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10 YEARS OF THE POLISH ACT ON LOBBYING ACTIVITY – 10 YEARS OF DISAPPOINTMENTS

1. MOTIVES AND INTENTIONS

Several months ago 10 years¹ passed since the act of July 7, 2005 on lobbying activity in the law-making process (Journal of Laws No. 169, item 1414, as amended; hereinafter referred to as “the lobbying act”) entered into force. It seems that a decade is enough time to assess the effectiveness of this regulation, and the experiences gathered during that period are a source of sufficient knowledge about its shortcomings and advantages, making it possible to present conclusions concerning the legislator’s success or the need to introduce legislative changes.

Nowadays only a few people remember the socio-political atmosphere around the legislative work on the draft: the frequent media coverage concerning shady relations between business and politics (e.g. works on amending the regulations concerning the radio and TV², the behind-the-scenes activities of interest groups around the provisions regulating so called biofuels³, or the lessons learnt from the legislative work on regulations concerning gambling⁴) outraging public opinion, the pessimistic approach of citizens regarding the honesty of civil servants proven

¹ The Lobbying act entered into force 6 months after its promulgation, i.e. March 7, 2006.

² P. Smoleński, *Ustawa za łapówkę czyli przychodzi Rywin do Michnika*, “Gazeta Wyborcza” of December 27, 2002; M. M. Wiszowaty, *Działalność lobbingsowa w procesie stanowienia prawa*, Warsaw 2010, p. 27 et seq.

³ M. Majewski, P. Reszka, *Wojna o biopaliwa czyli lobbying po polsku*, “Rzeczpospolita” of December 18, 2002; D. Kołakowska, *Kupowanie ustawy*, “Rzeczpospolita” of July 9, 2003; D. Kołakowska, *Nieprzyzwoita ustawa*, “Rzeczpospolita” of July 11, 2003; P. Śmiłowicz, *Stop lobbistom i innym roślinom*, “Rzeczpospolita” of December 9, 2003.

⁴ M. Majewski, *Bank z misiami. Ustawa o hazardzie była pierwszą, profesjonalnie lobbowaną ustawą Trzeciej Rzeczypospolitej*, “Rzeczpospolita” of May 23, 2000; *Polska przesiąknięta korupcją*, “Rzeczpospolita” of March 22, 2000; B. Sierszuła, D. Walewska, *Pochwały i ostrzeżenia dla*

in empirical research⁵ or the criticism of the quality of legislation – expressed unchangeably for the last two decades – from concerned representatives of academia (including, above all, complaints about the mode of law-making)⁶. As a result of the belief among Poles that “legal acts can be purchased”, both “in public statements and in literature, theses were presented about the necessity to create a coherent legal framework for a phenomenon that has up until now been marginalized”⁷, i.e. the activity of lobbyists in the legislative process.

Though the problem of backstage impact on the process of law-making and various “pressure groups” influencing the shape of legal solutions has been discussed in Polish literature in the field of law and political studies for at least several decades⁸, the issue has already been known in the reality of the Second Republic (as evidenced by restrictive statutory regulations from the interwar period foreseeing draconian sanctions for crimes of public servants committed in relation to the

Polski. Jak walczyć z korupcją w okresie zmian w gospodarce?, “Rzeczpospolita” of September 26, 2000.

⁵ Pols of the CBOS Public Opinion Research Centre of 2004 presented i.a. the following conclusion: “Over two-thirds of respondents (69%) are of the opinion that in Poland money can bring about the adoption of a new act, a change of law, only one in ten (10%) thinks that it is not possible. One in five (21%) do not have any precise opinion on that topic. In the last ten months, the number of people convinced of the existence of these kind of pathologies has grown by 10 percentage points”; *Korupcja, nepotyzm, nieuczciwy lobbying*, message from the polls by CBOS, BS/2/2004, p. 4.

⁶ Cf.: S. Wronkowska, *Tworzenie prawa w Polsce – ocena i proponowane kierunki zmian. Raport Rady Legislacyjnej przy Prezesie Rady Ministrów*, “Przegląd Legislacyjny” 2006, No. 1(53); J. Warchała, *Dyskusja. Język polskiej legislacji, czyli zrozumiałość przekazu a stosowanie prawa. Materiały z konferencji zorganizowanej przez Komisję Kultury i Środków Przekazu oraz Komisję Ustawodawczą*, Chancellery of the Senate of the Republic of Poland, Warsaw 2007; K. Rybiński (ed.), *Rola grup interesów w procesie stanowienia prawa Polsce*, Vistula University, Warsaw 2012; T. Kozłowski, *Legislacja bez autorytetu prawa*, “Ruch Prawniczy Ekonomiczny i Socjologiczny” 1994, year LVI, No. 4(80); A. Malinowski (ed.), *Zarys metodyki pracy legislatora. Ustawy. Akty wykonawcze. Prawo miejscowe*, Warsaw 2009; I. Lipowicz, *Uwagi o polskim systemie stanowienia prawa*, “Państwo i Prawo” 2012, Vol. 7, pp. 5–19.

⁷ M. M. Wiszowaty, *Definicje legalne lobbingu w ustawodawstwie stanowym i federalnym Stanów Zjednoczonych*, “Gdańskie Studia Prawnicze” 2005, Vol. XIV, p. 358.

⁸ The pioneer of Polish studies in this discipline was Stanisław Ehrlich, linked to the Faculty of Law of the University of Warsaw. He lectured at universities in the USA, Canada and Western Europe, he was a member of international scientific bodies focused on the pluralism and activities of interest groups (i.a. the Executive Committee of the *Association Internationale des Sciences Politiques* oraz *Commite International pour la Documentation des Sciences Sociales*), founder and long-standing chair of the Research Committee for Socio-Political Pluralism of IPSA); many of his works on pressure groups and lobbying were translated into foreign languages. Selected works by Ehrlich concerning lobbying and pressure groups see: S. Ehrlich, *Brytyjski proces prawotwórczy (na przykładzie nacjonalizacji przemysłu)*, “Państwo i Prawo” 1977, No. 5, pp. 55–62; S. Ehrlich, *“Grupy nacisku” w strukturze politycznej kapitalizmu*, Warsaw 1962; S. Ehrlich, *Władza i interesy: studium struktury politycznej kapitalizmu*, Warsaw 1974; S. Ehrlich, *Lobby*, “Państwo i Prawo” 1961, No. 3(181), pp. 463–478.

post held⁹), and some commentators even make a further step and speak of “rich lobbying traditions stemming at least from the times of the Republic of the Nobility”¹⁰ (according to such an interpretation, the period of Polish democracy of the nobility from many centuries ago – including in particular the institution of deputies’ instructions and *viritim* elections, the activities of magnates’ coteries – could be a perfect historical example of the struggle of particular groups for the shaping of the public sphere¹¹), it was correctly explained in the justification of the draft lobbying act that “the prepared act on lobbying activity constitutes a *novum* not only in the Polish legal system”¹². Even though prior to the entry into force of the lobbying act, the Polish legal system had been familiar with procedures allowing interested entities who had not been exercising public power to impact the law-making process¹³, so far there has been no act that would regulate the matter in a comprehensive manner – such an assumption was at least declared during the works on the act. Thus, the concept of introducing “hard”, statutory regulation (in the form of mandatory legislation; therefore proposals for adopting soft law measures or a solution consisting in the lack of “top-down” regulation that would allow the very milieu of business and politics to “self-regulate” were rejected) won, which was congruent with the pan-European tendency to regulate lobbying activities¹⁴ (Marcin Michał Wiszowaty notices a change in the approach to regulating lobbying in Europe: the 1998 Georgian act and the 2000 Lithuanian act initiated the pan-European tendency to “juridize” the previously neglected matter¹⁵). It was even suggested that over-regulation is better than under-regulation¹⁶.

⁹ According to the provisions of the act of March 18, 1921 on combatting profit-driven crimes committed by civil servants (Journal of Laws 1921, No. 30, item 177) a civil servant guilty of accepting a gift or another type of financial gain was punished with death by shooting.

¹⁰ M. M. Wiszowaty, *Ustawa o działalności lobbingsowej w procesie stanowienia prawa*, “Przegląd Sejmowy” 2006, No. 5(76), p. 41.

¹¹ K. Jasiecki, K. Mołęda-Zdziech, U. Kurczewska, *Lobbing*, Krakow 2000, p. 14; B. Piwo-war, J. Świeca, *Lobbing: biznes – prawo – polityka*, Warsaw 2010, p. 16.

¹² Justification of the draft act on lobbying activity in the law-making process (print No.: 2188, Sejm of the Republic of Poland of the 4th term).

¹³ To exemplify that: according to the provisions of Article 19 section 1 of the act of May 23, 1991 on trade unions (Journal of Laws 2015, item 1881, as amended), trade union organizations have the right to present opinions concerning assumptions and drafts of legal acts within the scope covered by the tasks of trade unions. At the same time, according to Article 16 of the act of May 23, 1991 on employers’ organizations (Journal of Laws 2015, item 2029) the legislator granted employers’ organizations the right to present opinions concerning assumptions and drafts of legal acts within the scope of rights and interests of employers’ organizations.

¹⁴ A. Vetulani-Cęgiel, *Lobbing w procesie kształtowania prawa autorskiego w Unii Europejskiej*, Warsaw 2013, p. 330.

¹⁵ M. M. Wiszowaty, *Regulacja prawna lobbingu w państwach europejskich – najnowsze przykłady i pierwsze podsumowania na tle tendencji światowych*, “Przegląd Sejmowy” 2012, No. 5(112), p. 52.

¹⁶ The issue was one of the “flashpoints” in discussions of politicians and experts accompanying the works on the lobbying act. On the one hand, views were presented that statutory regulation

Moreover, as a result of the indignation sparked by information about corruption in public life, arguments were put forward that new lobbying regulations would fulfil the intentions of the lawmaker, who foresaw in the constitution the principles of the openness of public life (art. 61 of the Constitution) and the right to submit petitions, proposals and complaints (art. 63 of the Constitution). The idea was promoted that the institution of lobbying – despite society's strong negative associations with corruption and lawless impact on the decision-making process¹⁷ – is a form of social participation and an embodiment of “deliberate democracy” popular in political philosophy, one of the tools of communication making it possible to bring the model of “participatory” or “discursive”¹⁸ governance to reality. The social need to pass an act was evident (the fact that 399 deputies were in favour of the act, only 4 abstained and nobody dared to be against speaks for itself)¹⁹, and the hopes attached to it were high.

2. CONTENT OF THE ACT

Despite its ambitious title and the wording of art. 1 (suggesting that the content of the act pertains to the – broadly understood – “law-making process”, i.e. encompasses the activities of various bodies and numerous forms of law-making, including the activities undertaken by the President of the Republic of Poland or the National Broadcasting Council issuing regulations or local authorities:

of lobbying was not needed, and that codes of ethics of lobbyists and changes to the rules of procedure of parliamentary chambers were a sufficient instrument, on the other the Polish Business Council stated in its position that “even some over-regulation will be definitely less harmful in this case than a lack of such regulation”. M. M. Wiszowaty, *Działalność lobbująca...*, p. 11.

¹⁷ A. Kubiak, *Parlamentarzyści o lobbingu: raport z badań*, Warsaw 2008, p. 5 et seq.

¹⁸ The model understood in such a manner is associated above all with the concepts put forward by the leading liberal thinkers of the second half of the 20th century: John Rawls and Jurgen Habermas. Independent of the vast corpus of foreign literature, the topic was also discussed by numerous Polish authors, such as: B. Abramowicz, *Koncepcja demokracji deliberacyjnej jako odpowiedź na postulaty usprawnienia demokracji przedstawicielskiej*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2011, year LXXIII, Vol. 4, pp. 215–229; T. Buksiński, *Dylematy demokracji deliberatywnej Johna Rawlsa i Jürgena Habermasa*, (in:) R. Marszałek, E. Nowak-Juchacz (eds.), *Rozum jest wolny, wolność – rozumna*, Warsaw 2002; A. Krzynówek, *Państwo i sfera publiczna w modelu demokracji dyskursowej*, (in:) D. Pietrzyk-Reeves (ed.), *Pytania współczesnej filozofii polityki*, Krakow 2007; J. Sroka, *Deliberacja i rządzenie wielopasmowe. Teoria i praktyka*, Wrocław 2009; R. Wonicki, *Spór o demokratyczne państwo prawa. Teoria Jürgena Habermasa wobec liberalnej, republikańskiej i socjalnej wizji państwa*, Warsaw 2007; K. Koźmiński, *Rola mediów w procesie stanowienia prawa w demokracji deliberatywnej*, (in:) A. Mróz, A. Niewiadomski, M. Pawelec (eds.), *Prawo, język, media*, Warsaw 2011, pp. 189–200.

¹⁹ Vote No. 28, sitting 107 on July 7, 2005, at <http://orka.sejm.gov.pl/SQL.nsf/glosowania?OpenAgent&4&107&28> (visited January 17, 2017).

self-government and government administration bodies, passing acts of local law, as well as internally binding law; and moreover creating grounds for assuming that lobbying was regulated on many levels, including also the stage of consultations and the issuing of opinions on drafts²⁰), provisions of the act have a very narrow scope of application. In general, the very volume of regulations and size of the act allow for the conclusion that it is particularly short (the more so if one takes into consideration the complexity of the regulated issue and confronts it with the volume of other acts related to its subject matter²¹).

Having read the act, one comes to the conclusion that “the act ignores the possibility of lobbies influencing law-making by the President (draft acts and resolutions), the Sejm, the Senate, the National Broadcasting Council and the decision-making bodies of local self-government and local government administration bodies (acts of local law). Furthermore, the regulation does not include the possibility of a group of citizens proposing a legislative initiative. What remains outside of the scope of the act is also lobbying concerning legal acts binding in the Polish legal order which originate from the procedure stipulated in the act of 11 March 2004 on the cooperation of the Council of Ministers with the Sejm and the Senate in matters related to the membership of the Republic of Poland in the European Union (...) the legislator did not decide to include in the provisions of the act at least the lobbying activities addressed at local and regional authorities”²². Among the authorities with legislative competences, the lobbying act solely mentions the Council of Ministers (according to art. 3 of the act, it is obliged to keep an inventory of legislative work, with information about draft assumptions for draft acts, draft acts and draft resolutions of the Council of Ministers), the President of the Council of Ministers and the ministers (art. 4 – analogical obligation to keep an inventory of legislative work), the Sejm (art. 8 speaking of an optional public hearing regarding a draft act in the chamber; in specific matters, the act makes reference to the principles contained in the Rules of Procedure of the Sejm), as well as other “entities responsible for preparing a draft resolution” that can hold a public hearing concerning such a draft (art. 9).

The aforementioned inventory of legislative work has not only an informative function (it brings the principle of the openness of public authorities’ actions into

²⁰ P. Kuczma, *Lobbying samorządowy czyli wolnoamerykanka*, “Rzeczpospolita. Prawo co dnia” of December 21, 2011.

²¹ The lobbying act is composed of only 24 articles. At the same time, the Rules of Procedure of the Sejm of the Republic of Poland of July 30, 1992 (Official Gazette of the Republic of Poland 2012, item 32, as amended) currently have 207 articles, Rules of Procedure of the Senate of the Republic of Poland of November 23, 1990 (Official Gazette of the Republic of Poland 2016, item 824) – 103 articles, and the act of June 24, 1999 (regulating a very narrow issue of a people’s petition) on the exercise of legislative initiative by citizens (Journal of Laws 1999, No. 62, item 688, as amended) – 21 articles.

²² P. Kuczma, *Definicja lobbingu według ustawy z 7 lipca 2005 r.*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2007, year LXIX, Vol. 4, p. 89.

reality), but it also allows “everybody” to present their interest in the works on draft assumptions for draft acts and draft resolutions. Submittal of an application results in a formal possibility of participating in the works on a draft act or resolution, yet the very application cannot be treated as a form of guarantee of participation in such works²³. Nevertheless, provisions of the act were constructed so that, in practice, compliance with the principle of openness (making information about drafts public) and participation (holding a public hearing) depends only on good will of the authorities engaged in the law-making process. Though formally the bodies listed in the act are obliged to keep an inventory of legislative work, the legislator did not foresee any sanctions for disregarding it. Moreover, the holding of a public hearing is not obligatory, and the provisions of the act definitely overuse the word “may” (according to art. 8, a public hearing “may” take place in the Sejm, art. 9 foresees that “the entity responsible for preparing a draft resolution may hold a public hearing concerning that draft”). The decision to hold a hearing is thus always dependent on the opinion of the entity responsible for preparation of the draft²⁴. What is more, it is possible to cancel a public hearing due to technical conditions or the conditions of the premises – it is enough that the entity states that it is not possible to organize a public hearing concerning a draft resolution (in particular because of the number of people willing to participate in it – art. 9 section 4).

Similar solution was introduced in the Rules of Procedure of the Sejm²⁵. According to the wording of art. 70a of the Rules, it is admissible to hold a public hearing concerning a draft act in the chamber, yet it is not obligatory (the decision in this respect is made by a resolution of the committee examining the draft upon a written motion of a deputy), it is severely limited in time (takes place only during one sitting of the committee – art. 70f section 2), takes place prior to detailed examination of a draft (art. 70f section 1) and may be cancelled “if due to technical conditions or conditions of the premises, and in particular due to the number of people willing to take part in a public hearing, it is not possible to organize such a public hearing” (art. 70e). The model awakens the objections of commentators (and did wake them already at the stage of legislative work on the act), who reckoned that the institution of public hearing is solely “fictitious”: the waiving of a public hearing may be “introduced solely for technical reasons or due to conditions of the premises” yet both these notions are vague and create a real possibility not to allow all of the interested parties to present their positions.

²³ W. J. Wołpiuk, *Ustawa o lobbingu i perspektywy jej realizacji*, “Studia Prawnicze” 2006, No. 3, p. 141 et seq.

²⁴ S. Spurek, *Komentarz do art. 9 ustawy o działalności lobbingowej w procesie stanowienia prawa*, (in:) *Działalność lobbingowa w procesie stanowienia prawa. Komentarz*, LEX 2015.

²⁵ Resolution of the Sejm of the Republic of Poland of July 30, 1992 – Rules of Procedure of the Sejm of the Republic of Poland (Official Gazette of the Republic of Poland of 2012, item 32, as amended).

It is dangerous inasmuch as it is particularly if a draft act awakens significant controversies or social emotions that a significant number of interested parties will appear. As a consequence, a public hearing may be turning into a highly fictitious tool”²⁶.

The legislator introduced a differentiation between lobbying activity (according to art. 2 section 1 it is “each activity undertaken by means of legally permitted methods aimed at influencing public authorities in the law-making process”) and “professional lobbying activity” (which must meet a number of conditions: be of profit-making nature; be conducted on behalf and for the benefit of third parties in order to have the interests of such parties included in the law-making process; be conducted by an entrepreneur or a natural person not being an entrepreneur based on a civil-law contract) – and imposes specific duties solely on professional lobbyists. “Such a definition of lobbying activity excludes from among lobbyists a significant group of people, and some even say the majority of those, who actually perform lobbying activities. All associations and their employees who actually conduct lobbying activities are – in the light of the act – not professional lobbyists. Therefore, a number of associations, chambers, societies, organizations were established that lobby for their own interest and are not registered as lobbyists. Thus, they do not bear the consequences of being lobbyists, i.e. they do not register with the Ministry of Internal Affairs and Administration, whereby professional lobbyists are obliged to do that”²⁷. In other words, the act only regulates the legal situation of entities that meet all of the following criteria: they profit from their activities, they act in the interest of third parties, they have the legal form of entrepreneurs or are natural persons in a civil-law relationship with their principal.

Failing to meet one of the above describe conditions (e.g. being in an employment relationship with the principal, acting in one’s own interest or running an NGO that is not a business entity) is enough not to acquire the legal status of a professional lobbyist, and hence not to be bound by the provisions of the act. It is obvious that not every form of lobbying activity must be of profit-making character – it is enough to think of the activities of an NGO, a trade union or a publisher (or even a single journalist or a consultant), who actively and comprehensively influence the legislative process – in the light of the definition of professional lobbying activity adopted in the act, they are not subject to any statutory obligations²⁸. Another example: barristers or solicitors, who acting on behalf of their clients and against remuneration impact the process of law-making meet the conditions

²⁶ P. Uziębło, *Instytucja wysłuchania publicznego w sprawie projektów ustaw (wybrane zagadnienia)*, “Gdańskie Studia Prawnicze” 2014, Vol. XXXI, p. 694.

²⁷ A. Kubiak, A. Krzewińska, *Działania pozorne w procesie stanowienia prawa na przykładzie ustawy o lobbingu*, “Przegląd Socjologiczny” 2009, Vol. 58, issue 1, p. 39.

²⁸ A. Chmielarz, *Działalność lobbingowa w procedurze ustawodawczej w Polsce – rozważania w zakresie teorii, prawa i praktyki*, “Studia Prawno-Ekonomiczne” 2007, No. 75, p. 73.

for including them among professional lobbyists²⁹, however if solicitors (even if they act for an identical entity and use identical methods) act on the basis of an employment contract they do not meet the criterion of a civil-law relationship (they are employed based on labour law provisions), and thus cannot be considered professional lobbyists. Wording of the provision leads to a certain paradox: a natural person lobbying based on a civil-law contract is a professional lobbyist, and the very same lobbyist if employed loses the status of a professional lobbyist (*sic!*) in the moment of entering into an employment relationship with the principal. It is another basic inconsistency of the regulation in question.

Assuming optimistically that a lobbyist meets all the criteria necessary to be considered a professional lobbyist, he or she should register (according to art. 10, the inventory of entities conducting professional lobbying activities is open and kept by the minister responsible for public administration matters). From that moment on, he or she gets the right to perform the activities “in the seat of the body providing services to a public authority”, and information concerning his or her activity should be made available in the Public Information Bulletin by public authorities (art. 16). Conducting professional lobbying activities without an entry into the inventory is punishable by an administrative fine in the amount from 3 000 PLN to 50 000 PLN (not to be forgotten: this risk does not exist in the case of an even most ruthless lobbyist who does not meet all the conditions specified in art. 2 of the act concerning professional lobbyists). Apart from the ridiculously low (relative to the capabilities of entities conducting activities on certain regulated markets and the economic consequences of the regulation) financial sanction³⁰, the act solely introduces legal consequences for failing to comply with the duty to register (even though the title of chapter 5 says “sanctions”, which sug-

²⁹ P. Kuczma, *Działalność lobbingowa korporacji prawniczych i ich członków*, “Palestra” 2014, No. 1–2, p. 148. It is, however, worth emphasizing that e.g. in the light of article 1 section 1 of the act of May 26, 1982 – the Law on the Advocates’ Profession (i.e. Journal of Laws 2015, item 615, as amended) “The Bar is established to provide legal assistance, co-operate in protecting a person’s rights and freedoms as well as to formulate and apply the law” (bolded by the authors), therefore the process of law-making is, according to the legislator’s intention, part of a bar member’s profession. Hence, one may question the relevance of introducing additional rationing in the case of lobbying activities of members of the bar (including the requirement to be entered in an appropriate register; there is no separate register e.g. of members of the bar acting in civil or criminal cases). However, there is no doubt that procedural matters concerning such activities (similarly to the activities of bar members e.g. in civil proceedings) may be the subject of statutory regulation. In the opinion of the authors, it must always respect the principles of the profession of a bar member, including legal privilege.

³⁰ As an example: the 2000 report of the World Bank on corruption in Poland stated that “in 1992 the fee for blocking the amendment of the act on games of chance and operation of casinos amounted to 500 thousand USD. Recently, the prices for blocking changes in other important acts reaches approx. 3 million USD”. *Programy antykorupcyjne. Raport Banku Światowego*, “Gazeta Wyborcza” of March 24, 2000.

gests that the number of provisions specifying negative consequences for breaching the act is plural).

The institution of inventory as per the model designed in the act also raises serious objections. Only a professional lobbyist is disclosed, there is no obligation, however, to disclose any information about the relationship between the registered entity and his or her principal. In other words, based on the inventory it is known who can act but it is not clear in whose interest. "It is visible that the Polish legislator on the one hand presented a very broad definition and thus a broad scope of entities was included in the group of entities conducting lobbying activities, and on the other did not cover with the regulation solutions frequently occurring in the majority of legal systems in the world, related to such notions as identification and registration of a lobbyist's principals (both direct and indirect) or interested parties, or entities benefitting from lobbying activity"³¹. Furthermore, "the lack of statutory obligation of a lobbyist to inform the registration body about the goals of his or her lobbying activity is a grave shortcoming of the act. It is a loophole"³². It is often underscored that effective regulation of lobbying requires lobbyists to comply with the obligation of registration and disclosure³³ – thus it is hard to conclude that the act in its current shape meets its assumptions. Surprisingly narrow is the scope of obligations of a registered lobbyist (in particular against the background of analogous solutions abroad, e.g. Lithuanian provisions require a lobbyist to precisely state the legal acts that he or she impacted, business relations and to disclose own expenses and income³⁴).

In the light of the aforementioned, barely outlined and exemplary (but also numerous other) imperfections of the act, it met with an exceptionally sceptical welcome from the commentators. It was frequently assessed as a model example of a legal "nonsense"³⁵, an "act prepared in a rush, without necessary analyses and unsuitable for real needs of the Polish public life"³⁶. Marek Zubik stated that the lobbying act was an "apparent regulation by the legislator", the content of which raises serious "doubts whether any entity from the ones currently conducting lobbying activity will decide to register in the inventory of entities conducting pro-

³¹ P. Burczaniuk, *Znaczenie lobbingu w kontekście bezpieczeństwa wewnętrznego państwa*, "Przegląd Bezpieczeństwa Wewnętrznego" 2015, Vol. 7, issue 12, p. 161.

³² M. Wiszowaty, *Działalność lobbingsowa...*, p. 180.

³³ M. M. Wiszowaty, *Regulacja prawna lobbingu samorządowego na świecie*, Instytut Spraw Publicznych, Warsaw 2010, p. 23; M. M. Wiszowaty, *Ustawa z 7 VII 2005 r. o działalności lobbingsowej w procesie stanowienia prawa, w trzecią rocznicę uchwalenia: analiza de lege lata i propozycje de lege ferenda*, "Acta Pomerania" 2008, No. 1, p. 3.

³⁴ M. M. Wiszowaty, *Regulacja prawna lobbingu w państwach europejskich...*, p. 55.

³⁵ A. Kubiak, *Lobbing w polskim prawie i praktyce*, "Annales. Etyka w życiu gospodarczym" 2013, No. 16, p. 136.

³⁶ J. Zbieranek, *Wnioski i rekomendacje*, (in:) G. Makowski (ed.), *Lobbing w samorządzie województwa. Raport z badań i monitoringu*, Warsaw 2010, p. 142.

fessional lobbying activities”³⁷. A similar stance was presented by Anna Kubiak and Aneta Krzewińska, who deemed the lobbying act a “non-genuine action”³⁸, and Grażyna Kopińska stated that “the key provisions of the act on lobbying are dead”³⁹. Paweł Kuczma contested in turn that “the hardest, yet also the most important aim will be to create a correct definition of lobbying activity. The legislator did not fulfil this task, which is not a source of optimism before subsequent amendments of the act, which in the light of the above described solutions seem to be indispensable”⁴⁰. It is hardly surprising, therefore, that (already at the stage of its entry into force and first years of validity) even the most radical demands were presented *de lege ferenda*: “the legislator should introduce far-reaching changes into the act on lobbying activity as soon as possible. The optimum solution, in particular in the light of so numerous shortcomings of the currently binding regulation, would be to adopt a brand new act and repeal the presently valid one”⁴¹.

Even though attempts were made at a systemic change (since, as was explained in official documents on legislative works, “despite the existence of the act, lobbying activity is in fact not regulated and remains outside of control. The scale of identified weakness and gaps provides grounds for drawing conclusions about the illusory role of the provisions of the lobbying act and the need to prepare a new regulation without delay”⁴²), they were not successful. Minor amendments of the act did not touch upon the key contents of the act (the act was amended four times, all amendments were of a purely “cosmetic” nature), and the experts who criticized the normative shape of the act 10 years ago have not changed their position – they still consider the act to be a “façade regulation”⁴³.

Taking a close look at the vast body of literature devoted to the topic of the national system of law-making, it is hard not to get the impression that in the deliberations up until now a sufficient number of arguments were formulated in favour of an in-depth and consistent reform. Yet still, the lobbying act has been in force for over a decade and there are no signs that it could be the subject of a legislator’s intervention in the near future. Perhaps then critical analyses, formulated solely based on “dry” normative material, are not a sufficient argument for change? Perhaps the lobbying act is one of those normative acts which – albeit

³⁷ M. Zubik, *Ustawa o działalności lobbingsowej w procesie stanowienia prawa. Uwagi na tle sytuacji organizacji pozarządowych*, Institute of Public Affairs, Warsaw 2006, p. 12.

³⁸ A. Kubiak, A. Krzewińska, *Działania pozorowane...*

³⁹ E. Kania, *Kopińska: najważniejsze przepisy ustawy o lobbingu są martwe*, “Rzeczpospolita” of November 9, 2014.

⁴⁰ P. Kuczma, *Działalność lobbingsowa...*, p. 92.

⁴¹ M. M. Wiszowaty, *Ustawa o działalności lobbingsowej...*, p. 70.

⁴² Draft assumptions for draft act on lobbying of March 3, 2011, <https://legislacja.rcl.gov.pl/projekt/4600/katalog/4604#4604> (visited January 17, 2017), p. 3.

⁴³ M. M. Wiszowaty, A. Ivanowa, *Tak w Polsce, jak i w Unii regulacja lobbingu jest fasadowa*, “Gazeta Prawna” of May 24, 2016.

faulty in formal aspects – bring desired real effects? The matter becomes slightly more clear once practical aspects of the validity of the lobbying act are analysed.

3. APPLICATION OF THE LOBBYING ACT

At the beginning it is worth quoting some figures. Currently, the inventory of people conducting professional lobbying activity includes almost 400 entities⁴⁴, yet as regards lobbyists performing lobbying activity in the Sejm, there are only 34 of them⁴⁵. At the same time to obtain an access card to the premises administered by the Chancellery of the Sejm within the scope allowing for lobbying activity (art. 201b of the Rules of Procedure of the Sejm), the interested party is required to disclose the interest that is protected by him or her as part of the lobbying activity conducted (as was pointed out before, this obligation is not included in the lobbying act).

Two conclusions can be drawn from the above. The very fact that disclosure of protected interest was not included in the lobbying act but a different (non-statutory) normative act (moreover, pertaining just to one of many fractions of the law-making process) proves the imperfection of the act in question. Secondly, the small number of lobbyists who decided to succumb to the discipline contained in the Rules of Procedure of the Sejm shows that the general and imprecise character of the lobbying act grants perfect room for escape from full transparency of lobbying activities. It is obvious that conducting effective lobbying activities does not require a physical presence on the premises of the Sejm.

Furthermore, there is a certain disharmony between the regulations of the lobbying act and the provisions of e.g. the Rules of Procedure of the Sejm, which discourages real lobbyists from disclosing their true activities. Article 154 section 2a of the Rules of Procedure of the Sejm solely limits the right of people conducting professional lobbying activities to participation in the sittings of Sejm committees (*a contrario*, this is not the case when it comes to the sittings of Sejm sub-committees; this results directly from art. 154 section 2d of the Rules of Procedure of the Sejm). This constitutes a natural incentive to engage in non-genuine activities, conducted by lobbyists as representatives of social organizations and other non-professional lobbyists⁴⁶. It is yet another malfunction that thwarts the initial aims of the lobbying act. Furthermore, the obligations imposed on so

⁴⁴ See <https://bip.mswia.gov.pl/bip/rejestr-podmiotow-wykon/23846,Rejestr-podmiotow-wykonujacych-zawodowa-dzialalnosc-lobbingowa.html> (visited September 25, 2016).

⁴⁵ See http://www.sejm.gov.pl/Sejm8.nsf/lobbing_osoby.xsp (visited September 25, 2016).

⁴⁶ A. Kubiak, A. Krzewińska, *Działania pozorne...*, pp. 39–40.

called professional lobbyists actually encourage them to escape from the discipline of the lobbying act and to act as non-professional lobbyists⁴⁷.

Further figures also prove the insignificant scale of disclosed i.e. professional lobbying. In total, from the entry into force of the lobbying act until December 31, 2015, professional lobbyists' participation was registered in the case of 292 sittings of Sejm committees⁴⁸. Approx. 13 900 sittings of standing committees took place in the same time⁴⁹, which means that the rate of participation of professional lobbyists in the sittings of standing committees in the Sejm was at the level of approx. 2.1%. Moreover, it needs to be emphasised that in vast majority of cases, the participation was passive (i.e. lobbyists did not make any interventions and did not present any postulates in writing) – only in 28 cases did professional lobbyists take the floor during sittings of committees and submitted only 14 written proposals of amendments, remarks, demands, etc.⁵⁰. The disclosed activity of lobbyists is hence undoubtedly minute.

Taking into consideration the existence of undisclosed lobbying, i.e. *de facto* formally non-professional lobbying, one must ask a question about the scale and effects of such activity. Research in this area is – understandably – difficult since there is no obligation to register and there are no limitations for non-professional (social) lobbyists, and thus it is not possible to identify any hard data on this aspect of lobbying activity. However, an analysis of materials from legislative processes (both at the governmental and the parliamentary stage), allows one to notice general participation of various stakeholders (companies, sectoral organizations, NGOs, trade unions, etc.), who are not professional lobbyists and thus are not subject to the discipline of the lobbying act. Inasmuch as it can be assumed that some of these entities act in broadly understood public interest (e.g. NGOs), certainly many of them (sectoral organizations, entrepreneurs, etc.) act in broadly defined economic interest.

Also in the perception of bodies connected with law-making, non-professional lobbying is a relatively common phenomenon playing a key role in the legislative processes⁵¹. On the other hand, a survey conducted by the Batory Foundation⁵² is a source of interesting insights, from which it results that – at least on a declarative level – MPs state that they deal with “unofficial” lobbying infrequently or not at all (some MPs do notice the phenomenon and declare having come into contact with it – in particular MPs with more years in the parliament)⁵³. Additionally,

⁴⁷ *Ibidem*, p. 40. The authors present a very telling example of the lobbyists' unwillingness to wear red badges.

⁴⁸ See www.sejm.gov.pl.

⁴⁹ *Ibidem*.

⁵⁰ See <http://www.sejm.gov.pl/lobbing/>, data covering the period until December 31, 2015.

⁵¹ Cf. *Projekt założeń projektu ustawy o lobbingu*, <https://legislacja.rcl.gov.pl/docs//1/4600/5050/5051/dokument1721.pdf>, p. 3 (visited January 17, 2017).

⁵² A. Kubiak, *Parlamentarzyści o lobbingu...*

⁵³ *Ibidem*, p. 15.

despite declarative insignificant contact with lobbying, MPs point out that there are cases when external entities strive for their support for specific legislative solutions⁵⁴. It is also telling that majority of respondents declare that they were not persuaded to change their decisions by professional lobbyists (67%)⁵⁵; this may constitute empirical evidence both of the small scale of lobbying and – on the contrary – of the existence of a “grey area” of unofficial lobbying.

The latter thesis is supported by answers to subsequent questions in the survey – it turns out it is not professional lobbyists who most often strive for MPs’ influence on the law, but above all people acting as experts and invited as guests during the works of Sejm committees and sub-committees (obviously next to other MPs)⁵⁶. It needs to be pointed out that representatives of sectoral organizations e.g. acting in the form of associations⁵⁷ or economic chambers⁵⁸ may also act in the form of non-professional lobbying.

As a consequence, available publications draw attention to the institutionalization of non-professional lobbying in the form of the participation of experts and invited guests in the sittings of Sejm committees and sub-committees⁵⁹ (based art. 154 section 3 and art. 165 section 2 of the Rules of Procedure of the Sejm). Clearly, such people are formally not required to disclose any protected interest or to register. What is more, the formula stipulated in the aforementioned provisions of the Rules of Procedure of the Sejm even suggests the impartiality of such people – it is, however, not verified in any manner, and it is not a preliminary condition for being invited to sittings of Sejm committees and sub-committees. Answers of the respondents show that this impartiality is often dubious⁶⁰.

In practice the lobbying act does not force any disclosure either of the goals of the lobbying activity or of its methods. It seems that this in particular should be at the core of the correct regulation of lobbying activity. It is important inasmuch as there is no doubt that entities conducting lobbying activity (in particular for businesses) do not feel the need to disclose their activities or represented interest⁶¹.

⁵⁴ *Ibidem*, p. 17–18.

⁵⁵ *Ibidem*, p. 19.

⁵⁶ *Ibidem*, p. 20–21.

⁵⁷ Cf. H. Jagoda, *Stowarzyszenie jako forma branżowego zrzeszenia przedsiębiorstw*, “Ekonomia i Prawo” 2012, Vol. 11, No. 4, pp. 124–125.

⁵⁸ *Przejrzystość procesu stanowienia prawa. Raport z realizacji projektu “Społeczny monitoring procesu stanowienia prawa”*, Batory Foundation, Warsaw 2008, pp. 154–155.

⁵⁹ *Czy możliwy jest przejrzysty lobbing? Raport o potrzebie lepszych regulacji i dobrych praktyk działalności lobbingowej*, Batory Foundation 2015, p. 14. Cf. also A. Kubiak, A. Krzewińska, *Działania pozorne...*, p. 40.

⁶⁰ A. Kubiak, A. Krzewińska, *Działania pozorne...*, p. 40. Among people who potentially could be actual lobbyists, the Authors list also assistants to deputies, deputies themselves, journalists (pp. 40–42).

⁶¹ G. Słocki, *Normatywna konstrukcja zjawiska lobbingu w ustawie o działalności lobbingowej*, “Przegląd Prawa i Administracji” 2007, No. LXXV, p. 234.

Furthermore, public statements often mention the original sin of the Polish lobbying act in its current wording i.e. the fact that the regulation only covers professional lobbying, whereas any lobbying regulation should (for the sake of transparency) also include phenomena going beyond economic lobbying, such as, broadly understood, public interest advocacy⁶² (e.g. of NGOs)⁶³. Additionally, the definition of professional lobbying contained in art. 2 sections 2 and 3 of the lobbying act pertains solely to persons who act for the benefit of third parties representing their interest based on a civil-law contract, against a remuneration. Therefore, e.g. entities acting in their own economic interest, such as the already mentioned economic chambers or entrepreneurs themselves are not considered professional lobbyists. We are hence dealing with a clear exclusion of all public interest activities (NGOs) from the discipline of the lobbying act as well as of activities in one's own interest (entrepreneurs, sectoral organizations) or in the vital interest of a given pressure group (e.g. professional interest).

In this context, persons who register as professional lobbyists are discriminated against in comparison with all these entities who are not covered by the definition of professional lobbying – this view is clearly expressed by people conducting professional lobbying activities⁶⁴. Moreover, in the opinion of the authors of the present article, there are no meaningful arguments in favour of such a differentiated approach by the legislator to professional lobbying, non-professional lobbying or even advocacy. Each of these fields of activity aims at exerting an impact on the process of law-making. Differentiation between professional lobbying and other manifestations of lobbying (and covering only the former with statutory restrictions) favours the creation of pathologies consisting in hidden lobbying, e.g. lobbying activities for economic entities conducted in the formula of an NGO or an experts' institution. Currently, the regulations in this aspect are so inadequate that it is hard to speak of illegal activities – the lobbying act simply permits such practices indirectly. At the same time, 1) disclosure (transparency) of such activities; 2) learning about the interests represented by these entities; 3) monitoring their impact on specific legislative solutions are in society's interest.

A further problem stemming from application of the lobbying act is the question of so called public hearings. Inasmuch as the very institution of public hearing should be in general viewed positively as a tool of social participation in the law-making process⁶⁵, the practice of its application, however, is far from perfect.

⁶² Cf. M. Mołęda-Zdziech, *Ewolucja modeli lobbingu – wpływ gospodarki opartej na informacjach i wiedzy*, "Kwartalnik Kolegium Społeczno-Ekonomiczne. Studia i Prace" 2012, No. 2, p. 58.

⁶³ *System stanowienia prawa w Polsce. Zielona księga*, Chancellery of the President of the Republic of Poland, Warsaw 2013, p. 58 et seq.

⁶⁴ *Przejrzystość procesu stanowienia prawa...*, pp. 153–161.

⁶⁵ S. Patyra, *Wysłuchanie publiczne jako środek partycypacji społecznej w sejmowym postępowaniu ustawodawczym*, (in:) J. Połuszný, W. Skrzydło (eds.) et al., *Prawo naszych sąsiadów*.

What is particularly striking is above all the low number of public hearings that took place in the Sejm (in the Sejm of the 5th term – 6; 6th term – 12; 7th term – 10; 8th term – 2). Thus, in total during the whole period of validity of the lobbying act there were only 30 public hearings, which in comparison with the total number of draft acts examined by the Sejm during that period, i.e. 3819⁶⁶ amounts only to approx. 0.78% of all draft acts. The figures show that the institution is in fact marginal, or even ignored, and has no impact on the law-making process in the Sejm.

4. CONCLUSIONS

The lobbying act, as can be seen, cannot be assessed positively. Without exaggeration one may state that in its current form, the regulation is practically inoperative. It is, therefore, obvious that deep changes are necessary in this area. The basic demand concerns the elimination of the incomprehensible differentiation of professional lobbying and a parallel introduction of a uniform regulation covering all manifestations of lobbying (professional and non-professional), as well as advocacy. Such a uniform regulation must ensure transparency of actions consisting in influencing the law-making process (it remains to be discussed whether the current registration model should be kept at ministerial level, or whether a different solution should be adopted), and allow for broad participation in the law-making process of entities operating in a transparent manner (for example, there should be no discrimination of lobbyists in the case of sittings of Sejm sub-committees) – which will discourage lobbyists from acting in secrecy. Furthermore, it is necessary to introduce regulations – guaranteeing transparency – concerning the participation of experts and invited guests in the law-making process in the Sejm. Using these institutions for the purpose of hidden lobbying must be eliminated or possibly covered by board lobbying regulations. Another problem requiring urgent solution is also the shortage of public hearings. Therefore, it seems justified in this context to take into consideration the introduction of a positive catalogue of premises for obligatory public hearings.

Konstytucyjne podstawy budowania i rozwoju społeczeństwa obywatelskiego w Polsce i na Ukrainie, Rzeszów 2013, p. 243.

⁶⁶ Data based on studies concerning draft acts from the 5th to the 8th term of the Sejm, www.sejm.gov.pl.

10 YEARS OF THE POLISH ACT ON LOBBYING ACTIVITY – 10 YEARS OF DISAPPOINTMENTS

Summary

The aim of this paper is to present the main solutions adopted in Polish act of July 7, 2005 on lobbying activity in the law-making process, with particular emphasis on the dysfunctions of this regulation. Despite the hopes of reducing corruption in public life and ensuring the transparency of the decision-making process, the discussed act deserves a critical evaluation. Among the many weaknesses, some must be especially identified: the act ignores the possibility of lobbies influencing the law-making by the President, the parliament bodies, the National Broadcasting Council and the decision-making bodies of local self-government and local government administration bodies; public hearing procedure; defective definition of lobbying activity and the size of penalties for violation of the lobbying regulations. Moreover, actual effects of the act were presented, which prove the thesis that Polish lobbying act can be assessed as “apparent regulation”.

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KEYWORDS

lobbying, act of July 7, 2005 on lobbying activity, legislation, participation, corruption, public hearing

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lobbying, ustawa z dnia 7 lipca 2005 r. o działalności lobbingowej w procesie stanowienia prawa, legislacja, partycypacja, korupcja, wysłuchanie publiczne