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Lobbying: the italian regulatory framework under the comparative perspective

Andrea Bortoluzzi

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*What is lobbying?*

In political science, lobbying is defined as the set of tactics and strategy used by the representatives of interest groups – “lobbyists” – seeking to influence the formation and implementation of public policy for the benefit of the groups they represent.

In their turn, the interest groups, as formal organisations, usually based on individual voluntary membership, seek to influence public policy without assuming governmental responsibility.

Lobbyists are the political representatives of the groups, and may be either officials of those groups assigned to public relations, or private operators offering their specific expertise in particular fields of competence and their institutional contacts in order to promote a cause close to their clients’ hearts.

The term “lobbying” is derived from the premises – the lobbies – in which informal meetings may take place between the representatives of the groups and the legislators before or during the passage through parliament of a legislative measure that the interest groups would like to block or to influence in a direction in line with their preferences.

Lobbying takes the practical form of action to provide information on the groups’ own demands being conveyed to the public decision-makers, and the lobbyist is the person endeavours to convert the information into influence.

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over the decisions of the political authority, during two phases: the preparation and approval of legislative measures, and the implementation of public policy.

During the latter phase, the procedures for the application of the legislative measures consisting of adapting the measures to the characteristics of the end beneficiaries, who strive to bring them in line with their own specific needs.

The regulation of lobbying: delimitation of the field of research.

Lobbying as a political practice, then, is an instrument whereby the demands of a group can be reflected in the formation of legislative measures. As such, it is an instrument that actively promotes greater awareness among public decision-makers of the pros and cons of the choices they make.

The management of every decision-making process calls for the conduct of preliminary investigations that will give the decision-makers the fullest possible information on the nature and content of the interests, both public and private, involved in the decision-making process so that they can assess their scope and the merits of protecting them.

An informed evaluation of the possible options is all the more important for the decision-maker in that, in a political decision, the general interest is freely assessed by the decider so that the decision can be based on an autonomous choice of the common good to be achieved.

Lobbying, therefore, is essential to the informed preparation of decisions, a process in which the demands of the business world and of civil society can be made known to the political authority.

It is undoubtedly a socially and legally acceptable activity provided that it respects the decision-making autonomy and responsibility of the political and administrative authority and that the influence brought to bear complies with the

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3 C. Deodato, La decisione pubblica tra interessi particolari e interesse generale [The public decision: special interests and the general interest]. http://www.giustizia-administrativa.it/documentazione/2011
principles of transparency, probity, proportionality and subsidiarity and – where lobbying is regulated – with the law. The rules on counteracting the phenomena that may improperly be attributed to lobbying are outside the scope of this paper: they include recourse to inappropriate means of influencing the public decision-maker, such as the fraudulent claiming of influence with a public official, clientelism and the manipulation of information, or illegal practices such as criminal conspiracy, corruption, the gathering of personal information for the purpose of vilification, threats, bid rigging and unlawful funding of political parties.

Legislative measures and regulations designed to curb such unlawful activities will not therefore be taken into consideration here. They range from those that govern the financing of parties (Law 1974/195 as further amended) to those regulating the transparency of the asset holdings of elected representatives (Law 441 of 5 July 1982), from criminal provisions on malfeasance in office (the combined provisions of articles 323 and 357 of the Criminal Code) and corruption (articles 318 and 319 of the Criminal Code) to those on the criminal liability of companies as regards the offence of corruption (Legislative Decree 231/2001).

The intention here is to examine all the rules that the legal system imposes on lobbying, in part for the purpose of limiting certain lobbying practices and in part to promote access to public decision-makers by establishing the requirement for transparency and trustworthiness in the relations between the lobbyist and the decision-maker.

_Lobbying: the internal rules_

Lobbying is heavily dependent on the opportunities for the lobbyist to access the public decision-maker. The more the interest groups are facilitated in their access to institutions, the greater the likelihood that the public decision-maker may make certain decisions or to defer them _sine die_ based on a range of options.

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L. Larivera, _Il Lobbying, utilità e necessaria regolamentazione_ [Lobbying, usefulness and necessary regulation], _La Civiltà Cattolica_, 7 January 2012, pp.11 et seq.
adequately represented by a plurality of stakeholders, in other words in a better informed manner.

If one looks at the legal discipline on access to the legal order, one finds extensive regulation of access to administrative instruments contained in the rules on administrative procedure (articles 9 and 10 of Law 241, 7 August 1990, as amended by article 10 bis of Law 15/2005), implementing the principles of the disclosure and transparency of administrative action and establishing a general principle of administrative activity that fosters participation and ensures that it is impartial and transparent.

The issue of access, however, viewed in terms of lobbying, relates not to the right to know the content of administrative documents but to the right to provide information to the public decision-maker relating to its legislative or regulatory activity, where this may influence its decisions.

In other words, it refers to the participation of the individual or of interest groups in the political decision-making process rather than in the administrative procedure.

Such participation does not imply involvement in the shaping of decisions through the exercise of a direct power; it consists of the expression of interests through which individuals and groups formulate their requests to the public decision-making bodies in order to influence their choices.

It is, then, an indirect and unstructured power.

The primary source of that power in the political system is the Constitutional Charter, within the limits that the power is recognised in the Charter.

Supporting that power are the principles enacted by articles 2 and 3 of the Constitution, guaranteeing to every citizen the inviolable rights of the person, both as an individual and in the social groups in which human personality is expressed, and placing a duty on the Republic to remove those obstacles that impede the effective participation of all workers in the political, economic and social organisation of the country.

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From this, it appears that there is constitutional protection for the exercise of the rights of personality in social groups, and therefore also in the organisations representing the person’s interests and his effective participation in political, economic and social organisation and also in the expression of individual and collective interests.

Subject to the prohibitions imposed on individuals by criminal law, moreover, the right of association and therefore the right to form interest groups enjoys similar protection pursuant to article 18 of the Constitution.

The Constitution also upholds the individual or collective right to put forward requests to the public decision-maker, guaranteeing freedom to express thought in speech or writing or any other form of communication, as stated by its article 21. It also establishes the right of petition regulated by article 50, granting every citizen the right to present petitions to the two Parliamentary chambers in order to request legislative measures or express collective needs, thus legitimising recourse to the instruments for the exercise of the interests of pressure groups.

According to the provisions of article 118 of the Constitutional Charter, moreover, the public institutions (the State, Metropolitan Cities, Provinces and Municipalities) may not limit but must promote the autonomous initiatives of citizens both as individuals and as members of associations in conducting activities of general interest, based on the principle of subsidiarity.

Access to the process of shaping political decisions is also encouraged through lobbying, subject to the condition that it is for the attainment of a common interest, on the basis of the principle of subsidiarity.

Admittedly the wording of article 118 seems to be confined to legitimising recourse to private autonomy to substitute public autonomy in the realisation of activities of general interest (referred to as “horizontal subsidiarity”). But it should be pointed out that, although this provision as interpreted in administrative case law has laid down the principle that local entities must protect and realise “the development of civil society starting from grassroots”, in other words “from respect for the valorisation of individual energies”, since private autonomy must be preferred wherever it is better able to engage in activities in the general interest, it appears that such subsidiarity is fully legitimised even when
the individual or interest groups are limited to providing information designed to influence the public decision-maker as regards activities in the general interest\textsuperscript{7}.

Taking a further look at the system of sources, in the absence of State laws regulating this issue, the only current law that, in regulating access, contains a definition of lobbying is the one issued by the Region of Abruzzo (Law 61 of 22 December 2011, in Bollettino Ufficiale della Regione Abruzzo no. 2 of 12 January 2011).

According to that law, by lobbying is meant “any activity for the representation of special interests performed by special interest groups by means of proposals, requests, suggestions, studies, research, analysis and any initiative or oral or written communication, including by data transmission, for the purpose of pursuing lawful interests on their own behalf or on behalf of third parties, to include those of an economic nature, with public decision-makers in order to influence current public decision-making processes, or to launch new public decision-making processes”.

By special interest groups are meant: “associations, foundations, provided that they are recognised, committees with temporary objects and companies having lawful interests without general relevance, even where these are non-economic in nature”.

By representation of special interests is meant: “a subject representing the special interest group in dealings with the public decision-makers”.

By public decision-making processes is meant: “the procedures for the preparation of legislative instruments and general administrative instruments”.

By public decision-makers are meant: “the President of the Regional Council, the Assessors, and the Regional Councillors”.

Article 3 of Regional Law 61 provides for the creation of a public register of the representatives of special interests and their accreditation; article 4 states the prerequisites for the representatives of special interests, specifying the subjective requirements and the documents supporting the powers of the group.

representatives and the organisational powers of the Group itself (“Interest groups may be entered in the Register if their internal organisation is governed by the principle of democracy, if they pursue interests deserving of protection in accordance with the legal order and if they have been established for at least three months as of the date of the application for listing in the Register”). Article 5 sets out the procedures for access to the Council Committees and the political groups represented on the Regional Council. A limit on such access is the prohibition on “exerting forms of pressure on public decision-makers such as to affect their freedom of discretion and voting” (article 6). The sanctions for non-compliance are a formal warning, temporary suspension or revocation of the lobbyist’s listing. The law implements the constitutional principles mentioned above, although it has certain significant gaps from the subjective viewpoint: regional officials are not included among the public decision-makers, and individual commercial enterprises may also be listed as lobbyists provided that they are “governed by the principle of democracy”. If this affirmation is considered from the purely formal viewpoint, it would seem to incorporate in the sphere of application of the regional law any company that is regulated according to the types specified in the Civil Code. Individual enterprises are another, and more complex, matter (again, speaking in purely formal terms): in these, democracy would need to be guaranteed through the conduct of activities in the form of a family concern, as evidenced in written form. There is a caveat of a general nature as regards this statement. It gives rise to an enormously relevant question, that of the systematic internal contradictions between the Civil Code and the Constitution in terms of the enterprise – in other words, the compatibility between the top-down concept of an undertaking (as in the Code) and the democratic concept (as in the Constitution, if this is seen in the light of the protection and realisation of the rights of personality rather than as rules on the subject of economic freedoms). Even more relevant and problematic is the question of the contradictions between legal formants, i.e. between the formal discipline of relationships within and external to the undertaking as designated by written and substantive sources of those relationships, determined by custom.⁸

⁸ For possible critical reflections on the contradictions mentioned, may I refer to A. Bortoluzzi, Lezioni di Diritto di Impresa, I, Varese, 2008.
A similar discipline of lobbying, although lacking a provision defining that activity, is currently in force in the Region of Molise (Regional Law 24, 22 October 2204) and the Region of Tuscany (Regional Law 5, 18 January 2002).

There is no State law regulating access and therefore lobbying (even though the proposals and bills tabled in Parliament from 1948 to date number over thirty: only six have been examined by the competent committees, and none has ever been debated in Parliament).

While a review of the sources offers little food for thought on the discipline of lobbying, the review of legal formants is even more meagre.

While case-law as a legal formant amounts to just a few sparse judgments of the Constitutional Court, the formant based on jurisprudence consists of only two monographs on the subject.\(^9\)

It is worthwhile to dwell a little on the decisions delivered by the Court. Looking back to the past, two of them tackle the issue of the right to strike and, in particular, the legitimacy of the “political strike”, in other words abstaining from work on not only financial but also political grounds, when the demands can be met only by acts of government or legislative measures.\(^10\) In the second of its judgments, the Constitutional Court ruled that recourse to the strike is legitimate even when it is for political ends, since it is a means that, when necessarily assessed in the context of the instruments for the exertion of pressure used by the various social groups, is appropriate in furthering the pursuit of the aims stated in the second paragraph of article 3 of the Constitution. The third and more recent judgment concerns the legitimacy of a series of measures contained in the Statute of the Region of Emilia Romagna, including those set out in articles 18 and 19 on the subject of democratic participation in regional decision-making processes.\(^11\) The first of the measures provides for an investigation in the

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\(^9\) P. L. Petrillo, Democrazie sotto pressione, Parlamenti e Lobbying nel Diritto Pubblico Comparato [Democracies under pressure, Parliaments and Lobbying in Comparative Public Law], Milan, 2011; G. Colavitti, Rappresentanza e interessi organizzati [Representation and organised interests], Milan, 2005.

\(^10\) These are Constitutional Court judgments 1 and 290 of 1974.

\(^11\) Constitutional Court judgment 379 of 2004.
form of a joint public enquiry called by the legislative assembly, in which “associations, committees and groups of citizens with a concern of other than an individual nature” participate in the preparation of legislative or administrative measures, the grounds for which are to be based on the findings of the enquiry. The second measure was on the right of all associations requesting involvement to take part in the legislative procedure. The constitutional legitimacy of such measures is upheld by the Court in that their purpose is not to expropriate the powers of the legislative powers or to obstruct or delay the work of public administrative bodies, but rather to improve and make more transparent the procedures for linking the representative bodies with the parties having greater concern in the various public policies.

Even though they do not explicitly address the question of lobbying, these judgments are pertinent to the subject discussed here. The first two legitimise what is known as “grassroots lobbying”, a tactic used by interest groups to generate public pressure on governing bodies by mobilising specific segments of the general public manifesting a keen concern with a given policy problem. The third judgment goes to the heart of the issue of the relationship between politics and policy. In Italy this is not just an institutional but also a cultural, scientific and language problem (Italian does not have two terms to differentiate between politics and policy, just one: “politica”). Recognition of the constitutional legitimacy of the procedures for regulating the public decision-maker’s consultation of social or economic bodies that are expert in certain administrative issues (on questions of policy) does not, according to the Constitutional Court, detract from recognition of the fundamental role of the representation of the political forces that inspiring the representative bodies (hence the role of politics).

**Lobbying: regulation in the context of comparative law**

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13 R. Lizzi, I gruppi di interesse in Italia fra continuità e cambiamento, Fattori istituzionali e dinamiche di policy (Interest groups in Italy: continuity and change: Institutional factors and policy dynamics, in Rivista Italiana di Politiche Pubbliche, 2, 2011, p. 179 et seq.
Politologists teach us that the institutional system and *policy style*, in other words the body of standardised procedures customarily used to decide on public policy and put it into effect\(^{14}\), determine access to the public decision-maker.

The institutional system of the United States, based on the separation of government between the Presidency and Congress, offers the powerful Congressional and Senate committees broad autonomy of legislation, which rewards access. This is not the case in Europe, where parliaments perform a role of ratifying or amending government decisions.

The policy style of Anglo-American democracies (the United States, Great Britain, Canada, Australia and New Zealand), where decision-making power is not very concentrated and bureaucracies depend on the information provided by groups, fosters access for a fragmented system of groups, with organisations operating in more restricted and specialised spheres. The Japanese and French systems, based on powerful dirigiste and interventionist bureaucracies, are more selective. Midway between the two are the Scandinavians, whose more highly developed bureaucracies promote access to groups, incorporating them in the institutions and ensuring that they take an active part in the creation of a social state\(^ {15}\).

The politologists also teach us that the mechanics of the party system and its impact on the formation and workings of governments may give rise to a demand for fragmented access; even though these are unitary and selective systems.

This is the case of Italy, where a dominion-based system of alliances between party and groups – through kinship, in the sense of a relationship of political consanguinity claimed by certain groups with the dominant party or with its factions and/or satellite parties – promotes the restricted access of groups to the political or bureaucratic seats of decision-making, from which there is a certain expectation of electoral support\(^ {16}\).

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\(^{15}\) L. Mattina, *op. cit.* p. 128 et seq.

\(^{16}\) Again L. Mattina, *op. cit.* p. 131.
In Italy another method of restricted access is, again according to the politologists, that of the ‘clientele’, the situation arising when an interest group manages to impose itself as the sole representative of a given social sector vis-à-vis the bureaucratic body designated to monitor its activity, establishing preferential mechanisms of collaboration.

Access to decision-makers is still restricted in Italy even when, as routinely reported in the news, the political parties and institutions have been badly hit by the political crisis, but its contagion has not spread to the organisations and interest groups that were linked to those parties and their apparatus.

Although this has reinforced the autonomy of the groups, it has not altered their mode of procedure.

Today it is the individual party exponents, constellations of sub-party groups working directly with the interest groups, parliamentarians belonging to different political groups involved in the same questions of policy, interest groups and lobbies, who are in the front line in the formulation of public policy[^17].

These are the lessons on which the jurist bases his thinking on the widely differing policies on the regulation of access to public decision-makers in countries governed by liberal democracies.

The institutional systems based on separate government and a fragmented policy style regulate access by legislative measures directed, in some cases, towards lobbying activity (United States, Australia, Canada, Denmark), and in others towards the relationship between parliament and interest groups (Great Britain). Those systems featuring concentrated decision-making power and a selective policy style either regulate access by measures governing the relationship between parliamentarians or government bodies on the one hand and, on the other, external interests (as in the case of Japan), or (as in France) they do not regulate such access at all.

Institutional systems with concentrated decision-making power and in which access to policy-making is encouraged do not have any regulatory discipline (Sweden, Norway).

On the other hand, a close relationship does not exist there between institutional political systems, policy styles and legal systems.

Whereas social practices and civic attitudes are the bases for the former, the latter are based on the exercise of centralised power.

The factors that come into play here are the relationships between authority and autonomy and the varying weight attached by the different legal systems to the role of authority and autonomy in regulating relations between the associated parties.

The relationship is therefore between custom and the rules of law if it is true that custom tends to maintain a monopoly of that part of law that does not concern, or is of little concern to, centralised power.\(^\text{18}\).

It should be pointed out that formal rules, statutory rules (laws and regulations) and informal rules of behaviour (codes of behaviour, conventions) constitute an integrated institutional system if there is no conflict between the first and the second\(^\text{19}\).

Despite the apparent differences in the regulation of the influence of interest groups on the public decision-maker in the various legal systems, the question is that all lawmakers and government forces tend, more or less explicitly, to formulate the rules of the system in such a way as to curb or place restrictions on the activities, social position, status or ideology of some communities (social classes, groups, and trade and professional associations that can be designated as the legislator’s reference groups) while they protect and promote the activities, social position, status and ideology of others\(^\text{20}\).

And where the phenomenon is not regulated through legislative channels but is left to custom, the factors coming into play are the relationships between

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domination practices, in other words the manner in which control is in fact distributed and exerted within and upon the political body, and the distribution and exercise of the formal authority that constitutes the system.\(^1\)

Accordingly, whether the rules regulate the activity of the interest groups or of the parliamentarians or the executive in their relations with those groups, the common law legal systems tend to legitimise lobbying directly.

In the former case, they do so by limiting the autonomy of the groups, resorting to the rules of written sources of law derived from legislative and/or jurisprudential formants (in the United States); in the latter case they allow them freedom of action in accordance with general rules based on written sources, here again derived from the same formants, regulating associations in general and legitimising their full operational autonomy as regards lobbying, but they regulate the activity of the “ruler” by the provisions of written law in the nature of regulations (Great Britain).

The system current in Japan is similar to the English legitimisation of lobbying, even though it is the outcome of a curious juxtaposition between the customary rules of prescribed behaviour (Giri) and written law imitating the civil law of Western Europe, in some cases German and in others French law, and the influence of common law models (the Meiji era).

France and Germany, whose legal systems are in the Romanist tradition, the content of which is prevalently authoritarian derived from written sources – legislative sources in the case of France and jurisprudential in the case of Germany – are silent on the issue of lobbying.

Also silent are Switzerland and Norway, whose systems are related to civil law.

In consequence, the legitimisation of lobbying in these countries is indirect. It is filtered through unwritten sources.

The primary sources are customary law, including at the Constitutional level, legitimising selective political practices for access by groups (as in the case of

France), or including groups within the public decision-making machinery (as in the case of Germany and the Nordic countries).

As we have seen, the Italian legal system says nothing on the issue – a system that belongs to the area of Roman law, with French and German influences as regards written sources as well as making broad recourse to custom, especially in the economic and business field.

Constitutional case law, in application of the principles that we have reviewed above, legitimises some of the consuetudinary practices of lobbies without regulating their activity, and therefore essentially respecting their autonomy.

This is the case of the few regional laws in force, which adopt the regulatory system of Great Britain and the United States, albeit only in part (since the direct regulations designed to affect the operating procedures of lobbying activities have not been adopted).

Custom is the overriding factor in the area concerned.

In some instances, this is through the informal institutionalisation of access to public decision-making processes through Government negotiation or concertation on the formulation of social or economic policy with the major interest groups. In other instances, it is through recourse to pre-decision procedures entailing the setting up of informal networks consisting of interest groups, lobbies and parliamentarians to support micro-proposals, amendments to financial laws, petitions and applications for benefits and exemptions.

These consuetudinarian practices in Italy are inherent in the access not only to national but also to local decision-makers.

We can now draw certain conclusions of a general nature from this brief digression.

Whatever the legal systems may be, they react to the phenomenon of lobbying by pressure groups by treating them as an ineluctable feature of democratic systems.\footnote{G. Pasquino, Gruppi di pressione [Pressure groups], Dizionario di politica, Milan, 1990, p. 475}
This leads to the issue of representation, in other words the legitimisation – in some cases explicit through written laws or case-law decisions, in other cases cryptic\textsuperscript{23}, by recourse to implicit models – of the fact that the sovereign interest of the people may be manifested and may seek satisfaction not only through elected political institutions but also through free associations\textsuperscript{24}.

And this principle, despite the tortuous paths inevitably taken in any legal system laying down the procedures for and limits of representation of interest groups, is common to all the legal systems we have considered.

\textit{Lobbying in the European Union}

Access in the European Union has certain features of its own compared with access within individual Member States.

Political scientists are debating the institutional nature of the European Union.

Without entering into the merits of the question, there is no doubt that there are certain elements of theoretical institutional and empirical identity between the EU and the United States.

There are those who consider that both institutions have the features of composite democracies, characterised by the vertical and horizontal separation of decision-making mechanisms, which therefore become difficult to monopolise.

\textsuperscript{23} R. Sacco, in R. Sacco-A. Gambaro, Sistemi giuridici comparati [Comparative legal systems], Turin, 1996, p. 7.

\textsuperscript{24} M. Tronconi, La sfida della rappresentanza, l’ambito specifico di quella industriale [The challenge of representation, the specific sphere of industrial representation], Liuc Papers, no. 240, Serie Economia e Imprese, 64, April 2011.
In Europe and across the Atlantic, one governs without a government, and the decision-making power is dispersed over an array of institutions that are independent of each other but are functionally interconnected.\(^25\)

This kind of dispersion facilitates the access of interest groups to the Community decision-makers, an access that takes different forms depending on the issues concerned, the competences of the Community bodies and the decision-making processes.

The groups carry out their action mainly with reference to the “first pillar” of the European Union, within the sphere of which come various supranational public policies (monetary, agriculture, foreign trade, fisheries, competition, regional policy, market regulation). The groups’ main target is the Commission, which is vested with the power of proposal and drafting of legislative measures. The Commission favours access in order to deal with budget limits both in the phase of investigating measures and in their implementation, and also in order to overcome the democratic deficit arising from the transfer of powers from the state to the Community dimension without adequate representation. The expert committees that support the Commission in the drafting of proposals are the elective instruments of access for interest groups, as is what is known as “comitology”, i.e. the system of committees supporting the Commission in the phase of execution of the measures resolved by the Council and the European Parliament. The Parliament is open to access through parliamentary hearings, and opens the committees and individual parliamentarians above all to groups representing generic interests (the environment, health, consumer affairs).\(^26\)

These being the institutional and policy prerequisites relating to the access of groups in the European Union, the European legal system, seen as a system independent of those of the Member States, legitimises the access of groups to the public decision-maker above all as a matter of general principle. The Treaty on European Union, in Title II, headed “Provisions on Democratic Principles”,


\(^{26}\) L. Mattina, op. cit. p.137 ss.
while affirming that the Union is founded on representative democracy, states in article 10(3) that “decisions shall be taken as openly and as closely as possible to the citizen”. It goes on to state in article 11 that “the institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action”. The institutions must also maintain an open, transparent and regular dialogue with representative associations and civil society and conduct broad consultations with the parties concerned in order to ensure that the Union's actions are coherent and transparent. To promote such access in a framework of transparency, an Agreement between the European Parliament and the Commission approved by the European Parliament on 11 May 2011 (in OJ L 191, 22 July 2011) established a voluntary Register for the registration and monitoring of organisations, legal persons and self-employed individuals engaged in EU policy-making and policy implementation. The Agreement on the Register, whose establishment and operation must be in accordance with the principles of proportionality and non-discrimination, includes: a set of guidelines on the scope of the Register, eligible activities and the system of exemptions; the sections open to registration; the information required from registrants; a code of conduct and a complaints mechanism, as well as the measures to be applied in the event of non-compliance with that code.

Having legitimised the access of the groups to the Community decision-maker through the Treaty, the Community institutions have essentially adopted a policy that respects the autonomy of the groups and their operations, confining themselves to establishing a voluntary Register, registration in which implies acceptance of a code of conduct. This is regulation by default as proposed by the Commission and Parliament to the interest groups for the (self-)regulation of their activities.

In substance, this remains in the sphere of custom. Given the silence of the Council on the subject, custom remains the sole criterion for the regulation of access to this Community institution.

The European Parliament has not confined itself to adopting a code of conduct for lobbyists, but has also wished to regulate the activity of parliamentarians in their contacts with the interest groups. It has adopted a Code of Conduct for
MEPs, effective from 1 January 2012, designed to influence lobbying activity. It includes in the MEP’s obligations that of not accepting any financial benefit in exchange for being prepared to vote for or against or to influence a legislative act. It regulates conflicts of interest and requires members to submit a declaration of their financial interests (including their membership of committees or boards of companies, non-governmental organisations, associations or other legal bodies). It lays down the obligation not to accept gifts or favours. It suspends the benefits and concessions granted to former MEPs who are professionally engaged in lobbying or representation associated with the EU decision-making process.

This regulation too confirms the essential respect for the activities of interest groups, safeguarding their autonomy in that Parliament has limited its own field of action as regards policies on the influence of groups.

**Lobbying in the United States**

While the European Union encourages access, it is the US institutional system that has historically and by its intrinsic nature always offered multiple and preferential channels of access to the public decision-maker.

From the viewpoint with which we are concerned here, in other words the regulation of lobbying, it may be of interest to take a closer look at that system.

Even though, as we know, the American legal system is prevalently based on the jurisprudential formant of law, the legislative formant has had a leading role in the regulation of lobbying27.

The earliest precedents relate to the laws of the individual federal states.

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The first legislative text on the subject dates back to 1877, when the Constitution of Georgia prohibited the lobbying of its legislators. In 1890 the State of Massachusetts enacted a law requiring lobbyists to register their interests and to disclose the expenses paid and incurred for lobbying.

At Federal level, it was not until 1946 that Congress passed the Federal Regulation of Lobbying Act, as a component of a larger Act regulating other matters, which was enacted without any prior hearing.

The law imposed the obligation on lobbyists to register their interest and to produce quarterly reports on moneys received and expended for lobbying activities.

It took a further forty years for Congress to lay down new rules on the transparency of lobbying to replace those enacted by the first Federal law of 1946, which was criticised for its considerable opacity.

In 1995 Congress approved the Lobbying Disclosure Act (LDA), which was not limited to regulating the lobbying of members of Congress but also extended to the lobbying of Congress officials and members of the executive.

The LDA confirmed the obligation of lobbyists to register their interests, regulating the reporting of data more exhaustively than had been contemplated in the 1946 Act, but in substance it was still a legislative measure with sparse regulatory impact.

Another sphere of the discipline of lobbying in the United States is the fiscal area. From 1915 to 1962 the Department of the Treasury consistently denied any possibility of the tax deduction of expenses incurred for lobbying. In 1962 such expenses became deductible, but in 1993 Congress reintroduced the non-deductibility of certain expenses, in other words those incurred to influence decisions to be taken by persons involved in legislative activity.

In the same way, nonprofit organisations are prevented from making use of their tax exemption status when engaged in lobbying.
Where such organisations perform lobbying activities, furthermore, they are not permitted to take advantage of grants, bonuses and federal loans, and the contributions they receive are not tax-deductible.

In 2007, Congress approved a new legislative measure, the Honest Leadership and Open Government Act (HLOGA), which reinforced the LDA by extending the obligations of transparency for the activities of lobbying coalitions, imposing a new system of registration of expenses and contributions made to or on behalf of legislative or executive branch officials and candidates for federal office.

The Act extends the cooling-off period for the exercise of lobbying by former members of Congress (but not its officials) to two years. It contains obligations on the lobbyists’ disclosure of fund-raising for electoral campaigns and prohibits gifts from lobbyists to Congress members and officials.

After he was elected, President Obama gave internal instructions to the administration on lobbying of himself, forbidding any oral communication by lobbyists to the presidential staff on the “stimulus package”, stating that lobbyists could not be nominated by the President as members of his staff, subject to specific derogations, and laying down the principle that no member of the Obama administration could work as a lobbyist at any time during the period of his mandate and that lobbyists could not be members of any Federal advisory committee.

Legislation on the regulation of lobbying varies from state to state. Many states impose limits or prohibitions on fund-raising for electoral campaigns. Forty-three states prohibit what is known as “contingent fee lobbying”, the practice of paying the lobbyist a percentage of any contract secured for his client, and many states provide some form of regulation of lobbying by anyone having previously served in a public decision-making office (“anti-revolving door provision”).

Turning to the jurisprudential legal formant, the Supreme Court has only rarely delivered judgments on lobbying. When it has done so, this has been in terms of its consideration of the compatibility of the laws on transparency and taxation
with the First Amendment of the Constitution, which guarantees freedom of speech.

The Court has ruled that laws imposing transparency on lobbying activities are generally compatible with this provision of the Constitution\textsuperscript{28}.

On the subject of tax, the Court has also ruled that the laws not providing for the deductibility of lobbying expenditures and those disapplying tax concessions to nonprofit organisations engaged in lobbying activities do not contravene the First Amendment\textsuperscript{29}.

Even though the Supreme Court has not reviewed the constitutionality of other types of laws relating to lobbying, many minor courts have given decisions on the subject that legitimate the legislation on lobbying. Some relate to the ban on the payment of contributions to lawmakers, others refer to the prohibition of contingency fees, and yet others concern the revolving door restrictions, as well as limitations on participation in election committees or fund-raising for electoral campaigns.\textsuperscript{30}

In terms of the transparency of lobbying and its special fiscal treatment, the regulatory laws are regarded as constitutional from the viewpoint of the First Amendment. In a series of recent cases, the Supreme Court has expressed strong scepticism as to the constitutionality of measures limiting the use of money to influence the choices of the public decision-maker.

\textsuperscript{28} United States v. Harriss, 347 U.S. 612 (1954)


The landmark case is that of Citizens United vs. FEC (the Federal Election Commission)\textsuperscript{31}, a decision in which the Court legitimises a restricted definition of corruption, excludes the concept that ingratiating and the sale of access amount to corruption, and rejects the idea that political equality may justify laws restricting the right of speech\textsuperscript{32}.

The United States, therefore, regulates access in a manner not unlike the manner adopted by the EU Commission and Parliament.

While the latter do not have recourse to legislative measures in order to regulate lobbying and confine themselves to regulating the issue by rules directed towards the activities of the decision-makers (and former decision-makers) and to the voluntary registration of lobbyists, the United States tends to resort directly to the legislative instrument to regulate the behaviour of decision-makers (and former decision-makers) and to make the registration of lobbyists compulsory.

The operational autonomy of interest groups is broadly protected in both systems, with greater stress being placed on autonomy in the EU and a more markedly authoritarian approach being taken in the United States.

This authoritarian approach is opposed – once the Rubicon of the fiscal type of rules or the rules of transparency has been crossed – by measures aiming to limit the activity of groups in practice, relying on the First Amendment of the Constitution as very broadly interpreted by the Supreme Court and thus including the use of money in the right to freedom of speech.


\textsuperscript{32} The judgment was also reflected in the lower courts; see Green Party of Connecticut v Garfield, 616 F. 3d 189 (2d Circuit 2010); Brinkman v. Budish 692 F. Supp. 2d 855 (S.D. Ohio 2010).
Critical profiles of the discipline

Pressure groups, as we have seen, are an unavoidable element of the political process in democratic systems, but there may be more than one critical aspect of their activities in the workings of democracy.

Political scientists in fact believe that the emergence of pressure groups as a dominant factor in a political system may be a sign of a serious crisis both in public administration and in representative bodies. There are criticalities in all the legal systems taken into consideration when they address the regulation of lobbying.

This is true both of the systems that rely on custom alone and of those that have acted by enacting legislative measures and within which doctrine-based and jurisprudential formants are applied to the issue.

It is in fact hard to reconcile the constitutional guarantees as to the exercise of fundamental rights and at the same time to ensure that the political scene is immune to groups aiming to preserve their rent-seeking positions to the detriment of the community.

Since it is difficult for groups of citizens representing generic interests to be capable of influencing the choices of public decision-makers as efficiently as do the economic interest groups promoting specific interests, the central issue is that of guaranteeing equality of opportunities in the lobbying action to which the various stakeholders operating on the socio-economic scene are entitled.

On the other hand, where this issue has been widely analysed from this viewpoint, in other words in the United States, the economic literature has made it clear that corporate lobbying is closely linked to the market performance of the lobbying firm, and that the lobbying conducted by interest groups influences

33 G. Pasquino, Pressure groups, op. cit., p.475.
34 R. Hasen, op. cit., p.227, and the authors cited in note 213.
the level of protection of investors, reducing it to below efficiency margins due to the ability of the corporate insiders to use the assets they control to influence politicians, and to the inability of the institutional investor to capture the full value that efficient investor protection would produce for outside investors.\textsuperscript{36}

The focus of examination therefore shifts from the Constitutional principles guaranteeing the participation of the groups in the institutional political process to the principles regulating the economic processes.

In this respect, the American economic law literature, starting from the distortions produced on the lobbying market – in the sense of lobbying as a rent-seeking technique – deplores the detrimental effects in that it implies the withdrawal of resources from productive use\textsuperscript{37}; this activity is economically inefficient and gives rise to lobbying laws that also prove to be inefficient, since they may result in a waste of public money and lead to protectionist measures likely to discourage competition or private innovation\textsuperscript{38}.

The promotion of the national economic interest is also considered by these (although they are aware that they cannot base it on any case-law precedent, and that little attention paid to the subject of the doctrine-based legal formant) to be a primary governmental interest, one that is guaranteed in the courts\textsuperscript{39}, which


\textsuperscript{37} “Rent-seeking is the consequence in terms of the economic and social costs of the transfers of wealth”: G. Tullock, The Welfare Costs of Tariffs, Monopolies and Theft, Western Economic Journal, 5, 1967, pp. 224, 232

\textsuperscript{38} R.L. Hasen, op. cit., pp.229-235.

\textsuperscript{39} R.L. Hasen, op. cit., p.241.
may well be in conflict with the interest of the right to freedom of speech and petition laid down in the First Amendment.\textsuperscript{40}

In the light of the promotion of the national economic interest, measures prohibiting lobbyists to raise funds for electoral campaigns and the imposition of a cooling-off period of at least five years on ex public decision-makers before they may engage in lobbying are considered to be legitimate.

And, to this end, it is also held legitimate to reintroduce limits on the contribution to electoral campaigns by corporations even after the Citizens United judgment cited above.

The measures that could have an effect on lobbying in the light of the national economic interest relate not only to the direct but also the indirect regulation of this activity in order to influence the market behaviour of those involved in lobbying.

This is the standpoint for viewing the measures issued by the Securities and Exchange Commission in 2010 that limit the lobbying activities of financial consultancy groups, and those adopted in the fiscal field.

In this field, the regulation of corporate lobbying respects the market laws according to the classic liberal tenets that deplore purely speculative intent and extol the endeavour to create collective wealth, without restricting the scope for of the exercise of fundamental constitutional rights.

This is a view that aims to limit the lobbying activity of corporations, while nonetheless respecting their autonomy, in the light of a higher interest than that of the corporation, and also to restrict the use of public decision-makers in lobbying.

\textsuperscript{40} In his dissenting opinion in the Citizens United case, Chief Justice Stevens held that it is legitimate to impose limits on corporate contributions to electoral campaigns, given the distortions created on the market by rent-seeking pursued through lobbying.
While in North America one can visualise a government concern for protecting the national economic interest in order to counter-balance corporate lobbying practices, it would be hard to conceive that the same path might be taken in the European Union.

The absence of institutions that could operate to safeguard a Community economic interest rules out any possible use of the instrument established according to US doctrine to restrict corporate lobbying. The EC Treaty is imbued with anti-monopoly principles, prohibiting as it does any agreement that might restrict or falsify the play of competition (Article 81).

But these declarations of principle have found fertile ground in the individual national legal systems (and therefore also in the individual economic systems of member countries) through the standardisation of liberalising policies implemented by directive (the liberalisation of financial, banking and insurance services), as well as the protection of investors and consumer groups from monopolistic practices, these too by directive.

In this respect, the Community institutions are assuming the role of a point of access to interest groups that is “complementary” to the points of access to the institutional, policy and regulatory systems of the individual Member States, becoming a target for the corporate lobbying rent-seeking policies without it being possible for these to be counter-balanced by a European economic interest, which is lacking.

The field of action for lobbying practices in the anti-standardisation sense is particularly fertile when it comes to the harmonisation of company legislation, with the aim of safeguarding the Member States’ individual regulatory systems, and therefore their competitive advantages.

It should be recalled that lobbying has reduced to a state of paralysis any initiative attempting to regulate the subject of company ownership and control, an issue of special relevance as regards relations between undertakings, institutions and the policies of individual member countries. This has been the subject of a study by a committee of EU experts, which was mandated to
consider the problem and to propose solutions in the light of one of the cardinal legal principles of Community action, that of proportionality.\footnote{The study by EU legal experts, Proportionality between ownership and control in EU listed companies, Comparative legal study, May 18, 2007, has not resulted in any normative measure.}

This principle of proportionality is the only means of counteracting – with a view to arriving at a balance between interest groups with generic interests and those having specific interests – the right of access by such groups to the Community institutions, a right that, as we have seen, is guaranteed by the Treaties.

It is a principle that must be observed not only in the action and reaction of the institutions to the lobbying activity of the various interest groups (whether their interests are generic or specific), but also in the action/reaction of interest groups in their lobbying of institutions.\footnote{On the principle of proportionality, I take the liberty of referring to: A. Bortoluzzi, Proporzionalità, Digesto, IV, Sezione Civile, Aggiornamento ***, Turin, 2007.}

In Italy too, the principle of the national economic interest is hard to use to counter-balance the impact on the public decision-maker of lobbying by groups with specific interests with the impact of lobbying by generic interest groups, whose rights of access – as we have seen – are guaranteed by the Constitution.

The Italian legal system, despite the existence of an institutional order that tends to place the emphasis on the national economic interest, in that it is inspired by state dirigisme\footnote{A. Quadrio Curzio, Tre costitutioni economiche, italiana, europea bicamerale [Three economic constitutions: Italian, European, Bicameral], in L. Ornaghi (ed.) La nuova età delle costitutioni [The new age of constitutions], Bologna, 2000.}, is characterised by a system for the regulation of companies that tends to privilege autonomy.
It is a system whose foundations are in the Civil Code, one that has resisted and still resists any “irritant” from outside that Code, whether it is the Constitutional Charter, Community directives or the rules of lex mercatoria.\textsuperscript{44}

The by-laws of the Italian company are governed by the rules of the family firm, “pacts of iron” concluded due to a normative system “of plaster”,\textsuperscript{45} serving as a formal shield to whoever dominates the company, either as its boss or its administrator.

In this political/legal system, the national economic interest disintegrates and the interest of individual market operators prevails.

In Italy the right to company lobbying cannot be offset by a national economic interest that, although it is proclaimed on paper, does not exist in actual economic and legal relationships.

Lobbying is in fact a consistent practice of the company, which combines within itself instrumental action (the corporate economic interest), and communicative action (the family political interest), a practice that directly affects the public economic policy choices through the practice of clientelism (which we have already mentioned), or even of direct employment by certain companies of the political parties or their factions (and vice versa, especially in the case of private companies the whole or part of whose capital is held by a public entity).

The organisations representing their members’ interests (trade unions, the Italian Confederation of Industry, and professional bodies) act according to the rules of custom, which assign them broad powers, not only of initiative but also of veto, since they are recognised as institutional interlocutors (in the case of the professional bodies, also by law).

Against this background, the question of regulating the activity of interest groups does not appear to be a topical issue on the political or the corporate agenda.

\textsuperscript{44} For further details, I take the liberty of referring to A. Bortoluzzi, Lezioni di diritto di impresa, op. cit.

\textsuperscript{45} L. Mossa, Per il diritto dell’Italia [For the law of Italy], in Riv. Dir. Comm. XLIII, 1945, p.1.
If anything, the topical issue is the idea of political parties, for electoral purposes, and the organisations representing group interests (mainly the Unions and Confindustria) capturing, through political action, the sectors of the population without political representation and therefore condemned to marginalisation.

Andrea Bortoluzzi