



## ARTICLES

### SHAPING THE FUTURE OF EUROPE – FIRST PART

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# TRANSPARENCY AT THE EXPENSE OF EQUALITY AND INTEGRITY: PRESENT AND FUTURE DIRECTIONS OF LOBBY REGULATION IN THE EUROPEAN PARLIAMENT

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ABSTRACT: Citizens' perception that lawmaking is dominated by special interests undermines their trust in democratic institutions and lawmaking processes. This also applies to the EU, where lobby regulation remains weak despite past lobbying scandals. While the European Commission and the European Parliament established a Joint Transparency Register in 2011, registration remains voluntary for lobbyists. Given that domestic lobbies have increasingly been oriented towards the European supranational realm, adopting effective lobby regulation at EU level has become more essential than ever to protect the democratic legitimacy of EU lawmaking. This especially applies to the European Parliament, which has important decision-making powers in the context of the ordinary legislative procedure, and which represents the citizens of the EU, thereby constituting a key lobbying target. My goal, in this *Article*, is to show why and how lobbying should be further regulated in the European Parliament. I first examine the specificities of lobbying in the EU and in its Parliament,

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before looking at the EU's constitutional framework, as well as EU parliamentary law, the Joint Transparency Register established in 2011, and the provisional version of the Agreement on a Mandatory Transparency Register published in December 2020. I then evaluate the European Parliament's current regulation of lobbying from the perspective of EU primary law. I argue that its narrow focus on transparency is misguided and neglects other fundamental democratic values, such as equality. Moreover, the existing framework does not sufficiently focus on MEPs' duties of integrity.

KEYWORDS: equality – European Parliament – integrity – interest groups – lobbying – transparency.

## I. INTRODUCTION

"The directly-elected European Parliament is no less than the voice of all the European people, expressing their hopes – and fears – for the future of Europe. The representative nature of the Parliament ensures that the progress towards European unity is public and democratic. The Parliament's active role in European legislation is to ensure that European laws are drawn up and approached according to the democratic process. [...] [A]s Europe moves towards greater unity, the role of our Parliament will be to ensure that the European people participate fully in this process".<sup>1</sup>

Trust in domestic democracy and governance has seen better days. In 2020, the Eurobarometer of the European Commission (EC) reported that only 36 per cent of Europeans trusted their national parliament and 40 per cent their national government.<sup>2</sup> As regards the EU, trust levels are generally higher, but rarely lie above the 50 per cent mark: in 2020, less than half (48 per cent) of Europeans trusted the European Parliament (EP), and 45 per cent the EC.<sup>3</sup>

Public cynicism extends to domestic lawmaking processes and to the lobbying industry.<sup>4</sup> Most European countries have witnessed scandals connected to lobbying in recent decades.<sup>5</sup> Similar affairs also surfaced in the EU: in 2011, the *Sunday Times* revealed that four MEPs had agreed to put forward specific amendments in the EP in exchange for a fee.<sup>6</sup>

<sup>1</sup> Lord Plumb, former President of the European Parliament; see H Plumb, *One Parliament for Twelve: The European Parliament* (European Parliament 1988) 5. The quote appears in S Bowler and DM Farrell, 'Legislator Shirking and Voter Monitoring: Impacts of European Parliament Electoral Systems upon Legislator-Voter Relationships' (1993) *JComMarSt* 45, 47.

<sup>2</sup> European Commission, 'Report: Public Opinion in the European Union' (Standard European Barometer 93), July-August 2020, 45.

<sup>3</sup> *Ibid.* 109.

<sup>4</sup> OECD, *Lobbyists, Government and Public Trust, Volume 2: Promoting Integrity through Self-Regulation* (OECD 2012) 21.

<sup>5</sup> See the scandals reported in the various contributions published in A Bitonti and P Harris (eds), *Lobbying in Europe: Public Affairs and the Lobbying Industry in 28 EU Countries* (Palgrave Macmillan 2017).

<sup>6</sup> The Insight Team, 'Insight: Fourth MEP Taped in "Cash for Laws" Scandal' (27 March 2011) *Sunday Times* [www.thetimes.co.uk](http://www.thetimes.co.uk). Scandals pertaining to the EC include the so-called Dalligate, the Barrosogate, and the Oettigate.

While bribery cases remain the exception, lobbying efforts can be aggressive at EU level. The General Data Protection Regulation has been called “one of the most lobbied pieces of European legislation in European Union history”.<sup>7</sup> As regards the EU Copyright Directive, which was adopted in 2019 following intense deliberations, the EP has stated that “MEPs have rarely or never been subject to a similar degree of lobbying before”.<sup>8</sup> For some time, the Worst EU Lobbying Awards ceremony was even held in Brussels every year.<sup>9</sup>

In the public’s perception, corporations are often deemed the most successful and experienced lobbyists, including at the supranational level. This intuition matches Mancur Olson’s famous theory of collective action according to which “small interest groups with intensely held preferences” are more likely to effectively defend their interests.<sup>10</sup> Accordingly, many political scientists have mapped the power of business lobbyists in the EU.<sup>11</sup>

Yet grassroots lobbying has scored points in the EU as well, including with regard to issues of high political salience.<sup>12</sup> One example is the Anti-Counterfeiting Trade Agreement, which the EP refused to approve following vigorous citizen lobbying.<sup>13</sup> Dür, Bernhagen, and Marshall argue that contrary to prevalent views, corporate actors are often less successful than citizen groups when it comes to influencing the EU lawmaking process.<sup>14</sup> Mahoney shows that the scope, level of conflict, and salience of the policy issue at stake are more important determinants of lobbying success than the type of actor who

<sup>7</sup> W Long, ‘Significant Impact of New EU Data Protection Regulation on Financial Services’ (18 April 2014) Global Banking and Finance Review [www.globalbankingandfinance.com](http://www.globalbankingandfinance.com).

<sup>8</sup> European Parliament Press Release of 27 March 2019, Questions and Answers on Issues About the Digital Copyright Directive.

<sup>9</sup> K Lukas-Eder, ‘EU-Lobbying für Wissenschaft und Forschung: Die Bayerische Forschungsallianz GmbH’ in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* (Springer 2014) 295, 296.

<sup>10</sup> M Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press 1971).

<sup>11</sup> E.g. M Kluger Rasmussen, ‘The Battle for Influence: The Politics of Business Influence in the European Parliament’ (2015) *JComMarSt* 365 (finding that the influence of business lobbies depends on their degree of unity, the salience of the issue at stake, and institutional factors); P Bouwen, ‘Corporate Lobbying in the European Union: The Logic of Access’ (2002) *Journal of European Public Policy* 365 (examining the conditions under which corporate actors can get access to EU decision-makers); D Coen, ‘The Evolution of the Large Firm as a Political Actor in the European Union’ (1997) *Journal of European Public Policy* 91 (providing an overview of the role played by corporations in the EU lawmaking process across time).

<sup>12</sup> B Farrand, ‘Lobbying and Lawmaking in the European Union: The Development of Copyright Law and the Rejection of the Anti-Counterfeiting Trade Agreement’ (2015) *OJLS* 487.

<sup>13</sup> S Breiteneder, ‘Power to the Grassroots! Die Ablehnung des ACTA-Abkommens durch das Europäische Parlament’ in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 113; B Farrand, ‘Lobbying and Lawmaking in the European Union: The Development of Copyright Law and the Rejection of the Anti-Counterfeiting Trade Agreement’ cit.

<sup>14</sup> A Dür, P Bernhagen and D Marshall, ‘Interest Group Success in the European Union: When (and Why) Does Business Lose?’ (2015) *Comparative Political Studies* 951. By contrast, Mahoney claims that businesses and citizens have similar chances to be successful. See C Mahoney, ‘Lobbying Success in the United States and the European Union’ (2007) *Journal of Public Policy* 35, 51 ff.

is lobbying and the tactics he or she is using.<sup>15</sup> It is also worth noting that while grassroots lobbying is usually viewed positively because it involves “ordinary citizens”, it can also be manipulated by special interests (so-called “astroturfing”).<sup>16</sup>

The perception that EU lawmaking is substantially shaped by well-organised interest groups (IGs) undermines citizens’ trust in European democracy, also because the EU’s response to the aforementioned “cash for amendments” scandal has been timid. As of today, the EU has almost no binding legislation on lobbying. In 2011, the EC and the EP established their Joint Transparency Register (JTR), yet under this scheme, registration remains voluntary for lobbyists.<sup>17</sup> As of 31 March 2021, 12,457 entities had registered.<sup>18</sup> Only in 2019 did the EP make a further step towards transparency by encouraging or even requiring MEPs, rapporteurs, shadow rapporteurs, and committee chairs to disclose their meetings with interest representatives.<sup>19</sup> In December 2020, after negotiations that lasted roughly four years, the EP, the Council, and the EC reached an Agreement on a Mandatory Transparency Register (AMTR).<sup>20</sup> Provided that the AMTR is approved by the institutions, it will replace the JTR.<sup>21</sup> However, the AMTR has been criticised for failing to deliver on its promise. While the Agreement is “of a binding nature for the signatory institutions”,<sup>22</sup> it does not establish mandatory registration requirements for lobbyists. Due to these limitations, Emilia Korkea-aho goes so far as to state that the AMTR is “not a step forward”.<sup>23</sup>

<sup>15</sup> C Mahoney, ‘Lobbying Success in the United States and the European Union’ cit. 47 ff.

<sup>16</sup> ET Walker, ‘Astroturf Lobbying’ in P Harris, A Bitonti, CS Fleisher and A Skorkjær Binderkrantz (eds), *The Palgrave Encyclopedia of Interest Groups, Lobbying and Public Affairs* (Palgrave Macmillan 2020); see also (in relation to international lawmaking) M Durkee, ‘Astroturf Activism’ (2017) StanLRev 201.

<sup>17</sup> Registration is only necessary for IGs that want to access the EP. See art. 29 of the Interinstitutional Agreement of 19 April 2014 between the EP and the EC on the Transparency Register for Organisations and Self-Employed Engaged in EU Policy-Making and Policy Implementation, 11 ff. (hereinafter: IATR).

<sup>18</sup> Transparency Register 6,665 of them (53.5 per cent) were in-house lobbyists and trade, business, and professional associations, while 3,381 (27.1 per cent) were NGOs ec.europa.eu. According to Dinan, who looks at the former register of the EC, “many trade associations and business associations chose to categorise themselves as NGOs”. See W Dinan, ‘Lobbying Transparency: The Limits of EU Monitory Democracy’ (2021) *Politics and Governance* 237, 240.

<sup>19</sup> European Parliament 2019-2024, Rules of procedure, 9th parliamentary term, January 2021 (hereinafter: EPRoP), art. 11(3). The EPRoP use the word “should” for MEPs, and “shall” for rapporteurs, shadow rapporteurs, and committee chairs.

<sup>20</sup> Transparency Register Negotiations, Compromise Package at Technical Level for the Attention of the Political Negotiators, Agreement on a Mandatory Transparency Register, 11 December 2020 (hereinafter: AMTR).

<sup>21</sup> Art. 15(3) AMTR.

<sup>22</sup> Art. 15(1) AMTR.

<sup>23</sup> E Korkea-aho, ‘Op-Ed: New Year, New Transparency Register?’ (12 January 2021) EU Law Live eu-lawlive.com.

In recent years, domestic lobbies have been shifting their attention from State parliaments and governments to the European supranational realm.<sup>24</sup> Effective lobby regulation at EU level has thus become more essential than ever.<sup>25</sup> This especially applies to the EP, which has important decision-making powers in the context of the ordinary legislative procedure,<sup>26</sup> and which represents the citizens of the EU.<sup>27</sup> The EP's powers have gradually increased over the past decades, especially with the Lisbon Treaty.<sup>28</sup> As a consequence, the EP has turned into a key lobbying venue.<sup>29</sup>

In this *Article*, I show why and how lobbying should be further regulated in the EP. I first examine the specificities of lobbying in the EU and the EP (II) before looking at the EU's constitutional framework, EU parliamentary law, the JTR established in 2011 and revised in 2014, and the provisional AMTR of December 2020 (III). I then evaluate the EP's regulatory scheme from the perspective of EU primary law (IV). I argue that existing regulation narrowly focuses on transparency, while neglecting other crucial democratic values enshrined in the EU Treaties, as well considerations pertaining to integrity.

Throughout this *Article*, I refer to lobbying as the attempt by natural or legal persons lacking legal authority in a public decision-making process, except for citizens acting on their own behalf, to influence the decisions of those holding such legal authority.<sup>30</sup> For reasons of scope, I focus on inside lobbying, which targets public decision-makers directly, and not on outside lobbying, which relies on the media and public opinion to influence political decisions.<sup>31</sup>

<sup>24</sup> On this topic, see J Beyers and B Kerremans, 'Critical Resource Dependencies and the Europeanization of Domestic Interest Groups' (2007) *Journal of European Public Policy* 460.

<sup>25</sup> E.g. D Plehwe, 'Europäisierung von Interessenvertretung' in A Zimmer and R Speth (eds), *Lobby Work – Interessenvertretung als Politikgestaltung* (Springer 2015) 121.

<sup>26</sup> Art. 294 TFEU.

<sup>27</sup> Art. 10(2) TEU. See also 'Editorial: The 2019 Elections and the Future Role of the European Parliament: Upsetting the Institutional Balance?' (2019) *European Papers* www.europeanpapers.eu 3, 4. On the two levels of representation embodied by the EP (citizens) and the Council (Member States), see Information COM/2001/428 final from the Commission of 12 October 2001, *European Governance – A White Paper* 1, 7.

<sup>28</sup> See also S Hix and B Høyland, 'Empowerment of the European Parliament' (2013) *Annual Review of Political Science* 171. The authors find that the EP "now has a significant impact on policy outcomes in Brussels", *ibid.* 185.

<sup>29</sup> It goes without saying that a comprehensive study of EU lobbying should also focus on other institutions, including the Council, which serves the function of a second legislative chamber besides the EP. The EC, which has the right of initiative in the context of the EU lawmaking process, is the EU institution that figures most prominently in EU lobbying scholarship.

<sup>30</sup> This definition builds on L Milbrath, *The Washington Lobbyists* (Rand McNally 1963) 8.

<sup>31</sup> On this distinction, which is commonly drawn in political science, see e.g. F Weiler and M Brändli, 'Inside Versus Outside Lobbying: How the Institutional Framework Shapes the Lobbying Behaviour of Interest Groups' (2015) *EurJPolRes* 745.

This *Article* is exclusively devoted to legislative lobbying, and to EP lobbying in particular. It does not cover attempts to influence the EU institutions in the pre- or post-parliamentary phase, despite the great importance of lobbying at these two stages of the legislative process,<sup>32</sup> and even though these forms of (non-parliamentary) lobbying come with their own difficulties, including from the perspective of democratic legitimacy.<sup>33</sup> My narrow focus on the EP means that I do not look at the European Economic and Social Committee and the European Committee of the Regions, which both advise the EC, the EP, and the Council, and which must be consulted prior to the adoption of specific legal acts.<sup>34</sup> Finally, the *Article* does not deal with domestic regulatory contexts, although it is worth noting that lobbying law is still rudimentary in EU Member States too. While some of the issues highlighted in this *Article* are specific to the EU, many others can also be identified in domestic legal orders.<sup>35</sup>

## II. THE EUROPEAN PARLIAMENT: A LOBBYING TARGET *SUI GENERIS*?

In order to analyse the legal framework that applies to lobbying in the EP, it seems essential to understand the extent to which lobbying in the EP is a special case compared to other forms of lobbying at the domestic and EU level. Therefore, in this section, I highlight the specificities of lobbying in the EU (II.1) and in the EP (II.2).

### II.1. SPECIFICITIES OF LOBBYING IN THE EU

A substantial part of EU legal scholarship is built on the almost axiomatic – though not unchallenged<sup>36</sup> – idea that the EU is an entity *sui generis*; Jacques Delors famously called

<sup>32</sup> For instance, Harlow writes that consultations occurring at these pre- and post-legislative stages are “perhaps the most effective device for interest-representation and citizen participation in rulemaking”. See C Harlow, ‘The Limping Legitimacy of EU Lawmaking: A Barrier to Integration’ (2016) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 29, 38.

<sup>33</sup> Bartl, who focuses on European private law, emphasises that the EC “has framed the consultation procedures [in this area] in a way that prevents a democratically relevant discussion about goals from taking place”. See M Bartl, ‘Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political’ (2015) ELJ 572, 592.

<sup>34</sup> See art. 13(4) TEU.

<sup>35</sup> See S Mulcahy, ‘Lobbying in Europe: Hidden Influence, Privileged Access’ (Transparency International Report 2015) [images.transparencycdn.org](http://images.transparencycdn.org).

<sup>36</sup> For a seminal critique of the *sui generis* attribute as tautological, negative, and unhistorical, see R Schütze, ‘Two-and-a-half Ways of Thinking About the European Union’ (2016) *Politique européenne* 28. Schütze proposes to apply federalist concepts to the EU. See also JE Fossum, ‘Reflections on EU Legitimacy and Governing’ (2016) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 1033, 1034. See further (although the author acknowledges several “deviations from the model of the federal state”) J Habermas, ‘Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible’ (2015) ELJ 546.

the EU an *objet politique non identifié*.<sup>37</sup> This deep-seated belief that the EU differs from international organisations,<sup>38</sup> on the one hand, and domestic legal orders, on the other hand, has led to an isolation of EU legal scholarship from other fields of public law, especially public international law and domestic constitutional law. This also applies to political science studies pertaining to EU lobbying, which often focus on the idiosyncrasies of the EU instead of comparing it to domestic or international lobbying regimes.<sup>39</sup> More generally, EU lobbying is often presented as an activity *sui generis*.<sup>40</sup> But what exactly is special about it, if at all? As a matter of fact, at least six peculiarities can be identified.

To begin with, EU lobbying operates in the context of what is usually referred to as a *multi-level system of governance*.<sup>41</sup> As Hooghe and Marks highlight, this means that “authority and policy-making influence are shared across multiple levels of government – subnational, national, and supranational”.<sup>42</sup> This structure has several implications for lobbyists: first, EU lobbying is a multi-level activity,<sup>43</sup> as it contains numerous points of entry for lobbyists;<sup>44</sup> Woll talks about a “complex web of representation”.<sup>45</sup> Scholars stress that lobbying is even more pervasive in the EU than at the national level.<sup>46</sup> This is partly due to the gradual increase in EU competences, and to institutional reforms that made some types of lobbying more likely to succeed. For instance, pushing for specific

<sup>37</sup> W Phelan, ‘What Is *Sui Generis* About the European Union? Costly International Cooperation in a Self-Contained Regime’ (2012) *International Studies Review* 367.

<sup>38</sup> The EU displays “both supranational and intergovernmental characteristics”, see P Bouwen, ‘A Theoretical and Empirical Study of Corporate Lobbying in the European Parliament’ (2 December 2003) *European Integration Online Papers* 1, 4.

<sup>39</sup> On this topic, see C Woll, ‘Lobbying in the European Union: From *Sui Generis* to a Comparative Perspective’ (2006) *Journal of European Public Policy* 456. Woll highlights the functional similarities between the EU and domestic legal orders.

<sup>40</sup> See e.g. G Stahl, ‘Der Ausschuss der Regionen: Politische Vertretung und Lobbyist für Städte und Regionen’ in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 127.

<sup>41</sup> See e.g. P Bouwen, ‘Corporate Lobbying in the European Union: The Logic of Access’ cit. 365. Some authors highlight similarities between the EU and domestic systems with multiple levels of governance, such as the United States: see e.g., FR Baumgartner, ‘EU Lobbying: A View From the US’ (2007) *Journal of European Public Policy* 482.

<sup>42</sup> L Hooghe and G Marks, *Multi-Level Governance and European Integration* (Rowman & Littlefield 2001) 2.

<sup>43</sup> SS Andersen and KA Eliassen, ‘European Community Lobbying’ (1991) *EurJPolRes* 173, 178.

<sup>44</sup> W Lehmann, ‘Lobbying in the European Union: Current Rules and Practices’ (European Parliament Directorate-General for Research Working Paper 4-2003) 1, 16.

<sup>45</sup> C Woll, ‘The Brash and the Soft-Spoken: Lobbying Styles in a Transatlantic Comparison’ (2012) *Interest Groups and Advocacy* 193, 201.

<sup>46</sup> P Griesser, ‘Lobbying im Mehrebenensystem der EU: Licht und Schatten’ in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 61. For instance, Eising reports that EC officials “maintain almost as many contacts with interest organizations as with Members of the European Parliament (MEPs) or with officials in the Council of the EU”. See R Eising, ‘The Access of Business Interests to EU Institutions: Towards *Élite* Pluralism?’ (2007) *Journal of European Public Policy* 384, 384.

changes has arguably become easier since the extension, in the Council, of qualified majority voting to issues that previously required unanimity.<sup>47</sup> Another consequence of the EU's multi-level architecture is that lobbying can be particularly challenging for groups with modest resources, which are likely to struggle even in relatively simple governance structures.<sup>48</sup> The complexity of EU lawmaking means that lobbyists must be highly process-oriented in order to succeed; because personal connections matter in this context, some IGs are *de facto* excluded.<sup>49</sup> Yet another implication of the multi-level system is that EU lobbying techniques are multi-faceted, as IGs need to tailor their strategy to various lobbying targets and lobbying channels; this makes it hard to generate findings about EU lobbying that apply across the board.<sup>50</sup>

A second characteristic of EU lobbying is that unlike most of its member States, the EU has a pluralist system of governance.<sup>51</sup> While neo-corporatist models structure the relationship between the State and IGs by giving specific groups a privileged position to articulate their interests,<sup>52</sup> pluralist systems let IGs compete freely with each other.<sup>53</sup> This likely explains why in the EU, many actors choose to lobby the institutions directly, instead

<sup>47</sup> Art. 16(3) TEU. According to some scholars, qualified majority voting led to an "explosion of EU lobbying in the final decade of the 20<sup>th</sup> century", see H Hauser, 'European Union Lobbying Post-Lisbon: An Economic Analysis' (2011) *BerkeleyJIntL* 680, 687. However, unanimity makes it easier for lobbyists to block proposals. On the EU's many veto actors, see M Dawson, 'How Can EU Law Respond to Populism?' (2020) *OJLS* 183, 205.

<sup>48</sup> P Bouwen, 'Corporate Lobbying in the European Union: The Logic of Access' cit. 374.

<sup>49</sup> K Joos, 'Erfolg durch Prozesskompetenz. Paradigmenwechsel in der Interessensvertretung nach dem Vertrag von Lissabon' in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 29, 40 ff. According to Hauser, "concerns of unequal access to political institutions and asymmetrical provision of information are magnified when applying general theories of lobbying of [sic] the EU". See H Hauser, 'European Union Lobbying Post-Lisbon: An Economic Analysis' cit. 708.

<sup>50</sup> P Bouwen, 'Corporate Lobbying in the European Union: The Logic of Access' cit. 365. As Bouwen shows, "the demand for access goods is derived from the specific role of each EU institution in the legislative process", *ibid.* 378.

<sup>51</sup> D Lowery, C Poppelaars and J Berkhout, 'The European Union System in Comparative Perspective: A Bridge Too Far' (2008) *West European Politics* 1231, 1239. Some authors argue that the EU fits neither of these categories, see e.g. TR Burns and M Carson, 'European Union, Neo-Corporatist, and Pluralist Governance Arrangements: Lobbying and Policy-Making Patterns in a Comparative Perspective' (2002) *International Journal of Regulation and Governance* 129. According to other scholars, the EU's way of structuring the interaction with IGs is pluralist but includes some neo-corporatist traits. See N Pérez-Solórzano Borragán and S Smismans, 'Representativeness: A Tool to Structure Intermediation in the European Union?' (2012) *JComMarSt* 403.

<sup>52</sup> PC Schmitter, 'Neo-Corporatism' in B Badie, D Berg-Schlosser and L Morlino (eds), *International Encyclopedia of Political Science* (SAGE 2011) 1669. Scholars disagree as regards the meaning of the concept of neo-corporatism. See PM Christiansen, 'Corporatism (and Neo-Corporatism)' in P Harris, A Bitonti, CS Fleisher and A Skorkjær Binderkrantz (eds), *The Palgrave Encyclopedia of Interest Groups, Lobbying and Public Affairs* cit.

<sup>53</sup> U von Alemann, 'Pluralist Interest Intermediation' in B Badie, D Berg-Schlosser and L Morlino (eds), *International Encyclopedia of Political Science* cit. 1873.



of relying on collective action (e.g. via federations).<sup>54</sup> Some political scientists argue that the EU system is characterised by elite pluralism, as “businesses are systematically advantaged over citizen groups and non-governmental organizations”.<sup>55</sup> One plausible reason for this state of affairs pertains to the unequal distribution of resources among IGs.

Third, EU lobbying operates against the backdrop of *numerous and heterogeneous domestic constituencies*, which can make it hard for lobbyists to convince a substantial number of decision-makers of the soundness of their proposals. This diversity is also seen as an obstacle to the adoption of lobby regulation in the EU, where many different domestic political cultures and, therefore, different perceptions of lobbying practices coexist.<sup>56</sup> Another consequence of this heterogeneity is that domestic actors are more likely to lobby the EU institutions if lobbying is a well-accepted practice in their own State.<sup>57</sup>

Fourth, technocratic considerations – *i.e.*, “functional legitimacy, linked to expertise”<sup>58</sup> – are often relied on in EU lawmaking, especially in the pre-parliamentary phase.<sup>59</sup> The EC in particular heavily uses expert knowledge to legitimise its proposals and actions.<sup>60</sup> Indeed, the EC has a “relatively fragile basis of legitimation”,<sup>61</sup> even if its President<sup>62</sup> is elected by the EP on the proposal of the European Council.<sup>63</sup> More generally, the EU’s democratic credentials are often deemed weak compared to most domestic settings.<sup>64</sup>

<sup>54</sup> D Coen, ‘The Evolution of the Large Firm as a Political Actor in the European Union’ cit. On this topic, see also RJ Bennett, ‘Business Routes of Influence in Brussels: Exploring the Choice of Direct Representation’ (1999) *Political Studies* 240.

<sup>55</sup> EÖ Atıkan and AW Chalmers, ‘Choosing Lobbying Sides: The General Data Protection Regulation of the European Union’ (2019) *Journal of Public Policy* 543, 543. For more nuanced views, see R Eising, ‘The Access of Business Interests to EU Institutions: Towards Élite Pluralism?’ cit. 399; D Coen and A Katsaitis, ‘Chameleon Pluralism in the EU: An Empirical Study of the European Commission Interest Group Density and Diversity Across Policy Domains’ (2013) *Journal of European Public Policy* 1104.

<sup>56</sup> W Lehmann, ‘Lobbying in the European Union: Current Rules and Practices’ cit. 38. Huber also highlights the various conceptions of democracy that exist in the EU Member States: P Huber, ‘Art. 10 EUV’ in R Streinz (ed.), *EUV/AEUV* (3rd edn, CH Beck 2018) para. 3 ff.

<sup>57</sup> P Bouwen, ‘Corporate Lobbying in the European Union: The Logic of Access’ cit. 375.

<sup>58</sup> SS Andersen and KA Eliassen, ‘European Community Lobbying’ cit. 178.

<sup>59</sup> A Føllesdal and S Hix, ‘Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ (2006) *JComMarSt* 533. See also M Bartl, ‘Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political’ cit.; C Harlow, ‘The Limping Legitimacy of EU Lawmaking: A Barrier to Integration’ cit. 35; A Jakab, ‘Full Parliamentarisation of the EU Without Changing the Treaties: Why We Should Aim for It and How Easily It Can Be Achieved’ (Jean Monnet Working Papers 03-2012) 14.

<sup>60</sup> C Boswell, ‘The Political Functions of Expert Knowledge: Knowledge and Legitimation in European Union Immigration Policy’ (2008) *Journal of European Public Policy* 471, 477 ff.

<sup>61</sup> *Ibid.* 477.

<sup>62</sup> The members of the EC are appointed by the European Council, subject to the consent of the EP: art. 17(7) subpara. 3 TEU.

<sup>63</sup> Art. 17(7)(1) TEU.

<sup>64</sup> See e.g. A Føllesdal and S Hix, ‘Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ cit. 534 ff. The authors mention the prevalence of executive authorities, the limited powers of the EP, the absence of truly European elections, the EU’s remoteness from domestic contexts, and the ideological

For instance, the EU is perceived as distant from domestic contexts and civil society.<sup>65</sup> Scholars also highlight the modest participation of EU citizens in EU elections,<sup>66</sup> and the fact that citizen engagement is predominantly driven by domestic policy issues.<sup>67</sup> Some argue that one consequence of this democratic deficit is that “private interest groups do not have to compete with democratic party politics in the EU policy-making process”.<sup>68</sup>

Fifth, the EU exercises a tremendous *normative power*, one reason being the sheer economic weight of its internal market. Besides affecting the legal orders of the EU Member States, EU law also influences third countries and global standards.<sup>69</sup> This “Brussels effect”,<sup>70</sup> as Anu Bradford calls it, explains why EU lobbying has become a priority for many domestic, transnational, and international actors, including non-EU Member States facing significant “adaptational pressures” and “adjustment costs”.<sup>71</sup> As of 31 March 2021, the United Kingdom, the United States, and Switzerland were the most well-represented third countries in the JTR.<sup>72</sup>

One last point pertains to the relatively *scarce resources* that are at the disposal of the EU institutions. For instance, the EC employs 32,000 persons,<sup>73</sup> while the Swiss federal administration counts more than 35,000 full-time staff members.<sup>74</sup> The lack of resources

discrepancy between EU and domestic policies. Some of these concerns are also expressed in the EC’s White Paper on European Governance. See Information COM/2001/428 final cit. See also A Alemanno, ‘Europe’s Democracy Challenge: Citizen Participation in and Beyond Elections’ (2020) *German Law Journal* 35.

<sup>65</sup> H Hauser, ‘European Union Lobbying Post-Lisbon: An Economic Analysis’ cit. 680. This criticism also applies to the EP.

<sup>66</sup> D Curtin and AJ Meijer, ‘Does Transparency Strengthen Legitimacy?’ (2006) *Information Polity* 109, 110.

<sup>67</sup> *Ibid.* 115. Hix and Høyland argue that “the electoral connection in the European Parliament is almost nonexistent”, as MEPs’ re-election depends on how well their domestic party is doing. See S Hix and B Høyland, ‘Empowerment of the European Parliament’ cit. 184.

<sup>68</sup> A Føllesdal and S Hix, ‘Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ cit. 537.

<sup>69</sup> H Hauser, ‘European Union Lobbying Post-Lisbon: An Economic Analysis’ cit.

<sup>70</sup> A Bradford, ‘The Brussels Effect’ (2012) *Northwestern University Law Review* 1.

<sup>71</sup> EÖ Atıkan and AW Chalmers, ‘Choosing Lobbying Sides: The General Data Protection Regulation of the European Union’ cit. 547. On this topic, see also E Korkea-aho, “Mr Smith Goes to Brussels”: Third Country Lobbying and the Making of EU Law and Policy’ (2016) *CYELS* 45.

<sup>72</sup> See ec.europa.eu. 983 registered entities had their office in the United Kingdom, while 452 were based in the United States, and 281 in Switzerland. See also Joint Transparency Register Secretariat, Annual Report on the Operations of the Transparency Register 2017, presented by the Secretaries-General of the European Parliament and the European Commission to Ms Sylvie Guillaume, Vice-President of the European Parliament and Mr Frans Timmermans, First Vice-President of the European Commission (hereinafter: JTRS Annual Report 2017), 9; Joint Transparency Register Secretariat, Annual Report on the Operations of the Transparency Register 2018, presented by the Secretaries-General of the European Parliament and the European Commission to Ms Sylvie Guillaume, Vice-President of the European Parliament and Mr Frans Timmermans, First Vice-President of the European Commission (hereinafter: JTRS Annual Report 2018), 7.

<sup>73</sup> EC, *Commission Staff*, ec.europa.eu.

<sup>74</sup> Figures retrieved from the publication *The Swiss Confederation – A Brief Guide 2021* (Federal Chancellery 2021) www.bk.admin.ch.

increases the need for EU officials to rely on lobbyists in order to carry out their work.<sup>75</sup> Pursuant to the exchange theory of lobbying, both officials and IGs benefit from – and even depend on<sup>76</sup> – lobbying interactions.<sup>77</sup>

## II.2. SPECIFICITIES OF LOBBYING IN THE EUROPEAN PARLIAMENT

Zooming in on the EP, what makes this institution special compared to other lobbying venues in the EU, on the one hand, and domestic parliaments, on the other hand? Again, several characteristics can be underlined. These distinctive features show the importance of studying EP lobbying, and of acknowledging that this type of lobbying activity operates within specific constraints.

The EP was long deemed “an institution of secondary importance” from the perspective of EU lobbying, especially before the adoption of the Single European Act (SEA) in 1987.<sup>78</sup> Thus, unlike domestic parliaments, *the EP has been a neglected lobbying venue*, both in practice and in lobbying scholarship. For many years, the EP “was hardly in the media focus, the Members of the European Parliament (MEPs) too unimportant, even uninteresting to be associated with lobbying or corruption”.<sup>79</sup> Before the late 1980s, lobbyists mainly targeted the EC and the Council.<sup>80</sup>

The SEA was a turning point for EU lobbying:<sup>81</sup> it led to an increase in lobbying in general, notably due to its aim to establish an internal market by 1992,<sup>82</sup> and gave more power to the EP through the cooperation procedure.<sup>83</sup> A few years later, the Maastricht Treaty

<sup>75</sup> D Coen, ‘Empirical and Theoretical Studies in EU Lobbying’ (2007) *Journal of European Public Policy* 333, 334.

<sup>76</sup> A Bunea, ‘Regulating European Union Lobbying: In Whose Interest?’ (2019) *Journal of European Public Policy* 1579, 1582.

<sup>77</sup> I Michalowitz, ‘Warum die EU-Politik Lobbying braucht? Der Tauschansatz als implizites Forschungsparadigma’ in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 17.

<sup>78</sup> R Eising, ‘The Access of Business Interests to EU Institutions: Towards Élite Pluralism?’ cit. 385. Eising refers to a study by Jean Meynaud and Dusan Sidjanski.

<sup>79</sup> D Dialer and M Richter, ‘“Cash-for-Amendments“-Skandal: Europaabgeordnete unter Generalverdacht’ in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 235, 236.

<sup>80</sup> W Lehmann, ‘Lobbying in the European Union: Current Rules and Practices’ cit. 33.

<sup>81</sup> Interestingly, the Act was itself substantially shaped by IGs, most prominently by the European Round Table of Industrialists. On this topic, see M Green Cowles, ‘Setting the Agenda for a New Europe: The ERT and EC 1992’ (1995) *JComMarSt* 501.

<sup>82</sup> H Hauser, ‘European Union Lobbying Post-Lisbon: An Economic Analysis’ cit. 690. See also (talking about a “well-documented boom in EU business lobbying” after the SEA) D Coen, ‘The Evolution of the Large Firm as a Political Actor in the European Union’ cit. 92.

<sup>83</sup> The Lisbon Treaty abolished the cooperation procedure. The SEA also introduced the direct election of MEPs (which, previously, had been delegates of domestic parliaments).

introduced the co-decision procedure,<sup>84</sup> which further established the EP as a site of power with veto rights.<sup>85</sup> Today, due to the expansion of the EP's competences, especially after Lisbon, the EP is no longer a "phantom parliament": it has become a crucial lobbying target, just like the EC and the Council.<sup>86</sup> Still, lobby regulation is, overall, less strict in the EP than in the EC, at least regarding specific aspects such as conflicts of interest and revolving doors<sup>87</sup> (see *infra*, IV.3), although the Council clearly remains the black sheep as far as lobby regulation is concerned.<sup>88</sup> Moreover, scholarly literature on EP lobbying remains scant in comparison to analyses of EC lobbying. This is true even if the EP has generally been more open to lobby regulation than the EC in the past, and even if it has been pushing for reforms and for a mandatory transparency register in recent years.<sup>89</sup>

Another feature that distinguishes the EP from other EU institutions is that it is composed of *directly elected representatives*.<sup>90</sup> As Beate Kohler-Koch highlights, "[t]he EP embodies the principle of democratic representation which is based on the fundamental right of European citizens to partake equally in political rule".<sup>91</sup> While the EC must serve

<sup>84</sup> Today, the co-decision procedure corresponds to the ordinary legislative procedure (art. 289(1) and art. 294 TFEU). According to Fabbrini, the fact that this procedure now applies to all issues connected to the single market "constitutes a striking success for the EP"; see S Fabbrini, 'The European Union and the Puzzle of Parliamentary Government' (2015) *Journal of European Integration* 571, 576.

<sup>85</sup> W Lehmann, 'Lobbying in the European Union: Current Rules and Practices' cit. 33; P Bouwen, 'Corporate Lobbying in the European Union: The Logic of Access' cit. 380; S White, 'Footprints in the Sand: Regulating Conflict of Interest at EU Level' in J-B Auby, E Breen and T Perroud (eds), *Corruption and Conflicts of Interest: A Comparative Law Approach* (Edward Elgar 2014) 272, 274.

<sup>86</sup> H Hauser, 'European Union Lobbying Post-Lisbon: An Economic Analysis' cit. 696. See also D Dialer and M Richter, 'Einleitung: Entmystifizierung von EU-Lobbying' in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 1, 5.

<sup>87</sup> The expression is commonly used to refer to the seamless transition between the public and the private sector. See e.g. D Freund, 'Access All Areas: When EU Politicians Become Lobbyists' (Transparency International Report 2017).

<sup>88</sup> This remains true even though the Council joined the AMTR in 2020, as "the most obvious lobbying targets" within the Council, namely the Member States' permanent representations, are likely to remain outside the scope of EU Lobby Regulation: E Korkea-aho, 'Op-Ed: New Year, New Transparency Register?' cit. Indeed, art. 12 AMTR provides that Member States may adopt voluntary measures that "make certain activities targeting their permanent representations conditional upon registration in the register".

<sup>89</sup> R de Caria, 'The Constitutional Right to Lobby on the Two Sides of the Atlantic: Between Freedom and Democracy' (2013) *Cambridge Journal of International and Comparative Law* 452, 466; D Chabanet, 'Les enjeux de la codification des groupes d'intérêt au sein de l'UE' (2009) *Revue française de science politique* 997, 997 ff.

<sup>90</sup> Art. 14(3) TEU.

<sup>91</sup> B Kohler-Koch, 'Civil Society and EU Democracy: "Astroturf" Representation?' (2010) *Journal of European Public Policy* 100, 108.

the supranational interest,<sup>92</sup> and while the Council defends domestic interests, the principle of the independent mandate<sup>93</sup> requires MEPs to be guided by the interests of their constituents.<sup>94</sup> Of course, whom and what this constituency encompasses is open to debate.<sup>95</sup> Answering this question requires developing a normative theory of representation in the EP, and MEPs can be expected to hold different views on the matter.

Third, the EP has *limited resources*, including compared to other EU institutions. In 2016, approximately 32,000 persons were employed by the EC, while approximately 7,500 individuals worked for the EP.<sup>96</sup> Another constraint is time: for instance, rapporteurs tasked with writing a report on behalf of an EP committee often work under short deadlines, contrary to the EC, which usually has more time to prepare its proposals in the context of the pre-parliamentary phase.<sup>97</sup> While the plenary has the last word, the EP's committees accomplish the great bulk of the parliamentary work, and are therefore crucial interlocutors for lobbyists.<sup>98</sup> Due to their dependency on external resources, committees can be expected to be receptive to the inputs of IGs.

Finally, EU democracy is constrained by the fact that the EU is a *purposive project*, and that fundamental goals such as safeguarding the internal market are deemed non-negotiable.<sup>99</sup> Thus, the legislature tends to consider that its task is to give effect to pre-defined

<sup>92</sup> Art. 17(3)(3) TEU and art. 245 TFEU. See also Decision 700/20187c of the Commission of 31 January 2018 on a Code of Conduct for the Members of the European Commission, 7 ff. (hereinafter: CoC-EC), art. 2(1).

<sup>93</sup> Art. 2 EPoP.

<sup>94</sup> According to Bouwen, "MEPs remain firmly rooted in their national political systems" and responsive to domestic constituencies. P Bouwen, 'A Theoretical and Empirical Study of Corporate Lobbying in the European Parliament' cit. 11. However, public scrutiny is usually less stringent as regards MEPs than for domestic representatives. See M Kluger Rasmussen, 'Lobbying the European Parliament: A Necessary Evil' (CEPS Policy Brief 242-2011) 2.

<sup>95</sup> On this topic, see e.g. A Rehfeld, *The Concept of Constituency: Political Representation, Democratic Legitimacy, and Institutional Design* (Cambridge University Press 2005).

<sup>96</sup> BBC, 'Reality Check: Who Works for the EU and What Do They Get Paid?' (24 May 2016) [www.bbc.com](http://www.bbc.com).

<sup>97</sup> M Kluger Rasmussen, 'Lobbying the European Parliament: A Necessary Evil' cit. 2.

<sup>98</sup> P Bouwen, 'A Theoretical and Empirical Study of Corporate Lobbying in the European Parliament' cit. 5. As highlighted by Bouwen, it is easier to table amendments in committees than in the plenary. See *ibid.* 6.

<sup>99</sup> G Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) ELJ 2. See also M Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' cit.; D Kochenov, 'EU Citizenship: Some Systemic Constitutional Implications' (2018) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 1061, 1071.

objectives and assumptions which it does not fundamentally challenge,<sup>100</sup> while “Europeans are denied a meaningful democratic forum for the debating and adoption of laws”.<sup>101</sup> This also means that some forms of lobbying – especially those that oppose the rationality of the internal market – are bound to fail. Lobbying deploys itself within a narrow range of options, as the EP does not question the broader underlying purposes of EU law.<sup>102</sup> On the other hand, as Mark Dawson notes, the EU has also begun to intervene in sensitive policy areas, which may give lobbyists a new boost, including in the EP.<sup>103</sup>

### III. THE PLACE OF EU LOBBYING IN EU PRIMARY LAW AND EU PARLIAMENTARY LAW

Scholars converge in saying that despite the practical importance of lobbying at EU level, the Union displays a hands-off approach when it comes to regulating this practice.<sup>104</sup> To understand whether this statement is correct as regards EP lobbying, and if so, whether this attitude is justified, it seems important to first recall the place of EP lobbying in EU primary law. Besides examining how the TEU and TFEU deal with lobbies (III.1), I highlight relevant provisions of the Charter of Fundamental Rights of the European Union [2012] (Charter) (III.2).<sup>105</sup> In a second step, in order to understand how the EP implements these provisions, I examine the EP’s Rules of procedure (EPRoP) (III.3), and I briefly discuss the JTR currently in force (III.4), as well as the provisional AMTR (III.5).

#### III.1. THE TEU AND THE TFEU

The EU Treaties contain several provisions that are relevant from the perspective of lobbying. These provisions highlight the importance of citizen involvement, on the one hand, and of open and transparent lawmaking, on the other hand. These two aspects illustrate the democratic value of lobbying, but also the threats that such practices can create for democratic lawmaking processes, including at the supranational level.

<sup>100</sup> G Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ cit. 3; M Bartl, ‘Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political’ cit. 592 ff. The EP is even described as “a champion of the integration project”. See ‘Editorial: The 2019 Elections and the Future Role of the European Parliament: Upsetting the Institutional Balance?’ cit. 4.

<sup>101</sup> G Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ cit. 14. See, in the same vein, J Habermas, ‘Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible’ cit. 551. Another criticism pertains to “the absence of a clear mandate entrusted by the European constituency as to a political line giving guidance to the Parliament”. See ‘Editorial: The 2019 Elections and the Future Role of the European Parliament: Upsetting the Institutional Balance?’ cit. 3 ff.

<sup>102</sup> G Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ cit. 16.

<sup>103</sup> M Dawson, ‘Juncker’s Political Commission: Did It Work?’ (Swedish Institute for European Policy Studies 2019) 4.

<sup>104</sup> M Kluger Rasmussen, ‘Lobbying the European Parliament: A Necessary Evil’ cit. 1.

<sup>105</sup> The Charter has the same legal status as the EU Treaties, see art. 6(1) TEU.

As regards *the importance of citizen involvement*, four main categories of norms can be identified, namely norms pertaining to equality, closeness to citizens, representation, and participation.<sup>106</sup> The first aspect, *equality*, is mentioned several times in the Treaties. Together with democracy,<sup>107</sup> equality is one of the values on which the EU is founded.<sup>108</sup> It must also be promoted by the Union's institutional framework.<sup>109</sup> Art. 9 TEU belongs to the title "Provisions on Democratic Principles" and states that "the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies".<sup>110</sup> A second requirement is *closeness to the citizen* ("Bürgernähe") in the context of decision-making.<sup>111</sup> Scholars have linked this concept to the principle of subsidiarity, but also to participatory democracy.<sup>112</sup> Third, several provisions refer to *representation*: art. 10 TEU provides that "[t]he functioning of the Union shall be founded on representative democracy" and that "[c]itizens are directly represented at Union level in the European Parliament". Fourth, the Treaties emphasise *participation*. Art. 10(3) TEU gives citizens "the right to participate in the democratic life of the Union". Importantly, art. 11(1) TEU states that "[t]he 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".<sup>113</sup> Art. 11(2) TEU also underlines the necessity for the institutions to interact "with representative associations and civil society"; it thereby grants EU lobbying constitutional protection.<sup>114</sup> Art. 15(1) TFEU mentions the goal of "ensur[ing] the participation of civil society", and art. 227 TFEU pertains to the right of petition.

<sup>106</sup> Alemanno describes representation and participation as two "complementary sources of democratic legitimacy in the Union". A Alemanno, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy' (2014) ELR 72, 81.

<sup>107</sup> Pechstein highlights the importance of representative democracy via periodic elections, and argues that the democratic principle is only moderately developed. See M Pechstein, 'Art. 2 EUV' in R Streinz (ed), *EUV/AEUV* (3rd edn, CH Beck 2018) para. 4.

<sup>108</sup> Art. 2 TEU.

<sup>109</sup> Art. 13(1) TEU.

<sup>110</sup> The provision (drafted in the context of the Treaty on a Constitution for Europe) was originally entitled "principle of democratic equality", see S Magiera, 'Art. 9 EUV' in R Streinz (ed), *EUV/AEUV* cit. paras 1 and 7. The article protects the equal participation and representation of citizens in the democratic process, see *ibid.* para. 4. Magiera adds that a finding of infringement seems only likely in the case of arbitrary, i.e. manifest and substantial, disregard of this principle. See *ibid.* para. 11.

<sup>111</sup> Art. 1 TEU.

<sup>112</sup> See M Pechstein, 'Art. 1 EUV' in R Streinz (ed), *EUV/AEUV* cit. para. 23. Pechstein argues that this closeness to the citizen has not been achieved in practice, see *ibid.* para. 24.

<sup>113</sup> According to Huber, the criterion of representativeness should be given a broad interpretation. See P Huber, 'Art. 11 EUV' in R Streinz (ed), *EUV/AEUV* cit. para. 12.

<sup>114</sup> *Ibid.* para. 18 ff.

Besides highlighting the value of citizen involvement, the Treaties also stress the importance of *openness and transparency* in EU lawmaking. While both openness and transparency serve democratic ideals because they enable meaningful citizen participation and public accountability, their implications for lobby regulation require discussing them separately from the other democratic principles highlighted above.

Looking at the Treaties, art. 1 TEU states the goal of establishing a union “in which decisions are taken as openly as possible”.<sup>115</sup> This aim is reiterated in art. 10(3) TEU.<sup>116</sup> Moreover, the work of the institutions must be performed “as openly as possible” to ensure “good governance and [...] the participation of civil society” (art. 15(1) TFEU). As regards transparency, art. 15(2) TFEU pertains to the publicity of the meetings of the EP, and art. 15(3) TFEU establishes “a right of access to documents of the Union’s institutions, bodies, offices and agencies, whatever their medium”.<sup>117</sup> Finally, the dialogue between the institutions and civil society must be open and transparent (art. 11(2) TEU), a provision that shows that the two terms are often mentioned jointly.

Noting that openness and transparency are frequently conflated in practice, Alemanno argues that openness requires active efforts on the part of the EU institutions to engage with the broader public, and that openness ultimately aims to strengthen democratic participation. By contrast, transparency is a component of openness that is more passive in character, and that mainly translates into publicity requirements and the right of access to documents.<sup>118</sup> As I will argue, the fact that the EP primarily focuses on the passive component (i.e., transparency) in the context of lobby regulation triggers several difficulties (*infra*, IV). One such issue is that the EP does not sufficiently account for the fact that openness and transparency are prerequisites to enabling citizen involvement and, importantly, a type of citizen involvement that is in line with democratic principles like political equality (art. 9 TEU). To achieve this, however, openness and transparency must themselves be interpreted in the light of democratic (and, therefore, egalitarian) considerations.

### III.2. THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The Charter of Fundamental Rights of the European Union (Charter) also contains provisions pertaining to citizen involvement, on the one hand, and transparency and openness, on the other hand.

For one thing, the Charter shows that various democratic considerations – including participation and representation – justify protecting lobbying activities. Lobbying falls under

<sup>115</sup> This requirement was introduced by the Treaty of Amsterdam in 1997. See M Pechstein, ‘Art. 1 EUV’ cit. paras 1 and 21.

<sup>116</sup> As Huber notes, openness guarantees effective participation. See P Huber, ‘Art. 10 EUV’ cit. para. 51.

<sup>117</sup> See also Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding Public Access to European Parliament, Council and Commission Documents.

<sup>118</sup> A Alemanno, ‘Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy’ cit. 73 ff.



the scope<sup>119</sup> of freedom of expression and information, which is deemed a prerequisite of democracy.<sup>120</sup> Moreover, the Charter guarantees “freedom of association at all levels, in particular in political, trade union and civic matters”;<sup>121</sup> in other words, forming IGs is a fundamental right.<sup>122</sup> Finally, the Charter also protects the right of individuals and groups to petition the EP.<sup>123</sup> Thus, in several respects, lobbying practices serve democratic goals.

Still, lobbying must be compatible with the Charter’s commitment to openness, and with transparency in particular. This commitment is expressed in the right to good administration, which requires the institutions to act impartially, fairly, and in a timely manner,<sup>124</sup> and which includes a duty to give reasons, as well as a duty of equal treatment.<sup>125</sup> It is also reflected in the right of access to documents,<sup>126</sup> and in the right to refer cases of maladministration to the European Ombudsperson.<sup>127</sup>

This confirms the ambivalent character of lobbying: on the one hand, it is a democratic practice which the Charter protects; on the other hand, lobbying must conform with the Charter’s requirement of open and transparent lawmaking.

### III.3. THE EP’S RULES OF PROCEDURE

To understand how the abstract provisions of EU primary law take shape in practice, we must examine how the EP addresses lobbying in its Rules of procedure (EPRoP).<sup>128</sup> Complementing the provisions on openness and transparency enshrined in the Treaties and in the Charter (*supra*, III.1-2), the EPRoP address several normative concerns in relation to lobbying activities. These concerns pertain to the independence of MEPs, to the transparency of Members’ activities, and to lobbyists’ access to the EP building.

First, art. 2 EPRoP protects the *independence* of MEPs, stating that “Members shall exercise their mandate freely and independently, shall not be bound by any instructions

<sup>119</sup> Krajewski also mentions arts 15 and 16 of the Charter, which guarantee the freedom to choose an occupation and the right to work, as well as the freedom to conduct a business. According to him, these rights are not violated by EU Lobby Regulation. See M Krajewski, ‘Rechtsfragen der Regulierung von Lobbying gegenüber EU-Institutionen’ in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 269, 280.

<sup>120</sup> Art. 10 of the Charter. See R Streinz, ‘Art. 10 EU-Grundrechte-Charta’ in R Streinz (ed), *EUV/AEUV* cit. para. 2.

<sup>121</sup> Art. 12(1) of the Charter.

<sup>122</sup> R Streinz, ‘Art. 12 EU-Grundrechte-Charta’ in R Streinz (ed), *EUV/AEUV* cit. para. 8.

<sup>123</sup> Art. 44 of the Charter; see also art. 227 TFEU.

<sup>124</sup> Art. 41 of the Charter.

<sup>125</sup> R Streinz, ‘Art. 41 EU-Grundrechte-Charta’ in R Streinz (ed), *EUV/AEUV* cit. paras 5 and 11.

<sup>126</sup> Art. 42 of the Charter.

<sup>127</sup> Art. 43 of the Charter.

<sup>128</sup> Pursuant to art. 232 TFEU, the EP adopts its own Rules of procedure. See also Decision 2005/684/EC, Euratom of the European Parliament of 28 September 2005 adopting the Statute of the European Parliament, 1 ff. (hereinafter: EP Statute), which “lays down the regulations and general conditions governing the performance of the duties of Members of the European Parliament” (art. 1).

and shall not receive a binding mandate".<sup>129</sup> Similar provisions can be found in the constitutions of the EU Member States.<sup>130</sup> Second, several norms guarantee the *transparency of MEPs' activities*. The disclosure of MEPs' financial interests – a recent requirement<sup>131</sup> – is regulated in the Code of Conduct (CoC-EP) appended to the EPRoP (Annex I). The Code entered into force in 2012, when the cash-for-amendments scandal was still fresh. Transparency also applies to the meetings between MEPs and lobbyists: art. 11(2) EPRoP provides that Members should endeavour to only interact with registered lobbyists,<sup>132</sup> and art. 11(3) EPRoP, adopted on 31 January 2019,<sup>133</sup> encourages them to publish their meetings with IGs falling under the scope of the JTR ("should"). Rapporteurs, shadow rapporteurs, and committee chairs are even required to do so ("shall").<sup>134</sup> Finally, art. 121(1) EPRoP states that the EP must act "with the utmost transparency" and in conformity with art. 1 subpara. 2, TEU (openness and closeness), art. 15 TFEU (openness and transparency), and art. 42 of the Charter (transparency). Third, the EPRoP mentions the *access of IGs to the EP*, stating that access badges are granted based on the norms adopted by the Bureau.<sup>135</sup>

#### III.4. THE JOINT TRANSPARENCY REGISTER

Besides the EPRoP (*supra*, III.3), lobbying activities are mainly regulated via the JTR, which is based on the Interinstitutional Agreement on the Transparency Register (IATR) between the EC and the EP.<sup>136</sup> Without going into the details of this scheme, it is important to briefly recall its main features.

First, registration is voluntary, and therefore the IATR provides incentives for lobbyists to join the register.<sup>137</sup> Second, registrants must share information about their organisation, including the number of staff engaged in lobbying activities and holding an access

<sup>129</sup> See also arts 2(1), 3, and 9(1) EP Statute.

<sup>130</sup> See e.g. art. 27(1) of the Constitution of the French Republic of 4 October 1958; art. 38(1) of the Basic Law for the Federal Republic of Germany of 23 May 1949; art. 67(2) of the Spanish Constitution of 31 October 1978; art. 67 of the Constitution of the Italian Republic of 22 December 1947; art. 104(1) of the Constitution of the Republic of Poland of 2 April 1997.

<sup>131</sup> As noted by Transparency International, "[t]he 2014-2019 legislative term of the European Parliament is the first where Members had to fill out their declarations of financial interest right from start". See D Freund and R Kergueno, 'Moonlighting in Brussels: Side Jobs and Ethics Concerns at the European Parliament' (Transparency International Report 2018) 6.

<sup>132</sup> See, by contrast, art. 7(1) CoC-EC.

<sup>133</sup> Decision 2018/2170(REG) of the European Parliament of 31 January 2019 on Amendments to Parliament's Rules of procedure affecting Chapters 1 and 4 of Title I; Chapter 3 of Title V; Chapters 4 and 5 of Title VII; Chapter 1 of Title VIII; Title XII; Title XIV and Annex II.

<sup>134</sup> See, by contrast, art. 7(2) CoC-EC.

<sup>135</sup> Art. 123(1) EPRoP.

<sup>136</sup> Art. 295 TFEU. The IATR was reviewed and amended in 2014. Prior to this, the EP (1995) and the EC (2008) each had separate (voluntary) registers.

<sup>137</sup> Arts 29-30 IATR. The 2018 report of the Joint Transparency Register Secretariat (JTRS) lists the following advantages: long-term access to EP premises, eligibility as a speaker at public hearings, subscription

pass.<sup>138</sup> They must disclose the pieces of legislation they are working on, their links with EU institutions, and financial information pertaining to their lobbying activities.<sup>139</sup> Third, the IATR contains a Code of Conduct applicable to all registrants.<sup>140</sup> Fourth and finally, the JTR is operated by the Joint Transparency Register Secretariat (JTRS), which is composed of EC and EP officials.<sup>141</sup>

### III.5. THE AGREEMENT ON A MANDATORY TRANSPARENCY REGISTER

In December 2020, shortly before the present *Article* was published, the EP, the Council, and the EC reached an Agreement on a Mandatory Transparency Register (AMTR). At the time of writing, the AMTR was still pending before the EU institutions, which does not allow for a definitive assessment of its provisions in the present *Article*. Still, providing a brief overview over the text of the provisional AMTR seems appropriate given its importance for the future of EU lobby regulation.

Under the new scheme, and contrary to what the title of the AMTR suggests, registration remains optional for interest representatives. In order to “encourage registration”, the signatory institutions undertake to adopt so-called “conditionality measures”.<sup>142</sup> Like under the JTR, registrants must disclose general information about their organisation, their links to Union institutions, as well as financial data.<sup>143</sup> Moreover, they are bound to observe a Code of Conduct.<sup>144</sup> The implementation of the AMTR is monitored by a Management Board composed of “the Secretaries-General of the signatory institutions who shall chair it on a rotating basis for a term of one year”.<sup>145</sup> The Secretariat, which is composed of “the heads of unit, or equivalent, responsible for transparency issues in each signatory institution [...] and the respective staff”,<sup>146</sup> is tasked with “manag[ing] the functioning of the register”.<sup>147</sup>

to email notifications on the activities of EP committees, ability to organise events on the EP premises, and ability to request patronage by the president of the EP. See JTRS Annual Report 2018, 8.

<sup>138</sup> Annex II IATR, I.

<sup>139</sup> I.e., an estimate of the annual costs related to lobbying, EU funding and, for some actors, the annual turnover generated by lobbying activities. See Annex II IATR, II.

<sup>140</sup> Annex III IATR and art. 21 dash 2 IATR.

<sup>141</sup> Art. 24 IATR.

<sup>142</sup> Art. 5(1) and (2) AMTR.

<sup>143</sup> Annex I AMTR.

<sup>144</sup> Annex II AMTR.

<sup>145</sup> Art. 7(1) AMTR.

<sup>146</sup> Art. 8(1) AMTR.

<sup>147</sup> *Ibid.*

#### IV. EVALUATING LOBBY REGULATION IN THE EP FROM THE PERSPECTIVE OF EU PRIMARY LAW

After having highlighted the specificities of EU and EP lobbying, as well as the place of lobbying in EU primary law and EU parliamentary law (*supra*, II and III), my goal, in this section, is to critically assess selected aspects of the EP's regulatory framework (*supra*, III.3-III.5). As I will show, the EP's almost exclusive focus on transparency (IV.1) – which is however realised in an imperfect and selective way – leads to a problematic neglect of equality (IV.2) and integrity (IV.3) considerations. Examining these two other orientations of lobby regulation is important in order to move beyond the transparency paradigm that characterises much of lobby regulation and research, including with regard to the EP. As the OECD emphasises, a comprehensive lobby regulation strategy that aims to strengthen the democratic legitimacy of lawmaking processes cannot only address transparency. It must also tackle equality and integrity issues.<sup>148</sup>

##### IV.1. TRANSPARENCY AS THE MAIN DRIVER OF EP LOBBY REGULATION

A first critique that can be formulated regarding the EP's scheme of lobby regulation is its narrow focus on transparency as a regulatory objective. As a result, lobbying practices that are deemed transparent and compliant with the CoC-EP are legitimised rather than fundamentally challenged by the applicable regulation. This approach to lobbying neglects other democratic ideals, as well as the principle of openness (*supra*, III.1 and III.2).

According to Smismans, transparency and representativeness (which includes what Smismans calls "system representativeness" and "organisational representativeness"<sup>149</sup>) are the two main concerns that originally drove lobby regulation in the EU.<sup>150</sup> These two emphases are reflected in the White Paper on European Governance (WPEG) published by the EC in 2001.<sup>151</sup> The WPEG also highlights the importance of openness, equality, closeness to citizens, and participation. Alemanno describes the WPEG as a "turning point" in the emergence of the principle of openness.<sup>152</sup> As already mentioned, the Lisbon

<sup>148</sup> See OECD, *Lobbyists, Government and Public Trust, Volume 1: Increasing Transparency through Legislation* (OECD 2009); OECD, *Lobbyists, Government and Public Trust, Volume 2: Promoting Integrity through Self-Regulation* cit.; OECD, *Lobbyists, Governments and Public Trust, Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying* (OECD 2014).

<sup>149</sup> System representativeness pertains to "whether the overall system of interest intermediation is structured as a balanced representation of the interests at stake", while "organisational representativeness" relates to whether a specific interest group is representative. See S Smismans, 'Regulating Interest Group Participation in the European Union: Changing Paradigms Between Transparency and Representation' (2014) ELR 470.

<sup>150</sup> *Ibid.*

<sup>151</sup> Information COM/2001/428 final cit.

<sup>152</sup> A Alemanno, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy' cit. 83.

Treaty and the EU Charter have since entrenched the importance of these various principles (*supra*, III.1).

However, this agenda has been shifting in emphasis since the publication of the WPEG, and despite the entry into force of the Lisbon Treaty in 2009. As its title suggests, the EC's Green Paper on a European Transparency Initiative of 2006<sup>153</sup> – which led to creation of the EC's Register of Interest Representatives in 2008 – mainly addressed issues pertaining to transparency.<sup>154</sup> As highlighted in a 2003 report of the EP's Directorate-General for Research, "[t]he basic purpose of all regulation and codes of conduct is to bring lobbying into the open"<sup>155</sup> – no less, but also no more. Similarly, the current JTR and its Code of Conduct are driven by transparency considerations,<sup>156</sup> and the same applies to the provisional AMTR. Influenced by this approach, the solutions proposed by academics mostly revolve around disclosure and the regulation of individual behaviour, as opposed to structural reforms.<sup>157</sup>

Of course, transparency is an important step in the regulation of lobbying. It is a precondition for the realisation of other democratic ideals, as it makes it possible for citizens to hold their representatives accountable.<sup>158</sup> Transparency has been high on the agenda of many NGOs pushing for more robust EU lobby regulation.<sup>159</sup> Yet to solely frame lobbying as a transparency issue is problematic for a range of reasons, one of them being that this narrow approach neglects the other principles pertaining to interest representation that are highlighted in EU primary law (*supra*, III.1 and III.2). Relatedly, transparency alone does not eliminate important democratic concerns pertaining to lobbying, such as well-known imbalances caused by the unequal distribution of political resources<sup>160</sup> and,

<sup>153</sup> COM/2006/0194 final of 3 May 2006, Green Paper: European Transparency Initiative, 194. On the European Transparency Initiative, see J Greenwood, 'The Lobby Regulation Element of the European Transparency Initiative: Between Liberal and Deliberative Models of Democracy' (2011) *Comparative European Politics* 317.

<sup>154</sup> S Smismans, 'Regulating Interest Group Participation in the European Union: Changing Paradigms Between Transparency and Representation' cit. 39. See also N Pérez-Solórzano Borragán and S Smismans, 'Representativeness: A Tool to Structure Intermediation in the European Union?' cit. 417; J Greenwood, 'The Lobby Regulation Element of the European Transparency Initiative: Between Liberal and Deliberative Models of Democracy' cit. 319.

<sup>155</sup> W Lehmann, 'Lobbying in the European Union: Current Rules and Practices' cit.

<sup>156</sup> S Smismans, 'Regulating Interest Group Participation in the European Union: Changing Paradigms Between Transparency and Representation' cit. 44.

<sup>157</sup> See e.g. D Dialer and M Richter, 'Einleitung: Entmystifizierung von EU-Lobbying' cit. 12 ff.

<sup>158</sup> J Greenwood, 'Organized Civil Society and Democratic Legitimacy in the European Union' (2007) *British Journal of Political Science* 333, 335. For instance, the JTRS expects that the transparency provided by the JTR will lead to "increased public scrutiny, giving citizens, the media and stakeholders the possibility to track the activities and potential influence of interest representatives". See JTRS Annual Report 2017, 3.

<sup>159</sup> Prominent examples include Transparency International and ALTER-EU, the Alliance for Lobbying Transparency and Ethics Regulation.

<sup>160</sup> On this topic, see J Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics* (Cambridge University Press 2010).

therefore, the unequal ability to participate and to be represented. Transparency serves democratic ideals, but does not suffice from the perspective of democratic legitimacy.<sup>161</sup> Curtin and Meijer caution against overestimating the legitimising effect of transparency, which is often viewed as a silver bullet, “a type of holistic medicine designed to remedy many of the ailments the body of the EU is perceived to have”.<sup>162</sup>

A second issue pertains to the *imperfect and selective realisation* of transparency in relation to EP lobbying. Pseudo-transparency is arguably even more problematic than a transparent lack of transparency, as it deceives the broader public. For instance, MEPs are not required to only meet with registered lobbyists,<sup>163</sup> and most Members are not obliged to publish a legislative footprint.<sup>164</sup> Moreover, because registrants must choose among various categories of IGs and indicate to which category they belong, they are able to influence the reporting requirements by making strategic choices.<sup>165</sup> More generally, problems of non-compliance (e.g., inaccurate data) have been reported.<sup>166</sup> In 2018, the JTRS noted that “[o]f the quality checks performed, 48,52% of the registrations were deemed to be satisfactory (1,923), while the remaining entities were contacted with regard to eligibility or inconsistencies of the data contained in their entries”.<sup>167</sup> Such inaccuracies are encouraged by the lack of systematic checks by the JTRS.<sup>168</sup> In addition, non-compliance results, at most, in an entity being removed from the JTR for one or two years.<sup>169</sup> Similarly, under the AMTR, “where appropriate in the light of the seriousness of the non-observance”, the Secretariat may “prohibit the interest representative from registering again for a period of between 20 working days and two years”.<sup>170</sup> Moreover, few alerts and complaints are lodged regarding alleged ineligibilities, factual mistakes, activities of non-registered entities, and suspected breaches of the Code of Conduct of interest representatives.<sup>171</sup>

<sup>161</sup> A Alemanno, ‘Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy’ cit. 84.

<sup>162</sup> D Curtin and AJ Meijer, ‘Does Transparency Strengthen Legitimacy?’ cit. 110.

<sup>163</sup> Art. 11(2) EProP.

<sup>164</sup> Art. 11(3) EProP.

<sup>165</sup> J Greenwood and J Dreger, ‘The Transparency Register: A European Vanguard of Strong Lobby Regulation?’ (2013) *Interest Groups and Advocacy* 139, 143. See Annex I IATR regarding the various categories.

<sup>166</sup> D Chabanet, ‘Les enjeux de la codification’ cit. 1003 ff.

<sup>167</sup> JTRS Annual Report 2018, 10-11. In 2017, 53 per cent of the registrations that were subject to a check were deemed satisfactory. See JTRS Annual Report 2017, 12.

<sup>168</sup> J Greenwood and J Dreger, ‘The Transparency Register: A European Vanguard of Strong Lobby Regulation?’ cit. 143. A Member once declared to be the “Master of the Universe” in his financial declaration, which went unnoticed by the JTRS. See J Grad and M Frischhut, ‘Legal and Ethical Rules in EU Decision-Making: “Soft Law” for Targets and Actors of Lobbying’ in D Dialer and M Richter (eds), *Lobbying in the European Union: Strategies, Dynamics and Trends* (Springer 2019) 305, 315.

<sup>169</sup> Art. 34 IATR and Annex IV IATR.

<sup>170</sup> Annex III AMTR, art. 8.1.

<sup>171</sup> See arts 31 and 33 IATR; JTRS Annual Report 2018, 11. In 2018, only two out of thirteen complaints were deemed admissible; in both cases, a “satisfactory” solution was reached or expected, see JTRS Annual

Another obvious and often mentioned deficiency is the *voluntary* character of both the JTR and the AMTR.<sup>172</sup> In 2016, the EC presented a proposal for a mandatory Transparency Register.<sup>173</sup> The negotiations with the EP and the Council first failed in April 2019.<sup>174</sup> Eventually, in 2020, the EP, the Council, and the EC reached a political agreement: the AMTR (*supra*, III.5). Despite being called a “Mandatory Transparency Register”, the new register grants the EU institutions significant leeway in deciding which interactions they wish to allow.<sup>175</sup> Moreover, registration remains optional under this scheme.<sup>176</sup> As already highlighted, at the time of writing, the AMTR still needed to be approved by the institutions in order to enter into force.

It is worth noting that in the past, some scholars argued for the replacement of the IATR by a regulation, as the IATR only binds the institutions and not third parties.<sup>177</sup> One question that needs to be clarified in this regard is whether a Treaty amendment would be necessary in order to make the JTR mandatory through a regulation.<sup>178</sup>

Both the IATR and the AMTR contain several problematic *exemptions*,<sup>179</sup> including as regards contacts occurring upon the EP’s or an MEP’s initiative, “such as ad hoc or regular requests for factual information, data or expertise”.<sup>180</sup> As Smismans notes with regard to

Report 2018, 11 ff. In 2017, only three complaints were deemed admissible; one of them was closed, while the two other entries were removed from the Register for lack of eligibility. See JTRS Annual Report 2017, 13.

<sup>172</sup> Alemanno even qualifies the JTR as “legally irrelevant”. See A Alemanno, ‘Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy’ cit. 85.

<sup>173</sup> Proposal for a Interinstitutional Agreement COM(2016) 627 final from the Commission of 28 September 2016 on a Mandatory Transparency Register.

<sup>174</sup> ALTER-EU, *Mandatory EU Lobby Transparency Sunken by EU Institutions* (5 April 2019) Alter-EU [www.alter-eu.org](http://www.alter-eu.org). In December 2019, EC President von der Leyen expressed her intention to resume the negotiations in her mission letter to Commissioner Jourová: Mission Letter of 1 December 2019 to Věra Jourová, Vice-President for Values and Transparency 5.

<sup>175</sup> See recital 7 AMTR.

<sup>176</sup> Art. 5 AMTR. See also E Korkea-aho, ‘Op-Ed: New Year, New Transparency Register?’ cit., noting that the institutions are “stretching the definition of mandatory beyond normal uses of the word”. In its press release, the EC calls the new register “*de facto* mandatory”, which is misleading. See European Commission, *Questions & Answers: Agreement on a Mandatory Transparency Register* (15 December 2020), [ec.europa.eu](http://ec.europa.eu).

<sup>177</sup> See M Krajewski, ‘Rechtsfragen der Regulierung von Lobbying gegenüber EU-Institutionen’ cit. 271.

<sup>178</sup> While scope precludes addressing this issue at length, some scholars argue that the EU has the competence to regulate lobbying based on art. 298 TFEU (for the EU administration) and based on the doctrine of implied powers in relation to art. 298 TFEU (for the EP). See *ibid.* 272 ff. *Contra*: D Dialer and M Richter, ‘“Cash-for-Amendments”-Skandal: Europaabgeordnete unter Generalverdacht’ cit. 249. Krajewski also mentions a “Kompetenz kraft Natur der Sache”; see M Krajewski, ‘Rechtsfragen der Regulierung von Lobbying gegenüber EU-Institutionen’ cit. 277 ff. The EC views an interinstitutional agreement as “the most pragmatic and promising option to achieve a mandatory scheme in a reasonable timeframe”. See European Commission, *Questions & Answers: Proposal for an Interinstitutional Agreement on a Mandatory Transparency Register* (28 September 2016), [ec.europa.eu](http://ec.europa.eu).

<sup>179</sup> See arts 9-20 IATR (which contain exemptions, and clarify which entities are “expected to register”); art. 4 AMTR (which lists the activities that are “not covered” by the Agreement).

<sup>180</sup> Art. 12 IATR. Art. 4(1)(d) AMTR uses similar wording.

the IATR, “the Register has thus strong limitations since most *formal* consultation mechanisms do not fall in its field of application”.<sup>181</sup> Another sweeping exemption – which applies if the conditions set out in the IATR and the AMTR are fulfilled – pertains to law firms and consultancies.<sup>182</sup> Such exclusions undermine transparency, as well as the broad definition of lobbying adopted by the IATR and the AMTR.<sup>183</sup>

These examples show that lobby regulation in the EP, which is mainly driven by transparency concerns, supports “procedural rather than more fundamental change” when it comes to addressing the EU’s democratic deficit.<sup>184</sup> As a result, other democratic values protected by EU primary law, especially equality, closeness to citizens, representation, and participation, are neglected. In the following subsection, I focus on equality, which is arguably the most fundamental democratic value, and which supports the other democratic ideals guaranteed by EU primary law.

#### IV.2. A TROUBLING NEGLECT OF EQUALITY

Equality is one of the values of the EU,<sup>185</sup> and art. 9 TEU protects equality as a democratic principle. Yet due to the focus on transparency I have highlighted (*supra*, IV.1), equality concerns are largely left out by EP lobby regulation. This neglect of equality is particularly troubling in the case of the EP, which directly represents the citizens of the EU.<sup>186</sup>

As previously highlighted, EU lawmaking is characterised by a high level of complexity (*supra*, II.1).<sup>187</sup> Therefore, and perhaps even more than in domestic politics, IGs with superior resources can be expected to navigate EU lawmaking more easily and more effectively than less privileged actors, let alone ordinary citizens; this also corresponds to the findings of several political science studies.<sup>188</sup> More generally, several authors complain that instruments of citizen participation (e.g., the European Citizens’ Initiative and the right to petition the EP) are not as widely used as they should be.<sup>189</sup> Instead of promoting

<sup>181</sup> S Smismans, ‘Regulating Interest Group Participation in the European Union: Changing Paradigms Between Transparency and Representation’ cit. 36.

<sup>182</sup> Art. 10 IATR; art. 4(1)(a) AMTR.

<sup>183</sup> Art. 7 IATR; art. 3 AMTR. On the advantages of a broad definition, see M Kluger Rasmussen, ‘Lobbying the European Parliament: A Necessary Evil’ cit. 4; L Obholzer, ‘A Call to Members of the European Parliament: Take Transparency Seriously and Enact the “Legislative Footprint”’ (CEPS Policy Brief 256-2011) 5.

<sup>184</sup> See, with reference to G Majone, A Føllesdal and S Hix, ‘Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ cit. 538.

<sup>185</sup> Art. 2 TEU.

<sup>186</sup> Art. 10(1) TEU.

<sup>187</sup> J Greenwood, ‘Organized Civil Society and Democratic Legitimacy in the European Union’ cit. 335.

<sup>188</sup> See *supra*, footnote 55.

<sup>189</sup> A Alemanno, ‘Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy’ cit. 37 ff. Jakab describes the citizens’ initiative as “a nice jewel with limited practical relevance”. See A Jakab, ‘Full Parliamentarisation of the EU Without Changing the Treaties: Why We Should Aim for it and How Easily It Can Be Achieved’ cit. 17. On this topic, see also A Alemanno, ‘Beyond Consultations:



citizen involvement, the participatory mechanisms available in the EU, such as formal consultation procedures, are geared towards the participation of “functional intermediaries”.<sup>190</sup> The EP’s lobby regulation scheme exacerbates these basic inequalities in several respects. Three main sources of inequality that directly result from the EP’s approach to transparency deserve to be highlighted.

For one thing, and as already mentioned, *contacts that occur upon the initiative of MEPs* (e.g. in the context of official consultations and hearings) are not subject to registration requirements.<sup>191</sup> This imperfect transparency (see also *supra*, IV.1) prevents the equal representation and participation of IGs in EU lawmaking processes. As Rasmussen highlights, at present, MEPs consult IGs in an unsystematic fashion, which can lead to imbalances and biases in favour of specific actors and positions.<sup>192</sup> The current regulatory regime hardly makes it possible to scrutinise whether MEPs’ choices are balanced. In other words, there is no requirement of system representativeness in the way the EP deals with IGs (on the concept of system representativeness, see *supra*, IV.1).<sup>193</sup> Therefore, “not all European interests are pushing at an open door with the same force”.<sup>194</sup> This is partly due to the EU’s pluralist system of interest representation (*supra*, II.1); thus, giving IGs more equal opportunities to be represented and to participate might require moving in the direction of a neo-corporatist system of interest intermediation. Instead of letting IGs compete freely against each other, the EP could consult them in a more structured way. One way of doing so would be to ensure that relevant groups with a large membership (which, as Mancur Olson claims, are at a disadvantage compared with small groups when it comes to organising themselves<sup>195</sup>) are directly invited to share their views with regard to a given policy issue.

Second, the EP’s scheme of lobby regulation lacks measures aimed at ensuring that IGs have an *equal opportunity to lobby MEPs* even when the political resources at their disposal are modest. One way of doing so would be to provide funding or strategic advice to IGs that need it, such as IGs that have a large membership. The EC has been granting financial support to specific – and especially less wealthy – IGs since 1976, yet such measures have no equivalent in the EP. The common assumption that funding helps to

Reimagining EU Participatory Politics’ (5 December 2018) Carnegie Europe [carnegieeurope.eu](http://carnegieeurope.eu); A Alemanno, *Lobbying for Change: Find Your Voice to Create a Better Society* (Icon Books Ltd 2017).

<sup>190</sup> A Alemanno, ‘Beyond Consultations: Reimagining EU Participatory Politics’ cit. 2. The author also highlights a range of measures that could strengthen citizen lobbying, see *ibid.* 3. On this topic, see also A Alemanno, *Lobbying for Change: Find Your Voice to Create a Better Society* cit. 68 ff. and 106 ff.

<sup>191</sup> Art. 12 IATR; art. 4(1)(d) AMTR.

<sup>192</sup> M Kluger Rasmussen, ‘Lobbying the European Parliament: A Necessary Evil’ cit. 6.

<sup>193</sup> N Pérez-Solórzano Borragán and S Smismans, ‘Representativeness: A Tool to Structure Intermediation in the European Union?’ cit.

<sup>194</sup> D Coen, ‘The Evolution of the Large Firm as a Political Actor in the European Union’ cit. 107.

<sup>195</sup> M Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* cit. 127.

balance out inequalities between IGs at EU level is probably overly optimistic.<sup>196</sup> Still, Greenwood reports that for many IGs, this funding ensures their independence in a way that is comparable to the role played by the public funding of political parties in the domestic context.<sup>197</sup> The fact that registered IGs must disclose information pertaining to their financial resources represents a valuable step, as it can raise awareness about resource inequalities. However, this transparency measure does not, as such, level the playing field. Besides financial support, providing policy advice to IGs who are not as well-informed or as well-connected as more established players would help them lobby more effectively. Another measure could be for the EP to provide further guidance on the selection of experts in the context of committee hearings.

Third, *exemptions* from the JTR's and AMTR's registration requirements (*supra*, IV.1) show that some lobbyists are, *de jure*, more equal than others. The JTR and AMTR rely on a broad definition of lobbying,<sup>198</sup> yet as I have noted earlier, they exclude manifold actors from their scope, including law firms and consultancies,<sup>199</sup> trade unions and employers' organisations,<sup>200</sup> third countries' governments,<sup>201</sup> and regional public authorities.<sup>202</sup> Again, selective transparency has the effect of putting some IGs at a disadvantage, and sends misleading signals to the public.

To conclude, and as Alemanno highlights, transparency is viewed as a tool to improve the output legitimacy of EU lawmaking.<sup>203</sup> Meanwhile, however, other democratic values enshrined in EU primary law are being overlooked.

#### IV.3. TRANSPARENCY AS A PROOF OF INTEGRITY?

A third problematic aspect of EP lobbying law pertains to MEPs' duty of integrity.<sup>204</sup> In the scholarly literature and relevant policy work, integrity is often identified as another goal of lobby regulation besides transparency.<sup>205</sup> The two concepts are frequently mentioned

<sup>196</sup> M Crepez and M Hanegraaff, 'The Funding of Interest Groups in the EU: Are the Rich Getting Richer?' (2020) *Journal of European Public Policy* 102.

<sup>197</sup> J Greenwood, 'Organized Civil Society and Democratic Legitimacy in the European Union' cit. 344.

<sup>198</sup> Art. 7 IATR; art. 3 AMTR.

<sup>199</sup> Art. 10 IATR; art. 4(1)(a) AMTR.

<sup>200</sup> Art. 11 IATR; art. 4(1)(c) AMTR.

<sup>201</sup> Art. 15 IATR; art. 4(2)(d) AMTR.

<sup>202</sup> Art. 16 IATR; art. 4(2)(a) AMTR.

<sup>203</sup> A Alemanno, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy' cit. 72.

<sup>204</sup> Art. 1 CoC-EP.

<sup>205</sup> See e.g. D Dialer and M Richter, "'Cash-for-Amendments"-Skandal: Europaabgeordnete unter Generalverdacht' cit. 255. See also the work of the OECD, *Lobbyists, Government and Public Trust, Volume 1: Increasing Transparency through Legislation* cit.; OECD, *Lobbyists, Government and Public Trust, Volume 2: Promoting Integrity through Self-Regulation* cit.; OECD, *Lobbyists, Government and Public Trust, Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying* cit.

jointly in public discourse and in the scholarly literature, due to the widespread assumption that they go hand in hand: the former is viewed as a tool to guarantee and demonstrate the latter and, as a result, to increase public trust.<sup>206</sup>

Integrity designates “the quality of being honest and having strong moral principles”.<sup>207</sup> Like other moral concepts, it has been increasingly referred to in EU law.<sup>208</sup> In the legal context, integrity is often used as an umbrella category that includes various principles of good behaviour.

As previously highlighted, the normative principles that must guide the behaviour of MEPs are mentioned in several provisions of EU primary law and in the EPoP and CoC-EP. One fundamental principle that applies to MEPs is that they must exercise their mandate independently.<sup>209</sup> Moreover, MEPs must be guided by “disinterest, integrity, openness, diligence, honesty, and accountability and respect for Parliament’s reputation”, “act solely in the public interest”,<sup>210</sup> and immediately address conflicts of interest.<sup>211</sup> While all these provisions pertain to integrity, significant gaps remain. Several loopholes can be traced back to the problem of imperfect and selective transparency (*supra*, IV.1): they pertain to MEPs’ side jobs, to the problem of revolving doors, and to a lack of enforcement of the CoC-EP.

The first lacuna results from MEPs’ *side jobs*. Indeed, although MEPs are employed full-time by the EP, they are not prohibited from engaging in ancillary activities.<sup>212</sup> This practice, called “moonlighting”, has raised criticism, especially when the income earned through side jobs is substantial.<sup>213</sup> MEPs are prohibited from engaging in “paid professional lobbying directly linked to the Union decision-making process”<sup>214</sup> while they are in office, yet Transparency International found that three MEPs disclosed paid employment

<sup>206</sup> See e.g., Information COM/2001/428 final cit.; U von der Leyen, Mission Letter cit. 3.

<sup>207</sup> Cambridge Online Dictionary dictionary.cambridge.org.

<sup>208</sup> J Grad and M Frischhut, ‘Legal and Ethical Rules in EU Decision-Making: “Soft Law” for Targets and Actors of Lobbying’ cit. 306. On references to ethics and morality in EU primary and secondary law, see also M Frischhut, “EU”: Short for “Ethical Union”? The Role of Ethics in European Union Law’ (2015) ZaöRV/HJIL 531; M Frischhut, *The Ethical Spirit of EU Law* (Springer 2019).

<sup>209</sup> Art. 2 CoC-EP.

<sup>210</sup> Art. 1 CoC-EP.

<sup>211</sup> Art. 3 CoC-EP.

<sup>212</sup> See, by contrast, art. 8(1) CoC-EC.

<sup>213</sup> See e.g. D Freund and R Kergueno, ‘Moonlighting in Brussels: Side Jobs and Ethics Concerns at the European Parliament’ cit. However, Transparency International acknowledges that even unpaid jobs can be problematic from the perspective of conflicts of interest. See *ibid.* 12. While the incomes generated by side jobs must be disclosed, the exact amount is not revealed; instead, MEPs must match their income with the closest income category. See art. 4(2) CoC-EP.

<sup>214</sup> Art. 2(c) CoC-EP.

with entities appearing in the JTR.<sup>215</sup> While these second jobs can jeopardise MEPs' independence, regulatory proposals in this area have failed. The EP has decided to eliminate the potential for conflicts of interest in connection with gifts,<sup>216</sup> but some important loopholes remain.<sup>217</sup> Conflicts of interest need to be addressed in a more encompassing and consistent fashion at EU level,<sup>218</sup> including in the EP, which must be responsive to the citizens of the EU. So far, the EP's efforts to make lobbying more transparent have not made it possible to address these gaps.

Another loophole is that *former MEPs are not prohibited from engaging in lobbying*, although if they do, they must inform the EP and cannot benefit from the facilities granted to former Members.<sup>219</sup> Contrary to what applies to the EC and its staff and to MEPs' staff, MEPs are not required to observe any cooling-off period upon leaving office.<sup>220</sup> The problem of revolving doors has spilt much ink in relation to the EC<sup>221</sup> due to insufficient monitoring of conflicts of interest.<sup>222</sup> In the EP, the lack of regulation can lead to similar – undisclosed – conflicts while MEPs are still in office (so-called “time-shifted *quid pro*

<sup>215</sup> D Freund and R Kergueno, 'Moonlighting in Brussels: Side Jobs and Ethics Concerns at the European Parliament' cit. 2. According to Transparency International, its disclosure of several side jobs of incumbent MEPs “led about 100 MEPs to drop activities”. See *ibid.* 12.

<sup>216</sup> See art. 5(1) CoC-EP (which only allows MEPs to accept gifts “with an approximate value of less than EUR 150 given in accordance with courtesy usage or those given to them in accordance with courtesy usage when they are representing Parliament in an official capacity”); Bureau of the European Parliament, Decision on Implementing Measures for the Code of Conduct for Members of the European Parliament with Respect to Financial Interests and Conflicts of Interest, Decision of 15 April 2013 (hereinafter: Bureau Decision on Col).

<sup>217</sup> Another problematic case pertains to events organised by third parties, as art. 5(3) CoC-EP provides that MEPs may accept “the direct payment of [travel, accommodation, and subsistence] expenses by third parties, when Members attend, pursuant to an invitation and in the performance of their duties, at any events organised by third parties”. While such payments must be disclosed (see Bureau Decision on Col, art. 6 ff.), a risk of conflicts of interest remains.

<sup>218</sup> See S White, 'Footprints in the Sand: Regulating Conflict of Interest at EU Level' cit.

<sup>219</sup> Art. 6 CoC-EP. According to Tansey, this provision is not properly implemented. See R Tansey, 'The EU's Revolving Door Problem: How Big Business Gains Privileged Access' in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 257, 258.

<sup>220</sup> Senior staff members are bound by a cooling-off period of 12 months. See Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, Title II art. 16. Members of the EC must respect a cooling-off period of 2 years, except for former EC Presidents (3 years). See arts 11(2), 11(4) and 11(5) CoC-EC.

<sup>221</sup> Corporate European Observatory, *The Revolving Doors Spin Again: Barroso II Commissioners Join the Corporate Sector* (28 October 2015) corporateeurope.org. See already SS Andersen and KA Eliassen, 'European Community Lobbying' cit. 177. In 2017, Transparency International reported that over half of former European Commissioners had gone to work for an entity on the JTR. See D Freund, 'Access All Areas: When EU Politicians Become Lobbyists' cit. 6.

<sup>222</sup> I Gräßle, 'Der Fall Dalli: Die europäische Tabaklobby im Visier' in D Dialer and M Richter (eds), *Lobbying in der Europäischen Union: Zwischen Professionalisierung und Regulierung* cit. 231, 232.

*quo*"<sup>223</sup>).<sup>224</sup> While the CoC-EP states that conflicts of interest must be avoided, *i.e.*, cases where "a personal interest [...] could improperly influence the performance of [an MEP's] duties",<sup>225</sup> the Code does not prohibit obvious causes of interest collisions.

Finally, the *monitoring and enforcement of the CoC-EP*, and therefore of MEPs' duties of integrity, is insufficient.<sup>226</sup> According to Transparency International, none of the 24 MEPs found to have violated the CoC-EP over a five-year period was sanctioned, and only one reprimand was issued.<sup>227</sup> This lack of enforcement also applies to MEPs' duty to disclose their financial interests, as I have already highlighted (*supra*, IV.1).<sup>228</sup>

One major issue is that when MEPs face a conflict of interest, they must first address it on their own; only if no solution can be found must they inform the President of the EP.<sup>229</sup> Another severe limitation is that only the President can enforce the CoC-EP.<sup>230</sup> The Advisory Committee on the Conduct of Members can merely provide "guidance on the interpretation and implementation" of the Code.<sup>231</sup> In the case of alleged breaches of the Code, it is only tasked with formulating recommendations, as the President enjoys exclusive decisional authority.<sup>232</sup> While the Committee's recommendations to the President are not made available to the public, EU transparency activists have claimed that so far, the President has never observed them.<sup>233</sup> Be that as it may, the independence of the Advisory Committee is open to doubt, given that the Committee is composed of MEPs.<sup>234</sup> Therefore, several authors and NGOs as well as EC President von der Leyen recommend the creation of an independent interinstitutional ethics body.<sup>235</sup> To sum up, the fact that EP lobby regulation is fixated on transparency means that MEPs' integrity is not sufficiently guaranteed.

<sup>223</sup> D Freund, 'Access All Areas: When EU Politicians Become Lobbyists' cit. 13.

<sup>224</sup> E.g., S White, 'Footprints in the Sand: Regulating Conflict of Interest at EU Level' cit. 285. On this topic, see R Tansey, 'The EU's Revolving Door Problem: How Big Business Gains Privileged Access' cit.

<sup>225</sup> Art. 3(1) CoC-EP. See also J Grad and M Frischhut, 'Legal and Ethical Rules in EU Decision-Making: "Soft Law" for Targets and Actors of Lobbying' cit. 314.

<sup>226</sup> On the importance of monitoring and enforcement mechanisms, see e.g. M Kluger Rasmussen, 'Lobbying the European Parliament: A Necessary Evil' cit. 5.

<sup>227</sup> D Freund and R Kergueno, 'Moonlighting in Brussels: Side Jobs and Ethics Concerns at the European Parliament' cit. 3.

<sup>228</sup> Art. 4 CoC-EP.

<sup>229</sup> Art. 3 CoC-EP.

<sup>230</sup> D Freund and R Kergueno, 'Moonlighting in Brussels: Side Jobs and Ethics Concerns at the European Parliament' cit. 3. See art. 8 CoC-EP.

<sup>231</sup> Art. 7(4) CoC-EP.

<sup>232</sup> Art. 8(2) and (3) CoC-EP.

<sup>233</sup> J Grad, *Transparency and Lobbying: Money Meets Law and Ethics* (Management Centre Innsbruck 2016) (on file with author) 110 ff.; J Grad and M Frischhut, 'Legal and Ethical Rules in EU Decision-Making: "Soft Law" for Targets and Actors of Lobbying' cit. 319.

<sup>234</sup> Art. 7(2) CoC-EP.

<sup>235</sup> S White, 'Footprints in the Sand: Regulating Conflict of Interest at EU Level' cit.; D Freund and R Kergueno, 'Moonlighting in Brussels: Side Jobs and Ethics Concerns at the European Parliament' cit. 15; D

## V. CONCLUSION

In the early 1990s, Andersen and Eliassen, noting that lobbying was on the rise, argued that “in a representative [European Community] system where the parliamentary chain of command is the core, interest representation will have to be more regularized”.<sup>236</sup> Since then, the EP’s competences have grown significantly, yet the regulation of EP lobbying is still in its infancy.

The EP’s regulatory scheme suffers from significant gaps, and it obtains mediocre scores as far as its robustness is concerned.<sup>237</sup> Especially the narrow focus on transparency risks legitimising lobbying activities without fundamentally questioning them. Another danger created by the transparency approach is that of symbolic legislation:<sup>238</sup> appealing as transparency schemes may be, they often lead to pseudo-transparency which, in the long run, undermines public trust.

Transparency alone is insufficient to address public distrust of the EU institutions. When it comes to regulating lobbying, the EU should not be constrained by its characterisation as a legal order *sui generis*. Just like domestic legal orders, the EU institutions, and the EP in particular, must complement transparency efforts with measures that strengthen the EU’s democratic credentials, including the democratic ideals to which the EU is committed by virtue of EU primary law.

Freund, ‘Access All Areas: When EU Politicians Become Lobbyists’ cit. 8; M Frischhut, ‘Strengthening Transparency and Integrity via the New “Independent Ethics Body”’ (European Parliament, October 2020); Mission Letter cit. 5.

<sup>236</sup> SS Andersen and KA Eliassen, ‘European Community Lobbying’ cit. 173.

<sup>237</sup> In a report published by Transparency International in 2015, the EP obtained 45 out of 100 points for the robustness of its lobby regulation. See S Mulcahy, ‘Lobbying in Europe: Hidden Influence, Privileged Access’ cit. 39. As regards the Centre for Public Integrity (CPI) Index, the EP’s regulatory scheme obtains 32 points, and is therefore characterised as a scheme of “medium-robustness”. See R Chari, J Hogan, G Murphy and M Crepaz, *Regulating Lobbying: A Global Comparison* (2nd edn, Manchester University Press 2019) 183. On the CPI Index, see *ibid.* 160 ff.

<sup>238</sup> Krishnakumar defines symbolic legislation as legislation that aims “to appease the public superficially without effecting any real change in how elected officials conduct business with lobbyists or the interest groups whom lobbyists represent”. See AS Krishnakumar, ‘Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation’ (2007) *Alabama Law Review* 513, 516.