COMPARISON OF THE LEGISLATIVE INITIATIVE ON LOBBYING WITH INTERNATIONAL EXPERIENCE IN LOBBYING REGULATION.

Models and forms of legal regulation of lobbying.

The institution of lobbying exists in almost every country in the world, but the existence and level of detail of legislation in this area varies greatly from country to country. To date, the following countries have adopted special lobbying legislation: the United States, Australia, Canada, France, Germany, Hungary, Israel, Mexico, Georgia, Lithuania, Poland, Slovenia, Montenegro, Austria, the Netherlands, Ireland, and now Ukraine. In addition, lobbying has received international legal regulation at the level of the European Union authorities, statutory bodies of the Council of Europe, the Organization for Economic Cooperation and Development, and even within the framework of the CIS model lawmaking. Countries such as Brazil, Chile, Italy, Spain, the United Kingdom, Latvia, Estonia, the Russian Federation, Moldova, and Kazakhstan have discussed or are still discussing legislative projects on lobbying.

The most striking example of the use of lobbying in its entirety is the United States.

Therefore, it is not surprising that many countries that are beginning to legalize lobbying are in a hurry to emulate the American experience.

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The Report of the Venice Commission (2011) on the legal framework for the regulation of lobbying in the Council of Europe Member States has identified three models/systems of legislative regulation of lobbying:

LOW-REGULATED SYSTEM

(Germany, France, Poland, European Parliament, EU Commission):

- there are rules for individual registration, but the amount of information to be provided is rather small;
- there is no requirement to report a lobbyist's expenses;
- there are no strict sanctions for violations/non-compliance with the legislation;
- regulation covers only legislative activities and concerns the parliament;
- the register of lobbyists is publicly available, but does not contain all the information about lobbyists' activities;
- no cool-off restrictions
  (i.e., restrictions on members of the legislature or high-ranking officials to engage in lobbying activities for a certain period of time after termination of office/dismissal).

MEDIUM-REGULATED SYSTEM

(Lithuania, Hungary, Canada, some US states, Australia, Taiwan):d

- there are detailed rules for registration and disclosure of information, including the subject of lobbying activities and lobbying objects;
- the legislation requires disclosure of lobbyists' lobbying expenses; however, there is no requirement for disclosure of expenses by the lobbyist's employer;
- there is a state agency that oversees lobbying activities;
- regulation covers activities not only in relation to the legislative process, but also among executive bodies and officials;
- the register of lobbyists is publicly available, but some information in the register remains restricted;
- the legislation sets cool-off restrictions.

A HIGHLY-REGULATED SYSTEM

(USA at the federal level and at the level of most US states):

- there are detailed rules for registering and disclosing a significant amount of information, including disclosure of information about all employees, and prompt changes to the register;
- there are strict requirements for disclosure of lobbying expenses, the lobbyist's salary, accounting of lobbying-related expenses, calculation of expenses for each specific official or legislator and their family members, contributions to political parties, etc;
- all information in the register of lobbyists is public;
- there is a system of sanctions, including criminal sanctions, for violations of lobbying legislation;
- lobbying activities include not only activities in relation to the legislative body, but also in relation to executive bodies and officials;
- there are strict requirements for disclosure of the lobbyist's employer's expenses;
- there is a state agency that oversees lobbying activities, receives and reviews reports, and conducts regular inspections;
- the legislation sets cool-off restrictions.

OF THE 27 MEMBER STATES OF THE EUROPEAN UNION

most have adopted rules and regulations on lobbying.

IN 6 COUNTRIES

have adopted separate laws regulating lobbying activities

(Ireland, France, Austria, Lithuania, Poland, and Slovenia).

IN 9 COUNTRIES, THERE IS A SOFT CONTROL

mechanism with self-regulation of lobbyists

(Germany, Italy, Spain, the Netherlands, Finland, the Czech Republic, Croatia, Latvia, and Romania).

Other countries are gradually introducing legislative regulation of lobbying activities, such as Belgium, whose House of Representatives voted in 2018 to introduce a lobbyist register into its Rules of Procedure and Procedural Code.

The group of EU countries that are not yet subject to any form of legal regulation of lobbying activities *(Estonia, Greece, Hungary, Luxembourg, Portugal, Slovakia, and Malta)* deserves special attention.

As a rule, the common features of lobbying in these countries are: registration of a person wishing to provide lobbying services in accordance with a certain procedure; availability of an open register of lobbyists; reporting of lobbyists on their activities to the authorities and the public; establishment of certain restrictions on such activities; obligation to comply with the established rules of conduct, etc.

Experience in regulating lobbying activities of individual EU member states.

Lithuania

Among all the post-socialist countries, Lithuania was **the first** to adopt a law on lobbying. The Law on Lobbying was adopted in 2000 after a series of corruption scandals. The law introduced numerous and detailed definitions of concepts, clearly delineated the list of persons who are and are not allowed to be lobbyists, and established a mandatory system of lobbyist registration.

It is worth noting that the list of persons subject to influence is very detailed in the Law: "the President of the Republic, members of the Seimas of the Republic of Lithuania, members of the Government of the Republic of Lithuania, vice-ministers, chancellors of the Government, heads of parliamentary political parties, mayors, members of city councils, heads of city administrations and their deputies, other public officials, public officials, and other persons who participate in the preparation, consideration, and adoption of draft legal acts in accordance with the procedure established by legal acts."

The registration system in Lithuania includes only contract lobbyists attempting to influence the legislative branch. The law does not regulate the activities of in-house lobbyists who are part of the permanent staff of a corporation and non-profit lobbying organizations. Lobbyists in Lithuania are obliged to submit a detailed annual report on their lobbying activities to the register. Information on lobbying activities is public, and the list of lobbyists is published every three months in the professional publication "Official Journal" and on the website of the Central Ethics Committee.

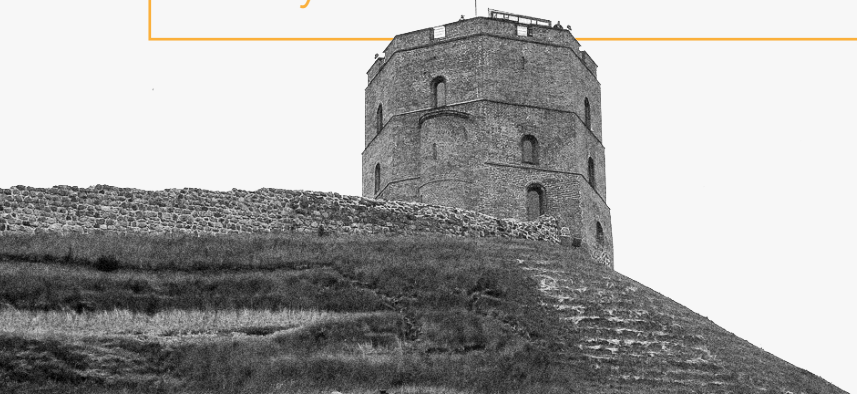
40
lobbyists

The complexity of the Law during the first 17 years of its operation significantly limited lobbying activities, and as of **2017**, there were only 40 lobbyists.

The first years of the Law were not very successful for the development of lobbying. A complicated registration system with a high registration fee, a lack of understanding of the value of professional lobbyists for the development of democracy among the public, an effectively non-transparent means of influencing officials while Lithuanian interest groups weren't using sophisticated lobbying practices, and access and influence mainly based on personal connections and corrupt practices... these were all factors that led to the ineffectiveness of the register.

252
lobbyists

However, as a result of amendments to the Law in 2017 and 2021, the work of this institution was significantly improved. As of 2021, **252 lobbyists** were registered in Lithuania.



Hungary

The unsuccessful experience of legalizing lobbying in Hungary is particularly illustrative for Ukraine. A voluntary register of lobbyists was introduced there in 1994. In 2006, the Law on Lobbying came into force, which included mandatory registration for lobbyists, a general code of conduct, and reporting requirements for lobbyists and executive authorities. The Ministry of Justice was entrusted with maintaining the register.

The law provided for broad rights for lobbying organizations:

- allowed them to initiate hearings in committees of all levels and branches of government and obliged representatives of the latter to hold such meetings;
- provided them with direct access to the entrance to the parliament, government buildings, and local self-government bodies;
- allowed them to initiate personal hearings with MPs, members of local self-government bodies, and ministerial officials;
- allowed them to directly influence all government agencies through a mechanism of direct communication of the results of their research by sending publications.

Hungarian lawmakers did not take into account the comments of civil society organizations on the definition of the difference between lobbyists and the public sector. According to the law, NGOs could be fined EUR 40,000 if they were not registered as lobbyists. Members of the public argued that legalizing lobbying in this way benefited only large commercial organizations that were connected to existing financial and political groups, while weakening public control over the government's actions.

600
lobbyists

By the end of 2010, there were about 600 registered lobbyists

However, they also criticized the effectiveness of the lobbying transparency legislation. For example, it was easy to circumvent lobbying regulations because the Ministry of Justice did had not developed any guidelines for enforcing the law. In addition, violations of the requirements for registration and lobbying activities were not considered or brought to court. At the same time, the law imposed significant obligations on registered lobbyists.

The public and interest groups had a low level of support for the law. The majority believed that the law was not taking the political and cultural context of Hungary into account. Therefore, this had a negative impact on the implementation of the law by all participants in political decision-making. Eventually, in 2011, the law on lobbying was repealed due to its complete ineffectiveness. Instead, only indirect legal grounds for lobbying and control over unlawful influence on officials remained.

Hungary's experience has demonstrated the unsuccessful experience of transferring legislative norms from other countries without legal and political context, broad support of all stakeholders, and independent public and international control being taken into account. Oleksandr Zaslavskyi, Director of the Analytical Department of the Agency for Legislative Initiatives, expressed his expert opinion on the Hungarian experience: "Here is an example of Hungary, where an ill-conceived law on lobbying has become one of the factors weakening civil society and is associated with the strengthening of Orban's power, restrictions on the opposition's access to the media, elections, and so on. In other words, the weakening of civil society, along with the resulting strengthening of authoritarian tendencies, began to be discernible there. Everyone in Ukraine realized that this was definitely not the way to do it."

Compliance of the Law of Ukraine "On Lobbying" with international legal standards.

The main international standards in the field of lobbying and everything related to it are covered in a number of recommendations and resolutions of the Council of Europe and the Organization for Economic Cooperation and Development (OECD). Individual states have their own legislative regulation. The Council of Europe and the Organization for Economic Cooperation and Development (OECD) have developed and adopted a number of documents on the regulation of lobbying activities, which proclaim the need for legal regulation of the latter in their member states. Such documents include:

01 **RECOMMENDATION 1908 (2010) OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE ON**

Lobbying in a Democratic Society (European Code of Conduct on Lobbying), which was confirmed by Resolution 1744 (2010) on Extra-institutional actors in the democratic system;

02 **OECD RECOMMENDATION "LOBBYING IN A DEMOCRATIC SOCIETY"**

(European Code of Conduct on Lobbying) (C(2016)16);

03 **RECOMMENDATION CM/REC(2017)2 OF THE COMMITTEE OF MINISTERS OF THE COUNCIL**

of Europe to member states on the legal regulation of lobbying activities in the context of public decision-making.

The development of lobbying laws in line with the OECD and Council of Europe Recommendations should be based on the constitution and laws of the member state. For example, paragraph 6 of the OECD Recommendation C(2016)16 states that "countries should not directly copy rules and recommendations from one jurisdiction to another.

Instead, they should assess the potential and limitations of different policy and regulatory options and apply the implications and lessons learned from other systems to their own context," and paragraph 15 clarifies: "Governments and legislators have the primary responsibility for establishing clear standards of conduct for public officials who are lobbied." Therefore, the subjects of legislative initiative should take this into account when drafting their own bills. International documents provide only general recommendations, and the ultimate responsibility for the effective or ineffective operation of certain norms will be borne by the initiators of the bills.

The Law of Ukraine on Lobbying is in line with the Recommendation CM/Rec(2017)2 of the Committee of Ministers of the Council of Europe on:

DETERMINING THE LIST OF PERSONS

subject to lobbying influence;

TRANSPARENCY

– information on lobbying activities is open and public;

EXISTENCE OF A REGISTER OF LOBBYISTS

and requirements for minimum information to be contained therein;

SANCTIONS AND LIABILITY

in case of violation of the established lobbying standards.

The law partially complies with the principles of the Recommendations in certain respects, namely:

01 Availability of definitions of the main concepts related to the lobbying process;

02 Regulations on rules for public officials regarding their relations with lobbyists;

03 Norms for avoiding conflicts of interest;

04 Standards of ethical behavior of lobbyists.

The following principles of the Law do not comply with the Recommendation:

INVOLVEMENT

of civil society in political decision-making.

The key inconsistencies with international experience are the following parts of the provisions of the adopted Law on Lobbying:

01 On the distinction between lobbying and civil advocacy;

02 Regarding the duration of the cool-off period;

03 Regarding the way the Code of Conduct is regulated.

1. Failure to distinguish between lobbying and civil advocacy.

The lack of distinction does not comply with Principle 4 of the CoE Recommendation on the involvement of civil society in political life, which stipulates that legal regulation of lobbying activities should not violate the democratic right of citizens to:

express their opinions;

petition public officials, bodies, and institutions;

кампанії за політичні зміни та зміни до законодавства.

Representatives of civil society in Ukraine emphasize the violation of this principle the most. They argue that the creation of the lobbying institution could lead to the formation of a "caste" of lobbyists and limit the advocacy of the interests of different segments of society.

The law may have a negative impact on freedom of expression, the democratic process of advocacy, and civil society. Advocacy is becoming overregulated, causing what is known in constitutional law as a chilling effect – the effects of deterrence, self-restraint, not to mention the European Commission's recommendation that lobbying regulation should not impede or restrict the legitimate activities of civil society.

However, it should be noted that the problem of the correlation between advocacy and lobbying exists not only in Ukraine. For example, in the United States, lobbying is considered to be any influence aimed at representatives of the legislative and executive branches of government. There are only a few legal mechanisms that allow NGOs to have some influence on decision-makers without violating lobbying laws. At the same time, in Australia, the Lobbying Code of Conduct defines categories of individuals and organizations that are not considered lobbyists. These include, in particular, religious organizations; non-profit organizations and associations; persons acting on behalf of relatives or friends; members of foreign trade delegations, and others. Similarly, Article 7 of the Lithuanian Law on Lobbying Activities states that the activities of socially useful non-governmental organizations do not constitute lobbying.

Thus, the main inconsistency of the Law with international practices is the lack of understanding of the difference between lobbying as a legitimate activity and advocacy as a necessary activity in a democratic society.

2. Short "cool-off" period.

The "cool-off" period is the time when former officials cannot work as lobbyists. Although the law provides for a "cool-off" period, this period is set for only 1 year, which may be too short to avoid a conflict of interest. Global practice generally provides for longer "cool-off" periods. For example, in Canada, such a period for public officials is 5 years. The longer the period, the less likely it is that a conflict of interest and corruption will arise.

3. Disadvantages of the way the Code of Conduct is regulated.

Given the international practice, a code of conduct (code of ethics) is an internal document of a certain association of people on a professional basis, for example, lobbyists, who have agreed to follow certain rules in their activities. Instead, the Law stipulates that the Code of Conduct will be approved by the NACP, which is an entity external to lobbyists.

The law also does not specify what exactly should be contained in the Code of Conduct, and therefore it may not meet the requirements of subparagraph d) of paragraph 14 of the CoE Recommendation on avoidance of conflicts of interest and the requirement of subparagraph b) of paragraph 17 of the CoE Recommendation on the availability of guidelines (rules) for public officials on their relations with lobbyists.

In other words, the Law has significant shortcomings in terms of regulating the Code of Conduct from the point of view of international practice:

01 the Code is planned to be adopted by an external body (the NAPC), although such documents are usually internal acts;

02 the Code will be common to all participants in lobbying, which again contradicts the standard logic of adopting this document;

03 the definition of "lobbying participants" is absent and does not allow for an unambiguous interpretation;

04 determining the status of an MP (as a lobbyist) through a by-law adopted by the NACP does not comply with the Constitution of Ukraine;

05 even if the Code of Conduct is adopted in accordance with the law, there is no guarantee that it will take into account international recommendations.

Форми відповідальності за порушення норм законодавства про лобізм.

The Law provides only for administrative liability for violation of lobbying regulations, which is in line with paragraph 15 of the CoE Recommendations. Administrative liability for failure to comply with the conditions of lobbying is a common international practice, but there are also countries that provide for criminal liability in the form of imprisonment.

REPUBLIC OF LITHUANIA

The Law on Lobbying Activities of the Republic of Lithuania stipulates that persons who have caused damage to other persons through illegal lobbying activities shall **compensate for the damage** in accordance with the procedure established by the laws of the Republic of Lithuania.

CANADA

In Canada, punishment is provided in the form of conviction under simplified procedure or indictment. The threshold for **a fine is USD 50,000 or USD 200,000**, respectively, and the term of **imprisonment is 6 months or 2 years**.

FRENCH REPUBLIC

In the French Republic, the maximum penalty for violating lobbying laws is **a one-year prison sentence** and **a fine of EUR 15,000**.

REPUBLIC OF AUSTRIA

In the Republic of Austria, the administrative penalty is a **fine of up to EUR 20,000**, and in case of **repeated violations, up to EUR 60,000**, provided that the act does not face judicial punishment.

IRELAND

In Ireland, the maximum penalty can be **imprisonment for up to 2 years**.

США

In the United States, the main type of punishment for committing such offences is **a fine**. However, for deliberate and intentional concealment of information, a lobbyist may be punished with **imprisonment of up to 5 years.**

Thus, in other countries, the types of sanctions for violations of lobbying activities can be divided into pecuniary (fines) and physical (imprisonment or restriction of liberty). In addition, the amount of material sanctions (taking into account the average monthly income of citizens of these countries) is large, which ensures the prevention of offences in this area.

Connection between lobbying regulation and the level of corruption

The institution of lobbying, even in the United States, is often subject to public criticism. This is due to a number of corruption scandals involving lobbyists. However, the United States of America embody the principle of the rule of law, which is ensured, in particular, by a developed justice system and an effective law enforcement system.

The adoption of the Law is unlikely to have a significant impact on reducing corruption. The explanatory notes to both alternative legislative projects stated that the main purpose of legalizing lobbying was to fight corruption. However, according to Ukrainian experts, the mere legalization of lobbying in Ukraine will not significantly reduce corruption. Such phenomena as bribing politicians and paying for votes will not be stopped, because this is not about regulating lobbying, rather about ordinary corruption.

Legalization of lobbying is unlikely to stop political corruption. It may contribute to the creation of a separate closed corps of lobbyists, as the Main Scientific and Expert Department of the Verkhovna Rada of Ukraine warned in its comments to the first version of legislative project No. 3059. As a result, law-abiding citizens, businesses, and public organizations will have to pay lobbyists to protect their rights and put forward their proposals. Legal experts emphasize that this will have a negative impact on access to political decision-making and justify this position by Article 25(a) of the International Covenant on Civil and Political Rights, which establishes the right of every citizen "to take part in the conduct of public affairs, directly or through freely chosen representatives." As well as General Comment 25 of the UN Human Rights Committee, which states that modalities of citizen participation, including public debate and dialogue, should be enshrined in the constitution and other laws of the state concerned. At the same time, this Law will not be able to stop bribing politicians to promote certain legislative projects and vote for their adoption. And despite the fact that bribing MPs is illegal today, this does not change the real situation in the country.

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