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# Lobbying in a Democratic State of Law – between Meaning and Judgment<sup>\*</sup>

*Lobbying en un Estado Democrático de Derecho:  
concepto y valoración*

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**Abstract:** This paper analyzes the notion of lobbying from the opposing perspective of state institutions and interest groups. The main thesis implies that, in order to formulate any reasonable judgment about lobbying, it is essential to approach this phenomenon only within a strictly defined context in order to address the ambiguity of the term. This holds in particular for assessments of lobbying expressed as part of legal discourse, but also in the realm of social or political discussion and debate. The place of lobbying as a state institution is specifically determined by the fundamental system of government prevailing in the given country. However, as to the remainder, lobbying as such calls for a more detailed reflection on the proper shape of decision-making procedures by government institutions.

**Keywords:** lobbying; responsible lobbying; law-making; common good; deliberative democracy; civic participation.

**Resumen:** Este trabajo analiza la noción de lobby a partir de la doble perspectivas de las instituciones estatales y de los grupos de interés. La tesis principal es que para formular cualquier juicio razonable sobre la actividad de los grupos de presión, es esencial estudiar el fenómeno en un contexto definido estrictamente, con el fin de hacer frente a la ambigüedad del término. Esto afecta especialmente a las aportaciones de lobbies cuyo discurso es jurídico, pero también en las que afectan al ámbito de la discusión y el debate social o político. El lugar del lobby como institución estatal se determina específicamente por el sistema de gobierno que prevalezca en el país de que se trate. En cualquier caso, el lobby como tal, exige una reflexión detallada sobre la forma adecuada de los procedimientos de toma de decisiones por parte de las instituciones gubernamentales.

**Palabras clave:** grupos de presión; presión responsable; elaboración de leyes; bien común; democracia deliberativa; participación cívica.

## INTRODUCTION

Lobbying as a legal entity, both in historical and contemporary terms, was (and still is) a challenge for legislators. It inherently involves the problems of how to define lobbying activities and how to effectively institutionalize them. The general social understanding of lobbying and its perception can be radically different, depending on whether the opinions are

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voiced by the people or by economic operators. In public discourse, lobbying is nearly universally perceived in the context of morally unacceptable attempts to influence public institutions' decisions by professional lobbyists. In economic science, particularly in management, lobbying is seen as one of effective and extremely cost-effective strategies designed to achieve the objectives relevant to a given institution or individual. As such, this strategy is also considered a tool for corporate social responsibility<sup>1</sup>.

Lobbying research is shaped by many disciplines ranging from political science, organization theory, and management studies to communication studies. From theoretical point of view and according to the legal doctrine, important questions emerge about the essence and the characteristics of lobbying, as well as institutional models of lobbying, including the analysis of arguments in favor of or against introducing legislative solutions for lobbying based on a specific model. However, arguments like that do not fully explore the substance of the dispute about lobbying. The contemporary discussion essentially revolves around two distinct issues – the absence of effective means to control and govern lobbying, and the moral assessment of exerting influence on decisions taken by public institutions by actors representing particular interests.

The core thesis of this paper is that – given the plurality of approaches and meanings of lobbying – general statements and judgments are not possible to formulate. The term 'lobbying' reveals a multiplicity of meanings, and therefore each time a judgment is formulated, it needs to take into account the particularities of the specific situation in which lobbying takes place. And in particular, the profound differences in meanings and evaluations of lobbying become evident from two different perspectives – the state institutions and interest groups. In the context of legal regulations, discussions about lobbying should touch upon the multifaceted nature of the issue and, more importantly, should recognize the ambiguity of the term. Hence, opinions and judgments should be expressed in respect of a particular legal culture. Within the framework of the European legal culture, the factors to be taken into account include the principle of democratic legitimacy, the growing tendency to make pragmatic justifications for the law enacted, and civic engagement

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<sup>1</sup> Compare A. JAKUBIAK-MIROŃCZUK, «Lobbing – konflikt realizacji partykularnych interesów grup społecznych a ochrona interesu publicznego», *Przegląd Bezpieczeństwa Wewnętrznego*, 12/15, p. 166.

in law-making<sup>2</sup>. It is evident that lobbying involves not only lawmaking processes, however, it is this area of lobbying that is typically subject to specific legal regulations. As a rule, the ‘interest groups’ perspective is underpinned by the efficiency criterion, meaning that legal regulations are intended to limit the forms of lobbying activities or where procedures are reviewed in terms of their vulnerability to influencing the decision-making process. It would be interesting to explore new lobbying measures related to globalization processes, which is regrettably outside the scope of this analysis.

#### DEFINITION OF LOBBYING – PLURALITY OF DEFINITIONS (LEVELS/APPROACHES) AND DIFFERENCES IN MEANING

In the broadest sense, lobbying is taking action aimed at influencing public officials in order to serve the interest of particular groups or individuals. Legal regulations may include the following lobbying-related expressions: lobbying activities, lobbyism, promotion of interests, advocacy of interests, institutional relationships, etc. In order to clarify the differences in meaning widely identified in literature, I will address them from three distinct categories: semantic problems, definition-related problems, and systemic problems.

The term ‘lobbying’ comes from the name of the hallways (or lobbies) where Members of Parliament and individuals who wanted to present their arguments gathered together. They engaged in conversations in order to influence decisions of people representing public institutions so that they reflected particular interests. From this perspective, the notion of lobbying consists of three elements: two subjective ones – the individual representing particular interests and the individual representing public authority, and one objective element – influence on decision making. In non-legal sciences, lobbying is primarily defined through the criteria of an addressee, methods of action, and purpose. These two model approaches are compatible with each other, but do not cover all the wealth of activities falling within the broadly understood boundaries of lobbying. Classifications of lobbying are typically secondary to detailed differentiations with regard to each individual category.

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<sup>2</sup> See: C. H. MONTIN, «Smart Regulation: A Global Challenge for Policy Makers», *ERRADA Newsletter*, April, 2012. Accessed via <<http://smartregulation.net>> (April, 26th, 2016).

The ‘individual representing particular interests’ category comprises both, professional lobbyists, and those who pursue lobbying activities using other measures or as part of ancillary secondary activity linked to their profession, e.g. lawyers. Similar ambiguity emerges with respect to organizations engaging in lobbying activities. In particular, forms of lobbying can be used by public relations agencies, consulting companies, law offices, economic operators, as well as non-governmental organizations or other bodies working in support of specific ideas. Interestingly, institutions of local government may also engage in lobbying activities in relation to central governmental bodies and public administration authorities because of the conflicting interests between these two tiers of government.

For many years, the emergence of professional lobbyists has been a flagship argument in favor of setting up a legal framework for lobbying, through the introduction of a registry-based model. In this approach, it was recognized that lobbying was mainly done for the benefit of those with economic interests. On the other hand, the interests of economic operators are largely subordinated to profit-making and, as such, are competitive against actions and measures taken for the common good. Today, there is also an increasingly wide array of actors engaged in lobbying activities. The diversity among lobbyists is also reflected in the existing registers of lobbyists, or comprehensive lists of members of associations who seek to influence public decisions. However, this does not mean that lobbying for business has ceased to exist, or that corporations, especially multinational companies, no longer attempt to leverage the law-making process in their own favor at the domestic, European, and international level. One example is the wide-ranging and effective lobbying campaigns of pharmaceutical companies<sup>3</sup>. However, this form of lobbying activities is pursued by *non state actors*, also as part of primary statutory activities. Among social actors, lobbying activities are widespread in trade/professional associations, corporations, trade unions, citizens’ groups, churches, or charity organizations.

As for the modern understanding of lobbying, it is particularly important to identify three different tendencies. On the one hand, there is a tendency in actors providing professional lobbying services to join forces

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<sup>3</sup> TRANSPARENCY INTERNATIONAL, *Lobbying in Europe: bidden influence, privileged access*, rapport, <[www.transparency.org/whatwedo/publication/lobbying\\_in\\_europe](http://www.transparency.org/whatwedo/publication/lobbying_in_europe)>, p. 16-19 (April, 26th, 2016).

and act together, especially at the level of European institutions and global relationships. They set up permanent associations and coalitions, mostly industry groupings, whose purpose is to coordinate and orchestrate the activities of their members so that they would not adversely impact the area concerned, and to avoid situations where the same goal is pursued by means of very different and mutually exclusive means. At the same time, organizations advocating for a particular interest group can be members of a number of different eurogroups<sup>4</sup>. This tendency is particularly pronounced whenever ad hoc agreements are concluded, focused on the implementation of specific objectives by actors who seek differing interests on a day to day basis. Thirdly, there is a trend to build cooperation platforms. This tendency is strongly rooted in cross-sectoral lobbying. Actors varying in status, forms of organization, or range of activities unite to form an alliance under one common project. Cooperation platforms are primarily designed to facilitate exchange of information and to create a network-based structure of relations which, in the longer perspective, can be more extensively used to take actions and measures to fulfill a goal. The EU Platform for Action on Diet, Physical Activity and Health can be provided as an example of this type of forum for European-level organizations. The Platform was established by, and operates under, the leadership of the European Commission; it brings together a wide spectrum of organizations and is committed to integration, dissemination, exchange, and verification of information rather than decision-making<sup>5</sup>. In this form, lobbying essentially means finding a solution to protect the interest of all stakeholders.

Keeping in mind the foregoing arguments, it is concluded that, while nearly all categories of actors operating in the public domain engage in lobbying activities of some sort, the legal definition of lobbying cannot be derived solely from the categories of such actors. Also, the traditional distinction between professional and non-professional lobbying has been lost. Many countries have adopted legal regulations imposing additional obligations on agents who operate as professional lobbyists<sup>6</sup>. In the context of these new developments, legal inequalities tend to emerge as a result, and we may fail to see a

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<sup>4</sup> See more: R. CHARI, J. HOGAN y G. MURPHY, *Regulating lobbying*, European Policy Research Unit Series, Manchester University Press, Manchester, 2010.

<sup>5</sup> D. GUÉGUEN, *European Lobbying*, Europolitics, Brussels, 2007, p. 132-134.

<sup>6</sup> See: <[http://ec.europa.eu/health/nutrition\\_physical\\_activity/platform/index\\_en.htm](http://ec.europa.eu/health/nutrition_physical_activity/platform/index_en.htm)> (April, 26th, 2016).

complete picture of who influences and how decisions are made by public institutions.

In defining the lobbying phenomena, another category of relevance are activities and measures undertaken in support of particular interests. Broadly speaking, lobbying consists of influencing the decisions of state institutions. To describe this category, we should begin with the original, historical meaning of lobbying which is that of presenting arguments. Today, this original meaning has been extended in two important aspects. First and foremost, lobbying now covers measures and activities aimed at exerting direct influence on decision-making, but also – in the broad meaning of the term – all activities that allow presenting information, arguments, or standpoints in an indirect manner. In addition, lobbying activities can be focused on maintaining *status quo*.

Traditionally, indirect lobbying activities were intended to create a situation where public institutions were exposed to influence, as is the case with the *grass-roots* lobbying, for example by receiving petitions by citizens who were inspired or convinced about advocating specific arguments. Indirect lobbying measures are involved where, for example, research communities integrate to disseminate specific messages in the public domain by means of advertising or media campaigns, for example through the Internet. Another aspect of indirect lobbying is that there is a greater variety of very sophisticated lobbying strategies used to promote particular ideas, which may be considered morally wrong owing to the lack of their transparency. As a result, the very same measures and actions may or may not be seen to represent lobbying, depending on their actual purpose. With technological progress and social development, and the increasing opportunities to undertake international and transnational activities, lobbyists are free to use direct and indirect measures on a very large scale. In the second case, they can use very sophisticated, complex, and hardly recognizable strategies that are difficult to identify for an outside observer. Consequently, a given activity may escape unequivocal identification as lobbying.

This aspect is also apparent in the legal framework. The list of activities classified as lobbying varies considerably among different legal systems: in the United States, lobbying is defined as an attempt to obtain the goodwill of a public official, allowing contact between a public official and a lobbyist, drawing the attention of a deputy or a public official to the provision of services, gifts, entertainment, influencing the decision to buy goods or services offered by a lobbying client, advertising in media and contact with media

aimed to exert influence on the public administration<sup>7</sup>. In Columbian law of 2003, apart from the activities listed above, the catalogue of lobbying activities also included representation of interests of foreign states, law monitoring, and influencing public opinion<sup>8</sup>. In the UK, lobbying is the process of trying to influence decisions by contacting public officials. The following examples of influencing the decision-making process are described in French legislation: involvement in the work of governmental committees, activities in the French Economic and Social Council, formal and informal meetings with public officials, public relations campaigns, legal actions, lobbying parliamentarians, influencing political parties and their leaders, demonstrations, strikes, attempts to block or sabotage political decisions<sup>9</sup>.

The second aspect is to some extent secondary to the former one, but when analyzed from the perspective of lobbying actors, it adds to the list of meanings of the term ‘lobbying’. Influencing as a lobbying activity can be direct or indirect, covert or overt. Direct lobbying measures are actions aimed directly at state institutions without any intermediaries or associates. Overt lobbying efforts are taken by interest groups in their own name or by other lobbying agents on their behalf, as long as the identity of the lobbyist’s client is disclosed. Direct lobbying includes, for instance, participation in negotiations held by the competent institutions, drawing up a bill or drafting a regulation, submitting amendments in the course of law-making procedure, filing petitions, complaints, grievances, recommendations, or opinions. Any of the above measures can be either overt or covert. However, if these actions are taken directly and openly, they fit into the idea of advocacy of interests and inherently belong to the domain of broadly defined civil participation (engagement), which is a perfectly legal element of a civil society. The power of interest groups is vested in their ability to formulate substantive arguments, including technical expertise (technical lobbying), and the capability to take orchestrated actions to solve problems focused on achieving consensus on the issue at hand.

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<sup>7</sup> For example, *The Florida Legislature Guide to Lobbyist Registration and Reporting*, Tallahassee, 2004; *A Guide to the Texas Law*, <[www.ethics.state.tx.us](http://www.ethics.state.tx.us)>; and *Guide to Lobbying in Oregon*, <[www.gspc.state.or.us](http://www.gspc.state.or.us)>.

<sup>8</sup> M. WISZOWATY, *Regulacja prawna lobbingu na świecie. Historia, elementy, stan obecny*, Warszawa, 2008, p. 45.

<sup>9</sup> F. L. WILSON, «French Interest Group Politics: Pluralist or Neocorporationist?», *The American Political Science Review*, 1983, vol. 77, i. 4, p. 898.

Indirect actions is where ideas or arguments are promoted, information is delivered, research is presented and disseminated, or campaigns are conducted to advocate for the introduction of a specific solution; it might as well mean refraining from taking any action to maintain the status quo<sup>10</sup>. Indirect measures are typically intended to create or change a particular attitude to the promoted policy. In the overt form, such measures are considered grass-roots lobbying, whereas covert actions are described as astroturfing.

Astroturfing is also referred to as artificial-grass lobbying<sup>11</sup>. Astroturfing is the practice of covert, indirect and unethical influencing, or manipulation. In essence, lobby or pressure groups are camouflaged to make them appear to be civil initiatives, by creating blogs, accounts on social media, or by seizing control of Wikipedia pages. The purpose of astroturfing is to make public opinion believe that there is a general, independent, or expert support for a particular idea, solution, or a product. Astroturfing can be accompanied by attempts to discredit individuals or institutions by criticizing or contesting the purpose of the lobbying efforts. Disinformation is another strategy used in astroturfing where the public opinion is given a multitude of contradictory information to discourage people from learning more about the subject.

Similar difficulties emerge with defining lobbying based on the criterion of purpose of the lobbying activities. The aim of lobbying can be to change the law, to take specific decisions, to gain access to information, to create a favorable attitude, to change awareness among those to whom the public discourse is addressed, politicians, and individuals representing state institutions. Lobbying can also be intended to gain competitive advantage, and the above aims can be a means with which to do this. Classification of the types of lobbying policies is also based on the 'object' of lobbying, which is similar to the purpose of lobbying: redistribution policies focused on the transfer of resources, distribution policies involving reallocation of public expenditure, or regulatory policies covering legislation and the executive<sup>12</sup>. An important characteristic of these categories

<sup>10</sup> Compare: R. VAN SCHENDELEN, *Machiavelli in Brussels, The Art. of Lobbying in the UE*, Amsterdam, 2005, p. 230.

<sup>11</sup> See more: T. P. LYON and J. W. MAXWELL, «Astroturf: Interest Group Lobbying and Corporate Strategy», *Journal of Economics and Management Strategy*, vol. 13, n. 4, Winter 2004, Blackwell Publishing, p. 561-595.

<sup>12</sup> A. SURDEJ, «Czy Polska powinna inwestować w lobbying? O niektórych uwarunkowaniach efektywności lobbingu europejskiego», materiały konferencji *Rola lobbingu w procesie integracji Polski z Unią Europejską*, Uniwersytet Jagielloński, May, 12 and 13th, 2000, p. 3; U. KURCZEWSKA and M. MOŁĘDA-ZDZIECH, *Lobbying w Unii Europejskiej*, Warszawa, 2002, p. 19.



is that lobbying activities are geared towards pursuing particular interests. One exception is that lobbying can be employed also within the realm of *public affairs*, or acting for the public good. If public affairs are involved, lobbying primarily serves the objectives of the common good instead of particular interests<sup>13</sup>.

Particular interests – as opposed to the interests of the community or the interests of the state – can be perceived in many different ways. Even when setting aside the different understanding of the common good and the questions about the values it represents, it should be noted that the interest groups, as they themselves declare, may act only in their own interest, whether in compliance or not with the public interest, or both for their own interest and the interest of the community, as well as (as is the case with *public affairs*) for the common good. When actors advocate for their own interest only, their activities qualify as illegal, at least in the majority of cases. Paradoxically, public opinion believes such measures are equivalent to lobbying. The form of lobbying activities is a separate issue to discuss as it can qualify either as legal or illegal, moral or immoral, depending on the content of the applicable law. These categories are not compatible. All lobbying activities classified as *astro-turfing* are legal by definition; however, the lack of transparency makes them morally dubious in the eyes of public opinion.

From the perspective of the interest groups, lobbying is a means of legitimate advocacy for the interests of social groups, within the structure of the public authorities<sup>14</sup>. This justification of lobbying is mainly of economic and democratic nature. If economic actors and their setting, where economic conditions ultimately translate into costs or profits, are governed by and depend on the decisions of public institutions, it appears reasonable for them to take actions aimed at limiting the costs and maximizing profits. In this perspective, the efficiency requirements ultimately determine the scope and methods of action. Well planned and organized advocacy of interests, also based on preventive lobbying, is generally recognized as an important tenet of gaining competitive advantage<sup>15</sup>. Furthermore, both economic operators and social

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<sup>13</sup> T. STUART and J. STEVE, *Public affairs in practice: a practical guide to lobbying*, Kogan Page, London and Philadelphia, 2007, p. 7.

<sup>14</sup> INTERCHURCH ORGANISATION FOR DEVELOPMENT COOPERATION, *Guidelines on lobby and advocacy*, <[www.icco.nl/Portals/1/Documenten/Lobby%20and%20advocacy%20guidelines.pdf](http://www.icco.nl/Portals/1/Documenten/Lobby%20and%20advocacy%20guidelines.pdf)>, June, 2010 (April, 26th, 2016).

<sup>15</sup> I. DE BRUYCKER, «Framing and advocacy: a research agenda for interest group studies», *Journal of European Public Policy*, April, 8th, 2016, p. 1-13 (April, 26th, 2016).

actors in democratic states operating according to the principles of economic freedom and civic participation, in the broad meaning of the term, are authorized to take lawful actions aimed at pursuing their particular interests and, in particular, to use means and measures to influence the decisions of state institutions, provided for under the law. Despite the development of the concept of civil society, public opinion reflects widespread concern about the influence exerted by economic operators on decision-making by state institutions, its potential and its actual extent<sup>16</sup>.

The public debate about lobbying revolves around the assessment of the effects of lobbying as either negative or positive. Positive opinions are limited to transparent forms of lobbying activities implemented in a manner provided for by law, and specifically to the participation in lawmaking by submitting pragmatic arguments. In reality, this form of lobbying activities does not include all aspects of exertion of influence by interest groups. Corruption is seen as a particularly adverse phenomenon linked with lobbying. Low confidence in the activities of the public establishment and the absence of transparent decision-making procedures typically accompany popular beliefs about negative consequences of lobbying. In the United States, 45.5 percent of citizens believe interest groups should be generally prohibited from contacting members of Congress, while 80 percent of respondents claim the lobbying pressure on the government is too extensive<sup>17</sup>.

One of the deep-rooted causes underlying the negative public perceptions of lobbying is that, in extreme cases, lobbying activities are seen to satisfy the criteria of acts prohibited by law, such as bribery, paid protection, trading in influence (active paid protection), or contribute to the abuse of public power. In other cases, it is the law maker who defines types of lobbying activities authorized under law. As a rule, the cornerstone of contemporary legal regulations governing lobbying is lobbying registers. Lobby registers are present in the majority of legal systems, including the US, the EU, and in most of the EU member states. Lobby registers identify the lobbyist, the contracting entity, arrangements between the lobbyist and the contracting entity, financial means, and individuals approached by lobbyists. Registers for lobby

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<sup>16</sup> J. M. MOORE, «The Influence of External Factors (Lobbyists) Regarding Major Policy Decisions on Gun Rights and How they Affect Public Impressions Regarding Federal Government», *Master's Capstone Theses*, Paper 35, 2015, p. 39-44.

<sup>17</sup> A. LEWICKA-STRZAŁECKA, «Etyka lobbingu», in A. PROTAS (ed.), *Kompendium wiedzy o lobbingu*, Warszawa, 2009, p. 74, including references therein.

transparency may also include qualification of the legality of the lobbying activities<sup>18</sup>. The legality criterion is based not only on the nature of lobbying activities, but on the mere fact that the lobbying is done by lobbyists who meet all formal criteria. Whenever the reporting obligations are not fulfilled, the defaulting entities may face legal sanctions. In the European Union, there are incentives for organizations and individuals to register in exchange for easier access to selected institutions.

The ‘lobby register’ model raises a number of issues. First, in the context of new developments in the indirect lobbying strategies, it is justifiable to argue that the lobby register model is of limited range as it only covers direct lobbying activities in selected areas of state administration, most commonly having to do with the law-making. In addition, it is impossible to come up with an adequate and all-encompassing legal definition of lobbying owing to the ambiguities, multiple dimensions, and complexity of the lobbying phenomenon. Hence, law makers face the huge challenge of adopting and imposing specific regulations to govern the process of influencing decisions made by public authorities to make it reflect and conform to the principles of law. In view of the multidimensional status of the lobbying phenomenon, the *ratio legis* of setting up legal frameworks of lobbying is limited to efforts to strengthen the transparency of selected decision-making processes instead of regulating lobbying as such.

The first lobbying regulations in the United States were geared to contain and control contacts between representatives of business and members of the US congress<sup>19</sup>. For this purpose, mandatory lobby registers and statutory obligations to disclose information imposed on lobbyists have been introduced. This objective can be considered justified and practicable in conditions where lobbyists have no or very limited access to decision-makers in the state administration, and are given no other opportunities of engagement in decision-making procedures. As a rule, this is the situation that prevails in countries pursuing an authoritarian leadership style, provided that there are no physical communication channels with which public opinion can be influenced.

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<sup>18</sup> D. OBRADOVIC, «Regulating Lobbying in the European Union», in J. J. RICHARDSON and D. COEN, *Lobbying the European Union: Institutions, Actors, and Issues*, OUP Oxford, Oxford, 2009, p. 299-300.

<sup>19</sup> See: A. ROSENTHAL, *The Third House: Lobbyists and Lobbying in the States*, CQ Press, Washington DC, 2001, ch. 1.

In the European culture of law, where the principles of ‘participation’ and inclusion of ‘subjects’ of the law in the law-making process have evolved, completely different conditions for the functioning and development of lobbying have emerged. As a result, the role and nature of lobbying regulations needs to be reconsidered. In contemporary circumstances, nobody is capable of verifying and controlling all lobbying activities, but there is still a need to differentiate between desired, acceptable, and detrimental lobbying. Traditionally, the opposition between particular interests pursued by lobbying and the common good threatened by lobbying is inherent to lobbying as a phenomenon. Such an approach is supported by evidence from the rich history of lobbying scandals.

Where lobbying is differentiated on the basis of the ‘motivation’ or the ‘purpose’ criterion, a distinction can be made between lobbying for business and lobbying that represents public or social interests. Likewise, the activities pursued for the common good can be classified into the so-called «white» measures and «grey», «black» or «murky» area of activities<sup>20</sup>. In the latter case, these measures are aimed to pursue interests of a group or an individual competing with or in conflict with the public good. «Murky» social activity is where not only particular interests of a group are favored, but also «negative values» of a given organization are propagated<sup>21</sup>. These type of activities in pursuit of self-interests may fulfill the prerequisites of a prohibited act.

In contemporary democratic systems, interest groups acting in their own particular interests at the expense of the common good take part in the law-making discourse within the framework of public consultations or by exercising the right of petition. These types of activities are described as «white» lobbying. Other entities engaging in activities that fall within the definition of «black» lobbying or «murky» social activities prefer largely undisclosed or fully concealed measures. These measures can be either direct and illegal or indirect and legal. In addition, these measures may give rise to tortuous liability or – in a more sophisticated form – can be misleading actions made

<sup>20</sup> L. H. MAYER, «What Is This ‘Lobbying’ That We Are So Worried About?», *Yale Law & Policy Review*, vol. 26, 2007-2008, p. 547-548.

<sup>21</sup> P. GLIŃSKI, *Style działania organizacji pozarządowych w Polsce. Grupy interesu czy pożytku publicznego*, IFiS PAN, Warszawa, 2006, p. 10. For different meanings of «lobbing in shadows» see Z. ROBINSON, «Lobbying in the Shadows: Religious Interest Groups in the Legislative Process», *Emory Law Journal*, vol. 64, i. 4, 2015, p. 1041-1102.

seemingly for the common good, as is the case with astroturfing. «Black» lobbying and «murky» lobbying activities can be the source of negative social perception of lobbying in general. Those against the idea of ‘civic participation’ invoke arguments about the absence of rationale and reasonable justification, harmful consequences, or the superficial nature of influencing decisions of state authorities<sup>22</sup>.

The matter is further complicated by the lack of reliable data in the public discourse. Lobbyists engaging in «black» or «grey» lobbying activities have no interest in disclosing the data. Lobbying is a situation of bilateral interaction with state institutions on the one hand, and lobbyists on the other hand. For reasons of ambiguity in identifying illegal lobbying, state institutions can be accused of violating the law, partiality, inadequately performing their duties or, paradoxically, violating the citizens’ right to participate. In general, the phenomenon of lobbying should be reflected on, taking into account the conditions in which the approached state officials operate.

#### THE COMMON GOOD – A STABLE OR A COMPROMISED CATEGORY?

Lobbying essentially involves two key categories: particular interests and general interests. Particular interests are linked to the interests of groups represented by people having consistent or similar individual interests. The general or public interest relates to the concept of common good. A relevant question is whether the notion of legal public interest is equivalent to or synonymous with the protection of common good, or whether the relationship between legal public interest and the common good is of a different nature.

In essence, the public good is in conflict with particular interests as it involves a commitment to act for the good of the community and the state. Reflections on the common good are rooted in two traditions: a classical one and the tradition of Enlightenment related to the notion of *raison d'état*. In classical terms, the common good is understood in relation to the great value attached to the development of members of a political community from the subject-focused perspective, and as a sum of conditions facilitating the further development of the political community from the object-focused

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<sup>22</sup> See: M. MIESSEN, *The Violence of Participation: Spatial Practices Beyond Models of Consensus*, *Fillip Magazine*, i. 7, Winter 2008, Vancouver, p. 16-17.

perspective. In this sense, state and law are made to serve common objectives, or the good of every person. Hence, the common good can only be defined if we know how the human good and development can be pursued. The enlightenment perspective seeks to express the common good as caring for the national interest (*raison d'État*), or the state and its institutions. In a positivist approach, the common good stems from the law enacted<sup>23</sup>. Contemporary legal systems universally declare they protect the common good, which is understood in a manner that is typical of that specific legal culture. The rules on how to protect the common good are enshrined in national constitutions<sup>24</sup>.

This distinction is particularly important while analyzing the phenomenon of lobbying as a situation where particular interests and the protection of the common good are two conflicting areas. In theory, there are three solutions available: the supremacy of the common good over particular interests, the supremacy of particular interests over the common good, and complementarity to both. In the legal traditions mentioned earlier, each one provides arguments in favor of one of the three proposed solutions to the discussed conflict between the individual good – even being a part of particular interests – and the common good. For example, in Classical tradition, especially the Aristotelian one, to sacrifice individual interest for the sake of the common good is the embodiment of the idea of dignity and beauty in an individual<sup>25</sup>. Saint Thomas advocated a community of personal interests and the common good. In the liberal tradition, it is generally acknowledged that individual interests are primary to and prevail over the general interests and, as opposed to the arguments of Communitarianism, where the common good prevails over individual interests, although the fundamental rights of individuals are warranted<sup>26</sup>. In a procedural approach, the common good is implemented by means of rational, honest, and neutral procedures.

<sup>23</sup> M. PIECHOWIAK, «Prawne i pozaprawne pojęcie dobra wspólnego», in W. ARNDT, F. LONGCHAMPS DE BÉRIER and K. SZCZUCKI (eds.), *Dobro wspólne teoria i praktyka*, Wyd. Sejmowe, Warszawa 2013, p. 25.

<sup>24</sup> M. RHONHEIMER and W. F. MURPHY, *The Common Good of Constitutional Democracy: Essays in Political Philosophy and on Catholic Social Teaching*, Catholic University of America Press, Washington DC, 2013, p. 73-74.

<sup>25</sup> ARYSTOTELES, «Etyka Nikomachejska», I, 3, in D. GROMSKA (trad.), *Arystoteles, Dzieła wszystkie*, vol. 5, Warszawa, 1995, p. 78-79.

<sup>26</sup> A. MACINTYRE, «Politics, Philosophy and Common Good», in K. KNIGHT (ed.), *MacIntyre Reader*, University of Notre Dame, Indiana, 1998, p. 245-246.

The common feature of all these approaches is that the common good as a value stems from the supra-individual realm<sup>27</sup>. The common good is perceived in relation to the public good or the general interest and to the interests of individuals<sup>28</sup>. In case-law, the common good can be recognized as a clause that limits the fundamental rights. It is relevant whether and to what extent the common good is understood as conditions conducive to the development of individuals and the communities they create, or as a national interest (*raison d'État*), or general interest to which individuals must subordinate themselves<sup>29</sup>.

Public interest can be undermined by measures that might compromise the legality of the activities of state institutions and in particular, that might prompt them to take decisions that violate the conditions of procedural fairness and standards of a democratic state of law. In the literature, it is argued that in the European setting, the common good is perceived as the outcome of fair and equitable negotiations between two groups of interest<sup>30</sup>. In this approach, the principles of procedural fairness need to be accepted to warrant fair and just outcomes. From the material perspective, it is also possible to adopt a catalogue of values relevant for the given legal system and the legal culture, altogether defining the common good<sup>31</sup>.

The competence to make law consists in the ability to settle the difference between and reconcile particular interests and the common good, and also involves the competence to define the common good in the context of social relations concerned. Currently, particularly in deliberative democracies, the common good is subject to legal debate. And specifically, the common good is defined according to the given focus area, always within the context of

<sup>27</sup> R. PROSTAK, *Rzecz o sprawiedliwości. Komunitarystyczna krytyka współczesnego liberalizmu amerykańskiego*, Kraków, 2004, p. 169; and G. RADBRUCH, «Ustawa i prawo», *Ius et Lex*, 1/2002, p. 183-184.

<sup>28</sup> COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU), judgment on May, 4th, 1999. Joined Cases C-108/97 and C-109/97, *Windsurfing Chimsee*, Zb. Orz., 1999, p. 2779.

<sup>29</sup> M. PIECHOWIAK, *Dobro wspólne jako fundament polskiego porządku konstytucyjnego*, Warszawa, 2012, p. 438-439.

<sup>30</sup> J. STEINER, *The Foundations of Deliberative Democracy: Empirical Research and Normative Implications*, Cambridge University Press, 2012, p. 88-103.

<sup>31</sup> A positivist approach will imply limiting the scope of standards which, because of their relevance, will be included in the category of common good. Today, especially in the United States, a trend can also be observed to adopt a broader perception of the common good, shaped by and evolving from legal and social culture. For more arguments on this issue, refer to R. DWORKIN, *Taking Rights Seriously*, Harvard University Press, 1978, p. 14-80.

constitutional principles and the legal culture prevailing in the given state. At the level of the basic principles of the political system, the political nature of the state can be determined by drawing a reference between individuals' rights and the way the common good is protected and understood. From the theoretical point of view, all decisions made by public authorities imply and involve a settlement of a conflict of interests. In terms of law-making decisions, the conflict of interests is settled in an abstract way, while at the law implementation levels – the conflict of interests is settled in a specific and concrete manner. Depending on a particular field of law, the settlement made will resolve the conflict between colliding interests of individuals or the collision between particular and public interests, which is crucial to lobbying. In legal systems based on the principles of a democratic state of law, the decisions are governed by a set of values, both procedural and substantive, that constitute the content of the general (public) interest.

#### LOBBYING IN A DEMOCRATIC STATE OF LAW

Arguments in favor of establishing a legal framework for lobbying can be formulated by relying only on the principles of the political system of the state. This aspect is particularly apparent regarding the *ratio legis* of the past and present lobbying regulations. From a historical perspective, the *ratio legis* of lobbying relied on the lesser of two evils principle. In the 19th century, the concept of public authority followed closely the assumptions of early legal positivism, whereas any type of influencing over public officials was considered a negative phenomenon. This approach is no longer suitable or sustainable in the democratic systems, even more so in conditions where civic participation institutions are well developed.

On the other hand, to claim that influencing public decisions is a positive phenomenon would not only be counterfactual but also it would not be justified even by invoking deliberative democracy theories. The conditions of discourse formulated on the basis of these theories, reflecting the ideas of rational law-making within the settings of participatory politics and civil self-government, are translated into the ideal of political autonomy based on practical reasoning of the citizens<sup>32</sup>. According to the idea of deliberation in

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<sup>32</sup> J. BOHMAN and W. REGH, «Introduction», in ID. (eds.), *Deliberative Democracy. Essays on Reason and Politic*, MIT Press, Cambridge 1997, p. IX.



public discourse, including the legal discourse, subjective exclusions are not approved, in the sense that free and rational individuals seek arguments in favor of specific opinions and solutions of the discussed matters<sup>33</sup>. The deliberative concept is far from the perception of law as the outcome of free-market competition between individual preferences<sup>34</sup>. This is a vision of democracy where conditions are sought to facilitate development of communities and their members in the republican tradition.

Without entering a doctrinal dispute, based on the paradigm of the state as a community based on informed participation of citizens and focused on the realization of the common good, the influencing of decisions made by state authorities, including lobbying, can be considered admissible and accepted, both by individuals and other social groups, including groups representing particular interests. It is a distinct question to what extent and under which conditions the influencing is considered acceptable. The answers to the foregoing questions are largely reflections on how to correctly hold public authority, and what the law-making and decision-making procedures by public entities should look like. Apart from the fact that the answers are formulated in the given political and cultural setting, it is also necessary to consider whether – at the level of individual procedures – participation is actually justified in view of the fact that some of the fields concerned are particularly vulnerable in the context of internal and external state security, and to what extent participation provides an opportunity for optimal use of social resources, and whether or not it can make it difficult to reach a fair and just decision.

Theoretical relations between public administration and lobbying groups can evolve into different types of legal interrelationships – clientelism, parantelism, and illegal links<sup>35</sup>. Legal relationships can be either neocorporatist in form, or based on the idea of a dialogue with authorized social partners; mandatory consultations with representatives of interest groups operating within advisory bodies, or entrusting public tasks to non-governmental organiza-

<sup>33</sup> COHEN, J., «Deliberation and Democratic Legitimacy», in A. HAMLIN and B. PETTIT (eds.), *The Good Polity*, Basil Blackwell, Oxford, 1997, p. 75-76.

<sup>34</sup> Compare: A. TSCHENTSCHER, A. BÄCHTIGER, J. STEINER and M. STEENBERGEN, «Deliberation in Parliaments Research Objectives and Preliminary Results of the Bern Center for Interdisciplinary Deliberations Studies», *Legisprudence: International Journal for the Study of Legislation*, Hart Publishing, vol. 4, i. 1, 2010, p. 13.

<sup>35</sup> G. B. PETERS, *Administracja publiczna w systemie politycznym*, Warszawa, 1999, p. 216.

tions<sup>36</sup>. Clientelism is a model where public administration recognizes particular interest groups as representatives of interests and co-participants in the management of the given public sphere. The term 'clientelism' denotes the actual influence exerted by an interest group in the public decision-making process. This phenomenon is widely perceived in negative terms. Parantelism is similar to clientelism, but the influence on public administration is exerted by political parties<sup>37</sup>.

There are two main models of influence found in the literature on this subject, used by business groups to pursue their goals: corporatism and pluralism. Apart from that, the following democratic representation and legitimacy models have been defined in the EU: pluralism, statism, neocorporatist forms, and industrial relations<sup>38</sup>. According to the principle of pluralism, groups of interest are free to compete within the framework of procedural rules provided for by the state<sup>39</sup>. In statism, the state partakes in decision-making processes, and the representation of interest groups is limited to a minimum. Neocorporatist forms are where the decision-making process is organized around mediations and negotiations between state institutions and representatives of business groups. In industrial relations, corporate officials are not allowed to actively take part in organizations, and the representation of interests is vested in business organizations<sup>40</sup>.

Examples of modern forms of corporatism are platforms, partnerships, or other initiatives or fora that bring together interest groups in the given domain, operating under a particular status in their relations with the government or other public bodies. The mandate and powers vested in these entities depend on the competences and powers at law.

Lobbying as part of social or community life can be perceived negatively as a game of favors in exchange for a decision, or a game between the public authorities and interest groups. This is a game of influencing won by those who are able to fulfill their own interests in the most effective way. In this

<sup>36</sup> H. IZDEBSKI, «Administracja w systemie politycznym», in J. HAUSNER, *Administracja publiczna*, Wydawnictwo Naukowe, Warszawa, 2008, p. 227.

<sup>37</sup> *Ibid.* p. 228.

<sup>38</sup> J. BEYERS, R. EISING and W. A. MALONEY, *Interest Group Politics in Europe: Lessons from EU Studies and Comparative Politics*, Routledge, 2013, p. 75; and A. JAKUBIAK-MIRONCZUK, *op. cit.* p. 177-178.

<sup>39</sup> P. S. BERMAN, «Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism», *Indiana Journal of Global Legal Studies*, vol. 20, i. 2, 2013, p. 665-670.

<sup>40</sup> J. CZUB, *Lobbying grup biznesu w Unii Europejskiej*, MT Biznes, 2012, p. 75-76.

case, arguments, information, or images are means to implement changes under generally accepted principles<sup>41</sup>. Lobbying can be understood in a positive way, as an important element of communication in compliance with all procedures provided for by law, and as a measure taken within the framework of a social dialogue<sup>42</sup>. In the latter case, lobbying is recognized as a special type of communication geared towards achieving the desired outcome, but the effectiveness of such efforts is highly dependent on organizational and cultural context<sup>43</sup>. However, in this perspective, communication is one of many, albeit the most important measure available.

The essence of this approach is to take into account the context of substantive settings and conditions shaped by the social exchange theory. This theory is based on the assumption that lobbying is the contribution made by groups of interest to public processes. It consists in collaboration between politicians and interest groups on a 'quid-pro-quo' basis<sup>44</sup>. The degree to which institutions welcome and embrace an exchange-based influence can be determined by analyzing how they operate, including the strategies they use to win over resources necessary to make a decision, with a focus on expertise, intelligence, and social support. Therefore, the power of a social group depends not only on the place in the system according to the law, but is also linked with its actual capability to influence and steer public life. Exerting influence on decisions of public authorities is determined mainly by the logic of needs of state institutions, the resources of interest groups, and the opportunities of exchange within the framework of the existing law.

In view of the above, the idea of responsible lobbying can be invoked. It stems from the concept of social responsibility of business and is in fact a qualified form of influencing, limited in its purpose and form. According to the principles of responsible lobbying, lobbying enables realization of particular interests, but first and foremost, it supports the development of universal values, including economic development and the quality of the law enacted. Its main tool is reliable and confirmed information presented in a transparent

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<sup>41</sup> M. CLAMEN, *Lobbying i jego sekrety*, Warszawa, 2005, p. 1, 4, 15.

<sup>42</sup> *Ibid.* p. 15-16, 216.

<sup>43</sup> See: A. J. NOWNES and K. WALKER DEALEJANDRO, «Lobbying in the New Millennium: Evidence of Continuity and Change in Three States», *State Politics & Policy Quarterly*, vol. 9, n. 4, December, 11th, 2011, p. 429-455.

<sup>44</sup> J. FITZGERALD, *Lobbying in Australia: You Can't Expect Anything to Change If You Don't Speak Up*, Sydney, 2006, p. 20.

manner. Lobbying is recognized as a form of power or entitlement vested in the citizens of democratic states, or an effective tool with which economic changes can be effectively orchestrated<sup>45</sup>.

Reflections about lobbying lead to the conclusion that, to be able to formulate any definitions or judgments about lobbying, account must be taken of the actual context of lobbying, as well as the high risk of misunderstanding. The matter is further complicated by the fact that any and all evaluations and opinions must be rooted in a broad institutional perspective. This holds in particular for judgments expressed as part of a legal discourse about lobbying, but also in the realm of social or political discussion and debate. The place of lobbying as a state institution is specifically determined by the fundamental system of government prevailing in the given country. According to the principles of the rule of law and democracy, social actors cannot be denied the right to influence decisions of state institutions. However, as to the remainder, lobbying as such calls for a more detailed reflection on the proper shape of decision-making procedures by government institutions, so that the scope of participation translates into maximum benefits in the domain of the common good. The lobbying phenomenon is a complex, multifaceted and expensive one, and it clearly involves both procedural problems – as to whom, how and within what limits one can participate in the decision-making by state authorities, as well as substantive problems – as to key arguments to be considered in the settlement of conflicts between particular interests and the common good.

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<sup>45</sup> Compare: T. BAUER, «Responsible lobbying: a multidimensional model», *The Journal of Corporate Citizenship*, vol. 2014, n. 53, March, 2014, p. 66.