

# **En route to multilevel governance. How the EU Transparency Register contributed to a strengthened role of subnational actors in the EU lawmaking process**

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**RESUMO:** Os actores subnacionais levan décadas influíndo activamente na lexislación da UE. O artigo ofrece unha visión xeral das entidades locais e rexionais de Alemaña e o seu papel no sistema constitucional federal e europeo e explica como contribuíron ao desenvolvemento dun rexistro de transparencia obrigatorio da UE. Inclúe unha descrición detallada das diferentes etapas do proceso e que actores participaron. O resultado das negociacións avalíase en función dos seus efectos sobre os entes locais e a gobernanza multinivel mentres se considera a lexislación futura.

**Palabras chave:** Alemaña, Unión Europea, actores subnacionais, Rexistro de Transparencia da UE, lobbying

**RESUMEN:** Los actores subnacionales han estado influyendo activamente en la legislación de la UE durante décadas. El artículo proporciona una descripción general de las entidades locales y regionales en Alemania y su papel en el sistema constitucional federal y europeo y explica cómo han contribuido al desarrollo de un registro obligatorio de transparencia de la UE. Esto incluye una descripción detallada de las diferentes etapas del proceso y qué actores estuvieron involucrados. El resultado de las negociaciones se evalúa con respecto a sus efectos sobre las autoridades locales y la gobernanza multinivel al considerar la legislación futura.

**Palabras clave:** Alemania, Unión Europea, actores subnacionales, Registro de Transparencia de la UE, lobbying

**ABSTRACT:** Subnational actors have been actively influencing EU legislation for decades. The article provides an overview of local and regional entities in Germany and their role in the Federal and European constitutional system and explains how they have contributed to the development of a mandatory EU transparency register. This includes a detailed description of the different stages of the process and which actors were involved. The result of the negotiations is assessed with regard to its effects on local authorities and multilevel governance while considering future legislation.

**Keywords:** Germany, European Union, subnational actors, EU Transparency Register, lobbying,

## Introduction

Subnational public entities have been actively involved in the European Union's legislative process for many years. While there are substantial differences concerning the constitutional role of local authorities between member states, the options for engagement with the European Institutions are comparable. In this article, the author will try to provide insight into the work of a German local government association on the example of the measures that were undertaken by the German County Association and its partners on the development of a European Transparency Register. The Transparency Register plays a vital role in regulating the way local authorities cooperate with the European Institutions and therefore is a key element of a working multilevel-governance system.

### 1. Local government and its associations in Germany

To fully understand the work of local government associations in Brussels, one will first need a basic understanding of the very complex federal structure of Germany and the role of local authorities within. The following paragraphs will provide a basic introduction into the levels of public administration in Germany and the way they work together.

Local government is considered the "third tier" of public administration in Germany, with the first tier being the national (*Bundesregierung*) and the second the regional governments (*Landesregierungen*). With regards to the federal constitutional structure, local authorities are considered part of the regional authorities (*Länder*) with a strong right to self-government. The local administrative level in Germany currently consists of 11,056 municipalities (cities and towns), 294 county-councils, the latter existing only in 13 of the 16 federal states (three states – Berlin, Bremen and Hamburg - are so called city states which are considered both local and regional entities and accordingly fulfil tasks attributed to local and regional authorities), and numerous other local and supra-local entities. The right to self-government, which is enshrined in Article 28 of the German constitution, grants local authorities a wide range of rights and competences where they can act autonomously and within their own discretion (cf. Ruge & Ritgen, 2021:130).

The three German national local government associations (Association of German cities, German County Association and the German Association of Towns and Municipalities) jointly represent all local authorities in Germany. The associations' main task is the representation of interests towards the federal government and the federal parliament. The national headquarters of the associations are in Berlin, Bonn and Köln, but a representation towards the EU was established in Brussels in 1991. What started as a joint undertaking is now developed into three independent offices that each comprises between one to three full time equivalent positions. In recent years, several regional associations, metropolitan regions and other related entities (one of them being the Association of German Public Utilities, "VKU") have set up further individual offices. The associations' staff fulfil a number of tasks, the main priority being the monitoring of EU legislation and the representation of interests towards the EU Institutions.

Local government associations play an important role in both national and regional legislative procedures. A obligatory consultation of the three national local government associations is foreseen within the rules of procedure for the Federal Ministries (see Article 47(2) *Gemeinsame Geschäftsordnung der Bundesministerien*) and the Federal Parliament (see Article 70 *Geschäftsordnung des Deutschen Bundestags*) for legislative acts that affect local governments' competences. Similar rules exist within the regional constitutions for regional local government associations (e.g. Article 71 (2) *Verfassung des Landes Baden-Württemberg*).

When it comes to legislative procedures on EU level, the situation proves to be quite different. The treaties of the European Union establish a close cooperation between member states (the national level that is represented by the Council) and the other European Institutions

(which extends partly to the regional authorities through Article 12 TEU (Treaty on European Union) given the Bundesrat is considered a national parliament in that sense). Being a federal country, a law was introduced in 1993 (Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union, EUZBLG) which has the sole purpose of regulating the cooperation between federal and regional authorities. On the basis of this law, the regional authorities have the right to be informed of any new legislative proposals that could be of interest to them (see § 2 EUZBLG). The aforementioned law furthermore grants the regional authorities access to negotiations on an EU level in cases legislative proposals have a possible impact on areas that lie within the intranational competence of the regions (see § 4 EUZBLG).

Despite the local authorities being considered a part of the regional authorities (in a federal constitutional sense, see above), they are not granted any comparable rights. The Federal Government is not obliged to inform the local government associations of any relevant legislative proposals, and neither are the regional authorities. Local government associations have no right to participate in negotiations within the legislative procedures at EU level. The European treaties include an obligation for the EU institutions to “respect the equality of Member States (...) as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government” (see Article 4 (2) TEU), but do not oblige the European Commission or the Parliament to formally consult local government associations on legislative acts that would have an impact on their competences and/or tasks. Like every private sector company, citizens and NGOs, local authorities and their associations have the right to participate in public consultations, however until today the European Commission often treats their contributions no different than those it has received from private entities or civil society.

A good example of this practice can be found in the results of the consultation on the future of the Common Agricultural Policy. Within a three-month long consultation period, the European Commission has received over 322,000 replies, with the majority (61 %) coming from private enterprises<sup>1</sup>. Even though the policy is highly relevant to local authorities in most member states, only 3 % of the contributions were submitted by regional or local authorities (public or mixed) – one of them being the contribution that was sent by the author of this article on behalf of the German County Association. In the months following the consultation, European Commission officials often criticized the small number of contributions received from local authorities. When discussing this point with representatives of the Secretariat General (which is internally responsible for public consultations) it became clear that the European Commission followed a purely quantitative approach, counting the contribution of the German County Association solely as one of 322,000 it has received without applying any additional qualitative criteria and thus not considering the large number of entities that are represented by the local government association. Given this experience, the German County Association currently limits its participating in public consultations to cases that are of very high relevance to its members.

The most viable option to make the local governments’ voice heard in a formal manner within the European legislative procedure is by addressing the issue in the European Committee of the Regions (CoR). Created in 1994, the European Committee of the Regions is an advisory body which represents the interests of regional and local authorities in the European Union and issues opinions on their behalf to the Council and the Commission. Out of 350 seats in total, the three German local government associations each hold one of the 24 seats that are assigned to Germany, while the 16 regional authorities hold the remaining 21 seats. According to Article

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<sup>1</sup> An overview of the contributions is provided in the Factual Summary of the European Commission: [https://ec.europa.eu/info/sites/default/files/food-farming-fisheries/key\\_policies/documents/prelim-report-public-consul-modernising-simplifying-cap\\_2017\\_en.pdf](https://ec.europa.eu/info/sites/default/files/food-farming-fisheries/key_policies/documents/prelim-report-public-consul-modernising-simplifying-cap_2017_en.pdf)

307 Treaty on the Functioning of the European Union (TFEU), the European Institutions must consult the CoR “where the Treaties so provide and in all other cases (...) in which one of these institutions considers it appropriate”. The CoR additionally can issue a so called “own initiative opinion” in cases in which it considers such action appropriate. Even with the unbalanced distribution of seats between regional and local level within the German delegation, the CoR plays a vital role in the work of the German Local government associations due to the vast number of representatives of local authorities from other member states and possibilities it provides to form cross-border alliances and to exchange amongst members.

## **2. A European Transparency Register**

In 2014, the European Commission (EC) presented a proposal for an Interinstitutional Agreement between the European Council (Council), the European Parliament (EP) and the Commission that would have in many cases obliged representatives of local authorities – even at the political level – to register in a joint Transparency Register prior to any meeting or contact with European Commissioners and high-ranking representatives of the European Commission. A final agreement reached between the institutions in May 2021 on an Interinstitutional Agreement register now broadly exempts representatives of national and subnational authorities as well as their associations from the scope of the register. After a brief overview of the development of the EU transparency register, the author will explain how local government associations have contributed to this result.

## **3. General thoughts on Transparency registers and lobbying. Definition of the term “Lobbying”**

To understand how and why transparency registers work, one first needs to understand what the term “lobbying” refers to exactly. The origins of the term “lobbying” are not entirely certain, however some attribute it to President Ulysses S. Grant (cf. Jesse Sheidlower, 2006), who is said to have used it to describe political advocates who sojourned in the lobby of the Willard Hotel in Washington D.C. to approach and try to convince him of their political views. Nowadays, Merriam Webster defines the term lobbying as “conducting activities aimed at influencing public officials and especially members of a legislative body on legislation” (*Merriam-Webster's Collegiate Dictionary*, 2021), while the Council of Europe’s definition includes any “concerted effort to influence policy formulation and decision- making, with a view to obtaining some designated result from government authorities and elected representatives” (cf. Council of Europe (2009) doc. 11937). According to a study conducted by the European Parliament’s Policy Department, lobbying falls within the broader scope of so-called interest representation, but is mostly limited to legislative and executive aspects (cf. Nettesheim, 2013, p.11).

All definitions are in principle neutral, however the perception of lobbyism by the general public is mostly negative, often implying that that people with socio-economic power are changing legislature to serve their own particular interests. To some, excessive lobbying might even contribute to the democratic deficit that is often attributed to the European Union (cf. Karr, 2007 p. 10). Lobbying in an EU context is certainly not comparable to the effort undertaken in the United States in terms of the employed capital (in particular when it comes to campaign contributions), but the influence of private sector companies and association is steadily growing. According to a report published by Transparency International EU, the so-called “Big Five” or GAFAM - Google, Amazon, Facebook, Apple and Microsoft - spent a combined € 19m lobbying the EU in the year 2020 (cf. Kergueno et. al., 2021, p.8). Another report published by Transparency International EU by Daniel Freund, who is currently serving as Member of

the European Parliament (Greens/EFA, GER), estimated that there were 37,351 people involved in lobbying the EU in the year 2016, of which 26,483 seem to have established a regular presence in Brussels (cf. Daniel Freund, 2016).

With the vast number corporate representations in Brussels and other European capitals, many of them increasingly use indirect forms of advocacy. In many recent cases private sector companies join or set up neutral sounding organizations (that often carry names that would suggest they are representing a neutral group, e.g. “The Information Technology Industry Council” that consists of various digital companies, amongst those the above mentioned GAFAM) which then establish a contact to members of parliament or government representations to convince them of the companies’ position on the respective legislative act. While lobbying conducted by private sector entities within the legislative is widely considered immoral and sometimes anti-democratic, one cannot deny the need for private sector input to enhance the practicability and efficiency of regulations and directives.

That being said, feedback or input provided by public authorities on regional, national or European legislative procedures is usually not perceived negatively by the public but rather a sign of working multilevel-governance and is in principle not considered “lobbying”. In some member states (one of them being Germany), local authorities and their associations have the right to be consulted on all topics that affect them in their competences. The OECD considers “formal and informal, vertical and horizontal mechanisms and processes of inter-governmental consultation, co-ordination, co-operation and joint decision-making” (cf. *OECD Handbook Decentralization*, 2019, p.155) crucial for an effective multi-level governance.

#### **4. The objective of a Transparency register**

Transparency registers exist in numerous countries, with the earliest being introduced in the United States in 1946 with the Lobbying Act. Paragraph 308 of the act stated the following: *“Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate and shall give to those officers in writing and under oath, his name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses, and what expenses are to be included”*.

The objective of a Transparency register is to provide the public with information on who is involved in certain initiatives and – in some cases – present an overview with which representatives a lawmaker had contact prior to agreeing to include or strike certain provisions. To date, several member states and even regional parliaments have introduced their own registers. The resulting “soft pressure” on lawmakers has led to numerous accusations, one of them laid down a report by Lobbycontrol on European Commissioner Oettinger who is said to have met primarily with representatives of private enterprises and associations thereof while suggesting civil society organizations have not been sufficiently represented (cf. Katzemich, 2017).

#### **5. The development of an EU transparency register. Transparency in the context of the EU Treaties**

The Treaties of the European Union oblige the European Institutions to “conduct their work as openly as possible” (see Article 15 TFEU) and to “give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action” (see Article 11(2) Treaty on European Union (TEU)). The effect of those

principles is clearly visible when communicating with representatives of the European Commission or the European Parliament: EU officials can be searched and found on the digital register of EU staff, the so called “Who is Who”<sup>2</sup>. The register clearly indicates the name and phone number of the official and experience has shown that contacting representatives of the European Commission and the European Parliament (and in some cases the Council, however the general level of transparency is substantially lower due to the large number of meetings that are not open to the public) is generally easy and very efficient. In most cases, the European Institutions’ staff will reply to requests from public and private associations, NGOs and citizens in a very frank and open manner. In this regard, the overall transparency standard the Institutions have set for themselves is and has been very high when compared to permanent representations and member states’ ministries: the Permanent Representation of the Federal Republic of Germany to the European Union has recently decided to no longer provide the names of its officials on its website<sup>3</sup> (phone numbers had never been available to the general public), possibly to discourage unwanted contacts.

Such a level of transparency – which is certainly greatly appreciated by anyone working in EU affairs and crucial element of a participative democracy – brings with it several challenges. While the general idea that citizens and NGOs can easily contact EU officials is certainly sensible, without any further regulation, the same access is automatically granted to those that have less honorable motives and pursue particular (and mostly economic) interests.

## **6. The early stages of an EU Transparency Register**

In 1995, the European Parliament firstly introduced a register for lobbyists accessing its premises (cf. Mańko et. al, 2014, p. 3). Prior to the introduction of the register, lobbying the European Institutions was not regulated at all. Until 2011, roughly 4,000 individuals had been recorded in the register with their names and the organizations they represent. The European Commission introduced a voluntary register of lobbyists as part of a first “European Transparency Initiative” (see Communication COM(2009)612). Shortly after the introduction, the European Parliament adopted a resolution (drafted by former Finnish Prime Minister Alexander Stubb) in which it called for a joint transparency register that would cover all Institutions of the EU (see resolution 2007/2115(INI). On 23 June 2011, an Interinstitutional Agreement on a Transparency Register (IIA 2011) was signed by the European Commission and the European Parliament. Registration remained voluntary, but organizations would only receive access passes to the Parliament after they had successfully done so. Registrants were expected to provide more data (e.g. goals/remits, main activities etc.) than with the previous registers (see Annex II of the IIA 2011). The Registration in the public database was done online, and registrants had to update their data on an annual basis. The agreement comprised a code of conduct which registrants were obliged to respect. The 12 points covered aspects such as the duty to identify themselves in relations with representatives of the institutions by disclosing their name and the organization represented, disclose their clients, and state their interests. According to the Code of Conduct, Registrants must not obtain or try to obtain information or any decision in a dishonest manner. The IIA 2011 established a procedure for introducing complaints against registrants who did not abide by the Code of Conduct, however consequences of a violation remained minimal. The register has since been operated by the Joint Transparency Register Secretariat (JTRS) of the European Parliament and the European Commission since who conducted random checks to verify the correctness of data provided. Registrants who did not provide the required updates or did not cooperate were barred from the system.

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<sup>2</sup> <https://op.europa.eu/de/web/who-is-who>

<sup>3</sup> <https://bruessel-eu.diplo.de/eu-de>

The IIA 2011 explicitly excluded local and regional authorities from the scope of the Register (see Article 13 IIA 2011), while representative offices or legal entities as well as the respective associations were expected to register. The annual report published by the JTRS in 2013 shows that until that on 31 October 2013, there had been 5,952 registrants in the register (see *Annual Report on the operations of the Transparency Register*, 2013), the majority of which were In-house lobbyists and trade/professional associations (2,972) and NGOs (1,536). Even without a formal obligation to register, 275 organizations representing local, regional, and municipal authorities (118) and other public or mixed entities (157) had registered until that date. The majority of local government associations present in Brussels however had not registered, given that they mostly do not consider themselves lobbyists but rather part of the multilevel-government system. A similar approach was taken by the representations of the German regional authorities (Länder), who due to their strong role within the federal system in Germany did not register at all. Given the lack of punitive measures, the EU transparency register was not considered overly relevant for the work of the respective offices and thus the following developments were not monitored closely by most local and regional government representatives in Brussels.

## **7. The 2014 review of the EU's Transparency Register**

In 2013, a joint high-level working group of the European Parliament and the European Commission<sup>4</sup> reviewed the IIA 2011 and adopted a draft provisional text (2014/2010(ACI), 2014, p. 7) in December 2013 with recommendations for technical and political revision. The recommendations included a number of clarifications on the definitions, more detailed provisions on relevant activities, rules on relevant information lobbyists have to provide (e.g. membership in high-level groups and expert groups, membership or participation in EP intergroups or industry forums etc.). Points 14-16 of the recommendations contained several key aspects, stating that member states government services and regional public authorities and their representations were not expected to register, however associations of regional authorities were. By adding these points, it became clear that from the perspective of the European Commission even member states' government services as well as regional authorities would in principle fall in the scope of the register but were exempted from an obligation to register. Furthermore, all other sub-national public authorities were expected to register – which would have included all local authorities. This extension of the scope was later openly and heavily criticized by the Bundesrat (cf. decision 456/14, point 3).

Another relevant aspect was the recommended further widening of the scope of the IIA (see point 8 of the recommendations), which would cover “activities that are 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 the channel or medium of communication used and (...) irrespective of where they were undertaken”. According to the recommendations, the term “direct influence” would refer to a direct contact or communication with the EU institutions or other action following up on such activities while “indirect influence” would cover the use of intermediate vectors of influence such as media, public opinions, social events or conferences targeting the EU institutions or their members and/or officials. To enforce the rules, it was recommended that the European Parliament would only provide access passes to those entities that had registered prior to the application. The European Commission could limit access to expert groups and other advisory bodies to entities who had

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<sup>4</sup> The group consisted of the European Parliament's Vice-President Rainer Wieland (EPP, Germany), Anni Podimata (S&D, Greece), Edward McMillan-Scott (ALDE, UK), Isabelle Durant (Greens/EFA, Belgium), Oldřich Vlasák (ECR, Czech Republic), Jiří Maštálka (GUE/NGL, Czech Republic) and European Commission Vice-President Maroš Šefčovič.

successfully registered. All the above-mentioned aspects were incorporated in the renewed Interinstitutional Agreement (IIA 2014, Interinstitutional agreement on the transparency register, 2014).

A European Parliament report on the modification of the IIA by MEP Roberto Gualtieri (Decision 2014/2010(ACI)) was discussed in the Committee on Constitutional Affairs (AFCO) and was later adopted by the plenary on 15 April 2014, thus approving the revised IIA (cf. Gerig & Ritz, 2015). At the same time, members of European Parliament renewed their call for a mandatory register, asking the Commission to submit a proposal for a regulation by end-2016.

Contrary to the German regional offices, who are regularly informed by the European Commission of recent developments and new initiatives on the basis of Article 2 EUZBLG (see above), local authorities have to actively monitor the websites and press releases of the European Commission to find out which new initiatives are published and what they will contain. In order to be more efficient, the majority of local government associations rely on networks and umbrella organizations such as the Council of European Municipalities (CEMR) and the European Local Authorities Network (ELAN) to efficiently exchange new information amongst themselves. But even with the vast networks, local government associations were not aware of those developments. In the case of the Transparency Register, a German regional representation approached the German County Association in 2014 with information on the European Commission's plan to review the register. It is quite rare for a regional representation to inform the local government associations of such developments and it usually happens only when the regional authority expects to be reliant on the support of the German associations and their European partners.

The three other German local government associations immediately contacted the European Commission and the Roberto Gualtieri's office in the European parliament when they learned of the developments. While the MEPs office was hesitant to engage, representatives of the Joint Transparency register agreed to discuss the issue. During the following meeting, in which the Joint Transparency Register, the Council of European Municipalities and Regions and several other local government associations participated, the representatives of the JTRS stated rising "lobbying of wine regions" towards the European Commission as the main reason for the extension of the scope to local authorities (which is certainly not the strongest argument, given that the regional entities were not obliged to register under the new rules). The JTRS's view was that all levels of member states' government should ideally register in an EU transparency register to make their influence more visible. A high-ranking representative of the JTRS added that he does not differentiate between private and public influence and that all lobbyists are to be treated equally.

Unfortunately for local authorities and their associations, the situation worsened when the European Commission announced another European Transparency Initiative in 2014. The Initiative aimed at countering criticism concerning the lack of transparency in the negotiations on the Transatlantic Trade and Investment Partnership (TTIP) between the United States of America and the European Union. The European Commission published two decisions (Commission decision 2014/839/EU, 2014 & Commission decision 2014/838/EU, 2014). The first obliged the European Commission to publish all meetings held with representatives of organizations that would fall under the scope of the transparency register. Article 2 b of the decision clearly stated that the rules do not apply to meetings with public authorities (at national, regional and local level), whereas meetings with "associations or networks created to represent regions or other sub-national public authorities" were covered by the scope of the decision. Neither document included a general ban on meetings with entities that, despite an obligation to register, had not done so. The Commission had however committed itself to have Commissioners only meet representatives of registered entities. This decision led to far-reaching consequences: In 2015, Commissioner Oettinger requested a meeting with the lord

mayor of a larger city in Baden-Württemberg in the south of Germany. Besides his public office, the mayor held a high-ranking political position at the German Association of Cities. Due to this fact, the cabinet of Commissioner Oettinger asked the German Association of Cities to register in the transparency register, otherwise he could not participate in the meeting. Since the scope of the transparency register covered meetings irrespective of where they were they take place, all meetings (in private or in public, in Brussels or the member states) between representatives of local authorities and members of the European Parliament and EU Commission officials would have potentially required a prior registration in the transparency register. At the peak of the migration crisis, a request for a meeting between county presidents with a high-ranking official at the Directorate General for Home Affairs (DG HOME) of the EU-Commission was rejected due to the fact that the German County Association had not registered in the transparency register. The European Commission explained that it regretted its decision but was bound by the above-mentioned self-commitment.

In a joint letter sent in December 2014, the three German local government associations asked Commissioner Timmermans not to apply the rules of the IIA and the two above mentioned decisions on meetings of local authorities and their associations with EU officials and Members of the European Parliament. The position was reiterated in a contribution to a public consultation on guidelines on the Transparency Register. In his reply to the letter, the head of cabinet of Commissioner Timmermans explained that while local authorities are considered public entities, their associations are not comparable and therefore must be treated differently. It became clear that any further effort to address the issue at working level would be futile and that it was necessary to discuss the topic at political level.

To facilitate a political debate and to find possible allies, the representative of the German County Association in the European Committee of the Regions, Mr. Hans-Jörg Duppré (President of the County Südwestpfalz) raised the issue in a meeting of the Bureau of the Committee in December 2014 and received broad support of members from all political groups and member states. Following the discussion in the Bureau, representatives from the Austrian local government associations successfully tabled amendments to a resolution of the Committee of the regions on the Commission Work Programme 2015 (Resolution RESOL-VI-001, point 50), in which the Commission had announced the publication of a proposal for an Interinstitutional Agreement on a mandatory Transparency Register in its 2015 Work Programme (cf. Communication COM(2014)910, p. 10). In February 2015, Commissioner Timmermans participated in the CoR's plenary session, where numerous representatives of local and regional authorities heavily criticized the European Commission for the measures it had taken. It seems that the overwhelming resistance surprised the Commissioner, who in turn declared that the rules of the IIA and the Transparency Initiative of the Commission must not impede the work of local and regional representatives. If that was the case, the rules should be reviewed. Further pressure was applied to the Commission when the president of the Bundesrat forwarded its decision (see above) on the IIA to Commissioner Timmermans.

A rather unexpected but crucial element to the successful development of the register came in the form of a so called "own-initiative opinion", which was drafted in 2015 under the title "Transparency, accountability and integrity in the EU institutions" (Opinion 2015/2041(INI)). In the original draft, rapporteur Sven Giegold (Greens/EFA, Germany) suggested that representations of national, regional and local authorities should not fall under the EU lobby register if they have their own mandatory lobby register and do not offer workspace for private or corporate actors within their representations. Most of the local government associations present in Brussels do not generally follow own-initiative opinions closely due to their limited impact on legislative acts. They can however – as this case will show - serve to prepare a strategy by determining the European Parliament's position at an early stage and thus influence the pre-legislative work of the European Commission. In the present case, Austrian and German regional associations were in close contact with the rapporteur,

while the German County Association discussed the issue on several occasions with various shadow rapporteurs. It became clear that the rapporteur saw an urgent need for more transparency and explained that the point on local authorities did not correspond to his position but was only introduced to appease the shadow rapporteurs of which some had been local councilors in the past and were therefore open to discuss further amendments. After numerous meetings with the Members of the European Parliament, the German Permanent Representation and regional associations, the adopted opinion stated that “(...) reference to Articles 4 (2) and 5 (2) of the TEU, that democratically elected and controlled state institutions at national, regional and local level and their representations towards the EU institutions, as well as their internal bodies and formal and informal associations and umbrella organizations composed exclusively thereof, should not fall under the EU Transparency Register if they act in the public interest, as they are part of the EU’s multi-level system of governance”.

A possible challenge in terms of the underlying legal competence arose in the discussion between the institutions: the EU needs an explicit competence to impose rules on citizens and businesses. Article 298 (2) TFEU allows the Parliament and Council to establish, provisions ensuring that the EU institutions carry out their missions with the support of an open and independent European administration. This, however, would have only allowed the EU to regulate the issue of transparency with respect to EU officials, not regarding lobbyists (cf. Maňko et al, 2014, p.7). Another option would have required to base the proposal on Article 352 TFEU (flexibility clause) which applies when EU action is necessary to achieve one of its objectives and no specific legal basis exists in the treaties. Any proposal based on the flexibility clause however has to follow a special legislative procedure which requires unanimity in the Council and the consent of the European Parliament. While the European Parliament continuously called for an ordinary legislative procedure, the European Commission considered an Interinstitutional Agreement based on Article 295 TFEU to be the option with the highest prospects of success.

## **8. The 2016 proposal for a mandatory Transparency Register**

On 28 September 2016, the European Commission published a proposal for a mandatory Transparency Register, based on an Interinstitutional Agreement (IIA 2016) covering the European Parliament, the Council of the EU and the Commission (Proposal for an act COM(2016)627). In Article 4(2) the agreement mentions several entities which do not fall within the scope of the Transparency register. Among them, the text mentions “public authorities of Member States, including their permanent representations and embassies, at national and subnational level” as well as “associations and networks of public authorities, at Union, national or subnational level, on condition that they act exclusively on behalf of the relevant public bodies”. While the wording in the most recent Commission proposal differs partly from the above mentioned own-initiative report, the structure and overall objective remains similar.

The clarification regarding the composition of the associations serves to close any existing loopholes by differentiating between those associations that consist entirely of public entities (and therefore act in the public interest) and those that are mixed (and therefore might pursue objectives of particular interest to private sector entities). This clarification will certainly be helpful to both, the European Institutions and the local government and its associations since it provides legal certainty and allows a clear distinction between unwanted “lobbying” and effective multilevel-governance mechanisms and/or consultations. The proposal was heavily debated for four years until negotiators of the European Parliament, the Council of the EU and the European Commission reached a compromise on 7 December 2020 on how the Transparency Register will become de facto mandatory. The agreement was signed by the three institutions on 20 May 2021.

During the preceding negotiations, local government associations had been in constant contact with relevant Members of Parliament and the Permanent Representations, however it quickly became clear that the respective rule excluding public authorities was not up for discussion and therefore no further intervention was necessary. One would assume that this was the end of the legislative process and a cause for celebration, but the German translation of the text - that was published only after the agreement - brought an unpleasant surprise. Contrary to the other language versions, the German version does not refer to “public authorities (...) at national and subnational level” but rather exempts “public authorities (...) at national and regional level” from the scope of the transparency register. While this is a clear error in the translation (all other language versions refer to the subnational level or use similar terms), due to the procedural aspects, the German text cannot be changed after the agreement has been reached.

Currently, the German Federal Government and its Foreign Service are working towards a solution in close cooperation with the German County Association, one option being a protocol declaration by the Federal Government (and the Austrian government) that lists the types of entities that should be exempted. It is not entirely clear whether such a declaration is binding for the European Commission and the Parliament and therefore the parties involved are exploring other options.

## **9. Conclusion. An Outlook on things to come**

While the agreement was reached only recently, the preceding discussion and the resulting strengthening of the role of local and regional authorities in the legislative process has already had an impact on a proposal that have been presented by the European Commission in recent months: In a communication on better regulation (Communication COM/2021/219), the European Commission announced that within its public consultation procedures, it will distinguish between contributions received from different types of stakeholders (public authorities, civil society, private sector enterprises etc.). The Commission furthermore states it will cooperate more closely with local, regional and national authorities on EU policymaking, thus reaffirming the important role subnational actors play in the EU legislative procedure.

The strong cooperation between local government associations from several member states, their umbrella organization CEMR and the European Committee of the Regions has proven very successful and will certainly continue to work towards an even stronger involvement of subnational entities in the European legislative process in the future. While the agreement on the Transparency Register is considered a crucial achievement, true multilevel governance can only be achieved when local and regional authorities are granted full participatory rights within the Treaties.

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