Transparency in EU decision making, holding corporations to account: why the ETI needs mandatory lobbying disclosure

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The Green Paper

The Green Paper on the European Transparency Initiative (ETI) is long overdue and it is to be welcomed that the Commission has recognised and is beginning to address the serious issues of accountability and legitimacy that face the EU as a polity. The Green Paper rightly states that the framework in which lobby groups and civil society groups operate is of great importance to EU governance and that "relations between the Commission and interest representatives must be open to outside scrutiny" (Green Paper, 2006: 4). To enable this to happen the Commission must ensure all lobbying is transparent.

The Commission correctly recognises that an essential component of its transparency drive will be to ensure that "When lobby groups seek to contribute to EU policy development, it must be clear to the general public which input they provide to the European institutions. It must also be clear who they represent, what their mission is and how they are funded" (Green Paper, 2006, II.1.4: 5). This analysis is absolutely correct in so far as it goes,[162] yet the solution on offer, a voluntary register of lobbyists, cannot possibly do the essential work needed. Those proposing a voluntary register – in both the Commission and in the commercial lobbying sector – have yet to answer this critical point: what is to be done about those lobbyists who simply choose not to register?

Based on principles of fairness and equality it is clear that all actors trying to influence and shape public policy should be subject to some form of registration. The policy process should be open and transparent, and nobody should be excepted from this.

Currently, the situation in Brussels is similar to that in the UK where regulation is focused on the activities of the lobbied. In Canada and the US the emphasis is very much on those doing the lobbying. Neither system is perfect. However, a system which combines information on both lobbyists and legislators (including officials) would best serve the principle of transparency.

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162. It is important to remember that many commercial lobbyists provide background advice and analysis for clients so all such work would need to be captured in order for the public to know who is shaping policy decisions, and how. It is also crucial that the Commission ensures such information is placed in the public domain in a timely manner.

Why regulate?

The predominant response of the public affairs industry to the proposal to regulate lobbying is to appear perplexed. "Why," they ask, "do we need regulation?". They point to the lack of lobbying scandals and mutter about overkill. Most importantly they scurry about creating "professional" lobbying organisations and developing codes of conduct. These are intended to head off the threat of regulation by appearing to be doing something.

The main problems with lobbying are secrecy, deception, imbalances in resources and preferential access for corporations.

Secrecy

Lobbying is by definition the representation of interests and not simply the offering or sharing of information and education. The first and most essential thing for the public to know is which interests are being represented to EU policy makers, journalists and the public and by whom.

The problem is that the lobbyists still refuse to divulge their clients. The knee-jerk secrecy is an important problem in Brussels. A case in point is the European Public Affairs Consultancies' Association (EPACA), the organisation rather hurriedly set up by the biggest lobbying consultancies in Brussels to challenge regulation. Of course EPACA claims to be an organisation of long-standing informally, and maybe that is even true. But it has emerged into the light as a result of the perceived threat of regulation. EPACA is desperate to avoid any real transparency but at the same time to claim that it is all for it. In its press release responding to the publication of the ETI in May 2006 it stated: "The European Public Affairs Consultancies' Association (EPACA) today welcomed the proposals aimed at maintaining the highest standards of lobbying in Brussels." But a few lines later they let slip that they are actually not in favour of transparency. John Houston, Chairman of EPACA, said:

> "The EPACA code of conduct ... ensures that every time a lobbyist from one of our member consultancies has contact with the institutions the interest they represent is fully disclosed. That is what transparency is all about."[163]

Unfortunately, this is not what transparency is all about. The question of transparency is one for the public at large not simply for lobbyists and their targets. Not only would the system they propose not be transparent, it would be unenforceable since it would be impossible to check each and every time if disclosure had been made. The only alternative is a mandatory public register disclosing clients for all to see.

Deceptive lobbying

But there is a need to disclose more than just clients. Corporations engaged in lobbying work and in funding think-tanks spend millions of euros on their campaigns

163. "Public affairs consultancies welcome European Commission proposals", EPACA, 3 May 2006 (www.epaca.org/policy/documents/press_release_3may2006.pdf).

to open up markets and pursue market opportunities. Most of the time we simply do not know if this has been ploughed into deceptive or dishonest campaigns. But we do have enough evidence that deceptive lobbying is a common problem. The huge number of policy and discussion groups set up by lobbyists to bring decision makers closer to corporate actors are an example of this. All of these should be required to fully disclose funding, and all of the lobbied (MEPs, civil servants, etc.) should disclose their membership of all such organisations. These fora are an important source of corporate influence in Brussels. Lobbyists like to pretend that these have nothing to do with lobbying.

The funding of these lobby groups is paralleled by huge sums spent by the corporations on funding think-tanks and other lobby ventures. The little we do know suggests a largely covert attempt to influence policy and practice. For example, ExxonMobil has spent US$120 000 on the Centre for the New Europe between 1998 and 2004. The funding is very rarely disclosed in the work of think-tanks like the Centre for the New Europe and the network of 130 other market friendly think-tanks clustered under the umbrella of the Stockholm Network.[164]

This kind of deceptive strategy is well known in the world of PR and lobbying as the "third party technique". It is utilised by the corporations to deceive the public and policy makers about the support which pro-corporate measures actually have. Perhaps one of the worst examples of this in the past few years was the payments made by SmithKlineBeacham to patient interest groups to enable them to lobby and demonstrate in favour of the Patents on Life Directive. Simon Gentry, SKBs Head of External Affairs, admitted paying the Genetic Interest Group (GIG) "money and expenses" and giving them "gifts in kind", offering help "to find their way around Brussels" and "access to our consultants". An SKB company report claimed all this had "done democracy a good turn".[165]

This use of "front groups" and covert funding of citizens groups is a key reason why all organisations lobbying the European institutions need to disclose how much they get from corporations or other lobby groups and what for.

Imbalance in resources

But the problems with lobbying are deeper than discussions of transparency can capture. Every observer acknowledges that the corporations have far and away the most resources to put into pursuing their objectives. During the life patents decision, SKB spent upwards of £20 million on its lobbying effort.[166] This is a problem which transparency alone cannot resolve. It is one reason why a reform of the whole machinery of interaction between European institutions and lobbyists is necessary.

164. Corporate Europe Observatory, "Covert industry funding fuels the expansion of radical right-wing EU think tanks" (www.corporateeurope.org/stockholmnetwork.html), July 2005.
165. Monbiot, G., *Captive state: the corporate takeover of Britain*, Macmillan, London, 2000, 259-60.
166. Balanya, B. et al, *Europe Inc.*, 2000, 85. Monbiot, op. cit., 257.

Corporate access

But perhaps the bigger problem in this regard is the preferential access granted by the Commission to the corporations and the lobbyists. The most obvious level is in the influence the corporations have over the Commission via lobby groups such as the Trans Atlantic Business Dialogue, the European Services Forum and the European Round Table of Industrialists. Business lobbying resulted in the Single European Act, the creation of the euro (the Maastricht Treaty), the Lisbon Strategy (subordinating Europe to a strategy of "competitiveness"), all of which followed corporate demands. But in its routine activities, the Commission privileges corporations in high-level groups. In the High-Level Group on Competitiveness, Energy and Environment, the Greens revealed this year that UNICE, the employers federation, got six of the 28 invites alone, while NGOs had to be satisfied with one.[167]

But corporate access works in more than one direction. One indication is in the immense problem of revolving doors. Commission officials go on to take up lucrative jobs in industry. At best this gives the appearance of conflict of interest. The Commission appears to be itself reluctant to acknowledge its own responsibility or indeed even the existence of such a state of affairs as the scandal of the Commission officials working on the REACH directive, who either came from or went on to work in the chemical industry as lobbyists, recently showed. The Commission originally denied Greenpeace claims, saying that they were "unfounded" and based on "sloppy research". Greenpeace responded by naming the officials and citing Commission records to show that they had worked there.[168] This example is one of very many in which officials in the Commission move into industry and vice versa.

In the end, we think that democracy cannot be reduced to interest groups. We are not in favour of a system which allows only resource rich groups to access policy makers, especially if there is no internal accountability in their organisations. This point is generally made by the corporate lobbyists attempting to trip up their resource poor opponents in the NGO world. But it is also clear that business organisations are not democratic in the sense that they do not reflect the public interest. All the internal democracy in the world cannot make a corporation a democratic body reflecting the interests of the public. It is still by nature an organisation for pursuing private interests. Similarly NGOs are often not accountable to their members nor democratic internally. But even if they were this would not solve the problem of democracy, since the entire basis for the legitimacy of a democracy must rest with the people.

At present, corporations are hugely privileged in EC decision making. But even if we reduced that privilege by opening up the system and allowing NGOs equal access, the problem of legitimacy would remain. This is why the problem of the democratic deficit will continue to haunt even a transparent and open commission.

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167. "High-level groups: corporate Europe is becoming a reality", 10 February 2006 (www.groen.be/homepage_page.asp?page_id=492).
168. Spongenberg, H., "Greenpeace accuses Commission of slander in chemicals law spat", *EU Observer*, 8 May 2006 (http://euobserver.com/9/21533).

Transparency myths of the disclosure deniers

But even the most modest arguments for transparency are rejected by the lobbyists. There are a few recurring myths that have grown up surrounding lobbyists regulation that need to be addressed. First, is the issue of definition. As experience in US and Canada shows, it is indeed possible to define a lobbyist, despite industry protestations to the contrary.

Secondly, the idea that regulation would generate a massive and costly bureaucracy that would not work needs to be properly assessed – again the North American experience tells us different. The range of electronic registration systems in place across the USA and Canada demonstrates that e-registration is a cost effective way of putting important information on lobbying in the public domain in a timely fashion. The fact that many of the lobbying companies who have a presence across both the EU and US complain about the unworkability of such schemes in the EU yet appear to have little problem in complying with such legislation in North America suggests that such arguments are bogus.

Thirdly, the question of registration as a barrier to access crops up every time lobbyists are faced with the possibility of regulation. Five years ago we surveyed over 68 different organisations running lobbyist registers across the US and Canada.[169] Not one of those who responded to this survey agreed with the idea that registration represents a barrier to the democratic participation of individuals and small groups with little or no resources. Many suggested that registration could often promote participation:

> "I have talked to non-profit organisations who voiced a real concern that such disclosure laws would have a chilling effect [on participation]. I have not seen any evidence to support that view" (Terry L. Draver, US General Accounting Office, Washington).

The development of the dedicated Internet site and database to track the beneficiaries of EU funds demonstrates clearly that the creation of online databases is more a matter of political will rather than a question of bureaucracy or technology.[170] If the Commission are prepared to use such technology to increase funding transparency then there is no reason why it cannot be done to increase lobbying transparency. However, the evidence suggests that this must be done on a mandatory basis. Research in the United States by the independent watchdog Public Citizen clearly shows that voluntary electronic lobbyist registers have a very poor compliance rates, approximately only 10%,[171] whereas mandatory registers have high compliance rates.

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169. We undertook this survey as part of our evidence gathering for the inquiry by the Standards Committee of the Scottish Parliament into the registration of lobbying. Miller, D., Dinan, W. and Schlesinger, P., "Response to the Standards Committee consultation paper statutory registration of commercial lobbyists", Stirling Media Research Institute, June 2001.

170. Green Paper, European Transparency Initiative, European Commission (http://europa.eu.int/comm/commission_barroso/kallas/doc/com2006_0194_4_en.pdf), 3.

171. See for example Holman, C. and Lincoln, T., "Electronic reporting of lobbyist financial activity under the Lobbying Disclosure Act of 1995", Public Citizen, 15 May 2005; and Holman, C. and Stern, R., "Access delayed is access denied: electronic reporting of campaign finance activity", *Public Integrity*, winter 2000.

The current proposals set out in the ETI Green Paper offer very weak incentives for lobbyists to register on a voluntary basis, which means it is likely that many lobbyists will not sign up to such measures. In effect, all the effort and energy invested in the ETI will have been wasted. Instead of overemphasising and exaggerating the difficulties of mandatory registration some thought should be given to its real democratic benefits:

> "Regulation of lobbyists, to my knowledge, has worked everywhere it has been tried. There is always initial resistance to anything new, but lobbyists seem to appreciate some of the 'ethical' protections in regulations once they operate under them" (Marilyn Hughes, Executive Director, Oklahoma Ethics Commission).

According to our respondents, regulation has benefited the policy process:

> "Asking lobbyists to register and identify their clients, their expenditures, and their contributions at least gives the public, and the legislature, the opportunity to see who is doing what and potentially why. More than once I have heard a legislator say something like 'I know X result would be good for your client, but is that a good result for the State of Minnesota?'" (Don Gemberling, Minnesota).

Many respondents added that the Web facilitates timely, user-friendly and inexpensive registration opportunities:

> "The [Wisconsin Lobbyists-on-Line] program especially benefits grass-roots organisations, small circulation newspapers, and smaller businesses that now have information that was previously only available to organisations that maintained a full-time presence in the capitol … This program is eminently replicable" (Judd Roth, Wisconsin Ethics Board).

> "The public is benefited by these statistics [data from lobbyists register], but more importantly, by access – including electronic access – to the actual documents that are filed, with detailed breakdowns of the categories of expenditures of any given registrant" (Pennsylvania State Ethics Commission).

In many senses the debate around transparency is one of political will. Quite simply if the Commission wants proper and meaningful democratic reforms it can make this happen. If the Commission is serious about rebuilding confidence it must make a register of lobbyists mandatory and it must require that clients and fees are disclosed. The Commission also needs to reform itself and stop preferential access for corporations. These are matters of great urgency and it is important that the Commission demonstrates real political leadership. Civil society groups across Europe are looking for some signal that the Commission is willing to respond to criticisms of the democratic deficits in European politics. A register that requires openness by all outside interests seeking to influence policy making would be an important way of addressing these concerns.