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Critical Analysis**

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A PROPOSTA LEGISLATIVA DE 2019 DE REGULAÇÃO DE *LOBBYING*
EM PORTUGAL:
ANÁLISE CRÍTICA

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Abstract: This article analyzes the legislative proposal to regulate lobbying that was under discussion in the Portuguese Parliament in 2019 and which was then politically vetoed by the President of the Republic. It makes this critical analysis from a comparative point of view, resorting to comparison with foreign legislation to evaluate the goodness of the solutions then enshrined. Only such a comparison allows us to assess the robustness of the regulatory model that was then sought to be introduced into our legal system. Such a perspective could inspire and guide future legislative initiatives in this area, so that any future regulation of lobbying in Portugal is in line with the best practices of countries where such activity has long been subject to legal discipline.

Keywords: Lobbying; regulation; comparative law; democracy; rule of law.

Resumo: Este artigo analisa criticamente a proposta legislativa de regulação do *lobbying* que esteve em discussão no parlamento português em 2019 e que foi, depois, vetada politicamente pelo Presidente da República. Faz essa análise crítica de um ponto de vista comparativo, recorrendo à comparação com legislações estrangeiras para avaliar a bondade das soluções então consagradas. Só tal comparação permite avaliar a robustez do modelo regulatório que então se procurou introduzir no nosso ordenamento jurídico. Tal perspetiva poderá inspirar e guiar futuras iniciativas legislativas neste domínio, no sentido de que qualquer futura regulação do *lobbying* em Portugal esteja em linha com as melhores práticas dos países onde tal atividade já é desde há muito alvo de disciplina legal.

Palavras-chave: *Lobbying*; regulação; direito comparado; democracia; estado de direito.

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1. Introduction

Recent events in Portugal, related to a judicial investigation regarding potential criminal offences arising from contacts between holders of high public offices and private investors,² have once again brought to the fore the issue of lobbying regulation in Portugal.

However, this now hot topic was on the agenda back in 2019, when the Portuguese Parliament sought to finally approve legislation on the regulation of lobbying.³ It was the first time in the country's democratic history (since 1974) that legislative debate on this issue had progressed so far (Martins-Lampreia, 2017: 271-278).⁴ At the time, the expectation was that said legislation would be swiftly voted and come into force on the 1st of January 2020. But the bill was vetoed by the President of the Republic, and the parliamentarians failed to address the President's grounds for the veto and improve the draft legislation.⁵

Against this background, it is pertinent to proceed with a specific analysis of the 2019 draft legislation, to avoid its shortcomings and pitfalls in future legislative initiatives on this matter.

In this paper I will engage with the text of the legislative proposal as submitted for plenary discussion and voting by the competent parliamentary commission. I will draw on the main features of lobbying regulation across different jurisdictions and analyze the Portuguese proposal against such background. The comparative perspective will thus serve to put the past Portuguese draft regulation in a wider context, highlighting both its strengths and weaknesses (Kanol, 2015: 110-115).

Aside from the proposal text, I will also take into consideration some of the modifications introduced into it by the parliamentary plenary. Indeed, some of the most crucial provisions that had been included in the draft proposal were eliminated in the general discussion and voting. Apart from casting doubts on the commitment of the members of parliament in this matter,⁶ it also forces the evaluation of whether such kind of changes frustrate the overall aims of a credible and useful lobbying regulation, turning the then

2. I am referring to the so-called *Operation Influencer*, which led to the resignation of the Prime-Minister and gathered international media attention. See Financial Times, "Portuguese PM António Costa resigns as corruption crisis erupts", 7 November 2023 (<https://www.ft.com/content/928a5144-749a-4e21-b52d-c01c5d52a46c>).

3. The draft proposal results of the merging of law projects n.º 225/XIII, n.º 734/XIII and n.º 735/XIII, and n.º 1053/XIII, approved by the parliamentary Temporary Commission for the Strengthening of Transparency in the Exercise of Public Powers. Available at: <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailIniciativa.aspx?BID=43223>. The document was published in the DAR II série A n.º 108, 2019.06.06, da 4.ª SL da XIII Leg (pp. 53-63).

4. Several eastern European countries were faster in dealing legislatively with the issue of lobbying. See Grath (2008: 15-32).

5. See the President of the Republic's letter to Parliament, dated 12 July 2019, available at: <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailIniciativa.aspx?BID=43223>.

6. As noted by Vargovčíková, (2017: 254), the processes towards lobbying regulation tend to generate an "enigma": "More and more public and private actors want to be seen as supporting lobbying regulation, yet these same actors seem to be contributing to the ineffectiveness and lack of implementation of the regulations".

Portuguese draft legislation into mere “symbolic” regulation (Vargovčíková, 2017: 255). Ultimately, the question is one of knowing if the attempted legislation had enough “teeth” to face the problems and issues surrounding lobbying. At least in a way that could have contributed to the overall health of the political system and to increase the trust of the Portuguese citizens in the democratic process.

This is all the more important in the wake of several corruption and integrity scandals that have assailed Portuguese politics in the last few years.⁷ A former Prime-Minister is still awaiting trial under the accusation of having committed 31 crimes and illegally amassed 24 million euros deposited in Switzerland. Perhaps more lightly, but not reassuringly, in 2016 news surfaced that three Secretaries of State had accepted paid trips by GALP (oil company) to watch games of the European football championship in France—one of whom, the Secretary for Tax Matters, had oversight responsibility concerning a 100 million euros legal dispute involving the State and that same company. Finally, around the same time, a number of prominent high-ranking public officials were formally accused of corruption relating to the award of “golden visas” (they were eventually found not guilty by the court).

Obviously, lobbying should not be strictly equated with corruption (Goldberg, 2018: 199-201),⁸ especially with bribes. And it should also not be confused with situations in which a public official finds himself in a conflict of interest (Rose-Ackerman, Palifka, 2016: 362).⁹ In any case, lobbying may negatively impact the democratic process and skew political decision-making away from (what could be deemed as) better versions of public interest (Rose-Ackerman, Palifka, 2016: 361).¹⁰ For example, empirical data of the US shows that “corporations and trade associations comprise the vast majority of lobbying expenditures by interest groups” and that “business groups’ lobbying expenditures are, on average, higher than nonbusiness

7. See Vargovčíková (2017: 262), highlighting how scandals were instrumental in pushing forward lobbying regulation in Poland and the Czech Republic. But the author lists additional conditions worth noting as well: existence of policy entrepreneurs interested in the regulation and knowledge-wise capable of making concrete policy measures; and emergence of a “normative and political climate” that “made it appear potentially beneficial to political entrepreneurs to turn lobbying into a political issue, profiling themselves as «white knights», virtuous men and women of action coming with solutions to bring more ethics into politics”. This last aspect will become relevant for a later discussion on the ambivalence of the effects lobbying regulation in this relationship between money and politics. In a broader empirical and comparative study, Crepaz (2017: 231-252) finds that political scandals motivate the presentation of lobbying regulation proposals but not necessarily their adoption. According to the author, scandals tend to “stimulate the realm of symbolic politics rather than actually affecting the adoption of a law”.

8. The author distinguishes lobbying from corruption through four socially inspired features: lobbied policy-makers formulate general and universally binding policies, instead of the private gain happening in corrupt interactions; lobbyists can never be certain about the outcome, while corrupt practices give more assurances of the result; lobbyists have to compete with other lobbyists for access and influence; lobbying can be public and transparent, while corruption is always concealed.

9. See, also, Apollonio, Cain, Drutman (2008: 19-20), highlighting how “it is problematic to reasonably define what is or is not corrupt behavior with regard to lobbying” if seen under the paradigmatic frameworks of bribes and conflicts of interest.

10. The authors note that “lobbying and political pressure challenge the egalitarian values of democracy”.

interests” (Figueiredo, Richter, 2014: 165). The concern is higher if lobbying is covertly exercised through informal networks through which “money”, “relationships” and “information” opaquely circulate (Apollonio, Cain, Drutman, 2008: 20). Thus, establishing a legal framework for lobbying and shedding some light on its practice seems democratically warranted and important as means of preventing corruption — even if it is “no panacea” (Chari, Murphy, Hogan, 2007: 433). If done properly, the hope is that lobbying regulation increases the observability of the contact between private interests and lawmakers, in a way that supports an anti-corruption culture (Santos, Costa, 2014: 385).¹¹ and deters the degeneration of those contacts into corrupt *quid pro quos* (Rose-Ackerman, Palifka, 2016: 362).

The next section envisages a more theoretical approach to the problem of lobbying, so as to establish a framework of meaning under which to integrate the correspondent regulation. Section 3 will turn to the provisions of the Portuguese draft legislative proposal, drawing on a comparative perspective to properly assess its content. I will conclude with an overall evaluation of what we ought to expect from it.

2. A social theory approach to lobbying regulation

This section seeks to develop a sociologically-inspired approach to lobbying, so as to put it in a broader framework of analysis and understand how it operates in society. The assumption is that a clearer picture of the societal embeddedness of lobbying enables one to better design and assess its legal regulation. By looking at lobbying from a societal perspective, it will become easier to highlight the advantages it promises and the problems it may cause, as well as the type of regulatory measures that better serve the goal of maximizing the former and avoiding the latter. Accordingly, a social theory approach to lobbying does not have solely a descriptive dimension, but also a normative one: by better accounting for the societal dynamics that underlie, or are induced by, lobbying, one also gets a standpoint to assess and evaluate the appropriateness or inappropriateness of the measures put in place. Simultaneously, such an approach averts a purely individualistic view of lobbying in favor of its more systemic features, something which — as I will seek to underscore — is not devoid of relevance to the regulatory take on the matter.

Petra Hiller resorts to social systems theory to provide some sociologically inspired insights on corruption and lobbying. She departs from the assumption of multiple, differentiated and autonomous contexts, spheres or realms in society (Hiller, 2010: 67). The acceptance of a myriad of differentiated systemic rationalities makes it easy to conceptualize corruption as a situation in which “the political system has been infiltrated by the logic of an extraneous system” (Hiller, 2010: 68). This happens whenever “power is exchanged for money and political decisions are no longer determined only by political concerns” (Hiller, 2010: 68). In sum, the rationality of economics determines and captures the rationality of the

11. The authors write that “[t]here is evidence that regulations are having some effect on how interest groups and lobbyists deal with public officials; and greater exposure of group activities is leading some groups to be concerned about their image and the way they go about doing political business.”

political system, thus eroding the boundaries of its autonomy and corrupting its operations (which corresponds to the typical bribery situation).¹² But the most striking aspect of this interpretation relates to the fact that, aside from the underlying systemic disruption implicated by corruption, one cannot go past the point that it involves a “linkage of different horizons of meaning in social communication” (Hiller, 2010: 68). This linkage is done in particular through organizations, as decision-making social systems (Hiller, 2010: 68). Accordingly, a corrupt decision is one determined by a systemic rationality different from the expectedly appropriate one (political criteria instead of the prescribed legal criteria, economic criteria instead of legal criteria, etc.) (Hiller, 2010: 69). Overall, corruption points to the intersection of different horizons of meaning (Hiller, 2010: 70), in a way in which one systemic logic is disruptively overdetermined by another.

Against this background, a certain theorization of lobbying ensues. In fact, Hiller looks at lobbying as a “network of contacts between politics and business”, thus linking “different horizons of meaning” (Hiller, 2010: 77). Accordingly, lobbyists are “address brokers” that “connect people from different functional contexts” (Hiller, 2010: 77). Obviously, she has in view people or entities that specialize in providing such interlinking services,¹³ which leaves out of purview those situations in which companies themselves do lobbying without professional intermediaries or third-parties. By restricting it to a connection between politics and business, the author also unnecessary reduces the relevant scope of this activity.¹⁴ In any case, the pertinent point is precisely the idea that lobbying as an activity establishes a bridge between different realms or spheres, accounting for the influence that some non-political actor will have on political and democratic decision-making.¹⁵ A corruption problem (at least, in a social-theoretical sense) will arise whenever such activity causes “functional differentiation to collapse” (Hiller, 2010: 80; Neves, 2010: 21), so that it is possible to conclude that political decision-making was *unduly* determined by non-political criteria.¹⁶ Richard Hasen points to a dimension of disruptive impact of lobbying on the political logic when he underscores that lobbyists “tend to lobby for

12. Also employing a social theory approach, but premised on Jürgen Habermas’ work, see Deflem (1995: 258) defining corruption as “that type of strategic action in which two or more actors undertake an exchange relation by way of a successful transfer of steering media (money or power) which sidesteps the legally prescribed procedure to regulate the relation”.

13. Lobbyists perform this role with a certain degree of autonomy, which may actually lead them astray from the interests of their principal. On this usually less focused problem, see Holyoke (2017: 272-289), and Schiff, Seuffer, Whitesell, Lowery (2015: 225-248).

14. The organization doing lobbying, either on its own behalf or through an intermediary, must not necessarily be a for-profit company or firm. See Chari, Murphy, Hogan (2007: 422), referring to lobby groups for economic interests, professional interests and civil society interests.

15. On lobbying as “«stably intermediating» between the polity and the legislators/regulators”, especially in the framework of the European Union, see Caria (2013: 473).

16. See Goldberg (2018: 203), considering that lobbying may harm democracy when it induces bias in favor of interest groups, so that it “compromises the equality of representation”.

legislation that is itself an inefficient use of government resources”, thus translating into rent-seeking activity (Hasen, 2012: 197).¹⁷

The approach relied on here shows the conundrum faced by lobbying regulation (Santos, Costa, 2014: 390).¹⁸ On the one hand, it is instrumental to ensure that politics is open to consider different and competing interests, as well as to receive relevant information from different sources (Hiller, 2010: 80; and Cohen-Eliya, Hammer (2011: 273). From this point of view, lobbying enhances democratic representation.¹⁹ This relates to the constitutional status of lobbying, which underscores its close link to democracy,²⁰ independently of whether one accentuates its functional character to an enlightened lawmaking process²¹ or its fundamental right status.²² On the other hand, particular interests have to be prevented from taking the upper hand over the public interest, which could happen, even in the absence of bribery, whenever the political decision-maker acts on non-political or non-democratic criteria (either because it expects a future reward, lacks sufficient interpersonal distance to the lobbyist, or is simply deciding in favor of the lobbied interested against a wider public interest).²³ For example,

17. This thesis, if accepted, implies that not only is the political decision-making logic corrupted, but also that a negative externality is produced on the economic system itself due to the inefficient legislation enacted.

18. The authors refer to a “three-way tension”: “indispensability of interest groups to democracy, their influence [...], and the need to regulate them to protect the public interest”.

19. See the theory of lobbying as legislative subsidy expounded by Hall, Deardorff (2006: 81), stressing that groups enable legislators to do a better job as representatives” and that they “enlarge the resources that legislators have to work on behalf of their constituents”. In similar vein, Allard (2008: 23-68).

20. Caria (2013: 473 ss.) puts forward the thesis of a different constitutional conception in the European Union and the United States. While the former grounds lobbying in the democratic principle, the latter grounds it in the freedom of expression (First Amendment). While I do understand the reasoning, I find it objectionable. First, concerning his most relevant insight, I doubt that the contraposition is one “between freedom and democracy” as the author frames it. Instead, I take his argument as pointing to two legal orders that technically configure lobbying differently: one, the US, subjectivizes it and qualifies it as a fundamental right; the other, the EU, does not subjectivize it and considers it merely a duty upon the public decision-maker. In fact, public law across Europe has widely worked with the notion that a rule imposing a duty upon a public body does not necessarily create a subjective right for a private party. So it is not exactly about freedom or democracy, but about technically having a subjective right to lobby or not. Second, Caria obscures that, even in the US where lobbying is configured as a First Amendment protected right, it is still about democracy and democratic self-governance. That is indeed the only way to understand the discussion around the nefarious impact that lobbying may have in the democratic process by privileging certain interests and ignoring others.

21. As in Article 11 of the Treaty of the European Union. See Caria (2013: 474).

22. *United States v. Harris* 347 U.S. 612 (1954). See Hasen (2012: 196).

23. See Cohen-Eliya, Hammer (2011: 276-277) identifying “democratic failures” caused by lobbying either because of the “great financial resources and [...] superior ability to organize” of businesses, the revolving door phenomenon or the fact that a “vast majority of lobbying activities takes place in narrowly defined niches with no involvement of the public and very limited competition”. Similarly, Apollonio, Cain, Drutman (2008: 43). Highlighting how “officials may shape their decisions in office, consciously or unconsciously, to maximize future employment prospects”, see Palmer, Schneer (2019). Similarly, even Hall, Deardorff (2006: 81), who have a rather positive view of lobbying, acknowledge that “groups that are better able to pay the costs of information-gathering, policy analysis, and lobbying will be advantaged” over those that are not, thus skewing the democratic decision-making process towards such privileged interests.

Bruce Owen alludes to the danger of a systemic lawful political corruption (Owen, 2016: 16 ss.).

Accordingly, while it is clear that lobbying does not equate to corruption in a criminal sense,²⁴ some consider it may lead to situations in which the political system ends up operating according to an extraneous logic.²⁵ The concern, then, is not so much with bribes through lobbying, but with how lobbyists influence political decisions and the effects thereof on democratic decision-making.²⁶

Consequently, it is up to the law to mediate this tension between lobbying and democracy (Bitonti, 2017: 17). Fundamentally, it has to ensure the *integrity* of the democratic political sphere and of the political decision-making process, contributing to guarantee that political solutions will be determined by the search for the public good, notwithstanding the legally permissible and acceptable influence of non-political actors.²⁷ This means, then, that the legal system, through legislation specifically addressing lobbying, is instrumental in providing for the protection of the autonomy of a democratic political system (Susman, 2006: 749-750). The legal safeguards underpin its operations and seek to adequately structure its relationship with other spheres.²⁸ If the “interlinkage” is to happen between, for example, organizations of the political and economic systems, then law will discipline and calibrate the terms of that interconnection so as to curb the dangers it entails. Besides the value inherent in a fully-functioning autonomous political system, one also wishes to sustain the perception of said autonomy by society at large, so as to avoid pitfalls of legitimacy.

The view just expounded fits particularly well with those that are taken to be the “values driving lobbying regulation”, namely: the “prevention of improper influence on government action” and the “promotion of a level playing field by restricting unfair or unequal opportunities to influence government action” (Briffault, 2014: 163). According to Briffault, while *improper* influence may happen in situations of decisions taken in exchange for some private benefit (2014: 163), *unfair* influence may derive from the special position of the lobbyist vis-à-vis the politician and other lobbyists (be

24. See Hasen (2012: 218) highlighting how there is little evidence of large and outright criminal corruption in lobbying activities.

25. See Goldberg (2018: 206-207) referring to several gray areas between lobbying and corruption that involve: personal ties, revolving door personnel, campaign contributions, and the buying of policies or votes. For the author corruption will exist whenever the interactions “circumvent public deliberation and implement secrecy”, precisely what could be taken to be the opposite of a properly differentiated political logic. Similarly, Wedel (2012).

26. For example, Hasen (2012: 226) informs that “lobbying skews public policy away from the interests of the poor”.

27. If one considers, as Apollonio, Cain, Drutman (2008: 43), that “systemic reasons” for bias in policies exist (in favor of lobbyists), so that the “imbalances in the pressure system are endemic”, the idea of ensuring the integrity of the political system is all the more important. Regulation of lobbying is, in that sense, beneficial to the political system itself.

28. See Chari, Murphy, Hogan (2007: 422): “schemes to regulate lobbying derive from concerns over the democratic deficit, the openness and transparency of government, equality of access to public affairs, and the perceived need to manage information flows to and from government”.

it in terms of proximity or resources) (2014: 164)..²⁹ This unfairness may include situations in which lobbyists distort the agenda setting by leading politicians to focus on certain issues and disregard others in which there is not so much active lobbying (Cotton, 2016).

These ideas confirm how the goal is still one of ensuring the integrity of the democratic decision making-process and of the public interest-oriented rationality of the political system (Goldberg, 2018: 203)..³⁰ In particular, it seems especially relevant to care about the channels of access to lawmakers, the type of issues targeted and the action of officials in the aftermath of the contacts..³¹

A much used means to counteract perceived negative influences of lobbying is to strengthen transparency, so as to increase the observability by the public of the linkages happening between politics and organizations of interest representation..³² To make those interconnections sufficiently visible for assessment and evaluation from different points of view in society is a way not only to make it a possible object of critique from the *outside*..³³ but also of inducing positive self-restraint at both the political and non-political ends of the lobbying relationship..³⁴ That is all the more important when lobbying operates by inducing legislative inertia regarding issues that fall under the radar of public opinion's attention (Hasen, 2012: 226). Some authors, however, propose publicly-funded lobbying, in order to increase lobbying for underrepresented and disadvantaged groups.³⁵ (and that may be indeed the solution to best match the problem of unfair lobbying, due to the disparity of resources and influence between different types of interest groups).

29. See also Owen (2016: 32): "lobbying is not the problem; the problem is imbalanced lobbying". For example, Coen (2007: 335) points to the "emergence of an elite trust-based relationship between insider interest groups and EU officials".

30. See also the principles of lobbying regulation enumerated by Bitonti (2017: 26-27), namely accountability, transparency, openness, and fairness.

31. See Hasen (2012: 221), highlighting that "lobbyists are most likely to be successful when (1) they have direct access to legislative officials and their staff, (2) they are working on issues of lower salience, and (3) the legislator being lobbied are either already in agreement with the position of the lobbyist or are indifferent about the policy proposals of the lobbyists".

32. Noting the striking similarity between lobbying regulation across different countries, with a core centered on "registration and disclosure obligations, plus some form of «revolving door» limitation", see Caria (2013: 478).

33. As noted by Briffault (2014: 165): "transparency facilitates public oversight and pressure for the adoption of reforms to address forms of improper or unfair influence that transparency may reveal". Similarly, Holman, Luneburg, (2012: 97-98), highlighting that transparency can prevent corruption, prevent the appearance of corruption, improve the accountability of governmental officials, enlighten public officials on who is trying to influence them, and equalize the position of different groups attempting to influence decision-makers by inducing counter-lobbying. According to Johnson (2006: 49): "statements made by lobbyists that are hidden from public view cannot easily be probed or disputed".

34. See Santos, Costa (2014: 387), underscoring how disclosure provisions appear "to have produced a culture of restraint by established influential interests and their lobbyists in dealings with public officials; greater concern for their group's public image; and increased professionalism of lobbyists".

35. See Gerken, Tausanovitch (2014), and Apollonio, Cain, Drutman (2008: 46). In this regard, Greenwood, Dreger (2013: 139-162), draw attention to the substantial public funding available to non-governmental organizations in the European Union.

Nonetheless, it is important to bear in mind that lobbying operates in a given context, which impacts on its features, consequences, and degree of success.³⁶ Different regulatory solutions, other than simply transparency and even revolving-door limitations, may be needed to address those contextual determinants of lobbying. The interesting study of Christine Mahoney demonstrates empirically the relevance of issue salience³⁷ and institutional design.³⁸ And while the former may be somewhat counteracted by increased transparency, the latter requires another type of responses. For example, if one concludes that a given “system, with direct elections that are privately funded, biases responsiveness in favor of wealthier advocates” (Mahoney, 2007: 52), then probably the best answer will be at the level of campaign finance and not exactly of lobbying transparency.³⁹

In any case, the lobbying regulation effort should be serious and sufficiently muscled.⁴⁰ It is not desirable to just put in place a “symbolic legislation” (Vargovčíková, 2017: 255), with no conditions of success and effectiveness in limiting negative externalities arising out of the interlinkages between the political system and other realms. And one of the reasons for that to be avoided is due to the inherent ambivalence of lobbying regulation: it not only disciplines, but it also *legalizes* such activity (Vargovčíková, 2017: 262). An added legitimacy may accrue to lobbyists thereof, which will work to their own advantage if the checks on the activity are purely illusory.⁴¹ Instead, lobbying regulation should work to guarantee that the interconnections between officials and lobbyists are ultimately beneficial for both. Only that way can lobbying be perceived as something systemically positive, thus lending added input and output legitimacy to political actors in light of knowledge transfer and engagement with civil society (Hauser, 2011: 682 ss.). In sum, lobbying regulation should strive to ensure that the input given by lobbyists is not politically and democratically harmful, but transparent and constructive for the political decision-maker who has to balance competing interests.

36. On the importance of acknowledging that there is not one single model of lobbying regulation, and that different countries and contexts require different regulations, see Bitonti, Harris (2017: 11).

37. See Mahoney (2007: 47-50) concluding that lobbyists are more likely to succeed when fewer parties are involved and issues are less salient (“the larger an issue is in scope and salience, and the higher the level of conflict, the less likely lobbyists are to achieve their aims”).

38. See Mahoney (2007: 44-47) counterintuitively finding that “policymakers appear to be more responsive to the views of organized interests in the less electorally accountable system” (the EU). The author relates the measurable degree of lobbying success with the probability of policy change in the EU as opposed to the US. Also comparing the different lobbying styles in the US and the EU, explaining them in light of distinct institutional features, see Wool (2012: 193-214).

39. This problem is less pronounced in Portugal given the public funds available for political campaigns, the tight limits on individual donations and the prohibition of corporate contributions.

40. A related issue is the influence that lobbyists have on the elaboration of lobbying regulation. See, on the Austrian case, Crepaz (2016: 5-24).

41. See Holman, Luneburg, (2012: 97-99), highlighting how lobbyists both in the US and the EU “overwhelmingly favor creation of a lobbyist registry and applaud transparency of their work”. And the “most often cited reason” for that is “to persuade the public that lobbying activity is a legitimate part of the policymaking process”.

3. The Portuguese 2019 proposal for regulating lobbying

3.1. General remarks

In this Section I will provide an analysis of the 2019 proposal for regulating lobbying in Portugal.⁴² I will also consider the changes introduced by the plenary voting, given their significant impact on the original text presented by the sectoral committee. The final text was approved on the 27th June 2019.⁴³

While I will rely on literature focusing on different jurisdictions, it is particularly useful to bear in mind the evaluation carried out by the *Center for Public Integrity* (CPI) on lobbying legislation across the United States. That work is important not only because of its extent and breadth, but also because of its detailed methodology. It assesses and grades the effectiveness of lobbying legislation through forty-eight questions that focus on “eight key areas of disclosure”: “definition of lobbyist”; “individual registration”; “individual spending disclosure”; “employer spending disclosure”; “electronic filing”; “public access to a registry of lobbyists”; “enforcement”; and “revolving door provisions”.⁴⁴

The CPI managed to put forward a very comprehensive guide on how to regulate lobbying. Furthermore, the rules and solutions adopted by the US states who top the list (such as Washington state) may be relied upon when drafting new legislation in other countries.

All in all, the CPI research can help draw a line between *real* and merely *symbolic* lobbying regulation. And it clearly points to good model legislation that can be inspiring in other latitudes so as to put in place lobbying regulation that contributes to minimize possible harms to democratic integrity. Accordingly, it is striking that lobbying regulation in Canada, Germany and the European Parliament fares so badly under the criteria developed by CPI.⁴⁵ In fact, while Washington state scores 87/100, Germany and the EU Parliament – according to Chari / Murphy / Hogan – would score only 17/100 and 15/100, respectively, below any other American state.⁴⁶

42. Published in the DAR II série A n.º 108, 2019.06.06, da 4.ª SL da XIII Leg (pp. 53-63), and available at: <https://debates.parlamento.pt/catalogo/r3/dar/s2a/13/04/108/2019-06-06/53?pgs=53-63&org=PLC>.

43. The final text is available at: <https://debates.parlamento.pt/catalogo/r3/dar/s2a/13/04/120S1/2019-07-02/2?pgs=2-6&org=PLC>.

44. <https://publicintegrity.org/state-politics/influence/hired-guns/methodology-5/>.

45. The scoring was done by Chari, Murphy, Hogan (2007: 425-426).

46. This difference can probably be explained by different underlying conceptions of lobbying regulation. As explained by Holman, Luneburg (2012: 77), the US approach is “designed largely to enhance transparency, reduce corruption in the policymaking process and promote public accountability of decision makers”, while the European approach has been one of “facilitat[ing] the interaction between business leaders and lawmakers in an effort to boost economic development”. Nonetheless, the same authors do point to the fact that “the purpose and concept of lobbying regulation across Europe is rapidly undergoing a transformation” so as to “win back the public’s confidence through renewed transparency in the policymaking process”.

With the proposal discussed in Portugal, the country was clearly trying to fare better than others in the European Union. For example, as addressed in the following sections, registration was mandatory (and not voluntary), it encompassed both professional and non-professional lobbyists, and it was not just a device for granting a pass to policymakers and official buildings.⁴⁷ One may say that the intention was to increase the transparency of lobbying⁴⁸ and, consequently, reduce opportunities for corruption or distortions to the democratic decision-making process.

Nevertheless, my own estimates of the Portuguese proposal under the CPI framework points to a score of roughly 28/100, which is low and subpar in comparison with more robust legislations worldwide that could have inspired it.

3.2. Definition of lobbying and scope of the legislation

The text of the proposed legislation presents a definition of lobbying in Article 2.º, n.º 1. According to this provision: “The activities of legitimate interest representation are those exercised respecting the law with the purpose of influencing, directly or indirectly, the elaboration or implementation of public policies, legislative and regulatory acts, administrative acts or public contracts, as well as the decision-making processes of public institutions, either on their own behalf or on behalf of specific groups or third parties”. It then went on to exemplify the sort of activities covered, namely: contacting public entities, sending correspondence, hosting events and conferences, or participating in notice-and-comment procedures concerning any normative acts (n.º 2). Additionally, there were some exclusions from the scope of the law, namely activities carried out by the so-called “social partners” (such as workers unions and employer associations) regarding “social concertation” within the framework of the Economic and Social Council.⁴⁹

The proposed legislation also specified the public entities that were to be considered covered by its regime: the Parliament, the Government (and its supporting staff), the organs of the Autonomous Regions (and its supporting staff), the organs and services of the so-called direct and indirect public administration, the independent administrative agencies, as well as the organs and services of the so-called autonomous, regional and municipal public administration (Article 3.º).⁵⁰

47. That contrasts with the situation in Germany, Lithuania, Hungary, France, and Poland, as reported by Holman, Luneburg, (2012: 89-90).

48. See, about the reasons for introducing the lobbying register concerning the European Commission, Obradovic (2009: 305).

49. <http://www.ces.pt/>

50. This excluded the President of the Republic and the administrative services in its dependency, which was one of the reasons invoked for the presidential veto. While I understand the President’s concern, the President does not have neither legislative nor properly executive-administrative powers, so I fail to see that importance of having a register for the Presidency’s services. The President’s most meaningful power is that of being allowed to veto legislation, which is merely a negative power. Ideally, the Presidency in the Portuguese constitutional framework should be a non-lobbyable State organ.

It is noteworthy that the proposal provided for an activity-based definition of lobbying (as opposed to a status- or entity-based one), which considerably ensured an expanded coverage.⁵¹ The inspiration of the provision seems to have come from the lobbying definition employed by European institutions (Caria, 2013: 457).⁵²

Furthermore, it did not focus only on professional or commercial lobbying, since it targeted any entity that engaged in lobbying, either on its own behalf or on behalf of a third-party.⁵³ Correlatedly, it should be emphasized that there was no minimum amount of spending, or even time-allocation threshold, to qualify as a lobbyist.⁵⁴

The scope of application encompassed all public entities in the legislative and executive branches, which is praiseworthy. This is particularly important in a constitutional framework like the Portuguese in which the Government possesses proper legislative power on par with the Parliament.⁵⁵ Accordingly, the law ensured that no loopholes exist at the legislative level (by including both Government and Parliament), while simultaneously guaranteeing that the executive or administrative domain was also virtually fully covered.⁵⁶ All in all, the law elected the public legal personality of the entities concerned as the criterion for determining its own scope of application.⁵⁷

51. For a comparison with the Polish case, which focused on an entity-based definition, see Vargovčíková, (2017: 266 ff.), and Michalek (2017: 267).

52. For another wider ranging definition of lobbying, see RCW (Revised Code of Washington) 42.17A.005 (34).

53. Lobbying Disclosure Act 1995 (US) 2 USC §1602, Section 3 (8).

54. Lobbying Disclosure Act 1995 (US) 2 USC §1602, Section 3 (10).

55. In the future, it will be relevant to conduct some research on how the Portuguese constitutional framework affects lobbying activities, namely in terms of lobbying targets and venues. In a regime in which both Government and Parliament have legislative capacity for most matters (which includes the capacity of each to overturn the legislative acts of the other), it is not clear at the outset how lobbyists will define their strategies and how they will determine which institutional venue will appear as more promising in terms of lobbying efforts. In times of political normalcy, the political party that has formed Government also controls the Parliament (either because it obtained an absolute majority of seats in the election or because it established a coalition with another party so as to have such absolute majority). I would expect more lobbying activities geared towards the Government, due to the more concentrated and streamlined nature of the legislative procedure of the Government, the fact of its support in the Parliament and that it deals with most regulatory matters. However, in circumstances of so-called "minority Government", in which a parliamentarian majoritarian support is not available, lobbying efforts could be geared towards both venues. Very generally on the issue, see Varone et al. (2018). On the Portuguese constitutional system, see the brief presentation by Canas, Martins (2005: 423-425).

56. That seems particularly important in light of the very significant lobbying activity following the enactment of legislation and because of its implementation. See You (2017).

57. For example, private entities — namely, commercial companies whose main shareholder is the state — are not covered within the lobbying legislation.

3.3. Registration

The Portuguese proposal imposed upon all covered public entities the duty to create a “transparency register”. But it allowed them, instead, to use the “Transparency Register for the Representation of Interests” created and managed by the Parliament (art. 4.º, n.º 1). This had the potential to mean that we could either face a situation of multiple registers or have the information relatively concentrated on the register of the Parliament.

The content of the registration was defined by art. 5.º. Even though it allowed for more specific rules to be enacted by the concerned public entities, the following information was to be mandatorily included in the register: (i) name of the entity, address, telephone, email, website; (ii) listing of the main interests represented; (iii) name of the members of the corporate board of company; (iv) name of the person responsible for the activity of interest representation, if and when it exists (art. 5.º, n.º 1).

If lobbying was to be carried out through some professional intermediary, both the lobbyist and its client should be registered (art. 5.º, n.º 2).

An additional disclosure obligation impended upon professional lobbyists representing interests on behalf of third-parties: they should indicate the name of their three main clients as per amount spent (art. 5.º, n.º 3 and n.º 4). Moreover, professional lobbyists should also register the name of the client they are representing whenever granted a hearing by a public entity (art. 5.º, n.º 3).

At the outset, it is noteworthy that the registration obligation was rather soft.

The proposed legislation lacked any temporal indication on when, or up until when, a registration was to be done.⁵⁸ The underlying idea seems to be that registration was only necessary when the lobbyist concretely intended to engage in lobbying activity, so that it should precede it.⁵⁹ However, this certainly impacts on the *ex ante* informational character of the registration. Probably it even partially robs the effectiveness of transparency in catalyzing counter-mobilization of interest representation as soon as possible. There would be some value in publicly knowing, within a short period of time, that someone has been employed as a lobbyist, even if any concrete lobbying activity is not yet set to occur. As it has been configured, the Portuguese proposal allowed lobbyists (both those on their own behalf and on behalf of third-parties) to register only just before engaging in some sort of contact. Accordingly, counter-lobbying would be able to organize itself only at a later stage. However, it could do it earlier if deadlines for registration were established.⁶⁰

58. Comparatively, the LDA establishes a period of until forty-five days after a first lobbying contact or after the beginning of the employment relation (2 U.S.C. §1603 Section 4 (a)(1)). Similarly, the RCW requires registration before lobbying or within thirty days after being employed as lobbyist (RCW 42.17A.600 (1)). Irish legislation also establishes a deadline. See Keeling, Feeney, Hogan (2017: 130).

59. Similarly in Austria, according to Köppl (2017: 50).

60. To increase the chances of competitive lobbying, Cohen-Eliya, Hammer (2011: 285) proposes real time communications by lobbyists on their own websites, such as written materials they submit to public officials.

Even though – in the original draft proposal – professional lobbyists had to specify their three main clients relative to their overall business income, there was no obligation to quantify the amounts.⁶¹ That was only a corollary of the fact that the proposed legislation required no specification in registering the compensation to be received by the lobbyist.⁶² Combined with the inexistence of a duty of lobbyists to periodically file income and expenses reports,⁶³ this means one could not expect improvements on the knowledge of the amounts involved in this type of activities.⁶⁴ Correlatedly, a positive aspect seemed to be the absence of a threshold amount of income or expenses to qualify as a lobbyist,⁶⁵ so that even volunteer lobbyists were supposed to be registered.

Moreover, the contents of registration was minimal. In particular for professional lobbyists, registration could have intended to gather more information, such as if the lobbyist has held public office before, what specific bills had been targeted (Holman, Luneburg, 2012: 82), and which public officials – or, at least, departments and cabinets – were addressed (Briffault, 2014: 190). Briffault goes further in recommending that the lobbyist be required to indicate “the specific actions requested of the officials lobbied” (Briffault, 2014: 191). All this additional information, which was not contemplated in the draft legislation, would enable the public to create a more realistic footprint of the contacts lobbyists engage in, so as to better track their influence on policies, legislation or administrative activity.

A matter of concern related to the identification of the client on whose behalf the professional lobbyist acts. As previously mentioned, the proposal addressed this issue by requiring the registration of both (art. 5.º, n.º 2). That solution still does not ensure that a specific client will be identified as the principal in each of the lobbyist’s actions before a public entity or even a concrete public official. In fact, the law only required such identification when a “hearing” was granted (art. 5.º, n.º 3). My interpretation is that it was envisioning situations of private meetings between the public official and the professional lobbyist. If that is correct, however, it leaves out of purview different types of lobbying activities, in which the identity of the client will not have to be disclosed. Given the importance of such disclosure to the decision-maker,⁶⁶ this aspect of the law could be reconsidered in the future.

Additionally, the voting of the proposal in the parliamentary plenary eliminated not only the obligation to identify the professional lobbyists’ client upon granting of a hearing, but also the obligation to include in the

61. Unlike, for example, the rather light lobbying register for the European Commission. See Obradovic (2009: 308), and Moessing (2014: 74).

62. For example, the RCW 42.17A.600 (1)(d) is much more demanding.

63. See, for example, LDA 2 U.S.C. §1604 Section 5 (b). In the literature, see Briffault (2014: 190).

64. With the same critique regarding the regimes in Ireland and the United Kingdom, see Keeling, Feeney, Hogan (2017: 130).

65. Something which is similar in Canada (see Holman, Luneburg, (2012: 82), and Ireland (see Keeling, Feeney, Hogan (2017: 130). But unlike the LDA 2 U.S.C. §1603 Section 4 (a)(3).

66. See Briffault (2014: 171) highlighting that “a lobbyist’s failure to disclose the principal on whose behalf he acts is a form of deceit”, given the “importance of lobbying disclosure to those who are lobbied to enable them to better understand the forces behind the lobbyists seeking to influence them”.

register their three major clients.⁶⁷ This appears to have curtailed the transparency potential initially envisioned and warrants reflection on whether the main purposes of lobbying regulation can be fulfilled under circumstances in which the clients remain totally unidentified.⁶⁸

Several of these options seem to have derived from an underlying conception of the register and of registration as a port of entry for lobbyists: the registration was an initial formal hurdle that was to be overcome before carrying out lobbying activities. In that sense, the register assumed an essentially *certifying* or *accreditation* function (Vargovčíková, 2017: 263), which partially explains its informational minimalism concerning the post-registration activities of lobbyists. The drawback is that it reduced the public monitoring and scrutiny of lobbying activities. In fact, it would have been smarter to look at the register as a database gathering the most complete information possible, so as to enable the assessment and evaluation of lobbying in a given time. The extent and depth of the information is instrumental in allowing transparency to have the positive desired systemic effect,⁶⁹ such as fostering lobbying competition, avoiding improper lobbying and counteracting the disproportionate influence some lobbyists may attain in issues still not sufficiently salient (Cohen-Eliya, Hammer, 2011: 283).

It was also far from clear, and apparently absent from the text of the proposal, what the sanctions for not complying with the mandatory registration are. It has to be questioned whether the proposed law dealt effectively with the danger of emerging unregistered lobbyists (Vargovčíková, 2017: 263). I will return to this issue when dealing with enforcement.

3.4. Rights and duties of registered entities

The proposal defined both rights and duties of the registered entities in articles 6.^º and 7.^º.

Registered lobbyists were entitled to contact public entities, to access public buildings, to be informed on ongoing public consultations about regulatory and legislative initiatives, to solicit the update of the data on the registry, and to file complaints about the functioning of the register (art. 6.^º).

Correlatedly, their status also implied duties, namely: to fulfill the obligation to declare the information required by the law, as well as to guarantee that it is correct and maintained up to date; to identify as lobbyist before the public officials they address, so that the “nature of the contact” is unmistakably clear, accompanied by their personal identification; to ensure

67. <https://www.dn.pt/poder/interior/regulamentacao-do-lobbying-fica-a-meio-caminho-10726074.html>

68. See the critique in the Portuguese media: https://observador.pt/opiniao/a-comissao-do-retrocesso-da-transparencia/?fbclid=IwAROXTCX41kzO8kgjEqkoOMXCtbpdT_x_h5Y2vCoVO4KlemoNI3_uLuZx4IHQ.

69. Precisely criticizing the transparency register of the European Union for lack of effectiveness due to the low quality of the information disclosed, see Bunea (2018: 378-403).

that information and documents provided to public officials is not incomplete or inaccurate; to abstain from using the registration as a factor of commercial valorization; to identify as lobbyist in any event concerning the discussion of public policies or legislative acts whenever organized, hosted, or sponsored by public entities (art. 7.º, n.º 1).

Concerning professional lobbyists, the law required them to indicate which third-party they are representing when making an appointment with a public entity (art. 7.º, n.º 2).⁷⁰

Unsurprisingly, and in line with the informational minimalism of the register, the Portuguese proposal did not contemplate the obligation of lobbyists to file periodical reports on their activities, profits and expenses. However, this information could be valuable from the public's point of view, so as to grasp how much money is being invested to steer policies in certain directions. As highlighted by Johnson, besides the more intuitive assertion that "the expenditure of large amount of money on lobbying poses risks to good government", "beyond a certain point, expenditures suggest an effort to overwhelm the facts through excessive spending" (Johnson, 2006: 50). But in the absence of any financial information whatsoever, it becomes impossible, first, to determine the sums lobbying is moving (so as to gain a better image of the market and its actors) and, second, for citizens to assess and critique connections between big spending and particular policy outcomes (Johnson, 2006: 50).

Moreover, there was also no obligation whatsoever to specify and publicize what public action was being targeted. Accordingly, the draft legislation would hardly improve the lobbying footprint of legislative or administrative actions.

3.5. Duties of public entities

The proposal also imposed some duties on public entities.⁷¹

At the outset, it made the granting of a hearing by a public entity dependent of the previous registration of the lobbyist. In that sense, it seems to forbid public entities from having meetings with non-registered lobbyists (art. 8.º, n.º 1).

Furthermore, it required public entities to divulge through their website, with "regular periodicity", the meetings they had with registered entities. While such temporal standard left room for disparate interpretations (with some

70. But, as noted before, the voting on the plenary stroke down this obligation.

71. See, comparatively, Vargovčíková (2017: 267), highlighting how, in Poland, several proposals that could enhance the transparency of the relationship between public officials and lobbyists were discarded by the competent parliamentary commission (namely: the duty of high-ranking officials to file to their superiors monthly reports on all lobbying contacts; or the duty of all public officials to write notes from lobbying contacts and make them available as annex to bills passed on the matter, which would improve legislative tracking).

implementation dangers),⁷² the obligation was temporally more strict for the Parliament, which was to make that information public every subsequent month (art. 11.º, n.º 7). In any case, the proposal only made it mandatory to indicate the date and matter of those meetings (art. 8.º, n.º 3). This contrasts, for example, with the Polish case, which, according to Michalek, imposes “an obligation on the side of public administration officers to prepare a detailed report on every contact with professional lobbyists, including level of their influence on the decisions made by the public body” (Michalek, 2017: 263-268).

Finally, with a much more administrative or bureaucratic character, the law required public entities to publish annually a report about the transparency register, which was to include information such as number of registered entities, access to the register, and problems concerning its operation.

3.6. *Revolving door provisions*

Any credible lobbying regulation tends to address the so-called revolving-door phenomenon:⁷³ “the hiring as lobbyists of former government officials upon their leaving public office” (Briffault, 2014: 182). The danger is both of unfair or possibly improper influence resulting from lobbying done by former state employees (Briffault, 2014: 165; and Johnson, 2006: 32), either because former officials have greater access to their past employers or because current officials may act in a way that maximizes their future professional prospects in the private sector (Webber, 1996: 39). This is an especially important issue given the number of studies empirically showing that the personal connections of the lobbyists, and the personal access they provide, matters more than the substantive expertise they may have acquired previously (LaPira, Thomas III, 2014: 5-8; Vidal, Draca, Fons-Rosen, 2012: 3731-3733; and Figueiredo, Richter, 2014: 167).⁷⁴ Moreover, one should not underplay how revolving door restrictions may contribute to reduce the appearance of both unfair and improper influence (Webber, 1996: 39).

The Portuguese proposal attempted to deal with this issue in article 10.º. It determined that the holders of political or high-ranking public offices were not allowed to engage in professional lobbying of their former entity or ministry for a period of 3 years after leaving office (art. 10.º, n.º 1).⁷⁵

It is noteworthy that this provision only affected holders of political offices and high-ranking public offices, meaning that a large number of cabinet staff was not covered. The restrictiveness of this criterion can be critically

72. See Holman, Luneburg, (2012: 94), reporting the concern, in Slovenia, that government officials may not be reporting all their lobbying contacts. Similarly, LaPira, Thomas III (2014: 24), who, nonetheless, highlight how verifying disclosure accuracy requires an “inordinate amount of resources”.

73. The study by Palmer, Schneer (2019) empirically makes the case to not overemphasize the revolving door phenomenon. According to their sample, “service on a corporate board is a more likely outcome than employment as a lobbyist”.

74. Nonetheless, Coen (2007) highlights the emergence, in the European Union, of a “significant resource dependency between officials and lobbyists based on regulatory needs, expertise, information and reputation”. Similarly, Hermansson (2016).

75. It also establishes incompatibilities between carrying out professional lobbying and being an attorney or being employed by a regulatory agency (art. 10.º, n.º 2).

assessed. For example, relating to the situation in the United States, LaPira and Thomas underscore how “very few lobbyists are former members of Congress”, while “the most common type of revolving door lobbyists are those who worked for a House member” (LaPira, Thomas III, 2014: 16). Accordingly, there is obviously room to rethink how one determines the scope of covered staff.

One could also question whether the period of three years is sufficiently long. For example, Canada has set it at five years (Cohen-Eliya, Hammer, 2011: 279).⁷⁶ Furthermore, the prohibition to engage in lobbying concerns *only* lobbying targeted specifically at the official’s former entity or ministry. It is, thus, an institution-based, rather than an activity-based, definition of the scope of the revolving-door prohibition. For example, a former minister for the Economy will not be able to professionally lobby the Ministry for the Economy, but he will be able to lobby any other Ministry or public administrative entity. Similarly, a former Member of Parliament will not be able to professionally lobby the Parliament but will be able to lobby the Government (which, for most matters, also has legislative powers).

This may raise doubts on the positive impact of such a provision on the integrity of democratic decision-making. It would be naïve to ignore the several ways in which the provisions on revolving-door prohibitions can be circumvented, either through accepting a formal job at a company or providing it consulting services.⁷⁷ Other regulations would be required to more thoroughly address the interplay between former public officials and private companies.⁷⁸

Unsurprisingly, LaPira and Thomas are skeptical of the practical implications of cooling-off periods provisions, defending instead other type of measures to counteract more nefarious effects of lobbying (such as shifting some disclosure burdens to the government officials themselves or requiring lobbyists to disclose more details about their previous government employment status) (LaPira, Thomas III, 2014: 24).

3.7. Enforcement

The proposal dealt with enforcement issues (only) in art. 9.^o. It establishes that, notwithstanding other sanctions (it is not clear what they might be), the violation of the duties imposed by the legislation will determine the suspension of the violating entity from the registry and, consequently, access limitations to persons representing them (n.^o 1). These suspending decisions shall be published online (n.^o 2).

76. Apparently proposing the same for the US, see Hasen (2012: 238). Ireland has set it at 1-year (see Keeling, Feeney, Hogan (2017: 133).

77. See Palmer, Schneer (2019): “Employment as an advisor, board member, or consultant to a firm can allow a former officeholder to provide strategic guidance and represent the interests of the firm to the government entity he or she once worked for – without registering as a lobbyist”.

78. Palmer, Schneer (2019) present lobbying and board service as substitutes. Accordingly, rules will also be needed on cooling-off periods for accepting a private job after leaving office. Even as a complement to the rules on lobbying as a way of ensuring they efficacy and ultimate aim of curbing undue influence on decision-makers.

Besides lacking in establishing a comprehensive regime, this provision was also light. First, it did not identify a general controlling instance, nor did it give any indication to the several public entities concerned on how to determine who should assume the role of enforcer for each registry created.⁷⁹ Second, it did not establish any fines or criminal penalties as sanctions to the violators (Holman, Luneburg, 2012: 85).⁸⁰ Third, it allowed only for suspension decisions, with dubious punitive character. In fact, it was not clear whether this suspension could be used punitively to inhibit lobbyists from engaging in lobbying activity, or whether it would work as a mechanism of inhibiting lobbying while some corrective conduct is undertaken. If it was intended to be used punitively, it would have been reasonable and proportional — perhaps even constitutionally mandatory — to establish the possible duration of the suspension.⁸¹ Correlatedly, it would have been wise to establish the possibility of expulsion from the registry after persistent infringing behavior.⁸²

This scarce enforcement regime fits badly with a law that establishes registration as mandatory for lobbyists, contrasting with laws of other countries in which civil and criminal penalties are contemplated to deal with violations of lobbying regulations. In fact, a robust enforcement regime is taken to be instrumental to the success of lobbying regulations based on transparency disclosures (Bunea, 2018: 401).

3.8. Impact on other legal domains

Any legislation on lobbying that might be adopted in Portugal will necessarily have impact in other areas of law.

At the outset, the legislation might have a side impact on the legal relationship between clients and lobbyists in the case of professional lobbying, in particular concerning their contractual arrangements. It is worth discussing whether a legal order as the Portuguese one would accept the so-called contingency fee agreements, in which the lobbyist is only entitled to payment if their lobbying efforts proves successful.⁸³ It is worth recalling

79. That contrasts, for example, with the situation in Canada (in which the law vests enforcement authority in an independent officer of Parliament) and in the U.S. (in which the LDA vests enforcement authority in two legislative officers, the Secretary of the Senate and the Clerk of the House of Representatives). See Holman, Luneburg, (2012: 93). The same authors inform (p. 93) that Slovenia created “a special Commission for the Prevention of Corruption charged with implementing and enforcing the law”. Irish legislation also designates an instance of control, according to Keeling, Feeney, Hogan (2017: 132).

80. See, also, Köppl (2017: 50) (referring fines of up to Euro 60.000), and, on Ireland, see Keeling, Feeney, Hogan (2017: 132) (with fines which vary from Euro 200 for incomplete filings to up to 2 years for failing to register).

81. For example, Canada’s law establishes that an entity may be prohibited from lobbying up to 2 years. See Holman, Luneburg, (2012: 85).

82. A possibility which exists in certain lobbying regimes of European Union institutions. See OBRADOVIC, “Regulating Lobbying in the European Union...”, pp. 315-316, and Moessing (2014: 81).

83. In the United States, this type of agreements is not prohibited at the federal level, but it is widely prohibited at the state level. As explained by Briffault (2014: 169), “courts have long treated contingent fee arrangements for lobbyists as void for public

that Portugal does not contemplate contingency fee attorney representation. Accordingly, the reasons for the American stance on contingency fee agreements could be replicated in the Portuguese context to sustain that said agreements would be in violation of art. 280.⁹ of the Civil Code (agreements against public policy or good morals), thereby being void.

Furthermore, the implications of lobbying legislation on tax law also have to be considered, namely whether it is — or should be — possible to consider lobbying expenditure as business expenses deductible for tax purposes.⁸⁴ A political discussion on this matter will have to ensue after the approval of any law on this matter.

4. Evaluation and conclusion

In 2019, the President of the Portuguese Parliament indicated publicly that he wished that the lobbying legislation would be passed in Parliament before the national holiday of the 25th of April. More than 4 years have passed, and such approval is yet to happen. Some have interpreted this as a sign of lack of political commitment to this legislation.

If political commitment surfaces again, it perhaps can be expected that it will be to produce robust lobbying regulation. Under international standards, the 2019 proposal was a very soft document not in line with the most sophisticated legislative pieces of other jurisdictions. In particular, as emphasized, the content of the transparency register was minimal, the major obligation of identifying professional lobbyists' clients had been dropped, there were no profits and expenses filings or reports, and the rules on enforcement were deficient.

This left room to doubt whether such legislation, as it stood in the proposal, would be apt to become an effective means of curbing improper and unfair influence on public officials. One wonders whether, if it had been adopted, these provisions could have turned into symbolic legislation, with no effectiveness in counteracting the dangers arising out of the interconnections between business and politics.

Sooner or later, the Portuguese parliament will certainly reattempt approving legislation on this matter. Some of the shortcomings and pitfalls identified here will hopefully be addressed and avoided to ensure a

policy on the theory that they create an incentive for lobbyists to use improper means to influence government action". However, the author notes how a First Amendment inspired understanding of lobbying may ground challenges to prohibitions of contingent fees, especially by "mak[ing] it more difficult for some individuals or groups to hire a lobbyist". This would have to be balanced with the interest in not incentivizing lobbyists to use improper means to attain their goals and receive the fee. The author suggests, for example, permitting contingent fees agreements but requiring its disclosure. See JOH Johnson (2006: 36 ss., who is of the opinion that "contingent-fee lobbying is more likely to promote the interests of big business" instead of benefiting the poor. As a side note, it is worth noting that contingent fees are admitted in the United States for attorney representation purposes (being understood as means of enhancing access to justice for disadvantaged persons), something which is not common to all countries and does not exist concretely in Portugal.

84. See, in the United States, Hasen (2012: 211), and Briffault (2014: 172).

productive, beneficial, and transparent interaction between public officials and public office holders in the adoption of decisions that best serve the public interest.

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