



INSTYTUT SPRAW PUBLICZNYCH
THE INSTITUTE OF PUBLIC AFFAIRS



Fellowship Program for Moldovan Public Policy Analysts
Policy Papers 06/07

REGULATING LOBBYING: LESSONS TO BE LEARNED

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The papers in the series have been written by policy analysts as a result of study visits to Warsaw in the framework of a fellowship programme, co-ordinated by the Institute of Public Affairs, Warsaw and the Institute for Public Policy, Chisinau co-financed by the Polish aid programme 2007 of the Ministry of Foreign Affairs. The opinions are those of the author.



I. Introduction

Existence of large interest groups and their efforts to influence decision making process is a reality in modern democracies. The act of lobbying is a mechanism that attempts to change laws and policies that affect lives of individuals or communities. Encouraging lobbying satisfies the participatory demand of the public and potentially provides an important channel for minority voices. Yet lobbying is not perceived to be all for the public good. Often, lobbying is depicted in a negative way, assuming that it implies some sort of obscure undue influence by private or vested interests in the decision making process.¹ This is a situation facilitated by money and privileges offered by lobbyists. Influenced by the various scandals, public opinion in many countries considers lobbying practices as illegal or at least unethical. As a result, public concerns in many countries moved the issue of formal regulation on lobbying onto the political agenda. However, setting rules for lobbying has proved very difficult in many countries because it is not only an important aspect of good governance, but also a sensitive political issue.

In any modern society, a complex interaction is practiced constantly between public office holders and various stakeholders, which has become not only inevitable, but necessary and useful. It is generally accepted that lobbyists may contribute to a better and wiser decision taken by the office holders since they provide on behalf of third parties an informed point of view which may merit consideration. However, just as the complexity of modern government necessitates lobbying, so the proliferation of lobbying activity introduces many new actors into policy processes. As a result, those processes become obscured and an environment is created where coercion and corruption can occur. Thus the regulation of lobbying becomes necessary.

On the other hand, any attempt at regulating lobbying postulates a very pragmatic recognition of the existence of the phenomenon in a specific society. It entails the explicit assertion of legitimacy of such an activity and the setting up of rules and conditions for its proper conduct.

For over a century the United States was the sole jurisdiction to regulate lobbyists, though many countries legislated against bribery and other means of influencing government officials. In 1991 a Library of Congress survey found that only three other countries, Australia, Canada, and Germany had instituted lobbyist legislation². In 2004 a similar survey, conducted by the Irish

¹ Andre C. Cote, “*Developing a legal framework for lobbying and the registration of lobbyists: the Quebec experience*”, p. 2; <http://www.oalis.oecd.org/olis/2007doc.nsf/809a2d78518a8277c125685d005300b2/20f1e0d13c7be1d5c12572ed003a7eb1?OpenDocument>

² A.P. Pross, “*Lobbying: Models for regulation*”, p.5, <http://www.oecd.org/dataoecd/17/50/38944782.pdf>

Institute of Public Administration, reported that “countries with specific rules and regulations governing the activities of lobbyists and interest groups are more the exception than the rule”³.

According to the survey “Are governance arrangements adequate to prevent conflict of interest in post public employment and lobbying?”, conducted by the Organization for Economic Co-operation and Development (OECD) in late 2005 early 2006 in 30 OECD countries, only five of them (Canada, Hungary, Poland, United Kingdom and United States of America) have already set rules for lobbying and even fewer have experience of long established legal frameworks for improving transparency in lobbying.

Nevertheless, the interest in regulating lobbying is increasing. The big number of initiatives and discussions all over the world represents a real evidence of this process. At the same time, there is evidence to suggest that some lobbyists would welcome greater regulation in order to set themselves apart from those who threaten to bring the profession into disrepute. Casting public light on the relationship between civil society and government (politicians and bureaucrats) is increasingly regarded as a desirable and necessary development in the interests of good government.⁴

Examination of the legislation adopted by different countries reveals a variety of regulatory schemes on the part of the legislature. These variations are systemic, reflecting constitutional arrangements and political cultures rooted in different national experience. At the same time, it must be recognized that each political system values the objectives of the regulation differently and varies legislative provisions accordingly. The aim for each country is to devise a regime which is effective and takes account of its own governmental structure and practices and political and administrative culture.⁵

The primary source of rules on lobbying is the law, though codes of conduct are also used for setting rules, particularly for senior public officials. However, as the OECD survey shows, some countries (e.g. Scandinavian states) consider specific rules on lobbying unnecessary as the benefits of open democracies outweigh the potential dangers of unregulated lobbying.⁶

³ Margaret Mary Malone, “*Regulation of Lobbyists in Developed Countries. Current Rules and Practices*”, Institute of Public Administration, 2004, p. 3;
<http://www.environ.ie/en/LocalGovernment/LocalGovernmentAdministration/Lobbyists/PublicationsDocuments/FileDownload,2048.en.pdf>

⁴ Margaret Mary Malone, “*Regulation of Lobbyists in Developed Countries. Current Rules and Practices*”, p. 23.

⁵ Ibid., p. 4.

⁶ Organization for Economic Cooperation and Development (OECD), *Governance arrangements to ensure transparency in lobbying: comparative overview*, 2006, p.5;

Analyzing the general frameworks in which the issue of regulating lobby arose, two tendencies can be identified:

1. regulating lobbying is a measure undertaken in the framework of anticorruption campaigns, fed by high profile scandals which occurred in the society (for instance, the case of Poland);
2. regulating lobbying is a measure for enhancing accountability and transparency in the decision making process (for instance, the EU's European Transparency Initiative⁷, which dedicates a separate chapter to the transparency and interest representation [lobbying], has launched a review of Commission's overall approach to transparency).

In the case of Poland the initiative to clarify conditions for lobbying and to provide an adequate legal framework was launched as a result of high profile corruption cases. In a report on corruption in 1999, the World Bank described the pathological forms of lobbying in the Sejm (Polish Parliament), including the practice of providing financial benefits in return for the favours of blocking or modifying the provisions to be included in the law.⁸ One of the most important cases which contributed to the development of the 2005 Act on legislative and regulatory lobbying was the so-called "Rywin's affair", which indicated clearly that in the course of the legislative process the pressures of various circles were more important than the public benefit. This affair has demonstrated not only to the political class, but also to society at large, the necessity to regulate the lobbying activity by law.

Finally, as a general principle, it is essential that lobbying regulation be perceived by all concerned to serve a useful function. Perhaps, this is the most important lesson to be learned, both by countries initiating lobby regulations and those having recently enacted such kind of regulation, from the Australian experience. There a lobbyist register was instituted in 1983, but abandoned in 1996 because, in the view of the Government, it was "toothless and unenforceable", and in the view of others because its provisions were ignored and access to the registered information was highly restricted; in other words, because it failed to serve a useful purpose.⁹

<http://www.olis.oecd.org/olis/2006doc.nsf/809a2d78518a8277c125685d005300b2/7c4c82f8fe5bfa4fc1257100002ff7da?OpenDocument>

⁷ COM (2006) 194

⁸ World Bank, *Anti-corruption in transition. A tribute to the policy debate*, 2000, quoted by Juliusz Galkowski, "Developing a legal framework for lobbying: the Polish experience", p.2; <http://www.olis.oecd.org/olis/2006doc.nsf/809a2d78518a8277c125685d005300b2/73abdc6f50362009c12570ec005ba705?OpenDocument>

⁹ A.P. Pross, "Lobbying: Models for regulation", p.9-10.

II. Challenge of definitions

Two classes of actors are targeted by regulations governing lobbying. The first are government officials, including legislators, who are themselves lobbied; the second are lobbyists. Since the government officials are usually explicitly identified in the national legislation, the definition of lobbyists and lobbying activity is a challenging issue.

A proper definition of lobbying provides a basis for adequately addressing the public concern. However, a too narrow or too wide definition could possibly render legislative efforts ineffective. There is no single definition of lobbying; it reflects the country's political and legal context.¹⁰ Thus, in the North American system the legislators, because of the element of compensation involved by the lobbyists' activities, have felt that it is logical to start the process of regulation by defining lobbyists in terms of their financial relationship to clients or employers. This approach defines a lobbyist as a person who receives some form of remuneration for representing the interests of a third party to governmental officials. At the same time, the compensation is used as the trigger for registration.

In the so called corporatist system, represented mainly by the European countries, defining lobbying and determining who is a lobbyist has proven particularly difficult. The specificity of this system is that some organizations have integrated the decision making process in the context of the "social partnership". Thus, sector associations participate, virtually by right, in the consultative bodies. A body of law and conventions has evolved over the time to regulate their participation. These organizations (for instance, formal industry, labour associations, trade unions etc.) have a recognized place in the deliberations that lead to government policy. Their participation is already known, the processes are defined, and the interests of the associations are familiar to the public as well as officials.¹¹

The concept of lobbying was at odds with the practice found in a number of European countries where corporatist structures made legitimate the participation of numerous groups in governmental decision-making process. It is difficult to understand how, for instance, the representative of a trade organization could be characterized as a lobbyist when he or she was participating by invitation or by tradition in officially advisory committees.

¹⁰ Organization for Economic Cooperation and Development (OECD), *Governance arrangements to ensure transparency in lobbying: comparative overview*, 2006.

¹¹ A.P. Pross, "Lobbying: Models for regulation", p.6-7.

The European Parliament circumvented this problem by providing a set of conditions which, if met, would lead a consultant or organization employee to register as a lobbyist.¹² This approach does not attempt to define a lobbyist, but rely upon self-definition through the incentive of applying for a pass. All those lobbyists wishing to visit the Parliament would find it much easier to obtain a regular pass, available in return for signing a code of conduct than to stand in the line for a day pass.¹³ A similar system has been in place in Germany since 1972, where the associations wishing to be heard must register beforehand, disclosing their specific interests and the names and addresses of their representatives. Registration is published and secures a pass to the legislature.

Nevertheless, this is only a solution for a particular impasse, targeting only one category of decision makers. This solution could be used also to identify lobbyists acting in the executive, but, given the size and extent of most public services, it is much less amenable to control. In the same time, this system can encourage non-compliance.

If oversight and regulation are needed, then it may be desirable to combine some of the provisions of North American regulation with those that prevail in corporatist countries. In particular, this would involve a broad definition of who is required to register as a lobbyist. A registry that simply records the names of individuals or organizations who wish to communicate with Parliamentary and Ministry committees does not adequately inform anyone who is working elsewhere in the government to influence government decisions on behalf of third parties. A registry that includes those lobbyists would not undermine corporatist practices, but could supplement the present system of registering and authorizing organizations to participate in formal policy discussions.

These considerations draw attention to the fact that, where the inclusiveness of the registry is concerned, much depends on the legislature's understanding of where lobbying takes place and what activities constitute lobbying. In today's world, where much government policy is at least shaped at administrative levels, it seems essential to employ a broad definition of where lobbying is carried out¹⁴. In the United States, for instance, federal and state legislation often assumes that lobbying begins and ends at the legislative branch or, if it takes place elsewhere, with members of the executive who are covered in the legislation. Canadian legislation, on the other hand, takes a broader view of how lobbyists target government, extending to nearly all public officials,

¹² Rule 9 (Members' financial interests, standards of conduct and access to Parliament) and Annex IX (Provisions concerning the application of Rule 9(4) – Lobbying in Parliament) to the Rules of Procedure of the European Parliament, <http://www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=TOC>

¹³ A.P. Pross, "*Lobbying: Models for regulation*", p.12.

¹⁴ *Ibid.*, p.14.

though contacts with cabinet ministers and senior officials are the subject of more extensive reporting.

The Polish model focuses exclusively on lobbying in the law-making process at the central level. An issue of dispute related to the content of the Lobbying Act was inclusion or exclusion of local authorities from the scope of the Act due to the fact that there are no express provisions concerning the lobbying at the local level. It was noted that the transparency of decision making at the local level should in no case be diminished.¹⁵ Even if during the work of the Extraordinary Committee of the Sejm it was noted that the local authorities are included in the concept of public authorities, these declarations do not make the wording of the Act more precise.

Similarly, it is important to specify what activities constitute lobbying. For instance, the U.S. Lobbying Disclosure Act of 1995 defines lobbying activities as lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts and coordination with the lobbying activities of others.¹⁶

A lobbying activity implies a direct communication, either oral or written (including an electronic communication), between a lobbyist and the person being lobbied. The existing legislation commonly states that communication must be made in an attempt to influence a decision making process in which the person being lobbied is involved. Legal precision is also essential for successful enforcement of regulation. However, the “attempt to influence” does not meet this prerequisite, giving the floor to vagueness and partial individual interpretations. The Polish Act on legislative and regulatory lobbying¹⁷ is more precise in this respect. It states that lobbying activity is carried out with a view to ensuring that the interests of a third party are fully reflected in the legislation or regulation proposed or pending.

On the other hand, this communication should not affect the public office holder’s duty to respond to the person’s needs, taking into consideration the fact that they are acting for the public benefit. Individuals seeking any kind of government benefit for themselves are generally within their rights when they seek meetings with officials and present arguments supporting their case. These individuals are certainly lobbying, but because they are exercising the right to petition on their own behalf, are not “lobbyists” as defined by most regulations.

¹⁵ Juliusz Galkowski, “*Developing a legal framework for lobbying: the Polish experience*”, p.5.

¹⁶ U.S. Lobbying Disclosure Act of 1995, section 3(7),
http://www.senate.gov/legislative/Lobbying/Lobby_Disclosure_Act/compilation.pdf

¹⁷ Act of 7 July 2005 on legislative and regulatory lobbying, art.2 (2).

This brings us to the matter of exclusions. Regardless of how specific laws define lobbyists or the act of lobbying, lawmakers have attempted to achieve greater certainty by setting out exclusions. The most common exclusions refer to the representatives of other governments – local, regional and international – who are acting in their official capacities. Certain activities are also excluded, particularly activities of public nature, such as appearing before legislative committees or other inquiries. The principle in both instances has to do with the public role of the official or nature of the activity involved. If either is transparently a performance of a public function, then further publicity, or exposure, is considered to be unnecessary. At the same time, care has to be taken that exclusions are not so broadly stated as to encourage non-compliance.¹⁸

Generally, a lobbyist is a natural or a legal person registered according to relevant legal provisions in order to carry out lobbying activities. However, taking into consideration the scope of activity and the effects produced by lobbying, when regulating lobbying it is also important to pay attention to persons that can not act as lobbyists due to professional or personal reasons (for instance, MPs, politicians, close relatives etc.)

Even if the original draft law, submitted by the Government to the Sejm in 2003, specified what groups and organization were not subject to its provisions, expressly listing the representatives of diplomatic missions, political parties, trade unions, as well as association of employers, the Polish Act in force lacks both exclusions and statements of incompatibility.

Experience has shown that vague or partial definitions of who is to be covered by legislation, or what activities are encompassed, leads to non-compliance or inadequate compliance. For the time being, it is difficult to recommend a uniform pattern of definition for lobbying, taking into consideration a variety of regulatory schemes and state by state peculiarities. However, a number of points to check can be identified, namely:

- Professional activity, undertaken by a natural or legal person;
- Carried out for or on behalf of a third party;
- Usually a remunerated activity, not necessarily with a sum of money or a fee; it could be also any other material or immaterial benefit;
- This activity is subject to registration – this process ensures, on the one hand, transparency and provides the public with information and, on the other hand, grants to registrants access to different incentives and benefits related to their activity (for instance, passes, updated information etc.);

¹⁸ A.P. Pross, “*Lobbying: Models for regulation*”, p.15.

- The activity is undertaken to ensure the reflection of the third party's interests in the legislation, policies and other types of decisions.

III. Transparency in lobbying activity

Measure for increasing transparency is at the heart of regulations on lobbying. Failure to provide information to the public risks low compliance with regulations.

Why registration?

Registration of lobbyists is an indispensable element of transparent lobbying activity. This action follows a double goal, namely:

- Provides the ground for ensuring the transparency of lobbying activities by granting access to the public to relevant information about the lobbyists and the interests they are representing and promoting in the decision making process. By providing more extensive information on who has contributed to the development of a policy or legal framework , external scrutiny is reinforced. To qualify for entry in the register, applicants would need to provide at least information on who they represent, what their mission is and how they are funded;
- It serves as basis for providing incentives and facilities related to lobbyists` activity (passes, access to authorities, access to updated information etc.). Lobbyists that register information about themselves and their specific interests, will be, in return, alerted to consultations in those specific areas.

In this sense, the Polish Act prescribes that the Register of professional lobbyists and lobbying firms shall be accessible to the public. Nevertheless, the information that is prescribed by law to be contained in the Register is far from sufficient and relevant for the public. On the other hand, professional lobbying may be carried out subject to registration. This fact allows the professional lobbyists to undertake their activity in the office of the public authority involved or within the Sejm or Senate.

A subject of discussion concerning registration is its voluntary or compulsory character. This issue has been also raised by the European Commission in its Green Paper on European Transparency Initiative. Many contributions supported the establishment of a voluntary register. However, a considerable number of those consulted, in particular NGOs, advocated a

compulsory approach as the only way of ensuring full transparency. Finally, the Commission supported the voluntary and incentive-based registration system.¹⁹

The same position seems to be reflected by the Polish Act (art. 11(1)), which states that entry into Register shall be effected based on the relevant application.

Disclosure: how much is enough?

Disclosing information on actual lobbying activities has become a general requirement in countries with regulations on lobbying. The challenge in disclosure has to do with the quantity and details of the information submitted. To achieve transparency there must be meaningful disclosure. Both compliance and timely and effective analysis are enhanced if disclosures are pertinent, but parsimonious.

According to A.P. Pross, disclosure is the aspect of lobby regulation most susceptible to elaboration, wise and unwise. Elaboration may flow from experience with lobbying processes and be designed to obtain information that best exposes how governments are influenced. However, goaded by evidence of corruption and scandal, lawmakers sometimes impose ever more exhaustive requirements for disclosure. For example, financial information is a popular target, yet the true costs of a lobbying campaign are extremely difficult to assess. The data demanded is difficult to obtain and what is provided is often incomplete and therefore virtually meaningless.

Core disclosure requirements ask lobbyists to identify:

- The interest being represented;
- Object of lobbying;
- The state institutions being lobbied.

Each of these categories is susceptible to expansion. Where regulation has been in place for some years, additional disclosure requirements include details on expenditure, lobbying techniques, organizational membership and, where permitted, arrangements for contingency funding. Their usefulness often depends on how legislators intend to apply the information that is collected. If the purpose is primarily to obtain, and to give the public, a broad understanding of what interests will be affected by changes in policy, then general statements may suffice. If, on

¹⁹ Communication from the Commission of the European Communities. Follow up to the Green Paper “European Transparency Initiative”, COM(2007) 127 final, March 21, 2007.

the other hand, legislators expect that the information might be used in criminal prosecutions, detailed knowledge of lobbyists' activities could be valuable.²⁰

The interest being represented

While registration identifies lobbyists themselves, it does not shed much light on those who benefit. As this became apparent, regulations were introduced that compelled lobbyists to identify the names of their clients, and any person or organization that controls or directs the activities of the client or has a direct interest in the outcome of the lobbyist's undertaking.

In line with this view, the *Green Paper on the European Transparency Initiative*, prepared for the European Commission, has suggested that groups be asked to provide systematically information about their objectives, sources of funding and the interest represented.

The Polish Act, in Art. 15, also stipulates the obligation of Professional Lobbyist or Professional Lobbying Firm to furnish the Public Authority with a written statement naming the entity for or on behalf of which the lobbying activity is being carried out.

There is no doubt that identification of third parties expecting to benefit from the outcome of lobbying activities is helpful to officials as they assess the pressures for specific outcomes, and it also alerts other stakeholders, including the public, to efforts to obtain public benefits.²¹

Objective of lobbying

Unquestionably the public and officials need to know what it is that lobbying campaigns are intended to achieve. In many cases protagonists are only too eager to identify their causes, but in others they have strong reasons for obscuring their objectives. Their motives are not necessarily illegal; probably most often reflect competitive pressures in business. It is said that the Canadian data on lobby registration is followed most avidly not by politicians, officials or journalists, but by lobbyists themselves, because they find in it useful indications of the work that their competitors are doing and the opportunities that businesses are pursuing. This poses a dilemma: How precise should the demand be for information concerning the objectives of lobbying? Too precise, and the unintended effect is to damage enterprise. Too vague, and the public interest is violated.²²

²⁰ A.P. Pross, "*Lobbying: Models for regulation*", p.16-17.

²¹ A.P. Pross, "*Lobbying: Models for regulation*", p.18.

²² *Ibid.*, p.20.

The Polish model uses another approach to the subject. Instead of requiring beforehand the disclosure of objectives of lobbying, the Act (Art. 7) provides the lobbyists with the right to notify of their interest in the legislation or regulation specified by the Legislative Work Programme, issued at least once every six months by the Council of Ministers. This notification should also contain the interests that are intended to be safeguarded vis-à-vis the legislation or regulation involved or the legal arrangements the inclusion of which is to be sought.

As a general conclusion, lawmakers have a choice between accepting broad descriptions of lobbyists' objectives and requiring them to provide more precise details about the specific legislation, programme, policy or other government activity that they are concerned with. If the former, legislators must expect that interests will state their objectives in very broad terms, often with the result that it is virtually impossible to discern the real purpose of a lobby campaign.

The targets of lobbying

Identification of the institutions being lobbied is equally important, since it allows tracking of decision processes, and alerts officials and others to the need to ensure that all issues and considerations are taken into account.

European registries appear to most frequently require lists of interests seeking to appear before specific parliamentary and administrative committees. The United States *Lobbying Disclosure Act* describes reportable lobbying contacts as any oral or written communication to a covered executive branch official or a covered legislative branch official made on behalf of a client.²³ Canada's *Lobbyists Registration Act* treats almost the entire public service as susceptible to lobbying influence, and requires lobbyists to identify on first registration any department or other governmental institution with which they communicate or intend to communicate.²⁴

The situation in Poland is unclear. The Act does not expressly stipulate the obligation of lobbyists to keep the record and report on the authorities which are targeted or intended to be targeted by their activity. Nevertheless, by interpreting the existing provisions we can assume that lobbying is carried out to influence the Parliament and any other authority in charge of drafting or amending the legislation specified by the Legislative Work Programme. This shortcoming creates ambiguity in the law's implementation process and should be addressed in

²³ U.S. Lobbying Disclosure Act of 1995, section 3(8) (A).

²⁴ Canada's Lobbyists Registration Act of 1985, section 5 (2), <http://laws.justice.gc.ca/en/showdoc/cs/L-12.4//en?page=1>

the context of a larger reform concerning the reporting procedures which are not covered by the Act.

As a conclusion, disclosure is an important part of regulation of lobbying. Effective disclosure requirements elicit that information which most succinctly and accurately captures the intent of lobbying activity, identifies its beneficiaries and points to those authorities that are its targets. Even when regulation succeeds in securing this core information, it will by no means ensure that decision processes are transparent or satisfy the legitimate information needs of key players in the legislative process. Depending on those needs, supplementary disclosure will be required. However, attempts to satisfy the additional needs of the users of disclosed information can create a reporting system that collapses under its own weight. Thus, when one intends to regulate lobbying he/she must remember that it is important to apply a few basic rules:

- Information sought and collected has to be relevant to the core goals of ensuring transparency, integrity and efficacy;
- The demand for information is realistic in practical and legal terms;
- Information can be disseminated efficiently to the public, to legislator and to the officials.²⁵

Integrity rules: Codes of conduct for lobbyists

Alongside external scrutiny of contacts with lobbyists, integrity rules are another essential contribution to transparency in lobbying.

According to A.P. Pross²⁶, three types of codes of conduct now affect the operation of lobbyists in a number of countries. The least coercive are the professional codes adopted in several jurisdictions by associations that have been organized by lobbyists themselves. Consequently, though some associations of lobbyists have attempted to discipline disobedient practitioners, the open nature of the business and public ignorance of professional codes has rendered their efforts largely ineffective. The codes, therefore, state important ground rules for lobbyists in their relations with one another, with clients and with government officials, but because enforcement is extremely limited they do little to constrain those lobbyists who wish to break the rules.

Employment and post-employment codes and the rules governing the conduct of members of legislatures are in several ways the more significant influences on the behaviour of lobbyists. A

²⁵ A.P. Pross, "*Lobbying: Models for regulation*", p.26.

²⁶ Ibid., p.28-29.

number of jurisdictions have rules in place that purport to regulate the conduct of members of the legislature and public servants, and though lobbyists may not be specifically enjoined to respect them, the consequences of ignoring them, as far as public officials are concerned, will act as a constraint on their behaviour and thus on that of lobbyists.

A few jurisdictions impose codes of conduct on lobbyists, either as a condition of access to legislatures and government offices, or as in the case of Canada, as part of the legislation regulating lobbying. As we have seen, the European Parliament, under Rule 9(4) permits lobbyists to hold permanent passes to the legislature on condition that they observe a code of conduct. Failure to comply with the code can lead to withdrawal of the lobbyist's pass, and thus to the denial of access to Parliament.

Canada appears to be the only one state that has legislated a code of conduct. The code, which came into effect in 1997, has two elements: a statement of principles and a set of rules which flow from those principles. There are three principles, calling on lobbyists to conduct themselves with openness, with integrity and honesty, and in a professional manner. Thus, the principle of openness (or transparency) invokes three standards: an obligation to identify to officials the beneficiaries of the lobbying activity and the reasons for it; a commitment to convey information accurately, taking care not to mislead those being lobbied, and, thirdly, a requirement to remind office holders of the lobbyist's own obligation to adhere to the Act and the Code. The standards relating to integrity and honesty are confined to a commitment to respect the confidential nature of information obtained and not to use confidential information to the disadvantage of their client, employer or organization. The principle of professionalism is covered by the rules relating to conflict of interest, requiring lobbyists to avoid representing conflicting or competing interests and to avoid placing office holders in positions of conflict of interest.²⁷

As far as codes of conduct are concerned, the central issue that excites debate is not their actual content, but rather their status (voluntary, enforced with incentives or full-fledged regulation). The European Commission has taken the view that voluntary codes of conduct for lobbyists can play a useful supporting role. The Commission invited the lobbyists to adopt their own codes of conduct on the basis of its minimum criteria. The main features of these criteria can be summarised as follows:

- Lobbyists should act in an honest manner and always declare the interest they represent;
- They should not disseminate misleading information;

²⁷ Canadian Lobbyists' Code of Conduct, in force since March 1, 1997. <http://www.orl-bdl.gc.ca/epic/site/lobbyist-lobbyiste.nsf/en/nx00019e.html#code>

- They should not offer any form of inducement in order to obtain information or to receive preferential treatment.

In its recent *Green Paper* on transparency the Commission notes that various umbrella organizations have adopted voluntary codes, which are based on these minimum standards and are very similar in tone and content, and that some have added to their codes internal sanction mechanisms, ranging from reprimand to limited or indefinite expulsion.

On the other hand, the European Parliament has a compulsory code of conduct for all seeking accreditation. Any breach could lead to the withdrawal of accreditation, i.e. of the possibility of physical access to the premises of the European Parliament.

Unfortunately, the Polish Act lacks provisions about the code of conduct of lobbyists

IV. Securing compliance

Achieving compliance is a constant challenge that requires using a combination of measures and mechanisms. The external control is usually performed by the national authority in charge of administering the rules on lobbying. According to the Polish model, the authority in charge of control over the lobbying activity is the Ministry of Interior and Administration. The designation of a central government ministry to administer the rules on lobbying is subject to criticism. As the Canadian model showed, the Registrar, who was not a senior official, was ultimately subject to the pressures that ministers and other officials could bring to bear. Furthermore, the office was vulnerable to budgetary, staffing and organizational decisions that severely limited its effectiveness. A solution in this case could be the appointment by the legislature of a high standing official or body for a fixed term or otherwise removable only through a formal legislative process. This official or body must be independent of the government of the day.

The imposition of sanctions is often the first recourse of legislators attempting to address issues arising from improper lobbying. Sanctions are a necessary feature of lobby legislation, but are seldom sufficiently stringent to constitute a true deterrent. Even substantial fines or imprisonment may not intimidate lobbyists who anticipate very large profits from winning significant government contracts for their clients.²⁸

At the same time, the sanctions are only a small part of the regulatory regime that will confine illegal activity to tolerable limits. The system of sanctions must be complemented by the

²⁸ A.P. Pross, "*Lobbying: Models for regulation*", p.30.

authorization of registry officials to require additional information to be submitted by registrants and the power to investigate the alleged breaches of lobbyists' obligations.

Different jurisdictions, alongside with traditional sanctions, have set up a complementary system of measures aiming at securing compliance with lobby regulations. For instance, any failure to comply with the rules of conduct of lobbyists in European Parliament may lead to the withdrawal of the pass. In Canada, the Registrar has the power to investigate suspected breaches of the code of conduct. The final report of any investigation carried out must be sent to the Parliament. This practice of reporting to the Parliament is a substantial incentive for compliance. No lobbyist who plans to remain in business wants to benefit from unwelcome publicity that follows from making public the reports. The most valuable asset of any lobbyist is his or her access to the decision makers. Public officials are distinctly unwilling to have contacts with lobbyists with dubious reputation.

Those who are lobbied also have an important role to play in ensuring compliance with lobby regulations. They are in the best position to require that lobbyists observe codes of ethics and to report failures to do so. Their effectiveness, however, will depend on the extent to which they are familiar with the regulations regarding lobbying and with their own obligation to assist the monitoring process. This means that there must be managerial directives requiring public servants to verify lobbyists' credentials and to report any offences. In turn, the effectiveness of such directives implies that public servants should be exposed to educational programmes that prepare them to recognize lobbying activity and familiarize them with reporting facilities and requirements.

When adequately supported, education can be far more effective. Education strives to create a culture of compliance with the requirements of registration legislation and the ethical standards promulgated by governments. At the same time, education helps the public to appreciate the significance and utility of lobbying processes, including knowing how to participate in policy debates, rather than the blanket condemnation of lobbying that is encouraged by scandals.

In conclusion, it seems evident that compliance is best addressed through a spectrum of measures starting with clear requirements for inclusive and timely registration and disclosure and going on to include²⁹:

- Formal sanctions;

²⁹ Ibid., p.32.

- Managerial directives requiring public servants to verify lobbyists' credentials and to report possible offences;
- The endowment of registry officials with adequate powers of investigation;
- Education.

V. **Quo vadis?**

Lobbying is an indispensable element of a democratic society. It contributes to the improvement of decisions since it is an instrument to provide the stakeholders with relevant information and different opinions on the topic. It allows also the voice of those directly affected by the decision to be heard and taken into consideration.

Regulating lobbying is approached as an anticorruption measure or a measure for enhancing transparency and accountability in the decision making process. However, regulating lobbying should not be perceived as a universal remedy for any malfunction in the decision making system. The existence of undue influence should also be addressed by other means.

Lobbying regulations have to respect and conform to the characteristics of each jurisdiction. Even if there is an increased interest in developing lobbying regulations, it is not wise to propose legislation, which is copied from one jurisdiction to another. Adoption actually means adaptation. The best that one can do is to identify a number of common situations that may be addressed in similar, but not identical, ways.

Regulating lobbying is a manifestation of maturity of the democratic society. In this respect, the initiative of the Republic of Moldova to regulate lobbying represents a step forward towards this goal. Nevertheless, this effort will have zero effect, if a number of related issues are not addressed. Thus, the independence of media is doubtful, human rights are often violated, the civil society is weak as opposed to the government and the effort and resources deployed for fighting against corruption are not commensurate to the results.

The Polish experience shows that the decision to regulate lobbying should not be taken in a hurry. Notwithstanding the period of discussions within the Extraordinary Committee of the Polish Sejm, it became clear from the beginning that the Act on legislative and regulatory lobbying was a weak piece of legislation that would soon need to be significantly amended. The present practice already points out some specific issues. For instance, the Act introduces opportunities for arbitrary decisions being taken by public officials. This is particularly the issue of the power of deciding which natural or legal person is to be regarded as conducting lobbying

or not. According to the Polish Act only a registered lobbyist can address the public official, who has a duty to report any contact of unregistered lobbyists. Unregistered lobbying activity is subject to a fine from PLN 3 000 up to 50 000. There are already signals that representatives of nongovernmental organizations are unwelcome at some of the Parliamentary Committees. Thus, there are reasons for concern that the Act might provide a pretext for the limitation of the already rather insignificant role of the NGOs in the decision making process.

Nevertheless, this situation can not and should not impede the development of some institutions crucial also for transparency in decision making process. Even if the Polish Act on Lobbying has been subject to criticisms, it provides for institutions that must be taken into consideration and introduced in the Moldovan reality: conducting public hearings on important issues and development of short term legislative plans, accompanied by reasons for amending/drafting a specific piece of legislation. Another measure that should be considered is the promotion of ethical standards in the decision making process.