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Contents

- I. LACK OF COMMON LOBBYING STANDARDS IN THE EU..... 3**
- II. PAST INITIATIVES 4**
- III. REASONS FOR THE LACK OF COMMON LOBBYISTS’ RULES IN THE EU..... 4**
 - III.1. THE AUTONOMY OF EU INSTITUTIONS TO REGULATE THEIR INTERNAL AFFAIRS ACCORDING TO THEIR OWN OPERATIONAL RULES4
 - III.2. DIFFERENT ROLES AND TASKS ASSIGNED TO EU INSTITUTIONS.....4
 - III.3. DIFFERENCES IN COMMISSION AND EP APPROACHES TO REGULATING OF LOBBYING.....5
- IV. PROSPECTS FOR ESTABLISHING A COMMON LOBBYISTS’ REGISTER IN THE EU 8**

I. Lack of common lobbying standards in the EU

Lobbying is not regulated in the European Union (EU) in a uniform or coherent manner. While the European Parliament (EP) has had a registry and code of conduct for lobbyists¹ for a considerable period of time, the European Commission has moved more slowly from the open access policy for lobbyists towards the adoption of regulatory standards for this activity.² It recently decided to introduce registration for lobbyists.³ The applicants for the register have to subscribe to a code of conduct.⁴ The Commission's register for interest representatives (rather than lobbyists) is due to open on 23 June 2008. The Commission established data base CONECCS – Consultation, the European Commission, and Civil Society, which was used to ensure that each of the Commissions Directorate Generals (DGs) finds the relevant partners to talk with over policy proposals is closed. However, the register of stakeholders participating in the civil dialogue with the DG Trade⁵ remains fully operational in spite of the fact that area of its application will also come in the remit of the new Commission's register for lobbyists.

The Commission has clearly expressed its preference to develop the register and code of conduct for lobbyists together with the European Parliament, the Committee of Regions and the Economic and Social Committee. The Commission's intention is, in principle, endorsed by the European Parliament.⁶ By the end of 2008 a joint working group between Commission, Council and Parliament should report on feasibility of establishing common lobbyists' register. Does this mean that in future there will be ethical standards for lobbyists applicable to all EU institutions?

Although, the Commissioner responsible for the introduction of the Commission's register for lobbyists, Mr Kallas, finds that there is now very solid common ground for the Commission and Parliament to develop a shared register⁷, it is not likely that *ius commune* for lobbyists will be agreed by all EU institutions in near future. The obstacles standing in way of such an inter-institutional agreement are considerable.

¹ European Parliament, Rules of procedure of the European Parliament, 16th ed. (2005) Article 3 of Annex IX, <http://www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=TOC> A register of accredited lobbyist is published on the EP website, <http://www.europarl.europa.eu/parliament/expert/lobbyAlphaOrderByOrg.do?letter=U>

² On the historical development of the Commission's regulating activities in respect to lobbying see, Daniela Obradovic and Malte-Carlos Hinrichsen (2007) 'Regulation of lobbying in the European Union', paper presented at the ECREA Symposium 2007 'Equal Opportunities and Communication Rights: Representation, Participation & the European Democratic Deficit', 11 and 12 October 2007, Brussels.

³ Commission of the European Communities (2007) 'Communication from the Commission: Follow-up to the Green Paper European Transparency Initiative', COM(2007)127, 21.3.2007.

⁴ Ibid., p. 5.

⁵ <http://trade.ec.europa.eu/civilsoc/search.cfm?action=form>

⁶ European Parliament (2008) '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)', <http://www.europarl.europa.eu/sides/getDOC.do?pubref=-//EP//TEXT+TA+P6-TA-20...>, point 11.

⁷ Vice-President Kallas' statement on the adoption of the Stubb/Friedrich report on 8/05/2008, http://ec.europa.eu/commission_barroso/kallas/transparency_en.htm

II. Past initiatives

Prior to the Commission's latest programme for setting up an interest representatives' register, efforts undertaken in the Union aimed at the creation of common European standards for regulating lobbying have not produced encouraging results. The Governance White Paper⁸ called on the Commission, the European Parliament and the Council to review their practices and contribute to the general reference framework for consultation by 2004. The June 2003 inter-institutional agreement on the better law-making initiative, urged the three institutions to improve the coordination of their preparatory work and to adopt a common methodology for carrying out impact assessments.⁹ Furthermore, all three institutions have endorsed the development of the common approach to impact assessment.¹⁰ Despite these initiatives, there is still no common framework for consultation with interested parties which is applicable to all EU institutions. The initiative for the adoption of the Statute for a European Association (EA) as part of a general approach to regulate the establishment of interest associations at the European level failed as well.¹¹

III. Reasons for the lack of common lobbyists' rules in the EU

III.1. The autonomy of EU institutions to regulate their internal affairs according to their own operational rules

The lack of common lobbyists' standards in the EU is primarily attributable to the founding principles of the EU institutional framework, which is based upon the principle of inter-institutional balance. This means that each institution has a degree of autonomy in regulating its operational rules.¹² That is to say, that the critical and essential feature of the EU organisational design is the institutions' discretion to adopt their own internal rules and procedures. Consequently, they do not have an obligation to synchronise those conventions among themselves.

III.2. Different roles and tasks assigned to EU institutions

Not all EU institutions are equally attractive or receptive to lobbying activities. Their relations with lobbyists are predominantly determined by the role they play in EU decision making. This is the reason why the rules which are appropriate for the regulation of lobbying activities in one institution might not serve the requirements of another. The European Parliament rec-

⁸ Commission of the European Communities (2001) 'European governance: White paper', COM(2001) 428, 25.7.2001, p. 17.

⁹ Interinstitutional agreement on better law-making, OJ C 321, 31.12.2003, pp. 1-5, points 4 and 30.

¹⁰ Commission of the European Communities (2007) 'Commission staff working paper, Annex to the Report from the Commission "Better lawmaking 2006" pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (14th report), SEC(2007) 737, 4.6.2007, p. 16.

¹¹ Commission of the European Communities (2005) 'Communication from the Commission to the Council and the European Parliament: 'Outcome of the screening of legislative proposals pending before the Legislator', COM (2005) 462. The proposal for the EA statute has been withdrawn in spite of the fact that the Commission foresaw its adoption in its 2003 Action plan for company law and corporate governance (European Commission (2003) 'Modernising company law and enforcing corporate governance in the European Union – A plan to move forward' COM(2003) 284, 21 May 2003, p. 22). For the latest version see Council of the European Union, Amended proposal for a Council Regulation (EEC) on the statute for a European Association, 17 March 2003, Council document 6873/03.

¹² Jacqué, Jean-Paul (2007) 'The principle of institutional balance', *Common Market Law Review*, 41(2): 383-391.

ognises that institutions have essential differences and might end up with different requirements for lobbyists.¹³

It is very well documented in the literature¹⁴ that European decisions are most efficiently influenced at the pre-drafting stage, while they are with the Commission. Accordingly, lobbyists are most interested in having unhindered access to this institution. Furthermore, only the Commission holds internet-based public consultations prior to adopting draft proposals. In order for participating parties to have their contributions taken into consideration by the Commission, they must comply with representativeness and accountability, hereafter called ‘the Commission’s minimum standards for consultations’.¹⁵ The Commission’s new register of lobby groups is combined with the standard template for internet consultations. It invites lobbyists and interest groups working to influence decisions taken in European Union institutions to subscribe to the public register. If a group declines registration, the Commission will not consider its contributions to the internet-based consultations because it will be seen as having failed to fulfil the criterion of representativeness.. The Commission justifies the imposition of those requirements on the grounds that ‘with better involvement comes greater responsibility.’¹⁶

These are not the circumstances under which lobbying activities take place in the European Parliament (EP) or the Council. For example, the EP created its own civil society constituency called Agora Forum encompassing 500 civil society organisations that meet the EP lobbyists’ requirements. EP members consult these organisations during the preparation of Parliamentary committees’ reports.¹⁷ Thus, since lobbying conditions are not reproducible throughout the complex EU institutional design, it remains questionable whether a single set of rules can govern very different lobbying situations.

III.3. Differences in Commission and EP approaches to regulating of lobbying

At present, there are significant differences in the Commission’s and the EP’s approaches to regulating of lobbying.

The most obvious, but not the most important one, concerns the fact that the EP insists on mandatory registration, while for the Commission voluntary compliance appears to be more appropriate. Since the lobbyists’ access to the EP building and its members is conditional upon their registration, any common registrar of interest representatives in the EU would be *de facto* mandatory for lobbyists.

¹³ European Parliament (2008) ‘Report on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions (2007/2115(INI)’, A6-0105/2008, <http://www.europarl.europa.eu/sides/getDOC.do?pubref=-//EP//NONSGML+REPORT+A6-2008-0105+0+DOC+P-...>, p. 10.

¹⁴ See e.g. Mazey, Sonia and Richardson, Jeremy (2001) ‘Institutionalizing promiscuity: Commission-interest group relations in the European Union’, in Stone, Sweet et al. (2001) eds., *The Institutionalisation of Europe*, Oxford: Oxford University Press, pp. 71-93; Mazey, S. and Richardson, J. (2006) ‘Interest groups and EU policy-making: organizational logic and venue shopping’, in J. Richardson (ed.), *European Union: Power and Policy-Making*, London and New York: Routledge, pp. 247–65; Coen, D. (2007) ‘Empirical and theoretical studies in EU lobbying’, *Journal of European Public Policy*, 14(3): 333-345, p. 336;

¹⁵ Commission of the European Communities (2002) ‘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, 11.12.2002.

¹⁶ Commission of the European Communities (2001) ‘European governance: White paper’, COM(2001) 428, 25.7.2001, p. 15, 17, and 18.

¹⁷ Cf <http://www.europarl.europa.eu/parliament/archive/staticDisplay.do?id=66&pageRank=2...>

A more serious discrepancy between two institutions lies in how they treat the financial disclosure requirement. Although both institutions call for disclosure of financial interests and funding sources of lobby organisations entering the register, their positions on the content of this requirement are not in concert.

The Commission is of the opinion that interest groups should declare funding sources and major clients. This is supposed to ensure that the Commission as well as the public can identify and assess the driving forces behind positions taken and interests presented. Financial disclosure in practice means declaring the turnover linked to lobbying EU institutions as well as the relative weight per client (for professional consultancies and law firms), the relative share of funding from various sources in relation to total funding (for NGOs, think tank, etc) and the cost associated with lobbying (for companies, trade associations, etc).¹⁸ The operationalisation of those requirements should be compatible with the Union legislation on data protection applicable to its institutions. If the Commission finds it necessary for the performance of its tasks in the public interest – as referred to in Article 5(a) of Regulation 45/2001¹⁹ - to make more data available, including those mentioned in its proposed register for lobbyists, this is in line with this Regulation, provided that lobbyists are informed about this and other relevant circumstances, when their data are collected.²⁰

The European Parliament calls for ‘full financial disclosure’ without indicating the precise meaning of this request. It only asserts that such disclosure requirement should be equally applicable to all registered interest representatives and carried out within meaningful parameters, without having to provide exact figures.²¹ Given that the examination of the current Parliamentary rules on lobbying cannot contribute to further clarification of its standing on this matter because they do not require accredited interest representatives to disclose financial information, the Parliament position on disclosure of financial data remains very elusive.

Another issue on which there is no common position concerns the establishment of a body for monitoring the accuracy of information solicited by registrars. Whether EU institutions will be able to establish such mechanism is debatable. An earlier attempt to set up an Advisory Committee on Standards in Public Life²² has failed due to the opposition of the EP. The rejected model had no sanctioning powers and also no powers with regards to the management and monitoring of registers of interest of EU officials. Is it now possible to establish a com-

¹⁸ The European Commission press release, IP/07/367, 21 March 2007, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/367&format=HTML&a...>

¹⁹ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L8, 12.1.2001, pp. 1-22.

²⁰ See Article 11 of the Regulation. See in particular European Data Protection Supervisor, (EDPS) Case 2006-95, Transparency and data protection: conclusions on releasing further information about lobbyists, 31 August 2006 (http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/B ackgroundP/06-08-31_transparency_lobbyists_EN.pdf).

²¹ European Parliament (2008) ‘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)’, <http://www.europarl.europa.eu/sides/getDOC.do?pubref=-//EP//TEXT+TA+P6-TA-20...>, points 22 and 23.

²² Commission of the European Communities (2000) ‘Proposal for an Agreement between the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee and the Committee of the Regions establishing an Advisory Group on Standards in Public Life, SEC(2000) 2077.

mon monitoring structure to manage the new common register for lobbyists when previous efforts to create a public ethics monitoring body with only mild advisory competence proved to be futile? The gravity of the problem is worsened by the fact that both the Commission and the EP insist that sanctions, such as suspension of membership or even removal from the register, be imposed on groups which supply inaccurate information or breach the code of conduct. This sanctioning regime should be, presumably, carried out by the monitoring body overseeing the functioning of the register for lobbyists.

Furthermore, there is no harmony among these EU institutions with regard to how their standards governing conflicts of interests among public officials which complement the ethics rules for lobbyists. While there are numerous and very strict rules on the disclosure of the financial interests of the Commissioners,²³ the EP ethics regime²⁴ is in contrast quite weak,²⁵ even though, it requires the EP members to declare their financial interests.²⁶

An additional problem arises from the EP's insistence on the use of a 'legislative footprint', i.e. an indicative list, attached to a Parliamentary report or Commission legislative proposals, of registered interest representatives who were consulted and had significant input during the preparation of the report or EU policy initiatives.²⁷ Although the Commission publishes all contributions submitted during the internet-based consultations prior to the drafting of its proposals,²⁸ it does not refer specifically, in the explanatory statements accompanying its proposals, to groups whose opinions have made significant influence upon its drafts.

²³ Article 213(2) EC, Article 287 EC, Code of Conduct for Commissioners, SEC(2004) 1487/2 of 24 November 2004, http://ec.europa.eu/commission_barroso/code_of_conduct/code_conduct_en.pdf, On-line permanent publication of the declarations of interests of Commissioners (http://ec.europa.eu/commission_barroso/interests/index_en.htm) and Public register of received gifts with a value of more than EUR 150 (http://ec.europa.eu/commission_barroso/gifts/gifts_fr.pdf), Note from the President and Mrs Kroes to the members of the Commission on the identification of actual or potential conflicts of interest concerning the Commissioner for Competition (SEC(2004) 1541 of 1 December 2004) http://216.239.59.104/search?q=cache:_i5nrSakhyEJ:ec.europa.eu/comm/commission_barroso/interests/kroes/interests_en.pdf+Note+from+the+President+and+Mrs+Kroes+to+the+members+of+the+Commission+on+the+identification+of+actual+or+potential+conflicts+of+interest+concerning+the+Commissioner+for+Competition&hl=nl&ct=clnk&cd=1&gl=nl, Ad hoc ethics committee on activities post-employment (in operation) established by Decision C (2003) 3570 of 21 October 2003, Commission of the European Communities (2008) 'Communication from Vice-President Kallas to the Commission on enhancing the environment for professional ethics in the Commission', SEC(2008) 301, 5.3.2008, http://ec.europa.eu/commission_barroso/kallas/doc/com2008_0305_ethic_en.pdf

²⁴ Articles 189-201 EC, Article 2 of the Annex I of the Rules of Procedure and Article 9 of the Rules of Procedure (*supra*)

²⁵ See Demmke, C and others (2007) 'Regulating conflicts of interests for holders of public office in the European Union: A comparative study of the rules and standards of professional ethics for the holders of public office in the EU-27 and EU institutions', http://ec.europa.eu/dgs/policy_advisers/publications/docs/hpo_professional_ethics_en.pdf, pp.60-66.

²⁶ European Parliament (2008) '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)', <http://www.europarl.europa.eu/sides/getDOC.do?pubref=-//EP//TEXT+TA+P6-TA-20...>, point 5.

²⁷ *Ibid*, point 3.

²⁸ Cf at http://ec.europa.eu/yourvoice/consultations/index_en.htm

IV. Prospects for establishing a common lobbyists' register in the EU

It is very unlikely that a common lobbyists' register in the EU will be put into operation any-time soon. Obstacles to such a development are numerous, and include: the autonomy of EU institutions to regulate their internal affairs according to their own operational rules; dissimilarities in lobbying situations across different EU institutions, and differences between the Commission's and EP's approaches to regulating lobbying which are manifest in the nature of the registration requirement (mandatory or voluntary), the content of the financial disclosure requirement, the scope of competence of a body monitoring the functioning of the register for lobbyists, and the question concerning the indication of groups which have decisively influenced Commission's proposals or EP reports.

Nevertheless, we would like to point out several factors which could facilitate the adoption of the common lobbyists' regulation in the EU. For example, the Commission and the EP do agree upon the definition of lobbying,²⁹ the need to sanction non-compliance with the register requirements, and the need to publish a transparent overview of the experts groups and advisory bodies the Commission has set up to assist in preparing its policy initiatives³⁰ as well as a list of intergroups the EP has established to support its committee work.³¹ Finally, although, EU institutions have no common approach to the designation of the exact context of the financial disclosure requirement, it should be kept in mind that this requirement is not targeted specifically at interest groups and NGOs active at the EU level,³² but, rather comprises part of the wider EU effort to improve transparency in EU finances.³³ This suggests that EU institutions might be able to adopt the common position on the matter.

²⁹ In both the EP's and Commission's view lobbying means "all activities carried out with the objective of influencing the policy formulation and decision making process of the European institutions". Accordingly lobbyists are defined as persons carrying out such activities, working in a variety of organisations such as public affairs consultancies, law firms, non-governmental organisations (NGOs), think tanks, corporate lobby units ('in-house representatives') or trade associations. This wide definition of lobbyist is in line with the Commission's definition of 'civil society organisations' which is a wide-ranging concept including trade unions and employers' federations, non-governmental organisations, consumer groups, organisation representing social and economic players, charities and community-based organisations operating at European, at national, regional or local level. For further information see Daniela Obradovic and Malte-Carlos Hinrichsen (2007) 'Regulation of lobbying in the European Union', paper presented at the ECREA Symposium 2007 "Equal Opportunities and Communication Rights: Representation, Participation & the European Democratic Deficit", 11 and 12 October 2007, Brussels.

³⁰ See <http://ec.europa.eu/transparency/regexpert/index.cfm>

³¹ European Parliament (2008) '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)', <http://www.europarl.europa.eu/sides/getDOC.do?pubref=-//EP//TEXT+TA+P6-TA-20...>, point 6.

³² Statistics do not show any disproportionate number of fraud cases involving NGOs as compared to other forms of undertaking. Indeed, out of 3000 enquiries into different sectors benefiting from European funding investigated by OLAF (European Anti-Fraud Office) since 2001 and passed on to the competent authorities for legal prosecution, only 10 concerned NGOs (see Report written by F.M. Partners Limited on behalf of Open Society Institute-Brussels, Concord, The Platform of European Social NGOs, SOLIDAR, The European Women's Lobby, Striking a Balance. Efficiency, Effectiveness and Accountability. The Impact of the EU Financial Regulation on the Relationship between the European Commission and NGOs, April 2005, <http://www.solidar.org/english/pdf/Striking%20a%20Balance%20Final1.pdf>

³³ European Financial Regulation (Council Regulation (EC, Euroatom) No 1995/2006 of 13 December 2006 amending Regulation (EC, Euroatom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities,) OJ L 390, 30.12.2006, p. 1) and implementing instruments Council Regulation Commission Regulation (EC, Euroatom) No 478/2007 of 23 April 2007 amending Regulation (EC,

However, the most compelling reason to establish common regulatory rules for lobbyists in the EU is the lack of incentives for civil society groups to comply with the enrolment requirements of the Commission's register of interest representatives. Although lobbyists on the Commission's register will have the advantage of being alerted to consultations in specific areas, it is feared that this is relatively weak incentive, particularly for Brussels-based interest groups that follow the Commission's activities on a daily basis. The Commission thus introduced an additional encouragement to registering, whereby it will consider only registered groups to be representative of their sectors during the internet-based public consultations; not-registered groups will not be considered as representative. This is embedded in the Commission's minimum standards for consultations which stipulate that 'if ... information (on groups representativeness – D.O.) is not provided, submissions will be considered as individual contributions'.³⁴ According to the consultation standards, the Commission gives more weight to submissions solicited by representative groups than to individual views. It considers an opinion expressed in the consultation process to be more relevant and useful if it is submitted by a group which is regarded to be representative of the sector. That is the reason why the Commission needs to have at its disposal information concerning representativeness of groups participating in consultations.

It is very questionable whether the mentioned incentives for signing up in the new register can serve their purpose. The automatic alert function will be very difficult to implement for several reasons. First of all, the application thereof would create a privileged group of recipients of information held by the Commission. Such practices are prohibited by European laws which assure equal and unconditional access to information possessed by EU institutions to all EU citizens and residences, whether groups or individuals, without making the dissemination conditional upon the fulfilment of particular requirements.³⁵ Furthermore, the consultations standards do not require the Commission to provide all interested civil society organisations with individually issued invitations to participate in an EU consultation.³⁶ At the same

Euratom) No 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 111, 28.4.2007, pp. 13–45), provide for annual ex-post publication of beneficiaries of money received from the Structural Funds as from 2008 and of money received under the Common Agricultural Policy as of 2009. In the field of structural funds, Commission Regulation (EC) No 1828/2006 of 8 December 2006 setting out rules for the implementation of Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and of Regulation (EC) No 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund, OJ L 371, 27.12.2006, pp. 1–163, clearly puts the responsibility for collecting and publishing data of beneficiaries on the member states and the Commission. In the field of fisheries Commission Regulation (EC) No 498/2007 of 26 March 2007 laying down detailed rules for the implementation of Council Regulation (EC) No 1198/2006 on the European Fisheries Fund, OJ L 120, 10.5.2007, pp. 1–80, stipulates the same requirement. In the area of agriculture the Commission Proposal for a Council Regulation amending Regulation (EC) No 1290/2005 on the financing of the common agricultural policy, COM(2007) 122, 20.3.2007 provides for the member states obligation to publish the list of beneficiaries. The Commission has itself already started publishing information on beneficiaries under the programmes it manages directly at http://ec.europa.eu/grants/beneficiaries_en.htm and beneficiaries of public contracts at http://ec.europa.eu/public_contracts/beneficiaries_en.htm

³⁴ Commission of the European Communities (2002) '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, 11.12.2002, p.17.

³⁵ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

³⁶ The European Ombudsman, Decision 948/2004/OV of 4 May 2005, www.euro-ombudsman.eu.int/decision/en/040948.htm

time, it is unclear whether those standards allow for designated potential participants to be alerted, while other potentially interested parties are not.³⁷

Because interest groups have no compelling reason to sign the Commission's register of lobbyists, the Commission has called for the establishment of the common EU interest representatives' register. It is the Commission hope that such an initiative will increase mobilisation for registration among civil society organisations.

³⁷ For an extensive assessment of the mobilisation effect of incentives for entering the Commission's lobbyists' register see Daniela Obradovic and Malte-Carlos Hinrichsen (2007) 'Regulation of lobbying in the European Union', paper presented at the ECREA Symposium 2007 "Equal Opportunities and Communication Rights: Representation, Participation & the European Democratic Deficit", 11 and 12 October 2007, Brussels.