

Participation in rule-making: European Union

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1. A central feature of EU governance

Participation of interest representatives in EU decision-making procedures is a central feature of EU governance.² At the outset of European integration, it was institutionalized via the advisory bodies that assisted the three original Communities (a Consultative Committee in the case of the European Coal and Steel Community; and the Economic and Social Committee, common to the European Economic Community and to the European Atomic Energy Community). The Court invoked the existence of the Economic and Social Committee as an argument to support the specificity of the then Community legal order in *Van Gend en Loos*. In its view, this was a means through which “nationals of the states brought together in the Community [were] called upon to cooperate in the functioning of [the] Community”.³ But participation developed mostly outside these bodies. In a neo-functionalist logic,⁴ participation was seen as a means to spur integration further, but also as a way of compensating the limited regulatory capacities of the EU policy-making institutions.⁵ Informal contacts with interest groups allowed an exchange of expertise but also anticipated consensus that could facilitate acceptance, implementation and, hence, effectiveness of the acts adopted.⁶

The relations between the Commission and interest groups changed since the beginning of the 1990s, when transparency came to the fore both as an essential dimension of good administrative conduct and as a legal principle. Under the impetus of transparency, the

¹ As indicated in the footnotes below, this text is based on, and updates, some of the arguments that are developed in J. Mendes (2011), *Participation in EU Rule-Making. A Rights-based Approach*, Oxford: Oxford University Press, Chapters 3 and 5.

² Participation has manifold meanings, but it can generally be defined as “decisional processes where persons ‘external’ to the institutional setup, different from those entrusted with decision-making powers, are formally [or informally] associated therewith” (Mendes, *Participation in EU Rule-Making, cit.*, p. 27).

³ Judgment in *Van Gend & Loos v. Nederlandse administratie der belastingen*, Case 26/62, ECLI:EU:C:1963:1, p. 12

⁴ See, e.g., E. Haas (1968 [1958]), *The uniting of Europe. Political, social, and economic forces 1950-1957*, Stanford: Stanford University Press.

⁵ In more detail, see Mendes, *Participation in EU Rule-Making, cit.*, pp. 80-127.

⁶ The opening statements of the Commission Communication “An open and structured dialogue between the Commission and special interest groups” are indicative of this dynamic: “The Commission has always been an institution open to outside input. The Commission believes this process to be fundamental to the development of its policies. This dialogue has proved valuable to both the Commission and to interested outside parties. Commission officials acknowledge the need for such outside input and welcome it.” (Communication 93/C63/02, of 12 of December 1992, SEC/92/2272 final).

Commission called for the self-regulation of interested groups, suggested codes of conduct, created a register of interest groups (now a joint Parliament and Commission Transparency Register), published minimum standards for consultation.⁷ These standards define the way the Commission relates to interest groups and the public during decision-making procedures. They refer to the clarity and provision of information that grounds the consultation processes, to openness and effectiveness; they specify the time-frames for consultations and determine the publicity of the respective results.⁸ Together with the register, they remain the basis for the more structured way the Commission created to receive input from interest groups and the public via impact assessments.

The Commission thus sought to change its image and its practices. In the past two decades, it turned participation into a “trust enhancing principle”, a principle that, despite the changes, remained mainly directed at ensuring the effectiveness of EU policies.⁹ In this turn, participation also became explicitly associated to the purpose of bringing the EU institutions closer to its citizens. It has also been widened, encompassing informal procedures whereby the public at large – and not only holders of concerned interests – is called upon to participate. The extent to which the Commission’s approach to participation – in particular its minimum standards – is followed by other institutions is uncertain. Nevertheless, the European Parliament has indicated that, subject to changes, the other EU institutions should also apply the standards the Commission defined for its services.¹⁰

Importantly, the procedures leading to the adoption of non-legislative acts of general scope (rule-making) have escaped this reformation impetus in one significant aspect.¹¹

⁷ See, inter alia, Green Paper “European Transparency Initiative”, COM (2006) 194 final, Brussels, 3.5.2006; Communication “European Transparency Initiative - A framework for relations with interest representatives (Register and Code of Conduct)” (COM(2008) 323 final, Brussels, 27.5.2008). These and other relevant documents are available at <http://ec.europa.eu/transparencyregister/info/homePage.do?locale=en>. See also Communication from the Commission, “Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission”, COM(2002) 704 final, Brussels, 11.12.2002 (revised a decade later: Commission Staff Working Document, “Review of the Commission Consultation Policy”, SWD(2012) 422 final, Strasbourg, 12.12.2012).

⁸ See Communication “Towards a reinforced culture of consultation and dialogue”, *cit.*, pp. 19–22.

⁹ K. Lenaerts (2004) ““In the Union we trust”: Trust-enhancing principles of Community law” *Common Market Law Review*, Vol. 41, No. 2, pp. 317–343. On the relevance of participation for the EU governance from the perspective of the Commission, see Commission, “European Governance. A White Paper”, COM (2001) 428 final, Brussels, 25.7.2001.

¹⁰ EP Report on the perspectives for developing civil dialogue under the Treaty of Lisbon (2008/2067(INI)), Committee on Constitutional Affairs, Rapporteur: Genowefa Grabowska, 4.12.2008, pp. 8 and 9.

¹¹ Non-legislative rule-making can be defined as a “process of content definition of acts of general application that concretise policy or legislative options”; these acts “potentially entail the solution, or the criteria of the solution, of more specific (individual) cases” (D. Curtin, H. Hoffman, J. Mendes (2013), “Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda”, *European Law Journal*,

As will be seen in more detail below, the minimum standards of consultation were mainly intended to apply in the realm of impact assessments, hence in the phase that precedes the Commission's proposal of legislative acts. Non-legislative rulemaking remains still today largely outside their scope.¹²

There are no general formal legal provisions that would impose participation in rulemaking procedures. In EU law, participation in decision-making procedures beyond the scope protected by the principle of *audi alteram partem* – single-case decision-making – is always dependent on specific legislative provisions.¹³ No general principle of EU law dictates a legal requirement to ensure participation in rulemaking procedures, although this would be justified, from a rule of law perspective, in cases where general rules may have similar effects to individual decisions;¹⁴ and, more generally, by an imperative of democracy as currently enshrined in the EU Treaty.¹⁵ Specific legislative provisions – where existent – are usually very broad, open provisions that leave choices on who, on what, when to hear and how to treat participation results mostly to the discretion of the decision-maker.¹⁶ However, in some policy areas, the absence of formal legal rules has not prevented the creation of sophisticated consultation procedures established in internal documents of EU bodies. One of the most cited cases is that of the European Aviation Agency, whose founding regulation determines that the agency “consults widely with interested parties”.¹⁷

The institutional interests and legal reasons defended by the EU institutions that have led to the exclusion of participation rights from rulemaking procedures and, indirectly, to the virtual exclusion of the role of law in regulating participation in rulemaking procedures will be explained next.

Vol. 19, No. 1, pp. 1-21, p. 2).

¹² See A. Alemanno and A. Meuwese (2013) “Impact Assessment of EU Non-Legislative Rulemaking: The Missing Link of 'New' Comitology”, *European Law Journal*, Vol. 19, No. 1, pp. 76–92.

¹³ P. Craig (2012), *EU Administrative Law*, Oxford: OUP, pp. 298-305.

¹⁴ See the analysis and references in Mendes, *Participation in EU Rule-Making*, cit., Ch. 5.

¹⁵ See, in this volume, Mendes, “Administrative procedure, administrative democracy”.

¹⁶ E.g. The Commission “shall carry out appropriate consultations with stakeholders” (Article 10 (3)(c) of Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products (OJ L 153/1, 18.6.2010).

¹⁷ EASA Management Board Decision 01-2012 [procedure to be applied by the agency for the issuing of opinions, certification specifications and guidance material] (available at <http://easa.europa.eu/system/files/dfu/EASA%20MB%20Decision%2001-2012%20Revised%20MB%20Decision%20RM%20Process%20.pdf>). See Article 52 of Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC (OJ L 79, 19.3.2008), which determines that consultation should follow “a timetable and a procedure which includes an obligation on the Agency to make a written response to the consultation process” (para 1) c).

2. Denying the role of law

2.1. *The Court: Atlanta*

The leading case on this matter remains *Atlanta*.¹⁸ The applicants claimed that their legal situation was affected by force of a Council regulation, adopted on the basis of the Treaty, concerning the bananas market and argued that they should have been heard before its adoption. The then Court of First Instance – upheld on appeal by the European Court of Justice – dismissed this plea on the basis of three main arguments. First, the right to be heard “must be considered in its proper context” and should not be extended to legislative procedures leading to the adoption of acts involving a choice of economic policy applicable to the generality of the traders concerned.¹⁹ Secondly, the only obligations of consultation incumbent on the Union legislature are those laid down in the Treaty. Thirdly, “the obligation to consult the Parliament, as laid down in various places in the Treaty, reflects at the [Union] level the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly”.²⁰ Subsequent case law confirmed and extended these arguments to non-legislative rulemaking adopted on the basis of EU legislation.²¹ Nevertheless, in this instance these arguments were particularly weak.²² If at all, respect for the procedures *defined in the Treaty* was only capable of excluding participation rights in the adoption of legal acts *directly based on the Treaty*. Even here the scope of the principle of representative democracy was quite limited – in the case at hand, the Council had adopted the regulation challenged in *Atlanta* after mere consultation of the Parliament. But to deny participation rights in the adoption of non-legislative acts on the basis of the principle according to which the exercise of power should be exercised at the EU level through the intermediary of a representative assembly was decidedly misplaced, given that, then, the role of the Parliament was considerably weak, where not inexistent.²³ In

¹⁸ Judgment of 11 December 1996, *Atlanta and others v Council and Commission*, T-521/93, ECLI:EU:T:1996:184, para 70 to 74; Judgment in *Atlanta and others v Commission and Council*, Case C-104/97 P, ECLI:EU:C:1999:498, para 35 to 38.

¹⁹ *Idem*, para 70; *idem*, para 37.

²⁰ Judgment in *Atlanta*, ECLI:EU:T:1996:184, para 71. On this argument, see also, Case T-135/96, *UEAPME v Council*, [1998] ECR II-2335, para 88.

²¹ Judgment of 16 July 1988, *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission*, Case T-199/96, ECLI:EU:T:1998:176; Judgment of 11 September 2002, *Pfizer Animal Health SA v Council*, Case T-13/99, ECLI:EU:T:2002:209, and Judgment of 11 September 2002, *Alpharma Inc. v Council*, Case T-70/99, ECLI:EU:T:2002:210.

²² For a developed analysis and criticism of *Atlanta*, see Mendes, *Participation in EU rule-making*, Chapter 5.

²³ Consider the role of the Parliament in comitology procedures during the 1990s and early 2000s.

general, the Court’s strong assertion regarding people’s participation in the “exercise of power” – implicitly accepted by the Court of Justice on appeal – denied that participatory democracy could be complementary to representative democracy. Today, this position is incompatible with the provisions of the Treaty on democracy.²⁴

The reasons why the Courts have refrained from imposing participation rights in rulemaking relate also to their construction of the right to be heard in procedures leading to the adoption of individual decisions.²⁵ The recognition of a right to be heard depends on the production of an adverse effect in the legal sphere of a sufficiently individualised person.²⁶ In the Courts’ view, which corresponds to the traditional way of conceiving the right to be heard, this requires that the act at issue establish a bilateral relationship between the decision-maker and the person affected. This means that the act needs to be an individual decision (or an act that can be considered as such) and that the holder of the right to be heard is, formally or substantively, its addressee. Participation rights could, therefore, not be transposed to the realm of rulemaking. This conception is mainly, but not exclusively, due to the influence of trial type judicial procedures in shaping procedural guarantees in administrative procedures.²⁷

Other reasons may be invoked to explain the Courts’ stance. One is a simplified view of the complexity of EU legal acts, according to which normative acts of general application and acts addressed at an identified addressee or addressees correspond to two neatly separated categories. The Courts have not ignored the fact that the former can be of individual concern to sufficiently individualised persons, but they have inconsistently valued the relevance attributed to this fact for purposes of granting participation rights.²⁸ In addition, the Courts’ approach to participation rights in rulemaking procedures has been conditioned by the restrictive standing rules enshrined in former Article 230 (4) EC, which Article 263(4) TFEU loosened with regard to non-legislative acts that do not require implementing measures.²⁹ The requirement of individual concern has been

²⁴ See, in this volume, Mendes, “Administrative procedure, administrative democracy”.

²⁵ In this sub-section, “Courts” is used in the plural to refer to the General Court and the European Court of Justice. Their arguments on the right to be heard were mutually reinforced in the both judgments issued in the case of *Atlanta*.

²⁶ E.g., Judgment in *Transocean Marine Paint Association v Commission*, Case 17/74, ECLI:EU:C:1974:106, para 15.

²⁷ See, for more detail, Mendes, *Participation in EU rule-making, cit.*, Chapter 4.

²⁸ See, further, Mendes, *Participation in EU rule-making, cit.*, Chapter 5, Section 5.2.

²⁹ Order of 6 September 2011, *Inuit Tapiriit Kanatami and Others v European Parliament and Council*, Case T-18/10, ECLI:EU:T:2011:419, para 56, establishing that “regulatory” acts, in the sense of Article 263(4) exclude legislative act (upheld on appeal Judgment in *Inuit Tapiriit Kanatami and Others v European Parliament and Council*, Case C-583/11 P, ECLI:EU:C:2013:625, para 56 to 61). See also Judgment of 25 October

influential at three different levels. To begin with, it has been transposed to define access also to administrative procedures: participation rights have been denied when individual concern to access the procedure cannot be established.³⁰ Next, the Courts have arguably feared the effects of the interplay between access to administrative procedures and standing: accepting broader rules of participation would strain their restrictive approach to standing. Finally, the restrictive standing rules have prevented the Court from being faced more often with pleas to extend participation rights: those actions that could be brought by persons whose rights and legally protected interests are affected by EU general acts, but who, nevertheless, did not have a direct and individual interest to require the annulment of an act, were most times considered inadmissible. Since the entry into force of the Lisbon Treaty, however, natural and legal persons do not need to demonstrate individual concern to grant standing in one specific set of cases, i.e. legal challenges to “regulatory acts” that do “not entail implementing measures”.³¹ This may allow more challenges grounded on breach of participation rights in procedures leading to this type of acts. It also opens the way to broaden access to administrative procedures: should the Courts continue using the conditions of standing as equally determinative of access to administrative procedures, at least in one instance “individual concern” will not be required.

The Courts’ stance is perplexing in the cases where there is an analogy with the situations covered by the right to be heard. Normative acts of general application may have a legal impact similar to individual decisions in the legal sphere of individuals. In particular in such cases, the Courts’ denial of participation rights eschews enforcing the rule of law in one of its fundamental dimensions: the protection of legally protected interests affected by the unilateral intervention of public powers. Recently, the Court has indirectly admitted the analogy between the effects of individual decisions and those of acts of general application, but has done so in one case delimited by two specific circumstances. First, the act challenged was a decision that had no formal addressees, but that was of direct and individual concern to the applicant because the procedure had been initiated by the latter.³² Secondly, the Regulation that based the adoption of the contested decision entailed, at various stages, the applicant’s right to submit comments. Nevertheless, the decision at stake - a Commission Implementing Decision that refused to include in a list

2011, *Microban v Commission*, ECLI:EU:T:2011:623, para 21 to 39, for a clarification of the requirements of standing regarding regulatory acts that do not require implementing measures.

³⁰ *Pfizer, cit.*, para 487 and *Alpharma, cit.*, para 388.

³¹ See footnote 29.

³² Judgment of 6 September 2013, *Sepra Europe Ltd v Commission*, ECLI:EU:T:2013:407, para 30 and 31.

of authorised products a chemical substance - arguably produced general effects, since non-inclusion means that the substance cannot be marketed by whoever would wish to do so. Among other pleas, the applicant alleged breach of the right to be heard. The Court recognised that “the contested decision adversely [affected] the applicant”, after having recalled its most restrictive formulation of the right to be heard – i.e. it is a corollary of the rights of the defence that ought to be observed “in an administrative procedure taken *against a specific person*” or “initiated *against a person* which are liable to culminate in a measure adversely affecting that person”.³³ The Court did not explicitly say that the applicant had a right to be heard. But the act’s adverse effect sufficed to examine the applicant’s arguments.³⁴ However, the two specific circumstances of the case mentioned, indicate that this line of reasoning is unlikely to be extended to other cases. The applicant was affected in such a way that the Court did not consider it necessary to examine whether the decision at stake was a regulatory act that does not entail implementing measures. The analogy with individual decisions with formal addressees was quite straightforward. The step has not been made to a situation in which, in view of the direct impact that EU rulemaking may have in the legal sphere of private persons, these persons should be recognised a right to participate even in the absence of procedural rules establishing that right.³⁵

2.2. *The Commission*

The reason behind the Commission’s choice to develop participation at the margins of law is fairly straightforward: it boils down to avoiding the risk of excessive legalism that could hinder the timely delivery of policy, as was explicitly stated in the 2002 Communication defining the minimum standards of consultation. In the words of the Commission: “a situation must be avoided in which a Commission proposal could be challenged in the Court on the grounds of alleged lack of consultation of interested parties. Such an over-legalistic approach would be incompatible with the need for timely delivery of policy, and with the expectations of the citizens that the European Institutions should deliver on substance rather than concentrating on procedures.”³⁶

³³ *Idem*, para 65 to 67, emphasis added.

³⁴ See, further, on the distinction between “initiated against” and “adversely affecting”, Mendes, *Participation in EU rule-making, cit.*, Chapter 4, and I. Rabinovici (2012) “The Right to Be Heard in the Charter of Fundamental Rights of the European Union”, *European Public Law*, Vol. 18, No. 1, pp. 149–173.

³⁵ See, in more detail, Mendes, *Participation in EU rule-making, cit.*, Chapter 5, Section 5.3 and Chapter 2.

³⁶ “Towards a reinforced culture of consultation and dialogue”, *cit.*, p. 10; see also Commission, “European Governance. A White Paper”, COM(2001) 428 final, Brussels, 25.7.2001, pp. 16-17.

As mentioned above, the Commission excluded from the scope of application of the principles and standards of consultation defined in this Communication non-legislative initiatives not covered by impact assessment procedures.³⁷ In 2009, it extended impact assessment procedures to “*certain* implementing measures ... likely to have *significant* impacts”.³⁸ In these cases, consultations are subject to the 2002 standards. This still excludes the application of consultation standards from most non-legislative rule-making, including from most delegated and implementing acts.³⁹ The selection of those cases is mostly in the hands of the Commission, as there are very few legislative acts that make the adoption of non-legislative acts of general application subject to impact assessment procedures. The European Court of Auditors has been critical of the lack of transparency of the Commission’s selection of initiatives that it subjects to impact assessments.⁴⁰ But even, where the Commission’s standards apply – seemingly constraining the choices on how to conduct consultation – its services fail often to comply. According to the Impact Assessment Board, consultation has been one of the “recurring” “basic weaknesses” of impact assessment reports.⁴¹ The problem resides in the lack of or inadequate feedback these reports give to participants: their views – “in particular (...) those unlikely to be acted upon”⁴² – are not transparently reflected in the IA reports.

At any rate, the full discretion of the Commission in making basic choices regarding the opportunity and forms of participation excludes any possibility of these procedures functioning as a surrogate means of procedural protection of the legal sphere of persons

³⁷ Communication “Towards a reinforced culture of consultation...”, *cit.*, p. 15.

³⁸ Commission, ‘Impact Assessment Guidelines’, 15 Jan. 2009, SEC(2009) 92, p. 6 (available at <http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf>), emphasis added.

³⁹ Post-Lisbon, the reference to “implementing measures” in the 2009 Guidelines should be read to include delegated acts. See Curtin, Hofmann and Mendes, “Constitutionalising EU Executive Rule-Making Procedures”, *cit.*, p. 12, fn 52.

⁴⁰ See European Court of Auditors, “Impact Assessments in the EU institutions: do they support decision making?”, Special Report No. 3/2010, pp. 28 and 46.

⁴¹ “Impact Assessment Board Report for 2012” (available at http://ec.europa.eu/smart-regulation/impact/key_docs/docs/iab_report_2012_en_final.pdf), p. 24. The IA Report of 2013 noted that “The number of recommendations relating to stakeholder consultation continued to be important (...) However, this did not reflect an increased concern with regard to the respect of the Commission’s consultation standards, but rather with the way in which stakeholders’ views were presented in draft IA reports” (p. 7; see footnote below).

⁴² IA Board Report 2011, p. 16; IA Board Report 2012, pp. 16, 24-6; IA Board Report 2013, pp. 7 and 8 (which indicates that “The Board’s opinions often recommended to present the different views throughout the report, to be transparent about critical views and to better explain how stakeholders’ concerns were taken into account”).

affected by rulemaking.⁴³ As explained above, the Courts have indirectly sanctioned the Commission's choices by denying participation rights in rulemaking procedures in the absence of a legal provision. The task to change the *status quo* has thus been placed squarely in the hands of the EU legislator.

2.3. *The EU legislator*

The EU legislator has not been active in fostering participation rights in rulemaking procedures of EU institutions and executive bodies. This may be partially explained by the fact that the Commission is the legislative initiator par excellence and it is not inclined to give away its free choice in deciding who, when and how to consult. The persistent influence of the model of executive federalism in shaping the image of the EU administration may be an additional reason. This image is still likely to condition legislative decisions on the design of procedures, which, moreover, may be trapped in the delicate balance that needs to be achieved between competing interests in negotiating EU legislation. In general, however, in contrast with its position regarding the decisional procedures followed by the EU institutions, the EU legislator has imposed participation procedures on the Member States when implementing EU law,⁴⁴ as well as on European standardisation organisations to whom the Commission requests the elaboration of standards.⁴⁵

More evidently, the European Parliament has recently denied (or overlooked?) the possibility of participation procedures being included in a possible future law on the EU administrative procedure. By a resolution of 2013, the European Parliament requested the Commission to make a legislative proposal in this regard. Its recommendations were, in substance, limited to codifying general principles and procedural rules applicable to individual decision-making that have long been established in the case law and have been restated in the Code of Good Administrative Behaviour of the European Ombudsman.⁴⁶

⁴³ Mendes, *Participation in EU rule-making*, *cit.*, pp. 132-136. On the effectiveness of these mechanisms, see Craig, *EU Administrative Law*, *cit.*, p. 301.

⁴⁴ Craig, *EU Administrative Law*, *cit.*, 298–299.

⁴⁵ Article 5 of Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation (OJ L 316, 14.11.2012, p. 12–33).

⁴⁶ European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INI)), Annex, recommendations 3 and 4. The other recommendations pertain to the objective and scope of the regulation to be adopted (Recommendation 1), to the relationship between the regulation and sectoral instruments (Recommendation 2), to the review and correction of own decisions (Recommendation 5), to the form and publicity to be given to the regulation (Recommendation 6). The Code is available at <http://www.ombudsman.europa.eu/en/resources/code.faces#/page/1>. The legislative proposal requested would not turn the Ombudsman's Code binding.

There was no word regarding procedural rules that could guide the making of non-legislative acts, much less on participation. Two reasons may explain – albeit not justify – this silence regarding non-legislative acts.⁴⁷ First, the fact that national laws on the administrative procedure largely lack rules on lawmaking by administrations may have influenced the choice of the Parliament. The eventual coherence of a possible EU law on the administrative procedure with its national counter-parts could facilitate the Council’s support to the Parliament’s proposal. At the same time, the absence of rules on administrative lawmaking in most national laws on the administrative procedure makes them obsolete, rather than commendable.⁴⁸ From the perspective of procedural protection, the sheer significance of the use of general rules by contemporary administrations impoverishes a law on the administrative procedure that focuses only on individual decision-making.⁴⁹ Second, a minimum version of a EU law on the administrative procedure could also increase the chances that the Commission would follow Parliament’s resolution and advance a legislative proposal.⁵⁰ However, the minimum version requested by the Parliament will have missed a crucial share of what the Union administration does.

3. Towards hardening participation in EU rulemaking

Concretising the rule of law and democracy – both fundamental values of EU law – in non-legislative rulemaking procedures requires forms of participation that go beyond a purely policy driven approach that focuses on process efficiency and outputs without

⁴⁷ Also in J. Mendes, “The making of delegated and implementing acts: legitimacy beyond inter-institutional balances” in C.F. Bergstrom and D. Ritleng (eds.) *Comitology and Commission Rule-making after Lisbon: The New Chapter*, forthcoming (OUP).

⁴⁸ J. Barnes “Reforma e innovación del procedimiento” in J. Barnes (ed.) *La Transformación del Procedimiento Administrativo*, Sevilla: Global Law Press – Editorial Derecho Global, pp. 11-69, at pp. 19-23.

⁴⁹ J. Mashaw (1981), “Administrative due process: The Quest for a Dignitary Theory”, 61 *Boston University Law Review*, pp. 889-91, p. 896.

⁵⁰ Under Article 225 TFEU the Commission is not bound to follow the Parliament’s request. As the European Parliament stressed recently, although the Commission usually complies with the formal requirement to reply to Parliament’s requests, it fails on “substantial follow-up”. The problem seems to be serious enough, given that the Parliament has invoked the need for a Treaty revision that would force the Commission to follow up on its proposals, thereby directly challenging the Commission’s formal exclusive power of initiating legislation that has been at the core of the Union method since the outset of the Communities (see Report on the implementation of the Treaty of Lisbon with respect to the European Parliament (2013/2130(INI)), A70120/2014, 17.2.2014, Committee on Constitutional Affairs, Rapporteur: Paulo Rangel, para 28 and 29). In this case, the Commission purported to follow the Parliament’s recommendation (see “Follow up to the European Parliament resolution with recommendations to the Commission on a Law of Administrative Procedure of the European Union, adopted by the Commission on 24 April 2013”, available at <http://www.europarl.europa.eu/oecil/popups/ficheprocedure.do?lang=en&reference=2012/2024%28INL%29#tab-0>).

consideration for procedural protection or equality.⁵¹ This might – and in many cases will – require legal rules on participation that ensure sufficient conditions of access and voice. From the perspective of the rule of law, some degree of limitation of the discretion of the decision-maker as to who, when, and how consult is needed in the cases where the procedural protection to holders of legally protected interests affected by rulemaking should be granted. That would be particularly justified where non-legislative acts of general application produce similar effects in the individual’s legal spheres as individual decisions. The fact that Article 41 of the Charter, when mentioning the rights of the citizens vis-à-vis the EU administration, only refers to single case decision-making is not an obstacle to enshrining procedural rules on participation in rule-making. These would be outside the scope of a fundamental right to good administration.

There are of course costs to the establishment of binding procedural rules on participation. Participation is bound to consume significant resources and to delay procedures. Depending on the rules of standing (still restrictive in EU law regarding acts of general application) binding rules will extend the power of the Courts to procedures that would otherwise be a matter of purely administrative practice. More powerful legal persons are likely to take advantage and manipulate procedural rules in their benefit. All these are important considerations that need to be seriously considered in designing procedural rules. There may not be easy solutions, but there are alternatives to an outright denial of binding legal rules and procedural rights that compromises fundamental legal and political values of the Union.⁵² More than a decade of practice of a non-legal approach to participation in rulemaking procedures – tenaciously defended by the Commission – has shown its limits. The Commission’s minimum standards of consultation, despite having led to improvements in terms of transparency and inclusiveness of consultation, still display important shortcomings and largely exclude non-legislative rule-making.

⁵¹ On the rationale of democracy supporting procedural rules of participation, and how that rationale may partially overlap with a rule of law rationale see, in this volume, Mendes, “Administrative procedure, administrative democracy”.

⁵² See, e.g., Mendes, *Participation in EU rule-making, cit.*, Chapter 5, Section 5.3 and Chapter 2, Section 2.6.