallest positive effect of lobbying regulation on political equality is highly contested (Karr, 2007: 79). Clive Thomas argued that with lobbying regulation, "lobbyists, especially those representing powerful interests, are much less likely to use blatant strong-arm tactics...However, what has in fact happened is that modern big-time lobbyists are wheel-dealers under a different disguise" (1998: 512-513). Virginia Gray and David Lowery found that greater stringency is negatively correlated with the presence of institutions (1998: 88). Nevertheless, the effect turned out to be very small (Gray and Lowery, 1998: 88). Relying on interviews, Michelle Cini wrote that European Public Affairs Consultancies Association was sceptic about the possibility that regulation can balance corporate and civil society interests (2008: 753). Based on his game theoretical model, Scott Ainsworth even argued that stringent regulation would especially hurt the small groups (1993: 53). The cause of this argument could be the increased cost and effort needed to lobby. Margaret Brinig et al. argued that with regulation, entering the lobbying industry and lobbying become more costly. Organising a lobbying effort becomes more cumbersome (1993: 383). We see that lobbying regulation's impact on political equality is highly controversial, Unless, there is strong empirical proof that stringent regulations and unbalanced interest representation are inversely correlated, one should shy away from considering lobbying regulation's effect on balancing inequalities.

On the whole, one can say that regulating lobbying in the EU can be an important step towards remedying the democratic deficit of the EU by increasing transparency and accountability. However, one should note that this can happen on the condition that there is enough media attention to the register (Bassett, 2008: 1085-1086). Ignorance of regulation has always arisen as a consequence of limited or no media attention. This was clearly the case in Canada (Pross, 2006: 191; Rush, 1994: 639) and the US (Thomas, 1998: 512) more so before the Abramoff scandal.

WHY SELF-REGULATION CANNOT BE A SUBSTITUTE FOR MANDATORY REGISTRATION?

Unlike the proponents of regulating lobbying, some argue that mandatory lobbying regulation is not the best method for controlling lobbying. According to some authors, self-regulation may be preferable both by the regulator and the regulated to mandatory government regulation. Self-regulation is more flexible than formal legislation (Greenwood and Thomas, 1998: 494; McLaughlin and Greenwood, 1995: 154). Governmental authorities can avoid certain unwanted conflicts with some interests and overcome problems that arise with interest groups smoothly. At the other side, interest groups avoid strict control over their behaviour (Greenwood and Thomas, 1998: 494). According to these authors, self-regulation can be used by interest groups to gain certain respectability from the public and to be held in esteem in the eyes of the policy-makers by applying their code of conducts (Greenwood and Thomas, 1998: 495-496; McLaughlin and Greenwood, 1995: 148).

In the UK most of the regulators were of the opinion that regulation would create barriers of access, so self-regulation should be preferred (Greenwood and Thomas, 1998: 496). Although they argued that the legislative regulations can be as useless as self-regulatory schemes which are normally weak and lack effectiveness (Greenwood and Thomas, 1998: 494), many examples do show that with government regulation, stringency and enforcement increases. The number of lobbyists signing to self-regulatory code of conducts remains very low (Preston, 1999: 225). In the UK, the secretary of The Association of Professional Political Consultants Charles Miller argued that: "What also concerned us at the time was that a self-regulatory body like ours has no ultimate sanction. We cannot require people to be regulated; we are a voluntary body and we felt that despite the circumstances that led to the establishment of this Committee,

government is still held in far higher esteem than we are as individual companies” (Jordan, 1998: 534).

Until the early 2000s, the Commission was against accreditation of pressure groups, as in their opinion, this would cause a problem for open access to EU policy-makers hampering their much needed information and expertise (McLaughlin and Greenwood, 1995: 143; Greenwood and Thomas, 1998: 492; Lehmann, 2010: 58; Eising, 2003: 197). Commission opted out for advocating self-regulation (Flannery, 2010: 72; Eising, 2003: 197). In 2004 Jens Nyman-Christensen, argued that the Commission works in a transparent and fair way with the civil society (Wesselius, 2005: 18). Compared to then, the Commission has somewhat changed its attitude towards pure self-regulation even though they still show signs of doubt towards implementing a mandatory register. Increasing number of actors and the determination to increase transparency in the Commission have been the main motivating elements for the Commissioner Siim Kallas to make a move (Long and Lörinczi, 2009: 180; Bouwen, 2010: 31-32). The European Commission had this to say about their motivation for creating a voluntary register: “The European Commission wishes to let citizens know which general or specific interests are influencing the decision-making process of the European institutions and the resources mobilized to that end” (European Commission, 2011).

One year after implementing a voluntary register, the Commission argued that enough registries have been made so that mandatory registering is not needed (European Commission, 2009). However, reports show that most lobbyists are not registering (European Voice, 2010; Chari and O’Donovan, 2011: 9, 15); research has pointed out that, fifty largest companies in the EU have not in fact registered to the voluntary register and they are lobbying in secret. These companies are using trade organisations to do their lobbying so that they can have more discretion (Euroactiv, 2010). There is also concern about the finances disclosed (Greenwood, 2011: 324). Research has shown that the information in the registry was highly inaccurate (EUobserver, 2010). These phenomena are not surprising as there are not enough incentives for interest groups to register voluntarily (Obradovic, 2009: 309-310; Greenwood, 2011: 322). It is difficult to argue that the voluntary register had any substantial effect in terms of regulating behaviour (Svendsen, 2011: 133).

This situation is not likely to change unless registration becomes mandatory. Having the evidence that self-regulation has not been successful anywhere so far, and the current voluntary register of the European Commission is failing, one can easily say that the self-regulation will never be taken seriously by the public (Billet, 2007: 329). Even some of those who fervently opposed a mandatory register seem to change their minds as self-regulation badly failed. Mr. Christian D. de Fouloy who argued that transparency could be achieved without a ‘cumbersome bureaucracy’ that will be the result of EU legislation on lobbying in 2002 clearly changed rhetoric and stated that self-regulation does not work and the Commission should change its policy to address this problem (Wesselius, 2005: 17-18). Those who argue for self-regulation do so because of their opposition to the ‘negative consequences’ of mandatory registration (Dinan, 2006: 62). Once registration becomes law though, the fears of the negative impacts of regulation faded away. The Canadian example shows that the concern over registration becoming onerous and costly did not materialise (Rush, 1994: 636, 639; Rush, 1998: 521).

CONCLUSION: TIME FOR ENACTING A MANDATORY REGISTER FOR THE EUROPEAN UNION

We have seen that the accountability issue in the Commission has an important part to play in the arguments against the democratic quality of the EU. Despite this problem and serious activism by certain transparency organisations such as The Alliance for Lobbying Transparency and Ethics Regulation (ALTER-EU) to make the Commission’s register

mandatory, the lobby register for the Commission is still voluntary. Some of the latest proclamations by the Commissioner Maroš Šefčovič show some rhetorical change towards implementing a mandatory register. Rather than justifying the voluntary nature of the register, Šefčovič told the reporters in June 2011 that mandatory register will be considered after certain treaty changes required to enact such regulation can be done (Šefčovič, 2011). If the current Commissioner wants to be considered as a governor who had a real impact on increasing the democratic legitimacy of the European Commission and not become a target of criticism like Siim Kallas¹ who was the one that initiated the European Transparency Initiative (ETI) but fell short of obtaining results due to the voluntary nature of regulation, then he should not delay the decision to make the necessary changes that will result in a mandatory register.

¹ Siim Kallas was perceived by some to be interested in the European Transparency Initiative to 'maximize his legacy and reputation rather than truly achieving transparency and accountability by paying attention to details with regards to operationalization of the regulation' (Greenwood, 2011: 324).

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