

# A Rawlsian perspective on the institutional limits of lobbying the European Commission

Research article

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Received March 13 2020; Accepted April 03 2020

**Abstract:** In the process of drafting European Union (EU) legislation and supervising its effective national implementation, the European Commission has to cooperate with lobbyists. This exchange involves the risk of arbitrary lobby influence on its decisions at the expense of other EU citizens. Against this backdrop, this article addresses the research question of which normative principles should constrain the Commission's interaction with lobbyists. Based on the contractarian approach from Rawls' Law of Peoples, it identifies eight criteria of a Rawlsian lobby consultation system for the Commission, which representatives of EU countries could accept from behind a Rawlsian veil of ignorance and in view of the fundamental interest of their people. These normative criteria can be supervised by independent institutions like the European Parliament and the European Court of Justice. They constitute a procedural approach to the political supervision of the Commission's interaction with lobbyists that can be enforced without compromising its necessary institutional independence.

**Keywords:** *European Commission • European Union • John Rawls • Law of Peoples • Principal Agent Theory • Responsible Lobbyism*

**JEL Classification:** B49, B59, H11, K40, P16

## 1. Introduction

Lobbyism refers to “a deliberate attempt to effect or to resist change in the law through direct communications with public policymakers including legislators, legislative staff, and executive branch officials” (Ostas 2007, p. 33).<sup>1</sup> It may be conducted by private citizens petitioning those in power, by civic organizations advocating for specific causes like the protection of consumer rights or the environment or by paid agents lobbying for business clients (ibid).

In recent years, the European Union's (EU) institutions have seen a steady increase in lobbying activities (Coen and Richardson 2009, p. 3) because they

determine a growing share of legislation in member states. Most of the lobbying efforts originate in the private sector and focus on the European Commission (EC) (Anastasiadis 2014, p. 263) as the EU's powerful civil service with the exclusive right to draft EU legislation (based on the joint priorities of national leaders) and the task of ensuring its proper execution in EU countries (Bouwen 2009).

In exercising its legislative and executive duties, the EC regularly consults lobbyists and shapes the exchange with them actively. It prescribes consultation formats, funds the participation of financially weak groups, specifies informal staff rules for the exchange with lobbyists, and offers web-based feedback tools (Bouwen 2009, pp. 26–31). Lobbyists can be “an invaluable source of information” (Keffer and Hill 1997, pp. 1371–1372) and legitimacy (Bouwen 2009, p. 22) in the

<sup>1</sup> According to Ostas, this statement reflects the spirit of the US Lobbying Disclosure Act of 1995.

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process of drafting legislation (Hamilton and Hoch 1997, pp. 118–119) and in supervising its national implementation (Bouwen 2009, p. 21). However, the EC determines its approach to lobby consultation idiosyncratically, without stating principles or reasons for it. Accordingly, its responsiveness to lobbyists is problematic as it can lead to ill-informed legislation that favors some citizens at the expense of all others (Stark 1997; Lee and Baik 2010). The mere impression that its approach is arbitrary or unfair suffices to undermine the legitimacy of EU institutions (Hauser 2011, p. 685; Anastasiadis et al. 2018, p. 1).

This raises the normative question of how the EC should organize its exchange with lobbyists, more specifically by which normative principles what type of exchange is (il-)legitimate. This translates into the broader question as to which institutional arrangement can prevent illegitimate and encourage legitimate lobbying as defined by the corresponding normative principles.

The issue of responsible lobbying has already been discussed in the literature on business ethics (Hamilton and Hoch 1997; Keffer and Hill 1997; Stark 1997; Weber 1997; Grimaldi 2002). Most contributors agree that some forms of lobbying are legitimate, so that it is impossible to avoid problematic forms based on legal restrictions alone (Stark 1997; Ostas 2007), and that responsible lobbying requires compliance with additional ethical restrictions (Hamilton and Hoch 1997; Keffer and Hill 1997). Other contributors propose viewing corporations as political actors (Matten and Crane 2005; van Oosterhout 2010; Scherer and Palazzo 2011) and treating their lobbying efforts toward the EU as an integral part of good corporate citizenship (Anastasiadis 2007, 2014) or corporate social responsibility (Bauer 2014, 2016, 2017).

However, those contributors either propose restrictions that cannot be applied to the EU's complex governance framework and the unique role of the EC or discuss effective lobbying in the EU without identifying clear normative restrictions.<sup>2</sup> This opens up a research gap that is filled in by this article by systematically exploring the normative limits of EC lobbying. Based on the contractarian method in Rawls' Law of Peoples (LoFP), it enquires how leaders of EU states could assess the EC's approach to lobby consultations in a Rawlsian original position.

2 The corresponding conceptual models are limited to the general demand that firms should act responsibly and in line with their preferred approach to CC or CSR. Such a pluralistic, firm-centered approach cannot prevent irresponsible lobbying because the least restrictive lobbying approach will easily become the norm when professional lobbyists compete for influence or when public officials sell their power to the highest bidder.

The analysis reveals that representatives would accept the principles of the EU's jurisdiction in its foundational Lisbon Treaty (LT), if an impartial and binding institution, like the EC, protected their peoples' freedom and equality from exploitation by a majority and freeriding by a minority of other EU countries. They would accept the EC's mandate if transparent, fair, and effective rules reduced the risk of power delegation of arbitrary lobbying influence on their decisions. To this end, this article proposes eight criteria for a Rawlsian system of lobby consultation specifying for which purposes, by which procedures, which citizens must be consulted, and how their proposals must be treated. Under the supervision of independent institutions like the European Parliament (EP) or European Court of Justice (ECJ), this procedural approach can address the principal-agent problem of political control over the EC (Pollack 2007; Dehousse 2008; Gailmard 2012). It can expose and prevent undue lobby influence without undermining its mission-critical independence or requiring ex-ante knowledge of the desired outcome of its work (McCubbins et al. 1987).

This article contributes to the scholarly discourse on responsible lobbying by revealing the EC's current approach to the interaction with lobbyists as arbitrary and potentially biased and by proposing a fair, rule-based Rawlsian system of lobby consultation. Its contribution to the theory development consists of applying Rawls' contractarian framework to a new domain and relating it to principal-agent theory to validate its normative implications.

Section 2 gives an account of EC-targeted lobbying efforts, identifies them as problematic, and considers the justification and implementation problem of the EC's current approach. Section 3 justifies a Rawlsian consultation system and discusses its enforceability. Section 4 concludes the article.

## 2. The EC and lobbying

In its current form, the EU is a community of independent democratic nation-states that have established joint institutions to shape and stabilize their voluntary and equitable political, economic, and cultural cooperation. The ground rules of their collaboration are laid out in the LT, which envisages the delegation of power from signatory states to EU institutions, most notably the European Council (EUC), EP, EC, and ECJ, and specifies their respective mandates, competences, and relative powers in EU law-making, law enforcement, and budget administration. Thus, the LT determines the main entry points for lobbying at the EU-level (Bouwen 2009, pp. 32–33). The corresponding lobbying activities have

increased rapidly (Coen and Richardson 2009, p. 3)<sup>3</sup> in line with the ever-growing extent and importance of EU legislation (Anastasiadis 2014, p. 263). Because of its key role in law-making and law-enforcement, the EC has become the main target for EU-level lobbying efforts (Hauser 2011, p. 694; Bauer 2017, p. 1).<sup>4</sup> In line with its main duties within the framework of EU institutions, the EC faces two main types of lobbying (Bouwen 2009).

*Legislative lobbying* relates to the key role of the EC in the EU's legislative process, especially its exclusive right to propose legal drafts and its constant involvement in their revision, amendment, and adoption (Anastasiadis 2014, pp. 262–263).<sup>5</sup> Its formal agenda-setting power and its related influence on the early, informal stages of the drafting process, where research, expert hearings, and other preliminary steps in the formulation of legislation are carried out, make the EC an attractive target for lobbyists who seek to make legislative changes. In the early stages of law-making, it is easier and quicker to achieve them (Bouwen 2009, p. 20; Hauser 2011, p. 681).

*Lobbyism for litigation* relates to the EC's executive capacity as the “guardian” of the EU's legal framework and the associated task of supervising the appropriate national ratification and application of EU legislation (Bouwen 2009, p. 21). Supervised by the ECJ, the EC may initiate an official infringement procedure, if it observes or is made aware of possible violations of EU rules. If the ECJ judicially confirms the EC's suspicion, the violating state shall be punished in accordance with the gravity of the case and required to comply with the rules (LT, Art. 260). The EC's influence on the initiation or inhibition of the infringement process leads to lobbying that aims at inciting the EC to bring cases to or

keep cases from the ECJ (Bouwen 2009, p. 21). For lobbyists, this is a way of influencing the application of EU law in line with their interest.<sup>6</sup>

The EC's accessibility to lobbyists is prescribed in Art. 11 of the LT. It obliges the EC to “carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.” This has two major advantages. First, the exchange with lobbyists is a relatively cheap and important source of information (Keffer and Hill 1997, pp. 1371–1372) for EC staff, who are experts in their field but often lack crucial information for successfully performing their complex task of drafting EU-wide legislation. The addressees of a policy “may have relevant ‘local knowledge’ of a social problem and how to remediate it” (Hamilton and Hoch 1997, pp. 118–119) or may point to the violation of existing legislation by others.

Second, lobbyists are an important source of legitimacy for the EC (Bouwen 2009, p. 22) that—in view of its considerable power over EU citizens—must justify its decisions to them. Legislative drafts that are demonstrably based on a balanced consultation of affected groups will be perceived as more legitimate than those drafted by EC staff alone. Hence, EC-level lobbying can serve as an accountability mechanism compared to the constitutional right of citizens to petition their national government for changes in the law (Ostas 2007).

However, accessibility to lobbyists also involves risks. Lobbyists can exploit the information deficit of EC staff to influence their decisions based on a particular way of presenting information to them. Professional lobbyists are specialized in presenting their positions as technically optimal solutions in the public interest, and it may require substantial experience and technical expertise to recognize them as attempts to obtain privilege (Grossman and Helpman 2001). The naïve consideration of lobby input can lead to an involuntary deviation of the EC from its guidelines.

Another risk relates to the potential opportunism of commissioners who might abuse their formal agenda-setting power for negotiating with lobbyists themselves (Stark 1997). For instance, they might tailor legal

3 Currently, 11,745 (March 12, 2020) registered lobbyists compete for influence on EU institutions, with 60 % lobbying for the private sector (6,235 as in-house lobbyists and trade, business, or professional associations; 862 as professional consultancies, law firms, or consultants). <http://ec.europa.eu/transparencyregister/public/homePage.do?locale=de> (March 12, 2020)

4 For instance, most of the registered lobbyists regularly meet with members of the EC (94 %), whereas the participation in lobbying the European Council (39 %) and other institutions is considerably lower (Mahoney 2008, p. 131).

5 Although the EU's general policy guidelines are negotiated by national leaders in the EUC and their specialized ministers in the CoM, their translation into actual policy proposals is delegated to the EC. By Art. 17 and 292 of the LT, it has the exclusive right to introduce drafts into the legislative process. In a first formal reading, both the EP and the EUC independently comment on a draft and are asked to vote on it following a review by the EC with simple majority voting in the EP and at least qualified majority voting in the EUC. If one of them disagrees, they shall enter a conciliation process under EC guidance to identify a more acceptable amendment and, if successful, adopt the proposed policy (LT, Art. 294; Anastasiadis 2014, pp. 262–263).

6 The third type of lobbying, which is beyond the scope of this article, can be described as “funds lobbying” (Bouwen 2009, p. 20). As the EU's civil service, the EC is in charge of collecting and managing the EU's budget and running the corresponding programs, including its five structural and investment funds that are designed “to support economic development across all EU countries” (EC 2018; [http://ec.europa.eu/regional\\_policy/en/funding/](http://ec.europa.eu/regional_policy/en/funding/) (January 5, 2018)). In this function, it makes important decisions on the allocation of various subsidies, research grants, and other types of funding. “Funds lobbying” aims at gaining access to those financing opportunities and is conducted by a wide range of governmental, business, and civil society groups that seek support for their projects (Bouwen 2009, pp. 20–21).

drafts to a special interest in exchange for future job opportunities (Lee and Baik 2010). Because decision-makers at the later stages of the legislative process might have less information on the specifics of the problem to be addressed by a draft, opportunistic commissioners might, for their part, offer them a biased draft as the optimal solution.

To secure the benefits of lobbyism, while reducing the risks (Table 1), it is important to define and implement suitable rules for the exchange with special interest groups. While the EC actively organizes its interaction with lobbyists, for example, by funding financially weak groups to enable their participation in lobby consultations, formulating informal rules for the appropriate exchange with lobbyists, determining the format of consultations, and offering web-based feedback channels to citizens (for more details, refer Bouwen 2009, pp. 26–31), it does so idiosyncratically, without stating principles or providing reasons for its specific approach.

This gives rise to two interrelated problems. Considering the potential influence of lobbyists on the EC’s wide-ranging and powerful decisions, the EC’s idiosyncratic and intransparent approach to the interaction with them leads to a justification problem. It can be criticized as arbitrary and potentially unfair, which calls for a more principled and legitimate approach.

As opportunistic commissioners might ignore these principled constraints that prevent them from making self-serving agreements with lobbyists at the expense of EU citizens, there is an implementation problem with any justified system of lobby consultation. It must include suitable monitoring and enforcement mechanisms to ensure that the EC adheres to the normative constraints.

The following analysis successively addresses both problems from the contractarian perspective in Rawls’ (1999) LofP and a variant of principal-agent theory (McCubbins et al. 1987).

### 3. A Rawlsian lobby consultation system for the EC

As a variant of social contract theory (Wenar 2017), Rawls’ LofP enquires whether rational and reasonable

individuals would unanimously choose an institution, rule, or principle in a hypothetical state of nature, based on certain assumptions about their individual motives and decision situation (on the logical structure of contractarian arguments, Mueller 2002b). In the present case, it investigates the normative question of whether representatives of EU countries would unanimously accept the EC’s jurisdiction, mandate and approach to lobby interaction if they had to decide in the interest of all their citizens and from behind a veil of ignorance that conceals morally arbitrary aspects of their country’s situation (Table 2).

#### 3.1. A Rawlsian original position

In a Rawlsian framework, the political power and activities of EU institutions, like the EC, are justified by principles that are supported—in line with the contractarian ideal of unanimity (Mueller 2002a, pp. 496–497)—by all political representatives of the affected peoples under idealized conditions. This means that the heads of state of EU countries, as the highest representatives of their peoples, are expected to sign a hypothetical social contract on the basic terms of their cooperation (Wenar 2017). They have to choose between different versions of a foundational treaty, which specifies the normative principles and joint institutions that structure their peoples’ political, economic, and cultural relations. In the given scenario, they have to decide if the EC’s current jurisdiction, mandate, and approach to exchange with lobbyists are acceptable to them and if not, what changes would be required.

In a Rawlsian argument, national leaders have to decide in a hypothetical original position or state of nature. In this decision situation, they will be “reasonably and fairly situated as free and equal” (Rawls 1999, p. 33). Each of them has the same influence on the outcome, irrespective of the size, population, power, or wealth of his country. In addition, representatives cannot influence each other’s decision on the normative adequacy of the EC’s role, neither through rational discourse nor by the exertion of military, political, or economic pressure.

With regard to their individual decision motives, it is believed that representatives make their choice with a view to the fundamental interest of all members of their

	Opportunities	Risks
Information deficit of commissioners	Lobbyism as an important source of information	Lobbyism as a manipulation attempt
Opportunism of commissioners	Lobbyism as an accountability mechanism	Lobbyism as an attempt to obtain privileges

Source: The author.

**Table 1.** Opportunities and risks of lobbyism

General Form	Specific Components	Application to the Present Case
<b>Object of Justification:</b> What is normatively evaluated?	<b>Rawlsian Social Contract:</b> 3) Individuals agree on rule r, principle p or institution i	<b>Ch. 3.4: Rawlsian Limits to Lobbyism</b> 3) Representatives would adopt transparent, fair and independently supervised criteria for the EC's lobby consultations
<b>Mechanism of Justification:</b> What drives the argument?	<b>Deterministic Hypothesis:</b> 2a) Rational individuals choose the option which best satisfies their subjective motives under objective conditions 2b) Reasonable individuals behind a veil of ignorance choose the option that all others can choose and for the same	<b>Ch. 3.3: Mandate of the Commission</b> 2a) Representatives would delegate power to the EC if the risks of bureaucratic drift and lobby capture were contained
<b>Basis of Justification:</b> On which premises is it built?	<b>Hypothetical Original Position:</b> 1a) Individual motives (preferences, interests, goals, conception of the good (life)...) 1b) Decision situation (available information, endowments...)	<b>Ch. 3.2: Jurisdiction of EU institutions</b> 2b) Representatives could accept the EU's terms of cooperation as fair if impartial and binding institutions like the EC protected their freedom and equality
		<b>Ch. 3.1: Rawlsian Original Position</b> 1a) Representatives choose terms of cooperation according to the fundamental interests of their free and equal people 1b) A veil of ignorance conceals their peoples' size, wealth and power; socio-

Source: Adapted from Mueller (2002b, p. 471) and applied to the present case.

**Table 2.** Structure of the argument for a Rawlsian system of lobby consultation for the European Commission

people, and not just the majority that elected them into office or an even narrower powerbase. For Rawls, the fundamental interest of peoples encompasses their desire “to protect their political independence and their free culture with its civil liberties [and] to guarantee their security, territory, and the well-being of their citizens” (p. 34). Moreover, it comprises their citizens’ “proper self-respect [...] as a people resting on their common awareness of their trials during their history and of their culture with its accomplishments” (p. 34). This self-respect “shows itself in a people’s insisting on receiving from other peoples a proper respect and recognition of their equality” (p. 35).

In the original position, representatives have to make their choice on principles for the EC under specific circumstances. Such hypothetical conditions of the decision situation are modeled in terms of a veil of ignorance concealing any information on the territorial extension, natural resources, population size, political and economic strength, and historical relations of the represented people. Representatives know only “that reasonably favorable conditions obtain [sic] that make constitutional democracy possible” (p. 33). Accordingly, they decide in the knowledge that their people enjoy a minimum level of economic wealth and social peace.

The driving force behind the contractarian argument is a deterministic hypothesis on the typical behavior of decision-makers in the described hypothetical decision situation (Mueller 2002b). In a Rawlsian setting, the behavioral hypothesis posits that national leaders are

rational and reasonable. As rational individuals, they choose the role of the EC that best realizes the fundamental interest of their people under the specified conditions of constitutional democracy, minimum economic wealth, and relative social peace. As reasonable individuals, they will support the idea that all representatives can choose unanimously for the same reason. The Rawlsian veil of ignorance helps to identify those universally shared reasons by removing morally arbitrary and discriminatory factors from the decision situation. Thus, it prevents representatives from favoring a specific mandate for the EC and its exchange with lobbyists merely because it suits their current political, economic, and social situations. The veil ensures that their choice reflects a stable consensus for the right reasons based on the mutual recognition of their fundamental interest in contrast to a mere *modus vivendi* that breaks down once the underlying power constellation changes (Wenar 2017).

Section 3.2 considers whether rational and reasonable representatives in this original position could accept the basic principles of the EC’s jurisdiction as specified in the LT.

### 3.2. A Rawlsian evaluation of the EU’s jurisdiction

The LT demarcates the EU’s jurisdiction, and thus, the scope of the EC’s actions is presented in such a

way that rational and reasonable representatives could accept it under fair decision-making conditions and with a view to their people's freedom and independence and equal status.

The LT safeguards the former based on the principle of conferral (Art. 5.2) which requires that any competences of the EU must be delegated explicitly to its institutions by member states in line with national constitutional provisions. This prevents the EU from involuntarily depriving member states of their sovereignty and ensures that diligent representatives only delegate tasks to the EU if it benefits all of their citizens. To minimize the EU's coercive interference with the domestic affairs of its members, the LT strictly ties the use of delegated competences to the principles of subsidiarity (Art. 5.3) and proportionality (Art. 5.4). The former restricts the EU's activities within authorized policy areas to collective action problems that cannot be solved nationally (Mueller and Baeumlisberger 2020). The latter restricts it to measures that are necessary for solving them. In addition, the legislative process within those limits remains under the joint control of national leaders. They must unanimously initiate and approve all important collective decisions, for example, on the admission of new members, matters of taxation, the EU's common foreign and security policies or the appointment of important officials in EU institutions. If a country strongly disagrees with the EU's political orientation, it can invoke Art. 50 of the LT that gives it the right to revoke its membership based on a democratic decision and leave the EU in an orderly manner. It seems clear that, from behind a Rawlsian veil of ignorance, national leaders would consider those provisions as sufficiently restrictive to protect their people's fundamental freedom and independence.

Moreover, the LT contains rules that safeguard the equal status of EU members as the second part of their fundamental interest as a nation. For instance, any voluntary transfer of national power to the EU is strictly reciprocal, requiring the same transfer from all other EU members. This gives each of them, however limited it may be, the same amount of impact on the extent of the EU's governance framework and mission. In addition, the EU is obliged to "respect the equality of Member states before the Treaties as well as their national identities" (Art. 4.2) when exercising its delegated competences. It must organize collective action at the EU-level in such a manner that all EU countries benefit equally and may not sacrifice the interest of smaller countries to the benefit of larger ones, based neither on a utilitarian nor on a majoritarian calculus. Finally, national representatives must make important decisions unanimously. This ensures that each EU country has a veto right in fundamental matters and obliges all EU member states

to recognize each other's equal worthiness of respect and recognition, irrespective of their size, power, wealth, or history. Again, it seems clear that from behind a veil of ignorance, national leaders could accept these LT principles as suitable for protecting their equal status as a people.

In virtue of their general acceptability behind the veil, those principles can serve as the object of a Rawlsian consensus between rational and reasonable representatives. Independent of their variable conditions, EU countries have a universally shared reason to accept them as fair terms of their voluntary and equitable cooperation. They reflect terms of cooperation "that a people sincerely believes other equal peoples might accept also; and should they do so [...] will honor [...] even in those cases where [they] might profit by violating them" (Rawls 1999, p. 35).<sup>7</sup>

The preceding analysis indicates that the LT delimits the EU's area of responsibility in line with the Rawlsian social contract. It restricts the scope of EU politics so that it is generally acceptable to the leaders of EU countries in a fair Rawlsian decision situation. However, despite the hypothetical acceptance of the principles outlined, they may still have qualms about signing the LT, which allows for majoritarian decisions on nonfundamental policy issues and envisages the creation of powerful, independent institutions like the EC, which are difficult to control. To address these concerns, Section 3.3 extends the Rawlsian analysis to the EU's governance framework and its processes of law-making and law enforcement.

### 3.3. A Rawlsian assessment of the EC's mandate

The LT envisages the delegation of legislative, judicative, and executive powers to institutions such as the EUC, Council of Ministers (CoM), Parliament (EP), ECJ, and EC. On signing it, EU countries transfer the main decision-making authority on EU legislation to the EUC and the CoM, where the heads of state and their ministers determine the political priorities of EU politics (Hayes-Renshaw 2009) in nonfundamental matters based on qualified majority voting, with the number of national votes being conditional on the number of represented

<sup>7</sup> This self-stabilizing trait of reciprocally accepted just institutions finds the expression in the LT, which requires that "pursuant to the principle of sincere cooperation, the Union and the Member states shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties." It further requires them to "take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union" (Art. 4.3).

citizens. The exclusive responsibility for translating these priorities of (most) national governments into legal proposals is delegated to specialized bureaucrats in the EC who must submit their drafts to separate votes by the EUC and EP. If a draft fails to pass the required qualified and simple majority thresholds, the EC has to mediate between both institutions to promote the adoption of a revised draft (Anastasiadis 2014).

The task of supervising the due ratification, consistent interpretation, and proper enforcement of adopted EU legislation<sup>8</sup> in all EU countries is assigned to the ECJ, which—in its General Court—also gives EU citizens and their governments the chance to challenge decisions by EU institutions (LT, Art. 251–281). As the EU does not have “a full EU-wide policy-implementing framework” comprising agencies with executive powers and a police force, EU countries have a key role in realizing EU legislation (Bouwen 2009, p. 21). The EC has the task of monitoring the due fulfillment of the respective obligations. If it suspects or is made aware of noncompliance by a particular country, it may initiate the EU’s infringement procedure (Art. 258–260), which can lead to financial penalties for violating states, or the withdrawal of their voting rights (Art. 7).

Behind the veil, representatives of the fundamental interest of their people could accept the delegation of national power to those institutions and the EC, particularly in view of the difficulties in reaching decisions in the post-veil scenario. In the ideal original position, they can easily identify generally accepted political goals in line with the principles of the LT, and they quickly know which policies are suitable for putting them into practice, and they are prepared to do their part in achieving this. However, as rational decision-makers, they would anticipate that without the veil, it would be much harder to reach, specify, and realize collective decisions.

First, they would recognize that most democratically elected leaders merely represent a majority of their citizens due to the immense costs of organizing unanimously supported political decisions (Buchanan 1975, ch. 3). They would anticipate that due to those decision-making costs, without the veil, national leaders are likely to resort to majoritarian voting on nonfundamental collective decisions at EU-level (as specified in the LT). They would realize that this involves the potential risk for their own people of losing their voice in the EU’s political process and of falling victim to exploitative

collective decisions by a majority of the other peoples.<sup>9</sup> By delegating the task of drafting legislation and organizing its revision and adoption to the EC (Art. 17.2), national representatives can reduce this risk of exploitative domination. By Art. 17.3 of the LT, the EC is “completely independent” in exercising its right of legislative initiative. At the same time, it must use its powers “to promote the general interest of the Union and [to] take appropriate initiatives to that end” (Art. 17.1). Under those three features of its legislative mandate—power of initiative, institutional independence, and orientation toward the common good of all countries—the EC can protect individual EU countries from attempts by others to use majoritarian decision-making at the expense of their core interest. Under those conditions, power delegation to the EC makes weighted majoritarian voting acceptable to them, thus enabling faster EU decisions without sacrificing the freedom and independence of their peoples.

Second, rational leaders behind the veil would anticipate the immense costs of collecting the necessary information and combining the required expertise for the formulation of EU-wide legislation. They would see that in day-to-day politics, national leaders will be reluctant to allocate their limited time and resources to this complex process. Moreover, they would recognize that the national perspective of representatives and their domestic experts would complicate the search for EU-wide solutions that accommodate all national peculiarities.<sup>10</sup> Against this backdrop, another benefit of granting the EC its right of legislative initiative, and a mediating role in the process of drafting, reviewing, amending, and adopting EU legislation, lies in the associated reduction in information costs (Majone 2001, p. 103; 2005, p. 5).

8 There are different types of EU legislation. A significant part of EU legislation takes the form of directives that merely state the legislative goal, leaving the approach for realizing it nationally to each EU country. Only a small part of EU legislation takes the form of regulation that applies directly to all EU citizens without any scope for national variation.

9 In cases of “one country, one vote”, populous countries would be particularly concerned about this risk as it would expose a majority of EU citizens to exploitative domination by a minority. In cases of weighted majoritarian, voting based on population size, small countries would have to worry more.

10 Although public debate among citizens with diverging opinions typically fosters compromise, public negotiation, and decision-making by closely scrutinized political leaders continue to increase the polarization between them, making it less likely and more costly to achieve a possible consensus. This is because that constant public scrutiny incentivizes them to “use their actions as a signal of loyalty to their constituents, potentially ignoring private information about the true desirability of different policies” (Stasavage 2007, p. 59). McGuire and Ohsfeldt (1989) describe a similar dynamic situation in connection with the adoption of the US constitution by the delegates of the 13 ratifying states. They found empirical evidence that its adoption was not only facilitated by the informational isolation of delegates in the Federal Convention from their constituencies but also by the fact that they did not face a reelection constraint, once the constitution was adopted. Similarly, the commissioners are not merely more insulated from potentially polarizing public scrutiny, but may only serve one 5-year term of office.

As a specialized agency, the EC can focus on the preparation and revision of legislation. Given that “members of the Commission shall be chosen on the ground of their general competence and European commitment” (Art. 17.3), they have the required expertise and experience in dealing with the complexities of EU law-making, which helps them find generally accepted and technically feasible compromises (Dehousse 2008, p. 791). At the same time, representatives continue to determine the EU’s political priorities and retain veto power over all drafts. Accordingly, behind the veil, granting the EC its exclusive right of the legislative initiative seems an acceptable way of enabling better collective decisions, without sacrificing national freedom and independence.

Third, representatives would understand that without the veil, rational contractors have a commitment problem because many political decisions have the incentive structure of a prisoner’s dilemma (Buchanan 1975). They would see it as a rationale for each EU country to reap the benefits of legal compliance by all other countries while saving on the cost of their compliance—with the likely outcome that none of the countries will honor the commitment to an EU-level decision, despite their shared preference for its general implementation. Furnishing an independent institution like the EC, with a key role in initiating or inhibiting the infringement procedure in case of national violations of EU legislation is a way for EU countries to increase the credibility of their policy commitments (Majone 2001, p. 103; 2005, p. 5). Under their independent monitoring and enforcement capabilities, commissioners assist them in detecting opportunistic breaches of adopted rules by free riders and ensuring general compliance (Hauser 2011, p. 694). By Art. 17.1 of the LT, the EC must use those independent powers to “ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them.” In fulfilling this task, it “shall neither seek nor take instructions from any Government or other institution, body, office or entity” (Art. 17.3). In view of those three features of its executive mandate—institutional independence, monitoring and sanctioning powers, and strict impartiality—the EC can assure national representatives that even their uncommitted peers will comply with collective EU-level decisions. This increases their willingness to do their part as well, thus contributing to the effectiveness of their joint policies.

As a facilitator of collective decisions, an expert in specifying their concrete terms and a guardian of their due implementation, the EC acts as a trustee of EU countries with a fiduciary duty toward them (Majone 2001). The countries entrust the EC with wide-ranging political power, under the proviso that it exercises it to their joint benefit and in the spirit of the LT as their fundamental

agreement. It seems clear that behind the Rawlsian veil, national leaders could accept this mandate of the EC in view of its contribution to faster, better, and more binding collective decisions. However, power delegation to an institutionally independent bureaucracy, like the EC, also involves risks that a Rawlsian analysis must take into account. Section 3.4 will address them.

### 3.4. A Rawlsian perspective on the EC’s approach to lobby consultations

In exercising its legislative and executive duties, the EC depends on exchange with lobbyists, which can be an important source of information (Hamilton and Hoch 1997; Keffer and Hill 1997) and legitimacy (Bouwen 2009) in the process of drafting EU legislation and launching enforcement mechanisms. This is especially so in view of the EC’s limited resources and institutional distance to citizens (Hauser 2011, pp. 680–681) as well as its history of “regulatory failures” in cases of solitary, unadvised decisions (Mendes 2011, p. 1853). Under those advantages, EU countries oblige the EC, in Art. 11 of the LT, to “carry out broad consultations with parties concerned to ensure that the Union’s actions are coherent and transparent.”

From a Rawlsian perspective, this provision of the LT is problematic as it obliges the EC to interact with citizens, but without making any further specifications on the appropriate approach. In conjunction with the EC’s exclusive right of legislative initiative and influence on the infringement procedure, such an unrestricted authorization opens the doors wide for the uncontrolled influence of special interest groups on the drafting process and implementation of EU legislation. More specifically, it exposes national leaders in the EUC and the citizens they represent to the risk of moral hazard on the part of their agents in the EC, who might be tempted to exploit their information advantage as experts and task owners, in favor of the concealed pursuit of their own (political) preferences, deviating from those of their principals (Gailmard 2012). Commissioners might misuse their powers to achieve personal gain by using their exclusive right to draft legislation for the benefit of lobbyists in exchange for private benefits like future job opportunities (Stark 1997) or they might reduce their work effort by conducting mandatory lobby consultations negligently (Grossman and Helpman 2001). In both cases, the EC would (un-)intentionally grant manipulative lobbyists to influence EU legislation.

In the wake of Art. 11, this kind of lobby influence weakens the EC’s performance whether it leads to decisions that are misinformed or fail to consider all relevant facts. A distorted or incomplete information base due to



the uncritical or unbalanced consideration of lobby input can reduce the effectiveness of the EC in realizing the goals of national leaders. It negatively affects the quality of the EC's contribution to the EU's legislative and executive processes, at the worse producing outcomes with (unintended) harmful side-effects on some citizens or other policy areas.

Undue lobby influence undermines the EC's legitimacy if it leads to decisions that favor the narrow interest of lobbyists and their clients at the expense of (most) other citizens. This violates the principle of equal treatment by arbitrarily granting benefits to only some of them, while others are denied these benefits. Moreover, it can undermine the autonomy and welfare of those EU citizens who must involuntarily pay for those exclusive advantages in terms of tax money, legal discrimination, or any other (competitive) disadvantage. Undue lobby influence can also have negative overall consequences, in comparison with a situation without lobby influence, in terms of efficiency and welfare losses. The mere impression that those problems might apply can weaken the support of citizens for EU institutions in general and the EC in particular.

Against this background, it seems clear that behind a Rawlsian veil and in view of the fundamental interest of their entire people, political leaders could only accept the authorization of lobby interaction in Art. 11, in conjunction with suitable measures for keeping the related risks of bureaucratic drift and lobby capture in check. To this effect, they would insist on tying the EC's mandate to generally acceptable rules for the exchange with lobbyists to ensure that it improves the EC's performance and legitimacy instead of undermining it. Those restrictions would have to be observed in four key categories of lobby consultation. They would have to drive (a) the purpose of consultations, (b) the selection of participants, (c) the procedures for interacting with them, and (d) the protocol for dealing with their suggestions. When

combined, the two dimensions of lobbyism and the four categories of consultation imply eight design criteria for a transparent and fair Rawlsian system of lobby interaction for the EC (Table 3).

### 3.4.1. Purpose of lobby consultations

From a Rawlsian perspective, there are two major reasons for requiring the systematic interaction of the EC with lobbyists. In line with the legitimacy dimension of lobbyism, the first aim of lobby consultations consists of obliging the EC to assure and convince EU citizens and their elected leaders that it exercises its powers responsibly in line with their expectations. Like any powerful institution, the EC must justify its coercive actions to those whose freedom and independence it restricts (Ostas 2007, p. 47). Giving citizens and their lobbyists, the chance to influence nascent EU legislation and its later national application enables the EC to demonstrate to them and their elected leaders that it does not exercise its entrusted powers negligently or for personal gain. For this to succeed, citizens must be consulted transparently based on generally acceptable rules that give each of them a fair chance to voice concerns and to receive a reasonable reply. If properly devised and supervised, these rules facilitate the detection of violations of citizens' fundamental interest, thus forcing the EC to avoid them or to defend them.

From this viewpoint, the exchange with lobbyists is not a form of participatory democracy that allows citizens to participate actively in and exercise tangible influence on the EC's decisions, as some have suggested (Hueller 2010; Mendes 2011). The EC is an unelected technocratic institution with a purely supporting role for elected representatives in the EUC and EP. Mandatory lobby influence on its decisions would qualify as a form of "participatory technocracy" that undermines democratic representation in the EU instead of

	Purpose of consultations	Participation in consultations	Procedures of consultations	Protocol of consultations
Legitimacy for the EC	The EC must consult citizens transparently based on generally acceptable rules to assure them and their leaders that it does not abuse its powers	The EC must grant all citizens equal access to consultations or fair representation in cases of limited capacities to prove its impartiality	The EC must consult participants impartially based on preset procedures to give them an equal say or fair representation in consultations	The EC must document contributions accurately and provide reasons for (not) considering them to show that it takes them seriously
Information for the EC	The EC must consult citizens systematically to ensure that it does not miss crucial facts and information needed to exercise its mandate effectively	The EC must ensure that consultations are equally open to all citizens to obtain a holistic and accurate picture of relevant facts and views	The EC must ensure topic-related, fact-based, and discourse-oriented contributions to promote an exchange that yields new insights	The EC must communicate what it has learned from consultations to show that it uses the exchange with lobbyists to improve its work

Source: The author.

**Table 3.** Design criteria for a Rawlsian system of lobby consultation

strengthening it. From a Rawlsian perspective, the interaction with lobbyists should rather be seen and organized as an instrument of political control that prevents the EC bureaucracy from using its powers illegitimately and reassures citizens and their representatives of the EC's proper fulfillment of its mandate.

In line with the information dimension of lobbying, the second major purpose of lobby consultations consists of ensuring that the EC does not overlook essential facts and issues in the exercise of its duties. Both drafting legislation and supervising its proper implementation require a solid information base. Asking affected citizens and their lobbyists for their perspective could improve the practicability and effectiveness of legislation. As before, this requires the balanced consultation of the addressees of a piece of legislation based on generally acceptable rules that ensure the consideration of all relevant perspectives and facts. If properly devised and supervised, these rules can assist the EC in avoiding mistakes and failures in the exercise of its official mandate.

From this perspective, the interaction with lobbyists should not be mistaken for a form of "deliberative democracy" that produces consensual political outcomes from nonhierarchical discourses between different lobby groups. Such a conception would create the false impression that lobbyists deliberate to correct and replace the flawed collective decisions of elected national representatives. From a Rawlsian viewpoint, lobby consultations have a purely advisory function. They provide the EC with valuable information on the optimal realization of the democratically legitimate decisions made by national representatives in the EUC. Accordingly, the outcomes of discussions between lobbyists merely serve as a source of inspiration in the drafting process as an indicator of the probable effect of a legislative project and as an early-warning mechanism for the avoidance of technical errors in the drafting process.

### 3.4.2. Participation in lobby consultations

In a Rawlsian framework, the EC should be obliged to observe rules for selecting participants in lobby consultations. In line with the legitimacy dimension of lobbying, they should aim to build trust in and acceptance of the EC's decisions on the part of those who are affected by them. They must oblige the EC to prove to citizens and their leaders that it does not privilege anyone in deviation from democratically legitimized political priorities. The EC can grant affected citizens equal and indiscriminating access to lobby consultations by allowing them to self-select into the respective interaction formats, for example, by publicly announcing its legislative projects

and registering applications by those who wish to comment on them.<sup>11</sup> The unrestricted and transparent admittance of interested citizens to the process would assure them that the EC does not accidentally or deliberately ignore their perspective while arbitrarily allowing access to others.

However, such a system of self-selection is likely to increase the registration of participants beyond the capacities of interaction formats, especially if consultations take the form of small advisory groups or expert committees instead of large public hearings or round tables (Bouwen 2009, p. 30). In such cases, the EC will have to consult citizens representatively. To secure the legitimizing effect of lobbying, it will have to choose a composition of participants that fairly represents those who have declared an interest in participating, for example, by inviting a representative selection of associations and other organizations for the collective pursuit of interest instead.<sup>12</sup>

As the addressees of legislation differ in their ability to organize and finance lobbyists (Olson 1965; Hauser 2011, p. 686), a system of fair stakeholder representation would have to include mechanisms for the involvement of unorganized citizens. This is important because lobbying efforts often aim at changing political decisions in such a way that provides a small group with enormous benefits while distributing the associated costs over a much larger group like taxpayers, consumers or contributors to social security. As the associated per capita cost for the latter is very small, their own engagement in (defensive) lobbying efforts simply does not pay off (Tollison 2004, p. 200). This is made worse by the fact that it is much more complicated to organize as a large group (Olson 1965). If lobbying is supposed to contribute to the EC's legitimacy, the resulting underrepresentation of the "silent majority" must be avoided by suitable measures.

The EC's current practice of funding the participation of certain groups in consultations is one promising approach. In line with the notion of fair representation, the EC "appears to be funding citizens or social organizations at a higher rate than other types of groups" to "foster a more balanced dialogue with civil society" (Bouwen 2009, p. 27). However, the EC's current funding approach is opaque and arbitrary. To live up to a Rawlsian standard, it would have to be based on transparent and fair rules that promote equal opportunity of access to consultations for all. In contrast to the current

<sup>11</sup> It could use its existing web-based feedback system, where citizens can comment on legislative initiatives (Hueller 2010).

<sup>12</sup> Trade associations could represent the interests of employers, trade unions those of employees, consumer protection groups those of consumers and so on (Jastram 2012).

practice, these rules would have to exclude the EC from the decision as to who receives funding. Otherwise, the dependence of funded citizens from the EC's goodwill will compromise their ability to represent their interest.

The participation of petitioners in consultations is another promising approach to improve the representation of unorganized citizens. Petitions are a relatively cost-effective way of organizing collective interest. They do not require an organization structure or tedious coordination between its signatories. It suffices to formulate and explain a political demand and email it to others. If they share the concern, they will pass it on, and the demand will receive widespread support. Obliging the EC to involve the authors of petitions with a minimum number of supporters would improve the representation of the "silent majority" in consultations.<sup>13</sup>

In line with the information dimension of lobbyism, the rules for selecting participants in lobby consultations should aim at ensuring that the EC's work is based on an accurate and holistic picture of all relevant facts and stakeholder perspectives. This would improve the EC's task performance by reducing the likelihood of mistakes and omissions. The equal openness of consultations to all citizens and the duty to conduct them with a representative selection of their lobbyists can play an important role in achieving this. For instance, it would assist the EC in assessing the credibility of lobbyists, as the open exchange between competing experts on a given topic makes it harder to withhold crucial information or make false claims (Grossman and Helpman 2001). Moreover, the simultaneous consultation of lobbyists with diverging interest makes it more difficult for the EC to secretly pursue its own agenda. When the entire spectrum of lobby perspectives is on the table, its choice to follow one of them in particular is revealing. This helps EU citizens and their leaders to detect deviations from their democratically legitimized political priorities.

To select the participants in lobby consultations in line with the principle of fair representation, the EC requires specific information on lobbyists and their clients. The EC's voluntary transparency register, which asks lobbyists to disclose the purpose and mission of their organization and other details on their agenda and affiliations, supplies important information for the selection process. It helps in evaluating who should be invited to consultations to ensure a holistic picture of all relevant stakeholder perspectives on a given legislative project and to avoid the illegitimate overrepresentation of some

groups. To achieve this, the transparency register would have to be mandatory for all lobbyists who intend to participate in consultations, and it would have to include even more detailed information on lobby groups.<sup>14</sup>

### 3.4.3. Procedures of lobby consultation

From a Rawlsian point of view, the EC should be obliged to organize lobby consultations based on predefined and generally accepted procedures. In line with the legitimacy dimension of lobbyism, it should be required to do so to legitimize its role in formulating and enforcing coercive legislation to affected EU citizens and their elected representatives. The involvement of lobbyists in a fair consultation process would increase their acceptance of the EC's decisions, even if they disagree with the actual outcome.<sup>15</sup> If lobbyists get a fair chance to argue their case in suitable consultation formats, regardless of their nationality, profession, or concern, and if they can be sure that their case receives serious consideration by the EC, they will find it easier to accept a rejection of their proposal. Accordingly, consultation procedures should grant all participants an equal say or fair representation, that is, they should be equally entitled to influence the agenda and to contribute to discussions with proposals, comments, and questions.<sup>16</sup>

In consultations, the EC should have to act as an impartial referee that supervises the observance of the prescribed procedures. It should be responsible for explaining the legislative issue in question and for moderating the ensuing exchange, for example, by administering agenda, discussion time, and intervention rights. To make it more difficult for the EC to secretly steer the entire consultation toward a predetermined outcome reflecting its preferences in deviation from the political priorities of national leaders (see discussion of the phenomenon of orchestration in Schleifer 2013), it should be denied an active part in consultations. Its role should be limited to ensuring the fair representation of all affected citizens in line with the predetermined procedures.

Another reason for requiring the EC to consult lobbyists based on predefined and fair procedures relates to the information dimension of lobbyism. If all groups

13 It would also be a more sensible application of this instrument, which currently rather weakens democratic accountability by enabling the EC to use its right of legislative initiative without authorization by the EUC in case of a petition by one million citizens.

14 Any lobbyist or organization that claims to speak on behalf of others might in some way have to prove that they do so objectively. An NGO might have to produce a(n) anonymous list of its donors, the spokesman of a petition might refer to a list of signatures, a trade union to the number of its members and an employers association to the number of shareholders and company owners.

15 Fair procedures increase the input legitimacy, even if the resulting decision lacks output legitimacy (Mena and Palazzo 2012).

16 Similar criteria in the context of multistakeholder initiatives can be found in Jastram (2012, p. 81).

affected by a legislative project have an equal chance to argue their point and to criticize each other in a fair process, the quality of consultation outcomes and their usefulness to the EC will increase. In view of their diverging interest, participants will keep each other's manipulative inclinations in check. They will provide missing and expose false information to make their perspective known or to prevent their adversaries from painting a false picture. Their controversial exchange is likely to open new vistas and to reveal new solutions to problems. As Ostas (2007) puts it in his adversarial model of lobbying, "so long as all stakeholders are heard, no single stakeholder need be concerned with the public good because the process will generate a socially acceptable outcome" (p. 49). The EC can use the generated new insights to improve its decisions.

Hence, the EC's role as an impartial moderator should consist of ensuring that contributions to consultations are topic-related, fact-based, and discourse-oriented. It should punish participants that undermine consultations by means of irrelevant, false, or destructive contributions. Sanctions could include reprimands, withdrawal of the right to speak, exclusion from the process or inclusion in a blacklist that prohibits participation in future lobby consultations. For particularly severe breaches of consultation rules, there might even be criminal consequences. Those sanctions will deter attempts to manipulate or compromise the consultation process.

#### 3.4.4. Protocol for dealing with lobby input

From a Rawlsian viewpoint, the EC should be obliged to prepare an official protocol of interactions with lobbyists. In line with the legitimacy dimension of lobbying, a requirement to document all contributions to consultations accurately, and to provide reasons for considering or rejecting them, signals to participants that each has a fair chance of weighing in on a legislative issue. It obliges the EC to take note of the concerns and proposals of participants and to take them seriously. Moreover, it provides important information on the EC's decision logic to its political principals. From the EC's replies, nonparticipating citizens and their elected leaders can discern where and why the EC deviates from their instructions. In later stages of the legislative process, this helps them to make their decision on whether to accept the EC's drafts.

For this to succeed, all comments, proposals, criticisms, and questions would have to be accurately documented in line with the intentions of participants, for example, in terms of mutually approved minutes of meetings. This would prevent the EC from misrepresenting or dropping inconvenient criticism that does not reflect

its preferences or those of its favored groups. Moreover, the EC should be required to reply to each contribution and should have to offer transparent, comprehensible, and plausible reasons for accepting or rejecting them. This would reassure citizens that it does not arbitrarily favor convenient and ignore unwelcome contributions.

In line with the information dimension of lobbying, an obligation to prepare a protocol of consultations reduces the risk of the EC overlooking or ignoring relevant facts and perspectives on a decision. The obligatory preparation of a detailed protocol with reasonable replies to participants suggests that all contributions to consultations are carefully considered. An additional requirement to share the lessons learned from the controversial exchange of lobbyists and to explain how they might improve the decision in question would encourage the creation of new insights and their application in the EC's work. This would make it harder for the EC to conduct inconsequential lobby consultations or to use them as a pretext for socially harmful decisions.

### 3.5. Enforceability of a Rawlsian lobby consultation system

Behind a Rawlsian veil of ignorance, representatives would not only approve of the outlined lobby consultation system in view of its normative desirability but also in view of its merits at the level of implementation. They would support it because it assists them in addressing three practical problems related to the political supervision of the EC. The first problem is their lack of (ex-ante) knowledge on the desired outcome of the EC's work. The EC is given the right of legislative initiative precisely because of its unique expertise in translating the unspecific political priorities of national leaders into legislative drafts. If the latter had to develop a precise idea of the envisaged policy, this major reason for delegating legislative power to the EC would become obsolete. The EC could exploit this information deficit by giving national leaders the impression that a negligent or biased decision is the technically optimal solution.

A lobby consultation system comprising transparent and generally acceptable rules can avoid this problem. As shown by McCubbins et al. (1987), administrative procedures can serve as an instrument of political control over bureaucracies that enable politicians "to assure compliance without specifying, or even necessarily knowing, what substantive outcome is most in their interest" (ibid, p. 244). By formulating procedural requirements, politicians can "assign relative degrees of importance to the constituents whose interests are at stake [...] and thereby channel an agency's decision toward the substantive outcomes that are most favored by those who

are intended to be benefited by policy [sic]" (ibid). In the present context, it means that the fair consultation procedures chosen behind the Rawlsian veil can be an effective way of protecting the EU's legislative process from lobby capture and bureaucratic drift at the level of the EC. By ensuring the EC's compliance with the formulated criteria for selecting participants, conducting consultations, and dealing with contributions, national representatives in the EUC and EP can ensure that the EC respects the fundamental interest of their people without possessing specific ex-ante knowledge of the substantive results of consultations.

The second problem associated with exercising political control over the EC lies in obtaining information on undesirable activities of the EC in the course of consulting lobbyists. As the EC will try to conceal its negligent or biased interaction with them, national leaders would have to engage in costly monitoring activities to detect it. Again, those costs in terms of valuable time and the need to acquire technical knowledge on the legal matters in question would undermine an important reason for delegating the corresponding tasks to the EC in the first place.<sup>17</sup>

The described Rawlsian system of lobby consultation can address this problem. Transparent procedural rules are a comparatively cheap way for national leaders to supervise the EC's interaction with lobbyists without having to engage in costly monitoring activities. They can achieve this by passing on most of the monitoring costs to the citizens and lobby groups affected by a legislative or executive decision of the EC. If consultation procedures are public knowledge, those who are disadvantaged by the privileged consultation of others could bring the violation of the rules to the attention of national leaders. To supervise the compliance of their political agents in the EC, they would merely have to establish suitable grievance mechanisms. This compatibility of transparent consultation rules with decentralized supervision gives decision-makers behind the veil another powerful reason to accept them.

The third problem of exercising political control over the EC consists of the lack of effective enforcement mechanisms. Currently, national leaders can only determine the EC's budget, veto legislative proposals in later stages of the legislative process. As political representatives will be reluctant to replace

all commissioners (Mueller 2002a, p. 309), reject the whole budget or relaunch an entire legislative project to punish an individual commissioner for the inappropriate exchange with lobbyists, none of these measures will effectively dissuade the EC's noncompliance with consultation rules. At the same time, furnishing national representatives with stricter and more direct sanctioning power would compromise the EC's official task of impartially supervising the proper implementation of EU legislation in member states, thus undermining another important reason for power delegation to the EC.

The outlined Rawlsian system of lobby consultation offers a way of avoiding this issue. It does not require politicians to participate in the enforcement of consultation procedures but allows delegation of the task of punishing noncompliant commissioners to the EP or ECJ. Those institutions can apply much more targeted and severe sanctions in cases of rule violations, without compromising the EC's executive responsibilities toward national governments. Possible sanctions might include the removal or even prosecution of individual commissioners or their citation before an investigating committee which has the power to negatively impact their career by subjecting them to public criticism (McCubbins et al. 1987, pp. 248–249).

Through assisting national leaders in meeting those practical concerns, the proposed consultation system exhibits the properties of a Rawlsian realistic utopia (Rawls 1999, § 1). As such, it constitutes a sufficiently ambitious ideal that offers normative guidance on a reform of the EC's approach to lobby consultation, while remaining practicable under "reasonably favorable" conditions (ibid, p. 11). Thus, it satisfies the 'ought implies can' condition that rational and reasonable decision-makers behind the Rawlsian veil of ignorance would insist on and "extends what are ordinarily thought to be the limits of practicable political possibility" (p. 11).

## 4. Conclusion

This article explored the normative limits of lobbying the EC and their practicability from the contractarian perspective in Rawls' LofP and principal-agent theory. It addressed the normative question of whether the representatives of EU countries could accept the EC's jurisdiction, mandate, and exchange with lobbyists, as specified in the EU's foundational LT, from behind a Rawlsian veil of ignorance and in view of the fundamental interest of their people. The analysis revealed that they could accept on condition of additional provisions for dealing with the associated risks of bureaucratic drift and lobby capture. To this end, it proposed eight design criteria for a Rawlsian system of lobby consultations

<sup>17</sup> In cases of information leakages between the supervising principals, the appeal of monitoring the activities of the EC becomes even lower, as each politician will prefer to use the information provided by his peers, while saving on the costs of personally obtaining it through monitoring activities. This collective action problem of political oversight by multiple principals can lead to a suboptimal level of supervision (Gailmard 2009).

determining for which purposes and by which procedures which participants should be consulted by the EC, and how the EC should deal with their suggestions.

As procedural rules, they are an effective solution to the principal-agent problem of political control over the EC. Specifically, they can be a cost-efficient mechanism for detecting undue lobby influence on the EC that requires neither ex-ante knowledge on the desired

outcome of consultations nor direct monitoring activities that would compromise the EC's mission-critical institutional independence. Moreover, they can be supervised by institutions like the EP or ECJ.

As a justified and practicable approach to lobby control, the proposed Rawlsian system would make the EC's decisions more accountable to EU citizens, thus protecting its legitimacy.

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