Transparency and Lobbying or How Transparency According the European Legal Frame Seems To Vanish In the Haze

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Objectively, the lobbies have no interest in being transparent in their action. In fact they are not transparent. They are simply present at and actively engage with the normative institutions of the Union. The rest is literature, elements of language, "newspeak" characterized by its widely consumed emptiness. Indeed, for the jurist, transparency is not a subject as such of EU law whose conceptual content is perceived as stable.[1] How to, in these circumstances, think about this pseudo concept which is applied to the action of lobbies, if not as a communication strategy of the lobbyists themselves whose objective is quite simple: to continue to act in a perfectly efficient manner, with no real control or legitimacy other than that derived from the interests they defend at all costs, while affirming the visibility and consequently the transparency of their action. The strategy seems to have been effective. The pressure groups have ever since become respectable because they have been officially declared transparent, i.e., referenced and accredited, known and – and therefore legitimate – thanks to European Union regulations which are applicable to them since 2011[2] … This new cloak that transparency seems to us, however, too big or at least very badly tailored for them.

Public Law specialists in France have long neglected the study of pressure groups[3]. Indeed lobbying consists in "placing a special interest under the protection of state sovereignty." But the legacy inherited from the French Revolution and Rousseau founded a notion of general interest rendering the question of legitimate and justifiable interference by private or corporate interests impossible to think of in the sphere of state action. To put it briefly, general interest cannot, unlike the Anglo-Saxon idea, be the sum or product of individual interests.[4] General interest, as conceived in the French tradition, transcends individual or corporate wills. Therefore, the legislator understood as institutionalization of public interest does not express anything other than the latter in the act it enacts, i.e., the law. The act of the legislator accedes to legislative dignity only to the extent that it was adopted by interests other than individual. The democratic ideal thus conceived renders the pressure that groups that necessarily defend private interests,[5] lobbies, therefore, could put on the national jurislator.[6]

** http://nihoneuropa.univ-tours.fr*

[1] For a still relevant collected volume on the proposals and thoughts produced, see J. Rideau ed., *La transparence dans l'Union européenne, Mythe ou principe juridique*, Paris LGDJ, 1999.

[2] Interinstitutional agreement concluded between European Parliament and the Commission on the establishment of a transparency register for organizations and persons acting independently and taking part in the implementation of EU policies. See OJEU, L 191 of 22. 07. 2011.

[3] Terminological squabbles about the distinction between pressure groups and lobbies have but a relative interest in EU law, indeed even in Public Law. We shall refer to the remarkable work done by G. Houillon, *Le Lobbying en droit public*, Bruylant, 2012.

[4] J.J. Rousseau, *Du contrat social*, II, 6.

[5] G. Houillon, *op.cit.*, p. 429.

[6] R. Goy, "Des vices de la volonté parlementaire," *Politique*, 1962, No VI, p. 130. See also P. Brunet, *Vouloir pour la nation. Le concept de représentation dans la théorie de l'État*, Bruylant-LGDJ, 1994.

Changes in the conception of general interest involve thinking about both the question of establishing "links with social interest groups"[7]. The determination of general interest still vesting partly with the administration[8] which can no longer cease from considering individual interests[9] as worthy of not giving any weight to and that of the need for efficiency of the norm. The test of the legitimacy of the norm or even that of the validity of the norm from a Kelsenian point of view is no longer sufficient to justify the very idea of a legal rule or standard. Now the efficiency – in the economic sense of the term - standard is the suitable indicator of the success of public action. The measure of this normative efficiency, its evaluation, has rendered possible, necessary, or indeed even justifiable the action of lobbies in connection with institutional decision makers. Indeed lobbying makes it possible to "bring a point of view on the subject and can, in this way, fulfill an explanatory mission with regard to the legislator. As a truly legislative activity, lobbying complements parliamentary work as work performed in the private sector, by those responsible for the implementation of law and are, therefore, best placed to know the effects they produce."[10]

In spite of these developments, the French public law continues to refuse to recognize "material acts of lobbies", i.e., the "fact of lobbying."[11] Ideological and especially constitutional foundations of sovereignty - unitary conception of the nation (Article 3 of the DHCR) which prohibits a "body" or lobby that does not expressly emanate from exercising sovereignty - and representation - prohibition of imperative term of office (Art 27 C.) that the pressure of lobbies necessarily imply – prevent the consecration of lobbies. Therefore, it is confrontational logic that structures in France the way of understanding lobbying or, if one prefers, the aporia between sovereignty (and general interest) and individual interests, while in the US conciliation has been made possible on conceptual bases that are certainly different - general interest is seen as the sum of individual interests - but of .uncontestable constitutional strength since it is by virtue of freedom of association and freedom of expression (first amendments of 1791) that the lobbying is allowed to operate and genuine guarantee of their means of action provided. Outside the sphere of Public Law, the analysis of lobbies has inevitably been absorbed by political science and sociology. Despite numerous studies conducted by outstanding authors,[12] one can only regret the relative paucity of these analyses for the jurist, in so far as political science and sociology, for reasons or motivations that are very different in nature, have long since abandoned law in the understanding of normative phenomena. The classifying virtues of the work of political scientists and sociologists can nevertheless be mobilized by the jurist despite their inscription in a non-normative approach.

Furthermore, and this point will be discussed at length later on, we witness, on the part of the lobbies themselves and some academic, political and especially media relays, the use of what we will call at this stage, a spurious, if not suspect, and "flamboyant" terminology, but devoid of any relevant and stable definition. Transparency, democracy, legitimacy are terms that constitute the explanatory Newspeak of the action of lobbies (and lobbies themselves), which fall within a strategy of dazzling rather than a conceptual light thrown on the object studied. Yet it is in this context that the analysis of lobbies with regard to the European Union is being undertaken.

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[7] J. Chevallier, "Présentation," *in* CURAPP, *Public-Privé*, 1995, p. 12, quoted by F. Rouvillois in his Preface to G. Houillon's thesis, *op.cit.*, p. XX.

[8] G. Dumont, *La citoyenneté administrative,* Thèse, Paris II, 2002, p. 272.

[9] F. Rouvillois, *op.cit*., p. XXI.

[10] L. Cohen-Tanugi*, Le droit sans État*, PUF, 1992, p. 145. *M.-M. Vlaicu*, "Accessibilité du droit et règlementation du lobbying : l'influence du système des États-Unis sur l'Union européenne," *Jurisdoctoria*, No 1, 2008, p. 143 and the pages that follow, especially p. 149 to 153.

[11] G. Houillon, *op.cit*., p. 425.

[12] P.-H. Claeys et *alii* (ed.), *Lobbyisme, pluralisme et intégration européenne*, Bruxelles, Presses interuniversitaires européennes, 1998. S. Mazey et J. Richardson, *Interest Intermediation in the EU : Filling the Hollow Core*, London, Routledge, 1999. R. Balme, Chabanet et V. Wright (ed.), *L'action collective en Europe*, Paris, Presses de Sciences Po, 2000. I. Smets et P. Winand, "À la recherche d'un modèle européen de la représentation des intérêts," in P. Magnette (ed.), *Le nouveau modèle européen*, vol.1 Institutions et gouvernance, coll. Études européennes, 2000, pp.139-154. J. Greenwood, *Interest Representation in the European Union*, Basingstoke, Palgrave Macmillan, 2003. H. Michel (ed.), *Lobbyistes et lobbying de l'Union européenne. Trajectoires, formations et pratiques des représentants d'intérêts*, Strasbourg, Presses Universitaires de Strasbourg, 2005.

While it is old or at least known in its practice at the European institutions,[13] lobbying is recent with regard to legal framing. What is striking, when we look back, is the relative lack of interest on the part of communitarian (Unionist) French Public Law specialists for this topic.[14] Absent among or rejected by domestic law publicists[15] - therefore not critically discussed-, lobbying is, on the contrary, admitted among Europeanists but without being legally conceptualized for all that. The result in both cases boils down to the same: an analytic space deserted by jurists, as earlier pointed out, which is immediately occupied by the lobbyists themselves, the media and non-legal social sciences for providing the wrapping or the scientific-explanatory caution for the statuses and functions of lobbies.

The legal framework that has been applied to them since 2011 in the form of an interinstitutional agreement, renews, indeed even constitutes a new point of departure that will enable jurists, especially those who specialize in Public Law, to take the topic in their stride. Analysis options are or will, obviously, be multiple. The one we will focus in the context of this paper will be based on a critical approach to the framework. Indeed, if the common transparency register (CTR) constitutes the new cloak of lobbying in the EU (1), at the same time, in an obviously predictable manner, the register of transparency (and legitimacy) continually exploited seems to actually form a true cloak of invisibility that benefits the lobbyists (2).

1. Transparency Register or the New Cloak of Lobbying in the European Union

Thanks to their interinstitutional agreement of 23d July 2011,[16] which required nearly four years of negotiations, the European Parliament and the Commission have done useful work. Now, in fact, a common register for these two institutions - also called the transparency register - allows them to formalize the list of representatives of interest groups considered as playing an active role with them. Devoid of any binding effect and endowed with a more than relative invocability, this agreement establishes a much awaited framework system for the activity of lobbying (1.1), although a more consistent legal definition is still awaited (1.2).

1.1 The Much Awaited Legal Framework for the Activity of Lobbying

The need to regulate lobbying activities was based on two main reasons: streamlining the action of interest groups whose exact number is unknown - more than 15 000 according to the most accepted studies[17] -
but whose power of influence is real; enable these groups to escape the undermining lobby / lobbying by dressing up in the word of thousand virtues which is that of transparency.[18].The question of the legal framework for lobbying activities in the EU is not new, as opposed to the initiative - totally missed - in France,[19] since the

[13] J. Meynaud et D. Sidjanski, *Les groupes de pression dans la Communauté européenne* , Université de Montréal, 1969. J. Rideau, "Groupes de pression et administration dans la Communauté européenne," *Peace Palace Library*, 1992, p. 203 and the pages that follow. J.-L. Clergerie, "L'influence du lobbying sur les institutions communautaires," *in* Mélanges G. Vanderssanden, Bruylant, 2008, p. 89 and the pages that follow. M.-L. Basilien-Gainche, "Le Parlement européen face au lobbying," *LPA*, 11, 06. 2009, p. 81 and the pages that follow.

[14] Cf. the significant bibliography in English presented in No 6, p. 2 and subsequent pages of the previously cited thesis of G. Houillon. See also, M. Mekki, *L'intérêt général et le contrat. Contribution à une étude de la hiérarchie des intérêts en droit privé*, LGDJ, 2004, as well the numerous publications of this author in private law. In another vein, J. Lapousterle, *L'influence des groupes de pression sur l'élaboration des normes. Illustration à partir du droit de la propriété littéraire et artistique*, Dalloz, 2009.

[15] See however, G. Lamarque, *Le lobbying*, PUF, coll. *Que sais-je ?*, 1996. See also the numerous works of J. Chevalier, PUF, Coll. *Thémis*, 2002, especially p. 268 and the pages that follow.

[16] Earlier interinstitutional agreement.

[17] J.Greenwood et J. Dreger, "*The Transparency Register: A European vanguard of strong lobby regulation ?*," *Interest Groups & Advocacy* (2013) 2, p. 139 and the subsequent pages (*published online 23 April 2013*).

[18]. A study on the virtues and benefits of the use of the term transparency by EU institutions could be made. Everybody could win from promoting this notion, especially in the field of reinforcing the legitimacy of one another.

[19]. Indeed it was in October 2013 that the register of lobbyists of the National Assembly was put in place. The very negative vision – culturally and hypocritically negative – constitutes a serious obstacle for the filling in of this register, because as of 15th march 2014, only about hundred enrollments were registered. On the National Assembly's site, we observe that a large public is intended, but the division between those who pretend not to be involved in lobbying (especially the religious orders) and those who want to be referenced in order to be legitimized (law firms) is tenacious.

establishment and maintenance of a system of registration was introduced in 1996 by the European Parliament.[20] In 2006, the Commission took the lead in an important communication[21] proposing a common register" in the form of one-stop shop for active lobbies with the Commission and Parliament." The Committee on Constitutional Affairs of the latter responded positively to this initiative. The Finnish MEP Alexander Stubb (EPP) prepared a first report.[22] As soon as he had been appointed Foreign Minister of Finland, the work was taken over by Ingo Friedrich (EPP). Adopted on 1 April 2008 by the CCA[23], the report placed rather high requirements of the regulatory framework since it purported to introduce more transparency in the activities of lobbyists, "the obligation for them to register with the common transparency register "in addition to" ensuring the publication of their financial resources."

After The 2009 elections, a new working group was formed between the Parliament and the Commission (The Council had refused to participate in it as early as 2008). Carlo Casini (Isabelle Durant and Jo Leinen) were authors of another important report adopted on 2 March 2011 by the CCA[24] and by the Parliament on 11th May 2011.[25] The most important substantive change and which would become an object of much criticism was, of course, the abandonment of the principle mandatory *de jure* registration, even if this obligation was fulfilled de facto after a rather unconvincing interpretation of texts.

The Legal basis for IA is twofold. Firstly it is Article 11 TEU, which, let us recall, belongs to the treaty's Title II on "Provisions on democratic principles", which leaves space for some to cleverly interpret its scope.[26] This article essentially provides that "The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society"[27] in addition to giving the opportunity to "citizens and representative associations the opportunity to make known and publicly exchange their opinions."This basis sets the standard for a fundamental right[28], i.e., freedom of expression in the European sense of the term.[29]

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[20]. The first written question on the possible establishment of a regulation of activities of interest groups dates back to 1989. In 1991, the commission for regulations, verification of powers and immunities wrote a report in which it was proposed to create a code of conduct and a register for lobbyists, but the formulated proposals which were the object of a heated discussion in the commission, were not submitted to the plenary assembly. In 1994, the same commission wrote a new report which avoided terminological confrontations and retained the principle of facultative self-designation by interest groups. The regulatory proposals were less restrictive and deemed more favourable to lobbying than those that figured in the earlier report.

[21] Cf. in particular COM (2009) 612.

[22] Resolution of 8th May 2008 adopted by the full commission approving the Stubber report which called for "interinstitutionnel agreement on a register common to the Parliament, Commission and Council. It invited the Commission to negotiate with the Parliament a common code of conduct intended for the lobbyists and insisted that sanctions be taken against those who breach it (going to the extent of removing them from the register in the case of non-compliance)."

[23] Commission on Constitutional Affairs.

[24] PE458.636, *Draft report on conclusion of an interinstitutional agreement between the European Parliament and the Commission on a common Transparency Register* (2010/2291(ACI)).

[25] T7-0222/2011*, Proposal for a European Parliament decision on conclusion of an interinstitutional agreement between the European Parliament and the Commission on a common Transparency Register,* (2010/2291(ACI)).

[26] It is on this basis that a major part of the arguments relating to the legitimacy of lobbies and their action has been built.

[27] Art. 11-2 TEU.

[28] Let us recall that the idea of transparency is not all a right contained in the Charter of Fundamental Rights. Article 15 TFEU refers to transparency as principle founding the right of access to EU documents.

[29] In its famous decision handed out on 7th December 1976, No. 5493/72, *Handyside v UK*, the court, referring to Article 10 of the ECHR 10 the European Court of Human Rights, proclaimed that "Freedom of expression...is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population." Article 11 of the Charter of Fundamental Rights 2009 similarly lays down the following in its chapter on Freedom of expression and information: "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected."

It is Article 295 TFEU,[30] the second legal basis of the agreement, which will serve as instrumental support to the principle of transparency by allowing it to be presented in the form of a regime which will be sketched below.
The common transparency register for the registration and monitoring of organizations and individuals acting as independent parties involved in the formulation and implementation of EU policies is the basis of the system governing relations between Parliament and the Commission.[31] This register[32] - or registration form - does contain the names and details[33] (in particular financial)[34] of interest groups,[35] a code of conduct[36] and a complaints mechanism. As regards the Code of Conduct, Annex III of the IA[37] specifies the obligations now mandatory on pressure groups with respect to their relations with the institutions[38] (and agents) and especially the MEPs.[39]

The heart of the device lies herein in so far as in case of non compliance with the code, sanctions can be adopted after a complaint: "Non-compliance with the code of conduct by registrants or by their representatives may lead, following an investigation paying due respect to the principle of proportionality and the right of defence, to the application of measures laid down in Annex 4 such as suspension or removal from the register and, if applicable, withdrawal of the badges affording access to the European Parliament issued to the persons concerned and, if appropriate, their organizations. A decision to apply such measures may be published on the register's website." The sense of courtesy with which the IA handles interest groups could be appreciated. In legal terms, this means that the obligations imposed on them come from simple moral commitment and that the penalties they may incur are quite hypothetical, although anyone - will be hard to administer evidence - may file a complaint by completing a specific form[40] showing non compliance with of the said code.[41]

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[30] Article 295 TFEU stipulates: "The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature."

[31] Points 2 & 3 of the IA.

[32] http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en#en, accessed February 1, 2015.

[33] Basic information : name(s), address, telephone number, email and website of the organisation ; identity of the person legally responsible for the organization, and the name of the organization's director, his or her joint director, as the case may be, contact for the activities covered by the register; names of persons for whom entry passes to the European Parliament buildings is asked for; number of people (members, personnel, etc.) participating in activities which fall within the register's scope of application; objectives/term of office – areas of interest – activities – countries where these activities are exercised – affiliations to networks – general information falling within the register's scope; if need be, the number of members (persons and organizations).

[34] All the financial figures provided should cover a full year of operation and refer to the financial year most recently ended, on the date of registration or renewal of registration. Double counting is not excluded. The financial declaration made by specialized consultants, law firms and consultants acting as independent agents on behalf of their clients (list and grid) do not exclude the clients from including by themselves these contractual activities in their own declarations so that the financial effort they are making is not underestimated.

[35] Point 7 a) of the IA.

[36] Point 7 b) of the IA.

[37] To be read along with points 7, 17 and 18 of the IA.

[38] With respect to their relations with EU institutions as well as its members, the civil servants and agents of EU institutions, those who register always indicate their name and the entity or entities which they represent or for which they work ; declare their interests, promoted objectives and ends; do not obtain or try to obtain information or decisions in a dishonest fashion or by having recourse to an abusive pressure or an inappropriate behaviour ; do not claim to have a formal relationship with the Union or one of its institutions in their relations with third parties and wrongly present the effect of their registration in manner that mislead a third party or the civil servants or other agents of the Union;

[39] The persons representing or working for entities that are registered with the European Parliament in order to receive a nominative and non transferable entry pass to the premises of the European Union: strictly respect the provisions of Article 9, those of Appendix and those of Article 2, Section 2 of Appendix 1 of the European Parliament regulations; ensure that the assistance provided within the framework of Article 2 of Appendix 1 is declared in the register foreseen for this purpose: obtain, in order to avoid any conflict of interest, the prior consent of the concerned MEP(s) for any contractual link with an MEP's assistant or for any recruitment of such an assistant and declare it later in the register. .

[40] Appendix IV of the IA.

From the operational point of view, the administration of the register is ensured by "the Joint Secretariat of the register." This secretariat consists of EP groups and officials of the Commission and acts in the implementation of measures in order to contribute to the register's quality of content. A coordinator, Gérard Legris, has been appointed. He has the status of the Head of the Unit "Transparency, Relations with. Stakeholders and External Organisations." He is answerable to the Parliament and the Commission jointly in so far as the register is common to both institutions. The general secretariats of Parliament and the Commission are responsible for reporting on the register's operation to the vice-presidents of the two institutions.

It is undoubtedly Title IV of the Agreement of 23d July 2011 - *Scope of the register* - with respect to its points 8 and 9, that is most instructive with regard to our topic. Indeed, it defines but broadly and ultimately elliptically, lobbying as an alternative form of activities: those covered by the register and those excluded[42] from it. These activities pertain to legal and other professional advice, provided that these activities are connected to the exercise of the fundamental right of a client to a fair trial, the steps taken to enlighten a client in a general legal situation or his/her/its specific legal situation or to advise the client on the opportunity or the opportunistic nature or acceptability of a specific initiative of legal or administrative nature under the law in effect, or advice given to a client to help organize its activities in compliance with the law ...

Activities of lobbying *per se*, those which fall within the scope of the register and which are welcome to register,[43] the spectrum retained is wide. This is indeed the activities "carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions, irrespective of where they are undertaken and of the channel or medium of communication used, for example via outsourcing, media, contracts with professional intermediaries, think tanks, platforms, forums, campaigns and grassroots initiatives. These activities include: contacting Members and their assistants, officials or other staff of the EU institutions; preparing, circulating and communicating letters, information material or discussion papers and position papers; organizing events, meetings, promotional activities, conferences or social events, invitations to which have been sent to Members and their assistants, officials or other staff of the EU institutions; and voluntary contributions and participation in formal consultations or hearings on envisaged EU legislative or other legal acts and other open consultations."[44]

A legal and European definition of lobbying (more than the lobbies so to speak) remains, however, necessary to try and understand this strange object of "rejection" because of the notions of occult nature, concealment or evil intentions that are attached to it in spite of the useful common transparency register opened in 2011. This register is a milestone in the sense it provides both the definition and the scope of lobbying understood as multi-facetted activities and a regime that controls it. At the same time, these activities are presented in a descriptive manner and as if their past activities had been codified here, which is very disappointing because the presentation lacks real normative input. The materialization of the definition of lobbying, its perception by jurists, is still pending.

1.2 A Much Awaited Legal Definition of the Activity of Lobbying

In the positivist jurist's eyes, lobbying (lobbies) should be studied and understood in terms of the concept of norms - legal standards, it goes without saying.

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[41] On 15th April 2014 a revised version of the transparency register intended to give more details and reinforce firmness with regard to those who breach the rules had been adopted.
(.http://ec.europa.eu/transparencyregister/public/homePage.do, accessed Feburary 1, 2015).

[42] We have to still note that there is sort of inbetweeness in this apparatus. In fact specific regulations have been foreseen with regard to religious communities, political parties, local authorities, networks or form of activities that are not endowed with a legal status but working within the ambit of the register. If the general rule is that such activities are not concerned by the said register and therefore there is an incentive to registration in order to get closer to these institutions. Their different offices of representation are supposed to register themselves as soon as relations with the EU institutions (Parliament and Commission) have been established.

[43] All organizations and persons acting as independent agents, whatever be their legal status, engaged in activities that fall within the register's scope of application, are indeed expected to register.

[44] Rules of Procedure of European Parliament. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20150101+ANN-09+DOC+XML+V0//EN, accessed February 1, 2015.

As practice connected to the adoption of the norm, lobbying entertains a relationship with the institutions set up and organized by law and producing standards, this practice therefore and verily becomes graspable by law, "an object study by the jurist."[45] From a Unionist perspective,[46] the recourse to an operating conception of the notion of lobby - the practice of lobbying - is indispensable in order not to be locked in a simplistic vision of the notion aforementioned at the risk of eliminating a number of active players involved in EU institutions and thus projecting on lobbying some pseudo ethical and moralizing concepts – that which a rigorous positivism must strive to avoid – with the more or less avowed purpose of participating in EU policy and decision making.

In a study by Professor Farjat 2000,[47] lobbying is "any activity to carry out actions intended to affect, directly or indirectly, the process of developing, implementation and interference with legislation, standards, regulations and, more generally, any government intervention." This relatively successful definition can be applied to describe lobbying in the European Union.[48] It corresponds to, or at least overlaps with, those that had been proposed in the fifties by A. Mathiot with respect to American pressure groups[49] - "any action undertaken with the authorities to pressure or a more or less interested propaganda by groups that strive by all the means in their power, direct or hijacked, to influence government and legislative action"- or in the nineties by J.-A. Bassot[50] for whom lobbying appears to be an action carried out by various means near the holders of administrative power or political power in order o achieve goals that are specific to the community it represents."

The question of the responsibility of pressure groups,[51] the normative force of their action[52] and / or their influence on the European institutions is more recent.[53] It is in this renewed perspective that fits the definition with six cumulative criteria of G. Houillon that is substantially quoted below.[54] For this author, "lobbying is a spontaneous action[55] (1) whose purpose is to achieve integration, without compensation directly related to this objective[56] (2), of a particular interest (3) by an authority endowed with the power of decision-making (4) within provisions set to become mandatory (5) of a legislation being drafted or specifically drafted for this purpose.

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[45] Expression borrowed from G. Houillon, *op.cit.*, p. 963 and subsequent pages.

[46] Even if this expression is subject to discussion, we must make concessions for the discipline which deals with EU law. Community law specialists are deprived of a disciplinary qualification that had long been useful to distinguish them from the Europeanists who were accepted as specialists of the ECHR. The term Unionist, even though it harks back to the political movement founded by Churchill towards the end of the nineteen forties, makes it possible to identify an object – European Union – and logically an academic discipline which is an extension of Community Law.

[47] G. Farjat, "Les pouvoirs privés économiques ," Mélanges Ph. Kahn, *Souveraineté étatique et marchés internationaux à la fin du 20e siècle*, Litec, 2000, p. 613 and the pages that follow, especially p. 617-619.

[48] Understood here as an international organization endowed with its own competences and legal personality.

[49] "Les *pressure groups* aux États-Unis," *RFSP*, 1952, p. 429 and the pages that follow.

[50] "Groupes de pression," in O. Duhamel and Y. Mény (eds.), *Dictionnaire constitutionnel*, PUF, 1992, p. 469 and the pages that follow.

[51] M.-L. Basilien-Gainche, "La régulation des stratégies politiques des acteurs économiques ou comment promouvoir un lobbying responsable ?," *RAE*, 2009-2010, p. 535 et s. *Un lobbying responsable : info ou intox ?* Colloquium of 28th April 2014 organized by par the IRDA, CERAP et GERCIE research centres (under the guidance of M. Mekki et P.-Y. Monjal).

[52] Among the many publication of Professor M. Mekki, confer "L'influence normative des groupes de pression : force vive ou force subversive ?," *JCP G*, 2009, p. 47 and subsequent pages. "La force et l'influence normative des groupes d'intérêts. Identification, utilité et encadrement," *Gaz. Pal.*, 2011.

[53] Cf *supra* Foot Notes 11 to 14.

[54] Particularly consult pages 8 to 54 of the introductory chapter to his work.

[55] This criterion refers to a material conception of law (of its sources) which is different from formal sources. One could go back to the work of civil law jurists like Gény and Lambert as well as P. Amselek, "Brèves réflexions sur la notion de source du droit," *APD*, 1982, p. 255 and subsequent pages. F. Virally, *La pensée juridique*, LGDJ, 1960, p. 149 and the following pages. Particular reference should be made to R. Chapus, *Droit administratif général*, T. 1, Montchrestien, 12ème ed., 1998, No 45, p. 27 according to whom the material source represents "the cause of existence of a rule of law, the considerations out of which they arise and the aspirations to which they try to respond." This definition substantially draws from that proposed by G. Rippert in his book *Les forces créatrice du droit*, LGDJ, 1955, especially p. 71 and the pages that follow.

[56] This criterion prevents lobbying from taking the legal form of a contract – if one could admit that lobbying falls within a conormative logic, it is about unilateral acts we are talking – or of corruption – if lobbying is a freedom, it could not consist in an abuse or offence as the acceptation of a consideration by an authority endowed with the prerogative of public power could be qualified precisely as corrupt. See articles 432-11, 433-1, 434-9 and 432-11-2° of the Penal Code.

Lobbying can also seek the modification of an existing legal provision (6). From the Unionist point of view, this definition seems quite acceptable even if some adjustments could be made.

First, we believe that the proposed definition of lobbying in the EU framework must be part of a fairly conventional register of the so-called clean and functional definitions of certain concepts in Union law. This expression should be understood in the sense that what matters is not so much the legal subject acting in the legal order of the EU, its status, and its most recognized name in state orders for example[57] ... but its activity and its actions in this order. Without making excessive analogies, we know that the concept of a company as defined by the Court ignores the very term, consequently its designation, retaining only the concept of economic activity as characterization or purpose of the action of any entity, regardless of its status.[58] It must also be the case with regard to the subject under consideration. Lobbying (gerund of the verb "to lobby") must, therefore, be understood primarily as an action, a normative and active role, an economic activity the purpose of which is well understood.

This functional approach also allows us to particularly rid the jurist of the cumbersome and useless term lobby that a structural-formal perspective would tend to favor. Indeed, the work of sociologists and political scientists have failed, in our knowledge, to identify an independent,[59] stable and above all, accepted definition of the term lobby; starting with the players themselves of lobbying who get lost in digressions or introductory remarks or constant justification when it comes to introducing or identifying themselves.[60]

In terms of communication strategy, "social" honorability or media repute, intelligence, even though it may seem uncanny, consists in not defining who these actors are, challenging the work of researchers who qualify them as "lobbies" for according to the circumstances prevailing at the moment, dressing oneself in all virtues - necessarily - consulting, expertise, transparency obviously and other cosmetic coats that are most acknowledged by the politically correct. Not naming amounts to not thinking and therefore not challenging. Access to this reputation is obtained by borrowing the little uneven path of amputation of thought and voluntary retraction of critical reflections thanks to the most basic techniques of political communication employed.[61]

The functional conception of the whole idea of lobbying built on the notion of "activity" on which one could reasonably rely, prompts us to determine the four cumulative criteria that constitute its basis. The first can be described as normative and expresses the idea that the lobbying activity aims solely to act - ultimately – on the legal organization of the Union: inspiration as to the norm, co- development, evaluation and / or modification thereof. From an instrumental point of view, the standard[62] evoked here must be understood in the broad sense. Under this angle, Articles 288, 289 and 290 TFEU serve as legal bases in the sense that regulations, directives, decisions, regulatory or delegated actions, but also the decisions of the Court are potentially affected by lobbying activity falling within their field of activity and aiming at the adoption of a standard, modification, etc. Secondly, a structural criterion can usefully be mobilized to continue this attempt to construct a definition of European lobbying. Indeed, there is a non-detachable connection between lobbying and the institutional framework on which or within which it operates.

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[57] Designations which are for the most part unacceptable in EU law.

[58] In case 23. 04. 1991, C-41/90, *Klaus Höfner and Fritz Elser c/ Macrotron GmbH*, The Court of Justice defined the concept of an undertaking as comprising « any entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed». For a recent confirmation of the same, CJEU, 4. 09. 2014, *YKK Corp. e.a. c/ Commission*, Case. C-408/12.

[59] See *supra* Foot Note 12.

[60] M. Mekki et P.-Y. Monjal, *Un lobbying responsable : info ou intox ?* Colloquium earlier mentioned. During this event, the tug of war between the doctrine of political scientists and the participants (the lobbyists) highlighted their inability to come to terms with each other on their status as well as the object of their role. Those who assume the term "lobby" and those who do not accept it. The observer comes out of these false clarifications and justifications quite perplexed.

[61] In the sense of *in citæ politis communicatio regat*, the speech that governs the life of the city. On the merely technical and rhetorical level, the exercise is simple. You are "accused" of being a lobby? Pretend that you endorse that roll but that you work in a transparent manner. If you are angry, because the lobbies are supposed to be opaque, show that you are transparent and by definition you are not a lobby but another more respectable thing.

[62] P.-Y. Monjal, *Les normes de droit communautaire*, PUF, Coll. *Que sais-je ?*, 2000.

With respect to the Union, determining this framework is relatively simple when we admit that the normative institutions are the Commission (its executive, regulatory and delegated legislative proposals), the Council of the Union - but also the European Council within the framework of its defense powers where military - industrial issues are absolutely huge – and, of course, the European Parliament in the framework of mainly of the PLO.[63] As regards judicial institutions, we believe that there is no difficulty in admitting that it is a normative institution and that the question of the independence of its members would constitute an insurmountable barrier to any attempt at action or, at least, approach by the lobbies. Imagining for a moment the situation could be otherwise does not seem realistic in our viewpoint.[64]

Thirdly, a qualifiable criterion of material[65] can be used that targets the very nature of lobbying. Indeed, this type of lobbying activity is carried out in a market and remains nothing more than a service provided against remuneration. Tracing lobbying to an economic activity[66] not only reflects reality and but also allows us to especially legalize this item in the Union's economic law categories. Here, the concepts and regimes relating to services (in its two components of freedom of establishment and freedom to provide services. - Art 49 and 56 TFEU) but also to business undertakings (agreements and abuse of dominant position -. 101 and Art 102 TFEU) seem totally mobilized. One can also use the concept of worker - service provided against remuneration in the context of a hierarchical relationship between the worker and his employer[67] - once a company has its own means of action-oriented lobbying.

An ultimate criterion can be highlighted. It's the one that deals with the very purpose of lobbying. This purpose is normative at first sight, as we said earlier. But we prefer to speak, nevertheless, of normative criterion when it comes to lobbying to obtain a "standard". The finalist criterion referred here is nothing other than the pursuit of self-interest, corporatist interests sometimes - economic or industrial – of economic operators acting within the internal market and having a necessarily subjective competitive interest in seeing to that the standards that apply

[63] Ordinary legislative procedure binding the European Parliament (Article 289 TFEU).

[64] This discourse, because this is nothing else but that, which consists in claiming in the name of separation of powers, democracy or even the most basic professional ethics (arguments made by the lawyers of lobbyists themselves), that judges are not "approachable" does not correspond to reality. Who, indeed, can imagine that when industrial interests of a State are at stake or millions of euros can be imposed against companies - including tobacco, see below - that steps are not taken in the direction of the entourage of judges or, and this cannot be entirely ruled out that a judge is not personally informed by his government, or even approached, about the possible scope of one or another jurisprudential solution. Admittedly, the conscience clause can always be enforced. But what conscience we are talking about? When there are hundreds of companies whose business could be deadly for thousands of people, we could hardly imagine that those who serve them experience so much this difficulty "of personal ethical conscience" to not approach the judges. In a different, but recent record, we know how insistently the City of Lyon, its Legal Services and its main political leaders, in addition to having almost the Act of January 27, 2014 devoted to the City of Lyon, did everything possible to contact one by one all the teams of the members of the Constitutional Council. The decision that the latter gave was based on a one vote majority and represents a bothersome legal strangeness. Indeed, the Council explained that the law is unconstitutional, but because of its importance (project for the city) and the transitional regime it establishes (the electoral regime of President of the said the city), that unconstitutionality was acceptable. Political reason has prevailed over the normative rationality. After all it is a political choice, not judicial but governmental on the part of the Constitutional Council, which is not surprising to the extent it is not a court! This is something that the Court of justice will – without doubt – not say, *RDUE*, 2013/2, p. 1 and the pages that follow.

[65] See *supra* Foot Note 53.

[66] Especially in the sense of Article 57 TFEU relating to services.

[67] Among recent case law, CJEU, 07. 06. 2005, *Dodl et Oberhollenzer,* case C-543/03, « A person has the status of an employed or self-employed person within the meaning of Regulation No 1408/71 where he is covered, even if only in respect of a single risk, on a compulsory or optional basis, by a general or special social security scheme mentioned in Article 1(a) of that regulation, irrespective of the existence of an employment relationship. It is for the national court to make the necessary enquiries to determine whether those entitled belong to a branch of the social security system and, accordingly, whether they are 'employed persons' within the meaning of Article 1(a) of that regulation».

to them they are beneficial, economically viable. The goal, the purpose of this activity is nothing but that and cannot be logically otherwise.

Thus presented, lobbying could be accepted as an economic activity, that is to say, a service provided against remuneration[68] to economic operators[69] by service providers (material criterion) to obtain from the normative institutions of Union (organic criterion), by all means permitted by the CRT, the taking into account of the substantial competitive and economic interests of the operators (finalist criterion) in the standards that they are able to adopt (normative criterion) for the proper functioning of the internal market.

The advantage of this proposal is that it avoids falling into some perfectly rhetorical traps harmful to academic research but also to the freedom of expression. Indeed, the religious[70] or philosophical[71] interest groups which, with all their force, often employ clever arguments and counter arguments to escape classification as "lobby" with a view to getting out of analytical fields and therefore critical of the policy or juridical science will hardly escape the assessment of their real influence when a functional conception of lobbying is retained. Such a conception is fully complies with a positivist and normativist[72] view of law which must consider that the legality of the standard has nothing to do with the question of moral values or with political science and sociology. However, a careful reading of the common register of the Union of parliamentary work and the various commentaries indicates that it is this argumentative "register" which was exploited to found the conceptual bases to justify the activity of lobbying.

2. The Transparency Register or the cloak of invisibility of the activity of lobbying in the European Union

Lobbying activity within the European Union needs to be based on a strictly legal and substantialized approach rather than be defined by a long statement of practices and actors blurring its contours. From haziness to opacity, the step to take is not that big, unless we consider that the proclaimed transparency of this activity eventually renders it completely invisible: which then would strictly come down to the same. In this play of light and shade, if we may spin an optical metaphor, if the activity of lobbying is transparent, it is a refracted transparency (2.1) which calls into question the allegedly non-detachable or logically necessary link that binds it to the notion of legitimacy which is also extensively exploited (2.2).

2.1 The Refracted Transparency of the Activity of Lobbying

The common register of the Union is entirely built on the noun "transparency" which, by being uttered like an incantation, has prevailed with such convincing obviousness that suspecting lobbies of acting opaquely has become in itself reprehensible.

However, in our view, this transparency we are talking about, this *mantra,* is only a language element in a general contraption whose purpose is to divert the attention of the observers. The strategy is well thought out, but unconvincing. Indeed, this notion is legally fragile in EU law and we are far from convinced that the evaluation of the CTR will allowus to conclude with confidence that opacity, secrecy and maneuvers do not continue to characterize this so lucrative economic activity. The principle of transparency seeks to transform the EU into a

[68] The notion of remuneration is very widely understood in the European Union. If a service has been provided, and the consideration consisted in simple reimbursement of expenses for instance, the Court of Justice considers that it consitutes a remuneration. P.-Y. Monjal, "Marchés, concessions, SIEG, in house… les nécessaires ajustements européens des collectivités territoriales françaises," *RDUE,* 2013/3, p. 234 and the pages that follow.

[69] The notion of economic operator is a comprehensive term and does not take into account the private or public status of the operator.

[70] With regard to this point, it was interesting to observe the reaction of the Catholic and Protestant churches at the time of establishment of the French register in 2013. https://www.contexte.com/article/transversal/les-nouvelles-regles-des-lobbystes-a-l-assemblee-nationale_20441.html, accessed February 2, 2015.

[71] What is alluded to here are the two major Masonic lodges in France.

[72] This is the reason why we could not accept that the activity of associations or NGOS whose objective is to defend "noble causes", for according to them these are non-economic, non industrial and non competitive, escape from the lobbying label. This is a divisive debate because it is moralistic. In reality, it makes little sense when the purpose of their action is to act on institutions and decision makers in order to obtain a standard favourable to the interests they defend.

sort of glass house in which institutional relations and decision-making processes would escape criticism against their opacity and remoteness from citizens.[73]

One of the first legal manifestations of the principle of transparency was Declaration No 17 accompanying the Maastricht Treaty on the right of access to information.[74] Institutional consecration came from the Amsterdam Treaty which introduced the principle of openness in its first article.[75] The Lisbon Treaty maintains, meanwhile, the general reference to the principle of openness in Article 1-2 TEU, but then develops the principle of transparency in both the fundamental treaties.[76] The treaty establishes special ties between a number of general principles to guide the action of the Union such as openness, transparency, consistency, or good governance. It is the case with Article 15-1 TFEU[77] which, however, underscores very well the ambivalence of these principles that constitute both the aims, objectives and at the same time the means to achieve other goals which are still more imperative, such as democracy, economic and social progress, sustainable development, etc.

Obviously the question of the legal status of such a principle arises. In his public access to documents part of the Union, the judge of the European Union gave it a strong legal value, strictly interpreting the limits that may be brought to the notion of transparency. Through successive generalizations, we can admit that transparency constitutes a fundamental principle of law, but certainly not in our view, a general principle of the European Union. For the Court of Justice, the principle of transparency has certainly acquired a sufficient degree of autonomy to constitute an obligation as such, but it sees transparency as a consequence of the principle of equal treatment for example.[78] Transparency, therefore, covers pre-existing legal provisions, such as motivation or the publicity of the legal acts of the Union. Pursuant to transparency, relatively disparate regimes have come up such as clarity and the quality of drafting of legal documents, those dealing with access to documents of the institutions of the Union, or even the publicity of its deliberations or discussions.

From a strictly legal standpoint, the "idea" or the principle of transparency does not go without saying.[79] Under these conditions, there can be no question of considering the registry as founding in law any legally binding and enforceable regime against lobbying .based entirely on an identifiable principle, that is to say, transparency. Such

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[73] But legally speaking, things are not that clear. Transparency has to be seen in the light of the struggle for influence that institutions are involved in. Opacity having been imputed to the executive branch of the Union, the highlighting of the principle of transparency to which the European Parliament is more accustomed, cannot but serve the battle that it is waging in order to extend its powers. Transparency puts it in a very interesting position because it forces its partners to justify, indeed even eliminate their administrative practices that it judges are often opaque.

[74] "Openness of the decision-making process strengthens the democratic nature of the institutions and the public's confidence
in the administration." On this basis, the interinstitutional declaration of the Parliament, Council and Commission dated 25th October 1993 entitled " Democracy, Transparency and Subsidiarity," extended by the Code of Conduct of the Council and the Commission dated 31st December 1993 on public access to documents provides a veritable catalogue of good practices which the Council as well as the Commission ought to comply in the name of transparency with.

[75] Though formulated very differently, this principle certainly recalls that of transparency, if only because of the connection made with the decision making process.

[76] In Article 15 TFEU , it appears as a a very general principle that must guide the actions of the EU institutions the outcome of which would be the right of access to EU documents. In Article 11 TEU, it is included in the provsions relating to democrtic principles and as such, it makes the obligation to inform and consult in the first of EU institutions, with respect to the civil society in general.

[77] "The Union's institutions, bodies, offices and agencies conduct their work as openly as possible in order to ensure the participation of civil society and thus promote good governance."

[78] The court has affirmed as general principles of community law the following principles : rule of law, legal certainty, non-discrimination, due process of law, prohibition of double jeopardy, non-retrospective punishments, solidarity between member states … The Court has elevated a certain number of rights and liberties to the rank of fundamental rights of the European community . The right of property, inviolability of domicile, freedom to exercise a professional activity, freedom of opinion, protection of private life, protection of family, freedom of religion and belief, equal treatment figure among these.

[79] J. Rideau (ed.), *La transparence dans Union européenne Mythe ou principe juridique*, *loc.cit*.

transparency is, quite obviously, invisible for the jurist despite its widespread use. Therefore, it is more in the field of argumentative rhetoric, of discourse, as earlier indicated, that we must situate it.

In the meaning currently given to it, transparency refers to a clear role that one does not try to hide from the public. It is from this perspective that CTR was conceived in 2011. But the original meaning (s) of the word should not be forgotten. Thus we learn from *Littré* that transparency is "that which lets itself be penetrated by a fairly abundant light allowing us to clearly distinguish objects through their thickness."

A body is said to be transparent when it "transmits a light by refraction and through which the objects are clearly visible."[80] Refraction is a modification or a change in the direction of a light ray passing from one medium to another.[81] The medium thus constitutes a material "that lets light pass relatively."

These few digressions are useful to throw light on - so to speak - the word under review. What we need to understand here is that transparency cannot, in any way, mean perfect exposure of the object seen, highlighted. The illumination of the object - the decision-making process within the Union – through the effect of transparency means that something, an object, comes between the light source and the illuminated object. In other words, seeing by transparency, it is to see through (trans) a body - CTR - to make the said decision making appear (*parere*). In this process of refraction, there is a residual share of light that does not expose what one wants to show or demonstrate, or if you prefer, the necessarily persistent grey areas. Refraction redirects the light and makes it possible to show only what one can or wants to show.[82] The decision-making process involving interest groups is, therefore, only partially visible; lobbying activity, by being transparent, becomes invisible to the observer. This is obviously the goal sought after.

Thus the lobbies can henceforth proclaim, "Look how transparent we are!" See how the CTR throws light on the decision making process that we let pass through us, see how the pressure groups that we constitute are supposed to advance openly (registration, financial information ...), etc. But that part of the decision that we are able to see, through this play of refraction that has been forgotten by diverting the original sense of the word transparency, is intended to fool us.[83] Absolutely nothing in the CTR or on the lessons learnt from its application allows us to sustain that the EU citizen is able to see everything (to know everything) that is decided at the level of Union. The light retained by refraction, i.e., transparency undoubtedly constitutes the invisible cloak of the lobbies.[84]

The normative weakness[85] of the IA, its minimal invocability, is a real source of concern for some or, conversely, a real source of comfort to others.[86] The legal authority for the institutions to enter into such agreements is not debatable. Born initially out of practice, this competence has gradually been enshrined in the Treaties.[87] The legal value of these agreements is not obvious, however.

First, we know that Article 295 TFEU defines the binding nature of the agreements in a facultative manner and only with regard to the parties that sign them,[88] which excludes third parties *de jure* and any possible invocation. On the other hand, if we can retain a material criterion - the will of the authors of the act as it emerges from its content - as justifying control by the judge and the enforceability of the agreement on those who do not comply

[80] Larousse Dictionary, 2014.

[81] Deviation that a ray of light goes through when it crosses a milieu whose density is different, *ibid.*

[82] D. Diderot would sustain thus in "Le défaut de transparence et le mat", *Salon de 1765*, Œuvres. t. XIII, p. 205.

[83] B. Sourice, http://blogs.rue89.nouvelobs.com/de-interet-conflit/2013/06/22/lobbying-en-europe-le-jeu-de-dupe-de-la-transparence-230613, accessed February 3, 2015.

[84] In a figurative sense and according to Littré, transparency has an altogether unexpected meaning: "that which lets see a hidden meaning, something concealed." In his *Dialogues - Rousseau juge de Jean-Jacques,* J.-J. Rousseau thus writes: "His heart transparent like cristal cannot hide anything that is happening therein."

[85] Apart from his thesis devoted to the topic, one could benefit from the reading of the many works of A.-M. Tournepiche, "La clarification du statut juridique des accords interinstitutionnels," *RTDE*, 2002, p. 209.

[86] Let us leave it to the reader to determine who should or who should not be bothered...

[87] Either in the attached protocols, or in the core of the treaties: Art. 193 or 291 TCE, 295 TFEU (*supra*).

[88] Indeed Article 295 TFEU foresees that institutions could make these agreements mandatory. Legally and logically, it signifies that by nature and by the will of its drafters, these agreements are not in themselves legally constraining for the signing parties and much less for the third parties.

with it, we note that the few available case law decisions[89] show that the judge is free to determine the mandatory nature of the agreement and everything depends on the very terms used in the said agreement.

In view of the details recalled above, one cannot but note the contents of the "non-normative" CTR, its almost total absence of legal effectiveness that makes it quite different from the American model consisting of 500 pages of particularly "tight" regulations as clarified in the report made by Stubb, MEP, earlier mentioned. In addition to the conditional that is used very often, an alternate reading of the key points of the IA helps us demonstrate "that due to transparency, interpretation amounts to invisibility" again.

On closer examination, point V of the IA entitled "Rules applicable to those who register" is perplexing. Apart from "agreeing to provide information,""agreeing to act in compliance with the code of conduct,""taking note ..." we do not see many constraints that are imposed on lobbyists. To this total lack of general legal obligation, the "steps" as stipulated in Section VI "in case of non compliance with the code of conduct" are precisely "steps" and not sanctions as such, which may lead to "removal from the register and withdrawal, where applicable, of any authorization for access to the European Parliament's premises."[90]

The success of the register could not but be guaranteed. On the website of CTR, we are told that in 2013 "entities" involved with the Commission and Parliament[91] were over 6830. More than 670 law firms and lobbies are registered - but without any real distinction - and nearly 3,380 lobbyists throng the corridors of European Union institutions.[92]

Representatives of associations 1500 to have registered and "think tanks" (Think-tanks and academic groups) are close to 400 to have registered.[93] Justin Greenwood[94] believes that "the Register's coverage now includes 75% of for-profit organizations relating to the private sector, and about 60% of NGOs." At the same time, showcase associations, misleading fronts of the industry, account for 15% of registered NGOs, while they ought to be listed among business lobby groups.

As for the code of conduct, which comes under the legal category of acts falling outside the nomenclature, the 2011 AI exhorts - simply - natural or legal persons concerned to "agree to act in compliance with the code" and also to accept that complaints about them "are treated on the basis of the code." As for the code of conduct itself, if we wanted to find material traces of its normativity despite its formal name - which can, by its very nature, never constitute a case of inadmissibility[95] before the judge of the European Union - research is disappointing. Lobbies, in fact, "indicate,""do not obtain information dishonestly,""ensure", and "comply with."

Worse still, strategies to bypass the code of conduct are easy to deploy, while being in full compliance with it. Clearly, the code of conduct does not prohibit (despite its non-binding nature), it only authorizes according to the old liberal adage and very Kelsenian of law. Thus, when it is stated that lobbies "do not obtain or try to obtain information or decisions dishonestly or by use of undue pressure or inappropriate behaviour," they need to only,

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[89] CJCE, 27. 09. 1988, *Parliament c/ Council*, case. C302/87, *Rec.* I-5615. See also, CJEU, 19. 03. 1996, *Commission c/ Council*, case. C-25/94, *Rec.* I-1469.

[90] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0376+0+DOC+XML+V0//en, accessed February 2, 2015.

[91] See the Transparency Register website.

[92] See the register's structure which consists of 6 entries: law firms, inhouse lobbyists, associations, NGOs, think tanks, religious communities, local authorities.
http://ec.europa.eu/transparencyregister/public/consultation/statistics.do?locale=en&action=prepareView,
accessed February 3, 2015.

[93] Not surprisingly, not to say quite dismayingly, that it is the Brussels based think tank Bruegel which published a series of notes intended for the future members of the Commission in order to give them some advice on the actions to be undertaken in expectation of the Parliamentary hearings (EP commissions) to come. (http://eu2do.bruegel.org).

[94] *op.cit.*.

[95] We could think here about the action in annulment foreseen in Article 263-4 TFEU as well as to the referral procedure intended to ascertain the meaning and interpretation of EU law foreseen in Article 267 TFEU.

in that case, and of course honestly,[96] obtain information smoothly and politely. "Similarly, lobbies commit themselves to "always identifying themselves by name and, by registration number, if applicable, and by the entity or entities they work for or represent."[97] They will certainly do so; at least in what they will give us to see. As regards the rest, everything will be invisible ... but legitimately.

2.2 The (de) legitimated Transparency of Lobbying

Another term has appeared in the well-oiled discourse of lobbies. Transparency cannot in itself suffice to make lobbying a technically respectable activity. Even if it is transparent, this discourse needs to be founded upon the politically more substantial notion of legitimacy.

The equation is simple: lobbies + parliament = legitimacy of the Union. In other words, as lobbies are involved in the development of the EU norms, which we know is partly crafted by the EP, in a transparent manner, the activity of lobbying is not only legitimate, but it also helps strengthen the overall legitimacy of the Union. What would the EU be without the lobbies?

The Stubb report mentioned before provides information on this point, that is to say, the logical link, or at least the necessary connection, to serve the perfectly understood demonstration connecting lobbies/ transparency/legitimacy. It sustains that "policy making would be very poor without their (lobbies') contribution. … Transparency of political institutions is a prerequisite for legitimacy. Therefore rules for lobbying are ultimately a question of legitimacy."[98]

More systematic in his expression, G. Legris, Coordinator of the Joint Secretariat for Transparency, explains that "In a democracy, citizens have the right to communicate their opinion, be it individual or collective, to public decision makers. They could do it directly or give power to an intermediary to represent and defend their positions. The public decision makers, for their part, need enlightenment […] that is why public affairs, governmental affairs, advocacy must be recognized as legitimate and necessary. […] These activities, in order to be compatible with democratic principles, must be in accordance with two essential conditions", concludes G. Legris, "transparency (citizens have the right to know who is engaged in these activities) and conformity with law and ethical principles."[99] This combination of notions where everything stems from everything, where we are told that democracy comes down to transparency, that lobbies are the guardians of the legitimacy of the Union, that ethics constitutes this moral code of conduct that will be taken for granted ... has deeply penetrated the actors (lobbies[100] and institutions) concerned. But this combination of notions, and more particularly this martingale of legitimacy that would be self-fulfilling, is doubly questionable. First, and foremost, the concepts mobilized by their promoters are absolutely not mastered in their very basic meaning and, secondly, the auto justificatory procedure is so obvious here that it becomes doubtful.

The concept of legitimacy is one of the most complex concepts to deal with as P. Magnettehas perfectly demonstrated in an important part of his work devoted to the European Union.[101] Furthermore, he explains and establishes that the institutional system of the Union can, itself, escape this conceptual arsenal of political science specific to the sole concept of the State, in so far as that the system has not managed to be sufficiently mature to be able to contend with concepts specific to other patterns of organization of human societies designated as complex. We are witnessing an intellectual plunder which consists in taking for granted notions - including that of legitimacy - which are not final and stable or construed in a way as to be appropriately engaged with by those who have a calculated interest in hiding behind their clothes.

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[96] Honesty and dishonesty are basically moral notions, they do not fall within the ambit of law as long as they are not endowed with definition and consecration. It could, therefore, be admitted here that this specification is totally useless and without any effect but that of making some "salve their consciences" and reassuring others.

[97] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0376+0+DOC+XML+V0//en, accessed February 3, 2015.

[98] Cf. Stubb's report entitled "EU lobbying under spotlight," 03. 04. 2008, Réf. : 20080331FCS25217.
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20080414FCS26495+0+DOC+XML+V0//EN, accessed February 3, 2015

[99] http://pubaffairsparis.org/un-mot-de-la-part-de-gerard-legris-registre-de-transparence/, accessed February 3, 2015.

[100] As demonstrated in the several papers presented at the colloquium held on 28th May 2014, cited herein.

[101] P. Magnette, *Contrôler l'Europe*, IEE, 2003.

A large and rigorous legal-institutional approach is to be preferred to this intellectual laziness. But we know with what contempt and lightweight some big names of political science discredit the right to know and therefore to understand.[102] Let us recall that legitimacy is understood in law as a mechanism of both representation and control. What do lobbies represent, apart from private interests, and who controls them? Let us also recall that the institution used to get near the Union was necessarily the EP, which has both an obvious weakness but also a real decision making power. Weakness, to the extent that parliamentarians are not necessarily technically equipped to understand the issues and the significant economic challenges that play at their level in addition to being deprived of technical advisers who would be attached to them (unlike ministers or commissioners) ... As for European Parliament's strength, it must be sought in its participation in the making of the said European norms.

If we cannot argue that the lobbying activity reinforces the legitimacy of the EU institutions to the extent that it is based on other external and conceptual frames, we can, on the other hand, affirm that the whole challenge for them consists in reaching and crossing the threshold of social respectability. This respectability is acquired through repeated claims to transparency and self-proclaimed legitimacy. But this legitimacy is purely private, economic and corporatist. The interest groups have never been and will never be, functionally and professionally, able to enable the Union to be more legitimate in the political and citizenship terrain ... Why not say it? Why muddy the waters? The legitimacy spoken of here is manipulated. The European Parliament is legitimate in the political and democratic sense. The lobbies are legitimate in the private sphere, with regard to the clients they serve.

In this quest for legitimacy by proxy, it would have been interesting to systematize the thinking by operating an operational and conceptual distinction: industrial lobbies (broad sense) are represented by a legitimate proxy within the pattern of democratic representation that the European Parliament embodies (see Articles 10 and 11 TEU in particular) and which is vouched for by legislative record;[103] non-industrial lobbies (NGOs, and some misleading fronts of the industry ...) can take the route of European Citizens' Initiative.[104] Without being pessimistic, we can note that the ECI is likely to be hijacked by the lobbies to reach for the democratic grail that this popular initiative represents. Behind the sovereign people, there are industrial submarines which are so transparent that we obviously do not see them act to mobilize networks of signatories.

Active on the field of lobbyist practice for 3 years, according to the report published on June 20, 2013[105] by the Alter-EU[106] associative platform, specialized in the monitoring of EU lobbying, it is argued: "the voluntary register is a failure due to lack of commitment on the part of a major portion of lobbyists who fail to register. Besides, it is full of incomplete or unchecked details." For example, the online trading company E-Bay declares a lobbying budget of less than € 50,000, while employing five lobbyists two of whom are accredited with the Commission.

Conversely, a Turkish company producing organic baby clothing is among the three largest contributors to the Brussels lobbying, while it does not even have offices. This is likely to be an uncorrected reporting error because not checked by the Commission services responsible for the register.

In its report, Alter-EU also shows that more than a hundred companies, real free-riders involved in lobbying in Brussels, still reported no activity of any kind in the registry. Among the notable absentees, there are Apple and Amazon who clashed swords alongside Google and Facebook (the "GAFA gang") in order to limit the scope of a

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[102] Cf The introductory remarks made by R. Dehouse, research guide, at the viva voce of N. Leron at the Paris Institute of Political Studies (IEP, Paris) on 29 January 2014, *La gouvernance constitutionnelle des juges* (the constitutional governance of the judges). « N. Leron (a trained jurist) had to undergo an intellectual transformation by substituting to the certainties of the jurist the more guarded attitude of researchers in social sciences." Suddenly, the jurist learns that he is not a researcher, that law does not fall within the ambit of social sciences and that he is filled with certainties...

[103] The legislative record that had been imagined and which is to enable citizens (it is not clear which citizens it is intended for) to know the names of lobbies that have approached the MEPs is simply a gimmick. Who could, reasonably, know for an instant, what was said, exchanged, negotiated between the MEPs and the interest groups? Presenting the said record as a guarantee, indeed even a tangible proof of transparency, far and above its being an imposture, makes no sense.

[104] European Citizens' Initiative foreseen in Article 11-4 TEU.

[105] http://www.alter-eu.org/sites/default/files/documents/Rescue_the_Register_report_25June2013.pdf

[106] See the excellent synthesis of this report made by B. Sourice, *op.cit*.

draft regulation on the protection of personal data on the Internet.[107] Another notable case among listed companies, there is the US investment bank Goldman Sachs (GS), known for its aggressive financial strategy and its close links with the administration in Washington.[108] While these companies do not comply with the voluntary framework set up by the European Commission, it does not prevent them from being received and heard within the European Union institutions.

For Alter-EU, the case of Olli Rehn, Vice President of the European Commission and Commissioner for Economic and Monetary Affairs, perfectly illustrates how not following the lobbying register and code of conduct is tolerated at the highest level. Thus, 62% of appointments that the Commissioner had given between January 2011 and February 2012 had been made with respect to non-registered organizations, including three meetings with representatives of Goldman Sachs.

"While many parliamentarians have repeatedly expressed their wish to see the register move towards a more restrictive approach, the Commission continues to defend a "voluntary" approach[109] in some areas of activity,[110] which is questionable as was pointed out by the Court of Justice of the European Union.[111]

Conclusion

The failure of the system, particularly the absence of restriction on the authenticity of the data provided, just as the existence of opaque practices as evidenced by the recent Dalligate scandal,[112] or even the maneuvers of the tobacco[113] lobby are all elements which convince the jurist that the transparency we are talking about is only proclaimed, repeated, imagined or even sublimated, but in no case operational and founded legally speaking.[114] Since March 2012, more than 400 quality checks, or 15 per week, have been carried out. On an average, 60% of the random checks found data "problems" that is to say, incomplete or non-existent data. However, only five complaints were addressed and only one case resulted in removal from the register.[115] It is this critical work that the Unionist jurist must devote himself to, in order to continue to pursue the construction of objects of study in law. It is the collective responsibility of the publicist doctrine to position itself firmly against the newspeak that a lot of ignorance and / or intellectual ease equate with law in all legitimacy or transparency, or both.

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[107] Please refer to the edifying works of J. Lapousterle, *L'influence des groupes de pression sur l'élaboration des normes*, *loc.cit*., which deals with issues currently at the heart of considerable economic stakes relating to intellectual property and its status within the framework of worldwide on-line marketing platforms of identified works due to consideration of these as services (online sales) by the Court of Justice. France has already lost its battle for reduced fiscal taxation on these sales which are not goods (physical objects) but services.

[108] In the US, where the declaration of lobbying activities are mandatory, the bank says that it spent in 2012 some 3, 540, 000 dollars to influence policies in Washington.

[109] In May 2013 Maroš Šefčovič specified his position in his personal blog : "I always thought that the voluntary approach was the best for European Union institutions [...]. I am convinced that the vast majority of interest groups have nothing to hide and gradually all of them will end up registering."

[110] The edifying words of L. Ferrari and M. Pernin, *Les lobbies dans l'UE et le marché transatlantique,* enabling us to measure the degree of opacity of action by lobbies. (http://www.contrelacour.fr/lobbies-union-europeenne-ttip, accessed February 3, 2015).

[111] CJEU, 03. 07. 2014, *Sophie in 't Veld*, Case. C-350/12 P. In this extremely interesting case, the Council of the European Union asked for the annulment of the decision by the general court through which the general court had partially annulled the decision of the Council of the European Union dated 29th October 2009 refusing to grant Mrs inn't Veld complete access to a document containing the opinion of the legal department of the Council about a Commission recommendation to the Council intended to open negotiations between the EU and the USA with a view to concluding an agreement intended to give the US Treasury Department data from the financial messaging system. The appeal was rejected. This decision must be read in relation to the negotiations taking place within the framework of the TTIP or TAFTA.

[112] http://bruxelles.blogs.liberation.fr/coulisses/2013/03/dalligate-barroso-a-t-il-été-manipulé-par-lindustrie-du-tabac.html, accessed February 3, 2015.

[113] In France in July 2014, the tobacco lobby did not want to establish a system of traceability of cigarettes. Indeed, the "evaporation" of millions of cigarettes that we find again as smuggled goods is, undoubtedly, more interesting to avoid paying taxes. Let us recall that between 2001 and 2002, record penalties have been imposed by the Commission on well-known tobacco manufacturers who had been converted into smugglers. Aren't defenders of these big groups whose conscience clause could be mobilized at any moment, passive lobbyists in so far as they try to obtain from the judge, prior to the trial, a decision which must coincide with the protection of the multiple interests of their clients whom they would have defended earlier?

[114] The scandalous Monsanto affair which revealed the existence of a connection between the EAFS (European Authority for Food Security) and the American company clearly has not served as a lesson. See J. Bové, *Hold-Up à Bruxelles. Les lobbies au cœur de l'Europe*, La découverte, 2014, especially p. 33 and the following pages.

[115] M. Malherbe, "Quel bilan pour le registre de transparence de l'UE ?",http://www.lacomeuropeenne.fr/2012/11/28/quel-bilan-pour-le-registre-de-transparence-de-l-ue/, accessed February 3, 2015.