

Institutionalization of lobbying as one of the means to reduce corruption in Ukraine

Lobbying is one of the crucial elements of democracy. It is a voice of a civil society, a businesses and other stakeholders in political debates. At the same time, lobbying is a global multi-billion-dollar business with a high risk of corruption. There are no surveys which prove that a regulation of lobbying can reduce the level of corruption, however, there is a survey that demonstrates that in the U.S. where lobbying is highly regulated the corruption index is lower than, for example, in Poland, Lithuania, where lobbying is low or limited in regulation.

Ukraine is a country with no lobbying traditions or special regulations. However, lobbying *de facto* exists in Ukraine and there is a high level of corruption. According to Global Perception Index (GPI), under previous regime Ukraine ranked 142 out of 175 countries in terms of corruption.¹

The question arises whether it is necessary to regulate a lobbying activity in Ukraine and which legal framework for lobbying can be designed to reduce corruption?

The definitions of lobbying activity, a lobbyist, lobbying targets are of fundamental importance, as a proper definition allows obtaining a purpose for regulation that is ensuring transparency and accountability in decision-making. Inadequate regulation makes this purpose unachieved and legislative efforts ineffective. If lobbying activity, a lobbyist, lobbying targets are narrowly defined, such system fails to identify who is seeking to influence, whom and for what purpose.

Legal definition of lobbying differs in scope. In some jurisdictions, like in the one of the EU, lobbying includes direct and indirect influence, in others, like in the ones of the U.S,

¹ Report, "The State of Corruption: Armenia, Azerbaijan, Georgia, Moldova and Ukraine, Transparency International", published 2 July 2015, https://www.transparency.org/whatwedo/publication/the_state_of_corruption_armenia_azerbaijan_georgia_moldova_and_ukraine

Poland and Lithuania, it only directs one. In case of the EU, lobbying can be provided by all interest groups, in the U.S, Poland and Lithuania - only by professional lobbyists. Therefore, in order to provide an access to a decision-making process and remain less 'loopholes', definitions of 'lobbying' should cover direct and indirect influence by all interest groups, not only professional ones.

In public perception lobbying is still associated with political corruption. Obviously, lobbying and corruption are fundamentally opposite concepts simply because lobbying is a legal influence on a decision- making process. While corruption is an illegal influence on a decision-making process, as it involves, mainly, bribery or trading in influence, both of which are criminal offences under the UN Convention against Corruption and Criminal Law Convention on Corruption of the Council of Europe. Knowledge, intent or purpose that can be inferred from objective factual circumstances, are the elements of corruption offence².

Traditionally conducts in lobbying activities involve a number of potential corruption risks, main of which as follows.

Contribution to the election campaign and fundraising

Even when there is no intention to act in a corruptive way, the nexus between lobbying and a donation creates perceptions of corruption.³

The critical question is when campaign's contribution is a lobbying, and when it is a corruption. In any jurisdiction corruption occurs when a decision is made in return for contribution, *quid pro quo*, even if amount of such contribution complies with the cap requirements.

² Article 28, UN Convention against Corruption, https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

³Report, "Investigation Into Corruption Risks Involved in Lobbying", www.icac.nsw.gov.au

Caps on contribution might serve be a way to reduce corruption's risks. Besides, a person that contributes should be identified. If the contribution, especially from a corporate, is not capped, and there is a system, which does not allow defining who is behind a contribution, then money can buy access and influence.

Although in the U.S contributions to parties are limited, direct contributions from corporates, labor organizations, federal governments and foreign nationals are prohibited⁴.

In Poland contributions to the political parties can be transferred only by natural persons and parties are obliged to report.⁵ There is no limitation of the amount of finance.

In Lithuania the law on financing and financial control of political parties and political campaigns provides regulations and caps on campaign expenditures.⁶

According to the Law on Political Parties in Ukraine, there is no cap on amount of contributions. There are some restrictions to contribute to a party's elections. The restriction concerns foreign organizations, anonymous persons, state companies and religious organizations. The law does not envisage any mandatory audit of a political party's incomes and expenses statement.⁷

Thus, Poland and Ukraine need to adopt a law which would limit the amount of contribution to an election campaign.

⁴The FEC and the Federal Campaign Finance Law,

http://www.fec.gov/pages/brochures/fecfeca.shtml#Contribution_Limits

⁵ EU Anti-Corruption Report, Poland, Brussels, 2014, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_poland_chapter_en.pdf

⁶ EU Anti-Corruption report, Lithuania, Brussels, 2014 http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_lithuania_chapter_en.pdf

⁷Law on Political Party <http://zakon4.rada.gov.ua/laws/show/2365-14>

Gifts and other benefits

The giving of gifts or granting other benefits to a public official pose an obvious corruption risk. Such conduct can involve bribery or an attempt to bribe, for which there is a sanction under the criminal law. There is no reason why lobbyists or their clients should offer “winning and dining” and other benefits to public officials, and there are no circumstances, in which such conduct should be considered an appropriate one⁸. Any gift should be prohibited because of one more reason that is a “reciprocity principle”.⁹ The reciprocity principle has its origin in a human nature and has been confirmed by a variety of clinical studies: when you give something to somebody, a sense of reciprocal obligation arises.¹⁰

In the European Union, members of parliament “refrain from accepting, in the performance of their duties, any gifts or similar benefits, other than those with an approximate value of less than EUR 150, given in accordance with courtesy usage”.¹¹ The same rule applies for Commissioners.¹²

In Poland parliamentarians who accept benefits “in connection with the performance of public functions” can be criminally liable under the bribery provisions of the article 228 of the Penal Code of Poland¹³.

In Lithuania politicians and civil servants may not accept or grant gifts or services if this might rise to a conflict of interests in the meaning of the law. This restriction is not

⁸ Supra note 63

⁹ Supra note 3

¹⁰ Ibid

¹¹ Article 5 Code of Conduct for Members of European Parliament, http://www.europarl.europa.eu/pdf/meps/201305_Code_of_conduct_EN.pdf

¹² Article 1.11, http://ec.europa.eu/commission_2010-2014/pdf/code_conduct_en.pdf

¹³ Act on the Exercise of the Mandate of a Deputy or Senator [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4\(2012\)4_Poland_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4(2012)4_Poland_EN.pdf)

applicable to protocol gifts, which are valued less than EUR 29.¹⁴ Gifts or services that are acceptable because they do not rise a conflict of interest have to be reported in the declaration of private interests, if their value exceeds EUR 145.¹⁵

In Ukraine public officials can accept gifts if given in accordance with courtesy usage and if their value does not exceed one official minimum salary that is UAH 1378 (USD 60), cumulatively per year the value of gifts cannot exceed two minimal salaries.¹⁶

Former public officials acting as lobbyists (revolving door)

A related corruption risk arises when former public officials are involved in lobbying as they can use a network or information obtained when in an office.

In order to address this corruption risk, countries restrict employment for some period of time. For example, the US law provides that former officials shall not, for a period of 2 years after leaving office, engage in any lobbying activity¹⁷.

Former member of the EU's parliament, which engages in lobbying, directly linked to the European Union's decision-making process, "shall not benefit from the facilities granted to former Members for the duration of the activity in question".¹⁸ Former commissioners cannot be engage in any lobbying activity of Commissioners for 12-18 months after leaving office.¹⁹

¹⁴ Supra note 51

[http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4\(2014\)5_Lithuania_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4(2014)5_Lithuania_EN.pdf)

¹⁵ Ibid

¹⁶ Article 23

¹⁷ Honest Leadership and Open Government Act, <http://www.gpo.gov/fdsys/pkg/PLAW-110publ81/content-detail.html>

¹⁸ Code of Conduct Annex 1 Article 6

¹⁹ EU Institutions, Code of Conduct for Former Commissioners, 2011, Section 1.2.

In Lithuania Articles 18-20 of the Law on the Adjustment of Public and Private Interests in Civil Service provide for “cooling-off” for former members of the parliament for one year.²⁰

In Poland there are no regulations, which would prohibit members of the parliament from being employed in certain positions or in specific sectors upon expiry of their term of office.

However the authorities consider making amendments and imposing a one- or- two-year “cooling-off” period for former parliamentarians²¹.

Pursuant to Article 25 of Law on Prevention of Corruption in Ukraine former public officials cannot hold the position in companies of sectors, which were under their control, during one year²².

Supplementary tools to reduce corruptions

One of the efficient mechanisms to reduce corruption in Ukraine and on the international level is to disclose beneficiary owners from all financial transactions, assets or property, even though another person appears as a registered owner. Such a binding mechanism could allow tracking a source, a movement and a destination of illicit funds' gains from corrupt activities²³.

Another tool that could prevent corruption in lobbying locally and internationally is an increase of transparency in offshore jurisdictions, as money from corrupt activity might move

²⁰Supra note 51, [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4\(2014\)5_Lithuania_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4(2014)5_Lithuania_EN.pdf)

²¹Supra note 52 [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4\(2012\)4_Poland_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4(2012)4_Poland_EN.pdf)

²²Law on Prevention of Corruption in Ukraine, <http://zakon4.rada.gov.ua/laws/show/1700-18/page2>

²³GOPAC Position Paper, http://gopacnetwork.org/Docs/PositionPapers/PP_GTFAML_EN_WEB.pdf

from one offshore bank’s account to another offshore bank account. Until such system exists, the corruption will prosper.

Among 28 European Union’s countries, only Lithuania (2001), Poland (2005), Hungary (2006, repealed in 2011), France (2010), Slovenia (2010) and Austria (2011) and the United Kingdom (2015) have adopted a special lobbying legislation.²⁴ This absence of lobbying regulations in Europe is mainly explained by the European tradition of corporatism where major interests have been represented by labor unions and large industrial groups.²⁵

The table below provides a summary of differences between the regulations in the US, the EU, Lithuania, and Poland.

	Interest groups/professional lobbying	Kind of register	Disclosure of lobbying target (public official)	Disclosure of financial information
USA	Professional	Mandatory	Yes	Yes
EU	Any interest groups	Voluntary	No	No
Lithuania	Professional	Mandatory	No	Partially
Poland	Professional	Mandatory	No	No

In Ukraine there is no special regulation of lobbying activity. Some general rule about rights to participate in the governance, submit petitions, express opinion stated in Constitution of Ukraine and in other legislation. The necessity to adopt a special law on lobbying is stated in the Law on Ant-corruption Strategy 2014-2017of Ukraine, which

²⁴Transparency International, “Lifting the Lid on Lobbying: Slovenia Call for Transparent and Ethical Lobbying,” http://www.transparency.si/images/publikacije/lobiranje/report_lobbyingslovenia.pdf

²⁵ValtsKalniņš, “Transparency in Lobbying: Comparative Review of Existing and Emerging Regulatory Regimes”,

underlined establishing of lobbying as a legitimate democratic way of interaction between civil society and the rule of law, which would prevent corruption in the law-making process.²⁶

Currently in Ukraine, lobbying activity has a hidden character. In many cases current decision-makers are involved as lobbyists. Besides, many members of Ukrainian parliament have their own business, thus they do not need professional lobbyists. Some business groups have strong influence on decision-making in the parliament. However, the influence of such organizations as think tanks, civil society organizations, which represent non-profit interests, is weaker.

Taking into consideration this social-political context, there is a risk that the regulation of lobbying will not bring a quick result, lobbying will remain in the shadow at least for the time being. For example, in Poland around 300 professional lobbyists were registered but only about 20 of them were active in Parliament and lobbying is mainly performed in an informal manner.²⁷ In Lithuania same many powerful groups of interest are outside of the scope of the law, such interest groups as business associations and other NGOs, law firms, which seek to influence the legislative process out of lobbying process.²⁸ A limited scope of definition of lobbyist is one of the reasons of this.

In order to remove lobbying from the shadow, some incentives can be provided, such as incentives for registered lobbyists to have access to parliamentary premises; to provide public hearings and an opportunity to participate in public hearings. Besides incentives, an obligation to provide for legislative footprints would be an important step towards

²⁶Law on Ant-corruption Strategy 2014- 2017 of Ukraine

²⁷ Supra note 51,

[http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4\(2012\)4_Poland_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4(2012)4_Poland_EN.pdf)

²⁸Supra note 52

[http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4\(2014\)5_Lithuania_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4(2014)5_Lithuania_EN.pdf)

transparency. Such a footprint would give details about involved group's interest and any supporting materials provided by the lobbyists.²⁹

Moreover, some survey suggests that there is no cogent relationship between perceptions of corruption and regulatory mechanisms of lobbying.³⁰

Lobbying and corruption are a phenomenon that exists in both developed and developing countries. Data indicates that in the US, where lobbying is highly-regulated, the level of corruption is lower than in Poland and Lithuania, where lobbying is low-regulated. According to the Corruption Perception Index, 2014, the US is the 17th least corrupt country in the world, while Poland and Lithuania are accordingly the 35th and the 39th.³¹

Under this index Ukraine is on the bottom that means Ukraine must immediately implement many radical anti-corruption measures. To some extent an effective regulation of lobbying activity with broad disclosure of information about lobbying targets, finance flow and enforcement mechanism can reduce corruption as would make lobbying more transparent. Besides, regulation of lobbying in Ukraine could provide open and equal access of civil society and other interest groups to the decision-making process at the legislative level. As was mentioned, just regulation of lobbying would not be a sufficient enough solution. Prevention of and fighting corruption's policy must be the first priority of Ukraine and shall include all possible measures that were discussed above, e.g. imposing caps on campaigns' contributions and fundraising, opening beneficiary owners of all companies, to which money is transferred, replacing absolute immunity by a limited one, etc.

At the international level a decision of countries to increase transparency in the offshore jurisdictions could be very effective, as it could address not only corruption issues but also financing of terrorism and an organized crime. Besides, proper policy for the

²⁹Mulcahy Susann, "Lobbying in Europe, Hidden Influence, Privileged Access", Transparency International, http://www.transparency.org/whatwedo/publication/lobbying_in_europe

³⁰Supra note 12

³¹ International Transparency Index, 2014, <http://www.transparency.org/cpi2014>

development of democratic institutions (free election, freedom of mass media, accountability of public officials, etc.) and creation a culture of transparency and integrity are also essential.