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# THE REFORM OF THE EU TRANSPARENCY REGISTER

Kim Fyhr\*

*Abstract: This paper looks at the latest reform of the EU Transparency Register (TR). I will approach the negotiations on the TR from the angle of the legislative process and will focus in particular on the life cycle of the TR proposal all the way from its preparatory phase within the Commission until the trilogue negotiations and the adoption of the TR package. I will be arguing that peer pressure between EU institutions had a significant impact on the negotiations. Furthermore, peer pressure inside EU institutions was also important. The final outcome of the TR will be analysed with regard to the effectiveness and added value of the TR interinstitutional agreement and the accompanying legal and political instruments. Solutions aimed at increasing transparency will be discussed in terms of their practical effect on EU institutions, the European Commission, the European Parliament and the Council of the European Union. The findings of this paper suggest that the achieved compromise provides added value to the TR regime of the EU. Moreover, the compromise has contributed to transforming the EU TR towards a hybrid transparency system consisting of elements of a different nature. Finally, I will conclude by discussing the future prospects of developing the EU TR regime.*

*Keywords: EU law, transparency, transparency register, lobbying, interinstitutional agreements.*

## 1 Introduction: extending the EU transparency regime

Transparency is the *sine qua non* for the public trust and confidence of citizens in the institutions of any democratic polity. People need to know how decision-makers and legislators make decisions affecting the life of citizens. It is also important to know which stakeholders are involved in the often-complex processes of law-making. The point of departure of this paper is the European Union (EU) and its latest major pursuit for greater transparency, the reform of the EU Transparency Register (TR). The EU institutions – the European Commission (Commission), the European Parliament (EP) and the Council of the European Union (Council) – managed to find a compromise on the package consisting of

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EU level transparency instruments in late 2020 after several years of difficult negotiations.

The EU TR is a register where interest representatives<sup>1</sup> register to provide transparency on their public relations functions and to be able to meet – and lobby – certain EU policy-makers and officials.<sup>2</sup> In ordinary words, it is often called the lobby register. Before the latest reform, the TR of 2011<sup>3</sup> covered the Commission and the EP and it was of a voluntary nature.<sup>4</sup> The TR Interinstitutional Agreement (IIA) was amended in 2014.<sup>5</sup> The amendment brought the Council to the arrangement as an observer.

This paper focuses on how the reform of the TR came into being from 2016 to 2021 and looks at the implications of the TR package from the angle of effectiveness. At the heart of the analysis on these aspects is the extension of the scope of the TR. The impact of this extension is chiefly related to expanding the application to cover the General Secretariat of the Council (GSC)<sup>6</sup> and the new arrangements for the Permanent Representations of the EU Member States and the EP.

Transparency has its foundations in EU primary law. Article 1 of the Treaty on European Union (TEU) states that '[t]his Treaty marks a new stage in the process of creating an ever closer union among the peoples Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen [...]'. The Court of Justice of the European Union (CJEU) has built on this provision of the Treaty in ascertaining this im-

<sup>1</sup> On interest representation and interest groups, see Justin Greenwood, *Interest Representation in the European Union* (4th edn, Palgrave MacMillan Education 2017) 4-10 and Heike Klüver, *Lobbying in the European Union. Interest Groups, Lobbying Coalitions, and Policy Change* (OUP 2013) 5-6. Definition a) of Article 2 of the IIA on the Transparency Register defines 'interest representatives' as follows: "interest representative" means any natural or legal person, or formal or informal group, association or network thereof that engages in covered activities'.

<sup>2</sup> For a classic and comprehensive presentation on EU lobbying, see Rinus Van Schedelen, *Machiavelli in Brussels. The Art of Lobbying the EU* (Amsterdam University Press 2002).

<sup>3</sup> Interinstitutional Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation [2011] OJ L191/29.

<sup>4</sup> Although the TR is voluntary, decision-makers only meet with registered organisations, which makes the TR *de facto* mandatory. See Adriana Bunea 'Legitimacy through Targeted Transparency? Regulatory Effectiveness and Sustainability of Lobbying Regulation in the European Union' (2018) 57 *European Journal of Political Research* 378.

<sup>5</sup> Interinstitutional Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation [2014] OJ L277/11.

<sup>6</sup> On the tasks and role of the GSC, see Martin Westlake and David Galloway, *The Council of the European Union* (3<sup>rd</sup> edn, John Harper Publishing 2004) 348-353.

portant principle in its case law.<sup>7</sup> In the same vein, Article 15(1) of the Treaty on the Functioning of the European Union (TFEU) continues, '[i]n order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible'. In addition to these rather general primary law provisions, a particularly important Article in the TEU is Article 11 and especially paragraphs 1 and 2 thereof. Pursuant to paragraph 1, '[t]he institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action'. In accordance with paragraph 2, '[t]he institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society'.

I will be tackling this topic in light of the research questions and according to the methodological approach presented below. This paper suggests that it is the extended scope of the TR that brings significant added value to the current EU TR regime. The paper therefore differs from the first, predominantly critical reactions to the deal achieved by the EU institutions in late 2020.<sup>8</sup> The available research literature on interest representation has been quite dispersed across a wide spectrum but the existing literature enables some metrics for comparison between different systems.<sup>9</sup> Until now, there have not been many academic contributions on the latest reform of the TR.<sup>10</sup> Some indeed deal with the reform and its outcomes, but not much attention has been paid to the legislative process that led to the reform. I attempt to fill the gap in the legislative process on the TR reform package from 2016 until 2021. Any review of the research literature on this particular topic would reveal that the various phases of law-making on the TR reform package and in particular its key provisions are relatively uncharted territory.

## 2 Research questions and methodology

A major part of scientific research on the EU TR is of an empirical nature. This paper takes a somewhat different approach and sets the

<sup>7</sup> Case C-92/09 *Schecke and Eifert* ECLI: EU:C:2010:662.

<sup>8</sup> See eg Emilia Korkea-aho, 'New Year, New Transparency Register' (*EU Law Live*, 12 January 2021) <[eulawlive.com/op-ed-new-year-new-transparency-register-by-emilia-korkea-aho/](http://eulawlive.com/op-ed-new-year-new-transparency-register-by-emilia-korkea-aho/)> accessed 16 November 2021. This contribution is the first reflection on the TR register deal of December 2020.

<sup>9</sup> See William Dinan, 'Lobbying Transparency: The Limits of EU Monitoring Democracy' (2021) 9 *Politics and Governance* 240.

<sup>10</sup> In addition to Korkea-aho, another recent academic contribution on the new TR is Odile Ammann, 'Transparency at the Expense of Equality and Integrity: Present and Future Directions of Lobby Regulation in the European Parliament' (2021) 6 *European Papers* 239. This paper has the special merit of tackling the TR from the point of view of the EP.

law-making process at the apex. The main research questions are: *how did the reform of the Transparency Register come into being in the EU legislative process; what was the role of peer pressure in this process; and what added value does the final compromise package provide in terms of its legal content?*

The point of departure of the analysis steers the method in the direction of a significant degree of descriptiveness but also provides analysis of the legal and political content of the TR package. I will present the life cycle of the TR reform from the phase when the Commission published the proposal to the phase of the adoption of the package by co-legislators. The main angle of the paper is thus the legislative process, which led to the adoption of the compromise package. In this respect, an important focus is the extended scope of the TR, which is constantly undergoing evolution.

As for the method, I have chosen to proceed by comparing the status quo, ie the state of the TR of 2014 with the TR reform package adopted in 2021. The focus of this analysis is on the main substantive provisions of the TR package related to the scope and the conditionality of the TR.

In terms of substance, I will be shedding light on the major positions of different EU institutions during the law-making process. Finally, it will be time to draw some conclusions based on the findings on the final substantive outcome of interinstitutional negotiations, the TR Package. Particular attention will be paid to the effectiveness<sup>11</sup> of the achieved outcome of the transparency register vis-à-vis the proposed more mandatory register arrangement.

Regarding the scope and limitations of this paper, it should be noted that the paper focuses solely on the EU TR. Therefore, the reform of the EU Access Regulation<sup>12</sup> is excluded from the ensuing analysis. The

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<sup>11</sup> It should be noted that the concept of effectiveness in the context of lobbying is contested. See Gianluca Sgueo, *Transparency of Lobbying at EU level* (European Parliamentary Research Service 2015) 3.

<sup>12</sup> Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents will not be discussed. The same applies to the 'Proposal for a Regulation of the European Parliament and the Council amending Regulation (No) 1049/2001 regarding public access to European Parliament, Council and Commission documents' COM (2011) 137 final. The initiative to amend the regulation has not progressed. In addition, the discussion on an independent EU ethics body goes beyond the boundaries of this paper. The EP especially has raised the need for an ethics body. See European Parliament, Resolution of 14 September 2017 on transparency, accountability and integrity in the EU institutions, 2015/2041(INI). In this context it should be noted that Article 42 of the EU Charter of Fundamental Rights on the right of access to documents stipulates that '[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium'.

focus is also set at the EU level and this is why national transparency registers fall outside the scope of this paper.<sup>13</sup> This is despite the fact that sometimes the national level of regulation may also provide inputs for the design of EU level law, also in the field of transparency. The two levels are of an interactive nature.

At the conceptual level, this paper is attached to two main paradigms. First, the analysis of the legislative process on TR is largely based on the concept of peer pressure.<sup>14</sup> Within the frame of this paper, peer pressure refers to the pressure exercised by the three main EU institutions with a significant role in EU law-making, namely the Commission, the Council, and the EP. In addition, it also briefly discusses the role of NGOs in the exercise of the TR. Peer pressure can be discerned in two separate yet overlapping strands: internal and external peer pressure. With internal peer pressure, I am referring to intra-institutional peer pressure. In practical terms, an example of this is the peer pressure between the Council and the Member States. This example is an important one because, on the one hand, some Member States have national transparency registers while others may not have them at all. Furthermore, some Member States may have far-reaching expectations at the EU level regarding the TR while others may have a lower level of ambition. The example of the Council mainly functions vertically from the Member States towards the Council because the Council was not tightly covered by the TR before the reform but naturally the EU level TR may also create pressure towards the Member States for their national TR arrangements and plans. The internal peer pressure should therefore be looked at as a two-way information and pressure flow. It is worth noting that the unilateral actions of the Member States also had an impact on each other's positions. In the EP, internal peer pressure can be seen, for example, as pressure exercised between the different EP political groups<sup>15</sup> or between political groups and individual MEPs. It may be a different story for the Commission, despite there being practical differences between different

<sup>13</sup> For a comparative discussion on different systems of regulation, see for instance Raj Chari, John Hogan, Gary Murphy and Michele Crepaz, *Regulating Lobbying: A Global Comparison* (2nd edn, Manchester University Press 2019).

<sup>14</sup> On the notion of peer pressure, see Maarten Hillebrandt, 'The Big Lesson after Ten Years of EU Transparency Reforms? You Will Never Get It Right' (*Open Government in the EU*, 14 January 2020) <[www.eu-opengovernment.eu/?p=1064](http://www.eu-opengovernment.eu/?p=1064)> accessed 16 November 2021.

<sup>15</sup> Pursuant to Rule 33 of the EP Rules of Procedure, 'a political group shall consist of Members elected in at least one-quarter of the Member States. The minimum number of Members required to form a political group shall be 23'. The current political groups of the EP are the European People's Party Group (EPP), the Progressive Alliance of Socialists and Democrats (S&D), Renew Europe (RE), Identity and Democracy (ID), Greens-European Free Alliance (Greens-EFA), European Conservatives and Reformists (ECR) and European United Left-Nordic Green Left (GUE/NGL). In addition to these groups, there are also non-affiliated MEPs not belonging to any of the groups.



Commission Directorates General, although the same rules apply to the Commission college.

External peer pressure can for its part be regarded as peer pressure from the outside, firstly from other institutions (interinstitutional peer pressure) but also from civil society, such as from NGOs.

Hillebrandt finds that in the EU discussion on transparency, inter-institutional relations are a factor that has often been overlooked. Within the frame of the EU, the institutions are in a perpetual battle for citizens' approval and trust and that is why the interinstitutional perspective is so important.<sup>16</sup> This is the notion of pressure coming mainly from the other EU institutions involved in the EU legislative process. For example, the fact that before the reform the Commission utilised the TR while the Council did not have a significant impact on the final outcome of negotiations. It can be argued that this peer pressure was present throughout the reform process and was also reinforced by, for instance, the related civil society discussion on the TR. In this exercise, NGOs had an important role to play.

I will also be arguing that the peer pressure from the supranational institutions, namely the Commission and the EP, proved important in setting the intergovernmental institution, the Council, in motion in the use of the TR. This is despite the general setting where the Commission was defending a mandatory TR, and the EP and the Council largely shared the same camp advocating a more flexible approach. All in all, one of the main goals of this paper is to provide an outline of how peer review shaped the process. This is carried out by embarking on the dynamics of interinstitutional pressure.

Second, the paper operates with the concept of a hybrid model of the TR. By hybrid model, I mean a multifaceted EU level TR regulatory framework. This system consists of both legally binding and legally non-binding instruments. Legal and political actions are intertwined and are also interdependent. It includes mandatory and non-mandatory elements for meeting requirements. Furthermore, it also includes different elements, such as unilateral or joint actions, like the publication of meetings of key politicians and civil servants. The hybrid model can be regarded as a possible intermediate phase on the way to a more coercive model of an EU TR in the future, with a vast array of legal obligations and stringent sanctions.

What are the empirical data used in this paper? At the outset, I will be using the previous TR EU instruments dating back to the early 2010s

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<sup>16</sup> Hillebrandt (n 14).

as a basis to reflect on the latest TR reform package. The TR in force before the latest reform offers a starting point for an evaluation of the substantive changes made during the latest reform of the TR. It should also be noted that the empirical sources of the latest reform consist of the Commission's initial TR proposals and the available positions of the co-legislators, the Council, and the EP. The positions of the EP and the Council can be found in the available texts drafted during the legislative process. It is particularly interesting to ponder the dynamics of peer pressure against the background of the negotiating mandates, or the information made publicly available thereon, of the Council and the EP. The analysis goes further on the basis of the evolving legislative texts of the institutions.

Due to the method and the sources used, this paper falls within the scope of empirical legislative studies. A characteristic of this branch of legislative studies is the comparison of different legal texts that evolve over time. In the context of this paper, the focus is on the TR that existed before the 2017-2021 reform, the reform package itself. By looking at the substantive provisions, the key aim is to carve out the substantive added value that was brought to the TR during the latest reform. The TR register before the reform hence functions as a yardstick for analysing the amendments made to the TR.

The current research on the TR for natural reasons chiefly focuses on the previous TR. This paper attempts to build on this by introducing the TR reform package not only by presenting the state of play of this legal reform package. I will try to bring new elements to the discussion by explaining how the preparatory texts evolved in the current direction and what the role of peer pressure was in this exercise leading to the genesis of the current TR. This constitutes the empirical legislative studies layer of this paper, which is somewhat different from previous empirical studies on the TR.

### **3 The starting point: the 2011 Transparency Register and the amendment of 2014**

Holman and Luneburg find that previously the North American and European lobbying registers were different. Whereas the US and Canadian systems concentrated on increasing transparency, the European system was more about granting access for lobbyists to decision-makers.<sup>17</sup> This holds true of the evolution of the EU TR regime, which at the outset largely leant – and still does – on controlling the access of lobbyists to EU

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<sup>17</sup> Craig Holman and William Luneburg, 'Lobbying and Transparency: A Comparative Analysis of Regulatory Reform' (2012) 1 *Interest Groups and Advocacy* 75, 75-77.



decision-makers. Nonetheless, when the recent developments are analysed, it is possible to identify the budding form of a wider perception of transparency, for instance in making public the contacts with interest representatives.

The initial transparency register came into being in 2011.<sup>18</sup> It provides for a TR for the Commission and the EP. However, the scope and the voluntary nature of the register in particular gave rise to ideas of reforming the TR system.

The TR of 2014<sup>19</sup> was an offspring of the TR register of 2011. Bunea found in her empirical study on the effectiveness and sustainability of the TR of 2014 from the angle of stakeholders that the TR regime was largely inefficient in reducing the information gap concerning the supranational lobbying between the public and interest groups. Additionally, the sustainability of the TR was considered questionable.<sup>20</sup> In my opinion, the major shortcoming of the 2014 TR was its institutional scope, namely the fact that the Council fell outside it. The Commission and the EP were indeed covered but, for other institutions, most notably the Council, Article VIII of the IIA on the involvement of other institutions and bodies was relevant. This provision set out an invitation for the Council and the European Council to join the register. In the same vein, other EU institutions, agencies and bodies were encouraged to use the framework established with this IIA.

Looking at the scope of the 2014 IIA, the interest representation activities covered do not appear to be all that different from the activities covered in the 2021 IIA.<sup>21</sup> Again, the main difference was the institutional coverage and reach of the IIA. Like many other EU instruments, the IIA of 2014 also contained in its final provisions in Article IX a review clause envisaging a review for 2017. Despite this, the Commission had

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<sup>18</sup> This stage of the EU lobby register with a pivotal role played by the Commission in its design can be considered as an experimental early phase of European lobbying registration. See Dinan (n 9) 240.

<sup>19</sup> Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation [2014] OJ L277/11.

<sup>20</sup> Bunea (n 4).

<sup>21</sup> See Article III of the 2014 IIA: 'The scope of the register covers all activities, other than those referred to in paragraphs 10 to 12, carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions, irrespective of where they are undertaken and of the channel or medium of communication used, for example via outsourcing, media, contracts with professional intermediaries, think tanks, platforms, forums, campaigns and grassroots initiatives'. This provision also included specifications to these activities with a non-exhaustive list of activities. Moreover, the provision contained paragraphs setting out the activities that are not covered.

already used its right of initiative before this foreseen review and made a proposal for a new TR.

Another difference between the IIA exercise of 2014 and the IIA of 2021 relates to interinstitutional negotiation dynamics. The 2014 IIA was a negotiation between the Commission and the EP – two supranational institutions. The later round of review brought into play the Council, which changed the dynamics and made the negotiation more complex. Above all, the Council is the co-legislator together with the EP. It is also a more difficult institution because of its structure: it has the Secretariat but similarly an important layer is the Member States' Permanent Representations to the EU, which have an instrumental role at all levels of Council legislative and policy work.

#### **4 The preparatory process of the Commission and the content of the proposals**

In September 2016, the Commission presented its proposal for an interinstitutional agreement on a mandatory Transparency Register.<sup>22</sup> The legal basis for the reform of the Transparency Register was Article 295 TFEU, which provides for the use of interinstitutional agreements.<sup>23</sup>

In the background, there was a reinforced commitment of the Juncker Commission to increase transparency.<sup>24</sup> The initiative was also linked to the objectives of the interinstitutional agreement on better law-making.<sup>25</sup> On 28 September 2016, the Commission stated:

The Commission has today proposed an Interinstitutional Agreement (IIA) which will put in place a robust system ensuring the transparency of lobbying activities, building on the existing voluntary Transparency Register of the Parliament and the Commission. The Commission is proposing that all three institutions – including the Council – be subject to the same minimum standards for the first time. Under these proposals, meetings with decision-makers from the three institutions

<sup>22</sup> Commission, 'Proposal for an interinstitutional agreement on a mandatory transparency register' COM (2016) 627 final, 28 September 2016. For insights into the mandatory transparency register, see Aleksandra Milicevic, 'The Mandatory Transparency Register Initiative: Towards a Better Governance of Lobbying in the EU' (2017) 19 *Revija za evropsko pravo* 71.

<sup>23</sup> The corresponding provision in Euratom Treaty is Article 106a.

<sup>24</sup> 'A new start for Europe: My agenda for jobs, growth, fairness and democratic change. Political guidelines for the next European Commission' (Strasbourg, 15 July 2014) <[ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech\\_en.pdf](http://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech_en.pdf)> accessed 16 November 2021.

<sup>25</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making. Interinstitutional Agreement of 13 April 2016 on Better Law-making, [2016] OJ L123/1.

would become conditional on prior registration in the Transparency Register.<sup>26</sup>

The Commission college has taken a steady position on the transparency prerequisites of meeting lobbyists over the years.<sup>27</sup> The interest representatives seeking to meet with Commissioners and Commission officials have to register in the TR.<sup>28</sup> Otherwise, the meeting will not take place. The effective use of the TR probably makes the Commission ‘the best pupil in the class’ of EU institutions when it comes to transparency practices.<sup>29</sup> The other two institutions involved in EU law-making, namely the EP and the Council, have followed. Already early on, the EP took action in bringing more transparency to its interaction with different stakeholders. It should be noted that the Commission and the EP are supranational institutions while the Council is intergovernmental and hence *sui generis* with regard to best practices for transparency. What makes the difference here is that the rules for the transparency of an instrumental part of the Council, namely the Member States’ Permanent Representations, can be derived from national law.

With its proposal, the Commission was also heeding the call of civil society to increase the transparency of EU policymaking.<sup>30</sup> For decades, the EU has been criticised for making decisions behind closed doors and the Commission’s proposal was a partial attempt to respond to this criticism. In fact, NGOs had contested the voluntary nature of the previous TR.<sup>31</sup> An extension of the TR seemed a very natural way forward.<sup>32</sup>

<sup>26</sup> European Commission, Delivering on Transparency: Commission proposes mandatory Transparency Register for all EU Institutions. Press release (Brussels, 28 September 2016) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_16\\_3182](https://ec.europa.eu/commission/presscorner/detail/en/IP_16_3182)> accessed 16 November 2021.

<sup>27</sup> Commission Decision 2014/839/EU Euratom of 25 November 2014 on the publication of information on meetings held between Members of the Commission and organisations or self-employed individuals [2014] OJ L343/22.

<sup>28</sup> For the regulatory approach to making public the meetings of top civil servant management of the Commission, see Commission Decision 2014/838/EU Euratom of 25 November 2014 on the publication of meetings held between Directors-General of the Commission and organisations or self-employed individuals [2014] OJ L343/22.

<sup>29</sup> It is possible also to question if this really is the case. For example, Korkea-aho (n 8) finds that, before the latest amendment, ‘of the three institutions, the Council of the European Union, has never been part of the register. While the European Parliament is a founding member, its participation in the transparency register has been half-hearted, leaving the Commission to claim the EU transparency championship’. Hillebrandt (n 14), in turn, considers that an institution can never do it right – even for the best student there is always a lot more work to do.

<sup>30</sup> On civil society participation, see Eva G Heidbreder, ‘Civil Society Participation in EU Governance’ (2012) 7 *Living Reviews in European Governance* 5.

<sup>31</sup> Chari, Hogan, Murphy and Crepaz (n 13).

<sup>32</sup> For past experiences on the EU lobbying regulation, see Heike Klüver, ‘The Contextual Nature of Lobbying: Explaining Lobbying Success in the European Union’ (2011) 12 *Euro-*

For example, Bunea considers that in preparing the TR proposal the Commission functioned as an agenda setter and legitimacy maximiser, seeking to build a reputation for being responsive to the preferences of stakeholders.<sup>33</sup>

The Commission carried out a public consultation on TR during the preparatory process of the proposal. An analysis of responses received were outlined in a separate report.<sup>34</sup> The main message of the individuals participating in the consultation was that the scope of the register should be broadened. Unregistered organisations were largely in favour of excluding certain types of organisations. Registered organisations landed in between these two extremes.<sup>35</sup>

The spearhead of the Commission's proposals was the extension of the scope to cover all three EU institutions and the mandatory nature of the register.<sup>36</sup> These two proposed amendments were to steer the negotiations on the TR over the next four years.

Let us now dig deeper into the Commission's proposal of 2016 as regards its content. Article 5 of the Commission's proposals sets out the rules for interactions conditional upon registration. This is clearly a key provision and it covers all three institutions. Paragraph 1 defines the types of interactions conditional on prior registration of interest representatives. It should be noted that this paragraph includes the interactions related to the EP and the Commission. The novelty of this provision is that it also contains interactions in the Council. For the rules concerning meetings, this extension meant meetings between interest representatives and the Ambassador of the current or forthcoming Presidency of the Council of the EU, as well as their deputies in the Committee of the Permanent Representatives of the Governments of the Member States to the European Union, the Council's Secretary-General, and Directors

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pean Union Politics 483.

<sup>33</sup> Adriana Bunea, 'Regulating European Union Lobbying. In Whose Interest?' (2018) 26 *Journal of European Public Policy* 1579.

<sup>34</sup> European Commission, Analysis of responses to the Open Public Consultation on the proposal for a mandatory Transparency Register, Final Report, report for Secretariat-General (July 2016) <[ec.europa.eu/info/sites/info/files/summary-report-public-consultation-transparency-register.pdf](http://ec.europa.eu/info/sites/info/files/summary-report-public-consultation-transparency-register.pdf)> accessed 16 November 2021.

<sup>35</sup> *ibid.*, i.

<sup>36</sup> Article 5 of the Commission's IIA proposal defined interactions conditional upon registration institution by institution. Furthermore, Article 13 of the proposed IIA set out rules for the voluntary involvement of Member States' permanent representations to the EU. See 'Proposal for an Interinstitutional Agreement on a Mandatory Transparency Register' (Brussels 28 November) 2016. The IIA was complemented, *inter alia*, with an annex setting forth a code of conduct for registrants in the TR for their interactions with the institutions. See Annexes to the 'Proposal for an Interinstitutional Agreement on a Mandatory Transparency Register' COM(2016) 627 final, 28 September 2016.

General.<sup>37</sup> Paragraph 2 of the proposal left implementing the conditionality at the internal discretion of the institution concerned. Furthermore, paragraph 3 of the proposal set out the possibility to go even further in making certain interactions conditional as long as these decisions aimed at strengthening the current transparency framework.

We can conclude that content-wise the most significant proposed amendment in the proposal vis-à-vis the 2014 TR dealt with the scope: the proposed IIA – already by virtue of its name including the three institutions – also stretched the scope to the Council. Regarding the Council, it is important to note that the coverage of the transparency arrangements was extended to the Council Secretariat – albeit to a limited extent. In addition to the rules enshrined in Article 5 of the IIA, the proposal went even further than covering the interactions of the Permanent Representative and the Deputy Permanent Representative of the current and forthcoming Council Presidency. Article 13 also proffered the possibility of the voluntary involvement of the Permanent Representations of the EU Member States. It is interesting to follow how this provision changed towards the end of the negotiations of the TR.

## **5 The handling of the proposals in the EU institutions**

As the name of the legal instrument, the interinstitutional agreement, reveals, the negotiation includes all the EU institutions involved in the legislative process: the Commission, the Council, and the EP. The procedure with regard to dealing with IIAs is quite similar to running an ordinary legislative procedure through the EU law-making machinery.

In accordance with Article 295 TFEU, '[t]he European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature'. The decision-making rule is qualified majority. It is worth noting that IIAs are not considered EU legislation, but rather as internal regulation or soft law. However, the eventuality of IIAs being of a binding nature should not be omitted. Should this be the case in the IIA concerned, it would take the IIA towards a harder regulation than simply internal rules or soft law.

I will next discuss how the co-legislators dealt with the TR in their own internal decision-making processes. Furthermore, I will touch upon the ensuing interinstitutional negotiations, which eventually led to a breakthrough in finding a compromise acceptable to all institutions.

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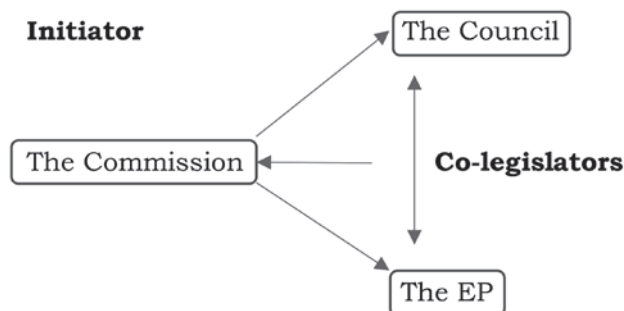
<sup>37</sup> *ibid.*, Article 5(1).

A common feature for all the institutions in dealing with the TR was the sensitivity of the topic. Discussion on transparency legislation is also always subject to a great deal of public attention that may make the legislators more cautious in their positions. It is easy to gain the stigma of a laggard and it is hard to take the profile of leader. In spite of this, what is at issue is not the public image of the institutions but rather the genuine will to increase transparency.

This brings us to the crosscutting issue of institutional peer pressure. In the figure below, I illustrate the impact of peer pressure in the concrete case of the TR. As it demonstrates, the key actors are the Commission, the EP, and the Council. Civil society also provides inputs to the process. The supranational institutions function within the sphere of supranationalism while the Council is located in the sphere of intergovernmentalism.<sup>38</sup> All three institutions are naturally subject to EU law. In addition, in the case of the TR, the Council functions in the spheres of EU law, national law, and international law.

The figure below is a simplified illustration of peer pressure in the case of the TR reform. It demonstrates peer pressure from the initiator of the legislation in this case, the Commission, on the co-legislators in moving forward to a more ambitious system of TR arrangements. On the other hand, it illustrates that the co-legislators jointly exerted peer pressure for the Commission most notably to take a more pragmatic approach to conditionality. It is clear, of course, that the co-legislators, the EP and the Council, exercised peer pressure on each other as well.

Figure 1. Peer pressure and the negotiations on TR



<sup>38</sup> This setting quite often leads to the situation where – in terms of positions – the Commission and the EP are closer to one another and the Council remains a counterforce to the other two institutions. In the case of the TR, this was not the case as the EP and Council had quite a similar line in the deal-breaking substantial issue, conditionality, while the Commission's position represented a different view.



### 5.1 Discussion in the Parliament

The EP had already implemented its lobbying register in 1996. However, during the first few years of the register, the focus of the Parliament was largely on the access of lobbyists to EP premises. Afterwards, there was a change in approach. Notwithstanding this, the EP has been characterised as lacking formal rules governing how MEPs consult interest groups.<sup>39</sup> The EP has also faced criticism about its rather narrow focus on transparency as a regulatory goal.<sup>40</sup>

After the publication of the Commission's proposal, the EP started its proceedings. The responsible committee on the TR in the EP was the Committee on Constitutional Affairs (AFCO). The EP also set up a particular contact group for dealing with this proposal. In fact, the contact group proved in practical terms extremely important for dealing with the TR proposal in the EP. MEP Sylvie Guillaume and MEP Danuta Hübner (then chair of the AFCO Committee) were appointed by the Conference of Presidents of the EP (CoP)<sup>41</sup> as lead negotiators. After extensive internal work in the EP, the CoP adopted on 15 June 2017 the EP negotiating mandate on the TR.<sup>42</sup>

After the EP elections in spring 2019, it took some time for the EP to become internally organised and also for this file to be set into motion again within the EP.<sup>43</sup> In April 2020, the CoP appointed the lead negotiators<sup>44</sup> and then confirmed the mandate of the EP. The interinstitutional negotiations could then resume.

In substantive terms all the way from the beginning of the negotiations, a key point for the EP was to preserve the freedom of mandate of

<sup>39</sup> Maja Kluger Dionigi, *Lobbying in the European Parliament. The Battle for Influence* (Palgrave MacMillan 2017) 15.

<sup>40</sup> Ammann (n 10) 258.

<sup>41</sup> The CoP is a political organ ranking the highest within the EP and it consists of the Chairs of the Political Groups. The President of the European Parliament plays a pivotal role in the CoP.

<sup>42</sup> For details of the EP negotiating mandate on the TR, see <[www.europarl.europa.eu/RegData/publications/reg/2017/602260/EP-PE\\_REG\(2017\)602260\\_XL.pdf](http://www.europarl.europa.eu/RegData/publications/reg/2017/602260/EP-PE_REG(2017)602260_XL.pdf)> accessed 16 November 2021.

<sup>43</sup> On unfinished business, it is laid down in Article 240 of the EP Rules of Procedure that '[a]t the end of the last part-session before elections, all Parliament's unfinished business shall be deemed to have lapsed, subject to the provisions of the second paragraph. At the beginning of each parliamentary term, the Conference of Presidents shall take a decision on reasoned requests from parliamentary committees and other institutions to resume or continue the consideration of such unfinished business'.

<sup>44</sup> Vice President of the EP, Katarina Barley, was appointed as the lead negotiator on behalf of the EP, together with MEP Danuta Hübner, who continued in this capacity.

MEPs.<sup>45</sup> The negotiating mandate set out a clear objective, according to which any conditions introduced should

fully respect the Institutions' and their members' respective roles, as provided for under the Treaties; this shall include in case of the Members of the European Parliament respect for the provisions of the Statute which sets out independence of the mandate; consequently applicability to Intergroups and unofficial groupings organised by Members should be determined by the Parliament.<sup>46</sup>

The EP therefore defended its institutional prerogatives and raised its institutional peculiarities in the discussion. Nevertheless, practical and meaningful ways to increase transparency were sought in the EP proceedings.

How did the EP tackle the issue internally? Within the EP, the EU primary law provisions on transparency cascade down in the EP Rules of Procedure.<sup>47</sup> The EP introduced changes in its RoP, limiting the access of lobbyists to EP premises should they not be registered.<sup>48</sup> As for the freedom of mandate, the EP adopted changes to its RoP. Pursuant to rule 11(2) of the EP RoP, MEPs should only meet interest representatives registered in the TR. This practice puts considerable peer pressure on MEPs to make full use of the register. Bringing in such internal arrangements can also be seen as an attempt to transform the TR for the EP towards a hybrid model consisting of different forms of practical transparency arrangements, which derive from different EU instruments.

## **5.2 Discussion in the Council**

One major shortcoming in the scope of the previous TR was the exclusion of the Council and the EU agencies, although some commenta-

<sup>45</sup> Pursuant to Article 6(1) of the EU Electoral Act of 1976 currently in force, 'Members of the European Parliament shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate'. See Act concerning the election of members of the European Parliament by direct universal suffrage [1976] OJ L278/5. It should be noted that the new EU electoral law has not yet entered into force due to the lack of national approval by all the EU Member States in accordance with their national constitutional law provisions. See also the Decision of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament 2005/684/EC Euratom.

<sup>46</sup> EP negotiating mandate on TR (n 42).

<sup>47</sup> Ammann (n 10) 255.

<sup>48</sup> The EP approved in the January 2019 plenary session an amendment to its rules of procedure. This amendment required rapporteurs, shadow rapporteurs and committee chairs to publish meetings with interest representatives. Additionally, other MEPs were also encouraged to do so. See <[www.europarl.europa.eu/news/en/press-room/20190123IPR24128/ep-approves-more-transparency-and-efficiency-in-its-internal-rules](http://www.europarl.europa.eu/news/en/press-room/20190123IPR24128/ep-approves-more-transparency-and-efficiency-in-its-internal-rules)> accessed 16 November 2021.

tors have argued that this was not particularly problematic because the same actors also lobby the Commission and the EP.<sup>49</sup> Being of a different institutional nature should not however be an excuse for the Council to be excluded from the TR. In addition, EU agencies play a significant role with their expanding tasks and competences in formulating EU policies and this was another blind spot in the previous TR exercises.

In the Council discussion on the TR, the biggest legal hurdle was how to involve Member States' Permanent Representations<sup>50</sup> in the application of the TR. This proved legally impossible due to the fact that under EU law and international law, most notably the Vienna Convention on Diplomatic Relations, regulating the Permanent Representations falls within the competence of the State concerned.<sup>51</sup>

In the figure below, I have illustrated the hybrid model of the TR in the context of the Council. The regulatory framework is EU law, national law, and international law, although one must bear in mind that EU law does not offer a solution to the use of the TR in the case of Permanent Representations from the competence point of view. International law and national law are the drivers in this regard. The figure below illustrates this. The starting point is the sovereignty of Member States over their Permanent Representations enshrined in the Vienna Convention. This means that the Member States have full control of their Permanent Representations to the EU and the transparency arrangements that they follow. This stems from international law. Given the Member States' competence, national transparency legislation can be applied on Permanent Representations. Furthermore, EU legislation and transparency policies offer an important source from which Permanent Representations can draw inspiration, for example for their unilateral transparency arrangements. However, it is a different story for the GSC. EU law, on this occasion the TR IIA, offers a sound and solid legal basis for GSC involvement. When addressing Council involvement, it must be borne in mind that the legal basis for regulating the transparency register is not shared competence.

The hybrid model includes different elements: the provisions of the TR package placed legal obligations on the GSC but, for the Permanent

<sup>49</sup> See Stijn Smismans, 'Regulating Interest Group Participation in the European Union: Changing Paradigms between Transparency and Representation' (2014) 39 *European Law Review* 470.

<sup>50</sup> All the 27 Member States have Permanent Representations to the European Union. Permanent Representations are accredited to the EU and diplomats working there represent the Member States concerned to the EU institutions and participate in the preparation of EU policies and legislation at various levels of policy-making organs, most notably within the Council.

<sup>51</sup> Vienna Convention on Diplomatic Relations, United Nations Treaty Series Vol 500, 95.

Representations, it is all about political aspirations. In addition to the use of the TR, I have also included a layer of unilateral actions, such as the publication of the meetings of the top management of the Permanent Representations. This form of unilateral action of course falls within the category of political actions.

Figure 2. The levels of the regulatory framework for major Council actors in the light of the TR

EU law	National law	International law
GSC		
PRs	PRs	PRs

In the face of this legal conundrum, the Council started to prepare a political way out of the impasse in building a legally sound solution for involving Permanent Representations. The way forward was found in a political declaration to be signed by Member States willing to use the transparency register six months before the start of the rotating Presidency of the Council of the European Union<sup>52</sup> and during the Presidency. Some Member States also took unilateral measures by publishing the meetings of Permanent Representative and Deputy Permanent Representative of the Permanent Representations to the EU with the interest representatives.

After lengthy negotiations within the Council,<sup>53</sup> the Council Working Party on General Affairs (Coreper)<sup>54</sup> agreed upon a negotiation man-

<sup>52</sup> In accordance with Article 1(4) of the Council Rules of Procedure (RoP): ‘The Presidency of the Council, with the exception of the Foreign Affairs configuration, shall be held by pre-established groups of three Member States for a period of 18 months. The groups shall be made up on a basis of equal rotation among the Member States, taking into account their diversity and geographical balance within the Union. Each member of the group shall in turn chair for a six-month period all configurations of the Council, with the exception of the Foreign Affairs configuration. The other members of the group shall assist the Chair in all its responsibilities on the basis of a common programme. The members of the team may decide alternative arrangements among themselves’.

<sup>53</sup> Pursuant to Article 2(2) of the Council RoP, ‘[t]he General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission. It shall be responsible for overall coordination of policies, institutional and administrative questions, horizontal dossiers which affect several of the European Union’s policies, such as the multiannual financial framework and enlargement, and any dossier entrusted to it by the European Council, having regard to operating rules for the Economic and Monetary Union’.

<sup>54</sup> Coreper stands for the Committee of Permanent Representatives of the Member States of the European Union. It is set out in Article 16(7) of TEU that says ‘[a] Committee of Per-

date under the Estonian Presidency in December 2017.<sup>55</sup> This formed the basis of the Council position for interinstitutional talks with the Commission and the EP.

In the course of the negotiations in the Council, it became evident that the legal architecture of the Transparency Register ought to change. In addition to the IIA, the Council complemented the package with a Council Decision. The change in the legal architecture should be understood as reflecting in a steady fashion the prerogatives of each institution to define its own internal best practices. This also illustrates the aspiration of the Council to transform the EU TR into a multi-layered hybrid model and, together with the EP, to include the endeavour of the Commission for a uniform TR regime in the EU.

### **5.3 Interinstitutional negotiations**

The interinstitutional negotiations on the Transparency Register went on during the Bulgarian, Austrian and Romanian Presidencies but were halted due to the EP elections and the subsequent internal organisation of the EP and the change of the Commission in 2019.<sup>56</sup> During this phase of stalled negotiations, important inputs to the process were given by the European Ombudsman Emily O'Reilly who issued suggestions on the TR on 27 June 2019 based on filed complaints. She argued that the register should be a 'central transparency hub' for all institutions and agencies. Furthermore, she considered that monitoring and sanctioning should be regulated. The necessity to govern the lobbying of Member States officials was also brought up.<sup>57</sup>

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manent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council'. The tasks of Coreper are defined more specifically in Article 19 of the Council RoP. For practical reasons related to its preparatory role, Coreper has been divided into two formations, Coreper II chaired by the Permanent Representative and Coreper I chaired by the Deputy Permanent Representative of the Presidency. Coreper II is responsible for substantive preparation in the areas of economic and financial affairs, foreign affairs, general affairs and justice and home affairs, while Coreper I deals with agriculture, fisheries, competitiveness, education, youth, culture, sport, employment, social policy, consumer affairs, environment, transport, telecommunications and energy, ie the issues falling under the old Community pillar.

<sup>55</sup> Council of the EU, Council Agrees Mandate for Negotiations. Press release of 6 December 2017 <[www.consilium.europa.eu/en/press/press-releases/2017/12/06/transparency-register-council-agrees-mandate-for-negotiations/#](http://www.consilium.europa.eu/en/press/press-releases/2017/12/06/transparency-register-council-agrees-mandate-for-negotiations/#)> accessed 16 November 2021.

<sup>56</sup> The interinstitutional negotiations are conducted in the so-called trilogues. On trilogues, see Gijs Jan Brandsma, Justin Greenwood, Ariadna Ripoll Servent and Christilla Roederer-Rynning, 'Inside the Black Box of Trilogues: Introduction to the Special Issue' (2021) 28 *Journal of European Public Policy* 1.

<sup>57</sup> European Ombudsman, Efforts to Improve the EU Transparency Register (27 June 2019) <[www.ombudsman.europa.eu/en/correspondence/en/67708](http://www.ombudsman.europa.eu/en/correspondence/en/67708)> accessed 16 November 2021.

After the institutional changes, the negotiations resumed in 2020. The single most important political and legal issue to be extracted from the negotiations on the TR is conditionality.<sup>58</sup> This means the application of the principle ‘no registration, no meeting’.

The Commission was very much sticking to its guns on the principle of conditionality until the change of the Commission. It, however, became evident that it would not be possible to agree on the *stricto sensu* application of this principle due to the legal constraints, most notably the lack of EU competence to cover Permanent Representations and also MEPs. Therefore, the institutions agreed on an alternative way forward, including complementary elements of a different nature to the TR arrangements.

During the German Presidency to the Council, the negotiations gathered momentum again, despite the practical restrictions that COVID-19 set on the conduct of negotiations. The solution found was marked by a slightly lower level of ambition, yet was a practical and meaningful way of involving all the institutions in the TR.

Why were interinstitutional negotiations on this file so difficult? The big volume of the TR package and the phase of institutional change with the new EP and the Commission stepping to the stage in 2019 only offer a partial explanation. The main issue in bringing clarity to this is the difference of the major positions of the institutions on conditionality, in particular. It is important to realise that this difference of views was not only a political issue but also a legal one. A breakthrough in the negotiations was achieved when all the institutions accepted a new architecture for the basics of the TR. This consisted of different EU instruments with both legally binding and non-binding elements. This system is the hybrid model of the TR. Mutual peer pressure can be seen as an important factor in facilitating the search for consensus.<sup>59</sup> It can often be the case that in transparency measures other institutions are eager to point out the shortcomings of other institutions.<sup>60</sup> Peer pressure should not be seen as merely consisting of negative aspects, some sort of interinstitutional blame-game. With peer pressure, one can also understand positive aspects, such as trying to genuinely and proactively strive for higher standards of transparency. This does not always include interinstitutional

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<sup>58</sup> Definition h) of Article 2 of IIA on the TR defines conditionality in the following way: “conditionality” means the principle whereby registration in the register is a necessary precondition for interest representatives to be able to carry out certain covered activities’.

<sup>59</sup> According to Hillebrandt (n 14), ‘when we look at the development of most policies related to transparency, we see that they are indeed strongly tied up with interinstitutional competition’.

<sup>60</sup> *ibid.*



considerations and pondering whether ‘my institution’ looks good or bad compared with ‘other institutions’. With best practices, it is possible to encourage other institutions to take into use measures of doing better in transparency.

## **6 The final outcome of the Transparency Package**

The EU institutions reached a compromise on the package in December 2020.<sup>61</sup> The EP AFCO Committee voted on the package on 13 April 2021 and the EP plenary adopted it on 16 April 2021. The Council agreed to adopt the whole package on 6 May 2021 and it was published in the Official Journal on 11 June 2021.<sup>62</sup> The final compromise package contained a change in the legal architecture. It now included the IIA, the Council Decision, and the Code of Conduct.

If one examines the key Article 5 of the IIA, one can detect that paragraph 5 which sets out the rules on individual institutions has been removed. Other parts of the Article remain largely intact with regard to the content. In the context of the Council, the principle of leaving more precise decisions to the discretion of institutions was concretised in the Council Decision on the regulation of contacts between the General Secretariat and interest representatives.<sup>63</sup>

All the EU Member States re-affirmed their commitment to the TR by signing the accompanying declaration on the utilisation of the TR six months before the Presidency and during the Presidency. The fact that all the Member States’ governments in the end joined the declaration can be regarded as a major success. The utilisation of the TR by Member States’ Permanent Representations is a good and practical way forward in mainstreaming the use of the register for significant players in the Council in a concrete manner. Even though making public the meetings between interest representatives and the management of the Permanent Representations is not a part of the declaration, it should be noted that an increasing number of Member States make public these meetings.<sup>64</sup> The power of setting an example and incentives should not be underestimated.

<sup>61</sup> See, for example, the Commission’s related press release <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2327](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2327)> accessed 16 November 2021.

<sup>62</sup> Interinstitutional Agreement of 20 May 2021 between the European Parliament, the Council of the European Union and the European Commission on a mandatory transparency register [2021] OJ L207/1.

<sup>63</sup> Council document 5703/21, Brussels 16 April 2021.

<sup>64</sup> The trio Presidencies have also made public the meetings with interest representatives, starting from the trio consisting of Romania, Finland and Croatia.

An equally important element in the TR was the political statement of the three institutions that underscores the importance of 'conditionality as a cornerstone of the coordinated approach the three institutions have taken with the aim of reinforcing a common transparency culture while setting high standards of transparent and ethical interest representation at Union level'.<sup>65</sup> The political statement further specified the conditional and complementary transparency measures that are in place and consistent with the IIA. The political statement is another important element of the TR package, which takes the new EU TR system towards a hybrid model. Even though this statement is of a political nature, it may in the longer term feed into the future preparation of EU transparency legislation. The joint political declaration can also be seen as a token of the political importance that the institutions attach to transparency. All three institutions wanted to be part of it and this leads to the thought that interinstitutional peer pressure must have been in place.

There are naturally differing opinions on this and views that the new agreement is not a step forward.<sup>66</sup> One source of criticism is naturally the scope of the TR. The result is not perfect as it seldom is in the work of the EU legislator, but it is good in the current circumstances. An optimal solution would have been an even more mandatory register involving all the three institutions on a broad and compulsory basis. Increasing transparency is not, however, as simple as one might think at first. Introducing a very rigid system of transparency may not always be the best solution for true transparency. The type of transparency at issue is after all the mainstreaming of transparency at various levels of governance, and one could well call it a transparency culture. If the scope of the TR can be seen as a weakness of the package, it can similarly be considered a strength. Despite certain shortcomings in the extent of the scope, the reform of the TR introduces new openings especially towards increasing the scope to the Council and deepening the involvement of the EP, too.

The result achieved respected the institutional balance.<sup>67</sup> Within the frame of an IIA and its legal basis, it is particularly important to

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<sup>65</sup> Political statement of the European Parliament, the Council of the European Union, and the European Commission on the occasion of the adoption of the interinstitutional agreement on a mandatory transparency register.

<sup>66</sup> Korkea-aho (n 8).

<sup>67</sup> The Treaties do not directly refer to institutional balance. However, it is enshrined in Article 13(2) TEU that '[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation'. The concept of institutional balance has developed in EU law mainly as part of the interpretation practice of the CJEU, especially in the landmark ruling *Meroni*. See Case C-9/56 *Meroni & Co, Industrie Metallurgische, SpA v High Authority of the European Coal and Steel Community* ECLI:EU:C:1958:7.

safeguard the institutional prerogatives of the institutions, even when designing the transparency arrangements.

Over the years, the European system has been undergoing a transformation, which can even be called a new wave of strong lobby regulation.<sup>68</sup> Holman and Luneburg have argued that especially the Commission's 2008 European Transparency Initiative campaign 'fundamentally transformed the objective of lobbyist registration systems to focus on transparency and bolstering public confidence in the EU'.<sup>69</sup> Despite the hybrid model features, the reform of the EU TR can be considered an example of this evolution.

The main benefit in the TR is the extended scope of the approved package. The TR is now mandatory, although certain major limitations do exist. However, a significant achievement is the extension of the TR to the Council. This will inevitably create a precedent for further extensions in future reviews of the TR. It can be argued that the interpretation of competence, the scope itself, and possibly related tasks only evolve in one direction, namely that of further extension and integration. There is usually no rolling back of competences and tasks.

Although there have been some comments about a watered-down TR after the deal was made public, I think that in particular the extension of the scope of the TR and its mandatory nature are elements that merit that the package be called a reform rather than simply an amendment.<sup>70</sup>

## 7 Conclusions: credit and critique

How does the new TR look in the light of the introduced amendments? The reform of the EU TR can be criticised for lack of ambition. On the other hand, it can be argued that the achieved package is as good as it gets at this point of time. It should not be forgotten that the package extends the scope of the TR to the Council Secretariat,<sup>71</sup> which is an instrumental actor in the Council legislative process. The new TR is also strengthened by the rules on third-country lobbying.<sup>72</sup> Further-

<sup>68</sup> Holman and Luneburg (n 17) 91-92.

<sup>69</sup> *ibid.*, 92.

<sup>70</sup> Misgivings about the mandatory nature of the TR have been raised by some commentators after the final deal on the TR was made public. See *inter alia* Korkea-aho (n 8).

<sup>71</sup> Coverage within the GSC includes the levels of Secretary General and Directors General. Despite the neutral status of the Council Secretariat, in practical terms it has an important role in the law-making process on the Council side. Not much research has been conducted on how intensively the GSC is a target for lobbying, but it is nonetheless important to cover it due to the need to impose rules on this operative and organisational part of the Council. Extending the scope to the GSC means putting in place safeguards.

<sup>72</sup> Korkea-aho (n 8).

more, the package sows the seeds for the greater involvement of Member States' Permanent Representations to the EU. This can also be considered an achievement against the backdrop of the lack of legal basis for the mandatory involvement of Permanent Representations. The strong commitment, albeit a political one, is clearly a step in the right direction. Therefore, as the title of this paper suggests, the latest amendment to the TR deserves to be called a reform.<sup>73</sup>

Soft-law measures and voluntary approaches stemming from different actors in the administration of law-making entities should not be ignored. For example, making public the meetings of senior management of these public organisations with interest representatives can proffer significant added value to the transparency regime in question by providing information to citizens about who is meeting with whom in different phases of policy making. For public acceptance and for the comprehension of the public, it would be necessary to have minimum standards for the TR. It would be hard to explain to the public why different EU institutions are applying different practices.<sup>74</sup> The compromise package achieved can be regarded as a sufficient minimum standard, on which additional elements can be built. The need for common standards does not deny that institutions are by nature different.

Striving for transparency is not just about clearing a hurdle but engaging in an open process of increasing transparency. Efforts in this regard should above all be incentive efforts – ie actions aiming truly at increasing transparency – and not just fulfilling formal obligations. The practical impact of these actions can be more significant than that of legal obligations, especially in areas where the limits of EU competence are relatively obscure.

When considering the effectiveness of the outcome of the reform of the TR, it is possible to observe that the new arrangements improve *prima facie* the effectiveness of the TR system. This is mainly due to the extension of the scope of the new TR, but also thanks to additional elements, such as the participation of Member States' Permanent Representations, albeit on a voluntary basis. The hybrid model of the TR clearly has its merits. The political declaration on the use of the TR for meetings of the Permanent Representatives and the Deputy Permanent Representatives are significant because this level of officials is the target of quite signif-

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<sup>73</sup> The new EU TR introduces a new legal architecture that also brings a fundamental change to the previous TR system.

<sup>74</sup> Furthermore, there has not been much progress in setting out joint legislative observatories for EU institutions, which means that citizens still have to deal with separate observatories if they want to track down how different legislative initiatives have proceeded in the EU decision-making process.

ificant high-level lobbying by interest representatives. In many respects, Deputy Permanent Representatives are subject to an even higher volume of lobbying due to the policy sectors falling under Coreper I, which are of great interest to lobbyists. These policy sectors include, for example, environment, energy, industry, transport and telecommunications policies.

This improves the overall effectiveness of the EU TR, but naturally it remains for research at a later stage to judge the overall impact of the new TR on increasing transparency based on the gathered data. For an in-depth analysis of the impact of the new TR, one would need parameters and the necessary temporal distance.

The exercise of reforming the TR also reveals some differences between institutions as regards the approach to the TR. Although the institutions share the same objective of increasing transparency, they took a rather different line on how to achieve this objective. The Commission deserves credit for launching the reform initiative. The Council took quite an intergovernmental view on the reform, stressing the prerogatives of Member States. In addition, the EP was to some extent reluctant to address the issue of freedom of mandate in a more stringent way in the context of the TR, but still exercised peer pressure on the Council.

On institutional peer pressure, one can generally say that it greatly contributed to the adoption of the final compromise package. The Commission maintained throughout the negotiations the need for an ambitious TR arrangement and led by example. This had an effect on the functioning of the co-legislators. The EP and the Council, in turn, exerted peer pressure on each other and sought to go further in the transparency arrangements. Outside pressure, such as that from NGOs, also had an impact on the result.

The need to regulate the domain of the EU transparency register with IIAs is rather problematic. This legal instrument does not create sufficiently firm legal possibilities for tougher measures when it comes to the application of the rules, such as imposing sanctions. As I see it, utilising the catch-all Article 352 TFEU<sup>75</sup> would not improve the situation – in fact, it might be counterproductive due to the unanimity requirement that also runs the risk of resorting to the lowest common denominator and thus watering down legislation. For example, Krajewski concluded

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<sup>75</sup> The subsidiary powers doctrine is enshrined in Article 352 TFEU. In accordance with Article 352(1), '[i]f action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament'.

that the EU has been given the power to regulate lobbying activities in a binding manner and recourse to Article 352 TFEU is therefore not necessary.<sup>76</sup> Article 298(2) TFEU could have offered an interesting opportunity to serve as the legal basis for the TR with the ordinary legislative procedure, but the problem of this provision is its scope:<sup>77</sup> it is limited to public administration.

For the future, it might be useful if EU primary law included a special legal basis for secondary legislation on the transparency register. Even though the eventuality of amending Treaties is unlikely, the on-going Conference on the Future of Europe could be an excellent opportunity to consider this option for a Treaty provision for the transparency register, should the conclusion of the conference engage in the reform of the Treaties.<sup>78</sup> A new legal basis could also be helpful in legal terms to introduce tougher sanctions for not complying with the TR.

Too rigid transparency regimes may lead to unintended consequences. During the reform of the TR, discussion was held on the role of small-scale interest representatives, such as very small companies, in the context of the requirements of the TR. Concerns were expressed that the TR might put small and large actors in unequal situations in terms, amongst others, of the administrative burden of registering. The final compromise package included a provision pursuant to which small interest representatives meet the registration requirement if their 'umbrella organisations' are registered in the TR.<sup>79</sup> It would not have been positive for transparency if the access of very small actors to the EU decision-making was made harder by excessive red tape. Hence, the solution found was good.

The new obligations and further commitments of the institutions will lead to the further mainstreaming of the utilisation of the TR, even though the coverage is not as wide as it should be. Nevertheless, EU institutions are advancing in utilising the TR and best practices will be

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<sup>76</sup> Markus Krajewski, 'Legal Framework for a Mandatory EU Lobby Register and Regulations: Legal Study' (2013) 12 available at SSRN <<https://ssrn.com/abstract=2284843>> accessed 16 November 2021.

<sup>77</sup> It is provided in Article 298 TFEU that '1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration. 2. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary procedure, shall establish provisions to that end'.

<sup>78</sup> See European Commission, 'Communication to the European Parliament and the Council: Shaping the Conference on the Future of Europe' COM(2020) 27 Final (Brussels, 22 January 2020). See also Joint Declaration on the Conference on the Future of Europe 6796/21 (Brussels, 5 March 2021).

<sup>79</sup> Recital 10 of IIA.



shared. It can be expected that this will pave the way for the further development of the TR and ultimately for its wider scope.

The EU TR is obviously undergoing transformation into a hybrid system. The mandatory register is being complemented by additional, softer elements, such as voluntary measures by the Member States' Permanent Representations. This transformation process will most probably lead to a more mandatory TR system at the EU level in the course of time. In the meantime, one should look at the evolved TR as practically as possible and identify openly the advantages and disadvantages of the system.

Making public the meetings of key decision-makers with interest representatives should be understood as an essential element in this kind of hybrid system of transparency. This is the case especially with Member States' Permanent Representations whose coverage in the TR encounters significant legal constraints.<sup>80</sup> Nonetheless, making public the meetings should be an issue not only for the Council but for all the EU institutions and this should be considered when the time comes for a review of the new TR system. In the potential next round of amending the TR, making public the meetings with interest representatives could be made mandatory for all institutions.<sup>81</sup>

The reform of the EU TR is not the end. It is a start. It has opened the door for greater transparency for all the institutions involved in the EU legislative process. It can also be expected that this package will be subject to review once there is enough evidence on the functioning of the new arrangements. In this case, the issue will be to set the bar higher. The key point is to have in the medium term a mandatory TR, which would allow sufficient flexibility for different EU institutions to put into use the most effective transparency measures.



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<sup>80</sup> It should be noted that there are differences between the magnitude of lobbying between Coreper I and Coreper II. Coreper I sectors have traditionally been targets of more extensive lobbying activities.

<sup>81</sup> As for the level of applying the publication, the level of the heads of unit of all institutions could be feasible.