

PARTICIPATION AND THE ROLE OF LAW AFTER LISBON: A LEGAL VIEW ON ARTICLE 11 TEU

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[Published in *Common Market Law Review*, Vol. 48, No. 6, pp. 1849-1878 (2011)]

1. Article 11 TEU and the role of law

Participation – broadly understood as the possibility for non-institutional actors to take part in decision-making – has been a constitutive feature of the European administration and polity since the beginning of the integration process. Law, however, has been left largely outside the political and institutional developments that have concretized participation as a principle of EU governance and that ultimately led to the insertion of Article 11 in the Treaty on European Union. Legal rights of participation in particular have been kept within rather strict limits. Except where otherwise provided by law, they are limited to the right to be heard in adjudicatory procedures leading to the adoption of individual decisions. Beyond such cases, there are no legal mechanisms to ensure voice to citizens or persons affected in decision-making procedures of the EU institutions and bodies. This has been the position tenaciously adopted by the Luxembourg Courts on participation rights.¹

This *status quo* may change as a result of the Lisbon Treaty, especially – but not only – due to Article 11 TEU.² Yet, two years on from the entry into force of the Treaty, the political and legal meanings of this provision and the consequences thereof remain uncertain. So far, the debate has focused essentially on the European citizens’ initiative, which constitutes the only true innovation this Treaty article stipulates.³ The lack of novelty in the other norms of Article 11 – largely, a formal recognition of previous institutional practices – as well as their somewhat hortatory tone seem to cast doubt on their potential for normative innovation. But aren’t those norms capable of bringing about a change in the way of perceiving participation in EU law and governance?

This article argues that, while Article 11 TEU builds to a large extent on practices of participation based on instrumental rationales – i.e. envisaging the compensation of a lack of decision-makers’ resources, improved policy outcomes and responsiveness, enhanced trust, acceptance and compliance – it entails a distinct transformation in the way of perceiving participation in the EU. For the first time at Treaty level participation in decision-making

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¹ Case T-521/93, *Atlanta AG and others v. Council and Commission*, [1996] ECR II-1707, paras. 70-74; Case C-104/97 P, *Atlanta AG and others v. Commission and Council*, [1999] ECR I-6983, paras. 35-38.

² Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform*, (OUP, 2010), p. 77.

³ Regulation (EU) No 211/2011 of 16 Feb. 2011 on the citizens’ initiative, O.J. 2011, L 65/1. See in this *Review*, Dougan, “What are we to make of the citizens’ initiative?”.

beyond political representation is explicitly linked to democracy. The democracy of the Union now rests, by force of Article 11 TEU, also on the links it establishes directly with its citizens. Participation is therefore one of the foundations of democracy in the EU. As such, it can no longer be approached merely as an aspect of process efficiency and policy outputs, detached from democratic values such as equality and transparency. This article discusses the normative implications of this fundamental link. It argues that Article 11 TEU postulates a transition from the instrumental usages of participation typical of participatory governance to participation conceived as a basis of participatory democracy. In operating this shift, the relationships between the citizens and representative associations, on the one hand, and the EU decision-makers, on the other, need to be reconsidered with respect to their value for the individual, so as to ensure voice independently of problem-solving needs as well as equal treatment of participants. The article argues that this normative shift may require expanding the role of law with regard to participation, in particular in rulemaking procedures, from which law has been virtually excluded. Provisions of the Treaty on the Functioning of the European Union on open administration (Arts. 15(1) and 298(1) TFEU) and on non-legislative acts of the Union (Arts. 290 and 291 TFEU) are also likely to contribute to changing the role of law with regard to participation. Furthermore, the new rules on reviewable acts and on standing of private persons (Art. 263(1) and (4) TFEU) might provide the Court of Justice of the European Union with more opportunities to review its position on this matter.

It is acknowledged that law is not the only way of giving effect to the prescriptions of Article 11 TEU. Indeed, its very wording (“by appropriate means”) opens a wide variety of possibilities, ranging from general participatory instruments directed at citizens without distinction, such as programmes for citizens’ participation, to policy-oriented instruments, such as online consultations.⁴ The terms of Article 11 TEU are broad enough to encompass these different forms. At the same time, it is also acknowledged that not all the participatory practices it may cover are necessarily informed by a democratic rationale. These caveats notwithstanding, Article 11 TEU invites a discussion on the role law may have in giving effect to the distinct transformation it postulates.

The present article begins by analysing the a-systematic nature, background and normative meaning of Article 11 TEU (section 2). This allows us to understand the potentialities and limitations of Article 11 TEU as a trigger for change of the *status quo* of participation in EU law and governance. It then examines the normative implications of elevating participation to one of the bases of democracy in the Union and proposes an interpretation of the legal consequences that may stem from Article 11 TEU (section 3). Finally, the article discusses the possible roles the EU institutions may have in enforcing participation (section 4). It concludes that the normative shift Article 11 TEU postulates limits the discretion of the institutions in shaping participation practices, and that law may play a significant role in guaranteeing the conditions that ensure participation as a possible source of democratic legitimacy in the EU (section 5).

⁴ Hüller, “Playground or Democratization? New Participatory Procedures at the European Commission”, (2010) *Swiss Political Science Review*, 77-107, at 82; Fischer-Hotzel, “Democratic Participation? The involvement of citizens in policy-making at the European Commission”, (2010) *Journal of Contemporary European Research*, 335-52, at 341, 343.

2. Embedded participation: Interpretation and foundations of Article 11 TEU

2.1 *Beyond rhetoric: the interpretation problems*

Beyond the explicit recognition of participatory democracy as one of the democratic underpinnings of the Union, the meaning of Article 11 TEU is far from settled. This provision can be readily criticized for being rhetorical more than than having a normative prescriptive content. It does not display a systematic and coherent set of norms, and it leaves the impression of a “shopping list” in which the participatory traits of current EU governance were included. Where systemic links with other Treaty norms can be established (e.g. the references to openness in Arts. 15(1) and 298(1) TFEU), it is not fully clear how the drafters conceived them and how such links can be interpreted. This adds to the general impression of somewhat shallow declamatory statements.

The problems of interpretation begin with the terminology used. Article 11 TEU refers to citizens, representative associations, civil society and parties concerned, without giving any indications on whether or when some of these terms are to be interpreted distinctly or taken as synonyms. The apparent random use of different concepts leads to obscurity. Indeed, is there any difference – and if so what – between the opportunity institutions need to give to citizens and representative associations to publicly exchange their views (Art. 11(1) TEU) and the duty of the same institutions to maintain an open, transparent and regular dialogue with representative associations and civil society (Art. 11(2) TEU)? Are citizens part of “civil society” or does this term include only collective actors? Does the absence of an explicit reference to “all areas of Union action” in Article 11(2) TEU allow the interpreter to conclude that “dialogue” can be excluded from certain policy fields? But, then, what is “dialogue” if not an “exchange of views”? Does the reference to “appropriate means” in Article 11(1) TEU leave more leeway to the institutions in how to give effect to this norm than the provision of Article 11(2) TEU, where no such reference is made?

The wording of Article 11(3) TEU and the fact that ensuring broad consultations is only a duty of the Commission seems to indicate that consultations under this provision refer back to the policy-driven practices of consultation that the Commission put in place in particular in the last decade. But the Commission is equally bound by paragraphs 1 and 2 of Article 11 TEU, which establish general duties of giving voice, which seemingly postulate normatively more demanding forms of participation. The references to “citizens” in Article 11(1) TEU and to a public exchange of views, as well as to an “open and transparent” dialogue in Article 11(2) TEU indicate that these provisions are inspired by a conception of participation that goes beyond the mere connection between participation and improved policy outcomes.⁵ At the same time, where can one draw the line between consultations, public exchange of views and dialogue? And are consultations not a means of ensuring the latter? In addition, the duty of the Commission to consult parties concerned has a specific purpose: it is intended as a means of ensuring that the “Union’s actions are coherent and transparent”. However, it is far from clear how consultation can enhance the coherence of

⁵ On the possible legal consequences, see *infra* section 3.2. On the implications of Art. 11 TEU for the Commission, see *infra* section 4.

the Union's actions. Also depending on the practices followed, it may be problematic to limit consultation to parties concerned if transparency is one its goals.

The attributes used may also raise questions. Can the interpreter ascribe any meaning to the fact that there should be a “*public* exchange of views” (Art. 11(1) TEU), an “*open, transparent and regular* dialogue” (Art. 11(2) TEU), but only “*broad* consultations” (Art. 11(3) TEU)? “Open, transparent and regular” dialogue (Art. 11(2) TEU) seems to be a normatively denser requirement than the “opportunity to make known and publicly exchange ... views” (Art. 11(1) TEU). On this assumption, and if one excludes citizens from “civil society”, their involvement in EU decision-making seems minimum: they are only given a voice (Art. 11(1) TEU), or should be consulted if they intervene as “parties concerned” (Art. 11(3) TEU), without any additional guarantees that could stem from Article 11(2) TEU.⁶

One further remark regards the imposition of duties of consultation only on the EU institutions, with the exclusion of bodies, offices and agencies. This exclusion makes sense in Article 11(4) TEU, admitting that the EU citizen's initiative is mainly destined to initiate a legislative procedure.⁷ In the other provisions of Article 11 TEU, it is not coherent with those norms of the Treaty on the Functioning of the European Union which, significantly, have been amended in order to encompass bodies, offices and agencies in crucial aspects of EU law (e.g. rules on access to documents – Art. 15(3) TFEU – and judicial review – Art. 263(1) TFEU). This exclusion contrasts, in particular, with Article 15(1), according to which “in order to promote good governance and ensure the participation of civil society, the *Union institutions, bodies, offices and agencies* shall conduct their work as openly as possible”.⁸ While it is not fully clear how the drafters of the Treaty have generally conceived the relationship between participation and openness, this norm seems to indicate that openness is a means to ensure that civil society participates in the work of the Union.⁹ However, the EU may consider that its duties of dialogue and consultation under Article 11 TEU do not extend to its bodies, offices and agencies. Arguably, this would be a limited interpretation of the scope of participation as a democratic principle on which the Union is founded, and, possibly, an argument difficult to maintain in view of other Treaty provisions, namely Article 15(1) TFEU. Were the argument to be used, its possible effects can be countered by the fact that some agencies have put in place consultation practices that are, in many respects, similar to those followed by the Commission.¹⁰ These, as will be seen below, have largely been grounded on Article 11 TEU. Other agencies are legally bound to open their decision-making and rule-making procedures to participation.¹¹ Nevertheless, unless one adopts an extensive

⁶ In this sense, see Fischer-Hotzel, “Democratic participation?”, op. cit. *supra* note 4, p. 339-40. The normative reading of Art. 11(1) TEU proposed *infra*, in section 3, indicates ways of avoiding this effect (specifically, the recognition of participation rights).

⁷ This requires interpreting narrowly the term “legal act” (“*acte juridique*”) used in Art. 11(4) TEU.

⁸ Emphasis added.

⁹ Also in a preliminary draft of the Constitutional Treaty, openness appeared as a condition of the principle of participatory democracy: “The Institutions are to ensure a high level of openness, permitting citizens’ organizations of all kinds to play a full part in the Union’s affairs” (Secretariat of the Convention, “Cover Note from Praesidium to the Convention”, Conv 369/02, Brussels, 28 Oct. 2002, p. 15, available at <european-convention.eu.int/docs/sessplen/00369.en2.pdf>).

¹⁰ E.g. the European Aviation and Safety Agency (<easa.europa.eu/certification/current-consultations.php> and <easa.europa.eu/rulemaking/consultative-bodies-safety-standards-consultative-committee-SSCC.php>).

¹¹ E.g. Art. 9 of Regulation (EC) No. 178/2002 of 28 Jan. 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedural in

interpretation of Article 11 TEU – considering that its wording betrays its rationale – the EU bodies, offices and agencies are kept at arm’s length from the legal consequences that may stem from this Treaty article.¹²

The poor drafting of Article 11 TEU leads to interpretative uncertainties. It possibly weakens a reading of this provision that breaks fundamentally with its links to the institutional practices that preceded it.¹³ Yet, as will be argued below, there is more to Article 11 TEU than a literal interpretation of its words. The concerns with the democratic legitimacy of the Union expressed, among others, in the Laeken Declaration¹⁴ and the systematic insertion of Article 11 as one of the Treaty’s “provisions on democratic principles” – together with norms on representative democracy, equality of citizens and the role of national parliaments – sustain a fundamental change in the way of understanding participation as practised before Lisbon.

2.2 Background: Participatory governance

The rather a-systematic nature of Article 11 TEU is the consequence not only of the drafting process of the equivalent provision of the Constitutional Treaty,¹⁵ but also of the background of this Treaty article. With the exception of the European citizen’s initiative (Art. 11(4) TEU), to a great extent its norms crystallize participatory practices that have been developed mainly by the Commission, both before and after 2001, the year when that institution adopted the White Paper on Governance.¹⁶ This section will not analyse the more immediate political reasons that led to the inclusion of Article 11 in the TEU,¹⁷ but will highlight its *structural precedents*. These underline the continuities with previous institutional practices, now elevated to a principle of democracy.

Various mechanisms put in place by the EU institutions – mostly informally, beyond the Treaties and law – have largely underpinned EU policy-making in participation since the outset of integration.¹⁸ Such developments were prompted by the limited resources of the EU administration and by the need to cope with the regulatory failures of the EU institutions and bodies. The interactions between the latter and interest groups gave shape to various instances of participatory governance in the EU. Characteristic of participatory governance are participation practices that aim at assembling the resources and ensuring cooperation of those persons whose input is considered useful to improve the substantive quality of

matters of food safety, O.J. 2002, L 31/1; Art. 52(1)(c) of Regulation No. 216/2008 of 20 Feb. 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, O.J. 2008, L 79/1.

¹² On the possible legal consequences of Art. 11, see section 4 *infra*.

¹³ See section 3.1 *infra*.

¹⁴ Presidency Conclusions of the Laeken European Council (14 and 15 Dec. 2001): Annex I: Laeken Declaration on the future of the European Union (Bull. EC 12-2001, pp. 19-23).

¹⁵ On the drafting of the Constitutional Treaty’s title on “the democratic life of the Union”, see Closa, “Constitutional prospects of European citizenship and new forms of democracy”, in Amato, Bribosia and De Witte (Eds), *Genèse et destinée de la Constitution Européenne: commentaire du Traité établissant une Constitution pour l’Europe à la lumière des travaux préparatoires et perspectives d’avenir* (Bruylant, 2007), pp. 1037-63, at p. 1049.

¹⁶ “European Governance. A White Paper”, COM(2001)428 final, Brussels, 25.7.2001.

¹⁷ Specifically on why and how an article on participatory democracy made its way to the Constitutional Treaty, see Bouza García, “Civil society expectations on Article 11 TEU: more democracy or better access?”, paper presented at the 40th UACES annual conference (Bruges, Belgium: 6-8 Sept. 2010), on file with the author.

¹⁸ See, further, Mendes, *Participation in EU rule-making. A rights-based approach*, (OUP, 2011), Chapt. 3, sections 3.1 and 3.2.

decision-making and facilitate acceptance and compliance with the regulatory decisions.¹⁹ As such, participatory governance targets the participation of legal persons (collective actors) and it largely excludes individuals. The rationales of participatory governance are well illustrated by the Commission's introductory statements to the document where it first sought to structure the informal channels of communication it had established with interest groups since the outset of integration: "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."²⁰

The reform of EU governance kick-started by the Commission's 2001 White Paper did not fundamentally change the instrumental traits of participatory governance.²¹ Participation became an explicit principle of EU good governance and, as such, part of the Commission's strategy to enhance the social legitimacy of EU decision-making processes, i.e. an instrument to foster the societal acceptance of EU decisions.²² In this context, participation was heralded as a means of creating channels of communication between decision-makers and the public, thereby enhancing the visibility of, and trust in EU policy-making. "Civil dialogue" became part of EU parlance, as did "civil society" and "civil society organizations". At the same time, the Commission insisted on the duties of civil society organizations – a term that includes the lobbyists with whom it had established the links mentioned above²³ – to ensure transparency and accountability.²⁴ For its part, it committed itself to "rationalize [the] unwieldy system" of its consultation practices, "to make it more effective and accountable both for those consulted and those receiving the advice".²⁵ This led to the adoption of consultation principles and standards in the Communication on a reinforced culture of dialogue and consultation.²⁶

Nevertheless, despite the rhetoric of connecting the EU to its citizens and to civil society, participation kept on serving very much the same purposes as before and maintained fairly the same traits it had acquired in the decades that preceded the White Paper.²⁷

¹⁹ Greven, "Some Considerations on Participation in Participatory Governance", in Kohler-Koch and Rittberger (Eds.), *Debating the Democratic Legitimacy of the European Union* (Rowan & Littlefield, 2007), pp. 231-48, at pp. 236-37, 240.

²⁰ Commission Communication 'An open and structured dialogue between the Commission and special interest groups' (Communication 93/C63/02, of 12 of Dec. 1992, SEC/92/2272 final) available at < www.ec.europa.eu/civil_society/interest_groups/index_en.htm>.

²¹ Magnette, "European governance and civic participation: beyond elitist citizenship?", (2003) *Political Studies*, 144-160; Armstrong, "Rediscovering civil society: the European Union and the White Paper on Governance", (2002) *European Law Journal*, 102-132; Walker, "The White Paper in constitutional context", in Joerges, Mény and Weiler (Eds.), "Symposium: Mountain or Molehill? A critical appraisal of the Commission White Paper on Governance", (2001) Jean Monnet Working Paper n.º 6/01.

²² On social legitimacy, see Weiler, "Problems of legitimacy in post 1992 Europe", (1991) *Aussenwirtschaft*, 411-37, at 416.

²³ White Paper on Governance, cited *supra* note 16, p. 14.

²⁴ *Ibid.*, p. 15.

²⁵ *Ibid.*, p. 17.

²⁶ Communication, "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.

²⁷ Underlying this observation is the assumption that the enhancing trust function of participation is still, in the Commission's view and practices after 2000, a policy-oriented use of participation, not a value-based one.

Underneath the reforms, the continuity with previous practices was evidenced in the Commission's definition of the principle of participation.²⁸ Irrespective of new forms of dialogue, practices similar to those the Commission had fostered since integration – reformed in the light of the new principles and standards – served now to “[generate] a sense of belonging to Europe”, create a “transnational [public] space” and “help policy makers to stay in touch with European public opinion”.²⁹ Conceptually, the turn to the “European civil society” did little more than to give new appearance and structure to the forms of interest representation that the Commission had since long promoted.³⁰

This is the substratum of Article 11 TEU, with the exception, already mentioned, of the European citizen's initiative. Seen from this perspective, Article 11 TEU seems to have mostly transformed the views of the Commission on how to link the EU institutions to “civil society”, into duties, also of other institutions.

Nevertheless, to view this Treaty article merely as a continuity of previous practices without much normative content is to disregard the potential normative repercussions of the distinct transformation it introduced, by constituting one of the Treaty's “provisions on democratic principles”: the elevation of participation to one of the foundations of democracy in the EU. In a demanding normative reading of Article 11 TEU, this provision establishes democracy also in its participatory component as a “founding principle” of the EU.³¹ Participatory democracy became a legal principle rather than a political aspiration, and one with a specific fundamental function: it determines the “general legitimacy foundations of the Union”.³² Participatory democracy thus acquired “a normative founding function for the whole of the Union's legal order” against which the exercise of public authority is justified.³³ This reading of Article 11 TEU requires both political and legal reforms, the reasons for which will be analysed next.

3. A normative reading of Article 11 TEU

3.1 *Democracy: Beyond participatory governance*

As is widely known, the search for sources of legitimacy complementary to representative democracy has been at the core of the debates on the democratic legitimacy of the Union. Indeed, the challenges posed to representative democracy are particularly acute at the European level, due to the Union's size, diversity, distance between elected politicians and

Depending on sector specificities, there may be important nuances to the continuity of meaning between previous and new forms of fostering participation.

²⁸ “The *quality, relevance and effectiveness of EU policies* depend on ensuring wide participation throughout the policy chain – from conception to implementation. Improved participation is likely [to] create more confidence in the end result and in the Institutions which deliver policies” (White Paper on Governance, cited *supra* note 16, p. 10, emphasis added).

²⁹ *Ibid.*, pp. 11-12.

³⁰ For a more detailed analysis of the evolution of the meaning of participation in EU governance, see Mendes, *op. cit. supra* note 18, Chapt. 3, section 3.3. On the results of the Commission's reforms of consultation practices, see section 3 *infra*.

³¹ On founding principles, see Von Bogdandy, “Founding Principles”, in Von Bogdandy and Bast (Eds.), *Principles of European Constitutional Law* (Hart publishing, 2010), pp. 11-54, in particular pp. 21-23.

³² *Ibid.*, p. 12.

³³ *Ibid.*, p. 21.

citizens, and to the very institutional complexity of the Union.³⁴ In general, problems of democratic legitimacy have ranked high on the agenda of the EU in the past two decades. The European Councils of Birmingham and Edinburgh, held in 1992 in the aftermath of the Maastricht referenda, and the Laeken Declaration are expressive hallmarks of the political preoccupations with reaching out to the European citizens.³⁵ For the first time, these concerns are now reflected at the Treaty level, and prominently so in Article 11 TEU.

It is true that the democratic value of the involvement of non-institutional actors in decision-making procedures remains contentious, both in terms of how it is practised and in terms of its normative desirability. The reservations usually placed on participation as a source of democratic legitimacy are well expressed in the judgment of the German Constitutional Court on the ratification of the Lisbon Treaty. According to this Court, “the merely deliberative participation of the citizens and of their societal organizations in the political rule ... cannot replace the legitimizing connection based on elections and other votes”.³⁶ From this perspective, participation is only a means of “making the primary representative and democratic connection of legitimation more effective”.³⁷ And indeed, as in the case of most contemporary polities, the legitimacy of the EU institutions is, by force of the Treaty, founded on representative democracy (Art. 10(1) TEU), which indicates that participation is meant to be a complementary source of democratic legitimacy. The concrete implications of the relationship between representation and participation in the EU remain to be seen, as these are also rival sources of democratic legitimacy.

This caveat notwithstanding, the democratic legitimacy of the Union now rests explicitly, and by force of a Treaty norm, on the links it establishes with its citizens – be it through representation in the European Parliament and Member States’ democratic accountability (Art. 10(2) TEU), be it through direct participation (Art. 11 TEU). By Treaty determination, participation is an aspect of democratic legitimacy. This postulates a normative shift in the way participation in EU law and governance is approached. Participation practices under Article 11 TEU can no longer be viewed only as a manifestation of participatory governance – which focus on problem-solving capacities and on efficiency of regulatory decisions – but need to be assessed in the light of their broader democratic meaning. This has important normative implications.

First, the link established by Article 11 TEU between participation and democracy is a normative yardstick against which to assess the participation practices currently in place that are intended to give effect to this Treaty article. From this perspective, current practices of consultation display important shortcomings. Lack of clarity in the selection of participants, inadequate time frames for consultation, lack or limited feedback to participants have been highlighted by political scientists as remaining problems in the EU governance approach to

³⁴ Ibid., p. 51; Mény, “De la Démocratie en Europe: Old Concepts and New Challenges”, 41 *JCMS* (2003), 1-13, at 4; Follesdal and Hix, “Why is there a democratic deficit in the EU: A response to Majone and Moravcsik”, 44 *JCMS* (2006), 533-62, at 534-36, among many others.

³⁵ “Birmingham Declaration - A Community close to its citizens”, Annex I to the Conclusions of the Presidency of the Birmingham European Council (Bull. EC 10-1992, p. 9); “Transparency – Implementation of the Birmingham Declaration”, Annex 3 to Part 1 of the Conclusions of the Presidency of the Edinburgh European Council (Bull. EC 12-1992). Presidency Conclusions of the Laeken European Council (14 and 15 Dec. 2001): Annex I: Laeken Declaration on the future of the European Union (Bull. EC 12-2001, pp. 19-23).

³⁶ BVerfG, 2 BvE 2/08 of 30.6.2009, para 272, available at www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.

³⁷ Ibid.

participation practices.³⁸ They have persisted, despite the reforms introduced in the follow up of the 2002 Commission Communication on minimum standards of consultation, which attempted, with partial success, to address these and other problems.³⁹ Such shortcomings compromise the very governance purposes that guided the creation of participation opportunities in EU decision-making procedures – enhancing problem-solving capacity, facilitating compliance and acceptance of regulatory decisions – as well as the legitimacy claims that may be defended on the basis of Article 11 TEU, since they compromise transparency and accountability. As they stand, the democratic potential of current practices of participation remains a contentious issue from the perspective of liberal, deliberative and participatory concepts of democracy.⁴⁰ Reforms are therefore needed to correct current failings.

Lack of clarity in the selection of participants is an issue regarding selective and closed practices of consultation. Studies of online consultations indicate that such closed practices tend to dominate at the level of implementation, in contrast to consultations occurring at the pre-legislative phase (i.e. prior to the Commission's legislative proposal) that appear to be more open to whoever wishes to participate.⁴¹ Weak feedback on consultation procedures, on the other hand, seems to be a general failing common to consultations undertaken across the spectrum of the policy cycle. Where existent, the reports on consultation and the Commission's explanation regarding the evaluations of the input received tend to be unsatisfactory.⁴² This is aggravated by the tendency to conduct standardized consultations – questionnaires that, according to critics, potentially transform participation into ticking exercises – since in these cases “Commission reports ... typically consist of bulky tables and diagrams ...[and] usually are not accompanied by any analytical description and/or result assessment”.⁴³ Most of these problems are well known to the Commission: they are reflected in the Commission's self-assessment of its consultation practices and are indicated in reports written under the auspices of the EU.⁴⁴ Given their negative impact on governance output,

³⁸ Fazi and Smith, “Civil dialogue: making it work better”, (2006) Study commissioned by the Civil Society Contact Group, pp. 45 and 48; Quittkat and Finke, “The EU Commission Consultation Regime”, in Kohler-Koch, De Bievre and Moloney, *Opening EU-Governance to Civil Society – Gains and Challenges*, CONNEX Report Series No. 5, pp. 200, 218; Ferretti, “Participatory strategies in the regulation of GMO products in the EU”, in Steffek, Kissling and Nanz (Eds.), *Civil society participation in European and global governance. A cure for the democratic deficit?* (Macmillan, 2008), pp. 166-84; Quittkat, “The European Commission's Online Consultations: A Success Story?”, 49 *JCMS* (2011), 653-74.

³⁹ Communication, “Towards a reinforced culture...”, cited *supra* note 26. There are indeed indications that inclusiveness, transparency and accountability of Commission's consultations have improved. See Quittkat and Finke, *op. cit. supra* note 38, pp. 183-222; Kohler-Koch, “Does participatory governance hold its promises?”, in Kohler-Koch and Larat (Eds.), *Efficient and democratic governance*, Connex Report Series n. 9, (2008), pp. 265-295, at, p. 282.

⁴⁰ See Kohler-Koch, “The Organization of Interests and Democracy in the European Union”, in Kohler-Koch and Rittberger, *op. cit. supra* note 19, pp. 255-71; Hüller, “Playground or Democratization? New Participatory Procedures at the European Commission”, (2010) *Swiss Political Science Review*, 77-107, at 98-100.

⁴¹ Kohler-Koch, *op. cit. supra* note 38, p. 279. She bases her statement mainly on empirical studies undertaken in the framework of Connex Research Group 4 on consultations undertaken by DG Employment and DG Trade (cf. p. 289, note 12). See also, Fazi and Smith, *op. cit. supra* note 38, pp. 27-30; Quittkat, *op. cit. supra* note 38, p. 660, who rightfully notes that formal access does not mean actual participation. According to Quittkat, “[t]he frequency of open, selective, and closed [online consultations] is very unevenly distributed depending on the DG and the issue” (p. 660).

⁴² Quittkat, “The European Commission's Online Consultations...”, *op. cit. supra* note 38, pp. 662-64.

⁴³ *Ibid.*, pp. 661 and 664.

⁴⁴ E.g. Commission Staff Working Document, “Impact Assessment Board Report for 2010”, SEC(2011)126 final, Brussels, 24.1.2011, p. 14; Commission Communication, “Smart Regulation in the

but also on perceptions of democratic legitimacy – and in view of Article 11 TEU – it is unlikely, that these failings will remain untouched.⁴⁵

A second normative implication of raising participation to one of the foundations of democracy and, as a such, to a founding legal principle of the EU brings us to a deeper level of analysis. As mentioned above, the major challenge Article 11 TEU raises is the transition from participation based on a logic of participatory governance⁴⁶ to participation that concretizes democracy as a “value” of the Union, and that responds to the respective normative yardsticks, such as equality and transparency. Focusing on the role of the citizen in the EU political system – rather than that of interest groups – and strengthening the position of individuals and representative associations in their relationships with EU decision-makers, in terms of access to procedures and justification of decisions, are, arguably, important aspects of this normative shift. This argument is supported by the ultimate reasons that since 1992 have led the Union to create mechanisms of reaching out to citizens: increased concern with political disaffection and attempts to create a sense of belonging.⁴⁷ In addition, the wording of Article 11(1) TEU, with its reference to citizens and to a public exchange of views – the terminological ambiguity of Article 11 notwithstanding – supports a conception of participation different from one focused on instrumental rationales.

However, the participatory practices that ground Article 11 TEU have been largely detached from normative considerations regarding the place of the citizen in the Union’s political system.⁴⁸ This is still reflected in Article 11 TEU. Perhaps given its participatory governance background,⁴⁹ its norms are fairly weak with regard to the position of the individual or associations – or, indeed, the citizen – in relation to the EU institutions (with the exception of para 4).⁵⁰ They enshrine duties of the institutions, rather than entitlements of individuals or representative associations to participate. This would have been too distant from the practices of the institutions the constitutional significance of which Member States now formally recognized.

And yet, the normative shift Article 11 TEU postulates – in the interpretation defended in this contribution – implies focusing on the relationships of the participants, be they citizens or persons concerned, with the EU institutions and bodies, taking the former as reference points irrespective of the presumed quality of policy outcomes. This shift requires ensuring voice to those interested in participating, and in particular, equal treatment of participants. Equality is understood here as procedural equality, i.e. it expresses the idea that

European Union”, COM(2010)543 final, Brussels, 8.10.2010, pp. 10-11; Commission Staff Working Document, “Impact Assessment Board Report for 2009”, SEC(2009)1728 final, Brussels, 29.1.2010, p. 9; Communication from the Commission “Follow-up to the Green Paper ‘European Transparency Initiative’”, COM(2007)127 final, Brussels, 21.3.2007, p. 6; Inter-institutional Monitoring Group, “First Interim Report Monitoring on the functioning the Lamfalussy process”, Brussels, 22 March 2006, pp. 12-13 (available at <ec.europa.eu/internal_market/finances/docs/committees/060322_first_interim_report_en.pdf>).

⁴⁵ Communication, “Smart Regulation in the European Union”, cited *supra* note 44, p. 3. A different matter, of course, is how reforms will come about and to what extent they will intend or be capable of addressing the shortcomings mentioned. On possible implications of Article 11 TEU with regard to the Commission, see *infra*, section 4.

⁴⁶ See *supra* section 2.2.

⁴⁷ See *supra* note 35.

⁴⁸ Mendes, *op. cit.* *supra* note 18, p. 451.

⁴⁹ See *supra* section 2.2

⁵⁰ Closa, *op. cit.* *supra* note 15, p. 1050. The term “citizen” implies excluding non-citizens, while participation may also be justified in relation to e.g. residents. The term individual is therefore preferred in the text, with a view not to exclude non-citizens *a priori*.

those involved should be able to have equal procedural opportunities to influence decision-making procedures.⁵¹

Ensuring equal treatment through current practices appears to be particularly problematic. While equality is essential to the idea of democracy,⁵² participatory governance as it has been fostered so far at the EU level – and in accordance with its features pointed out above – has largely excluded considerations of equality.⁵³ Equality of citizens is now a democratic principle of the EU – or a “provision on democratic principles” – by force of Article 9 TEU and, arguably, ought to be extended to participation exercised under Article 11 TEU. This requires that the Union’s institutions, bodies, offices and agencies also treat legal persons participating in EU decision-making procedures equally.

Ensuring a voice to both actual and potential participants implies giving due consideration to the position of those who disagree with the decisions taken and of those who, for different reasons, are excluded from decision-making procedures.⁵⁴ That this is not a concern of the predominantly utilitarian conceptions of participation that hitherto prevailed in EU governance is confirmed by the 2010 report of the Impact Assessment Board. According to this report “the Board ... often recommended a more transparent reflection of the views expressed, especially those which were opposed to the preferred approach”.⁵⁵ Yet, as argued above, postulating participation as a principle of democracy requires a return to “participation as intrinsic value for the individual” – giving them voice or the legal possibility to have voice – more than as “a means for improved problem-solving in complex governance arrangements”.⁵⁶ Current practices need therefore to be adapted and coupled with rules or mechanisms that ensure, to the extent possible, due consideration for the different views expressed.

3.2 *The role of law*

Could law have a role in operating the shift from participatory governance to participation as a principle of democracy postulated by Article 11 TEU? Hitherto, the definition of participation practices has been mainly left to the discretion of the decision-maker, more prominently, the Commission.⁵⁷ However, the limits of discretion should not be overlooked. As shown by a decade of implementation of minimum standards of consultation,

⁵¹ On the need to situate this view of equality within a theory of political equality, in particular when considering equal treatment as a rule that yields institutional requirements, see Beitz, *Political Equality. An Essay in Democratic Theory* (Princeton, 1989), pp. 4-19.

⁵² “Democracy is a concept that virtually defies definition” (Lijphart, *Democracy in Plural Societies. A comparative Exploration* (Yale Univ. Press, 1997), p. 4) and that can be discussed from different conceptual perspectives. Nevertheless, one may argue that a claim of equality is common to different theories of democracy, even if present in different degrees and shapes, depending on each conceptualization. At an abstract level, one can surmise “democracy is essentially a matter of the equal distribution of power over political decisions”, taking equal power to mean equal influence as an ideal that cannot be detached from an adequate conception of democracy (Dworkin, “What is Equality? Part 4: Political Equality”, (1987) *University of San Francisco Law Review*, 1-30, at 4, 12-18).

⁵³ Greven, op. cit. *supra* note 19, pp. 236-37, 240.

⁵⁴ According to Schmidt-Assmann, this is one of the functions of administrative law in contemporary society (Schmidt-Assmann, *La teoría general del derecho administrativo como sistema* (Madrid: 2003), pp. 23-25 and pp. 36-40). See also Greven, op. cit. *supra* note 19, pp. 241-42.

⁵⁵ “Impact Assessment Board Report for 2010”, cited *supra* note 44, p. 14.

⁵⁶ Greven, op. cit. *supra* note 19.

⁵⁷ For an assessment, see Craig, *EU Administrative Law*, (OUP, 2006), pp. 328-30.

administrative accommodation through self-imposed standards has produced mixed results in terms of ensuring equitable and inclusive participation, adequate time frames, the publication of results and the justification of decisions in view of participation.

The juridification of participation is contentious. Among other problems: it may hinder the timely delivery of policy; it extends the reach of judicial review in controlling policy decisions, which may lead to an undesirable degree of judicial intrusion in policy-making; and it may contribute to strengthening the influence of corporate actors in decision-making to the detriment of the less powerful citizens.⁵⁸ Therefore juridification requires, among others, devising solutions to minimize the procedural costs of legal forms of participation, defining adequately the boundaries between judicial review over procedure and judicial review over the substance of policy decisions, and ensuring access to the less powerful.

Yet, unbounded discretion regarding how and when to grant participation and who to include is incapable of giving effect to Article 11 TEU insofar as it postulates participation as a democratic principle. It fails to ensure, at least with a fair degree of predictability and certainty, voice to those excluded by decision-makers from participatory arrangements, but also fails to ensure equal treatment of those who participate. If the conditions of participation are purely in the hands of the decision-maker, their choices regarding who, how and when to consult are likely to be determined by their own perceptions of the problem they need to address, and are likely to be conditioned by the regulatory capabilities and limitations of the decision-maker.⁵⁹ Seeking to effectively involve all those potentially interested in participatory procedures, to duly consider the range of competing public and private legally protected interests and rights at stake, and give reasons for the final decision in view of this balancing exercise, may or may not be a priority. Arguably, only legal limits placed on participation procedures are capable of countering both the tendency to take into account only the input of those whose contributions may be valuable in view of the regulatory problem at hand, and the tendency to consider only the comments of those who are in principle favourable to the decision-maker.⁶⁰ These tendencies compromise the democratic meaning of participation as a means of giving voice. They also compromise the protection of the legal sphere of those whose rights and legally protected interests are affected by the exercise of public authority, whatever form it takes. Respect for rights and legally protected interests affected by public regulation is one relevant limit to the exercise of public authority in the pursuance of public interest and, as such, an essential aspect of the rule of law. This “rule of law” dimension of the relationships between individuals and political power exercised by public authorities is not in itself a consequence of the provisions of Article 11 TEU – and was possibly a distant concern of the drafters of the Treaty.⁶¹ But respect for the rights and legally protected interests of individuals in their relationships with authority is a condition of democracy, insofar as the protection of one’s legal sphere is an important dimension of individual

⁵⁸ Craig, op. cit. *supra* note 57, p. 328. Harlow, “Citizen Access to Political Power in the European Union”, EUI Working Paper RSC No 99/2, pp. 48-49.

⁵⁹ Greven, op. cit. *supra* note 19, pp. 241-42.

⁶⁰ See *supra* text of note 55. Indeed, the decision-maker can easily justify policy choices after consultation procedures by stating that the objections have been duly taken into account (Ferretti, “Participation, Democratic Deficit and Good Regulation: A Case Study of Participatory Strategies in the European Regulation of GMO Products”, ZERP-Diskussionspapier 6/200, in particular, pp. 16-17). This is all the more true if the giving of reasons is not subject to further judicial or administrative controls.

⁶¹ See *supra* section 3 on the background of Art. 11 TEU.

freedom. Indeed, the protection of rights and legally protected interests (individual, collective and diffuse interests) that might otherwise be neglected in the political process is one of the various reasons supporting participation from a perspective of democracy.⁶²

It follows that law is needed to limit the discretion of the decision-maker regarding fundamental choices on participation procedures, if ensuring voice to those interested in decision-making in a way that guarantees consideration of divergent views, is indeed the purpose of such procedures. In other words, law is needed to strengthen the position of individuals and representative associations in their relationships with the EU institutions. But what could the role of law be in this regard? As mentioned above, concrete legal solutions need to address complex issues. As much as administrative or political solutions left purely to the discretion of decision-makers, legal solutions may be only partially successful in operating the mentioned shift. While acknowledging these difficulties, the following proposals are intended as a blueprint of possible ways in which law could contribute to operating the normative shift from participatory governance to participation as a principle of democracy postulated by Article 11 TEU.

One form legal intervention can take is the recognition of participation rights. Participation rights are legally justified when the act adopted – a binding legal act or a formally non-binding act that has a sufficient constraining effect – impinges significantly on the legal sphere of private persons, that is, when it is sufficiently concrete to affect the rights, legally protected interests, and duties of the persons it concerns.⁶³ Rights and legally protected interests may be liberty or property rights. They may be collective or diffuse interests, which also have an individual dimension and are, as such, part of individuals' legal spheres.⁶⁴ When these are affected by public regulation, the conflict between private legal spheres and the exercise of public authority is strongest. This is where the lack of consideration for the position of participants may have more direct and severe consequences in their legal spheres and constrain their individual freedom. In other words, this is where the due consideration for the interests they voice is most important, both from a rule of law and a democratic point of view.⁶⁵ When acts of public authority affect legal relationships involving individuals, the “intrusion” of public power in the legal sphere of private persons is strong enough to justify (in legal terms) giving voice to the latter and requires that they be granted adequate means of protection. Under these circumstances, participation rights are arguably *the* “appropriate means” to give citizens and representative associations an opportunity to make their views known (Art. 11(1) TEU). They imply the decision-maker's duty to consider the substantive rights and legally protected interests voiced by those affected in the balancing exercise that grounds their decision.

As results from the above, participation rights are not recognized to citizens as such but to citizens and representative associations as holders of rights or legally protected interests touched by decision-making, i.e. to citizens as persons concerned. This does not exclude the possibility that participation rights are subsumed under the hypothesis of Article 11(1) TEU. Their recognition is certainly not the only way to give effect to Article 11(1) – the

⁶² See further Pennock, *Democratic Political Theory* (Princeton Univ. Press, 1979), pp. 441-49.

⁶³ On the legal reasons of participation and on the legal grounds for their expansion to rulemaking procedures, see Mendes, *op. cit. supra* note 18, Chapt. 2.

⁶⁴ See, further, Mendes, *op. cit. supra* note 18, Chapt. 2, section 2.3.

⁶⁵ See *supra* text at note 62.

only paragraph that explicitly grants the decision-maker the discretion to choose the “appropriate means to implement it – but may be required under the circumstances and for the reasons explained above. In this reading of Article 11(1) TEU, the Commission may need to recognize participation rights for persons concerned under Article 11(1), and not under Article 11(3) TEU. Despite the latter’s explicit reference to persons concerned, this provision has, arguably, a different scope. As mentioned above, it refers back to the policy-driven practices of consultation that the Commission has put in place. They now constitute a constitutionally imposed duty of the Commission – a duty that has two specific goals, i.e. to ensure the coherence and the transparency of Union’s actions – rather than a self-imposed practice. But Article 11(3) TEU does not seem to support the recognition of participation rights.⁶⁶

This does not mean that law is excluded from giving effect to Article 11(3) TEU. Indeed, from a legal perspective, the recognition of participation rights is not the only alternative to unlimited discretion of decision-makers in defining opportunities of participation. When the intervention of public powers in the legal sphere of private persons is not as intrusive, the recognition of participation rights may not be justified on legal grounds. Still, ensuring due consideration of the position of the various participants in procedures where participation is postulated as a source of democratic legitimacy, requires sufficient conditions of access (e.g. provision of adequate information, adequate timeframes for participation) and justification (of the choices of participants, of the treatment of the results of participation, of the final decision adopted). These conditions cut across the three provisions of Article 11 TEU. In all these cases, legal rules might be needed to ensure compliance thereof, and, to this extent, ensure that participants are effectively given a voice and treated equally, and that participation procedures are transparent and accountable.

If one assumes that acts that impact sufficiently in the legal sphere of private persons are likely to be more common at the level of implementation, extending the reach of law as proposed in this article requires distinguishing different types of acts. The changes that, in the interpretation proposed here, are postulated by Article 11 TEU are likely to have different implications at the level of agenda setting, policy definition and legislation, on the one hand, and at the level of implementation, on the other. The conditions under which the recognition of participation rights may be required are more likely to occur in the latter case. Yet, one should not exclude *a priori* the possibility that acts at the primary level of regulation may also be capable of affecting the legal sphere of private persons in a substantive and concrete way.

Juridification implies judicialization. Citizens and representative associations ought to be given the possibility of challenging the validity of legal acts on the basis of a violation of Article 11 TEU or of legal rules that implement this Treaty article. In the construction proposed here, *locus standi* should be granted to holders of participation *rights*, whose substantive rights and legally protected interests have been affected by a legal act adopted in violation of their procedural right to participate. Standing should also be recognized for natural or legal persons who were denied access to decision-making procedures in violation of legal *rules* on participation that give effect to Article 11 TEU and are applicable in the case at hand, or whose views were ignored also in violation of these rules. The reach of the Court in this last case would depend on the scope and on the degree of constraint postulated by the

⁶⁶ On the legal consequences that may stem from Art. 11(3) TEU, see *infra* section 4.

legal rules created in application of Article 11 TEU. However, standing is dependent on the conditions currently defined in Article 263(4) TFEU, which remain rather restrictive as hitherto interpreted by the Court.⁶⁷ In reality, more often than not – especially where individual concern is a requirement of standing – individuals and representative associations may be prevented from enforcing participation rights and rules enacted on the basis of Article 11 TEU.

In sum, in the interpretation of Article 11 TEU proposed here, the choice on the “appropriate means” to implement this Treaty article – which, despite being envisaged only in paragraph 1, also exists when implementing paragraphs 2 and 3 – is limited in view of the normative shift it postulates. The pages above proposed two possible implications of this argument, i.e. two limitations to the discretion of the institutions that arguably stem from Article 11 TEU. First, participation rights may be required as a means of giving voice to individuals and representative associations under Article 11(1) TEU, in the circumstances explained above. Second, legal rules may be required to guarantee the conditions of access and justification mentioned above, which are needed to ensure voice to those interested in participating, under the three norms of Article 11 TEU. In other words, law may be needed to ensure the procedural conditions upon which the democratic value of participation depends.

The normative claims defended here are open to debate. In particular, it may be argued that the wording of Article 11 TEU does not favour a rights-based approach to participation, nor do participation rights seem to have been an intended effect of this Treaty article, if one considers its substratum. These are valid arguments. However, one may retort that this view ignores the normative implications of participation that are now explicitly part of the foundations of democracy in the EU, a link established - possibly inadvertently - by the drafters of the Treaty when inserting Article 11 in Title II of the TEU.

4. Participation and participation rights after Lisbon: In whose hands?

Irrespective of the normative views one may defend on the reforms needed to give effect to Article 11 TEU, and on the reasons and instruments for such reforms, the EU institutions will need to decide in which instances and under which forms they will implement its norms. Even if they – including the Court – may prefer to keep law at arm’s length of participation in rule-making procedures, this position is arguably harder to maintain under the Lisbon Treaty for two main reasons.

Firstly, legal consequences follow from both the mandatory terms of Article 11 TEU and from the fact that participation is now explicitly one of the foundations of EU democracy, and, as such, one of the “founding principles” – an “overarching normative frame of reference” – of the EU legal order.⁶⁸ The decision-maker is now bound not only by the duties of Article 11 but, more generally and possibly more densely, by the normative implications of participation as a principle of democracy. Concretely, the way the EU

⁶⁷ See *infra* notes 81 and 82, as well as respective text. See, however, in the field of State aid, Case C-198/91, *William Cook plc v. Commission*, [1993] ECR I-2487, paras. 22-26; Case C-225/91, *Matra v. Commission*, [1993] ECR I-3203, paras. 17-20.

⁶⁸ Von Bogdandy, *op. cit. supra* note 31, p. 21.

institutions – as well as agencies and bodies – implement their duties under Article 11 should give effect to that principle. Secondly, other Treaty provisions may influence possible legal developments on this matter, as will result from the analysis below.

4.1 “*The institutions*”

According to Article 11 TEU, the duties to foster a public exchange of views with citizens (para 1) and to maintain an “open, transparent and regular dialogue” with representative associations and civil society (para 2) are extended to *all* institutions. Exactly what this might mean for the European Parliament, the Council, the European Council, not to mention the Court, the Court of Auditors and the European Central Bank is far from clear. At first sight, the fact that the wording of Article 11(1) and (2) encompasses all institutions without distinction may be perceived as a sign of the arguable lack of reflection of the drafters of the Treaty regarding the meaning and implications of participation as one of the foundations of democracy in the Union. Nevertheless, the wording of these norms is clear in this respect: all institutions are bound by duties of participation and dialogue.

Article 11 will necessarily have different implications for different institutions and for different areas of their action, if any at all in some cases. Indeed, restrictive, or even corrective interpretation (possibly leading to the non-application of Art. 11), might be needed when applying Article 11(1) and (2) to institutions such as the European Central Bank, the Court of Justice or the Court of Auditors, or to areas such as the common foreign and security policy or the budgetary policy of the Union. In general, the implications of Article 11 will be different depending on the type of acts at issue (legislative/non-legislative, general/concrete acts) and also on the involvement of the European Parliament, as will be defended below. While these broad criteria might shed some light on how to interpret Article 11 with regard to the institutions that are less obvious holders of participation duties and to areas where participation is potentially disruptive, they are far from solving all the problems that may be raised in this regard. At any rate, the demands of Article 11 need to be assessed on a case-by-case analysis.⁶⁹

4.2 *The Commission*

Article 11 TEU has clearer implications for the Commission. Given its active role in fostering participation in the past, the consequences of these norms in its regard are perhaps easier to discern. It will, first of all, imply further reforms of the Commission’s current consultation practices, which Article 11(3) TEU transforms into a duty.⁷⁰ The Commission has recently indicated that it wishes to do so, but it has not shown signs of departing from the path it defined in the 2002 Communication, i.e. administrative accommodation excluding legal regulation of consultation.⁷¹ In any event, the Commission has lost some discretion in shaping

⁶⁹ On the scope of the obligations that may stem from Art. 11 TEU in the normative reading proposed in this Article, see *supra* section 3.2.

⁷⁰ On the shortcomings of current practices, see *supra* section 3.1.

⁷¹ Communication, “Towards a reinforced culture...” cited *supra* note 26, p. 10; Communication, “Smart Regulation...”, cited *supra* note 44, p. 3, where it is stated, “... the views of those most affected by regulation have a key role to play in smart regulation. The Commission has made great strides in opening its policy making to stakeholders. This can also be taken a step further and the Commission will lengthen the period for its

its participation practices, as it cannot deviate from the duties and standards stipulated in the three paragraphs of Article 11, unless in breach of the Treaty. This may well require changes beyond those the Commission might be willing to take on board.⁷²

Thus, closed-door consultations with participants selected according to criteria defined ad hoc by the Commission may be considered contrary to the wording and spirit of Article 11 TEU.⁷³ According to this provision, the institutions need to engage in *public* exchange of views, *open and transparent* dialogue and *broad* consultations. While Article 11 TEU will not prevent the occurrence of rather exclusive contacts established with selected entities, such practices may be at odds with the Treaty, if they hinder the purposes and effectiveness of public, open and broad consultations that might be held in parallel to more restricted fora of participation. Even if, under Article 11(1) TEU, the institutions remain free to choose the “appropriate means” that ensure participation, this discretion is conditioned by the normative parameters defined in Article 11. These considerations have more far-reaching effects with regard to participation procedures followed in the adoption of delegated and implementing acts, given that, currently, restricted forms of participation are a more common practice at this regulatory level.⁷⁴

Furthermore, a public exchange of views needs to be extended to “all areas of Union action” (Art. 11(1) TEU), and not only to those where the institutions consider it pertinent.⁷⁵ This specification leads us to question the normative validity of strategic uses of participation that the Commission has fostered. By such strategic uses, the Commission has opened policy or decision-making procedures to the public or to stakeholders only in the areas where regulatory needs so recommended – be it because of the EU’s limited resources, or of specific needs of responsiveness, compliance, or transparency. An interpretation of Article 11 informed by the normative consequences that stem from elevating participation to one of the foundations of democracy in the Union indicates that these uses of participation are, as a matter of principle, excluded. Arguably, this conclusion is not hindered by the leeway given to the institutions to decide on the “appropriate means” of a public exchange of views. Indeed, this impacts on the way this provision will be concretized not on its scope of application.

This begs another question. In the light of Article 11(1) TEU, are legal norms that determine a duty of the institutions to consult *where* appropriate unlawful? Such provisions are common in non-legislative procedures conducted by the Commission and, usually, give it considerable leeway in deciding who, how and when to consult. One could argue that such situations fall under Article 11(3) TEU, where there is no reference to “all areas of the Union” and where participation is limited to parties concerned. This is defensible also in the light of the possible drawbacks of participation, which the Commission might be better placed to judge in specific instances. However, it might be difficult to determine what consultations for the purposes of Article 11(3) are and what consultations that give citizens

consultations, and carry out a review of its consultation processes to see how to strengthen the voice of citizens and stakeholders further. This will help to put into practice the provisions of the Lisbon Treaty on participatory democracy”.

⁷² See also *supra* section 3.1.

⁷³ This applies equally to the other institutions, as well as bodies, offices and agencies, in the extensive interpretation defended above (*supra* section 2.1).

⁷⁴ See *supra* note 41.

⁷⁵ As mentioned above (*supra* section 2), it is not clear how this provision is to be delimited from paras. 2 and 3 of Art. 11, and hence, whether this specification can also be extended to these other norms.

and representative associations the opportunity to make their views known under Article 11(1) are, especially considering that citizens can also act as persons concerned.⁷⁶ At the very least, the Commission's choice needs to be transparent, since transparency is one of the specific goals defined in Article 11(3) TEU. It follows that the Commission's choices as to who, how and when to consult should be justified and made public. This is arguably one legal consequence of Article 11(3) TEU. Indeed, even if this Treaty article endorses previous Commission's practices of consultation, it also transforms them in view not only of the wording of this provision, but also of the normative implications of participation as a principle of democracy.

4.3 *The EU legislature*

Article 298(2) TFEU provides a legal basis for the adoption of a regulation, by the European Parliament and the Council in an ordinary legislative procedure, defining the conditions for an "open, efficient and independent European administration" (Art. 298(1) TFEU). Irrespective of what concrete solutions may be reached to give effect to this provision, these will need to be legally and politically motivated in the light of the relevant Treaty provisions, including Article 11 TEU. The link between openness and participation is expressly established in Article 15(1) TFEU and it might be difficult to justify the choice to omit participation from a legislative act that sets the procedural rules of the EU administration on the basis of Article 298 TFEU. The EU legislature is likely to consider the implications of Article 11 TEU in connection with the functioning of the EU administration. The readiness in defining the rules that concretize the European citizen's initiative may be an indication of the commitment of the legislature to giving effect to Article 11 TEU. This commitment might extend to the other norms of this Article.

More generally, the distinction between legislative and non-legislative acts introduced by the Lisbon Treaty – even if, as such, this does not constitute an innovation proper – compels decision-makers (the legislature included), legal and political analysts as well as interpreters (among which, the Court) to further reflect on the different procedural rules that, in view of the Lisbon Treaty, ought to govern the adoption of the respective acts beyond the core distinctions explicitly made in the Treaty. In the light of Article 11 TEU, as well as of Articles 15(1) and 298(1) TFEU – which stress that openness is one important trait of the activity of the EU institutions and, specifically, of the EU administration – participation is likely to become a relevant issue of debate. This may lead to different solutions envisaged with regard to legislative and non-legislative procedures, also because the Treaty provides for specific openness rules with regard to the former (e.g. Art. 15(2) TFEU) but not with regard to the latter. Arguably, the debate on the place, role and shape of participation is even more important with regard to non-legislative procedures, where the Commission consultation standards largely do not apply⁷⁷ and where, as argued above, the likelihood that rules impact directly on the legal sphere of natural and legal persons strengthens the legal reasons to

⁷⁶ On this view see *supra* section 3.2.

⁷⁷ Communication "Towards a reinforced culture of consultation...", cited *supra* note 26, p. 15. See, however, Commission, 'Impact Assessment Guidelines', 15 Jan. 2009, SEC(2009) 92, p. 6 (available at <ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_en.pdf>), which still excludes the application of consultation standards from a large share of delegated and implementing acts adopted outside legislative procedures.

provide for participation rights. The procedural specificities that may give rise to a clearer distinction between the legal regime applicable to legislative acts and that applicable to non-legislative acts may be defined in EU legislation or developed by the Court.

At a more prosaic level, Article 11 requires the establishment – possibly by legal act – of criteria that define core concepts for its implementation. Indeed, who are representative associations (Art. 11(1) and (2) TEU) and who are parties concerned (Art. 11(3) TEU)? These terms imply a selection of the natural and legal persons whose participation is covered by Article 11 TEU. At the same time, possible litigation regarding these terms is likely to prompt the Court to acquire a more prominent role in the definition of access to participation, certainly so if the terms mentioned end up being defined through legal acts. Indirectly, this may make it hard not to enter the discussion on whether participation rights may arise on the basis of Article 11 TEU.

4.4 *The Court*

The Court will probably be faced with participation claims based on Article 11 TEU.⁷⁸ Two important modifications introduced by the Lisbon Treaty will increase the chances that applicants raise issues regarding rules and rights of participation in legal actions. Firstly, Article 263(1) TFEU enlarges the scope of reviewable acts, which now include, *inter alia*, acts of bodies, offices and agencies of the Union intended to produce legal effects *vis-à-vis* third parties.⁷⁹ Therefore, more litigation is expected with regard to administrative rules and decisions adopted by such bodies, offices and agencies. Their decision-making procedures are usually established in the legal acts that created them, and, at least in the case of EU agencies, they often entail provisions on consultation procedures.⁸⁰ Secondly, Article 263(4) TFEU loosened the conditions of standing of natural and legal persons, not requiring individual concern in actions for annulment of regulatory acts that do not entail implementing measures. The doubts on how to interpret this provision and in particular the term “regulatory acts” have been sufficiently debated in the literature.⁸¹ Even if the Courts maintain the restrictive interpretation recently adopted by the General Court, considering the conditions of standing the Treaty reserved for “regulatory acts” applicable only to non-legislative acts,⁸² the new norm of Article 263(4) TFEU will allow actions for annulment that under the previous rules would most likely be inadmissible.

The Court is therefore likely to be called to apply and concretize the provisions of Article 11 TEU. The fact that participation is now explicitly a foundation of democracy, and,

⁷⁸ See also Craig, op. cit. *supra* note 2, p. 70.

⁷⁹ This draws on previous case law that, in order to ensure effective judicial protection, had admitted annulment actions against acts of EU agencies with external legal effects. E.g. Case T-411/06, *Sogelma v European Agency for Reconstruction (EAR)*, [2008] ECR II-2771, paras. 36, 37 and 49-53.

⁸⁰ See *supra* note 11 for examples. As mentioned, the frequency of such provisions may counter the fact that bodies, offices and agencies of the Union are not mentioned in Art. 11 TEU. In an extensive interpretation, specific duties of consultations impinging on them by force of specific legislation may be interpreted in light of the normative implications of Art. 11 TEU. See *supra* section 2.

⁸¹ Koch, “Locus standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals’ right to an effective remedy”, 30 *EL Rev.* (2005), 511-27, at 519-27; Dougan, “The Treaty of Lisbon 2007: Winning minds, not hearts”, 45 *CML Rev.* (2008), 617-703, at 676-79; Craig, op. cit. *supra* note 2, pp. 129-132. See also Case T-532/08, *Norilsk Nickel v Commission*, Order of 7 Sept. 2010, nyr., paras. 67-72.

⁸² Order of 6 Sept. 2011 in Case T-18/10, *Inuit Tapiriit Kanatami and others v. Parliament and Council*, nyr.

as such, a dimension of a founding principle of the EU legal order strengthens its autonomy *vis-à-vis* the political process in shaping norms and practices of participation.⁸³ Arguably, should the Court decide to enforce legal claims of participation on the basis of Article 11 TEU, it would now be sheltered from possible criticism of hindering the political choices of the institutions beyond what the Treaties allow. It may adopt an active stance in defining rules that concretize the standards defined in Article 11, independently of the action of the legislature or the executive in this regard. More importantly, it should not refrain from upholding participation rights in rule-making procedures when legal reasons justify the procedural protection of rights and legally protected interests, as defended above.

It follows that Article 11 TEU may lead the Court to revise the position it has defended in the case of *Atlanta* and maintained ever since, i.e. as a matter of principle, participation rights are excluded from rule-making procedures.⁸⁴ If, nevertheless, the Court wishes to maintain this position, leaving to the other institutions the choices on how best to implement Article 11 TEU, it will have to choose a different line of argument from the one used in *Atlanta* that it has maintained hitherto.⁸⁵ Firstly, there it defended the view that the only obligations of consultation impinging on the EU institutions are those specifically envisaged in the relevant provisions of the Treaties.⁸⁶ This argument no longer holds in view of the general duties of consultation stemming from Article 11 TEU. Secondly, the Court has persistently held that “the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly” excludes direct participation in rule-making procedures except where duties of consultation are explicitly enshrined in a Treaty or legislative provision.⁸⁷ The Lisbon Treaty provisions on democracy show that participation and representation are meant to be complementary and not mutually excludable, as the Court implicitly sustained in *Atlanta*. The principle of representative democracy remains the predominant source of democracy in the Union – as indicated by the wording of Article 10(1) TEU⁸⁸ – and this is likely to perpetuate the debate on the conflicts between participation and representation. Nevertheless, as before, the strength of representative democracy through the European Parliament continues to depend on the concrete Treaty competence.⁸⁹ In fact, while more often than not the Parliament is now involved in the legislative process as a co-legislator, the ordinary legislative procedure has not been incorporated into all areas of EU competence. Special legislative procedures

⁸³ Von Bogdandy, op. cit. *supra* note 31, p. 18, referring in general to the consequences of constitutional principles.

⁸⁴ Case T-521/93, *Atlanta*, paras. 70-74; Case C-104/97 P, *Atlanta*, paras. 35-38, both cited *supra* note 1. See also Case T-199/96, *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission*, [1998] ECR II-2805; Case T-13/99, *Pfizer Animal Health SA v Council*, [2002] ECR II-3305, and Case T-70/99, *Alpharma Inc. v Council*, [2002] ECR II-3495. see Mendes, op. cit. *supra* note 18, Chapt. 5, Section 5.2.

⁸⁵ See, for a recent example, *Norilsk Nickel*, cited *supra* note 81, para 113.

⁸⁶ Case T-521/93, *Atlanta*, para 71, Case C-104/97 P, *Atlanta*, para. 38; both cited *supra* note 1. On this argument, see also, Case T-135/96, *UEAPME v. Council*, [1998] ECR II-2335, para 88.

⁸⁷ Case T-521/93, *Atlanta*, cited *supra* note 1, para 71. See also on this, *UEAPME*, previous note, para 88.

⁸⁸ “The functioning of the Union shall be *founded* on representative democracy” (emphasis added). No parallel statement is made with regard to participatory democracy. In addition, while the refractions of representative democracy are clear in other Treaty modifications (e.g. the role of national parliaments, the strengthened role of the European Parliament in the legislative procedures), this is not the case with regard to participatory democracy.

⁸⁹ Questioning the uniform meaning of founding principles in the different areas of Union law, von Bogdandy, op. cit. *supra* note 31, p. 27.

involving a Council decision, sometimes after consulting the European Parliament, other times after seeking its consent, are still present in important areas, *passerelle* clauses notwithstanding.⁹⁰ According to the idea that participation and representation are complementary sources of democracy, the Court may refrain from enforcing participation in decision-making procedures where the involvement of the Parliament is strongest – i.e. co-decision in ordinary legislative procedures. By the same token, it should be stricter in giving legal effect to the norms and value standards of Article 11 where the position of the Parliament is weaker – e.g. in the adoption of non-legislative acts under Articles 290 and 291 TFEU – or non-existent – e.g. in the adoption of informal administrative rules (such as guidelines) by the Commission or by European agencies that have nonetheless constraining normative power.

5. Article 11 TEU and the role of law

Article 11 TEU draws to a large extent on practices of participation that the EU institutions have developed throughout the integration process and in particular during the past decade. Nevertheless, it introduced a distinct transformation in the way of perceiving participation. Participation can no longer be understood only as a means of increasing problem-solving capacities, as it has been typically approached from the perspective of participatory governance. As a result of Article 11 TEU, participation is now one of the pillars of EU democracy. It has been elevated to the category of a founding legal principle. Democratic participation is now, explicitly by force of the Treaty, a normative yardstick against which the exercise of public authority is justified.

Participation, as a basis of EU democracy, requires re-centring participation in its intrinsic value of giving voice to individuals and representative associations, as well as strengthening their position in the relationships they establish with the EU institutions and bodies, in terms of access to decision-making procedures and of justification of decisions. It implies ensuring equal procedural treatment of individuals, independently of access criteria focused on the quality of regulatory outcomes. Participation under Article 11 TEU requires countering current tendencies to restrict *a priori* access to those whose contributions the decision-maker considers valuable in view of the regulatory problem at hand, and to disregard the view of those opposed to the decision-maker's preferred approach. In this reading, it also requires transparency as to the selection of participants and the justification of decisions in view of the results of participation.

While not *all* participation practices that give effect to Article 11 TEU ought to be covered by legal rules, this Treaty article establishes general duties of the institutions to create opportunities of participation that, in the case of paragraph 1, need to cover all fields of Union's action. These duties should be geared towards giving effect to the normative shift that Article 11 TEU postulates. Arguably, the conditions to ensure that participation may be a source of democratic legitimacy cannot be sufficiently guaranteed through self-imposed standards. Ten years of application of the Commission's minimum standards of consultation have revealed the limits of an exclusively self-regulatory approach to participation in ensuring

⁹⁰ Dougan, *op. cit. supra* note 81, pp. 640-41 (and respective footnotes 116 and 117).

procedural equality and transparency. Law may play a significant role in this regard, irrespective of the possible risks entailed in the juridification of participation.

One possible implication of rethinking participation as a means of giving voice as well as strengthening the relationships between the citizens and the EU institutions and bodies is the creation of participation rights. These ensure the procedural protection of the rights and legally protected interests of those affected by public regulation. From a legal perspective, participation rights are required when the acts adopted by the EU institutions or bodies – irrespective of their general or individual nature – may have a sufficient impact on the legal sphere of persons concerned. In other words, when such acts may impact sufficiently on property and liberty rights as well as on collective and diffuse interests, that the persons affected are in a position to voice. Participation rights ensure that rights and legally protected interests are not neglected in the political process. In this sense, and insofar as such rights and interests should be protected in a democratic polity, participation rights are a means of operating the normative shift postulated by Article 11 TEU. Moreover, they can no longer, as hitherto, be denied on the basis of arguments of representative democracy drawn from the Treaties, nor on grounds of lack of Treaty basis.

Also beyond the situations where participation rights should be granted, legal rules may be needed to ensure that citizens are effectively given a voice and treated equally, and that participation procedures are transparent. These are conditions participation practices should fulfil if they are to base claims of democracy. Such conditions depend on compliance with rules of access as well as on justification of procedural and substantive choices, and may be compromised if the discretion of decision-makers is not bound by procedural rules. In sum, the democratic meaning of participation conveyed by Article 11 TEU, and its implications in terms of equality and respect for rights and legally protected interests, make it increasingly difficult to argue that law should be kept at arms' length from the participation opportunities provided to individuals and associations by the EU institutions

The legal implications of Article 11 may be more far-reaching with regard to non-legislative acts. First, it follows from the above that the role of law with regard to participation will vary depending on the degree of “intrusion” of public acts in the persons' legal spheres. Non-legislative acts that concretize the choices of the legislature are likely to have more concrete impacts in their regard. Second, participation and representation are, in the Treaty, complementary sources of democratic legitimacy. Accordingly, the role of democratic participation as a normative yardstick for the justification of public authority is likely to vary depending on the degree of involvement and decision-making role of the European Parliament in given procedures. This is significantly lower in the adoption of non-legislative acts.

To conclude, there is more to Article 11 TEU than the drafters of the Treaty probably envisaged. Its normative implications advise at the very least the debate on what the role of law should be regarding participation procedures and participation rights. The Court, the Commission and the European Parliament together with the Council, acting in their capacity as legislator, for different reasons and prompted by other Treaty provisions, are likely to have an important say on the future of participation and participation rights in EU law and governance.