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Transparency Register: the negotiation between three different views of lobbyists' legitimacy

Isabel de Castro Asarta
Robert Gordon University-Aberdeen

Abstract

The European Parliament and the European Commission have recently decided to merge their respective lobby registers in order to enhance transparency. The negotiations have as a result a more stringent, but still friendly framework for stakeholders and organisations participating in EU policy making. The third legislative institution, the Council of the European Union, has historically disengaged from the process on the declared grounds that it is not as an institute the subject of substantial lobbying, but has shown a change of policy in the last few weeks: it now seems openly willing to participate in the project and, eventually, to join the register. Even if the negotiations are still open, there is already evidence available to support the thesis of this paper: each of the three institutions has embedded a different approach to lobbyists' legitimacy to participate in the decision making process, which is shaping the negotiations around the Transparency Register, starting, for example, by its very name. Moreover, these different legitimacy approaches have their roots in the three different ways of perceiving and understanding democracy that each institution presents and that revolve around different versions of Liberal-Representative and Republicanism-Participatory Democracy.

Institutions, ideology and sources of legitimacy in the European Union

Each political institution presents different features that reflect the aims they were meant to achieve when they were conceived. This is true for all polities as well as for the European Union, where the spread of powers, the youth of the system and its multilevel and multinational nature may make ideological differences between institutions very evident.

For the purpose of this paper, the focus is on the ideology that stems from the sources of legitimacy of each institution. The rationale is the assumption that the way institutions have to legitimate themselves necessarily shapes the way these institutions perceive interest representation legitimacy to participate in the decision and policy making process of the European Union.

The European Parliament answers to the formal exigencies of liberal democratic representation. MEPs are directly and periodically elected by universal suffrage under

territorial constituencies in an environment of freedom of the press and open competitiveness between political parties.

It is true that, following Coperland and Patterson's[1] list of functions a parliament should fulfil in order to be called a proper parliament, the EP certainly does not fully comply with the linkage function between demos and legislative power. Indeed, European elections have been popularly characterised as second-order elections[2] and therefore, seem to be unable to represent the European demos, if such a thing exists.

However, representation is not only about reflection but also about action. Indeed, many of the Member States' Parliaments do not fully conform with Coperland and Patterson's decision making function as properly as the European Parliament does[3], being most of the time heavily dominated by the executive power. Thus, Member States' Parliamentary elections might be well first order ones, but the fact is that in many cases, they act more as presidential elections –where you choose directly the executive- than as proper parliamentary ones.

Thus, let us allow the European Parliament to also beneficiate from the illusion of being considered as a "proper" parliament. And let us do so, most of all because what is interesting for the aims of this paper is the EP's source of legitimacy, which is exactly the same as the rest of Member States' Parliaments: 'the representation of the people'. This is nonetheless a very significant simplification that arises because of the nature of the interests represented as well as of the position in the political arena of this sort of representation: political parties represent general interests, that is, views of the world and besides –and accordingly with Liberal democratic precepts- they have traditionally benefited from a quasi monopolistic position in representation.

At this point, it is necessary to recall that legitimacy, as Max Weber described it, is a pretension claimed by the domination system[4]. In itself it represents just the probability of the system being practically treated as justified in a sustainable way. The pretension becomes operative only when the public-the dominated - believes in it. Thus, legitimacy is not a feature of the system, it is not an "objective fact". It can be seen as a message that only becomes a tangible reality producing relevant effects

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[1] They must fulfil three functions: linkage (about connecting the wide public with the legislative power), decision-making (about policy influence towards the executive) and legitimacy (about adding legitimacy to the system). In Gary Copeland and Samuel C.Patterson,*Parliaments in the Modern World: Changing Institutions*.Ann Arbor,University of Michigan Press,Michigan,1994,p.154

[2] Karlheinz Reif and Hermann Schmitt,'Nine Second Order Elections: Results',in: *European Journal of Political Research,*No.8,1980

[3] As it is shown empirically in: Roger Scully,'Democracy,Legitimacy and the European Parliament', in M.Green Cowles and M.Smith (eds.), *The State of the European Union:Risk, Reform, Resistance and Revival*,vol.5, Oxford University Press, Oxford, 2000,p.238 and in Torbjorn Bergman and Tapio Raunio, 'Parliaments and Policy Making in the European Union', in J.Richardson, *European Union:Power and Policy-Making*,2nd edn, Routledge, London, 2001,p.121

[4] Max Weber, Economía y Sociedad. *Fondo de Cultura Económica*,Madrid,2002,p.170

when it is accepted by the dominated. Therefore, legitimacy is not to "be found" in a system, but to be constructed through ideology, that - to be successful - has to feed and reflect back certain dominating values.

As a result, legitimacy is an open process: there can be and actually are different sources of legitimacy because there are different ideas, depending on the different co-existing values of a given society in a given time. The consequence is that no claimer (no institution in this case) can have the monopoly of legitimacy. Of course, there are values better established than others –normally the ones that are backed by a system of thought, that is, an ideology- but it remains very risky to try to establish a hierarchy of sources of legitimacy and even more to try to exclude some of them from being actually sources of legitimacy at all.

For Held, apart from the participation of the demos -within a wide range of possibilities going from the simple election of those who take decisions to the actual participation or self-regulation in the decisions[5]-, the democratic form of domination has historically been justified (legitimated) because it supposedly brings about one or more of the following values: equality, freedom, moral self development, common interest, private interests, social utility, satisfaction of needs, efficient decisions[6].

Speaking of efficiency, it is to recall that originally, the legitimacy of the European Commission came from its independence and its expertise. This has been baptised as "output legitimacy"[7] and opposed to "input legitimacy", being the latter the proper "democratic" one. However, we could only consider "output" legitimacy not being democratic if we think of democracy as just the mechanism of participation. The problem is that few today seem to use this narrow definition. At least, as Sartori points out 'Democracy' nowadays is interpreted as liberal-democracy[8], with content far richer than the mere election of a Parliament, including equally the all-important rule of law, separation/division of powers or respect and defence of fundamental rights.

The narrow definition of democracy, as a set of mechanisms that can be grouped in direct mechanisms and representative mechanisms[9] might be useful as an academic exercise aimed at deconstructing a system. However, it might also lead to losing sight of the bigger picture, which is inescapable if we want to talk about legitimacy. In this sense, it seems more appropriate to try to seize what the word "democratic" means in public discourse. Moreover, in a world in which "democratic" tends to mean actually

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[5] David Held, Modelos de Democracia.*Alianza Editorial,*Madrid,1996,p.20
[6] Íbid.,pp.19-20
[7] Franz Scharpf in *Governing in Europe:Effective and Democratic?*,Oxford University Press, Oxford, 1999
[8] Giovanni Sartori, *Elementos de Teoría Política.*Alianza Editorial, Madrid,1992,p.29
[9] According for example to Hirst:Paul Hirst, *Representative Democracy and its limits*,Polity Press ,Cambridge,1990,p.28

"legitimate", to say that a source of legitimacy is not democratic is actually the same as saying that it is no source of legitimacy at all. And that, again, can be risky.

Returning to the Commission, it appears that its initial source of legitimacy has been eroded since the Treaty of Rome and the expansion of the EU's competences. This might be due to several reasons: a process of institutional fusion[10], to a national defensive reaction against too powerful supra nationalism as well as to a deliberate search of legitimacy for the EU, but especially for the Commission, in the classical sources of liberal democracy. Roughly said, the trend is towards constraint and to politicise the Commission by increasing the EP's and Council's powers over it. The Lisbon Treaty confirms this trend: election of the President of the Commission by the EP (and not just the former veto); extension of co-decision[11]; and possible intervention of national Parliaments in the legislative initiative for reasons of subsidiarity.

Certainly, with the increase of competences, that is, areas where the Commission can propose legislation, efficiency seems no longer to be a sufficient premise, and perhaps not even for the Commission. On the other hand, the search for efficiency and the regulatory nature of EU policy making combined with an endemic lack of resources has led the Commission to work closely with organised society on a regular basis for a very long time now[12]. As participation in our societies can be a source of legitimacy, the logical step is to make visible something already existing. As Greenwood states, "The European Transparency Initiative, announced by European Commission vice-President Kallas in 2005, is founded on the premise that transparency is a pre-condition for popular legitimacy"[13].

During the joint conference[14] previous to the signing of the Inter Institutional Agreement[15] (IIA) that lead to the launch of the Transparency Register, it is worth highlighting that amongst all the present groups (academia, NGOs –including NGOs specialized in transparency-, trade associations, think tanks, lawyers, consultants, church, EP, Commission and even Council...) the only one who talked about "participatory democracy" referring to interest representation activities at EU level was Jens Nymand Christensen, the responsible Director on the dossier of the European

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[10] Wolfgang Wessels, *An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes,*1997, in:Journal of Common Market Studies Vol.35,No.2,pp.267-299.

[11] After Lisbon called "Ordinary Legislative Procedure"

[12] Justin Greenwood,*Interest Representation in the European Union*.Basingstoke, Palgrave Macmillan, 2007

[13] Justin Greenwood,*The lobby regulation element of the European Transparency Initiative: Between liberal and deliberative models of democracy*,Comparative European Politics,2011,Vol.9,3,317–343,p.318

[14] On 6th October 2010 in the EP-Brussels

[15] http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0174&language=EN#title2

Commission at the time. Indeed, the claiming of this sort of legitimacy seems complementary to the original one (efficiency) and it also seems capable to adjust to the reality of the very developed phenomenon of interest representation at EU level[16]. Besides, if the Commission had not evolved and had restricted justification solely to the efficiency argument, the mere participation of external interests to help the Commission to fulfil tasks it cannot manage alone, would appear as a simple failure of the institution that, moreover, would allow external interests to decide on matters that affect all European citizens in a way or another.

The Commission might be smart by claiming this sort of legitimacy, most of all because the concept "Participatory Democracy", unlike "Liberal Democracy", remains open, elastic and rather empty of content in terms of implementation. Its roots might be found in what David Held names 'developmental republicanism'[17], that groups the trends claiming for higher levels of citizen participation in politics -whilst Liberal Democracy was imposing itself- and that includes authors like Rousseau or Wollstonecraft. The lack of definition in terms of structures for participation makes the concept suitable for individual direct participation as well as for participation by means of organisations, being the latter a systemic feature of the everyday work of the Commission.

The legitimacy of the Council of the European Union stems from the legitimacy of the Member State's governments directly. As suggested at the beginning, national parliamentary governments would normally and primarily benefit not that much from the legitimacy awarded by the Parliaments when they "choose" government, but more from a direct endorsement by the population due to the electoral law (when, for example, systems are majoritarian, legally or de facto) or due to political uses as, mainly, the discipline of party. Thus, presidential and parliamentary governments would present the same powerful source of legitimacy. Also powerful is the position national governments have in the Union: Member States are actually the principals of the whole system and, when acting at EU level, as it is an international arena, national governments are representing the position of the State as a whole and not just of the government of the country. Certainly, if there is an institution with a secure and legitimate position in the EU construction, this must be the Council[18].

Until here we have three institutions legitimated or claiming legitimacy by means of the demos' participation. However, ideology supporting the claims may differ: it is clear for the case of the Commission raising the flags of efficiency (Schumpeter and its "technique" as central concept) and participatory democracy (where society directly

[16] For a complete overview of the phenomenon, see Op.Cit note 12
[17] Op.cit.,note 5 ,pp 55-90
[18] In the opposite side of the spectrum: the European Economic and Social Committee (EESC), oddly meant to represent civil society under a –obviously failed- corporativist social strata approach.

participates in the decision) against the liberal democratic approach of the EP and of the Council in which primarily citizens participate not in the decision itself but by means of liberal representation (that is, by choosing the ones who will decide).

The differences we could expect between the EP and the Council, within the liberal democratic approach, are the focus of the attention. For the EP, parliamentarism, representation and public opinion should be central, whilst the Council should put the emphasis on the executive. It is possible that these differences fit also with Held's distinction between protective and developmental liberal democracy, the latter being an evolution of the former which, while maintaining the separation between state and society, demands proportionality in the representation, clear separation between the bureaucrats and the elected-being those empowered- and public debate.[19]Besides, in the Council, nationality is defining by nature, whereas this is not the case for the EP, nor for the Commission. This should mean that the way Member States' societies have to perceive interest representation legitimacy should be clearly reflected in the Council's attitudes towards the phenomenon.

[19] Note that these are only some of the differences he describes in Op. Cit. note 5, pp 121-139. However, what is interesting here is the focus on the executive and the nationality effect on the Council.

The arena: society participating through organisations in EU decision and policy making

When Europeans think about citizens' direct participation in public matters, the images normally recorded in their minds are Greek democracy, referenda, citizens' legislative initiative, the Swiss system or even the -limited to local and small communities- concessions to direct participation that developmental liberal democracy currently offers in some of the Member States[20]. All these examples however refer to individual participation and moreover-with the exception of referenda, probably the most limited form of direct participation that one can imagine and of the generally under used citizens' legislative initiative - they are and were always circumscribed to small communities and not going beyond the local level of government.

The interest representation phenomenon at EU level shows a completely different face: participation is carried out through organisations and it is acting at transnational level. In fact, participation is significant and operative precisely because of these two features. First, the fragmentation of the EU multi-level system offers an open and friendly frame-with multiple points of access- for the participation of a large number of interests[21]. Secondly, participation through organisations naturally overcomes the problems of traditional direct participation, recognized by the figures of Participatory Democracy -like Pateman or Macpherson-, namely, the lack of interest and knowledge of common people concerning politics[22]. Organisations, as said, overcome the problem naturally, given that they suppose differentiation, specification and rationality, so that there we face actors that present a real interest and that are wise and rational enough to organise themselves to achieve certain goals.

The Participatory Democracy approach has thus traditionally (from Rousseau or Wollstonecraft to Pateman or Macpherson) centred its focus of attention in the individual participation and the development of a political culture of participation inside each citizen by acting consequently in the different life spheres, like at local level, in the family or at work. A direct participation system for wide societies has never been seriously proposed after Marx, in the assumption that public matters in current national States were far too complicated and the constituency far too big to such a system being operative and, at the same time, remaining democratic.

[20] As an example, in Spain, villages under 100 inhabitants have the possibility to govern themselves, within local competences, by means of direct democracy.
[21] Op.cit.note 12, p.23
[22] Carole Pateman,Paricipation and Democratic Theory.Cambridge University Press,Cambridge,1970,pp1-21. Pateman, in the line of Rousseau, argues that this is a consequence of Liberal democratic political structures, which do not lead to a sufficient involvement of citizens in the political process (pp.22-44)

However, more recent approaches that appear to be springing from Participatory Democracy, like deliberative democracy or associative democracy draw the attention on the role of "civil society". Problems with these approaches lay first in the concept of "civil society"[23] itself, which, where assimilated to that of "social movements"[24], which would leave aside many of the interests represented at EU level. Second, and maybe related to the former, deliberative democrats tend to "see groups as simple catalysts for public deliberation of important issues"[25]-which might be the case sometimes, but which is difficult to imagine when what the EU is regulating is, for example, how many centimetres boxes should have for transporting fruits. Further and in other words, there seems to be a consensus around the idea that it is precisely the regulatory nature of the EU that gives opportunities to interest representation participation and that these groups would have rather little influence when it comes to intergovernmental decision making[26], such as Treaty revisions or enlargement, which at EU level are for sure "important issues". And third, associative democrats consider that internal democracy –liberal representation alike- of the groups is essential for a democratic participation[27], which would challenge many of the participating organisations amongst the "civil society" ones[28].

Returning to the roots of Participatory Democracy, it seems that the initial lack of attention to intermediate organisations (between the citizen and the government) and the scope limited to local participation or other similarly reduced spheres, apparently left only one natural alternative to the study of interest representation at EU level: the pluralistic approach, which talked specifically about interest organisations taking part in politics in macro matters on a competitive basis. As much as Dahl and the other authors of these school might be interesting and despite appearances, the model –at least the original- does neither fit perfectly into the reality of interest representation at EU level. The utilitarian/rational choice approach might leave aside very important at EU level post materialistic interests[29] as well as in principle unexpected collaborations between groups or the abundant existence of umbrella associations; the limited role assigned to the political power-with political action being a result of competition between interests and the political power acting as a judge- might leave aside the fact that there is indeed a political agenda by the side of the institutions dominating the

[23] For a complete conceptual overview, see Barbara Finke, Civil society participation in EU governance. *Living Reviews in European Governance*, *2*(2),2007.
[24]Jürgen Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, Cambridge,MA, 1996.
[25] Justin Greenwood and Darren Halpin, The European Commission and the public governance of interest groups in the European Union: Seeking a Niche between accreditation and laissez-faire, Perspectives on European Politics and Society (8:2, June 2007)
[26] Op.cot.note12,p.2.
[27] Op.cit note 25
[28] Íbid.
[29] Ronald Inglehart, *Culture Shift in Advanced Industrial Society*, Princeton University Press, Princeton 1990

process; and the (later qualified by Dahl himself) belief on a sort of free market of interests that would assure competition between them might leave aside the Commission's support to certain civil society interests in the name of –the also democratic- equity in access.

The discussion about whether the phenomenon of interest representation at EU level is closer to a Participatory Democracy model or to a pluralistic or neo-pluralistic one might be open[30]. What is however –or should be- out of discussion is that the phenomenon does not answer to a Liberal Democracy frame, not even the developmental one, given that they key point here –and what pluralists and "participatorists" have in common- is that there is no longer a supposed and desired separation between state/public and society/private, a fundamental assumption of Liberal Democracy.

Apart from this, the nature of the interest represented is also very different. Against the general interest represented by political parties, we encounter here specific interests that, unlike in the liberal representation model, do not necessarily exclude each other. Indeed, one can be adherent of an environmental organisation, contribute to a feminist one and work in or being owner of a certain company at the same time. From this point of view, territorial representativeness loses its sense, given that the aim of territorial constituencies is precisely to assure that everybody is represented once- "one man, one vote". As said, this is so because of the nature of the interests represented: you cannot have two different views of the world at the same time, this is why you cannot choose two political parties at the same election. But you can perfectly form part –and this is often the case- of different organisations at the same time, and some of them might have something similar to an internal representative-democratic way of working, but others not. Therefore, liberal representation does not fit with the nature of the phenomenon and, when regulating, this should be taken into account. Otherwise, the risk of destroying the added value of private and plural participation in politics could become serious.

Moreover and going beyond conceptualization, the interest representation phenomenon at EU level is so institutionalized, with so relevant outcomes and presenting a so different nature and way of working compared to that of traditional liberal representation that it cannot be considered as a mere concession of the latter, as could be the case for emerging forms of individual direct participation, such as the European Citizens' Initiative.

[30]It might also be a fake discussion, given the alleged descriptive nature of Pluralism: Participatory Democracy and its apparent associated -Deliberative and Associative Democracy- are openly normative, they talk about the improvement of public life, as well as Liberal Democracy did and still does. Even if at the end of the day and taking a closer look to the latest developments of pluralism, the differentiation might not be that clear, the point here is that they might be actually complementary to seize the phenomenon in the absence of a comprehensive frame.

Thus, the least that can be said is that it deserves a separate frame –with its own exigencies- from Liberal Representative Democracy. The Lisbon Treaty seems to capture this, with its new article 11 on Participatory Democracy that, even if remaining vague in terms of implementation (except for the European Citizens' initiative), establishes a first constitutional frame for an alternative and complementary form of understanding democracy.

Interest Representation legitimacy perceived by the institutions and consequent style of regulation

In the Liberal Democratic approach, the first fact that could influence interest representation legitimacy is that, separation between state and society is a key feature of the ideology that expresses a defensive approach towards political action. In theory, if the separation exists, it is to protect citizens from interference of the political power into in their private lives. On the contrary, in Participatory Democratic approaches, participation and freedom go necessarily together[31], erasing by this, at least partly, the frontier between society/private and state/public, what clearly shows a proactive attitude towards politics.

Apart from this, the Council has been traditionally accused of opacity in general, but regarding interest representation its attitude could moreover be described as denial[32]. It logically follows that the legitimacy presumed to lobbyists to take part in the decision making process might not be exactly high for this institution. As like many other issues in the world of the executives, there are problems and practices that necessarily exist but there is no need to stir things up, in the name of governability. It has to be added that attitudes towards lobbying in many of the MSs are far more negative than in the Brussels' environment, a handicap that Brussels' public affairs and public relations professional have to face each time they want to perform actions at national level. The situation seems even worse in the New Member States, given the concerns expressed by MEPs coming from these countries in the Committee of Constitutional Affairs (AFCO) meeting of 18 April, where they insisted in how negatively lobbying was perceived in their countries, that the phenomenon was new for them and by no means seen as a routine. As a Polish scholar of the College of Europe recently said in an interview, it seems that Central-Eastern Europeans see lobbying as "corruption in disguise"[33].

Even if badges for lobbyists in the EP have a distinctive red colour, this institution recognizes the phenomenon[34]. Consequently and in coherence with its liberal-

[31] In the line of what was explained by Benjamin Constant when talking about the differences between liberal and ancient Greek democracy in Benjamin Constant, *The Liberty of Ancients Compared with that of Moderns*, 1816 in http://www.uark.edu/depts/comminfo/cambridge/ancients.html

[32] The argument looks as follows: it still claims that lobby pressure is "suffered" by the Member States individually and not by the Council as an institution. Obviously, the point here is that the Council is actually composed by the Member States and that this could be also said from the EP: it is not the civil servants of the EP who are lobbied, but the Members of Parliament. To overcome this situation during the negotiations of the Transparency register, the official position of the Commission seems to be that a distinction should be made between lobbying the institution (when for example it is the Presidency which is lobbied) and lobbying MSs individually to "help to form" the National position, the latter not falling within the scope of the register.

[33] http://www.euractiv.com/en/pa/scholar-east-europeans-see-lobbying-corruption-disguise-interview-505445

[34] Apart from reasons of efficiency or the general influence that interest representation has in Brussels, it is very possible that the main reason for the EP to accept the action of interest representation could be precisely the failure in the linkage function of the EP expressed at the beginning: the EP would actually need interest representation to maintain a regular contact with the society for whom they are legislating, given that –in the absence of the full expression of a European demos- by other means is for the moment impossible.

defensive approach, it approved in 1996 the establishment of a de facto mandatory register[35] of regular lobbyists. Although the register was accessible in the EP's website by 2003, the primary intention of this accreditation system was never to provide transparency to the public concerning lobbying activities -a list of names cannot give much information-, but to protect MEPs in their relations with external actors[36]. Indeed, the defensive approach seems also to work the other way round, protecting the political power from society. The emphasis was thus put on the internal code of conduct for MEPs and staff. It seems that it was not until the Stubb report[37], in 2008 and in response to the ETI and the Commission's invitation to the Parliament to adhere to it, that lobby regulation was approached by the EP as an issue of –also- transparency.

Of course, the emphasis on MEPs self-control has not been abandoned. Moreover, right now there is a working group on New Codes of Conduct- constituted as a response to the "cash for amendments" scandal[38]- which outcomes could be far more important in terms of direct consequences for lobbyists than the Transparency Register. Even if it is working in full opacity, it appears that one of the issues might be the substitution of long term badges for daily badges, what could jeopardize the supposed main new incentive for registering in the Transparency Register. The legislative footprint might also be involved, with the question of making it mandatory for meetings with rapporteurs. But, as said, it is difficult to say given the lack of transparency of this working group, the results of which are foreseen to be presented in AFCO this July[39].

MEPs have traditionally focused on self protection regarding lobby regulation because they believe that by protecting themselves they are automatically protecting the demos, given that they are the ones that represent the citizens. As vice-president of the EP Isabelle Durant energetically stated during a conference on Participatory Democracy in the EESC, "civil society does not represent the citizens, they have a very important role, but they do not represent the citizens"[40]. Parliaments, thus, represent -and tend to see- citizens as a compact mass that expresses itself (apart from the elections) by means of the also general "public opinion". Consequently, the EP should

[35] Launched in 1996, it is the facto mandatory because registering and getting a long term badge is part of the same process of accreditation. Apart of the limit of 4 badges per organisation, it is to note that badges are often denied and that the procedure remains completely opaque.

[36] In this sense, for Kohler-Koch, when regulating interest organisations under a liberal democratic approach, in that the aim is to achieve public deliberation, it makes no sense to discourage the development of the population of interest groups by asking questions about their representativeness and accountability. In Kohler Koch, B. (2010) Civil society and EU democracy: Astroturf representation. Journal of European Public Policy 17(1): 100–116

[37] http://www.europarl.europa.eu/meetdocs/2004_2009/documents/pr/707/707844/707844en.pdf

[38] A good press article about first consequences in Europolitics: http://preprod.europolitics.abccom.cyberscope.fr/ep-to-reinforce-internal-rules-but-doesn-t-fully-sweep-backyard-art300097.html

[39] http://ec.europa.eu/avservices/video/videoplayer.cfm?ref=77243

[40] Originally in French, this was said 22nd March 2011 during the conference "What are the prospects for Participatory Democracy in Europe?",organised by Group III EESC.

be the most sensitive of the institutions to European public opinion[41], even if it is weak. In this sense, a recent survey of public affairs professionals working in Brussels indicates that –in the view of the polled- the EP, when interacting with lobbyists, shows a clear and strong trend to favour civil society interests over the rest, meaning here by "civil society", again, basically NGOs[42]. This is coherent with the Stubb report approved after amendments, which states that the EP "considers it essential that representatives of civil society have access to the EU institutions, first and foremost to Parliament"[43]. All this could indicate a sort of legitimacy ad hoc, given to special groups depending of the values/interests that they represent. On the other hand, that the EP has moral concerns and wants to make moral distinctions between lobbyists is a fact that was clearly expressed during the negotiation of the IIA and that had as its outcome, for example, the visual barrier (a bold black line) clearly separating NGOs, think tanks, religious interests and local/regional interests from consultancies, law firms and in-house lobbyists (business interests).

As said at the beginning, the EP recognizes the magnitude of the phenomenon. However, recognizing the phenomenon –and putting the measures to face it- is not the same as recognizing its inherent democratic legitimacy. Indeed, it is not the same saying, as the mentioned approved report said, "interest representatives play an essential role in the open and pluralistic dialogue on which a democratic system rests, and are an important source of information for its Members in the performance of their mandate"[44] than saying "Lobbying is a legitimate part of the democratic system, regardless of whether it is carried out by individual citizens or companies, civil society organisations and other interest groups or firms working on behalf of third parties (public affairs professionals, think-tanks and lawyers)"[45], as the Commission's Green Paper on the ETI stated.

Thus, for the side of the Commission, even if it has been flirting with the liberal biased idea of exigencies of representativeness for NGOs[46], it seems that overall it is understood that the aim of regulation at the end of the day should not be to make public a private system- at the image of the failed EESC-, nor to privatise policy making- with few and powerful interests financing political campaigns and setting the agenda-, but to build a Participatory democratic frame – having as more interests involved as

[41] As the example of the constitution of the working group given in the previous paragraph might also illustrate

[42] http://www.comres.co.uk/ecpaconferencepollfeb11.aspx. Bearing in mind the limitations of this survey, the good thing is that it is made every year and that the trend in what the EP concerns seems clear. After the survey, the Council would favour industrial interest and the Commission would be in general balanced.

[43] http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0197&language=EN

[44] Íbid.

[45] http://ec.europa.eu/transparency/eti/docs/gp_en.pdf

[46] Op.cit.,note 13

possible participating in a transparent way- in which both systems, public and private[47], can cooperate to achieve better outcomes in the public policy field.

As we are talking about Participatory democracy, it is clear that participation in itself is not inherently democratic, unless the widest range of interests are involved. This is why the Commission has traditionally and formally[48] maintained an open approach regarding access and rejected the idea of an accreditation system that would veto some interests. Therefore, its register is voluntary and the Commission does not deliver badges to lobbyists. The voluntary nature of the registry has been heavily criticised. Whilst the main defence of this position is the lack of a legal basis, there are also concerns about whether a legally robust definition of lobbying could be established, and concerns about the extra administrative workload which the implementation of a mandatory register would create. Also for these reasons, the principle of an elective registration, rather than forced compliance, remains the preferred choice of approach.

On the other hand, further institutionalization is necessary to assure possibilities of access to all kind of interests –with the potential to counterbalance each other- that naturally don't start in equal conditions. As the Green Paper defends, "In some cases, the Community offers financial support in order to ensure that views of certain interest groups are effectively voiced at European level (e.g. consumer interests, disabled citizens, environmental interests etc.)".

Transparency is not only a precondition for legitimacy, but also for accountability or, in the vague words on the issue of the Green Paper, "external scrutiny". The Commission's register, unlike the EP's, has as its main aim to enhance transparency. This is the reason why different categories of lobbyists have to answer to different questions asked of them in the fields of structure and financial disclosure. The most obvious example of this is that consultancies and law firms have to disclose their clients (otherwise it would be impossible to know which interest they represent) rather than just the amount they spend in lobbying. A more significant issue is the requirement for NGOs to disclose the geographic spread of their membership, a question which is not asked of producer associations, presumably on the grounds that the latter are likely to have this property anyway. This seems to reflect a long-standing preference for NGOs to be 'representative', despite the inappropriateness of this

[47] For the Commission the distinction between private and public systems is important, even if not expressly mentioned: despite the broad and still valid definition of lobbying given in the Green Paper as "all activities carried out with the objective of influencing the policy formulation and decision-making processes of the European institutions", public authorities of any kind were never expected to register in the Register of Interest Representatives, as long as they had a public legal status.

[48] The idea of the Commission having a de facto accreditation system for reasons of governability is articulated in Op.Cit., note 25. One could argue that, at least regarding its register, the Commission has maintained a more consistent approach towards "openness"- for example, the deletion of any entry from the register has to be very well justified and get the written authorisation of the Head of Unit.

requirement for organisations whose main purpose is to raise a cause[49]. The system is thus far from being polished, given that it presents discriminatory and dysfunctional levels of exigencies depending on the type of interest[50]. Unfortunately, the Transparency register does not improve much the situation and, again, as Greenwood states regarding the Commission's register, it seems that also for the common register far less attention has been put in the operability of the scheme than in its establishment[51].

As the Transparency Register is about transparency, it was obvious that it should be the Commission's register and not the Parliament's one which was taken as the basis. Indeed, the new register maintains the same structure as the Commission one. The negotiation was thus not very much centred on the contents of the register itself, but on its legal nature (mandatory vs. voluntary); the scope; and the name.

[49] Op.cit, note 25

[50] In complement to the previous footnote, a further step in transparency would be for NGOs to disclose the sources of private funding contributions. Similarly, think tanks could disclose who are their members and sponsors and membership fees; trade associations, its members and membership fees, etc.

[51] Op.cit., note 13

The negotiation of a common regulation for lobbyists

The Transparency Register is not exactly a new register, but an evolution of the Register of Interest Representatives that associates the badge delivery system of the EP by making this delivery conditional upon registration. However, the accreditation system of the EP remains independent, given that registration does not assure the badge and that the EP reserves its right to deliver badges to individuals which organisations are not registered. This association was meant to be the new main incentive to register- and to make it earn the title of "de facto mandatory"-, what as we have seen before could present problems depending on the outcomes of the working group currently deliberating on this issue.

A virtual Joint Secretariat formed by officials of both institutions under the coordination of the Head of the Transparency Unit of the Commission (fact that also talks about the leading role of the Commission in the process) has been set up to manage the system. In terms of internal transparency, this inter institutional cooperation could improve the way the EP acts regarding badges delivery. But there is always the issue that interest representatives would get very contradictory attitudes from the joint Secretariat, depending if they are talking to EP officials or to Commission ones.

After the Stubb report, the negotiations between the EP and the Commission re-started in May 2010[52], so that by October we had already two novelties: that the new register was going to be called "Transparency Register" and that the Council had now the intention of seriously considering joining it, what was announced in September, probably after realising that the talks between the EP and the Commission were actually going to have an outcome from which they could not justifiably be left out.

The changing of the name was not just about marketing. On the contrary, it was at the moment a major political step, as well as a shift to an ad-hoc legitimacy approach towards lobbyists. Indeed, the conference of 6th October 2010 and its debates were mainly about the name, in that many stakeholders –lobbying the negotiation at the moment- wished to avoid being labelled as "lobbyists": lawyers, NGOs, churches and think tanks were prominent in this respect. Moreover, the representative of COMECE[53] did not want neither to be named "interest representative", because they assimilated "interests" to commercial interests. Similarly, CEPS[54] defended that think tanks were actually the contrary as "interest representatives", given that in its nature was to be independent of any external interest. Both approaches were heavily criticised and the argument took on a touch of absurdity when, in its next intervention, the

[52] http://www.euractiv.com/en/pa/eu-breakthrough-lobby-register-news-497831
[53] Commission of the Bishops' Conferences of the European Community
[54] The Centre for European Policy Studies, a think tank

representative of the think tank complained about the EP only giving 4 badges to his organisation.

After the shift, it is expressly understood that "lobbying" and even "interest representation" have a negative connotation. Far away are the words of the Green Paper now, in which "lobbying" was "a legitimate part of the democratic system". Moreover, if you award with the same legitimacy to all groups and the problem is only that the word "lobbying" has a negative connotation, why then should you leave it for describing business interests, still called officially in the IIA "in-house lobbyists"?

Similarly, the division in subfolders for the groups is also ideological. Here we are not only talking about the black bold line separating "good lobbyists" from "bad lobbyists", but also about the different categories of interests contained in the IIA, which did not exist for the old register. Existing were different on-line inscription forms depending on the transparency exigencies for each group, as we talked before. Now, on the contrary, there are going to be formally six separate sections, but only three different inscription forms, given that transparency exigencies have basically not changed.

Even if ideologically this is a big loss, the shift also shows that the Commission had already won concerning the voluntary principle, given that there would have been no need of "everybody feeling comfortable in the Register" if it was going to be legally mandatory. As Commission vice president Šefčovic and EP vice president Wallis assured significantly at the moment, the new name and the separation in categories would bring more organisations to the register.

Indeed, the EP has always wanted a mandatory scheme, but the Commission has been extremely firm regarding its voluntary approach. Remarkable was EP President Buzek's move, reacting towards the "cash for amendments" scandal at the beginning of April (when the IIA negotiation was already closed under a voluntary scheme): he asked publicly the Commission to make the Transparency register mandatory. Presumably, someone at also very high level in the Commission must have said no, given that nothing happened. MEPs however reacted and a torrent of amendments for the Casini report on the IIA in the sense of regarding this scheme as a first step towards making the register mandatory in the future culminated in a compromise amendment that is to be found in the EP's Decision of 11 May[55] and that foresees the revision -due not later than June 2013- as the frame to prepare the transition to a mandatory scheme.

There were also a high number of amendments regarding the scope, concretely about article 13 of the IIA that states that local, regional and municipal authorities are not concerned by the register, but that however their representative offices created to deal with the EU institutions actually are. This is consistent with the approved Stubb

[55] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0222+0+DOC+XML+V0//EN&language=EN

report, which unlike the Commission old scheme[56], did not make distinctions between public and private interests, as long as they were performing also lobbying activities and not just the activities provided for them in the Treaties. Thus, a regional office would have to register not because it was participating in the Committee of the Regions (CoR), but because it was lobbying the EP/Commission on certain issues. The IIA has adopted the type of activities performed as the only guide to know whether an organisation would fall within the scope or not: if someone is lobbying, should register, regardless of its legal status.

The German Länder did not like this proposal at all and lobbied heavily in the EP in order not to be considered as lobbyists. In their view-and given the degree of perfection of the German federalism it is perhaps understandable-, if a regional office should register, so should also the REPER. The amendment Häfner-Belier-Tarand was the most resolute, given that they subjected the approval of the whole IIA to the exemption of –certain- regional offices to register. Häfner defended in AFCO that the inherent territorial representativeness of the regions should entail a privileged treatment: they were representing the "people" of this territories, something that the rest of the MEPs –also creatures of territorial representativeness- had no problems in understanding and approve. In the end, the compromise amendment states that the offices exempted should be the ones "forming part of (the) administrations" of the regional, local and municipal authorities. This means that, in order to be exempted, they have to be an integral part of the public authority. How this is going to be implemented will remain a mystery until the publication of the implementation guidelines, but it seems that a totally public legal status and the engagement of civil servants are going to be decisive[57].

The issue is extremely complicated: by this move, the framework will be less transparent, given that powerful lobbyists are going to be exempted from registering. On the other hand, resuming the distinction of the Commission between public and private status could be useful to build a pure participatory democratic frame, in which the focus of attention would be to integrate democratically public and private spheres in the decision making process.

Besides, it is clear that regional offices are lobbying the EU, but it is also true that they are doing so because they do not have a proper way of representation. As said at the beginning, representation is also about action and in this sense the CoR[58] is almost as

[56] http://ec.europa.eu/transparency/docs/reg/FAQ_en.pdf

[57] If this is finally the case, the risk of discrimination amongst regions having the same level of competences is high, given that all will depend on the legal form under which these regions decided to constitute their offices in Brussels long before this scheme was set up.

[58] Again, the mistake was the approach, putting together and at the same level local and regional authorities with extremely different levels of competences.

ineffective as the EESC. For powerful regional entities with legislative competences directly affected by EU competences, the Treaty is simply not sufficient.

The binding nature of the common Code of Conduct upon registration and the formal systematization of the complaint mechanism were outcomes of the public rhetoric of the EP towards making this register more constraining and serious than the old one. None of them will in reality have relevant consequences regarding transparency or accountability, given that almost all organisations of the old register accepted the given code[59] and that the "new" complaint mechanism is a copy of the complaint mechanism already existing for the Commission's register. Moreover, the real engagement of the EP concerning the amelioration of the accuracy of the data is doubtful, given that, in principle, it has left the task of the control of the accuracy to the Commission and that no EP budget is dedicated to this.

However, the rhetoric had a relevant outcome in terms of accountability: the Transparency register is going to make public if an organisation has been suspended or removed from the register for reasons of non- compliance with the code. Apparently, this is going to be implemented in the frame of the complaint mechanism, but also in the one of the Quality Checks launched by Šefčovic, which for the moment has been a more efficient source of accuracy control than the more administratively constricted complaint mechanism.

Finally, the entry into scene of the Council in the negotiation is going to be illustrated by a political statement on the 23 June, day of the official launch of the Transparency register. It is expected to include a statement of full support to the scheme as well as the announcement of the official entry into the negotiations to join it. At this stage, it is impossible to know how is it going to affect the scheme, but it is almost sure that its attitude towards the presence of lobbying in the Council will be somehow reflected and could affect article 15 of the IIA, that, speaking about the activities which should be taken into account for the financial declaration, includes "activities directed at Member States' bodies operating at EU level".

Odd about this register is that even if it is going to be voluntary, the impression it gave during the negotiation –most of all in the Länder episode- is that it was somehow mandatory. In fact, the Commission had to explain constantly in AFCO, but also in the Council, that no one was "obliged" to register and had to insist in the accuracy of the construction "expected to register". Like this, the consequences for organisations that would not register, were only that the Commission (and the EP) could criticize them when they would fall into the scope.

The structure, the transparency exigencies and the accountability measures remain more or less the same as in the old register. Despite all this, there is the general

[59] They had as an alternative naming a different but stricter code to which they were bound.

impression that the scheme is now beginning to become serious. This is very important given that there are many organisations missing in the register, especially amongst law firms and think tanks.

Bearing in mind that one of the distinctive features of interest representation in Brussels is the importance of reputation, it is not to rule out that the most powerful incentive for registering now might be the fact that this scheme is going to be a common answer of the three institutions to the lobby phenomenon. If this is true, the Commission, as leader of the negotiation, could have been right in putting all the efforts in the political negotiation, that is, in the establishment of the scheme itself despite ideological sacrifices. However, this statement is conditional to a further polishing of the scheme in order to enhance transparency with equity and to continue with the line of establishing an adequate –Participatory democratic- framework for this phenomenon. Unfortunately, the political negotiation is far from being over, not only because of the recent adhesion of the Council, but also and most of all because the EP has not give up the will of making the register mandatory. It seems thus that the polishing will have to wait until better times.

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