

# LEGAL STUDY

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LEGAL FRAMEWORK FOR A MANDATORY EU  
LOBBY REGISTER AND REGULATIONS

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## 1. EXECUTIVE SUMMARY

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A binding regulation of lobbying activities at the EU level including the requirement to register and to adhere to certain standards of behavior would be the most effective way of regulating these activities. Examples, in the EU, but also in third countries (US, Canada) show the variety of such mandatory approaches, but also their feasibility.

The legal basis for such a regulation can be found in Article 298 (2) TFEU concerning lobbyists which target EU institutions engaged in administrative tasks. Based on the implied powers doctrine, the EU's competence could be extended to cover all activities addressing EU organs and institutions engaged in administrative as well as legislative tasks.

A regulation based on Article 298 (2) TFEU and/or the implied powers doctrine could be adopted through the ordinary legislative procedure.

Until a binding regulation is adopted, each EU institution can amend its own staff regulations to address the behavior of its own staff vis-à-vis lobbyists. Furthermore, the EU's organs could change their own rules of procedure to regulate access of lobbyists to the premises of these organs. This might then have a factually binding character. Such effects could also be reached by the interinstitutional agreement between Parliament and Commission in 2011.

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## 2. BACKGROUND AND SCOPE OF THE STUDY

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Activities of lobbyists vis-à-vis EU institutions, in particular the European Commission and the European Parliament, are currently not regulated in a binding manner. A common "Transparency Register" of the European Parliament and the European Commission is based on an Interinstitutional Agreement concluded by the two organs on 23 June 2011.<sup>1</sup> This register relies on voluntary registrations and includes a non-binding code of conduct. As stipulated in Paragraph 30 of the Interinstitutional Agreement a review process is due to

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<sup>1</sup> OJ, 22 July 2011, L 191/29.

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.

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### 3. LEGAL BASIS FOR A MANDATORY REGISTER

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A mandatory lobby register at the EU level would require the adoption of EU legislation, i.e. a binding EU regulation or directive. The first question in this context is which legal form such a mandatory register should take. Arguably, the adoption of an EU regulation would be the preferred option. As stated in Article 288 TFEU, a regulation is binding in its entirety and directly applicable. It can therefore establish direct requirements for lobbyists and would not need any further implementation legislation. The crucial point is on which legal basis the EU could adopt such a regulation.

According to the principle of limited conferral of powers, the EU can only legislate if the treaties contain a legal basis for the respective act. There is no provision in the treaty which contains an explicit competence of the EU to adopt binding rules for lobbyists. Articles 11 TEU and 15(1) TFEU which contain the general rules on transparency do not contain a legislative competence. These provisions only establish general principles, but lack a specific conferral of powers to the European legislator to adopt binding rules for lobbyists.<sup>18</sup> However, there seem to be at least three potential legal bases for an EU regulation containing mandatory rules for lobbyists: Article 298 (2) TFEU, the doctrine of implied powers and Article 352 TFEU.

#### 3.1. ARTICLE 298 (2) TFEU: OPEN, EFFICIENT AND INDEPENDENT EUROPEAN ADMINISTRATION

Article 298 (1) TFEU stipulates that “[i]n carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration”. According to Article 298 (2) TFEU, “the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.”

This legal basis was newly introduced into the EU treaties by the Treaty of Lisbon. It allows the EU to enact general rules and regulations concerning administrative procedures with the objective to establish and ensure the openness, efficiency and independence of a European Administration. This legal basis has not yet been used in EU legislation and there is no case law on this provision yet. Accordingly, an interpretation of this provision can only be based on the standard methods of interpreting EU Law.

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<sup>18</sup> This is also clearly stated in a Legal Opinion of the Legal Service of the European Parliament on the issue. See European Parliament, Legal Opinion Re: Possibility and modalities of mandatory registration of lobbyists, 25 March 2010 (on file with author).

Three aspects are relevant in the present context: First, which institutions fall under the term “European administration”? Second, what do the terms “open” and “independent” mean?<sup>19</sup> And most importantly, third, can Article 298 TFEU only be used to regulate the administration or can it also be used to regulate the conduct of other individuals in the context of negotiations?

The term “European administration” in the context of Article 298 refers to all forms of administration at the European level.<sup>20</sup> From an institutional perspective, this includes the two organs mostly associated with administrative and executive power in the EU, the Council and the Commission and their administrative units, but also all agencies or other independent institutions engaged in administrative tasks.<sup>21</sup> As Article 298 refers to all EU organs, the term European administration also includes the administrative units of the European Parliament.

A more difficult question concerns whether the term “European administration” also includes the Members of the European Parliament who are predominantly engaged in legislative activities. From the perspective of the classical doctrine of the separation of powers, such an understanding of “administration” does not seem to comply with the ordinary meaning of the term. It is therefore doubtful whether a legal measure based on Article 298 TFEU could also cover legislative activities of the Members of the European Parliament. Consequently, a binding regulation with this legal basis would not cover all lobbying activities in the EU context.

Openness in the context of Article 298 TFEU refers to the general notion of transparency of the administration and is connected with the EU’s principle of transparency as enshrined in Article 11 TEU and Article 15 TFEU.<sup>22</sup> Article 15 (1) states that “the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.” It should be noted that a binding lobbying register does not restrict the openness of the European administration as it does not generally limit the access of businesses, citizens and their associations to the European institutions. Instead it only requires that such access and related activities are based on the principle of transparency.

Independence relates to objective and impartial decision-making by individual officials. Articles 8 and 9 of the European Code of Good Administrative Behaviour could be used as

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<sup>19</sup> Arguably, the notion of an „efficient“ administration is less relevant in the context of the regulation of lobbying.

<sup>20</sup> Markus Krajewski/Ulrich Rösslein, Art. 298 TFEU, No. 10, in: Eberhard Grabitz/Meinhard Hilf/Martin Nettesheim (eds), *Das Recht der Europäischen Union*, München 2012.

<sup>21</sup> Herwig Hofmann/Gerard C. Rowe/Alexander Türk, *Administrative Law and Policy of the European Union*, Oxford 2011, p. 11-12.

<sup>22</sup> Krajewski / Rösslein, above note 20, No. 18.

an exemplification.<sup>23</sup> In particular, officials shall not give “preferential treatment on any grounds whatsoever.” Decisions influenced by lobbying could therefore conflict with those standards. It is therefore safe to assume that transparency concerning lobbying activities would contribute to an “open, efficient and independent European administration.”

Article 298 TFEU was introduced in the TFEU to have a legal basis for the regulation of general EU administrative law and therefore to regulate the administration.<sup>24</sup> It needs to be determined whether this provision could also be used to regulate the activities of others which might influence the administration. This requires an interpretation of the term “provisions to that end” in Article 298 (2) TFEU. The end mentioned is that the “institutions, bodies, offices and agencies of the Union” have “the support of an open, efficient and independent European administration”. The wording of the Article is not limited to rules addressing the administration only even though this would seem to be his primary focus. Yet, any provision which supports the establishment of an open and independent European administration can be based on Article 298 (2) TFEU. Regulating the behaviour of lobbyists which address entities and institution of the European administration as defined above could therefore be based on Article 298 (2) TFEU. This would, however, not apply to lobbying activities which target law-makers as they are engaged in legislation and not administration. In sum, it seems possible to base binding rules and the requirement to register for those lobbying activities which relate to European administration. However, as this would exclude the Members of the Parliament as they are not part of the administration in the meaning of Article 298 TFEU. Consequently, Article 298 (2) TFEU by itself would not be sufficient for a regulation which extends to all lobbying activities at the EU level.

A regulation of this kind would be adopted in accordance with the ordinary legislative procedure as stipulated in Art. 298 (2) TFEU. The ordinary legislative procedure is specified in Article 294 TFEU. It requires a proposal from the European Commission and a decision of the European Parliament and the Council who act as joint legislators. In this context, the Council would generally decide by qualified majority voting (Art. 16 (3) TEU). It should be noted that the European Commission could be invited to consider a proposal of this kind on the basis of a European Citizen Initiative as stipulated in Article 11 (4) TEU and Article 24

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<sup>23</sup> Article 8 - Impartiality and independence: “1. The official shall be impartial and independent. The official shall abstain from any arbitrary action adversely affecting members of the public, as well as from any preferential treatment on any grounds whatsoever. 2. The conduct of the official shall never be guided by personal, family or national interest or by political pressure. The official shall not take part in a decision in which he or she, or any close member of his or her family, has a financial interest.”

Article 9 – Objectivity: “When taking decisions, the official shall take into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration.”, see The European Code of Good Administrative Behaviour, available from <http://www.ombudsman.europa.eu>.

<sup>24</sup> Eva Nieto, Relevant Provisions of the Lisbon Treaty on EU Administrative Law, Note to the European Parliament, PE 432.744, 2010, p. 8 f..

TFEU. However, it needs to be kept in mind that a European Citizen Initiative would only require the Commission to consider such a proposal and could not force the Commission to actually make such a proposal.

### 3.2. IMPLIED POWERS DOCTRINE

The doctrine of implied powers enables EU organs to take measures even if no expressed legal basis exists in the treaties. Whereas implied powers have long been accepted in principle in EU law, their exact contours and prerequisites remain contested. The doctrine has been particularly relevant in external relations where it was used to establish EU external competences which would allow the EU to enter into international agreements.<sup>25</sup> However, implied powers have also been accepted in internal legislation.<sup>26</sup> The ECJ even accepted that the EU may adopt criminal sanctions in an area where it is competent even if the general competence for criminal matters remains with the Member States.<sup>27</sup>

According to EU law doctrine, a narrow and a broad approach towards implied powers can be distinguished:<sup>28</sup> The narrow approach concerns a competence which has been explicitly given to the EU organs but which cannot usefully be exercised without an additional competence. A broader approach requires only a specific objective which implies the competence to enact measures to achieve that goal. The scope of the implied powers doctrine in the broader sense remains contested. Though case law seems to indicate that the ECJ was from time to time willing to accept a broader understanding, no clear approach can be derived from this.<sup>29</sup> It should also be noted that Article 352 TFEU contains a specific legal basis for measures which are aimed at achieving one of the EU's objectives for which the treaties did not provide specific competences.

However, the doctrine of implied powers in its narrow sense could be used to complement the competence given to the EU in Article 298 (2) TFEU. As stated above, this provision explicitly only covers the regulation of open and independent administration, but not legislation or general policy-making. However, lobbying activities vis-à-vis staff of the European Commission or of the European Parliament who are engaged in administrative tasks cannot be usefully regulated without also regulating lobbying activities targeted at legislative or policy-making activities. The doctrine of implied powers in its narrow sense and used in connection with Article 298 (2) TFEU would therefore allow the regulation of all lobbying activities, because the regulation of lobbying activities targeted at administrative only is not possible. A regulation based on the doctrine of implied powers in connection

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<sup>25</sup> ECJ, Case 22/70 (*Commission / Council – AETR*), ECR 1971, p. 263 (274), para 16.

<sup>26</sup> Martin Nettesheim, *Kompetenzen*, in: Armin von Bogdandy / Jürgen Bast (eds), *Europäisches Verfassungsrecht*, 2nd ed., Heidelberg 2009, p. 412-413.

<sup>27</sup> ECJ, Case C-176/03 (*Commission / Council*), ECR 2005, p. I-7879, para. 48.

<sup>28</sup> P. Craig and G. de Burca, *EU law*, Fourth Edition, Oxford 2008, p. 90.

<sup>29</sup> Nettesheim, above note 26, p. 413.

with Article 298 (2) TFEU would be adopted in the same way as regulations based directly on Article 298 (2) TFEU, i.e. through the ordinary legislative procedure.<sup>30</sup>

Another aspect of implied powers which is well accepted in the literature and in domestic legal systems, concerns a competence which is based on the recognition that the relevant matter can only be regulated by the EU, because a regulation of the subject by the Member States would be obviously useless.<sup>31</sup> This competence – sometimes called competence based on the nature of the matter (Natur der Sache) – has so far not been used by the ECJ, but there is no indication that the ECJ might not accept it. This aspect of the implied powers doctrine seems particularly relevant in the present context.

It can be argued that the regulation of lobbying activities vis-à-vis the EU's organs and institutions is a matter which by its very nature can only be regulated by the EU. Lobbyists or lobbying activities with a clear EU focus cannot be regulated by the Member States, because they have no competence for the regulation of genuine EU affairs. The same argument is accepted in German constitutional law doctrine concerning the regulation of lobbying activities at the federal level: Even though there is no express competence in the German constitution for the regulation of lobbyists, it is accepted that only the Federation and not the Länder (the States) can legislate on this matter.<sup>32</sup> Usually this is based on the competence of the Federation to legislate on the federal state organs. Consequently, the Federation cannot legislate on lobbying activities at the Länder level. This parallels the situation at EU level: Only the EU has the inherent power to legislate about those lobbying activities which concern its organs.

Accepting an implied competence of the EU to regulate lobbying activities at the EU level does not diminish in any respect sovereignty rights of the Member States. Member States remain free to regulate lobbying activities towards their organs and institutions in different manners.<sup>33</sup> They are also free in adopting regulations addressing their nationals and companies engaged in lobbying activities for example through national taxation or company laws. Finally, Belgium as the country where most lobbyists have established themselves also remains free to regulate based on the principle of territorial sovereignty. Recognizing that an EU competence to regulate EU lobbying activities does not diminish regulatory competences of the Member States is a crucial aspect in the context of implied powers as there is always a danger that this doctrine could be used to broaden the scope of the EU to the detriment of the Member States.

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<sup>30</sup> See above a).

<sup>31</sup> Nettesheim, above note 26, p. 412.

<sup>32</sup> Helge Sodan, Lobbyregister als Verfassungsproblem, Landes- und Kommunalverwaltung 2012, 193 (197); Hoppe, above note 13, p.140.

<sup>33</sup> EU and Member State lobbying regulations may have an overlap regarding Member State's governments. If these are lobbied in their capacities as national constitutional organs, the Member States remain competent. If Ministers are lobbied in their capacity as members of the Council of the EU, the competence of the EU exists.

Based on the foregoing it seems safe to argue that the EU has the competence to regulate lobbying activities aimed at EU organs and institutions engaged in legislative activities based on the understanding of the implied powers doctrine developed above. Such a competence might even include the competence to impose sanctions as indicated by the ECJ.<sup>34</sup>

The above conclusion raises the question about the applicable legislative procedure. Apparently this question has not yet been addressed in legal doctrine let alone by the ECJ. Since the Treaty of Lisbon, the answer would seem rather obvious: In the absence of any indication that a special legislative procedure is more closely related to the subject matter, the ordinary legislative procedure would be appropriate, because this procedure is the normal EU procedure. Hence, Art. 294 TFEU would apply requiring a proposal by the Commission and a joint legislative act of the Parliament and the Council, the latter acting on the basis of a qualified majority voting.

### **3.3. ARTICLE 352 TFEU**

Lastly, binding regulations could also be based on Article 352 TFEU. This provision enables the EU to legislate should it be necessary “to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers”. It can be argued that adopting a mandatory lobby register generally binding on lobbyists would be necessary to attain the objective of transparency as stipulated in Article 11 TEU and 15(1) TFEU. However, it should be noted that such measures require unanimity in the Council and only the consent of the European Parliament. This is due to the fact that Article 352 TFEU is usually employed if the treaties neither explicitly nor implicitly confer a competence on the EU, but its activities are nevertheless required to attain an objective mentioned in the treaties.

The latter aspect usually leads to the conclusion that a lobby-register can only be based on Article 352 TFEU. In particular, this seems to be the view of the Legal Service of the European Parliament. In a Legal Opinion of 25 March 2010 the Parliament’s Legal Service recalled that Articles 11 TEU and 15 TFEU do not contain legal bases for a binding register and then focused on the issue of Article 352 TFEU alone.<sup>35</sup> The Legal Opinion neither addressed the doctrine of implied powers nor the potential of Article 298 (2) TFEU. However, as shown above the EU has been given the power to regulate lobbying activities in a binding manner based on these legal principles. Recourse to Article 352 TFEU is therefore not necessary.

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<sup>34</sup> ECJ, Case C-176/03, above note 27, para. 48

<sup>35</sup> European Parliament, Legal Opinion Re: Possibility and modalities of mandatory registration of lobbyists, 25 March 2010 (on file with author).

### **3.4. TREATY REFORM**

The analysis of the previous sections clearly showed that a sufficient legal basis for a binding lobby-register can already be found in the existing primary law. However, for reasons of clarity it might be useful to include an explicit legal basis in the treaties in the context of a future treaty reform. For example, Article 298 TFEU could be amended to include a paragraph 3 stating “The European Parliament and the Council acting by means of regulations in accordance with the ordinary legislative procedure may establish a mandatory register for lobbyists and binding standards for the activities of lobbyists.” Such a provision could be implemented on the basis of the requirements for amending the treaties are laid down in Article 48 TEU. Amendments are to be developed by a European Convention or by an Intergovernmental conference. The reforms then need to be ratified by all Member States in order to enter into force.

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## **4. OPTIONS TO ENHANCE THE EFFECTIVENESS OF THE CURRENT SYSTEM**

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As shown in section 3, establishing a mandatory register would require the adoption of a regulation through the ordinary legislative procedure or the special procedure mentioned in Article 352 TFEU. In both cases, the European Commission would need to propose such a regulation and the Council would have to approve of it (unanimously and only with the consent of Parliament in Article 352 TFEU and acting on the basis of a qualified majority vote as a co-legislator with Parliament in the ordinary legislative procedure). Given the reluctance of the Council to adopt rules on transparency and the length of legislative procedures in the EU, options to improve the current system and to aim at a de facto binding character should be considered as possibilities in the short term.

In this context, it is worth pointing to the possibility of regulating the behavior of the staff of the EU’s institutions through the Staff Regulations. The legal basis for staff regulations can be found in Article 336 TFEU. It stipulates that Parliament and Council can enact Staff Regulations of Officials of the European Union and the Conditions of Employment of other servants of the Union based on the ordinary legislative procedure. There are no relevant restrictions regarding the competences of the EU institutions concerning rules which only apply to their own personnel when they interact with lobbyists. For example, rules requiring Commission staff to only speak at events organised by registered organisations or to only meet with lobbyists from registered organisations could be incorporated into the Staff

Regulations.<sup>36</sup> However, it should be noted that these Staff Regulations are binding on the staff only and not on lobbyists.

Furthermore, registration requirements and standards of conduct could be incorporated into or annexed to the Rules of Procedure of the relevant organs.<sup>37</sup> They could regulate such elements as meetings with EU officials (MEPs, Commission staff, etc.), access to EU facilities (buildings, official meetings, workshops and other events), membership in expert working groups, speaking in front of EU institutions or at meetings organized by them. Requirements that only registered organisations can receive EU subsidies or contracts with a link with EU policies and lobbying could be included in the EU budget or the Commission and European Parliament guidelines for grants and contracts. As such rules would only regulate the internal organization and decision-making process, they would only be formally binding on the institutions. Hence, Rules of Procedure can only include requirements for lobbyists when they interact with the institutions.

The factual impact of such rules depends on their contents and the strictness of their implementation. Generally, such rules can be considered as *de facto* binding on lobbyists if the latter have to comply with them if they want to interact with the respective institutions. Since this is the primary goal of most lobbyists, such rules would target a significant portion of lobbying activities. However, if lobbyists chose not to have direct contact with the institutions, Rules of Procedure cannot compel them to register. In addition, rules of Procedure could not impose any penal sanctions for non-compliance. Non-compliance with the requirements of the register could only lead to exclusion from the register and refusal of further interactions.

The interinstitutional agreement upon which the current system is based is a *sui generis* instrument, but it also addresses the behavior of those lobbyists which are in contact with the Commission and Parliament. Interinstitutional agreements have therefore similar legal consequences as the Rules of Procedure. 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, as pointed out at the outset, the current system is only voluntary. Yet, the EU institutions could strengthen the agreement by including rules which are binding on themselves.

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<sup>36</sup> See also Dirk Hasler, *Die Europäische Transparenzinitiative und "Legislatives Lobbying"*, *Zeitschrift für europarechtliche Studien* 2007, 503 (516 et seq).

<sup>37</sup> The legal bases for the Rules of Procedure are Art. 232 (1) TFEU (Parliament) and Art. 249 (1) TFEU (Commission),

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## 5. CONCLUSION

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A binding regulation of lobbying activities at the EU level including the requirement to register and to adhere to certain standards of behavior would be the most effective way of regulating these activities. Examples, in the EU, but also in third countries (US, Canada) show the variety of such mandatory approaches, but also their feasibility.

The legal basis for such a regulation can be found in Article 298 (2) TFEU concerning lobbyists which target EU institutions engaged in administrative tasks. Based on the implied powers doctrine, the EU's competence could be extended to cover all activities addressing EU organs and institutions engaged in administrative as well as legislative tasks.

A regulation based on Article 298 (2) TFEU and/or the implied powers doctrine could be adopted through the ordinary legislative procedure.

Until a binding regulation is adopted, each EU institution can amend its own staff regulations to address the behavior of its own staff vis-à-vis lobbyists. Furthermore, the EU's organs could change their own rules of procedure to regulate access of lobbyists to the premises of these organs. This might then have a factually binding character. Such effects could also be reached by the interinstitutional agreement between Parliament and Commission in 2011.