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Legal Regulation of Lobbying in Poland: Key Issues

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Abstract

What proves to be characteristic of the democratic system is the fact that it constantly witnesses various tensions between authorities, opposition, citizens, diverse legal subjects, advocacy groups, etc. Their disputes concern changing or upholding the existing legal environment, which is unavoidable in this case. This situation is not surprising or improper as lobbying understood in this way is an immanent, often useful part of the system. However, what may be puzzling is the fact that democratic political systems are characterized by the variety of attitudes adopted by authorities toward the practice – from pretending it does not exist (and thus requires no regulations) to implementing regulations of a highly general nature. Poland experiences both the practice itself and the attempts to legally regulate it. The aim of the article is to critically analyze the existing situation.

Streszczenie

Regulacja prawna lobbingu w Polsce: kluczowe problemy

Cechą charakterystyczną ustroju demokratycznego jest to, iż nieustannie dochodzi w nim do tarć. Ścierają się więc, w różnych konfiguracjach, władza, opozycja, obywatele, różne-

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go typu podmioty prawa, grupy interesu itp. Spór zaś idzie o zmianę istniejącego stanu prawnego, bądź też jego zachowanie, a rozbieżność oczekiwań w tym względzie ma charakter zupełnie nieunikniony. Nic w tym szczególnie zaskakującego czy niestosownego, wszak tak pojmowany lobbying jest immanentną, często użyteczną, częścią systemu. To, co może natomiast zastanawiać, to fakt, że w demokratycznych systemach politycznych istnieje tak wiele różnych postaw ośrodków władzy wobec zjawiska – od pozorowania, że ono nie istnieje (i nie wymaga regulacji) do wdrażania regulacji o bardzo ogólnym bądź też niemal kazuistycznym charakterze. Także i w Polsce do czynienia mamy tak z samym zjawiskiem, jak i z próbą jego prawnego uregulowania, a poniższy artykuł ma na celu krytyczną analizę istniejącego stanu faktycznego.

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Given the contemporary scale of lobbying, its different assessment by citizens, and different political traditions of individual democracies, it is no longer surprising that the approaches to regulating it are so diverse. The US is considered as a leader in this respect. It was there that meticulous legal solutions were adopted to “civilize” the advocacy of interests and make it a transparent issue. In many countries this problem has not been addressed, or the presence of this practice has been somewhat camouflaged by giving it a different name². There is also a group of countries which have established only a very general framework for its functioning. It seems apt to say that Poland belongs to the last category. Thus, the question is are the legal regulations adopted in Poland sufficient for the political system to be considered transparent and whether they guarantee equal access to the decision-making process for the advocacy entities.

I. Constitutional Provisions

The key legal act in Poland is the 1997 Constitution³, which regulates – more or less precisely – the foundations of the state’s political and social life and

² M.M. Wiszowaty, *Regulacja prawna lobbyngu na świecie. Historia, elementy, stan obecny*, Warsaw 2008, p. 30.

³ Constitution of the Republic of Poland of 2 April 1997 (Dz.U., No. 78, item 483).

serves as a starting point for regulating its other aspects. This also applies to lobbying, although it would be wrong to expect that the Constitution refers to it directly. Nevertheless, there are several constitutional provisions which indirectly evidence the presence of lobbying and advocacy groups in Poland as well as the legality of their activities:

- Art. 12 – according to which the state “ensures freedom for the creation and functioning of trade unions, socio-occupational organizations of farmers, societies, citizens’ movements, other voluntary associations and foundations”;
- Art. 17 – states that “by means of a statute, self-governments may be created within a profession in which the public repose confidence” and this also applies to other forms of self-government;
- Art. 20 – declares freedom of economic activity, dialogue and cooperation between social partners;
- Art. 21 – protects private ownership;
- Art. 31 – emphasizes the obligation to “respect the freedoms and rights of others”;
- Art. 32 – proclaims all persons being equal before the law;
- Art. 57 – ensures “the freedom of peaceful assembly and participation in such assemblies [...] to everyone”;
- Art. 58 – guarantees to everyone, on certain conditions, “the freedom of association”;
- Art. 59 – guarantees associations the right to collective bargaining negotiations, to conclude collective agreements and to organize workers’ strikes⁴;
- Art. 61 – gives a citizen “the right to obtain information on the activities of organs of public authority as well as persons discharging public functions”, including “access to documents and entry to sittings of collective organs of public authority formed by universal elections”;
- Art. 63 – guarantees everyone “the right to submit petitions, proposals and complaints in the public interest, in his own interest or in the interests of another person – with his consent – to organs of public authority”.

⁴ An exception here are those who serve in the Polish Army, police, national security agencies, etc.

Even the overview of the provisions gives us the possibility to conclude that lobbying in Poland is allowed. Thus, legally accepted are various activities that protect individual interests and put forward to public authorities their implementation (or abandoning their implementation) into the binding legal system – naturally, as long as these activities do not violate the law found in other legal acts⁵.

II. The Act

In post-1989 Poland there was a large number of issues requiring more urgent attention of the government institutions than the matter of legal regulation of lobbying. Thus, the actions in this sphere were limited to implementing norms indirectly related to the discussed practice, such as the Rules of Procedure of the Sejm and the Senate. However, as the media uncovered numerous controversies surrounding the government and the advocacy groups, it became necessary to make lobbying more transparent and accessible to public opinion and at the same time legitimized⁶. Therefore, the Act of 7th July 2005 on lobbying in legislative process and three executive orders, were adopted⁷. Interestingly, Poland was one of the first European states to adopt legal regulations on lobbying, and still is one of the few countries in the region with its own, unique regulation of this practice⁸.

The said law clearly has some advantages; however, according to Marcin Wiszowaty, their list is limited to merely two points: 1) it does exist; 2) with this regulation the state officially and directly recognized lobbying as a legal activity⁹. Alas, the list of its drawbacks is much more imposing.

Why did the lawmakers need as many as 8 years since the adoption of the Constitution to prepare the relevant act? Thus, the legal vacuum continued in

⁵ P. Kuczma, *Lobbying w Polsce*, Toruń 2010, pp. 171–178.

⁶ L. Graniszewski, *Lobbying i jego instytucjonalizacja w Polsce*, “Infos” 2019, No. 13, p. 2.

⁷ Act of July 7, 2005 on lobbying activities in the law-making process (Consolidated text: Dz.U. 2017, item 248).

⁸ Fundacja im. Stefana Batorego, *Czy możliwy jest przejrzysty lobbying? Raport o potrzebie lepszych regulacji i dobrych praktyk działalności lobbyingowej*, Warsaw 2015, p. 8.

⁹ M.M. Wiszowaty, *Z pustego w próżne. Jak fikcyjną regulację lobbingu rząd chce zamienić na... jeszcze gorszą*, <https://klubjagiellonski.pl/2017/11/03/z-pustego-w-prozne-jak-fikcyjna-regulacje-lobbingu-rzad-chce-zamienic-na-jeszcze-gorsza/#> (18.01.2018).

which the relations between the government and the advocacy groups were regulated almost solely by the ancient Roman principle *nullum crimen sine lege*.

The adopted legal solutions have a somewhat temporary character – what other explanation is there for the said act consisting of not more than 24 articles and containing grammatical and stylistic flaws as well as content-related shortcomings?

Why does the said act deal solely with the “legislative process”? Moreover, it does so selectively, focusing on the Council of Ministers and the Sejm. This leads to another question: what about the legislative and the judiciary branch¹⁰?

The adopted definition of “lobbying activity” and “professional lobbying activity” is flawed; as a result, the act e.g. covers neither the vast majority of persons and entities participating in such activity non-professionally or on an ad hoc basis, nor experts, thus comprehensive control of this practice is impossible.

The act defines the rules of transparency and execution, forms of control and the rules for registering the entities focusing solely on professional lobbying activity; however, it does not mention other entities, which arises doubts as to e.g. the matter of the equality of persons/entities under the law.

The act lacks definitions of such key terms as “lobbyist”, “employer”, “advocacy group”, “pressure group”, “legislative process”, etc.

Why does the Polish register of entities engaged in professional lobbying activity (an otherwise justified instrument) have the form of a barely digital PDF file, located somewhere among the vast resources of the Biuletyn Informacji Publicznej (BIP, the Bulletin of Public Information) of the Ministry of Internal Affairs and Administration? This is very impractical compared e.g. with other European or American solutions.

An entity is entered into the register after filling a specific form, paying a registration fee (!) and personal data verification. A certificate confirming the entry is issued only at the request of the entity involved and is valid for a fixed period¹¹. Having such an entry offers hardly any additional privileges for the registered entities. This does not seem conducive to registering.

¹⁰ As can be expected, in Poland there are no laws that regulate lobbying in these specific areas.

¹¹ The form contains a field described as “Subject of lobbying activity”. Such information may seem as important as the contact data, if not more significant considering the transpar-

The registered entities are not required to deliver any reports on their lobbying activity.

Removal from the register takes place after a specific form is submitted. However, it is done by adding an appropriate annotation to the entry (it does not lead to the removal of data), which clearly contradicts the Personal Data Protection Act currently in force¹².

The regulations that concern controlling professional lobbying activity are surprisingly general¹³. Firstly, the government institutions are obliged to publish in the BIP annual accounts of all and any activities undertaken in relation to them by professional lobbyists¹⁴. Secondly, the fines envisioned by the lawmakers for entities participating in professional lobbying without registering are in the amounts incongruous with today's financial reality (3000–5000 PLN).

Based on these comments – a brief and by no means complete catalogue of the flaws in the discussed legal act – it will not be too far-fetched to state that the present law on lobbying is to a large extent a dead letter¹⁵.

Furthermore, the state – and more specifically, its government institutions – seem to be entirely uninterested in encouraging professional lobbyists to undertake grass-roots initiatives aimed at ethical self-regulation of this sphere. Nor do professional lobbyists themselves show any inclination to act in this matter, as if they found the current situation satisfactory. Some initiatives, such as the one by the Association of Professional Lobbyists in Poland regarding the internal Code of Professional Ethics, are valuable yet have no influence whatsoever on the quality, transparency and social perception of lobbying in Poland.

Moreover, the profession of a “lobbyist” was added (as item 243202) to the Classification of Occupations and Specializations for the Labor Market¹⁶ (yet

ency of legislative process and legality of lobbying activities. Yet this field is annotated with an asterisk and the phrase “to be completed on a voluntary basis”.

¹² As of 25 March 2020, 485 entities were entered into the register in total. 34 of them were removed; however, their data are still accessible there. It is difficult to believe that lobbying in Poland would have occurred on such a small scale over the last 15 years.

¹³ More on this in P. Kuczma, *op.cit.*, pp. 194–199.

¹⁴ Such contacts have been observed only occasionally.

¹⁵ M.M. Wiszowaty, *Z pustego...*

¹⁶ Cf. Classification of Occupations and Specializations for the Labor Market of 7 August 2014, consolidated version (Dz.U. 2018, item 227).

another document in the PDF form) only in 2010, i.e. 5 years after the discussed Act came into force. Thus, in the meantime, one could participate in such activity although the profession did not formally exist. Furthermore, searching for lobbying services in the Business Activity Central Register and Information Record¹⁷ proves futile. The database can be searched only record by record (there is no search engine), and the relevant information can be found in Section M → “Professional, scientific and technical activity” → category 70 “Activity of Head Offices; management-related counselling” → sub-category 70.21 “Public relations and communication”. This turns out to encompass “counselling and direct help, including lobbying for business entities and other entities in the scope of public relations and communication”¹⁸. Thus, it is yet another aspect in which Polish legal regulations of lobbying do not fully reflect the factual state, and functionality of the implemented auxiliary solutions is far from perfect.

III. Project of Changes to the Act

The legal regulation of lobbying in Poland is undeniably wrong for multiple reasons. The society also remains critical of lobbying due to its legal construct and widespread misunderstanding of the concept, compounded by its skewed portrayal in the media. Thus, the currently ruling camp has conceived an idea of a new, broader-scope regulation of lobbying in a single act that would cover, e.g. access to public information, transparency in public life, and anti-corruption aspects¹⁹. Yet, while the very idea of new regulation of lobbying was right and included certain valuable solutions²⁰, the development process raised serious objections.

¹⁷ Ministry of Entrepreneurship and Technology, *Klasyfikacja kodów PKD (Polska Klasyfikacja Działalności*, Polish Classification of Activity), <https://www.biznes.gov.pl/pl/klasyfikacja-pkd> (1.12.2018).

¹⁸ Ibidem.

¹⁹ The project of the act on public interest disclosure, <https://www.rpo.gov.pl/sites/default/files/ustawa-o-jawnosci-zycia-publicznego-projekt-z%208-stycznia-2018.pdf> (30.11.2018).

²⁰ Such as broadening the group of lobbying targets, introducing obligatory reporting for lobbyists, registration of non-professional lobbyists.

Out of many points raised with regard to the legislation project, only the most important ones, which led to shelving the project, will be listed here. The comments emphasized, e.g. that²¹:

- the project of the act was prepared by people close to the minister coordinating secret services, which raises doubts as to the actual intentions of the authors;
- the work on the project purportedly took 10 months while social consultations lasted only 6 days;
- regulating so many different issues with a single act is legislatively unsound;
- the project, to a large extent, doubled solutions included in already existing legislation;
- the project allows limiting access to public information if it concerns actions of state-owned enterprises and government special purpose funds, or when this hinders the functioning of a government institution;
- the project obligates NGOs to publish information about their income for the last two years under pain of penal liability (the so-called chilling effect);
- business representatives (including foreign ones) and professional lobbyists are exempt from this obligation (which raises e.g. the question regarding equality before law);
- the definition of lobbying adopted in the project limits its conceptual scope, excluding e.g. local government units from such activities;
- the president as the target of lobbying has been entirely overlooked;
- the registration fee for lobbyists is to be raised tenfold;
- the proposal makes it significantly more difficult for officials to move from public to private sector, without differentiating among their former functions or the character of the future jobs.

So far, the authors do not remind the public opinion about this project. However, judging by the presented reservations, its quality is doubtful as lobbying in Poland requires developing an entirely new legal regulation with correctly defined goals and properly determined subject and object scope;

²¹ W. Cieśla, *Ustawa o jawności w PiS. Lobbyista rosyjskiej firmy paliwowej może mieć więcej swobody niż organizacje pozarządowe*, Newsweek, 13.11.2017; W. Tumidalski, *Rada Legislacyjna chce zmian zapisów o lobbingu*, Rzeczpospolita, 16.01.2018.

a regulation that would be effective due to a proper system of enforcing its provisions²². The described project has none of these features and it has rightly been put on hold.

IV. Concluding Remarks

Polish lawmakers seem to overlook obvious facts while harsh criticisms of the current legal state coming from renowned experts remain unanswered. Lobbying in Poland had unofficially functioned for years, and when the relevant act was adopted, it turned out to be defective. Yet, its vagueness, lack of precision, detachment from reality, obvious gaps, etc. do not cause indignation; neither the government institutions are not motivated to improve the law, nor the lobbyists.

Such murky legislative waters result in negative social perception of lobbying. If nobody is interested in obeying the law, transparency, and equal access to institutions, developing effective, modern solutions for the future and strengthening social participation²³, while the media report only scandals involving the government and advocacy groups, it is no wonder that an average citizen sees lobbying solely as corruption and nepotism. This in turn engenders mistrust in the actions of the government institutions, undermines the belief in democratic order and discourages the few active citizens from becoming more involved in public life.

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²² M.M. Wiszowaty, *Z pustego...*; L. Graniszewski, op.cit., p. 4.

²³ More on the benefits from sound regulation of lobbying in: A. Kubiak, *Lobbying w polskim prawie i praktyce*, "Annales. Etyka w życiu gospodarczym" 2013, No. 16, p. 133; M. Piechowicz, *Lobbying gospodarczy w procesie decyzyjnym Unii Europejskiej*, Toruń 2013, pp. 113–119.

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