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Democratic Dilemmas and the Regulation of Lobbying – the European Transparency Initiative and the Register for Lobbyists¹

Abstract: *This article provides a preliminary assessment of the register for interest groups launched by the European Commission (EC) in June 2008 within the framework of the European Transparency Initiative (ETI). The analysis is carried out in light of the democratic dilemmas between input and output legitimacy, i.e. between transparency and openness on one hand (input), and effectiveness of the EU decision-making process on the other (output). The critique of the ETI is presented from the viewpoints of three classes of actors: the EC, civil society organizations, and business representatives. The critique demonstrates that the ETI tools are too weak, and only partially contribute to strengthening the legitimacy of the EU political system.*

Introduction

The European Transparency Initiative was intended as a ‘review of the Commission’s overall approach to transparency’ and a step towards a ‘more structured framework for the activities of interest representatives’.² It was launched in a climate of mistrust towards the EU political system and a growing Euro-scepticism following the fiascos (from the EU point of view) of the constitutional referenda in France and the Netherlands in 2005. The transparency reform was a response to that credibility crisis and intended as a means to strengthen EU legitimacy, especially in its input dimension.

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² Commission of the European Communities, *Green Paper. European Transparency Initiative*, 03.05.2006., Brussels, COM (2006) 194 final, p.3.

The European Commission launched an ‘enormous programme of self-legitimation’, making ‘transparency, efficacy and the ethics of public action core parts of the European agenda’.³ The ETI aim was to strengthen both output legitimacy (making use of the informational value of interest groups), and input legitimacy (the right of citizens to ‘know who the lobbyists are, what they do and what they stand for’).⁴ These efforts, aimed at fighting the democratic deficit in the EU political system, produced as side effects particular dilemmas between transparency and openness (inclusiveness) on the one hand, and efficiency on the other – dilemmas which European decision-makers are still dealing with.

The ETI provides an appropriate framework in which to demonstrate the outlines of these democratic dilemmas and methods for addressing them. This article focuses on regulating the relations between the Commission and the lobbyists, with particular emphasis on the question of a formal register for interest groups. The aim is to conduct a critique of the ETI in light of the two dimensions of legitimacy – transparency and efficiency – in order to show how they are interconnected and sometimes conflicting.

On the one hand, in the light of the negotiation theory described below, the question is how open and transparent the EU decision-making process should be when it involves a variety of interest groups, assuming that transparency and publicity do not promote deliberation at the elite level. Another important issue is to find out if it is possible to reconcile the efficiency-driven and output-oriented approach of the Commission with inclusiveness and openness to all comers.

This analysis is carried out on the basis of three types of empirical material: interviews, contributions to the consultations on the ETI, and opinions expressed in the media during 2007–2009. The selection of the interviewees was aimed at ensuring that three main groups of actors in the debate over the ETI were represented, i.e. the European Commission, Brussels-based non-governmental organizations, as well business interests. The list of interviewees is contained in the footnote below.⁵

³ D. Chabanet, *The Regulation of Interest Groups in the European Union in: European Governance and Democracy. Power and Protest in the EU*, ed. R. Balme, D. Chabanet, Lanham 2008, p. 209–234.

⁴ S. Kallas, *The need for a European transparency initiative*, Speech in The European Foundation for Management, Nottingham Business School, 3.03.2005.

⁵ The interviews were carried out in March and April 2008 in Brussels, with the following persons: Bodo Lehmann, Project Coordinator – European Transparency Initiative, European Commission Secretariat-General; Kristian Schmidt, Deputy Head of S. Kallas’ Cabinet, European Commission; Pirrko Kauppinen, Policy Officer, Relations with Civil Society: follow up of consultation standard, European Commission-Secretariat-General; Adrian Aupperle, Associate Advocacy Officer, Transparency International; Christine Pohl, Corporates Campaign, Friends of the Earth Europe; Emmanuelle Faure, Director for European Union Affairs, European Foundation Centre; Regula Heggli, Coordinator, Civil Society Contact Group, c/o Social Platform, Brussels; Christian Feustel, Senior Adviser for EP Affairs, Business Europe.

The article begins with a review of the theoretical concepts used to analyse the ETI. In the second section, the analysis of the ETI is carried out in the light of the democratic dilemmas mentioned above. In the last part, possible measures for improvement of the ETI are proposed, taking into consideration that the register has now been in operation for three years.

1. Input and output legitimacy

A clear distinction between input and output legitimacy was introduced by F. Scharpf. Input legitimacy, described as government *by* the people, is based on the assumption that *'political choices are legitimate if and because they reflect the "will of the people", so they can be derived from the authentic preferences of the members of a community'*. Consequently, governing bodies and officials should be accountable to those governed. Input legitimacy requires participation of *all* persons affected by the decision, or their representatives in the decision-making process. These arguments, however, are not plausible in large political systems, where such inclusiveness is impossible and where decisions are taken by a majority, which poses a threat to minority interests. This danger can be diminished if a 'thick' collective identity exists and members of a community can assume that the *'people will do no wrong'*, i.e. they rely on the benevolence of their fellow citizens.⁶

Secondly, with regard to the output perspective – government *for* the people – Scharpf claims that *'political choices are legitimate if and because they effectively promote the common welfare of the constituency in question'*. Legitimate government is one which is capable of effective problem-solving and delivering outcomes which respond to the expectations of those governed.⁷

Scharpf claims that these two dimensions of legitimacy co-exist and complement each other in the nation-state, but that this is not the case for the European supranational polity, capable of legitimacy only in terms of output.⁸ According to Scharpf, *'Given the historical, linguistic, cultural, ethnic and institutional diversity of its member states, there is no question that the European Union is far from having achieved the "thick" collective identity that we have come to take for granted in national democracies – and in its absence, institutional reforms will not greatly increase the input-oriented legitimacy of decisions taken by majority rule'*.⁹ His scepticism about the possibility of achieving input legitimacy at the European level is related to a triple deficit: lack of col-

⁶ F. Scharpf, *Governing in Europe: effective and democratic?*, Oxford 1999, p. 6–8.

⁷ *Ibidem*, p. 6.

⁸ *Ibidem*, p. 12.

⁹ *Ibidem*, p. 9.

lective identity, lack of European-wide policy debates and discussions, and lack of a European-wide institutional infrastructure which could hold decision-makers accountable.¹⁰ Similarly, S. Saurugger points out in this regard that *'the EU has difficulties providing European citizens with government by and of the people, that is, with political representation and citizen representation, but assures government for and with the people, that is, effective government'*.¹¹

As we shall see, both dimensions of legitimacy are closely related and mutually reinforcing. Scharpf claims that the output legitimacy of the EU would be strengthened if a system of informal policy networks would be established, creating conditions for a wide deliberation over policy outcomes. This would allow for the achievement of win-win outcomes, satisfying all interested parties.¹² Inclusiveness – an input-legitimacy condition – is here regarded as a mechanism for strengthening output legitimacy. According to J. Greenwood the EU, as a non-majoritarian multi-level system, suffers from *'the lack of public space'* of participation, i.e. the absence of *'traditional structural mechanisms ensuring input legitimacy such as: mass political parties, adversarial party politics, EU-wide media, voting that changes a government, and a decision-making system which is understood by the citizens'*.¹³ The involvement of organised civil society into the European decision-making process would serve to enhance the democratic character of the EU system. Interest groups are meant to be a *'potential transmission belt conveying the plurality of interests to EU institutions and bringing Europe closer to the people'*.¹⁴ They perform core democratic functions in the EU, by contributing to input legitimacy (i.e. securing citizens' participation in public policy formulation) and output legitimacy (providing lawmakers with expertise and information otherwise not available).¹⁵ In an international organization, the democratic character of which is difficult to ensure due to the large extent of the delegation of powers, citizens' participation, influence, and control of policy-making can be seen as mechanisms ensuring input legitimacy.¹⁶

¹⁰ Ibidem, p. 187.

¹¹ S. Saurugger, *Democratic 'Misfit'? Conceptions of Civil Society Participation in France and the European Union*, "Political Studies" No. 55/2007, p. 387.

¹² F. Scharpf, op.cit., p. 19–25.

¹³ J. Greenwood, *Governance and organised civil society at the European Union level: the search for 'input legitimacy' through elite groups* in: *Governance and civil society in the European Union*, ed. C. Ruzza, V. Della Salla, Vol. II, Manchester 2007, p. 31 and 44–45.

¹⁴ B. Kohler-Koch, *The organization of interests and democracy in the European Union* in: *Debating the democratic legitimacy of the European Union*, ed. B. Kohler-Koch, B. Rittberger, Lanham 2007, p. 267–268.

¹⁵ J. Greenwood, *Interest Representation in the European Union*, Basingstoke 2007, p. 1.

¹⁶ R. Dahl, *Can international organizations be democratic? A sceptic's view* in: *Democracy's edges*, ed. I. Shapiro, C. Hacker-Cordon, Cambridge 1999, p. 19–31.

The European Commission, owing to its role as a technocratic administration dealing with agenda-setting and facilitating compromise in the interest of the Community, is the '*foremost venue for interest representation at the European level*'.¹⁷ Its legitimacy has been historically based on the delivery of effective solutions to the problems of European citizens. Consequently, there was little demand for input legitimacy and democratisation of this depoliticised bureaucracy. The recourse to organised civil society however had a clear instrumental value for the Commission as a means to strengthen both its input and output legitimacy.¹⁸ In its institutional interest, the Commission focused on the 'functional participation' of civil society organisations in policy-making, in order to provide expertise and ensure compliance and implementation. This conceptualization is consistent with the efficiency-driven and output-oriented approach of the Commission as the central-policy-entrepreneur of the European integration process.¹⁹ The involvement of civil society, however, is frequently viewed more an instrument of engineered discourse than a true bottom-up process. As S. Smismans states: '*the Commission's governance debate seems at best an efficiency driven exercise, and at worst an attempt to provide a legitimating discourse for its own institutional position and functioning, without including profound reforms*'.²⁰

While inclusive decision-making can be a cure for a legitimacy deficit in some aspects, at the same time it can also pose a threat to transparency and equality of access for all actors. As we shall see, certain dilemmas and conflicts between different dimensions of democratic legitimacy have emerged in the EU political system.

2. Democratic dilemmas in the EU political system

The greater involvement of citizens in the decision-making process leads to the classic problem of governance, which R. Dahl described as the need to find a balance between 'system effectiveness' (efficient and effective

¹⁷ J. Greenwood, *op.cit.*, p. 24.

¹⁸ B. Kohler-Koch, *Civil Society Contribution to Democratic Governance: A Critical Assessment* in: ed. B. Kohler-Koch, D. De Bièvre, W. Maloney, *Opening EU-Governance to Civil Society – Gains and Challenges*, CONNEX Report Series No. 5, February 2008, Mannheim, p. 11.

¹⁹ S. Smismans, *European Civil Society: Shaped by Discourses and Institutional Interests*, "European Law Journal" Vol. 9(4)/2003, p. 486.

²⁰ S. Smismans, *The Constitutional Labelling of 'The Democratic Life of the EU': Representative and Participatory Democracy* in: *Political Theory and the European Constitution*, ed. A. Follesdal, L. Dobson, London 2004, p. 129.

delivery of outcomes) and ‘citizen effectiveness’ (citizens’ participation in policy-making).²¹

Undoubtedly, inclusive decision-making processes carry a democratic potential, but they may also raise concerns about transparency, accountability, and responsibility.²² The essence of a governance approach is *flexibility*, which implies the emergence of ‘*informal structures and processes able to constitute and reconstitute themselves easily*’ in order to provide the most effective policy outcomes. However, it is difficult to keep them transparent when their advantage lies in blurring the boundaries in order to stay responsive to changing conditions. A basic tension in governance is between efficiency (providing cohesive, timely responses to demands) and transparency.²³ Multi-level governance in the European Union, based on informality and orientation towards achieving effective outcomes rather than complying with formal rules and procedures, has even been called a ‘Faustian Bargain’, where fundamental democratic values, such as transparency and political accountability, are traded for increased policy-making efficiency and effectiveness.²⁴

Publicity can have negative consequences, among which inefficiency seems to be one of the most important problems. This argument has been developed and augmented by the negotiation theory, according to which negotiations should be held behind closed doors, otherwise the problem-solving capacity of the system suffers.²⁵ For negotiation theorists, actors in the decision-making process are hampered by a constant exposure to the audience of their *constituents*, who have fixed preferences and focus on their own interest, often without a willingness to compromise. This forces negotiators to demonstrate that they are fighting their interests.²⁶ D. Naurin proved this mechanism by analysing letters sent by industry lobbyists in Brussels to the EC under the presumption that they would remain confidential, and comparing them with the public position papers and press releases. His study demonstrated that arguments for show are used more frequently in public documents than in confidential letters, which is in line with the assumptions of negotia-

²¹ R.A. Dahl, *A Democratic Dilemma: System Effectiveness versus Citizen Participation*, “Political Science Quarterly” Vol. 109(1)/1994, p. 34.

²² V. Della Salla, *Introduction: the unequal sides of a triangle – democracy, governance and civil society in: Governance and civil society in the European Union*, ed. C. Ruzza, V. Della Salla, Vol. I, Manchester 2007, p. 1–10.

²³ *Ibidem*, p. 6–7.

²⁴ B.G. Peters, J. Pierre, *Multi-level Governance and Democracy: A Faustian Bargain? in: Multi-level governance*, ed. I. Bache, M. Flinders, Oxford 2004, p. 79–92.

²⁵ D. Naurin, *Taking Transparency Seriously*, SEI Working Paper, No. 59/2002, p. 7.

²⁶ D. Naurin, *Why increasing transparency in the European Union will not make lobbyists behave any better than they already do*, Paper prepared for the “EUSA Ninth Biennial International Conference” Austin, 31.03–2.04.2005, p. 10–11.

tion theory.²⁷ That is why, according to David Stasavage, ‘*in any empirical investigation we should expect to see more uncompromising positions taken during open-door bargaining, greater polarization of debate, and more frequent breakdowns in bargaining than would otherwise be the case*’.²⁸ Transparency will in fact lead to an increase in self-interested justifications, boosting pressure from home constituencies, which makes representatives less willing to search for common solutions and more eager to use self-referenced public arguments (for show) in the decision-making process. This turns the supposed purifying effect of publicity into its something opposite, i.e. into a lower problem-solving capacity.²⁹ Some authors claim that ‘*transparency of negotiation and bargaining processes in the phase of decision-preparation do not constitute a necessity (...) as the atmosphere of trust and confidence among decision-makers, which allows for complicated compromises to be made, would suffer*’.³⁰

Against this background, it becomes clear that transparency, while reinforcing input legitimacy (by making the decision-making process easier to understand and control), can substantially threaten output legitimacy by impeding the ability of EU institutions to carry out their tasks effectively.³¹ In this sense, rendering relationships between EU institutions and interest groups too transparent can negatively affect the efficiency of problem-solving. Therefore, relations between EU institutions and interest groups are to a high extent informal, not based on any provisions of the Treaties (except for the European Economic and Social Committee), ‘*ad hoc and discretionary and exist wherever there are ‘grey areas*’.³²

The question is then how open and transparent the EU decision-making process, involving a variety of interest groups, should be, if transparency and publicity do not promote deliberation at the elite level. Consequently, another issue to examine is whether the negotiation pattern can be applied to the relations between the Commission and the interest groups, and if it is possible to introduce into those relations the concept of a ‘confidentiality area’ which would facilitate compromise.

²⁷ Ibidem, p. 26.

²⁸ D. Stasavage, *Open-Door or Closed-Door? Transparency in Domestic and International Bargaining*, “International Organization” Vol. 58(4)/2004, p. 679.

²⁹ D. Naurin, *Taking Transparency Seriously*, op.cit. p. 17.

³⁰ C. Grønbech-Jensen, *The Scandinavian tradition of open government and the European Union: problems of compatibility?*, “Journal of European Public Policy” Vol. 5(1)/1998, p. 195.

³¹ A. Menon, S. Weatherill, *Legitimacy, Accountability and Delegation in the European Union* in: *Accountability and legitimacy in the European Union*, ed. A. Arnall, D. Wincott, Oxford 2002.

³² K. Middlemas, *Orchestrating Europe. The Informal Politics of the European Union 1973–1995*, London 1995, p. XX.

The European Commission also faces another dilemma. It declares openness to all-comers but at the same time, for the sake of efficiency, grants privileged access in order to ensure a high-quality input of ‘relevant’ interest groups. Inclusion of all affected parties in the process, e.g. public consultation of legislative initiatives, would lead to information overload. This makes selection among inputs not only necessary but inevitable.³³ As some scholars have pointed out, ‘*deliberation under real-world conditions tends to privilege actors better equipped in material and cognitive resources and this could lead to new forms of exclusion or domination*’.³⁴ Some authors even claim that the Commission, although officially against to any system of accreditation, in fact grants selected lobbyists with privileged access.³⁵ The system of ‘insiders’ and ‘outsiders’ has been established by the use of various forums (such as committees, working groups, conferences), grouping together the most relevant players.³⁶ In consequence, a system of ‘*élite pluralism*’ emerges in these relations, privileging mainly business interest groups.³⁷

From the above examination it appears that multi-level governance carries with it certain dilemmas and trade-offs: ‘*increase in efficiency reduces transparency, improvement in deliberation weakens equal representation*’.³⁸ Therefore, inclusiveness and informality, although presumably allowing for participation and a higher problem-solving capacity, cannot be taken so uncritically as an impetus for democratization.³⁹ It follows from this observation that there is a dilemma between input and output legitimacy – between transparency and openness (inclusiveness) on the one hand, and efficiency on the other (which is often enhanced when the degree of transparency and openness is lower). Priority has not always been given to input dimension legitimacy, especially in the case of the technocratic European Commission, which has traditionally relied on the output dimension of legitimacy. This has resulted in the unequal access of different interest groups to the decision-making process and contributed to a relatively high level of secrecy.

³³ B. Kohler-Koch, *The organization of interests and democracy...*, op.cit., p. 260.

³⁴ J. De Bardeleben, A. Hurrelmann, *Democratic dilemmas of multilevel governance: legitimacy, representation and accountability in the European Union*, Houndmills 2007, p. 8.

³⁵ J. Greenwood, *Interest Representation...*, op.cit., p. 45.

³⁶ A. Broscheid, D. Coen, *Lobbying activity and fora creation in the EU: empirically exploring the nature of the policy good*, “Journal of European Public Policy” Vol. 14(3)/2007, p. 348.

³⁷ D. Coen, *The evolution of the large firm as a political actor in the European Union*, “Journal of European Public Policy” Vol. 4(1)/1997, p. 91–108.

³⁸ J. De Bardeleben, A. Hurrelmann, op.cit., p. 8.

³⁹ B. Kohler-Koch, B. Rittberger, *Charting crowded territory: debating the democratic legitimacy of the European Union* in: B. Kohler-Koch, B. Rittberger, op.cit., p. 9.

3. The European Transparency Initiative (ETI) in light of the democratic dilemmas

The debate on the ETI in the College of Commissioners commenced in May 2005 and led to the decision to launch the Initiative on 9 November 2005. On 3 May 2006, the Commission adopted the *Green Paper on European Transparency Initiative*.

The main problem area which is addressed in the Green Paper is the lack of sufficient information about lobbying practices in the EU, resulting in an unclear influence being exerted by different lobbyists in the legislative process, obscure sources of their funding, and insufficient information on how public money is spent by citizen interest groups, and even including cases of deceptive lobbying (such as fake grass-roots campaigns financed by business groups).⁴⁰ This lack of transparency in the mechanisms of interest representation at the EU level is acknowledged to be damaging to the democratic legitimacy of the supranational polity.

The Green Paper groups transparency measures into two categories, i.e.: outside scrutiny and integrity rules.⁴¹ The first category contains measures regulating interactions between the Commission and interest groups, mainly through public consultations of legislative proposals. Outside scrutiny was ensured e.g. by the Minimum standards of 2002⁴² or the CONECCS voluntary database of interest groups.⁴³ The Green Paper proposed the establishment of a voluntary registration system for all interest groups.

Measures falling into the category of 'integrity rules' regulate the actions of those who are lobbied, i.e. decision makers (Staff Regulations and codes of administrative behaviour) as well as the lobbyists (i.e. voluntary codes of conduct,). The Green Paper called for a common code of conduct for all lobbyists, or at least common minimum requirements, developed by the lobbying profession itself, and for a system of monitoring and the provision of sanctions for incorrect registration and/or breaching the code of conduct.⁴⁴

⁴⁰ Commission of the European Communities, *Green Paper...*, op.cit, p. 5–6.

⁴¹ *Ibidem*, p. 6.

⁴² Commission of the European Communities, *Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission*, 11.12.2002., Brussels, COM(2002) 704 final,.

⁴³ On the basis of a White Paper on Governance of 2001, 'a comprehensive on-line database with details of civil society organisations active at the European level' called CONECCS (Consultation, the European Commission and Civil Society) replaced a telephone directory created in 1997. Cf. Commission of the European Communities, *European Governance. A White Paper*, 25.07.2001., Brussels, COM(2001) 428 final,.

⁴⁴ Commission of the European Communities, *Green Paper...*, op.cit, p. 10.

On 21 March 2007, the Commission decided to open a voluntary register for interest groups, classified into three categories: professional consultancies and law firms; in-house lobbyists and trade associations; NGOs (non-governmental organizations) and think tanks. Registrants have to reveal who they represent, what their objectives are, what their funding sources are, and who are their major clients. Incentives for registering include a boosted reputation, recognition of contributions as representative for specific sectors, and the possibility to receive alerts for consultations in those areas of lobbyists' interests. The financial disclosure rules differ for each category. Professional consultancies and law firms have to declare their turnover linked to lobbying EU institutions and the relative weight per client. NGOs and think tanks have to disclose their overall budgets and the relative share of funding from various sources, while the remainder have to declare their costs associated with lobbying.⁴⁵

A voluntary code of conduct drawn up by the Commission in discussion with stakeholders was introduced as a complement to the register. It was not intended to replace the existing codes, but rather to draw from that experience and improve deficiencies, e.g. by including a system of monitoring and sanctions.⁴⁶ The heated debate over the ETI tools was mainly about the register and the scope of information subject to disclosure, especially that of a financial character. The concept of a common code of conduct turned out to be less controversial, since it would have been counterproductive for the lobbying profession to oppose a set of ethical rules of behaviour. However, the code is criticised in any case as a toothless and meaningless tool, '*a joke which won't change anything*' (oral information received from a representative of a Brussels-based NGO, 21 April 2008).

The register was launched on 23 June 2008 and linked to the subscription to a code of conduct. Evaluation of the system was foreseen after one year of operation, and the introduction of a system of compulsory registration was left 'on the table' if the existing scheme proved unsatisfactory (i.e. if an insufficient number of lobbyists signed up during the first year).⁴⁷

⁴⁵ Ibidem.

⁴⁶ The Commission has been encouraging interest groups to draw their own codes of conduct since the early 1990s. In 1994, a group of 25 commercial lobby firms in Brussels adopted a self-regulatory code. In the following years, various umbrella organisations of European public affairs practitioners (e.g. SEAP – Society of European Affairs Professionals; EPACA – European Public Affairs Consultancies Association) adopted voluntary codes of conduct, based on the minimum standards proposed by the Commission; cf. J. Greenwood, *Regulating Lobbying in the European Union*, "Parliamentary Affairs" Vol. 51(4)/1998, p. 591.

⁴⁷ Commission Press Release, *European Transparency Initiative: Commission invites lobbyists and interest groups to subscribe to public register*, doc. ref. IP/07/367, Brussels, 21.03.2007.

In public consultations on the Green Paper, 160 contributions were received from the EU Member States, private sector interest groups, NGOs, and several individual citizens. The idea of establishing a register and a code of conduct, as well as making the disclosed information public, was commonly accepted. The main points of contention concerned: the voluntary character of the register, incentives for registering, the financial information to be disclosed, and the lack of a common approach with other EU institutions.⁴⁸

Three main groups of actors emerged in the discussions. The EC consistently stood for a voluntary register. Commercial lobbyists, of whom the most active group included public affairs consultancies (EPACA, SEAP and ECPA – European Centre for Public Affairs) and the law firms, openly criticised the rules of financial disclosure. Finally, there was a broad camp of NGOs, concentrated around the Alliance for Lobbying Transparency and Ethics Regulation (ALTER-EU), which called for a mandatory register common for all EU institutions.

3.1. The ‘confidentiality versus transparency’ dilemma

As pointed out above, transparency can make negotiations more difficult since it encourages actors to use more ‘arguments for show’ in order to satisfy their home constituencies, which makes it more difficult to achieve a compromise. This is the first democratic dilemma to be dealt with by the EU decision-makers.

Siim Kallas, Vice-President of the Commission and Commissioner for Administrative Affairs, Audit and Anti-Fraud, described the aim of the ETI as ‘ensuring a proper functioning of the decision-making process, responsive to public demands but allowing also for a ‘space for reflection’ if a balance on the highest possible level of transparency is acquired’.⁴⁹ In his opinion, there is a need for a confidential ‘protected area’ in the relations of policy makers with stakeholders, mainly at the early stages of policy formulation. A line between what should be public and what should be confidential should be drawn by a person responsible for a certain dossier.⁵⁰

However, empirical evidence shows that the relations between the Commission and interest groups do not resemble the classical negotiation pattern. Rather, it is much more a one-way relationship, where the interest group presents its position to the Commission and no particular bargaining takes place.

⁴⁸ Commission of the European Communities, *Results of the Commission consultation on the Green Paper ‘European Transparency Initiative*, 21.03.2007., Brussels, COM (2006) 194 final.

⁴⁹ S. Kallas, *The need for a European transparency initiative*, op.cit.

⁵⁰ EurActiv.com, *Interview: Commissioner Kallas on the Transparency Initiative*, 02.11.2005; <http://www.euractiv.com/en/pa/interview-commissioner-kallas-transparency-initiative/article-146719> (last visited 05.08.2011).

The negotiation theory argument about the ‘blessing effect of confidentiality’ on the search for a compromise works well when applied to real life workings in the world of politics, and it can be applied to internal relations within the Commission or between the ‘EU executive’ and the EP. However, it does not fit as a model to demonstrate the relationship between decision-makers and interest groups, at least not in the case of NGOs (interview with Ch. Pohl). In their lobbying activities, NGOs are *‘just presenting their positions, making their point clear, while transparency, especially towards their members – the constituencies – lies in their very nature’* (interview with R. Heggli).

A so-called ‘black box’ for the Commission prior to opening the consultations seems necessary for it to work efficiently and to draft a proposal *internally* (Interview with K. Schmidt). But at some point, the Commission has to go public with a proposal, where it meets with the stakeholders’ reactions (Interview with A. Aupperle). A universal ‘change of generation’ in terms of policy-making takes place in the EU and in every democratic system, including greater openness of decision-makers to inputs from different stakeholders and greater publicity. Bowing to pressure from only one sector or a specific interest group is unthinkable (Interview with E. Faure). On the other hand, interest groups do recognise that there are some desirable limits to transparency, especially in bi-lateral meetings with Commissioners (interview with Ch. Feustel).

These findings suggest that confidentiality in relations between the Commission and interest groups is not necessary to ensure effective decision-making. The negotiation theory argument does not apply to those relations, which seem to be much more unidirectional than bargain-like and are based on unequal positions of stakeholders, among whom only the Commission has the right to define what the ‘European interest’ is. Transparency should thus contribute to increased input legitimacy without a serious weakening of its output dimension, but it is doubtful if the ETI tools are effective enough to achieve real transparency.

One of the reasons is that the register is voluntary and incentive-based. Lobbyists were expected to register for the sake of their reputation and credibility.⁵¹ In this ‘bottom-up approach’ the Commission would rely on the lobbyists themselves to keep the tool credible, like in case of Wikipedia – a database consulted by many with trust in its content and resources that are in fact verified only by other users (interview with E. Faure). However, there remains a risk that lobbyists who have something to hide will not register, and these

⁵¹ EurActiv.com, *Interview: Friends of the Earth’s Paul de Clerck on lobbying transparency*, 26.07.2005; at: <http://www.euractiv.com/en/pa/interview-friends-earth-paul-clerck-lobbying-transparency/article-142957> (last visited 05.08.2011).

are exactly those whose at whom registration should be primarily aimed (interview with Ch. Pohl).

The 'alert' incentives for registering, although possibly useful for small interest groups from outside of Brussels, are commonly seen as weak and inappropriate. Serious lobbyists have to stay up to date anyway and already have well-established channels of contact. The main EU institutions already offer newsletters and online alerts available by simple e-mail registration (Interview with R. Heggli). Consequently, it can be more advantageous to avoid full transparency than to register in exchange for the weak benefits offered.⁵² A more convincing argument to register is reputation, since *'there would be negative publicity for those who choose not to register'*.⁵³

The weakness, especially the lack of a verification mechanism concerning the accuracy of the information provided by the registrants, has been proven several times. In December 2008, The Cheerleading Federation of Ireland registered, having mistaken the tool for a grant application form.⁵⁴ In February 2009, the ALTER-EU revealed thirteen cases of fake shell companies that entered into the register and declared suspiciously high expenditures on lobbying,⁵⁵ whose aim was possibly just to spam the register. An Italian spammer was accused of false listings in the Commission's and the EP databases when he registered Fares Bank with an enormously high lobbying expenditure amounting to 250 million euro.⁵⁶ Paradoxically, the register thus discloses irrelevant information about organizations which have nothing to do with lobbying, while at the same time leaving too much discretion for the big players to not register or to hide and disguise their lobbying activities, and in particular their spending on lobbying.

Commissioner Kallas was widely appreciated for *'kick-starting an open debate on lobbying transparency and ethics reforms'*, which fell in line with a general consensus that the ETI *'falls short of what is needed and would largely preserve the current non-transparent and unregulated practices of EU lobbying'*.⁵⁷

⁵² Greenpeace, *Response to the ETI Green Paper. Transparency and interest representation*, Brussels 2006.

⁵³ S. Taylor, *Commission register shunned by lobbyists*, "European Voice", 05.02.2007.

⁵⁴ L. Phillips, *Irish cheerleaders mistake lobby registry for grant application*, EUobserver, 19.02.2009, <http://euobserver.com/9/27644> (last visited 05.08.2011).

⁵⁵ BNA Money and Politics Report, *Lobby register faulted*, Arlington 2009.

⁵⁶ L. Phillips, *Italian 'spammer' used EU registry to boost his image*, EUobserver, 16.02.2009, <http://euobserver.com/9/27624> (last visited 05.08.2011).

⁵⁷ Corporate Europe Observatory, *Response to chapter 1 and 2 of the Green Paper on the European Transparency Initiative*, Brussels 2006.

3.2. The 'openness versus efficiency' dilemma

The second dilemma to be dealt with by the Commission in its relations with interest groups is about reconciling effectiveness in delivering timely solutions to citizens' problems with the requirement to remain open to all interested parties. In order to solve this problem, the Commission is said to select 'relevant' interest groups and grant them with privileged access.⁵⁸

The issue of unequal access of different interest groups within the EU decision-making structures seems to be neglected in the ETI, although it could be linked to the Commission's persistent preference for a self-regulatory scheme. The Commission has maintained this approach since the early 1990s, for fear of damaging '*well-developed patterns of institutional involvement by private interests in public policy formulation and implementation*' by an imposed solution.⁵⁹ The output dimension of legitimacy is prioritised, while input legitimacy suffers.

The self-regulatory scheme can also be looked at as the 'lowest common denominator' possible for acceptance by the member states,⁶⁰ which represent different 'transparency cultures'. For example, the Scandinavian countries and the Netherlands generally push for more openness, while France, Belgium, Luxembourg and Germany more often prefer to work behind closed doors.

A voluntary register was intended to be '*an expression of trust in the European lobby professionals*',⁶¹ a preventive instrument to avoid an Abramoff-like scandal in Brussels.⁶² This approach was based on the assumption that the price of non-registering – i.e. damaged reputation – would be sufficiently high to encourage all to register (Interview with K. Schmidt). Also, the EC did not want to waste time waiting for the necessary legal basis provided by the Treaty of Lisbon.⁶³

⁵⁸ A. Broscheid, D. Coen, *op.cit.*, p. 348.

⁵⁹ A.M. McLaughlin, J.Greenwood, *The Management of Interest Representation in the European Union*, "Journal of Common Market Studies" Vol. 33(1)/1995, p. 143.

⁶⁰ D. Chabanet, *The Regulation of...*, *op.cit.*, p. 30.

⁶¹ S. Kallas, *Speech to SEAP's General Assembly*, Brussels, 23.04.2007.

⁶² Former Republican lobbyist Jack Abramoff was sentenced to five years and 10 months in prison in March 2006 in the USA, after pleading guilty to fraud, tax evasion and conspiracy to bribe public officials. The scandal prompted two Congressmen of the Republican Party to give up their seats in the Congress; cf. *Investigating Abramoff – Special Report*, "The Washington Post", <http://www.washingtonpost.com/wp-dyn/content/linkset/2005/06/22/LI2005062200936.html> (last visited 01.04.2008).

⁶³ That legal basis can be found in Articles 8A and 8B of the new Title II in the EU Treaty concerning 'Provisions on democratic principles'. However, according to the EP Legal Services, the register could also be adopted by a legal act under the existing Treaty provisions, namely under the procedure of Article 308 CE, since openness is declared as one of the Community objectives in Article 1 of the EU Treaty and the actions of the Community 'prove necessary' to ensure that aim; cf. European Parliament, *Legal Service, Legal Opinion on legal basis for a mandatory registration of lobbyists and possible sanctions foreseen by such a system*, doc. ref. SJ-0821/07, Luxembourg, 18.01.2008, p. 6–9.

Regardless of the merits of its justifications, the Commission's preference for a voluntary register has met with severe criticism, both from commercial lobbyists and the NGO sector, as a 'triumph of hope over experience'.⁶⁴ Commercial lobbyists called for a mandatory register with the aim of creating a level playing field for all lobbyists and avoiding distorted competition between those registered (obliged to disclose sensitive information e.g. client fees) and those who are not. ALTER-EU directly links the self-regulation preference with unequal access of different interest groups to the decision-making process: '*Vested interests are defending secrecy and privileged access by advocating self-regulation, voluntary codes of conduct, and other pseudo-solutions that do nothing to increase democratic scrutiny of the role of lobbyists in EU policy-making*'.⁶⁵

The NGOs are calling for a mandatory system for those who spend a certain amount of money or time on lobbying activities in Brussels, so as not to impose excessive burdens on individuals and small groups and guarantee the openness of the Commission to all-comers.⁶⁶ Business representatives, refuting the arguments about their privileged position in Brussels, give examples of major legislative acts, such as the REACH Directive, where a balance in consultations was ensured between the private sector and citizens' organizations (interview with Ch. Feustel). The director for European Public Affairs of one of the multi-national companies claims that: '*NGOs are extremely powerful in Europe today; they enjoy a great public confidence. It is very difficult for politicians to take a decision which goes in line with the interests of business and against a 'nice and fuzzy' NGO. They cannot dismiss the opinion of a credible NGO such as WWF or BEUC*' (oral information received on 21 April 2008). Some scholars have noted that the EU system of interest representation is still open to outsiders that can come 'from nowhere' and easily get their agenda adopted,⁶⁷ which falls in line with the Commission's commitment to a consultative policy style.⁶⁸ Similarly, some practitioners maintain that even small interest groups, with limited human or financial resources, can be successful in lobbying in Brussels as long as they have a clever strategy (interview with A. Aupperle).

⁶⁴ EurActiv.com, *Kallas urges lobbyists to co-operate on EU register*, 19.06.2007, <http://www.euractiv.com/en/pa/kallas-urges-lobbyists-operate-eu-register/article-164716> (last visited 05.08.2011).

⁶⁵ ALTER-EU, *Ending corporate privileges and secrecy around lobbying in the European Union*, Brussels 2005, p. 2.

⁶⁶ ALTER-EU, *Recommendations on lobbying transparency and ethics in European Union*, Brussels 2006.

⁶⁷ J. Greenwood, *Interest Representation...*, op.cit.

⁶⁸ D. Coen, J. Richardson, *A commitment to consultation*, "European Voice", 17.09.2009.

Nevertheless, NGOs continue to criticise the Commission's selective approach towards interest groups. According to the European Citizens Action Service (ECAS), 'there are some 15,000 lobbyists around the EU institutions, and although the presence of NGOs has increased, only some 10% of lobbying is on behalf of non-profit causes'.⁶⁹ ALTER-EU gives examples of Joint task forces in which only corporate interests are represented (e.g. the high level group 'CARS21 – Competitive Automotive Regulatory System for the 21st Century'), and of privileged status granted to business lobby groups (e.g. the European Services Forum and the Trans-Atlantic Business Dialogue).⁷⁰ In a study published in March 2008, ALTER-EU provided an analysis of expert groups advising the EC, claiming – despite a very limited sample – that business interests' dominance is indicative of EU policy-making in general. Publicity is seen as a cure for the unbalanced composition of advisory bodies.

The postulate that there is a direct link between the lack of transparency and unequal access to the Commission suggests that the ETI could help in resolving this problem. According to NGOs however, the Initiative is a great disappointment in this regard. The Commission has given in to the business lobby on the point of financial disclosure and names of individual lobbyists, taking it for granted that the NGOs would join the register (interview with R. Heggli).

The question of unequal access to the Commission implies the existence of two particular problems, both triggered by the EC's pro-efficiency orientation: the dominance of business representatives to the detriment of NGOs on the one hand, and the preference given to European-level federations, appreciated as sources of high-level expertise. This latter preference was reflected in the representativeness criteria for registering in the CONECCS database,⁷¹ and in the White Paper on Governance (WPG) with its idea of 'more extensive partnership arrangements' with interest groups 'well established in consultative practices'.⁷²

In response to the first dimension of inequality, i.e. the industry bias of the Commission, the ETI register, by disclosing financial sources and lobbying expenses, can at least provide information about the disproportion between citizens' organizations and businesses (interview with Ch. Pohl). This could help

⁶⁹ ECAS, *Tips for the would-be european lobbyist*, Brussels 2007, p. 2.

⁷⁰ ALTER-EU, *Ending corporate privileges...*

⁷¹ The eligibility criteria to register in CONECCS were as follows: an organisation had to be a non-profit representative body organised at the European level, i.e. with members in three or more European Union or Candidate countries; be active and have expertise in one or more of the policy areas of the Commission, have some degree of formal or institutional existence; cf. Commission of the European Communities, *Towards a reinforced culture...*, op.cit., p. 17.

⁷² Commission of the European Communities, *European Governance...*, op.cit., p. 17.

reveal the ‘*dangers of money buying influence and concentrate the minds of legislators on the need to seek out views from a wide spectrum of interests*’.⁷³

On the other hand, with regard to the preference for European-level Federations and organizations, it should be noted that in comparison to previous solutions, the Commission seems here to move towards greater openness. There are no representativeness criteria proposed in the new registration system, which seems to suggest a shift in the Commission’s priorities from output to input legitimacy. Still, commercial lobbyists and several NGOs have pointed out that making the alert about consultations available only to those registered could create a privileged class of lobbyists, whereas such information should be available to the general public.⁷⁴ The criticism was also raised that treating the contribution of a non-registered organization as a response of an individual person was ‘entirely undemocratic’ and turned the Kallas’ stick-and-carrot method on its head and against the aim of the ETI, which was to improve the means of consulting with interested parties.⁷⁵

To sum up, the empirical evidence gathered during this study seems to suggest that any solution to the dilemma between openness and effectiveness in the ETI is ambiguous at best. On the one hand, the preference for a self-regulatory approach could imply that the Commission, in its institutional interest, wants to preserve a well-established system of relations with selected interest groups, within which industrial and pan-European organizations are in a majority. In that sense, the ETI prioritises output legitimacy. On the other hand, the register does not impose any representativeness criteria and is open to all interested parties ready to reveal information about who they represent. This approach works in favour of greater openness, at least in terms of formal requirements towards registrants, strengthening at the same time input dimension of legitimacy.

4. Prospects and perspectives for the future

The findings of this study suggest that the ETI solutions are not sufficient to ensure either a high level of transparency or equal access to the Commission. A common opinion is that the register is only a ‘first step’ and further measures need to be taken.

⁷³ ECAS, *op.cit.*, p. 2.

⁷⁴ EPACA, *Response to the European Commission’s European Transparency Initiative (ETI) Green Paper and Consultation*, Brussels 2006.

⁷⁵ EurActiv.com, *EPACA: Single public affairs register ‘better system’ – interview with J. Laloum*, 15.11.2007; at: <http://www.euractiv.com/en/pa/epaca-single-public-affairs-register-better-system/article-168429> (last visited 05.08.2011).

The EC re-evaluated the register after one year of functioning, in October 2009.⁷⁶ The improvements it proposed concerned mainly clarification of the definition of direct lobbying and financial disclosure rules. Voices were raised that those changes – although fixing some deficiencies in the scheme – would let the ‘*fundamental flaws remain*’.⁷⁷

There also emerged a willingness to work simultaneously on a common solution with the EP, starting with the initiative of spring 2008.⁷⁸ On 11 May 2011 an Inter-institutional agreement on a Joint Transparency Register between the Parliament and the Commission was adopted, including a common Code of Conduct for the registrants. This agreement foresees quite severe measures in the event of the non-compliance with the Code of Conduct, such as suspension or withdrawal from the register and withdrawal of the badges granting access to the EP.⁷⁹ The Joint Transparency Register of the EC and the EP was launched on 23 June 2011, with the proclaimed intent, as formulated by the EC vice-president Maroš Šefčovič to ‘*set benchmarks for many other capitals in Europe and the world*’.⁸⁰ Registrants are now able to switch their existing registration to the Joint Register and any new registration or update is possible only through it.⁸¹ As of 8 August 2011, 4158 interest representatives have signed up, among which 751 are already listed in the new Transparency Register. The breakdown into different categories shows that the highest number of registered entities represent in-house lobbyists and trade associations

⁷⁶ Communication from Commission of the European Communities, *European Transparency Initiative: the Register of Interest Representatives, one year after*, Brussels, 29.10.2009.

⁷⁷ ALTER-EU, *Commission review of lobby register brings minor improvements but fails to fix fundamental flaws*, Brussels 2009.

⁷⁸ On 1.04.2008, the EP Constitutional Affairs Committee adopted the Report on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions (approved in a plenary vote on 8.05.2008). The amended draft report by A. Stubb, the rapporteur, called for a mandatory register common for the EP, the Commission, and the Council and a ‘*full financial disclosure*’ (in line with what the Commission proposes; a more detailed description to be prepared by mid-2009 by a joint working group with representatives from the Commission and the EP, formed on 16 December 2008). Still, it was underscored that financial figures are not always adequate to reflect the scale of lobbying activity, given the NGOs reliance on voluntary unpaid work. In this regard, the idea of a ‘*legislative footprint*’, attached to parliamentary reports or legislative proposals of the Commission, was proposed; cf. European Parliament, Committee on Constitutional Affairs, *Report on the development...*, op.cit.

⁷⁹ European Parliament decision of 11.05.2011 on the conclusion of an inter-institutional agreement between the European Parliament and the Commission on a common Transparency Register, doc. ref. 2010/2291(ACI), Annex: Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, p. 4.

⁸⁰ Commission Press Release, *Commission and European Parliament launch Joint Transparency Register to shed light on all those seeking to influence European policy*, doc. ref. IP/11/773, 23.06.2011.

⁸¹ European Parliament decision of 11.05.2011, op.cit.

(1976), followed by the NGOs (1262). Only 301 registrants are commercial lobbyists (public affairs consultancies and law firms). The reasons behind the delay in registering may be different, e.g. difficulties in getting the agreement of all clients, a fear of being removed from the register,⁸² or insufficient guidelines from the Commission on how to declare financial information.⁸³

Despite the growing number of registrants, the register still lacks efficiency, in particular because it does not provide relevant financial information about what interests are engaged in lobbying. ALTER-EU calls for disclosing detailed information on how money is spent on lobbying, as well as the names of individual lobbyists in order to ‘*identify possible “conflicts of interest” and “revolving door” cases at an early stage*’.⁸⁴ Meanwhile, commercial lobbyists criticise the current disclosure rules as too burdensome and practically impossible to comply with, resulting in a register with ‘non-comparable’ figures.⁸⁵ Business representatives raise the argument that ‘*money does not equal influence*’ in Brussels, where successful lobbying relies much more on ‘*communication skills, coalition building and good arguments*’, and in consequence, ‘*quantitative information about the financing of lobbying efforts at EU level is not a useful measure of influence*’.⁸⁶

A possible way to reveal the real influence of interest groups on decision-makers would be to develop a practice of tracing a ‘legislative footprint’ – a written description of lobbying activity containing a list of interest representatives consulted during the preparation of a piece of legislation, attached to each parliamentary report and legislative proposal of the Commission.⁸⁷ This could, however, cause serious operational problems since with major legislative acts the Commission could end up with a 50 page proposal and a 300-page description of consulted interest groups (interview with Ch. Feustel).

After three years of its functioning, various weaknesses of the register can be noted, including inappropriate incentives and the as-yet unclear rules of financial disclosure. Against this background, it is doubtful if the ETI contributes to any great extent to increasing the legitimacy of the EU political system.

⁸² In January 2009, The European Commission decided to suspend Public affairs consultancy firm GPlus from the register for failing to disclose the identities of all its clients. That was only a temporary exclusion and the consultancy firm was back in the register after declaring all the missing clients.

⁸³ S. Taylor, *op.cit.*

⁸⁴ ALTER-EU, *Benchmarks for the EU lobbying transparency register*, Brussels 2008.

⁸⁵ EurActiv.com, *Kallas defends voluntary lobbying scheme in face of boycott*, 23.08.2007, <http://www.euractiv.com/en/pa/kallas-defends-voluntary-lobbying-scheme-face-boycott/article-166077> (last visited 05.08.2011).

⁸⁶ EPACA, *op.cit.*

⁸⁷ European Parliament, Committee on Constitutional Affairs, *Report on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions*, doc. ref. 2007/2115 (INI), A6-0105/2008, 02.04.2008.

Conclusions

The findings of this study suggest that it is necessary to re-evaluate the first assumption derived from the negotiation theory. Relations between the Commission and interest groups do not seem to resemble the accepted negotiation pattern, and consequently the argument propagating the ‘blessing effect of confidentiality’ applies more to the internal procedures within the Commission as well as to inter-institutional relations. It follows from this observation that increased transparency in relations with interest representatives could contribute to strengthening input legitimacy without seriously damaging the efficiency of decision-making. However, as we have seen, the ETI tools are evaluated as insufficient and too weak to achieve a high degree of transparency. This could imply that the Commission is still more output-oriented in practice.

The empirical material seems to confirm that a dilemma between openness to all-comers and output legitimacy does exist. As we have seen, the ETI is criticised for not addressing the issue of privileged access granted to business representatives. Yet it has to be emphasised that in comparison to previous regulations, the ETI instruments do not seem to preserve the Commission’s preference for pan-European organizations. It can be argued in this light that the Commission has somewhat prioritised the input dimension of legitimacy (allowing for greater inclusiveness). However, given the severe criticism that has been levelled at the ETI, it is difficult to state that its overall contribution to strengthening the legitimacy of the EU system has been meaningful, primarily due to the weak and inappropriate tools proposed.

On the eve of the launch of the Joint Transparency Register, ALTER – EU revealed in its report that the largest industry lobby groups consistently under-report their expenditure data in the Commission’s register. Those conclusions were drawn on the basis of a significant gap between the staffing levels of those organizations with the lobbying expenditures declared in the register. According to the authors of the report, *‘this makes a mockery of financial disclosure, which is an essential element in lobbying transparency and indeed of ethical lobbying’*. The new Joint Transparency Register does not provide a solution to this problem, since it still does not postulate mechanisms such as clear guidance on disclosure requirements, regular checks on registrants to prevent under-reporting, or meaningful enforcement mechanisms in the event under-reporting is discovered.⁸⁸

⁸⁸ ALTER-EU, *The missing millions – how the new lobby register needs to tackle the ‘under-reporting’ by industry lobby groups*, Brussels 2011.