

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



CITIZENS AND
EU ADMINISTRATION
- DIRECT AND
INDIRECT LINKS -

NOTE



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POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

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Abstract

This briefing note focuses on the legal and non-legal avenues by which transparency and participation have been ensured in EU law and practice. Transparency and participation have produced the main recent changes in the way the EU administration relates to its citizens. We provide an overview of the current law and practice and their strengths and weaknesses post-Lisbon. In addition, reference is made to the European Ombudsman and the right to petition the European Parliament.

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LIST OF ABBREVIATIONS

ECSC European Coal and Steel Community

TEU Treaty on European Union

TFEU Treaty on the Functioning of the European Union

1. FRAMING THE LINKS BETWEEN CITIZENS AND EU ADMINISTRATION

KEY FINDINGS

- The normative frameworks that shape the relationships of the EU administration to its citizens have changed and gained new dimensions in the evolution of European integration. Parameters of the political and legal legitimacy of the EU administration have altered accordingly.
- The Lisbon Treaty for the first time links openness, transparency and participation at treaty level with democracy within the framework of “democratic principles”. These provide the constitutional framework for the procedural regulations to be adopted on the basis of Article 298 TFEU.

Channels of communication between citizens and the EU institutions have been in place since the outset of European integration. While the European administration was very much influenced by the bureaucratic tradition of national systems, it took shape at a time in which more or less embryonic modes of transparency and participation were beginning to emerge in national administrative structures and national administrative laws. This occurred especially through the creation of consultative bodies with an advisory role to the executives, which influenced EU structures. Moreover, the very nature of the early Community administration – reduced to a minimum administrative machinery which should work in close cooperation with the parties concerned (Article 5 ECSC Treaty) – favoured the creation of direct channels of communication between the European (Community) administration and the persons concerned by its decisions. This was essentially grounded on the need to foster the collaboration of the latter, given the administration’s limited resources, and on a logic of neo-functionalist spill-over that would further integration.¹ Finally, sector-specific legislation – mainly in the area of competition – envisaged from early on a set of formalised procedural guarantees directed at ensuring fairness of administrative decisions encroaching directly on the legal sphere of private persons.²

Important milestones in the history of integration have progressively and fundamentally changed the normative frameworks that shape the relationships of the EU administration to its citizens. The Maastricht Treaty introduced EU citizenship, and, with it, mechanisms of protection of Union citizens’ rights (and residents), such as the right to complain to the European Ombudsman and the right to petition the European Parliament, which thereby became constitutionally recognised. The completion of the internal market brought to the

¹ Joana Mendes, *Participation in EU rulemaking. A rights-based approach*, Chapter 3, Section 3.1, Oxford, Oxford University Press, 2011, forthcoming.

fore concerns on administrative enforcement and on achieving a sufficient degree of responsiveness to the needs of economic operators and consumers.³ By 1992, the explicit move towards a political union revealed the reality of a (semi-) autonomous administrative power that is not embedded in a democratically elected government at the same level of governance and pressed for restoring the confidence of the Union citizens in the European integration process.⁴ In response to this challenge, the Commission heralded, *inter alia*, openness and participation as principles of good governance.⁵ With more or less success, openness and participation have since shaped EU institutional practice in the attempt to 'reach out to the citizens' and breach the perceived legitimacy deficit of the EU and its administration. Finally, very much under the influence of the European Ombudsman, the Charter of Fundamental Rights proclaimed the right to good administration as fundamental right of the EU citizen. It thereby consolidated a set of procedural rights developed by the European Courts over the years and directed at limiting administrative discretion. The right of access to documents, the right of referring cases of maladministration to the Ombudsman and the right to petition the European Parliament were also elevated to the category of fundamental rights. At the same time they provide practical means enabling citizens to be 'responsive' and to hold the institutions to account other than only through strict judicial review. The right to petition the EP is for example a means of enabling them to exert some influence on Union bodies over the making and implementation of Union law. By bringing complaints to the European Ombudsman citizens enforce legality and accountability in the activities of the Union administration as well as transparency in the decision-making process.

These political and normative changes have altered the parameters of the democratic and legal legitimacy of action by the EU administration.

The Lisbon Treaty builds on this *acquis* and brings it a step further. Moreover, the issue of the relationship between citizens and the EU administration is particularly salient after the Lisbon Treaty because of the considerable reinforcement of both political and administrative executive power of the EU in recent years.⁶ This includes not only new actors such as the President of the European Council, the High Representative of Common Foreign and Security Policy and the European External Action Service but also the formal and informal

² Regulation No 17, of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ L 13/204, 21.02.1962), and Commission Regulation No 99/63 EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ L 127, 20.08.63).

³ 'The internal market after 1992: meeting the challenge', Report presented to the Commission by the High Level Group on the operation of the internal market, President: Peter Sutherland, SEC(92)2044, Brussels, 26.10.1992 (the so-called Sutherland Report).

⁴ Conclusions of the European Councils of Birmingham and of Edinburgh (points I.1 of both, Bulletin of the European Communities, No. 10, 1992, p. 7 and Bulletin of the European Communities, No. 12, 1992, p. 7).

⁵ 'European Governance. A White Paper', COM (2001) 428 final, Brussels, 25.7.2001.

⁶ See further, Deirdre Curtin, *Executive power of the European Union: law, practices and the living constitution*, Oxford, Oxford University Press, 2009.

expansion and intensification of the remit of existing actors such as agencies and committees.

The Lisbon Treaty linked openness, transparency and participation at treaty level for the first time with democracy within the framework of “democratic principles”. Article 11 explicitly embraces a more participatory understanding of democracy, complementary to representative democracy (Article 10 TEU). Not only must “every citizen” have “the right to participate in the democratic life of the Union” but also “decisions shall be taken as openly as possible and as closely as possible to the citizen” (Article 10(3) TEU). In addition certain obligations regarding openness, transparency and participation are placed on “the institutions” (Article 11(1) to (3) TEU). These hortatory and vague words can be read in the light of a deeper democratic meaning why openness, transparency and participation are important, namely that, “increased openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system”.⁷ After Lisbon, these normative standards will shape the relationships between the EU administration and its citizens by force of the Treaty. Arguably, the democratic principles of Articles 10 and 11 will need to be respected and developed in the regulations adopted following Article 298 TFEU.

This briefing note will focus on the legal and non-legal avenues by which transparency and participation have been ensured in EU law and practice. Transparency and participation have produced the main recent changes in the way the EU administration relates to its citizens. The following sections will provide an overview of the current law and practice and their strengths and weaknesses post-Lisbon. In addition, reference will be made to the European Ombudsman and the right to petition the European Parliament. The European Ombudsman has been and, very likely, will remain an important driving force in correcting administrative practices in these respects. Reference to its role in shaping the relationships between the EU administration and its citizens is therefore justified. The right to petition the European Parliament is an important means of reacting against administrative misconduct and we will explore its continuing relevance post-Lisbon. The right to complain to the Commission is an important link between citizens and the EU administration. It is directly connected to the enforcement of EU law. Since this will be addressed in a separate briefing note to the Working Group that places complaints in their specific context, we leave it out.

⁷ Joined Cases C-39/05P and C-52/05P, *Turco v Council of Ministers*, paragraph 45, judgment of 1 July 2008, ECR [2008] I-4723, reiterating the preamble of Regulation 1049/2001. Authors’ emphasis.

2. TRANSPARENT EU ADMINISTRATION: A ROADMAP⁸

KEY FINDINGS

- Access to documents has acquired the status of a rather fundamental norm in the EU legal and constitutional system. At the same time it has however also in recent years become highly 'legalized' with many of the most crucial issues as to the meaning of the exceptions, the relationship with national legal provisions and the relationship with other legal rights that also enjoy a fundamental status (e.g. privacy and data protection).
- It is increasingly considered an obligation on the part of all institutions and organs within the EU to put on Internet extensive information about their tasks, their organization structure, their activities, the agendas for their meetings as well as information on the most important documents under discussion in that context.

2.1. Legal and non-legal procedural avenues

Prior to the Treaty of Amsterdam, transparency-related measures were viewed as a matter for the affected institutions themselves, to do with their internal functioning and hence falling under their respective rules of procedure. This essentially self-regulatory approach meant that initially the tendency was to view the principle of public access to documents as at most a voluntarily assumed specific principle of administrative law that has gradually, through the medium of case law, acquired some procedural flesh and substance.⁹ The focus in this first time period was on gradually constructing a right of access by the public to certain categories of document held by the three decision-making institutions (Commission, Council and the European Parliament). The General Court and the Court of Justice effectively built a body of case law that on the whole kept pressure on the institutions to behave fairly and to devise adequate systems of scrutiny. They tended in the early case law to interpret the scope of the legal provisions (decisions by the institutions based on their internal rules of procedure) rather broadly so that, for example, specific institutional arrangements did not operate to reduce the reach of the access to documents provisions.¹⁰ The technique of legal interpretation used by the Courts during this foundational period involved a type of teleological reasoning which placed the initial Code of Conduct adopted by two decision-making institutions in the context of its broader democratic purpose.¹¹ The Courts tended to emphasize the underlying purpose of access to documents as resting on

⁸ Parts 2 and 3 of this briefing note draws on Deirdre Curtin and Joana Mendes, "Transparency and participation: a vista of democratic principles for EU administration", *Revue Française d'Administration Publique*, 2011, forthcoming.

⁹ On this case law see further, Deirdre Curtin, 'Citizens' fundamental right of access to information: an evolving digital passepartout?', *Common Market Law Review*, (37) 1, 2000, p. 7–21.

¹⁰ See further, for example, Case T-194/94, *Carvel and Guardian Newspapers v Council* [1995] ECR II-2765 and Case T-174/95, *Svenska Journalistförbundet (Swedish Union of Journalists) v Council* [1998] ECR II-2289.

general notions of public control of the activities of public institutions. Thus, the Courts developed what can be termed a constitutional perspective on access to documents provisions *avant la lettre*. Only later were these 'rights' given an explicitly constitutional foundation, first in the Treaty of Amsterdam, then in the Charter on Fundamental Rights and later in the Lisbon Treaty (Article 15 TFEU).

The specifically 'legal' approach culminated with the adoption of a new and binding legal instrument, Regulation 1049/2001 that entered into force on 3 December 2001.¹² Although, in accordance with then Article 255 EC, EU level legislation granted a public right of access to the documents of only the three main law-making institutions (the Commission, the Council of Ministers and the European Parliament), the access to documents legislation was applied voluntarily by a wide variety of other institutions and (quasi-) autonomous actors.¹³ The Treaty of Lisbon in Article 15(3) TFEU consolidates this position in practice with the explicit treaty level provision of the right of access to documents of the "Union institutions, bodies, offices and agencies, whatever their medium", very much in line with the previous Article 42 of the Charter on Fundamental Rights of the European Union.

The legal-constitutional approach is relatively solidly anchored in legal texts, including at the most fundamental level of the Treaty on European Union in its Lisbon version. The provisions on public access to documents clearly have caused changes by giving citizens a tool to obtain the documents they wish to obtain, albeit with a considerable and significant time lag.¹⁴ Access to documents has acquired the status of a rather fundamental norm in the EU legal and constitutional system. At the same time it has however also in recent years become highly 'legalized' with many of the most crucial issues as to the meaning of the exceptions, the relationship with national legal provisions and the relationship with other legal rights that also enjoy a fundamental status (e.g. privacy and data protection). The Court(s) in Luxembourg who were once seen as the 'unsung hero' of those seeking to open up the inner institutional workings of the EU have come under fire at times for what is perceived to be an unnecessarily generous interpretation of the scope and meaning of

¹¹ See further, Deirdre Curtin, 'Betwixt and between: democracy and transparency in the governance of the EU', in Jan A. Winter, Deirdre Curtin, Alfred E. Kellerman and Bruno de Witte (eds.), *Reforming the treaty on European Union*, The Hague, Kluwer Law International, 1996, p. 95–121.

¹² See, Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31 May 2001, p. 43. See further, European Commission, 'Green paper: public access to documents held by the institutions of the European Community. A Review', COM (2007) 185 final (18 May 2007). See too, Commission staff working document, report on the outcome of the public consultation on the review of regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, SEC (2008) 29/2 (16 January 2008).

¹³ See further, Joni Helikoski and Päivi Leino, 'Darkness at the break of noon: the case law on regulation No. 1049/2001 on access to documents', *Common Market Law Review*, Vol. 43 (3), 2006, p. 735–782.

¹⁴ See further, Lorenzo Cotino, 'Theory and reality of public access to EU information', in Deirdre Curtin, Alfred E. Kellermann and Steven Blockmans (eds.), *The EU constitution: the best way forward?*, The Hague, Kluwer, 2005, p. 233–244.

several key exceptions to the legal right.¹⁵ This is more particularly the case when it considers its own documents and the 'administration of justice'.¹⁶ In addition there is some attempt to turn back the clock by the Commission in particular in the on-going revision of the access to documents regulation.¹⁷

2.2. What happens in practice?

The best way of understanding overall the legal contribution to the transparency discourse is that it has made some of the institutions more aware of how they can pro-actively make their own information widely available to the public using information and communication technologies. The Internet played a limited role in the early period since the EU did not for a long time actively create transparency. Just as critical as the formal legal road—and in practice what it is all about—is the quality and scope and completeness of the information and documents that the institutions make available on the internet, via either specific registers on their respective web-sites or via specific data-bases placed by them on the Internet. This is as far as most citizens get: either they get a 'hit' in terms of the document or information they are looking for, or they do not. These 'passive' users as they might be termed will however benefit greatly from the front-running 'active'—and often highly critical—users who monitor the various registers and at times rather systematically request the institutions to put on the Internet those documents registered but not available. It is sometimes argued that the legal regulations on access to documents are not significant from the perspective of how comparatively little use is made by the public of the legal 'rights' and moreover how limited the range of 'users' is: largely students and researchers (40%) and lawyers (8.8%).¹⁸

It is increasingly considered an obligation on the part of all institutions and organs within the EU to put on Internet extensive information about their tasks, their organization structure, their activities, the agendas for their meetings as well as information on the most important documents under discussion in that context. The information placed on the Web pages of the various institutions may relate to documents already placed in the public domain. In this case the initial function of putting information on Internet is simply to make such information more speedily available and more readily accessible to a wide range of users. However, with the advent of Registers of documents in recent years, in particular that of the Council and of the Commission, more documents are being placed on the Internet at an earlier stage of the decision-making procedure and including documents that

¹⁵ See further, Joni Helliskoski and Päivi Leino, 'Darkness at the break of noon: the case law on regulation No. 1049/2001 on access to documents', cit.

¹⁶ See, Case C-514/07P, *Sweden v API and Commission* [2010].

¹⁷ See further, Francesco Maini, Jean-Patrick Villeneuve and Martial Pasquier, "'Less is more'? The Commission proposal on access to EU documents and the proper limits of transparency', *Revue Française d'Administration Publique*, forthcoming.

are not necessarily published elsewhere. In recent years the Commission in particular has set up several different specific document registers. These include a very detailed 'comitology' register¹⁹ and other specific web sites by the various Directorate Generals as well as a specific register on expert groups. All of these specific registers and web sites relate more generally to the province of the administration in a general sense and may include some documents of a more internal nature (for example, minutes of committee meetings, meeting documents and minutes of meetings as well as draft decisions). They are particularly relevant to understand decision-making processes supporting the enactment of implementing – administrative – rulemaking. But the existing registers also provide information on the administrative activity entailed in the preparation of legislative proposals and policy initiatives. This is the case of the 'Register on Expert Groups'²⁰, which lists formal and informal advisory bodies established either by Commission decisions or created informally by the Commission services and provides key information on those groups. Also the Commission's register of interest representatives is a voluntary register intended to contribute to the transparency of the administrative activity in the ascendant phase of the legislative procedure.²¹ At the same time the Commission and the Parliament are working towards establishing a common code of conduct and common register of interest representatives in the near future.²²

3. PARTICIPATING IN EU ADMINISTRATION: A ROADMAP

KEY FINDINGS

- The fundamental principle according to which the right to be heard needs to be ensured in administrative procedures leading to the adoption of acts adverse to the legal sphere of persons concerned, does not include rule-making procedures, which are the essence of much of market social regulation in the EU and elsewhere. Except where otherwise provided, participation is in these instances a matter of institutional practices and is largely dependent on policy choices.
- Article 11 TEU draws essentially on current institutional practices of participation. Their meaning ranges from more strategically oriented rationales of interest representation and the more value-laden aims of civil dialogue. Their democratic value is questionable.

¹⁸ See for example, Lorenzo Cotino, 'Theory and Reality of Public Access to EU Information', cit.

¹⁹ See, <http://ec.europa.eu/transparency/regcomitology/fag_en.htm>.

²⁰ See, <<http://ec.europa.eu/transparency/regexpert/index.cfm>>.

²¹ See, Commission Register of Interest Representatives, <https://webgate.ec.europa.eu/transparency/regrin/welcome.do?locale=en>. See, the critical initial report by ALTER-EU (The Alliance for Lobbying Transparency and Ethics Regulation), Commission Lobby Register Fails Transparency Test, <<http://www.alter-eu.org/en/system/files/publications/Commission+Register+Fails+Transparency+Test.pdf>>.

²² See, press release of end of October 2010, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/544&format=HTML&aged=0&language=EN&guiLanguage=en>

3.1. Legal and non-legal procedural avenues

Contrary to transparency, the legal and non-legal avenues have remained largely separate with regard to participation in EU administrative law and governance. The legal realm of participation has been restricted to the scope of the right to be heard.²³ However, this fundamental principle of EU law covers only a very limited segment of administrative action: individual decision-making, i.e. procedures that are liable to culminate in a measure adversely affecting the person to whom it is addressed. The right to be heard is a requirement of the rule of law in judicial procedures and owes little to the democratic rationale of engaging the citizens in the activity of the administration and of bringing them closer to the exercise of power. At the same time, participation by citizens in EU administrative action that takes effect through the adoption of non-legislative normative acts (i.e. administrative rulemaking) is left outside the purview of law. The Courts have explicitly refrained from creating participation rights with regard to such normative procedures including administrative rulemaking. Such administrative rulemaking is however the essence of much of market and social regulation in the EU and elsewhere.²⁴

Beyond the realm of the right to be heard, participation continues to be seen as a matter of institutional practices. In some instances, the EU legislator defines the duty of the Commission or other executive bodies of the EU to consult the public or interested persons. In most cases, however, no other requirements are defined by law, which means that the decision-maker is free to conduct consultation procedures as it finds more appropriate, deciding freely on the timeframes and on the need and shape of feedback statements. In these cases, the only difference between consultation procedures not backed up by legal provisions and those that are required by law is that, in the latter case, the decision-maker loses the choice whether or not to conduct a consultative procedure.²⁵ In all other aspects, such participation practices will most likely be those that are embedded in the EU since the beginning of the European integration process.

In current EU governance, the age-old forms of interest representation that originated in the early stage of European economic integration – in particular in the Economic and Social Committee, various advisory committees with representatives of social and economic sectors affected by EU regulation, and informal lobbying – coexist with other more or less

²³ It has been developed essentially by the EU Courts (see, among many others, Case 234/84, *Belgium v Commission* [1986] ECR 2263, paragraph 27; Case C-135/92, *Fiskano v Commission* [1994] ECR I-2885, paragraph 39; Case T-260/94, *Air Inter v Commission* [1997] ECR II-997, paragraph 60) and it is enshrined in the Charter of Fundamental Rights as a component of the right to good administration (Article 41, 2, a)).

²⁴ Case T-521/93, *Atlanta AG and others v Council and Commission* [1996] ECR II-1707; Case C-104/97 P, *Atlanta AG and others v Commission and Council* [1999] ECR I-6983. On the scope of the right to be heard, see, among others, Joana Mendes, *Participation in EU rulemaking. A rights-based approach*, Chapter 4.

²⁵ The formulation of the legal provision may still leave some leeway to the decision-maker regarding the opportunity of consultation. See, for example, Article 3 (2) of Commission Directive n. 2004/72/EC.

structured access gateways to EU policy and decision-making – stakeholder consultation *fora*, expert seminars, regular contacts with EU-level networks of civil society organisations, conferences, online consultations open to the public.²⁶ These are common both to legislative procedures – in particular preceding the elaboration of a legislative proposal by the Commission, where consultations are part of impact assessments – and administrative rulemaking procedures, developed in the further definition and implementation of legal rules.

Different concepts are commonly used to describe this reality: interest representation, consultation and civil dialogue. These terms are very often used as synonyms, their contours are difficult to draw and they partially overlap. Arguably, however, they connote different approaches to participation, different phases and modes of the EU-civil society relationships, different values and, hence, different “audiences” (representative associations, persons concerned, public, citizens, civil society organisations). As such, they represent different opportunities of participation.

Interest representation focuses primarily on access of organisations that aggregate the preferences of their constituencies and seek not only to influence decisional processes that affect the interests they represent, but, in general, to promote such interests in EU policymaking. This encompasses informal lobbying, participation in advisory bodies, but also other channels of influencing policymaking that have emerged in more recent years. Interest representation connotes an instrumental use of participation based on regulatory needs, on the exchange of expertise and information, but also on ensuring anticipated consensus intended to facilitate acceptance, implementation and, hence, effectiveness.²⁷

“Civil dialogue” encompasses a value-laden dimension of engaging citizens in the public sphere and public interest action. The term seems to have been used for the first time in EU official documents in the 1997 Communication from the Commission on “Promoting the role of voluntary organisations and foundations in Europe”, to refer to “more systematic consultation” of voluntary sector organisations and foundations – mostly NGOs – therefore referring to interactions with one specific type of actors.²⁸ While the 1997 Communication focused essentially on the role of “civil dialogue” in the realm of social policy, the same approach to the involvement of NGOs in EU policymaking coined later initiatives of the

²⁶ Christine Quittkat and Barbara Finke, ‘The EU Commission Consultation Regime’, in Beate Kohler-Koch, Dirk de Bièvre and William Moloney, *Opening EU-Governance to civil society - gains and challenges*, CONNEX Report Series No. 5, 2008, p. 183-222, at p. 195-210.

²⁷ Commission Communication, ‘An open and structured dialogue between the Commission and special interest groups’, Communication 93/C63/02, of 12 of December 1992, SEC/92/2272 final, available at <www.ec.europa.eu/civil_society/interest_groups/index_en.htm>.

²⁸ Communication from the Commission on ‘Promoting the role of voluntary organisations and foundations in Europe’, COM (97) 241 final, Brussels, 06.06.1997, p. 7, adopted in the follow up of Declaration n. 23 of the

Commission, which were not sector specific, referring broadly to the involvement of civil society in EU regulation.²⁹ It is hard to detach “civil dialogue” from the Commission’s attempts to tackle the legitimacy concerns blighting the European Union that became particularly pressing at the end of the 1990s. Even if instrumental reasons for fostering more structured forms of interactions with private entities are certainly not excluded from civil dialogue, the term is associated with the EU’s attempts to foster participatory democracy as part of its legitimisation strategy to come to grips with the democratic deficit.³⁰ Nevertheless, civil dialogue seems to be “rather based on a continuum between informal lobbying and structured relations”, and empirical research shows that its degree of openness to the wider public varies strongly in different channels.³¹

Consultation is a “looser concept” than interest representation and civil dialogue. Consultation during policy or decision-making is one means of ensuring interest representation or of giving rise to continuous and structured forms of involvement of organised civil society that embodies civil dialogue. The more strategically oriented rationales of interest representation and the more value-laden aims of civil dialogue converge in consultation procedures. Concretely, consultations are a means to ensure enhanced problem solving: they add expertise to regulatory procedures, facilitate responsiveness and, hence, adherence to regulatory acts. But they are also perceived as a means to ‘create a public’: inclusive consultations aim at broadening the legitimacy basis of the EU regulatory activity through the involvement of the varied range of interests and communities on which the latter depends.

Article 11 TEU draws essentially on these practices, which fall outside the realm of law. Nevertheless, their democratic value is questionable. First, because, as was just seen, not all forms of participation are informed by a democratic rationale. Secondly, empirical studies on the practices of participation reveal shortcomings that hinder the very functioning of participation.

3.2. What happens in practice?

The reasons why participation in EU governance is kept mostly outside the reach of the law relates mostly to the fear of judicialization of decisional processes that, in the final analysis,

Maastricht Treaty. See also, Stijn Smismans, ‘European civil society: shaped by discourses and institutional interests’, *European Law Journal*, 2003, Vol. 9 (4), p. 473-495, at 475.

²⁹ Discussion paper, ‘The Commission and non-governmental organisations: building a stronger partnership’ (available at <http://ec.europa.eu/civil_society/ngo/docs/communication_en.pdf>), White paper, p. 14 and 15.

³⁰ This is confirmed by the discussion paper, ‘The Commission and non-governmental organisations: building a stronger partnership’, cit., p. 4.

³¹ ‘Civil dialogue: making it work better’, study commissioned by the Civil Society Contact Group researched and written by Elodie Fazi and Jeremy Smith, p. 6.

are largely dependent on political choices.³² This choice however may impact on the claimed democratic quality of such procedures. In particular, from the perspective of the decision-maker, it may foster a strategic use of participation that might be shorn of basic guarantees that would ensure inclusiveness, transparency and the equal treatment of participants (e.g. decision-maker may take into account only results favourable to them). Participation is then likely to be seen as a means of ensuring responsiveness and compliance with regulatory decisions, or at best of collecting information on regulatory proposals, and hence, may be directed at selected actors. In certain cases, it might be difficult to draw the line between participation in public decision-making and negotiated regulation.

The principles and standards of consultation defined in the 2002 Commission Communication, while endorsing and defending the non-legal approach to participation, attempted to avoid its main shortcomings. Among other standards, the Commission stated that consultation procedures should be equitable, adequate time limits for consultation should be respected, the different contributions should be duly considered and adequate feedback should be provided.³³ To the extent that the Commission follows these standards, its practice in many respects resembles the conduct of a decision-maker bound by the procedural rules that would stem from the recognition of participation rights. In practice, the Commission's efforts to enhance and structure participation practices have proven fairly successful. On the basis of the empirical studies conducted by political scientists, Kohler-Koch notes that inclusiveness, transparency and accountability of consultation practices have improved in relation to the practices that had been in place before 2002.³⁴

These improvements notwithstanding, it remains true that the Commission only applies these standards to the extent that it considers this useful to its purposes: timely and effective delivery of responsive and informed policy.³⁵ Furthermore, there are still quite a few imbalances in the personal and objective scope of participatory practices. Empirical studies conducted by political scientists highlight, in particular, that the scope of application of the minimum standards of consultation is not clear. Indeed, as defined by the Commission, they apply primarily to "major policy initiatives", which leaves much leeway to define in each case what qualifies as such, and leaves out implementing regulation, hence,

³² Paul Craig, *EU Administrative Law*, Oxford, Oxford University Press, 2006, p. 328-9; Commission Communication 2002, '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, 11.11.2002.

³³ Commission Communication 2002, 'Towards a reinforced culture of consultation and dialogue: general principles and minimum standards for consultation of interested parties by the Commission', cit., p. 19-22.

³⁴ Beate Kohler-Koch, 'Does participatory governance hold its promises?', in Beate Kohler-Koch and Fabrice Larat (eds.), *Efficient and democratic governance in the European Union*, Mannheim, CONNEX Report Series No. 9, Mannheim, p. 282.

³⁵ Paul Craig, *EU Administrative Law*, cit., p. 328.

administrative normative acts. A needs-driven approach seems to prevail and dialogue regarding more controversial initiatives can easily be avoided.³⁶

More importantly, crucial aspects of the consultation processes remain problematic, also in view of the stated standards. Perhaps not surprisingly, the Commission is not faithful to its self-imposed requirements of consultation in many respects. Four problematic points, in particular, emerge from empirical studies on consultation procedures. First, the issue of participant selection: in the case of more selective participatory procedures, such as policy fora or consultations of targeted groups, it is not clear how participants are selected.³⁷ This is perhaps a more pressing problem at the level of implementing rulemaking, given that restricted forms of participation tend to replace online consultations with a wide range of participants.³⁸ Furthermore, the Commission is free to decide the target groups of consultation and need not justify its choices. Concrete participants may be selected on the basis of the existent contacts of each DG, which gives the Commission a high degree of "control over what partners it will encounter".³⁹ Secondly, at times, the timeframes of consultation are too narrow given the complexity of the subject matter at issue.⁴⁰ Thirdly, consultation procedures do not always occur at the moment of the procedure in which contributions could be really taken into account.⁴¹ Fourthly, the criteria used by the decision-maker to assess the different contributions and their representativity are not clear, given the lack or limited feedback on participation.⁴²

In the face of these drawbacks, it is not uncommon that political scientists point out the lack of enforceability as a possible factor explaining the inconsistent use of the minimum standards, as well as the indeterminacy of legislative provisions regarding consultation as a factor that can hinder the effectiveness of consultation procedures.⁴³ Despite the acknowledged improvements in consultation, and to the extent that generalisations are

³⁶ Communication, 'Towards a reinforced culture of consultation and dialogue: general principles and minimum standards for consultation of interested parties by the Commission', cit., p. 42.

³⁷ See Christine Quittkat and Barbara Finke, 'The EU Commission consultation regime', cit., p. 200; Elodie Fazi and Jeremy Smith, cit., p. 9 and 45.

³⁸ Beate Kohler-Koch, 'Does participatory governance hold its promises?', cit, p. 279, referring to empirical studies undertaken on consultations undertaken by DG Employment and DG Trade (cf. p. 289, n. 12). See also, Elodie Fazi and Jeremy Smith, cit., p. 27-30).

³⁹ Thomas Persson, 'Democratizing European Chemicals Policy: do consultations favour civil society participation?', *Journal of Civil Society*, Vol. 3 (3), 2007, p. 226-7, underlining that this was not the case in the REACH consultation.

⁴⁰ This has been pointed out by the Inter-institutional Monitoring Group on the functioning of the Lamfalussy procedure, which is characterised by the relevance attributed to consultation in rulemaking.

⁴¹ This problem has been identified in consultations regarding the approval of genetically modified food. See, Patrycja Dbrowska, 'Civil society involvement in the EU regulations on GMOs: from the design of a participatory garden to growing trees of European public debate', *Journal of Civil Society*, Vol. 3 (3), 2007, p. 287-304, at p. 296.

⁴² Christine Quittkat and Barbara Finke, cit, p. 218; Elodie Fazi and Jeremy Smith, cit., p. 9 and 48; Patrycja Dbrowska, 'Civil society involvement in the EU regulations on GMOs: from the design of a participatory garden to growing trees of European public debate', cit., p. 295.

⁴³ Elodie Fazi and Jeremy Smith, cit., p. 39; Patrycja Dbrowska, 'Civil society involvement in the EU regulations on GMOs: from the design of a participatory garden to growing trees of European public debate', cit., p. 296, 298.

possible on the basis of the studies conducted, the Commission's current practice has led to patchy results. Its inconsistent and, at times, ill-conceived practices are often at odds with the proclaimed goals of consultation: increased legitimacy, informed and responsive rulemaking.⁴⁴ This hinders the potential democratic quality of participation practices, both from a conception of democracy that emphasises equality in access to decision-making and accountability,⁴⁵ and from a more deliberative perspective of democracy. From the discussion above on current European governance practices we deduce a shallow veneer of dialogue in cases where inclusive and open participation is effectively absent thus failing to rise to the challenge of genuinely democratic deliberative processes. The Commission has recently announced its intention to carry out a review of its consultation processes in order to "strengthen the voice of citizens and stakeholders further" thereby giving effect to the provisions of the Lisbon Treaty on participatory democracy.⁴⁶ Indeed, the mandatory terms of Article 11 TEU impel change. The question is whether the path chosen so far by the Commission, which it intends to pursue, is the best way to correct the deficits of current practices.

4. MALADMINISTRATION AND THE OMBUDSMAN

KEY FINDINGS

- The right to complain to the European Ombudsman, in particular the possibility of *actio popularis*, is an important procedural route enabling citizens to have a low threshold interface with the EU administration and to initiate an account holding process.
- The work of the Ombudsman helps to move the understanding of transparency in the EU context away from an individual and passive focus on the legal right of every citizen to have access to certain documents to a much broader and pro-active duty of the EU administration to ensure that information about its policies and actions are made genuinely accessible.

The Ombudsman performs a complementary role to the courts in Luxembourg. Maladministration and illegality are not considered to be separate ideas in the European system so the European Ombudsman is also engaged in the task of ensuring that the law is applied. Maladministration has been defined as occurring when a public body fails to act in accordance with a rule or principle, which is binding upon it.⁴⁷ In some cases therefore an

Maria P. Ferretti, 'Participation, democratic deficit and good regulation. A case study of participatory strategies in the European regulation of GMO products', *ZERP-Diskussionspapier*, June 2006, at p. 17-18.

⁴⁴ Thomas Persson, 'Democratizing European Chemicals Policy: do consultations favour civil society participation?', cit., p. 223-238. Maria P. Ferretti, 'Participation, democratic deficit and good regulation. A case study of participatory strategies in the European regulation of GMO products', cit.

⁴⁵ For a broader assessment, see Beate Kohler-Koch, 'Does participation hold its promises?', cit., p. 279-84, 288.

⁴⁶ Communication, "Smart Regulation in the European Union", COM (2010) 543 final, Brussels, 8.10.2010, p. 3.

⁴⁷ European Ombudsman Annual Report 1995, pp. 8-5

aggrieved individual may either bring proceedings in court, or complain to the Ombudsman. It is not possible to do both, because the Treaty excludes an inquiry by the Ombudsman if the alleged facts are or have been the subject of legal proceedings. The difference is that in order to bring a complaint to the Ombudsman the complainant does not need to show a legal interest or be personally affected by the maladministration. This possibility of *actio popularis* complaints is an important procedural route enabling citizens to have a low threshold interface with the Union administration and to initiate an account holding process. When an individual complaint is addressed to the Ombudsman he first examines whether it is within his mandate, namely that the complaint is directed against a Union body as opposed to the Member State administration and that it concerns a possible instance of maladministration. The complainant must further have exhausted administrative steps, as laid down in the Statute of the Ombudsman.⁴⁸ The Ombudsman enjoys a discretionary power to make an inquiry into the complaint or to close the file; generally the Ombudsman initiates inquiries in about only one fifth of the cases.

There are procedural limitations to a complaint (and even own initiative investigation) to the Ombudsman since the Ombudsman's power is to issue 'recommendations'. The Ombudsman according to the Implementing Rules "as far as possible cooperates with the institution concerned in seeking a friendly solution to eliminate the maladministration and to satisfy the complainant".⁴⁹ The Ombudsman cannot force the institutions in question to comply. Nor may he refer questions to the courts in Luxembourg on a point of law (on behalf of the complainant). The very long running *Bavarian Lager* saga⁵⁰ is a good example of how even a very strong recommendation and subsequent special report to the European Parliament and a clear finding of maladministration had no effect on the behaviour of the institution (the Commission) accused of maladministration. Indeed it took two further court cases over a span of six years for a clear ruling to emerge at the highest judicial level as to the correct way to "interpret" a complex relationship between access to documents on the one hand and data protection and the right to privacy on the other. Only an affluent, litigious and persistent complainant will be able to afford the very long march through the courts (concerning the minutes of a meeting that took place 14 years earlier!).

The Ombudsman has had a particularly important role in ensuring transparency in the EU. Currently, about one third of his inquiries deal with lack of transparency, including refusal

⁴⁸ Article 2(8) of the Statute of the Ombudsman (available at <http://www.ombudsman.europa.eu/resources/statute.faces>).

⁴⁹ Article 6 (1) of the Implementing Provisions (available at <http://www.ombudsman.europa.eu/en/resources/provisions.faces>).

⁵⁰ See, most recently, judgment of 29 June 2010, Case C-18/08 P, *Commission v The Bavarian Lager Co. Ltd.* [2010] nyr.

of information.⁵¹ In the early years the Ombudsman adopted a rather legal approach in his work, although the emphasis was more on the structural aspects of the manner in which certain institutions, mainly the Council and the Commission, made information available or not.⁵² As arbiter of maladministration, the Ombudsman has an interest in transparency as good governance and the Code of good administrative behaviour helps to promote transparency through the formulation of policies as rules and guidelines.⁵³ The Code provides guidance to public servants on requests for access to information. Indeed, the work of the Ombudsman helps to move the understanding of transparency in the EU context away from an individual and passive focus on the legal right of every citizen to have access to certain documents to a much broader and pro-active duty of the EU administration to ensure that information about its policies and actions are made genuinely accessible. The Ombudsman's inquisitorial procedures, allow him to access administrative files and also to make files public during the proceedings and are perhaps the most potent machinery for opening windows on public information yet devised. They can also provide an alternative route for members of the public to access documents—and one that does not entail the costs involved in the more formal 'legal' route. Thus the Ombudsman acts as an important catalyst for openness and transparency.⁵⁴

The Ombudsman's review of instances of maladministration provides remedies to breaches of participation beyond the purview of the legal scope of the right to be heard. For instance, the Ombudsman has confirmed that it is within his powers to review compliance with the minimum standards on consultation adopted by the Commission and has indicated his willingness to do so in a pro-active way.⁵⁵ Administrative practices that escape judicial review can therefore be controlled. Unlike the Courts, the Ombudsman may therefore contribute to countering some of the remaining flaws in the Commission's practice of consultation. However, his contribution in this respect is necessarily limited by the scope of application of the minimum standards on consultation.⁵⁶

⁵¹ European Parliament resolution of 25 November 2010 on the annual report on the European Ombudsman's activities in 2009 (P7_TA-PROV(2010)0435) (available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0435&language=EN&ring=A7-2010-0275>).

⁵² For an overview of the activities of the Ombudsman in this respect see, Ian Harden, 'The European Ombudsman's efforts to increase openness in the Union', in Veerle Deckmyn (ed.), *Increasing transparency in the European Union*, Maastricht, European Institute of Public Administration, 2002, p. 123–145, at p. 130 et seq.

⁵³ European Ombudsman, *European Code of Good Administrative Behaviour*, available in the latest version at <http://www.euro-ombudsman.eu.int/>.

⁵⁴ See too, Carol Harlow, 'Transparency in the European Union: weighing the public and private interest', in Jan Wouters, Luc Verhey and Philipp Kiiver (eds.), *European constitutionalism beyond Lisbon*, Antwerp, Intersentia, 2009, p. 209–238.

⁵⁵ See Decision of the Ombudsman on complaint 948/2004/OV against the Commission (4.5.2005), paragraphs 1.1 to 1.4, 3.8, and 3.18, as well as Decision of the Ombudsman on complaint 3617/2006/JF against the Commission (3.7.2008).

⁵⁶ On these limits, see Joana Mendes, *Participation in EU rulemaking*, cit. Chapter 3, Sub-section 3.3.3.

5. PETITIONING THE EUROPEAN PARLIAMENT

KEY FINDINGS

- The right to petition the European Parliament has a somewhat ambiguous nature. It is both a means to support the Parliament's role of democratic oversight of the definition and implementation of EU policies and a non-judicial means of redress of breaches to EU law. This leads to confusion over diverse non-judicial means of redress and, particularly on the meaning and use of the right to petition.
- Articles 10(3) and 11(1) and (2) TEU reinforce the democratic nature of the right to petition. Petitions should be understood essentially as a means to support the Parliament's role of democratic oversight, and, more generally, its ability to monitor the impact that certain policies or practices may have on the rights of EU citizens and residents.

The right to petition the European Parliament has a somewhat ambiguous nature. On the one hand, it establishes a direct link between the European Parliament and the Union citizens, as well as residents, and thereby enables direct participation in the political life of the Union. Significantly, this right is also extended by the Parliament's Rules of Procedure to non-citizens and non-residents affected by EU law.⁵⁷ Petitions allow citizens and non-citizens to signal "remaining gaps [in EU legislation] that need to be filled in order to ensure adherence to the Union's objectives".⁵⁸ Therefore, they "can make a positive contribution to law-making", indicating areas where EU law is weak or ineffective in the light of the objectives of the respective legislative acts.⁵⁹ On the other hand, the right to petition is a non-judicial means of redress of breaches to EU law and hence it is limited *ratione materiae* to EU matters that concern petitioners directly (Article 227 TFEU). To our knowledge, there are no indications on how this requirement has been interpreted by the Committee on Petitions.⁶⁰ Arguably, however, this brings the right to petition closer to the right to complain to the European Ombudsman (even if matters that may be object of petitions need not be restricted to cases of maladministration) and to the right to complain to the Commission on infringements. Indeed, often, petitions disclose issues of transposition and

⁵⁷ Rules of Procedure, 7th Parliamentary term, November 2010, Rule 201, paragraph 13 (available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20101110+O+DOC+PDF+VO//EN&language=EN>)

⁵⁸ European Parliament Resolution of 6 July 2010 on the deliberations of the Committee on Petitions during the year 2009, P7_TA-PROV(2010)0261, Recital E (available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0261+O+DOC+XML+VO//EN>).

⁵⁹ European Parliament Resolution of 23 September 2008 on the deliberations of the Committee on petitions during 2007, P6_TA(2008)0437, recital S (OJ C 8E/48, 14.1.2010).

⁶⁰ According to the Resolution on the deliberations of the Committee on Petitions during the parliamentary year 1995-1996, 'the conditions of admissibility of petitions, as laid down by the Rules of Procedure, are applied by the Committee on Petitions on the basis of criteria which the committee itself has established' (paragraph 5, OJ C 261/195, 9.9.1996. The European Parliament has manifested fears that establishing in the Treaty that the right to petition would be limited to matters that concern directly the petitioner would restrict this right and "greatly [diminish] the political significance of petitions" (see Resolution on the deliberations of the Committee on Petitions during the parliamentary year 1990-1991, paragraph 13, OJ C 183/448, 15.7.91). This indicates that the Committee on Petitions is likely not to have interpreted this requirement restrictively.

enforcement of EU law.⁶¹ This leads to confusion over diverse non-judicial means of redress and, particularly on the meaning and use of the right to petition.⁶²

Lack of understanding of the purpose of the right to petition seems to be one of the main problems the Committee on Petitions struggles with.⁶³ According to the “Explanatory statement” annexed to the Report on the deliberations of the Committee on Petitions during 2009, less than half of the petitions received in 2009 were declared admissible.⁶⁴ In addition, the Committee on Petitions appears to have been struggling with structural difficulties and fighting for visibility, or at least for awareness of its effective role.⁶⁵

The democratic relevance of the right to petition should be clarified. Petitions should be understood essentially as a means to support the Parliament’s role of democratic oversight of the definition and implementation of EU policies, and, more generally, of the impact that certain policies or practices may have on the rights of EU citizens and residents.⁶⁶ While petitions to the Parliament may be a relevant means of signalling malfunctioning of the EU administration, the respective control of the EU administration is best performed by the European Ombudsman and such issues are indeed likely to be transferred to the Ombudsman in the framework of cooperation between the two bodies. As has been recognised by the Committee on Petitions, the Ombudsman has an important contribution towards a Union where decisions are taken as openly and as closely as possible to the citizens (Article 10(3) TEU).⁶⁷

Arguably, Articles 10(3) and 11(1) and (2) TEU reinforce the democratic nature of the right to petition. This is a relevant means of ensuring participatory democracy. In the light of the Treaty articles mentioned, the European Parliament may plea for the reinforcement of the institutional links that ensure the effectiveness of the right to petition and enable the democratic role of this right.⁶⁸ Establishing links with similar committees operating at the national level may also reinforce the contribution of petitions to democratic oversight and control.⁶⁹ The Lisbon Treaty favours such links, given the overall reinforcement of the role of national parliaments in the European Union.⁷⁰

An important step to strengthen the right to petition in the light of the new normative framework of the Lisbon Treaty could be to amend the rules on access to documents, providing that the interest raised by a petitioner should be considered when assessing the public interest in disclosing a document. This was proposed in the Report of the Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs of the European Parliament on

⁶¹ European Parliament Resolution of 6 July 2010, cit., paragraph 24.

⁶² European Parliament Resolution of 23 September 2008, cit., recital E.

the (stalled) Commission's legislative proposal for a regulation on public access to documents.⁷¹

The European Parliament has manifested concern regarding the possible overlap of the right to petition with the European citizens' initiative. Problems may arise from the mentioned lack of understanding as to the purpose of the right to petition. Indeed, citizens have already sought to exercise their right under Article 11(4) TEU, which has not yet been regulated, using the right to petition.⁷² The envisaged legal regime on the newly conferred citizen's initiative is likely to make the distinction between these two rights clearer in the eyes of the citizen.

The European citizens' initiative has a much higher threshold of participation than the right to petition, since it requires one million citizens of a significant number of Member States to trigger it. On the other hand, the purposes of the right to petition are more varied, even if viewed only from the perspective of its role in supporting the democratic oversight of the European Parliament. The right to petition is a means to trigger political action, but not specifically to initiate a legislative procedure, at least not directly. It may still however lead to this outcome, should the European Parliament follow up on a petition requiring legislative intervention and request the Commission to submit a proposal under Article 225 TFEU. Effectively, this would be an initiative of the European Parliament and its political and constitutional meaning would be different than if it were to fall under Article 11(4) TEU. At any rate, these considerations indicate that the right to petition may remain a complementary – and possibly reinforced – way that EU citizens, residents and non-residents affected by EU law can trigger political initiatives at the EU level. The political visibility of the European citizens' initiative might ultimately contribute to increase the salience of petitioning the European Parliament.

⁶³ European Parliament Resolution of 6 July 2010, cit., paragraph 32. According to the 'Explanatory statement' annexed to the Report on the deliberations of the Committee on Petitions during 2009 (A7-0186/2010), about forty-six percent of the petitions received in 2009 were declared admissible.

⁶⁴ A7-0186/2010, P. 12. See also European Parliament Resolution of 6 July 2010, cit., paragraph 32.

⁶⁵ European Parliament Resolution of 6 July 2010, cit., paragraphs 1, 3, 4, 8, 9, 14, 18, and 34. European Parliament Resolution of 9 March 2009 on SOLVIT, paragraph 27 (OJ C 349E/10, 22.12.2010).

⁶⁶ See, for example, European Parliament resolution of 26 March 2009 on the impact of extensive urbanisation in Spain on individual rights of European citizens, on the environment and on the application of EU law, based upon petitions received (2008/2248(INI)) (OJ C 117 E, 6.5.2010).

⁶⁷ Report on the deliberations of the Committee on Petitions during 2009, A7-0186/2010, p. 21. See also European Parliament Resolution of 6 July 2010, cit., paragraph 13.

⁶⁸ This has occurred as an effect of the recognition of the right to petition as a fundamental right : see European Parliament Resolution of 2 April 2009 on problems and prospects concerning European citizenship, paragraph 61 (OJ C 137E/14, 27.5.2010). See also European Parliament Resolution of 6 July 2010, cit., recital G.

⁶⁹ European Parliament Resolution of 6 July 2010, cit., paragraph 29.

⁷⁰ Article 12 TEU and Protocol No 1 on the Role of National Parliaments in the European Union.

⁷¹ Report on the proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (A5-0318/2000), Amendment 31 (available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2000-0318+0+DOC+PDF+V0//EN>).

⁷² European Parliament Resolution of 6 July 2010, cit., paragraph 4.

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