

# ACCOUNTABILITY IN LOBBYING: LEGAL TOOLS THAT WORK

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# INTRODUCTION

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Who is standing behind the laws and decisions that politicians make? This question has been looming the discussions about transparency for a long time now and was even further incited by accusations that political influence of large financial institutions should take some blame for the recent worldwide financial crisis. Lately, more and more politicians have started declaring accountability and transparency as one of their main policy focus, turning citizens' engagement into one of the mostly promoted attributes of democracy. However, history has proven again and again that the abuse of this right may create exclusive favorable conditions for private interest groups, distort the legal system or even affect the market by creating preconditions for corruption.

Some countries choose to regulate this by adopting rigid lobbying regulation, others by aiming to capture input from different interest groups in inclusive and open legislative procedures. Among other things, taking secrecy out of politics means identifying these risks and preparing practical tools for managing them by increasing accountability and openness.

The main question, emerging throughout all the current discussions remains the same. Is there an effective way to legally regulate lobbying? Which countries have managed to do this most effectively and why did they succeed?

The **aim of the researchers of this paper** was to prepare a document that would offer some answers to this question attempting to ensure that these answers could be easily translatable into concrete solutions.

For the purposes of this research, in order to capture and analyze all potential risks of undue influence, the scope of lobbying will be defined as both formal and informal contacts with the public officials and civil servants either inside and outside institutional premises as long as such contacts aim to influence regulation or policy; the potential "lobbying" of the judiciary will be left out of this scope as the principles of independence and impartiality of the judiciary are elements of an entirely different system with its own features.<sup>1</sup>

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1 Report on the Role of Extra-Institutional Actors in the Democratic System (Lobbying) Adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013), accessible online [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)011-e) (retrieved 15/01/2014)

# REGULATING LOBBYING

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## A BRIEF HISTORY OF LOBBYING REGULATION

Lately, more and more researchers, international organizations and national governments have placed lobbying control in the focus of their agendas. Not only was the last decade very fruitful in terms of new lobbying legislation worldwide, but discussions concerning what actually works have also become more frequent and in-depth. More countries have regulated lobbying in the past ten years than in the previous forty; between the 1940's and the early 2000s only four countries regulated lobbying practices, whereas since 2005 an additional eight to ten countries have chosen to do so.<sup>2</sup> Despite all this, the question of how to ensure that lobbying is accountable remains relevant and the search for effective regulation is still ongoing.

Regulation itself is most commonly defined as “the control, direction or adjustment of a private or quasi-private activity for the purpose of some public benefit.”<sup>3</sup> In this sense, the role of regulation in lobbying exists, in theory, to ensure that interest groups follow certain desirable rules when trying to influence the political decision-making process<sup>4</sup>. However, making regulation serve this purpose seems to be a challenge.

Some political researchers and historians have traced the earliest attempts at lobbying back to the earliest political forums of Greece and Rome. The origins of modern lobbying are mostly attributed to the United States. Many believe the term “lobbyist” originated from Ulysses S. Grant’s use of the term to describe those frequenting the Willard Hotel lobby in Washington DC in order to gain access to the President, who used to enjoy a cigar and brandy there. The US was also the country in which the first attempts were made to regulate lobbying activities. Before the middle of the 20th century, lobbying was considered to be an activity which fell under the First Amendment and using the services of lobbyists was considered to be a manifestation of the right to petition. Eventually, recurrent corruption and the abuse of office scandals<sup>5</sup> resulted in a slightly different approach and the adoption of the first nationwide law on lobbying activities, the Federal Regulation of Lobbying Act (1946). It defined lobbying as a professional activity which not only required lobbyists to be officially registered by the House of Representatives, but also obliged them to file declarations of their financial records.<sup>6</sup> The act was amended in 1951, and was later replaced by the Lobbying Disclosure Act in 1995 which made it mandatory for lobbyists to declare their profession on a publicly accessible register.<sup>7</sup> Canada is also often mentioned as another country which made early efforts to institutionalize the lobbying process. The *Lobbyist Registration Act* of 1989 put a rather powerful regulation into practice, requiring both profit and non-profit lobbyists to report their professional lobbying activities monthly.

In Europe, the history of regulating lobbying is also rather long. In 1951, Germany adopted a regulation on lobbying in the lower house of its federal parliament (originally, it was not created to

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2 Organization for Co-operation and Development *Building Trust through Fairer Decision Making: In-depth Report on Progress Made in Implementing the OECD Recommendation on Principles for Transparency and Integrity in Lobbying*. P.2, 28

3 Greenwood J., Thomas CS. *Introduction: Regulating Lobbying in the Western World*. 1998, Parliamentary Affairs 51 (4), P. 493

4 Kanol D. *Should the European Commission Enact a Mandatory Lobby Register?* Journal of Contemporary European Research, Volume 8, Issue 4 (2012), available online: <http://www.jcer.net/index.php/jcer/article/view/460/371> (retrieved 25/04/2014)

5 Rimgaudas Gelezevicius *Lobizmo teisinis reguliavimas ir institucionalizacija Lietuvoje: pirmojo desimtmečio isdavos ir pamokos*. Societal Studies. 2013 5 (1), p.177-191

6 Paul Flannery (2010), *Lobbying Regulation in the EU: A comparison with the USA & Canada*, *Social and Political Review*

7 A “lobbyist” is now defined as “any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a six-month period.” (U.S.C. § 1602: Disclosure of Lobbying Activities — Definitions)

serve as a lobby registry, but to rather grant official entry passes for organizations involved in the German *social partnership* model).<sup>8</sup> Since 1972, there has been a register of associations in the German Bundestag and a registration of interested representatives has existed in the French National Assembly since 2009.<sup>9</sup>

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### More countries have regulated lobbying in the past ten years than in the previous forty

At the end of the last century, lobbying regulation was addressed by the European Parliament (1996) and in Georgia (1998).<sup>10</sup> In 1998, the Republic of Georgia adopted a register that can be called the first lobbying register in Europe, which at least on paper serves the purpose of a control tool to reduce the influence of lobbyists.<sup>4</sup> However, since then only a small number of lobbyists have registered themselves on this list, meaning this tool has not become an effective accountability instrument.

The other European countries who have addressed the regulation of lobbying since 2000 are Lithuania (2001), Poland (2005), Macedonia (2008), Ireland (2008), Slovenia, Denmark and France (2010), the Netherlands and Austria (2012). Hungary, which had held its own voluntary register since 2006, repealed it again in 2011.<sup>11</sup> In Italy, there have been attempts to regulate lobbying in particular regions (Tuscany, 2004). In France, while lobbying had been debated for a very long time in the national parliament,<sup>12</sup> regulating initiatives only emerged in 2013. The strict American model of regulation was rather closely followed by Georgia, Lithuania, Poland and Hungary. After 2013, concrete efforts in regulating lobbying started in UK and Ireland. Even though there have been attempts to regulate lobbying activities in Ireland between 1999 and 2008, the first Register of Lobbying, which is considered to be a significant step towards increased lobbying transparency<sup>13</sup>, became effective only in 2015.<sup>14</sup> A Law on Lobbying was approved by Montenegro in 2014.

In the complicated institutional structure of the European Union, the first successful attempts to monitor lobbying institutionally were made in the 1990s. The first step towards a common understanding of lobbying in the EU was taken in 1992 in the official document *An open and structured dialogue between the Commission and special interest groups*.<sup>15</sup> However, this document offered a mostly self-regulatory approach. Another leap towards regulatory measures was the *European Transparency Initiative* of 2005, which was then transformed three years later into the *Transparency Initiative*. This initiative included a voluntary lobby register covering interest groups in the European Commission, Parliament and Council. Anyone who enrolls on the register is also obliged to sign a *Code of Conduct for Interest Representatives*. A new code of conduct for Members of the European Parliament came into force in 2011.<sup>16</sup>

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8 Holaman and Luneburg (2012), *Lobbying and transparency: A comparative analysis of regulatory reform*, p89, *Palgrave Journals Vol. 1*

9 Kalniņš, V. *Transparency in Lobbying: Comparative Review of Existing and Emerging Regulatory Regimes*, the Centre for Public Policy PROVIDUS, [http://www.europeum.org/images/lobby\\_pasos\\_final.pdf](http://www.europeum.org/images/lobby_pasos_final.pdf) (retrieved 15/01/2014)

10 Millar C. S.J.M., Köppl P. *Perspectives, practices and prospects of public affairs in CEE: a lobbying future anchored in an institutional context*, *Journal of Public Affairs*. Vol 14 (number 1 pp 4-17), 2014. P.13

11 Marcin Michal Wiszowaty, *First in Europe. Lobbying Regulation in the Republic of Georgia*

12 Verčič D., Tkalač V. A. *Public Relations and Lobbying: New Legislation in Slovenia*. *Public Relations Review* 38(1), 14-21, 2012

13 Transparency International Ireland, *Influence and Integrity. "Lobbying and its Regulation in Ireland"*, 2014, 6, 15.

14 The Department of Public Expenditure and Reform, *"Commencement of Regulation of Lobbying Act 2015"* <http://www.per.gov.ie/en/regulation-of-lobbying/> (retrieved 27/10/2015)

15 A brief review of lobbying regimes in the EU, Association of Accredited Public Policy Advocates to the European Union (2013) ([http://www.aalep.eu/a\\_brief\\_review\\_of\\_lobbying\\_regimes\\_in\\_the\\_EU](http://www.aalep.eu/a_brief_review_of_lobbying_regimes_in_the_EU)) retrieved 17/04/2014 )

16 Daniela Dvořáková, Michal Petrůj (2013), *Lobbying in the European Union – Regulation and Public Sector Economics Perspective*, p327, Mendel University Brno Journal 2/2013

## INCENTIVES FOR REGULATING LOBBYING

- Ensuring public interest and encouraging public participation

Many researchers argue that regulating lobbying itself generally has a positive impact on political life, helping to ensure equal access to decision-makers<sup>17</sup> and signalling that politicians are working for transparency and accountability. The positive impact of regulating lobbying-related activities and the approach to regulation as a means of risk management is also highlighted by the OECD, arguing simply that “a sound framework for transparency in lobbying is crucial to safeguard the public interest.”<sup>18</sup>

- Contributing to openness, transparency in decision-making and increasing trust

Furthermore, the issue of integrity and transparency in lobbying becomes crucial in building a foundation of trust for effective policy making.<sup>19</sup> Trust in governments and public institutions appears to have been seriously eroded,<sup>20</sup> making it even more of an issue lately. In this sense, the participation of extra-institutional actors in the political process has even been compared to an expression of political pluralism arguing that while lobbying can be seen as enhancing the democratic system by contributing to pluralism itself, regulation must guarantee transparency and safeguards to prevent a distortion of influences.<sup>21</sup> In a similar way, it may be argued that lobbying is a form of freedom of expression (Article 10 of the European Convention on Human Rights).<sup>22</sup> Finally, accountability regulation mechanisms not only allow for scrutiny of the law-making process by the public retrospectively, but also have a potential pre-emptive effect in preventing misconduct by lawmakers and other office holders by making them aware that they will be held accountable.<sup>23</sup>

## ...AND THE MAJOR CHALLENGES IN REGULATING LOBBYING

- Lack of a comprehensive approach

Naturally, influencing decisions can be both legal and illegal. Provided it is conducted following existing regulations and rules of disclosure, lobbying may be legal and is a regulated activity in many countries, sometimes affecting entire industries instead of one individual or company.<sup>24</sup> However, the main trigger for regulating lobbying seems to typically remain the perceived lack of transparency in how interest groups engage in the decision-making process.<sup>25</sup> Therefore, regulating lobbying is in

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17 Steffek J., Nanz P. *Emergent Patterns of Civil Society Participation in Global and European Governance*. Civil Society Participation in European and Global Governance: A Cure for the Democratic Deficit, edited by J. Steffek, C. Kissling and P. Nanz. 2008, p. 1-29

18 Organization for Co-operation and Development *Transparency and Integrity in Lobbying*. <http://www.oecd.org/about/membersandpartners/publicaffairs/50194111.pdf>

19 Organization for Co-operation and Development *Building Trust Through Fairer Decision Making: In-depth Report on Progress Made in Implementing the OECD Recommendation on Principles for Transparency and Integrity in Lobbying*. 2013, OECD Conference Center. P. 14-17, 23-24,49-50

20 See, for example, Edelman trust barometer 2014, more here - <http://www.edelman.com/insights/intellectual-property/2014-edelman-trust-barometer/about-trust/global-results/>

21 Report on the Role of Extra-Institutional Actors in the Democratic System (Lobbying) Adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013), accessible online [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)011-e) (retrieved 15/01/2014)

22 The European Court of Human rights also recognizes specific “participatory” right for certain kinds of decision making procedures as a procedural implication of other fundamental rights that may be affected by public decisions.

23 Ibid., P. 9-10; 14

24 Harstad B., Svensson J., *Bribes, Lobbying and Development*. American Political Science Review. Vol 105, No. 1 (2011). P. 46-63

25 Warhurst, J., *Locating the Target: Regulating Lobbying in Australia*. Parliamentary Affairs, 51 (4), P. 538-550, 1998; Rechtman RE, Larsen – Ledet JP. *Regulation of Lobbyists in Scandinavia: a Danish Perspective* Parliamentary Affairs 51(4): 579-586, 1998; Yishai Y. *Regulation of Interest Groups in Israel*. Parliamentary Affairs51 (4): 568-578, 1998

most cases reactive and “scandal driven”,<sup>26</sup> thus also lacking effective implementation measures or not cost effective.

- Different political models

Forms of lobbying and, subsequently, potential regulation models largely depend on the historic and cultural contexts of different countries. Even democracy models differ in different countries and that is why good practice standards usually leave broad discretion when choosing approaches to regulating lobbying.<sup>27</sup> At the same time, the risks of undue influence seem to be very similar across countries, thus the fundamental legal instruments for managing these risks are similar as well, with different application and forms.<sup>28</sup>

- Blurred lines between lobbying and democratic participation

Drawing the line between lobbying and the democratic participation of citizens in the decision-making process is difficult. Too strict regulations risk hamper a citizens’ right to participate in the democratic decision-making process, thus making it difficult to draft regulations that would strike the correct balance when identifying what the definition of a lobbyist should be<sup>29</sup>.

Furthermore, in most cases, asserting pressure on decision-makers is related to inter-personal relations and it is difficult to know where to draw the line as to when the exchanging of ideas becomes lobbying. The infamous case of the lobbyist Jack Abramoff, who pleaded guilty to the bribery of government officials is one example which revealed many of the relationships which exist in the decision-making process in the US: the “Abramoff probe” convicted a long list of former officials and business partners.<sup>30</sup>

- Lack of commonly accepted definitions

Younger democracies often do not have traditions of official lobbying, but do have a history of private interest groups influencing decision-making. The need to define lobbying is widely recognized by many experts and international organizations, but in practice the terms “lobbying” and “lobbyists” often become confusing as they are often used to define any process which aims to influence state officials.<sup>31</sup>

- Latent nature of undue influence

As with the crime of corruption, both sides are usually interested in concealing the act of undue influence, thus making it very difficult to identify in practice. In cases of undue influence, corruption may become “legal” for further stages and if the moment of exchange is not captured, it is very difficult to trace at a later date. Businessmen and politicians may exchange favors that “pay each other” over time by the allocation of specific legislation or procurement contracts and distributing

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26 Organization for Co-operation and Development *Building Trust Through Fairer Decision Making: In-depth Report on Progress Made in Implementing the OECD Recommendation on Principles for Transparency and Integrity in Lobbying*. 2013, OECD Conference Center. P. 29

27 Report on the Role of Extra-Institutional Actors in the Democratic System (Lobbying) Adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013), accessible online [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)011-e) P. 6 (retrieved 15/01/2014)

28 See, for example, an article by Carla S.J.M. Millar and Peter Köppl analyzing the relationship between the interpretation of the terms “public affairs”, “lobbying” and different cultural, historic contexts. “Perspectives, practices and prospects of public affairs in CEE: a lobbying future anchored in an institutional context”, *Journal of Public Affairs*. Vol 14 (number 1 pp 4-17), 2014

29 Report on the Role of Extra-Institutional Actors in the Democratic System (Lobbying) Adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013), accessible online [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)011-e) (retrieved 15/01/2014)

30 See, for example: Weisman J., January 8, 2006. *Abramoff Probe Turns Focus on DeLay Aide* <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/09/AR2006010900952.html>; Sherman M., April 21, 2012 *Tony Rudy, Former Tom DeLay Aide, Last To Be Sentenced In Abramoff Probe* [http://www.huffingtonpost.com/2012/04/21/tony-rudy-jack-abramoff\\_n\\_1442656.html](http://www.huffingtonpost.com/2012/04/21/tony-rudy-jack-abramoff_n_1442656.html)

31 Millar CCJM, Kasl Kallmannova D. 2013 *Public Affairs in CEE: on the way to transparency?* Conference paper, Stockholm September 2013

political campaign funding; or simply through an explicit switch in the political power 'chair' among the elite players. Even the simple repeated bribery of politicians may also be encompassed by this notion if we think of the bribe as the "political campaign funding" itself.<sup>32</sup>

## MANAGING CORRUPTION RISKS IN LOBBYING

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Taking these issues into account, this paper aims to address the problem of managing risks in lobbying from the end point, looking for potential legal instruments to contribute to ensuring that (1) attempts to unduly affect the decision-making process are recorded and unrecorded attempts raise timely red flags and (2) that there are mechanisms in place to capture potential cases of undue influence.

To address these points, for the purpose of this research the decision-making process is conditionally broken down to four main stages. Classically, J. L. Hyland identifies the four stages as 1. Agenda-setting and the identification of alternatives; 2. Comparative assessment; 3. Decision between alternatives and 4. Implementation<sup>33</sup>.

For the purposes of this research, this process will be elaborated by adopting a wider definition of "decision-making" to include not only legislative bills, but also other decisions.

The first hypothetical stage is defined in this paper as the setting of the agenda and includes preparing the official hearings or any other kind of meetings aimed at putting particular issues on the official agenda or any other kind of activity which has the aim of initiating discussions on particular issues at the decision-making level. The outcome of this stage may be defined as the appearance of particular issues on the official agenda and the initiation of discussions thereon.

The second stage comprises any kind of processes concerning the aggregation of ideas, ranging from state actors discussing ideas on new regulations, to non-state actors discussing/providing ideas for adopting new regulations, or amending or withdrawing existing ones. This is the stage where assessments should be made to be followed later and the bill (or amendment) is drafted.

The third stage includes selecting decisions from alternatives and the drafting of the document or the presenting of a draft document for signing (in cases of regulations passed by particular institutions). It includes voting or other forms for passing the regulation (signing, etc) to turn the document into something legally enforceable.

The final stage is the implementation of the decision in practice.

## LEGAL INSTRUMENTS AS A FORM OF MANAGING CORRUPTION RELATED RISKS

While being a widely researched subject, in practice lobbying remains a rather secretive activity and there is scarce data on the actual effects of undisclosed lobbying, the forms that it most frequently takes, and the sectors which are affected the most.

One of the few sociological surveys aiming to fill in this gap is the lobbying survey conducted by Burson–Marsteller in 2013. This survey revealed that nearly a third of politicians and senior officials from 20 EU countries considered the most negative aspect of lobbying to be that interests are not

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<sup>32</sup> Kaufmann D, Vicente P., *Legal Corruption* Second Draft, October, 2005, [http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Legal\\_Corruption.pdf](http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Legal_Corruption.pdf) (retrieved 24/04/2014)

<sup>33</sup> Hyland, J.L., 1995: *Democratic Theory: The philosophical foundations*, Manchester University Press, Manchester.

clearly outlined or that there is a lack of transparency. The survey on lobbying for lobbyists (OECD, 2009) and the survey on lobbying for legislators (OECD, 2013), similarly provided that transparency in lobbying practices can help alleviate actual or perceived problems of inappropriate influence peddling by lobbyists. This principle of disclosure and transparency seems to dominate all conversations about lobbying regulation.

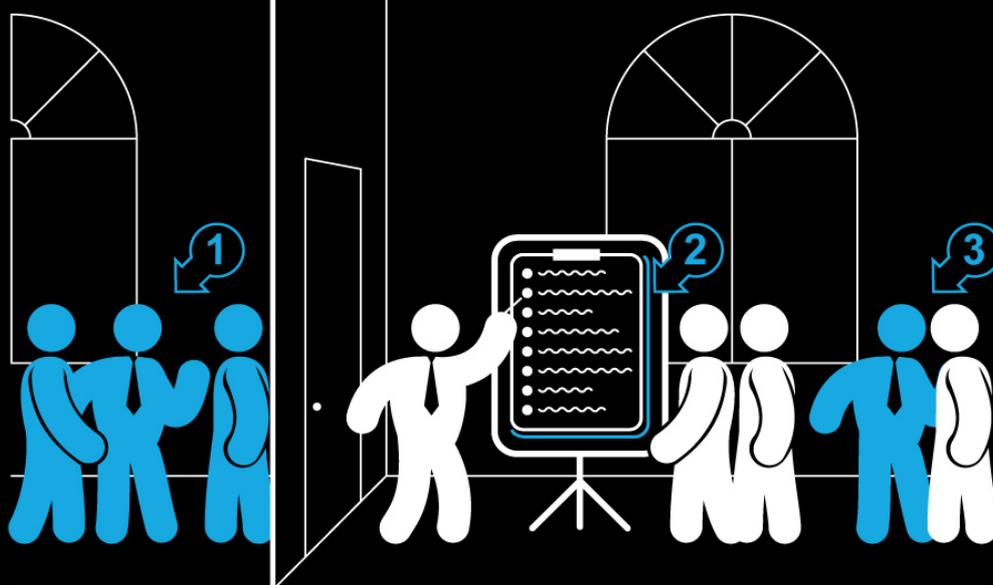
Other principles defining lobbying regulation are defined as balance, fairness, enforceability and ensuring that it adequately addresses specific socio-economic contexts. Back in 2010, the Organization of Cooperation and Development (OECD) established the main principles of an effective legal regulation which largely remain very relevant today. In general, the principles define what the regulatory framework of lobbying activities should be and while they should form the basis of any sound regulatory framework for lobbying related activities, as the OECD notes, it would be barely possible to have one model that would suit all legal and socio-economic contexts.

Instead of focusing on one model, this paper aims to provide an overview of the major corruption and transparency risks in activities related to lobbying at different decision-making stages and offer potential risk management solutions from the regulatory perspective.

The purpose is to not focus on regulation as the only viable solution, but to analyze which regulatory tools, if chosen, could act as effective risk management mechanisms.

# THE FIRST DECISION-MAKING STAGE

## 1/4 | SETTING THE AGENDA FOR DECISION-MAKING



### ACCOUNTABILITY RISKS AT THIS STAGE:

- 1** Lack of opportunity to provide input when setting official agendas. This can happen, for example, if agendas are drafted abusing fast-track processes, or are drafted behind closed doors
- 2** Lack of disclosure with regards to who supports certain issues on the agenda. This makes it harder to trace the links between interest groups and forthcoming decisions
- 3** Lack of openness and transparency, allowing for select interest groups to put certain issues on the agenda based on narrow private interests

### RISK MANAGEMENT MECHANISMS:

- Clearly defined procedures for submitting proposals for agenda-setting
- Obligation to publish the diaries/schedules of decision-makers (the higher the level within the institution, the stronger the rules for publication)
- Clear guidelines for exceptions and/or fast-track processes for drafting official agendas and introducing new items

- Clear procedures for submitting proposals for agenda-setting;
- Obligation to publish the agendas of decision-makers (the higher the level of the institution, the higher publication standard);
- Clear guidelines for exceptions and/or the acceleration of procedures for drafting official agendas and inserting new items

For any kind of decision to adopt, amend or repeal any kind of a bill, this must first appear on the agenda of policy makers. For particular issues to be discussed in public hearings or decisions to be taken, they must first appear on the official agenda. Only if a certain issue is placed onto the agenda, does it become a subject for further stages and have the potential to become an official decision.

If this stage is not transparent, it allows for interested groups to put those issues which determine the protection of their interests' onto the official agenda, which creates the preconditions to advocate for favourable decisions later on.

During the interviews conducted for this research, a wide scope of different methods of influence was identified. Such methods range from official and unofficial meetings with public officials to the initiation of extensive media coverage on particular issues, the initiation of public petitions, or even entire publicity campaigns, designed to raise public concerns which subsequently make politicians put a particular issue on the agenda. The most frequently used official methods seem to include official requests to decision-makers, official meetings with decision-makers during their official office hours and different forms of public petitions.

The major risks of undue influence at this stage are all related to a lack of clarity in the rules as to how the agendas are set, a lack of openness in the setting of the agenda, ambiguous exceptions allowing for certain issues to appear on agendas which do not follow the regular procedures and a lack of official records behind agenda-setting.

Accountability risks at this stage:

- The risk of certain issues being put on the agenda at the "last minute" following an accelerated procedure, thus not allowing other interested parties to provide quality input and decreasing public engagement. This may happen for many reasons, either due to a lack of good governance standards or due to bribery, nepotistic or other relations between private interest groups and politicians, or the trading of influence.
- The risk of a lack of disclosure with regards to who stands behind certain issues on the agenda, making it harder to trace the links between certain interest groups and certain decisions made in the future and making it almost impossible to timely identify potential conflicts of interests;
- The agendas are set not following the principles of openness and do not allow for public scrutiny and subsequently even encourage those willing to participate in the decision-making process to use potential "shortcuts" (personal acquaintances, unofficial meetings, etc).

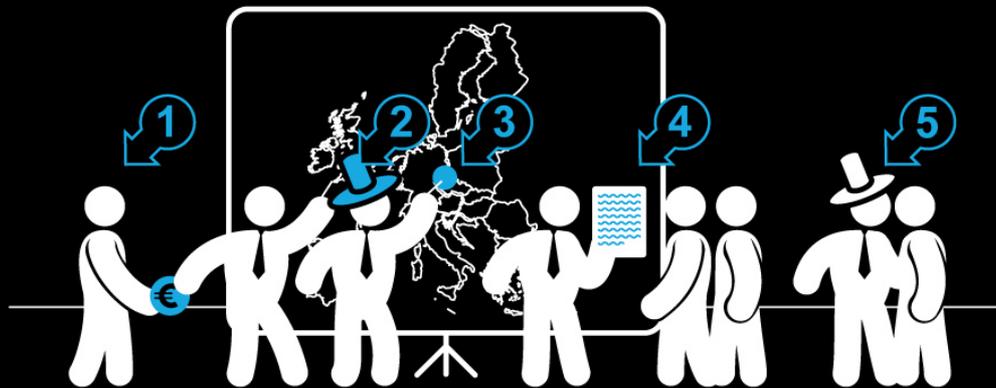
There are no possible legal tools which would allow all of the interest groups standing behind all of the different agenda-setting stages and amendments to be captured effectively. It is also probably impossible to capture all the individuals or companies standing behind public relations campaigns aimed at affecting politicians by increasing public awareness of particular issues and it is equally impossible to hope that all interactions regarding issues on official agendas take place during the official office hours of the decision-makers. Moreover, there is no need to do so, as any attempt to overview everything would be completely cost ineffective, almost impossible to enforce and would probably threaten freedom of expression at some point.

What is possible, as one of the lobbyists interviewed noted, is to ensure that the public knows how to officially propose putting particular issues onto the agenda by setting clear standard submission procedures, making sure that there are no procedural loopholes allowing official agendas to be changed “overnight” and that as many agendas as possible are publicly accessible. The latter, of course, depends on the level of the public institution and its nature – and there is also the risk of “losing the ends” in having too much information, so the higher the level, the higher the standards of publicity should be. As lobbyists working with national parliaments, local government institutions and different ministries note, a lack of accessible public agendas may also become an incentive to search for personal acquaintances and unofficial “inner” sources with the aim of proposing amendments to agendas, thus promoting a culture of secrecy.

# THE SECOND DECISION – MAKING STAGE

2/4

## COMPARATIVE ASSESSMENTS



### ACCOUNTABILITY RISKS AT THIS STAGE:

- 1 Decision makers may draft proposals according to their own private interests or that of other people, following unofficial agreements that were made (clientelism, trading of influence, bribery and other forms of corruption)
- 2 Lack of participation in decision-making debates means that access is only granted to certain groups with a vested interest, which are able to afford professional lobbyists or which enjoy special access to the decision-makers
- 3 The risk that decisions being made will only take into account narrow interests and will not be based on quality impartial arguments that take into account the public interest, thus distorting the legal market. This can negatively affect industries or even the broader socio-political landscape
- 4 The risk that influence on decision-making will be indirectly exercised through political donations and contributions
- 5 Lack of disclosure of potential conflicts of interests, allowing decision-makers to benefit their private interests

### RISK MANAGEMENT MECHANISMS:

- |  |   |
|--|---|
| → Clear guidelines allowing for public engagement, and public/expert consultations that contribute to inclusive and open decision-making processes | → Easy-to-use database of legal acts (or, depending on the institution, other official decisions) |
| → Publicly accessible supporting documents, showing argumentation for specific proposals   | → Clear definitions of lobbying/lobbyists and a publicly accessible lobbyists register            |
| → Effective regulation and control of conflicts of interests; codes of conduct; revolving door regulations   | → Clear guidelines for the use of feasibility studies and cost-benefit analysis                   |
|  | → Publishing minutes of official meetings   |

- Clear guidelines for allowing public engagement, public and expert consultations to contribute to an inclusive and open process when preparing to make decisions
- The obligation to publish accessibly supporting documents providing argumentation for specific proposals
- The obligation to consider feasibility studies and cost-benefit analysis as effective measures to contribute towards ensuring that decisions are based on as much objective argumentation as possible
- The existence of clear definitions of lobbying/lobbyists and a publicly accessible register providing a list of all lobbyists; potentially also including lobbying reports
- Clear regulations and systems for monitoring conflicts of interests of public officials, codes of conduct, revolving door regulations
- The existence of an easy to use database of legal acts (or, depending on the institution, other official decisions) and ensuring that there is effective access to information about hearings on specific issues
- The timely publishing of agendas of when and what decisions are to be discussed at public meetings (also acting as a preventive measure)
- The obligation to publish the minutes of official meetings (incl. local and executive branches) in which discussions about particular decisions take place
- Effective oversight

In theory, comparative assessments should take place every time an idea is adopted, amended or repelled, or when any kind of a decision is raised, and every policy decision should be based on sound arguments and, where relevant, a thorough analysis of specific sectors and situations. At this stage, input on decisions should be gathered from different actors and sources. Public hearings, meetings and the entire principle of open government is based on the notion that public inclusions not only help to provide more input into the decision-making process, but also provide at least some degree of accountability. Tracing which input from which interested groups actually influenced which legal acts may be extremely complicated. Even more so, such influence may affect the entire direction of a policy, affecting not one, but a number of legal acts. For example, an IMF working paper published in 2009 linked intensive lobbying by the financial, insurance and real estate industries in the US with the high-risk lending practices<sup>34</sup> which were argued to be one of the reasons for the recent economic crisis.

At the same time, it is difficult to even determine where to draw the line between just “sharing ideas” and actually asserting pressure on the decision-making process. A political system is considered to be transparent if information is available to those who will be affected by governmental law-making, decisions and enforcement, and when the information is accessible, sufficient, and easily understandable;<sup>35</sup> in the context of lobbying this should mean that not only information about government activity, but also about private interests attempting to influence public policy be made public and be easily accessible.

It seems that the methods used to influence decision-makers at this stage are very similar to the methods used in the first stage. In addition to those methods, however, the targeting of officials

34 Blanchard, O. *The Crisis: Basic Mechanisms, and Appropriate Policies*, International Monetary Fund working paper, 2009. Available online: <https://www.imf.org/external/pubs/ft/wp/2009/wp0980.pdf> (retrieved 23/04/2014)

35 Report on the Role of Extra-Institutional Actors in the Democratic System (Lobbying) Adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013), accessible online [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)011-e) P. 14 (retrieved 15/01/2014)

directly seems to be used more frequently through providing a privately conducted analysis defending selected positions. Similar shadow methods used at this stage also include unofficial meetings with public officials which take place after office hours and providing public officials with supporting data (analysis, research, argumentation lines), which is then later presented as official supporting rationale from the public office and give no indications of their actual authorship.

There is a general consensus that ultimate responsibility for integrity in lobbying lies with those who are being lobbied<sup>36</sup> but the mechanisms needed to manage such risks are very important. The risk of unrecorded influence is very high at this stage. This would not be an issue in itself, however if there is undue influence, it may become impossible to trace it at further legislative stage, thus legalizing corruption for further implementation.

At this stage in the decision-making process, the drafting of a bill or any other document has already started. While the risks remain similar, it seems that it might be more cost effective for private interest groups to engage at this particular stage.

**Accountability risks at this stage:**

- The risk that decision-making debates (either public meetings or any other form) will only be accessible for those particular groups with a vested interest which are able to afford lobbyists or which enjoy special access to decision-makers. This might either happen due to lack of good governance or where there is a specific interest on the part of a decision-maker to conceal some of the information;
- The risk that new decisions will only take into account narrow interests and will not be based on quality impartial arguments which take public interest into account, thus distorting the legal market and negatively affecting industries or even countries;
- The risk that decision-makers will propose and draft decisions following either their own private benefit or following unofficial agreements on behalf of the private benefit of another person. Both of the latter may happen either due to the private interests of the decision-makers themselves or due to particular cases of clientelism, trading of influence or even bribery;
- The risk that influences on decision-making will be indirectly exercised through political donations and contributions;
- The risk that potential conflicts of interests will go unnoticed, allowing particular decision-makers to benefit.

The requirement that the agendas of hearings or other forms of meetings where particular decisions are discussed be published in advance may contribute to public participation and increased transparency. As the lobbyists and CSO representatives interviewed noted, from a practical point of view ensuring that stakeholders have the opportunity and access to participate in the decision-making process starts by first making the information about decision-making, agendas and minutes accessible and available to all parties. The timely publishing of the dates and agendas of hearings on particular issues and/or legislative proposals means that the opportunity exists for interested stakeholders to participate in such hearings (or other procedures, where possible). However, this is naturally not possible in government branches and at all levels, both due to the amount of different decisions which are taken daily, and due to the very specific nature of such decisions.

It would be cost ineffective (and maybe even a breach of the right to privacy if the requirement extends to after office hour activities) and impossible to monitor any requirement for all policy

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<sup>36</sup> See, for example, Organization for Co-operation and Development *Building Trust through Fairer Decision Making: In-depth Report on Progress Made in Implementing the OECD Recommendation on Principles for Transparency and Integrity in Lobbying*. P.3,

makers to publish all of their conversations with potentially interested stakeholders. Therefore, risk management mechanisms are needed to ensure that the decision-making process is not based solely on the preferences of selected individuals. The records of at the least those meetings that take place during the office hours should be made accessible to the public. As both the major public relations and lobbying companies and the decisions-makers become more and more concerned about equal access and their reputation, at least some part of all the meetings related to specific decisions take place during official office hours. Therefore, having publicly accessible records of such meetings would reduce the amount of meetings which take place in the grey zone. An effective system for declaring conflicts of interests which allows for public scrutiny makes it more difficult for decision-makers to act in their own interest without taking the public into account.

Another tool for managing risks at this stage is to organize public consultations for certain decisions. Naturally, not all issues on the agenda would be of interest to external actors and it is impossible to organize public consultations for all decisions made at different branches and at different levels of government. However, the most important decisions should encompass public consultations as a natural part of the process and engage experts where relevant. In this way, not only would more means for citizens engagement be created, but a culture of openness would also be fostered.

In most public procedures, it is the responsibility of decision-makers to ensure that the quality of their decisions is high and that the origins of the ideas behind particular decision are clear. At the same time, since ideas do not leave footprints, it is often impossible to identify whether this standard is being ensured. There are different potential instruments in place helping to ensure this, which usually include requirements to prepare explanatory notes explaining the rationale and origins of particular proposed regulations, other supporting documents, and cost benefit analysis or feasibility studies where relevant. Therefore, it is crucial to ensure that the existing system ensures adequate requirements for publicly accessible explanatory notes when decisions proposals are drafted. Such documents should define the goal of the proposed decision, a list of stakeholders which have been consulted, and a clear line of argumentation. In particular cases, especially, when the decisions are related to allocating public funds to particular fields, sectors or awarding public contracts, a cost-benefit analysis may become indispensable.

It is crucial that the interactions with lobbyists (either officially defined as such or any other interactions the aim of which is to influence the decision-making process) at this point are already kept on record and are later made available for reference.

For this, a mutual understanding between decision-makers and lobbyists as to what exactly lobbying is should exist to a contribution to the understanding of what the legal and accountable ways of influencing decision-making are. As has already been noted, there is no single definition of lobbying which could be recognized as fitting and addressing all of the potential risks related to lobbying. Countries may choose how to define lobbyists or define the act of lobbying, just as they chose different scopes of such definitions. Their definitions should be selected and drafted based on an extensive analysis of the local context, and there has already been extensive research in the field – the only general rule here is that ambiguous exceptions should not be allowed. Furthermore, definitions of lobbying should include all factual lobbying activities, instead of focusing on professional lobbyists only. The definition offered by Transparency International draws heavily on the Sunlight Foundation Lobbying Guidelines,<sup>37</sup> the OECD Report on Progress made in implementing the OECD Principles for Transparency and Integrity in Lobbying (2014) and Council of Europe Parliamentary Assembly Recommendation 1908 (2010) on lobbying in a democratic society. It may be used as a starting point for defining lobbying on the national level. According to Transparency International, lobbying may be defined as “Any direct or indirect communication with public officials, political decision-makers or representatives for the purposes of influencing public decision-making carried out by or on behalf of any organised group”.

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<sup>37</sup> <http://sunlightfoundation.com/blog/2013/12/03/announcing-sunlights-international-lobbying-guidelines/>

As practitioners note, it is crucial not to create exceptions for particular interest groups when defining lobbyists, since such exceptions may easily become ways to circumvent laws.

In different institutions, the right to propose ideas for regulations and amendments is vested in different actors. In national executive institutions, it is the responsibility of ministers and the administration to ensure fair and integral procedures. Many of the informants working in the national fields in different EU countries interviewed noted that it is the executive branch, mainly the different ministries, which often face the challenge of channelling the origins of the specific decrees of ministers or the processes which trigger such decisions. While decisions at this level may have a rather direct effect on particular sectors (for example, even a large effect on the allocation of funds), have a long lasting impact, and may even form the basis for allocating financial flows, the procedure for adopting such decrees does not usually require any explanatory notes and does not have any means for the inclusion of stakeholders. Therefore, as the informants noted, it is quite difficult to identify potential undue influence in such cases. The potential cost effective legal instruments for managing these risks are barely sufficient; therefore, it should be ensured that there are requirements that at least the calendars of such decision-makers be published and that there is a legal obligation to publish both the drafts of such documents and the date of when the document will be signed.

At the local government level, the situation is similar. Depending on the political landscape, the decision-making power is usually vested in the council and the ideas of new legal acts should, at least theoretically, be discussed there first. Therefore, it is very important that civil servants are integral, that they have sufficient independence guaranties and safe reporting channels, and that they declare their interests too. Also, the requirement to publish the minutes of such meetings becomes relevant. The legal obligation to provide the dates of upcoming meetings and the agendas set for such meetings in a timely manner should be an element of any legal system.

As a result, public officials at all levels and branches become responsible for reporting contacts with lobbyists and ensuring that such contacts are conducted with the relevant good public administration principles: impartiality, access to information, transparency, fairness and the managing of conflicts of interests. Sound and clear standards of office should be set in codes of conducts. At the same time, as this stage is very vulnerable from the personal relations point of view, the need for adequate mechanisms which aim to ensure a cooling off period becomes relevant in order to ensure that the politicians do not abuse their personal networks should they change careers and begin to work in the private sector – or vice versa. On a similar note, preventive systems requiring the declaration of the private interests and assets of public officials are often perceived as an important tool in managing the risk of corruption and of a lack of integrity in lobbying. By providing publicly accessible information, such tools may indeed act as an additional preventive tool for lobbying transparency by helping to trace potential conflicts of interests at the decision-making level and in tracing the sources of the assets of public officials.<sup>38</sup>

In general, the integrity, fairness, openness and inclusiveness of decision-making procedures and the regulatory safeguards which are usually mentioned in the context of the effective engagement of citizens, form a sound basis for integrity here as well. There are different approaches towards this depending on the political and cultural context, but there are several mutual denominators, for example, the obligation to organize public consultations (both formal and informal), the publishing of agendas and the inclusion of stakeholders in discussions from the very first stages, and the opening up of hearings on particular bills to interested parties.<sup>39</sup>

A rather simple tool for managing the risk of the undue influence of private interests at this stage is the requirement for lobbyists to prepare reports providing information on who, when and to what

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38 Kalniņš, V. *Transparency in Lobbying: Comparative Review of Existing and Emerging Regulatory Regimes*, the Centre for Public Policy PROVIDUS, [http://www.europeum.org/images/lobby\\_pasos\\_final.pdf](http://www.europeum.org/images/lobby_pasos_final.pdf) P. 14

39 See, for example, the overview of how OECD countries organize consultations here: Organization for Co-operation and Development *Building Trust through Fairer Decision Making: In-depth Report on Progress Made in Implementing the OECD Recommendation on Principles for Transparency and Integrity in Lobbying*. P.19-21

extent they were lobbying and what was the goal in a timely manner. Lobbyists themselves argue that too burdensome reporting requirements might have the opposite effect, and it is widely acknowledged that “too burdensome reporting mechanisms shall collapse under their own weight”,<sup>40</sup> but a simple set of questions would help to ensure an easily accessible database that may act as a tool for tracing influence on particular policies and regulations. In this case, the form is as important as the content. To enhance transparency, public scrutiny is crucial. Therefore, the reports should be obligatory filed using online tools and user friendly databases. Politicians and other decision-makers should be obliged to record all of their interactions regarding official decisions, however it is more tangible to oversee this from the point of lobbyists as the representatives of any other profession simply because such reports are easier to search by a selected subject or access when searching for particular decisions.

At this stage, also, it is very important for the decision-makers to understand which stakeholders represent what type of interests. Therefore, the need to establish which lobbyists are actually representing particular private interests in a country, might act as an effective risk management tool. A mandatory, publicly accessible registry has the potential both to provide a clear and easy to use way of finding out who those people who work as lobbyists are and as a tool for decision-makers to manage risks when communicating with them. While there is no empirical evidence that a register in itself may act as an effective accountability tool, it may be a convenient and cost effective measure acting as a directory for decision-makers willing to check whether they have been contacted by a registered lobbyist who will then have the duty to report the interaction later on. The use of a register of lobbyists as a tool for managing corruption and undue influence is analysed more extensively risks in further chapters.

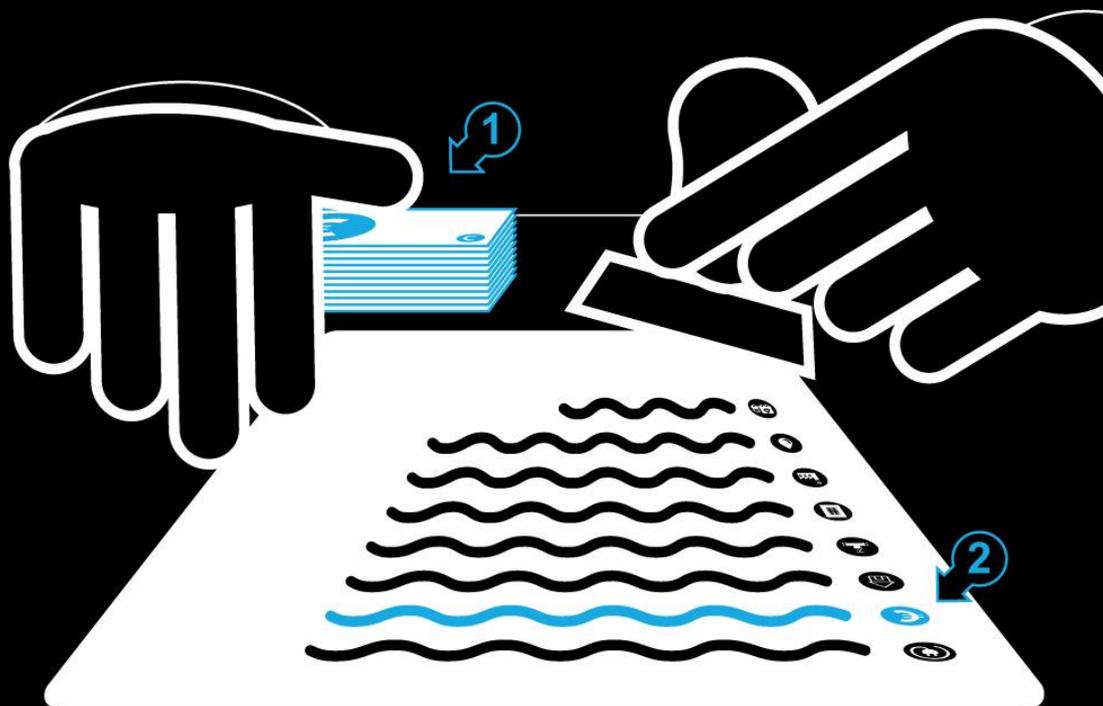
In a broader sense, there is also the need to manage the risk of undue influence through financial contributions to political campaigns or for politicians/political parties. There is no general consensus among countries or experts as to whether lobbyists should be required to report their contributions to political campaigns and politicians separately. Addressing this issue from the end point, a risk management tool in this regard should be comprised of a sound political party funding legal framework in the first place, so that a specific focus on lobbyists may not be necessary. By ensuring that the financial reports of all political parties and politicians are published in a timely manner, that they are detailed (listing not only all contributions, but also all costs to manage indirect contributions risks) and that there is an oversight mechanism in place, this risk may be managed without additional tools and regulations. At the same time, the requirement to provide this information in lobbying reports may be a more simple approach as such information is then easier to comprehend for scrutiny. However, experts note that whatever the regulations in this regard, there seems to be many ways of providing financial contributions “off the record.” For example, lobbyists may be contributing to charity organizations which have connections with certain politicians, thus contributing to the “election potential” for the politicians. However, as there are no tools that would eliminate this risk of indirect financial contributions from lobbyists entirely, this risk management tool would therefore need to be accompanied by others.

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40 Countries are often criticized for not paying enough attention to the costs of administrative burden when establishing lobbying related regulations. For more, see, for example: Organization of Co-operation and Development. *Lobbyists, Governments and Public Trust, Volume 1 Increasing Transparency through Legislation*. 2009

# THE THIRD DECISION-MAKING STAGE

## 3/4 | DECISION BETWEEN ALTERNATIVES



### ACCOUNTABILITY RISKS AT THIS STAGE:

- 1 Politicians may be bribed or unduly influenced in decision-making processes
- 2 The public interest is not taken into account

### RISK MANAGEMENT MECHANISMS:

- Publicly accessible records of voting at all levels
- Reporting mechanisms
- Publicly accessible supporting documents

*- Records of voting at all levels*

*- Reporting mechanisms*

The experts interviewed generally noted that this stage is not as vulnerable to corruption as the previous two, quoting the fact that documents have already been drafted by this stage and that there is no space for undue influence. Also, practitioners claim that it is highly unlikely for those interested in unduly affecting decision-making to wait until this stage as it carries too high of a risk.

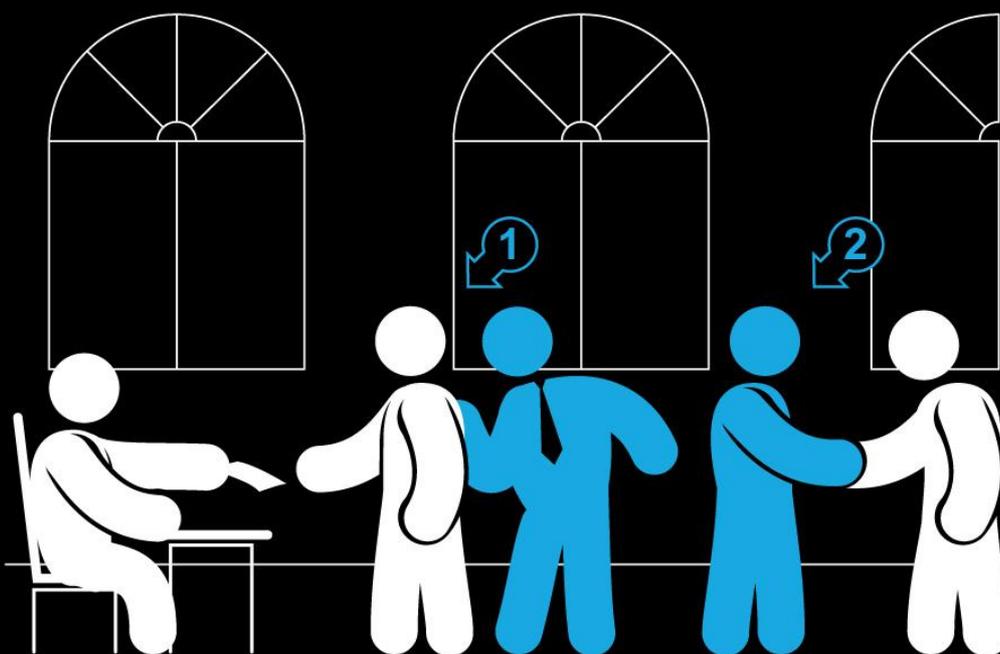
However, others also refer to cases in which private interests wait for this particular stage calculating the “costs and benefits” of potential interventions. Bribing public officials before voting or otherwise unduly influencing the outcome of the adoption a decision in some cases may be a shorter and easier way than aiming to affect the entire decision-making procedure. At the same time, law enforcement officials claim that this is easier to trace than earlier undue interventions as the possibility that at least one of the public officials who have been approached reporting such an encounter increases.

The mechanisms for managing undue influence risks at this stage are therefore minimized if the risks have been well managed in the prior stages. At both the national (parliamentary) and municipal levels, accountability increases if the voting results have been made public and accessible in a user friendly manner. This should be the minimum legal obligation that also has the potential to engage more citizens into monitoring policy making in the first place.

In addition, this stage stresses the necessity for proper reporting mechanisms and obligations to report potential malpractice or even attempted undue influence. While this is actually crucial at all stages the decision-making process, the final stage may become the point at which it is decided whether a draft document becomes an official decision. Therefore, there should be a legal standard requiring known or alleged corruption or fraud cases in the public sector to be reported. There is no consensus as to whether a failure to do so should be regarded as a failure to comply with the law, but the general idea is that a proven failure to do so should indeed be regarded as a breach of good governance standards and act as grounds for the deprivation of the right to work in the civil service.

# THE FINAL DECISION-MAKING STAGE

## 4/4 | IMPLEMENTATION



### ACCOUNTABILITY RISKS AT THIS STAGE:

- 1 The risk that the decision will not be implemented as a result of undue influence
- 2 The risk that the decision will be implemented in alternative ways as a result of undue influence

### RISK MANAGEMENT MECHANISMS:

- Publicly accessible meeting agendas, calendars and minutes of the decision-makers
- Clear arguments for amendments

- *Publicly accessible meeting agendas, calendars and minutes of the decision-makers*
- *Existing clear arguments for amendments*

Once an official decision has been adopted, it becomes enforceable and is set for implementation. It seems that this stage is not immune from interest groups attempting to influence the implementation, interpretation or amendments of decisions either. As the spokesman of the Centre for Responsive Politics, Michael Beckel has said “Until it is chiseled in stone, the lobbying continues.”

The methods of influence used at this stage are mostly similar to those used in the above-mentioned stages. In order to alter the way particular notions are interpreted by official institutions, legal arguments are engaged more often. Unofficial and official meetings with decision-makers, publicity campaigns, and operating through intermediaries seem to be the other most commonly used methods.

Therefore, the publishing of the official agendas of decision-makers becomes very important as it helps to send the signal that decision-makers are open to discussions (helping to reduce understanding that unofficial meetings are needed). It may not be very effective to publish all minutes of all meetings, but in practice it does help to identify not only which interest groups were interested in what changes, but also the content of official meetings may contribute to an understanding of the original intentions of decision-makers.

However, just as in previous stages, there is no effective way to control whether all meetings, especially those which take place after office hours, are reported. Therefore, as in previous changes, it is important to ensure that if amendments are actually proposed, there is an obligation to provide argumentation in the supporting documents.

# INSTRUMENTS LAB: LEGISLATIVE FOOTPRINT

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The **potential** – reducing shadow lobbying by providing a record of all inputs, contributes to the culture of accountability and openness, providing additional insights as to what were the main arguments for decisions

The **challenge** – there is no tangible way to ensure that decision-makers report all input from all stakeholders

One of the tools included in the OECD Principles for Transparency and Integrity in Lobbying (2010) which is often mentioned as having the potential for managing corruption risks in lobbying activities is a legislative footprint. A legislative footprint may be a part of a wider model regulating lobbying activities in a country or simply perceived as a part of ensuring quality policy making and managing the risks of undue influence in the decision-making process. In a sense, it also has the potential to contribute to increasing public trust in decision-making by aiming to publicly disclose information on who is contributing to policy making and thus challenging the often prevailing assumptions that decision-making is determined by shadow actors and corporations.

In general, a legislative footprint is a document detailing all the contributions to the particular draft decision providing who, how and when particular inputs were proposed. A legislative footprint may be broadly defined as “a document that would detail the time, person, and subject of a legislator’s contact with a stakeholder.”<sup>41</sup> It is an indicative list of the interested representatives consulted during the preparation of decisions with the idea of giving a picture of the different interests mobilized by the decision-making process and thus helping the public, the media and anyone interested to scrutinize legislative work.<sup>42</sup>

A legislative footprint is most frequently associated with bills and legislative decisions, partly because it would be impossible to provide such documents for absolutely all decisions at all levels and branches of state institutions, and partly because it is legislative bills which usually affect entire industries, sectors or a larger group of people (as opposed to administrative decisions, for example). In theory, this tool could be applied at different institutional levels, but requiring it at all cases would not be cost effective and would hardly provide clarity. Unless the compilation of inputs can be automatized by collecting all online inputs, the requirement to have a legislative footprint should be applied at least for Parliamentary and Governmental decisions (including laws, decrees, and decisions).

From the anti-corruption angle, legislative footprints may help to ensure that the influence of interest groups on policy-making is not disproportionate, and that private interests are not preferred over public interests, which could otherwise lead to undue influence and state capture. It also allows voters to monitor parliamentarians’ activities and to hold them accountable.<sup>43</sup> It has the potential to provide a relatively low cost solution towards increasing transparency in the decision-making process by “reflecting in a transparent manner the breadth of lobbying, advice and input received.”<sup>44</sup> This allows for both the retrospective tracing of channels of influence in cases where potential

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41 Obholzer, L. *A Call to Members of the European Parliament: Take transparency seriously and enact the ‘legislative footprint’* Center for European Policy Studies, No. 256, October 2011 [www.ceps.eu/ceps/dld/6323/pdf](http://www.ceps.eu/ceps/dld/6323/pdf) (retrieved 15/01/2014)

42 Report on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions (2007/2115(INI)) Committee on Constitutional Affairs, Reporter: Alexander Stubb, available for download online here: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-396.734+03+DOC+WORD+V0/EN&language=EN> (retrieved 05/05/2014)

43 Anti-Corruption Helpdesk Query *Legislative Footprint*. Prepared by Martini, M., rev. by Chenie, M. and Hodess, R. for Transparency International, 2013. Available online: [http://www.transparency.org/files/content/corruptionqas/legislative\\_footprint.pdf](http://www.transparency.org/files/content/corruptionqas/legislative_footprint.pdf) (retrieved 15/01/2014)

44 A brief excerpt taken from the draft opinion on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions (2007/2115(INI)), draftswoman: Diana Wallis, available online along with other documents on the development of the framework: <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2008-0105&language=HR> (retrieved 15/01/2014)

conflicts of interests arise and real time monitoring of which interest groups participate in the decision-making process.

While there have been some voluntary initiatives (for example, UK MEP Diana Wallis, UK Conservative Party), to date no countries have adopted this tool in such a formal sense. Therefore, it is difficult to see how it works in practice and identify the challenges and opportunities empirically. Similar regulations exist worldwide which provide information on which actors were consulted for particular regulations in the format of public consultations, publishing the written proposals, etc. This chapter aims to overview these existing regulations by analysing some selected illustrative examples and looking for re-emerging patterns of the successful managing of risks in this regard.

In France, reporters from National Assembly committees submitting bodies of law for debate and voting by the Assembly proper must annex a list of the people who were consulted on the legislation, or the absence of such. However, this is not provided as annexes to particular bills in the final stages of publishing regulations. Therefore, while there are preconditions for tracking interest groups which have been consulted at the Assembly level, this potential is not used to its fullest extent since it fails to provide an exhaustive list of all interest groups consulted during the final legislative stage.

In Poland, there are separate instruments which when taken together constitute a system similar to that of a legislative footprint. According to the Act of Law on the Lobbying Activity in the Legislative Process, ministries are obliged to make any information on actions pertaining to them which were initiated by professional lobbyists together with a description of the expected solution available in the Public Information Bulletin immediately. Once a year, the managers of offices serving public authorities are obliged to prepare information on those activities which were commenced by professional lobbyists with reference to them in previous year, including both the specification of the matters lobbied and a description of the influence exerted by professional lobbyists in the legislative process on the matter.<sup>45</sup> While this is not all provided in annexes of particular draft bills, this information has to be published in the Public Information Bulletin. In Poland, these notifications are all made available, except for private addresses.<sup>46</sup> On the governmental portal<sup>47</sup> information on all bills that are proceeded by the government and within the government (before sending it to the parliament) is published. In general, proposals, reports on consultations and lobbyists statements (if there are any) are published. However, practitioners note that if you compare this portal to what is published on the particular ministries websites (they have to run their own legislative web pages), you may often find that some documents sometimes are missing. Parliament has its own portal where it publishes all bill proceeded there (including governmental) - [sejm.gov.pl](http://sejm.gov.pl) and [senat.gov.pl](http://senat.gov.pl). The Parliament is obliged by its own articles – and, according to practitioners, one of the major problems of this legislation is that it covers only very selected group of institutions, while others are completely outside, even if they have legislative initiative.

Similarly in Lithuania, all notifications/comments submitted for particular draft bills by interested parties must include the identities of the parties who made the proposal and concrete proposals. Unlike in Lithuania, if the notifier acts as a professional lobbyist, there is the requirement for the confirmation of their entry onto the Register. In Lithuania, all such written proposals are supposed to be provided online as annexes to laws, but only written submitted proposals are included in these annexes, along with official comments and submissions from other public interested institutions. According to lobbyists working in Lithuania, this tool is therefore not seen as an effective accountability measure, but rather as something to see what the positions of the different state institutions which were providing their input were. Politicians also seem to see this tool in such context. Therefore, its potential use to shed light on how decisions are influenced remains unexplored.

Estonia is an interesting case of contributing to more openness by using existing online solutions. [www.osale.ee](http://www.osale.ee) is an online platform where everyone can freely comment on existing bills, suggest proposals and ideas to the government and follow the development of specific bills. It requires an

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45 The Act of Law on the Lobbying Activity in the Legislative Process  
<http://legislationline.org/download/action/download/id/828/file/c56348c0e63ccb829cdee44827e1.pdf> (retrieved 15/01/2014)

46 More on the Polish regulatory system: GALKOWSKI, J. *Polish Lobbying Law – Towards Transparency.*, 2008  
<http://www.sigmaweb.org/publicationsdocuments/41831780.pdf> (retrieved 15/01/2014)

47 <http://legislacja.rcl.gov.pl/> is

ID-card, Mobile-Id or other online identity approval to log in. When a bill is open for comments on [osale.ee](https://osale.ee) it is possible for an interest group to give their input in a form of a comment. The main challenge with [osale.ee](https://osale.ee) is that it is rather seldom used by the Government or ministries in practice. They tend to use another portal, [eelnoud.valitsus.ee](https://eelnoud.valitsus.ee) (Estonian and EU-related bills), more frequently. This platform is a specific legislative online platform where anyone can make comments concerning specific bills or related documents. The challenge in this case is that many documents which would be interesting for a broader public has only limited access (only to be used within the institution or classified as a state secret, for example), based on the Public Information Act. In practice, the platform is rather difficult for people to use without specific knowledge. As far as I know, official proposals are submitted by ministries or committees. All the documents and comments that have been submitted using these tools are later published in the portal both as a list and as actual files and are accessible for everybody if there are no access restrictions.

While there are countries that have systems similar to legislative footprints, they do not seem to make sure that the collected information is all put in one place, which would ensure easy access to the lists of actors who have provided input on particular bills. While the greatest potential of this tool is publicity, easy access and transparency, scattered reports fail to use the potential that such a tool may have. There are concrete cases when systems, which are similar to legislative footprints, fail to present full-scale information. For example, Ireland's Freedom of Information Act 2014 extends the application of FOI to almost all public bodies and allows better access to government records, in order to better ensure the public's right to information. However, it contains exceptions and, as a result, many significant state-sponsored agencies and organizations are excluded from this Act<sup>48</sup>. At the same time, the first National Action Plan under the Open Government Partnership contains a commitment to introduce a 'legislative footprint', which would include consultation documents, meetings and received submissions, but Irish law itself does not require the publication of a 'legislative footprint'<sup>49</sup>.

Judging from these selected examples, two major models for creating a legislative footprint may be identified:

- A specific separate tool requiring all decision-makers to collect and publish input from interested parties which aim to influence decisions. This is a more proactive approach putting the obligation on decision-makers.
- A compilation of all input received on specific decisions that may be either automatized, collecting and publishing what was provided online using the parliamentary online platform or the online platform of any other public institution where draft decisions are published. If implemented correctly, this would seem to be a cost effective solution and while it will be very difficult to identify unrecorded input and ensure control, this may at least provide a basis for controlling conflicts of interests or trade of influence. Also, if conducted timely, it may also help to raise red flags.

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<sup>48</sup> Transparency International Ireland, Influence and Integrity. "Lobbying and its Regulation in Ireland" 29

<sup>49</sup> Ibid, 30

# INSTRUMENTS LAB: LOBBYISTS REGISTER

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*The **potential** – to provide a precondition for accountable lobbying by providing a list of all individuals and organizations engaged (or willing to engage) in influencing decisions, as well as a potential contribution to effective oversight*

*The **challenge** – the list (register) itself is not an accountability tool and it is impossible to ensure that lobbyists declare all their activities. The register may be seen as an effective tool only when it is part of a broader comprehensive system comprised of requirements to conduct effective public consultations, encouraging better access to decision-making and the higher quality of documents supporting decisions. The register is usually perceived as a database for all registered lobbyists instead of a register of lobbying activities, which also fails to use all the potential it may offer.*

A mandatory register for private or legal persons engaged in lobbying related activities in a country has the potential to act as a risk management tool from two perspectives. First, it provides an easy to access “go to” point for politicians and public officials whenever they are approached by interest groups aiming to affect the outcome of a decision-making procedure. At the same time, it creates the potential for public scrutiny. Secondly, it may serve as a tool for helping to trace interests affecting the decision-making process. The effectiveness of the tool, however, depends largely on how it is constructed.

Two different models may be distinguished here. The first one is the classical “registers” model requiring all lobbyists to register providing predetermined information in order to pursue their activities. The second one is a mixture of voluntary and obligatory requirements, sometimes providing some kind of incentives for lobbyists to register. This chapter will select some of the oldest existing models of registries, some emerging new patterns for regulating such registers and analyze them respectively aiming to establish the preconditions for the success of such a tool in managing corruption risks in lobbying-related activities. The scope will be limited to some illustrative examples from countries which have chosen completely different models, thus searching for mutual emerging trends in succeeding or failing of the registry.

It is crucial to correctly define who should register and what. It seems that two potential models may be distinguished here. First, the model applied in most countries that choose to have a lobbyists register is to demand that all lobbyists should register and provide reports. This approach relies on the notion that lobbying is a professional activity carried out either by professional lobbyists or people who spend a significant amount of time on this. Such an approach allows for the country to have a list of all those who lobby and to browse through their activity logs. It also usually implies that there is a legal definition of a lobbyist and therefore lays foundations to further contribute to the professional community. The second model, which is somewhat similar to the countries that chose to capture all efforts to affect legislation, is to capture lobbying activities instead of lobbyists. This is a reversed legislative footprint model that relies on registering all lobbying activities instead of relying separately on having a separate register. In such cases, there is no separate register for lobbyists and, hence, there may be no separate legal definition of a lobbyist.

The register model can also be partly defined by a choice to impose the duty to register either on lobbyists or politicians, or on both, to some extent. In the US-like model, the obligation of reporting is on the lobbyists themselves, coupled with a strict supervision mechanism. In the EU system, decision-makers (but only on senior levels of the European Commission) are required to disclose meetings with lobbyists, while lobbyists themselves rarely publish any such report and some basic information about the specific institutions they are interested in is published in the transparency register. As have been elaborated further, some EU member states require no reporting whatsoever.

It is complicated to say what works better and who should have the obligation to report. In terms of enforcement, requiring policy makers to report is probably easier to do as they are regulated by laws already - and consistent logging of meetings (and input) is technically easier to do. On the other hand, for example, some Members of the European Parliament (MEPs) reportedly challenge this approach since, given their autonomy as elected representatives, they cannot be ‘forced’ to disclose meetings, which largely undermines the effectiveness of this system.

In this regard, reporting by the lobbyists seems to be more representative disclosure of lobbying activities. It is crucial, though, for such a system to have an appropriate enforcement mechanism, with overseeing officials, sanctions and due procedures.

Another related question is to decide what the limits of reporting should be. There should be a line between requirements to disclose the specific legislative positions as it might run counter to the commercial interests of lobbyists / companies or the protection of its intellectual property. The threshold of reporting could, therefore, be the requirements to disclose meetings with decision makers, with a brief description of the topic of the meeting, provided it happens in their 'official capacity'. The amount of money spent for lobbying, the actual 'beneficiary' ('client') should be disclosed. This should also be linked to legislative footprint (see below).

The Republic of Georgia adopted what can be called the first lobbying register in Europe in 1998. Lobbyists in Georgia must register in order to lobby the President, Vice President, and all legislators in representative institutions at all levels of government. In practice, however, it is difficult to evaluate whether this tool has actually increased transparency and accountability in the decision-making process. As there is no central lobbyist registry with every single government body having separate options for lobbyists to register it is difficult to estimate how many registered lobbyists there are. Registered lobbyists have to file reports containing all the relevant information, including payments and meetings, to the government bodies where they are registered on a monthly basis. However, the complicated system of different registers seems to make it difficult to enforce and monitor. So far, all of this makes the register not very effective from the anti-corruption angle.

In the UK, the Public Affairs Council provides a voluntary lobbyists' register: membership of the Association of Professional Political Consultants (APPC) and Chartered Institute of Public Relations (CIPR) is contingent on registration, but the register is open to non-members too, however it only contains contact information and a list of clients; it is published quarterly.<sup>50</sup> This model was widely criticized due to the fact that the register was only voluntary, failing to capture many private and legal persons who are reportedly actively engaged in lobbying related activities, and it was also criticized as an attempt for lobbyists to stave off statutory obligatory registration.<sup>51</sup> This seems likely to be changed soon, with the Transparency of Lobbying, Non-party Campaigning and the Trade Union Administration Bill which was introduced to the House of Commons in July 2013. With these amendments in place, it would provide that "a person must not carry on the business of consultant lobbying unless the person is entered in the register of consultant lobbyists."<sup>52</sup> However, this attempt has already received widespread criticism<sup>53</sup> for being too narrow and for failing to capture the most active private and legal persons engaged in lobbying activities in the country.<sup>54</sup> On a slightly different note, the Ministerial Code (of Conduct) for Government now includes the requirement for departments to publish details of meetings with outside interest groups, but the requirement has also been criticized for being rather vague and there is reportedly a wide discrepancy between the quality of the information contained.<sup>55</sup>

France also has recently undergone some amendments in the field and has taken a different approach towards creating a register. A register for the Senate is mandatory, but is constructed in a different manner from the classical model where the register contains all lobbyists working in the

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50 Current voluntary registration scheme is available online: United Kingdom Public Affairs Council (UKPAC) Register: <http://www.publicaffairsCouncil.org.uk/en/search-the-register/about-the-register.cfm> (retrieved 15/01/2014)

51 See, for example, the criticism of this voluntary regime by Alliance for Lobbying Transparency - <http://www.lobbyingtransparency.org/15-blog/general/57-up-to-90-of-lobbyists-shun-new-transparency-register> (retrieved 15/01/2014)

52 Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Bill – the draft text. Current stage - third reading in the House of Lords. Available online: [http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0050/lbill\\_2013-20140050\\_en\\_1.htm](http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0050/lbill_2013-20140050_en_1.htm) (retrieved 15/01/2014)

53 Access Info Europe, *Civil society groups warn UK Lobbying Bill is too weak on transparency*, available online <http://www.access-info.org/en/lobbying-transparency/477-uk-lobbying-letter> (retrieved 15/01/2014)

54 See, for example, the criticism of the Bill by Alliance for Lobbying Transparency : <http://www.lobbyingtransparency.org/15-blog/general/94-a-fake-register> or criticism of the Bill by the Deputy Chair of the Association of Professional Political Consultants, Iain Anderson - <http://www.appc.org.uk/lobbying-transparency-bill-it-would-be-difficult-to-produce-a-worse-bill/> (retrieved 15/01/2014)

55 The Ministerial Code (of Conduct) for Government, available online: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61402/ministerial-code-may-2010.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61402/ministerial-code-may-2010.pdf) (retrieved 15/01/2014)

country in regardless of the level at which they lobby. Two registers have co-existed here since 2009 at the National Assembly and at the Senate – each applying only to its own institution. There is no argument for such separation, except that it makes it easier to coordinate logistically. At the Senate, there is the requirement that lobbyists register their names annually (organization and lobbyist) and the interests they represent, thus granting access to the premises of the Senate along with an identification badge. The lobbyist must also register any invitations to travel abroad extended to the MPs, their collaborators or their staff (only 3 declared in 2013). The lobbyist, by entering onto the register, agrees to abide by a Code of Conduct<sup>56</sup>. At the National Assembly, the register was the same until October 2013. There are also new rules for the National Assembly, which were introduced in October 2013, additionally requiring the disclosure by lobbying firms of the name of the lobbyists' customers, and the budget pro-sector they represent. All representatives of interests need to declare information on their activities led the previous year (issues of interest, the form of the lobbying: hearing, symposium, sending of positions, etc.), business turnover or money spent on lobbying activity – but only for lobbying in the Parliament - and the source of funding for associations/NGOs. The lobbyist must abide by a Code of Conduct; in return, they get a badge facilitating the formalities of access to the National Assembly (allowing them to spend less time at reception). An alert system was created to provide information on when a new issue is being discussed (according to the practitioners interviewed, this does not, however, work effectively) and registered lobbyists can put their contributions online (a system which is not working practically either). This register is still voluntary and only pertains to the National Assembly<sup>57</sup>. Just as in the case of UK, this model has received widespread criticism. First of all, according to the representatives of local CSOs interviewed, the coexistence of 2 registers is an aberration, and additionally there does not seem to be enough incentives for lobbyists to register themselves on the voluntary register. Indeed, by June 2014, only 145 lobbyists had registered with the National Assembly. Another challenge is the fact that there is no effective oversight mechanism is mentioned<sup>58</sup> and there is a lack of effective sanctioning for non-compliance. The need for technical improvement allowing online registration and access to statistics on the data registered is also a big challenge. Furthermore, the executive branch in France is afforded more overall legislative power than either of the chambers of Parliament, and is often the target for lobbyists. According to local CSOs, there are almost no regulations which govern access or conduct.

Both the examples of the UK and France have been criticized for their lack of effective oversight, too narrow approach towards who should be considered lobbyists, and the lack of enforcement mechanisms which would actually make lobbyists register. An incentives based approach does not seem to be enough to ensure that lobbyists register and the risk of an opposite effect emerges in such cases. Firstly, if a country chooses to regulate lobbying by requiring all lobbyists to register, there is an expectation that the list will be comprehensive and provide information about who the people actually lobbying in the country are. Secondly, those private interests that are not willing to be revealed as lobbyists may use the argument that a voluntary register already exists to stave off the actual implementation of an obligatory registry.

The USA and Canada have a completely different approach and are somewhat closer to the classical registries approach. All active lobbyists there must register with the appropriate government entity and provide regular reports on their activities, the identity of both themselves and their clients, a description of their activities, general issue areas and specific issues concerning lobbying, the agencies they have contacted within their lobbying activities, the names of their employees and their former official positions. In the US case, this information also extends to their income and expenses for lobbying activities, the identity of other participants and financial contributors to lobbying activities, information about any foreign entities they have engaged and

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56 Représentants d'intérêts à l'Assemblée nationale ("Interest representatives at the National Assembly"), including the Code of Conduct for the interest groups at the National Assembly and registration forms and instructions. Available in French: [http://www2.assemblee-nationale.fr/14/representant-d-interets/repre\\_interet#rd1319](http://www2.assemblee-nationale.fr/14/representant-d-interets/repre_interet#rd1319) (retrieved 15/01/2014)

57 Tableau des représentants d'intérêts ("List of interest representatives") at the National Assembly, available in French: [http://www2.assemblee-nationale.fr/representant/representant\\_interet\\_liste](http://www2.assemblee-nationale.fr/representant/representant_interet_liste); (retrieved 15/01/2014), Les groupes d'intérêts au Sénat ("Interest groups at the Senate"), including the Code de Conduit: [http://www.senat.fr/role/groupe\\_interet.html](http://www.senat.fr/role/groupe_interet.html) (retrieved 15/01/2014)

58 Limited progress on lobbying transparency in France by Greg Brown OCT. 4, 2013 <http://sunlightfoundation.com/blog/2013/10/04/limited-progress-on-lobbying-transparency-in-france/> (retrieved 15/01/2014)

details on “certain contributions” (contributions to parties and politicians).<sup>59</sup> The reports have to be provided monthly in Canada and quarterly in the USA. There are no positive incentives for lobbyists to register, but sanctions are foreseen for their failure to do so.

In Europe, the only systems that could be compared to the USA and Canadian models are the regulations in place in Lithuania and Romania, and the emerging legislation in the Czech Republic, Ukraine and Bulgaria (so far, the proposed draft bills in the latter countries have not received political support). The requirements for disclosure differ, as does their frequency, but in general the information is the same. All of these countries have the requirement that the identity details of lobbyists or their employees be disclosed (the draft law in the Czech Republic is an exception to this requirement with regard to corporate lobbyists), the lobbying clients and the amounts they pay, the issues/acts they have lobbied, the authorities lobbied (except for Lithuania).<sup>60</sup> Oversight and enforcement are also an issue in these cases. The amount of information required to be disclosed presupposes that it will be practically impossible to ensure the accuracy of it all. In Romania, there is a requirement for public officials to report if they are lobbied, thus allowing for the information provided by lobbyists to be cross-checked. In Ukraine, the proposed regulation provides for random checks of information. In Lithuania, the Chief Ethics Commission is assigned the oversight function. However, the amount of information provided by the lobbyists would, again, be overwhelming for any institution to provide effective control (even though only approximately 30 lobbyists are registered in Lithuania, the actual number of actors engaged in lobbying is estimated to be much higher).

A similar approach has been declared in Slovenia's ambitious “Integrity and Prevention of Corruption Act (ZIntPK)” the preamble of which states that it is “aimed at strengthening integrity and transparency, as well as preventing corruption and avoiding and combating conflicts of interest.” Registration is mandatory for all individuals working in a private capacity to influence legislation or public policy and requires all information to be provided in the same manner as in Lithuania, the draft laws in the Czech Republic, Romania and Ukraine. This law is heavily criticized for establishing a double standard for professional lobbyists: according to this law, they need to register while in-house lobbyists (CEO's of companies, etc.) do not need to register. Therefore, this law is said to create a grey zone for those willing to circumvent it. Just as in Romania, government officials are obliged to report lobbying contacts.<sup>61</sup> This law separates lobbyists into 3 categories and this determines the different supervision and reporting measures for each category. Professional lobbyists need to register and file annual reports on their activities. Non-professional lobbyists (e.g. employees or CEOs of private companies) do not need to register, but each contact with public officials needs to be reported to the Commission for the prevention of corruption (CPC) by the person who has been lobbied. The third category, which consist of individuals, informal groups and interest groups which influence the public decision-making process with the intention of achieving a systemic enhancement of the rule of law, democracy, the protection of human rights and fundamental freedoms, etc. do not register and these contacts are not reported to the CPC. This latter category seems to posing most problems in practice as there seems to be a tendency to circumvent the regulations by using this institute to influence decision-making by private interest groups or corporate lobbyists.

One of the latest examples is the case of Ireland. In Ireland, Ireland's First Register of Lobbying became a legal requirement from 1 September 2015.<sup>62</sup> Lobbyists are required to register with an oversight agency, the Standards Public Office Commission, and file online returns three times a year regarding their lobbying activities. The public register is believed to create more transparency in

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59 For a comparative overview, see, for example, Kalniņš, V. *Transparency in Lobbying: Comparative Review of Existing and Emerging Regulatory Regimes*, the Centre for Public Policy PROVIDUS, [http://www.europeum.org/images/lobby\\_pasos\\_final.pdf](http://www.europeum.org/images/lobby_pasos_final.pdf) P. 19-20

60 Kalniņš, V. *Transparency in Lobbying: Comparative Review of Existing and Emerging Regulatory Regimes*, the Centre for Public Policy PROVIDUS, [http://www.europeum.org/images/lobby\\_pasos\\_final.pdf](http://www.europeum.org/images/lobby_pasos_final.pdf) P. 21 (retrieved 15/01/2014); the Lithuanian Law on Lobbying Activities, Art. 11, [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=437586](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=437586) (retrieved 15/01/2014)

61 Holmana, C., Luneburg W., *Lobbying and transparency: A comparative analysis of regulatory reform*. 2012 Macmillan Publishers Ltd. 2047-7414 Interest Groups & Advocacy Vol. 1, 1, 75–104 Available online: <http://www.palgrave-journals.com/iga/journal/v1/n1/full/iga20124a.html> (retrieved 15/01/2014)

62 The Department of Public Expenditure and Reform “*Commencement of Regulation of Lobbying Act 2015*” <http://www.per.gov.ie/en/regulation-of-lobbying/> (retrieved 27/10/2015)

Ireland's lobbying sector. Under the Registration of Lobbying Bill 2014, register should capture lobbying by paid professionals, as well as "in-house" lobbyists from a wide range of interest groups.<sup>63</sup> Lobbying is defined as communications with lobbying targets in relation to "the initiation, development or modification of any public policy or of any public programme; the preparation of an enactment; or the award of any grant, loan, or other financial support, contract or other agreement, or of any licence or other authorisation involving public funds", and lobbyists must register if they "make or manage or direct the making of" communications with key officials.<sup>64</sup> However, these formulations have received some criticism because of possible occurrence of unintended exceptions.<sup>65</sup> At the same time, the bill requires to register only paid lobbying activities, thus creating pre-conditions for attempts to avoid the registration in case the lobbying work is paid indirectly. Moreover, the bill contains a lot of official exceptions regarding different types of communication, which has created concerns about undermined utility of register for tracking and assessing influence.<sup>66</sup> Another drawback of the bill is considered to be a lack of lobbying targets, as the bill includes six categories of higher-grade public officials (i.e. Ministers and Ministers of State, National legislators, MEPs for Irish constituencies, Members of local authorities, Special Advisers, prescribed public servants) and dismiss a significant number of lower-grade public officials.<sup>67</sup> Finally, once registered lobbyists are obliged to file returns three times a year to the Register of lobbying (with a possibility to delay the publication of the filed return)<sup>68</sup>, but even though these returns are thought to capture core information, there are some concerns that important pieces of relevant information may be missed.<sup>69</sup>

The countries which chose to have a mandatory register all seem to be facing the same challenges in ensuring oversight and making sure that the definition of those who have to register is not too narrow. In order for this tool to be an effective corruption risk management tool and not to act merely as a window dressing, it needs to provide valuable information, ensure oversight and have the potential to engage a wider public into scrutiny. Information on the identity details of both individual lobbyists or the employees of corporate lobbyists, lobbying clients and the amounts they pay, the issues/specific regulations and authorities lobbied should be the minimum standard. To ensure oversight, a system of random checks could be complemented with the obligation that public officials report contacts from persons or companies that are not registered lobbyists. Moreover, the reports provided by lobbyists should be published in an easily accessible and comprehensive manner so that both public officials and the wider society could engage in the monitoring of this information.

In Lithuania, representatives of the oversight institution responsible for overseeing the implementation of this register note that it would not be overly costly to create an online database which would allow lobbyists to register online and provide the required information quickly. This could then be compiled automatically into reports for periods at a later date without additional input from the lobbyists. Practicing lobbyists, however, note that this could only work if there are adequate time limits. They state that, for example, it would be hard to expect lobbyists to register their intent to lobby particular decision-makers in advance after the registering of a draft decision.<sup>70</sup>

It seems that the only more tangible way to make the register at least partly effective is to provide an easy to use platform for filling it in which does not require any additional extensive reporting. In this way, even in cases where it does not work as an effective accountability tool, the register would at least serve as a directory and help to compile lobbying reports.

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<sup>63</sup> Ibid

<sup>64</sup> Ibid

<sup>65</sup> Transparency International Ireland, Influence and Integrity. "Lobbying and its Regulation in Ireland" 32

<sup>66</sup> Ibid 32

<sup>67</sup> Ibid 33

<sup>68</sup> Including the standard business details of their clients (for professional lobbyists only), the names and positions of the public officials lobbied, the subject-matter of the communications and the results sought, the type and extent of the lobbying activities, the name of the person who had primary responsibility for the lobbying, the names of current or former designated public officials employed by or providing services to the lobbyist, and additional information which may be prescribed by the Minister. Ten pat 33,34.

<sup>69</sup> These include declaration of access passes to Leinster house or other public sector buildings, made submissions or documentation shared with public officials, any financial information about the lobbying activities carried out, any information about political donations made or work done on behalf of political parties and candidates, public funding received or memberships of boards or advisory groups. Ibid 34

<sup>70</sup> Frolenko, Š. *Kas galima visiems – negalima lobistams*. Published in [www.delfi.lt](http://www.delfi.lt)

<http://www.delfi.lt/verslas/verslas/s-frolenko-kas-galima-visiems-negalima-lobistams.d?id=65496780>

It is very important to note that none of examples of implementing lobbyists register turned out to be effective as sole standing anti-corruption tools. The lobbyists register may act as an effective additional tool to the already existing system of accountability regulations that ensure equal access, timely publication of draft laws and other draft legal documents, etc.

# INSTRUMENTS LAB: COST-BENEFIT ANALYSIS

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*The **potential** – to have a more sound and comprehensive argumentation for decisions, contributing towards a higher quality of policy-making and fewer opportunities for undue influence*

*The **challenge** – cost-benefit analysis are very technical in nature, especially in highly specific areas, and their quality may only be evaluated by people with particular expertise; furthermore, due to their technical nature, such analysis usually need to be subcontracted and may be very expensive. In addition, a cost-benefit analysis may not be applicable to some decisions*

Decision-making should always be based on clear arguments and analysis to ensure that policy is formed comprehensively and accountably. The analytical tools used in this process mostly come from the sphere of economics. One of the tools which has proven to be incomparably efficient in policy making is the cost-benefit analysis. Despite its common use in economics, it is also widely applied as an analytical procedure in policy making to show whether a proposed regulation or policy is consistent with economic efficiency or not<sup>71</sup>. Therefore, in decision-making, cost-benefit analysis (CBA) means a technique that aims to estimate the potential strengths and weaknesses of alternative decisions, calculate and compare benefits and the costs of a particular project, decision or government policy. It is usually identified as a measure to help to ensure that decisions are accountable by ensuring that they are made based on a sound and clear analysis of the situation and to reduce the probability of undue influence.

Today, the method is applied in many fields and countries around the world, ranging from evaluations in welfare economics to environmental policies. However, its economic origins have prompted a discussion about the comprehensiveness of a metric system for evaluations in other fields. In theory, a policy whose benefits outweigh the costs in the analysis should be enacted. If it doesn't pass, it should be rejected.

Since the use of CBA is more common in economics, it is useful to understand how this tool came to be applied in policy making in the first place. The theoretical foundations of the procedure had first been introduced during the 19<sup>th</sup> century<sup>72</sup>. The analytical system which was developed helped to show that the net benefits of a construction were in the end compensated by a consumer surplus<sup>73</sup> and the system was proven to work. Over time, CBA, which had originally been created to serve for the evaluation of construction costs, became an essential part of modern welfare economics. Its principles were introduced in the 1930s and 1940s by Hicks (1939, 1943) and Kaldor (1939). The *Kaldor-Hicks compensation principle* included parts of the Pareto efficiency, saying that when allocating resources, it is impossible to make one party better off without taking resources from at least one other. However, according to Kaldor-Hick's idea of hypothetical compensation, potential losers might be compensated by the beneficiaries. That means that under the Kaldor-Hicks principle, a positive outcome of the analysis might actually make some individuals worse off, at the same time increasing the level of welfare generally<sup>74</sup>. The principle also included a rule that benefits, in the form of increasing human well-being, are to exceed costs, which are measured as a reduction in well-being. The method's normative end is the maximization of wealth, which makes it a desirable measuring tool in policy making.

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71 Tyler, Cowen, Using Cost-Benefit Analysis to Review Regulation (1998) George Mason University Draft 2 <<https://www.gmu.edu/centers/publicchoice/faculty%20pages/Tyler/Cowen%20on%20cost%20benefit.pdf>> Accessed on May 19<sup>th</sup> 2014, p. 16

72 Jules Dupuit, French engineer and economist is one of the authors of the original approach. He established a system where choices are evaluated by assuming that human preference can be summed up, including the aggregated benefits and costs for all individuals together resulting from a change. For conducting the analysis, it is required to know the people's willingness to pay for different outcomes. Edward Stringham, Kaldor-Hicks Efficiency and the Problem of Central Planning (2001): [https://itunesu.mises.org/journals/qjae/pdf/qjae4\\_2\\_3.pdf](https://itunesu.mises.org/journals/qjae/pdf/qjae4_2_3.pdf) P. 42

73 OECD, Cost Benefit Analysis: Recent Developments (2006) [http://www.keepeek.com/Digital-Asset-Management/oced/environment/cost-benefit-analysis-and-the-environment\\_9789264010055-en#page33](http://www.keepeek.com/Digital-Asset-Management/oced/environment/cost-benefit-analysis-and-the-environment_9789264010055-en#page33), p. 32

74 In addition, the Kaldor-Hicks method faced some critics. The most common argument is that the Kaldor-Hicks standard of CBA only considers the change in total wealth, but not the benefits for the individual. Tyler, Cowen, Using Cost-Benefit Analysis to Review Regulation (1998) George Mason University Draft 2 <<https://www.gmu.edu/centers/publicchoice/faculty%20pages/Tyler/Cowen%20on%20cost%20benefit.pdf>> Accessed on May 19<sup>th</sup> 2014, p. 20.

It seems that just as in the case of lobbying regulation in general, the USA was a pioneer country in developing cost-benefit analysis to act as a tool in evaluating decision-making alternatives. The US Flood Control Act of 1936 was the first guideline in which CBA was put into practice,<sup>75</sup> but it took another 30 years until the principles of modern CBA had been set out. It was the Nixon Administration, in enacting the “Quality of Life review” in 1971, a review process that required state agencies to consider alternatives before adopting regulations. While the directive had been ignored by many agencies, it demonstrated that this tool can be used in practice. As time went by, concerns about inflation caused by the federal government activities initiated efforts for the adaption of a modern and comprehensive method to consider alternatives. During Gerald Ford's presidency, Executive Order 11821 was adopted requiring the preparation of Inflation Impact Statements in order to clarify the economic impact of regulatory proposals. At the early stages of the development of this tool, the major problem was the unwillingness of agencies' officials to analyze the impact of their proposed draft regulations<sup>76</sup>. Nevertheless, successive administrations reformed the process further and regulatory reform was on top of Ronald Reagan's main agenda when he took office in 1981. In his Executive 12291, it was provided that “Regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society.” The directive made it obligatory for regulatory agencies to provide a regulatory impact analysis for pending regulations to the Office of Information and Regulatory Affairs (OIRA)<sup>77</sup>. This development can now be seen as the birth of the principles of modern cost-benefit analysis. It was a rather powerful political instrument as it gave a supervisory body the competences to delay or even recommend rejection of regulatory measures that, in its view, did not sufficiently consider economic issues. In the past 30 years of implementing CBA, OIRA has become a largely unpopular agency in the US bureaucracy<sup>78</sup>.

There are now a number of other examples applying similar procedures. Norway is usually named as a country known for its expertise in using cost-benefit analysis in decision-making. In a report prepared for the Norwegian Ministry of Finance, the aims for using CBA are not only described as being to find the most profitable choice in monetary terms, but also that “the analysis should aim to describe all consequences assumed to be of importance to the assessment to be made by decision-makers, including non-priced effects and the distributional implications of measures”<sup>79</sup>.

In United Kingdom, the Regulatory Impact Analysis (RIA) takes a similar approach. It shares many principles with modern CBA. The UK Cabinet Office defines RIA as “a framework for analysis of the likely impacts of a policy change and the range of options for implementing it.” An analysis regarding Impact Assessment has to be conducted by the UK Government when planning regulations that would exert influence on the private sector, civil society organizations and public services<sup>80</sup>. Regulatory Assessment Impact is considered as an analytical mechanism that serves the government's aim of reducing the impact of regulation on business, and to only make use of regulation where it is necessary and effective. The analysis' principles of regulation include the

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75 In its declaration it described the Federal Government's duties as being to “improve or participate in the improvement of navigable waters [...] for flood control purposes if the benefits to whomsoever they accrue are in excess of the estimated costs.” While construction costs were a part of the analysis, social costs were omitted. Therefore it is questionable if many of the projects would pass a modern Cost-Benefit test.

76 As so-called independent agencies were not subject of presidential executive orders, success had mostly been limited to agencies in the president's sphere of influence. Murray Weidenbaum, *Regulatory Process Reform: From Ford to Clinton* (1991), *The Ford Administration* <<http://www.cato.org/sites/cato.org/files/serials/files/regulation/1991/1/reg20n1a.html>> Accessed on May 23rd 2014

77 OIRA was newly set up federal institution in Washington that should now control compliance with certain standards in rulemaking.

78 Michael Trebilcock/Adonis Yatchew/Andy Baziliauskas, *Overview of Cost-Benefit Analysis and its Applications in Public Policy Decisions* (2007), Charles River Associates. P. 2

79 A first guide named “Programme Analysis” was introduced in 1978 by the Ministry of Finance, and new technical reports published in the 1990s by a “Cost Calculation Committee.” The Committee's work resulted in two Green Papers on Cost-Benefit Analysis (1997) and Profitability Assessments in the Public Sector (1998). These reports provided grounds for a guide to Cost-benefit analysis by the Ministry of Finance in 2000, whose guidelines were once more revised in 2005. Finally, the Norwegian Government Agency for Financial Management published an analysis handbook on CBA in 2010 in order to improve user friendliness. NOU Official Norwegian Reports, *Cost Benefit Analysis* (2012) <[http://www.regjeringen.no/pages/38220627/PDFS/NOU201220120016000EN\\_PDFS.pdf](http://www.regjeringen.no/pages/38220627/PDFS/NOU201220120016000EN_PDFS.pdf)>, P. 9, 18

80 HM Government, *Impact Assessment Overview* (2011)

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31606/11-1110-impact-assessment-overview.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31606/11-1110-impact-assessment-overview.pdf) Accessed on May 26th 2014 P. 1

consideration of costs and benefits of proposed policies, thus showing a clear commitment to the use of cost-benefit analysis<sup>81</sup>.

But the UK is not the only country to make use of analytical procedures before adapting regulations. According to the OECD Report on RIA use in member countries, the practice is not only widely accepted in most of the OECD countries, but also actively applied by many of them<sup>82</sup>.

As can be seen above, CBA and similar methods have gained widespread recognition in politics. At the same time, there has also been a lot of criticism of the use of an economic method to make political decisions that might have a critical impact on the welfare of certain groups. The critics unfold in two realms: a technical and a moral one<sup>83</sup>.

One of the main reasons why cost-benefit analysis is spreading as a common political practice in the decision-making process is probably not only an economic one. It also adds crucial value due to its rational model, which gives it high levels of transparency and comparability. Furthermore, CBA does not only show which policy is the most efficient, but also provides information as to how to determine the optimal scale of a policy.

Against a backdrop of growing discussions about the undue influence of lobbyists on stakeholders, it needs to be mentioned that a competitive process in decision-making has democratic advantages, which might be vital in preventing attempts to manipulate policies into a certain desired direction. Interest groups might make efforts to exaggerate or minimize the risks of a change in order to influence decisions. This is where cost-benefit analysis comes in, enabling the arguments used for drafting policy and regulations to be scrutinized.

Cost-benefit analysis may be applied to different types of decisions, but the benefits of this method are probably most obvious in public financing decisions. One example of CBA use in practice is a USAID initiative "Feed the Future", which is aimed to reduce poverty, hunger and under-nutrition. USAID has been incorporating CBA methods into agricultural program design since 2009 (including specialized CBA training for agricultural officers and others). Analysts examine the incentives facing multiple stakeholders, including prices, profits, and losses over a long period of time.<sup>84</sup> Then this information helps to determine who is likely to win or lose due to the project and adjusts its' design as necessary. Finally, the costs and benefits of the project are calculated.<sup>85</sup> As for today, 23 missions around the world have used CBA to analyze or inform Feed the Future programming.<sup>86</sup> It has undoubtedly produced concrete results, i.e. CBA helped to prove the efficiency of Feed the Future West initiative in Haiti aiming to modernize and create productive agricultural zones, as well as changed the priorities from training to development buck in the Pastoralist Resiliency improvement and Market Expansion (PRIME) project in Ethiopia.<sup>87</sup>

Four major challenges exist in practice. First, due to the highly technical nature of most of the issues that would need CBA, only experts working in those fields will be able to understand whether they

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81 Department for Business Innovation & Skills, Better Regulation Framework Manual (2013) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/211981/bis-13-1038-better-regulation-framework-manual-guidance-for-officials.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211981/bis-13-1038-better-regulation-framework-manual-guidance-for-officials.pdf) Accessed on May 26th 2014 P.4

82 OECD, Regulatory Impact Analysis: Best Practices in OECD Countries (1997) <http://www.oecd.org/regreform/regulatory-policy/35258828.pdf> P. 8

83 For example, Kelman (1981) pointed at the moral problems that have to be considered when making use of the analysis. According to him, the monetization of environmental goods and public health constitute an ethical challenge to policy makers, as some policy choices might be rational but not moral. He argued that policy impacts cannot be valued with money. McGarity concluded a first comprehensive work on the critics and strengths of CBA, including criticism of valuing morality risks, discounting future effects, and ignoring distributional impacts. Despite the common perception of Cost-Benefit Analysis as a means to reduce unnecessary regulation, some emphasize that it is actually anti-regulatory and, in particular, neo-classical in nature. (Shapiro 2010:5) (Sunstein 2001:299-314) Stuart Shapiro, The Evolution of Cost-Benefit Analysis in US-Regulatory Decision-making (2010), Jerusalem Papers in Regulation & Governance, Working Paper Nr.5 <http://regulation.huji.ac.il/papers/jp5.pdf>, Sunstein, C. (2001b), 'Is Cost-Benefit Analysis for Everyone', Administrative Law Review 53, 299-314

84 Gregory Gangelhoff and Sally Rey, "Delivering Bang for Development Bucks: Cost-Benefit Analysis and Feed the Future." December 15<sup>th</sup> 2014. <https://blog.usaid.gov/2014/12/delivering-more-bang-for-development-bucks-cost-benefit-analysis-and-feed-the-future/>

85 Ibid

86 Ibid

87 Ibid

are actually of a high enough quality. Secondly, for the same reasons, the conducting of a CBA is usually subcontracted and requires additional costs. Also, the technical nature of such an analysis often serves as a reason to deem the entire CBA to be confidential. Therefore, regulations describing the use of this instrument should be clear enough so as to make sure that when such analysis are conducted (in some countries, this is solved by establishing the value of the project to be) and exceptions for confidentiality should be clearly defined so that the finished CBA could be made public. Finally, CBA analysts continue to seek new ways of explaining their work to decision-makers, who struggle to value this type of analysis in use.

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