



Provisional version

Committee on Legal Affairs and Human Rights

Transparency and openness in European institutions

Report*

Rapporteur: Ms Nataša VUCKOVIC, Serbia, Socialist Group

A. Draft resolution

1. The Parliamentary Assembly recalls its [Resolution 1744 \(2010\)](#) on “Extra-institutional actors in the democratic system”, [Recommendation 1908 \(2010\)](#) on “Lobbying in a democratic society (European code of good conduct)” and its [Resolution 1943 \(2013\)](#) and [Recommendation 2019 \(2013\)](#) on “Corruption as a threat to the rule of law”.
2. The Assembly recalls that extra-institutional actors, including economic interest and pressure groups, trade unions and consumers organisations, are a part of a democratic society. Their lobbying activities are not illegitimate *per se* and can be beneficial for the functioning of a democratic political system. However, unregulated and nontransparent lobbying may undermine democratic principles and good governance. Citizens should know which actors influence the making of political decisions.
3. The Assembly recalls the Council of Europe’s *acquis* in the area of promoting good governance and transparency of democratic institutions, in particular the Convention on Access to Official Documents (ETS No. 205), the 2013 report of the European Commission for Democracy through Law (Venice Commission) on “The role of extra-institutional actors in a democratic system” and the work of the Group of States against Corruption (GRECO). Moreover, principles on good conduct on lobbying are included in paragraph 11 of Assembly’s [Recommendation 1908 \(2010\)](#) and may serve as guidelines for elaborating regulations on lobbying.
4. The Assembly notes that the European Union (EU) and its institutions – the European Parliament, the Council of the European Union and the European Commission – are particularly targeted by various lobbying groups, in view of their legislative and decision-making functions in implementing the European Union internal market. This has an impact on European Union citizens’ and consumers in the European Union, in Europe and worldwide.
5. The Assembly notes with concern cases of secret and unbalanced lobbying, reports on conflicts of interests and practice of limited access to official documents within some of the European Union institutions. Some of these cases have been investigated by the European Ombudsman, who has found ‘maladministration’ and has subsequently addressed specific recommendations to these institutions.
6. The Assembly welcomes the measures recently taken by the European Union institutions in order to improve its transparency and avoid conflicts of interest of its officials, in particular the revamped Joint Transparency Register set up in the European Parliament and the European Commission and the adoption, in 2011, of the Code of Conduct for Commissioners. It stresses that the values of democracy and good governance, enshrined in the European Union law and which the European Union is grounded on, inspire

* Draft resolution and draft recommendation adopted unanimously by the committee on 18 May 2016.

many nations, citizens and democratic movements in Europe and worldwide. It notes, however, that additional measures need to be introduced in order to ensure fair and balanced access to the European Union institutions by all interested actors, including non-economic interest groups, as well as full and unimpeded access to their documents.

7. The Assembly also notes that very few Council of Europe member States have a regulatory framework on lobbying activities, including a transparency register. It therefore calls on national parliaments to ensure that such frameworks are set up.

8. The Assembly calls on member States of the Council of Europe to do their utmost to promote the principles of transparency, accountability, integrity and primacy of the public interest and to implement the existing international instruments in this field, including the relevant Council of Europe conventions and recommendations as well as the recommendations of the Group of States against Corruption.

9. The Assembly also calls on the European Union and on those member States of the Council of Europe which have not yet done so, to sign and/or ratify the Convention on Access to Official Documents and to take into account Assembly's Recommendation 1908 (2010).

10. The Assembly calls on the European Union to step up its co-operation with the Council of Europe in the fight against corruption, in particular by speeding up the negotiations on EU participation in GRECO. It also calls on the EU institutions to take their decisions as openly as possible. For this purpose, the Assembly recommends that the European Union institutions:

10.1. implement the European Ombudsman's recommendations on transparency, avoiding conflicts of interests and ensuring access to documents;

10.2. further improve the Joint Transparency Register, by expanding it to all institutions of the European Union, making registration of lobbyists obligatory and introducing sanctions for non-registration and providing inaccurate data;

10.3. publish legislative footprints in order to track any input received and aimed at influencing European Union legislation and policies;

10.4. amend the European Parliament's Code of Conduct by introducing 'cooling off' periods for departing members in order to avoid conflicts of interest;

10.5. revise Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents in order to expand it to other European Union institutions, bodies, offices and agencies.

B. Draft recommendation

1. Referring to its Resolution ... (2016) on “Transparency and openness in European institutions”, the Parliamentary Assembly recommends that the Committee of Ministers:

- 1.1. finalise without delay its work on a legal instrument on the regulation of lobbying activities;
- 1.2. reflect on the role of extra-institutional actors in the Council of Europe and on the need to take measures to regulate their activities, where necessary;
- 1.3. draft a comparative study on the regulation of lobbying activities in Council of Europe member States;
- 1.4. urge States that have not yet done so, to sign and/or ratify the Convention on Access to Official Documents (ETS No. 205)
- 1.5. consolidate co-operation with the European Union for the purpose of its accession to the Convention on Access to Official Documents and its participation in the Group of States against Corruption (GRECO).

C. Explanatory memorandum by Ms Nataša Vučković, rapporteur

1. Introduction

1.1. Procedure

1. The motion for a resolution on “Transparency and openness in European institutions”¹ was forwarded to the Committee on Legal Affairs and Human Rights for report on 29 September 2014.² The Committee appointed me as rapporteur at its meeting in Madrid on 30 October 2014. On 25 June 2015, the Committee held a hearing with the participation of Mr Francesco Maiani, Associate Professor, *Institut des hautes études en administration publique (IDHEAP)*, Lausanne, Switzerland, and member of the Venice Commission (San Marino); Mr Olivier Hoedeman, Research and Campaigns Coordinator, Corporate Europe Observatory, Brussels, Belgium; and Ms Marta Hirsch-Ziemińska, Head of Unit, Office of the European Ombudsman, Strasbourg, France.

2. On 12-13 October 2015, I carried out a fact-finding visit to Brussels, where I met with members of the European Parliament – Mr Denis de Jong (Netherlands, Confederal Group of the European United Left – Nordic Green Left) from the Intergroup “Integrity, transparency, anti-corruption and organized crime”, Ms Ingeborg Grässle (Germany, Group of the European People’s Party), chair of the Budgetary Control Committee) and Mr Sven Giegold (Germany, Group of the Greens/European Free Alliance), rapporteur on “Transparency, accountability and integrity in the European Union institutions”. I also talked to officials from the European Ombudsman office and the Joint Transparency Register Secretariat (European Commission and European Parliament), as well as representatives of NGOs (Transparency International, ALTER-EU Coalition and Corporate Europe Observatory).

1.2. Issues at stake

3. The above-mentioned motion for a resolution focuses on transparency and openness in the institutions of the European Union (EU) as regards lobbying activities, in particular in view of recent scandals in financial markets, conflicts of interest and corruption in the drug and food industries. The motion proposes to examine issues such as making available research undertaken in respect to a product or service, the ‘revolving door’ policy between civil servants and industries, avoiding conflicts of interest and measures taken in this area by the European Commission and “other expert bodies”. Work which I have undertaken on this subject has led me to analyse, principally, transparency and openness issues with respect to the European Union. I therefore propose to the Committee that the following four words “especially within the European Union” be added to the title of the report so as to better reflect the thrust of what is discussed in this report. Hence, with the Committee’s agreement, I propose that the new title of this report be: “Transparency and openness in European institutions, especially within the European Union”.

4. Europe has witnessed, in recent years, an increased scale and visibility of the influence of extra-institutional actors on politics and a declining level of public interest and involvement in politics and a loss of citizens’ confidence in state and political institutions.³ The practice of lobbying, which is not illegal and is a feature of a democratic system, is widely associated with secrecy and unfair advantage. This is particularly the case of the European Union’s institutions (the European Commission, the European Parliament and the Council of the European Union), which have been vested with considerable powers in legislating in various areas covered by the notion of “internal market”, and thus of direct interest for multinational companies which, in turn, have an enormous impact on the day-to-day life of consumers and European Union citizens. The alleged lack of transparency as regards the European Union decision making-process, and more specifically the influential practices of the extra-institutional actors, may cause suspicions of political corruption and may undermine public confidence in European institutions and policies. As stressed by the movers of the motion, if people are to trust and have confidence in their politicians and civil servants, there must be robust procedures and systems in place.

5. In my report, I intend to have a closer look at some of those allegations and examine the rules concerning transparency and openness in the three above mentioned institutions of the European Union. I will also focus on general issues related to lobbying, the ‘revolving door’ phenomenon, conflict of interests

¹ [Doc. 13548](#).

² Reference 4062.

³ Thomas Wieder, “[La défiance des Français envers la politique atteint un niveau record](#)”, *Le Monde*, 15 January 2013. See also the European Commission for Democracy Through Law (Venice Commission), [The role of extra-institutional actors in a democratic system](#), adopted at its 94th Plenary Session (Venice, 8-9 March 2013), CDL-AD(2013)011, paragraph 6.

and access to documents. Although the motion focuses on European institutions and the latter are indeed under strong pressure of different lobbying groups, one should not forget the problems faced by our own Organisation, the Council of Europe, and its member States. Although this issue deserves a separate examination, I intend to refer to the Council of Europe's *acquis* in this area and the recommendations of our Assembly. Some of them can also be applied in the European Union institutions. It is obvious that pressure of lobbying groups is not the same in the European Union, as is the case with respect to the Council of Europe, in view of the former's law-making powers and the interest it represents for industries and service companies. It does not mean, however, that our Organisation and we, as members of the Assembly and our national parliaments, are immune from any pressure or (unacceptable) influence.

2. Lobbying in the European Union

2.1. Lobbying in Brussels: some data

6. Brussels is today the second capital of the lobbying industry behind Washington. The number of lobbyists performing around the European institutions is estimated at 25,000-30,000.⁴ They closely follow the elaboration of European Union legislation and tend to influence European Union decision-makers. Despite that, it is still difficult to determine precisely their real influence. The main problem areas related to lobbying in this context are: the secrecy around it, the fact that big business outnumbers and outspends other interests (in terms of financial and human resources), privileged access to decision-makers and unresolved conflicts of interest that result in undue influence (such as the 'revolving door' policy).

7. According to Corporate Europe Observatory (a Brussels based NGO advocating better transparency in the European Union),⁵ the financial sector is one of the most represented sectors at the European Union level, with over 1,700 professional lobbyists and over 700 lobby groups. It spends more than 120 million euro per year on lobbying the European Union. Although trade unions and NGOs are also allowed to lobby, they dispose of far less means and spend only about 4 million euro on lobbying on European Union regulation and policies. Financial sector lobbyists have also a privileged access to decision-makers. Between 2008 and 2014, more than 70% of the European Commission advisers from its experts groups on financial market regulation had direct links (often through informal meetings) with the financial sector and this percentage was higher than before the financial crisis.

8. According to Transparency International, which, in June 2015, launched a new website to analyse meetings between lobbyists and Commissioners or top officials from the European Commission (integritywatch.eu), the European Commission's Directorate-General for Economic and Financial Affairs is one of the most heavily lobbied. Nearly 90% of such meetings took place with the participation of corporate lobbyists.

2.2. Opaque lobbying practices: some examples

9. Several facts show that unfair and opaque lobbying practices exist within the European Union institutions. One of the bigger corruption scandals involving the European Parliament took place in 2011. Journalists from *The Sunday Times*, pretending to be lobbyists, contacted 60 members of the European Parliament (MEPs) and asked them to table amendments in exchange of sums between 12,000 and 100,000 euros. Three MEPs accepted the offer.⁶ This case reveals that MEPs develop very close relationships with lobbyists without any transparency, which is why it is important to regulate and control these contacts and, most importantly, bring them out into the open.

10. The so-called "Dalligate" showed that the European Commission was not immune to undue influence from (tobacco) industries, either. In October 2012, Mr John Dalli, then European Union Commissioner for Health and Consumer Policy, resigned from his post, following allegations made by Swedish Match, a tobacco company, which claimed that Mr Silvio Zammit, a Maltese businessman and politician, had offered

⁴ According to Transparency International, [EU integrity](#).

⁵ Corporate Europe Observatory, [The fire-power of the financial lobby](#), 9 April 2014.

⁶ Mr Ernst Strasser, former Austrian Home Secretary, member of the Group of the European People's Party; Mr Zoran Thaler, former Slovenian Minister of Foreign Affairs, member of the Group of the Progressive Alliance of Socialists and Democrats in the European Parliament (SD) and former Romanian deputy Prime Minister Mr Adrian Severin, also member of the SD and former member of the Assembly. They are no longer members of the EP. Messrs Strasser and Thaler resigned in March 2011 from their MEP mandates and have been convicted for bribery and sentenced to prison in their home countries. Mr Severin was indicted by Romania's anti-corruption agency in September 2013 and sentenced to prison by the first-instance court in February 2016. See, for instance, T. Vogel, [Ex-MEP convicted of accepting bribes](#), European Voice, 12 February 2014, [Romanian MEP expelled over bribery scandal](#), EurActiv, 23 March 2011 or [Roumanie : prison pour un ex-eurodéputé](#), Le Figaro, 24 February 2016.

them the use his 'contacts' with Mr Dalli in order to influence a revision of European Union rules on tobacco products, in return for 60 million euros. In a controversial investigation report of October 2012, which was leaked in the press, the European Anti-fraud Office (OLAF)⁷ did not find any conclusive evidence of the direct participation of Mr Dalli, but did consider that he was aware of these events.⁸ In its opinion on the OLAF's investigation of February 2013 (whose summary was leaked in April 2013), its Supervisory Committee, composed of four independent experts, found that the investigation had not complied with European Union rules and legal safeguards.⁹ Moreover, the Maltese judiciary confirmed, in June 2013, that there were no grounds to institute criminal proceedings against Mr Dalli.¹⁰ Thus, the "Dalligate" rekindled discussions about the controversial influence of the tobacco industry in European institutions.¹¹ The director general of OLAF, Mr Giovanni Kessler, was also criticized for having allegedly overstepped his mandate and powers and for having conducted the above-mentioned investigation in an unprofessional manner; at the beginning of March 2016 the European Commission decided to lift his immunity following a request of the Belgian prosecutorial authorities.¹²

11. According to some sources, most of the European Union's product assessment rests on data and documents provided by industry, principally the phytopharmaceutical and food industries. According to the non-governmental organisation (NGO) Pesticides Action Network report,¹³ on a sample of seven new pesticides placed on the market (Risk Assessment), only 23% (99 of 434) independent studies on toxicity were provided by the industry and, "without any justification," none of which has been considered relevant enough to be used in the decision-making process. At the same time, French MEP José Bové (Greens/European Free Alliance), member of the Committee on Agriculture and Rural Development, indicated that documentation concerning genetically modified organisms (GMO) is transmitted to the European institutions and to member States by the same companies which produce them¹⁴. This points to a clear conflict of interests and needs to be followed by further analysis.

12. Experts from the European Food Safety Authority (EFSA), a European Union agency, maintain close relationships with the International Life Science Institute (ILSI), an important lobby group for agricultural, chemical, and pharmaceutical companies based in Washington. In May 2012, the President of the EFSA, Ms Diana Banati, was forced to resign because of her links with this group. She then officially joined the ILSI as its executive director for Europe. Despite that, in October 2012, the European Court of Auditors report revealed the links, which still existed, between six experts of the EFSA and the ILSI, namely members of the Board of Trustees and of scientific committees.¹⁵

13. Some NGOs – such as Corporate Europe Observatory¹⁶ and Transparency International¹⁷ – reveal that the practices of carrying out lobbying activities while holding office and the post-employment "revolving door" between the public and the private sectors – such as cases of MEPs becoming lobbyists or joining the banking sector after the end of their mandates – are frequent and worrying. According to Mr Hoedeman, three former Commissioners joined the financial or banking sector in 2010, including Mr Charlie McCreevy (subsequently, the European Commission had tightened-up its rules in this respect, by adopting a Code of Conduct – see below). But following the departure of the Barroso-2 Commission, in 2014, only one departing Commissioner was employed by a bank (Ms Neelie Croes who went to the Bank of America). The above-mentioned "Dalligate" also revealed a case of 'revolving door' at the level of highly-placed European Commission officials, since, when preparing the complaint to the European Commission, the tobacco

⁷ EurActiv, *OLAF's Dalligate report slammed as 'biased', 'amateurish'*, 29 April 2013.

⁸ *Press statement on behalf of the European Commission*, 16 October 2012.

⁹ Corporate Europe Observatory, *Supervisory Committee releases 29-page critical assessment of OLAF's Dalligate investigation*, 6 July 2014. See also the Activity Report of the Supervisory Committee, January 2012-January 2013, pages 12, 37 and 42.

¹⁰ Corporate Europe Observatory, *See no evil, hear no evil, speak no evil. The Commission's (non-)response to Dalligate*, 14 October 2013.

¹¹ Michael Hörz, *Looking back at the tobacco lobbying battle: Philip Morris' allies in the European Parliament*, *Corporate Europe Observatory*, 16 May 2014.

Timothée Vilars, *« Des députés européens en guerre contre le lobby du tabac »*, *L'Obs*, 5 March 2015.

¹² [Commission allows Belgian prosecutors to investigate EU anti-fraud chief](#), Politico, 11 March 2016.

¹³ Pesticides Action Network, *Pesticides : des évaluations européennes incomplètes qui vont à l'encontre de la législation!*, 17 September 2014, p.3. ; Audrey Loubens, *« L'évaluation de la toxicité des pesticides repose quasi-exclusivement sur les données des industriels »*, *Techniques de l'ingénieur*, 12 November 2014.

¹⁴ Julien Pruvost, *« OGM : José Bové dénonce la vision «court-termiste» de l'UE »*, *Libération*, 14 January 2015.

See also Corporate Europe Observatory, *Conflicts on the menu - A decade of industry influence at the European Food Safety Authority (EFSA)*, February 2012.

¹⁵ The European Court of Auditors, *Management of conflicts of interests in selected EU agencies*, special report, n°15/2012, p.26.

¹⁶ *The MEPs who became corporate lobbyists*, Corporate Europe Observatory, 31 March 2014.

¹⁷ *Lobbying in Europe, hidden influence, privileged access*, Transparency International, 15 April 2015, p.7.

company Swedish Match, was assisted by Mr Michel Petite, former head of the Commission Legal Service, who had joined the lobbying-law firm, Clifford Chance, and remained member of the Commission ad-hoc ethical committee.¹⁸ While the European Commission has now clear rules on conflict of interest in its Code of Conduct, there are no similar rules for members of the European Parliament, who are also allowed to have side jobs and /or sit on boards of private sector entities (including big banks), while holding their mandates. As stressed by Mr Hoedeman at the hearing in June 2015, at least five influential MEPs from the Economic Affairs Committee had moved into banking lobbying jobs, after their mandates expired in 2014.

14. The food industry is another example of heavy lobbying. In 2010-2011, when the European Parliament was working on European Union's food labelling rules, it was exposed to unbalanced lobby pressure.¹⁹ According to Mr Hoedeman, the industry lobbying was sending nearly 150 emails per day to MEPs and NGOs advocating public health were outnumbered by 10-1 factor. Amendments drafted by food industry lobbyists were eventually adopted and those proposing more transparency in food labelling (such as 'traffic-light' labels) were rejected.

15. Another interesting example is that of the lobbying battle around regulations on endocrine disruptors (hormone disrupting chemicals with negative health impacts, such as infertility, cancer and obesity): due to the lobbying by the pesticide and chemical industries, the European Commission had delayed the adoption of its legislative proposals in this field. Their aim was to prevent bans and restrictions on pesticides and on chemicals like bisphenol-A that are widely used in food packing.²⁰ Their lobbying tactics included mobilizing certain actors within the European Commission as well as other external actors (lobbyists, scientists or farmers' organisations), producing dramatic figures on the alleged economic impact of the measures to be taken, undermining credible scientists, asking for an impact assessment and using 'free trade' agreement and TTIP negotiations as an argument.²¹ The European Food Safety Agency, which had been consulted in this case, had relied mainly on experts from food industry and its recommendations were very weak.²²

16. Another example exposing the power of corporate lobbying in the European Union is that the car industry, which influenced the drafting of the RDE ('real driving emissions') second package in the wake of the Volkswagen's diesel emissions scandal. In a very tight vote, on 3 February 2016, the European Parliament did not reject the proposed nitrogen oxide (NOx) emission limits for diesel cars, although the newly proposed norms still allow a 50 percent overshoot of the legal limit for Nox of 80 milligrams/kilometre.²³

3. Defining "lobbying"

17. As many extra-institutional actors tend to influence decision-making, creating serious risk of conflict of interests and with it, the risk of regulatory and policy capture, one should reflect on what lobbying in a democratic society means. For this reason, in 2010, the Organisation for Economic Co-Operation and Development (OECD) drew up, for the benefit of decision makers in the executive and legislative branches, the Principles for Transparency and Integrity in Lobbying. This document defines lobbying as "the oral or written communication with a public official to influence legislation, policy or administrative decisions, often focusing on the legislative branch at the national and sub-national levels. However, it also takes place in the executive branch, for example, to influence the adoption of regulations or the design of projects and contracts."²⁴ This definition was also picked up by the European Commission for Democracy through Law (Venice Commission) in its report on "The role of extra-institutional actors in a democratic system".²⁵

18. The Venice Commission further specified that a) "lobbying is carried out by an "extra-institutional" actor, i.e. an entity or person who is not, in doing so, exerting public authority or fulfilling a constitutional mandate"; b) it "usually involves the lobbyists receiving directly or indirectly consideration for their services to attempt to influence political decisions, i.e. pursuing this activity on a "professional" basis."²⁶ In its report, the

¹⁸ Corporate Europe Observatory, *Leaked OLAF report on Dalli case flawed and inconclusive*, 29 April 2013.

¹⁹ EU observer, *EU food labelling spotlights strength of industry lobbying*, 13 September 2011.

²⁰ Corporate Europe Observatory, *A toxic affair. How the chemical lobby blocked action on hormone disrupting chemicals*, by S. Horel, May 2015.

²¹ Ibid, p. 7. See also Marine Jobert, François Veillerette, *Perturbateurs endocriniens. La menace invisible*, Paris 2015, pp. 90-98.

²² Ibid, p. 9.

²³ Euronews, *VW scandal: EU deal allows vehicles to exceed pollution limits*, 3 February 2016. See also Corporate Europe Observatory, *Scandal-hit car industry in the driving seat for new emissions regulations*, 29 January 2016.

²⁴ OECD, *Recommendation of the Council on Principles for Transparency and Integrity in Lobbying*, 18 February 2010 – C (2010)16.

²⁵ Venice Commission, *supra* note 3, paragraph 12.

²⁶ Ibid, paragraph 13.

terms “interest groups”, “lobbyists” and “extra-institutional actors” were used interchangeably. Civil servants, politicians and the concerned public institutions are the “targets” of such lobbying activities. Lobbying in the judiciary and donations to political parties as a form of lobbying were left out of the scope of this study.²⁷

19. Furthermore, the Assembly, in its Resolution 1744 (2010) on “Extra-institutional actors in the democratic system”²⁸ has recalled that extra-institutional actors may include trade unions, constituted advisory bodies, business community groups, other interest and pressure groups, advocacy and lobby groups and more or less formal networks of influence, civil society organisations such as charities, non-profit or non-governmental organisations, volunteer associations, and other groups as well as religious organisations, which also attempt to influence political decisions. Finally, according to Transparency International, a number of actors attempting to influence political decisions do not consider themselves to be lobbying as such, and call their activities by another name: advocacy, public affairs or interest representation.²⁹

20. No doubt Transparency International itself is an advocacy or lobby group by their own standards. The same is true for human rights groups such as Amnesty International, Human Rights Watch or others. This goes to show that lobbying is not evil *per se*. It enhances the democratic system through its contribution to pluralism. It allows individuals or groups to play a role in political processes from which they would otherwise be excluded. Interest groups also provide outside information and skills during the formulation of law-making process. Moreover, lobbying may reinforce rather than undermine the confidence of the public towards the State and its institutions, when the latter are attentive to the claims and preoccupations of citizens’ organisations. Nonetheless, as the Venice Commission underlined, the influence of lobbies arouses concerns as regards legitimacy, representativeness, transparency and accountability.³⁰ A way of fighting against the potential adverse effects of lobbying, concerning in particular accountability and transparency, consists in regulating the activities of the lobbyists and enabling every citizen to have access to relevant information, including documents.

21. An important instrument for the promotion of transparency in any institution is the protection of whistleblowers who disclose corrupt and otherwise nontransparent practices. Encouraging insiders to blow the whistle on abuses is a key element of good governance. But I will not enter into any details on this important subject which was recently covered in the report by my Committee colleague Mr Pieter Omtzigt (Netherlands, EPP/CD)³¹ and Assembly’s Resolution 2060 (2015) and Recommendation 2073 (2015).³²

4. Instruments concerning openness and transparency in the legislative process

4.1. Council of Europe

4.1.1. General rules

22. The Council of Europe has constantly supported civil society involvement in public affairs.³³ It stressed that pluralism of interests is an important feature of democracy and it is perfectly legitimate for members of society to organise and lobby for their interests. Civil society assists both in balancing interests and representing minorities,³⁴ but if its activities remain unregulated, this may carry the risk of undermining democratic principles.³⁵

23. Recommendation CM/Rec(2007) 14 of the Committee of Ministers lays down a set of minimum standards concerning the creation, organisation, management and legal status of NGOs and formulates transparency safeguards.³⁶ It also recommends that “governmental and quasi-governmental mechanisms at all levels should ensure the effective participation of NGOs without discrimination in dialogue and

²⁷ Ibid, paragraph 14.

²⁸ Extra-institutional actors in the democratic system, Resolution 1744 (2010), adopted by the Assembly on 23 June 2010. See also report of the Committee on Political Affairs and Democracy, rapporteur Mr Hendrik Daems (Belgium), Doc. 12278 of 4 June 2010.

²⁹ Transparency International, *supra* note 16, p.7

³⁰ Venice Commission, *supra* note 3, paragraph 50.

³¹ Adopted on 23 June 2015.

³² “Improving the protection of whistle blowers”, Doc. 13791 of 19 May 2015.

³³ Recommendation CM/Rec(2007)14 of the Committee of Ministers to member States on the legal status of non-governmental organisations in Europe, adopted by the Committee of Ministers on 10 October 2007.

³⁴ Venice Commission, *supra* note 3, paragraph 43.

³⁵ Recommendation 1908 (2010) Lobbying in a democratic society (European code of good conduct on lobbying), adopted by the Assembly the 26 April 2010, paragraphs 1 and 2. See also report of the Committee on Economic Affairs and Development, rapporteur Mr José Mendes Bota (Portugal, EPP), Doc. 11937 of 5 June 2009.

³⁶ Recommendation CM/Rec(2007)14, *supra* note 33, paragraphs 62 to 66.

consultation on public policy objectives and decisions” and “appropriate disclosure or access to official information.”³⁷

24. The European Court of Human Rights (ECtHR or “the Court”) has not yet dealt directly with lobbying. However, it has repeatedly stated that “there can be no democracy without pluralism.”³⁸ According to the Court, pluralism involves “a balance [...] which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”³⁹

25. The rights to freedom of expression and of association, as guaranteed respectively by Articles 10 and 11 of the European Convention on Human Rights (ECHR), are of special importance in this context. Groups and associations involved in lobbying do benefit from the guarantees contained in Article 11 of the Convention to the extent that they qualify as “associations” under its terms. Furthermore, the various modalities of lobbying consist in receiving and imparting information and ideas in the meaning of Article 10 of the ECHR. The Court has recognized that political parties play an essential role in ensuring pluralism and democracy and “associations formed for other purposes [...] are also important to the proper functioning of democracy.”⁴⁰ In this respect, “where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively”. Nevertheless, the Court does not recognize a “right to lobby” as such.

26. Article 10 of the ECHR does not recognize a general right of access to administrative data and documents, despite the fact that the Court’s case law is gradually moving towards the recognition of a right of access to information, which is instrumental to the dialogue between civil society at large and political authorities.⁴¹ However, the Council of Europe has adopted its Convention on Access to Official Documents,⁴² which is the only international convention expressly recognizing the right of access to documents as such. Limitations to this right must be set down in law, necessary in democratic society and proportionate to the protected aim (for example, national security, defence or privacy). This convention reaffirms the importance of transparency of public authorities in a democratic and pluralistic society and sets forth the minimum standards to be applied in the processing of requests for access to official documents. Unfortunately, it has so far been ratified by eight countries only:⁴³ Bosnia and Herzegovina, Estonia, Finland, Hungary, Lithuania, Montenegro, Norway and Sweden, while ten ratifications are needed for its entry into force.

27. The Code of Good Practice on Civil Participation in the Decision-Making Process⁴⁴ adopted by the Conference of International Non-governmental Organisations (INGOs) on 1 October 2009 includes general principles, guidelines, tools and mechanisms for the involvement of civil society organisations in the political decision-making process and has been endorsed by the Committee of Ministers.⁴⁵

28. The Council of Europe has also adopted a number of conventions on combatting corruption and, which also encompass lobbying. The Criminal Law Convention on Corruption⁴⁶ and its Additional Protocol⁴⁷ deal with matters such as the criminalization of corruption in the public and private sectors, while the Civil Law Convention on Corruption⁴⁸ concerns liability and compensation for damage caused by corruption. Moreover, the Committee of Ministers’ Recommendation R (2000)10 on the “Model Code of Conduct for Public Officials”⁴⁹ deals with the conduct of public officials (but it does not apply to elected representatives, members of government and holders of judicial office) and sets forth rules on, amongst others, conflicts of interest, gifts, susceptibility to influence by others or leaving the public office. The monitoring of compliance

³⁷ *Ibid.*, paragraph 76.

³⁸ Refah Partisi and others v. Turkey, judgment of 13 February 2003, Applications Nos 41340/98, 41342/98, 41343/98 and 41344/98, paragraph 89, Socialist Party and others v. Turkey, judgment of 25 May 1998, Application No 21237/93, paragraph 41.

³⁹ Gorzelik and others v. Poland, judgment of 17 February 2004, Application No 44158/98, paragraph 90.

⁴⁰ *Ibid.*, paragraph 92.

⁴¹ Sdružení Jihočeské Matky v. Czech Republic, Application No 19101/03, decision on admissibility of 10 July 2006, pp. 9-10.

⁴² Convention on Access to Official Documents, 18 June 2009, CETS No 205.

⁴³ <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=205&CM=&DF=&CL=ENG>.

⁴⁴ Code of Good Practice on Civil Participation in the Decision-Making Process, adopted by the Conference of INGOs at its meeting on 1st October 2009.

⁴⁵ Declaration by the Committee of Ministers on the Code of Good Practice for Civil Participation in the Decision-Making Process, 21 October 2009.

⁴⁶ Criminal Law Convention on Corruption, ETS No. 173, 27 January 1999.

⁴⁷ Additional Protocol to the Criminal Law Convention on Corruption, ETS 191, 15 May 2003.

⁴⁸ Civil Law Convention on Corruption, ETS 174, 4 November 1999.

⁴⁹ Recommendation R (2000)10 of the Committee of Ministers on Code of Conduct for Public Officials, adopted by the Committee of Ministers on 11 May 2010.

with these standards has been entrusted to the Group of States against Corruption (GRECO). Its Thirteenth General Activities Report (2012) is devoted to the issue of lobbying and corruption.⁵⁰ It is currently conducting its fourth evaluation round on “Corruption prevention in respect of members of parliament, judges and prosecutors”.

4.1.2. The work of the Assembly

4.1.2.1. Internal rules

29. The Assembly adopted a couple of texts on lobbying, conflict of interest and corruption. As regards its own functioning, it has sought to improve its institutional framework and to promote the principles of transparency, accountability, integrity and primacy of the public interest. Therefore, by adopting its Resolution 1554 (2007) on “Conflict of interest”,⁵¹ it decided to attach to its Rules of Procedure provisions governing its members’ declarations of interest.⁵² In addition, a code of conduct for rapporteurs (Appendix IV to the Rules of Procedure) was adopted by Resolution 1799 (2011) and specific guidelines on the observation of elections have been drawn up.

30. By adopting its Resolution 1903 (2012) on “Code of conduct of members of the Parliamentary Assembly: good practice or a core duty?”,⁵³ the Assembly approved a code of conduct which its members must respect in the performance of their duties. The code of conduct (Appendix II to the Rules of Procedure) is aimed at responding to general concerns arising especially with regard to “political favouritism, offers of gifts or hospitality to members, situations of conflicts of interest or the use of members’ mandates to promote or safeguard personal interests”.⁵⁴ It has imposed new obligations on Assembly members (such as the obligation to register with the Secretariat gifts exceeding 200 euros foreseen in paragraph 14 of the code of conduct) and the possibility for the President of the Assembly to seek clarification and to impose sanctions on members who have breached the code of conduct (by preparing a reasoned statement to be read out in the Assembly or by excluding a member from Assembly sittings);⁵⁵ however, so far these new provisions have been rarely used in practice. According to the information received from the Secretariat, there has been only one gift registered with the latter and the Assembly President has had recourse to its disciplinary provisions in only one case (in January 2014, towards Mr Tamás Gaudi Nagy, Hungary, mainly for his provocative speech made at our Committee meeting in December 2013).

31. In Resolution 1903 (2012), the Assembly also took note of the problem of ‘interest representatives’, acting on behalf of private entities or States, exercising pressure on its members, even within the *Palais de l’Europe* and considered that “clear and transparent procedures” should be introduced to regulate their access to the Assembly.⁵⁶ That was why it instructed its Bureau to “revise the rules governing access to the *Palais de l’Europe*, and the use of the premises, and the appendices to the rules in question”⁵⁷ as well as, with regards to the prerogatives of its former members, to amend the special rules on honorary association with the Assembly and the special rules on the title and prerogatives of Honorary President of the Assembly.⁵⁸ As regards the first recommendation, there have been no significant developments. As regards the second one, the special rules on honorary association with the Assembly were revised in 2014 (see Appendix XVIII to the Rules of Procedure, paragraph 3, and Appendix XIX, paragraph 3): since then, former members and former Presidents of our Assembly representing or fostering other persons’ or entities’ interests do not benefit from the prerogatives of the honorary associates as far as the distribution of documents and access to the building and meeting rooms are concerned. However, the Assembly did not decide to impose further restrictions (such as “cooling-off periods”) on former Assembly members, “as the scale of the issue does not seem to call for such restrictions.”⁵⁹

⁵⁰ Adopted by GRECO 59, 18-22 March 2013.

⁵¹ Adopted on 24 May 2007.

⁵² Application of Rule 13 of the Rules of Procedure; see its Article 1.1: “All candidates for rapporteurship shall make an oral declaration of any professional, personal, financial or economic interests which might be considered relevant or conflicting with the subject of the report or with the country concerned by the report at the time of appointment in committee.” According to its Article 3, “Committees shall have the right to remove a rapporteur who failed to declare such interests or who made an untruthful declaration.”

⁵³ Adopted on 4 October 2012, see report of the Committee on Rules of Procedure, Immunities and Institutional Affairs, rapporteur: Mr Heald, doc. 13000.

⁵⁴ Paragraph 5 of the resolution.

⁵⁵ See paragraphs 17-21 of the code of conduct.

⁵⁶ Paragraph 8 of the resolution.

⁵⁷ Paragraph 9.2. of the resolution.

⁵⁸ Paragraph 9.3. of the resolution.

⁵⁹ See report by Mr Heald, *supra* note 53, paragraph 37.

4.1.2.2. Recommendations addressed to external actors and their follow-up

32. The Assembly dealt, more specifically, with the issue of lobbying in democratic societies in its [Resolution 1744 \(2010\)](#) on “Extra-institutional actors in the democratic system”⁶⁰ and [Recommendation 1908 \(2010\)](#) on “Lobbying in a democratic society (European code of good conduct on lobbying).”⁶¹

33. In its [Resolution 1744 \(2010\)](#), the Assembly examined the role of extra-institutional actors, including lobbies and networks of influence, and noted that their activities might raise some concerns with regard to fundamental principles of democracy; these concerns related in particular to the doubtful legitimacy of such actors, the lack of transparency regarding their functioning and of their democratic accountability.⁶² Thus, the Assembly invited the Venice Commission to study the issue.⁶³

34. In its [Recommendation 1908 \(2010\)](#), it noted that although lobbying was perfectly legitimate in a democratic and pluralist society, “unregulated, secret lobbying as such may undermine democratic principles and good governance”.⁶⁴ This may be specifically the case in “member states where democratic traditions are not deeply rooted and where the absence of effective mechanisms of checks and balances exercised by civil society constitutes a danger”.⁶⁵ In the view of the Assembly, in a democratic society citizens have the right to know the identity of the lobbying organisations which influence political and economic decision making; greater transparency of lobbying activities can strengthen the accountability of politicians and economic players as well as restore public confidence in government authorities’ democratic functioning.⁶⁶ Thus, the Assembly recommended that the Committee of Ministers elaborate a European code of good conduct on lobbying on the basis of the principles formulated in paragraph 11 of the said resolution:

“11.1. lobbying should be very clearly defined, differentiating between lobbying as a professionally compensated activity and the activities of civil society organisations, not forgetting self-regulating entities in different economic sectors;

11.2. transparency in the field of lobbying should be enhanced;

11.3. rules applicable to politicians, civil servants, members of pressure groups and businesses should be laid down, including the principle of potential conflicts of interest and the period of time after leaving office during which carrying out lobbying activities should be banned;

11.4. entities involved in lobbying activities should be registered;

11.5. prior consultations should be held with lobbying organisations on any draft legislation in this field;

11.6. well-defined, transparent, honest lobbying should be encouraged so as to improve the public image of persons involved in these activities.”

35. In response to [Recommendation 1908 \(2010\)](#), the Committee of Ministers shared the Assembly’s view that “ensuring the transparency of lobbying activities helps to combat the loss of confidence in institutions and declining interest in politics”⁶⁷ and noted that both GRECO (Group of States against Corruption) and the Conference of International Non-governmental Organisations (INGOs) supported the idea of drafting a code of conduct.

36. Following Assembly’s [Resolution No. 1744 \(2010\)](#), in 2013, the Venice Commission undertook the above-mentioned study on “[The role of extra-institutional actors in a democratic system](#)”.⁶⁸ The Venice Commission analysed “lobbying” as a concept and noted that this phenomenon was, on one hand, a problem for the democratic process, and, on the other hand, an important opportunity for decision makers to liaise with different stakeholders. As stressed by Professor Maiani, one of the authors of the said study, lobbying is also an important part of pluralism and the democratic process and as a source of otherwise

⁶⁰ Extra-institutional actors in the democratic system, [Resolution 1744 \(2010\)](#), supra note 27.

⁶¹ Supra note 34.

⁶² Supra note 27, paragraphs 8-10.

⁶³ Ibid, paragraph 20.

⁶⁴ Supra note 34, paragraph 2.

⁶⁵ Ibid, paragraph 4.

⁶⁶ Ibid, paragraph 9.

⁶⁷ “[Lobbying in a democratic society \(European Code of conduct on lobbying\)](#)” – Parliamentary Assembly [Recommendation 1908 \(2010\)](#), CM/AS(2010)Rec1908 final, 19 November 2010, reply adopted by the Committee of Ministers on 17 November 2010, paragraph 3.

⁶⁸ Venice Commission, supra note 3.

unavailable expert knowledge. However, three concerns have been raised in this context: 1) with regard to the involvement of some actors, who have no political legitimacy; 2) with regard to the inequality of resources and the possible distortion of the political process; 3) with regard to accountability: how decision-makers are coming to certain conclusions, and 4) with regard to the issue of conflict of interest, and in particular the practice of 'revolving doors'. Regulations can only alleviate these problems and the disclosure of data will not change the unequal distribution of resources. The Venice Commission recommended the adoption of regulations on lobbying activities, although it refrained from specifying concrete solutions. It also recommended obligatory registration of lobbyists, disclosure of data, the introduction of 'cooling off periods' for certain types of activities and establishing authorities to monitor lobbying. Regulations on lobbying should have a broad scope and should not make a distinction between different actors; otherwise there could be 'pockets of unaccountability'.

37. On many occasions the Assembly also took a stance on combatting corruption. In its [Resolution 1214 \(2000\)](#) on "Role of parliaments in fighting corruption,"⁶⁹ it recommended, amongst others, that State institutions, including parliaments, should be "so transparent and accountable as to be able to withstand corruption or permit its rapid exposure".⁷⁰ In addition, in June 2013, it adopted [Resolution 1943 \(2013\)](#) and [Recommendation 2019 \(2013\)](#) on "Corruption as a threat to the rule of law"⁷¹ setting out guiding principles in this respect. In the said recommendation, it proposed, once again, that the Committee of Ministers draw up guidelines for codes of conduct and ethics for public officials, in conformity with the guiding principles set out in [Recommendation 1908 \(2010\)](#) (European code of good conduct on lobbying), and that it launch a feasibility study on lobbying.⁷² The Committee of Ministers replied to the Assembly that terms of reference had been given to the European Committee on Legal Co-operation (CDCJ) – within the framework of the 2014-2015 Programme of Activities and Budget – to prepare, subject to a preliminary feasibility study, a legal instrument on the regulation of lobbying activities.⁷³ Further work on the drafting of a Council of Europe's legal instrument on this subject-matter is now underway within CDCJ.

38. On 8 April 2014, the Assembly launched its [anti-corruption platform](#), which creates a space for dialogue and helps to promote transparency and honesty in public life. So far, it has held a number of meetings and seminars on combating corruption.

39. The Assembly has looked into the relationship between public health and the interests of the pharmaceutical industry in its [Resolution 1749 \(2010\)](#) and [Recommendation 1929 \(2010\)](#) "Handling of the H1N1 pandemic: more transparency needed"⁷⁴ as well as, more recently, in [Resolution 2071 \(2015\)](#) on "Public health and the interests of the pharmaceutical industry: how to guarantee the primacy of public health interests?"⁷⁵ In [Resolution 1749 \(2010\)](#) and [Recommendation 1929 \(2010\)](#), the Assembly criticized the measures taken by public health authorities at international, European and national level in the framework of the H1N1 influenza pandemic and stressed that a lack of transparency in public decisions undermined democratic principles and good governance. In [Resolution 2071 \(2015\)](#), the Assembly addressed a number of recommendations to member States concerning the framework regulating interactions between the pharmaceutical industry and the health sector players (transparency of experts' interests and the costs of research, avoiding conflict of interests and 'revolving door', basing health-related decisions on the basis of individual and public health considerations).⁷⁶ In addition, when examining the potential health effects of the electromagnetic fields in its [Resolution 1815 \(2011\)](#) on "The potential dangers of electromagnetic fields and their effect on the environment",⁷⁷ it also recommended that member States of the Council of Europe "make the transparency of lobby groups mandatory."⁷⁸

⁶⁹ Adopted on 5 April 2000, see also report of the Committee on Economic Affairs and Development, rapporteurs MM. Leers and Tallo, [Doc. 8652](#).

⁷⁰ Paragraph 6.1.a) of the resolution.

⁷¹ Adopted by the Assembly on 26 June 2013. See also report by our Committee colleague, Ms Mailis Reps (Estonia, ALDE), [Doc. 13228](#).

⁷² Paragraphs 5 and 7 of this recommendation.

⁷³ Committee of Ministers, Reply to Assembly's [Recommendation 2019 \(2013\)](#), [Doc. 13390](#) of 21 January 2014.

⁷⁴ Adopted on 24 June 2010. See report of the Social, Health and Family Affairs Committee, rapporteur: Mr Paul Flynn (UK, SOC), [Doc. 12283](#) of 7 June 2010.

⁷⁵ Adopted on 29 September 2015. See report of the Committee on Social Affairs, Health and Sustainable Development, rapporteur: Ms Liliane Maury Pasquier (Switzerland, SOC), [Doc. 13869](#) of 14 September 2015.

⁷⁶ See, in particular, paragraphs 6.1 and 6.2 of the resolution.

⁷⁷ Adopted by the Standing Committee on 27 May 2011. See also report of the Committee on the Environment, Agriculture and Local and Regional Affairs, rapporteur: Mr Huss, [Doc. 12608](#).

⁷⁸ Paragraph 8.5.7 of the resolution.

4.2. In the European Union

4.2.1. Rules on decision-making process

40. The Treaty on the Union European sets forth rules on the democratic decision making process. According to its Article 10, paragraph 3, second sentence, “decisions shall be taken as openly and as closely as possible to the citizen”. Article 11 imposes specific obligations on the European Union institutions, which “shall, by appropriate means give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action” (paragraph 1) and “shall maintain an open, transparent and regular dialogue with representative associations and civil society” (paragraph 2). The European Commission carries “broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent” (paragraph 3). Furthermore, the Treaty on the Functioning of the European Union specifies that European Union institutions, bodies, offices and agencies have to conduct their work as openly as possible (Article 15, paragraph 1).

41. The Treaty on the Functioning of the European Union also enshrines the right of access to documents of its institutions, bodies, offices and agencies (according to its Article 15 paragraph 3 and subject to the principles and conditions defined in accordance with this provision). This right is also guaranteed in Article 42 of the EU Charter of Fundamental Rights; however, the latter provision speaks only about documents of the European Parliament, Council and the European Commission.

4.2.2. Transparency measures

42. The European Parliament was the first European institution to regulate lobbying activities on its own premises by introducing the first lobbyists’ Register and a code of ethics, with which lobbyists must comply. This measure was welcomed by the Assembly in its Recommendation 1908 (2010).⁷⁹ In 2008, the European Commission set up a Register of Interest Representatives, which was expanded in 2011 into a Transparency Register, when the European Parliament joined the initiative. On 10 February 2016, the register had 9,055 entries, that is to say only half (or one third) of the estimated number of lobbyists.

43. The Transparency Register publicly reveals information such as the number of employees involved in lobbying, the main legislative proposals in which they are interested and the amounts of money spent to bring a successful conclusion to their objectives. On 27 January 2015, a new ‘second generation’ version of the Transparency Register was launched. From now on, lobbyists have to provide additional information as regards their participation in committees, forums, intergroups as well as legislative files currently followed. Moreover, a streamlined “alerts & complaints” procedure allows for greater scrutiny and more efficient treatment of allegedly misleading information. The new version also requires the obligation to register for all those who want to meet commissioners, members of cabinets or directors-general or any other organisation wishing to speak during hearings organised by the European Parliament. According to this register, in-house lobbyists and trade, business and professional associations are most highly represented (with 4,629 out of 9,055 entries). They are followed by non-governmental organisations (2,252 entries), professional consultancies, law firms and self-employed consultants (1,057 entries), think tanks, academic and research institutions (649), organisations representing local, regional and municipal authorities, other public or mixed entities, etc. (429 entries) and churches (39 entries). For example, out of 9,055, registered lobbyists, 4,672 entities declare lobbying activities on “environment”; 4,111 – on “research and technology”; 4,001 – on “internal market”, 3,861 – on “enterprise”, 3,503 – on “energy”; 3,410 – on “economic and financial affairs”; 3,115 – on “trade”; 2,666 – on “public health” and 2,243 – on “agriculture”. The register still raises concerns as it remains optional for pressure groups, and therefore may be incomplete.⁸⁰ A new review of the Transparency Register is scheduled for 2017, but, according to the European Commission, it will remain voluntary,⁸¹ although the Juncker Commission intended to propose a mandatory register for the three main European Union institutions.⁸² Finally, this register is accompanied by a Code of Conduct, which compiles all rules, codes and good governance practices that officials, other staff and interest groups’ representatives shall respect.

44. The possibility of registration in the Transparency Register does not concern the Council of the European Union or the permanent representations of member States to the European Union, despite their

⁷⁹ In its paragraph 5.

⁸⁰ Gil Lejeune, Lobbying : à la poursuite de la transparence; le Huffington post, 26 February 2013.

⁸¹ Press release, The revised Transparency Register: more information, more incentives, tougher on those who break the rules, European Commission, Brussels, 15 April 2014.

⁸² Press release, Commission and Parliament Implement New Rules on Transparency Register, European Commission, Brussels, 27 January 2015.

important role in the law-making process. According to Transparency International's study published in April 2015, out of 19 countries and three European institutions, the Council of the European Union is third from bottom concerning the strength of the overall system of regulatory safeguards and efforts to promote open and ethical lobbying, with a score of 19%, while the European Commission ranges 53% and the European Parliament – 37%; the said study focused on transparency of public institutions, integrity of their officials and lobbyists and equality of access to public decision-making.⁸³ The average score for the three institutions was 36%.

45. Moreover, the line between research and lobbying becomes more and more blurred, when supposedly independent 'think tanks' moonlight as lobbyists. Such fake 'think tanks' – sometimes even set up by lobbying groups – undertake what is presented as independent research.⁸⁴ Besides that, the European Union does not have a taxation system like the United States, which would allow to determine more precisely whether a particular group is a lobby or a research institution or think tank.⁸⁵

46. NGOs, such as ALTER-EU, Corporate Europe and Transparency International, complained about the non-legally-binding nature of the Transparency Register, which fails to provide citizens with an accurate picture of the lobby scene in Brussels, and called for instituting sanctions for failure to register and/or disclose accurate data. As stressed in the 2015 report prepared by ALTER-EU, certain important lobbyists (including financial lobbyists, lobby consultancies, law firms and major corporations) have not registered yet. Many entries in the register are unreliable: certain lobby firms fail to disclose their clients, others masks their identities behind unidentified acronyms or under-report their spending and lobbyists numbers. According to the report, the Transparency Register Secretariat "lacks a proactive checking (...) that the entries are accurate and credible"⁸⁶; Transparency International representatives pretend that it is simply under-staffed.⁸⁷ Concerns were also raised as regards lobbyists' access to European Union commissioners and officials. Although since November 2014, European Union commissioners, members of their cabinets and directors general should not meet with unregistered lobbyists, there is no formal oversight of this practice and such lobbyists can easily meet lower level officials without any control.⁸⁸

47. A recent study commissioned by the European Parliament on lobbying in this institution shows that the latter is an important target for lobbyists, both across it and within its committees. MEPs are contacted at the stage of the examination of amendments in committees and plenary vote by groups not coming from their constituency.⁸⁹ The most lobbied committees in the EP are ITRE (Industry, Research and Energy Committee), ENVI (Environment, Public Health and Food Safety Committee), IMCO (Internal Market and Consumer Protection Committee) and ECON (Economic and Monetary Affairs Committee), which address issues relate to European Union market integration and regulation. The study praises the Transparency Register as "one of the most wide-ranging databases on lobbying activity in the world", although accessibility to relevant information is not always direct.⁹⁰ According to the authors of this study, the information already accessible in the register could be made more easily available and the Council of the European Union should join this database.⁹¹

48. Controversies also arise with respect to the functioning and the composition of the European Commission's expert groups (in DG Agriculture – civil dialogue groups) and the so-called "trilogues". As regards the expert groups, over 800 such advisory groups play a crucial role in assisting the European Commission in the elaboration of legislative proposals, policy initiatives and "delegated acts" (which might be adopted by the European Commission at the request of the Council or the European Parliament, according to Article 290 of the Treaty on the Functioning of the European Union⁹²) as well as in the implementation of

⁸³ Transparency International, *supra* note 16, p.8.

⁸⁴ *Are think tanks turning into lobbyists?*, *Transparify*, 12 March 2014.

⁸⁵ Xavier Carpentier-Tanguy, *Vous avez dit Lobby ?*, *Observatoire des Think tanks*, 15 October 2010.

⁸⁶ Alliance for Lobbying Transparency and Ethics Regulation (ALTER-EU), *New and Improved? Why the EU Lobby register still fails to deliver*, January 2015, p. 3.

⁸⁷ Euractiv, *EU institutions are less transparent than many member states*, by D. Freund and A. Johnson, 2 September 2015.

⁸⁸ *Ibid*, p. 6.

⁸⁹ European Parliament, Directorate-General for Internal Policies. Policy Department C Citizen's Rights and Constitutional Affairs, *Institutional and Constitutional aspects of Special Interest Representation. Study for the AFCCO Committee.*, 2015, p. 71.

⁹⁰ *Ibid*, p. 72.

⁹¹ *Ibid*, pp. 73-74.

⁹² Following such a delegation of the legislative power, the European Commission may adopt non-legislative acts of general application that supplement or amend certain non-essential elements of a legislative act; they have supremacy over national laws. This procedure is often used to take account of scientific or technical progress or specific events, or

European Union legislation and policies on various areas related to the functioning of the European Union internal market. They can be composed of individuals, organisations, European Union member States or public authorities. However, the composition of such groups is little known to the public and is often perceived as unbalanced, with corporate interests being much better represented than those of non-economic actors. Moreover, most of the documents related to such meetings are not public. A 2015 study commissioned by the European Parliament confirms that the imbalance in favour of economic interests has not decreased since 2013, despite some progress noted. As regards transparency, since 2013 the European Commission has increased its use of public calls (which remain optional) and the Register of Expert Groups has allowed for better access to information on expert group activity. However, the findings of this study leave no doubt as to the fact that the European Commission does not comply with the European Parliament's conditions on balance and transparency.⁹³

49. "Trilogues" are informal negotiations between the three European Union institutions – the European Parliament, the Council and the European Commission which are aimed at reaching early agreement on new European Union legislation. Around 80% of European Union laws are now agreed at first reading. An estimated 1500 "trilogue" meetings have taken place over the last five years.⁹⁴ Documents relating to "trilogues" are not available to the public and only a selected number of representatives of the three institutions attend such meetings. Therefore, representatives of civil society whom I met in Brussels complained about the lack of transparency in this context and the unbalanced influence of well-organised lobbying groups on the participants of such meetings.

4.2.3. Access to documents

50. Unlike the European Convention on Human Rights, Article 41 § 2 of the Charter of Fundamental Rights of the European Union enshrines the right of access to documents as a component of the "right to good administration". Rules concerning its implementation have been laid down by Regulation (EC) N° 1049/2001⁹⁵ more than 10 years ago and may now need to be updated.⁹⁶ Moreover, the European Union has not yet set up an independent authority to guarantee access to documents, contrary to many of its member States. In practice, access to some sort of documents is not that easy (see the above-mentioned case of "trilogues"). According to a study conducted by Transparency International in 2014, 78% of access to documents requests were for files that were already in the public domain; a significant part of such requests came from people working on European Union issues – journalists, members of NGOs or academics.⁹⁷

4.2.4. Safeguards on ethics

51. The European Commission elaborated, in 2011, a Code of conduct for commissioners. This code provides *inter alia* that commissioners may not engage in any other professional activity, whether gainful or not. (1.1) Whenever former commissioners intend to engage in an occupation during eighteen months after they have ceased to hold office, they shall inform the Commission. If there is a risk of conflict of interest, the Commission shall request an evaluation by an ad hoc Committee (1.2); commissioners have to declare any financial interests or assets which might create a conflict of interests in the performance of their duties; (1.3) and they shall declare the professional activities of their spouses or partners. (1.4) Finally, Commissioners shall hand gifts worth more than 150 euros over to the Commission's Protocol department. (1.11)

52. However, Transparency International has already pointed out some irregularities concerning, in particular, the lack of a clear definition of conflict of interest, the absence of sanctions for minor infringements, and the absence of proactive checks from the European Commission on whether commissioners might have a conflict of interest. Besides, there are also questions on how the European Commission is implementing the code of conduct in practice and whether the system is in fact capable of identifying and managing possible conflicts of interests.⁹⁸

to update quantitative values in many areas such as internal market, agriculture, environment, consumer protection, transport and the area of freedom, security and justice.

⁹³ European Parliament, Directorate-General for Internal Policies. Policy Department D. Budgetary Affairs, Composition of the Commission's expert groups and the status of the register of expert groups. Study, 2015, p. 8.

⁹⁴ European Ombudsman, press release of 28 May 2015, Ombudsman opens investigation to promote transparency of "trilogues".

⁹⁵ Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

⁹⁶ Openness, transparency and access to documents and information in the European Union, by Professor Henri Labayle, European Parliament Policy Department C Citizen's Rights and Constitutional Affairs, 2013, p.5.

⁹⁷ Transparency International, EU Integrity Study, 2014.

⁹⁸ Ethics and the European Commission: will Juncker practise what he preaches?, *Transparency International*, 1 October 2014.

4.2.5. Monitoring and Inter-institutional balance

53. The European Ombudsman, who investigates complaints about maladministration in the European Union institutions and bodies and can launch inquiries at his/her own initiative, receives a considerable number of complaints relating to questions of ethics, conflicts of interests or the practice of "revolving door" within the European Union institutions.⁹⁹ As indicated at the hearing in June 2015 by Ms Hirsch-Ziemińska, in 2014, over 21 % of the number of maladministration complaints received by the European Ombudsman, Ms Emily O'Reilly, concerned lack of transparency in the European Union administration (lack of access to documents or information, the composition of experts groups, conflicts of interests and lack of transparency in the decision-making process). 70 % of such cases concerned the European Commission, but were also cases against some European Union agencies. The Ombudsman action in this area is based on Articles 10 and 11 of the Treaty on the European Union as well as on Article 15 of the Treaty on the Functioning of the European Union. Every year the Ombudsman launches the International Right to Know Day (27 September), which puts the spotlight on transparency and accountability; in 2014, it focused in access to clinical data.

54. The Ombudsman's work in the field of transparency has focused on the following issues:

54.1. *'revolving door' cases*: following complaints brought by Corporate Europe Observatory, Greenpeace and some other NGOs in 2014, the Ombudsman made a number of recommendations to the European Commission asking to make its review processes on "revolving door" cases more robust to avoid conflicts of interest and to regularly publish online all relevant information as regards senior European Union officials.¹⁰⁰ European Union staff regulations specify that all officials leaving European Union employment must inform their institution of any proposed new employment during the two years after leaving their institution. Former senior officials are also not allowed to lobby their former colleagues for a period of 12 months following their departure. The Commission has said it will publish the names of relevant officials once a year, which is the legal minimum timeframe required, while the Ombudsman maintains her recommendation to the Commission to publish the names more regularly. In December 2015, she welcomed the publication of names of certain senior officials leaving the European Commission for new jobs.¹⁰¹

54.2. *lobbying*: following a 2012 inquiry into complaints on the inaccuracies in the European Commission Register of Interest Representatives, the Ombudsman made recommendations, following which the Joint Transparency Register was created; she also urged the Council of the European Union to participate in it;¹⁰²

54.3. *TTIP* (Transatlantic Trade and Investment Partnership, which the European Commission is now negotiating with the United States): following complaints about the secrecy of the negotiations, the Ombudsman recommended the disclosure of more data related to the negotiations of this agreement.¹⁰³ Subsequently, the European Commission and the Council of the European Union published some documents, but failed to publish others invoking data protection reasons;

54.4. *composition and transparency of the European Commission's experts groups (including DG Agriculture civil dialogue groups)*: following her own initiative investigation of 2014, the Ombudsman called for establishing a legally binding framework for all groups and the disclosure of minutes, CVs and other documents. The Commission announced that the procedures for the selection of such experts would be more transparent and that the experts' register would be revised in 2016;¹⁰⁴

54.5 *'trilogues'*: following her own initiative investigation, the Ombudsman requested the three European Union institutions to disclose information related to the law-making process conducted

⁹⁹ [Annual Report European Ombudsman 2013](#), pp.17 to 19.

¹⁰⁰ [Draft recommendation of the European Ombudsman in the inquiry based on complaints 2077/2012/TN and 1853/2013/TN against the European Commission](#), 22 September 2014.

¹⁰¹ European Ombudsman, press release of 14 December 2015, [Ombudsman welcomes publication of names following « revolving doors » inquiry](#).

¹⁰² European Ombudsman, [Annual report 2014](#), Section 2.2.

¹⁰³ European Ombudsman, press release of 23 March 2015, [Ombudsman commends Commission for progress on transparency in TTIP negotiations](#).

¹⁰⁴ European Ombudsman, press release of 2 February 2016, [Ombudsman: Citizens need to know more about expert groups' advice to Commission](#). Concerning DG Agriculture civil dialogue groups - [Proposals to improve the overall DG AGRI Civil Dialogue Groups process](#), summary of the decision of 7 September 2015.

behind closed doors. The three institutions submitted their opinions on the transparency of 'trilogues'.¹⁰⁵

54.6 *European Central Bank's (ECB) letter to the Irish government*: an Irish journalist requested, the disclosure of a letter that the ECB had addressed to the Irish government in December 2011 concerning Ireland's joining the European Union bailout scheme. The ECB refused to do so invoking the need to protect Ireland's financial stability. Having inspected the letter, the Ombudsman agreed with the ECB's decision; she stated, however, that three years later, in 2014, the invoked reasons were no longer valid and that the letter could be disclosed and that the ECB's actions could be more transparent. By the end of 2014, the ECB decided to disclose the letter.¹⁰⁶

54.7. *tobacco industry lobbying*: following a complaint by an NGO that the European Commission was not meeting its obligations under the WHO's Framework Convention on Tobacco Control (FCTC), the Ombudsman found that the Commission's approach to publicising meetings with tobacco industry lobbyists was inadequate (with the exception of DG Health). She also criticized the fact that the Commission did not consider contacts with tobacco industry lawyers as liaising with lobbyists. In a recommendation of October 2015, she called on the Commission to publish online all meetings with such lobbyists, or their legal representatives, as well as the minutes of those meetings. The Commission, however, considered that it met all its obligations under the FCTC.¹⁰⁷

55. Other institutions and bodies of the European Union also monitor the issue of transparency. Moreover, in 2012, the European Court of Auditors published a report whereby none of the audited European Union agencies¹⁰⁸ managed situations of conflict of interests in an appropriate way. A number of gaps, of different gravity, were raised in respect of the policies and specific procedures of these agencies, as well as in respect of their implementation.¹⁰⁹

56. Lastly, the European Anti-fraud Office investigates fraud against corruption and serious misconduct within the European institutions. However, following its investigation into the "Dalligate", it was criticized by its monitoring body – the Supervisory Committee (see above), as lacking independence vis-à-vis the European Commission.¹¹⁰ In its report on "The EU Integrity System", Transparency International laments the budgetary restrictions on several control organs, which might explain the lengthy investigations and audits led by the European Court of Auditors, OLAF and the Ombudsman. The NGO points out that OLAF falls within the European Commission's administration, which puts its independence into question. OLAF's control over other institutions would be more efficient and more credible if OLAF were more independent.¹¹¹

57. During my fact-finding mission to Brussels, I had the occasion to talk to EP's rapporteur, Mr Sven Giegold, who prepared a draft report on "Transparency, accountability and integrity in the EU institutions".¹¹² His report takes into account the critical voices expressed by the European Ombudsman and NGOs and calls for full transparency of lobbyists' actions and improving citizens' access to information and documents. According to the motion for EP resolution on this subject, the three European Union institutions "should record and disclose all input received from lobbyists/interest representatives on draft policies, laws and amendments as a 'legislative footprint' (...) (section 1) and the Transparency Register should become mandatory and should also include information from the Council of the European Union (sections 7 and 8). It also calls for, *inter alia*, for more transparency in dealing with lobbyists, amending the MEPs' Code of Conduct and extending the "cooling-off period" for both MEPs and commissioners to three years, implementing the Ombudsman's recommendations on expert groups and improving MEPs' and citizens' access to the Commission documents (including those on trade negotiations) and granting access to documents related to "trilogues". It also considers that Regulation (EC) No 1049/2001 should be updated and encompass all European Union institutions, bodies, offices and agencies currently not covered, such as the European Council, the European Central Bank, the Court of Justice, Europol and Eurojust.

¹⁰⁵ European Ombudsman, press release of 10 December 2015, Ombudsman launches public consultations on transparency of « trilogues ».

¹⁰⁶ Annual report 2014, *supra* note 36, Section 2.1.

¹⁰⁷ European Ombudsman, press release of 8 February 2016, Ombudsman regrets Commission stance on UN tobacco lobbying rules.

¹⁰⁸ The European Aviation Safety Agency (EASA), the European Chemicals Agency (ECHA), the European Food Safety Authority (EFSA) and the European Medicines Agency (EMA).

¹⁰⁹ The European Court of Auditors, Management of conflicts of interests in selected EU agencies, special report, n°15/2012.

¹¹⁰ Leaked OLAF report on Dalli case flawed and inconclusive, *Corporate Europe Observatory*, 29 April 2013.

¹¹¹ Transparency International, The EU Integrity System, April 2014, (p. 160 to 163).

¹¹² European Parliament, Committee on Constitutional Affairs, draft report 2015/2041 (INI), 18 November 2015.

4.3. In member States

58. According to the above-mentioned report by Transparency International,¹¹³ published on 15 April 2015, 58% of European Union citizens believe their country's government is to a large extent or entirely controlled by a few big interests. Among 19 European countries examined (the study also included the three European Union institutions),¹¹⁴ the vast majority have no comprehensive regulation of lobbying and no system mechanism for recording contacts between lobbyists and policy-makers, unlike Canada and the United States. Out of 19 reviewed countries, only seven¹¹⁵ have specific lobbying regulations; however, many of the existing regulations are flawed or unfit for their purpose and there are also problems with their implementation. Slovenia got the best score (50%), while countries hit by the financial crisis – Cyprus, Spain, Italy and Portugal – as well as Hungary sit at the bottom. Only 10 countries have opted for a register as the cornerstone of their approach: some of them made it mandatory (Austria, Ireland, Lithuania, Poland, Slovenia and the United Kingdom), others opted for voluntary registers applying to select institutions (France and the Netherlands) or registers targeting institutions at a sub-national level (Italy and Spain).¹¹⁶ Transparency International also regrets that the codes of conduct in place are frequently incomplete and do not provide sufficient behavioural guidance on how to deal with lobbying third parties.

59. The above-mentioned 2015 study focused only on 19 European Union member States. Two years earlier, within the Council of Europe, the Venice Commission conducted similar comparative research, the findings of which were presented in its above-mentioned report on “the role of extra-institutional actors in a democratic system”. It notes that ten countries within the Council of Europe have already introduced statutory rules on lobbying so far: Austria, France, Georgia, Germany, Hungary, two regions in Italy, (*Consiglio regionale della Toscana* and in *Regione Molise*), Lithuania, Poland, Slovenia and “The former Yugoslav Republic of Macedonia”. At the time the report was being drafted, other member States of the Council of Europe were elaborating lobbying regulations: Croatia, Denmark, Ireland, Montenegro, the Czech Republic, the United Kingdom, Serbia and Ukraine. Among the Observers States of the Council of Europe, the United States and six of ten Canadian provinces have developed regulations in this field; so has Israel (which has observer status with the Assembly).¹¹⁷ Another study on lobbying regulations was carried out earlier by the European Centre for Parliamentary Research and Documentation in December 2012, but covered only 32 member States of the Council of Europe.¹¹⁸

60. Following several studies on these regulations, three broad types of regulatory systems for lobbying can be distinguished: low, medium, and highly regulated systems. Member States of the Council of Europe have mainly brought in low (France, Germany and Poland) and medium (Hungary, Lithuania as well Canada and certain States in the United States of America) regulated systems, whereas the certain States in the United States of America have chosen highly regulated ones. According to the Venice Commission, European Institutions, namely the European Parliament and the European Commission, have adopted low regulated systems.¹¹⁹

5. Conclusion

61. Lobbying is a legitimate activity, but, in practice, it is often correlated with secrecy, the disproportionate number of lobbyists, privileged access to decision makers and conflicts of interest. Dishonest and secret lobbying should not be tolerated and one should expose cases of wrongdoing and impose sanctions. Continuous effort and further advancement in incorporating Council of Europe values and standards is necessary within its member States.

62. Too many examples illustrate that European Union institutions are constantly targeted by lobbyists, the vast majority of which are hired by big multinational companies. Their activities are not sufficiently transparent and their resources considerably exceed those of other interest groups, such as consumers' associations or trade unions.

¹¹³ Transparency International, *supra* note 16.

¹¹⁴ National assessments were conducted in 2014 in Austria, Bulgaria, Cyprus, Czech Republic, Estonia, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and the United Kingdom. The 19 countries and the three European Union institutions achieved an overall score of 31% for the quality of their promotion of transparency, integrity and equality of access in lobbying.

¹¹⁵ Austria, France, Ireland, Lithuania, Poland, Slovenia and the United Kingdom; *supra* note 16, p. 8.

¹¹⁶ *Supra* note 16, p. 31.

¹¹⁷ Venice Commission, *supra* note 3, paragraphs 73-75.

¹¹⁸ Y.-M. Doublet, *Lobbying et corruption*, in GRECO, General Activities Report 2012, *supra* note 69, p. 31.

¹¹⁹ Venice Commission, *supra* note 3, paragraphs 79-85.

63. The European Union needs to undertake more efforts to ensure transparency and openness of its institutions, as its legislation has a huge impact on the everyday life of its citizens. This would be particularly important in view of the long lasting debate and, unfortunately, the expanding picture of the “democratic deficit” in the European Union. At the same time, the values of democracy and good governance, enshrined in European Union law and which the European Union is grounded on, inspire many nations, citizens and democratic movements in Europe and worldwide. The ‘lobbying map’ in the European Union and the Council of Europe or other international organisations is incomparable, in view of what is at stake within those organisations. When implementing its internal market, the European Union has legislative powers which affect both consumers and economic actors, including big international companies. It is clear that in order to remain close to its citizens and fulfil the obligations resulting from its treaty law, the European Union would need to take further care of its transparency and openness.

64. My report only focuses on the institutions of the Council of Europe and three European Union institutions, but, of course, there have been reported cases of insufficient transparency in other institutions, bodies, agencies or offices. The reforms undertaken within the European Union in the last few years have brought about some improvement as regards transparency, access to documents and avoiding conflicts of interests. The Transparency Register has been revamped, a Code of Conduct for Commissioners has been adopted and unregistered lobbyists are not allowed to meet with Commissioners and certain top officials. However, many shortcomings have been revealed following the European Ombudsman’s investigations on issues like trilogues, the visibility of TTIP negotiations, the composition of expert groups within the European Commission, the influence of the tobacco industry or the ‘revolving door’ strategies. As regards the latter, there are still no rules on MEPs moving to influential jobs in the private sector following their departure from the European Parliament. The EU institutions should implement the European Ombudsman’s recommendations on transparency, avoiding conflicts of interests and ensuring access to documents. They could also further improve the Joint Transparency Register, by expanding it to the Council of the European Union, making registration obligatory and introducing sanctions for non-registration and providing inaccurate data; publish legislative footprints in order to track any input received and aimed at influencing European Union legislation and policies and amend the European Parliament’s Code of Conduct, by introducing ‘cooling off’ periods for departing members. As regards access to official documents, the outdated Regulation (EC) No 1049/2001 ought to be revised in order to encompass other European Union institutions, bodies, offices and agencies; the EU should also consider acceding to the Council of Europe Convention on Access to Official Documents. Moreover, as the EU’s accession to GRECO is still pending, negotiations in this regard should be accelerated.

65. Although my report does not focus on Council of Europe member States, it should be noted that very few Council of Europe member States have a regulatory framework on lobbying activities, including a transparency register. This is perhaps an issue that our national parliaments should consider in more detail. The Council of Europe’s Convention on Access to Official Documents has been ratified by only a few member States. The Assembly, national parliaments and the Committee of Ministers should do more in order to promote this legal instrument and intensify their calls for its ratification. The same should be said about promoting the ratification and implementation of Council of Europe conventions and recommendations on the fight against corruption, as well as the implementation of GRECO recommendations.

66. Following previous Assembly’s recommendations of 2010, the Committee of Ministers started drafting a legal instrument on the regulation of lobbying activities. Now, six years later, the Assembly should urge the Committee of Ministers to finalise this work and it could also propose that a comparative study on the regulation of lobbying activities in Council of Europe member States be undertaken, in view of the paucity of information available on this subject. The Committee of Ministers ought to also, I suggest, reflect on the role of extra-institutional actors in the Council of Europe and on whether there is a need to take measures to regulate their activities. The latter issue could likewise be considered by the Assembly, which is subject to influences from various interest groups, although – admittedly – the scale of this phenomenon cannot be compared with that of the European Union institutions. Although the Assembly has adopted various rules on avoiding conflict of interest and promoting good conduct of its members, it should also reflect on how they can be effectively implemented and make more frequent use of the disciplinary sanctions provided in its Rules of Procedures. It could set up a sort of “transparency register” in order to keep track of the contacts that its members have with various external interlocutors, including NGOs and other groups, during part-sessions in Strasbourg. As regards cases of lobbying in certain very particular areas (industries), they could be investigated by other committees of the Assembly which possess a more specific mandates (such as the Committee on Social Affairs, Health and Sustainable development, with respect to the case of H1N1 pandemic).

67. The overall trajectory of the European Union institutions and Council of Europe member States in respect of lobbying regulation is encouraging but their efforts are not truly effective yet. Member States and

European institutions have to focus on a broader framework taking into account transparency and access to documents, equality of access in lobbying and a broader regulatory framework. However, any real progress requires political will.

68. Without proper regulations, there can be no transparency in legislative process. Half measures do not work properly and sufficiently, as illustrated, for example, by the mitigated results of the small-scale reforms undertaken in the last few years within the EU. That is why the Council of Europe, its member States and European Union institutions should continue adopting measures in this area.