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***Panel 8D**: What difference has the lack of a constitution made to the work of the European Parliament? Views from the inside*

Chair and Discussant: John Peterson (University of Edinburgh),

Soft law or no law ? The European Parliament's new role in the management of organized interests

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Abstract

The European Parliament continues to evolve into a classical parliamentary institution. It becomes more political (in terms of party politics) and deals with issues touching upon people's daily lives, thus creating incentives for new methods of participation in EU policy-making. In a changing regulatory environment there are, however, less legislative dossiers of a redistributive nature and more decision-making on the legal framework shaping the activities of economic operators and creating a tension between private actors' rights and the interests of public authorities. The paper intends to assess, on the one hand, the impact of new preferences for legal or para-legal instruments and of institutional demands on the methods and strategies of interest representation. On the other hand, it seeks to clarify the relationship between private interest preferences concerning the extent of regulation and the choice of governance tools by the EU legislator.

Content

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1 Introduction

Current research on lobbying still starts in most cases from a clear distinction between public and private actors which operate according to very different rules and principles. While public actors are seen to apply a top-down approach from basic political tenets (e.g., social justice or economic competitiveness) to their practical implementation in specific legislation, private parties acting in markets are usually described to operate in fluid, multi-dimensional, and net-worked surroundings requiring rapid *ad hoc* problem-solving measures. Furthermore, public actors are usually seen to be the hierarchically superior part in the public-private relationship: only they can adopt binding rules for society as a whole and, at least in principle, it is up to them to what extent they allow special interests to bear on their regulatory and legislative activity. Despite twenty years of intensive academic work on (multi-level) governance and regulation and at least as many years of public discourse favouring deregulation and lean government this juxta-position between the government as the ultimate decision-maker and the private firm/association as the object of such decisions is still very prominent in the lobbying literature (Schneider 2004), and perhaps correctly so. Has lobbying research as an academic field been somewhat isolated from other fields of social science or is it precisely because of the subject matter of lobbying research that it does not see the priorities, instruments and procedures of public and private institutions as similar as some pluralist network theorists would have it?

Another question is more specifically related to the study of the European Union. Interest representation, particularly at the European level, has long been seen by functionalists as instrumental for the increase of the supranational institutions' autonomy (Stone Sweet and Sandholtz 1998). At the same time, European governance is characterised by much less spending power and hierarchical implementation instruments than national governments, hence providing a case study of "governance with less government" (if not "governance without government").[1] However, the trend towards deregulation and intensive public-private partnerships has been observed in parallel at both the national and the European level. Therefore, the second question raised here is the following: given that the multi-level structure of EU governance has mostly been more open and malleable to outside interests than close-knit and hierarchical national administrations, has the European level of governance benefited from a relative weakening of national state structures through deregulation? If so, has transnational interest representation played a role different from that of (increasing) lobbying at the national level? Finally, do European public institutions such as the European Commission and the European Parliament have different institutional demands on European interest representation than national governments on national lobbyists?[2] Or are they more easily captured by powerful trans-European associations which have the support of some national governments in the Council?

The rise of the European Parliament as co-legislator is one institutional change which has certainly restructured European governance. Not many years ago, it seemed natural that a description of the lobbying arena which gradually emerged in Brussels did not merit a separate chapter on the role of the European Parliament in EC decision making - and the

[1] In the words of constitutionalist Joseph Weiler: The EU is "constructed with a top-to-bottom hierarchy of norms, but with a bottom-to-top hierarchy of authority and real power" (Weiler 2001: 57).

[2] Michalowitz claims that "an organised market of lobbying [in Brussels] seems to have developed precisely due to [the European institutions'] active influence on lobbying behaviour" (2004: 92). For a more skeptical view of the differences between national and European lobbying practices see Michel 2005 (18/19).

many ways and means to influence it (Mazey and Richardson 1993). Then, an increased role of the Parliament was acknowledged as a result of the entry into force of the Single Act, on issues related to the single market. In manuals, lobbyists were given the advice to stick to the Commission draftsman because he or she often exerted great influence over the Commission's attitude towards amendments proposed by the Parliament or the Council at the later stages of a legislative proposal.

In the meantime, the situation has changed both at the practitioner and the academic level. While the study of European lobbying evolves from a descriptive into an analytical and hypothesis-testing discipline (Coen 2007) the practice of interest representation encompasses new institutions, policy areas, instruments and avenues, all of this at a significantly higher level of financial and structural commitment. Without any intention to diminish the pivotal role the Commission plays due to its right of initiative it is obvious today that with the extension of its legislative powers over the past 20 years the European Parliament has also become a preferred addressee of companies, trade associations, public affairs consultants, and citizens' action groups. The goals of these organised interests are to transmit selected information to Members of the European Parliament (MEPs), to underline particular aspects of the a legislative project and thus to influence the regulatory environment on their behalf or on behalf of their clients. They make similar attempts with the Commission and the Council, to be sure, but we will see below that changes in the interinstitutional triangle have profoundly influenced the way lobbyists perceive the European Parliament and the methods they have adopted to work productively in this new decision-making environment. Compared to dealing with streamlined hierarchical organisations such as national ministries, permanent representations or the Commission there are important caveats when working with a heteroclite and multipolar institution such as the European Parliament.

The paper will continue with a short theoretical discussion of the role of interest representation in modern governancec systems. The third section will dicsuss the increased use of soft law instruments in EU governance. As in the previous part, the focal point is the changing perception of the role of government with respect to markets and private actors. The fourth part deals with the structures and resources of special interests as well as with the measures the European Parliament has taken over the past years to manage its contacts with outside organisations. Chapter 5 describes how the European Parliament negotiates legislative dossiers, especially in codecision matters, under the new interinstitutional framework and aims at some tentative conclusions on if and how interest representation could influence it. In a final outlook (part 6) options for the further development of interest representation at the European level are discussed.

2 The representation of organised interests and the transformation of legal instruments in advanced democratic systems

The legitimacy of democratic decision systems is usually seen to consist of three components: the quality and effectiveness of the political decisions, i.e. their benefit for the citizens concerned (output legitimacy); the recruitment, representativeness and accessibility of political decision-makers (input-legitimacy); finally, the legitimacy of internal procedures, i.e. the legislative and administrative transparency of procedures and decisions, the self-obligation of the institutions involved to follow rules of good administration, as well as sufficient controllability by democratically elected representatives. This threefold legitimacy

can be seen as the yardstick to evaluate national as well as European approaches to manage organised interest representation.

After the end of the cold war a change of the role of the state has occurred in most European countries. Government was transformed from a carrier of sovereign powers to a service provider in an increasing number of domains. Furthermore, a trend towards deregulation and lean government became dominant. This changed not only the distribution of tasks between the private and public sectors but also the objectives and instruments of governmental activities. Regulation of economic policies has hence become an important object of political science, particularly in network industries such as telecommunications, energy or transport. Recent work in this field has been focussed on describing intermediate "third way" strategies between old style, interventionist, state-oriented policy-making and liberal initiatives to minimise the use of public resources for the implementation of common societal interests. In order to avoid a purely negative description of the objectives and the utility of state action a recent paradigm develops the concept of the "responsibility-sharing ensuring state" which assures the respect of public interests, e.g. in social policy or infrastructure, but does not carry out these activities by itself (Schuppert 2006, 236).

The core of the ensuring state concept is a new definition of state action instruments and the relationship between non-governmental and state actors. According to traditional legal norms there is a hierarchical relationship between public and private acts, the state being exempt from competition and directly responsible for the implementation and surveillance of most of its activities. More recent theories of governance and regulation stress that governance today is part of a network of private actors and negotiated contractual relationships. This new division of tasks is characterised by a natural tension between the state's dependability as the last instance of many legal or political decisions (e.g., in cases of market failure) and its responsibility to provide all citizens with a given set of social or economic provisions. The ensuring state implements these provisions through cooperation with non-governmental actors but does not necessarily carry them out directly. Hence its first responsibility remains to respect general interests but to implement them it does not act predominantly through legislation but more often through contracting and the creation of new types of agencies with characteristics of both public and private institutions. Consequently, governments and administrations do not have the monopoly for the common weal anymore.

In the UK, the desire of both Labour and Tory leaders to make the National Health Service independent from direct state interference can be cited as a classic recent example for this evolution. The basic idea in both parties seems to be that the underlying *raison d'être* of the NHS is changing from the public provision of health care to the purchase of medical treatment from any provider, be it public or private. However, all of this is conditional to the continuing requirement of free service for patients. In France, President Chirac has spoken out at the *Comité économique et social* in autumn 2006 in favour of less regulation by law and more contractual approaches.

This new division of responsibilities obviously entails new challenges for businesses and public authorities alike to negotiate favourable terms for entering into contractual relationships. The public side of these negotiations is hence increasingly guided by business practices such as outsourcing or focussing on core competences. Consultants specialising in the public sector often recommend solutions such as public-private partnerships for management problems at all levels of public administration. New governance approaches can, however, not eliminate the necessity to have a state which, oriented towards

safeguarding the general interest, is able to correct failures in the non-governmental implementation of political, social or economic responsibilities and to function as an insurance against inequitable definitions of the general interest. In this role the state cannot be dependent on arbitrary choices of private actors or their varying strength of implementation. There are risks that the insight into the necessity of certain regulations is sacrificed in order to obtain compromises with strong organised interests. The careful fine-tuning of private interest representation and intermediation, particularly in directly elected institutions, thus represents a substantial correction factor. Only if all social groups have roughly equal chances to shape governance an "open society of public interest interpreters" (Schuppert) can be created without running the risk to return to a modern version of corporatism.

The literature on European governance, too, has elaborated a number of theoretical models similar to the above concept of the "ensuring state" (Jachtenfuchs 1998, Kohler-Koch and Eising 1999, Lehmann 2002). The European multi-level governance paradigm is just one example where governance is, on the one hand, understood as a complex network of horizontal and vertical cooperative relationships. On the other, governance is often seen as a normative idea to improve the functioning of democratic systems at the European or global level. Some years ago, this debate was intensified in the European context by the efforts of the European Commission to reform the community method through extensive consultation procedures with carefully selected partner organisations and thus to improve the input legitimacy of European governance.[3] The 2006/2007 European Transparency Initiative (ETI) follows up on these earlier efforts but includes new elements such as special training programmes for Commission officials or internal awareness-raising campaigns.

One aspect of the transformations outlined so far is the increased resort to non-binding normative prescriptions in the regulation of markets or other sectors of society. Some examples of this at the EU level, such as Interinstitutional Agreements (IIA) or the Open Method of Coordination (OMC), have been extensively studied for the past five to ten years. Other aspects such as the influence of private interests on the choice of regulatory instruments still merit more scholarly attention, not least to clarify whether a legal system can contain multiple rules of recognition that lead to the system containing multiple, unranked, legal sources, with the possibility that they will result in inconsistent rules addressed to private actors.

3 The emergence of soft law in European governance

Soft law has always played an important role in European integration and is not a new phenomenon. It has been used since the early years of the European Community. In particular, Article 249 EC has always explicitly provided for two soft law instruments − recommendations and opinions.[4]

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[3] Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission (COM(2002)704 fin.

[4] "In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.
[...]
Recommendations and opinions shall have no binding force."

Over the years Community institutions have resorted to soft law instruments such as action programmes, communications, and similar documents with an increasing frequency. There have been also proposals to use soft law as an alternative to EC legislation. An illustration might be the Communication "Tax Policy in the European Union − Priorities for the years ahead."[5] Having regarded the difficulties to reach unanimous agreement on legislative proposals in the area of European tax policies, the European Commission called on the Community to consider the use of alternative instruments such as soft law acts. According to the European Commission "the use of non-legislative approaches or 'soft law' legislation may be an additional means of making progress in the tax field."

The European Commission has presented various reasons for using soft law rather than adopting binding legislation. Among its justifications is that the use of non-legislative (soft law) approaches could be particularly effective in cases where they have a firm legal foundation, are based on the Treaty, or the case law of the European Court of Justice (ECJ). In these cases, instruments such as communications, recommendations, guidelines, and interpretative notes can provide guidance to Member States on the application of the Treaty principles and promote the rapid removal of obstacles to the Internal Market.

The use of soft law can also address, at least to a certain extent, the problem of the asymmetry of a legal approach in EC law. This is because, first, these instruments can point to potential legal problems and indicate possible ways forward for dealing with them in order to avoid legal conflicts or even litigation. Second, soft law approaches can contribute to the development of new rules when the ECJ has struck down the old rules as unlawful. The downside of using soft law approaches is, however, that they can be very resource-intensive. And they are, of course, not directly binding in legal terms.

A large body of soft law has been so far developed by the European institutions. Despite this proliferation, the EC Treaty has not been adapted to the new reality. Apart from the very limited provision in Article 249 concerning the non-binding character of recommendations and options, the treaty remains silent on the nature, function, and status of other soft law instruments that frequently occur in Community practice. Due to a long-standing tradition of soft law in Community law, however, the ECJ has developed a case law on the nature and legal status of some soft law instruments.[6]

For the purpose of this paper, the analysis will focus on examining soft law in the EU framework and developed primarily by the European Commission (institutional soft law). Although the Council of the European Union and the European Parliament can create soft instruments as well, Commission soft law has been an important source of Community rules. Given the uncertain status of soft law, however, one might ask in what cases and under which conditions soft law instruments are capable of functioning as a satisfactory alternative to Community legislation.

Soft law has appeared in the public and scholarly debate as a more or less precisely defined term about ten years ago (although there are a few papers published in the early 1990s). For the purposes of this paper soft law is defined as "a variety of processes" which "have normative content [but] are not formally binding" (Trubek et al. 2005: 65). According to the actors creating such instruments we can distinguish between institutional soft law such as

[5] COM(2001)260 fin

[6] See for instance Cases C-322/88 Grimaldi vs Fonds des maladies professionnelles [1989] ECR4407 or C-303/90 French Republic vs Commission [1991] ECR I-5315

preparatory, informative, interpretative, steering and decisional instruments, member states' soft law or private self- or co-regulation.[7] In the EU context, Interinstitutional Agreements and the OMC have found particular attention among EU scholars. However, for an analysis of the mutual impact of soft law expansion and increased lobbying, instruments which include private actors are the most pertinent variety of soft law. According to a definition widely adopted by the European institutions, self-regulation concerns a "large number of practices, common rules, codes of conduct and, in particular, voluntary agreements which economic actors, social players, NGOs and organised groups establish themselves on a voluntary basis in order to regulate and organise their activities. Unlike coregulation, self-regulation does not involve a legislative act. Self-regulation is usually initiated by stakeholders." (European Commission 2002: 7).

As co-legislator, the European Parliament was never enthralled with soft law instruments. In its resolution on the Commission's White Paper on European Governance of 29 November 2001[8] the European Parliament reaffirmed its role of co-legislator and denounced the risk that certain proposals made in the White Paper could impinge on the effective exercise of its political responsibility. In agreement with the Commission, Parliament also reiterated its attachment to the Community method and to its obligation to scrutinise forthcoming proposals that would make the political process more open to civil society. On the delegation of responsibility to agencies, the Parliament's resolution basically agreed with the Commission's approach, adding however the request to set the conditions for a call back procedure. Moreover, autonomous agencies should be used only if specific scientific or technical expertise was required and a decentralised administration seemed appropriate. However, this should not lead to a reduction in expert and judicial scrutiny by the Commission or to any dilution of the Commission's political accountability. On co-regulation, the EP demanded a guarantee for Parliament's appropriate participation in the drafting and control of such schemes. Finally, the Parliament recognised the importance of information and communication with citizens on the challenges that Europe faces and stressed the role of parliamentary debate on politically salient issues to stimulate citizens interest on European issues.

Many of the ideas promoted by different actors in the debate on European governance were considered a elements of a "sub-treaty" reform of the EU. The uncertain destiny of the Treaty Establishing a Constitution for Europe (TCE) has considerably delayed any treaty-based changes of European policy-making. In any case, most of the institutional innovations contained in this text or its likely (non-constitutional) successor do not directly impinge on the practicalities of European governance and interest representation. There would be interesting changes in the Commission's right to implement delegated legislation on " non-essential elements" of European (framework) laws[9], which would certainly require Parliament's attention to how it could control these activities. But the problem would scarcely be new, reminding us to a large extent of the ongoing issue of comitology and its transparency.

In another example of "sub-treaty" reform, Parliament has achieved, after laborious negotiations, a revision of the Council's comitology rules. On 17 July 2006 the Council amended the decision laying down the procedures for the exercise of implementing powers conferred on the Commission to add a new procedure: regulatory procedure with scrutiny.[10]

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[7] For a list of examples of these different types of soft law see Peters and Pagotto 2006.
[8] OJ C 153 E of 27 June 2002, p. 314
[9] Article I-36 TCE
[10] Decision 2006/512/EC (OJ L 200 of 22 July 2006).

This procedure will allow the legislator to oppose the adoption of quasi legislative measures, namely measures of general scope 'amending' non-essential elements of basic instruments adopted by co-decision, if it considers that the draft exceeds the implementing powers provided for in the basic instrument, is incompatible with the aim or the content of that instrument or fails to respect the principles of subsidiarity or proportionality. The European Parliament, the Council and the Commission also adopted a joint statement containing a list of legal instruments already in force to be given priority for adjustment under the new procedure.

Perhaps the major "sub-treaty" issue that occupied the Parliament over the past few years was the debate leading to the IIA on Better Regulation.[11] This has notably introduced the idea of regulatory impact assessment into European governance. For the most part, however, better regulation aims at tidying up and reducing existing legislation and at improving the implementation of EU policies by national administrations. It is hence of less relevance for the analysis of public-private interactions except that possible impact assessment may become a new lobbying avenue for consultants specialising in this activity.

4 Private actors and the stringency of regulation

There is a natural tension between public and private actors in lobbying: each party involved in lobbying contacts is interested in different goods. The legislator obtains valuable information on the situation in the commercial battle-field and appreciates lobbyists' capacity to spread acceptance for a proposal or a bill among the addressees of such a text while the interest representative hopes to steer the decision-making process towards the preference structure of his or her clients (Michalowitz 2004: 91).

Private interests have an *a priori* preference for the absence of regulation because, according to a classic definition, the essential characteristic of regulation is the limitation of the exercise of property rights (Hosli et al. 2004 ?). Hence one of the positions most often taken by lobbyists is a preference for auto-regulation of a given economic sector. Auto-regulation comes in various guises such as codes of conduct, reporting obligations or autonomous, self-binding rule-setting without public interference. However, this general principle is subject to many exceptions which are usually a function of the competitive situation within or across sectors, countries or policies. If for instance lenient or absent regulation leads to the predominance of large economic operators in a particular market, small firms may be tempted to plead for activist legislation. If the *laissez*-faire attitude of a national or the European legislator brings about competitive advantages for certain companies or countries, other actors will probably fight for legislation establishing a level playing field. Non-business interests often depend exclusively on governmental activism to promote their political agenda in fields such as environmental protection or social legislation.

The admittedly simplifying principle of a preference for no regulation can be differentiated if we take into consideration that hard law and soft law are parts of a continuum lying partly in the daylight, partly in the penumbra of law. Specialists of soft law and governance have no difficulty of defining particular *loci* on this continuum, such as "soft acts with a law-plus function" (Peters and Pagotto 2006: 2).

[11] OJ C 321 of 31 December 2003, p. 1

European interest representation: tools and resources

Most manuals for successful interest representation still emphasise the necessity to get involved in the process of political design as early as possible (Guéguen 2007). This usually means to develop good contacts with the responsible services of the European Commission. A few years ago, the Commission had included the comprehensive consultation of regional and non-governmental stakeholders in its widely discussed White Paper on European Governance[12] as an important tool to renew the community method. This was not unanimously welcomed. There were critical comments, not least in the Parliament, that the White Paper intended to create undemocratic and technocratic pre-legislative mechanisms and to evade parliamentary control and effective interest representation (see below).[13]

One of the crucial questions in the analysis of modern interest representation is, of course, how equal opportunity of access to decision-making institutions of different sectors of society can be ensured. Hence academic as well as political debates today turn less around the question whether interest representation is legitimate than how interest representation should be managed and, in particular, how transparent financial and other networking relationships should be. The responsible Commissioner, Siim Kallas, initiated the creation of a new data base on lobbying organisations in March 2007, which is meant to replace or supplement an Internet resource based on voluntary self-descriptions of the organisations involved.[14] One of the reasons for this appears to be that the Commission wishes to provide much more detailed information on the flows of money that nurture the lobbying networks of the European Union. Other issues such as the fair design of the rules used for the control and registration of representatives in the Parliament were earlier examples of an awareness that interest representation has acquired such an importance that some norms and regulation seemed desirable. Such rules can also be seen as qualitative case studies in the framework of a functional theory of democratic systems.

The activities of interest representation and campaign associations generally fall into two categories:

- service functions, i.e. the provision of specific (and often exclusive) services for member organisations (e.g. the collection and evaluation of inaccessible information);
- direct interest representation, i.e. the attempt to influence decision-making processes from the outside (e.g. through contacts with MEPs, officials of the Commission or the Parliament or by participation in public hearings);

Other operations include decision making, i.e. the attempt to affect decisions directly from the inside (e.g. through membership in expert committees which evaluate and select research projects) and implementation, i.e. the participation in political or technical administration (e.g. by taking on management tasks within the framework of funding programmes).

The first two activities are the day-to-day duty of associations, business federations and public affairs consultants. In the parliamentary context of interest representation they make up the bulk of what is usually called lobbying. The two other aspects of lobbying are found more often within the European Commission or, sometimes, the Council or the Permanent

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[12] OJ C 287 of 12 October 2001, p. 1-29

[13] Cf. European Parliament resolution on European governance; OJ C 089 E of 14 April 2004, p. 103 - 106.

[14] COM(2007)127fin.

Representations of the Member States. They contribute in some way to public decision making and political priority setting in the sense described in the previous section.

The metaphor of the political market is often used to describe lobbying activities. Just as the equilibrium price in goods markets is ideally found by the interplay of supply and demand, the equilibrium level of influence is determined by the supply and demand of information, legitimacy and other goods provided by officials and politicians, on the one hand, and lobbyists, on the other. The immediate parallel of price formation in the commercial market would hence be the formation of institutional consensus in the EU political market. Nowadays, the general attitude of EP officials towards interests is benevolent. However, the fact that we are all now quite experienced in comparing the relative quality and availability of lobbying input has made the business of interest representation a more competitive one.

MEPs and lobbyists: how do they interact?

Former MEP and Chairman of the Environment Committee, Ken Collins, now President of the Scottish Environment Protection Agency and member of the European Public Affairs Consultancies' Association (EPACA), has repeatedly claimed , probably speaking for many other MEPs, that the main problem in the influence market was quality, not quantity. Badly prepared and unfocused efforts can be annoying, whereas useful and competent information is often welcome to policy-makers. Particularly useful are comparative research and evidence that will enable decision-makers to assess the impact of their proposal on the law and practices in each of the Member States. One of the suggestions most frequently given by how-to guides concerns the advantage of being in the game as far upstream as feasible. Hence the importance for many consultants to receive crucial SMS messages a few hours earlier than their competitors. Despite the aversions expressed by many MEPs high-pressure strategies are still recommended in many current lobbying manuals.

Besides business representatives Parliament is of course in close contact with organisations active in other areas (for instance with ETUC (European Trade Union Confederation), the BEUC (*Bureau européen des unions de consommateurs*) or the IEEP (Institute for European Environmental Policy), to name but a few important bodies). Quantitatively, the Brussels influence "market" is of course difficult to assess. Sources rarely agree on the exact number and the categorisation of interest groups. In most media articles it is claimed that around 15.000 people can be considered to work in different categories of interest representation and that their total budget is at least between 60 and 90 million Euros (Guéguen 2007).[15] The European Public Affairs Directory 2007 claims to assemble information on 18.000 "top European decision makers", among which are also officials of the EU institutions. The 160 interested parties that supplied written commentary to the Commission in the context of the ETI Green Paper can probably be viewed as the inner circle of Brussels lobbying.[16]

Think tanks which cover most salient policy areas are the new player on the block in EU interest representation. Often financed to a large extent by industry they are nevertheless sufficiently removed from direct lobbying to acquire a different standing. Institutes such as the Centre for European Policy Studies (CEPS) or the Centre for European Reform (CER) are prime examples of dynamic policy entrepreneurs in the provision of all sorts of private and

[15] See also Raphael Minder, The lobbyists that have taken Brussels by storm (Financial Times of 19 January 2006); Der Spiegel of 13 November 2006, p. 165

[16] See http://ec.europa.eu/transparency/eti/contributions.htm

public policy goods. It would be extremely interesting to investigate empirically whether this evolution is, at least partially, due to the rise of the EP as a policy-making institution.

Another aspect of increasing professionalisation are hearings where national or regional representations (e.g., the Bavarian representation next to the European Parliament) convene Commission officials, MEPs, experts and national politicians or civil servants for a debate on important policy areas such as water quality or GALILEO. In other words, occasions for an exchange of views and for influencing decision makers multiply and make venue shopping a necessity for effective lobbying.

Last but not least, the appearance of what could be called trade journals (e.g., the European Voice) contributes not only to the creation of a job and information market but also to a more homogenous professional self-perception. To work as an public affairs specialist in Brussels has become a job description at least as notorious as to be one of Washington's K-Street lobbying professionals, even to the outside world.

The degree of Europeanisation of business interests varies according to specific issues and Member States' lobbying traditions (Beyers and Kerremans 2007). Still, there has been a trend towards direct lobbying strategies which resulted in a marked specialisation according to sectors and in ad-hoc alliances based on issues. As many firms began to find their 'national champion' status under threat, the need was felt to become a member of a Eurogroup, both because of the uncertainties presented by the European market and because of the search for a 'Euro champion' status in particular industries. On the other hand, where Member States retain principal authority and responsibility, interests have less reasons to organise at the European level. The completion of many components of the Single Market project, the important role Member State governments continue to play in implementing and enforcing European rules, and the principle of subsidiarity all point to the unrelenting relevance of Member State authority (Thomson and Hosli 2006).[17] However, the extension of the Single Market into new areas such as services has refocused interests on the EU institutions.

The commencement of the Single Market project is a distinctive example of successful business lobbying, with a clear boost towards more European integration and a significant contribution from the European Parliament. In 1980, a Dutch electronics firm, submitted a memorandum entitled "Europe and Philips - opinions and proposals of a European company", which made detailed suggestions on how to create a European Single Market.[18] In 1984, a good part of these proposals resurfaced in the "Agenda for Action - Europe in 1990" of the ERT, an advisory body of Chairmen of the board and CEOs of big European companies which had been created in 1983 by Per Gyllenhammar, chairman of Volvo, the Swedish carmaker (van Apeldoorn 2000). The Commission then presented a very similar programme in its White Paper on the Internal Market. The European Parliament had already put its weight behind the Single Market project in its resolution of 9 April 1984, where it invited the Commission to present a proposal for a Council act on the creation of a complete internal market.[19] Stories like this lend some credibility to the functionalist school of European integration although the case for the importance of member states' interests can of course be made, too.

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[17] Thomson and Hosli test bargaining models based on previous knowledge of actor preferences and arrive at the conclusion that "the Commission and Parliament have substantial weight in the decision-making process, even though those weights are far less than that of the Council" (413/414).

[18] A central request was the elimination of intra-European trade barriers in order to increase the global competitiveness of big European firms by lowering costs.

[19] OJ C 127 of 14 May 1984, p. 9

5 The European Parliament: policy-making in the face of special interests and the member states

Consultation and binding law: a new strategy for private interests?

Wide consultation is one of the Commission's duties according to the Treaties and helps to ensure that proposals put to the legislature are sound. According to Protocol n° 7 annexed to the Amsterdam Treaty, on the application of the principles of subsidiarity and proportionality, "the Commission should […] consult widely before proposing legislation and, wherever appropriate, publish consultation documents".

There are estimates that approximately 0,5 to 1 million "actors" (i.e., industry groups, regional and local authorities, media, small and medium enterprises and trade union associations, NGOs, universities, research centres) are regularly in touch with the European institutions.[20] About 200 000 of them may already benefit from Community programmes managed by the Commission and often expect to have privileged access to future consultation and participation processes. Hence there would be a risk of establishing a class of favoured groups, firms and institutes if the European institutions, including the Parliament, focused too exclusively on these well acquainted actors (Eising 2007). The experience made by the Commission with the feedback to the White Paper on European Governance indicated, for instance, that public, regional and local actors as well as their associations responded with numerous contributions and concrete proposals, whereas there was relative silence of many organisations of civil society, including the social partners, when compared to their degree of involvement in the preparatory phase. Recent criticism of the High Level Groups installed by Commissioner Verheugen points in the same direction.

In a similar vein, these organisations often have very high expectations on what the Union's institutions should be able to do for them. There are regular complaints from civil society groups that there is a serious shortage in the European institutions of methods and human resources available for managing such a diversity of inputs and for functioning with open networks. Some groups require better cooperation and more technical support from management staff and other officials for these new consultation tasks. Their wish to influence is legitimate but it is also important to maintain an unbiased definition of the European general interest and to organise fairly an ever growing number of consultations.

The European institutions are widely seen, at least by those in regular contact with them, as more accessible as many national administrations and governments although they have much less publicity with citizens, associations, universities or cultural institutions. The European Commission has been making considerable efforts to bolster its input-legitimacy by comprehensive and early consultation of all public and private actors at the very preliminary stages of legislative proposals (cf. its Green and White Papers published well in advance of many formal proposals). Outside interests provide the Commission with key governance resources such as expert knowledge of highly technical dossiers (Bouwen, this volume). Consequently, while the Parliament has turned to some regulation of its contacts with outside parties (see below), the Commission has long sought to encourage self-regulation amongst

[20] Cf. European Governance Newsletter no. 7, European Commission, December 2001.

the interests themselves and continues to be open for all kinds of third party input. But a small number of well organised groups seems to get preferential access to the services. One consequence of this strategy is the so-called "secondary lobbyism" of less connected organisations towards groups well placed in the consultation grid.

With respect to its own decision-making and to the role of the legislative authority (Parliament and Council) the Commission has made it clear that consultation can never be an unlimited or permanent process. In other words, "there is a time to consult and there is a time to proceed with the internal decision-making and the final decision adopted by the Commission."[21] A clear dividing line must be drawn between consultations launched on the Commission's own initiative prior to the adoption of a proposal, and the subsequent formalised and compulsory decision-making process according to the Treaties, leading to binding legislation which can be attacked by judicial means.

Legal cases such as the recent judgment of the Court of First Instance on France Telecom's predatory pricing practices in its homeland[22] demonstrate two things: firstly, a general tidal change of the allocation of political legitimacy between the national and the European level is soon reflected in lobbying strategies (Bouwen and Mccown 2007). While firms might long have seen it as too risky or costly an approach to take legal action against the Commission such action is nowadays an almost normal instrument of defending company interests with respect to binding EU legislation. It means to take advantage of a different political climate with respect to the generally accepted depth and width of EU responsibilities and, more specifically, the legitimate instruments to be used by the Commission in its role as guardian of the treaties. Secondly, the tactics an interest chooses depend entirely on its position in different markets. What can be good in one member state can be detrimental in others.

The increasing likelihood and possible outcomes of such litigation is of course brought to the attention of MEPs by well-prepared lobbyists when they try to influence related legislative proposals that could impinge on their interests. Since a majority of MEPs are convinced that such proceedings are rather damaging for the public image of the European institutions and know that political attacks levelled against the Commission can tomorrow hit the ECJ and next week the European Parliament there is a general sense in the EP that it is crucial to avoid, if at all possible, confrontations which could lend themselves to the knee-jerk EU-criticism cherished by a good number of national media.

Interest groups in the European Parliament: who controls whom?

There is agreement among MEPs and EP civil servants that lobbying has increased significantly over the past decade. Some empirical research confirms this anecdotal evidence although hard quantitative data are hard to obtain given the informality and confidentiality of many contacts *(*Greenwood 2002*)*. What can clearly be demonstrated is the development of new instruments and the professionalisation of European lobbying. It will remain a challenge for this type of research to develop reliable indicators that encompass new phenomena such as lobbying work carried out by MEPs' assistants or temporary staff placed in committee secretariats. Generally speaking, lobbying the European Parliament has most increased in those policies where codecision applies (for instance, in Single Market legislation, consumer

[21] COM(2002)704, p. 11
[22] Case T-340/03

protection, environmental policy, European networks and transport, research, and European citizenship).

Interest representation takes place where decisions are made. Up to the entry into force of the Single European Act (SEA) on 1 July 1987 the Commission and the Council were therefore the preferred counter parts of non-governmental interest groups, while the European Parliament was often viewed as a "phantom Parliament" (Shanks and Lambert 1962). After the institutional position of the EP had been upgraded with the introduction of new legislative procedures - the co-operation and the co-decision procedures - pressure groups much intensified their action with the EP as a new channel of influence. In the early stages, less organised interest groups tried to form alliances with the EP on issues that most concerned the general public. Apparently the main strategy of these groups consisted in lobbying the Commission and the Council as the final targets *via* the Parliament. This had a considerable impact on the institutional balance and its internal dynamics: the Commission and the EP are no longer permanent allies representing the European interest but are increasingly becoming rivals competing for legitimacy (see below). Relations between the EP and "weaker" civic interest groups had the characteristics of what some EU scholars call 'advocacy coalitions'.

It has been estimated that there are about 70.000 individual contacts per year between the Members of the European Parliament and interest groups (Mazey and Richardson 2001). The EP comes into the focus of special interests as soon as the rapporteur of the competent committee starts to prepare his or her report, and the discussion commences within the committee and the political groups. The rapporteur and the committee chair are the main gatekeepers in forming the opinion of the EP. Personal acquaintance, nationality, or political affiliation that might influence the accessibility and openness of parliamentarians rank comparatively low in importance to lobbyists. Assistants, the secretariats of the political groups or the EP's research services are also considered less significant by lobbyists. They give preference to staff close to the rapporteur and the secretary of the Committee. Lobbyists and MEPs agree that it is most efficient to meet a Member in person. The average MEP still receives most of the requests for help and support by letter or e-mail but surprise visits in the office are also part of the game.

The fact that a large fraction of MEPs are not ready to accept industry rationales at face value obliges trade associations and other business groups to find a wider range of policy goods to offer: it is not sufficient to advertise positive effects for some European industries if a clear majority of MEPs is to be convinced. Public goods such as a cleaner environment or higher employment need to be included in the political equation.

Moreover, Rule 2 of the EP's Rules of Procedure specifies that Members shall not be bound by any instructions and shall not receive a binding mandate. To agree to vote in a particular way in exchange for whatever advantages a lobbyist may be prepared to offer would be tantamount to accepting a "binding mandate". Contrast this to some lobbying techniques, for instance those described by Scottish MEP Catherine Stihler: MEPs are phoned by lobbyists demanding urgent meetings or find them knocking on the office door without an appointment; sometimes Members wonder how a lobbyist got there in the first place. However, some tactics are more disturbing than others. For instance, during the debates on Parliament's reports on the biotechnology directive, some MEPs complained about the bombardment of letters and phone calls from companies such as SmithKline Beecham, Boehringer, or Aventis. MEPs expressed their hope that such pressures brought to bear by outside organisations would not happen again. The specialised press continues to report

doubtful efforts by pressure groups to influence Parliament's internal procedures, e.g. to avoid certain MEPs as rapporteurs for subjects for which they are known to be critical.[23]

From a Parliament standpoint the policy area is by far the most important variable that influences both its own institutional demands on consulting input and the level of lobbying activity it is confronted with. As a democratically elected institution it is particularly sensitive to issues which suddenly receive focussed public attention. Examples such as the services directive or the passenger data agreement with the United States show that press coverage, sometimes combined with legal proceedings covered by the specialised media, is a determining factor both for the supply and the demand side of the opinion market.

Institutional responses to increased lobbying

The first step to find solutions to the problems described in the previous section was a Written Question tabled by Alman Metten, in 1989. In 1991, Marc Galle, Chairman of the Committee on the Rules of Procedure, the Verification of Credentials and Immunities, was appointed to submit proposals for a code of conduct and a register of lobbyists. Galle's proposals included: a code of conduct with minimalist standards aimed at preventing abuse (such as prohibiting the sale of documents and the use of institutional premises); the establishment of 'no go' areas in the Parliament's buildings including members' offices and library facilities; examination of the role of lobbying with intergroups; and, taking an idea from the United States, the registration of lobbyists on an annual basis, spelling out the rights and obligations of those on the register, and specifying penalties for failure to comply. A final, and contentious proposal required MEPs annually to state their financial interests and those of their staff, on a separate register. Since no consensus could be reached as regarded the proposed definition of interest groups and the financial interests of MEPs and their staff, the report was finally not discussed in the plenary part-session. One reason behind this failure was the time pressure of the upcoming EP elections in 1994. The most substantive problem, however, were the controversies on the definition of what constituted a "lobbyist".

After the 1994 elections, a second attempt at regulating lobbying was undertaken by the Committee on the Rules of Procedure, the Verification of Credentials and Immunities, which, by letter of 10 August 1994, requested authorisation to draw up a report on lobbying in the European Parliament (Glyn Ford was later appointed rapporteur) and on the declaration of Members' financial interests (rapporteur: Jean-Thomas Nordmann). Mr Ford first asked for a study by Parliament's research services of the rules governing lobbying in the national parliaments of the Member States, thereby making the connection to issues of standards in public life which had arisen on the political agendas of many countries in the years before. The study showed that Member States with provisions governing the activities of interest groups or their representatives were the exception (notably Germany and the UK).

Avoiding the above-mentioned terminological difficulties, Mr Ford proposed a scheme of great simplicity. In its original form, it proposed that the College of Quaestors should issue permanent passes to persons who wished to enter Parliament frequently with a view to supplying information to Members within the framework of their parliamentary mandate.

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[23] For example, according to the European Voice of 9-15 January 2003 (p. 7) a business association representing British makers of food flavourings wrote to MEP Phillip Whitehead, Member of the Committee on the Environment, Public Health and Consumer Policy, asking him to oppose a Danish colleague's appointment as rapporteur.

Later on, the Ford report became concerned not only with regulating the activities of lobbyists, but also with those of parliamentarians, and the incremental extension of its scope led to spirited political debates among the principal groups.

In 1996, the Ford (and the Nordmann) reports were successfully submitted to the plenary after a first version had been referred back to the Committee in both cases.[24] The Ford report proposed amendments to the Parliament's Rules of Procedure, according to which the Quaestors should grant interest representatives a pass in exchange for acceptance of a code of conduct and registration. With regard to financial interests, each MEP is now required to make a detailed declaration of his professional activities. MEPs have to refrain from accepting any gift or benefit in the performance of their duties. Registered assistants also have to make a declaration of any other paid activities. The rules currently in force are annexed to the Rules of Procedure of the Parliament. In a further resolution based on a second report drawn up by Mr Ford, Parliament decided to supplement the Rules with a Code of Conduct for lobbyists (to become Article 3 of annex IX to the Rules).[25] The register of lobbyists provided for in the Rule 9 (2) of Parliament's Rules of Procedure has been available on the Internet for some time now.[26]

There are several explanations for its lengthy quest of a consensus on the regulation of lobbying and that of financial interests: persisting national differences in political culture, lack of a European regulation replacing national rules, different cultural and judicial attitudes towards lobbying in general. The EP's approach to enhance transparency should of course differ from that of the Commission, because each of the EU institutions should adapt its methods to the role it plays in decision-making. While the Commission as the agenda-setter wishes to keep an open dialogue and provides only minimum standards of self-regulation, the EP, as a pluralistic institution participating in legislation, requires institutional structures to secure transparency and the building of stable majorities. It was suggested that "the EP should try to reduce the immense options of pluralism to an easily comprehensible number of options and actors. The regulation of lobbying should contribute to an aggregation of interests and not a fragmentation and a pluralisation of interests" (Schaber 1998). Another critical observer arrives at the conclusion that "the difference between the schemes put forward by the Commission and the Parliament is that the former has sought means of ensuring wider-ranging consultation, whereas the latter may further privilege the already privileged" (Greenwood 1998).

In interinstitutional comparison the European Parliament is probably as open as the Commission, according to lobbyists. Access to the Council, for instance, is far more difficult. But the majority of lobbyists are aware that they have to face varying degrees of acceptance in the Parliament. They attribute this to reservations based on national culture and political allegiance. There is, e.g., a clear North-South division between countries familiar with professional lobbying and those where this industry is still in its infancy. Professional lobbying by public-affairs consultants is well known in the UK, for instance, but less in Latin countries and Germany (although the latter is rapidly catching up since the federal government moved to Berlin). Unsurprisingly, Conservative and Liberal parties more open to producer interest group lobbying than Social Democratic or Green Parties, whereas the opposite situation may be found with some civic interests. With certain Members, consultants

[24] OJ C261 of 9 September 1996, p. 51/52 and 73/75.
[25] OJ C167 of 2 June 1997, p. 14 and 22.
[26] http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?language=EN&id=65. In November 2006, the list comprised over 1600 organisations, some of which have up to 5 people working for them.

have a reputation of being too pushy. As many of them represent clients' interests, some MEPs do not consider them as players that they should rely on or include in their personal network. When evaluating interest positions on a given policy issue, MEPs mostly give preference to those outside interests that either represent a broad constituency such as trade unions, social movements or political parties, or those that can provide them with an aggregate view on the most efficient ways to deal with the problems and economic consequences.

One lobbyist recommends that "lobbyists should be alert to opportunities to make individual rapporteurs 'shine' in the eyes of their colleagues. Well-crafted legislative reports, based on careful investigation and meticulous analysis, can enhance the reputation of a newly elected MEP. And a reputation for diligence and intellectual acumen can lead to leadership positions in the future" (Buholzer 1998). Indeed, to a large extent MEPs act as individuals. Nevertheless, to secure re-election they will try to make use of interest groups and improve their reputation in the constituency and the national party. MEPs also rely on information from interest groups, chiefly if they are expected to make well thought-out judgements about technical details and scientific expertise. Lobbyists recognise that it is not in their interest to be suspected of underhand practices. Good relations with major EU institutions are essential for most of them.

Bicephalic policy-making: new interinstitutional interactions

Relations between the Commission and the Parliament have been often described and their relative influence is the subject of much legal and social science research on EU decision making. The claim put forward here is that the working relationships between the Commission and the Parliament have mainly changed because of a new style of collaboration between the Parliament and the Council (Jacobs 2005). The brokering activities of senior figures of the European Parliament, often lobbying their own governments, are now much more evident. This is obviously of great interest for campaigners and lobbying firms. Their resource allocation between the national and the European level may change as a result of this evolution. On the other hand, Parliament's institutional demands have also changed in the context of achieving a compromise at the latest stages of legislation and under close public scrutiny.

Only a few years ago the first legislative acts were adopted under the codecision procedure and signed by the Presidents of the EP and the Council, now customarily called the two branches of the "legislative authority".[27] This label has been applied in the framework of the community budget ("budgetary authority") but not in the early years of co-decision. The fact that in many cases it is not the Council alone which adopts EU directives or regulations has taken years to become common knowledge, even in the world of Brussels interest representation. Still today, the treaty refers only to the Council as the decision-making institution, even where co-decision applies. This would change with the entry into force of the constitutional treaty. In any case the year 2006 saw the highest percentage ever of acts adopted under codecision. Table 1 also demonstrates that the importance of first reading agreements has almost continuously risen since the entry into force of the Amsterdam treaty (1999 and 2004 were election years). The mechanisms to achieve agreements at the first reading have been further specified and formalised with the latest revision of the Joint

[27] For a succinct description of the consultation and the codecision procedures see Wonka and Warntjen (2004: 11-13).

Declaration on Practical Arrangements for the Codecision Procedure currently examined by Parliament and to be formally adopted soon. The Joint Declaration also enhances Parliament's profile at the moment of signature of an act commonly adopted with the Council (ceremony and press conference).

Table 1:

Percentage of acts adopted in 1st, 2nd and 3rd reading under the codecision procedure since the entry into force of the Treaty of Amsterdam (1 May 1999)

	1999*	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**
1st reading	5	12	21	16	32	41	34	58
2nd reading	19	30	26	45	46	37	19	35
3rd reading	5	19	20	15	15	14	0	10
Total	***29***	***61***	***67***	***76***	***93***	***92***	***53***	***103***

* from 1 May

Source: European Parliament, Directorate General for Internal Policies

The increasing application of the codecision procedure has had an impact both intra- and interinstitutionally. It is important for consultants, campaigners and other lobbyists to understand that inside Parliament committee rapporteurs and, to a lesser extent, chairmen are strongly attached to the substantive political issues under examination and fight for what they see as the best regulatory outcome in a given policy field. This is not to say that there is no influence from other strong figures of the political groups or from the (informal) national delegations. However, this sort of pressure, mostly quite unrelated to the technical aspects of the original dossier, mounts considerably with the advancement of a draft act to the conciliation stage. There may hence be tensions between the (political) 'experts' of the responsible committee (who are in any case losing their direct influence) and the conciliation specialists who tend to see Parliaments institutional position or the power of their political group as determining factors of their posture in negotiations with the Council. Naturally, there are tactical calculations on whether it is to Parliament's (or a committee's) advantage to conclude or not at the first reading.

Interinstitutionally, there was relatively little contact between the EP and Council staff, except perhaps in the budgetary procedure, until the end of the 1980s. Developments on legislative texts within the Council were generally communicated to the Parliament by Commission officials. Under the old consultation procedure the EP's role, always relatively weak, practically ceased once it had given its opinion, and the main deals were then done between the Commission and the Council. The cooperation procedure introduced by the Single

European Act complicated the situation, and gave greater bargaining power to the EP, but still left it in a weaker position than the other two institutions. The introduction of codecision, however, led to a new triangular relationship (in the legislative field) between the three institutions and thus to a much closer direct relationship between the EP and the Council, including between their respective staffs.

Ministers from countries holding the Presidency now not only address the Parliamentary committees within their area of responsibility at the beginning of their term of office (normally in order to outline their priorities and work programme), but increasingly offer to debrief committees at the end of their term of office on what they have achieved, notably at their Council meetings. The way in which these Ministerial presentations have been treated by EP committees is also evolving, with some committees (and Presidencies) seeking to move away from "pro forma" presentations of Presidency shopping lists to more in-depth discussions on matters of substance.

Presidency Ministers now routinely call on the relevant committee chairmen (and sometimes political group coordinators within the committees as well), typically before their Presidency has started to discuss future cooperation during their term-of-office, but also just before they address the committee or even on other occasions., such as when they are in Brussels for the final stages of conciliation negotiations. Even Ministers from countries not holding the Presidency are having increasing contacts with committees and with their chairmen.

There has also been a slow evolution with respect to active contributions from Council representatives other than Ministers. Not only Presidency but other Council working group representatives are increasingly present in EP committee meetings when legislative issues are being discussed. Moreover, the representatives present are usually technical experts from the Ministry in question, and know best what is at stake within the Council. The Commission, which is present at Council discussions, can also outline the state of Council discussions, but it may have a different perspective. It would obviously be of great value also to hear it directly from Council officials.

Furthermore, there are many informal contacts between EP and Council secretariat staff on co-decision files but Council officials avoid to name and shame particular delegations attempting to block progress or push through their special interest. All these considerations help to explain Council reluctance to speak in EP committee meetings There are signs, however, that this is beginning to change. EP committee staff know their counterparts on the Council secretariat, and in some cases may have regular formal meetings every 3 or 4 months with them to discuss horizontal legislative problems, timing of transmission of common positions, etc. Regular contacts also take place between the two institutions' respective conciliation services. There are other areas where new informal practices are being developed between the EP and the Council.

The position of the Parliament with regard to the Council is now stronger than it was, and there are far more direct contacts between the two institutions, as well as more scope for occasional coalitions against the Commission. What is unclear is the extent to which the EP's increasing influence in the codecision and budgetary contexts will spill over into areas where the EP has less formal powers, such as international trade agreements, justice and home affairs or foreign policy matters, cross-cutting issues such as the Lisbon Process, or non-legislative (and intergovernmental !) procedures such as the OMC. There may also be some resistance coming from within the Parliament against too cosy relationships with the Council Presidency or other big member states. For instance, the recent close (and effective)

cooperation between two German group leaders and the German government in some very important dossiers caused some misgivings among MEPs of other groups or nationalities.

Two basic lessons may be drawn by lobbyists and campaigners from this newly designed playing field: the Parliament can act differently at different stages of the legislative procedure (for instance, at the committee level in a first reading agreement or at the conciliation level in a third reading agreement) and the Parliament can be a valuable source of information on the state of play not only as concerns it inner workings but also the balance of positions in the Council. To reap these fruits, however, close observation of the proceedings and knowledge of the essential players and their staff are crucial.

Future research should certainly address the question of whether closer cooperation between the Parliament and the Council enhances or reduces the risk of the legislative authority to be captured by special interests. For a long time, European governance was quite isolated from public pressure, leading to an increased importance of more confidential exertion of political influence, such as lobbying (Michel 2005: 17). However indirectly, the European Parliament has succeeded in introducing or provoking some elements of popular democracy in the European political arena, such as demonstrations of unions or citizens' action groups. Recent examples include demonstrations in Strasbourg protesting against some liberalising elements of the ports and the services directives as well as movements against the dilution of the REACH directive on chemicals. While such events are still much more exceptional than at the national level, they clearly show the impact of a directly elected and majoritarian institution not only on the rules of legislative decision-making but also on the logic of influence.

6 Outlook

The difficult transition from negative to positive integration (Scharpf 1998) has been amply demonstrated for macroeconomic and social public policies. However, the private sector faces similar challenges which have changed their approach, for instance, to recent proposals for completion of the single market. As mentioned above, the single market project was unabashedly welcomed by industry, trade and banking interests as long as it constituted primarily the removal of barriers to trade, direct investment and capital transfers. Projects such as the services directive, the roaming charges regulation or the single European payment area meet much less enthusiasm from private interests because they risk to benefit consumers or workers to the detriment of profit-making, or because they are required because of factors not directly linked to the economy (for instance, the passenger data dispute with the United States). Hence the repeated calls from interest representations for self-regulation, soft-law instruments or even out-right rejection of some recent Commission proposals. In this new lobbying environment, where there is only qualified support from business interests for many proposals but intense pressure from other activists the European Parliament has become an important arena for fleshing out difficult compromises. One of the challenges of developing an evidence-based theory of lobbying will be to create models of lobbying strategies as a function of the type of integration envisaged by a new proposal.

Pluralistic democratic systems are supposed to give to all economic and social actors the chance not only to represent their private interests but also to express their views on how to balance interests in the shared public space between government, civil society and private individuals making choices about how they want to live. The idea of a state less inclined to claim supreme authority and extended to the multi-level governance system of the European

Union is part of an evolution towards public authorities which negotiate contractual relationships more than they enact binding legislation. Transparency and fair access to decision-making institutions will continue to be highly important in such a system. The crucial issue has been and will be how to compensate for different levels of organisational proficiency among interest groups in order to include all relevant positions into the framework of negotiations and to arrive at balanced political priorities.

The concept of the "ensuring state" places the duty to provide equitably for the public good at the centre of its responsibilities. Its guiding principle is hence to transform non-state actors' calculations to maximise their individual benefit into civic contributions to broader societal interests. Strong control mechanisms are necessary if there is to be a chance to arrive at such transformations. Whether the European Parliament specifically is in need of stronger control of its relations with private interests is an open question to which the results of the renewed debate on lobbying will bring the answer. True, its current rules date back to the mid 1990s but compared to many Member States this does not seem particularly irresponsible. However, in a recent Working Document, the Committee on Budgetary Control called for 'greater scrutiny of lobbying activities'.[28] The Committee on Constitutional Affairs will prepare a resolution on the constitutional aspects of interest representation which is expected to arrive at the plenary in autumn 2007.

The fine-tuning of interest representation in the European Parliament can also be seen as a contribution to the establishment of new public behavioural norms. European institutions would be in a much weaker position in dealing with national administrations if they had not their comprehensive knowledge of local situations and technical details. To an important extent they derive this legitimacy from non-state partners. On the other hand there is always a risk of instrumentalisation for private agendas. Two-level games to exploit political differences between the national and the European level must be watched, too.

The European multi-level structure has given birth to a multi-layered system of different levels and sectors of organised and aggregate interest representation. Some authors see a certain fragmentation of European interest representation over the past ten years (Grande 2001). Contacts between decision-makers and interests are seemingly less dependent on centralised associations or federations which often announce compromise positions of little appeal for the majority of their members.

The further evolution of the structure and the rules of interest representation with the European Parliament is difficult to anticipate. Considering the intensification of lobbying that was recently much covered by the media and the improved access of many groups to the public authorities of national capitals (Germany being a particularly instructive case) it would, however, be surprising if the European Parliament adopted a more restrictive posture. Even though the frequency and intensity of European legislation are likely to continue to decrease over the next years this might be compensated by further enlargement and the increasing openness of some national cultures for lobbying in the traditional sense. Besides, tight public budgets should lead to increased competition for public funds and hence for re-energized competitive lobbying at all levels of socio-economic and regulatory policy-making. Finally, the increase of the information load and the professionalisation of interests make it reasonable to expect an upsurge in political consultancy, which is often hardly discernible from classic lobbying. In any case, the new interinstitutional arrangements will

[28] Working Document on the European Transparency Initiative, rapporteur: José Javier Pomés Ruiz (PE 380.881), 4 December 2006

have to be factored in when devising an effective approach of interest representation at all levels.

This still leaves us with the question of the relationship between interests and the expansion of soft law. Without a dense "shadow of hierarchy" (Peters and Pagotto 2006: 15) soft law instruments would probably have less efficiency and compliance. In fact, recent research on the OMC, for instance, argues for its "communautarisation" in order to cure obvious pitfalls of the highly intergovernmental present approach. The application and the effects of the OMC should be more clearly defined and better integrated with the other pre-existing forms of cooperation within the EU, in accordance with basic requirements stemming from the Community legal order (Hatzopoulos 2007). This knowledge is, of course, part of the lobbying equation and leads towards a graduated strategy on the parts of interest representation: having to account for the ever present possibility of a hard law reaction from the public EU actors they attenuate their demands for less or no regulation and accept the need to provide support for the achievement of certain public policy goals. It would hence make it more difficult for the EU's bodies to insist on their institutional demands if private interests knew that hard law was out of the question.

As we have seen above, soft law may be considered as an alternative for hard law by some special interests. However, seen from the perspective of the public actor this "para-law" function (Peters and Pagotto 2006: 23) is not really the choice to be made. In most cases, the alternative to soft law is not hard law but no regulation at all. It is more often than not a "realistic" second-best solution, an escape from a political impasse and not a deliberate choice. There is clearly a limit to the influence of lobbying on the process of choosing a particular legislative tool. Typically, it is within the public institutions entitled to legislate that resistance to hard law is building up. However, it is a challenge for future lobbying research to establish possible contributions of private interests in the build-up of such resistance.

Finally, the variety of soft law tools is certainly an effective method to integrate non-state actors in the regulatory and legislative decision-making of the European Union. This is obvious for subjects such as technical norms or financial regulation, where private associations like the European Committee for Standardisation (CEN) or the International Accounting Standards Board (IASB) command technical expertise and long-term experience to an extent which would be difficult to acquire by political or juridical institutions. The World Meteorological Organization's and United Nations Environment Programme's Intergovernmental Panel on Climate Change may also serve as an illustration of a new approach to tackle scientifically difficult matters lacking clear causal relationships through an intensive collaboration of non-state scientific institutions and states. Although other programmes like the Lisbon process, having no central "legislator of last resort", show the limits of non-binding benchmarking, naming and shaming, and other normative instruments (Schäfer 2004), soft law certainly expands the possibilities for an intensive exchange of practices and norms between the public and the private realm. It may not be a new "world order" (Slaughter 2004) but it might help governments to operate better in a highly fluid and complicated environment. The future may thus be in hybrid combinations[29] of hard and soft law with strong and, hopefully, transparent inputs from competent private actors. -

[29] For a defense of the concept of "hybridity" see Trubek et al. 2006 (93 ff).

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