Are lawyer-lobbyists answerable to ‘a higher authority’?  
Bar association rules as lobbying regulation in the EU and the USA

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Abstract
This legal comparative article analyzes the regulatory framework of lobbying services provided by law firms in the European Union and the USA. The comparison of regulation between the jurisdictions focuses on three aspects: (1) the definition of lobbying, (2) the legal advice exception, and (3) alignment with bar association rules. While the EU and the USA are largely aligned on the first two points, the differences emerge with respect to the third. The EU regulatory framework ignores lawyers’ professional obligations, which, together with the bar associations’ half-hearted embrace of lobbying rules, is found to be the main reason why law firms in the EU fly under the regulatory radar. With lawyers increasingly becoming involved in the lobbying and advocacy market, the EU and its Member States need to bring their rules on par with the US regulatory model that acknowledges bar association rules as lobbying regulation.

Keywords  Lobbying · Lawyers · Legal profession · Regulation · EU · USA

Introduction
This article examines the regulation of one special group of lawyers who engage in lobbying activities as part of their employment, on behalf of a specific actor or an interest. Lawyers are sometimes compared to lobbyists (Dovi and McCain 2017), but such a broad comparison concealed variations in the ways in which a lawyer is like a lobbyist and is subject to regulatory obligations. As actors, lawyers have received little attention in interest group and advocacy research, and the questions that concern the legal profession are treated as niche topics with little general appeal or relevance. The assessment of lawyers as lobbyists, however, offers interesting and
worthwhile insights into the evolution of both the lobbying profession and lobbying regulation.

Lawyers engage in lobbying activities as part of diverse employment relationships, predominantly as law firm employees. In the transatlantic lobbying markets, law firms that provide lobbying services are not an anomaly but the norm (Korkea-aho 2021; Avril 2022). Law firms have not simply added lobbying alongside more typical legal services, but boutique law firms specializing in political advocacy have also emerged. Law firms’ services are most sought after in areas with complex regulatory systems such as competition law, State aid, risk regulation in health and environmental law, and sanctions law and policy. Law firms will likely also attract customers interested in influencing at the end of the policy process, that is, in implementation, where lawyers can provide niche regulatory expertise.

The introduction of lobbying practice groups within law firms is especially pronounced in the USA, where law firms have been involved in offering lobbying services since the early 1980s (Ross 2009, 691). According to federal lobbying disclosure data, five of the top ten lobbying firms in 2021 are law firms, including the top two. Brownstein Hyatt Farber Schreck and Akin Gump Strauss Hauer & Feld have long led the pack, generating income in 2021 of about 55.64 and 53.79 million US dollars.¹ According to observers, ‘[A]lthough lobbyists are not always lawyers, this specialty [lawyer-lobbyists] represents a significant proportion of a government relations firm’ (Keffer and Hill 1997, 1372). In Washington, DC alone, there were in 2014 approximately 80,000 lawyers, a large number of whom engage in public policy work (Allard 2014, 217).

The arrival of American law firms, which had been specializing for decades in lobbying political institutions in the USA, also prompted the development of lobbying activities in the legal profession based in Brussels from the 1990s onwards (Avril 2022; Vauchez 2015). This history is still visible from the fact that out of 82 law firms registered in the European Transparency Register (EUTR) (1% of the total number of registrations),² eleven are law firms headquartered in the USA.³ Although the US firms represent only 13% of the registered law firms in the EUTR, their dominance extends beyond their numbers. The annual lobbying costs of the two largest US law firms (Covington & Burling LLP and Squire Patton Boggs LLP) are EUR1,000,000, far exceeding those reported by EU-based smaller law firms. Recent years have, however, witnessed the emergence of ‘EU-grown’ law firms, like German law firm Alber & Geiger, with a sizeable lobbying practice. It is now the third biggest law firm whose reported costs have risen from EUR300,000—399,999 in

¹ https://www.opensecrets.org/federal-lobbying/top-lobbying-firms?cycle=2021.
² According to the annual reports of the EUTR, the proportion of law firm registrants among professional consultancies has grown from 7% in 2012 to 10.7% in 2017, stabilizing at just under 10% between 2018 and 2020. See the information collected from https://ec.europa.eu/transparencyregister/public/statisticPage/displayStaticPage.do?locale=en&reference=ANNUAL_REPORT.
³ https://ec.europa.eu/transparencyregister/public/consultation/reportControllerPager.do. Last visited 15 June 2022.
2020 to EUR1,000,000 in 2022.\textsuperscript{4} Exact figures on how many lawyers are lobbyists in either the USA or the EU are not available, but the evidence above suggests that the number is in the tens of thousands rather than the thousands.

The emergence of law firms in the lobbying market has given rise to intense debate, particularly in the EU. This is because law firms sometimes carry out lobbying activities outside of the EUTR or disclose only some of their activities in the register. In their view, lawyers cannot be subject to full compliance because doing so would compromise confidentiality—perhaps the most important bar association rule—they owe to clients and contravene lawyers’ professional obligations. Professional consultancy businesses that compete with law firms in the same market feel that the circumvention by law firms of disclosure rules on the basis of professional regulation unfairly favors law firms that can provide lobbying services unhindered by rules designed to increase the transparency of lobbying. Lawyers’ professional associations, bar associations, shift the responsibility to the EU, arguing that law firms would follow the rules if the EU adopted legislation on the matter (ALTER-EU 2016; CCBE 2016; Katzemich 2018).

Why should we care if the EU system of lobbying regulation has struggled to make the lobbying activities of lawyers transparent? Or that bar associations have taken a more proactive role in the USA than the EU? The conflict—be it real or perceived—between professional rules and lobbying regulation compromises transparency and effectively thwarts efforts to cultivate citizens’ (including lawyers’ competitors in the consultancy sector) trust in good governance and the rule of law. Despite the issue’s importance, law firms and the relationship between bar association rules and lobbying regulation have received meagre scholarly attention (see also Greenwood and Dreger 2013, 147–148).

This article seeks to remedy this oversight by providing the first detailed legal comparative analysis of the regulation of lobbying services by law firms in the EU and the USA. In particular, the article identifies whether and, if so, to what extent, law firms that provide lobbying services are subject to lobbying regulation in the two jurisdictions and what the relationship between lobbying regulations and lawyers’ professional obligations—bar association rules—is.

To date, 17 of 36 member countries of the Organization of Economic Cooperation and Development (OECD) have passed lobbying laws,\textsuperscript{5} designed to increase the transparency of the impact of lobbying on public policies (Holman and Luneburg 2012; OECD 2021). Lobbying refers to activities to influence decisions made by public authorities, while a lobbyist is an individual who undertakes such activities on behalf of a particular actor or a specific collective interest. Lobbying regulation is understood broadly as a set of rules, covering legislation, soft law rules, and other professional and ethics rules that aim to increase the transparency of lobbying activities. Crucial to the aim of transparency is the establishment of a legal regime that covers all actors that engage in lobbying, irrespective of their

\textsuperscript{4} https://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=67820416722-09. Last visited 15 June 2022.

\textsuperscript{5} https://www.oecd.org/corruption-integrity/case-studies/setting-rules-lobbying-aci.html.
organizational or legal form (Chari et al. 2019). Concretely, the discussion regarding lobbying regulation in this article is concerned with disclosure rules, that is, rules requiring those who engage in lobbying on one’s own or others’ behalf to register and disclose information about their activities to a lobbying register. The notion of ‘lawyer-lobbyist’ is used to specifically refer to a lawyer working in a law firm and engaging in lobbying on behalf of a client. In the remainder of the article, ‘lawyer’ and ‘lawyer-lobbyist’ are used interchangeably unless otherwise indicated.

The findings of the analysis suggest that the idea that legislation is imperative to ensure law firms are included in the EUTR is incorrect. The USA has successfully brought lawyers into the realm of lobbying regulation, not only because it has enforceable legislation, but because the bar associations have paid attention to the need to align professional rules of the legal profession with lobbying regulation. To ensure that lobbying regulation covers all actors who provide lobbying services, bar associations’ rules need to be seen as forming part of lobbying regulation. This is important, because the neglect of bar association rules results in weak lobbying regulation and in the long run also weakens the authority of the legal profession to set professional standards for its members. Analyzing bar association rules as professional lobbying rules, this article also contributes to filling the gap that exists regarding professional rules in lobbying regulation research (see, however, Năstase 2020; Antonucci and Scocchi 2018).

**Lawyers as lobbyists: role and regulation**

In this section, I review the existing literature on lawyer-lobbyists in the USA, the EU, and in the context of the research on the internationalization of law firms.

**The USA**

The USA has regulated lobbying at the federal level since the mid-2000s, and the currently applicable legislation, the Lobbying Disclosure Act (LDA), has been in force since 1995. The Honest Leadership and Open Government Act (HLOGA) of 2007 amended parts of the 1995 LDA. Most importantly, the HLOGA modified reporting duties and now requires quarterly (as opposed to semi-annual) filing of disclosure reports. US Government Accountability Office (GAO), however, found in its 2021 report that nearly a third of LDA reports did not ‘properly disclose’ data as required (GAO 2021), suggesting that the enforcement of the LDA remains an issue. All states also have passed legislation on lobbying.

The US debates focus on the Act’s constitutionality in light of the First Amendment, especially in relation to the right to petition government (Browne 1995; McKinley 2016), and questions about the application of the LDA in general or to particular groups or activities have received less attention. Legal historians have filled the gap left by contemporary accounts, casting light on the role of lawyers as public policy professionals. During the early days of the US republic, it was a common practice to hire lawyers to draft petitions, because the petition process included
a range of formalities, and lawyers were needed to pen and present the documents to government. Lawyers largely stayed away from broader policy petitions, mainly focusing on petitions relating to individualized grievances (McKinley 2016). This practice of using agents as ‘petition-drafters’ was negatively viewed by the courts. Arguing that people themselves should be able to make their claims in front of the legislature, the courts often invalidated contracts to hire petition agents. But contracts involving a lawyer agent were treated differently. The courts reasoned that non-lawyer agents were not capable of making contracts on legislative services, because persons without legal education or training could not provide legal services, and by analogy, services that concerned the legislature. Instead, lawyers’ ‘special knowledge’ and ‘training’ that derived from ‘years of study and experience’ made them proper lobbyists fit to lobby the legislative branch (Briffault 2014, 20; Teachout 2014, 37).

This piece of history is not just an eccentric detail. Namely, early US regulatory efforts to bring lobbying under control concerned these lawyers that represented their clients in Congress (Thomas 1993, 152). Understanding the central role that lawyers assumed as petition-agents lends itself to explaining the ease with which the contemporary US literature sees law firms as one type of lobbying firm together with consultancy firms, think tanks, and public relations agencies, all of which are subject to regulation (Fatka and Levien 1998, 566; Johnson 2006).

The EU

At the EU level, the focus is on the rules adopted by EU institutions with regard to the European Transparency Register (EUTR). The EUTR is soft in the sense that registration remains voluntary, and the institutions have few tools to force lobbyists to register and disclose information, leading observers to question both its effectiveness and legitimacy (Bunea 2017; Greenwood and Dreger 2013). The EU recently adopted a new interinstitutional agreement (IIA) on a mandatory EUTR (EC 2021), but despite its name, the IIA did not bring about changes to the register’s ‘voluntary club’ approach (Năstase and Muurmans 2018; Bunea and Gross 2019).

At the national level, legislation or other regulation exist only in a few countries. In the context of the EU, seven Member States (Austria, France, Germany, Ireland, Lithuania, Poland, Slovenia) and the UK as a former EU member have introduced lobbying legislation (Chari et al. 2019). The definitions of ‘lobbying’ and a ‘lobbyist’ are not identical across the jurisdictions, and the research has shown how differences in definitions reflect local traditions as well as responsiveness to political and economic concerns. In countries with a strong corporatist tradition, such as Austria, the 2012 law makes considerable concessions with regard to trade unions (Crepaz 2016; Köppl 2012). In some countries, laws are specifically aimed at tempering the risk posed by professional consultancy lobbyists. In Lithuania (2001) and Poland (2005), lobbying laws only effectively regulate professional consultancy firms, targeting the professionalization of lobbying (Jasiecki 2006; Lumi 2014; Vargovichková 2017). In the UK, the narrow scope of its legislation (2014) has been argued to reflect the government’s interests in keeping its private discussions and
decision-making out of the public’s eye (McKay and Wozniak 2020; Keeling et al.
2017).

The existing research on lobbying regulation, regarding both national and EU
levels, has largely ignored professional codes of conduct for lobbyists. Adopting an
ethics framework, Năstase (2020) argues that EU associations of lobbying profes-
sionals understand the ethics component narrowly, focusing only on the relationship
between lobbyists and policy-makers and forgetting clients. Codes of conduct are
adopted to signal lobbyists’ moral obligations to the EU institutions. The UK experi-
ence of self-regulation, which ended with the adoption of 2014 Lobbying Act, sug-
ests that the self-regulatory model is not a good choice in an area where the pub-
lic’s trust is in short supply (Dinan and Miller 2012). The analysis below will return
to these findings, because they offer an interesting contrast to lawyers’ professional
rules.

**Law firms in the lobbying market**

Law firms’ entry to the lobbying market has been acknowledged by researchers on
the both sides of the Atlantic. In the USA, where the entry occurred earlier than in
Europe, law firms took part in what Sheingate (2016) calls ‘building a business of
politics’, consolidating their own role as providers of lobbying services and contrib-
uting to the professionalization of lobbying in the USA. Lawyers were no longer
‘only’ lawyers, but they also become diplomats, educators, shepherds and power
brokers to serve the needs of clients (Schmidt 2005). Across the Atlantic, socio-his-
torical research has showed how lawyers in Brussels sought new sources of income
and tried to diversify their activities beyond legal advice on the implementation of
EU regulation (Vauchez 2015; Avril 2022). National law firms thus transformed into
transnational Euro-law firms, servicing both national and global customers.

These strands of research form part of a broader literature on how national law
firms broke free of nation-state constraints to become global and transnational actors
(Trubek et al. 1994; Dezalay and Sugarman 1995; Dezalay and Garth 1996; Quack
2005). This literature explains how law firms, faced with the internationalization of
financial markets and the proliferation of international and transnational institutions,
reinvented themselves through creating new service portfolios. In doing so, many
turned to lobbying services to attract new, multinational customers beyond national
borders. A recent example is Acquis Law and Policy, a firm specializing in EU sanc-
tions law and compliance, diplomatic support services to help actors from non-EU
countries better understand EU law, as well as general EU law and regulatory advo-
cacy, with clients including foreign governments, diplomatic missions, industry
associations and private companies both inside and outside the EU (https://www.
acquislp.eu). The same development has also been observed in the USA. Overseas
firms with plans to expand and invest in the USA have created demand for sophis-
ticated government advocacy representation. In particular, they look for expert
compliance advice and risk assessment, especially in matters relating to financial
services, privacy, and security, expertise typically available at law firms (Lipton and Hakim 2013).

This link between multinational clients and the expansion of law firms into the lobbying market is relevant from the perspective of the regulation of law firms. The legal profession has traditionally enjoyed considerable autonomy in setting its own professional and ethical codes. Lawyers are self-regulated by organizations known as bar associations or law societies established by legislation (Gorman 2014; Said and Harley 2017). Bar associations fulfil three functions: professional politics, knowledge exchange, and rule-setting (Quack 2005, 92). Of these, rule-setting is the most visible element to clients of legal services, and the element that is most concretely felt by lawyers themselves. Upon admission to the bar, lawyers become bound by the ethical rules of the profession such as the duty of confidentiality (see Sect. "Comparative analysis of EU and US regulations"). They risk losing their license to practice for failure to adhere to stipulated ethical standards. Self-regulation by bar associations is complemented by the socialization of members into ethical standards and ideologies underpinning the role of the legal profession as a trustee for values such as justice, accountability, transparency and rule of law.

Each US state and EU Member State have their own bar associations. Lawyers belong either to their own national- or state-level bar associations, or the associations of the places where they work, such as Belgium or the District of Columbia in the USA. The Council of Bars and Law Societies of Europe (CCBE) and American Bar Association (ABA) have in addition created transnational or federal standards for the cross-border conduct of lawyers that intersect with national- and state-level regulations (see Sect. "Comparative analysis of EU and US regulations").

The traditional bargain, forged at a time when the activities of law firms were confined to the largely national boundaries of the law, consisted of state authorities granting professions control over a specific area (Flood 2011, 509; Quack and Schüsler 2015, 52). Self-regulation by bar associations was a local affair. But economic globalization and waves of mergers and acquisitions creating large multinational law firms however disembedded law firms from national contexts and required that the regulatory bargain between bar associations, state and law firms be re-settled (Quack and Schüsler 2015, 53; Suddaby et al. 2007; Muzio & Ackroyd 2005). Dezalay and Garth (2010) have suggested that professional governance is being replaced with economic market-making governance. Be that as it may, lawyers’ professional regulation is an interesting example of the situation where national bar associations try to regulate the activities of large multinational law firms spanning not just borders, but professional cultures and organizational requirements.

While providing important insights, the existing research on either lobbying regulation or law firms has neglected the role of lawyers as potential lobbyists and bar association rules as niche topics. In particular, the use and relevance of bar association rules as rules of ‘a higher authority’ (Allard 2008) in the lobbying context is a fertile but so far ignored field for further study.
Regulation of law firms in lobbying regulations

Research design

The present article focuses on the USA and the EU. These two jurisdictions are chosen for two reasons. First, because the issue of the regulation of lawyer-lobbyists has been addressed in the USA and the EU, albeit at different levels and in different ways. Second, as jurisdictions, the USA and the EU are influential, and so their policies have a global impact and their standards matter more generally. As legal and political systems, the USA and the EU differ in many respects. However, they are similarly complex, share sufficiently similar legal and political institutions, and host lobbyist populations of comparable sizes to their respective capitals (Dinan and Wesselius 2010). Furthermore, the legal scene in Brussels is often compared to that in Washington, DC (Flood 1999). Earlier comparative lobbying research has also successfully examined the USA and the EU side by side (see, especially, Mahoney (2008), Baumgartner (2007), Woll (2006; 2012) and McGrath (2006)).

The detailed comparison of lobbying regulations is conducted adopting the functional method of comparative law (Michaels 2006; Örücü 2006). It is suited to examining phenomena that are organized differently but have similar functions in different legal systems (for a comparable design, see Gauja and Orr 2015). For instance, lobbying regulations in the USA and the EU are different from a technical-legal perspective, because the US regime is based on enforceable legislation while the EU operates through non-binding soft law. Yet they are comparable according to functional comparativism, because the regulations fulfil a similar function, that is, they aim to increase the transparency of public decision-making (Holman and Luneburg 2012). Methodologically, the article is based on an analysis of primary legal sources—legislation, soft law, and professional ethics rules. The analysis is complemented by a review of policy documents and research literature.

Parameters of analysis

To facilitate systematic comparative analysis, I identified three parameters of analysis: (1) definition of lobbying to include the giving of advice, (2) the existence of the ‘legal advice’ exception and (3) alignment of lobbying legislation with bar association rules. In the rest of this subsection, I briefly introduce the parameters and explain their importance by using examples from national lobbying laws.

To verify whether or not law firms and lawyers are subject to lobbying regulation, three aspects need to be taken into account. First, some lobbying regulations define lobbying to exclude preparatory work and the giving of advice. This is relevant for lawyers, because law firms typically provide services that consist of the giving of advice, as opposed to making contact with policy-makers on behalf of a client. Consequently, most law firms are not captured by lobbying laws that define such ‘background’ services as not being lobbying. For instance, the Irish legislation, Lobbying Act of 2015, is widely considered a success for establishing a broad scope
of legislation that covers diverse forms of lobbying and types of lobbyist. However, the Irish law defines lobbying as an act of making contact; a trigger for registration does not therefore exist based upon preparatory work and the giving of advice alone (Chari et al. 2019, 135). Besides Ireland, the UK also exempts consultancy services that do not include making contact, with its 2014 Lobbying Act not being applicable to law firms.

The second point concerns the way in which lobbying regulations treat the provision of legal advice, or lawyers and the legal profession more generally. For instance, Australia’s Code of Conduct (2013) excludes lawyers ‘who make occasional representations to Government’. A similar clause is in the Israel’s law (Chari et al. 2019, 116). Article 2 of the Austria’s lobbying law also provides that the activities of law firms cannot be identified as lobbying and are therefore exempted (Sickinger 2011, 55).

However, reading only the relevant pieces of legislation to understand their scope is, for the most part, insufficient. The third point concerns bar association rules. They are important in determining whether or not law firms register and disclose their lobbying activities, and their potential overlap with lobbying regulation may involve a conflict of two simultaneously applicable sets of legal rules. In next section, the USA and the EU are analyzed with the help of the three parameters set out above.

Comparative analysis of EU and US regulations

The definition of lobbying

In the USA, according to 3(7) LDA, lobbying activities mean ‘lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others’ (emphasis added). The Act not only extends to actors who make oral or written communications to designated public officials, but also to those who provide ‘background’ services to help communicate with public officials (see also Section 3(8) LDA). Due to the definition of lobbying expressly including preparatory work and the giving of advice, law firms are clearly regulated under the LDA.

Article 3 of the EU IIA (EC 2021) defines the activities covered by the EUTR. Lobbying refers to all activities—other than those referred to in Article 4—carried out by interest representatives ‘with the objective of influencing the formulation or implementation of policy or legislation, or the decision-making processes of the signatory institutions or other Union institutions, bodies, offices and agencies’. Subsection 2 gives some examples of lobbying activities:

Organising or participating in meetings, conferences or events as well as engaging in any similar contacts with Union institutions; contributing to or participating in consultations, hearings or other similar initiatives; organising communication campaigns, platforms, networks and grassroots initiatives; pre-
paring or commissioning of policy and position papers, amendments, opinion polls and surveys, open letters and other communication or information material, and commissioning and carrying out of research.

The EU definition also includes lobbying activities that take place in the background without necessarily involving contact with public officials.

If a law firm engages in activities defined as lobbying in 3(7) of the LDA or Article 3 of the IIA, it must—in principle at least and taking into account the points mentioned in Sections 4.2 and 4.3—register and provide information on such activities. The requested information covers identifying information such as contact details, the number of persons involved in lobbying, as well as information on the main legislative and policy initiatives followed by the registrant. Moreover, the law firm as an intermediary must provide information on revenue per client for lobbying activities (USA) or its clients and its expenses (EU) (Section 5 of the LDA, Annex I to the IIA). According to EU rules, the client must also register.

The legal advice exception

Both in the USA and the EU, certain activities have been exempted from disclosure duties. One particular exception, what I call the ‘legal advice exception’, concerns activities considered in the USA to be ‘the practice of law’, or, in the EU, to fall within the scope of ‘the provision of legal advice’.

In the USA, Section 3(8)(B)(xii) of the LDA stipulates that ‘lobbying contact’ does not include a communication that is made to an official in an agency with regard to:

I. a judicial proceeding or a criminal or civil law enforcement inquiry, investigation, or proceeding; or
II. a filing or proceeding that the Government is specifically required by statute or regulation to maintain or conduct on a confidential basis, if that agency is charged with responsibility for such proceeding, inquiry, investigation, or filing[…]

Despite its apparent simplicity that ties the application of the exception to formal proceedings, the scope of the exception has been challenging to determine, in particular in congressional investigative contexts, where it has been disputed whether lawyers have been retained for legal services or for services to help understand the ‘political process’ (Brand 2009, 643). As explained in detail below, these LDA exemptions are mirrored in US professional ethics rules that provide that representing a client in a congressional investigation or criminal or civil law proceedings is the practice of law, and thus outside LDA requirements (Jeffrey 2009, 721; Brand 2009, 641).

In the EU, the legal advice exception is more substantial. According to Article 4, the IIA does not apply to the provision of legal advice in the context of a client-intermediary relationship if:
I. it consists of representation in the context of a conciliation or mediation procedure aimed at preventing a dispute from being brought before a judicial or administrative body; 

II. it consists of advice given to clients to help them ensure that their activities comply with the existing legal framework; or 

III. it relates to representing clients and safeguarding their fundamental or procedural rights, such as the right to be heard, the fundamental right of a client to a fair trial, including the right of defence in administrative proceedings, such as activities carried out by lawyers or by any other professionals involved therein.

Submissions made as a party or a third party in the framework of a legal or administrative procedure established by EU law or by international law applicable to the Union are also excluded.

The EU’s formulation is similar to the one found in the USA, excluding activities falling within the realm of litigation and trial proceedings. The fact that the exception is explicitly attached to the existence of formal proceedings facilitates its interpretation and application.

Alignment with Bar rules

As explained above, the rules of bar associations concern ethical matters like confidentiality and conflicts of interest. Of the rules of bar associations, confidentiality is at the centre of the potential conflict between lobbying regulation and lawyers’ own codes. Lawyer-lobbyists face special challenges in reconciling their obligations under lobbying legislation and the ethical rules that govern the duty of confidentiality.

The principle of confidentiality covers information provided to the lawyer, more specifically, ‘any information a lawyer receives or obtains in the context of assisting a client in relation to legal proceedings or any conflict in general or to determine the rights and obligations of the client’ (Van Gerven 2013, 3). Different jurisdictions use different names to describe confidentiality, and for instance common law countries, such as the UK and the USA, speak—especially when referring to what a lawyer can be compelled to disclose in a court of law—of ‘legal professional privilege’ (UK) and ‘attorney-client privilege’ (USA), while ‘professional secrecy’ is more common in civil law countries like Belgium, Germany, Italy or the Nordic countries, and covers both the duty of confidentiality and a lawyer’s compelled disclosures in court (Lefebvre et al. 2012). The interpretation of the duty of confidentiality in the context of lobbying has, however, fallen on two international associations, to the ABA in the USA and the CCBE in the EU.

The USA and the rules of a ‘higher authority’

Originally founded in 1878, the American Bar Association (ABA) is a voluntary bar association of lawyers, which is not specific to any jurisdiction in the USA. It formulates model ethical codes related to the legal profession, with the Model Code of
Professional Responsibility (1969) or the more recent Model Rules of Professional Conduct (1983) being subsequently adopted in 49 states, the District of Columbia and the United States Virgin Islands. Its interest in rule-setting also extends to lobbying. The ABA publishes a compliance manual on federal lobbying law and practice (its fifth edition was published in 2014) and sponsors lobbying reform proposals through the ABA House of Delegates. Internally, the key arena within the ABA for discussions on lobbying regulation is the Section of Administrative Law and Regulatory Practice. In 2009, it appointed a Task Force, comprised of government groups, lawyers, and executives of lobbying firms. The Task Force’s report entitled ‘Lobbying Law In The Spotlight: Challenges And Proposed Improvements’ was published in 2011. It contained a set of recommendations for enhancing transparency around lobbying.

The Task Force did not specifically focus on law firms, yet its report briefly referred to ‘attorneys’. For the Task Force, the challenge of devising lobbying regulation lies in ensuring effective disclosure that does not impede the beneficial roles that lobbyists play in society. It then continued that ‘today, as attorneys increasingly find themselves providing analysis, advice, and advocacy in the policy realm, the bar has a natural interest in ensuring that the regulatory balance is struck wisely’ (ABA 2011, 7). The ABA has, indeed, been an active participant in discussions on lobbying legislation in the USA.

In the USA, a lawyer engaged in lobbying is deemed to have entered into a lawyer-client relationship. This means that all protections usually accorded to such relationship, including the duty of confidentiality, must in principle be observed. The lobbying work ‘becomes simply another part of the services provided by the lawyer to the client’ (Ross 2009, 690).

To be able to classify lobbying work as part of legal services was not simple and took time. The state-level bar associations first viewed lobbying work by lawyers as separate from the law practice and thus not protected by professional ethics rules. Law firms engaging in lobbying en masse since the 1980s pressurized the ABA to adopt Rule 5.7. that recognized lobbying as a law-related service and mandated that lawyers engaged in lobbying must comply with ethics rules applicable to lawyers in the practice of law (Jeffrey 2009, 718). The ABA changed Rule 5.7. in 1995, the same year the LDA came into force.

Yet the ABA soon realized that amending this particular rule was not sufficient and that there was a potential conflict between the duty of confidentiality and the registration and disclosure process created by the LDA. As Allard (2008, 31) who participated in the work of the ABA Task Force noted:

Lawyers thrive on compliance with rules, and must adhere to their own professional standards and canons of ethics. Like the Kosher hot dog company, lawyer-lobbyists must ‘answer to a higher authority’.

The ABA further amended its Model Rules to ensure that lawyers can comply with the LDA without fear of professional repercussions. According to Model Rule 1.6., ‘A lawyer may reveal relating to the representation of a client to the extent the lawyer reasonably believes necessary … to comply with other law or a court order’ (Ross 2009, 697). This means that a lawyer that engages in lobbying must observe
the disclosure duties of the LDA that mandates the disclosure of, among other information, fees paid to lobbying firms and contribution from third parties used to pay for lobbying services on behalf of the client. Although disclosure does not require the client’s consent, Model Rule 1.6 (b)(6) requires that the lawyer should ‘make sure that the client is aware of any such necessary disclosures’. States have modelled their own rules on the ABA’s Model Rules.

The EU and the rules ‘subordinate to lawyers’ own codes’

In Europe, the ABA’s counterpart is the Council of Bars and Law Societies of Europe that represents the bars and law societies of 42 European countries, and through them around one million lawyers. Like the ABA, the CCBE has also adopted two foundational documents: the Charter of Core Principles of the European Legal Profession (2006) and the Code of Conduct for European Lawyers (1988, last updated 2006). These two sets of norms are important in forming the basis of what they call the ‘deontology’ (the ethics of obligations) of the European legal profession. Despite their wide-ranging contributions to professional development, neither mentions lobbying. The CCBE is organized into 27 specialist committees and working groups, composed of national experts. One of the committees is devoted to the EUTR, describing its mission to work towards ‘supporting transparency in the decision-making of the EU institutions as a prerequisite for legitimacy, by stressing the need for the highest level of transparency without breaching existing deontological rules, e.g. rules on confidentiality recognized by the European Court of Justice’.

On its website, the EUTR committee lists two recommendations, both addressing the registration of national bars as lobbying organizations, as well as eight position papers, containing the CCBE’s professional-political view. In the run-up to the EU Commission’s work on the draft code of conduct for interest representatives, the CCBE (2008, emphasis added) sounded caution:

A code of conduct for interest representatives will raise problems for the legal profession, since lawyers are already regulated by national codes of conduct which are widely acknowledged to impose high standards on lawyers, particularly in relation to confidentiality and professional secrecy. We believe that any code for lobbyists which might apply to lawyers would inevitably be subordinate to lawyers’ own codes.

In 2016, it confirmed its position in response to the public consultation on a proposal for a mandatory EUTR. Calling for the ‘specificities of certain professions’ to be recognized, the CCBE (2016) noted that ‘the obligation for a lawyer to provide information on the legislative dossiers followed may conflict with his/her obligations under the rules of professional secrecy or legal professional privilege’.

The CCBE currently advocates for a mandatory regime (Joint Letter 2016). Interestingly, it has ceased drawing attention to the specificities of the legal profession.

6 https://www.ccbe.eu/actions/committees-working-groups/?idC=547&Committee=European%20Transparency%20Register.
The Joint Letter—to which the CCBE is a co-signatory—observed that ‘lobbyists come in many forms… and expertise is provided to policy makers on a daily basis by professional consultancies, law firms, industry associations, labour unions, NGOs, think tanks…’. The CCBE now situates itself in the group of rule-followers who ‘try to lead by example when it comes to filing complete, accurate, meaningful and up-to-date information on the register. Unfortunately, our commitments to transparency and accountability are not yet shared by all’ (Joint Letter 2016).

Apart from professional politics, the CCBE has also contributed to rule-setting at the national level. As many law firms are headquartered in Brussels, and their lawyers working in Brussels are members of the Belgian bar associations, three local bar associations—the Brussels Bar Association, the Society of Dutch-Speaking Bar Associations (Orde van Vlaamse Balies), and the Society of French and German-Speaking Bar Associations (Ordre des barreaux francophones et germanophone)—together with the CCBE defined a common position. According to the joint position, ‘if the lobbyist is a law firm, it must provide information on its turnover attributable to activities that fall within the scope of the register, as well as the relative weight of each client, in accordance with a defined grid’. The lawyer can, however, give this information on one condition: ‘a lawyer can give this information without violating his duty of professional secrecy if the lawyer (or law firm) first obtains the client’s express consent’ (Van Gerven 2013, 22, emphasis added). This means that even if a law firm registers in the EUTR giving, for instance, basic information, it may not disclose information on its clients unless the client expressly consents to the information being given.

The common position is not referenced on the CCBE’s website, neither is it included in any versions of the IIA or the implementing guidelines of the EUTR. Many EUTR registered law firms have added disclaimers to their profiles, asking visitors to the EUTR to ‘note that in line with the transparency register only clients and revenues which are not subject to the lawyers’ legal privilege have been listed above’ (Alber & Geiger), or that ‘As an international law firm, Covington and its lawyers adhere to the relevant bar rules’ (Covington & Burling LLP), or ‘Its lawyers adhere to applicable bar rules and other professional obligations in all countries it is operating in’ (Squire Patton Boggs LLP), or ‘Partners and Associates also follow codes of conduct as members of national Bar Associations’ (Bird & Bird LLP). However, none of these refer to any documents that would give more information on the relevant rules or codes of conduct, or how many clients are subject to the lawyers’ legal privilege or have forbidden the lawyer or the law firm from giving the relevant information.

Interestingly, the Commission has not publicly commented on the matter. Instead, the EP has insisted that law firms should take care of their obligations under the EUTR. It acknowledges the role that national bar associations play in setting professional standards but nudges the CCBE to keep the issue on the agenda. It also reminds bar associations that it is in the interest of the profession to ensure that professional rules are not abused to avoid publishing information required and that

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7 As per January 2022.
the ‘withholding of information is confined exclusively to what the law objectively permits’ (EP 2017, para 19).

Discussion

Both in the USA and the EU, the rules of bar associations serve as an ethical constitution of the legal profession, articulating the deontology of the legal profession. Ethical rules do not, however, serve only an internal function, in other words for disciplining lawyers for breaches of their ethical duties. They are also a tool of professional politics and professional authority through which bar associations defend their professional monopoly. This is true of the ABA in the USA and the CCBE in the EU. Why then is the regulatory outcome different between the USA and the EU?

First, comparatively speaking, the development in the EU attests to Quack’s (2006, 94) observation regarding how transnational organizations such as the CCBE may not fare well because they are ‘hampered by the diverging interests of their membership’ and are therefore less powerful at the international than national level. The CCBE appears weak and unable to rally national bar associations behind jointly defined positions, working instead with individual bar associations. In contrast, the ABA is more ‘in tune’ with state-level bar associations (the interests of which may also diverge less than is the case with EU Member States), and its Model Rules are followed across the USA. Tellingly, the CCBE’s position has not been followed in all Member States.

The French bar is one of national associations challenging the CCBE’s policy. French lobbying professionals are represented by three associations, one of them being the Association des Avocats Lobbyistes (AAL) (Sallé and Marchi 2017; Vauchez and Pierre 2021). All practicing lawyers in France are represented by the Conseil National des barreaux (CNB), with all lawyers also being registered in one of 161 local bars. As an umbrella organization, the CNB amended its internal rules to urge lawyers to sign up to lobbying registers at national (the so-called Sapin II), international and, specifically, EU level. Under Article 6.2.3 of Règlement Intérieur National de la profession d’avocat (RIN), French lawyers, if required by a public, European or international institution’s register, and if representing a client’s interests to that institution, register the client’s name and the amount of fees the lawyer has been paid for that representation.8

The decision of the CNB is important, as it opens up a new policy space for the articulation of an alternative view on the governance problem, transforming the field itself. It represents the seeds of what Quack calls ‘counter-expertise’, where an alternative proposal arises from the closely knit professional and knowledge community that has been supportive of the dominant policy paradigm (Quack 2016, 104). Whether such a decision is taken in the interest of the self-interested marketization

8 Décision à caractère normatif n 2015–001 portant ajout d’un article 6.2.3 au RIN sur l’avocat exerçant l’activité de représentation d’interets, Conseil National des Barreaux (12 June 2015), http://encyclopedia.avocats.fr/DOCS/DCN/RIN/DCN2015-001_RIN-MODIF_2015-06-12_Art-6-2-3-Avocat-lobbyiste-ajout.pdf.
and managerialization of the profession or as something to further support ethical conduct in the face of the dominant professional paradigm remains to be seen.

Secondly, difficulties of regulating law firms in the context of lobbying rules is not only an expression of the power that an influential elite such as the legal profession has over the discourse about their business, but also of how internal rule-setting and professional politics become intertwined. Until now, the CCBE been reluctant to amend its Code of Conduct or adopt a recommendation encouraging law firms to comply with the rules of the EUTR. Instead, it has insisted on a legally binding lobbying register for the EU, as in their view only a register of this kind can create a level playing field and enable lawyers to communicate the duty to register to clients. The EU argues that there is no specific legal basis in the EU Treaties to enact legislation on lobbying, which is why the EUTR is based on a non-binding IIA between the EU institutions.

The legally binding nature of the lobbying transparency rule is not, however, decisive. The findings of the legal comparative analysis suggest that the notion that only a legally binding register will force law firms to sign up to the EUTR is incorrect. The USA successfully brought lawyers into the realm of lobbying regulation, not only because it had enforceable legislation, but because the ABA paid attention to the need to align professional rules with lobbying legislation.

The argument, of course, rests on the comparison of two regulatory systems, one with enforceable legislation and one with non-binding rules. Ideally, we would see a comparison between two systems with enforceable legislation, but varied bar association rules. However, the finding can be supported by the French regulatory developments. Not only did the French bar amend its rules to require lawyer-lobbyists to comply with national legislation, but to comply also with non-binding rules of the EU. In other words, lobbying rules do not need to be enforceable for lawyers to comply with them and for bar associations to take them seriously.

While the CCBE’s policy runs the risk of withdrawing support for self-regulation by professional associations, national bar associations are more alert to the risk of governments and other (transnational) regulators stepping in and reasserting their regulatory authority. Another risk for the CCBE is the alienation of its members. Here a useful parallel can be drawn between public relations associations and bar associations. Năstase (2020) has argued that the codes of conduct developed by the EU professional associations neglect lobbyists’ obligations towards those whose interests they represent, that is, clients. Instead, lawyers’ professional rules in the EU protect clients but neglect the obligations towards their own members to ensure that they do not need to breach one set of rules in order to comply with another.

Concluding remarks

This article set out to compare the application of lobbying regulations on the policy activities of lawyers-as-lobbyists in the EU and the USA. In doing so, the article, first, contributed to the understanding of the profession of lawyers and law firms in relation to studies of lobbying.
The typical image of law firms offering purely legal services is outdated. In addition to what we might call the core legal services—those being representation by a lawyer during civil and criminal proceedings in court, and advice in contractual and business transactions—law firms increasingly provide lobbying and other public policy services to a broad base of clients. The analysis of regulatory frameworks in the USA and the EU shows that both regulations recognize lawyers as lobbyists and policy advocacy activities offered by law firms as lobbying. Consequently, law firms that offer lobbying services need to register unless their activities fall within the realm of the legal advice exception—formulated in the USA narrowly and in the EU more broadly.

The inclusion of law firms in the scope of lobbying legislation is more intricate than a quick scanning of the rules would suggest. The article, second, provided an explanation to why the EU system of lobbying regulation has struggled (as opposed to that of the USA) to make the lobbying activities of lawyers transparent. The explanation relates to the different roles bar associations have taken in the USA and the EU. From the perspective of a law firm that offers lobbying services, bar associations rules have the highest authority, and they are ultimately decisive for compliance with the rules. In the USA, the ABA realized this and amended its rules to ensure that compliance with the LDA does not constitute a violation of the rules of professional conduct. In Europe, the CCBE has focused on professional politics, neglecting the key responsibility of the organized profession to ensure that the profession’s rules are up-to-date and that the members of the legal profession can observe them without breaching other laws and rules.

This article also demonstrates how the regulation of law firms as lobbyists lies at the intersection of two areas of research that rarely interact: the regulation of lobbying and lawyer ethics rules and their interpretation. Such positioning in between research traditions might explain why lawyer-lobbyists have been neglected both by lobbying scholars as well as those of the legal profession or professions studies more generally. A renewed research interest in this important area also opens up new research opportunities. For instance, it would be important to establish empirically how many lobbyists are lawyers, that is, how large the lawyer-lobbyist population is. The present comparative legal analysis suggests that compliance with lobbying rules is not an issue for US law firms. It would be necessary to test this empirically by looking at disclosure differences among lawyer-lobbyists across regimes.

Another avenue concerns the implications of the findings for the literature on lobbying transparency and behaviour. For instance, there is a need for further studies on the attitudes of clients and how much value well-informed global clients place on the transparency of the services they buy. Governments have usually intervened in professional regulation to protect clients and consumers. But if the clients of law firms are not vulnerable, but rather elite cosmopolitan customers, does and should the government have an interest in controlling the commercially driven behaviour of professionals? Or should we see lobbying regulation as a way to protect those who provide lobbying services to clients potentially much larger and more powerful than the lawyer-lobbyists themselves?

Research could also be expanded to look at other actors that have sought and, in some cases, also obtained exemption from lobbying rules. One interesting example
would be trade unions that have secured concessions in national systems and at the EU level with regard to the so-called social dialogue. The findings from the research on bar associations could be used to understand how these national exemptions have been accommodated at the EU level and vice versa, and how the issue has affected the relationship between labour union confederations and their national affiliates.

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