Actors and Roles in EU Law

No Longer Marginal? Finding a Place for Lobbyists and Lobbying in EU Law Research

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Putting 'lobbyists' and 'lobbying' on the EU law map – acknowledging that there is little interest in lobbying by EU legal research – explaining why EU lawyers and especially constitutional law scholars should be interested in lobbying – presenting a framework to study lobbyists as regulated actors under EU law – considering the merits of ethnographically-oriented socio-legal research and the 'new legal realism' as methods of studying lobbyists and lobbying.

INTRODUCTION

Lobbying is hardly an unfamiliar term to anyone who even occasionally browses the news. As an activity, it means approaching decision-makers to influence legislative and regulatory action (or obtain a promise of inaction).[1] Some lobbyists, such as political consulting firms, do so professionally to advance the interests of clients, whereas businesses and non-governmental organisations (NGOs)

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[1] A. Chalmers, 'Trading Information for Access: Informational Lobbying Strategies and Interest Group Access to the European Union', 20 *Journal of European Public Policy* (2013) p. 39. The definitions of lobbying differ depending on the context. In the media, lobbying is understood broadly to refer to various situations where something is promoted ('Teens lobby for later curfews'), whereas in research and regulation the definitions are considerably narrower.

European Constitutional Law Review, 18: 682–705, 2022

doi:10.1017/S1574019622000384

organise and promote their own interests or collective interests of their members. This activity, also known and referred to as 'interest representation', 'interest group activity', and 'political advocacy',[2] forms part of the fabric of law- and policy-making processes. Despite the negative sentiments often directed at lobbyists, lobbying fulfils several useful functions in societies.[3]

Although lobbying is about influencing lawmaking and legislation, the interpretation of which is traditionally seen as the work of lawyers, lobbying is not a priority as a research topic in the legal scholarship. Lobbying research, which covers the practice of lobbying and its impact on law- and policy-making as well as the regulation of lobbying, is anchored in disciplines such as political sciences, economics, and (political) sociology: it is rarely found in legal studies in general, and in EU legal research in particular.[4]

This would not perhaps be so unusual if it were not for two developments. First, lobbying is a regulated practice, and the importance of regulating it is gaining ground globally. In an increasing number of countries both inside and outside the EU as well as at international levels of governance, lobbyists must pay heed to rules that govern their interactions with decision-makers. Second, lobbying has become an important part of the EU's rule of law agenda. Since 2020, the Commission has undertaken an annual Rule of Law Report that consists of a synthesising Communication and 27 Country Chapters, which rely on a qualitative assessment it has carried out.[5] The Report covers four key areas for the rule of law: the justice system, the anti-corruption framework, media pluralism, and other institutional issues related to checks and balances. The lobbying regulations of member states (or in many cases still, a lack of them) are analysed annually as part of the broader anti-corruption framework and more generally as an issue of equality, democracy and human rights. As pressure from international organisations is shown to be conducive to national regulation in member states,[6] it is likely that yearly assessments will encourage more member

[2]These terms and the respective actor terms –'lobbyist', 'interest group', 'interest representative', 'policy advocate' –are used interchangeably in this article. It is typically the activity – lobbying – that interests researchers, rather than the actor, with the definition of 'lobbyist' tending to be of only secondary concern. Consequently, if lobbyists are defined, they are defined in an effective but tautological fashion: lobbyists are actors who engage in lobbying.

[3]OECD, *Lobbyists, Governments and Public Trust, Volume 1: Increasing Transparency through Legislation* (1 December 2009), ⟨https://doi.org/10.1787/9789264073371-en⟩, last visited 7 November 2022.

[4]Exceptions exist, of course, and I refer to them in relevant parts of the article.

[5]2022 Rule of Law Report, ⟨https://ec.europa.eu/info/publications/2022-rule-law-report-communication-and-country-chapters_en⟩, last visited 7 November 2022.

[6]M. Crepaz, 'Why Do We Have Lobbying Rules? Investigating the Introduction of Lobbying Laws in EU and OECD Member States', 6 *Interest Groups & Advocacy* (2017) p. 231.

states to consider passing legislation on lobbying to satisfy the Commission's intensifying gaze.

The growing importance of the legal regulation of lobbying and the lack of legal research results in a curious mismatch. Why does the Commission think that transparent and regulated lobbying is an element of the rule of law when legal scholarship overlooks the whole issue? Why is legal scholarship content with leaving a quickly evolving, dynamic body of law to be researched by political scientists? This is not, however, merely an issue of policy or research preference. The lack of an overall legal approach to this field of research also creates problems of constitutional (law) importance, because the contribution of lobbying to democratic processes is underestimated and poorly understood.

In this article I raise two specific questions, which I aim to weave into a self-reflective analysis of the place of lobbyists and lobbying in EU legal scholarship: (1) how EU law research conceives of lobbyists and their roles, and (2) how lobbyists and their impact on EU law can be researched and which methodological choices could (and indeed should) be used.

As regards the first question, I reflect on the difficulties of EU law, constitutional and administrative law in particular, in enabling the recognition of lobbying and lobbyists in their own right and affording them, or legal regulation of them, any 'legal' value or relevance as a valid object of study. Part of the difficulty seems to stem from the fact that EU law scholars are waiting for the courts to first engage with lobbying and lobbyists. The analysis of EU legal research can possibly be extended to describe the state of national legal scholarship, too. But as this article focuses on EU law, consideration of national research needs to be left for another occasion. I also raise an important counterquestion, i.e. whether the marginalisation of lobbying in legal scholarship is a mistaken perception, and whether EU legal research has involved private actors and NGOs as actors and reflected on their ability to influence EU legislation and its application, but done so without using lobbying nomenclature (to avoid obvious negative connotations).

As for answering the second research question, I suggest a provisional means of conceiving of lobbyists as regulated actors and including them in the analysis of EU law by examining the regulatory frameworks within which lobbying takes place. I call these the political, the legal, and the constitutional frameworks. The 'political' framework comprises policy practices; the 'legal' dimension covers the norms and principles that are applicable to lobbying irrespective of their actual legal or normative bite (thereby also including soft law norms); and, finally, the 'constitutional' connects the practice of lobbying to constitutional and democratic principles governing the law-making process in the EU. Although legal scholarship shows a natural affinity and preference for the legal framework, this article argues it should not limit itself to describing and interpreting the law on lobbying, but should ambitiously extend its reach. Legal scholarship is well-placed to

address lobbying from a normative viewpoint that sees lobbying connected to democratic processes, and constitutional and administrative law scholarship especially should engage with lobbying. This is because constitutional law can contribute to reinvigorating prescriptive scholarship on lobbying, evaluating the practices of lobbying from the perspective of a democratic commitment to equality and inclusion as well as participation and broader rule of law principles.

As a reaction to this Special Section's call for legal scholars to 'make the parameters of their approach more explicit',[7] in this article I also briefly reflect on my experiences in conducting research on the margins of scholarship on a topic that is not deemed legally relevant or belonging to legal research. Namely, the 'exclusion or inclusion'[8] of some actors, some topics, or some methods from (or into) the scope of EU legal research not only affects the development of EU law, but also the scholar personally.

The article proceeds in main four steps. First, I discuss EU legal research on lobbying and suggest two reasons why there has been hardly any interest in lobbying by legal scholars. I then take note of the argument that, despite appearances to the contrary, EU legal research has covered lobbying and lobbyists by analysing civil society and private parties as actors of EU law and argue that while there may be some truth to the claim, it does not suffice to demonstrate that there is a place for lobbying in legal scholarship. Next, I introduce the three regulatory frameworks as elements of a future research agenda. In the penultimate section I make a few remarks on the methods of studying lobbyists under EU law and emphasise the importance of interdisciplinary research. In the final section I draw a conclusion from the discussion and analysis.

EU legal research and lobbying

Lobbying is not a preferred topic for EU legal scholarship, and there seems little to be said on the article's first question of how EU law research conceives of lobbyists and their roles. Administrative and constitutional law, which would be obvious places to study lobbying, have not developed a framework for doing so, or considered the implications of lobbying on the functioning of EU decision-making in any systemic or sustained way.

The marginal role of lobbying in legal scholarship in general and EU legal scholarship in particular seems, however, to make sense. Many would argue that because there is little to no relevant law, and therefore there are many areas that are unregulated, it is better for lawyers to stay away entirely. What is relevant law in terms of lobbying? The law on lobbying primarily consists of rules to increase the

[7]R. Gadbled and E. Muir in this Special Section.
[8]Ibid.

https://doi.org/10.1017/S1574019622000384 Published online by Cambridge University Press

transparency of lobbying through lobbying registers or meeting diaries. Despite what is sometimes assumed, rules governing different participatory mechanisms such as consultation procedures are not part of the law and regulation on lobbying. For instance, consultation rules establish the obligations of regulators to carry out certain actions and give citizens and companies rights to be notified, comment on proposals, know how comments are handled, or receive feedback. They are obviously important to lobbyists (and to the researchers of lobbying) too, but because their function is not to increase transparency but to structure participation, they do not constitute rules to regulate lobbying, although they undeniably constitute rules affecting lobbying.[9]

Even in this narrow sense, the idea that there is little to no relevant lobbying law is (and has been) factually incorrect. From a global perspective, the US has had legislation on lobbying since the 1950s, and Canada has too, from the late 1980s. To date, around 20 of the 36 member countries that make up the Organization of Economic Cooperation and Development have enacted lobbying laws.[10] Closer to home, seven EU member states (Austria, France, Germany, Ireland, Lithuania, Poland, Slovenia), and the UK as a former member state, have passed legislation on lobbying.[11] The proportion of lobbying-legislating member states is growing fast. In Finland, Italy, and Latvia, lobbying laws are currently being discussed by the legislature.[12] Additionally, many EU countries have non-binding rules in place to regulate access to decision-makers. At the EU level, EU institutions regulate lobbying through the European Transparency Register,[13]

[9]Another thing is whether transparency is too important at the cost of equality of access, for instance: *see* O. Ammann, 'Transparency at the Expense of Equality and Integrity: Present and Future Directions of Lobby Regulation in the European Parliament', 6 *European Papers* (2021) p. 239.

[10]The OECD has not updated its 'Timeline of Lobbying Regulations' since 2014 when it counted the existence of 15 lobbying regulations: ⟨https://www.oecd.org/corruption/ethics/lobbying/⟩, last visited 7 November 2022.

[11]For an overview, *see* R. Chari et al., *Regulating Lobbying: A Global Comparison*, 2nd edn (Manchester University Press 2019). Germany is not included because the legislation on a lobbying register came into force on 1 January 2022, *see* Gesetz zur Einführung eines Lobbyregisters für die Interessenvertretung gegenüber dem Deutschen Bundestag und gegenüber der Bundesregierung (Lobbyregistergesetz – LobbyRG), 16 April 2021, Bundesgesetzblatt 2021 Teil I Nr. 19 vom 27 April 2021, p. 818, ⟨*https://www.bgbl.de/xaver/bgbl/start.xav#__bgbl__%2F%2F*%5B%4$0attr_id%3D%27bgbl121s0818.pdf%27%5D__1625212991548⟩, last visited 7 November 2022.

[12]For Finland, *see* ⟨https://oikeusministerio.fi/en/project?tunnus=OM033:00/2019⟩, last visited 7 November 2022; for Italy, *see* ⟨https://www.thegoodlobby.it/campagne/lobbying-italia/⟩, last visited 7 November 2022, and for Latvia, ⟨https://delna.lv/wp-content/uploads/2021/06/EN_Designing-Lobbying-Regulation-in-Latvia_final.pdf⟩, last visited 7 November 2022.

[13]Transparency Register, ⟨https://ec.europa.eu/transparencyregister/public/homePage.do?redir=false&locale=en⟩, last visited 7 November 2022.

created by the Interinstitutional Agreement.[14] Registration on the European Transparency Register remains voluntary, however, and the EU institutions have few tools with which to force lobbyists to do so and disclose information: even so, the Register has data on over 13,000 lobbyists. The Register is complemented by the rules of the Commission and the European Parliament requiring their higher level Commission staff and MEPs serving legislative functions as rapporteurs to record their meetings in online calendars.[15]

Despite a flurry of recent legislative and regulatory activity, nearly all research in this area is conducted by political scientists.[16] What is particularly interesting is that the new lobbying legislation adopted in recent years in several European countries (Austria, France, Germany, Ireland, the UK) is mainly studied by political scientists, and few legal scholars have devoted any attention to its evolution.

The second reason why the lack of interest on the part of legal scholarship makes sense is tradition. As political scientists have traditionally studied lobbying (including legislation adopted on lobbying activities), lawyers are simply not accustomed to contributing to this area of study. One reason why lawyers have not developed a tradition in this area is that lawyers tend to look to, and subsequently frame their scholarship around, the courts. Legal research often takes case law as its starting point, and if there are no cases, there is little on which to base research.[17] In a recent monograph on the mobilisation of environmental movements in the wake of Brexit advocacy in the UK, Abbot and Lee note how environmental law scholarship is primarily occupied with NGOs as potential litigants.[18] In their view, this inflated interest in litigation 'reflects a well-known academic preference for courts and cases as "the star of the show", over statutes

[14]Interinstitutional Agreement of 20 May 2021 between the European Parliament, the Council of the European Union, and the European Commission on a mandatory transparency register. OJ L 207, 11.6.2021, p. 1-17.

[15]Commission Decision of 25 November 2014 on the publication of information on meetings held between Directors-General of the Commission and organisations or self-employed individuals 2014/838/EU, Art. 7 of Commission Decision C(2018)0700 on a Code of Conduct for the Members of the European Commission, and Rule 11 of the European Parliament's Rules of Procedure.

[16]As exceptions, *see* S. Smismans, 'Regulating Interest Group Participation in the EU: Changing Paradigms between Transparency and Representation', 39 *European Law Review* (2014) p. 470; E. Korkea-aho, 'Sunday Dinners and Hot Baths in a "Wild Wild North". The Nordic Discussions on Lobbying Laws and Implications for the EU Transparency Agenda', 27 *European Public Law* (2021) p. 355, and Ammann, *supra* n. 9.

[17]As one of the reviewers suggested, this may be a consequence of the dominance of English language scholarship, which has adopted the British understanding of legal scholarship: law is what courts say it is (not what legislatures or executives say).

[18]C. Abbot and M. Lee, *Environmental Movements and Legal Expertise. Shaping the Brexit Process* (UCL Press 2020) p. 9.

and legislatures'.[19] And while litigation occupies a key place in important legal scholarship on NGOs, not only in climate law but also in aspects of human rights law,[20] other aspects of their work, such as activities aiming to change law through lobbying, often tend to go largely unrecognised.

The singular focus of lawyers on courts is not a trend seen only in Europe. In the US, themes around lobbying are routinely considered in legal scholarship, but even there, researchers active in the field have noted the scarcity of research on lobbying compared to other areas, such as campaign financing, which in the US attracts major attention from legal scholars. When discussing the scant interest that researchers have in lobbying, Gerken remarks that one reason may be that there is not enough case law 'to kick around'.[21] This seems correct, because campaign financing, a field in which the US courts have over the years rendered many controversial judgments, including *Citizens United* in 2010,[22] has consistently remained a focus for administrative and constitutional law scholars.

But perhaps the marginalisation of lobbying in legal research is simply a mistaken perception? One may legitimately contend that legal scholarship has in fact included lobbyists and lobbying in the study of EU law but has done so without using lobbying nomenclature (to avoid negative associations). I consider this claim in the next sections.

Actor-orientation in legal research

EU legal research has typically focused on analysing the seven Treaty-mentioned institutions that shape the governance of the EU. Among them, the Court has always elicited keen interest from lawyers. Analyses of other than these seven traditional institutions have, however, gained in popularity in recent years with EU agencies as a particularly vibrant and fast-growing topic of legal research.[23] There is also a growing body of research on civil society and private actors.

While the term 'institution' helpfully captures many important actors of the EU, there is no respective umbrella of a term for these 'other' actors. The term 'non-institutional actor' can be found but is hardly used in EU administrative and

[19]Ibid. *See also* A. Somek, who describes EU legal scholarship as 'followership' in 'Two Times Two Temperaments of Legal Scholarship and the Question of Commodification', 1 *European Law Open* (2022) p. 627 at p. 630.

[20]*See* e.g. V. Passalacqua, 'Legal Mobilization via Preliminary Reference: Insights from the Case of Migrant Rights', 58 *Common Market Law Review* (2021) p. 751.

[21]H. Gerken, 'Keynote Address: Lobbying as the New Campaign Finance', 27 *Georgia State University Law Review* (2021) p. 1147 at p. 1156.

[22]558 U.S. 310 (2010).

[23]M. Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press 2016).

constitutional law. The Treaties and EU official documents do not use the concept, whereas some textbooks do but often without specifying which actors the term includes. The term 'non-institutional actor' is principally referred to in contexts where authors discuss the duty of the EU institutions to include actors other than the institutions in the decision-making process, especially in public consultations.[24] Outside EU law, the Venice Commission speaks of 'extra-institutional actors', defining them as 'an entity or person who is not ... exerting public authority or fulfilling a constitutional mandate'.[25] The notion of 'extra-institutional actors' is specifically used to discuss lobbying. The Venice Commission highlights how the extra-institutional actor can assume two roles in the lobbying relationship. It cites an example of a professional association that is exerting public authority when it defines deontological regulation (and thus, can potentially be lobbied), but which assumes the lobbying role of an extra-institutional actor when it, in the absence of a formal advisory role, influences a Bill that is pending before Parliament and which will affect the profession.

Perhaps to avoid getting tangled up in unnecessary categorisations, EU legal scholarship is increasingly interested in using the notion of an 'actor' to study EU law. This type of analysis seems particularly relevant for scholarship on the EU as a global actor shaping the international legal order, both inside and outside the Common Foreign and Security Policies.[26] Such research also involves EU agencies, whose international cooperation has intensified, triggering important legal questions regarding their status as global legal actors within the EU and on a global level.[27] These studies rarely explicitly describe what such actor-oriented analyses mean in terms of specific research design and methodology.

[24]E.g., D. Chalmers et al., *European Union Law: Text and Materials* (Cambridge University Press 2014).

[25]European Commission for Democracy through Law (Venice Commission), *Report on the Role of Extra-Institutional Actors in the Democratic System (Lobbying)*, adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013), para. 13a. The Venice Commission is the Council of Europe's advisory body on constitutional matters. Composed of national constitutional lawyers, the Venice Commission represents the constitutional traditions of its members.

[26]Among others *see* M. Evans and P. Koutrakos (eds.), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Hart Publishing 2011); K.E. Jørgensen and K.V. Laatikainen (eds.), *Routledge Handbook on the European Union and International Institutions: Performance, Policy, Power* (Routledge 2013); B. van Vooren et al. (eds.), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press 2013); D. Kochenov and F. Amtenbrink (eds.), *The European Union's Shaping of the International Legal Order* (Cambridge University Press 2014); J. Zeitlin (eds.), *Extending Experimentalist Governance? The European Union and Transnational Regulation* (Oxford University Press 2015). Most of this research began in the aftermath of the Lisbon Treaty and the conferral of legal personality on the EU.

[27]F. Coman-Kund, *European Union Agencies as Global Actors. A Legal Study of the European Aviation Safety Agency, Frontex and Europol* (Routledge 2018).

But, interestingly, the idea of the EU as an actor encompasses both formal institutions as well as civil society.[28]

The 'actor-orientation' connects EU legal research to similar tendencies in transnational and international law. According to Affolder, transnational law serves as a kind of 'holding pen' for those who feel restricted by the inability of existing legal vocabularies to accommodate new versions of law as it is 'lived'.[29] She argues that a major attraction of this 'holding pen' is its ability to turn away from states and other institutional entities to 'actors'. Transnational legal scholarship is, so she argues, brimming with accounts of 'actors' (non-state, NGOs, corporations, and so on) operating in a complex web of networks and other human constellations. With respect to transnational environmental law, she notes that it may have turned away from states but remains connected to them in the sense that 'actors' of transnational law are defined by reference to what they are *not*, that is, they are non-state actors. Affolder is not convinced by the turn that transnational environmental law has taken, and criticises it for not seeing 'people' behind actors. It is only by bringing 'human actors back on stage' that transnational environmental law scholarship can account for both dominant and marginal voices and bridge 'the gap between the bureaucratic language of law and its lived reality'.[30]

In the area of international law, the actor-orientation, similarly to transnational law, has focused on non-state actors that have become a staple of international law, offering a fresh alternative to state- and international organisation-focused analyses.[31] Specialised parts of international law, such as climate law, have looked at the efforts of economic non-state actors as participants in mitigating climate change and contributing to achieving sustainable development objectives. For instance, there are increasing calls for companies to better align with policies that are beneficial for society.[32] The verdict as to their impact is yet to come: while

[28]E. Fahey, *The EU as a Global Digital Actor. Institutionalising Global Data Protection, Trade, and Cybersecurity* (Bloomsbury 2022); E. Fahey and I. Mancini (eds.), *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics* (Edward Elgar 2022).

[29]N. Affolder, 'Transnational Environmental Law's Missing People', 8 *Transnational Environmental Law* (2019) p. 463.

[30]*See also* articles in Issue 2 of Volume 12 of *Transnational Legal Theory* (2021) gathering the papers for the Symposium 'Bringing the "human problem" back into transnational law – The example of corporate (ir)responsibility'.

[31]A. Byrnes, 'Whose International Law Is It: Some Reflections on the Contributions of Non-State Actors to the Development and Implementation of International Human Rights Law', 14 *Japanese Yearbook of International Law* (2016) p. 46; W.L. Cheah, 'The Limits and Potential of Peoples' Tribunals as Legal Actors: Revisiting the Tokyo Women's Tribunal', 13 *Transnational Legal Theory* (2022) p. 8.

[32]N. Mardirossian, *Handbook for SDG-Aligned Food Companies: Four Pillar Framework Standards*, Columbia Center on Sustainable Investment and UN Sustainable Development Solutions Network 2021.

non-state actors 'assert themselves as high-profile players in the mitigation realm, their effectiveness is unclear, and so is their theorization as actors from a legal-scholarly perspective'.[33]

This actor-oriented research has gained ground in legal scholarship of diverse jurisdictions and governance levels. In transnational and international law, actor-oriented research has emphasised examining the role and impact of non-state actors. The next section looks at EU legal research on civil society and private bodies as actors and whether this research constitutes the research on lobbyists and lobbying, just by another name.

Civil society and private bodies as actors in EU constitutional and administrative law

The EU is increasingly being held to standards of democratic decision-making, and the reforms that began to emerge after the Lisbon Treaty are a response to these new standards.[34] In less than a decade, the EU has created a range of mechanisms to consult citizens and interest groups prior to making decisions, cementing the importance of organised interests for inclusive and legitimate decision-making.[35] The statutory context for public consultations and, more broadly, for practices of participatory democracy is Article 11 TEU. Article 11 TEU uses a diversity of definitions such as 'representative associations', 'representative associations and civil society', or simply 'parties concerned'. All definitions cover both civil society and companies as private actors, with the idea being that the former act in the general interest and the latter for a distinctly private interest. The distinction is not watertight, either in concrete cases or generally, but is one which is usually drawn for the purposes of conducting research.

The literature on Article 11 TEU has mainly been occupied with concepts and institutional practices associated with participation, and there is, for instance, little understanding of what NGOs as civil society actors concretely do.[36] Another

[33]M. Rajavuori, 'The Role of Non-State Actors in Climate Law', in B. Mayer and A. Zahar (eds.), *Debating Climate Law* (Cambridge University Press 2021) p. 379.

[34]Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. OJ C 306, 17.12.2007, p. 1–271.

[35]Smismans, *supra* n. 16; J. Mendes, *Participation in EU Rulemaking. A Rights-based Approach* (Oxford University Press 2011); J. Mendes, 'The Democratic Foundations of the Union: Representative Democracy, Complementarity and the Legal Challenge of Article 11 TEU', in A. Lazowski and S. Blockmans (eds.), *Research Handbook on EU Institutional Law* (Edward Elgar 2016) p. 155.

[36]G. Busschaert, *Participatory Democracy, Civil Society and Social Europe* (Intersentia 2016); D. Ferri, 'Participation in EU Governance: A "Multi-Level" Perspective and a "Multifold" Approach', in C. Fraenkel-Haeberle et al. (eds.), *Citizen Participation in Multi-level Democracies* (Brill 2015) p. 334.

thing is that it is focused on civil society participation, and considerably less attention has been given to private actors as Article 11 TEU affected actors. This may be because much of the debate on civil society in the EU has emerged from a reaction to the overrepresentation of business interests in policy-making. The same observation with respect to non-state participation has been made across the Atlantic. In the US, Durkee notes how the growing literature on the formal processes of (inter)governmental development of law and policy seeks to understand the ways in which non-state actors are involved in it. Key advances in this field allow for the evaluation of non-state participation in law-making under the auspices of participation and consultation at national and international institutions, but with a firm focus on NGOs and other social and public interest movements.[37] Durkee writes that 'the literature that evaluates nonstate participation in lawmaking under the auspices of "consultation" at international institutions has principally focused on NGOs, and downplayed or underrecognized any business presence in this group'.[38]

There is no general term to describe civil society actors or private bodies in EU administrative and constitutional law in the EU legal and political frameworks. Generally speaking, these individuals and organisations are conceptualised as complementary actors, echoing the view that EU institutions and bodies are the primary players under EU law and other actors in civil society and private spheres influence – but do not determine – the outcome of EU law.

Sectoral EU law: environmental law as an example

Private parties

If there is any field of law where we should find civil society actors and private actors, it is environmental law and governance. It is one such area where the interest in, and inclusion of, a diversity of actors is 'absolutely routine'.[39] In line with the 'decentred' approach to regulation and governance, it is recognised that private parties are equipped with important resources, which, if used in collaboration with a public regulator, may improve aspects of the regulatory process from formulation to enforcement. In such cases, private parties usually refer to 'economic actors', including the regulated industry as a whole as well as individual companies.[40]

[37]M.J. Durkee, 'International Lobbying Law', 127 *Yale Law Journal* (2018) p. 1742.

[38]Ibid., p. 1749-1750.

[39]C. Abbot and M. Lee, 'Economic Actors in EU Environmental Law', 34 *Yearbook of European Law* (2015) p. 26.

[40]Ibid. *See also* A. Beckers in this Special Section.

The involvement of private parties in regulation is to the advantage of governments that can count on information held by economic actors and their ability to encourage norm take-up. Important contributions in this area analyse the role of companies in the context of the adoption of private standards into public agreements, or how the enrolment of private actors in the regulatory process has the potential to strengthen the legitimacy and accountability of regulation.[41] Companies may, for instance, use their policy-making influence in support of the enforcement of climate regulation that aligns with the ambitions of the Paris Agreement. As Freeman notes, 'private actors are not just rent-seekers that exacerbate the traditional democracy problem in administrative law; they are also regulatory resources capable of contributing to the efficacy and legitimacy of administration'.[42]

Much of the literature on economic actors, however, ignores any close-up elaboration of their constructive role in regulation and focuses instead on how governments can harness private engagement in rule-making and legitimacy challenges that the involvement of private parties may produce.[43] In many instances, the integration of economic actors into the regulatory process is associated with, and interpreted in terms of, the contemporaneous weakening of state regulatory activities to the extent that a line between 'regulatees' and 'regulators' is difficult to draw with certainty.[44] The problem with line-drawing is not only a theoretical one, as the risk is that too much input, especially from regulated actors, may lead to regulatory capture and tarnish the reputation of the whole policy sector.[45] What is clear is that while the state formally continues to facilitate the activities of private parties in the regulatory process, its role is no longer authoritative.

NGOs

Another important group of actors is non-governmental organisations. In studies on EU environmental law and governance, NGOs are typically framed

[41] *See* e.g. C. Scott, 'Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance', 29 *Journal of Law and Society* (2002) p. 56; J. Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation', *Public Law* (2003) p. 63; C. Abbot, 'Bridging the Gap – Non-state Actors and the Challenges of Regulating New Technology', 39 *Journal of Law and Society* (2012) p. 329.

[42] J. Freeman, 'Private Parties, Public Functions and the New Administrative Law', 52 *Administrative Law Review* (2000) p. 813 at p. 819.

[43] For the same observation *see also supra* n. 33.

[44] P. Grabosky, 'Beyond Responsive Regulation: The Expanding Role of Non-State Actors in the Regulatory Process', 7 *Regulation and Governance* (2013) p. 114.

[45] Capture theory implies that regulators have a potential to be influenced by actors they regulate. *See* E. Dal Bó, 'Regulatory Capture: A Review', 22 *Oxford Review of Economic Policy* (2006) p. 203.

as representatives of civil society and included in the literature that evaluates the potential of civil society to 'democratise' EU institutions by offering to law- and policy-makers the diverse perspectives of a European constituent.[46] As actors, private parties and NGOs are not cut from the same cloth. To the extent that economic actors are seen as enhancing the epistemic quality of regulation by adding to the expertise needed to regulate, NGOs are relied on to increase the (democratic) legitimacy of the regulation, although their distinct expert role is increasingly highlighted.[47]

The approach that perceives NGOs as sweet 'democratic darlings' tends to give them a passive role. They are invited to participate in consultations whenever it suits the regulator, but they cannot interfere in the process without an invitation. This 'regulatory' role of NGOs is these days complemented by a 'judicial', public interest litigation role. Recent events have raised the proactive profile of NGOs in legal scholarship; climate law again offers a prominent example. While awareness of the global climate emergency is growing, so too are signs of increased public commitment to reduce emissions, bringing NGOs and other environmental movements to the attention of legal scholars. ClientEarth in particular – a high-profile NGO that engages in strategic litigation to bring change in this area – has highlighted the transformative actor-potential of civil society to respond to the pressing issue of climate change on national, international and global levels.[48] As recently discovered actors, issues of environmental law and policy journals as well as non-specialised journals increasingly feature articles on how NGOs and other environmental movements strategically resort to litigation to push their cases to the top of the public agenda.[49]

[46]This literature compares to similar studies in international and transnational law, where the contributions of NGOs for enhancing the legitimacy of the law is also debated. *See* e.g. M. Beijerman, 'Conceptual Confusions in Debating the Role of NGOs for the Democratic Legitimacy of International Law', 9 *Transnational Legal Theory* (2018) p. 147.

[47]*See* Abbot and Lee, *supra* n. 18.

[48]ClientEarth, ⟨https://www.clientearth.org⟩, last visited 7 November 2022. With 35 cases under its belt according to the Curia database, ClientEarth has brought more cases to court than any other NGO.

[49]J.H. Jans and A.T. Marseille, 'The Role of NGOs in Environmental Litigation against Public Authorities: Some Observations on Judicial Review and Access to Court in the Netherlands', 22 *Journal of Environmental Law* (2010) p. 373; L. Muñoz and D. Moya, 'NGOs Environmental Legal Mobilization and Their Access to the Spanish Supreme Court', 9 *Oñati Socio-legal Series* (2018) p. 308; G. Sethi, 'Climate Litigation Movement by Non-Government Organizations: Contributions & Challenges', 29 *European Energy and Environmental Law Review* (2020) p. 177. NGOs have engaged in litigation on another front too, namely, NGOs long pushed the Commission to change standing rules under the Aarhus Regulation that nowadays allows NGOs to challenge general decisions, not only individual decisions: *see* ⟨https://environment.ec.europa.eu/law-and-governance/aarhus_en⟩, last visited 7 November 2022.

Not all NGOs, of course, engage in litigation, now or in the future. Climate law is an area where NGOs litigate, but this may never be emulated as a strategy in other areas of environmental law. However, while strategic litigators may represent a minority of all NGOs, most NGOs have the ambition to influence decision-making, and do so through lobbying decision-makers, proactively using their 'regulatory' role.

At least in the context of environmental law, both types of actors – private parties and NGOs – slowly 'chip away' at the traditional authority of a public regulator. While it may be an exaggeration to state that they thus determine the outcome of EU environmental law and policy, their active roles in lobbying and litigation challenge the primary role afforded to the EU institutions.

EU legal research and lobbying: the second look

Is this research on civil society and private actors then lobbying research? Could not we argue on the basis of these admittedly insufficient glimpses into constitutional and administrative law as well as environmental law that there is indeed research on lobbying? Perhaps, but with some heavy caveats. First, constitutional and administrative law has neglected the role of private parties and been primarily concerned with NGOs as the democratic 'darlings' of EU consultation and participation practices. Second, environmental law, while engaging with private parties, adopts an unnecessarily narrow, state-centric view, focusing on how governments can cultivate private engagement in rule-making. It furthermore tends to appreciate the litigation-relevant aspects of NGOs' work, neglecting lobbying as a viable way to contest government decisions and shape new policy. If EU legal research has already considered lobbying, it has done so incompletely and unevenly.

Why, then, should EU legal scholarship care about lobbying? What benefit can come from describing actors as lobbyists and analysing their activities as lobbying? First, by including lobbying it is possible to expand the scope of legal scholarship to cover practices that do not have the slightest thing to do with litigation and recognise how they too have legal value and normative potential. For instance, NGOs as well as private parties use legal arguments to lobby,[50] and evaluating the success of such activities would, instinctively, be a task suited to legal scholars, in collaboration with political scientists.[51] Second, legal scholarship should be interested in emerging law on lobbying. There is an increasing global interest

[50]Abbot and Lee, *supra* n. 18.

[51]At the core of the research on lobbying is explaining the success of interest representation activities that determine legal and policy change. Among others *see* F. Baumgartner et al., *Lobbying and Policy Change: Who Wins, Who Loses, and Why* (University of Chicago Press 2009); A. Dür et al.,

in the development of the regulatory architecture of lobbying, and legal scholars risk excluding themselves from having a say in the development of the framework if they continuously neglect lobbying as a relevant practice. Third, constitutional legal scholarship in particular should engage with lobbying. This is because constitutional law (or pockets of it) tends to be comfortable with raising normative questions (as opposed to more positivist accounts of law as it is proposed, adopted, and interpreted by EU institutions) and can contribute to reinvigorating prescriptive scholarship on lobbying, evaluating the practices of lobbying from the perspective of a democratic commitment to equality and inclusion as well as participation and rule of law concerns. I return to this below.

The lobbyist as a regulated actor in EU law: three regulatory frameworks

I now turn to consider the question of how one should view the role of lobbyist as an actor in EU law for the purposes of legal research. I put forward an idea for three regulatory frameworks that help construct the lobbyist as a regulated actor and lobbying as a regulated practice in EU law. These frameworks – political, legal, and constitutional – overlap with one another, yet each has a core that justifies its existence as separate from others.

The first framework is what I call 'political'. It is made up of policy practices that develop through regular interaction between lobbyists and EU institutions and bodies.[52] Despite the temporary character implied in the term 'policy practices', these practices fulfil very specific functions and have thereby become more or less permanent features of legislative and bureaucratic interaction. Some EU agencies have, for instance, put in place practices to regulate the interaction of lobbyists with the agency staff and the members of scientific committees. Currently the European Chemicals Agency includes industry groups, NGOs and others on its register of accredited stakeholders from which they are formally invited to take part in various agency activities. To safeguard 'the scientific integrity and independence of the European Chemicals Agency's bodies, the input of stakeholder observers has to remain scientific or technical. *The meetings are not to be used to promote political objectives or for lobbying*'.[53] In the spring of 2015, MEPs

'Interest Group Success in the European Union: When (and Why) Does Business Lose?', 48 *Comparative Political Studies* (2015) p. 951.

[52]For institutional practices, *see also* B. de Witte in this Special Section.

[53]European Chemicals Agency, 'ECHA's approach to engagement with its Accredited Stakeholder Organisations' (emphasis added), ⟨https://echa.europa.eu/documents/10162/17203/echas_approach_to_engagement_with_accredited_stakeholder_organisations_en.pdf/b54c589e-d615-42e4-ba09-ac4ecc2fefa1⟩, last visited 7 November 2022. No definition is given for 'lobbying'.

formed a cross-party working group that is particularly opposed to lobbying by tobacco companies but sees itself as 'part of a larger battle against lobbies in general'.[54] Through these policy practices (some of which may be grounded in legislation or international agreements), EU policymakers take a strong normative stance on what is an acceptable role to be played by a lobbyist in EU institutional practices.

The second framework is what I call 'legal'. As is clear from the above text, there is no legislation on lobbying and its conduct at the EU level, and legal rules that govern lobbying activity at the EU level have not yet been recognised as a body of lobbying law. Rather, legal rules in this regard are cast as a variety of transparency rules, such as rules relating to the EU's Transparency Register for lobbyists[55] or rules governing how EU Commission staff or MEPs should go about recording their meetings.[56] The notion of 'rule' is understood here broadly, because these rules are primarily non-binding. For instance, the registration requirements of the Transparency Register cannot be enforced against actors who refuse to register. The normative force of the Transparency Register is to be tested by a recent complaint submitted to the Register secretariat by MEPs Paul Tang, René Repasi and Christel Schaldemose. Lawmakers have asked the secretariat to investigate and withdraw access to the EU institutions for the representative of eight companies or organisation: Google, Meta, Amazon, CCIA, IAB Europe, SME Connect, Allied for Startups and Connected Commerce Council, if their allegations of undue lobbying practices are found to have merit.[57] Certain rules that I have here categorised under the legal dimension may also be described as belonging to the political dimension. However, while practices in the political dimension are individual, practices in the legal dimension often concern more

In connection with the infamous glyphosate saga, the European Chemicals Agency announced that it does not publish the names of the rapporteurs until the opinion has been agreed in order to 'protect them from any lobbying', *see* ECHA's letter to Greenpeace, dated 7 March 2017. The file has been subsequently removed from the internet and cannot even be found through archiving bots. The author has the letter as a paper copy. The European Chemicals Agency's policy not to publish names of the rapporteurs was also confirmed by its spokesperson in the media, ⟨https://www.gmwatch.org/en/news/latest-news/17497-eu-experts-accused-of-conflict-of-interest-over-herbicide-linked-to-cancer⟩, last visited 7 November 2022.

[54]J. Levy-Abegnoli, 'MEPs Declare "War" on Tobacco Companies', *The Parliament Magazine*, 5 March 2015, ⟨https://www.theparliamentmagazine.eu/articles/news/meps-declare-war-tobacco-companies⟩, last visited 7 November 2022. There is a legal ground for MEPs' tobacco opposition in Art. 5(3) of the WHO Framework Convention on Tobacco Control, to which the EU and the member states are parties.

[55]*Supra* n. 14.

[56]*Supra* n. 15.

[57]*Politico Pro*, ⟨https://pro.politico.eu/news/155270⟩, last visited 7 November 2022.

than one institution or agency. The rules of the legal dimension also seem to 'harden' over time.[58]

The third and final framework is termed 'constitutional'. The choice of the term 'constitutional' is perhaps controversial, but it was selected to connote the idea that lobbying must take place within a democratic framework or, perhaps more accurately, within a particular type of European democracy. The notion of constitutional suggests that there are boundaries beyond which lobbying becomes illegitimate and a threat to the democratic process, but those boundaries should not be drawn without consideration of broader rule of law values, including fundamental rights. The question is where, from a constitutional perspective, these boundaries should be 'found' or drawn. It is not assumed that some abstract European constitutional ethos exists from which we can easily infer normative commitments that then guide our judgement. Rather, the constitutional framework builds on the constitutional practices of a set of actors. Such constitutionally relevant actors are specific to jurisdictions, but the highest courts are usually actors whose statements have a constitutional value.

In the US, the Supreme Court has – if not frequently then at least occasionally – delivered rulings on the constitutionality of lobbying regulation. Here the central question for US scholarship is whether or not lobbying is protected as a First Amendment constitutional right. While some of the cases could be interpreted to give support to the existence of such a right, the court's final say on the matter is yet to be delivered.[59] Whether this constitutional right exists or not, lobbying has constitutional protection in the sense that lobbying legislation must be designed in such a way that it only minimally intrudes upon First Amendment rights (the right to petition, freedom of speech, and freedom of association).[60]

In the EU legal order, the EU court has rarely been presented with cases or legal questions that would have implications for lobbying and its regulation and have addressed lobbying only incidentally in a handful of cases.[61] The fact that there are fewer cases in the EU than in the US is probably a consequence of there not being legislation in the EU and of EU lobbyists not having enforceable rights through which to secure access to policy-making, such as those guaranteed in the notice-and-comment requirements of the Administrative Procedure Act in the US.[62]

[58]For instance, the 2021 Interinstitutional Agreement is titled a 'mandatory' instrument, although formally it is still, like its predecessors, a non-binding instrument.

[59]Z. Teachout, 'The Forgotten Law of Lobbying', 13 *Election Law Journal* (2014) p. 1.

[60]Ibid.

[61]*See* E. Korkea-aho, 'A Right to Lobby? Comparing Constitutional Discourses in the US and the EU', 26 *Columbia Journal of European Law* (Winter 2022) p. 1.

[62]Ibid.

https://doi.org/10.1017/S1574019622000384 Published online by Cambridge University Press

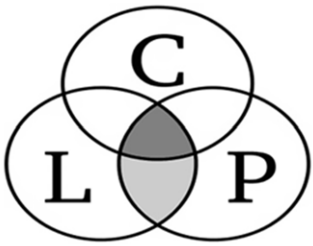

Figure 1. Field of lobbying as a regulated practice.

While the EU courts cannot be relied on for shedding light on lobbying in a constitutional framework, the Venice Commission is the only European – if not EU – actor to address lobbying and lobbyist from a constitutional angle. In its above-mentioned report on lobbyists as 'extra-institutional actors', it addresses lobbying from a perspective strongly informed by fundamental rights concerns. It explains that although all types of organised interests involved in lobbying benefit from protection under Articles 10 and 11 ECHR: to the extent that all organised interests qualify as protected 'associations', human rights and more broadly public interest lobbyists may 'attract a stronger protection than lobbying for the interests of a particular economic actor . . . '.[63] The Venice Commission underlines the positive role of lobbyists in democratic society, but insists on the importance of regulation to avoid problems, because unregulated lobbying poses 'the risk of undermining *democratic* principles'.[64] Regulation is also deemed necessary because otherwise 'lobbyists might damage the *democratic* rights of (other) citizens'.[65]

To illustrate the argument that I have developed above, the area where all three frameworks (P+L+C) operate simultaneously forms the 'field of lobbying as a regulated practice', coloured dark grey in the Venn diagram in Figure 1. In this field, a complex matrix of rules, customary practices and constitutional principles regulate the behaviour of lobbyists. What is the point of the three regulatory frameworks and the emergent 'field' in articulating future EU legal scholarship in this area? First, Figure 1 suggests that any kind of scholarship interested in lobbying must be aware of the simultaneous presence of all three regulatory frameworks for analysis. In other words, the researcher interested in lobbying and the role of lobbyists as regulated actors must consciously and continuously

[63] *Supra* n. 25, para. 27. Art. 10 ECHR protects the freedom of expression, and Art. 11 enshrines the freedom of association and assembly.

[64] Ibid., para. 38 (emphasis added).

[65] Ibid., para. 26 (emphasis added).

https://doi.org/10.1017/S1574019622000384 Published online by Cambridge University Press

position herself in the overlapping shadow that represents the area where all the three dimensions meet.

Second, Figure 1 underlines the fact that lobbying is fundamentally 'a business' of constitutional law. While the constitutional dimension is the most significant one from the point of view of democracy (keep in mind the Venice Commission's insistence on democracy in the report cited above), rule of law and fundamental rights protection, it has not perhaps received the attention it deserves. The little research there is on lobbying as a regulated practice occupies itself with the political and legal dimensions, the light grey area in the diagram. The overrepresentation of the political and legal dimensions also shows in the policy-oriented way in which lobbying is treated in the current EU. From the 2014 Juncker Commission to date, the EU has developed a myriad of measures to rein in the influence of lobbyists.[66] This evolving framework is informed by the principles of good governance, most importantly transparency, that form part of the political and legal frameworks. However, the pronounced emphasis on governance principles, although important, leaves lobbying disconnected from constitutional principles that govern democratic decision-making.[67] The lack of an overall approach to this field of research creates problems of constitutional importance, because the overall contribution of lobbying (be it positive or negative) to democratic processes is underestimated, and tools to evaluate its role and impact are left half-developed.

Methodological approaches for lobbying research

Research on lobbying has grown into what one might now describe as a fully-fledged global project with different branches. While American political science has long pioneered and dominated the evolution of the field, contemporary political science research has extended to cover new areas of political geography, such as Europe and the EU, as well as international organisations, states, regions and localities around the globe.[68]

Despite this expansion of lobbying research to cover new areas and actors, methodologically, lobbying research is solidly empirical, showcasing especially

[66]Most importantly, the Interinstitutional Agreement, *supra* n. 14, and Commission decisions, *supra* n. 15.

[67]This is not to say that transparency is not a concern for constitutional law. *See* M. Cohen-Eliya and Y. Hammer, 'Nontransparent Lobbying as a Democratic Failure', 2 *William & Mary Policy Review* (2010-2011) p. 265.

[68]This evolution of the field is clearly seen in the *Interest Groups & Advocacy*, a journal operating since 2011. In the early years many contributions had a distinctly American focus, but recent years have brought about a more balanced geographical coverage.

quantitative, statistical analyses.[69] There is also a vibrant qualitative tradition, which, using various combinations of the textual analysis of documents and qualitative expert interviews, seeks to further an understanding of the conditions under which lobbyists work to influence the content of EU norms.[70] Normative democratic research in terms of lobbying is scarcer.[71] For instance, taking up a key concept in lobbying research – that of a stakeholder which has emerged as a novel democratic subject who actively participates in varied institutional spaces – Abraham argues that few have conceptualised the stakeholder as a distinct political subject and considered its implications for democratic practice.[72] Ron and Singer lament the lack of nuances among democratic theorists interested in lobbying, suggesting that they 'have largely focused on whether lobbying itself is democratically legitimate at all [*emphasis removed*], largely answering in the negative; lobbying is generally viewed as an extension of self-interest into the public realm, and therefore inherently antidemocratic'.[73]

If EU legal studies were to include lobbying in the study of EU law and legislative activity, as the article has so far argued, from which methodological choices should such an inquiry begin? First, legal scholarship should resist the temptation to limit its intellectual inquiries to lobbying legislation, in particular from a doctrinal perspective of the law. Rather, and in line with this proposed framework above, legal scholarship on lobbying should consider the adoption of a multi-scalar approach, which is sensitive to the simultaneous importance of all three regulatory dimensions introduced above.[74]

The political framework calls for interviews, or more broadly ethnographic approaches, to document and understand the practices through which EU institutions, agencies and other bodies interact with lobbyists and permit them to influence law- and policy-making processes. In the legal framework, the focus could be on the increasing range of EU stakeholder policies and consultation mechanisms

[69]A. Bunea and F. Baumgartner, 'The State of the Discipline: Authorship, Research Designs, and Citation Patterns in Studies of EU Interest Groups and Lobbying', 21 *European Journal of Public Policy* (2014) p. 1412 at p. 1431. Based on stocktaking, they suggest that EU research on lobbying would benefit from including more diverse insights from different disciplinary and theoretical perspectives.

[70]Ibid.

[71]This is even more significant when taking into account that there is a lot of normative argumentation in relation to civil society, participatory democracy, participatory governance, and reflexive governance.

[72]*See* K.J. Abraham, 'Midcentury Modern: The Emergence of Stakeholders in Democratic Practice', 116 *American Political Science Review* (2022) p. 631.

[73]A. Ron and A.A. Singer, 'Democracy, Corruption, and the Ethics of Business Lobbying', 9 *Interest Groups & Advocacy* (2020) p. 38 at p. 39.

[74]For a multi-scalar approach, *see* M. Valverde, 'Jurisdiction and Scale: Legal "Technicalities" as Resources for Theory', 18 *Social and Legal Studies* (2009) p. 139.

and what their systematic content analysis could reveal about the effectiveness of stakeholder agendas in particular legislative reforms,[75] and on the systematisation and interpretation of legislative and legal material with respect to the emergent 'law on lobbying'. Finally, the constitutional level calls for a close reading of the courts' case law (if it exists) or consideration of how to balance fundamental rights with economic interests and policy considerations (for instance, 'Is it legitimate to exclude tobacco lobbyists, Big Tech or Big Oil from the policy process in which decisions that affect them are made?'). The constitutional level also involves a particular opening for normative legal scholarship to reflect on concerns and questions about democracy, legitimacy and accountability within the context of lobbying. The aim of this normatively anchored scholarship is to relate the study of legislation and rulemaking more closely to lobbying research and enable new questions to be asked. Who is a lobbyist in the eyes of the law? What is the legitimate place of a lobbyist in the law-making process and in EU institutional practices more broadly? Do concerted lobbying efforts affect the legitimacy of legislation ultimately produced? Should such legislation be interpreted differently?

The adoption of such methods that fall within the broadly conceived socio-legal agenda[76] does not suggest that an exploration should aim to reject doctrinal approaches. Rather, it stresses the reality that there are limited realistic possibilities for legal scholars to adopt a doctrinal 'desktop' approach to understand the role of lobbyists and the impact of lobbying on the content of EU norms.[77] The adoption of the socio-legal agenda therefore seeks to 'borrow' some of the methodological tools traditionally used in political and social sciences to answer the questions that legally-oriented research (including also doctrinally positioned research) wants to ask about lobbying and its impact on EU legislative activity.

[75]A. Rasmussen and D. Toshkov, 'The Effect of Stakeholder Involvement on Legislative Duration. Consultation of External Actors and Legislative Duration', 14 *European Union Politics* (2013) p. 366; A. Bunea, 'Designing Stakeholder Consultations: Reinforcing or Alleviating Bias in the European Union System of Governance?', 56 *European Journal of Public Policy* (2017) p. 46.

[76]In its broadest sense, socio-legal research, also known as 'law and society' or 'law in context', is the study of law in its legal, political, economic, and cultural contexts. It covers both theoretical and empirical perspectives and employs a wide variety of social sciences and humanities methods, *see* R. Banakar and M. Travers (eds.), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005). For empirical research in EU law, *see* H. Schepel and D. Chalmers, 'Law and European Integration: Socio-Legal Perspectives' *Archive of European Integration* (2004), ⟨http://aei.pitt.edu/3408/⟩, last visited 7 November 2022; A. Dyevre et al., 'The Future of European Legal Scholarship: Empirical Jurisprudence', 26(3) *Maastricht Journal of European and Comparative Law* (2019) p. 348.

[77]*See*, however, a recent study on the evolution of tax legislation where the data consisted of written statements provided to the public consultations during the legislative processes in Finland: L. Finer, 'Who Generated the Loopholes? A Case Study of Corporate Tax Advisors' Regulatory Capture over Anti-tax Avoidance Legislation in Finland', *Nordic Tax Journal* (2021) p. 1.

Such borrowing from the social and political sciences has already taken place in international and transnational legal research interested in non-state actors. What is broadly conceived of as 'an anthropological approach' has recently increased its profile among international legal scholars interested in non-state actors in international and transnational lawmaking processes. Scholars claim that international law has given insufficient attention to 'the micro-level details by which international law operates',[78] and offer ethnographic methods to broaden its reach and deepen its understanding. Ethnographic methods that include, among others, interviews and forms of participant observation can, therefore, provide access to a 'lived' experience and the ability to uncover 'power dynamics, disaggregating institutions and actors, and revealing local practices on the ground'.[79]

Ethnographically oriented socio-legal research draws inspiration from ongoing debate about an approach called 'new legal realism'.[80] According to the new legal realist position, the lived experience of the actors involved is an important source of legal knowledge, and this experience must be expressed in the actors' own words rather than inferred from predefined categories of legal, social and political activity. For the new legal realist school, standard socio-legal research claims to be interested in 'how things really happen', but it approaches its relevant actors through predefined conceptual categories, such as 'victim', 'guardian', 'lobbyist', or 'citizen', rather than allowing the actors to express themselves in their own words. Methodologically, new legal realism emphasises a 'humility in which we must listen to voices other than our own'.[81] 'Humility' is not used as a mere catchword, but as a proper scientific tool that allows for the ability to translate between different social realities, which most concretely boils down to the question of how to find lobbyists to interview or observe. Actors such as lobbyists rarely, if ever, explicitly identify themselves as 'lobbyists', and due to the negative connotations associated with the word, policymakers are similarly reluctant to talk about activities understood as 'lobbying'. As a method, ethnography fits ideally with the aspirations of the new legal realist variant of socio-legal studies, allowing the actors themselves to interpret and define their environment and activities. The added value of this approach (compared to ethnographic approaches conducted by a sociologist or an anthropologist) is the knowledge of legal thinking and processes that a legal realist researcher brings into her study.

[78]G. Sarfaty, 'Corporate Actors as Translators in Transnational Lawmaking', 115 *American Journal of International Law Unbound* (2021) p. 278.

[79]Ibid.

[80]V. Nourse and G. Shaffer, 'Varieties of New Legal Realism. Can a New World Order Prompt a New Legal Theory?', 95 *Cornell Law Review* (2009) p. 61.

[81]E. Mertz, 'Challenging Translations: New Legal Realist Methods', 25 *Wisconsin Law Review* (2005) p. 482.

Finally, I address the question of how lobbying has affected me as a researcher.[82] Lobbying is certainly not the most typical choice for legal scholarship. But having now studied it for some time, I find myself in a position where I have had to self-reflect on my own role as just that, namely as a legal scholar rather than a poor (wo)man's version of a social scientist and as a legal scholar who wants to remain in 'the legal wonderland' despite her research interests not qualifying as legal.[83] The interactive relationship between the investigator and what she investigates has made me reconsider the limits of my own discipline ('what constitutes legal research?', 'who decides what constitutes legal research?') and to see penumbral areas that would previously have been left hidden in the dark. The interactive relationship has also led me to ask whether a legal scholar interested in lobbying and its regulation becomes a lobbyist for lobbying research. The choice of lobbying as a topic has required me to specialise in what I have elsewhere called, following Jo Shaw, 'parking' one's research.[84] I find that I have spent much time driving in the multistorey EU law car park trying to find a suitable parking place. While this may not be a bad thing, it prompts reflection on what we, as lawyers and academics, consider is worthwhile legal research.

Conclusion

This article has investigated the actors, roles, and regulation of lobbying within the context of EU legal scholarship. Taking note of the privileged position of the EU institutions in legal scholarship, I have shown how 'other' actors, including lobbyists, have remained at the periphery. I have also demonstrated how legal scholarship, with environmental law at the helm, has focused on NGOs as the main group among these 'other' actors, facilitating the tendency to conceptualise them as the ultimate darlings of democracy. The article challenges the status quo and argues that the role of lobbyists and lobbying should become a routine consideration in the study of EU law and policy. This is not only likely to productively affect research, but also to create more awareness about the lobbyists' role vis-à-vis political power and law-making. Bringing lobbyists into EU law gives scholars and citizens a more immediate sense of the ways in which law in its varieties is made, and according to whose interests.

Studying lobbyists would not only be advantageous to legal scholarship, but a legal contribution would also benefit lobbying scholarship in its traditional political science outlook. I have put forward a means of conceptualising the lobbyist

[82]I limit myself to EU law. As legal cultures understand lobbying differently, the experience of a legal academic also changes.

[83]*See* A. Bailleux in this Special Section.

[84]E. Korkea-aho, 'NGOs as Lobbyists: Casualties of Environmental Law's Tunnel Vision?', 34 *Journal of Environmental Law* (2022) p. 233.

https://doi.org/10.1017/S1574019622000384 Published online by Cambridge University Press

that draws on what legal scholars do best: understanding and framing the world through rules. The identification of three regulatory frameworks – political, legal and constitutional – directs attention to how all of the three dimensions need be analysed to truly understand the actors, roles and regulation of lobbying. Bringing lobbyists into EU law does not require the reinvention of the methodological wheel. The broadly conceived socio-legal agenda that has a firm and well-established position in EU law is relevant and sufficient. What should particularly interest EU constitutional law scholarship is the fact that lobbying scholarship suffers from a normative democratic theory deficit and EU constitutional law is well-positioned to be at the forefront of addressing lobbying from a normative viewpoint.

https://doi.org/10.1017/S1574019622000384 Published online by Cambridge University Press