



Department of Political Science

Chair in Comparative Public Law

A Comparative Analysis of Lobbying Regulation in the United States
and in the European Union

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Academic Year: 2017/18

A mia madre e a mio padre, che mi hanno insegnato a navigare oltre il tramonto.

A Beatrice, la mia number one supporter.

A Elena, Maria, Lucrezia, Beatrice, Davide e Matteo, i migliori amici che potessi mai avere.

A RadioLUISS e a chi la frequenta.

Vi devo tutto.

E un ringraziamento speciale alla dottoressa del Vecchio, a cui auguro grandi successi accademici.

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Introduction

Lobbying is a phenomenon of much fascination, not just to the academic world, but to the general public as well. It is also a particularly controversial subject, which sometimes is featured in the news and capable of arising suspicions among citizens. It is also a matter of particular relevance today. Lobbying is an industry worth tens of millions of dollars¹ and in constant and rapid evolution. The past twenty years have also seen a significant evolution of both lobbying activities and lobbying regulation, not just in the United States and in the European Union, but in other OECD countries as well.² Some of those evolutions are taking place at the very moment as of time of writing, with the main European institutions (the Commission, the Parliament and the Council) discussing whether and how to change existing regulation on the matter.³ Analysing the reality of lobbying today is then necessary. The only question is how to do this, and which questions to ask.

Research method

The research method used in the thesis follows Ran Hirschl's model of case selection, signified in his essay *The Question of Case Selection in Comparative Constitutional Law*.⁴ Hirschl identifies four main types of scholarship labelled as comparative: «freestanding, single country studies mistakenly characterized as comparative only by virtue of dealing with any country other than the author's own»; «comparative reference aimed at self-reflection through analogy, distinction and contrast»; «comparative research aimed at generating “thick” concepts and thinking tools through multi-faceted descriptions»; and, finally, «studies that draw upon controlled comparison and inference-

¹ Euractiv in 2008 and Gueguen (2007) found that interest representation in the EU generated 60 to 90 million euros in revenue each year. See Coen, D., Richardson, J. (eds.) *Lobbying the European Union: Institutions, Actors, and Issues*, Oxford, Oxford University Press, 2009, p.6.

² A very large amount of countries regulated lobbying in the past twenty-five years. Poland regulated lobbying in 1992, the United States in 1995 (and later 2007), Lithuania in 2001, Canada in 2008, Austria in 2012 and so on. For more information see Petrillo, P.L., *Democrazie sotto pressione – Parlamenti e lobby nel diritto pubblico comparato*, Giuffrè Editore, Milan, 2011, and Bitonto, A., and Harris, P. (eds), *Lobbying in Europe: Public Affairs and the Lobbying Industry in 28 EU Countries*, Palgrave MacMillan, 2017.

³ European Commission, Negotiations begin on a mandatory Transparency Register for the three EU Institutions, Press release, 16 April 2018. The negotiations are currently ongoing, but the original proposal from the Commission in 2016 is analysed in section 1.8 of the thesis.

⁴ Hirschl, R., The Question of Case Selection in Comparative Constitutional Law, in *The American Journal of Comparative Law*, Vol. LIII, no.1, 2005.

oriented case selection principles in order to assess change, explain dynamics, and make inferences about cause and effect through systematic case selection and analysis of data».⁵ The thesis will focus on the latter model of analysis, which is also identified by him as the most effective. An inferential research method requires a hypothesis, which would be proved or disproved by qualitative and quantitative data.⁶ It also partially absorbs the third research method, that of creating «thick description» by comparing the two systems. The goal is, then, «theory building through causal inference», adapting a research method typical of the social sciences to the subject of comparative law.⁷

The testable hypotheses in the thesis attempts to explain the differing lobbying styles in the United States and in the European Union. It attempts to offer an institutional explanation, according to which lobbying style is a direct result of institutional structure, as in, procedural, constitutional and regulatory elements. A dual analysis is in this case required, and the thesis attempts to do so. On the one hand, it is necessary to offer a thick description of the differences in lobbying regulation and lobbying activities within the US and the EU. On the one hand, existing regulation on lobbying activities may create exogenous causes in explaining styles in the two systems. On the other hand, regulation of lobbying and its history offers a photograph of what lobbying entails. Chapter 1 and 2 of the thesis attempt to do this. Chapter 1 focuses on the history and jurisprudential evolution of lobbying regulation (and connected activities) in the two systems. Regulation in the two systems changed significantly throughout the history of the two systems, reflecting societal and jurisprudential changes taking place. Chapter 2 fixes lobbying regulation in the present day. It takes the entire spectrum of lobbying practices and compares it to existing and current legislation, attempting to find how effective it is in regulating the phenomenon. Once lobbying practices and regulation have been analysed, the thesis moves on to the inferential comparative analysis, signified in Chapter 3. Chapter 3 compares the institutional structure of the two systems, cross-referencing the differences (and similarities) with empirical data in attempting to offer an explanation for the differing lobbying styles in the US and the EU. The analysis compares the United States with the European Union for a set of reasons. The two systems have been analysed before in a comparative perspective by scholars of both comparative law⁸ and political

⁵ *Ibid.*, p.126-32.

⁶ *Ibid.* p.131.

⁷ *Ibid.*

⁸ For one example see Robert Schutze, who has compared the United States federal system with the European Union federal system; see *From Dual to Cooperative Federalism*, Oxford University Press, 2014.

science⁹. Additionally, lobbying in particular lends itself to this choice of analysis. Washington and Brussels both have the two largest lobbying industries in the world.¹⁰ Finally, it can be argued that the United States and the European Union represent two different ‘prototypical cases’. There are some similarities in both lobbying activities and regulation in the two systems, but there are also major distinctions. Comparing the two might offer elements which may be used in the analysis of cases similar to either system.¹¹

There is an additional, normative element of analysis in the thesis. Lobbying is a heavily discussed subject and has had a share of controversy regarding it. An additional question to be asked is what makes good lobbying regulation. The presence of lobbying has several advantages, and its usefulness has been recognised in both systems. Namely, the access to better information for the political or technical decision maker. It can increase government responsiveness in reacting to political issues, and it can adequately represent civil society in its interactions with those who govern. However, it is also a phenomenon that, if left unregulated or badly regulated, may lead to unconstitutional behaviour or to inadequately represent a balance between all elements of society. If these two latter pitfalls are prevented, lobbying may lead to a net gain in the decision-making process. This is part of what Chapter 2 is focused on. Other than just analysing current lobbying regulation in the two systems, it also compares the two systems using a normative standard. Thus, an additional question will be whether existing (or currently being discussed) legislation on the matter is effective, and if it adequately manages to contain the possible excesses or unconstitutional behaviour arising from lobbying activities. The next question is then which normative standards to set to guarantee only the positive results arising from lobbying.

Setting standards with which to analyse lobbying activities

A way to understand what standards to work towards would minimise the risk of unconstitutional lobbying activities would be to understand what those lobbying activities are. One of the predominant concerns is that lobbyists may act as corrupting forces,

⁹ For example, see Sergio Fabbrini, and works such as *Compound Democracies: Why the United States and Europe are becoming similar*, Oxford University Press, 2010.

¹⁰ Mahoney, C., *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008, p.1-2.

¹¹ Hirschl, R., The Question of Case Selection in Comparative Constitutional Law, in *The American Journal of Comparative Law*, Vol. LIII, no.1, 2005, p.142-4.

bribing decision-makers in order to obtain favourable laws. This is far from what happens in the majority of cases, clearly. But how is it possible to limit, disincentivise and punish the pathological dimension of lobbying.

Petrillo (2011), in his analysis, finds three existing models of lobbying regulation: ‘transparency-based regulation’, ‘participatory-based regulation’, and ‘slithering regulation’.¹² These are empirical models, not normative, but nonetheless the first two models signify what the decision makers in different systems were aspiring towards. Transparency-based regulation, in an acceptance of the role lobbyists make during the decision-making process, attempts to transform lobbying and its interaction with politics into a ‘glass palace’, where access by the citizen to the law-making process and lobbying activities regarding it is given priority.¹³ Participatory-based regulation adds a significant dimension to the previous model, by enforcing not just transparency but by actively integrating interest representatives inside the decision-making process.¹⁴ Both the United States and the European Union are placed in the second category, implying that the two objectives of transparency and participation are what they should legislate towards.¹⁵

Discussing ethically and philosophically what should be the required standards of lobbying would be too complex of a debate and risk expanding the focus of the thesis too much. The reason why transparency and equality of access to the decision-maker are the two standards adopted is that they have both been acknowledged and accepted by the decision-makers of the two systems themselves. There are multiple sources from which it is possible to see transparency and participation as an objective.

For what concerns the former element, both the United States and the European Union have openly acknowledged its value, both in general and in regulating interest representation. The Lobbying Disclosure Act of 1995, the main legislative framework regulating lobbying in the United States today, contained a section reporting Congress findings on the value of transparency in regulating lobbying. Section 2 of the Act stated that «responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decision-making process in both the legislative and executive branches of the Federal Government», and that «the effective public disclosure

¹² Petrillo, P.L., *Democrazie sotto pressione – Parlamenti e lobby nel diritto pubblico comparato*, Giuffrè Editore, Milan, 2011, p.88-95.

¹³ *Ibid.*, p.183-91.

¹⁴ *Ibid.*, p. 287-97.

¹⁵ *Ibid.*

of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government».¹⁶ Transparency in lobbying efforts is thus seen both as an end in itself (a requirement for responsible and representative Government) and as a means to increase public confidence. In any case, it is clear that transparency was one of the main objectives of the Act. The value of transparency would be used again as an objective with the Honest Leadership and Open Government Act of 2007.¹⁷

For what concerns the European Union, transparency and the participatory dimensions have always been acknowledged as values, at least in principle. These values go as far as to be enshrined in the European treaties. Article 11 of the Treaty on European Union (TEU) possesses both transparent and participatory dimensions. It states that «the institutions 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»; that «the institutions shall maintain an open, transparency, and regular dialogue with representative associations and civil society»; and that «the European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent».¹⁸ Both transparency and participatory guarantees are acknowledged here. The opportunity for citizens and representative associations to make their voice heard and the requirement for 'broad' consultations imply that there can be no discrimination *a priori* on the identity of the speaker: the provisions imply that any party who is concerned by an Union action has the right to be consulted. The element of transparency, at least for what concern the EU legislative process, is, clearly, also present. It has also been emphasized by the European Court of Justice itself.¹⁹

Transparency and equality of access to the decision makers can then be used as standards for the simple reason that legislators in the two systems have done so themselves. Additionally, transparency and equality of access have also been recognised by the OECD in its research on transparency and integrity in lobbying. In the report, the researchers outline several principles for enhancing regulation of lobbying activities, among which «a level playing field by granting all stakeholders fair and equitable access to the

¹⁶ Lobbying Disclosure Act of 1995, Pub. Law No. 104-65, §1.

¹⁷ Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, preamble.

¹⁸ Treaty on European Union, art.11.

¹⁹ For more details on the European Court of Justice's position towards transparency, see Section 3.4.2 of the third chapter of the thesis on trilogues and *De Capitani v. Parliament*.

development and implementation of public policies» and «an adequate degree of transparency to ensure that public officials, citizens and businesses can obtain sufficient information on lobbying activities». Transparency and equality of access seem then to be widely shared values in the subject matter of lobbying. Bitonto and Harris (2017) see the regulation of lobbying through four different lenses: accountability, transparency, openness and fairness.²⁰ It can be argued that accountability and transparency can be synthesized well under the dimension of transparency, and that the same can be done with openness and fairness under the dimension of equality of access. The thesis, then, will also analyse current legislation to reach a conclusion on how well these two values are guaranteed.

²⁰ Bitonto, A., and Harris, P. (eds), *Lobbying in Europe: Public Affairs and the Lobbying Industry in 28 EU Countries*, Palgrave MacMillan, 2017, p.17-30.

Chapter I – The history and jurisprudential evolution of lobbying regulation in the US and the EU

1.1 - The Right to Petition the Government and the First Amendment

When analysing the regulation of lobbying in the United States, the first thing that must be kept in mind is that lobbying is a phenomenon that has emerged organically in Anglo-Saxon countries before others. No scholars have been able to find the precise moment in which lobbying was born. The first usage of the word ‘lobby’ in a political context can be found in Great Britain in 1640, referring to the lobby preceding the entrance to the House of Commons in London.²¹ The first usage of the word as a verb, as in, to lobby somebody, can be found in the United States in 1832.²² Senator Robert C. Byrd charted in 1989 the fragmented history of lobbying in the United States throughout the XIX century, noting the immediate professionalization of actors who were hired by citizens or organised groups to advance their own interests.²³ By the second half of the century, with the growth of railroad construction, lobbying began to increase in size and frequency as a phenomenon and had become altogether common in Washington. At the beginning of the XX century, lobbying had already entered the public consciousness and would only continue to grow as a phenomenon in the further decades, spurred by the economic development of the country.²⁴

It has been argued by American jurisprudence²⁵ and scholars²⁶ that lobbying in the United States lays its roots in the First Amendment, especially by the norm pertaining to the Right to Petition. The text of the First Amendment of the American Constitution is as follows:

²¹ Petrillo, P.L., *Democrazie sotto pressione – Parlamenti e lobby nel diritto pubblico comparato*, Giuffrè Editore, Milan, 2011, p.47.

²² *Ibid.*

²³ Senator Byrd, Robert C., Lobbyists, in *The Senate, 1789-1989*, vol. 2, pp. 491-508, 1989.

²⁴ *Ibid.*

²⁵ It should be stated that the Supreme Court has never outright said in a majority opinion that lobbying is a fundamental right guaranteed by the Constitution. However, as can be seen in *United States v. Harriss*, extensive regulation of lobbying has always run the risk of interfering in the First Amendment, a fact that had been well accepted by Congress after *Harriss*, and which made regulation of the phenomenon a very delicate affair. This will be examined further in the chapter.

²⁶ Nicholas W. Allard, Lobbying is an Honorable Profession: The Right to Petition and the Competition to Be Right, 19 *Stan. L. & Pol'y Rev.* 23 (2008). Of the same opinion, see also Petrillo, P.L., *Democrazie sotto pressione – Parlamenti e lobby nel diritto pubblico comparato*, Giuffrè Editore, Milan, 2011.

« Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. »²⁷

The “right to petition the Government for a redress of grievances” is perhaps not as often mentioned as the other provisions of the Article, but it has informed much of the scholarship and jurisprudence regarding the practice of lobbying in the United States. It has, however, also been very controversial. Legal scholarship is divided on framing the Right to Petition: while some see it as a direct equation of it with lobbying, others see “petitioning” and “lobbying” as two distinct things. Most criticism towards the former opinion comes from the fact that petitioning, in origin, was a formal process, regulated by Congress.²⁸ At the beginning of the United States’ history people and groups of signatories could submit formal complaints to Congress for a redress of grievances. These complaints would be read out loud on the Congress floor during sessions.²⁹ The system was heavily used in the XVIII century and for a large part of the XIX century, but eventually fell into disuse,³⁰ being substituted by lobbying activities as we know them today – direct meetings and grassroots campaigns organised by hired professionals.

Scholars arguing for a distinction between petitioning and lobbying use the history and disappearance of petitioning to argue that lobbying enjoys no constitutional protection in the United States.³¹ The issue seems to be semantical, rather than ethical. We have already attempted to define the term “lobbying”, but it’s probably from divergence about the meaning of the term that this debate has originated. Not just some scholars, but even Justice Hugo Lafayette Black (at the time in which he was still a Senator), have argued for a distinction between the two terms. While “petitioning” is seen as a positive exercise of a constitutional right, “lobbying” has often been framed pejoratively as a network of informal contacts between an individual and the legislator to influence its own actions, though bribery, electoral financing or the use of personal relationships.³² But the distinction between lobbying and petitioning is far more muddled than what it might seem

²⁷ US Const. amend. I.

²⁸ Maggie McKinley, *Lobbying and the Petition Clause*, 68 *Stan. L. Rev.* 1131 (2016), p.1136.

²⁹ *Ibid.*

³⁰ *Ibid.* p.1159.

³¹ *Ibid.*

³² Congressional Research Service, *Congress and Pressure groups: Lobbying in a Modern Democracy* (1986), US Government Printing Office.

at a first glance – after all, one of the reasons for the decline of the formal petitioning process has been because of the emergence of lobbyists being hired to do the same exact thing.³³ It is interesting to note that even in the formal petition process petitioners had frequently taken up using “argument, charts, maps, and proposed statutory language” in the attempt to convince Congress³⁴ – rather similarly to what a hired lobbyist would do today when lobbying Congress.

If we get over the issue of semantics, it is possible to reconcile both interpretations. The criticism that has been most often levied at lobbyists is that they enjoy privileged access to legislators, due to the political power that the lobbying group or individual enjoys. But we have already argued that the two conditions necessary for ethical lobbying are the transparency of lobbying contacts and the equality of all interest groups in accessing the public decision maker. As such, by using these two principles and by contextualising the Petition Clause it is possible to equate petitioning with lobbying, removing the distinction between the two. The methods are the same – attempting to convince through argument the legislator to take a determinate action. Criticism of lobbyists in the second half of the XIX century and onwards had mostly focused on their excesses, centred around outlandish gifts and favours to gain the favour of decision makers, such as those carried out by Samuel Colt in the early 1850s attempting to win support for a seven-year extension of his patent.³⁵ But if gifts and favours are prohibited (and the prohibition enforced), if lobbyists are allocated equal participation and are held to standards of transparency then lobbying and petitioning would become the same thing, with the only difference being that lobbying is usually done by a specialised professional hired by the actor petitioning the government. Chapter II will try to analyse whether the current regulatory system of lobbying in the United States (and in the European Union) satisfies these three principles of transparency, equality of access, and enforcement of provisions.

1.1.1 - Madison’s Federalist Paper No. 10

When writing about the United States’ view and regulation of lobbying it is necessary to understand society’s vision at large regarding a determinate subject. Chapter 3 of the thesis will deal with the differences between lobbying in the United States and in the

³³ Maggie McKinley, *Lobbying and the Petition Clause*, 68 *Stan. L. Rev.* 1131 (2016) p.1155.

³⁴ *Ibid.* p.1152.

³⁵ Senator Byrd, Robert C., *Lobbyists*, in *The Senate, 1789-1989*, vol. 2, pp. 491-508, 1989.

European Union. But it must be understood that the two different “styles” of lobbying (and regulation) come from a larger vision of society. While European countries have often seen themselves as “neo-corporatist”, a unitary vision of collaboration between the government, society, employers and employees,³⁶ the United States have adopted instead a “pluralist” stance. What this means is that while in the European countries represented interests have the objective of cooperating together to reach an agreement that satisfies everyone, in the United States interests tend far more to compete with one another, and to end up in tugs-of-war³⁷. In the United States having winners and losers in advancing an interest is far more likely. How has this understanding of society developed?

The pluralist view of organised interests in the United States can find its roots (from which we can subsequently find elements for understanding the American jurisprudence focused around lobbying) inside the *Federalist Papers*. The Federalist Papers were a series of articles by Alexander Hamilton and James Madison written between 1787 and 1788, in the period of bitter debate regarding the ratification of the United States Constitution. The Federalist Papers are extremely useful to understand l'*esprit de loi* of the American constitution, and many scholars have already used them for this purpose. The article that interests us the most is *Federalist No. 10*, written by James Madison.³⁸ *Federalist No. 10* is a reflection on the nature of faction in a nation. Factions are defined by Madison as «a number of citizens, whether amounting to a majority or minority of a whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, and to the permanent and aggregate interests of the community».³⁹ The idea is of minority interests, opposed to the general interests of the community. Madison then argues that that factions can either be prevented, or that their effects can be controlled. The cost of preventing factions, however, would be a direct contradiction of the American experiment: according to Madison, the only ways to remove the causes of factionalism in society is to either destroy liberty itself («Liberty is to faction what air is to fire, an aliment without which it instantly expires»)⁴⁰ or to give «each citizen the same opinions, passions and interests»⁴¹ («impracticable» due to human nature itself, which

³⁶ Mihut, L., Lobbying in the United States and the European Union: New Developments in Lobbying Regulation (2008), Romanian Journal of European Affairs, vol.8 no.4.

³⁷ *Ibid.*

³⁸ Madison, J. *The Union as a Safeguard Against Domestic Faction and Insurrection (Federalist n°10) (1787)* Taken from: http://avalon.law.yale.edu/18th_century/fed10.asp

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

through reason gives each human being different opinions – uniformity of ideas is impossible by definition). Thus, for Madison faction is sown in the nature of man. It is not possible to prevent its causes, it is only possible to control its effects. And it is here that it is possible to see what would become one of the basic foundations of the American constitution. A form of direct democracy (which Madison calls «pure democracy») would run the risk of creating a potential tyranny of the majority, in which a majority in government could constrain a weaker minority and oppress it. Madison argues instead for the Republican form of government, which by today’s standards we would define as “representative democracy”. By delegating the government to a small number of citizens, it becomes possible to add an additional separation between the general population and men elected to be in government «whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations». ⁴² Madison then went on to define the balancing act between federal and national government: after all, the *Federalist Papers* were written to convince people to be in favour of the Federation.

There are several elements that can be gleaned from *Federalist No. 10*. First, we can see how factionalism is an evil to be controlled, rather than prevented. But the most important idea is his argument in favour of the Republican form of government. Representative democracy partially removes a government from its people. Out of this necessity the need for the possibility of people to petition the government (contained in the First Amendment) arises. If the Government is removed from its people, then an informational asymmetry is born, and must be remedied. Not only that, but the responsibility of Government to balance factions is clearly stated in the text: «a landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government». ⁴³ The main difference in the vision of society between the United States and European countries regarding interests (or factions) becomes apparent: they are fundamentally opposed, and they are something to be balanced with one another, rather than mediated.

⁴² *Ibid.*

⁴³ *Ibid.*

1.2 - The US Federal Regulation of Lobbying Act of 1946

Much of the bad reputation lobbyists enjoy in the general American public can be easily explained by the behaviour of lobbyists towards the end of the XIX century and in the first half of the XX century, until the end of World War II.⁴⁴ The Federal Regulation of Lobbying Act of 1946 was the first attempt in the United States to organically regulate the phenomenon of lobbying⁴⁵, while Europe was still recovering from World War II. Approved as Title III of the Legislative Reorganization Act of 1946, it had been long discussed before drafting - but the Act itself was hastily written, a fact that would bring its downfall a decade later. The origins of the Act can be found in the perceived excesses of lobbyists before World War II, who from the 1920s onwards started adopting more and more aggressive campaigns, stopping at nothing to achieve their objectives.⁴⁶ In particular, the furious assault by public utility lobbyists on the Wheeler-Rayburn bill (which attempted to break up public utility holding companies) in 1935 convinced Congress, and especially Senator (and future Justice of the Supreme Court) Hugo Lafayette Black that these excesses had to be contained, or at least to become transparent.⁴⁷

After World War II, an opportunity for this finally appeared. The Joint Committee on the Organization of Congress (counselled by the American Political Science Association) drafted the Federal Regulation of Lobbying Act to stop lobbyists from bottlenecking the legislative process, and recommended that Congress adopt it.⁴⁸ By 1946 35 states had already adopted lobbying disclosure laws, but a general regulation at a Federal level was completely absent.⁴⁹ The Federal Regulation of Lobbying Act found its origins in both the Federal Corrupt Practices Act and the failed draft bill of 1936 on lobbying disclosure.⁵⁰ It received surprisingly little discussion from Congress and was hastily approved⁵¹ by a Congress supportive of its parent bill.

⁴⁴ Congressional Research Service, *Congress and Pressure groups: Lobbying in a Modern Democracy* (1986), US Government Printing Office, p.3-10, 41.

⁴⁵ There had been some minor laws enacted in other statutes regulating lobbying by tax-exempt charitable groups, utility companies, federal ship building ventures and propaganda agents of foreign governments. However, the FRLA was the first Act to regulate lobbying under one law in all sectors.

⁴⁶ Maggie McKinley, *Lobbying and the Petition Clause*, 68 *Stan. L. Rev.* 1131 (2016) p.1160.

⁴⁷ *Ibid.* p.1158.

⁴⁸ Galloway, G. *The Operation of the Legislative Reorganization Act of 1946*, *The American Political Science Review*, vol. 45, no^o1 (1951) p. 65-67.

⁴⁹ Congressional Research Service, *Congress and Pressure groups: Lobbying in a Modern Democracy* (1986), US Government Printing Office, p.41.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, p.43.

The Federal Regulation of Lobbying Act is very interesting experiment to analyse. We have already seen how transparency is one of the requirements for a functional regulation of lobbying, and the entire Title's objective was an attempt to increase it. It also shares some similarities to the laws that would follow it, the Lobbying Disclosure Act of 1995 and the Honest Leadership and Open Government Act of 2006. For the first time, the FRLA introduced the requirement of filing a quarterly statement with the House of Representatives Clerk and with the Secretary of the Senate.⁵² It (indirectly) defined a lobbyist as «any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States»⁵³ and ordered lobbyists to write a detailed account of incomes and expenses of any kind. Reports would have included the name of the lobbyist; the name of the client and what interest it represented; how much the lobbyist would be paid, by whom and how much he would be paid for lobbying expenses.⁵⁴ Lobbyists were also required to state the proposed legislation they were employed to support or oppose.⁵⁵ These transparency provisions also extended to contributions: the lobbyist had to file a detailed and exact account of both solicited and received contributions. In case of donations larger than 500\$, the lobbyist had to indicate the donor's name and address, as well as the name and address of every person to whom a contribution was made.⁵⁶ Failure to register and disclose these quarterly statements could bring a misdemeanour charge with the possibility of imprisonment up to 12 months. Individuals convicted were barred from resuming lobbying activities for three years after conviction.⁵⁷ Violation of this provision would bring even more severe sanctions, with a felony charge punished by a fine of maximum \$10,000 and an imprisonment of up to 5 years.⁵⁸

Grassroots lobbying expenditures were also included in the transparency provisions, requiring disclosure of «the names of any papers, periodicals, magazines or other publications in which [the lobbyist] has caused to be published any articles or editorials».⁵⁹ 1994's attempt to regulate lobbying did try to include provisions requiring disclosure of grassroots lobbying, but Republican opposition to this particular provision

⁵² Federal Regulation of Lobbying Act of 1946, Pub. L. 601, Title III §§305, 308.

⁵³ *Ibid.* §308

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* §305

⁵⁷ *Ibid.* §310

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* §308

would bring the draft law to sink, due to a Republican filibuster.⁶⁰ In some ways, the FRLA was very advanced for its time: why then did the necessity arise of creating new legislation in 1996 and 2006? The FRLA had, unfortunately, unclear statutory language and very large loopholes, which became clearly apparent when the Supreme Court gave its judgement in *United States v. Harriss*.⁶¹ The act wouldn't be repealed until 1995, with the approval of the Lobbying Disclosure Act, but it would die a death by a thousand cuts before that nonetheless.

1.2.1 - *Harriss*, the “principal purpose” loophole and the failure of the Federal Regulation of Lobbying Act

Although innovative and the first real attempt in any country to regulate the phenomenon of lobbying, the Federal Regulation of Lobbying Act had heavy imperfections. The Act was a hastily written law regulating a constitutionally very delicate subject. The loopholes became clear with *United States v. Harriss*, a case decided by the US Supreme Court in 1954.⁶² The appellees, Moore and Harriss, had failed to disclose lobbying expenditures according to section §305 of the Federal Regulation of Lobbying Act. They had appealed to the District Court arguing the unconstitutionality of the Act – an opinion shared by the judges of the District Court. It must be noted that the Supreme Court actually upheld the constitutionality of the Act (reversing the decision of the District Court), but at the same time in its judgement it exposed the structural problems inherent with the legislative language of the law.

The District Court had argued three main points pertaining the Federal Regulation of Lobbying Act: « (1) that §§ 305, 307, and 308 are too vague and indefinite to meet the requirements of due process; (2) that §§ 305 and 308 violate the First Amendment guarantees of freedom of speech, freedom of the press, and the right to petition the Government; (3) that the penalty provision of § 310(b) violates the right of the people under the First Amendment to petition the Government.»⁶³ §305 of the US Code

⁶⁰ See note 78.

⁶¹ *United States v. Harriss* wasn't even a watershed moment in understanding the loopholes of the Act. Three years before the judgement, the Buchanan Hearings of 1950 heard from several witnesses that «the Act was an unsatisfactory law, that its effectiveness was limited, and that its provisions are in urgent need of strengthening and revision if the objectives of the framers [of the act] are to be fully realized». For more information, see Congressional Research Service, *Congress and Pressure groups: Lobbying in a Modern Democracy* (1986), US Government Printing Office, p.44-6.

⁶² *United States v. Harriss*, 347 US 612 (1954) Available: <https://supreme.justia.com/cases/federal/us/347/612/case.html>

⁶³ *Ibid.* p.347 US 617

pertained to the statements that had to be included in the FRLA reports. §§307 and 308 included provisions on who was included in the scope of the FRLA with §307 containing the infamous “principal purpose” requirement⁶⁴ and §308 containing another definition.⁶⁵

The Supreme Court refused to judge the latter point but disagreed with the interpretation of the first two points offered by the District Court. The government of the United States argued that the various definitions pertaining to who was included in the Act applied independently of one another – to be included in the scope of the Act a lobbyist only needed to be defined as one by either §307 or §308. The Court realised that this interpretation would be far too vague, and fall short of both the constitutional requirement of definiteness and the legislative history of the Federal Regulation of Lobbying Act. The interpretation of who was included in the scope of the FRLA had to be consequential. To avoid vagueness in interpreting the Act the Court held that the Act could only encompass «lobbying in its most commonly accepted sense», that is, «direct communication with members of Congress on pending or proposed federal legislation».⁶⁶ To be included in the scope of the Federal Regulation of Lobbying Act then a lobbyist would have to satisfy three prerequisites: «the “person must have solicited, collected or received contributions» (§307), «one of the main purposes of such “person”, or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by Congress» (§308), and «the intended method of accomplishing this purpose must have been through direct communication with members of Congress» (lobbying in its “commonly accepted sense”).⁶⁷ This was the crux of the Federal Regulation of Lobbying Act: only construed in such a way did the Lobbying Act meet the constitutional requirement of definiteness⁶⁸, according to the Court. A vaguer and more extensive interpretation would have raised questions of unconstitutionality regarding the First Amendment, in its «freedom to speak, publish and petition the Government»⁶⁹. But through this judicial construction, only an extremely limited number of people were now

⁶⁴ «The provisions of this title shall apply to any person (except a political committee as defined in the Federal Corrupt Practices Act, and duly organized State or local committees of a political party), who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly solicits, collects or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in the accomplishment of any of the following purposes: (a) The passage or defeat of any legislation by the Congress of the United States; (b) To influence directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.»

⁶⁵ «Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States [...]»

⁶⁶ *Ibid.* p.347 US 620.

⁶⁷ *Ibid.* p.347 US 623.

⁶⁸ *Ibid.* p.347 US 624.

⁶⁹ *Ibid.* p.347 US 625.

included by the scope of the Act. The Court also argued that there was nothing inherently forbidding Congress from requiring lobbying disclosure.⁷⁰ The dissenting opinions of Justice Douglas (with whom Justice Black concurred) and Justice Jackson went even further in criticising the FRLA as construed, both separately raising First Amendment concerns on the Act. What all Justices did agree on was that Congress had the power and the right to try again – but with the knowledge that this was a constitutionally delicate subject on which to tread very carefully.

Although *Harriss* had exposed the flaws in the Federal Regulation of Lobbying Act, it was far from the only element leading to the non-application of the Act. A huge part in this was also played by another flaw in the legislation itself – lack of clear enforcement mechanisms inside the Act. Being a criminal statute, the Justice Department had «inherent authority to prosecute violations» of the Federal Regulation of Lobbying Act, but the Act itself did not give specific investigatory power to it.⁷¹ Because of this, the Department took the position «that its enforcement responsibilities [were] triggered only upon receipt of a specific complaint».⁷² However, these were rare, and both Clerk and Secretary had no specific authority to monitor compliance of the Act by lobbyists either.⁷³ It was unclear who was supposed to enforce the act, and in the light of *Harriss* the registration process fell into disuse. This created a normative vacuum which would have lasted for forty years, leaving the FRLA in shambles and lobbying largely deregulated again.

1.3 - The Lobbying Disclosure Act of 1995

In the almost 50 years since the Federal Regulation of Lobbying Act, Congress had understood the numerous loopholes present inside lobbying regulation of the time with great lucidity. One example from Congress itself was the report of the Committee on Governmental Affairs of the United States Senate in 1986, documenting how Congress had already understood all of the flaws in the Federal Regulation of Lobbying Act, which

⁷⁰ *Ibid.* p.347 US 625.

⁷¹ Mary Kathryn Vanderbeck, First Amendment Constraints on Reform of the Federal Regulation of Lobbying Act, 57 *Tex. L. Rev.* 1219 (1979), p.1223-4.

⁷² *Ibid.*

⁷³ *Ibid.*

had led to its almost complete non-application.⁷⁴ Even the Lobbying Disclosure Act itself mentioned the loopholes present in the previous law.⁷⁵

There had been some attempts since *Harriss* to fix the statutory language of the FRLA before the LDA. Several attempts in the 1960s got stuck in Congress, while the draft bill of 1976 fell apart due to infighting between the House of Representatives and the Senate.⁷⁶ With the election of the 104th Congress, things finally seemed to change. The deregulation of lobbying had gone on for too long, and the understanding of having to fix the failures of lobbying regulation in the FRLA became increasingly bipartisan. A draft law had been proposed in 1994 by the 103rd Congress, sharing many similarities and even the name with what would become a year later the Lobbying Disclosure Act.⁷⁷ While enjoying apparent bipartisan support, the draft law fell apart in the Senate due to Republican filibustering, who opposed the regulation of grassroots lobbying contained in 1994's bill.⁷⁸ A year later, Congress the necessity to regulate lobbying and fix the loopholes contained in the Federal Regulation of Lobbying Act was still present. Congressmen understood that fixing the regulation of lobbying was not only needed to increase the representativeness of Government, but that it would also increase public confidence in the integrity of Government⁷⁹ - a point that had already been made by scholars and Congressmen in earlier decades.⁸⁰

A compromise was meticulously mediated by both sides, and one year later a new law was ready. The Lobbying Disclosure Act was passed by near-unanimous approval (and even by voice vote in the House of Representatives).⁸¹ It is interesting to note that Congress knew so well the mechanisms by which previous attempts had collapsed that the House of Representatives decided to abstain from amendments to approve the law as

⁷⁴ Congressional Research Service, *Congress and Pressure Groups: Lobbying in a Modern Democracy* (1986) Available: <https://babel.hathitrust.org/cgi/pt?id=pst.000011956068;view=1up;seq=1>

⁷⁵ «Congress finds that [...] existing lobbying disclosure statutes have been ineffective because of unclear statutory language, weak administrative and enforcement provisions, and an absence of clear guidance as to who is required to register and what they are required to disclose », cf. §2 Lobbying Disclosure Act, S.1060, 104th Cong. (1995).

⁷⁶ Mary Kathryn Vanderbeck, First Amendment Constraints on Reform of the Federal Regulation of Lobbying Act, 57 *Tex. L. Rev.* 1219 (1979), p.1224-25.

⁷⁷ Lobbying Disclosure Act, S.349, 103rd Cong. (1994).

⁷⁸ Clymer, A., (Oct. 7, 1994) G.O.P. Filibuster Deals a Setback to Lobbying Bill, *The New York Times*. Available: <https://www.nytimes.com/1994/10/07/us/gop-filibuster-deals-a-setback-to-lobbying-bill.html>

⁷⁹ Lobbying Disclosure Act of 1995, Pub. Law No. 104-65, §2.

⁸⁰ Mary Kathryn Vanderbeck, First Amendment Constraints on Reform of the Federal Regulation of Lobbying Act, 57 *Tex. L. Rev.* 1219 (1979), p. 1232-34.

⁸¹ Lobbying Disclosure Act, H.R. 2564, 104th Cong. (1995) Available: <https://www.congress.gov/bill/104th-congress/senate-bill/1060/all-actions>

quickly and as painlessly as possible.⁸² The Lobbying Disclosure Act is still the law in place in the United States today, even though it would be amended twelve years later with the Honest Leadership and Open Government Act of 2007.⁸³

The drafters of the Bill were extremely careful not to repeat the mistakes of the Federal Regulation of Lobbying Act. The LDA defined lobbyists and lobbying activities through the definition of lobbying contacts, as «any oral or written communication to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to: the formulation, modification or adoption of Federal legislation (including legislative proposals); the formulation, modification or adoption of a Federal rule, regulation, Executive order or any other program, policy or position of the United States Government; the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit or license); or the nomination or confirmation of a person for a position subject to confirmation by the Senate.»⁸⁴

Gone were the broad strokes of the Federal Regulation of Lobbying Act: one of the merits of the Lobbying Disclosure Act was to be broad enough to include most lobbying activities (except for grassroots lobbying, due to the aforementioned Republican opposition) but specific enough to frame them accurately and avoid the confusion present in the previous law. The FRLA standard of “principal purpose”, the origin of the biggest loophole in the Act, was exchanged for a threshold of more than 20% of an individual’s time over a six-month period spent lobbying to be included by the provisions of the LDA.⁸⁵ The Act also introduced a distinction between specialised (hired) lobbying firms and in-house lobbying departments, setting differentiated thresholds to be included in its provisions.⁸⁶ These thresholds were set at \$5000 income per client for lobbying firms, and \$20,000 in lobbying expenses for in-house lobbyists, both during the course of a six-month period.⁸⁷ Unlike with the quarterly reports of the Federal Regulation of Lobbying Act, the Lobbying Disclosure Act required (not including the initial registration of lobbyists and client) the lobbying firm to send a report every six months detailing

⁸² 141 Cong. Rec. 13099-13110 (1995).

⁸³ 2 USC., §261-70, §1601-14.

⁸⁴ Lobbying Disclosure Act of 1995, Pub. Law No. 104-65 §3.

⁸⁵ *Ibid.* §3 par. 10.

⁸⁶ *Ibid.* §4(a)(3)(A). See also Luneburg, W.V., The Evolution of Federal Lobbying Regulation: Where We are Now and Where We Should Be Going, 41 *McGeorge L. Rev.* 85 (2009), p.91

⁸⁷ *Ibid.*

lobbying activities.⁸⁸ These, like with the FRLA regulation, would be handled by the Secretary of the Senate and the Clerk of the House of Representatives.⁸⁹

The reports mandated by the LDA each semester would eventually become and be known as the LD-1 and the LD-2⁹⁰, which will be analysed further in Chapter 2. Filed by the lobbying firms themselves (with guidance from Clerk and Secretary), the reports are a statement of the name of the lobbying firm, name of the client and the name of each employee of the registrant expected to act as a lobbyist on behalf of the client.⁹¹ They also require the registrant to state the general issues expected to be lobbied on behalf of the client, and even specific issues lobbied in the period preceding the report.⁹² The LDA also required a declaration of the Houses of Congress and Federal agencies lobbied, but with no specificity: registrants weren't asked to detail all lobbying contacts held with individuals – a feature present in some other regulatory systems in the world.⁹³ Finally, regarding the “revolving doors” phenomenon the LDA did not ultimately increase the small pre-existing one year “cooling-off period” between switching careers.

It must be kept in mind that notwithstanding the failure of previous regulation the Lobbying Disclosure Act was still one of the first organic laws attempting to regulate lobbying (or at least its transparency) throughout the world. Canada regulated lobbying only in 2008,⁹⁴ France in 2009⁹⁵ and the European Union as a whole only started looking at the regulation of lobbying from 2005 onwards (although the European Parliament introduced its own regulatory scheme in 1996, soon after the LDA). The Bill, much like the Federal Regulation of Lobbying Act, was effectively treading new ground in attempting to regulate the activity. How effective it is today, together with the amendments of the Honest Leadership and Open Government Act of 2007, will be explored in Chapter 2.

⁸⁸ *Ibid.* §5

⁸⁹ *Ibid.*

⁹⁰ Luneburg, W.V., The Evolution of Federal Lobbying Regulation: Where We are Now and Where We Should Be Going, 41 *McGeorge L. Rev.* 85 (2009), p.92-9.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ Possible examples are Canada, Slovenia, Austria and Poland. See Gentili, A., Transparency register, work in progress, Evaluation Report (2013).

⁹⁴ Gentili, A., Transparency register, work in progress, Evaluation Report (2013).

⁹⁵ *Ibid.*

1.3.1 - The enactment of a gift ban in the Senate and in the House of Representatives

Not all the laws pertaining to lobbyists introduced by the 104th Congress were contained in the Lobbying Disclosure Act. A gift ban was also enacted in the same period as the Lobbying Disclosure Act, but it had to be approved in separate resolutions due to procedural reasons – in this case, the impossibility of the House of Representatives to legislate over the Senate and vice-versa. Approved as H.Res.250⁹⁶ and as S.Res.158⁹⁷, the resolutions placed clear limits on gifts to Members, officers and employees of both Houses. Strict restrictions were placed on the receiving on gifts by Members of Congress, in slightly different ways in the House and the Senate. What both statutes had in common was that in both cases Members, their aides and Congressional employees could not receive gifts of a certain value. Not all Members of Congress would comply, however, with the Abramoff scandals becoming the most well-known.

1.4 - The Honest Leadership and Open Government Act of 2007

In parallel with the European's Commission attempt to regulate lobbying with the European Transparency Register, the United States Congress would return to the subject matter again in 2007. The Honest Leadership and Open Government Act was one of the very first draft laws considered by the newly elected 110th Congress.⁹⁸ In contrast to the 104th Congress that approved the Lobbying Disclosure Act (which had a Republican majority), the 110th Congress enjoyed a Democrat majority, but the regulation of lobbying continued to enjoy large bipartisan support.⁹⁹ The need to return to lobbying regulation had been spurred by an egregious handful of lobbying scandals, specifically by the abuses of Jack Abramoff, Bob Ney and Randy "Duke" Cunningham.¹⁰⁰

Abramoff became in 2005 perhaps the United States' most notorious lobbyist. The extent of Abramoff's criminal behaviour was remarkable. While hired as a lobbyist for Indian tribes seeking a license for casinos, he ignored existing provisions on revolving doors for

⁹⁶ To amend the Rules of the House of Representatives to provide for gift reform, H.Res.250, 104th Congress (1995)

⁹⁷ A resolution to provide for Senate gift reform, S.Res.158, 104th Congress (1995).

⁹⁸ The Bill was actually the very first one introduced by the Senate after 2006's elections, as S.1 of the 110th Congress. <https://www.congress.gov/bill/110th-congress/senate-bill/1>

⁹⁹ 5 (out of 17) of the bill's cosponsors were Republicans. The Bill was approved in the House with a vote of 411-8 (roll call no.763), and in the Senate with a vote of 83-14 (Record Vote Number: 294), indicating large bipartisan support.

¹⁰⁰ Petrillo, P.L., *Democrazie sotto pressione – Parlamenti e lobby nel diritto pubblico comparato*, Giuffrè Editore, Milan, 2011., p. 239-40.

Congressmen¹⁰¹ and even attempted to scam his own clients by lobbying against them.¹⁰² Abramoff also pled guilty to counts of bribery, and admitted a violation of Congressional gift rules¹⁰³. This latter point in particular caught the attention of Congress: his use of free meals, expensive gifts and all-expenses-paid trips (which were not regulated by the LDA to punish the lobbyist, but only the Member of Congress under enforcement by the Committee on Standards of Official Conduct in the House and the Committee on Ethics in the Senate)¹⁰⁴ to influence Congress Members, officials and employees. This was a signal that the LDA was not doing enough to prevent lobbyists from using gifts to obtain legislative favours. Partly out of his vicinity to Republican politicians the Democrat-majority 110th Congress was spurred into action, after 2006's Congressional electoral campaign from Democrats focused on the excesses of American lobbyists, after the various scandals had been revealed.¹⁰⁵

Proposed during the very first session of the newly elected Congress, the Honest Leadership and Open Government Act was a series of amendments to the Lobbying Disclosure Act aimed at strengthening it. House of Representatives and Senate rules were also amended to this aim.¹⁰⁶ The frequency of reports to the Clerk and the Secretary were increased from twice a year to a quarterly fashion, like in the Federal Regulation of Lobbying Act regime.¹⁰⁷ The emphasis was also placed on having LD reports be available to the general public on the Internet through the websites of the Clerk and Secretary.¹⁰⁸ The ban on gifts was restated by integrating the LDA with the ban on gifts contained in Congress rules.¹⁰⁹ It could be argued that the objective might have been to place the burden of criminal behaviour on the giver of gifts (lobbyists), rather than just the receiver like with the LDA regime. Civil penalties were increased, and criminal penalties were introduced by the Honest Leadership and Open Government Act, punishing the aforementioned illegal gift-giving by lobbyists and other various violations of the statute. These could now be punished with a maximum sentence of 5 years.¹¹⁰ The economic

¹⁰¹ United States of America v. Jack A. Abramoff - Plea Agreement (2006), United States District Court for the District of Columbia. Available: <http://news.findlaw.com/wsj/docs/abramoff/usabrmff10306plea.pdf>

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ See notes 204 and 97.

¹⁰⁵ See the statements made by several Democrat Congressmen on the Congressional Record during discussion of the Honest Leadership and Open Government Act.

¹⁰⁶ Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81 §531-46.

¹⁰⁷ *Ibid.* §201

¹⁰⁸ *Ibid.*, §209(a)

¹⁰⁹ *Ibid.* §206

¹¹⁰ *Ibid.* §211

thresholds for having to comply with LDA provisions were adapted to lobbying income and expenditures in a quarterly, rather than semi-annual, interval.¹¹¹

The Honest Leadership and Open Government Act also intervened heavily in the subject of campaign contributions. Regulation of campaign funding predates lobbying regulation, as will be examined in Chapter 2. But the HLOGA integrated campaign contributions inside lobbying regulation, to ensure transparency in campaign donations by lobbyists. The Act required lobbyists to disclose to the Federal Election Commission any donation higher than 200\$ to any federal candidate or office-holder, and it also required them to disclose any PACs established or under control of the lobbying firm.¹¹² Finally, it required them to disclose any expenses used to pay for events connected to covered legislative or executive branch officials: these include those in honor or recognition of officials, of entities named after a legislative branch official, to entities established or controlled by officials, or of events (such as conferences) held by or for the benefit of officials.¹¹³ The HLOGA also regulated the subject of “bundled contributions”. Bundled contributions are the phenomenon by which a lobbyist (or anyone else who wants preferential access to a decision-maker) collects electoral campaign contributions, not including his own, for the benefit of an official. These would be then brought as a “dowry” to the decision-maker, now at risk of giving the lobbyist preferential access. Thanks to the HLOGA bundled contributions of more than 15,000\$ now had to be disclosed in the quarterly reports.¹¹⁴ Finally, the Honest Leadership and Open Government Act slightly increased the cool-off period for Senators to become lobbyists, from one year to two. The period for House members was left unchanged.¹¹⁵

1.5 - The Obama Executive Orders

Both the Lobbying Disclosure Act and the Honest Leadership and Open Government Act left a regulatory hole. Lobbying the executive was still not as regulated as lobbying the legislative chambers. There were some provisions included in the two Acts pertaining to lobbying the executive: disclosure of the “specific issues” lobbied include reference to

¹¹¹ *Ibid.* §201(b)

¹¹² *Ibid.* §203

¹¹³ *Ibid.*

¹¹⁴ *Ibid.* §204

¹¹⁵ *Ibid.* §531

relevant executive branch actions¹¹⁶; all provisions on disclosure of campaign financing or indirect forms of contributions (such as sponsored events) include those directed towards executive officeholders;¹¹⁷ and finally, lobbyists must comply with the request from an executive official to disclose their client or foreign entity they are lobbying for.¹¹⁸ There were, however, a few imperfections that Executive Order 13,490 attempted to rectify.

Obama had campaigned in 2008 on an anti-lobbying platform, following the same campaign Congress Democrats had two years earlier.¹¹⁹ Executive Order 13,490 was in fact the second executive order approved by the newly-elected President, and it attempted to further regulate lobbying the executive. Due to the impossibility for the President to create criminal penalties, the Order instead took the form of a compulsory pledge all appointees to the executive had to sign, and which would become an integral part of their contract.¹²⁰ In case of the breaches of the pledge employees could be sued for relief by the Attorney General of the United States.¹²¹

The pledge focused mostly on the issues of gifts and revolving doors. Similarly to Congress officials, executive appointees were now banned from receiving gifts from registered lobbyists or lobbying organizations for the duration of their service.¹²² The provisions pertaining to revolving doors attempted to regulate both lobbyists entering Government and appointees leaving Government to become lobbyists. In the former case, the pledge ordered appointees not to participate in particular matters directly related to former employees or former clients for a period of two years after appointment.¹²³ Specifically in the case of lobbyists, the Order also forbade a former lobbyist from participating in any particular matters or specific issue areas on which they had lobbied in the two years prior appointment.¹²⁴ Like the previous restriction, this provision would be valid for a period of two years since appointment. Finally, those leaving Government service to become lobbyists were forbidden from lobbying «any covered executive branch officials or non-career Senior Executive service appointee for the remainder of the

¹¹⁶ 2 USC., §1604.

¹¹⁷ *Ibid.*

¹¹⁸ 2 USC., §1609.

¹¹⁹ Luneburg, W.V., *The Evolution of Federal Lobbying Regulation: Where We are Now and Where We Should Be Going*, 41 *McGeorge L. Rev.* 85 (2009), p.87.

¹²⁰ Exec. Order No. 13,490, *Federal Register* Vol. 74, No.15 (2009), p.4673 §1.

¹²¹ *Ibid.* §5

¹²² *Ibid.* §1 Art. 1

¹²³ *Ibid.* §1 art. 2

¹²⁴ *Ibid.* §1 art. 3

Administration». ¹²⁵ Like with the Acts passed by Congress, lobbyists were still not required to disclose specific lobbying contacts in the executive.

1.6 - The progenitor of EU lobbying: the European Economic and Social Committee and the neo-corporatist tradition in Europe

The tradition of interest representation in Europe varied radically from that of the United States, and for a large part of its history the European Union stance towards organised interests reflected this. There are two fundamental differences between the United States and the European Union in both its vision and regulation of lobbying. The first one is that the European Union has lacked for a large part of its history an explicit guarantee of the right to lobby¹²⁶, as contained in the First Amendment of the United States Constitution as the right to petition the government (although the right to assembly and the freedom of speech have also been discussed regarding the right to lobby). The European Union has often acknowledged the legitimacy of interest representation, but not to such an essential degree as the constitutional protections towards lobbying in the United States. The second difference is no less important: the pluralist view of the United States of a society as an ecosystem of factions and interests. Like Madison described in *Federalist N°10*, these interests might be adversed to one another or even to the general interest itself. It is here that the lobbying paradigm takes place: a decision-maker will hear all interests in conflict to reach his own conclusion and be able to legislate effectively. There are countless examples in the United States of this conflict between different organised interests: public health campaigners against tobacco firms, groups advocating the right to bear arms against groups advocating for gun control, and so on.

Europe has lacked this vision, preferring instead a far more conciliatory and mediating approach to interests in conflict. Unlike with the “pluralist” stance of the United States, shaped by its constitutional history, Europe (and for a large amount of time, the European Union) has reflected until recently a “neo-corporatist” approach instead. Nowhere was this more evident than in the European Economic and Social Committee. It was established in 1958 by the Treaty of Rome, in articles 194 to 198. The role of the EESC

¹²⁵ *Ibid.* §1 art. 4-5

¹²⁶ This has changed, relatively recently. The Maastricht Treaty added with Article 138d a «right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Community’s fields of activity and which affects him directly». Article 12 of the Lisbon Treaty, signed in 2007, was similar. It will be examined further below.

had been expanded in further treaties, such as the Treaty of Maastricht of 1992¹²⁷ and the Treaty of Lisbon of 2007.¹²⁸ However, its relevance seems to have rather decreased throughout the decades.¹²⁹

The EESC is an advisory body tasked with giving its own opinions to the Commission and other EU organs. Members of the Plenary are nominated by Member States and approved by the Council of the European Union by unanimity.¹³⁰ The Plenary is composed by a maximum 350 members¹³¹ and are divided in three groups, following a clearly neo-corporatist model: Group I, composed by employer associations; Group II, composed by worker associations (trade unions); and Group III, composed by other and general interests (such as public health campaigners, environmental groups and so on).¹³² The EESC's creation was inspired by pre-existing public governance institutions present in Member States, such as in the Netherlands and Belgium.¹³³ Depending on the subject matter, advisory opinions on the law-making activities of the Commission can either be mandatory or optional.¹³⁴ However, as mentioned the relevance of the European Economic and Social Committee has been on the wane, notwithstanding amendments that have attempted to empower it. This seems to be more of a structural change in the European Union than anything else. The EESC has never enjoyed the rank of an official EU institution, instead being defined as a body.¹³⁵ Many interest groups have had the perception of the body being side-lined and relegated to a secondary role in the larger law-making process of the European Union institutions.¹³⁶ Because of this, it can be argued that conventional lobbying seems to have largely cannibalised the role of the EESC from the Maastricht Treaty onwards. This has been especially evident in the role of Group III, many members of which have almost completely transitioned to interest representation through lobbying activities. But Group III has been far from the only category to rely less on the EESC: both trade unions and employer associations have

¹²⁷ Treaty of Maastricht, art. 8(c), 64-66.

¹²⁸ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007) 2007/C 306/01, Art. 246-51.

¹²⁹ Bomberg, E., Peterson, J., Corbett, R., *The European Union: How does it work?* (2012), Oxford University Press, p.71.

¹³⁰ Art 301 TFEU

¹³¹ *Ibid.*

¹³² Art 300/2 TFEU

¹³³ Greenwood, J. *Interest Representation in the European Union* (2011), Palgrave Macmillan, p.45.

¹³⁴ Art 304 TFEU

¹³⁵ Ch. 3 "The Union's Advisory Bodies"

¹³⁶ Mihut, L., *Lobbying in the United States and the European Union: New Developments in Lobbying Regulation* (2008), Romanian Journal of European Affairs, vol.8 no.4.

opened offices in Brussels, from which they lobby European policymakers. Their role in the EESC is only preserved as that of “social partners”, mostly focused around rights and regulations regarding employment.¹³⁷

The question at this point might be why. Much has been debated in the past on the emergence of “Euro-corporatism”, a concept usually discussed in political science rather than legal studies. The debate at the time was focused on whether the neo-corporatist tradition of European Union countries (mostly centred around wage bargaining between trade unions and employers, mediated by the government) would shift upwards to the European Union. The possibility was there that the European institutions would get more and more involved in this process of wage-bargaining, to which general interest representation was tied. However, this did not happen. Instead of shifting upwards, neo-corporatism remained safely anchored to the national sphere.¹³⁸ All three groups started lobbying independently decision-makers in a gradual process. Employers’ associations began lobbying for favourable regulation, workers unions began lobbying for social policy at an EU level, while the interests represented in Group III started lobbying for their own separate issues.¹³⁹ Euro-corporatism had not materialised: in its place, the landscape of the European Union seemed instead to move to a pluralist vision of organised interests as well – just like in the United States, the only difference being the presence of peak associations in the European Union. As we will see, the European Commission would slowly shift in the past two decades from a neo-corporatist view to a pluralist one.

It would be an error to mistake the absence of Euro-corporatism for the general death of neo-corporatism. The neo-corporatist stance is alive in several European countries, first of which Germany. But it’s interesting to note how neo-corporatist bargaining has become more and more focused on the two issues of workers’ rights and wages. Several European countries have adopted in the meanwhile separate regulation of lobbying activities, implying that the phenomenon of lobbying may be evolving in parallel and altogether separately from the European neo-corporatist tradition, not just in the European Union but in its member states as well. It might be argued that the idea in the United

¹³⁷ Mihut, L., Lobbying in the United States and the European Union: New Developments in Lobbying Regulation (2008), Romanian Journal of European Affairs, vol.8 no.4.

¹³⁸ Woll, C., Lobbying in the European Union: From a *sui generis* to a Comparative Perspective (2006), *Journal of European Public Policy* 13:3 p.458-9.

¹³⁹ Mihut, L., Lobbying in the United States and the European Union: New Developments in Lobbying Regulation (2008), Romanian Journal of European Affairs, vol.8 no.4.

States of lobbying as the only possible representation of interests is what has brought lobbying in the country to have such a long history compared to continental Europe. Chapter 3 will try and examine whether the different origins of interest representation in the two systems have brought to different lobbying styles and activities in the European Union and in the United States.

1.7 - The past tension between the European Parliament and the European Commission on the regulation of lobbying activities

As is well known, regulation of the European Union is in a state of constant flux. Internal procedure has changed multiple times, and this plays a large part in the general experiment of the Union.¹⁴⁰ This already creates a marked difference compared to the United States, where internal regulation of the legislative process has received only slight changes with time. Not only this, but the jurisprudence of the European Union is also informed in a large part by more informal documents and actions, such as White Papers and successive amendments to internal regulation. This is part of the reason for which regulating lobbying in the European Union has been so complicated.

As already stated, lobbying began to grow in the European Union following the approval of the Treaty of Maastricht in 1987.¹⁴¹ This doesn't seem to have been motivated by any specific provision, rather by structural changes warranted by the growth in scope and competences of the European Union itself in the past thirty years. Lobbying actions are focused around law-making: with the increase in law-making powers in the European Union, the attempt to influence the process would grow as well. In any case, Brussels has become today one of the largest hubs together with Washington D.C. for lobbying activities in the world.¹⁴²

While the US had attempted in 1946, 1995 and 2007 to regulate lobbying, an organic regulation of the phenomenon in the European Union stalled until 2007. It is extremely interesting to note why, and it can be argued that it has to do with the aforementioned

¹⁴⁰ Regulations often change in the European Union, and even the Treaties themselves have often changed the role and procedure of the European Union: see, for example, the approval of the Treaty of Lisbon, Nice, Amsterdam and Maastricht in the past 30 years. Compare this to the United States, in which in the same period the Constitution was amended only once, and in a minor way.

¹⁴¹ See note 48.

¹⁴² Coen, D., The Impact of U.S. Lobbying Practice on the European Business-Government Relationship, in *California Management Review*, Vol. 41, No.4, 1999, p.2-4.

different views of society in the two systems. Before we do that, however, it is necessary to look at the timid attempts to regulate lobbying (and ensure its transparency) in the EU, before the European Transparency Initiative of 2007. As mentioned beforehand, for a large part of EU history the European Economic and Social Committee had the role of being the privileged partner to be consulted in the Union's law-making process. With the loss of relevance of this organ (although never admitted in an official way by EU institutions), represented interests began interacting in alternative ways with the Commission and the Parliament, including by conventional lobbying activities. In particular, the law-making process of the Commission comes to mind. The European Commission places great emphasis on the process of consultations with represented interests in the formulation of policy.¹⁴³ In the words of the Commission itself «through different instruments, such as Green and White Papers, Communications, advisory committees, business test panels and ad hoc consultations».¹⁴⁴ Getting the interest parties involved in the policy formulation (and execution) process is one of the pillars of the Commission's law-making process. However, what seems to have blocked an extensive regulation of interest representation have been several definitional quandaries, not all of which have been solved by the EU institutions. First of all, the Commission had rarely used the term "lobbying" until the European Transparency Initiative, perhaps due to the negative stigma surrounding the activity in some European countries, especially Southern. It preferred instead to use the generic term "civil society". This term is not completely unwarranted: it is well-certified that non-governmental organisations (NGOs) and other non-business interests have played and still play a huge role in consultations and conventional lobbying activities. Their role in contributing to the policy-making process is acknowledged and even encouraged by Commission documents.¹⁴⁵ However, it is remarkable to note how business interests (not including ones brought by what the Commission calls "social partners") are barely mentioned compared to the other dimensions of the umbrella term "civil society organisations". Until 2007 this led to a large confusion regarding the regulation of lobbying activities.¹⁴⁶

Nowhere is this more exemplified than in the Commission's White Paper on Governance of 2001, when the European Commission attempted to define a roadmap to give larger

¹⁴³ See, for example, the Commission's White Paper on Governance of 2001, examined below.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ Greenwood, J. *Interest Representation in the European Union* (2011), Palgrave Macmillan, p.60-1.

transparency and participation to civil society organisations. Although business interests already did lobby the Commission and the Parliament, they were not included in the umbrella term of civil society organisations. This differed greatly from the European Parliament's view on interest representation.

There might be reasons as to why this confusion. The differences with the view of society in the United States can shed some light. As stated earlier, the United States' jurisprudence has always had a pluralist view of society, factions and competing interests. NGOs and businesses are all put on the same level. They all lobby the government to influence the «formulation, modification or adoption of legislation» in the words of the Lobbying Disclosure Act. The hierarchy of organised interests in the European Union (especially in the Commission) was more confused. The European Community had initially correlated interest representation with “social partners”, trade unions and employer organisations – the latter of which do not even exist in the United States as a unified and cohesive whole. Then it began opening up to what was defined as “Group C” in the European Economic and Social Committee – «other and general interests». Finally, with the growth in competences following the Treaty of Maastricht and successive treaties, business interest representatives began focusing more on lobbying the Brussels institutions themselves rather than using national governments which would take their interests upwards to the Union.¹⁴⁷ This led to a very confused debate in the Commission as to who was being regulated and in which way. For example, the White Paper on Governance of 2001 put plans forwards for the creation of CONECCS, a voluntary database on European Civil Society Organisations. In order to be eligible to sign up to CONECCS, according to a Commission Communication written a year later, « an organisation must be a non-profit representative body organised at European level, i.e. with members in two or more European Union of Candidate countries (sic); be active and have expertise in one or more of the policy areas of the Commission, have some degree of formal or institutional existence; and be prepared to provide any reasonable information about itself required by the Commission, either for insertion on the database or in support of its request for inclusion».¹⁴⁸ Business interests would apparently seem to be excluded by this, but in the 2006 Green Paper for the European Transparency Initiative

¹⁴⁷ *Ibid.*

¹⁴⁸ European Commission, Communication from the Commission - Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704.

the Commission then drew on the definition for “civil society organisation” given by the European Economic and Social Committee, which included «organisations representing [...] economic players» as well.¹⁴⁹

The other main institution influenced by lobbying, the European Parliament, would take a more pro-active stance. The Parliament introduced the earliest form of lobbying regulation (not focused around self-regulation) in an European Union institution. In 1996 the Parliament launched an incentive-based voluntary regulation scheme.¹⁵⁰ This would be the same incentives contained in the Interinstitutional Agreement between the Commission and the Parliament in 2011 for the creation of a unified Transparency Register. The register was voluntary, but those signing up for it would receive a 1-year pass for access to Parliament buildings in exchange. Although a strong incentive to stimulate registration, it was far from perfect – unregistered lobbyists who obtained an invitation to the Parliament could enter it nonetheless, and meetings held outside the Parliament were still unregulated. With the growth of organised interests (both business and non-governmental), the European Parliament began to push for a mandatory register of lobbyists, like in the United States.¹⁵¹ The United States had already introduced a mandatory register with the Lobbying Disclosure Act, and several European countries adopted mandatory lobbyist registers as well.¹⁵²

The European Transparency Initiative, however, did not create this, due to opposition from the Commission. The entire Initiative ended up being a compromise between the Parliament, pushing for more extended regulation, and the Commission, which was informed by its previous thought on setting only minimum standards for “civil society organisations”. The person responsible for launching the European Transparency Initiative was Commissioner Siim Kallas. Kallas had understood the need to regulate the phenomenon of lobbying in the European Union, realising that current measures taken in the Commission were ineffective.¹⁵³

With the European Transparency Initiative the Commission decided to act on three main points centred around interest representation: it decided to create a voluntary Register for

¹⁴⁹ European Commission, Green Paper - European Transparency Initiative, COM(2006) 194 final. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0194&from=EN>, p.7

¹⁵⁰ OJ C 261, 9.9.1996 p.72-76.

¹⁵¹ European Parliament resolution of 8 May 2008 on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions (2007/2115(INI)), OJ C 271 E, 12.11.09.

¹⁵² See note 202.

¹⁵³ *Ibid.* 92, p.58-60.

interest representatives in the Commission; to «draft a Code of Conduct», the respect of which would be a requirement for entering the Register; to «establish a monitoring and enforcement mechanism for the Code and the Register»; and to «increase transparency through reinforced application of the Commission’s consultation standards, based [...] on a standard website for internet consultations».¹⁵⁴ The aforementioned “social partners” were notably excluded from the invitation to register, as long as they lobbied in the scope of their neo-corporatist role.¹⁵⁵ Regarding the Code of Conduct, provisions for interest representatives mainly pertain to identifying oneself and one’s client correctly, to declare the interests represented, to ensure the accuracy of information provided and to not induce EU staff to contravene rules and standards of behaviour.¹⁵⁶

The complete reasons as to why the Commission’s register was voluntary are unknown, but a strong element must have been played by the Commission’s vision of interest regulation, as outlined in the aforementioned White Paper on Governance of 2001. Consultation of experts and representatives are a lifeline to the Commission’s law-making process, and the Commission had always been afraid of placing barriers to entry to the process, preferring instead a self-regulatory approach and the approval of only minimum standards for consultation. It’s interesting to note the paradox of lobbying regulation in the European Union. Lobbying regulation should guarantee the transparency of lobbying activities and the equal ease of access to law-makers by all interest representatives. In the case of the Commission, the emphasis placed on the latter element risked actively damaging the first. A discussion regarding the effectiveness of the law-making process could also be mentioned, but in any case, between 2007 and 2011 the Commission’s voluntary register was just that, voluntary. The Commission effectively lacked the ability to punish abuses, for the simple fact that it was highly unlikely that someone capable of committing abuses would sign up for the Register at all.

Effective monitoring and enforcement of the Register was also problematic: barely any resources were dedicated to monitoring registrations, with a non-existent organization at a certain point even declaring an annual lobbying expenditure of €250 million.¹⁵⁷ The individual entries in the Register were mostly focused around declaring the name of the

¹⁵⁴ European Commission, Communication from the Commission - European transparency initiative - A framework for relations with interest representatives (Register and Code of Conduct), COM(2008)323. p.2 Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0323&from=EN>

¹⁵⁵ *Ibid.*, p.3.

¹⁵⁶ *Ibid.* p.7.

¹⁵⁷ Greenwood, J. *Interest Representation in the European Union* (2011), Palgrave Macmillan, p.60.

lobbying organization, clients (in the case of lobbying firms), annual lobbying expenditure and general interests represented. The quality of data declared was initially very low: the Commission had not given clear details as to how to calculate lobbying expenditure, with the end result being of the entries either being grossly over-estimated or under-estimated.¹⁵⁸ The general idea of the Register had been put into place, but the details about how to compile reports had not been cleared up.

Things partially improved from 2009 to 2011, when a High Level Working group was formed in collaboration between the European Commission and the European Parliament. It is interesting to analyse the European Parliament's resolution of 8 May, 2008 on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions.¹⁵⁹ It is here that it is possible to see how the Parliament's view on regulating lobbying differed from that of the Commission. First of all, it's interesting to note how the resolution defended lobbying activities as «playing an essential role in the open and pluralistic dialogue on which a democratic system rests».¹⁶⁰ The resolution also emphasised the lobbyists having transparent and equal access to decision-makers – the two prerequisites for legitimacy on which lobbying rests.¹⁶¹ But most of all, it's possible to see how the pluralist view present in the United States had begun to take hold in European Union institutions as well: article 10 of the Resolution argues that all public and private interest representatives carrying out lobbying activities should be considered lobbyists and treated in the same way», no matter the role they play: professional lobbyists, in-house lobbyists, NGOs, think-tanks, trade associations, trade unions and employers' organisations, profit-making & non-profit-making organisations and lawyers were suddenly all being placed at the same level.

Considering the neo-corporatist past (and present institutions) of the European Union, this shift in thought was nothing short of revolutionary. It is impossible to measure the influence and the inspiration of what the US Congress had given the European Parliament with the Lobbying Disclosure Act of 1995 and the Honest Leadership and Open Government Act of 2006. While it's interesting to note how the initial registration scheme for lobbyists in the European Parliament was introduced in 1996 (one year after the Lobbying Disclosure Act), it's difficult to understand the more subtler ways in which pre-

¹⁵⁸ *Ibid.*

¹⁵⁹ European Parliament resolution of 8 May 2008 on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions (2007/2115(INI)), OJ C 271 E, 12.11.09.

¹⁶⁰ *Ibid.* Preamble, article D

¹⁶¹ *Ibid.*, Art. 1

existing lobbying regulations on the other side of the Atlantic had influenced EU lobbying regulation.

The adoption of a pluralistic view of organised interests had taken a hold in the European Parliament, but not in the European Commission. Eventually, the two institutions came to a compromise, enshrined in the Interinstitutional Agreement between the European Parliament and the European Commission of 22 July, 2011, on «the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation».¹⁶² After two years of work the Joint Transparency Register, shared between the two institutions, was approved, following the wishes of the resolution by the Parliament of May 2008 and the Commission's Green Paper on the Transparency Register.¹⁶³ Today the Joint Register constitutes the near-totality of lobbying regulation in the European Union.

The regulation implemented by 2011's inter-institutional agreement was a direct continuation of the Commission's voluntary register. Registrants had to agree to a Code of Conduct upon signing up, mostly focused around not inducing European staff into illegal conduct or around disclosing a lobbyist's clients and interest during meetings – the text was the same as in the Commission's previous regulatory scheme.¹⁶⁴ Registered lobbyists signed up to the register also had to compile reports for web publication on the Register's websites, in which they had to disclose the name of the lobbying organization, its address, the name of lobbyists handling lobbying activities in the European Parliament and Commission, their goals or fields of interests, number of members and financial information, such as annual turnover and annual lobbying expenditure. Theoretically, the Register would also have contained the specific legislative proposals – but a quick look at the Register's website reveals that several entries have only entered very generic statements of interest areas such as “environment”, “climate action” or “healthcare”.¹⁶⁵ The language contained in the Interinstitutional Agreement on this matter is muddled.

¹⁶² 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 (2011), OJ L 191, 22.7.2011, p. 29–38.

¹⁶³ European Commission, Green Paper - European Transparency Initiative, COM(2006) 194 final. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0194&from=EN>

¹⁶⁴ *Ibid.*, Annex 3, p. 36.

¹⁶⁵ An example of a firm only disclosing generic areas of interests is Bayer, the German pharmaceutical company – but it's far from the only company to do so. Its entry in the Register can be found at: <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=3523776801-85>

The main advantage of the new Joint Register was setting up the “one-stop shop” requested by several lobbyists, so that they may register only once for both the Parliament and the Commission. Another advantage was that the pass for entry to Parliament and participation in public committee hearings held inside of it were tied to registration. However, the basic loopholes in regulation still remained. Lobbyists who lobbied outside of Parliament buildings were not bound by the Code of Conduct, as weren’t those who only lobbied the Commission and decided not to sign up for the Register. A number of minimal amendments to the Joint Register were approved with a new inter-institutional agreement between Parliament and the Commission in 2014.¹⁶⁶ These mostly consisted of the exclusion of lobbying towards Member States of the Union from the Register, and the addition of very scarce incentives from the Commission to sign up for the Register— that is, notification of public consultations being held in covered interest areas.¹⁶⁷ For those only lobbying the Commission, signing up for the Register was still a largely voluntary affair.

The Interinstitutional Agreement also set up a Joint Transparency Register Secretariat, composed of staff from both institutions. The Secretariat would oversee implementation and enforcement of the Register. It would also investigate complaints submitted and reports of non-compliance by firms. Measures for non-compliance depended on the extent of wrongful behaviour and cooperation in rectifying it: they could go from a formal warning to a removal of the Parliament badge for a period of one to two years. Again, the loophole remained: a lobbyist could violate several of the provisions of the Code of Conduct and not be punished, by simply not being signed up to the Register. The effectiveness of the 2011/2014 Interinstitutional Agreement will be analysed further in Chapter 2. What’s important to note is that the Commission and the Parliament eventually both agreed on the ineffectiveness of 2011/14’s regulation, and have been discussing for the past two years ways to reform the Register.

¹⁶⁶ Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation (2014), OJ L 277, 19.9.2014 Available: https://eur-lex.europa.eu/legal-content/el/ALL/?uri=uriserv%3AOJ.L.2014.277.01.0011.01.ENG#ntr1-L_2014277EN.01001101-E0001

¹⁶⁷ *Ibid.* L.277/15

1.8 - Future projects of reform

The loopholes present in the current Joint Transparency Register were clear. First, for those lobbying only the Commission the Register was still *de facto* voluntary; second, there were ways to lobby the European Parliament even without the entry pass; and third, the Council was still largely unregulated. In September 2016, the Commission eventually proposed a project of reform for the regulation of lobbying in the European Union. Changes can be argued to be mostly positive, and if a new Interinstitutional Agreement is adopted based on this principle it might at least fix the first two loopholes in current regulation. The reform of the Joint Register is mostly focused around ensuring transparency, with vice-president of the Juncker Commission Frans Timmermans being quoted as saying that *«the EU institutions need to work together to win back the trust of our citizens. We must be more open in everything we do. Today's proposals for a mandatory transparency register covering the Parliament, Council and Commission are an important step in the right direction. Citizens have the right to know who tries to influence EU law-making. We propose a simple rule: no meeting with decision-makers without prior registration. Through the Register, the public will see who is lobbying, who they represent and how much they spend»*.¹⁶⁸ The Commission had finally abandoned its fears of restricting access to decision-makers and put forward a proposal to bring forward a mandatory lobbying Register. It must be said that this decision did not happen in a vacuum, with the same Juncker Commission publishing information of meetings held by Commissioners, Cabinet Members and Commission Directors-general with interest representatives since December 2014.¹⁶⁹ Not only that, but the Commission began to require that interest representatives be signed up to the Register to hold meetings with Commission staff.¹⁷⁰ In any case, the goal with the new regulation was to enshrine these internal rules and extend them to the Parliament and Council as well.

¹⁶⁸ European Commission (Press Release), Delivering on transparency: Commission proposes mandatory Transparency Register for all EU institutions (2016). Available: http://europa.eu/rapid/press-release_IP-16-3182_en.htm

¹⁶⁹ Commission Decision on the publication of information on meetings held between Directors-General of the Commission and organisations or self-employed individuals (2014/838/EU, Euratom) / Commission Decision on the publication of information on meetings held between Members of the Commission and organisations or self-employed individuals (2014/839/EU, Euratom).

Available: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0838&from=EN> / <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0839&from=EN>

¹⁷⁰ European Commission, Communication from the President to the Commission – The Working Methods of the European Commission 2014-2019, C(2014) 9004, p.9. Available: <http://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-9004-EN-F1-1.Pdf>

It is interesting to note in the once neo-corporatist European Union the emergence of a potential “right to lobby”. Article 8B of the Treaty on the European Union, added by the Lisbon Treaty through its article 12 added two provisions of particular note: that «the institutions 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»¹⁷¹ and that «the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society»¹⁷². This is not the only provision regarding the “representation of interests”: the Treaty of Maastricht itself included an article regarding the ability to petition the European Parliament.¹⁷³ While not as basic as the “right to petition the government” contained in the United States Bill of Rights, the parallels are nonetheless striking, even though the European Parliament usually receives a number of petitions oscillating between one and three thousand.¹⁷⁴

The Commission’s proposal took the form of an Interinstitutional Agreement, the same instrument that had been used in 2011. The Agreement regulates several types of interactions with decision-makers in Parliament, now including the possibility of participating as a speaker in Committee public hearings, holding meetings with Commission staff and MEPs, and holding events inside the Parliament or the Commission. If the Agreement is adopted, all of these actions would become conditional upon signing up to the Register.¹⁷⁵ Some proposals had already been adopted by the individual institutions, but the Agreement would greatly improve coordination between the European Institutions. For lobbying actions inside the Commission, the Register enshrined many of the previous changes in internal regulation by the Juncker Commission.

Regulating the Council was still problematic. The only lobbying action conditional upon signing up to the Register is a meeting with the Presidency of the Council, his deputies or the Council’s Secretary-General and Directors-General.¹⁷⁶ Permanent representatives of

¹⁷¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007) 2007/C 306/01, art. 12.

¹⁷² *Ibid.*

¹⁷³ «Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Union's fields of activity and which affects him, her or it directly.»

¹⁷⁴ European Parliament, *Fact Sheets on the European Union – The right of petition* (2017). Available: http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_4.1.4.html

¹⁷⁵ European Commission Proposal COM(2016) 627 for a Interinstitutional Agreement on a mandatory Transparency Register (2016), p. 5-6. Available: <http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-627-EN-F1-1.PDF>

¹⁷⁶ *Ibid.*

Member States may only contribute to enforcing the Register voluntarily.¹⁷⁷ The reason for this is a conflict of competences: several European states have their own lobbying regulations, and lobbying through the Council requires lobbyists to take what is colloquially known as the “national route” to end up lobbying inside Brussels.¹⁷⁸ The Council has often presented itself as an institution in which no lobbying takes place – but the lobbying of individual member states on the European Union (and Council) agenda does.¹⁷⁹ One example is Volkswagen’s lobbying of German Chancellor Gerhard Schröder (at the time Germany was holding the Presidency of the Council) to block the decision making process over the End of Life Vehicle Directive between 1997 and 2000.¹⁸⁰ Volkswagen’s lobbying was able to delay and slightly water down the adoption of the Directive. Lobbying in the Council in some way does take place, but through the national route – and regulating it would effectively mean that the European Union would be intruding on state competences. That is what has left it largely deregulated. Whether member states in the Council will contribute to the Register after its possible adoption will remain to be seen.

According to the Agreement, the management of the Register would be a competence of both the Management Board of the Register (consisting of the Secretaries-General of Council, Commission and Parliament)¹⁸¹ and the Secretariat of the Register. If the Agreement is approved, the Secretariat (composed by staff from the Parliament, Council and Commission) will answer to the Management Board; it will report to it the overall implementation of the agreement, monitor the content of the register and carry out investigations.¹⁸² This is a model similar to that adopted in the United States, in which both the Clerk of the House of Representatives and the Secretary of the Senate monitor the Lobbying Disclosure Act regime. But unlike in the US, where the Secretary and Clerk refer violations to the US Attorney for the District of Columbia for criminal prosecution, in the European Union it is the Secretariat itself that can adopt sanctions and measures in cases of violation of the Code of Conduct. These measures are directed towards the registrant handling lobbying activities: it can simply be a formal warning, a «suspension of individual or multiple types of interaction available [...] for a period between 15 days

¹⁷⁷ *Ibid.*

¹⁷⁸ Greenwood, J. *Interest Representation in the European Union* (2011), Palgrave Macmillan p. 25-31

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ European Commission Proposal COM(2016) 627 for a Interinstitutional Agreement on a mandatory Transparency Register (2016), art.8.

¹⁸² *Ibid.* art. 9

and 1 year»¹⁸³ or outright «removal of the registration from the register for a period between 15 days and 2 years».¹⁸⁴

The adoption of a mandatory register for interest representatives by European institutions would signify not just a massive change, but an outright paradigm shift in the regulation of lobbying in the European Union. In 2006 the Commission had seen and decided against the mandatory registration regime adopted in the United States with the Lobbying Disclosure Act and the Honest Leadership and Open Government Act. Today instead it is proposing meetings with decision-makers be conditional upon signing up to the Transparency Register. The change is remarkable, but the Interinstitutional Agreement has not been adopted yet. How different systems of regulation fare with conventional lobbying activities (current regulation in the EU, the new Interinstitutional Agreement and the US system) will be analysed in Chapter 2.

Additionally, from 2015 to 2016 the Commission decided to give new impulse again to the effort to include the largest amount possible of stakeholders in its consultations.¹⁸⁵ It did so through the ‘Communication [...] on better regulations for better results – an EU agenda’¹⁸⁶ and through the Interinstitutional on better law agreement of 2016.¹⁸⁷ Opening up policy-making in the EU was seen as a way to increase the Union’s transparency and accountability.¹⁸⁸ The Agreement additionally created guidelines for stakeholder consultations and agreed to continue its extensive use of impact assessments. Finally, it emphasized the possibility for *ex post* evaluation of existing legislation, carried out collaboratively between the three European institutions.¹⁸⁹

¹⁸³ European Commission Proposal COM(2016) 627 for a Interinstitutional Agreement on a mandatory Transparency Register (2016), Annex 4, art. 10.1. Available: https://eur-lex.europa.eu/resource.html?uri=cellar:8a8de191-8648-11e6-b076-01aa75ed71a1.0001.02/DOC_2&format=PDF

¹⁸⁴ *Ibid.*

¹⁸⁵ De Caria, R., “*Le mani sulla legge*”: *il lobbying tra free speech e democrazia*, Milan, Ledizioni, 2017, p.213.

¹⁸⁶ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - better regulations for better results – an EU agenda, COM(2015)215.

¹⁸⁷ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on better law-making, OJ L 123 (2016), p.1-14.

¹⁸⁸ De Caria, R., “*Le mani sulla legge*”: *il lobbying tra free speech e democrazia*, Milan, Ledizioni, 2017, p.213-4.

¹⁸⁹ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on better law-making, OJ L 123 (2016), articles 20 to 24.

Chapter II – Comparing lobbying activities within the two systems to test the effectiveness of current regulation

2.1 - Introduction

Having rebuilt the history of lobbying regulation in the United States and in the European Union, it is now time to compare them to understand which of the two systems is more efficient in its regulation of lobbying activities in the light of the institutional features and practice. We have already talked in the introduction about how an effective lobbying system oriented towards basic principles of constitutionalism is both transparent and with a high degree of participation from all parties involved vis-à-vis the decision makers. Lobbying regulation in the United States is based on the Lobbying Disclosure Act of 1995, the Honest Leadership Act of 2007 and a few more recent minor laws and amendments, which will be analysed below. The European Union regulation was developed by the European Parliament and the European Commission, with, at least in the first years, a significant degree of ideological differences with one another, and was then unified into a single regulatory system.¹⁹⁰ The incoming changes to the European system, which would effectively introduce a mandatory registration system for lobbyists, are massive. However, since the new system has not been implemented (or even been officially approved by all parties), an analysis of the effectiveness of 2016's Interinstitutional Agreement on a mandatory Transparency Register would be mostly speculative. Because of this, when looking at the regulation of lobbying activities in the European Union the attention will be focused on both 2014's Transparency Register, the one currently in place, and 2016's proposed mandatory Transparency Register. The new Agreement and its provisions will be studied, but only in analysing whether the new provisions will significantly change the previous system.

There is a reason for which it is necessary to chart the single interactions present in lobbying activities, and how laws regulate them. Lobbying is (in the United States, at least) a constitutionally delicate affair, and it requires, as mentioned, equality of access and transparency. Lobbying is legitimate as long as these two preconditions are satisfied, and regulation is often necessary to ensure them. Comparing regulation in both systems to all the steps in a conventional lobbying action is also necessary to understand how

¹⁹⁰ See section 1.7 of the previous chapter.

effective current regulation is in concrete scenarios: if laws regulate actions which are not actually a part of lobbying activities they will either have little to do with lobbying regulation at all, or the result will be imperfect provisions which do not ensure the satisfaction of those two preconditions.

A conventional lobbying action usually follows a well-established structure. First, the lobbyists or lobbying firms conduct what is colloquially known as the ‘back office’ process. Back office activities are the backbone of the entire lobbying process: they are, most importantly and for our purpose, a research activity. They involve gathering the data and information necessary to convince a lawmaker to change current laws, or to oppose a particular legislative proposal. The rationale of back office activities is one of the main advantages of having lobbyists interact with decision-makers: if all stakeholders gather information and offer it to the lawmaker¹⁹¹ (in a logic aimed at advancing their political objectives), the lawmaker will come out with a better understanding of a specific subject and will be able to legislate more effectively.¹⁹² To augment this reasoning, reputation and trust are extremely important in the world of lobbying: a firm or individual lobbyist who develops a good reputation for accurate information will get a lawmaker’s full attention when representing an interest or client.¹⁹³ However, a check is still required on the information offered by a lobbyist: if a lawmaker has no way to verify the accuracy of the position paper he has been given, then he might be swayed by inaccurate or incorrect information. The possibility for lawmakers to research a determinate topic (and to check the truthfulness of information given by lobbyists) is required.

Most lobbying activities eventually involve a meeting between a lawmaker and an interest representative, and this constitutes what is known alternatively as the ‘front office’ process, ‘face-to-face’ activities or ‘inside lobbying’. Front office activities are the culmination of all previous efforts researched during the back office phase, and they involve synthesising all data and information gathered into an argument used to convince the lawmaker to back a specific position.¹⁹⁴ Regulation should ensure, as in the whole of

¹⁹¹ By lawmaker, we mean all those actors who are able to influence a law through their own direct action, by drafting it, by being able to amend it or by being able to reject it. See section 3.4.

¹⁹² De Caria, R., *“Le mani sulla legge”*: *il lobbying tra free speech e democrazia*, Milan, Ledizioni, 2017, p.302-3.

¹⁹³ Coen, D., Business Lobbying in the European Union, in Coen, D., Richardson, J. (eds.) *Lobbying the European Union: Institutions, Actors, and Issues*, Oxford, Oxford University Press, 2009, p.151-6.

¹⁹⁴ Petrillo, P.L., *Democrazie sotto pressione – Parlamenti e lobby nel diritto pubblico comparato*, Giuffrè Editore, Milan, 2011, p.49-50. See also Mahoney, C., *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008, p.127-30.

the lobbying process, the principles of transparency and equality of access.¹⁹⁵ The former principle involves a correct identification of lobbyists and their clients, and to inform the public about meetings and lobbying activities. The latter principle, equality of access, involves the possibility to participate in committee hearings, and some systems also enforce a temporary ban on ‘revolving doors’. The reason why a time-limited ban exists is that former decision-makers and governmental employees are very attractive to lobbying firms, for two reasons: they generally know the workings of inner government. But to some lobbying firms decision-makers are attractive because have personal connections to the lawmakers – clearly, adding personal connections to the lobbying process does not ensure the equality of participation between the stakeholders, because it might imply privileged access. A ban on switching careers for a few years will effectively dilute the advantage from personal connections, because many employees, appointees and members of both the legislative chamber and executive will eventually leave their post.

Some lobbying efforts also make use of what is known as ‘grassroots lobbying’, or ‘outside lobbying’, in particular in the US.¹⁹⁶ Grassroots lobbying, also depending on the electoral system (for example, it is favoured in first-past-the-post electoral systems) relies not on directly lobbying the political decision-maker, but on convincing the people who voted for a specific representative (in the case of an elected official) to lobby themselves said decision-maker.¹⁹⁷ This is done through mobilization of the public.¹⁹⁸ An advertisement inviting someone to write to an elected representative supporting or opposing a legislative proposal is a grassroots lobbying activity. Organising a campaign to invite users to tweet *en masse* to a public official advocating a political change is, likewise, a grassroots lobbying activity. The reasoning is very simple: a lobbyist needs to convince a decision maker to support or oppose a political action. But a decision maker (elected, in this specific case) will intrinsically try to appeal to his own voters. This does not mean that grassroots lobbying is only aimed at elected officials: while the method is certainly effective with officeholders seeking re-election, grassroots lobbying techniques

¹⁹⁵ It should be noted that not all scholars agree with the notion of transparency and openness as an intrinsic positive value, noting the possible dangers that may arise from a transparency-centred society. For one example, see Lessig, L., *Against Transparency*, *The New Republic*, October 9, 2009.

¹⁹⁶ De Caria, R., “*Le mani sulla legge*”: *il lobbying tra free speech e democrazia*, Milan, Ledizioni, 2017, p-74-8.

¹⁹⁷ Petrillo, P.L., *Democrazie sotto pressione – Parlamenti e lobby nel diritto pubblico comparato*, Giuffrè Editore, Milan, 2011, p.50-1.

¹⁹⁸ Mahoney, C., *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008, p.147-9.

can also be used towards non-elected officials as well. In the EU, grassroots lobbying tactics are less used compared to the US, but when they are they can be dramatically effective. One example was with the strong protests and strikes carried out by dockworkers protesting throughout the Union against the 'Port Package II' proposal in 2006, a mobilization directed towards the European decision makers opposing liberalization of docking laws.¹⁹⁹ The European Parliament would reject the Commission's proposal.

Grassroots lobbying activities are, in both the United States and in the European Union, completely unregulated. In the States, this is due to political – and constitutional - obstacles. On the one hand, Republican opposition has stalled efforts to regulate grassroots lobbying. This is because several organised interests appealing to Republican voters use grassroots lobbying to communicate their arguments to the public decision-makers, and this is one of the reasons why Republicans have opposed regulation (while their stance on regulating other forms of lobbying has been much more collaborative). In the Union, the new Register abandoned the very weak provisions present in the older, voluntary, Joint Transparency Register on disclosure of grassroots lobbying activities. The current Joint Register's inclusion of grassroots lobbying is still problematic: potentially, someone could lobby the European institutions through a well-made grassroots campaign without ever having a meeting with an European official and thus having to sign up to the Register. Grassroots lobbying activities in the EU are altogether far less common than what they are in the United States.²⁰⁰ They are nonetheless present, attempting to influence EU policymakers by instigating citizens to demand change.²⁰¹

Lobbyists in the United States also have access to an extremely powerful instrument which can be used to influence the government: campaign financing regulations.²⁰² While there have been some interesting developments in the European Parliament, the tool of campaign financing is nonetheless far more powerful in the United States, and it might help explain why lobbying in the United States is far more aggressive than in the Union.

¹⁹⁹ Bitonto, A., and Harris, P. (eds), *Lobbying in Europe: Public Affairs and the Lobbying Industry in 28 EU Countries*, Palgrave MacMillan, 2017, p.31-2.

²⁰⁰ Mahoney, C., *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008, p.160-3.

²⁰¹ *Ibid.*, p.9, 48-9.

²⁰² Petrillo, P.L., *Democrazie sotto pressione – Parlamenti e lobby nel diritto pubblico comparato*, Giuffrè Editore, Milan, 2011. p.51-2.

In any case, the subject of campaign financing is in constant evolution, and the influence these changes have had in lobbying activities are interesting to note.

A final note should be made regarding enforcement of provisions in both systems. Brilliantly-written regulation can still be ineffective if the enforcement mechanisms are inadequate or unclear. After all, the second main reason for the downfall of the Federal Regulation of Lobbying Act of 1946 was because of a general confusion present in its enforcement mechanisms.²⁰³ Unfortunately, both the European Union and the United States have some serious, unresolved issues regarding this.

2.2 - The definition of lobbying and lobbyists

Lobbying in itself is a delicate balance. A hired lobbyist will attempt to convince a decision-maker (a person in a position of power) to legislate in a determinate way, favourable to a societal actor (representing an organised interest), by who the lobbyist was either hired or to which the lobbyist belongs. Both the United States and the European Union accept this definition in different ways. The United States have managed to avoid the First Amendment problems of previous regulation by setting several exceptions and a threshold mechanism.²⁰⁴ Under LDA regulation, a person writing a letter to a Congressman asking him to consider a piece of legislation is not having a lobbying contact because he is not doing so on behalf of a client for financial or other forms of compensation.²⁰⁵ Even if he were, he would only have to register if his contact constituted more than « 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period.»²⁰⁶

The European Union, on the other hand, did not need to give clear definitions of lobbyists as much as the United States did (due to the Register being voluntary and offering an incentive-based scheme), but still gave a general definition of lobbying activities as «[those] carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions, irrespective of where they are undertaken and of the channel or medium of

²⁰³ Mary Kathryn Vanderbeck, First Amendment Constraints on Reform of the Federal Regulation of Lobbying Act, in 57 *Tex. L. Rev.* 1219, 1979, p.1222-4.

²⁰⁴ 2 U.S.C. § 1602 (8)(A)(B), (10).

²⁰⁵ *Ibid.*, (8)(A).

²⁰⁶ *Ibid.*, (10).

communication used».²⁰⁷ While this definition has the advantage of including grassroots lobbying, the boundaries of what constitutes a lobbyist and what doesn't are rather unclear. A newspaper advocating for a change in European Union law would be expected to register under the current regime. Paradoxically, what helps the Register in this case is the fact that it's still voluntary.

The Interinstitutional Agreement for a Mandatory Register of 2016 would do away with this problem, circumventing it. Instead of using a standard definition of lobbying activities and lobbyists to impose registration, the new provisions make front office lobbying activities conditional with signing up to the Register (outside European Union buildings as well, rather than just inside like with the previous regime).²⁰⁸ Whether a citizen writing a letter to a Member of the European Parliament constitutes lobbying becomes irrelevant, due to the way the Agreement is framed; a citizen might want to make his opinions known to a decision-maker, but he would only have to sign up to the Register if he wanted a direct meeting with a member of the Commission or the Parliament – in theory.²⁰⁹

The general picture is that both the disclosure regime in the United States and 2014's Interinstitutional Agreement in the European Union have understood in different ways how to frame lobbying activities and lobbyists. In the European Union, however, current regulation suffers under its voluntary character (a fact we will return to multiple times in this chapter). The new proposal for regulation in the Union would remedy this, but lobbying regulation in the EU would still suffer a fundamental problem not strictly related to definitions: enforcement mechanisms, which will be analysed further in this chapter.

2.3 - The regulation of back office activities

As mentioned previously, one of the positive interactions of lobbyists with decision-makers is research coming from the former. 'Position papers', documents from lobbyists containing an argument for a determinate legislative action, are so important for precisely this reason. It also implies the necessity for equal participation from different and often

²⁰⁷ Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation (2014), OJ L 277, 19.9.2014, Title III art. 7.

²⁰⁸ European Commission Proposal COM(2016) 627 for a Interinstitutional Agreement on a mandatory Transparency Register (2016), art. 5.

²⁰⁹ *Ibid.*

contrasting interests: by receiving arguments from all stakeholders a political decision-maker can become better-informed and become able to take a balanced choice, possessing the knowledge required. But even guaranteeing equal participation by all concerned stakeholders, the resulting process may still be imperfect for the decision-maker. The demand for impartial research may still be required, since an organised interest will argue in favour of a determinate position, possibly distorting the available information of the decision-maker. Both the United States and the European Union have mechanisms in place to guarantee an input from researchers and analysts impartial to organised interests. These organs are signified in the Congressional Research Service for the United States, and both the Joint Research Centre and the European Parliamentary Research Service for the European Union.

Created and perfected throughout the XX century, the Congressional Research Service's (CRS) official mission is to «provide Congress, throughout the legislative process, comprehensive and reliable legislative research, analysis and information services that are confidential, objective, nonpartisan, authoritative and timely».²¹⁰ Regulated by section 166 of Chapter 2 of the U.S. Code, the large use made by members of Congress of the CRS is both testified by its numbers and annual budget. Congress recently appropriated \$112,698,234 dollars to the CRS for the year 2018.²¹¹ In just 2017, the CRS released 1121 reports for general distribution, wrote 2573 confidential memoranda for Congress, had more than 5000 direct interactions in-person and responded to almost 50,000 requests by Congressional members and employees.²¹² How the Congressional Research Service can act as a balancing force between organised interests can be seen by the breadth of topics analysed, going from opinions and analyses from financial regulation to education to federal judiciary and constitutional law, and even international relations.²¹³ A Congressman who receives a position paper may simply write an e-mail to the CRS, and receive a response on the subject matter detailing opinions.

The European Union also has two main research organs, but they differ considerably from one another: the Joint Research Centre of the Commission (JRC) and the European Parliamentary Research Service (EPRS) of the European Parliament. The JRC is the oldest of the two, but it can't be directly compared with the Congressional Research

²¹⁰ Library of Congress, Congressional Research Service Annual Report, FY 2017, p.3.

²¹¹ Legislative Branch Appropriations Act, 2018, S.1648, 115th Congress (2017).

²¹² Library of Congress, Congressional Research Service Annual Report, FY 2017, p.2.

²¹³ *Ibid.* p. 8-50.

Service. The organ conducts research for the Commission, but it comes from a fundamentally scientific heritage. The JRC aims at giving both ‘independent scientific advice’ and ‘scientific and technical support’ to the Commission in achieving its programs.²¹⁴ Because of this, it mostly concerns scientific subjects, such as environmental issues, the digital agenda and statistical and quantitative analysis on economic subject matters.²¹⁵ It does not share the variety of research carried out by the Congressional Research Service, and when analysing Commission policies outside of purely scientific matters it usually focuses on short-term scientific impact assessment research. The budget of the JRC is however much larger than that of the CRS, being able to rely on a budget of €521,872,871, 394 of which came from the EU internal budget.²¹⁶

Much of independent research carried out in the European Union relies on detailed impact assessment activity, both *ex ante* and *ex post*.²¹⁷ The objective of impact assessment research is improve the quality of regulation, and to chart and map the influence and effects that a legislative proposal will have or that previously adopted legislation has had on various stakeholders.²¹⁸ The European Commission’s Impact Assessment procedure, which has also been adopted by the Parliament and Council in its general principles, is divided into six different phases: «problem identification, definition of the objectives, development of the main policy options, impact analysis comparison of the options in the light of their impact, and an outline for policy monitoring and evaluation».²¹⁹ The process through Impact assessments in the Commission are automatically triggered by regulatory proposals, White Papers, expenditure programmes, and negotiating guidelines for international agreements.²²⁰ The European Commission also relies on committees for expertise.²²¹ They are usually composed by representatives of national governments and are chaired by the Commission itself. They are an instrument, both formal and informal, tasked with giving advice on implementing measures.²²²

²¹⁴ European Commission, Joint Research Centre Annual Activity Report (2016), p.16.

²¹⁵ European Commission, Joint Research Centre Management Plan (2018), p. 35-53.

²¹⁶ European Commission, Joint Research Centre Annual Activity Report (2016), p. 25-7.

²¹⁷ Up until the approval of the Better Regulation package in 2015, detailed impact assessment activities were only carried out *ex ante*. Following adoption of the package *ex post* impact assessment research were added as well.

²¹⁸ Meuwese, A.C., Inter-institutionalising EU Impact Assessment, in Weatherill, S. (ed.), *Better Regulation*, Oxford and Portland (Oregon), Hart Publishing, 2007, p.276-7.

²¹⁹ *Ibid.*, p.288.

²²⁰ Chittenden, F., Ambler, T. Xiao, D., Impact Assessment in the EU, in Weatherill, S. (ed.), *Better Regulation*, Oxford and Portland (Oregon), Hart Publishing, 2007, p.277.

²²¹ Chalmers, D., Davies, G., Monti, G., *European Union Law – Third Edition*, Cambridge, Cambridge University Press, 2014, 154-60.

²²² *Ibid.*

The European Parliamentary Research Service, on the other hand, is a relatively recent creation, although it lays its roots in previous research organs and services available to MEPs in previous decades, and was initially thought of as a way to unify all of those into a single entity.²²³ It was constituted in 2013 with a mission similar to that of the CRS: to «provide [Members of the European Parliament] with independent, objective and authoritative analysis of, and research on, policy issues relating to the European Union».²²⁴ The EPRS itself states that its creation and structure was inspired by parliamentary research services and libraries in other countries, including the United States.²²⁵ The numbers of the EPRS are insofar smaller compared to those of the CRS, but it has been rapidly growing in the past three years since its creation, going from 541 publications published in 2014 to 1169 in 2016 and from 22% of MEPs making requests for research and analysis in 2014 to 88% in 2016.²²⁶ The scope of topics analysed is also far more similar to that of the CRS than to that of the Joint Research Centre, going from female employment, to digital health, to cybersecurity and cyber defence, just to cite some examples.²²⁷ Like with the CRS, MEPs may request briefings and analyses, giving lobbyist research a valid check just as in the United States. MEPs requesting information from the EPRS are protected by confidentiality, and a period of time must pass before research may be disclosed.²²⁸ The organ has also aimed at becoming a more pro-active service, so that information may be already available before being requested by MEPs.²²⁹ Finally, the EPRS carries out, like other European institutions, impact assessment research.²³⁰

2.4. - The regulation of front office activities

Once research activity by organised interests has been carried out comes the moment of setting up a meeting between interest representatives and political decision-makers. This is the climax of lobbying activities. The question is whether the two conditions of

²²³ Private exchange with a former EPRS official, 2018.

²²⁴ European Parliament, European Parliamentary Research Service. [online] Available at: <http://www.europarl.europa.eu/atyourservice/en/20150201PVL00031/European-Parliamentary-Research-Service>

²²⁵ European Parliamentary Research Center, The Work of EPRS – The First Three Years: 2014 to 2016, p. 3.

²²⁶ *Ibid.*, p. 4.

²²⁷ European Parliamentary Research Service, Members' Research Service – Catalogue of publications, January 2014 – December 2016, p. 5-48.

²²⁸ Private exchange with a former EPRS official, 2018.

²²⁹ *Ibid.*

²³⁰ European Parliamentary Research Center, The Work of EPRS – The First Three Years: 2014 to 2016, p.15-9.

transparency and participation are sufficiently protected by current regulation in the two systems.

In the United States, lobbying activities are disclosed through the use of the LD-1 and the LD-2, two different forms compiled by interest representatives containing the information required by both the Lobbying Disclosure Act and the Honest Leadership and Open Government Act. The LD-1 is the initial registration statement of lobbying firm and client, or of the in-house lobbyists engaging in lobbying activities. The statement simply connects a lobbying firm to a client and acts as a preliminary statement, requiring disclosure of subject matters on which the lobbyists expect to act on. The LD-2, on the other hand, is the quarterly report of all lobbying activities, containing all disclosure required by 2 U.S.C. §1604. The LD-2 requires registered lobbyists to state specific issues lobbied in the quarterly period (mirroring the LD-1, but with actual lobbying activities instead of expected lobbying activities), «including, to the maximum extent practicable, a list of bill numbers and references to specific executive branch actions»; «a statement of the Houses of Congress and the Federal agencies contacted by lobbyists employed by the registrant on behalf of the client»; «a list of the employees of the registrant who acted as lobbyists on behalf of the client», and, if applicable, «a description of the interest [...] of any foreign entity [...] in the specific issues listed under subparagraph (A)»²³¹.

An analysis should be made on just how informative (or transparent) this data is. On the one hand, the LD-2 gives a somewhat clear idea of the specific proposals lobbied, with reference to the relevant House and Senate proposals and even a specific reference to the individual provisions contained in the Bills. It also offers a list of all lobbyists involved in that quarter. Another useful element included in the disclosure regime is lobbying expenditures, and any interested parties may easily know how much a specific organised interest has spent attempting to influence public decision-makers. However, there are two flaws transparency-wise regarding the LD-2. First of all, the LD-2 states the specific issues lobbied, but not the legislative direction they were lobbied towards, and whether these lobbying attempts were successful or not. Whether a lobbying contact attempted to push new regulation, to repeal specific provisions contained in an Act or to push for deregulation is left up to speculation. The second flaw of the LD-2 is that, while in other lobbying regulation systems in the world specific lobbying contacts do have to be

²³¹ 2 U.S.C. §1604 (b).

disclosed, the regulatory system in the United States does not.²³² Lobbyists do not have to disclose which Congressmen, members of the executive or Federal agency employees they have had direct contact with. An important tool for citizens to evaluate their representatives with is, in this case, missing, and the former lack the ability to make their voice heard on a specific choice, because they do not know whether that specific choice was informed by lobbying activities towards their representative or not. An LD-2 might help investigative work on decision-making actions, but the flaw is that an investigative work is required in the first place.

The current disclosure regime in the European Union is perhaps even less transparent, at least when looking at the 2014 Agreement between the Commission and the European Parliament. Notwithstanding its voluntary character, the firms and lobbyists who do choose to register need to declare even less than what its counterparts in the United States do. The current Joint Transparency Register of the European Union requires lobbyists (and clients) to declare: «the name of the person legally responsible for the organisation and of [...] the principal contact point in respect of activities covered by the register (i.e. head of EU affairs)», and «names of the persons with authorisation for access to the European Parliament's premises»;²³³ «the number of persons [...] involved in activities covered by the register [...] and the amount of time spent by each person on such activities according to the following percentages [...]: 25%, 50%, 75% or 100%»;²³⁴ the general goals and fields of interests;²³⁵ and, if applicable, affiliations to networks. The 2014 Agreement also requires disclosure of the «main legislative proposals or policies targeted by activities of the registrant [...] covered by the register»,²³⁶ and links to EU institutions, such as membership of high-level groups, expert groups, European Parliament intergroups, and so on.²³⁷ Like in the United States, the disclosure regime requires a declaration of interest representation expenditures, but unlike in the United States the Union system asks for a financial disclosure on a yearly basis, rather than quarterly.²³⁸

²³² Gentili, A., Transparency register, work in progress (2013), p.15 fig. 3.

²³³ Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation (2014), OJ L 277, 19.9.2014, Annex II, Title I(b).

²³⁴ *Ibid.* Title I(c).

²³⁵ *Ibid.* Title I(d).

²³⁶ *Ibid.* Title II(A).

²³⁷ *Ibid.* Title II(B).

²³⁸ *Ibid.* Title II(C).

The flaws in the 2014 disclosure regime, compared to the United States, are several. The register does not require to state the names of individual lobbyists carrying out lobbying activities, but only those who are authorised to access the European Parliament. Most importantly, the provisions pertaining to the «main legislative proposals or policies», are very laxly enforced by the Secretariat, and are mostly left down to the ethical sense of the lobbyists themselves. We have already mentioned this problem in the previous chapter. For example, the Transparency Register page for Royal Dutch Shell does contain reference to specific EU policies and legislation followed by its lobbyists in the past year.²³⁹ But other firms, such as Bayer (which we mentioned) or Facebook²⁴⁰ are far more generic in their declarations of followed policies.

2.4.1 - The Council and the European Council, difficult to access and lacking regulation

While the 2016 Interinstitutional Agreement for a Mandatory Transparency Register represents a significant improvement over the previous registration regime, a loophole still exists both in the current 2014 Agreement and in the proposed Mandatory Register. Namely, the regulation of lobbying pertaining to the Council of the European Union.²⁴¹ The Council represents the ministers of national governments inside the European Union. It acts as a legislative body together with the European Parliament, and some scholars have noted it acts as an executive as well.²⁴²

The fact that national governments are represented creates problems in regulating lobbying inside the European Union. The legislative (thus decision-making) power in the European Union is a balance between a Euro-centric institution (the European Parliament) and an intergovernmental institution (the European Council and Council of

²³⁹ European Transparency Register, Shell Companies. [online] Available at: <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=05032108616-26&locale=en#en>

²⁴⁰ European Transparency Register, Facebook Ireland Limited. [online] Available at: <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=28666427835-74>

²⁴¹ In a strictly technical sense, interest representation and lobbying *stricto sensu* can also be carried out through the European Court of Justice. After all, several scholars have noted the power to advance policy change through the judicial system, both in the United States and in the European Union. However, lobbying through the judicial system by litigation, while similar in the results to conventional lobbying of other decision makers, is radically different as to the means. Because of this, lobbying through the ECJ (and the US Supreme Court) is not analysed, although it should be kept in mind that it's perfectly possible. For a detailed analysis, see McCown, M. Interest Groups and the European Court of Justice, in Coen, D., Richardson, J. (eds.) *Lobbying the European Union: Institutions, Actors, and Issues*, Oxford, Oxford University Press, 2009, p.89-104.

²⁴² Hayes-Renshaw, F., Least Accessible but not Inaccessible: Lobbying the Council and the European Council, in Coen, D., Richardson, J. (eds.) *Lobbying the European Union: Institutions, Actors, and Issues*, Oxford, Oxford University Press, 2009, p.71

Ministers). By representing national governments, the powers of the European Union towards the Council are very limited, and thus the members of the Council are mostly left to decide the rules for themselves. The Commission and the Parliament are effectively blocked from imposing lobbying regulation on the Council, since disclosure of lobbying inside the Council is a competence of national governments. This is also due to the principle of internal institutional autonomy, which leaves each European institution to autonomously regulate its operational rules.²⁴³ Legal obligations created by interinstitutional agreements, the instrument of choice of the Parliament and the Commission in jointly regulating lobbying activities inside the EU, cannot alter Treaty principles – among which is the principle of internal procedural autonomy of institutions.²⁴⁴ Thus, only the Council itself may choose to disclose lobbying activities. The Parliament and Commission had already understood the situation with the 2011/14 Interinstitutional Agreement, and this issue has appeared yet again in the 2016 Agreement for a Mandatory Register. If the Agreement is adopted, registration will become effectively mandatory for lobbyists at the Commission and Parliament, but for what concerns the Council only lobbyists meeting the Presidency will have to register. The Agreement has invited the individual members of the Council to register, but they can only be invited to join on a voluntary basis. There is no guarantee that national governments will do so: there are several doubts about whether the members of the Council will want to join.²⁴⁵

This is problematic for one reason in particular. One strong advantage for lobbyists, especially in the European Union, is the presence of the phenomenon colloquially known as ‘venue shopping’. Venue shopping refers to lobbying at the level most suitable for one’s interests: an institution at either the national or European level might treat a specific organised interest more receptively compared to another, and this allows lobbyists to ‘pick and choose’ whichever level they prefer.²⁴⁶ The phenomenon is also present in lobbying activities in the United States,²⁴⁷ especially following the transition from a ‘dual’ form of federalism to a more cooperative arrangement between federal government

²⁴³ Obradovic, D., Regulating Lobbying in the European Union, in Coen, D., Richardson, J. (eds.) *Lobbying the European Union: Institutions, Actors, and Issues*, Oxford, Oxford University Press, 2009, p.318.

²⁴⁴ *Ibid.*

²⁴⁵ Cooper, H. (2017). New Lobbying Rules Face Uncertain Future. *Politico.eu*, [online]. Available at: <https://www.politico.eu/article/new-lobbying-rules-face-uncertain-future-europe-transparency/>

²⁴⁶ Woll, C., Lobbying in the European Union: From a sui generis to a Comparative Perspective (2006), *Journal of European Public Policy* 13:3, p.461-2.

²⁴⁷ Baumgartner, F.R. and Jones, B.D., *Agendas and Instability in American Politics*, Chicago, University of Chicago Press, 1993.

and individual states.²⁴⁸ Lobbying the Council in its most basic terms refers to lobbying a national government, who if convinced will vouch for a policy favourable to an organised interest upwards.²⁴⁹ While the expansion of competences of the European Union has reduced the strength of taking the national route up to Brussels, it is nonetheless a powerful instrument which is still used and has been used in the past.²⁵⁰ Ministers taking part in the proceedings of the Council are doing so «*ex officio*», operating as the indirect representatives of their national citizens, whose interests they are expected to articulate and defend». ²⁵¹ This makes members of the Council particularly influenced by their own national interests.²⁵² Not only this, but a successful lobbying action towards a national government will push it towards lobbying other members of the Council as well - a phenomenon which has often led to ‘horse trading’ of concessions between members of the Council.²⁵³ More often than not attempts to sway votes in the Council come from lobbyists representing an industry with a strong economic footprint in one of the ‘big six’ countries.²⁵⁴ The issue with lobbying activities in the Council is that transparency is completely absent.²⁵⁵ Theoretically regulation would be a subject matter of national laws for each individual Council member, but only 8 members of the EU have a mandatory registration scheme for interest representatives (one of which is the United Kingdom).²⁵⁶ In addition to the scarce amount of disclosure regulations in the Member States there are even less provisions for lobbying in the Council. As of now, the institution is unregulated, and will still be even if the new regulations are implemented.

There is also the additional presence of the European Council. If the Council of the European Union is composed in different configurations by ministers of national governments, the European Council gathers together heads of government and heads of state. The two institutions are well-known for being «opaque», «closed», «elusive»,

²⁴⁸ See section 3.3 and 3.3.2 for a more detailed analysis.

²⁴⁹ Greenwood, J. *Interest Representation in the European Union* (2011), Palgrave Macmillan p. 25-31.

²⁵⁰ See the example of Volkswagen lobbying to influence the End of Life vehicle directive, mentioned in the previous chapter.

²⁵¹ Hayes-Renshaw, F., *Least Accessible but not Inaccessible: Lobbying the Council and the European Council*, in Coen, D., Richardson, J. (eds.) *Lobbying the European Union: Institutions, Actors, and Issues*, Oxford, Oxford University Press, 2009, p.77.

²⁵² *Ibid.*, p.78.

²⁵³ *Ibid.*, p.78, p.80-1.

²⁵⁴ Bitonto, A., and Harris, P. (eds), *Lobbying in Europe: Public Affairs and the Lobbying Industry in 28 EU Countries*, Palgrave MacMillan, 2017, p.34-5.

²⁵⁵ See note 233. A quick analysis of the Interinstitutional Agreements signed insofar prove how there are almost no provisions pertaining to lobbying in the Council.

²⁵⁶ European Parliamentary Research Service, *Regulation of lobbying across the EU*, p. 1-2.

«inscrutable» and «secretive».²⁵⁷ Some attempts to increase transparency have been made, but for the most part both institutions continue meeting behind closed doors.²⁵⁸ It might be argued that the unwillingness of the Council to regulate lobbying is then unsurprising, being an element of a larger culture of confidentiality. What is clear is that lobbying the Council and the European Council is harder and less common than in other European institutions (a fact also demonstrated empirically)²⁵⁹ – but it does nonetheless happen, and when it does its effects on the final structure of the law can be significant.²⁶⁰

There are also elements to believe that lobbying the Council and, especially, the European Council may have become more important in recent years, although there is no clear link yet to an increase in lobbying activities towards the two institutions. Some scholars have noted how in the past two decades policy coordination between the Member States has increased, introducing new areas of jurisdiction, but without shifting the relevant decision-making powers to a supranational institution.²⁶¹ The newfound centrality of the two intergovernmental institutions, the Council and the European Council, for substantive political decisions on these subject matters has led to what has been defined as «deliberative intergovernmentalism», in which the use of deliberation for decision-making leads to adoption of proposals by consensus.²⁶² The main institution that seems to have significantly increased its «day-to-day policy decisions» in Union affairs seems to be the European Council, which has taken on a «full range of policy issues that were previously dealt with mostly at the level of the Council and the Commission.»²⁶³ Its role has expanded notwithstanding Article 15 of the TEU (added by the Lisbon Treaty), which stated that the European Council «shall not exercise legislative functions».²⁶⁴ But the provision has only confirmed its role as a decision maker outside of the community

²⁵⁷ Hayes-Renshaw, F., Least Accessible but not Inaccessible: Lobbying the Council and the European Council, in Coen, D., Richardson, J. (eds.) *Lobbying the European Union: Institutions, Actors, and Issues*, Oxford, Oxford University Press, 2009, p.73.

²⁵⁸ *Ibid.*

²⁵⁹ Mahoney, C., *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008, p.131-4.

²⁶⁰ Hayes-Renshaw, F., Least Accessible but not Inaccessible: Lobbying the Council and the European Council, in Coen, D., Richardson, J. (eds.) *Lobbying the European Union: Institutions, Actors, and Issues*, Oxford, Oxford University Press, 2009, p.86-7.

²⁶¹ Puetter, U., *The European Council and the Council: New intergovernmentalism and institutional change*, Oxford, Oxford University Press, 2014, p. 1-5, 55-7.

²⁶² *Ibid.*, p.33-44.

²⁶³ *Ibid.*, p.72-33.

²⁶⁴ *Ibid.*, p.83.

method.²⁶⁵ In any case, the possibility of lobbying the European Council cannot be excluded, delineating an additional transparency problem together with the Council in today's (and tomorrow's) EU regulation of interest representation.

2.5 - The regulation of grassroots lobbying activities

If the regulation of lobbying activities were already a delicate subject, especially in the United States, then regulating grassroots lobbying is its most delicate issue. As mentioned beforehand, grassroots lobbying is not lobbying through a lobbyist, but inviting a citizen to drum up support for a specific cause and attempt to influence the decision-maker in a bottom-up approach. Since the decision maker depends on the citizen for re-election (at least in the United States: the absence of elections for the European Commission and the parliamentary system of the European Parliament creates very interesting distinctions), the former is often more inclined to listen to the latter, rather than a lobbyist. Grassroots lobbying is, thus, a very powerful instrument. But it is also completely unregulated in both the U.S. and the EU. The United States have attempted multiple times to regulate grassroots lobbying. The Federal Regulation of Lobbying Act of 1946 included grassroots lobbying in its provisions, and this was one of the main reasons for its downfall.²⁶⁶ The reason for which the FRLA had included grassroots lobbying provisions as far back as 1946 was that Congress had already realised just how powerful grassroots lobbying were as an instrument, and how they already had experience of its abuses in the decades preceding it. This brings to a very peculiar phenomenon which still exists today in the United States, known as 'astroturfing'. An astroturf lobbyist is, in the words of a U.S. Senator, «someone who gets paid [...] to pretend there is a groundswell of grassroots support or opposition for or to a particular piece of legislation».²⁶⁷ The astroturf lobbyist «sends out letters, e-mails, faxes [...] to stir up phony grassroots support for or against the particular piece of legislation».²⁶⁸ 1935's Wheeler-Rayburn Bill, mentioned in the previous chapter, was subject to a particularly vicious attack by astroturf lobbyists, with

²⁶⁵ *Ibid.*

²⁶⁶ See the section in the previous chapter on *United States v. Harriss*.

²⁶⁷ Straus, J.R, The Lobbying Disclosure Act at 20: Analysis and Issues for Congress. Congressional Research Service, p.24.

²⁶⁸ *Ibid.*

Congress receiving almost 250,000 telegrams opposing the bill, the vast majority of which were fake.²⁶⁹

When Congress returned to the regulation of lobbying, it found itself in a fight over grassroots lobbying. As mentioned beforehand, the first draft of the Lobbying Disclosure Act in 1994 collapsed in the Senate due to Republican filibustering, spurred by the presence of grassroots lobbying provisions.²⁷⁰ The final law ultimately did not regulate grassroots lobbying (or astroturf lobbying). The first draft of the Honest Leadership and Open Government Act of 2007 again attempted to regulate grassroots lobbying in its Section 220. This was again struck down from the Act during debate in the Senate, over concerns that it might discourage ordinary citizens from contacting their Congressmen or even force them to register as lobbyists.²⁷¹ It can be argued that this fear was not necessarily unwarranted: after all, the Supreme Court had reinterpreted the FRLA in *United States v. Harriss* precisely because otherwise it would have been too broad and would have included basic citizen engagement with their representatives. Whether Section 220 would have survived an exam by the Supreme Court once an issue arose is in doubt – but the problem disappeared when it was removed.

Grassroots lobbying in the European Union is also similarly unregulated, but for different reasons. The current agreement in place, the Inter-institutional Agreement of 2014 actually does acknowledge grassroots lobbying, by mentioning not just attempts to directly influence decision-makers in its definition of lobbying activities but indirect means as well, «irrespective of where they are undertaken and of the channel or medium of communications used, for example via outsourcing, media [...], platforms, forums, campaigns and grassroots initiatives».²⁷² The definition given is extremely broad, and would include a massive scope of activities. An improvised citizen campaign advocating for or against an EU directive would be included in this definition, as would be criticism from a TV channel in a country of the Union. These definitions would apply even if there were no organised interest behind these grassroots initiatives, for or not-for-profit. What has avoided problems with the broadness of this definition is, paradoxically, the voluntary

²⁶⁹ Maggie McKinley, Lobbying and the Petition Clause, *68 Stan. L. Rev.* 1131 (2016) p.1160.

²⁷⁰ Clymer, A., (Oct. 7, 1994) G.O.P. Filibuster Deals a Setback to Lobbying Bill, *The New York Times*. Available: <https://www.nytimes.com/1994/10/07/us/gop-filibuster-deals-a-setback-to-lobbying-bill.html>

²⁷¹ Straus, J.R, The Lobbying Disclosure Act at 20: Analysis and Issues for Congress. Congressional Research Service, p.24.

²⁷² Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation (2014), OJ L 277, 19.9.2014, Title III, art. 7.

character of the current Joint Register. But even the firms who have signed up to the Register do not have to openly disclose their grassroots lobbying efforts, since the Register only requires stating followed policies (which, as noted before, are largely left to the registrant in how specific they must be) and lobbying expenditures, including what concerns grassroots lobbying.²⁷³ So while the expenditures need to be disclosed, the actual campaigns are not.

The proposed 2016 Interinstitutional Agreement had to dispose of its small grassroots provisions because of its changing character. Instead of setting standards to be defined as a lobbyist, as previous regulation had done in both systems, the mandatory Register made meetings with officials from the three European Institutions (albeit only including the Presidency for what concerns the Council) conditional with signing up to the Register.²⁷⁴ The Mandatory Register does not impose registration *per se*, it imposes registration if the lobbyist wants to meet with officials. By removing standards to be defined as a lobbyist, grassroots provisions were thus removed.

2.6 - The regulation of campaign financing

The subject of campaign financing is one indirectly correlated with lobbying regulation. After all, one of the accusations thrown most often at lobbyists is that they use campaign donations to unduly influence decision-makers, or to get candidates for Federal office more receptive to their own interests. To have a complete picture of the distinctions between lobbying regulation in the European Union and the United States, it becomes necessary to talk about campaign finance regulation. One thing lobbying regulations and campaign finance regulations have in common in the United States is that they both share a very tortuous legislative history. It would take far too much to analyse in detail the legislative history of campaign finance regulation, so only a brief overview will be given, with an eye on how it influences lobbying efforts.

There have been several laws attempting to regulate campaign financing in the United States throughout its history in the XX century, but the current system is mostly built on two statutes: the Federal Election Campaign Act of 1971²⁷⁵ and the Bipartisan Campaign

²⁷³ This is never outright stated in the Agreement, only implied. The Register requires financial disclosure of expenses incurred for all activities covered by the Register, which would theoretically include grassroots lobbying activities.

²⁷⁴ See note 316.

²⁷⁵ Federal Election Campaign Act of 1971, Pub. Law No. 92-225.

Reform Act of 2002.²⁷⁶ These two were far from the only legislative initiatives regarding campaign financing, and the current system has been minorly amended several times. The reason why the regulation of campaign financing has such a chaotic legislative history is due to the fact that several provisions contained were challenged in court, often successfully.²⁷⁷ Similarly to lobbying regulation, campaign financing touches upon rights related to the First Amendment, and the Supreme Court of the United States has struck down provisions contained in the acts that, in its own opinion, infringed upon it. One Supreme Court case in particular, *Citizens United v. FEC*, will be analysed in more detail.

The main tools used for campaign financing today are political committees, political action committees and super political action committees (better known as super PACs). Political committees are the official platform of a candidate, dependent on him and with a direct relation to him. Political committees are the main organ orchestrating a political campaign for a determined candidate. They buy advertisements, organise campaign events and more generally spend money on the campaign trail attempting to get the candidate elected for Federal Office. Political action committees, on the other hand do not form around a candidate, but rather around an interest. The range of possible interests is extreme: PACs may be formed around gun regulation, gay marriage, the legalisation of marijuana or the right to abortion. PACs are the main tool used by lobbyists in the subject of electoral campaigning to influence the decision-maker. There is also a third type of political committee, the super PACs, organised both around interests and candidates, and which are not constrained by contribution or expenditure limits. This latter category was born out of the Supreme Court's decision in *Citizens United*. Regarding lobbying regulation, the latter two types of political committees are the most relevant to the subject. A large number of firms engaging in lobbying activities also manage a related Political Action Committee – adding to this, several super PACs have also emerged in the past few years in a similar fashion.²⁷⁸

Campaign financing regulation in the United States moves along four different axes: disclosure requirements, contribution limits, expenditure limits, and the possibility of public financing.²⁷⁹ All four of these elements were originally contained in the Federal

²⁷⁶ Bipartisan Campaign Reform Act of 2002, Pub. Law No. 107-155.

²⁷⁷ See, for example, *Buckley v. Valeo*, 424 U.S. 1 (1976); *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006); *Citizens United v. FEC*, 558 U.S. 310 (2010); et al.

²⁷⁸ A quick search on the Federal Election Commission's website can testify to this.

²⁷⁹ Hunker, K., *Elections Across the Pond: Comparing Campaign Finance Regimes in the United States and United Kingdom*, *Harvard Journal of Law & Public Policy* (2013), p.1106.

Election Campaign Act (FECA) of 1971. Following *Buckley v. Valeo*, expenditure limits by candidates were found to be unconstitutional, violating First Amendment provisions.²⁸⁰ According to the Court, the U.S. government could not prohibit individuals from using their own funds to finance their campaigns. A direct consequence of this decision was that the public financing scheme contained in the FECA (where the candidate for one of the major parties could rely on public financing for his campaign equal to the expenditure cap if it forewent private contributions) was irrevocably damaged, since the state could give public funding, but could not forbid private expenditures due to the decision of the Supreme Court in *Buckley*.

The two main axes left in campaign financing regulation are thus disclosure requirements and contribution limits. The 1974 amendments to the FECA created the Federal Election Commission (FEC), an independent regulatory body tasked with enforcing disclosure provisions concerning campaign donations and expenditures. The disclosure system present in the United States does, at least, guarantee transparency. Similarly to the lobbying disclosure reports, all major actors involved (the political committees of candidates and parties, political action committees, Super PACs and even lobbyists themselves through the module LD-203) have to submit a periodic report (the frequency of which varies depending on whether the current year is an election year or not)²⁸¹ in which they detail all contributions with a value of \$200 or higher which have been received, given or spent.²⁸² The committee is also required to maintain an internal record of even smaller donations, down to \$50.²⁸³ Researching campaign contributions is relatively easy, and all information is publicly accessible. All contribution data can be easily accessed through the FEC website, which charts all donations given or received over a two-year period.²⁸⁴ These donations can be indexed by individual, candidate political committee, party political committee, political action committee or even super PAC.²⁸⁵

Contribution limits are present and enforced in United States campaign finance regulation. An individual may donate a maximum of \$2,700 per candidate in each

²⁸⁰ *Buckley v. Valeo*, 424 U.S. 1 (1976). Available: <https://supreme.justia.com/cases/federal/us/424/1/case.html>

²⁸¹ 52 U.S.C. §30104.

²⁸² *Ibid.* (b)(3)(A)

²⁸³ *Ibid.* §30102 (c)(2)

²⁸⁴ <https://www.fec.gov/data/>

²⁸⁵ *Ibid.*

election, and a maximum of \$5000 per year to a political action committee.²⁸⁶ A PAC, on the other hand, may only donate a maximum of \$5000 per candidate in each election.²⁸⁷ The limit on campaign contributions applies to presidential elections as well, which means that an individual or PAC cannot donate more than the limit to a candidate for the Presidency.²⁸⁸ This is also one of the reasons why the Honest Leadership and Open Government Act had to regulate the phenomenon of bundled campaign donations: since an individual couldn't donate more than a determined sum (unless they were the ones themselves running for office), lobbyists were themselves fundraising campaign contributions for candidates, which could have led to the effect of a lobbyist having *de facto* indirectly contributed large sums of money. Super PACs, on the other hand, are not constrained by expenditure limits, for reasons which will be analysed in the following subsection – but for a lobbyist they may not be as effective as regular PACs. As a quick search on the FEC's website can reveal, most political action committees focus on distributing sums over an amount of different candidates, since they are constrained by the contribution limit.

The situation in the European Union, at least focusing at its supranational level, is markedly different. The only officeholders seeking election at a direct European level are members of the European Parliament. Another marked difference is that the parties composing the European Parliament are made up of coalitions of national parties, who come together under a common platform.

The first attempt to regulate campaign financing at a EU level was Regulation 2004/2003 of the European Parliament and of the Council, later amended by Regulation 1524/2007.²⁸⁹ The regulatory framework contained an initial definition of European political parties and introduced the first provisions on party contributions by private actors, including limits and disclosure requirements.²⁹⁰ The regulations were ultimately replaced by Regulation 1141/2014 on the statute and funding of European political parties and European political foundations. The new regulation maintained the definition and character of European political parties but introduced a few significant innovations compared to Regulation 2004/2003. First of all, limits on maximum party contributions

²⁸⁶ 52 U.S.C. §30116 (a). All contribution limits are periodically adjusted for inflation.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ Petrillo, P.L., *Democrazie sotto pressione – Parlamenti e lobby nel diritto pubblico comparato*, Giuffrè Editore, Milan, 2011, p.261-3.

²⁹⁰ *Ibid.*

from private actors were revised upwards, compared to the previous regime. The 2014 regulation also created a system of public funding for European political parties and foundations, to cover administrative expenditures and expenditures linked to campaigns up to «85% of the annual reimbursable expenditure indicated in the budget of a European political party and 85% of the eligible costs incurred by a European political foundation».²⁹¹ The funds are earmarked from the general budget of the European Union. In the original draft of the regulation, 85% of the party contributions from the European Union were distributed in proportion to the share taken by a European political party in the Parliament, while 15% were distributed in equal shares among the beneficiaries.²⁹² In 2018, Regulation 1141/2014 was minorly amended.²⁹³ Some loopholes used to gain easier access to public funding were closed.²⁹⁴ Most importantly, the share of funds depending on seat allocation in the European Parliament was slightly revised upwards to 90%.²⁹⁵ Finally, the co-financing requirement for financial contributions for the Union was reduced to 10% for European political parties and 5% for European political foundations, respectively.²⁹⁶

The system also allows for contributions from private individuals. Each party may accept donations from a natural or legal person of up to €18,000 a year.²⁹⁷ There is, however, a caveat: limits on donations according to national laws apply and take precedence, so there are effectively 28 entirely different regulations concerning campaign finance.²⁹⁸ The discussion concerning national regulations deserves some attention, if only to mark some very interesting comparisons with campaign contribution limits in the United States. The information found in a report commissioned by the Committee on Constitutional Affairs of the European Parliament is especially revealing.²⁹⁹ Although the vast majority of European Union countries have access to some form of public funding, the limits on campaign and party contributions by private individuals are actually higher in every

²⁹¹ Regulation No. 1141/2014 of the European Parliament and of the Council, Article 17, par. 4.

²⁹² *Ibid.* Art. 19.

²⁹³ Regulation 2018/673 of the European Parliament and of the Council amending Regulation No 1141/2014 on the statute and funding of European political parties and European political foundations.

²⁹⁴ *Ibid.*, art. 1 par. 8.

²⁹⁵ *Ibid.*, art. 1 par. 6.

²⁹⁶ This change in percentages comes from an amendment approved in 2017. For more information see <http://www.consilium.europa.eu/en/press/press-releases/2018/03/07/funding-of-european-political-parties-revised-rules-get-council-approval/>

²⁹⁷ Regulation No. 1141/2014 of the European Parliament and of the Council, Art. 20 par. 1.

²⁹⁸ *Ibid.* Art. 21 par. 1.

²⁹⁹ European Parliament, Party Financing and Referendum Campaigns in EU Member States – Study for the AFCCO Committee.

single European Union country than what they are in the United States.³⁰⁰ However, the system of PACs in place in the United States does not exist in the European Union, at least for what concerns campaign funding. It must also be said that campaign contribution limits in the United States apply on a per-candidate basis – a PAC or individual can donate only a limited amount of money to a single candidate but can spend far more money by financing like-minded candidates as well. On the other hand, most European countries (with the main exception of Germany, which has no limits on campaign contributions) and Regulation 1141/2014 apply limits on a donor basis – so that an individual may only contribute a limited amount of money each year.³⁰¹ Donations of more than €3000 received by European political parties also need to be disclosed.³⁰²

2.7 - *Citizens United v. FEC* and ‘independent expenditures’

A very interesting, though controversial, evolution of regulation of campaign financing took place in the United States in 2010. *Buckley* had already struck down limits on campaign expenditures, finding that individuals could not be prohibited from spending their own money to promote their electoral campaign. At the time of *Citizens United*, what was still in place was a ban on corporate or union independent expenditures. Corporations and unions could not buy advertisements or spend money from their general treasury to distribute ‘electioneering communications’, promoting or attacking a federal candidate.³⁰³ The only way in which they could contribute to electoral campaigns was through the use of a PAC, which had to be created and could only be funded through voluntary donations by shareholders or, in the case of trade unions, members.³⁰⁴ This provision was radically changed after *Citizens United*, which had a massive impact on campaign finance regulation in the United States. The case concerned a non-profit corporation, Citizens United, which in 2008 had created *Hillary*, a documentary which was, in the words of the Supreme Court, a «feature-length negative advertisement» and which was promoted with attack ads.³⁰⁵ What complicated matters was that, while

³⁰⁰ *Ibid.*, p.29-33.

³⁰¹ *Ibid.*

³⁰² Regulation No. 1141/2014 of the European Parliament and of the Council, Art. 32(e).

³⁰³ *Citizens United v. FEC*, 558 U.S. 310 (2010), p.1.

³⁰⁴ *Ibid.* p.45-7.

³⁰⁵ *Ibid.* p.7-8.

Citizens United was largely funded by private individuals, it received a small sum of donations from private corporations as well.

To understand the verdict of *Citizens United* it should be reminded that the Supreme Court of the United States has always had a very broad interpretation of the First Amendment and its right to free speech, as could be seen in *Buckley*.³⁰⁶ The decision to strike down the ban on independent expenditures was decided by a slim 5-4 majority.³⁰⁷ Justice Kennedy's majority opinion decided to judge the ban on donations from corporations on a *sui generis* basis, instead of a case-by-case basis, arguing that allowing a judge to decide whether the donations from private corporations were substantial enough to trigger the provisions contained in §401b could have a preventively chilling effect on free speech.³⁰⁸ Citing the example of media corporations and other previous Supreme Court cases, it then went on to argue that First Amendment provisions extended to corporations as well, rather than just individuals,³⁰⁹ and that a discrimination of speaker identity in deciding whether to allow speech or not was a clear violation of the First Amendment.³¹⁰ Free speech, according to the Court, could only be restricted if «this furthers a compelling interest and is narrowly tailored to achieve it».³¹¹ In a previous case, *Austin*, the Supreme Court had argued that the prohibition on independent expenditure furthered an anti-distortion interest, but this reasoning was struck down by *Citizens United* and *Austin* overturned.³¹² The only possible reasoning could be the one applied in *Buckley*, where the Court upheld the ceiling on contributions by arguing that this restriction served the compelling interest to «prevent corruption or its appearance».³¹³ But according to the Supreme Court, independent expenditures, not being coordinated with candidates, could not fit this purpose and constituted a violation of the free speech right of corporations.³¹⁴ The Supreme Court argued that that electioneering communications aimed at influencing the people, who had the final burden of election, and argued in favour of more communication, not less, which would inform political discussion more.³¹⁵ Disclosure would be, however, required, because it «permitted citizens and shareholders to react to

³⁰⁶ *Buckley v. Valeo*, 424 U.S. 1 (1976).

³⁰⁷ *Citizens United v. FEC*, 558 U.S. (2010), p.6.

³⁰⁸ *Citizens United v. FEC*, 558 U.S. 310 (2010), p.18-20.

³⁰⁹ *Ibid.* p.25-6.

³¹⁰ *Ibid.* p.30-1.

³¹¹ *Ibid.* p.23.

³¹² *Ibid.* p.32-40.

³¹³ *Ibid.* p.40-5.

³¹⁴ *Ibid.* p.41-42.

³¹⁵ *Ibid.* p.57.

the speech of corporate entities in a proper way».³¹⁶ Through this reasoning the Court ultimately decided to overturn *Austin* and strike down the ban on independent expenditures for electioneering communications, as long as they were disclosed to the FEC.

Citizens United was massively important because it created the category of super PACs, groups formed with the intention to influence elections, if they did so in a way independent from the candidate. Super PACs have no limits on how much money people can donate to them (unlike with standard PACs, where individuals can only contribute \$5000 a year to one)³¹⁷ and can buy advertisements and produce electioneering communications. *Citizens United* was massively controversial, with the most common critique being that it opened the door to unbound election spending by corporations. However, it seems to be too early to understand the effects of *Citizens United*. Super PACs have certainly developed after the case, and have spent a very large amount of money on influencing elections: in the 2016 presidential elections the main super PAC supporting Donald Trump, *Great America PAC*, spent 23 million dollars on independent expenditures;³¹⁸ *Priorities USA Action*, the main super PAC supporting Hillary Clinton and the Democratic Party, spent 133 million dollars.³¹⁹ But a quick search on the FEC's database of Super PACs reveals that the majority of funding towards both candidates came from individuals, not corporations. Keeping this in mind, drawing a causal link between corporate election funding and super PACs is difficult. But it can be speculated that the birth of super PACs might give firms a tool with which to indirectly influence the election of a candidate more receptive to the firm's interests, without necessarily directly contributing directly to the candidate's campaign. As noted previously, the link between lobbying and campaign finance is very complex and cannot be simplified in a linear way.

2.8 - 'Revolving doors' provisions

A small note should be opened on the subject of 'revolving doors'. The 'revolving doors' phenomenon arises when a former decision-maker or in general a public employee leaves

³¹⁶ *Ibid.* p.55-6.

³¹⁷ See note 384.

³¹⁸ Federal Election Commission, *Great America PAC, Financial Summary 2015-6*. Available: <https://www.fec.gov/data/committee/C00608489/>

³¹⁹ Federal Election Commission, *Priorities USA Action, Financial Summary 2015-6*. Available: <https://www.fec.gov/data/committee/C00495861/>

a government institution to take a job in private lobbying firms.³²⁰ There are two main reasons for which lobbying firms are interested in hiring a former public employee. The first is that, by having worked in a decision-making position or close to one, it is expected that the former public employee will have a greater expertise on how to structure lobbying activities and even knowledge on individual sectors – higher innate ability and/or human capital accumulation.³²¹ The second reason is that lobbyists have access to political connections due to their previous employment, and can access decision-makers more easily, compared to others.³²² In the framework of the thesis, transparency and equality of access to the decision-makers are the two standards to aim towards. In this context, the first reason would be legitimate – the second, however, would not. Empirical data seems to confirm the advantages given from the use of personal connections, at least for what concerns the U.S. Senate.³²³ A ‘cool-off period’ is then necessary for former decision-makers, to dissuade the use of personal connections to carry out lobbying activities. Both the United States and the European Union have some relevant provisions on the subject matter. Just how long a revolving door ban should be for former decision-makers is something largely left down to opinion. This might help explain why they largely vary between systems and between roles concerned.

In the United States, both the legislative and executive have differing revolving door bans. The United States Senate enforces a two-year ban on lobbying the Senate by former Senators.³²⁴ It also prohibits former staff members from lobbying the office or committee they were assigned at for a period of one year after the end of their employment.³²⁵ The House of Representatives has a shorter ban for both former members and staff, namely one year.³²⁶ Those who violate these provisions may be punished with a civil penalty of up to \$50,000.³²⁷ For post-employment restrictions in the Presidency, see the section in the past chapter on the Obama Executive Orders.

In the European Union, restriction on post-employment are enshrined in the Code of Conduct for Members of the European Commission. Former Commissioners are banned

³²⁰ Vidal, J.B., Draca, M., Fons-Rosen, C., *Revolving Doors Lobbyists*, CEP Discussion Papers, London School of Economics and Political Science, London, UK, p.1.

³²¹ *Ibid*, p.2.

³²² *Ibid*.

³²³ *Ibid.*, p.10-11.

³²⁴ Rules of Procedure of the United States Senate, Rule XXXVII, art. 8.

³²⁵ *Ibid*. art. 9.

³²⁶ 18 U.S.C. §207 (e)(1)(b).

³²⁷ 18 U.S.C. §216.

from lobbying Commission Members on subject matters which were part of the former Commissioner's portfolio for a period of two years after the end of employment.³²⁸ In the case of the President of the Commission, this period extends to three years.³²⁹ Members of the European Parliament have no restrictions on employment after the end of their term.

It is doubtful that the provisions present in both systems could be defined as adequate. A period of two years of cool-off is not enough to eliminate advantages from personal connections. Data gathered in the United States in 2011 suggests that former government officials connected to US Senators can extract around 23% of higher revenue for their lobbying firm, and the use of personal connections is further proven by the fact that the higher revenue persists as long as the decision-maker connected to the former government employee is in office.³³⁰ To this it should be added that in Europe the provisions present in the Code of Conduct of the Commissioners do not prohibit lobbying *per se*, but lobbying on subject matters which were part of a Commissioner's portfolio. The possibility of using personal connections is still present in both systems, for the simple reason that it's too short a time to guarantee enough turnover among the decision-makers, giving former officials a strong advantage outside of their knowledge.

2.9 - The enforcement problem

Although both systems contain different regulatory loopholes depending on the subject matter, there is one problem common to both the United States and the European Union regulation of lobbying: namely, enforcement of the relevant provisions. Both systems ultimately do not possess the tools necessary to prosecute lobbyists who do not comply with the relevant statutes. The question to be answered is whether both systems can adequately prosecute and punish lobbyists who violate lobbying provisions.

The problem in the United States is mostly practical, rather than legal. The LDA introduced civil penalties for violating its provisions,³³¹ while the Honest Leadership and

³²⁸ European Commission Decision on a Code of Conduct for the Members of the European Commission, C(2018), Art. 11 (2), (4).

³²⁹ *Ibid.* (5)

³³⁰ Vidal, J.B., Draca, M., Fons-Rosen, C., *Revolving Doors Lobbyists*, CEP Discussion Papers, London School of Economics and Political Science, London, UK, p.10-11.

³³¹ See the section in the previous chapter on the Lobbying Disclosure Act.

Open Government Act amended the LDA to introduce criminal penalties.³³² The enforcement mechanism is clear, at least in theory. The Secretary of the Senate and the Clerk of the House of Representatives handle registration and disclosure (the LD-1, the LD-2 and the LD-203 for campaign contributions) for what concerns lobbyists.³³³ They also have the duty to check compliance of the statute. In case of erroneous information or discovery of undisclosed activities they can report the alleged violation to the Attorney of the United States for the District of Columbia, the office of which can prosecute non-complying lobbyists.

Although a legal mechanism was created, enforcement nonetheless runs into significant problems due to how much effort is put by the Attorney into prosecuting violations of the two statutes. A 2008 Government Accountability Office report found that of the over 700 people assigned to the U.S. Attorney Office only five were assigned to enforcing the LDA, none of whom worked exclusively on enforcing it.³³⁴ Considering that up to 2009 the Secretary of the Senate had referred 5,596 cases to the United States Attorney Office, it becomes clear just how understaffed the Attorney Office is for what regards LDA enforcement.³³⁵ In the following years, in the period between 2009 and 2014, the number of cases referred to the USAO did not drop, with Clerk and Secretary referring another 2,308 notices of failure to comply with LD-2 disclosure requirements.³³⁶ The number of suits actually filed was miniscule: eight, in the twenty years since approval from the Lobbying Disclosure Act – a very far number from the thousands of notices sent by the Secretary and Clerk.³³⁷ It is clear then that there is a massive bottleneck in place between lobbying disclosure provisions and their active enforcement. As long as it is not fixed existing provisions are almost worthless.

The problem in the European Union is structural, and far more difficult to resolve. The current Joint Register's voluntary character makes enforcement for the entire category clearly impossible – it is highly unlikely that a lobbyist with the intention of violating the Register's Code of Conduct would voluntarily sign up to it, even just to obtain a pass for entry to the European Parliament (which can still be obtained on invitation). By

³³² See the section in the previous chapter on the Honest Leadership and Open Government Act.

³³³ 2 U.S.C. §1605

³³⁴ Luneburg, W.V., *The Evolution of Federal Lobbying Regulation: Where We are Now and Where We Should Be Going*, 41 *McGeorge L. Rev.* 85 (2009), p.124.

³³⁵ *Ibid.*, footnote 228.

³³⁶ Straus, J.R., *The Lobbying Disclosure Act at 20: Analysis and Issues for Congress*. Congressional Research Service, p.31.

³³⁷ *Ibid.*

transitioning to a mandatory register, forcing all lobbyists who want to meet with Commission or Parliament officials to sign up, theoretically enforcement would become easier. Lobbyists would be subject to transparency provisions and they would have to agree with its Code of Conduct. The Secretariat would also investigate possible violations of the Register's code or transparency provisions, and hand down appropriate punishments.³³⁸ But the strength of the measures that can be imposed is limited. The most severe punishment for a violation of the Mandatory Register's provisions is removal of the registration for a period between 15 days and 2 years, losing the pass to access the Parliament and, theoretically, the ability to meet Parliament or Commission members. But the burden to enforce that removal comes down to the decision-maker itself, who through either negligence or deceit could still allow access of the lobbyist to him or others. The worst that can happen to Commission staff is to be fired. In the case of a European Member of Parliament, measures for punishment would follow Rule 166 of the Rules of Procedure of European Parliament. In this case, the harshest sanction contained therein is a temporary suspension from participation in some or all activities of Parliament (except for voting in the plenary) for a period between two and thirty days. The problem, then, is dual-folded: the sanctions for unethical lobbyists are inadequate, but sanctions for possibly negligent decision-makers are inadequate as well.

Due to its peculiar legal personality the European Union does not have the tools to properly sanction or to prosecute misbehaviour in its institutions, by interest representatives or European officials: it cannot structurally implement criminal or civil penalties. There are a few practical examples for this: Edith Cresson, the misbehaviour of whom brought the Santer Commission to resign in 1999, was found by the European Court of Justice to violate her official duties as European official but did not even lose her Commission pension as a result.³³⁹ Fritz-Harald Wenig, a high-level official from the Commission's trade department who took bribes in exchange for leaking commercially sensitive information, was only fired from his post.³⁴⁰ The 'cash for laws' scandal, in which journalists posing as lobbyists were able to convince four MEPs to accept money in exchange for watering down banking reform legislation, was at least sanctioned, but

³³⁸ European Commission Proposal COM(2016) 627 for a Interinstitutional Agreement on a mandatory Transparency Register (2016), art.9.

³³⁹ Judgment of 11 July 2006, Commission of the European Communities v. Edith Cresson, C-432/04, ECLI:EU:C:2006:455, par. 151.

³⁴⁰ Schult, C. & Pauly, C., Brussels' Revolving Door for Top EU Officials, *Spiegel Online* [online] Available at: <http://www.spiegel.de/international/europe/european-commission-officials-and-potential-conflict-of-interests-a-926792.html>

not by the European Union. Three of the four involved MEPs were sentenced to jail by their own countries' judicial systems. If someone were to be caught bribing a European official, it is unclear as to who would have jurisdiction, whether the European Union or a national court (itself a judge of European Union law). These are not just judicial questions: they're constitutional as well, and as long as they're not answered criminal behaviour will not be disincentivised enough and enforcement will be lax.

2.10 – An overview on transparency and participatory guarantees in the US and in the EU

Having examined the multiple ways in which lobbying regulation is handled in both the United States and the European Union, it is necessary to judge them both in an attempt to understand whether the two systems guarantee the two requirements of transparency and equality of participation. Firstly, both systems have in place ways to give a non-partisan and objective check to lobbying research, through the Congressional Research Service and the European Parliamentary Research Service - the latter of which is rapidly growing in use.

Front office provisions are somewhat lacking in both systems. The United States requires disclosure of the name of individual lobbyists handling meetings for a client, while the current European system only requires disclosure of individuals in possession of the pass for entry to the European Parliament – however, neither requires the lobbyists to disclose individual meetings held with decision-makers, with an exception being made for the current European Commission, which has disclosed itself individual meetings between Commissioners and interest representatives. The LD-2 in the United States requires disclosing Federal Agencies and houses of Congress lobbied – but not much else. Both systems require financial disclosure of lobbying expenditure and income – the United States require an exact sum, while the European Joint Register only requires a range. Regarding the exact policy issues, the LD-2 in the United States requires disclosing legislative proposals lobbied, but not how they were lobbied. The European Union does not fare better on that, with the requirement for disclosing policy proposals followed being laxly enforced and unclear on the amount of detail required. As long as the new Interinstitutional Agreement for a mandatory Transparency Register is not implemented, the European Union will also have the flaw of being *de facto* voluntary. A note on the Council should also be made: even if the new regulation will be implemented, no disclosure requirements will be required from lobbyists for lobbying activities inside the

Council, leaving it largely unregulated – an imperfect situation, considering that lobbying the choices of national governments inside the Council does happen. Arguably, the regulation in the United States could be judged satisfactory from a transparency standpoint if a disclosure of individual meetings between lobbyists and decision-makers were required. The regulation in the European Union is more problematic, and while the new Mandatory Register would solve some of the present problems, it would not solve all of them. New regulation should require a stricter enforcement of the disclosure of legislative proposals followed by lobbyists, or better yet extend the disclosure of individual meetings to the European Parliament as well. These improvements, together with finding a way to extend disclosure requirement to lobbying activities inside the Council, would satisfy the condition of transparency for what concerns front office activities in the European Union.

With the growth of social media and advocacy, it becomes ever more necessary to properly regulate grassroots lobbying activities. However, it's necessary to remind just how complex of a subject matter is regulating them. The 1946 Federal Regulation of Lobbying Act in the United States made the mistake of making provisions pertaining to grassroots lobbying activities too broad, ultimately bringing to the downfall of the Act itself. The European Union also made a similar mistake with the 2014 Interinstitutional Agreement, but transitioned away from it with its new proposal for a mandatory register. In any case, current lobbying regulation in both systems does not satisfy the requirement for transparency for what pertains to grassroots lobbying, being *de facto* a completely unregulated subject matter. Implementing provisions on grassroots lobbying in the United States would ultimately be very difficult, since, as *United States v. Harriss* proved, its very regulation would create serious constitutional questions which might be struck down by the Supreme Court a second time. Regulating grassroots lobbying in the European Union might be slightly easier, by requiring a disclosure of both internal and contracted grassroots lobbying activities by all who sign up to the Register – at present time, however, no such provision is present. There is an additional question to be made whether this additional disclosure might infringe on national competences: whether a grassroots campaign originating in a single member state but aimed at European institutions need to be disclosed in the European Register. These issues prove how complicated the regulation of grassroots lobbying is, but does not diminish its necessity, especially in today's time and age.

The regulation of campaign financing is a question that pertains mainly to the United States, although the Parliament of the European Union has recently introduced both a form of public funding and the possibility of private donations to political parties (in accordance with national regulations). It can be argued that both systems satisfy the requirement for transparency, requiring donors, parties and candidates to disclose donations higher than \$200 and €3000, respectively in the United States and in the European Union. There are, however, other questions concerning the equality of participation between interest representatives to the public decision-makers. There are contribution limits on a per-candidate basis in place in the United States, which might dissuade the office-holder or seeker from becoming too dependent on a limited number of interest representatives. On the other hand, the fact that Congress had to regulate bundled contributions with the Honest Leadership and Open Government Act does imply that several lobbyists have attempted to gain privileged access to a decision-maker. This is, however, a larger ethical question. Although contribution limits would theoretically ensure that no officeholder grow too close to a specific PAC, the question of indirect influence arises, especially in the wake of *Citizens United*. An organised interest financing a super PAC that sways the public to vote for a determinate candidate who shares many ideas with its platform might enjoy privileged access to the would-be officeholder, once the latter is in power. This would not be through outright financing, but through shared political ideas. Although *Citizens United* led to a massive influx of money during election campaigns, there is no proof yet that this money has damaged the equality of interest representatives with political decision makers. Several questions concerning lobbying regulation, however, still stand.

Chapter III – Explaining differences in lobbying styles in the two systems

3.1 - Differences in EU and US lobbying styles at a first glance

It is not just the regulation of lobbying that differs considerably between the European Union and the United States. What are colloquially known as “lobbying styles” are largely different as well in the two systems. Lobbying in the US is typically framed as more aggressive and conducted along more partisan lines.³⁴¹ EU lobbying, on the other hand, is framed as more collaborative and subdued – in the words of a lobbyist, «in Brussels, you must learn to speak softly, softly, softly».³⁴² There are several authors that share this thesis - the notion that lobbying is conducted with two different styles in the two systems is not particularly controversial.³⁴³ It is a concept that can even be proved empirically. American lobbyists focus more on promoting or blocking legislation as an objective, compared to the European Union where most lobbying activities are carried out with the purpose of affecting the initial shape and contents of legislative and non-legislative proposals.³⁴⁴ Cultural factors might also have an influence in this: lawmakers in the EU possess less of a zero-sum view as to political divergences and conflicts, and interest representation in Brussels seems to have absorbed this view.³⁴⁵ US lobbyists resort far more often to grassroots (or ‘outside’) lobbying tactics, a divergence that becomes even more present when measuring the resources put into such activities.³⁴⁶ Finally, US lobbyists adopt different arguments compared to EU lobbyists, referring more often to commonly shared goals and public opinion.³⁴⁷ There are several other, subtler, differences, but nonetheless lobbying in the EU seems to have taken a very different evolution compared to that of the US.

The most inviting question to ask would be why the two styles differ so much. A preliminary hypothesis may be that lobbying being carried out in the European Union is

³⁴¹ Woll, C., Lobbying in the European Union: From a sui generis to a Comparative Perspective (2006), *Journal of European Public Policy* 13:3, p.460-1.

³⁴² *Ibid.*

³⁴³ See Greenwood (2003), Mihut (2009), Coen (1999), et al.

³⁴⁴ Mahoney, C., *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008, p.68-79.

³⁴⁵ Bitonto, A., and Harris, P. (eds), *Lobbying in Europe: Public Affairs and the Lobbying Industry in 28 EU Countries*, Palgrave MacMillan, 2017, p.41.

³⁴⁶ Mahoney, C., *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008. p.153-165.

³⁴⁷ *Ibid.* p.81-109.

more focused around technical matters (thus rewarding less aggressive lobbying efforts) in the light of the pool of exclusive and shared competences of the Union, while lobbying in the United States is more focused around politically controversial matters (rewarding more aggressive lobbying efforts). On the one hand, it is true that technical arguments – arguments referencing non-salient, mostly sector-specific and non-partisan arguments – are brought to the decision-maker more often in the EU by interest representatives. This category may also include arguments regarding the feasibility or workability of existing or proposed regulation.³⁴⁸ But arguments referencing common and shared societal goals (defined as «motherhood and apple pie issues»)³⁴⁹, while more prevalent in the United States, are also present in lobbying activities conducted in the European Union. Adding to this, often ‘technical’ arguments can be far more political than what they may appear at first glance. A possible example is the case of net neutrality in the US, in which an initially technical and sector-specific issue morphed into a controversial, salient and prolonged political battle.³⁵⁰ Another might be the case of the renewal of the authorisation in the EU for glyphosate, an ingredient used in weed killers which was found to be carcinogenic by the World Health Organisation but not by EU agencies.³⁵¹ Reducing often subtle differences in lobbying styles to a simple “technical versus political” spectrum would be misleading and diminutive.

Lobbying in the European Union seems then to have taken on a multi-faceted moderate character, compared to lobbying in the United States. A possible explanation, and one that will be explored here, is that differences between lobbying in the United States and lobbying in the European Union can be explained by the individual institutional characteristics of each system. The lobbying styles adopted in Brussels and in Washington are a direct result of the institutional and political structure in place, and objectives, arguments, and general character of lobbying activities change depending on which elements are present.

³⁴⁸ Using the data referenced in note 6, technical arguments or feasibility arguments are used by interest representatives 84% of the time in the EU (28% + 56%), compared to the US where they are used 48% of the time (26% + 22%).

³⁴⁹ *Ibid.*

³⁵⁰ Not Neutral About Net Neutrality, *The Economist*, 2014 [Online] Available at: <https://www.economist.com/business/2014/11/15/not-neutral-about-net-neutrality>

³⁵¹ Marks, S. and Paravicini, G., Europe’s high-stakes weedkiller decision goes to the wire, *Politico EU*, 2017 [Online] Available at: <https://www.politico.eu/pro/glyphosate-europe-high-stakes-weedkiller-decision-goes-to-the-wire/>

3.2 - Differences in how decision-makers come to power and the possible emergence of the *spitzenkandidat* process

A first institutional difference influencing lobbying styles and activities may be found in the relationship between the individual citizen and the decision-maker. Comparing the United States and the European Union in this creates some interesting comparisons. The United States is a presidential system. There is a clear separation of powers between the executive power (represented by the President of the United States) and the legislative power (represented by Congress).³⁵² Elections for the House and for electing the President are separate from one another, and even elections in the House and Senate are not completely synchronized.³⁵³ There is no guarantee that the party winning a majority in the House or Senate will be of the same of the President. Legislative candidates in the House of Representatives are also elected on a constituency basis in a first-past-the-post system.³⁵⁴ Candidates for Senate, on the other hand, are elected in the individual states, which are equally represented in the chamber.³⁵⁵ This creates a direct fiduciary relationship between elector and elected. Congressional elections are also held every two years. The entire House of Representatives and one-third of Senators stands for re-election every two years.

In the European Union, on the other hand, the situation is markedly different. On the one hand, the decision-making power is in a different balance. While in the United States Congress has the predominant responsibility to legislate (and the other main decision-maker, the President, is *de facto* also directly elected), in the European Union the Commission has the main right to initiate legislation, save for a few sparse cases.³⁵⁶ The European Parliament and Council may in the majority of cases only vote on draft laws and amend them in agreement with one another.³⁵⁷ The Commission is, *de facto*, the main law-making organ. The European Parliament also follows a different electoral system.³⁵⁸ Unlike in the United States, voters do not vote on an individual basis. Elections for the European Parliament have no constituencies and MEPs are not elected on a first-past-the-

³⁵² U.S. Const., Art. 1 §1, Art. 2 §1.

³⁵³ *Ibid.* Art. 1 §2, Art. 1 §3.

³⁵⁴ McKay, W., and Johnson, C.W., *Parliament and Congress: Representation and Scrutiny in the Twenty-First Century*, Oxford, Oxford University Press, 2010, p.88-90.

³⁵⁵ Originally, candidates for Senate were elected by each state legislature. The XVII Amendment (1913) made Senators directly elected.

³⁵⁶ Notably in the consent procedure. See Chalmers, D., Davies, G., Monti, G., *European Union Law – Third Edition*, Cambridge, Cambridge University Press, 2014, p.117-27.

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.* p.99-100.

post system like in the United States, votes being instead redistributed proportionally according to shares of the vote received in each Member State.³⁵⁹ Voters pick parties, not individuals.

It is also interesting to note how a new European Commission is formed. Although terms of the Commission coincide with elections of the European Parliament, there is not the same political relationship between the legislative and executive power that a classic parliamentary system would suggest. The European Parliament does not officially nominate the President of the Commission.³⁶⁰ This is a prerogative of the European Council, composed of heads of state and government from each Member State.³⁶¹ The Parliament does have a power of assent over the nomination of the President, but it does not propose a name itself.³⁶² If approved by the EP with an absolute majority, the proposed President of the European Commission must then nominate his or her vice president and 28 Commissioners, one from each Member State. The nominees are then subject to approval as a single entity (the College of Commissioners) by both the European Council and the European Parliament.³⁶³

The European Parliament does have another significant power over the Commission. Colloquially known as the ‘nuclear option’ in Union circles, one-tenth of members of the European Parliament may request a motion of censure, aiming to dismiss the current Commission as a whole. Such a motion requires a two-thirds majority of votes in the EP to be passed.³⁶⁴ The two-thirds requirement dissuades censure due to political disagreements, and one has never been passed in the history of the Union. The only Commission ever at risk of being censured, the Santer Commission in office from 1995 to 1999, resigned on its own when it became politically clear the motion would pass.³⁶⁵ The implication of the institutional structure is that the Commission, although subject to the European Parliament’s approval and dismissal, is not as directly dependent to the Parliament as a national government in most parliamentary systems would be, and once elected is more difficult to dismiss.

³⁵⁹ *Ibid.*, p.94.

³⁶⁰ The *spitzenkandidat* evolution, if continued, would change significantly the balance of power between the European institutions. See below.

³⁶¹ *Ibid.*, p.90-1, 101-2.

³⁶² See note 360 and the following section.

³⁶³ Article 17(5) TEU.

³⁶⁴ Chalmers, D., Davies, G., Monti, G., *European Union Law – Third Edition*, Cambridge, Cambridge University Press, 2014, p.102.

³⁶⁵ *Ibid.* See also C-432/04, *Commission v. Edith Cresson*.

The differences in how decision-makers come to power might partially explain why lobbying in the United States has taken on a less collaborative and more aggressive form. Lobbyists in the United States can make use of constituency arguments, where the decision-maker (a member of Congress) is openly or indirectly threatened with informing voters or the public opinion about a position taken on proposed or existing legislation.³⁶⁶ The Commission, on the other hand, is largely independent from the electorate, at least for what concerns the College of Commissioners. An exception to this rule would be created if the *spitzenkandidat* process persists in the future, which would indirectly tie the President of the Commission to elections of the European Parliament. Careers of individual Commissioners are not tied directly to public opinion, because they're not subject to elections. Dependence of the Commission on the Parliament (which is on the other hand directly elected) is also limited to their initial approval and to the possibility of censure. Constituency arguments in such a system would clearly not work under the existing conditions.³⁶⁷ Additionally, the institutional setting of the European Union is built for co-operation, not conflict,³⁶⁸ and generally an agreement between European institutions in the ordinary legislative procedure will often be reached even before the first reading in the European Parliament. The legislative process will be analysed in further details in sections 3.4, 3.4.2 and 3.4.3. What is important to note is that the absence of constituency arguments in the EU will often remove much of the tension that might arise between interest representatives and the decision-maker, which is instead present in the US. A legislative proposal by the European Commission might cause controversy, but voters have no direct tools to punish or reward the Commissioner responsible. A lobbyist involved in the debate would have no incentive to use public opinion to influence the decision-maker's choice.

It was previously argued that the link between voters and the Commission is not as strong as the link between voters and the Presidency of the United States. While still true for

³⁶⁶ Mahoney, C., *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008, p.100-6.

³⁶⁷ It should be noted that MEPs in some Member States are elected on a constituency basis, since elections to the European Parliament lack a unified electoral system. However, elections for the European Parliament are still considered second-order by many citizens, compared to national elections. The low turnout of 43% in the past two elections (including the 2014 one where the *spitzenkandidat* system was adopted) might be used to attest to the limited effectiveness of public opinion arguments by interest representatives. For more information, see Hobolt, S.B., A vote for the President? The role of *Spitzenkandidaten* in the 2014 European Parliament Elections, in *Journal of European Public Policy*, Vol. 21 No. 10, 2014, p.1528-40.

³⁶⁸ By using Arend Lijphart's distinctions between consensus democracy and majoritarian democracy, it can be argued that the European Union is far closer to the first model than to the second. See Lijphart, A., *Patterns of Democracy: Government Forms & Performance in Thirty-Six Countries (Second Edition)*, Yale University Press, 2012.

what concerns individual Commissioners, there might be a significant constitutional evolution taking place in the Union for the nomination of the President of the Commission. As of time of writing, it is unclear if this evolution will continue, or whether it will be interrupted, having only happened once. This is the role played by the *spitzenkandidat*, or ‘lead candidate’, process. The *spitzenkandidat* arose out of some innovations of the Lisbon Treaty. Namely, that the European Council had to take into account the elections of the European Parliament and consult with it in its choice of President of the Commission (Article 17(7) TEU); that the candidate was to be ‘elected’ (vis-à-vis the previous term used, ‘approved’) by the EP. The first point was also additionally stressed by Declaration 11, attached to the Treaty.³⁶⁹ Although not explicitly stated by the Treaty, the main European political parties took these provisions to mean that each group could choose a candidate for President of the Commission before EP elections, and that the European Council should nominate the one belonging to the party which took the largest share of the votes in elections.³⁷⁰ The European Council initially obliged after the 2014 European Parliament elections choosing Jean-Claude Juncker, the candidate chosen by the leaders of the national parties belonging to the EPP (European People’s Party).³⁷¹

The birth of the first ‘political Commission’ (as described by Juncker himself) has drawn, in the past years, mixed reactions – not just on the quality of the decision-making process, but on how politicised the current term actually is.³⁷² What is still unclear is whether the *spitzenkandidat* process has a future in itself. The European Council and the European Parliament are currently on a collision course regarding the process, and there is no telling whether the next EP elections will be held with the *spitzenkandidat* system or not. The European Parliament has pressured the European Council over using it again, and even adopted a decision in February 2018 stating that only a candidate chosen through the *spitzenkandidat* would receive assent from the chamber.³⁷³ A large amount of members of the European Council, on the other hand, have expressed opposition to the *spitzenkandidat*, with some critics even observing that committing to the process in

³⁶⁹ Corbett, R., ‘European Elections are Second-Order Elections’: Is Received Wisdom Changing?, in *Journal of Common Market Studies*, Vol. 52 No. 6, 2014, p.1196.

³⁷⁰ *Ibid.* p.1197.

³⁷¹ Peterson, J., Juncker’s political European Commission and an EU in crisis, in *Journal of Common Market Studies*, Vol. 55 No. 2, p.353-4.

³⁷² *Ibid.*, p.359-64.

³⁷³ European Parliament, (2017/2233(ACI)) European Parliament decision of 7 February 2018 on the revision of the Framework Agreement on relations between the European Parliament and the European Commission.

advance may be in itself a violation of the aforementioned Article 17(7) of the TEU.³⁷⁴ Some scholars have even noted that the process may have paradoxically expanded the political power and constitutional prerogatives of the European Council over the Commission, by giving the former the chance to significantly influence the agenda of the latter and to influence the choice of individual Commissioners – making the Commission less politicised, rather than more as desired by the European Parliament.³⁷⁵

The future of the *spitzenkandidat* is unknown. If the process is eventually repeated, this would mark a significant expansion of the Parliament's powers over the Commission,³⁷⁶ and it might create some interesting implications for lobbying activities. The continuation of the custom might create a level of vertical accountability to the President of the Commission currently missing from European elections, and it might open up the possibility for interest representatives to use constituency or public opinion arguments. However, two significant distinctions with the United States would still remain, which would still prevent lobbyists from actively using this argument. The first is an absence of pan-European mass media: while there is a plethora of national, inter-state TV channels in the United States, pan-European media is very scarce, if not completely absent.³⁷⁷ Interest representatives do not currently only lack the incentives, but they also lack the tools. A media campaign created to inform the public about the position of a potential candidate would require an enormous amount of coordination, in what is currently 28 different media landscapes.

3.3 Differing federal competences in the two systems

Another possible institutional explanation for the differing styles of lobbying in the two systems may be found in the competences and prerogatives reserved, respectively, to the United States federal government and the European Union itself. Depending on the subject matters reserved for jurisdiction at the federal level, the two entities may focus on subjects which may require different lobbying styles. The hypothesis might be that the

³⁷⁴ Herszenhorn, D.M., De La Baume, M., Commission's Spitzenkandidat process at risk, February 2018, *Politico EU* [online] Available at: <https://www.politico.eu/article/spitzenkandidat-jean-claude-juncker-race-with-no-rules-eu-leaders-brace-for-clash-over-2019-elections/>

³⁷⁵ Goldoni, M., Politicising EU Lawmaking? The *Spitzenkandidaten* Experiment as a Cautionary Tale, in *European Law Journal*, Vol. 22 No. 3, 2016, p.283-7.

³⁷⁶ WTE, TWB, & JHR., Editorial – Between the constitutional document and the constitutional settlement, in *European Constitutional Review*, Vol. 10 No 3, 2014, p.375-8.

³⁷⁷ Mahoney, C., *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008, P.150-60.

European Union has jurisdiction over matters which may require more consensus-based lobbying, while the United States federal government has competences which are more politically salient, and thus enable a more aggressive form of direct lobbying.³⁷⁸ While discussing this subject matter it should be kept in mind that lobbying in the US is also heavily present at the state level, and is quickly emerging at the national level in the Member States of the EU as well.

The question of competences is a very complex topic. The constitutional evolution and history in the two systems on which competences are reserved for the federal level has been rich and requires a detailed analysis. Some competences, such as the internal market competence in the EU and the Commerce Clause in the US, have followed the same evolutive path and converged,³⁷⁹ while other competences have preserved differences in either scope, objectives or extent of jurisdiction. A discussion about competences also inevitably invites a question on the federal model present in the two systems and its evolution.

To understand precisely which competences the federal government of the United States enjoys over its states, it is necessary to rely on the history and evolution of Article 1, Section 8 of the U.S. Constitution. The text of Section 8 is as follows:

«The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States (a provision known as the “Taxing and Spending Clause”); [...] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes (known as the “Commerce Clause”); To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures; [...] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; [...] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in

³⁷⁸ *Ibid.*, p.104-5.

³⁷⁹ See section 3.3.2.

the Government of the United States, or in any Department or Officer thereof (known as the “Proper and Necessary Clause”).»³⁸⁰

The implication is that the Federal Government of the United States can only exercise jurisdiction regarding the aforementioned subject matters, known as “enumerated powers”.³⁸¹ All residual jurisdiction is, theoretically, left in the hands of the states. The concept of enumerated powers has changed and evolved throughout the history of the United States, and it has led to countless tensions between states and the federal government. The Taxing and Spending Clause, the Commerce Clause, and the Proper and Necessary Clause have been the most relevant provision throughout the constitutional evolution of the enumerated powers. By observing the shifting jurisprudence of these three concepts it is possible to arrive to a contemporary understanding of US federalism, how the federal government legislates over these principles, and whether interest representatives might decide to lobby Washington or to stay at the state legislature level. For example, a broader interpretation of the Commerce Clause would give the federal government more extensive powers in its possibility to regulate the economy, inviting more lobbying activities. It is intuitive that lobbyists, and in particular those representing business, would attempt to influence those with the most power over their interest.

Enumerated powers rely on the Necessary and Proper Clause to be carried out. An initially controversial provision at the time of its approval, the provision was aimed at allowing the federal government the tools necessary to legislate over its other enumerated powers.³⁸² By allowing the government may create additional laws to carry into execution its enumerated powers, a concept known as “implied powers”.³⁸³ The extent of implied powers is a subject which has been heavily debated throughout the history of the United States. The Supreme Court had initially interpreted the necessary and proper clause restrictively, judging as implied powers only those which were strictly necessary for Congress’ execution of its enumerated powers.³⁸⁴ This came from an interpretation of the Proper and Necessary Clause restricting Congress’ powers, rather than enabling of them. The interpretation of the clause significantly shifted with 1822’s *McCulloch v. Maryland*.

³⁸⁰ U.S. Constitution, Article 1 Section 8. The section has been edited for conciseness.

³⁸¹ Rossum, Ralph A., Tarr, G. Alan, *American Constitutional Law - Tenth Edition, Volume I*, Boulder, Westview Press, 2017, p.113-4.

³⁸² Lawson, G., Miller, G.P., Natelson, R.G., Siedman, G.I., *The origins of the necessary and proper clause*, Cambridge University Press, 2010, p.97-111.

³⁸³ *Ibid.*, p.111-9. See also note 30.

³⁸⁴ *Ibid.* note 30.

Chief Justice Marshall, delivering the opinion of the Court, opened the door to far more broad and extensive implied powers, significantly expanding the powers of Congress.³⁸⁵ To Marshall, the necessary and proper clause gave Congress the means to achieve its duties given to it by the Constitution – its enumerated powers. And in its enumerated powers, the federal government had supremacy. In his own words: «let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional».³⁸⁶

This interpretation of the federal government's implied powers and in general of the relationship between the state and national government did not stay fixed for long. Following *McCulloch v. Maryland*, the Supreme Court subsequently alternated strongly between periods in which it affirmed the supremacy of the federal government (*McCulloch*, *Cohens*) to periods in which it affirmed violations of competences reserved to the states (*Coyle v. Smith*, *Hammer v. Dagenhart*). Following the appointment of Marshall's successor, Chief Justice Roger Brooke, the Court entered a period in which it argued the doctrine of 'dual federalism', in which the two levels of government (federal and state) are «coequal sovereignties», and that each is supreme in the exercise of its own competences – a doctrine in which the Proper and Necessary Clause had to be interpreted far more strictly, and in which the federal and state level were so divided that interaction between the two was considered redundant.³⁸⁷ In the period of 'dual federalism', the Commerce Clause would be interpreted similarly narrowly. The extent of the Commerce Clause according to jurisprudence is a particularly interesting subject for our analysis of competences, due to its natural relationship with interest representation. A strict interpretation would merely regulate intra-state commerce as a phenomenon in itself - in fact, the Supreme Court during its dual federalism period argued that the meaning of 'commerce' was «intercourse for the purpose of trade», excluding more extensive meanings which may be ascribed to the Clause, and implying that the regulatory power of the federal government only concerned the direct economic interaction between states.³⁸⁸

³⁸⁵ Rossum, Ralph A., Tarr, G. Alan, *American Constitutional Law - Tenth Edition, Volume I*, Boulder, Westview Press, 2017, p.278-81

³⁸⁶ *McCulloch v. Maryland*, 17 U.S. (Wheat.) 316 (1819).

³⁸⁷ Rossum, Ralph A., Tarr, G. Alan, *American Constitutional Law - Tenth Edition, Volume I*, Boulder, Westview Press, 2017, p.283-4.

³⁸⁸ *Ibid.*, p.284-5.

Eventually, during the presidency of Franklin D. Roosevelt the Court returned to a broader Commerce Clause, amidst the President's New Deal policies.³⁸⁹ The Court's reasoning now was that to allow Congressional intervention on intrastate commerce an effect only had to be present, without requiring a specific extent as it had in the previous decades with the so-called direct effect test.³⁹⁰ This shift in doctrine gave Congress and the federal government in general authority to regulate large sectors of the U.S. economy, necessary for carrying out Roosevelt's New Deal reforms and beginning the constitutional period that Bruce Ackerman defined as 'the modern Republic'.³⁹¹ It's interesting to note how the Supreme Court had shifted jurisprudence following Roosevelt's new appointments as justices.³⁹² The Supreme Court of the contemporary period, on the other hand, has returned to a more nuanced interpretation of Section 8, invalidating in *United States v. Lopez* (1995) and *U.S. v. Morrison* (2000) federal laws on the ground that they interfered in state competences. However, the power of Congress to regulate commercial activities for commercial purposes has been unaffected, giving contemporary Congress still large powers to regulate the economy.³⁹³

Competences in the European Union have also enjoyed, similarly to the United States, significant evolutions at different points in its history. In the current institutional framework, competences are delineated in articles 3, 4, 5 and 6 of the Treaty on the Functioning of the European Union (TFEU). These articles state the exclusive, shared, supporting and coordinating competences of the EU institutions. Exclusive competences are those on which only the Union may legislate: particularly, customs unions, competition rules necessary for the functioning of the internal market, monetary policy (for countries which have adopted the euro), the common fisheries policy, the common commercial policy and the conclusion of international agreements, when they affect common European rules (such as in the case of a trade agreement).³⁹⁴ Regarding shared competences, a member state may only legislate as long as the European Union does not choose to regulate the subject matter itself.³⁹⁵ The subject matters belonging to this

³⁸⁹ *Ibid.*, p.357-8.

³⁹⁰ *Ibid.*, p.359-60.

³⁹¹ Ackerman, B., *We the People – Foundations (Vol. 1)*, Cambridge, Massachusetts, Harvard University Press, 1991, p. 65-7, p. 105-119

³⁹² *Ibid.*

³⁹³ *Ibid.*

³⁹⁴ Article 3 TFEU.

³⁹⁵ Although the EU can legislate on these subject matters, it still needs to respect the principle of subsidiarity, and recent evolutions have stressed the element cooperative federalism which should underly the EU's jurisdiction.

category are the internal market, social policy (albeit in a limited form),³⁹⁶ agriculture and fisheries, the environment, consumer protection, transport, trans-European networks, energy, safety concerns in public health matters, and economic, social and territorial cohesion. The Union also enjoys shared competences over the area of freedom, security and justice.³⁹⁷ Articles 3, 4 and 6 of the Treaty on the Functioning of the European Union are far from the only provisions regarding jurisdiction of the Union over its Member States. Many subject matters also differ from one another procedurally, or in degree of collaboration between the national and the federal level. It is impossible to draw a clear distinction between national jurisdiction and European Union jurisdiction, as that limit is ever-changing – going through a constant process of «mutual adjustment resolution, [where] the boundaries of national and EU actions are constantly renegotiated.»³⁹⁸ While the Supreme Court of the US has alternated between clear-cut phases in which the balance of power of competences would shift between either the federal or the state governments, in the EU, particularly for what concerns the free movement of goods, the European Court of Justice with its jurisprudence has contributed to the progressive expansion and even ‘constitutionalisation’ of EU competences and jurisdiction.³⁹⁹

Defining the EU as a federal model would be opposed by the European institutions themselves, who have always defined the Union’s character as *sui generis*.⁴⁰⁰ The recent constitutional history and the approval of the Treaty of Lisbon suggests that the European Union may be adopting some positions very in line with the notion of cooperative federalism, similarly to the evolution in the United States.⁴⁰¹ Both the U.S. federal government and the Union can only legislate on matters conferred explicitly (or implicitly) to them by individual states: in the case of the United States, through the Constitution (and judicial evolution), in the case of the EU through the principle of conferral, subsidiarity and proportionality.

There are also additional principles underpinning the division of competences in the European Union and regulating the relationship between the national and supra-national level. Both the EU and the US have moved from a dual-federalist model to cooperative

³⁹⁶ Mostly focusing on equal opportunities law and policy. See Chapter 13, Chalmers, D., Davies, G., Monti, G., *European Union Law – Third Edition*, Cambridge, Cambridge University Press, 2014.

³⁹⁷ Article 4 TFEU.

³⁹⁸ Azoulay, L., *The Question of Competence in the European Union*, Oxford, Oxford University Press, 2014, p.12.

³⁹⁹ Stone Sweet, A., *The Judicial Construction of Europe*, Oxford, Oxford University Press, 2004, p.123-40.

⁴⁰⁰ Schutze, R., *From Dual to Cooperative Federalism*, Oxford, Oxford University Press, 2009, p.14.

⁴⁰¹ *Ibid.* p.243-79.

federalism. Cooperative federalism is not aimed at cutting clear distinctions between competences reserved to the federal level and competences reserved to the states, and prefers instead to create a model in which the two levels may interact with one another.⁴⁰² Although cooperative federalism may be an accurate description of the institutional relationship in both systems, there are still exceptions. A fully cooperative federalism wouldn't have had the jurisprudence of *U.S. v. Lopez*, or the principle of conferral, aimed at limiting the scope of EU action. Nevertheless, cooperative federalism is a strong ideal-type with which to describe the federal arrangement currently in place in the European Union and in the United States.

The methodological principles of the EU concerned with federalism can be mostly found in Articles 4 and 5 of the Treaty on European Union (TEU), added by the Treaty of Lisbon. The two articles are mostly focused on avoiding an excessive centralization of the competences of the European Union. Section 3 of Article 4 states that «Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties». The intended model of the Union in its division of competences is clearly cooperative. Article 5 underlines the three main guiding principles of Union action: respectively the principle of conferral (Article 4, section 1 and Article 5, section 2), the principle of subsidiarity (article 5, section 3) and the principle of proportionality (article 5, section 4).

The principle of conferral had always been implied by previous jurisprudence and institutional settings, but it was enshrined into text with the Treaty of Lisbon.⁴⁰³ It states that «the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States». The competences referred to are those contained in articles 3 to 6 of the TFEU, mentioned earlier. The principle of conferral seeks to contextualise those very same competences, by placing a general limit on the extent of legislative action by the European Union.

Of a similar importance are the principles of subsidiarity and proportionality. The principle of subsidiarity states that «in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed

⁴⁰² *Ibid.* p.4-6.

⁴⁰³ In fact, the implied principle of conferral stood behind the European Court of Justice's decision in *Tobacco Advertising I* [2000].

action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level».⁴⁰⁴ The principle works rather differently from that of conferral. While the latter is a limit on competences themselves, subsidiarity is a limit on the exercise of those competences – the execution of European law, and in particular that originating from shared competences.⁴⁰⁵ Additionally, the principle of subsidiarity is not just a limit, but a provision aimed at enhancing co-operation and by ensuring the creation of legislation with input as close to the citizen as possible. This point will be better analysed in Section 3.4.3. The principle of proportionality is also focused on the exercise of European competences, stating that «the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties».⁴⁰⁶ The Lisbon Treaty added two mechanisms to better integrate the principle of subsidiarity in the law-making process and to enhance cooperation between the national and supra-national level. Acting as a ‘soft’ check on proposed Union legislation, the mechanisms are colloquially known as the “yellow card” and “orange card” procedure.⁴⁰⁷ Both involve a power of oversight by national parliaments. If a third of national parliaments find proposed legislation not to respect the subsidiarity principle, they may oblige the European Commission to review the draft law.⁴⁰⁸ If the Commission considers the proposed draft law to respect the principle of subsidiarity, and if the legislative process is carried out in the ordinary legislative procedure, either the Council or Parliament may choose to reject the proposed legislation on grounds of violations of subsidiarity.⁴⁰⁹

There have been then some significant evolutions in the questions of competences at the European Union level, just like in the United States. The competences that interest us the most in the two systems are those which would naturally attract more attention from interest representatives. One is the competence on regulation of the internal market in the Union, and the Commerce Clause in the United States. Another is subject matters that can easily create political cleavages, such as citizenship law. The final competence that merits attention is the redistribution of resources to citizens. The final two points constitute the

⁴⁰⁴ Article 5, Section 3 TEU.

⁴⁰⁵ Schutze, R., *From Dual to Cooperative Federalism*, Oxford, Oxford University Press, 2009, p.249

⁴⁰⁶ Article 5, Section 4 TEU.

⁴⁰⁷ Groussot, X. and Bogojević, S., Subsidiarity as a Procedural Safeguard of Federalism, in Azoulay, L. (eds.), *The Question of Competence in the European Union*, Oxford, Oxford University Press, 2014, p.237-42

⁴⁰⁸ *Ibid.*

⁴⁰⁹ Schutze, R., *From Dual to Cooperative Federalism*, Oxford, Oxford University Press, 2009, p.260.

major differences between the US and the EU, and they might be those which stimulate a different approach to lobbying in the two systems.

3.3.1 - The evolution of the ‘internal market’ clause in the European Union and its near-equivalence to the ‘Commerce Clause’

Regulation of the internal market is one of the most extensive competences on which the European Union may legislate. With its evolution, a larger portion of competences regarding the economy has shifted from the national sphere to the European sphere. For the purpose of this essay, it is necessary to focus on economic subject matters which may attract activities from interest representatives. Because of this, it won't delve into the specific subject matter of macroeconomic parameters handled by the Union and in particular by the European Central Bank (ECB). This is because macroeconomic parameters are difficult to influence by interest representatives, at least for what regards purely monetary policy. What deserves attention, on the other hand, are all the competences regarding intra-Union commerce enshrined in the Union's competence on the shared market, similarly to the Commerce Clause in the United States. Aside from the possibility in regulating the internal market, subject matters indirectly related to commerce between Member States are also enshrined in the Treaties, by giving the Union shared jurisdiction over economic cohesion, agriculture and fisheries, the environment, consumer protection, transport, energy and common safety concerns in public health matters. Potentially, the Union may legislate over any economic matter related to these competences. Article 26 of the Treaty on the Functioning of the European Union (TFEU) goes more in-depth regarding the objectives of the European Union in regulating the internal market – the ultimate objective of its jurisdiction is ensuring the free movement of goods, persons, services and capital.⁴¹⁰ Article 114 of the TFEU sets procedural limits and provisions in the objective of harmonising the common market. It also introduces the possibility for a member state to introduce new national provisions to solve problems which might have been created by the legislation enacted by the Union. This marks an interesting comparison with the United States.

The fundamental idea contained in these provisions is that, like in the United States, commerce between the Member States is regulated by the European Union. Analysing

⁴¹⁰ Article 26, Section 2 TFEU

the jurisprudential evolution of the European Court of Justice can add more insight to how much power the European Union enjoys in exercising this competence. The ultimate result of the evolution of the European ‘Commerce Clause’ is, according to Robert Schutze, the near-equivalence of the Commerce Clause in the United States and the European Union.⁴¹¹ Although the relevant provisions in the European Treaties appear at first glance to be more textually subdued compared to the Commerce Clause in the US, «the European Court of Justice managed to gradually transform this ‘harmonization’ power into a ‘regulatory’ power that was – almost – completely independent of the existence of national legislation.»⁴¹² The only limit would be that the EU legislation would have to appreciably serve the functioning of the internal market or to remove obstacles to trade. As long as these two conditions are respected, there are no thematic limitations on EU regulation of the internal market.

The scope of Article 114, and the competences it gave to the EU, were clarified by the European Court of Justice in jurisprudence, starting with *Tobacco Advertising I*.⁴¹³ The case concerned a regulation banning tobacco advertising and sponsorship throughout the entire Union. Although the Commission had enacted the regulation using Article 114, concerning the Union’s competence on harmonizing the EU’s internal market, Germany objected. It argued that distortions of competition caused by the directive were marginal, and that the Directive had exceeded the competences granted to it by the provisions on harmonisation. The Court agreed on some points set forward, and set the standards which would properly frame the power of harmonisation by the Union. For the EU to legislate over the internal market in accordance with Article 114, the relevant measure had to contribute to remove obstacles to inter-state trade or competition; those distortions had to be appreciable, otherwise the article would have amounted to «an open-ended harmonisation power, [...] contrary to the principle that the Union only has conferred powers.»⁴¹⁴ and if the measures were aimed at future obstacles arising, those future problems had to be likely.⁴¹⁵

⁴¹¹ Schutze, R., Limits to the Union’s ‘Internal Market’ Competence(s), in Azoulay, L. (eds.), *The Question of Competence in the European Union*, Oxford, Oxford University Press, 2014, p.232-233.

⁴¹² *Ibid.*

⁴¹³ Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising I)* [2000] ECR I-8419.

⁴¹⁴ Chalmers, D., Davies, G., Monti, G., *European Union Law – Third Edition*, Cambridge, Cambridge University Press, 2014, p.680.

⁴¹⁵ *Ibid.*

Most importantly, *Tobacco Advertising I* set a significant constitutional evolution through the jurisprudence of the Court. For the first time, although the Court required future distortions to be probable the Union had been given the possibility of legislating preventively, rather than subsequently, in its approximation of national laws. This point would be stressed further in *Spain v. Council*. The judicial evolution greatly expanded the Union's competence over not just its harmonization, but general regulation of the internal market of the European Union, making the extent of the Union's jurisdiction over the internal market almost the same as Congress' jurisdiction over intra-state trade.⁴¹⁶

EU competences and US competences for what internal markets have then become remarkably similar. It cannot be the interpretation on this specific competence to influence lobbying styles in the two systems, because although it might attract a large amount of interest representatives currently both systems have a similar interpretation. But aside from the Commerce Clause, there are other competences reserved to the federal government of the United States additional element that may contribute to its politicisation of lobbying. Aside from regulating intra-state commerce and the Taxing & Spending Clause, Congress also has authority to legislate over rights of citizenship (the aforementioned «rule of naturalization»). This is a heavily politicised and controversial subject, and one on which interest representatives have been involved.⁴¹⁷ It has been demonstrated that lobbying activities from firms, trade unions and civil society organisations have had a significant effect on legislation regarding the subject matter.⁴¹⁸ Being a controversial and heavily politicised issue, it can be argued that this additional competence may attract more aggressive forms of lobbying. Although it obviously cannot account on its own for the generally more politicised character of interest representation in the US, it may nonetheless partially contribute to the general lobbying climate. There is, however, another enumerated power competence of the federal government that the European Union does not have, and which may prove a larger part of the explanation for differing lobbying styles.

⁴¹⁶ Schutze, R., Limits to the Union's 'Internal Market' Competence(s), in Azoulay, L. (eds.), *The Question of Competence in the European Union*, Oxford, Oxford University Press, 2014, P.225-8.

⁴¹⁷ Mahoney, C., *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008, p.102.

⁴¹⁸ Facchini, G., Mayda, A.M., Mishra, P., Do Interest Groups Affect U.S. Immigration Policy?, International Monetary Fund, IMF Working Paper, 2008, p.20-24.

3.3.2 - The redistributive power of the United States government and its implications for lobbying

Compared to the European Union, the United States federal government is far more powerful in its spending powers. Congress may «lay and collect taxes [...] to provide for the common defense and general welfare of the United States».⁴¹⁹ This is perhaps Congress' greatest power, and a natural magnet for interest representatives. Congress' power over government spending with the purpose of ensuring the general welfare creates an entire political dimension missing in the European Union: its power over societal economic redistribution, connected to social policy. With each yearly budget, Congress needs to decide how to allocate a large amount of money raised from U.S. citizens. A large number of interest representatives in the United States do lobby Congressmen and federal agencies in deciding how to redistribute those funds.⁴²⁰ This might be a direct result of the United States' pluralistic stance, creating a competition between organised interests for allocation of resources.

But there is also an additional, implied, dimension to Congress' power over government spending. Congress can use federal funds as a very powerful political tool to influence the political direction of the individual state, even in subject matters directly outside of its enumerated powers. The generality of the spending provision, in which Congress may spend money to provide for the «general welfare», has given it an extensive character. For example, *South Dakota v. Dole* (1987) concerned an appropriation of funds by Congress for highway construction throughout the United States.⁴²¹ In distributing the funds, Congress attached a condition that states which allowed persons under the age twenty-one to drink would have 5% of the dedicated resources withheld. The Supreme Court upheld this power, because the condition was related to a major aim of the highway program and because states still had the possibility not to change their alcohol laws – although it would have been more expensive for them not to do so.⁴²² Another example of the extensiveness of the scope of the Taxing and Spending Clause can be found in *Sebelius*, a constitutional challenge on the Affordable Care Act.⁴²³ The case concerned

⁴¹⁹ See note 380.

⁴²⁰ For examples, see Mahoney, C., *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008, p.85-7

⁴²¹ *South Dakota v. Dole*, 483 U.S. 203 (1987)

⁴²² Rossum, Ralph A., Tarr, G. Alan, *American Constitutional Law - Tenth Edition, Volume I*, Boulder, Westview Press, 201, p.361-2.

⁴²³ *National Federation of Independent Business et al. v. Sebelius et al.*, 567 U.S. 519 (2012).

both the presence of the so-called ‘individual mandate’ in the provisions of the Act, which obliged each citizen to be covered by health insurance, and complete withdrawal of Medicaid funds if states failed in expanding their healthcare coverage. Ultimately, while the majority of the justices agreed that the scope of the Act in its provision on the individual mandate exceeded the Commerce Clause and the Necessary and proper Clause, the provisions were nonetheless upheld on the grounds of the Taxing Clause. The threat to withdraw all Medicaid funds was found to exceed Congressional power, but this did not require striking down the entire Act.⁴²⁴

Compare the powers of Congress over welfare with the European Union jurisdiction on the matter, and the distinctions become very clear. The EU has no taxing power over the Union’s citizens, and its expenses do not include welfare. The Union does have the power to allocate structural funds for the development of Member States, but not at a social policy level. In the EU welfare and its expenses are still a matter mostly safe in the hands of individual Member States, who may decide themselves how to redistribute resources collected from their own citizens.⁴²⁵ Perhaps the Taxing and Spending Clause is part of the reason for which lobbying in the United States has taken on a more aggressive form, together with the US’ vision of a pluralistic, competing society – interests aimed at obtaining advantages concerning the redistribution of federal funds may hire lobbyists to advance their goals.

3.4 - Law-making procedures in the two systems

The major distinctions that may be found between the two legal systems, and perhaps the main argument in attempting to offer an institutional explanation behind different lobbying styles, pertain to the decision-making procedures. It can be argued that perhaps differing legislative processes may act as the largest explainer. Going into detail may help explain what are the exact institutional characteristics that may influence lobbying activities, bringing US lobbyists to adopt a more aggressive stance and EU lobbyists a more collaborative stance.

⁴²⁴ *Ibid.*, p.362-3.

⁴²⁵ Chalmers, D., Davies, G., Monti, G., *European Union Law – Third Edition*, Cambridge, Cambridge University Press, 2014, p.700-1.

The first, major difference is the responsibility in drafting legislation in the two systems. The main decision-maker in the United States at a federal level is Congress. The House of Representatives and the Senate propose laws pertaining to the federal competences given to them by the US Constitution.⁴²⁶ Although Congress is the main initiator of legislation, it is not the only one. The President can also legislate, by issuing executive orders.⁴²⁷ Executive orders are a very powerful instrument which has been and still is used extensively. Several New Deal legislation enacted by Franklin Delano Roosevelt during the 1930s took the shape of executive orders, as did the Emancipation Proclamation enacted by Abraham Lincoln during the American Civil War.⁴²⁸ ⁴²⁹ Congress may decide to override executive orders, but it can only do this with a two-thirds majority in both chambers.⁴³⁰

The European Union follows a very different process. In most cases, members of the European Parliament do not have the right to initiate legislation, only to vote on it and amend it. The same goes for the European Council of Ministers (representing national governments of the EU). Initiating EU legislation in the vast majority of legislative procedures is only carried out by the European Commission, who can thus be defined as the main decision-maker for what concerns Union affairs.

It was already mentioned how most lobbying activities in the United States focus on proposing or blocking legislation, while most lobbying activities in the European Union focus on modifying incoming legislation. It can be argued that the main reason for this difference may be found in the far lower barriers to propose or reject legislation. Proposing or blocking legislation in the US is far easier to do than in the EU. Generally, due to institutional characteristics discussed legislation is far more difficult to block in the EU.

First, the legislative process of the United States should be examined. Any Congressman can propose a Bill in Congress, either in the House of Representatives or in the Senate.⁴³¹ Depending on the chamber of origin, the draft Bill is then referred to its relevant

⁴²⁶ U.S. Const., Article 1.

⁴²⁷ Rossum, Ralph A., Tarr, G. Alan, *American Constitutional Law - Tenth Edition, Volume I*, Boulder, Westview Press, 2017, p.169-71.

⁴²⁸ *Ibid.*

⁴²⁹ Ackerman, B., *We the People – Foundations (Vol. 1)*, Cambridge, Massachusetts, Harvard University Press, 1991, p.105-110.

⁴³⁰ U.S. Const., Article 1, section 7.

⁴³¹ McKay, W., and Johnson, C.W., *Parliament and Congress: Representation and Scrutiny in the Twenty-First Century*, Oxford, Oxford University Press, 2010, p.387-91.

Committee by the Parliamentarian of either the House or Senate.⁴³² The relevant Committee may hold hearings on the Bill, may amend it and ultimately vote for or against the Bill. If the vote is favourable, the Bill is sent to the Floor of the chosen chamber, where it is discussed by the plenary.⁴³³ Since a Bill required the consent of both chambers of Congress, when legislation is advanced in one chamber parallel legislation is also proposed in the other and goes through largely the same process.⁴³⁴ The same Bill may go through radically different evolutions in the two chambers, and if approved by both chambers those differences eventually need to be resolved. Because of this, Congress often needs to find compromises between its chambers and to negotiate a Bill which will be agreed on by both.⁴³⁵ If a common Bill is passed, then it is sent to the President. Article 1, Section 7 of the US constitution gives the President of the United States the power to veto legislation, and he or she may do so for political reasons.⁴³⁶ If vetoed, the Bill needs to be approved by two thirds of the House in which the Bill originated.

There are also interesting insights to be found in the functioning of the US Senate, which may add perhaps even more possibilities to block legislation. First, the US Senate has access to an extremely powerful political instrument: filibustering. Filibustering consists in extending a statement on the Senate floor to abnormally long times. The possibility of doing this comes from the Standing Rules of the U.S. Senate, which permits a senator or multiple senators to speak as long as desired.⁴³⁷ A group of Senators may effectively block a piece of legislation from proceeding to the final vote. The only possibility to stop the filibuster is to invoke cloture, an instrument which temporarily interrupts the filibuster and proposes a motion (after two days) to immediately close the debate and proceed to the final vote.⁴³⁸ The problem can be found in the fact that to be approved a motion of cloture requires a majority of three-fifths, or 60 Senators. If the Senate does not enjoy such a majority, if remotely controversial the relevant Bill may be filibustered indefinitely, and the legislative procedure on all other Bills effectively paralysed.⁴³⁹ A Bill under filibuster in the chamber which does not enjoy a 60% majority may only be

⁴³² *Ibid.*, p.395-99

⁴³³ *Ibid.*

⁴³⁴ *Ibid.* p.444-52

⁴³⁵ *Ibid.*

⁴³⁶ Rossum, Ralph A., Tarr, G. Alan, *American Constitutional Law - Tenth Edition, Volume I*, Boulder, Westview Press, 2017, p.168-71.

⁴³⁷ McKay, W., and Johnson, C.W., *Parliament and Congress: Representation and Scrutiny in the Twenty-First Century*, Oxford, Oxford University Press, 2010. p.200-2.

⁴³⁸ *Ibid.*, p.437-9.

⁴³⁹ *Ibid.*

shelved as ‘unfinished business’.⁴⁴⁰ As mentioned in previous sections, if the term of the current Congress ends without the Bill reaching the final vote in the Senate all the legislative process needs to start over from the beginning. Considering that a term only lasts two years, it is intuitive to understand just how powerful filibustering is. Because of the existence of the instrument, the Senate effectively requires a three-fifths supermajority to approve a proposed Bill.

There is also another element at play in complicating the legislative procedure in the Senate. Congressional elections are held every two years. While the term of a House member is two years (and may afterwards be re-elected), the term of a member of the Senate is six years.⁴⁴¹ Senate elections are held in parallel with House elections, but in the Senate only a third of total seats are up for re-election. The practical meaning is the composition of the Senate is far slower in reflecting political shifts in the population than the House. A swing towards the Democratic or Republican party during elections may radically change the composition of the entire House of Representatives, but it may only change a maximum of a third of the Senate and keep the Senators elected during the two previous election cycles. The slower adoption of political shifts in the Senate is another basis for blocking legislation and combined with the required three-fifths majority to avoid a filibuster the structure of the Senate itself strongly disincentivises more controversial legislation.

The means of blocking proposed legislation in Congress, then, are numerous. The points at which a legislative proposal could be rejected are during Committee proceedings, during the vote in the plenary of the originating chamber, in the discussion on the parallel Bill in the other chamber (both during the Committee phase and during the plenary phase), in the attempt to reconcile differences between the two chambers and even in lobbying the President to veto a legislative proposal. These are effectively six different points where legislation can be blocked. Often different political majorities between House and Senate and the requirement for a three-fifths majority in the Senate only makes blocking legislation even easier, as does the fact that legislation stalled until the end of the current Congress term forces the whole legislative process to start over.⁴⁴² Understanding how interest representatives often work to block proposed legislation is intuitive, and perhaps

⁴⁴⁰ *Ibid.* p.200-2.

⁴⁴¹ *Ibid.* p.33-4

⁴⁴² *Ibid.*, p.444-52.

the institutional structure makes more aggressive tactics by lobbyists far more effective in their activities.

The situation in the European Union is markedly different, compared to the United States. The different institutional structure makes blocking (or proposing) legislation far more difficult to achieve, and most lobbyists work towards modifying proposed legislation.⁴⁴³ It was already mentioned in previous sections that the nomination of the European Commission is subject to approval from both the European Parliament and the Council. This creates, at the moment of the election, a relationship of trust between the two chambers and the Commission. Following the approval of the Treaty of Lisbon, the term of the European Commission is also synchronized with elections to the European Parliament. This implies at a legislative level that a Commission will generally be a product of a political majority present in the European Parliament. There is also another element that plays a role during elections of a Commission. The candidates for the Presidency of the Commission present their political guidelines before approval by the Parliament. The practical meaning of this is that the European Parliament generally knows the policies that a Commission will propose before approving or rejecting a candidate.⁴⁴⁴ If the Parliament approves a candidate, it is implied that it approves his or her policy program as well. Due to this process, proposals from the Commission will generally be politically uncontroversial to the Parliament, although there have been some significant albeit uncommon exceptions to this rule.⁴⁴⁵

The legislative procedure in itself might play the largest role in making lobbyists in the European institutions more collaborative. The European Commission is, in the majority of cases, the sole initiator of legislation. As a way of counteracting its intrinsic “democratic deficit”, all draft legislation usually receives some form of input from various interest representatives, either officially or unofficially. The process of consultation by the Commission is enshrined in the European Treaties themselves, mostly through Article 11 of the Treaty on European Union.⁴⁴⁶ The process will be better analysed in Section 3.4.3.

⁴⁴³ See note 34452.

⁴⁴⁴ Chalmers, D., Davies, G., Monti, G., *European Union Law – Third Edition*, Cambridge, Cambridge University Press, 2014, p.101-2

⁴⁴⁵ See the recently discussed Sat Cab directive, and the fate of the ACTA agreement in 2012.

⁴⁴⁶ Article 11 TEU.

Most legislation in the European Union is carried out through the ordinary legislative procedure, known before the Treaty of Lisbon as the ‘co-decision’ procedure. After the process of consultation, the Commission prepares a legislative proposal (either a Regulation, a Directive or a Decision), which it then sends to both the European Parliament and the Council. Throughout the entire legislative procedure an extensive role is played by trilogues, an informal instrument used by the European institutions to preventively find a compromise between the actors involved. The instrument will be examined further in the next section. During the first reading, the legislative process in the European Parliament is similar to that of a national parliament and even the U.S. Congress. The President initially assigns a proposal to a relevant committee, although other committees may also play a role in the process. The committee appoints a rapporteur, charged with overseeing the legislative proposal, with preparing a draft report on it and to negotiate agreements with the Commission and Council. The rapporteur is usually chosen on the basis of political groups, and other groups may nominate shadow rapporteurs to represent their position. The relevant committee may vote amendments on the draft law (often through the draft report) and subsequently decide whether to approve or reject the draft report. Whether amendments are approved or not, the proposal is sent to the plenary. The European Parliament begins debate on the proposal and may amend it. If the Council approves the position of the European Parliament without approving amendments of its own, the Act is adopted. If amendments are made by the Council, the proposed legislation is sent back to Parliament, where a second reading is held. If Parliament rejects the position of the Council, the legislation is not adopted. If it approves the position of the Council without submitting further amendments, the proposal is adopted. If the Parliament amends the proposal during the second reading and the Council does not approve said amendments, a Conciliation Committee is summoned, composed by a delegation of the Council (with one representative of each Member State) and a delegation of Parliament, reflecting the composition of political groups in it. The Conciliation Committee attempts to find a compromise between the two organs. If an agreement is not reached, then the proposal is rejected. If a compromise is reached, a Joint Text is prepared and a final vote is held in the Parliament and Council.⁴⁴⁷

There is an additional element aimed at increasing collaboration between the institutions: trilogues, and they will be examined further below. What should be kept in mind is that

⁴⁴⁷ Chalmers, D., Davies, G., Monti, G., *European Union Law – Third Edition*, Cambridge, Cambridge University Press, 2014, p.117-23.

the institutional relationships in the European Union seem to be built on collaboration. Many procedural characteristics of the legislative process in the European Union are aimed at finding a compromise between the different institutions and to dissuade interinstitutional political conflicts. This marks a stark difference with the United States, in which the relationship between the different branches of government can reach an almost adversarial stance. It might be argued that this might be a result of the clear ‘checks and balances’ systems in place in the United States. Congress, the Supreme Court and the Presidency all have some clear overriding mechanisms in place against one another – Congress (the Senate) and the President vote on judges of the Supreme Court, the President can veto a vote of Congress on legislation and Congress itself can overrule executive orders through legislation. In the European Union, checks and balances are less marked. While in both systems the respective Courts have delivered judgements in the past regarding the conflict between federal/supranational and the national levels,⁴⁴⁸ this is the main element of inter-institutional conflict inside the European Union. The presence of the European Commission at Parliament committee meetings on proposed legislation, the presence of trilogues (analysed in the next section) and the Reconciliation Committee are in-built elements aimed at increasing the chances of legislation to pass by reaching a compromise between the different European institutions. Lobbyists may play a role in this, both in the European Union and in the United States. But it can be argued the main difference in the two systems is that interest representatives in the EU act inside a pre-existing system already aimed at dissuading inter-institutional conflict, while in the US interest representatives have to mediate a compromise in a system where inter-institutional roles and relationships are strongly divided. The latter scenario may after all require more aggressive tactics, and the aforementioned multiple points at which legislation may be blocked may push lobbyists towards avoiding disadvantages, rather than obtaining advantages.

3.4.1 - The role played by trilogues in the EU

To fully understand the extent of the character of collaboration between EU institutions, it is necessary to mention the phenomenon of trilogues. Trilogues are an informal procedure, not themselves codified in the European treaties, made up by members of the

⁴⁴⁸ See *Sebellius*, for the United States; see *Tobacco Advertising I*, *Tobacco Advertising II*, *Swedish Match* et al. for the European Union.

European Commission, of the Council and the European Parliament.⁴⁴⁹ They are also an instrument, heavily used throughout the legislative procedure. Although the ordinary legislative procedure is built to find a compromise between the Council and the Parliament by itself – by including additional readings and even the possibility of a formal Conciliation Committee – the majority of European legislation is approved at the first reading. This is mostly thanks to the presence of trilogues, which are informal meetings held between the European institutions aimed at resolving conflicts early on during the legislative procedures.⁴⁵⁰ The European Parliament itself stated that «currently between 70 and 80% of the European Union’s legislative acts are adopted following a trilogue» (as of 2018).⁴⁵¹ The trilogue system has also shortened the time required for the legislative process, with most trilogues taking between 7 and 12 months. Even the Rules of Procedure of the European Parliament itself acknowledge the presence of inter-institutional negotiations, in Section 3 of Chapter 3.⁴⁵² The rules go insofar as to institutionalise and regulate the trilogues. The committee assigned to oversee the proposed legislation may decide, by a majority of its own votes, to enter negotiations with the Council to find a preliminary agreement, even before the first reading in Parliament.⁴⁵³ The negotiating group is primarily made up of the rapporteur assigned to the draft legislation and one or two shadow rapporteurs.⁴⁵⁴ Additionally, during trilogue negotiations interest representatives are often involved.⁴⁵⁵

The presence of trilogues testify to the collaborative institutional characteristics of the European institutions. However, before 2018 the trilogues were usually known for being notoriously untransparent. Provisional agreements reached in the so-called “fourth column” of trilogue documents would not be disclosed to the general public or to requestors. The situation changed with *De Capitani*, a judgement by the European Court of Justice. The case concerned a former civil servant in the European Union, Emilio De Capitani, who had requested the European Parliament access to the fourth column of ongoing trilogue documents on proposed police cooperation legislation – a request denied by the institution. The fourth column contained the draft compromise agreement between

⁴⁴⁹ Chalmers, D., Davies, G., Monti, G., *European Union Law – Third Edition*, Cambridge, Cambridge University Press, 2014, p.120-3.

⁴⁵⁰ Case T540/15 *De Capitani v. European Parliament* [2018] ECLI:EU:T:2018:167, par.68-9.

⁴⁵¹ *Ibid.*, par.70.

⁴⁵² *Ibid.*, par.73.

⁴⁵³ See note 440.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ De Caria, R., *“Le mani sulla legge”: il lobbying tra free speech e democrazia*, Milan, Ledizioni, 2017, p.305.

the Parliament and the Council. In Court, the Parliament argued that the decision-making process would be affected, that it would damage the cooperative relationship between Member States and EU institutions, that disclosure would lead to added public pressure and that the positions of institutions may change throughout the trilogue dialogue, risking disclosure of a position which would not risk be final («nothing is agreed until everything is agreed»)⁴⁵⁶ The ECJ disagreed. It found that the principles of publicity and transparency were inherent to the EU legislative process, referring to previous jurisprudence, Article 15(2) of the TFEU and Regulation No 1049/2001.⁴⁵⁷ Transparency requirements did allow some exceptions for disclosure, but they had to be clearly demonstrated and could not be applied on a near *sui generis* basis, especially considering that the transparency requirements include the legislative process in itself.⁴⁵⁸ The Court also didn't find that there was case law protecting a lack disclosure of legislative proceedings.⁴⁵⁹ Because of the overarching transparency requirements, the ECJ ruled in favour of Emilio De Capitani and annulled the decision by the European Parliament not to allow him access to the fourth column of trilogue documents. The case was decided in March 2018, making it too early to understand the consequences of such a decision. The ruling should theoretically allow European citizens to request access to ongoing trilogue discussions between the European institutions.

There is also (or used to be) an additional problem with the lack of transparency during trilogues, part of a larger discussion about organised interests. Although requestors or the general public are not able to see trilogue draft agreements, interest representatives are largely able to come into possession of them, following informal meetings with the interested institutions.⁴⁶⁰ Up until *De Capitani* lobbyists were effectively gaining access to what were leaked documents. Although access to trilogue documents could perhaps be useful to the general procedure in itself (with an additional element, interest representatives, becoming one of the actors brokering a compromise between the institutions), concerns arising from the informality of this disclosure of information were nonetheless present. In a non-institutionalised disclosure of information, the question is

⁴⁵⁶ Case T540/15 De Capitani v, European Parliament [2018] ECLI:EU:T:2018:167, par.7.

⁴⁵⁷ *Ibid.*, par.77-83.

⁴⁵⁸ *Ibid.*, par.80-1.

⁴⁵⁹ *Ibid.* par.82-3.

⁴⁶⁰ Cooper, H., Ariès, Q., (2017) POLITICO Brussels Influence: MEPs trigger lobbying ban on Monsanto – Behind the think tanks – Facebook Fakes?, *Politico EU* [online] Available at: <https://www.politico.eu/newsletter/politico-brussels-influence/politico-brussels-influence-meps-trigger-lobbying-ban-on-monsanto-behind-the-think-tanks-updated-facebook-fakes/>

whether the equality of access to that information between all interest representatives is present. As examined in the previous chapters, non-institutionalised practices, albeit those able to create a cooperative environment, risk creating discrepancies in the equality of access (and knowledge) of interest representatives towards the decision-maker.

3.4.2 – The presence of extensive consultation procedures in the Commission with shareholders and interest representatives

Interest representation in the European Commission has taken on in the past decades a fundamentally institutionalised character. The pre-legislative phase is essential to the law-making procedure of the European Commission. Extensive consultations are held on almost every single legislative subject, preceding the introduction of a legislative draft by Commissioners. The tools used for consultation are several: «consultative committees, expert groups, open hearings, ad hoc meetings, Internet consultations, questionnaires, focus groups, seminars/workshops», and others, depending on the specific subject, time, resources and who the Commission thinks should be consulted.⁴⁶¹ Article 11 of TEU states that «the institutions 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». It also states that «the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society» and that «the European Commission shall carry out broad consultations with parties concerned in order to ensure that its actions are coherent and transparent».⁴⁶² Article 11 was added by the Treaty of Lisbon, and it consolidated and enshrined into the Treaties the Commission's mandate to hold consultations. Article 11 was not the only juridical basis for the presence of an extensive consultation culture. Another substantial innovation was also created in the same Treaty by Protocol No.2 on the application of the principles of subsidiarity and proportionality. Fasone & Lupo (2013) have referred to article 2 of said protocol as an additional mandate for the Commission to hold consultations.⁴⁶³ Article 2, acts as an additional procedure to ensure that the principle of subsidiarity is respected. As the

⁴⁶¹ Obradovic, D., *Regulating Lobbying in the European Union*, in Coen, D., Richardson, J. (eds.) *Lobbying the European Union: Institutions, Actors, and Issues*, Oxford, Oxford University Press, 2009, p. 299.

⁴⁶² Article 11 TEU.

⁴⁶³ H.-J. Blanke, P. Colasante, C. Fasone, A. Iacoviello, N. Lupo, and S. Mangiameli, *Comment on Protocol No. 2, on the application of the principle of subsidiarity and proportionality in the European Union annexed to the Treaty of Lisbon*, in H.-J. Blanke, S. Mangiameli (eds.), *The Treaty on European Union (TEU)*, Vienna-New York, Springer, 2013, p.1652-1657.

preamble of the Protocol states, the objective to be achieved by the principle of subsidiarity is that «decisions are taken as closely as possible to the citizens of the Union».⁴⁶⁴ The process of consultation during the pre-legislative phase concerns general stakeholders and is altogether different from the mandatory legislative consultations with the Committee of the Regions and the Economic and Social Committee. While in the latter case the two committees may enjoy (depending on the legislative subject as mandated by the Treaties) a privileged, advisory relationship with the European institutions, in the pre-legislative phase consultations have taken on a more egalitarian form between different interests. A consultation culture was nonetheless present even before the Treaty of Lisbon. This culture was established by the Commission itself, mostly through its White Paper on Governance of 2001 and its adoption of General principles and minimum standards for consultation in 2002.⁴⁶⁵ Notably, the European Commission has in the past engaged in directly financing interest groups engaged at the EU level.⁴⁶⁶ Most funds have been directed at citizen or social organisations, conveying a desire to consciously and actively shape EU interest representation.⁴⁶⁷

The objective of the White Paper on Governance was to broaden the existing consultation process that was already taking an informal hold in the Commission. The document aimed at including a larger variety of participants outside of business interests, including non-business actors such as consumer groups, human rights groups and environmentalists.⁴⁶⁸ The idea of the Commission was to use consultations with interested parties as a means to solve the institution's inherent democratic deficit, a concept reflected eight years later in the subsidiarity-oriented character of Protocol No. 2 of the Lisbon Treaty.⁴⁶⁹ The *General principles and minimum standards for consultation of interested parties by the Commission* is the document still used today in establishing consultations in the pre-legislative phase. The document is inherently finalistic, rather than procedural. It sets objectives that the Commission should achieve in carrying out consultations, but not the methods it should use. This was done to guarantee a certain flexibility to the Commission

⁴⁶⁴ Protocol No.2 on the application of the principle of subsidiarity and proportionality in the European Union annexed to the Treaty of Lisbon, Preamble.

⁴⁶⁵ Chalmers, D., Davies, G., Monti, G., *European Union Law – Third Edition*, Cambridge, Cambridge University Press, 2014, p.406-11.

⁴⁶⁶ Coen, D., Business Lobbying in the European Union, in Coen, D., Richardson, J. (eds.) *Lobbying the European Union: Institutions, Actors, and Issues*, Oxford, Oxford University Press, 2009, p.26-7.

⁴⁶⁷ *Ibid.*

⁴⁶⁸ *Ibid.*, p.28.

⁴⁶⁹ European Commission, *European Governance: A White Paper*, COM(2001)428, p.4-7.

in being able to carry out consultations as to method.⁴⁷⁰ The general principles it had to respect in these processes were that of «participation, openness and accountability, effectiveness and coherence».⁴⁷¹ The stress on participation and absence of obstacles for access to the decision-maker, mentioned in the document, brings the discussion back to the problems already examined in Section 1.7 inherent to lobbying regulation in the Commission: paradoxically, a conflict between open participation and transparency.⁴⁷² From that point of view, the Commission seems to have recently shifted its positions, pushing for mandatory registration to the Transparency Register before meetings with interest representatives are held, and disclosing information about meetings between Commissioners and lobbyists.

The document is a communication and thus, not legally binding. The Commission argued that this had a dual purpose. The first was to create a clear distinction between the largely informal consultations in the pre-legislative phase and the compulsory advisory opinions by the ECSC or the Committee of Regions. The second was to avoid challenges in the European Court of Justice over an alleged lack of consultation. Although the ECJ found in favour of the Commission in *Spain v. Commission* (2002) over its refusal to enter into dialogue with interested parties, and although the Commission at the time held the view that there was no legal obligation to consult an individual party or give feedback to a particular view, it can be argued that the situation has changed due to constitutional evolutions. The Spanish government at the time had argued its case based on Article 296(2) TFEU, which mandated reasons and references for legal acts.⁴⁷³ The case of the Spanish government was not particularly strong, but with the appearance (with the Treaty of Lisbon) of both Article 11 and Protocol No. 2 it can be argued that the situation has significantly changed, with the Commission being now mandated to hold consultations.

It can be argued that the culture of consultation present at the European Commission may act as a moderating factor among interest representatives. By being bound to hold both formal and informal consultations with interested parties, and by virtue of the Commission actively seeking those interested parties (and not the other way around),

⁴⁷⁰ European Commission, Communication from the Commission - Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704, p.10-1.

⁴⁷¹ *Ibid.*, p.15-8.

⁴⁷² Obradovic, D., and Vizcaino, J.M.A., Good governance requirements concerning the participation of interest groups in EU consultations, in *Common Market Law Review*, Vol 43, 2006., p.1057.

⁴⁷³ Chalmers, D., Davies, G., Monti, G., *European Union Law – Third Edition*, Cambridge, Cambridge University Press, 2014, p.407-10

lobbyists may know that their opinion is to be expected and decide not to engage in aggressive tactics to gain access to decision makers. This might be attributed to the fact that the objectives of interest representatives during the phase of consultations is not to influence government decisions (at least directly), but to be actively involved in the pre-legislative process.⁴⁷⁴ The style of argumentation may change depending on this: the creation of a *de facto* forum for feedback may push against more aggressive, grassroots oriented tactics.

3.5 - The element of campaign financing

Returning to the subject of campaign contributions (already partially explored in Section 2.6 of the previous chapter), it might be, together with the institutional explanation, one of the biggest reasons for differences in lobbying styles between the United States and the European Union. Keeping in mind that the European Parliament is not the primary decision-maker in the European Union (while Congress in the United States is), lobbyists in the United States cannot easily be framed along the lines of a political party. Lobbyists in the European Union tend to have a fundamentally neutral character, trying to find compromises between the different European political parties in the Parliament. Their work in the Commission also rarely takes on a political form. In the United States the situation is different. The political cleavage in Congress is far stronger between lobbyists. Although there are notable exceptions, interest representatives are far easier to place on the political spectrum as to their vicinity with the decision-maker. It can be argued that this has to do with two reasons. One is the necessarily broad political spectrum present in parties of the European Parliament. A political group in the EP represents multiple national parties from a multitude of countries. Due to cultural and inter-party differences, the alliances between these national parties comprising a group must necessarily lead only to broad agreements. The question of competences reserved for Union legislation might also contribute to this, as explored in Section 3.3.3 – redistributive issues connected to fiscal policy and ethical & political issues such as citizenship rights are still a prevalently national issue, and the European institutions so far lack the budgetary power of Congress which can stimulate national states to follow individual policies.⁴⁷⁵ The other reason

⁴⁷⁴ Obradovic, D., and Vizcaino, J.M.A., Good governance requirements concerning the participation of interest groups in EU consultations, in *Common Market Law Review*, Vol 43, 2006., p.1050.

⁴⁷⁵ See section 3.3.3.

might be the presence of traditionally partisan issues, on which the Congress has authority to legislate. This should be connected to an increasing phenomenon in the U.S. Congress, connected to increasing political polarization – party-line voting. Party-line voting behaviour has consistently increased in the last decades in the US Congress. The number of party unity votes in Congress (measuring the number of votes where a majority of Democrats opposed a majority of Republicans) increased from around 60% in the early 1970s to roughly 90% in the recent Congresses.⁴⁷⁶ Defining the political climate in the United States as one of increasing political polarization is a relatively uncontroversial statement.

The intersection between interest representatives and this political polarization is a far more interesting matter, however. It might not necessarily be due to the presence of money in politics *per se*, it might be its institutionalization. There are no PACs in the European Union. As explored in section 2.6.1, political action committees also carry out extensive outside/grassroots lobbying activities, by attempting to mobilise the general public on a particular issue or legislative proposal. It is easy to do this in the United States thanks to the presence of widely followed national media outlets.⁴⁷⁷ It is near-impossible to do it in the European Union, where pan-European media is scarce and doesn't play a prevalent role in the political discourse.⁴⁷⁸ Adding to this in the United States is the presence of super PACs, who can only influence elections through independent expenditures – these expenditures, however, are unlimited. And as defined by the Supreme Court in *Citizens United*, independent expenditures are mainly electioneering communications – again, media and grassroots mobilization and influence.⁴⁷⁹

The structure of campaign regulations and electoral legislation might also contribute to this. Most European countries lack a constituency-based, first past the post system. Parties are the main electoral unit in European elections, not individuals. This is also reflected in the structure of the European Parliament, which elects its members on a national and proportional system. There are then two main distinctions between European Parliament elections and U.S. Congress elections. In both systems money can be donated, but while in the United States donations go prevalently to individuals, in the European Union

⁴⁷⁶ Dancy, L., and Sheagley, G. Partisanship and Perceptions of Party-Line Voting, in *Political Research Quarterly*, Vol. 71 No.1, 2018, p.33.

⁴⁷⁷ Mahoney, C., *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008, p.147-67.

⁴⁷⁸ *Ibid.*

⁴⁷⁹ See Section 2.6.2 in the previous chapter on Super PACs.

donations go prevalently to parties. The second distinction is that contribution limits in the European Union are placed on the donor, rather than on the candidate. A PAC in the United States could donate an incredibly large amount of money, if spread across a large enough group of candidates. In the European Union it is the individual or firm that runs into contribution limits.

The situation might however change, and these theories proven wrong. Through the past decades, the European Parliament's powers have grown, as has its politicization. The *spitzenkandidat* system is just a potential example of how politicisation in the European Parliament might be increasing, even though the political agreements within European political parties are still broad. If this politicisation (and power) increases, so might the conflict between parties – and so might the aggressiveness of lobbyists.

3.6 - The pluralist dichotomy in the United States and the absence thereof in the European Union

One final element which may play a role in determining relationships between interest representatives and the decision-maker is the strong pluralist tradition present in the United States, and the lack thereof in the European Union. The pluralist system, in which interests are fundamentally divided and in competition with one another in front of the decision-maker, might contribute to the aggressive behaviour of American lobbyists.⁴⁸⁰ Although the European Union has generally transitioned away from a neo-corporatist structure towards a pluralist structure itself,⁴⁸¹ the remnants of the European neo-corporatist tradition may nonetheless still play a role. One possible example is the presence of the so-called ad hoc coalitions in lobbying. These are coalitions between different interest representatives, sometimes belonging to different sectors, to lobby the political decision maker. A large coalition composed of a large variety of societal actors will have the strong advantage of representing a majoritarian, rather than minoritarian, interest, and as such a decision-maker may be more inclined to accept its arguments.⁴⁸² It also allows more resources to be pooled into the lobbying effort. Forming coalitions is often sought by U.S. interest representatives.⁴⁸³ Empirical data reflects this. The rationale

⁴⁸⁰ See sections 1.6 and, additionally, section 1.1.2.

⁴⁸¹ See sections 1.7 and 1.8.

⁴⁸² Mahoney, C., *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008, p.167-183.

⁴⁸³ *Ibid.*

behind ad-hoc coalitions seems to largely reflect the rationale behind the use of grassroots lobbying – both tactics are aimed at strengthening the appearance of popular will behind a stance on legislation. But empirically speaking, the creation of ad-hoc coalitions are far more likely to happen in the US than in the EU: 57% of American interest groups have used coalitions in their attempts to influence the decision-maker, while only 15 percent in the European Union has done the same.⁴⁸⁴

Why is coalition-building in the EU almost non-existent? Simply enough, it might have to do with the presence of peak organisations. One of the explanations offered by an EU lobbyist for the lack of ad hoc coalitions in their lobbying activities was that «we are the entire industry, so we don't really work with any other organisations».⁴⁸⁵ Peak organisations are coalitions in themselves, and do not have to prove that they represent a shared interest by their very existence. Peak organisations in themselves do not exist in the United States, and where they do exist they lack the power that their counterparts in Europe enjoy – both in raw political power and in privileged relationship with the decision-maker.⁴⁸⁶ The US only has sector-based organisations. It would be wrong however to assume that peak organisations and sector-based organisations are mutually exclusive with one another. Peak organisations might be absent from the US political landscape, but sector-based organisations do exist in the European Union. After all, interest representatives from peak organisations may be able to lobby on the general business environment, but someone who is specialised in the nuances of technical regulation exclusive to sectors in particular (chemicals, telecommunications) may be required for specific legislation.

There is not just the pluralist tradition of the United States making lobbyists more aggressive in the United States. There is also the presence of a neo-corporatist tradition in the European Union, *de facto* represented by the European Economic and Social Committee (EESC). The EESC was already analysed in Section 1.6, as were its origins. The advisory role of the EESC is still largely institutionalised, being mandated to advise on some subject matters during the legislative process. It can be argued that its decline in representing organised interest stems both due to neo-corporatist negotiation remaining at a firmly national level,⁴⁸⁷ and due to the necessity for sector-specific interest

⁴⁸⁴ *Ibid.*, p.173.

⁴⁸⁵ Mahoney, C., *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008, p.178.

⁴⁸⁶ *Ibid.*, p.174-7.

⁴⁸⁷ See section 1.6.

representatives in the Union, a category somewhat marginalised in the EESC, which instead gave priority to employer associations and trade unions. However, perhaps the presence of the EESC may have had a more indirect effect on EU lobbyists. By having a formal, institutionalised and collaborative character inside the Union, it may be argued that interest representatives even outside the EESC may nonetheless have been influenced by it. Lobbyists using an assertive style could invoke unwanted comparisons with the formality and institutional character of the EESC and may be expected to act in a similar way to it.

3.7 – Which conclusions can be drawn from the institutional differences on lobbying practice?

The fundamental conclusion to be drawn from this chapter is that lobbyists seem to follow the institutional structure, and not the other way around. Some scholars have noted the emergence of an ‘elite pluralist’ arrangement in the European Union in the past twenty years, «where industry is perceived as an integral policy player but must fit certain access criteria».⁴⁸⁸ The requirement for interest representatives to build trust with the European institutions, in particular with the Commission, may lead them to seek a reputation for reliable, sector-specific and pan-European information.⁴⁸⁹ The less assertive stance among lobbyists in the EU compared to the US may be explained by the institutional characteristics present in both systems, which reward differently one style or the other. Regarding competences, although the two market clauses in both systems seem to have become remarkably similar, the US federal government can legislate over how spending is allocated among its citizens, while the EU is far more limited from that point of view. It should be noted that Member States of the European Union have increased economic policy coordination in the past twenty years with the evolution of the Economic and Monetary Union (EMU), and the introduction of provisions on a balanced budget, the adoption of a single and centralised currency, and the containment of the ratio of

⁴⁸⁸ Coen, D., Business Lobbying in the European Union, in Coen, D., Richardson, J. (eds.) *Lobbying the European Union: Institutions, Actors, and Issues*, Oxford, Oxford University Press, 2009, p.151-2. Additionally, the definition of ‘elite pluralism’ given by Cohen may be useful: «a lobbying system in which access to the policy forums and committees is generally restricted to a limited number of policy players for whom membership is competitive, but strategically advisable. As such EU institutions may demand certain codes of conduct and restrictions in exchange for access» (p.164).

⁴⁸⁹ *Ibid.*, p.156.

government debt to GDP.⁴⁹⁰ However, it can be argued that these are fundamentally macroeconomic policies, which only affect redistribution and welfare use indirectly. Provisions contained in legislation such as the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union only contain objectives to attain, such as maintaining government borrowing for the ratio of planned or actual government deficit to GDP below 3%.⁴⁹¹ The means and methods as to which such objectives must be reached (and their influence on redistributive policies) are up to the choice of individual Member States. The same goes for monetary policy decided by the European Central Bank, which strongly affects the economy but only has an indirect effect on welfare.

On the other hand, the ‘spending clause’ gives direct power to the US federal system over welfare. Redistribution, and even other subject matters like citizenship competence of the federal government, are partisan and fundamentally political issues, matters which may attract more aggressive tactics by lobbyists. The second argument is focused on different mode of elections. While the prime federal decision maker in the United States is Congress, the prime decision maker in the European Union is the European Commission. Although the *spitzenkandidat* system, if continued, may introduce some remarkable innovations in the latter case, the fact remains that Congress is directly bound to elections, while the European Commission is not. This allows lobbyists to both use public opinion arguments and the public opinion itself to influence both actions and choice of representatives in Congress – something absent in the European Union, both due to the absence of direct elections for the main decision-maker (the Commission) and due to the difficulty of using the media on a trans-national level to influence public opinion.

The decision-making procedures in the two systems may prove the largest explainer for the difference between lobbying styles. The empirical difference present between objectives of lobbyists in the two systems, (where US interests aim to propose or block legislation, while EU interests aim to modify incoming legislation) may be explained by this. The presence of strong checks and balances derived from the U.S. Constitution creates a large amount of different moments at which legislation may be blocked. In the US, the barriers to both proposing and rejecting legislation is considerably lower than that in the EU. Any member of Congress in the US may propose a bill, and there are six points

⁴⁹⁰ Amténbrink, F., *The Metamorphosis of European Economic and Monetary Union*, in Chalmers, D., and Arnall, A. (eds.) *The Oxford Handbook of European Union Law*, Oxford, Oxford University Press, 2015, p.723-52.

⁴⁹¹ *Ibid.*

throughout the legislative process where legislation may be rejected. There is also the additional problem of a *de facto* three-fifths majority requirement in the Senate, which makes the tug of war between institutions in the US even stronger. Contrast this with the EU, where the entire decision-making system is structured around collaboration between the institutions, both *de jure* and *de facto*. The main facilitators of EU legislation are consultations and trilogues, both informal instruments but nonetheless widely used. Consultations, mandated by the Treaties and subject to standards by Commission documents, might give additional legitimacy to proposed legislation. By ensuring that the opinion of all interested parties has been heard (and by creating impact assessments), the Commission can present its draft legislation as backed by both the principle of accountability and the principle of subsidiarity. By having interest representatives contribute to the pre-legislative process instead of trying to influence it, lobbyists may be pushed into seeking a more collaborative style themselves. The instrument of trilogues might also contribute to this, by avoiding conflicts between the Parliament and Council by finding a preliminary agreement. Stoking conflict during an instrument aimed at reaching a compromise would obviously not be functional to interest representatives.

Campaign financing regulation (and political characteristics) may also play a role. Although the aforementioned direct election of the decision-maker plays a large role, lobbyists in the United States can often be framed along a political cleavage. Amidst the increase in polarisation currently taking place in the US Congress (with party-line voting having remarkably increased in the past decades), lobbyists may be growing more politicised, and thus more aggressive. On the other hand, in the EU alliances between MEPs in a political party in the European Parliament are necessarily broad, since they are comprised of an alliance between multiple national parties - each with similar characteristics with one another, but not necessarily the same views on every subject. By definition, a broader political spectrum would imply a lesser degree of politicisation. Elections in the European Union also lack two instruments present and largely used in the United States: PACs and Super PACs, strong drivers of political mobilization and, in the case of the former, campaign contributions. While individuals can finance European political parties (following the approval of regulation 1141/2014, analysed in section 2.6.1), the limits on contributions in the two systems are structured differently. While the limit on electoral contributions in the US is placed on the receiver (a candidate may only receive a certain sum from an individual or a PAC), limits in the EU are placed on the donor (an individual may only donate a certain sum each year, no matter how divided

between different parties). PACs in the European Union would then be, as mentioned, fundamentally far weaker than their US counterparts, who can contribute very large sums of money as long as they're properly divided. The ability of lobbyists to finance a large number of favourable decision-makers is thus limited in the EU, while it is not in the US.

As a final part of a possible institutional explanation it is necessary to understand the different traditions of business to government relationships in the United States and in the European Union. The pluralist tradition of the US of society as a competition between multiple minority interests enjoys a near-constitutional status thanks to Madison's *Federalist No.10*. This has led to an absence of so-called peak organisations, which on the other hand have flourished in Europe at large - and thus, the Union. This has had a direct influence on lobbying in both countries. Ad-hoc coalitions, very common in US lobbying activities, are far rarer in the European Union, where peak organisations may conduct lobbying themselves and where coalitions may be less necessary. But the neo-corporatist tradition may have also had some influence on the less assertive character of EU interest representatives. The presence and tradition of the ECSC, having existed since the Treaty of Rome, may have contributed to making EU lobbyists more willing to compromise. Through its status as a privileged partner to the EU institutions, it may have indirectly influenced lobbyists to adopt themselves a more collaborative stance.

The different institutional characteristics of the two systems may explain lobbying styles, both by virtue of institutional culture and by different incentives present. The European Union is fundamentally an evolving project. The constitutional evolution of the EU may change yet again this system of incentives, or even the fundamental characteristics of the European institutions themselves. Perhaps the lobbying style of European interest representatives may change together with them, and it will be interesting to observe whether future changes will draw lobbyists in the EU closer or more distant to the US lobbying style.

Conclusions

The thesis attempted to answer two main questions: what explains differing lobbying styles in the two systems, and whether current and proposed regulation is effective or adequate. Different institutional structures seem to be the main explanation for what concerns the first question. Regarding the second question, there is much to still be done in both systems. The analysis began with Madison's *Federalist Paper No.10* to describe the pluralist vision of the American political system. For the sake of the argument, it's best to quickly remember the main ideas espoused by him in it. Madison opposed what he defined as 'pure democracy', because in his general opposition to strong government⁴⁹² he saw the risk for it to be co-opted by what he called 'factions', minorities which would then oppose and perhaps oppress opposing minorities once in power. Because of this, he argued for the republican form of government: the difference was that, while direct democracy would directly give power to a faction, a Republic would add an additional degree of separation between citizen and government. Factions would thus not be in government, but they would nonetheless be represented in government, avoiding either the despotism of the faction or the despotism of arbitrary power typical in Europe at the time.

The terms 'pure democracy' and 'republic' are not the words we would use today to define what Madison means in *Federalist No.10*. It can be argued that better words would be, respectively, 'direct democracy' and 'representative democracy'. With this meaning, *Federalist No.10* becomes very relevant to the events of today. Recent years have seen a curious phenomenon emerge. On the one hand, trust by citizens in the institutions has been decreasing.⁴⁹³ Additionally, voter turnout has also dropped.⁴⁹⁴ Nowhere is this clearer than in the European Union, where, as we have seen, turnout for elections to the European Parliament have decreased from a high of 62% in 1979 to a low of 43% in the past two elections – paradoxically, considering the increase in powers of the European Parliament in the last two decades.⁴⁹⁵ On the other hand, 'non-conventional political participation' has seen a similarly increase, implying an outright shift in political

⁴⁹² Rosanvallon, P., *Controdemocrazia – La politica nell'era della sfiducia*, Castelvecchi, 2012, p.23.

⁴⁹³ *Ibid.*, p.182

⁴⁹⁴ *Ibid.*, p.14.

⁴⁹⁵ Hobolt, S.B., A vote for the President? The role of *Spitzenkandidaten* in the 2014 European Parliament Elections, in *Journal of European Public Policy*, Vol. 21 No. 10, 2014, p.1528-40.

activities carried out by the citizen – such as strikes, petitions, and demonstrations.⁴⁹⁶ Again, this has involved the European Union as well, as the demonstrations against the European Commission’s ‘Port Package II’ proposal in 2006 can attest to, both as to grassroots participation and as to effectiveness – MEPs would later vote against the proposal.⁴⁹⁷ The very idea of citizenship seems then to have mutated, leading to different forms of political activities from the citizen.

Populism also seems to have become an issue. A subject of particular interest to political scientists, theorists and sociologists, populism frames the ‘people’ as a whole, coherent sum.⁴⁹⁸ Most importantly, populism rhetoric attacks the present political system and in particular its substantive representative principle and procedure, invoking in its place the power of direct expression of the popular will.⁴⁹⁹ Rosanvallon (2011) sees populism as the pathological form of the counter-democratic (and positive) power of surveillance and vigilance, carried out by both the citizens and other institutions towards the government (such as the judicial power).⁵⁰⁰ Populism is then an absolute rejection of the current political system. Interest representatives, clearly, have not been spared by this, becoming themselves the targets of populist anger, seen as a symbol for money controlling politics and constraining the aforementioned ‘people’ by buying legislation for their own interest. This idea has always been present,⁵⁰¹ but the growth of populism in the past few years might have increased its presence even further. At the same time, current politicians and civil servants have found themselves unable to face the challenges brought by the 21st century. Increasing economic inequality,⁵⁰² decreasing social mobility⁵⁰³ and stagnant productivity growth⁵⁰⁴ in OECD countries have lent significant ammunition to popular resentment and populism.

It would be quite hubristic to suggest solutions to these fundamental structural problems of western societies today. There is no magic wand for solving the problem of populism

⁴⁹⁶ Rosanvallon, P., *Controdemocrazia – La politica nell’era della sfiducia*, Castelvechi, 2012, p.14.

⁴⁹⁷ See Section 2.1.

⁴⁹⁸ Rosanvallon, P., *Controdemocrazia – La politica nell’era della sfiducia*, Castelvechi, p.183.

⁴⁹⁹ *Ibid.*, p.185.

⁵⁰⁰ *Ibid.*, p.186.

⁵⁰¹ See Petrillo’s analysis of ‘Jacobin constitutionalism’ in *Democrazie sotto pressione – Parlamenti e lobby nel diritto pubblico comparato*, Giuffrè Editore, Milan, 2011.

⁵⁰² Keeley, B. (2015), *Income Inequality: The Gap between Rich and Poor*, OECD Insights, OECD Publishing, Paris, <https://doi.org/10.1787/9789264246010-en>.

⁵⁰³ OECD (2018), *A Broken Social Elevator? How to Promote Social Mobility*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264301085-en>, p.80-89.

⁵⁰⁴ OECD, *Labour productivity and utilisation (productivity/utilisation) annual growth rate (%)*, 2016. Available: <https://data.oecd.org/lprdy/labour-productivity-and-utilisation.htm#indicator-chart>.

or for offering solutions to economic stagnation. Our analysis, however, might suggest that interest representatives might have a role to play, and at least contribute to the search of a common solution to both problems, at least for what concerns the perception of political representation of the decision maker by citizens. Among the growth of non-conventional participation is the growth of advocacy activities. Several advocacy groups have emerged, carrying out interest representation in both Washington and Brussels.⁵⁰⁵ As problematic as the Commission's stance on interest representation may have been in the early 2000s,⁵⁰⁶ it can be argued that the Commission may not have been too far off in considering advocacy activities and interest representation in general as a means to resolving the Union's democratic deficit, and calling for a greater process of consultation before and during the legislative process.⁵⁰⁷

The problem is that advocacy in the European Union might still be perceived as a niche activity by common citizens. There is no hard evidence to support this, but the fact that the Commission itself offers direct funding to several citizens groups⁵⁰⁸ and the fact that non-business, non-governmental advocates only make up 25% of total interest representation in the EU could be used as an argument for this. The problem then might be that citizens in the EU haven't yet understood the potential of interest representation as a means to advocacy, notwithstanding the efforts of the Commission.

In his brilliant essay *Against Transparency*, Lawrence Lessig criticises the unequivocal and unconditional demand for transparency that took hold of the United States towards the end of the last decade.⁵⁰⁹ He argued that naked transparency could move the public towards erroneous and decontextualized judgment against those perceived to represent hidden interests.⁵¹⁰ The article, published in 2009, ended up being almost prophetic. A decade later populism has risen, not diminished. Lessig argued that transparency was a positive element, but he saw all the collateral damage that such reforms could create. It's fairly intuitive to see how this could apply to interest representation as well. Politicians

⁵⁰⁵ Mahoney, C., *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008.

⁵⁰⁶ See section 1.7.

⁵⁰⁷ See section 1.7 and 3.4.3.

⁵⁰⁸ Coen, D., Business Lobbying in the European Union, in Coen, D., Richardson, J. (eds.) *Lobbying the European Union: Institutions, Actors, and Issues*, Oxford, Oxford University Press, 2009, p.26-7.

⁵⁰⁹ Lessig, L., *Against Transparency*, The New Republic, October 9, 2009.

⁵¹⁰ *Ibid.*

could be summarily judged for having received campaign finance from a determined interest, the pathological form of the citizen's duty as watchdog.⁵¹¹

It might be argued then that the problem in the European Union and in the United States is similar, albeit with a few key differences. The 'transparency movement' has not satisfied populism in the United States. Some citizens of the European Union perceive its institutions as distant and unable to meet the requirements of citizens. In either case, interest representation has not been considered as a solution to these problems. If lobbying were understood by the general public as a means to fix the perceived lack of representation, democracy might be better off for it. If lobbying became popular for representing a group's interests, not just for niche advocacy groups or for multinational companies but for everyday demands by common citizens, this might both inform better decision making by the people in power and satisfy the request for better representation. Direct democracy would risk giving in to the pitfalls Madison identified in *Federalist No.10*. But the diffusion of lobbying as a means to representation, no matter the political spectrum or request, might preserve representative democracy and stem the tide of populism. If transparency and equality of access were guaranteed, then, interest representation would actively create that 'right to petition' so controversial in the United States.

There is, of course, a risk to this: as analysed in Chapter 3, lobbying in the United States has taken on a more aggressive and assertive form due to reasons discussed. An emergence of 'popular lobbying' might risk bringing more politicised interest representation. But perhaps what Coen identified as 'elite pluralism' might be the solution to avoid the emergence of aggressive lobbying in the European Union, where the decision maker would try to have as much information and feedback from stakeholders as possible but still be able to require a particular conduct and restrictions in exchange for access.⁵¹² If citizens of the EU absorbed the notion of interest representation for everyone, and if the decision makers in the US absorbed the European model of elite pluralism, then a 'best of both worlds' scenario might be created. Lobbying's constant evolution will continue, and its regulation along with it. There are several questions to answer, and the interest in the phenomenon will only increase further. Perhaps the public in the future will

⁵¹¹ Rosanvallon, P., *Controdemocrazia – La politica nell'era della sfiducia*, Castelvechhi, 2012., p.186.

⁵¹² See section 3.7.

begin to think that lobbying doesn't just belong to multinationals, or to niche citizen groups. They might just begin to think that lobbying belongs to everyone.

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Summary

1.1 - The Right to Petition the Government and the First Amendment

The phenomenon of lobbying emerged in parallel in the United Kingdom and in the United States during the XIX century. This was an effect of prevalently socioeconomic changes.⁵¹³ Jurisprudence concerning lobbying in the United States has often clashed with the First Amendment of the American Constitution, which protects freedom of speech, of the press, of assembly and the right to petition the Government.⁵¹⁴ This last point has by some been associated with lobbying activities, and it has been a controversial subject matter on which much debate has taken place. The Supreme Court has never stated in a majority opinion that lobbying was protected by the Right to Petition the Government, only by the First Amendment.⁵¹⁵ Lobbying shares many similarities with petitioning, but scholars are divided on the point to which they resemble one another. This is because petitioning was, towards the beginning of the history of the United States (at the end of the XVIII century and at the beginning of the XIX), a formal process, which was carried out in Congress at regular intervals.⁵¹⁶ A possible hypothesis to reconcile these two differing interpretations might be found in setting standards for lobbying activities, removing the majority of distinctions between what was the process of petitioning and the criticism lobbying activities face today.

1.1.1 - Madison's Federalist Paper No.10

Lobbying lays its roots in a pluralistic view of society, where differing interests are placed in competition with one another for access to the law maker. The origins of this worldview can be found in the Federalist Papers, a series of articles written during the debate for the ratification of the US Constitution. *Federalist No. 10*, by James Madison, was written as an argument in favour of the republican form of government, which by today's standards we would know as representative democracy.⁵¹⁷ This was done by talking extensively

⁵¹³ Senator Byrd, Robert C., Lobbyists, in *The Senate, 1789-1989*, vol. 2, pp. 491-508, 1989.

⁵¹⁴ US Const. amend. I.

⁵¹⁵ Maggie McKinley, Lobbying and the Petition Clause, *68 Stan. L. Rev.* 1131 (2016).

⁵¹⁶ *Ibid.*, p.1136.

⁵¹⁷ Madison, J. *The Union as a Safeguard Against Domestic Faction and Insurrection (Federalist n°10) (1787)* Taken from: http://avalon.law.yale.edu/18th_century/fed10.asp

about the behaviour of political citizens. Madison saw society as a series of divided and competing interests (defined by him as ‘factions’), which could not be repressed and had to instead be moderated. The way to do this, according to him, was to become a Republic, adding a degree of separation between the government and the people to avoid the rise of despotism a minority. The government must then be both removed from factions and mediate them with one another. The implications for lobbying are clear: those in power are not part of a faction, because they have been separated from it. Thus, the necessity to represent one’s interests in front of the government arises. Lobbying then does not just have a long legal history in the US: it has a philosophical one as well.

1.2 - The US Federal Regulation of Lobbying Act of 1946 and *United States v. Harriss*

1946 saw the first attempt to regulate lobbying in the US with a general law. Congress had been discussing a regulation of lobbying since the inter-war years, but it was only able to do so after the end of World War II.⁵¹⁸ The result was the Federal Regulation of Lobbying Act (FRLA), contained in the Legislative Reorganization Act of 1946 as Title III. The FRLA contained both very innovative provisions and very unclear provisions. On the one hand, it defined for the first time the standards of transparency and disclosure which lobbyists had to comply with.⁵¹⁹ On the other, the Act had been hastily written, and it contained several loopholes which would lead to the ultimate downfall of the law.⁵²⁰ The problems with the Act became clear in *United States v. Harriss* (1954), although several before the case had already noted problems with its provisions.⁵²¹ The FRLA set different conditions to define who had to register. The standards with which one was defined as a lobbyist were however too broad.⁵²² To avoid the law from overreaching and potentially interfere into First Amendment rights, the judges of the Supreme Court had to judge the standards cumulatively, instead of alternatively. The requirement of satisfying multiple standards effectively made the FRLA provisions inapplicable.⁵²³

⁵¹⁸ Congressional Research Service, *Congress and Pressure groups: Lobbying in a Modern Democracy* (1986), US Government Printing Office, p.3-10, 41

⁵¹⁹ Federal Regulation of Lobbying Act of 1946, Pub. L. 601, Title III §§305, 308.

⁵²⁰ Congressional Research Service, *Congress and Pressure groups: Lobbying in a Modern Democracy* (1986), US Government Printing Office, p.41-50.

⁵²¹ *Ibid.*, p.44-6. See the section on the Buchanan hearings.

⁵²² *United States v. Harriss*, 347 US 620 (1954).

⁵²³ Mary Kathryn Vanderbeck, *First Amendment Constraints on Reform of the Federal Regulation of Lobbying Act*, 57 *Tex. L. Rev.* 1219 (1979), p.1219-24.

1.3 - The Lobbying Disclosure Act of 1995 and the enactment of a gift ban in Congress

Congress next attempt regulate lobbying could only succeed almost 50 years later, with the Lobbying Disclosure Act (LDA) of 1995.⁵²⁴ Congress now knew all the constitutional mistakes of previous legislation, and so were able to find effective standards which would survive judicial review.⁵²⁵ Lobbyists were now defined through the use of lobbying contacts, a choice which made the definition of lobbyists both broad and specific enough.⁵²⁶ The LDA additionally set a standard of time spent lobbying and money, in order to be included in its provisions.⁵²⁷ Similarly to the FRLA, it returned to the subject of disclosure, requiring a report every six months detailing lobbying activities by each registered lobbying firm or office.⁵²⁸ In the same year as the LDA, both houses of Congress also approved a ban on gifts to Members, their aides and Congressional employees.⁵²⁹

1.4 - The Honest Leadership and Open Government Act of 2007 and the Obama Executive Orders

Following the Abramoff scandals in 2006, Congress returned to the subject matter of lobbying with the Honest Leadership and Open Government Act of 2007 (HLOGA).⁵³⁰ The Act effectively strengthened the LDA. It created criminal penalties for lobbyists (other than just civil like in the previous regime),⁵³¹ it increased the frequency of reports to quarterly,⁵³² and it integrated the subject of campaign contributions (up to that point regulated separately) inside the system of lobbying disclosure.⁵³³ Finally, it also regulated ‘bundled contributions’⁵³⁴ and slightly increased the cool-off period for Senators before they could become lobbyists.⁵³⁵ Four years later, Barack Obama also regulated lobbying

⁵²⁴ Lobbying Disclosure Act of 1995, Pub. Law No. 104-65.

⁵²⁵ 141 Cong. Rec. 13099-13110 (1995).

⁵²⁶ Lobbying Disclosure Act of 1995, Pub. Law No. 104-65 §3.

⁵²⁷ *Ibid.*

⁵²⁸ *Ibid.*, §5.

⁵²⁹ To amend the Rules of the House of Representatives to provide for gift reform, H.Res.250, 104th Congress (1995), and A resolution to provide for Senate gift reform, S.Res.158, 104th Congress (1995).

⁵³⁰ Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81.

⁵³¹ *Ibid.* §211.

⁵³² *Ibid.* §201.

⁵³³ *Ibid.* §203.

⁵³⁴ *Ibid.* §204.

⁵³⁵ *Ibid.* §531.

of the Presidency with Executive Order 13,490.⁵³⁶ This took the form of a pledge which all executive appointees had to take.⁵³⁷ In case of violations of the provisions of the pledge, the Attorney General of the US could sue for relief.⁵³⁸ The Order introduced a gift ban for executive appointees, and a cool-off period before a former appointee could become a lobbyist.⁵³⁹

1.5 - The European Economic and Social Committee and the neo-corporatist tradition in Europe

Lobbying in the European Union is a relatively recent phenomenon, having begun its growth following the Maastricht Treaty.⁵⁴⁰ Before the emergence of lobbying the EU view of interest representation was markedly neo-corporatist, being prevalently represented by the European Economic and Social Committee (EESC).⁵⁴¹ The EESC is an advisory body, which gives its own opinions to EU institutions on proposed legislation when mandated by the Treaties or on its own initiative.⁵⁴² The relevance of the body has however been decreasing in recent decades.⁵⁴³ This might have to do with the fact that the EESC is focused around ‘social partners’, and that the majority of its members represent either trade unions or employer associations.⁵⁴⁴ ‘Other and general interests’ (known in the framework of the body as Group III) are side-lined compared to the first two categories, and it can be argued that many may have moved to conventional lobbying activities to advance their own interests. This has made a regulation of lobbying activities outside of the neo-corporatist framework necessary in the Union.

1.6 - The past tension between the European Parliament and the European Commission on the regulation of lobbying activities, current regulation and future projects of reform

⁵³⁶ Exec. Order No. 13,490, Federal Register Vol. 74, No.15 (2009), p.4673.

⁵³⁷ *Ibid.*, §1.

⁵³⁸ *Ibid.*, §5.

⁵³⁹ *Ibid.* §1.

⁵⁴⁰ Mihut, L., Lobbying in the United States and the European Union: New Developments in Lobbying Regulation (2008), Romanian Journal of European Affairs, vol.8 no.4, et al.

⁵⁴¹ Woll, C., Lobbying in the European Union: From a *sui generis* to a Comparative Perspective (2006), *Journal of European Public Policy* 13:3 p.458-9.

⁵⁴² Art 304 TFEU.

⁵⁴³ Bomberg, E., Peterson, J., Corbett, R., *The European Union: How does it work?* (2012), Oxford University Press, p.71.

⁵⁴⁴ Art 300/2 TFEU.

A general regulation of lobbying in the EU, not exclusively focused on only one institution, stalled until 2007. This was due to an inherent tension between the European Parliament and the European Commission. The Parliament had an incentive-based lobbying registration scheme in place since 1996.⁵⁴⁵ While the EP had demanded at multiple points regulation of lobbying, the Commission was reluctant to draft it.⁵⁴⁶ The thought process of the Commission on the matter may be found in both the White Paper on Governance of 2001⁵⁴⁷ and the General Principles and Minimum Standards for consultation of interested parties by the Commission in 2002.⁵⁴⁸ The EC was effectively worried that regulation of interest representation might place too many barriers to entry for participation of civil society to the consultation process.⁵⁴⁹ Many of the positions adopted by the Commission up to 2007 were effectively contradictory with one another, such as with the CONECCS database which did or did not include business interests depending on the document.⁵⁵⁰ Eventually Commissioner Siim Kallas launched in that year the European Transparency Initiative (ETI), aimed at increasing disclosure by interest representatives.⁵⁵¹ The ETI was a compromise between the EP and the Commission, the former wanting extensive regulation of lobbying activities, while the latter wanting only minimum standards be placed on interest representatives. The result was a voluntary register for interest representatives, a Code of Conduct, and a standard website for Commission consultations. The two institutions were eventually able to unify their two Registers for interest representatives in 2011, but it stayed voluntary notwithstanding the EP's demand of a mandatory Register. The Agreement was minimally revised in 2014.⁵⁵²

A new Inter-institutional Agreement between the Commission and the Parliament on the subject matter was proposed in 2016.⁵⁵³ The new Agreement would effectively create a

⁵⁴⁵ OJ C 261, 9.9.1996 p.72-76.

⁵⁴⁶ European Parliament resolution of 8 May 2008 on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions (2007/2115(INI)), OJ C 271 E, 12.11.09.

⁵⁴⁷ European Commission, European Governance: A White Paper, COM(2001)428

⁵⁴⁸ European Commission, Communication from the Commission - Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704.

⁵⁴⁹ European Commission, European Governance: A White Paper, COM(2001)428

⁵⁵⁰ Compare and contrast COM(2002) 704 with COM(2006) 194 for an example.

⁵⁵¹ Greenwood, J. *Interest Representation in the European Union* (2011), Palgrave Macmillan, p.58-61.

⁵⁵² Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation (2014), OJ L 277, 19.9.2014.

⁵⁵³ European Commission Proposal COM(2016) 627 for a Interinstitutional Agreement on a mandatory Transparency Register (2016).

mandatory Register, by making lobbying contacts with European officials conditional with signing up for it. This shift in thought in the Commission followed a 2014 choice to publish details of meetings between interest representatives and Commissioners.⁵⁵⁴

2.1 - An overview of conventional lobbying activities

In the essay's analysis it is necessary to compare conventional lobbying activities with existing lobbying legislation, in order to understand how effective it currently is. A conventional lobbying activity offers several possibilities. The most commonly known is the front office, or 'face-to-face' process, a meeting between interest representatives and decision makers where the former attempts to convince the latter to take a specific choice.⁵⁵⁵ This requires a large amount of research by the interest representative to gather relevant data which will be used during the meeting, or contained in a position paper given to the decision maker – this phase is known as the back office process.⁵⁵⁶ There are additional possibilities. Lobbyists might make use of grassroots lobbying, where interest representatives mobilise citizens to lobby a decision maker themselves.⁵⁵⁷ Lobbyists might also use campaign finance in order to support favoured candidates.⁵⁵⁸

2.2 - The definition of lobbying and lobbyists

The first element analysed in existing lobbying regulation is the definition of lobbying activities and of lobbyists. After all, the inapplicability of the FRLA was caused by exactly this reason. The US has learned from its previous mistakes, creating the aforementioned threshold mechanism past which a person is included in the provisions of the LDA and HLOGA.⁵⁵⁹ In the EU, both current legislation and the proposed 2016 Inter-institutional Agreement circumvent the issue. Current legislation circumvents it because, even though the definition is very broad, the regime is nonetheless voluntary and

⁵⁵⁴ Commission Decision on the publication of information on meetings held between Directors-General of the Commission and organisations or self-employed individuals (2014/838/EU, Euratom) / Commission Decision on the publication of information on meetings held between Members of the Commission and organisations or self-employed individuals (2014/839/EU, Euratom).

⁵⁵⁵ Petrillo, P.L., *Democrazie sotto pressione – Parlamenti e lobby nel diritto pubblico comparato*, Giuffrè Editore, Milan, 2011, p.49-50.

⁵⁵⁶ De Caria, R., *“Le mani sulla legge”: il lobbying tra free speech e democrazia*, Milan, Ledizioni, 2017, p.302-3.

⁵⁵⁷ *Ibid.*, p.74-8.

⁵⁵⁸ Petrillo, P.L., *Democrazie sotto pressione – Parlamenti e lobby nel diritto pubblico comparato*, Giuffrè Editore, Milan, 2011. p.51-2.

⁵⁵⁹ See note 186.

incentive-based. 2016's Agreement would work on a similar principle: it does not frame lobbyists and then mandate them to Register, it requires registration for arranging meetings with European officials, which interest representatives would have to do in carrying out their lobbying activities.⁵⁶⁰

2.3 - The regulation of back office activities

In detailing lobbying regulation, there is the question of whether research gathered in the back office phase (and clearly aimed at advancing an interest) by lobbyists can be counter-balanced with a neutral 'check' of research for the decision-maker. There are two organs which work towards this objective in the two systems, the Congressional Research Service (CRS) in the US and the European Parliamentary Research Service (EPRS) in the EU. The answer seems to be affirmative: both organs have access to a relatively large budget and are used extensively by MEPs and members of Congress for information.⁵⁶¹ Research is very broad, concerning several subject matters that may be of interest to law makers. Both organs also create research proactively, that may be used should the need arise.⁵⁶² They also create impact assessments, both before approval of a proposal and after.⁵⁶³

2.4 - The regulation of front office activities

Front office activities are the main focal point of lobbying regulation. Lobbying disclosure in the US is carried out through the LD-1 and the LD-2, two forms used for LDA and HLOGA disclosure. The LD-2 is compiled each quarter, and requires lobbyists to disclose specific issues lobbied, lobbying expenditures or income, and a statement of Houses of Congress and Federal agencies contacted while carrying out lobbying activities.⁵⁶⁴ There are however doubts on how informative the data is. Lobbyists do not have to disclose whether they were for or against a determined proposal, and most importantly they do not have to disclose specific meetings with a federal employee or

⁵⁶⁰ European Commission Proposal COM(2016) 627 for a Interinstitutional Agreement on a mandatory Transparency Register (2016), art. 5.

⁵⁶¹ Private exchange with a former EPRS official, 2018.

⁵⁶² *Ibid.*

⁵⁶³ Meuwese, A.C., Inter-institutionalising EU Impact Assessment, in Weatherill, S. (ed.), *Better Regulation*, Oxford and Portland (Oregon), Hart Publishing, 2007, p.276-7.

⁵⁶⁴ 2 U.S.C. §1604 (b).

member of Congress. In the European Union, current disclosure requirements are even less transparent. The Register's voluntary character is the main problem, but there are also others. A firm signing up for the Register only needs to disclose employees with authorisation for access to the European Parliament, not necessarily those actually carrying out meetings with decision makers.⁵⁶⁵ Firms have to disclose lobbying expenditures, but on a yearly basis, unlike the quarterly reports required in the US.⁵⁶⁶ Most importantly, the Register requires disclosing main legislative proposals or policies targeted by lobbying activities on the firm, but an analysis of the European Transparency Register's website proves that enforcement of this particular provision has been lax at best.⁵⁶⁷

2.4.1 - The Council and the European Council, difficult to access and lacking regulation

Additionally, there is the problem of the Council of the European Union. Since it represents national governments at the EU level, both current and proposed legislation have not regulated lobbying activities in the institution.⁵⁶⁸ The 2016 Interinstitutional Agreement for a Mandatory Register does not (and cannot) oblige members of the Council to be included in its provisions, and this leaves the institution largely unregulated. This particularly becomes a problem when the phenomenon of venue shopping is considered, where lobbyists 'pick and choose' the level of government (national or supranational) that will be most receptive to their own interests.⁵⁶⁹ There is evidence that this phenomenon has taken place in the past, particularly in the Council.⁵⁷⁰ Considering that only eight members of the EU have a mandatory registration scheme for interest representatives, the possibilities of untransparent lobbying in the Council are easily understood.⁵⁷¹ Another problem has also emerged. The European Council also lacks

⁵⁶⁵ Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation (2014), OJ L 277, 19.9.2014, Annex II, Title I(b).

⁵⁶⁶ *Ibid.*, Title II(B).

⁵⁶⁷ A quick research of Facebook or Bayer's entry in the Transparency Register can attest to this.

⁵⁶⁸ Obradovic, D., Regulating Lobbying in the European Union, in Coen, D., Richardson, J. (eds.) *Lobbying the European Union: Institutions, Actors, and Issues*, Oxford, Oxford University Press, 2009, p.318.

⁵⁶⁹ Woll, C., Lobbying in the European Union: From a sui generis to a Comparative Perspective (2006), *Journal of European Public Policy* 13:3, p.461-2.

⁵⁷⁰ Greenwood, J. *Interest Representation in the European Union* (2011), Palgrave Macmillan p. 25-31

⁵⁷¹ European Parliamentary Research Service, Regulation of lobbying across the EU, p. 1-2.

regulation of lobbying, and with the expansion of its competences the need for disclosure requirements is similarly present.⁵⁷²

2.5 - The regulation of grassroots lobbying activities

Grassroots lobbying activities are, in both systems, completely unregulated. In the US, this has been both a political and a constitutional choice. The main reason for the downfall of the Federal Regulation of Lobbying Act was its overly broad grassroots lobbying provisions, drafted to dissuade ‘astro-turfing’, phony grassroots efforts created *ad hoc* by lobbyists particularly common in the United States.⁵⁷³ In any case, regulation of grassroots lobbying in the US runs the constant risk of interfering with rights given by the First Amendment, and this has made it perhaps the most constitutionally delicate lobbying activity. Additionally, regulation of grassroots lobbying has always run against Republican opposition, as the party’s filibuster on the first draft of the Lobbying Disclosure Act in 1994 can testify to.⁵⁷⁴ Regulation of the phenomenon in the European Union is also absent, but for different reasons. It should be stated that, theoretically, grassroots lobbying activities are included in the lobbying expenditures each firm should disclose, at least according to the 2014 Inter-institutional Agreement.⁵⁷⁵ The definition of grassroots lobbying in the Agreement is, however, extremely broad. Paradoxically, the provisions are only viable due to the voluntary character of EU lobbying regulation. With the transition to a mandatory Register (such as the one mandated by the 2016 Interinstitutional Agreement) grassroots lobbying provisions would have to be removed, and in fact they have been.

2.6 - The regulation of campaign financing

⁵⁷² Hayes-Renshaw, F., Least Accessible but not Inaccessible: Lobbying the Council and the European Council, in Coen, D., Richardson, J. (eds.) *Lobbying the European Union: Institutions, Actors, and Issues*, Oxford, Oxford University Press, 2009, p.71-9.

⁵⁷³ Straus, J.R., The Lobbying Disclosure Act at 20: Analysis and Issues for Congress. Congressional Research Service, p.24.

⁵⁷⁴ Clymer, A., (Oct. 7, 1994) G.O.P. Filibuster Deals a Setback to Lobbying Bill, *The New York Times*. Available: <https://www.nytimes.com/1994/10/07/us/gop-filibuster-deals-a-setback-to-lobbying-bill.html>

⁵⁷⁵ Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation (2014), OJ L 277, 19.9.2014, Title III, art. 7.

Due to the possibility for lobbyists to finance electoral campaigns of officeholders, an analysis of lobbying regulation must also concern itself with the regulation of campaign financing. Both systems have regulated the phenomenon, but in very different ways. In the US, the two main axes of campaign finance regulation are disclosure requirements and contribution limits.⁵⁷⁶ Regarding contribution limits, each individual citizen may only donate a maximum of \$2,700 to each candidate.⁵⁷⁷ All economic contributions to federal candidates higher than \$200 have to be disclosed to the Federal Election Commission, or FEC.⁵⁷⁸ All data concerning campaign contributions is readily made available on the FEC's website. Of particular note in the subject of campaign finance is the presence of PACs, or political action committees. These organisations may contribute more than an individual citizen to each candidate (\$5000) and they do so towards campaign that according to them best represents their interest.⁵⁷⁹ In the European Union, the situation is markedly different. PACs aren't present, and contribution limits towards European political parties are based on the donor, rather than the receiver. Each individual may only contribute a limited amount of money each year (€18,000).⁵⁸⁰ Contributions of more than €3000 need to be disclosed.⁵⁸¹ An additional difference is that European political parties have access to a large amount of public funding.⁵⁸²

2.7 - Citizens *United v. FEC* and 'independent expenditures'

Recent years have also seen the rise of super PACs in the US, a new actor in the landscape of campaign financing. In *Citizens United v. FEC*, the Supreme Court found unconstitutional limits placed on corporations or unions regarding independent expenditures for 'electioneering communications'.⁵⁸³ According to the Court, justifications for these provisions were not sufficient in the face of the rights given by the First Amendment concerning freedom of speech, and ultimately struck down the prohibition on independent expenditures, as long as they weren't coordinated with a

⁵⁷⁶ Hunker, K., Elections Across the Pond: Comparing Campaign Finance Regimes in the United States and United Kingdom, *Harvard Journal of Law & Public Policy* (2013), p.1106.

⁵⁷⁷ 52 U.S.C. §30116 (a). All contribution limits are periodically adjusted for inflation.

⁵⁷⁸ 52 U.S.C. §30104(b)(3)(A).

⁵⁷⁹ 52 U.S.C. §30116 (a).

⁵⁸⁰ Regulation No. 1141/2014 of the European Parliament and of the Council, Art. 20 par. 1.

⁵⁸¹ *Ibid.*, Art. 32(e).

⁵⁸² *Ibid.*, Art 17 par. 4.

⁵⁸³ *Citizens United v. FEC*, 558 U.S. 310 (2010).

federal candidate.⁵⁸⁴ This has created the category of super PACs, campaign organs which are unconstrained by limits on campaign spending by private actors. While individuals and firms can still only donate a limited sum to PACs or candidates, a dedicated super PAC they may raise and spend an unlimited amount of money to create electioneering communications, as long as those donations are disclosed. It seems to be too early to understand the implications of super PACs, but in the 2016 election hundreds of millions of dollars were spent by super PACs to promote their candidates.⁵⁸⁵

2.8 - 'Revolving doors' provisions

Some decision makers or their collaborators who have ended their employment or career may decide to become lobbyists afterwards. This opens the significant risk of them using their previously acquired connections to gain privileged access to current law makers.⁵⁸⁶ The phenomenon is known as 'revolving doors' and lobbying regulation often contains provisions on the subject matter. Cool-off periods, which must pass before a former decision maker or employee may lobby current decision makers, are mandated in the two systems, although at a varying degree of effectiveness. Former Senators in the United States are barred for two years from lobbying,⁵⁸⁷ while former staff members and former Members of the House are barred for only one.⁵⁸⁸ In the European Union, former Commissioners may not lobby on subject matters which were part of their portfolio for two years following the end of their employment, while a former President of the Commission may not do the same for three.⁵⁸⁹ MEPs have no restrictions on employment after the end of their term. In both systems, the cool-off period is very low, and may not guarantee an adequate turnover among decision-makers to remove the advantage from personal connections.

2.9 - The enforcement problem

⁵⁸⁴ *Ibid.*

⁵⁸⁵ The two main super PACs of the 2016 election spent, together, 156 million dollars.

⁵⁸⁶ Vidal, J.B., Draca, M., Fons-Rosen, C., *Revolving Doors Lobbyists*, CEP Discussion Papers, London School of Economics and Political Science, London, UK, p.1.

⁵⁸⁷ Rules of Procedure of the United States Senate, Rule XXXVII, art. 8.

⁵⁸⁸ 18 U.S.C. §207 (e)(1)(b).

⁵⁸⁹ European Commission Decision on a Code of Conduct for the Members of the European Commission, C(2018), Art. 11 (2), (4), (5).

Finally, both systems in their regulation of lobbying have run into a significant problem, which has significantly diminished the effectiveness of legislation on the matter: enforcement mechanisms. In the United States the legal procedure of enforcing LDA and HLOGA provisions is present and clear, but the system has run into practical problems. The Secretary of the Senate and the Clerk of the House of Representatives are tasked with checking compliance, and they may report alleged violations to the Attorney of the United States for the District of Columbia.⁵⁹⁰ But in 2008 only five staff members were assigned to LDA violations, and from 1995 to 2009, out of 5,596 cases referred to them by the Secretary and Clerk, only eight suits in total have been filed.⁵⁹¹ A large bottleneck is then present. Enforcement in the European Union is similarly distraught. Current regulation suffers from its voluntary and incentive-based character, making it impossible to police whoever is not listed in the Transparency Register. While the 2016 proposed Mandatory Register would at least solve this specific problem, the Union would still not have the instruments to punish unethical behaviour. Lobbyists violating the Code of Conduct may be removed from the Register, but no punishment is possible for actors carrying out lobbying activities outside the framework of the Register, even though the new framework would require lobbyists to be signed up for it if they want to meet Parliament or Commission officials in any situation.

3.1 - Differences in EU and US lobbying styles at a first glance

The second question the essay attempts to answer is whether an explanation for differing lobbying styles and behaviour may be given in the two systems. Lobbying in the US is usually framed as more aggressive, conducted along more partisan lines and with a more assertive behaviour.⁵⁹² Lobbying in the EU, on the other hand, is framed as far more collaborative and subdued.⁵⁹³ A preliminary explanation may be that law-making in the United States is usually focused on politicised subject matters, while law-making in the Union is more focused on technical subject matters. While partially true,⁵⁹⁴ it cannot be a

⁵⁹⁰ 2 U.S.C. §1605

⁵⁹¹ Luneburg, W.V., *The Evolution of Federal Lobbying Regulation: Where We are Now and Where We Should Be Going*, 41 *McGeorge L. Rev.* 85 (2009), p.124.

⁵⁹² Woll, C., *Lobbying in the European Union: From a sui generis to a Comparative Perspective* (2006), *Journal of European Public Policy* 13:3, p.460-1

⁵⁹³ *Ibid.*

⁵⁹⁴ Mahoney, C., *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008. p.153-165.

definitive answer. Differences in lobbying styles are multi-faceted and often subtle; because of this, the ‘political’ or ‘technical’ explanation may prove inadequate. The answer to differing lobbying styles may be found in the institutional and political structure in place in a determined system. Lobbyists adapt to the institutional framework, and change their tactics and style depending on it.

3.2 - Differences in how decision-makers come to power and the possible emergence of the *spitzenkandidat* process

The first argument offered in favour of this explanation concerns the differences in the relationship between the individual citizen and the decision-maker. In the United States, both the legislative and executive power (Congress and the President, respectively) are *de facto* directly elected. Members of the House of Representatives, in particular, are elected on a constituency, majoritarian basis.⁵⁹⁵ The elections of the two organs are separated. In the European Union, on the other hand, the institution with the main right to initiate legislation - the Commission - is not directly elected: it is nominated by the European Council and voted on by the European Parliament.⁵⁹⁶ There has been, however, a potential evolution taking place in the nomination of the President of the Commission: the *spitzenkandidat* process, in which each European political party nominates a candidate for President before EP elections, requesting the EC to nominate the candidate from the party which won the most votes.⁵⁹⁷ It is however unclear if the *spitzenkandidat* process will continue. A Commission may only be dismissed from its post through the use of censure in the EP, which requires a two-thirds majority and has never been used in the history of the Union.⁵⁹⁸ The differences in how decision makers come to power may be the reason for which lobbyists in the United States adopt far more often constituency or public opinion arguments, in which a lobbyist directly or indirectly threatens to inform the public about a lawmaker’s political position on a subject matter.⁵⁹⁹ Careers of

⁵⁹⁵ McKay, W., and Johnson, C.W., *Parliament and Congress: Representation and Scrutiny in the Twenty-First Century*, Oxford, Oxford University Press, 2010, p.88-90.

⁵⁹⁶ Chalmers, D., Davies, G., Monti, G., *European Union Law – Third Edition*, Cambridge, Cambridge University Press, 2014, p.90-1, 101-2.

⁵⁹⁷ Corbett, R., ‘European Elections are Second-Order Elections’: Is Received Wisdom Changing?, in *Journal of Common Market Studies*, Vol. 52 No. 6, 2014, p.1196-7.

⁵⁹⁸ Chalmers, D., Davies, G., Monti, G., *European Union Law – Third Edition*, Cambridge, Cambridge University Press, 2014, p.102.

⁵⁹⁹ Mahoney, C., *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008, p.100-6.

Commissioners, on the other hand, are not tied to elections or public opinion, making the argument ineffective.

3.3 - Differing federal competences in the two systems

The second argument in favour of the institutional explanation delves into the question of differing competences in the EU and in the US. This is a very extensive subject matter, enjoying an extremely rich constitutional history in both systems. In the US, the competences of the federal government are its enumerated powers. The extent to which Congress has been able to legislate over its competences has varied greatly with time, first expanding with 1822's *McCulloch v. Maryland*, then contracting with the doctrine of 'dual federalism', then expanding again in the Roosevelt years with the growth of cooperative federalism.⁶⁰⁰ Competences in the European Union are delineated by articles 3 to 6 of the Treaty on the Functioning of the European Union (TFEU), stating exclusive, shared, coordinating and supporting competences. The extent to which the European Union may legislate over these competences, on the other hand, is outlined in articles 4 and 5 of the Treaty on European Union, delineating the principle of conferral, subsidiarity and proportionality.

One initial hypothesis regarding competences may be a different interpretation of the Commerce Clause in the two systems. However, the evolution of the Commerce Clause in the United States, and the power over the internal market and its harmonization in the European Union, when analysed together with relevant jurisprudence have created a near-equivalence of the power to regulate commerce in the two systems.⁶⁰¹ This makes it impossible for differing 'commerce clauses' to explain differences in lobbying styles. The federal government of the United States however does have additional competences that the European Union does not have, and which may offer a more relevant explanation. On the one hand, Congress has the power to legislate on citizenship, a heavily politicised issue that attracts considerable attention from interest representatives.⁶⁰² On the other, there is the presence of the Taxing Clause and Spending Clause in the US.⁶⁰³ Congress

⁶⁰⁰ Rossum, Ralph A., Tarr, G. Alan, *American Constitutional Law - Tenth Edition, Volume I*, Boulder, Westview Press, 2017, p.278-85.

⁶⁰¹ Schutze, R., *From Dual to Cooperative Federalism*, Oxford, Oxford University Press, 2009, p.243-79.

⁶⁰² Facchini, G., Mayda, A.M., Mishra, P., Do Interest Groups Affect U.S. Immigration Policy?, International Monetary Fund, IMF Working Paper, 2008, p.20-24.

⁶⁰³ U.S. Constitution, Article 1, section 8.

may raise and spend money to provide for the ‘general welfare of the United States’. Taken together with an extensive interpretation of both the Taxing and Spending Clause, it has then access to a strong redistributive power which is completely absent in the EU. In the vision of a pluralistic society, several actors lobby the federal government to gain advantages through redistribution, and this competition among interests may help partially explain the more aggressive stance of lobbyists in the US.⁶⁰⁴

3.4 - Law-making procedures in the two systems

The third argument used is the different legislative procedures in the two systems: the major distinctions between the two may prove the biggest explanation for lobbying styles. First of all, the United States have far lower barriers to both proposing and blocking legislation compared to the Union. Any member of Congress may propose legislation, while in the EU in the vast majority of cases only the Commission may do the same.⁶⁰⁵ Blocking legislation is also far easier in the US than what it is in the EU. There are effectively six points at which proposed legislation may be rejected in the US: in Committee proceedings and in the plenary phase of both the House and the Senate; in the phase at which the two chambers attempt to resolve their differences; and if the President decides to veto the legislative proposal, which would then need a two-thirds majority to be approved. A rejection at any of these points blocks the legislation from passing. Additionally, there is the problem of a potential filibuster in the Senate, an extremely powerful political instrument. The possibility of filibustering has created effectively a *de facto* 60% supermajority requirement for legislation passing through the Chamber.⁶⁰⁶ Another reason for which the passage through the Senate a particularly delicate moment for legislation is given by differing term lengths in the Senate and in the House. While the entirety of the House is re-elected each election cycle (every two years), only a third of the Senate is, with the term length for each Senator being six years.⁶⁰⁷ Political shifts are thus far slower to take place in the Senate than in the House. To lower even further the barriers of blocking proposed legislation is the fact that if Congressional elections take place before a Bill is passed then the legislative procedure must start over from the

⁶⁰⁴ *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008, p.85-7.

⁶⁰⁵ McKay, W., and Johnson, C.W., *Parliament and Congress: Representation and Scrutiny in the Twenty-First Century*, Oxford, Oxford University Press, 2010, p.387-91.

⁶⁰⁶ *Ibid.*, p.200-02.

⁶⁰⁷ *Ibid.*, p.33-4.

beginning.⁶⁰⁸ A Bill successfully delayed until Congressional elections has been effectively rejected. It is intuitive then how lobbyists in the US may work more towards both proposing and blocking legislation.

In the EU, on the other hand, lobbyists focus more on modifying proposed legislation. On the one hand, legislation is far harder to block, and in the vast majority of cases only the Commission has the right to legislative initiative. On the other, the institutional framework may yet push lobbyists towards adopting a less assertive stance. Terms of the European Commission and the European Parliament are synchronised, implying that the former will always be the product of the latter. The co-decision procedure offers an in-built mechanism for reconciliation.⁶⁰⁹ Additionally, there is the role played by trilogues, informal meetings held throughout the legislative process between Parliament, Commission and Council to find a preliminary agreement.⁶¹⁰

3.4.1 - The presence of extensive consultation procedures in the Commission with shareholders and interest representatives

Interest representation has been institutionalised to a certain degree inside the Commission.⁶¹¹ Although the procedures for doing so are only codified in soft law, it is expected that the Commission should hear from anyone potentially affected by proposed legislation. With the Treaty of Lisbon, the process of consultation gained an almost constitutional mandate with the addition of Article 11 of the TEU and Protocol No. 2 on the application of the principles of subsidiarity and proportionality, both of which required the use of consultations during the legislative process.⁶¹² A consultation culture was nonetheless present far before the Treaty of Lisbon and can mostly be traced to the Commission's 2001 White Paper on Governance and its General principles and minimum standards for consultation from 2002. Consultations were seen by the Commission as a means to solve the Union's inherent democratic deficit, by making consultations as broad

⁶⁰⁸ *Ibid.*, p.444-52.

⁶⁰⁹ Chalmers, D., Davies, G., Monti, G., *European Union Law – Third Edition*, Cambridge, Cambridge University Press, 2014, p.117-23.

⁶¹⁰ *Ibid.*, p.120-3.

⁶¹¹ Coen, D., Business Lobbying in the European Union, in Coen, D., Richardson, J. (eds.) *Lobbying the European Union: Institutions, Actors, and Issues*, Oxford, Oxford University Press, 2009, p.22-34.

⁶¹² H.-J. Blanke, P. Colasante, C. Fasone, A. Iacoviello, N. Lupo, and S. Mangiameli, Comment on Protocol No. 2, on the application of the principle of subsidiarity and proportionality in the European Union annexed to the Treaty of Lisbon, in H.-J. Blanke, S. Mangiameli (eds.), *The Treaty on European Union (TEU)*, Vienna-New York, Springer, 2013, p.1652-1657.

as possible.⁶¹³ It may be argued that the consultation culture at the institution may act as a moderating factor among citizen representatives: with the Commission actively seeking stakeholders, aggressive tactics to gain access to the decision-maker may be disincentivised.

3.5 - The element of campaign finance

The differences in campaign finance behaviour and regulation may also help explain why the two lobbying styles differ. Lobbyists in the United States may more easily be politicised and placed on a political spectrum, mostly due to the presence of the Spending Clause. The federal government can both redistribute money raised through taxation and use the budgetary power to incentivise political choices in individual states. Additionally, political polarization has been increasing in the US in the past forty years, if party unity votes are considered.⁶¹⁴ More interestingly, much of what may influence a campaign in the US is absent in the EU. Pan-European media does not exist, and neither do PACs or super PACs. Another possible reason may be that limits on campaign contributions in the EU are placed on the donor. In the US a candidate is limited from accepting more than a determined amount of money from the same source. In the EU a donor is limited from donating over a certain sum. All of these elements taken together might contribute to these differences, although the *spitzenkandidat* system, if continued, might upset the balance.

3.6 - The pluralist dichotomy in the United States and the absence thereof in the European Union

The final element which may play a role in defining different lobbying styles is the strong pluralist tradition of the United States, and the lack thereof in the European Union. Although the European Union (not necessarily its individual Member States) has transitioned more towards pluralism itself, the neo-corporatist tradition of the past may still be playing a role. A phenomenon of ‘elite pluralism’ seems to have emerged in the Union in the past twenty years, «where industry is perceived as an integral policy player

⁶¹³ European Commission, European Governance: A White Paper, COM(2001)428.

⁶¹⁴ Dancy, L., and Sheagley, G. Partisanship and Perceptions of Party-Line Voting, in *Political Research Quarterly*, Vol. 71 No.1, 2018, p.33.

but must fit certain access criteria», and where «membership is competitive».⁶¹⁵ At the same time, there are no peak organisations in the US, while they are present in the EU.⁶¹⁶ This seems to be the main reason for which *ad hoc* coalitions in the US are far more common than what they are in the EU.⁶¹⁷ Sector-based organisations, on the other hand, are present in both systems. Additionally, the EESC may be acting as an external anchor to lobbyist behaviour in the EU. While its role has diminished in the past decades, it is a largely institutionalised body which has been carrying out some form of interest representation for decades. Its formal and collaborative character and tradition may dissuade lobbyists from using assertive styles, since they would be expected to act in a similar way to it.

4.1 - Conclusions

There is much that remains to be done in regulation of lobbying in the two systems. At the same time, it seems that institutions may be the best explainer for variations in lobbying style. Lobbying is a phenomenon in constant evolution, both in its activities and in its regulation. It is also a particularly interesting time to analyse it. With the growth of populism in Western countries⁶¹⁸ and the perception of not being properly represented at the European level, interest representation might offer a solution, maligned as it may be by populist movement. With the growth of non-conventional political activity⁶¹⁹ and the decline of conventional political activity lobbying might just preserve the model of representative democracy under stress without falling to the risks Madison identified in *Federalist Paper No.10*. A ‘popular’ vision of lobbying in the EU, where lobbying and advocacy are tools that may be used by anyone in society, and the adoption of the ‘elite pluralist’ model in the US, where the decision-maker may use gatekeeping on the basis of lobbyist reputation and quality research,⁶²⁰ may create the best of both worlds.

⁶¹⁵ Coen, D., Business Lobbying in the European Union, in Coen, D., Richardson, J. (eds.) *Lobbying the European Union: Institutions, Actors, and Issues*, Oxford, Oxford University Press, 2009, p.151-2., 164.

⁶¹⁶ Mahoney, C., *Brussels versus the Beltway – Advocacy in the United States and the European Union*, Washington, Georgetown University Press, 2008, p.173.

⁶¹⁷ *Ibid.*

⁶¹⁸ Rosanvallon, P., *Controdemocrazia – La politica nell’era della sfiducia*, Castelvecchi, 2012, p.182.

⁶¹⁹ *Ibid.*, p.14.

⁶²⁰ Coen, D., Business Lobbying in the European Union, in Coen, D., Richardson, J. (eds.) *Lobbying the European Union: Institutions, Actors, and Issues*, Oxford, Oxford University Press, 2009, p.151-2.