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ARTICLE

On the Proposed Measures to Regulate Third Country Interest Representation Activities in the European Union

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Abstract

The 2022–2023 Qatargate scandal – which entailed the widespread undermining of Union democracy by members of the European Parliament acting on behalf of third countries – has rocked the European Union to its core. The proposal by the Commission aimed at establishing transparency and accountability surrounding such activities cannot therefore come at a more appropriate time. But does the proposal live up to its objectives? Here, this piece casts doubt on whether that is the case, with this piece exploring Qatargate as an example, as well as the content, constitutionality, and criticism of the proposal. This Article also makes comparisons to Union-based representation activities and the Commission's approach to antidumping, and shines light on the Commission's treatment of third-country actors and representatives thereof.

Keywords: democracy; European Union; interest representation activities; lobbying; Qatargate

I. Introduction

Suitcases full of cash. Laptops seized. Paparazzi photos of hands shielding embarrassed faces in taxi backseats. These are the images that may come to one's mind when reflecting on the year 2023 for the European Union (EU). Such depictions reflect the "Qatargate" scandal that have plagued the supranational European body since December 2022.

Indeed, the revelation that members of the European Parliament (MEPs) have been compromised by third countries and entities acting on their behalf, to the extent that they have been deliberately undermining Union democracy, have rocked the Union to its core, with the crisis exposing deep failures of transparency and accountability.[1]

Addressing the issue more generally, in December 2023 the Commission proposed a Directive establishing harmonised requirements in the internal market on transparency of interest representation carried out by or on behalf of third countries. The proposal aims at establishing transparency and thereby accountability surrounding attempts to influence Union law and policy via lobbying by entities acting on behalf of third countries and by third countries themselves.[2] This proposal was foreseen already in President von der

[1] On this, see Oxford Analytica, "'Qatargate' Exposes EU Transparency Failures," *Emerald Expert Briefings* (2022) <https://doi.org/10.1108/OXAN-DB274950> accessed 11 January 2024.

[2] While "interest representation activities" can be generally seen as the more formal and perhaps less pejorative term for "lobbying," the two expressions will nevertheless be used here interchangeably, and the term lobbying is not invoked with the intention of negative connotation.

Leyen's 2022 State of the Union Address, where she noted that "Foreign entities are funding institutes that undermine our values. Their disinformation is spreading from the internet to the halls of our universities."[3]

This piece makes an attempt to unpack that proposal. To do so, firstly, further context underlying the Qatargate example is provided. The content of the proposal is subsequently explored, followed by an exploration of the Directive's constitutionality, with doubt being cast on the lawfulness of the use of Article 114 of the Treaty on the Functioning of the European Union (TFEU) as the legal basis. This piece then provides an overview of the criticisms that may be levied against the proposed Directive, before a comparison is made to the legislators' treatment of Union-based interest representation activities and the Commission's approach to third countries based on different constitutional principles more generally.

II. An example: Qatargate

What has come to be known as the "Qatergate"' scandal of 2022–2023 provides a suitable illustration as to why legislation addressing third country interest representation activities is necessary. Hundreds of documents from police investigations were leaked and obtained by news agency POLITICO. The documents revealed a "money-for-influence"[4] scandal that occurred within the European Parliament. A total of about €4 million was paid to European Parliament officials by people and entities operating in Qatar, Morocco and Mauritania. These, of course, are only the payments that have come to light – it can be assumed that others remain uncovered. It is perfectly possible (and probably rather likely) that bodies acting on behalf of other countries have engaged in similar activities. The payments were aimed at stopping various proposals in the European Parliament, such as "six parliamentary resolutions condemning Qatar's human rights record" and also "working to deliver a visa-free travel deal between Doha and the EU."[5]

Thus far, several arrests have been made: that of Eva Kaili (an MEP from Greece, then the vice-president of the European Parliament),[6] Francesco Giorgi (a parliamentary aide and the partner of Kaili),[7] Pier Antonio Panzeri (former Italian MEP).[8] Several others still have been charged, including MEPs Andrea Cozzolino (Italy) and Marc Tarabella (Belgium).[9] Arrest warrants have also been issued for Qatari nationals Ali Bin Samikh Al Marri (Labor Minister) and his aide Bettahar Boujellal.[10] However, this may be complicated by the fact that both may have diplomatic immunity.[11]

[3] 2022 State of the Union Address by President von der Leyen (14 September 2022), available at https://ec.europa.eu/commission/presscorner/detail/en/speech_22_5493 (last accessed 11 June 2024).

[4] Elisa Braun, Gian Volpicelli and Eddy Wax, "The Qatargate Files: Hundreds of Leaked Documents Reveal Scale of EU Corruption Scandal" (*POLITICO*, 12 April 2023) <https://www.politico.eu/article/european-parliament-qatargate-corruption-scandal-leaked-documents-pier-antonio-panzeri-francesco-giorgi-eva-kaili/> accessed 11 January 2024.

[5] Ibid.

[6] "One Year of 'Qatargate': Investigation Going Nowhere?" *EURACTIV* (12 June 2023) <https://www.euractiv.com/section/justice-home-affairs/news/one-year-of-qatargate-investigation-going-nowhere/> accessed 11 January 2024.

[7] Ibid.

[8] Ibid.

[9] Ibid. On the responses to the majority of these arrests, see: Gian Volpicelli, Eddy Wax and Elisa Braun, "The Qatargate Files: Inside the Police Interrogations" (*POLITICO*, 12 April 2023) <https://www.politico.eu/article/european-parliament-corruption-scandal-qatargate-police-interviews-pier-antonio-panzeri-francesco-giorgi-eva-kaili-andrea-cozzolino/> accessed 11 January 2024.

[10] Elisa Braun, "Belgium's on-Again, off-Again Hunt for the Men Accused of Corrupting the European Parliament" *POLITICO* (22 November 2023) <https://www.politico.eu/article/belgiums-on-again-off-again-hunt-for-the-men-accused-of-corrupting-the-european-parliament/> accessed 11 January 2024.

[11] Ibid.

As an example of the lobbying,

> Among the files seen by POLITICO was an eight-tab spreadsheet on Giorgi's laptop, seized at his flat in Brussels, listing hundreds of influence activities the network allegedly carried out between 2018 and 2022. The spreadsheet records more than 300 pieces of work for which the suspects received handsome fees. They allegedly achieved their ends using a network of associates working inside the Parliament, whom they called their "soldiers," according to the files.[12]

This is truly just the tip of the iceberg – and further details about the Qatargate developments have been published by POLITICO and other news outlets – but it is sufficient to understand the need for the proposed Directive of interest representation activities.

III. Content: "interest representation activities," etc.

The substance of the proposed Directive is to apply to any interest representation activities provided *to* a third country entity or any such activity carried out *by* such an entity where it "is linked to or substitutes activities of an economic nature and is thus comparable to an interest representation service."[13] That is, where an undertaking or individual conducts interest representation activities for a third country, or where a third country engages in such activities itself – where such activities are done in exchange for money (and are hence comparable to a service) – they will be caught by the proposed Directive.

For its part, a third country entity is defined In Article 2(4) as

> (a) the central government and public authorities at all other levels of a third country, with the exception of members of the European Economic Area; [or]
> (b) a public or private entity whose actions can be attributed to an entity referred to in point (a).[14]

According to the proposal, an interest activity, means an "activity conducted with the objective of influencing the development, formulation or implementation of policy or legislation, or public decision-making processes, in the Union."[15]

The same provision provides a list of examples of such activities, including:

> organising or participating in meetings, conferences or events, contributing to or participating in consultations or parliamentary hearings, organising communication or advertising campaigns, organising networks and grassroots initiatives, preparation of policy and position papers, legislative amendments, opinion polls, surveys or open letters, or activities in the context of research and education, where they are specifically carried out with that objective.

Thus, it can be concluded from these provisions that the Directive is intended to control all interest representation activities directed at the Union by interest representation groups that advise third countries or by third country entities themselves.

[12] Braun, Volpicelli and Wax (n 3).

[13] Art 3(1) Commission, "Proposal for a Directive establishing harmonised requirements in the internal market on transparency of interest representation carried out on behalf of third countries" COM(2023)637.

[14] Art 2(4) ibid.

[15] Art 2(1) ibid, emphasis added.

The Directive seeks to achieve full harmonisation, meaning Member States cannot maintain or introduce provisions deviating from the Directive, whether more or less stringent.[16] This might be seen as undesirable, as the proposed Directive is limited to transparency and does not go much further in terms of ensuring accountability, and a later section will discuss this issue.

As for the obligations laid down, the Directive requires each Member State to set up a transparency register for such bodies. The latter must record their activities at the latest by the time they commence.[17]

In terms of the information contained in the register that must be publicly available, this is provided for in Annex I[18] and includes details such as the name of the representation body, their website, the name of their legal representative, the category of organisational setup of the entity (e.g. company, law firm, nongovernmental organisation, consultancy, or academic institution), their registration number for any national transparency register they are listed in, their registration number in a business register, a description of the body's goals, area of activities and field of interest. They must also indicate the name of the third country on whose behalf the body carries out the representation activities, the annual amount of money spent on the representation activities, a description of the interest activity and its expected duration, the Member State(s) where the activity is carried out, the names of subcontractors, legislative proposals or policies targeted by the representation activity, and public officials contacted if the Member State so decides.

Hence, there are various provisions requiring quite in-depth levels of transparency. It is, however, possible for the representation body to ask for an exception by a "duly reasoned request . . . if justified on grounds of a legitimate interest, including a serious risk that the publication would expose an individual to a violation of fundamental rights."[19] The examples of fundamental rights provided includes the EU Charter of Fundamental Rights Articles 1 (human dignity), 2 (the right to life), 3 (right to the integrity), 4 (prohibition of torture and inhuman or degrading treatment) and Article 6 (right to liberty and security) of the Charter. How might these rights be impeded? Though no concrete examples are provided, one might envision a situation in which a non-governmental organisation from a third country that also consults that or another third country engages in lobbying activities that promote e.g. fundamental rights that are not supported by the third country from which they originate. In such a situation, if the third country from which the interest representation body originates finds out about the lobbying activities, they may threaten the fundamental rights of the individual(s) involved in the lobby group.

IV. Constitutionality: the legal basis

It is made clear in the Explanatory Memorandum,[20] preamble, and Article 1 that the proposed Directive is set to be based on Article 114 TFEU. As is well-known, Article 114 TFEU is the internal market harmonisation provision that is resorted to when more specific internal market legal bases are not available. In order to use Article 114 as a basis, the Commission has to interpret interest representation activities as "services" within the meaning of Article 57 TFEU, since they are normally provided for remuneration.[21] Thus, the Commission forwards that divergent Member State rules on interest representation can become "obstacles" to the functioning of the internal market, as required by Article 114 TFEU.

[16] Art 4 ibid.
[17] Arts 9 and 10 ibid.
[18] As provided for in Article 12(1)(a) ibid.
[19] Art 12(3) ibid.
[20] Ibid 9–10.
[21] Ibid 1.

In line with the chosen legal basis, Article 1(1) on the object and purpose of the Directive states firstly that the new rules are laid down "with a view to improving the functioning of the internal market by achieving a common level of transparency across the Union."[22] Thus, transparency is the *means* of protecting the functioning of the internal market, rather than the end goal in itself. Article 1(2) of the proposed Directive then goes on to state that

> The purpose of this Directive is to achieve that transparency in such a manner as to avoid creating a climate of distrust apt to deter natural or legal persons from Member States or third countries from engaging with or providing financial support to entities carrying out interest representation on behalf of a third country entity.

Hence, the reason for transparency is so that Member States and persons therefrom or third countries are not put off from interacting with or supporting third country interest representation groups. Connecting this to the internal market objective, this ensures that there is not a reduction of such activities in the internal market. This interpretation is supported by a statement in the recital that national divergences in rules on third country interest representation entities "may deter the development and provision of new interest representation activities in the internal market."[23] This suggests that the Commission views a reduction in such activities as undesirable. However, they do not provide any reasons as to *why* that is the case. Indeed, it is questionable whether we should want to see more interest representation at all. Some might even consider a reduction in such activities, e.g. by large corporations, as desirable. Such a reduction would put entities with less resources on more equal footing with those that have a large amount of resources to engage in the discussed interest representation activities.

Although only the internal market and the supporting goal of transparency are mentioned in the provision, it is arguable that this was not the only objective or perhaps even the *main* objective. Indeed, the Commission seems to be at least equally pursuing the objective of protecting democracy. This is made clear by various references in the Explanatory Memorandum to democracy. For instance, the Memorandum states that interest representation activities provide an opportunity for third country actors to "covertly influence decision-making and democratic processes in the Union."[24] The Commission also similarly states that "when carried out covertly, interest representation on behalf of third countries is prone to being used as a channel for interference in Union democracies."[25] They also observe that eight in ten Europeans "consider that foreign interference in Union democratic systems is a serious problem."[26] Numerous references are also made to democratic accountability.[27]

However, the Directive itself does not formally refer to democracy or the objective of protecting democracy at all. The reason for this incongruency is presumably that there would simply be no legal basis for the proposal to do so. There are very limited references to democracy in the TFEU.[28] Strikingly, even the TEU title on democracy principles says nothing about Union action being based in the promotion of democracy, though it strives to protect

[22] Art 1(1) Proposal for a Directive on Third Country Interest Representation.
[23] Recital 6 ibid.
[24] Ibid 1–2.
[25] Ibid 2.
[26] Ibid.
[27] See e.g. Proposal for a Directive on Third Country Interest Representation 3 and 16 as well as recitals 11 and 44.
[28] E.g. Article 165 of the Treaty on the Functioning of the European Union [2016] OJ C 202/47 (consolidated) on education states that "Union action shall be aimed at:... encouraging the participation of young people in democratic life in Europe."

representative democracy.[29] This absence stands in contrast to Article 21 of the TEU on principles that underlie the Union's international action, which includes a direct reference to democracy.[30]

There is therefore no direct reference in the Treaties to the promotion or protection of democracy internally. Perhaps this objective was deemed so obvious that it was simply left out of the Treaties. Alternatively, perhaps Article 2 TEU, which observes that the Union is founded on inter alia the value of democracy, was deemed sufficient.[31] This seems supported by the statement in the Explanatory Memorandum that "In line with Article 2 TEU, this initiative also aims to enhance the integrity of, and public trust in, the Union and Member State democratic institutions."[32] However, it is more than evident from the aforementioned wording of Article 2 TEU – which simply lists the Union's *values* – that this provision cannot serve as a legal basis.

While there is no possible legal basis for the Directive that is founded on the protection of democracy, the Court has certainly allowed the use of Article 114 TFEU in the pursuit of supporting or ancillary objectives. Firstly, the Court uses the centre of gravity test, looking at a measure's aim and content,[33] to determine the actual objective pursued. In that regard, it is doubtful that the central objective of the proposed Directive is indeed the harmonisation of the internal market; it is far more likely that the Court would conclude that the actual objective is the protection of democracy. Hence, it is questionable whether the institutions can rely on Article 114 TFEU as the proper legal basis for the Directive, and indeed whether there exists at all an appropriate legal basis.

Despite these limitations, if one adopts a teleological interpretation of the Treaties, it might be argued that it would run counter to the spirit and purpose of the Treaties if the Union were unable to legislate on matters that are at their essence aimed at the protection of Union democracy. This still does not solve the problem of an absence of a legal basis, however.

V. (Further) criticism

The draft has been criticised by nongovernmental organisation (NGO) The Good Lobby for its broad definition of interest representation activities.[34] Indeed, the group argues that "this puts at risk any attempt to put pressure on the institutions, also and above all by NGOs and all representatives of civil society."[35] It is true that compliance by interest representation bodies will likely include high costs, which many non-governmental organisations and civil society groups will simply be unable to afford.[36] This would run the risk of further entrenching inequalities between the efficacy of corporate and civil society

[29] Art 10 Treaty on European Union (TEU) [2016] OJ C 202/13 (consolidated).

[30] Art 21 ibid.

[31] Art 2 ibid.

[32] Proposal for a Directive on Third Country Interest Representation 9.

[33] Case C-300/89, *Commission v Council (Titanium Dioxide)* EU:C:1991:244 [13].

[34] Bianca Dominante and Fabio Rotondo, "La Commissione europea ha presentato una direttiva contro le interferenze di Paesi terzi." (*The Good Lobby Italia*, 21 December 2023) <https://www.thegoodlobby.it/la-commissione-europea-ha-presentato-una-direttiva-contro-le-interferenze-di-paesi-terzi/> accessed 11 January 2024.

[35] Ibid (translated). Indeed, it should be noted that NGOs and civil society constitute an important group of lobbyists in the Union and abroad. On this, see e.g. Sean D Ehrlich, Kimberly R Frugé and Jillienne Haglund, "Lobbying, Access Points, and the Protection of Human Rights in Democracies" (2023) 49 International Interactions 935; Esra Karliova Soysal, "Lobbying in the Field of Human Rights" (2021) 6 New Era International Journal of Interdisciplinary Social Researches 89.

[36] On the limited resources of civil society as compared to corporate and industry lobbies, see e.g. Jutta Joachim and Birgit Locher, *Transnational Activism in the UN and the EU: A Comparative Study* (Routledge 2008) 123. Moreover, it has been found "that higher resources are positively related to access to EU institutions": Wiebke Marie Junk, "Two Logics of NGO Advocacy: Understanding inside and Outside Lobbying on EU Environmental Policies" (2016) 23 Journal of European Public Policy 236, 240.

interest representation bodies.[37] Here, it could be desirable to introduce a provision providing for an exemption similar to that found in Article 12(3) of the proposed Directive, which provides an exemption from publication in the presence of a "legitimate interest." In particular, such a legitimate interest could perhaps be shown where compliance with the Directive would prevent a civil society organisation from carrying out its public interest-related function. Of course, as with the introduction of any exemption, bad faith actors will search for loopholes, making it necessary to construct with due care by looking at the functions of the applicant entity.

The Good Lobby Italy also note that the concept of interest representation activity could be open to a wide variety of conflicting interpretations.[38] This criticism seems less significant, given the elaborate list of such activities listed by the legislator in Article 2 on definitions (including participating in meetings, participating in consultations, etc). Moreover, it is highly likely that the legislation will be challenged by interest representation groups and that the Court of Justice will therefore be given an opportunity to provide clarity in this respect. Such challenges are most likely to come via preliminary references from national courts, given the well-established difficulties in obtaining standing in annulment actions for private parties under Article 263 TFEU.

Another criticism that can be levied against the proposal is the suitability of the proposed measure in terms of its ability to achieve the stated objective(s). Transparency in order to facilitate accountability is a common theme in the proposed Directive. As highlighted in the preamble,

> The main aim of this proposal, which complements existing measures at Union level, would be to introduce common transparency and accountability standards in the internal market for interest representation activities carried out on behalf of third countries.[39]

Transparency can be seen as a prerequisite for accountability: without information about the activities being carried out, of course the parties carrying out the activities cannot be held responsible for their actions. However, transparency cannot be considered as *sufficient* to achieve such accountability in and of itself.[40] Indeed, as the saying goes, one cannot shame the shameless:[41] where third country interest representatives and third countries simply do not care whether light is shone on their efforts to influence Union law and policy, nothing is achieved by the proposed Directive. This is likely the case where the potential profits from the activities significantly outweigh the potential sanction if caught not complying with the Directive. The current maximum fine of €1,000 for natural persons in breach of the proposed Directive is wholly insufficient to deter bad-faith actors such as those embedded in the Qatargate scandal from engaging in their covert interest representation activities that undermine democracy.

Finally, another criticism is the noticeable difference in the treatment of Union-based interest representation activities, which go largely unregulated, as compared to what is

[37] Scott Davidson, "Public Affairs Practice and Lobbying Inequality: Reform and Regulation of the Influence Game" (2017) 17 Journal of Public Affairs e1665

[38] Dominante and Rotondo (n 33).

[39] Proposal for a Directive on Third Country Interest Representation.

[40] Nevertheless, it can of course be acknowledged that "under certain conditions and in certain situations, transparency may contribute to accountability" Albert Meijer, "Transparency" in Mark Bovens, Robert Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (2014) 518.

[41] This argument has been forwarded and elaborated upon widely across the literature. See for instance Jonathan Fox, "The Uncertain Relationship between Transparency and Accountability" (2007) 17 Development in Practice 663.

proposed by the Commission for third country interest representation bodies. This will be explored in the following section.

VI. Comparison: measures on Union-based interest representation activities and antidumping

The proposed Directive applies to interest representation activities on behalf of third countries that occur "in the Union," meaning that it applies to interactions with both Union *and* national officials.[42] This stands in stark contrast to the existing legislation on internal interest representation activities, that is, lobbying by interest representation groups on behalf of Union entities. In that regard, the only legislation that exists is an inter-institutional agreement providing for a transparency register for interest representation activities that are directed at the Commission, Council, and Parliament.[43] The legal basis for the register is Article 295 TFEU, which enables these three institutions to "make arrangements for their cooperation." Any matters can be subject to such an agreement, meaning the same legal basis problems discussed in relation to the proposed Directive do not apply to the inter-institutional agreement.

Though other EU institutions, bodies, offices and agencies and Member State permanent representations can also optionally sign up for the register,[44] national-focused interest representation is explicitly excluded,[45] for reasons that remain unclear. From 2014–2021, the register only applied to the Parliament and Commission.[46] The recast 2021 inter-institutional agreement then included the Council.[47] Another significant change brought by the 2021 agreement was that it made the register *mandatory* for any interest representation bodies engaging with the three EU institutions.[48] Again, unlike the proposed Directive, the agreement does not achieve total harmonisation, meaning the three Union institutions are free to establish additional measures focused on cultivating increased interest representation transparency.

Another contrast between the proposed Directive and the inter-institutional agreement relates to their purposes. Whereas the proposed Directive gives a nod to internal market harmonisation, Article 1 of the agreement focuses directly on establishing transparent and ethical interest representation. This in itself casts doubt on whether the proposed Directive's legal basis is legitimate: if the inter-institutional agreement on parallel Union-based activities is based on transparency and the protection of democracy, why is the same not true of the proposed Directive? The pursuit of "*ethical* interest representation" is also a noteworthy difference from the proposed Directive, which makes no mention of such considerations. One can only wonder why it was not desirable to ensure ethical interest representation in the context of third country interest representation activities. Perhaps

[42] See Art 2(11)-(13) of the proposal on the definition of "public official."

[43] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on a mandatory transparency register 2021. On the register, see e.g. Justin Greenwood and Joanna Dreger, "The Transparency Register: A European Vanguard of Strong Lobby Regulation?" (2013) 2 Interest Groups & Advocacy 139.

[44] Arts 11 and 12 and Recital 9 Transparency Register inter-institutional agreement.

[45] Recital 11 Interinstitutional Agreement on a Mandatory Transparency Register.

[46] On the former register, see e.g. Alberto Alemanno, "Unpacking the Principle of Openness in EU Law Transparency, Participation and Democracy" [2014] SSRN 10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2303644> accessed 12 January 2023.

[47] Recital 6 Interinstitutional Agreement on a Mandatory Transparency Register.

[48] Recital 7 ibid. On the recast register, see again Alemanno in Alberto Alemanno, "Legal Opinion on the Proposed Inter-Institutional Agreement for a Mandatory Transparency Register in the European Union" (15 May 2017) <https://papers.ssrn.com/abstract=2996619> accessed 12 January 2024.

this is to ensure that all interest representation activities are indeed caught by the Directive, ethical or not.

As for the affairs covered by the agreement, it applies to activities that are practically identical in scope to the proposed Directive. In that regard, Article 3 states that "This Agreement shall cover activities carried out by interest representatives with the objective of influencing the formulation or implementation of policy or legislation, or the decision-making processes of the signatory institutions or other Union institutions, bodies, offices and agencies . . . *[i]n particular*":

(a) organising or participating in meetings, conferences or events, as well as engaging in any similar contacts with Union institutions;
(b) contributing to or participating in consultations, hearings or other similar initiatives;
(c) organising communication campaigns, platforms, networks and grassroots initiatives;
(d) preparing or commissioning policy and position papers, amendments, opinion polls and surveys, open letters and other communication or information material, and commissioning and carrying out research.

However, like the activities mentioned in the proposed Directive, this list is not exhaustive. An example is "making submissions in response to direct and specific requests from any of the Union institutions, their representatives or staff, for factual information, data or expertise."[49] Like the proposed Directive, these exceptions deprive the Agreement of much of its utility, given that such activities often entail significant interest representation efforts.

In terms of the content of the register to be made public, this includes the:

(a) name of the entity; address of the head office and the office in charge of relations with the Union, if different from the head office; phone number; e-mail address (1); website;
(b) form of the entity;
(c) interests represented;
(d) confirmation that the applicant operates in accordance with the code of conduct;
(e) name of the person legally responsible for the entity and of the person in charge of relations with the Union;
(f) an annual estimate of the full-time equivalents for the persons involved in covered activities according to the following percentages of a full-time activity: 10 %, 25 %, 50 %, 75 % or 100 %;
(g) goals, remit, fields of interest and geographical level of engagement;
(h) organisations of which the registrant is a member and entities with which the registrant is affiliated;
(i) registrant's members and/or affiliation with relevant networks and associations.

Hence, it can be observed that the proposed Directive goes than the agreement in the extent of information on the precise lobbying activities that must be made transparent: whereas the Agreement only requires transparency in respect to the interests represented and fields of interest, the proposed Directive requires an actual description of the interest activity. This suggests that there is an unexplained and unjustified degree

[49] Art 4 Interinstitutional Agreement on a Mandatory Transparency Register.

of discrimination being exercised by the Union in respect to third country entities. Whereas the requirements provide for *more* transparency in relation to third country interest representation activities, there seems to be no clear reason that such a level of transparency is not required for Union-based activities.

It should be noted that, while the inter-institutional agreement covers third countries "where such authorities are represented by legal entities, offices or networks without diplomatic status or are represented by an intermediary" it does not cover interest representation activities by third country actors themselves.[50]

The differential treatment of third-country and Union-based lobbyists is similar to the attempt made by the Commission to exclude third-country, allegedly non-democratic bodies from being "interested parties" for the purposes of anti-dumping measures. In that regard, in what can be called the *China Chamber of Commerce* case, the Court of Justice was charged with scrutinising a Commission decision *inter alia* imposing an anti-dumping duty and collecting a duty on imports of cast iron items from China.[51] The decision relates to the 1994 World Trade Organization Anti-Dumping Agreement,[52] and in particular to investigations conducted with a view to determining whether dumping has occurred or not. If a given country is being investigated for dumping, "interested parties" must be inter alia

> given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.[53]

Article 6.2 adds that

> Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered.[54]

The Commission decision under scrutiny relates to the EU-level initiation of anti-dumping proceedings concerning EU imports of cast iron items from China (and India).[55] The Chinese Chamber of Commerce took part in these proceedings.[56] Subsequently, the latter and other parties appealed the relevant Commission anti-dumping decision to the General Court. The Commission alleged that the case was inadmissible because the Chamber of Commerce was not democratically organised, but the General Court disagreed.[57] Before the Court of Justice (ECJ), the Commission remarkably argued that,

> a professional association cannot be an emanation of a State which is organised based on a communist one party system, since, in such a case, that association would be

[50] Art 4(2)(d) ibid.

[51] Case C-478/21 P, *China Chamber of Commerce v Commission* EU:C:2023:685 [1]. Many thanks are owed to Julia Bowley for bringing this case to my attention.

[52] Formally known as the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter: Anti-Dumping Agreement).

[53] Art 6.1 of the Anti-Dumping Agreement.

[54] Art 6.2 of the Anti-Dumping Agreement.

[55] Case C-478/21 P, *China Chamber of Commerce* (n 49) [14].

[56] Ibid [17].

[57] Case T-254/18, *China Chamber of Commerce and others v Commission* EU:T:2021:278 [139]; Case C-478/21 P, *China Chamber of Commerce* (n 49) [76].

> required to defend the interests of its members, as democratically defined by those members, vis-à-vis the State of which it is an emanation. Such a situation where a trade association would at the same time be part of a State and defend the collective interests of its members against that State is contrary to the fundamental principles of representative democracy which are common to the tradition of the Member States.[58]

Though the ECJ ultimately disagreed with the Commission (on the grounds that "there is no requirement . . . that an association representing members in legal proceedings be organised democratically")[59] the Commission's submissions are telling in terms of how it views societies that are not organised based on capitalist principles and how it views third countries more generally. In that respect, the Commission appears quick to discriminate against such actors simply by virtue of the fact that they do not adhere to "the fundamental principles . . . which are common to the tradition of the Member States."[60] This trend is also clearly seen in respect to interest representation activities by actors representing third countries. While this is merely one example, it provides a useful insight into how the Commission views third countries when pressed on this matter.

However, should being based on different constitutional principles be a reason for differential treatment, in particular when it is not immediately clear that all Member States uphold these principles?[61] Should third countries (and actors acting on their behalf) always be subject to such different legal tests and requirements? One might be instinctively inclined to say that this should not be the case, but in any event these are questions that the Parliament and Council will have to grapple with when it is time for them to review the proposal.

VII. Conclusion: the road ahead

Going forward, it would be desirable for significant amendments to be made to the Commission's proposal.

First and foremost, accountability mechanisms must be included in the measure should the Commission wish for the Directive to achieve anything at all. In that regard, one could envision, for instance, the establishment of harmonised penalties for representation activities that seek to undermine Union democracy. As it stands, had the Qatargate scandal occurred at a time when the proposed measure is adopted, it is questionable whether the suggested transparency requirements would have deterred the relevant actors from engaging in the abovementioned cash-for-favours activities. For the Directive to be effective, sufficient penalties must be established, which cannot be entirely ensured if this is left up to the Member States.[62] Moreover, at present, under the proposed Directive fines for infringements by natural persons cannot exceed €1,000[63]– far below what the European Parliament representatives received in exchange for their interest representation activities. Nevertheless, the publicity attracted by such condemnation renders the penalties more effective.

[58] Case C-478/21 P, *China Chamber of Commerce* (n 49) [76].
[59] Ibid [84].
[60] Ibid [76].
[61] As demonstrated e.g. by the rule of law backsliding crisis that has plagued the Union for over a decade. On this see e.g. the classic piece by Laurent Pech and Kim Lane Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU" (2017) 19 Cambridge Yearbook of European Legal Studies 3.
[62] As is presently the case under Art 22(1) of the proposed measure.
[63] Art 22(2) of the proposed Directive.

The problem with this proposal is that, as mentioned, there does not appear to be an immediately obvious valid legal basis for the Directive: the measure is not truly about the establishment or functioning of the internal market, but instead has at its essence the protection of democracy in mind. This implies that urgent Treaty amendment by the Member States may be required.

Other changes based on the criticisms discussed herein might include an explicit reference to the ability of public interest-focused groups to be exempt from the transparency registers. The purpose of such a change would be to ensure that such groups are not totally excluded from interest representation on account of limited financial resources.

Finally, and in line with the principle of equal treatment, the Commission should change its discriminatory attitude towards third countries that operate according to different constitutional principles than those common to the Member States. There is simply no good reason to discriminate so blatantly between interest representation activities that are done on behalf of third countries versus Union Member States and entities established therein. To be clear, this is not at all to argue for the watering down of the proposed Directive to match the standards required of Union-based interest representation by the inter-institutional agreement. In fact, since the Commission is correct to view interest representation, especially non-transparent interest representation, as potentially harmful to European democracy, it should lead the way in tightening lobbying regulations both for Union and third country entities.

Thus, whereas it is certainly desirable to lay down measures aimed at curbing anti-democratic lobbying activities, significant hurdles remain to achieving this objective.

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