Civil Society and Legitimate European Governance
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Preface

The origins of this book go back to a workshop I organised at the Institut d’Études Politiques in Paris in May 2003. This was possible due to the financial support of the European Union who had granted me a Marie Curie Fellowship, and due to Renaud Dehousse who was ready to host the event. The aim was to create an interdisciplinary exchange of ideas on civil society and European governance. From my experience at the European University Institute I know how difficult it is to get an interdisciplinary group together. Fortunately, Paris is an easy place to attract people. More difficult is getting them to stay in the working room, in particular in a place like Saint-Germain-des-Prés. But apparently it worked, and people even appeared to enjoy it. (Many thanks go to Astrid Gerecke for the practical organisation). Even to the extent that when the workshop had finished some went on debating civil society in the Jardin du Luxembourg rather than strolling through Paris. But it might also have been that they were just too exhausted by the workshop and the surprising spring heat that they didn’t get further than the nearby Jardin du Luxembourg, where unintended they bumped into their colleagues again. Anyway, it was at that moment, having some refreshment under the trees and backed by the funny James Bond tunes of the jazz band in the park, that I definitely decided the initiative should be given a follow-up in a book project.

I am very grateful to all those that were ready to engage in this experience. In addition to the contributors to this book, I would also like to thank Deidre Curtin, Robert Geyer and Tom Burns. To the contributors, I am particularly thankful for their patience (in particular those delivering early), and for standing for my comments and my insistence (in particular for those delivering late). Special thanks go to Peter Bonnor, Roland Erne, Carol Harlow, and Gráinne de Búrca for inspiring comments. I am grateful to Stefano Fella for language corrections.

I am also indebted to the publisher Edward Elgar, and in particular to Luke Adams for his patient and friendly collaboration.

I would like to dedicate this volume to a civil society movement that is currently aiming at improving my life quality: the movement of ‘pendolari padani’, i.e. people commuting by train in Northern Italy who are fed up with the bad public transport service. They are very disorganised and very spontaneous (even the name ‘pendolari padani’ is a name I gave them, since they haven’t one themselves – and they may even not like this one), but
apparently that does not seem to impede them from having some first (minor) successes. It is as if they all want to prove the correctness of Putnam’s well-known *Making Democracy Work (Civic Traditions in Modern Italy)* … Let’s hope then – Putnam’s analysis in mind – that eventual improvements of public transport in the North will not be at the expense of investment in the South.

Stijn Smismans
Trento, April 2005

Introduction
1. Civil society and European governance: from concepts to research agenda

Stijn Smismans

CIVIL SOCIETY FROM ARISTOTLE TO PRODI

The concept of civil society has a long tradition and has been given many interpretations, from being identified with political community by Aristotle to meaning nearly the opposite since Hegel, namely a differentiation of society in which civil society is defined as more or less formalised institutions which form an autonomous social sphere that is distinct from the State. In contrast to this dualistic model, in today’s complex modern society it has become more common to define civil society as a social sphere distinct from both State and market.

Depending on the definition, civil society has been attributed different roles in a democratic society (for an overview, see: Foley and Edwards 1997; Rossteutscher 2000). In particular since the 1990s the claimed democratic benefits of civil society have been stressed in the context of an increasing dissatisfaction with present-day representative democracy, which has often been linked to processes of technocratisation of governance, individualisation of society and globalisation of markets and centres of decision-making. Communitarians, for instance, have stressed the role of traditional family, functioning neighbourhoods and volunteer associations to revive feelings of community and shared values in reply to ‘the self-destroying capacities of liberalism and an increasingly ego-centrist attitude towards life’ (Etzioni 1998). In parallel, the debate on ‘social capital’ (for example, Putnam 1993 and 1995; Fukuyama 1995) has stressed that the quality of democratic politics and the vitality of a country’s economic life are highly dependent on its associational life. Voluntary organisations, such as neighbourhood associations, choral societies, bird watching clubs, sport clubs or bowling leagues, are supposed to generate social capital by supporting norms of reciprocity and civic engagement, building social trust and providing networks of social relations that can be mobilised for civic action. Theorists of
associative democracy have taken a more institutional perspective; they have made drafts of institutional design in which functions currently exercised by public and market actors would be ‘delegated’ to voluntary organisations, thus overcoming the shortcomings of welfare state bureaucracies and representative party politics (Hirst 1994; Cohen and Rogers 1995). In Central and Eastern Europe the concept of civil society re-entered political debate stressing the role of the democratic societal forces in opposition to the State-led communist society (Carter 1998; Hirst 1997: 156), whereas in South-American and African countries it has been used to draw attention to traditional forms of social organisation in confrontation with Western European imposed state structures. Meanwhile the role of civil society organisations has been stressed in democratising international governance structures, which lack the established democratic institutions of the nation-states but invade increasingly the policy-making space of the latter (Walzer 1995; Archibugi et al. 1998; Florini 2000; Nanz and Steffek 2004). It is in this context of the (democratic) legitimacy of ‘governance beyond the State’ that the concept of civil society has also found its way to the European level, in both the institutional and academic debate.

The civil society concept is a recent entrant at the European level. When I was asked in 1998 by the European Economic and Social Committee (EESC) to provide a preparatory study for what would later become the Committee’s opinion on ‘the role and contribution of civil society organisations in the building of Europe’ (22 September 1999, OJ C329, 17/11/99) hardly any reference could be found to that concept in the European integration literature (for a rare exception: Curtin 1999), or in official Community documents. The Community Institutions at best talked about ‘special interest groups’, NGOs and voluntary organisations, and only the Commission’s Directorate General for Social Affairs had since 1996 talked about a ‘civil dialogue’ which was needed to improve the effectiveness and legitimacy of policy-making in the social sector by including social NGOs (other than the social partners already involved via the social dialogue). Yet the EESC had a particular interest in developing a discourse on civil society: created by the Rome Treaty as the Community institution representing interest groups which had a stake in the building of a European market,¹ the Committee had de facto been rather marginalised in the institutional set-up. An explicit normative discourse on the democratic potential of civil society involvement in European governance would strengthen the position of the Committee in a European polity increasingly in search of legitimacy. The EESC was at least successful in that its discourse on and concept of civil society was taken over by the Commission.² In reply to the crisis of the Santer Commission, the new Commission President Prodi had begun his mandate with the promise of ‘a far-reaching process of administrative reform’ of the European Commission, the
lines of which were set out in the White Paper of Administrative Reform of March 2000 (see Curtin 2001), and subsequently in the much debated White Paper on European Governance of July 2001. In this context, the idea of civil society participation as a way to improve both the efficiency and legitimacy of European governance becomes a recurrent part of policy discourses.

Parallel to and encouraged by the Community institutional discourse, the concept of civil society also found its way into the European integration literature (Curtin 1999 and 2003, Armstrong 2002, De Schutter 2002, Smismans 2003). As will be described in more detail by Paul Magnette in Chapter 2 of this volume, several authors – convinced that the EU cannot become a fully-fledged parliamentary regime, and unsatisfied with the ‘no problem’ thesis (Moravcsik 2002; building on Majone 1996 and 2000) – have looked at civil society and decentralised participation as a possible remedy for the EU’s legitimacy deficit. As Kenneth Armstrong shows in Chapter 3 of this volume, the civil society perspective appears particularly attractive in the light of new modes of European governance.

However, while the concept of civil society has found its way into the European political and normative debate, the emergence of the civil society discourse also raises many questions. It has thus been argued that some Community Institutions use the civil society discourse above all to further their institutional interests (Smismans 2003) and that their multiple claims about the democratic potential of civil society may be contradictory (Armstrong 2002; De Schutter 2002). Moreover, it remains to be seen to what extent civil society organisations are really involved in (new modes of) European governance, and whether they have any potential – in terms of involvement in governance, internal organisation and links with citizens – to make the European polity more democratic (Warleigh 2001). This all recalls broader criticism regarding the concept of ‘civil society’. Thus it could be ideologically inspired to reduce state intervention, dismantling for instance the welfare state, or on the contrary be used as a way of imposing legal and public law guarantees on an otherwise private sphere. It might be simply a legitimating discourse for a status quo in interest intermediation where business is overrepresented, or on the contrary be a way of strengthening the position of assumed ‘general interest’ organisations, such as environmental or consumer associations. Yet even such associations might represent ‘particular interests’ rather than the general interest; they might not be organised democratically, and unable to link citizens into governance mechanisms, to which others would argue that the strength of civil society is precisely in its spontaneous character, that its ‘representativity’ cannot be imposed, and that it should precisely stay out of governance mechanisms to avoid capture and retain its democratic function.

While the concept of civil society may be ambiguous and all these critiques
may be well founded, it does not change one simple fact: there is an important reality out there which requires our attention both analytically and normatively; namely governance is increasingly characterised by complex interactions between public and private actors and by a blurring of the public and private sphere. This may be a democratic time bomb as it challenges traditional ideas of democratic accountability, but may also provide a potential to deepen democracy through participatory procedures. The concept of civil society is a fuzzy one that may frighten the analytical mind of political scientists and the sense for technical detail of lawyers. Yet, its strength is to focus on this public-private dimension and to require us to deal with the normative questions it raises.

FROM CONCEPTS TO RESEARCH AGENDA

So where then do civil society and European governance meet? It is worth recapitulating briefly on the concepts of civil society and European governance, in order to identify the research perspective that the former may engender in relation to the latter.

The Civil Society Concept

Civil society as a distinct social sphere can be defined taking into account different variables (Armstrong 2002): the characteristics and rationality of that social sphere, the nature or composition of its actors, and the relation between that social sphere and other spheres, identifying in particular its place in a democratic society. Yet these elements are intrinsically linked and difficult to disentangle.

A starting point may be to look at how many social spheres are distinguished within society. As mentioned above, the bipolar interpretation between State and civil society is more often replaced by a distinction between State, market and civil society. According to the often quoted definition of Cohen and Arato (1992: IX), one can distinguish a ‘political society’ composed of parties, political organisations and political publics (in particular parliaments); an ‘economic society’ composed of organisations of production and distribution, such as firms, cooperatives and partnerships; and ‘civil society’ composed of the intimate sphere, the sphere of associations, social movements and forms of public communication. In a comparable way Streeck and Schmitter have distinguished four models of social order, namely State, market, community and associations. They identify several properties with which the associative social order can be distinguished from State, market and community. For instance, the guiding principle of co-ordination and allocation
for State, market and community is respectively hierarchical control, dispersed competition and spontaneous solidarity, whereas the guiding principle for the associative order is inter-organisational concertation. Its predominant actors are functionally defined interest associations and not bureaucratic agencies (State), firms (market), or families (community). One can consider this associative order as the organised dimension of civil society, in contrast to the other elements identified by Cohen and Arato, namely the private sphere and forms of public communication.3

Among the theories claiming the beneficial democratic effects of civil society one can roughly distinguish between on the one hand, those stressing above all the independence of civil society and, on the other hand, those stressing the ‘intermediary function’ of civil society. Theories using the dualistic State-civil society conception generally stress the independence of civil society from the State. Yet even some theories distinguishing between State, market and civil society are built on the (strong) independence of the latter from the former. This is, for instance, the case in the social capital approach, the idea of ‘civil society as a learning school for democracy’, or the attention to the ‘independent’ role of social movements. Other theories, on the other hand, focus on the role of (organised) civil society as (structured) intermediation between the State, the market and the private sphere.

Due to this intermediating function, the borders between (organised) civil society, State, market and private sphere are not always easy to draw. Certain public services, for instance, may have been delegated by the State to civil society actors which may imply a bureaucratisation and ‘statalisation’ of the latter. Moreover, typical market actors as individual firms may form associations to defend their sectoral interest in policy-making. Such business associations are not ‘general interest associations’, to which some intend to limit the definition of civil society, but they do not correspond either to the characteristics of market actors. They have an intermediating function between the market and the State.

The aim of this introduction is not to provide a strict definition of civil society by identifying which actors should be part of it and which not. It rather wants to explain our focus on civil society and European governance. This focus makes us prioritise some interpretations of civil society over others. First, given the complexity of society in which European governance takes place, the triadic distinction between State/public authority, market and civil society will be preferred over the dualistic model. Second, the focus will be on civil society as an intermediary sphere rather than as an independent social sphere. Third, the focus will be on ‘organised civil society’ rather than on the intimate sphere and forms of communication.

In sum, while not ignoring the broader interpretations of civil society as a sphere distinct from – and independent of – State and market, the focus is on
civil society as the societal sphere composed of more or less organised groups which intermediate between State/public authority, market and private sphere. This interpretation allows us to provide a particular perspective on European governance.

When Civil Society Meets European Governance

Over the last decade ‘governance’ has become an increasingly popular concept with many different meanings, used both in several academic disciplines – such as political sciences and economics – and in political discourse (Hirst 2000; Rhodes 2000). Political actors have used it in a normative way to realise reform of administrative and/or political institutional structures, such as in the new public management debate, or in the discourse of ‘good governance’ used by international development agencies. Academics have used it to analyse changes in modes of governing. In general the concept is used to look at processes and actors that are part of policy-making or offering alternative sources of governing, and that are neglected by the traditional focus of political sciences on the core institutions of ‘government’, which are parliament, executive, administration and party politics. Moreover, the concept has often been used to refer to authoritative decision-making beyond the nation-state context; for instance, in relation to international decision-making processes or even in the private sector. But it is equally applied to changing modes of public intervention within the statal context, or better: placing public intervention within a multi-level context (Peters and Pierre 2001: 131; Schobben 2000). In general the ‘governance’ concept implies the recognition that the State is not the sole authoritative source of regulation, and stresses the multiple interactions between public structures, market actors and civil society.

In the context of EU studies, the concept of governance has initially been introduced as an analytical description of the multi-level nature of governing in Europe. Yet the idea of ‘multi-level governance’ has for long been characterised by a predominant focus on the ‘multi-level’ aspect in terms of vertical relations between the territorial levels of government, rather than on the horizontal ‘governance’ component in terms of relations between the public and private actors. The Commission’s White Paper on European Governance has definitely changed this picture, paying attention in particular to the involvement of civil society actors in European policy-making.

The role of civil society actors and public-private relations has now found a central place in the concept of governance as used in EU studies. Reiner Eising and Beate Kohler-Koch (1999: 5), for instance, defining governance as embracing all different modes of governing patterns, analyse the EU in terms of ‘network governance’, where ‘the “state” is vertically and horizontally
segmented’ and where governing ‘involves bringing together the relevant state and societal actors and building issue-specific constituencies’. More recently, Christiansen et al. (2003: 6) defined governance as ‘the production of authoritative decisions which are not produced by a single hierarchical structure, such as a democratically elected legislative assembly and government, but instead arise from the interaction of a plethora of public and private, collective and individual actors.’ The authors focus on ‘informal governance’, that is ‘when participation in the decision-making process is not yet or cannot be codified and publicly enforced’ (ibid: 6). While such informal governance can take place in inter-institutional relations, and thus purely among public actors, most often informal governance takes place at the point of contact between European institutions and European society. On the other hand, one should note that while the involvement of civil society in European governance is often informal, it may also be institutionalised and codified – for instance, through consultation procedures – and publicly enforced, as is, for instance, the case in the European social dialogue.7

The concept of (multi-level) European governance has thus found its way into the complex reality of public-private relationships, or to put it differently: it has discovered civil society. There is a solid common ground in the concepts of ‘European governance’ and ‘civil society’, namely the intermediary role of organised civil society in European governance. For sure, European governance does not only relate to questions of civil society involvement, whereas civil society entails questions beyond its intermediating role in relation to governance. Nevertheless, ‘civil society and European governance’ provides us with an intriguing research agenda. It allows us to focus on this ‘common ground’ where civil society actors interact with European policy-making.

The role of civil society actors or interest groups in policy-making is surely not a new issue in EU studies. There is an extensive literature on EU lobbying. However, ‘civil society and European governance’ provides an innovative perspective for two reasons. First, the governance concept stresses the importance of different stages of policy-making and modes of governing, and therefore allows us to address the role of civil society actors at multiple levels, broadening the debate beyond the focus of the lobbying literature, which has dealt mainly with the role of interest groups at the policy formulation stage, in particular in relation to the Community method.

Second, both the lobbying and the European governance literature provide above all an analytical perspective. This leaves unresolved the many normative questions raised by the complex interactions between public-private interactions in European policy-making. With its background in political theory, ‘civil society’ is a value-laden concept, which – while not always providing answers – has the advantage of requiring us to address these normative questions.
Put differently, the civil society concept provides a normative perspective to guide research questions on the role of intermediary organisations at the multiple stages of European governance in the light of the EU’s legitimacy debate.

This research agenda cannot be the sole playground of ‘abstract theory’, as it raises both questions of constitutional design and an accurate knowledge of the complex reality of European policy-making. Normative theory should therefore be inspired and tested by empirical analysis which can be provided by political scientists and sociologists, whereas lawyers should help to bridge the distance between the theoretical ideal and the constraints of existing legal institutions.

An interdisciplinary approach is required.

INTRODUCING THE INTERDISCIPLINARY DEBATE

To reply to the interdisciplinary challenge, this book has brought together scholars with backgrounds in political theory, law, political sciences (policy analysis, institutional analysis, lobby studies, industrial relations) and sociology. Although the authors have brought with them their own conceptual lenses, all chapters reflect some opening-up to other disciplines. The first part of the book provides a more normative theoretical perspective on the topic. Yet, it is not composed of pure theoretical drafts of what civil society participation should be, but provides a normative view on civil society and European governance that bases democratic theory on a well-informed analysis of the current situation. The second part of the book focuses on the legal and institutional context of civil society involvement, and may thus appear the privileged domain of legal scholars. Yet, the legal scholars involved go far beyond the traditional focus on this topic in terms of locus standi before the court, and beyond the legal reading of EU legitimacy in terms of legality. In the third part of this book political scientists and sociologists provide a further picture of the complex reality of civil society involvement in European governance, analysing its policy and associative context. While their approach is analytical in nature, the authors are guided by research questions inspired by the normative dimension of the civil society concept, and they have lost the traditional fear of political scientists to stretch their empirical insights into normative considerations.

The three chapters constituting the ‘normative-theoretical’ part of this book all place the issue of civil society participation in European governance in the context of the ‘deliberative turn’ in democratic theory. Paul Magnette argues that the revisionist interpretation of those who argue that the EU’s democratic deficit is a ‘false problem’, based on ‘false analogies’, is not satisfactory as
long as large parts of public opinion do not believe that the EU is consistent with democratic doctrines. The idea of civil society and decentralised participation may therefore appear as a useful tool to renovate both the diagnosis and the normative answers to the democratic deficit. Yet analysing in particular the model of directly deliberative polyarchy Magnette criticises its potentially elitist nature. Direct forms of deliberation do not guarantee a process of ‘enlightened understanding’ in the citizenry at large: they fail to ensure civic education and respect for the principle of civic equality. Magnette, therefore, argues that classic representative forms and party politics should not be neglected. Moreover, he is optimistic on the fact that a stronger politicisation of EU policies can be realised without jeopardising the community model and that one can find precisely in the tension between representative and direct participatory forms of democracy the vital condition of a democratic regime.

While Magnette deals with the general relationship between representation and participation, Kenneth Armstrong explores how best to account, on normative grounds, for the role of civil society in new modes of governance, analysing in particular the Open Method of Co-ordination (OMC). Like Magnette, Armstrong cannot be satisfied with the revisionist reading of the EU democratic deficit: in particular in light of the OMC it is hard to ‘legitimise’ EU intervention with the argument that it would be a mere regulatory non-redistributive policy clearly delegated and democratically ensured by accountability at national level through an intergovernmental frame.

Social regulation and economic and redistributive policies are increasingly fused both in terms of the horizontal policy dimension and in terms of allocation of powers between European and national level. In his quest for a normative account for new modes of governance, Armstrong first looks at Habermas’ constitutional project for the EU. Yet Habermas’ response, premised on the adoption of a European Constitution and enhanced EU-level democracy in rather traditional terms of parliamentary representation, struggles to deal with the multi-level nature of EU governance. In particular, Habermas’ conceptualisation of civil society in an (exclusive) relationship with parliamentary institutions within the embrace of democratic constitutionalism seems far from the multiple interactions of civil society in European governance. Tully’s ‘agonistic constitutionalism’, concerned with the contextual practice of democratic governance, might be suggested as solution but it lacks detail in suggesting institutional structures for the realisation of radical democracy. Armstrong concludes that the critical orientation of directly deliberative polyarchy, which aims at achieving democratic constitutionalism through the practice of actual problem-solving, may best equip us to think about civil society in new modes of governance.

A critical form of deliberative democracy is precisely also what Alex
Warleigh is pleading for. His model of ‘critical deliberativism’, which is explicitly said to be ‘engaged – and thus prescriptive’, is nevertheless ‘critical’ in being both model and tool, building on the current features of EU governance. Warleigh broadens the theoretical framework in particular by taking into account the flexible nature of European integration, not only in terms of different modes of governance as analysed by Armstrong, but in terms of the scope and competences of the EU, allowing for multi-speeds as expressed through an increased role of civil society in EU governance.

EU law scholars have traditionally limited their study of interest groups to a legalistic analysis of *locus standi* before the courts (for example, Micklitz and Reich 1996), whereas EU legitimacy has mainly been framed in terms of legality, institutional balance and parliamentary representation.8 Guided by the civil society concept, the legal scholars in this volume have broadened their perspective by relying on democratic theory, by focusing on the role of interest groups beyond the court-room (both Harlow and Bonnor), and by complementing their legal reasoning with an empirical analysis of how legal instruments work in practice (in particular Bonnor).

The legal-institutional part of the book starts with a revision of the traditional topic of *locus standi*. Olivier De Schutter argues that the discussions of associational standing before the European courts have been obscured by a failure to clearly distinguish between different rationales which may support it; namely, the ‘rule of law’ rationale – that is associations could guarantee the sanctioning of illegal acts before the courts in particular in relation to diffuse interests; the ‘participatory-adjudicative’ rationale – that is associational standing allows for judicial reasoning to be based on contextual understanding; and the ‘participatory-democracy’ rationale – that is associational standing would strengthen the involvement of civil society organisations in administrative proceedings and lawmaking. De Schutter confirms that the very restrictive current constitutional framework and judicial attitude does not make it possible for organisations to act as ‘private Attorneys General’ guaranteeing the ‘rule of law’. He argues, though, that the case law, which provides some exceptions to the principle of exclusion of associational standing, allows for slightly more optimism in relation to the ‘participatory-adjudicative’ and the ‘participatory-democracy’ rationale.

Also Carol Harlow pays attention to how civil society organisations are granted access or not to the court. Yet, the issue of *locus standi* is but a part – or if you want ‘the end of the pipeline phenomenon’ – of the broader picture of how law structures interest intermediation. Harlow therefore recalls how administrative law systems differ in their dealing with civil society organisations, dependent on broader conceptions of public law and the division of powers between political institutions. In any case, civil society organisations had a long way to go before finding a place in administrative law
at all, given the focus of the latter on the relationships of the administration with the citizen rather than with interest groups. In particular the American experience with ‘hard look review’ changed this picture and opened the way to mobilise administrative law in the interest of participatory, or at least ‘consultative’ democracy. Although ‘hard look review’ was soon eroded even in the US, and administrative law in the European countries didn’t provide the same space to interest groups, Harlow nevertheless asks why EC administrative law is so particularly restrictive in conceptualising a role for civil society organisations in EU policy-making. She concludes that as yet there is no real response from EC administrative law to the problems of participatory and new governance as experienced by the European administration. She also suggests that the traditional public/private boundary should be respected when new governance mechanisms imply tightened control of QUANGOs (quasi-NGOs) and CSOs (civil society organisations).

Peter Bonnor shifts our analysis away from the traditional legal focus on _locus standi_ before the court by studying another legal instrument through which European civil society organisations ‘can complain’, namely the European Ombudsman (EO). He analyses the existing and potential relations between the EO and civil society organisations; bottom-up – how the latter may complain to the EO regarding maladministration of the European institutions, and top-down – how the former may profit from civil society activity to further its institutional strategy. A key question is whether the EO can develop into a review-body for civil society organisations which believe that they have wrongfully not been consulted, or consulted badly. That the EO rather than the Court may be well placed for such review relates to the fact that civil society organisations mostly have no real consultation rights but are consulted informally or on the basis of soft law practices.

Bonnor’s sense for detail in relation to how legal instruments work in practice makes a perfect link with the third part of the book which provides an empirical analysis of the policy and associative context of civil society participation in European governance. Although claims about interest intermediation in the EU have also been made in general terms – arguing in particular that the intermediation pattern would be pluralist (Streeck and Schmitter 1991) – it is broadly acknowledged that civil society involvement in European policy-making differs strongly according to the policy sector. Thus it has been argued that some policy sectors may be more corporatist than pluralist in nature (Falkner 1998) and that different settings and procedures for interest intermediation are based on different normative assumptions (Smismans 2004).

While it is impossible to provide an exhaustive overview of the role of civil society involvement in EU policy-making, the third part of this book provides insights from such different sectors as environmental and consumer
protection, anti-racism, regionalism, competition policy, gender policy and regulation of financial services. Yet the picture of the complex nature of civil society participation in European governance is not only coloured by the differences in policy sectors, but also by the multi-level character of the European polity (taking into account civil society participation at European, national and decentralised levels), by the different stages of policy-making (from drafting legislation to implementation and control) and by different modes of governance. Moreover, inspired by the normative perspective of the civil society concept, the empirical analyses of the third part of this book will assess the bottom-up dynamics of the associative context and collective action.

Our analytical perspective starts with a chapter by Carlo Ruzza who deals with the role of civil society organisations in three policy-sectors, namely environmentalism, anti-racism and regionalism. If civil society organisations play a democratising role, he argues, one should find a certain fit between the discourses of these organisations and those of the European institutions. Without such a common ground civil society organisations would be marginalised actors and European policy-making would not be responsive to civil society demands. On the other hand, a too strong common ground in discourses may illustrate the institutional capture of civil society organisations and their inability to express critical voice. Using the technique of frame analysis, Carlo Ruzza shows that in these three sectors civil society organisations do play a role in democratising European governance as the frames in the discourses of the associations and of the institutions show both common ground and differences that allow critical voice.

The environmental sector is equally analysed by Hubert Heinelt and Britta Meinke-Brandmaier, who further deal with another sector in which traditionally ‘collective actors orientated at civil interests’ are active, namely consumer policy. Their analysis deals with participation in regulatory policy-making, but by paying particular attention to the implementation stage, the authors go beyond the ‘traditional focus’ on participation in the drafting of legislation. They provide both an analysis of the institutional context – noting in particular how the EP is increasingly developing the function of a ‘deliberative discourse forum’ – and of the different logics of collective action in these sectors.

Roland Erne shifts our focus to the role of trade unions in European governance. Yet, while the role of trade unions – and social partners – is rather well researched in relation to European social and employment policy (Falkner 1998; Ebbinghaus and Visser 2000; Smismans 2004), Erne has chosen to analyse a policy sector which may be equally important for trade unions but in which their participation is less likely to be institutionalised, namely European competition policy. The author argues that the current institutional setting of the EU provides alternative strategic options for
organised labour, namely Euro-democratisation, Euro-technocracy and (re-)nationalisation. These strategies rely either more on the movement-dimension of organised labour or on its ‘governance capacity’, and focus on different levels of the European polity. On the basis of two detailed case studies of mergers of firms in Europe, the chapter explains how transnational trade union co-operation happens in some cases and not in others, and whether it takes a more technocratic or democratic form. The multi-level analysis shows that if there has to be a Europeanisation of organised labour it must take place not only within EU-level structures, but also within the respective national, local and firm-level trade union organisations. This will be particularly demanding in the case of the Euro-democratisation strategy, but the author illustrates that this is not entirely impossible.

Also Laura Cram deals with the potential of a Europeanising civil society. Analysing the involvement of women organisations in EU policy-making in the UK, Ireland and Greece, she shows how this participation and the evaluation of this experience by the concerned actors is affected by the domestic political context, the characteristics of the groups and the role of collective beliefs and values at the domestic level. However, despite very variable experiences in practice, what has begun to become evident from these different cases is a sense of what Cram calls ‘banal Europeanism’: drawing on the notion of ‘banal nationalism’, it is argued that the EU is becoming enhabited in so far as individuals increasingly forget to remember that the current situation is not how things always were and accept the EU as simply part of their daily lives. Viewed from this perspective the self-interested discourse of EU institutions about civil society and the institutionalisation of the fiction about its role in increasing participatory democracy may ultimately become a self-fulfilling prophecy, since it may have an important role in ‘inventing the people’, ‘enhabiting the EU’ and shaping the reality of the environment in which civil society actors operate.

Cram’s optimism may be overshadowed by the analysis of Sabine Saurugger. Building on the literature on the professionalisation of political representation (going back to Weber), Saurugger argues that collective action in the EU also appears characterised by an ‘inevitable’ professionalisation. The professionalisation takes both the form of an increasing appeal to ‘representation professionals’ (lobbyists, consultancies, law firms) and the reorganisation of the internal structure of associations. As a consequence, one should be cautious when making claims as to the participatory nature of civil society involvement in EU governance. The idea itself of associative democracy by which the EU discourse seems inspired may be characterised by a permanent tension between the need to improve efficiency of interest representation and that of assuring citizens’ participation.

The idea of different types of interest representation, such as consultancies
or associations, is also present in the analysis of Pieter Bouwen. In an earlier work Bouwen has developed a theory on ‘the logic of access’, explaining the access of interest groups to decision-making processes in terms of demand and supply of ‘access goods’. In this book, Bouwen develops the normative implications of this theory by establishing a relationship between the concepts of ‘access goods’ and input/output legitimacy, and so bridges the gap between the EU legitimacy debate and the literature on EU business interest representation. His focus on business interests may surprise in the framework of civil society participation. Yet the borderlines of the concept of civil society are not easy to draw, as shown by the discourses and documents of the EU Institutions. Moreover, from a normative point of view, it is questionable to assume that the participation of, for instance, environmental or consumer NGOs would automatically contribute to ‘input-legitimacy’ whereas business groups would never do. Bouwen’s analysis, therefore, stretches the contours of our analysis. In fact, whereas the unbalanced participation of business versus non-business interests in EU policy-making has been problematised, no research has been conducted regarding the unequal participation of different organisational forms of business interest representation, namely companies, associations and consultants. Building on the theory of access, Bouwen argues that this unequal participation has important repercussions because the different organisational forms do not have the same potential to contribute to the legitimacy of EU governance.

The broadening perspective provided by Pieter Bouwen paves the way to the last chapter of this book. In my concluding contribution, I will identify the many remaining research challenges regarding the role of civil society in European governance, which are both of an analytical and a normative nature. The chapter focuses in particular on the difficulties to provide a normative framework for the complexity of the relationships between civil society and European governance, as it emerges from the analytical research. This requires an awareness of different normative narratives and languages. Therefore, the chapter places the role of civil society in European governance in the framework of reflexive deliberative polyarchy, which implies academically more attention for interdisciplinarity.

NOTES

1. Until the Nice Treaty, the EC Treaty did not refer to the EESC with the concept of civil society, and the Committee can be defined as a ‘functional assembly’ rather than an ‘associative parliament’, see Smismans (2004: 130–40).
2. To define civil society, the White Paper referred to the 1999 Opinion of the EESC which described as ‘civil society organisations’, the social partners; organisations representing social and economic players that are not social partners in the strict sense of the term; NGOs that bring people together for a common cause, such as environmental organisations,
charitable organisations, and so on; community-based organisations (CBOs), that is organisations set up within a society at the grassroots level to pursue member-oriented objectives (for example youth organisations); and religious communities.

3. Streeck and Schmitter do not identify whether social movements should be identified as part of the associative order or not. Within civil society they are more organised than the private sphere of ‘community’ (families) but less than associations.

4. While most of the governance debate introduces ‘the private’ into public decision-making, by ‘opening up’ collective decision-making to civil society, the concept of ‘corporate governance’ may, conversely, introduce ‘the public’ into ‘the private’: it has been argued that it introduces in the concept of corporate management the idea of satisfying legitimate expectations for accountability and regulation by interests beyond the corporate boundaries (Rhodes 1997: 48 and Moon 2002), although others have pointed to the fact that ‘corporate governance’ has mainly been limited to taking into account shareholders rather than stakeholders (Hirst 2000: 18).

5. For example, Hooghe (1996) and Pernice (2002). For a comparable argument about the vertical focus of the multi-level governance (MLG) concept, see also Schobben (2000: 51). Also in a more recent work, the path-makers of the concept, namely Hooghe and Marks (2002), while distinguishing two types of MLG retain mainly the vertical focus, whereas the relation between public and private actors is said to be an ‘orthogonal’ dimension to their analysis. For more detail on how these two types of MLG relate to the normative ideas of vertical and horizontal decentralism in EU constitutional debate, see Smismans (2005b: 2).

6. According to Kohler-Koch (1999: 14), ‘governance is about ways and means in which the divergent preferences of citizens are translated into effective policy choices, about how the plurality of societal interests are transformed into unitary action and the compliance of social actors is achieved’.

7. Such codified and publicly enforced public-private interactions leading to authoritative decisions could be considered ‘formal governance’; although Christiansen et al. never define the concept of ‘formal governance’. Their reluctance to create an explicit dichotomy between formal and informal governance can be explained by the difficulty to draw the line between the two. It suggests that whenever one talks about governance the ‘informal’ can never be far away. The informal governance concept appears, therefore, in particular as a research focus, rather than as a neat definition of a particular reality.

8. The (legal) literature on the role of committees and new modes of governance has introduced alternative conceptualisations of legitimacy, for example the debate on ‘deliberative supranationalism’. Yet while this debate made (normative) remarks on the role of interest groups, this issue has never been the central focus of debate. The debate on committees has focused in particular on comitology committees (composed of Member States’ representatives) and on the role of expertise. For an analysis that places interest group participation centre stage from both a legal and normative perspective, see Smismans (2004) in relation to social regulation; and Smismans (2005a) in relation to new modes of governance.

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PART I

Democratic theory, civil society and European governance
2. Democracy in the European Union: why and how to combine representation and participation?

Paul Magnette

The political and academic discourse on the ‘democratic deficit’ in the European Union was marked by a noticeable semantic change in the 1990s. Until then, it had merely been cast in institutional and formal terms, and focused on the evolution of the European Parliament. In the EP’s argument, backed by a large part of the legal doctrine and by the Court of Justice, the EU’s democratic deficit was equated with a parliamentary deficit. Since the mid-1990s, this discourse has been less concerned with institutional issues and ever more concentrated on the role ‘civil society’ plays or could play in European governance.

This chapter argues that these two streams of thought should not be divorced, as they often are. While the formalist parliamentary approach, ignoring the role of non-public actors in EU governance, missed a large part of the picture, the new discourse on civil society tends to overestimate the importance of ‘non-conventional’ forms of participation, and to neglect the central function of classic representative mechanisms.

In the first part of this chapter, I recall that the semantic shift from representative government to participatory governance reflects intellectual evolutions as much as political changes. In the second part, I examine the most sophisticated attempt to theorise decentralised and participatory forms of EU governance, under the label of ‘directly deliberative polyarchy’. I then stress the limits of this new paradigm in the light of democratic theory and indicate how representative politics could be structured in the EU so as to cope with these limits.

RETHINKING THE ‘DEMOCRATIC DEFICIT’: THE REVISIONIST TURN

The emergence of ‘civil society’ in EU parlance is merely the result of
strategies of legitimisation developed by EU institutions in recent years (Armstrong 2002; De Schutter 2002; Smismans 2003; Costa and Magnette 2004). One should not, however, reduce the discourse on civil society to a rhetorical instrumentalisation of private parties by EU institutions. The success of this concept is also due to the aggiornamento of the academic discourse on the EU’s democratic deficit, undertaken by a number of scholars at about the same period. Many found in the idea of civil society and decentralized participation a means to renovate both the diagnosis and the normative answers to this crucial issue.

Despite its long intellectual hegemony, the parliamentary analysis of the EU’s democratic deficit progressively lost its appeal in the 1990s. After Maastricht and Amsterdam, the Union was not perceived as more democratic in opinion polls, although the EP had been dramatically strengthened (Telo 1995). Institutional mimetism reached its limits when it appeared that the EP was unable and unwilling to turn the Commission into a full-fledged European government (Magnette 2001); at the same time, the weakness of pan-European political parties and media, and the constant decline in turn-out in European elections cast light on the limits of the ‘majoritarian avenue’ (Dehousse 1995).

In this intellectual context, in the academic literature on the EU’s legitimacy three arguments, which challenged the conventional wisdom of former decades, were put forward. The most renowned historian of European integration first recalled that the EU’s legitimacy still rests primarily on national democracies, which accept and indirectly shape European policies (Milward 1992). This argument was echoed by all those who argued, after Jo Weiler, that the EU does not and cannot have a ‘demos’ (Weiler 1999), so that it cannot become a ‘federal republic’.

On the same premises, one of Europe’s leading sociologists, Fritz Scharpf, argued that ‘the confusion and frustration of present debates can only be overcome if the distinction between input- and output-oriented democratic legitimacy is accepted, and if it is realized that the European polity is fundamentally different from national democracies since it can, for the time being, only aspire to the latter’ (Scharpf 1999: 12). In other words, the ‘democratic deficit’ was a false problem which tended to hide the real source of the EU’s legitimacy deficit: its inability to deliver the policies expected by the citizens.

A third challenge came from the most subtle students of EU public policies who argued after Giandomenico Majone that the nature of EU policies is such that parliamentary and majoritarian mechanisms of legitimisation would not fit them: since the EU is primarily a ‘regulatory state’, delivering policies which can only be made efficiently by experts and independent organs, traditional forms of accountability cannot be reproduced in this framework. The legitimacy of EU institutions and policies primarily rests on the efficiency
of the decision-making process; institutions of this kind should be held accountable through a set of ‘fiduciary principles’ (restricted mandate, obligation to weigh interests, consult, give reasons and report on their action) (Majone 1996: 2001).

Taken together, these three challenging views meant that the EU is legitimate because: (a) it was created and is still controlled by the member states; (b) its policies are confined to regulatory matters which are best dealt with by experts; (c) redistributive policies should be left to the member states and their majoritarian institutions. In a typically Schumpeterian attitude, aiming at conveying a ‘realistic’ account of the EU, Moravcsik synthesised these three arguments and concluded that ‘if we adopt reasonable criteria for judging democratic governance, then the widespread criticism of the EU as democratically illegitimate is unsupported by the existing empirical evidence’ (Moravcsik 2002: 605). At the dawn of the twenty-first century, a new conventional wisdom seems to have replaced, at least in academia, the former one: the EU’s democratic deficit is a myth, due to false analogies. 2

Albeit they gained large support in academic circles in recent years, these arguments have not become hegemonic. Among students of democracy, looking at the EU from a more distant point of view, the claim that the EU is not democratic remains widespread. Robert Dahl, one of the most respected theoreticians of democracy in the last decades, has cast doubts on the thesis of those who argue that the EU is democratic because it remains under the control of the governments: ‘in practice, delegation might be so extensive as to move a political system beyond the democratic threshold’ (Dahl 1999: 21), he argued, adding that this implies that ‘an international organization is not and probably cannot be a democracy’ (ibid: 19). His pessimism is twofold: on the one hand, it is based on the assumption that the more complex the chain of delegation is, the more difficult it will be to hold agents accountable; on the other hand, Dahl’s disagreement with the revisionist accounts of the EU’s democratic deficit derives from his refusal to reduce democracy ‘to check and channel the arbitrary and potentially corrupt power of the state’ (Moravcsik 2002: 606). In Dahl’s book, in addition to accountability, democracy requires political institutions that ‘provide citizens with opportunities for political participation, influence and control’ and this in turn implies that citizens need to be ‘concerned and informed about the policy decisions’ and that ‘political and communication elites … need to engage in public debate and discussion of the alternative in ways that … engage the attention and emotions of the public’ (Dahl 1999: 31). Viewed through this lens, the EU is not democratic, and it will not be as long as it is deprived of an ‘international equivalent to national political competition by parties and individuals seeking office’ (ibid).

With more optimistic accents, Jürgen Habermas follows this line of thought when he argues that the Union could become more legitimate if it managed to
forge redistributive policies that would provide the EU with 'normative goals' and if it adopted a constitution inspired by federal and parliamentary principles so as to politicise its policies (Habermas 2001). Whether we agree with these arguments or not, they bear witness to the persistence of a 'democratic ambition' in the EU, which is not content with the revisionist account of the EU’s legitimacy.

The endurance of this 'republican' ambition goes some way to explain the recent discourses on civil society and direct participation: convinced that the EU cannot become a full-fledged parliamentary regime, but unsatisfied with the 'no problem' thesis, several authors looked at civil society and decentralised participation as a possible remedy for the EU’s lack of democratic ambition. The concept seemed flexible and attractive enough to be used as the label of an alternative approach. A European civil society is less demanding than a European 'demos': it may be described as a network of organisations rooted in national contexts and coordinated at the European level, and observers can show that it already exists (Warleigh 2001), at least in nuce. Forging a new 'democratic paradigm' based on civil society for the EU could thus be seen as an alternative to both the status quo praised by the recent revisionist analysis and to the classic majoritarian avenue.

FROM THE 'MAJORITARIAN AVENUE' TO 'DIRECTLY DELIBERATIVE POLYARCHY': THE 'PRAGMATIC TURN'

One of the most elaborated attempts to theorise the active role of private parties in European governance is the concept of 'directly deliberative polyarchy' coined by Joshua Cohen and Charles Sabel (Cohen and Sabel 1997; 2002; Gerstenberg and Sabel 2002). This approach is original in that it takes the 'revisionist' analysis of the EU seriously, without however renouncing more ambitious democratic purposes. The 'directly deliberative polyarchy' (DDP) approach can be understood as an attempt to preserve democratic ideals in the EU without assuming an unlikely parliamentary and federalist revolution.

From an analytical point of view, Cohen, Gerstenberg and Sabel in large part follow the 'revisionist' account of the EU. Rejecting the 'personificationist thesis' of those who, like Habermas, Dahl or Lijphart (1999), argue that the EU will only be democratic when it adopts a federal pattern, they recall that there is no EU-demos. But far from seeing this absence as a deadlock, they argue that 'the opening boundaries of the modern polity, the undeniable increase in heterogeneity that follows, and the manifold institutional responses that these changes in turn provoke are better seen as creating the occasion for, indeed in part anticipating, a radical re-definition of our democratic and
constitutional ideals, rather than as signs of a democratic declension’ (Gerstenberg and Sabel 2002: 291).

The EU’s peculiar form of governance is characterised by two main features, according to the authors (Cohen and Sabel 1997). First, the issues at stake are shaped less by ideological visions than in classic politics: the actors generally agree on broad priorities and merely seek to define the best means to reach them. In Weberian terms, one would say that this kind of politics raises issues of Zweckrationalität more than of Wertrationalität. This argument echoes the ‘pragmatic’ interpretation of politics developed in the 1920s by John Dewey. Contemplating the evolution of public regulations in the pre-New Deal area, Dewey was convinced that

the questions of most concern at present may be said to be matters like sanitation, public health, healthful and adequate housing, transportation, planning of cities, regulation and distribution of immigrants, selection and management of personnel, right methods of instruction and preparation of competent teachers, scientific adjustment of taxation, efficient management of funds and so on. These are technical matters, as much so as the construction of an efficient engine for purposes of traction or locomotion. Like it they are to be settled by inquiry into facts. (Dewey 1927: 124–5)

Dewey did not mean that a scientific approach should be substituted for political modes of regulation; indeed he added that he was ‘far from thinking that such considerations, pertinent as they are to administrative activities, cover the entire political field’ (ibid). By stressing the ‘objective’ nature of some public concerns, he merely intended to advocate an epistemic conception of democracy, relying on collective experience rather than on petrified ideology, and so do Cohen and Sabel in their interpretation of the EU.

Their second argument is that, in these fields, the diversity and volatility of the circumstances is such that uniform procedures and stable rules would not fit the issues. In environmental, public health or consumer protection, matters widely regulated at the EU level, the diversity of local and/or sectoral contexts is such that an ad hoc solution can only be found by decentralising the implementation and by gathering the partial knowledge of dispersed actors. Moreover, in these fields, the risks and the scientific knowledge evolve so fast that regular updates and adjustments are necessary. Again, this interpretation of contemporary issues follows Dewey’s pragmatic argument, which implied that

policies and proposals for social action be treated as working hypothesis, not as programmes to be rigidly adhered to and executed. They will be experimental in the sense that they will be entertained subject to constant and well-equipped observation of the consequences they entail when acted upon, and subject to ready and flexible revision in the light of observed consequences. (Dewey 1927: 202–3).
This diagnosis is fully consistent with the ‘revisionist’ interpretation of the EU: it argues that new forms of governance are needed because the nature of EU policies is different from the classic domain of state legislation. The advocates of DDP however depart from the ‘revisionist’ analysis in normative terms. While Scharpf, Majone and Moravcsik argue that the EU is indirectly legitimated because it is controlled by accountable governments – the latter two adding that independent EU agencies do not violate democratic doctrines because they are submitted to ‘fiduciary principles’ – the advocates of DDP support a more open, direct and participatory form of democracy. They refuse to rely on the vigilance of the stakeholders who hold the regulators accountable, as in Majone’s interpretation. And they see Scharpf’s option for national forums of public deliberation as a form of ‘enlightened nationalism’ (Gerstenberg and Sabel 2002: 303) unfit for a transnational Union.

On these premises, they argue that an alternative paradigm is required, both to describe existing forms of regulation in the EU and to assess their democratic value. The authors do not follow those ‘radical’ activists who see the EU as a fortress that should be besieged by an independent and critical civil society; a DDP approach ‘does not seek refuge in social movements’ and the ‘possibility of protest’ (Cohen and Sabel 1997: 340). Neither are they content with classic forms of consultation of the stakeholders: a directly deliberative polyarchy aims at promoting direct participation, and thereby transforming the institutional setting, not simply at opening it or putting it under pressure.

The ambition of the authors is twofold. On the one hand, they intend to demonstrate that this version of democracy is normatively superior to classic forms of legitimisation drawing on parliamentary representation. In this, they echo the vast literature on deliberative democracy published in the last decade. This interpretation of the foundations and virtues of democracy seems to fit the EU since it emphasises factors which may fit a complex, diverse and volatile environment (Benhabib 1996; Bohman and Rehg 1997; Elster 1998; Dryzek 2000). First, in a deliberative reading of democracy, diversity is seen as a favourable condition rather than an obstacle, because it offers a broad range of viewpoints and options which can enhance the problem-solving capacity of a group by enriching its information. Second, when deliberation is understood as a permanent process, it may help correct the abuses and errors of previous decisions. Third, deliberation does not require centralised institutions reducing the autonomy of local contexts, but rather calls for forms of coordination among sub-units. Fourth, the decisions are supposed to be better implemented because they are better accepted when all those who have a stake in them have had the opportunity to have their voices heard.

In the author’s view, such a conception of democracy would improve both the problem-solving capacity of the polity, and the virtues of its members. In
terms of efficiency, it should allow a broader ‘exploration of possibilities, and the discovery of unexpected ones’ since the actors ‘come to grips with their differences in the course of solving problems that none can resolve alone’ (Gerstenberg and Sabel 2002: 292). In other words, it should enhance the collective intelligence by organising the confrontation and evaluation of partial knowledge. In terms of democratic value, it is supposed to improve the deliberative competence of the participants who not only find solutions to concrete problems through this process, but also strengthen their political capacities by experiencing deliberation. Moreover, since it constantly re-examines the options, such a process is supposed to correct biases between different groups by providing ‘a powerful motive for jurisdictions of many kinds to participate’ (ibid).

Beside this normative claim, to which I will come back in the third part of this chapter, the advocates of ‘directly deliberative polyarchy’ wish to demonstrate that this model can be institutionalised, and to show that it fits the EU. They highlight three features of the EU’s decision-making process which, in their eyes, foreshadow their conception of an ‘experimental’ democracy. First, decentralisation: a large array of local actors are granted autonomy to search for solutions in given areas of public policy. Second, mutual learning: these decentralised experiences are assessed with a view to identifying both flawed and valuable solutions. Third, adjustment: these assessments should be used as standards to stimulate further experimentation, through negative (criticisms) or positive (imitation) pressures. This process is supposed to be a permanent dynamic: the lessons drawn from decentralised experimentation are used to initiate new experiences, which, in turn, will be assessed.

The advocates of DDP aim at demonstrating that such a process is not only normatively desirable, but also politically plausible. The example they highlight to make their case is the so-called open method of coordination (OMC) used in the EU to make national employment policies converge (Cohen and Sabel 2002). Inspired by public management concepts (Rodrigues 2002), the OMC consists in organising a permanent confrontation of national practices at the EU level. Since the governments are unwilling to adopt common policies, let alone to harmonise their policies, in these fields which are the core of the Welfare state, they have opted for softer methods to reduce the costs of mutual adjustments (Dehousse 2004). With the help of the Commission, they define criteria which will serve as guidelines to conceive, assess and compare their policies (benchmarking). The governments still have a broad margin of manoeuvre to implement these guidelines, but they accept to be assessed by the other governments (peer review), with the help of the Commission, and may occasionally be addressed recommendations (monitoring). Comparative evaluations should help identify successful strategies that should be imitated by the other governments (best practices) so
as to improve the overall level of policy efficiency (mutual learning). In so far as it intends to draw lessons from local experiences, and since it is supposed to confront the views of experts, bureaucrats and stakeholders, this process is seen by the authors as a form of ‘learning’ or ‘epistemic’ democracy (Cohen and Sabel 2002: 21).

How far this normative description of the OMC reflects its reality, and how far the conclusions drawn in this example can be extrapolated to other fields of EU governance remains unclear, however. Although its authors suggest that directly deliberative polyarchy is ‘an institutional ideal for Europe’ (with a question mark) (Gerstenberg and Sabel 2002), it does not seem to be a comprehensive doctrine aimed at replacing all the other modes of democratic regulation. The authors stress that this new paradigm should be seen as a solution where the problem-solving capacity of current institutions seems insufficient, not as an alternative paradigm.

They list four conditions under which DDP could be experimented – stressing that ‘departures from these four conditions imply a less strong case for DDP, and a correspondingly stronger case for markets or regulatory solutions’ (Cohen and Sabel 1997: 331):

- first, DDP could help solve problems of compliance when the dispersion of the sites where the issues are dealt with renders centralized monitoring difficult or expensive;
- second, DDP can also fit situations of diversity, as it will give the problem solvers the opportunity to choose different instruments to reach similar aims;
- third, the volatility of an issue, which renders permanent assessment and adjustment necessary, also makes the case for a DDP approach; and
- finally, the complexity of an issue, due to the multiplicity of its causes and/or its connection to other issues, also pleads for a DDP solution, because it favours coordination across policy-sectors.

Examples of such dispersed, diverse, volatile and complex cases given by the authors include environmental and consumer protection, workplace safety, vocational training and employment policies, financial regulation and transport policy (Gerstenberg and Sabel 2002) as well as policy fields which are in large part outside the EU’s scope – urban poverty, local economic development and social services (Cohen and Sabel 1997; Cohen 1997a, b). In other words, DDP seems particularly adapted to the regulation of the ‘externalities of the market’ and the ‘open coordination’ of national policies in connected areas. It is not a universal solution to the EU’s problems of governance, and leaves aside its most sensitive aspects – monetary policy, coordination of economic, fiscal and budgetary policies, judicial and police
co-operation, redistributive policies, external action (from foreign affairs to defence, including trade, aid and development).

Actually, the scope of the DDP approach is somewhat ambivalent. On the one hand, its authors define precisely the conditions under which it would be adapted and give examples which are confined to a limited dimension of EU policies; in this respect, it can be seen as a complement to representative forms of governance. On the other hand, it is presented as an alternative to deliberation at a distance by a political elite (Gerstenberg and Sabel 2002: 292), and even as the principle of a ‘new constitutionalism’ (ibid: 307–18) whose purpose is no less than to ‘provide, and to operate as, an enabling constraint with regard to transnational forums of principle-guided ‘deliberative’ problem-solving and democratic participation’ (ibid: 341). The implications of DDP writ large on the EU’s structures are not entirely clear, however.

Moreover, far from offering a substitute to representative institutions, DDP actually requires institutional interventions, as is acknowledged by the authors (Cohen and Sabel 1997: 333–4). Each of the three classic branches of government has its own role to play. First, the scope of these participatory forums, their goals and procedures should be defined by the legislature, which should also provide the necessary resources and periodically review the process. Second, the infrastructure for information exchange between and among units, and the other tasks of co-ordination, should be dealt with by administrative agencies. Third, courts should review these experiments to make sure that they act in a real DDP way. In other words, these participatory forums are likely to enhance the responsibilities (and the workload) of the institutions.

We should however wonder if the regulation of direct deliberation by representative organs leaves the EU institutional balance unharmed. The available empirical data do not allow a general evaluation, but it is reasonable to believe that such a practice could be more easily dealt with by the legislature than by the other two branches. Defining an area where DDP can be experimented and drawing the lessons is not a very time-consuming task – especially if the assessment is prepared by administrative agencies. But supporting such a process, providing the resources for co-ordination and comparison, reporting and reviewing these experiments might be a huge task. One should not underestimate the risk that decentralised deliberations might overload the institutions which are responsible for the monitoring and review of these experiments – and which already suffer from a lack of resources. When they are granted autonomy, and are entitled to take decisions, these groups will produce a new influx of cases. Without additional administrative and judicial means, these experiments could weaken the capacity of the two non-legislative branches of the EU. Moreover, by giving the legislature the
power to initiate these processes, and to review the legislation in the light of their lessons, such a process undermines the Commission’s monopoly of initiative. Most of those who have studied the open method of co-ordination conclude that it tends to strengthen the role of the governments, at the expense of national legislatures, social partners and EU institutions (Goetschy 2002). My point is not that the Community way should be protected at all costs; but the implications of new practices on the institutional balance should be assessed carefully, so as to make a fully knowledgeable decision.

THE INEQUALITY BIAS OF DIRECT DELIBERATION

The major limit of directly deliberative democracy is its potentially elitist nature. Its promoters do take the civic ideal seriously: they see DDP as an inclusive process, and hope that it will improve the civic competence of the participants. There are good reasons to believe, however, that it will prove very difficult to achieve these ambitions.

First, empirical research shows that, so far, these processes remain very elitist de facto. Those groups which participate in consultations, co-regulation, hearings and other forms of direct deliberation over-represent business associations at the expense of more diffuse interests (Wallace and Young 1997). Other processes, such as the open method of co-ordination, merely gather professional experts and bureaucrats (Goetschy 2002). When the circle of participants is enlarged to other groups, more internal forms of inequality must be noticed: among ‘civic associations’ themselves, only professional members of European networks or platforms are directly involved (Weisbein 2002). Ordinary citizens do not participate, and even though they may be members of civic groups, they are often unaware of the group’s action. Once it becomes institutionalised, civil society does not make exception to the ‘iron law of oligarchy’.

In their preliminary analysis of the open method of co-ordination, Cohen and Sabel acknowledge that these forums are not as open as they should be. True, the experts involved in these deliberations are constrained to confront their views with those of their counterparts from other countries and/or institutions; but ‘la question de savoir si cette ouverture des comités d’experts à des personnes extérieures au processus de discussion est assez large pour inclure des “profanes” … demeure sans réponse’ (Cohen and Sabel 2002: 16). The authors conclude that ‘la démocratisation de la polyarchie concertée en est encore à l’état de projet, projet dont la concrétisation n’est pas encore à l’ordre du jour’ (ibid: 22). The fact that it is not open in today’s practice, does not mean that DDP is inherently undemocratic. In large part, the theory of DDP is, like other brands of deliberative democratic theories, a theory ‘that claims to
elucidate some aspects of the logic of existing democratic practices’ (Benhabib 1996: 84) on the one hand and to provide, on the other hand, ‘a model for institutions, a model that they should mirror’ (Cohen 1997a: 79). Whether a more open and inclusive DDP would be closer to the deliberative ideal of civic equality remains uncertain. The promoters of this paradigm draw on the classic accounts of the virtues of deliberative democracy: they express the hope that participants will ‘acquire political ideas in light of which democracy itself is justified’ (mutual respect, trust …) and that the process will ‘not only assume adequate information, but help to ensure it’, and thereby favour political equality and collective learning (Cohen and Sabel 1997: 318). These arguments restate the classic Tocquevillian credo, still very powerful in US political theory (Putnam 1993; Sandel 1996), that decentralised forms of deliberation are ‘ce que les écoles primaires sont à la science; elles la mettent à la portée du peuple; elles lui en font goûter l’usage public et l’habituent à s’en servir’ (Tocqueville 1985, I, V: 123). This assumption has never been demonstrated, however, and two objections can be raised. First, even if this were true, it would confine the virtues of DDP to the direct participants: nothing demonstrates, indeed, that those who do not take part in these experiences benefit from their educative effect. Second, it is doubtful that the lessons drawn from a local experience can be extrapolated to larger arenas: participants can become very competent in one given policy area, and yet remain incompetent citizens from a broader point of view. Their participation in a specialised forum could even distract them from broader arenas, by focusing their attention on narrow concerns – as illustrated by many instances of the famous NIMBY (not in my backyard) syndrome. Tocqueville himself warned against invalid inferences (Elster 1988), and one of the most enthusiastic advocates of ‘social capital’ has recently acknowledged the fragility of this assumption (Putnam 2000).

In other words, direct forms of deliberation do not guarantee a progress of ‘enlightened understanding’ (Dahl 1989) in the citizenry at large. Even if participatory mechanisms were widely open, even if inequalities could be corrected, even if deliberation was held in public – conditions which are far from being met in the EU today – their effects on the citizen’s civic competence would remain very limited. This is, in my view, the major reason why representative forms of democracy should remain primordial, and why participatory mechanisms should only be seen as a useful complement. While advocating dispersed and participatory forms of democracy, John Dewey acknowledged the limits of his model in the absence of a ‘great public’:

The ramification of the issues before the public is so wide and intricate, the technical matters involved are so specialised, the details are so many and so shifting, that the public cannot for any length of time identify and hold itself. It is not that there is no public, no large body of persons having a common interest in the
consequences of social transactions. There is too much public, a public too diffuse and scattered, and too intricate in composition. And there are too many publics, for conjoint actions which have indirect, serious and enduring consequences are multitudinous beyond comparison, and each one of them crosses the others and generates its own group of persons especially affected with little to hold these different publics together in an integrated whole. (Dewey 1927: 187)

In large part, this diagnosis made in the US in the 1920s holds true for the contemporary European Union. Despite the existence of thousands of organised groups and of numerous dispersed sites of open regulation, the EU lacks a ‘general public’; the citizens do not perceive its major issues and are not politically mobilised by EU affairs. And DDP, based on direct participation and decentralisation, is unlikely to fill this gap.

According to most scholars, civic participation indeed requires cognitive and motivational resources (Thompson 1970): citizens will only participate (directly or through their votes) if they think they understand the issues at stake, and if they think these issues are important for them. Otherwise, participation will be the province of the citizens benefiting from large financial, organisational and conceptual resources. In turn, two sets of factors seem to play an important role in the acquisition of these resources (Mayer and Perrineau 1992; Norris 2003; Milner 2002): the institutional structure, and the polarity of the party system. Concerning the former, research has shown that the institutional clarity of a political system encourages participation (Przeworski et al. 1999). The polarity of the party system is also recognised as an important factor of mobilisation: first, because it simplifies the electoral choice; second, because clear ideological conflicts socialise citizens, who understand complex political issues through simplified and normatively coherent discourses.7

This is acknowledged by the advocates of DDP themselves. Echoing Rawls, Joshua Cohen argues that political parties are a crucial element of any democracy for at least two reasons: first, ‘they provide a means through which individuals and groups who lack the “natural” advantages of wealth can overcome the political disadvantages that follow on that lack’; second, ‘parties are required to address a comprehensive range of political issues, they provide arenas in which debate is not restricted in the ways that it is in local, sectional, or issue-specific organizations’ (Cohen 1997a: 86). If co-ordination between sub-units cannot ensure these objectives, the problem for the EU then becomes: how can political parties be strengthened in such a diverse and volatile context?

The political system of the EU is not immune to partisan conflicts and open discussions. But, deliberation in the EU takes place in such a large number of different places, at so many different moments of the policy process, and between so many different actors, that it is widely dispersed, and very difficult
to understand. The problem is acknowledged by national institutions, too. However, the difference is that the complex set of actors, policy networks, institutions, and procedures which make national decisions is, in the eyes of the public, simplified by politics. Citizens understand public issues through the image given by political leaders and the media, not by personal experience. In the EU, on the contrary, the complexity of the machinery appears as such, without being translated into commonsense words by the performance of personalised political actors.

How could this kind of pedagogic dramatisation of politics be produced in the European Union? As we have seen in the first part of this chapter, many argue that a constitutional revolution is the only answer to this question (Habermas 2001). According to this federalist argument, the European Union can only be politicised, and thereby give rise to active citizenship, if it follows the classic European parliamentary model. A coherent executive, derived from and accountable to a double legislative body, able to lead the policy process and personified, would be much more understandable than the present Community model. Choosing the leader of this executive would become a crucial issue that would stimulate both the organisation of political parties and the media at European level. Citizens would feel that they were able to select their leaders and entitled to dismiss them. Thus, a European public sphere would emerge around the centre of the political system, as it did in the genesis of national public spheres (Mair 2000).

Two kinds of difficulties are, however, raised by this type of scenario. First, it is obvious, when one examines the reactions to this model among political leaders – those who collectively form the constitutional power in the EU – that it is still far from being the object of consensus. This does not mean that it is not possible, but that it will at least require time. Second, this scenario might be incompatible with the ‘community model’. If the Commission became the central organ of the Union, and if it was supported by a clear-cut parliamentary majority, could it remain the mediator between governments and the ‘guardian of the treaty’? In other words, could a politicised Commission be the neutral compromise-broker and controller of the other institutions and Member States? There seems to be a political dilemma here: either the Commission remains neutral, and the Union cannot be politicised; or it becomes a kind of European government, in which case its role needs to be fully rethought.

This, however, is a dilemma which is more apparent than real. It is largely due to a widespread, but partly incorrect, analytical distinction. Many scholars and political leaders indeed oppose both a politicised democracy, which in their eyes can only be majoritarian, and a consensus democracy, which cannot be politicised. In other words, the majoritarian model would be the only alternative to the consensus style of EU decision-making and the lack of interest that it generates.
Comparative analysis of European experiences shows that the opposition between consensus and politicisation is not so clear-cut. The classic distinction made by Lijphart between majoritarian and consensus democracies is often misunderstood. In ‘consociative’ countries, governments have often been made up of very large coalitions, associating two or more parties from both the left and the right-wing. This does not mean, however, that these countries have been dominated by consensus, the absence of public deliberation or civic apathy. On the contrary, strong political parties have been able to discuss their divergences in public, even though they were part of the same ‘majority’. Within a liberal-socialist government, such as the ones experienced in Belgium and the Netherlands in the 1990s, vivid oppositions on taxation or social policies are frequent and publicly exposed, and citizens do generally understand the issues at stake. In other words, a lively deliberation on public issues, opposing clearly distinguished visions, is compatible with a form of government based on compromise. So far, nothing has demonstrated that this kind of politicisation produces less civic interest than the classic majoritarian kind does. When compromises follow a sound process of public deliberation, and when their logic is clearly explained, the issues and the responsibilities of the different actors can be understood.

If the majoritarian model of Westminster and the hyper-consensus model of the contemporary EU are the two extremes of a continuum, a middle position, where discussions would be organised around five or six political identities should be possible. The EP party system is the matrix of this kind of politicisation (Hooghe et al. 2002; Gabel and Hix 2002). True, this kind of politicisation will not give the EU the majestic simplicity of Westminster, but it is, nevertheless, possible to clarify the issues and the politics of the EU, without requiring a constitutional revolution which is not supported by large political forces today, and which may not be adaptable to the subtle diversity of the European polity.

CONCLUSION

Long confined to institutional discussions, the discourse on the EU’s democratic deficit is now primarily centred on the role non-institutional actors play or could play in European governance. This semantic shift is useful as far as it reminds us that democracy cannot be created by institutional reforms, but it becomes dubious when it leads us to forget the central role of representative organs.

In this chapter, my purpose was first to show that we cannot define objective criteria to assess the EU’s democratic value, because such an evaluation depends on the observer’s normative preferences. The revisionist interpreta-
tion of those who argue that the EU’s democratic deficit is a ‘false problem’, based on ‘false analogies’, is not satisfactory. As long as large parts of public opinion, echoed by civic associations and scholars, do not believe that the EU is consistent with democratic doctrines, the ‘democratic deficit’ rhetoric will remain a powerful social norm. One way to address this problem might be to try and influence the perceptions of the public, by changing the criteria used to assess its democratic nature, as Schumpeter did in his time. Another strategy is to search for other ways to institutionalise democracy. This is what the advocates of new forms of direct deliberation do.

The major value of these approaches is that they take the democratic ambition seriously, while acknowledging that the EU cannot become a Westminster-like parliamentary regime. In so doing, they avoid both the deadlock of constitutional mimetism, and of the status quo. Moreover, they underline the democratic potential of existing practices often criticised for their opaqueness, such as comitology or the OMC, and they indicate how they could be improved. Their purpose is not only to invent new forms of deliberation that could complement existing institutional mechanisms, but also to renovate these institutions.

I have argued, however, that these approaches do not fulfil all their promises so far. They notably fail to demonstrate how direct forms of democracy can respect the principle of civic equality and foster civic education. This is the reason why classic representative forms should not be neglected: they remain, so far, the least unsatisfying way to ensure these crucial principles. And contrary to what is often argued, a stronger politicisation of EU policies does not jeopardise the community model.

Party politics and direct participation should thus be seen as complementary rather than adverse modes of deliberation in the EU. In his interpretation of Karl Mannheim’s work, Paul Ricoeur argued that a safe democracy must always combine ideology and utopia (Ricoeur 1997). The former is an indispensable element of social integration and civic education, but runs the danger to close the agenda and ossify public debates. Utopian views help reduce these risks, by opening new avenues and integrating marginal groups, but they generate secessionist temptations. The mutual interaction of these two patterns of thought may strengthen their respective virtues and reduce their negative effects. The opposition between representation and direct participation is not a perfect illustration of this hypothesis – as parties can be very utopian and private groups very ideological – but it exemplifies a comparable dynamics. Direct participation can solve some of the problems raised by classic institutions – lack of knowledge, rigidity, disconnection from social experiences. … In turn, a better structured representative arena could offer answers to the limits of participatory governance – fragmentation, elitism. … The EU, with its original set of competences and unprecedented
institutional balance, is a fascinating laboratory in this respect. This does not mean that tensions between these two forms of democracy should gradually vanish; but that they should be seen as one of these virtuous conflicts that the republicans have always seen, since Machiavelli, as the vital condition of any democratic regime.

NOTES

1. This divorce was clearly illustrated by the inter-institutional debate on European governance in 2001. While the Commission insisted on the participation of civil society in its White paper on European governance (COM(2001) 428 final), the EP answered by emphasizing the primacy of representative politics in its resolution on this White paper (doc. PE A5-0399/2001).

2. Despite their ‘analytical’ ambition, these approaches are obviously not normatively neutral. A purely objective approach of a sensitive issue such as the EU’s democratic deficit is not possible. Consciously or not, explicitly or not, the authors are always determined by their own national references (Schmidt 1997) and/or by their normative preferences (Craig 1999). The classic parliamentary avenue was based on orthodox constitutional premises; the ‘indirect legitimacy’ thesis is connected to an intergovernmental reading of the EU; the ‘output-legitimacy’ approach is consistent with a social-democratic ideology, while the ‘expert regulation’ argument is closer to a liberal-madisonian view.

3. In this respect, the advocates of ‘directly deliberative democracy’ adopt an attitude comparable to that of those who reinterpreted the practice of comitology as an instance of deliberation (Joerges and Neyer 1997).

4. Applied to the debate on the EU’s constitution, DDP is merely a restatement of the debate on constitutional patriotism (Habermas 2001) and constitutional toleration (Weiler 1999), as its major argument is that such a ‘new constitutionalism “sees” the polyarchical dispersion of sovereignty and legal pluralism … not as an evacuation of the practice of constitutional justification, but rather as an innovative way, open to modern denationalized societies, of self-consciously vindicating the original idea that democratic self-government and constitutional justification are not thwarted by, but rather benefit from the heterogeneity of participants’ (ibid: 316).

5. The authors make other disclaimers: ‘On suspecte souvent avec raison la démocratie concertée d’être sélective, voire élitiste: et lorsque la discussion relève de la compétence d’une élite professionnelle de la résolution des problèmes … elle deviendrait franchement exclusive. … La polyarchie concertée transforme potentiellement la “professionalité” : elle réduit sa prétention technocratique, et révèle que le jugement des experts dépend de l’évaluation des fins et moyens. … Ce n’est bien sûr qu’une hypothèse. Les éléments permettant de mesurer la vocation démocratique de la polyarchie concertée sont équivoques, peu concluants, voire contradictoire. Par exemple, on ne connaît pas le degré de ramification de la polyarchie concertée dans la société civile, au-delà d’une élite technique’ (ibid: 21–2).

6. In this respect, their attitude is similar to that of the authors who interpret the process of comitology as a form of ‘deliberative supranationalism’ (Joerges and Neyer 1997): these scholars argued that these processes are already deliberative, and that stressing their deliberative potential could help strengthen it: ‘The legitimacy of this governance is to be measured by the deliberative quality of the decision processes organized in it; with the help of law, these qualities are to be guaranteed, and additionally to have their connections to both the institutions of the nation states and the EU ensured’ (ibid: 7).

7. This does not mean that the party system should be bipolar to stimulate civic interest; a party system consisting of five to six parties might even be more efficient since it promotes more open and nuanced public discussions (Milner 2002).

8. In this prospect, the logic of the delegation of executive tasks to independent agencies would
have to be extended to a large set of new competencies. See Everson and Majone (2000).

9. Moreover, majoritarian governments, too, are often coalitions of parties who publicly disagree.

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Democracy in the European Union


3. Inclusive governance? Civil society and the open method of co-ordination

Kenneth A. Armstrong

INTRODUCTION

The point of departure for this chapter lies in a criticism made by Stijn Smismans that much of the discourse on the role of civil society in European Union (EU) governance has under-valued and under-analysed the role of civil society actors in 'new modes of governance' (Smismans 2003: 490). This chapter also picks up the thread of an argument raised in an earlier work that criticised the European Commission’s White Paper on European Governance (European Commission 2001) as overly-preoccupied with attaching civil society to the institutional apparatus of the ‘Community Method’ of legislative governance while underplaying the potential of civil society actors within new modes of governance like the ‘open method of co-ordination’ (‘OMC’) (Armstrong 2002). The ambition of this contribution is, therefore, to seek to account for civil society in new modes of governance like the OMC.

It would be useful to describe the role that civil society actors are, or are not, playing in OMC processes. Indeed, it would be of value to compare and contrast the degrees of civil society participation in different OMC processes and across different Member States. Nonetheless, the principal preoccupation of this chapter rests in articulating the conceptual basis through which to account for, or indeed critique, civil society’s role in OMC from the perspective of democratic constitutionalism.

The argument develops in the following way. In the first section, the principal features of OMC as a new mode of governance are outlined. The intention is not to provide a history or description of different OMC processes (there is now a rich literature out there: see Hodson and Maher 2001; de la Porte and Pochez 2002; de la Porte 2002; Regent 2002; Ferrera et al. 2002; Armstrong 2003a; Trubek and Mosher 2003). Rather, and focusing on the OMC process for social inclusion, some key features of this process are highlighted to facilitate the later discussion. The second section explores how best to account, on normative grounds, for the role of civil society in new modes of governance. It begins with Habermas’s procedural democracy;
proceeds through to an analysis of Majone’s model of the regulatory state and its co-option by Moravcsik in the name of democratic ‘realism’; and concludes with Tully’s agonistic constitutionalism and Cohen and Sabel’s directly-deliberative polyarchy. This sort of tour of the conceptual landscape is not entirely original (see especially Cohen and Sabel 2003). But it focuses specifically on the role of civil society and seeks to further develop the critical analysis of constitutionalism in the EU in the context of new modes of governance. The chapter concludes that notwithstanding the limitations of directly-deliberative polyarchy, its re-orientation of the methodology of critique from the horizon of the universal and ideal to that of the contextual and the practical offers us a way of both allowing civil society to get its hands dirty in processes of governance while also contributing to the normative quality of experimental governance. Whether or not such an openness to civil society renders OMC both an effective and legitimate technique of governance must, on current evidence, be open to doubt, but more importantly, it must continually remain so.

OMC AS A NEW MODE OF GOVERNANCE

The open method of co-ordination, while much discussed as a new mode of governance, also evades easy description. The term can be used simply to refer to the governance technique that the 2000 Lisbon European Council gave birth to and baptised as OMC. This new governance ‘child’ – apparently combining centralised elements of objective-setting, co-ordination and monitoring with decentralised elements of domestic policy formulation and exchanges of best practice – is described in the Lisbon Presidency Conclusions as having the following characteristics:

- fixing guidelines for the Union combined with specific timetables for achieving the goals set in the short, medium and long terms;
- establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice;
- translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;
- periodic monitoring, evaluation and peer review organised as mutual learning processes.

OMC processes have been initiated in a number of policy spheres from social
inclusion and pensions, to education and training. The post-Lisbon OMC ‘children’ draw their family resemblance first, from the ‘grandparent’ of the co-ordination process laid down for the multilateral surveillance of Member States’ economic policies (Article 99 EC) and more immediately, from the ‘parent’ of the employment policy co-ordination process launched at the Luxembourg summit in 1997 (and formalized in Articles 125-130 EC Treaty). However, each OMC process has its own unique features and combinations of features. In this way, the Lisbon Conclusions are best viewed as an attempt to articulate the family resemblance rather than to provide the genetic template for OMC clones.

For example, and using the model of the employment strategy co-ordination process, the Lisbon European Council committed the EU and Member States to tackling social exclusion and making a ‘decisive impact on the eradication of poverty’ through the use of an OMC process based on:

- the agreement of a set of common EU objectives (the Nice Objectives);
- a commitment by Member States to submitting National Action Plans (‘NAPincls’) on domestic strategies to tackle social exclusion;
- the monitoring and evaluation of the NAPincls through a process of review jointly by the Commission and the Council of Ministers;
- a mechanism for the peer review of examples of good practice;
- an agreement to develop a set of common EU social indicators (endorsed at the Laeken European Council in December 2001).

The OMC process on inclusion has a number of noteworthy features. First, and unlike the employment co-ordination process, there is no mechanism for issuing either individual or collective recommendations to the Member States, nor are there any European-level targets which are to be met. Second, the application of OMC in the social inclusion field also differs from both the economic and employment co-ordination processes because the EC Treaty does not itself specify the precise process to be used (something which the Member States could have written into the Treaty at Amsterdam at the same time as they were writing in the co-ordination process for the employment strategy). Instead, OMC is being used to give effect to Article 137(2) (a) EC which provides:

The Council … may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences in order to combat social exclusion, excluding any harmonisation of the laws and regulations of the Member States.

We have, then, a Treaty provision designed to encourage co-operation
between Member States which is ‘open’ as to the process to be used and the actors involved, but is ‘closed’ to the possibility of legislative harmonisation as an output of co-operation between Member States.

Third, the OMC process on inclusion contains a specific procedural objective, namely, ‘the mobilisation of all relevant bodies’ (4th Nice Objective). This objective – understood as including the promotion of the participation and self-expression of those suffering exclusion; mobilising public authorities at all levels in mainstreaming and co-ordinating policies to tackle exclusion; and promoting dialogue and partnership between public authorities, NGOs and social partners – has application not just to the policy processes Member States have or put in place, but indeed to the process of preparing the National Action Plans. In this way, the 4th Nice Objective provides a point of leverage for civil society actors to advocate more participatory governance approaches to tackling social exclusion and to the OMC process itself.

Finally, to support the OMC process there is also a Community Action Programme which provides funding under different streams for processes of ‘peer review’ and, significantly for present purposes, for the core-funding of transnational networks working in the social inclusion sphere (note that capacity-building is restricted to the direct support of transnational networks although national awareness-raising projects have been funded). The co-ordination process in the social inclusion field has developed to include a role for civil society actors at both national and transnational levels. It is this role which this chapter seeks to conceptualise.

NEW MODES OF GOVERNANCE AND EUROPEAN CONSTITUTIONALISM

As Tully reminds us, new modes of governance, both within and beyond the boundaries of the traditional nation state, pose new challenges for those seeking to articulate theories and concepts of democracy and constitutionalism (Tully 2002: 211–14). To adopt the language of Christodoulidis (2003), we can approach the development of new modes of governance from the perspectives of ‘constitutional optimism’ or ‘constitutional pessimism’. Viewed pessimistically, such new modes of governance may transfer decision-making to institutions beyond the normative embrace of traditional national democratic structures. In a transnational context, the setting of binding rules to be treated as a higher form of law may restrict domestic (democratically-chosen) policy choices, while the processes by which such rules are agreed may themselves claim little by way of democratic legitimation. On the other hand, new modes of governance open up the possibility for us to question how
well ‘old’ modes of governance serve us in providing democratic and constitutional legitimacy as well as suggesting new possibilities for democratic and constitutional experimentation. From this more ‘optimistic’ perspective, the very value of new modes of governance lies in the fact that they do indeed trouble or transgress settled understandings of democracy and constitutionalism. By unsettling our assumptions we must then make or re-make the case for old and new forms of governance, including making arguments that stem from concerns about democracy and constitutionalism.

In the specific context of the European Union, this tension is familiar. The development of comitology, European agencies and social dialogue have prompted favourable and unfavourable analyses and the emergence of OMC is not immune from such oscillations between constitutional optimism and pessimism. But the point is perhaps less one of adding up the pros and cons and seeing whether new modes of governance are to be welcomed or resisted and more one of better articulating the particular terrain on which such judgments are made. Below, different constitutional interpretations of new modes of governance are considered. We begin by considering the long shadow cast by Jürgen Habermas’s theory of procedural democracy over our understanding of the role of civil society in democratic legitimation.

The Shadow of Habermas

As Seligman identifies (2002), the turn to civil society in political theory and political philosophy since the Scottish Enlightenment has been predicated upon its ability to mediate certain sorts of tensions: ‘the individual and the social; public ethics and private interests; and individual passions and public concerns’ (ibid: 13–14). At the same time, and with the identification of the state and the economy as differentiated social sub-systems, civil society may also be understood as mediating and balancing relationships between the state, market and community (Offe 2000). Few theorists have been more influential in their articulation of this mediating role than Jürgen Habermas.

Habermas attempts to reconcile the individual and the social, the private and the public by steering a course that is normatively stronger than liberalism but weaker than republican theories (1996: 298). He seeks to account both for the private and public autonomy of the individual through a procedural model of deliberative constitutional democracy. This model rests upon a relationship and balance between the formal decision-making structures of the political system and the communicative structures of the ‘lifeworld’: a relationship mediated through a ‘public sphere’, of which civil society constitutes an important element. Thus, for Habermas:
Civil society is composed of those more or less spontaneously emergent associations, organizations, and movements that, attuned to how societal problems resonate in the private life spheres, distil and transmit such reactions in amplified form to the public sphere. The core of civil society comprises a network of associations that institutionalizes problem-solving discourses on questions of general interest inside the framework of organized public spheres. (Habermas 1996: 367)

Civil society, therefore, collects, organizes, thematizes and communicates public opinion to the formal structures of will-formation within the political system. At the same time, civil society reflexively attends to its own needs, ensuring its capacity to continue undistorted processes of communication and opinion-formation (Habermas 1996: 370).

If the legitimacy of the exercise of power by the political system relies upon deliberative democratic processes, it also relies on the constitutional embedding of such processes. Democracy and constitutionalism are, therefore, to be reconciled as self-reinforcing principles through which self-government can be realised. Legitimation though deliberative democracy is only possible through constitutional commitments to the prerequisites of a procedural model of democracy: the sorts of rights traditionally protected by liberal constitutionalism (for example rights of free speech and organisation, property and privacy, non-discrimination and equality); the constitution of the institutions of polyarchy (legislatures, courts, executive, political parties, voting structures); and the regulation of the circulation of power within the political system (including constitutional adjudication and judicial review). Moreover, as well as being central to the ‘constitutional’ underpinning of procedural democracy, law is also of general importance as the medium through which society – through democratic law-making processes – creates binding rules for itself and delegates powers to the administrative structures of the political system.

Habermas’s ambition is to stake out a set of normative and critical orientations through which to analyse and judge the democratic quality of governance practices. In this, Habermas affords civil society an important role in opinion-formation within the public sphere, mediating between the ‘lifeworld’ and the political ‘system’. But as will be suggested in the following sections, this understanding of civil society cannot be easily appropriated by those seeking to articulate a role for civil society in new modes of governance. OMC processes are in tension with the institutional, constitutional and legal architecture underpinning Habermas’s theory. Moreover, the trajectory of the governance of the welfare state in Europe points not to a (constitutionalized and democratized) EU as the successor to the nation state, but rather a multi-level engagement of institutions, constitutional and legal systems and actors (including civil society).
Civil society, the political system and OMC

Although Habermas attributes an important role to civil society, he also limits that role. That is to say, Habermas makes clear on numerous occasions that, for the most part, all that civic actors within the public sphere can do is to seek to ‘influence’ formal decision-making within the political system rather than exercising political power:

> public influence is transformed into communicative power only after it passes through the filters of the institutionalized procedures of democratic opinion- and will-formation and enters through parliamentary debates into legitimate law-making. (Habermas 1996: 371)

In seeking to maintain a separation between the communicative rationality of the lifeworld and the power imperatives of the system, civil society purchases its critical capacities at the expense of any actual power to decide. For Ashenden (1999), this idealisation of civil society as a sphere outside of power undercuts any critical potential arising from civil society. Ashenden suggests that civil society is rendered up in Habermas’s work as a normative presupposition and as an abstraction. Following Foucault, she suggests that only by considering the turn to civil society as a historically contingent occurrence can we truly hold up for judgement the practices of governance and indeed, civil society itself. In this way, the practice of criticism is not to be found within the idealisation of civil society in relation to the power of the political system, but must be oriented towards uncovering the practices of civil society and their relationship to practices of governance (we return to this issue below in the context of discussions of agonistic constitutionalism and directly-deliberative polyarchy).

Even if we were to accept the centrality of the balance between civil society and the formal democratic structures of the political system, this relationship is put into tension with modern developments in governance. We can approach this tension in two ways that are relevant to the present discussion. The first relates to the general implications of EU membership for the balance between civil society and representative democracy. The second concerns more directly OMC as a mode of governance.

In the context of the EU, the supply of democratic legitimation through institutions of representative democracy is weak for well-known reasons. Although Habermas would seek to remedy these deficiencies by recourse to a ‘catalytic’ constitutional process entailing the adoption of a formal constitution (supported by a referendum), a reinvigorated parliamentary structure, an active civic public sphere and a constitutional patriotism binding Europeans together (Habermas 2001), it is far from obvious that transnational representative democracy can bear the weight placed upon it to secure democratic legitimation for a Union of 25 or more states. Moreover, as Fine
and Smith note (2003), Habermas pursues a ‘twin-track’ process of democratic legitimation: (a) deliberation within the informal public sphere (facilitated by civil society); and (b) deliberative will-formation within the formal structures of representative democracy. However, insofar as representative democracy is likely to remain weak in the EU (even if a Constitution is ultimately adopted), as Fine and Smith suggest, the consequence is a shift from a ‘two-track’ process of democratic legitimation to a ‘one-track’ process (the centrality of civil society in promoting discourse and deliberation) that unbundles the reciprocal relationship between formal and informal public spheres. From a Habermasian perspective this either means that civil society takes on a more central legitimating role than would generally be considered appropriate, or it indicates a potential delegitimation of EU governance.

More importantly for present purposes, however, is what happens when governance moves outside the formal structures of representative democracy. As Habermas himself recognises much of modern governance exhibits trends towards what he would view as the illegitimate power exercised by an administration freed from the traditional separation of powers and ‘the diminishing binding force of parliamentary statutes’ (Habermas 1996: 430). That is to say, the rise of the regulatory welfare state is associated by Habermas with the development of ‘paragovernmental bargaining arrangements’ and other relationships between ‘administrative power’ and ‘social power’ (the power of organised interests) that cut across the ‘official’ constitutionally-regulated circulation of power within the political system. It is also associated with the retreat of law, the rise of new knowledge systems and new functional regulatory demands.

While the use of ‘social dialogue’ at EU-level is perhaps the sort of example of paragovernmental bargaining that Habermas has in mind (not least because of its ability to result in binding legal instruments), OMC might also be viewed as part of this trend because the relationship between parliamentary structures, national and EU administrations, and civil society is recast. First, OMC enhances the role of national and EU administrations. The European Parliament has no direct role in OMC processes (let alone being the instigator or author of such processes). Of course, given that OMC combines transnational processes of objective-setting, performance measurement, and review with decentralised processes of policy-making and legislating, then there is a role for national systems of representative democracy to become involved. Nonetheless, one cannot ignore the fact that national parliamentary systems are responding to stimuli from national and EU administrations rather than the other way round.

Second, insofar as civil society actors do become involved in OMC processes, although not the same as the corporatist-style arrangements which Habermas critiques as the development of the ‘therapeutic state’, OMC is
certainly closer to a model of governance that short-circuits rather than affirms the Habermasian ideal model for the circulation of power between civil society and the parliamentary complex. Third, OMC processes certainly indicate a decen­tering of law and an increased role for the statistical construction and mapping of social problems (we consider the role of law more fully below).

While OMC is a complex governance instrument (the efficacy of which is still unclear), it is evident that it does not conform to a traditional governance model in which institutions of representative democracy promulgate laws that are implemented by an administration and interpreted by a judiciary. Therefore, one cannot simply account for civil society’s role in OMC processes having in mind a Habermasian perspective that would be deeply troubled by such a reconfiguration of the relationship between representative and participatory democracy. Habermas does recognize that his ideal model is in tension with new modes of governance and counsels both legislatures and courts to seek to ensure fidelity to principles of procedural democracy. He even suggests a need for the ‘democratization’ of the administration (Habermas 1996: 440). But compared with his elaborate understanding of the preconditions for constitutional democracy focused on traditional representative democracy, Habermas can only weakly suggest ‘the interplay of institutional imagination and cautious experimentation’ as a basis for democratizing the administration under alternative governance conditions. So although a greater involvement of civil society in influencing, monitoring and evaluating OMC processes might be an example of democratic experimentalism, Habermas offers us no clear guide as to what counts as legitimate ‘influence’ and illegitimate ‘power’.

Multi-level governance, the welfare state and OMC
As will be apparent from the previous section, it is not that Habermas is unaware of the challenges that modern governance poses to the relationship between democracy and constitutionalism: quite the opposite as his work both on the European Union and on the rise of the regulatory welfare state make clear. The EU – as both a source of legal constraint on democratically-chosen domestic policies and as a legislative structure in its own right – has the potential to engender legitimation problems. The answer for Habermas is precisely the same as his response to the potential pathologies of the nation state: the constitutionalization of procedural democracy within the EU (see Singh Grewal 2001). Indeed, for Habermas, the positive need for greater policy co-ordination between Member States necessitated by the restriction on domestic decision-making capacity demands a heightened legitimation through the emergence of a European civil society and public sphere, a ‘catalytic’ European Constitution, a shared ‘political culture’, and reformed
political institutions (Habermas 2001). In this sense, Habermas seems to point us towards the EU and transnational governance as successor to the nation state (the EU as a means of making up for the loss of decision-making capacity domestically), but equally then requiring the same sorts of modalities of legitimation to prevent the reproduction of the pathologies associated with the emergence of the welfare state.

However, the development of OMC points to a different trajectory for the welfare state in Europe. As Scharpf indicates (2002), while EU economic law and policy have important implications for the conduct of national welfare policies, the solution of a uniform EU social welfare policy based on a consensus among Member States (which would have legitimacy in Habermasian terms) is not feasible, while a uniform solution based on majority rule would lack legitimacy. Our problem is how best to manage diversity between different national welfare systems rather than how to build a legitimate uniform European welfare system. The aim of OMC is, therefore, not to seek to impose a uniform and consensus-based model of the welfare state on EU member states, but rather to steer the diverse national systems. It cannot, therefore, be brought within the normative embrace of an EU constitutional architecture that seeks to re-impose a unity of sovereignty and legitimacy through a European public sphere (see Cohen and Sabel 2003). This multi-level terrain of decentralised decision-making and centralised co-ordination and steering which neither transcends the nation state, nor leaves it to its own devices, is not easily captured within Habermas’s critical constitutional project. Indeed it simply highlights the tension that Fine and Smith (2003) read in Habermas’s work between cosmopolitanism as the successor to the state and cosmopolitanism as something to be reconciled with the endurance of the state.

The point is this: while new legitimation problems are emerging as the EU seeks to manage diverse welfare states, the Habermasian proceduralist paradigm struggles to deal with the multi-level nature of EU governance. A response premised on the adoption of a European Constitution and enhanced EU-level democracy seems to miss the very different trajectory along which OMC is travelling.

 Law and OMC
Law plays a number of key roles in Habermas’s normative project. Law institutionalises and regulates democratic processes of will-formation, while endowing the individual with rights. Law and adjudication thus seek to protect both public and private autonomy. As a communicative medium, law acts as a crucial bridge between the ‘lifeworld’ and the political and legal ‘systems’. At the same time, law is a potential site for the pathologising tendencies of the political system while also at risk of overburdening its own regulatory
capacity. The answer for Habermas is not a liberal strategy that reduces the role of law and minimises the welfare state, nor is it an acceptance of the functional demands of the welfare state, but again a middle course in which the validity of law is grounded in the constitutionally regulated processes of democratic will-formation.

OMC processes, however, indicate a decentring of law. First, in terms of institutionalisation, while it is true that the co-ordination processes for economic and employment policies are institutionalised in the Treaties, the same cannot be said of the other post-Lisbon processes including the social inclusion process. The attempt to ‘constitutionalise’ OMC within the Constitutional Treaty failed in as much as no general provision outlining the features of OMC processes was agreed. The nature and form of OMC instead owes much to how the institutional actors shape and define these processes.

It is perhaps its potentially porous quality that allows OMC to open itself up to civil society. To be sure, the lack of legally institutionalised procedures represent a dilemma for transnational civil society and there have been calls for the creation of a legal basis for ‘civil dialogue’. On the other hand, legal institutionalisation of procedures performs a constraining as well as an enabling function and so is always a dilemma for civil society (an issue we return to below when considering Christodoulidis’s critique of the optimism of constitutional pluralists). Even from a pragmatic point of view, transnational NGOs have been reluctant to argue for a greater constitutionalisation of OMC until and unless such processes can be demonstrated to produce tangible and favourable results. And at the same time, given the multi-level nature of OMC, these issues are played out not only at transnational level but also, crucially, at national level in terms of the processes surrounding the NAPs. The point is this: OMC processes have not only been the subject of limited legal institutionalisation and constitutionalisation, the very question of the extent to which such processes ought to be constitutionalised and participation processes institutionalised is at stake.

Second, until the European Court of Justice’s ruling in respect of the procedures to be used when triggering the ‘excessive deficit procedure’, co-ordination processes have been free from judicial scrutiny. But as even that ruling recognises, judicial review is still only possible in respect of acts producing legal effects. Whereas the ECJ has been called upon to adjudicate on issues of the ‘representativeness’ of social partners in social dialogue, and on issues of access to documents in respect of comitology, what marks these ‘new modes of governance’ out from OMC is that they are oriented towards the production of measures producing legal effects whereas the OMC process on inclusion is not. It is difficult to envisage ways in which civil society actors might resort to adjudication before the Union’s courts to assert ‘rights’ of public autonomy in the absence of a process that produces measures having
legal effects. Whether or not domestic legal systems provide opportunities for adjudication around NAP processes will, of course, vary from one system to another. But again, this returns us to a multi-level constitutionalism that does not sit easily within the Habermasian perspective.

Third, in a more general sense, the language of law as the communicative medium is absent in OMC processes. To be sure, although not cloaked in legal form, guidelines, objectives and recommendations might well use prescriptive language. In this way one needs to avoid an overly formalistic approach. In addition, the employment policy co-ordination process may have more direct linkages to formal legal texts (and vice versa). Nonetheless, at its most basic level, OMC does not rely upon the traditional Community Method of law-making in which the institutional triangle of Commission, European Parliament and Council of Ministers negotiate legislative texts. Problem-solving under OMC is premised not upon an ideal of the production of a generalisable legal text as a uniform solution, but instead on the attempt to manage diversity through decentralized decision-making (see Scharpf 2002 and more generally, Cohen and Sabel 1997: 324–5). It tends to cloak its normative steer in ‘soft law’ guidelines, objectives and recommendations, rather than the ‘hard law’ of regulations or directives. Moreover, law as a language and law as a discipline – a discipline occupying a central role in EU studies – occupies a less dominant role compared to the techniques of the practitioners of social policy defining, quantifying and measuring labour market participation, child poverty, educational attainment at key stages. Debates revolve not around formally drafted legal texts, but around the choice of indicators, the availability and reliability of data, objectives and targets. There is a greater ‘fluidity’ of language in institutional documents than would be normal in legal texts.

Finally, and notwithstanding the Charter of Fundamental Rights, the introduction of OMC indicates a certain resistance to the use of law to endow the citizen with social rights. That is not to suggest that rights discourse is wholly absent or indeed that there is a necessary antagonism between OMC and rights discourse (see Armstrong 2003a; Bernard 2003): merely that the OMC process on inclusion has not been clearly enlisted towards the aims of promoting fundamental social rights and that the space OMC occupies is one deliberately not occupied by harmonised legislation in the social sphere (recall the prohibition on harmonisation in Article 137(2)(a) EC).

In short, while Habermas prescribes that ‘the more law is enlisted as a means of political steering and social planning, the greater the burden of legitimation that must be borne by the democratic genesis of law’ (Habermas 1996: 42), what happens when law is not enlisted towards the ends of political steering or social planning (as in OMC)? The question of democratic legitimation is not resolved and either we conclude that OMC processes ought
to be considered as suffering from deep legitimation problems that a greater involvement of civil society cannot cure or we need to rethink how we approach the question of legitimate and effective governance in the EU.

Does the EU Need More Democratic Legitimation?

One response to the question posed at the end of the last section might be to seek to treat much of what the EU does as a form of ‘exception’ to the normal precepts of democratic constitutionalism. There is a now well-known argument, deriving from the work of Giandomenico Majone that suggests we conceive of the EU as the external dimension of ‘the rise of the regulatory state’ (1994, 1996, 2000). Majone suggests that insofar as the EU is engaged in policies of economic and social regulation rather than redistributive policies, what matters is the credibility and efficiency of the regulatory process. That is not to say that Majone is unconcerned with issues of legitimacy. But using a ‘principal-agent’ approach there is a separation of democratic concerns (which attach to the delegating role of political ‘principals’ – the Member State) from legitimacy and accountability concerns that relate to how political ‘agents’ – the EU’s institutions – exercise their delegated responsibilities. Although there is a (national) space for ultimate democratic control over the delegation of powers, the thrust of the argument is in favour of giving independence to expert decision-makers to carry out their delegated tasks (subject to certain due process, transparency, participation and accountability requirements). From this perspective the historical tendency towards technocracy in the EU is not an accident that waits for democratic legitimacy to catch up in time, but is intrinsic to regulatory policy-making that demands a certain insulation of expert decision-making from overt political interference. Conversely, redistributive policies are less well suited to EU action and ought then to remain within the democratic structures of nation states. So while Habermas seeks a unified approach to European integration based on increasing democratic constitutionalism, Majone separates regulatory and redistributive policies in a way that the former requires little by way of direct democratic legitimation at EU-level, while the latter’s democratic legitimation is supplied through national structures.

Majone’s thesis has proved a source of influence for Moravcsik’s attempt to generalise a view that the EU requires little more by way of democratic legitimation than is already supplied by way of existing constitutional checks and balances, direct EP elections and, more fundamentally, national democratic systems (Moravcsik 2002). Rather than trying to build democratic legitimation in the EU having in mind ‘a utopian form of deliberative democracy’ (ibid: 605), Moravcsik demands that we look to ‘the real-world practices of existing governments and the multi-level political system in which
they act (ibid: p. 605). In Moravcsik’s ‘real world’ the practices of governance
are those of delegated regulatory policy and, following Majone, are in need of
no further democratic legitimation.

Gerstenberg and Sabel analyse Majone’s approach as the ‘de-politicization of
European policy-making’, the ‘separation of economics and politics’ and a
form of ‘antagonism’ between constitutionalism and democracy (2002:
296–300). To this we can add the separation of legitimate social regulation at
EU level, from more general social welfare provision which Majone would
view as necessarily within the normative embrace of Member States.
However, as Wincott (2003) argues, the separation of economics from the
politics of redistribution and of EU level market integration with national level
social welfare provision makes decreasing sense. As he suggests in the post-
EMU, post-Lisbon environment, the rhetoric has often been framed in terms
of integrating social policy into the economic policy agenda. What this
‘integration’ means is ambivalent. In terms of social inclusion it might mean
ensuring that, in an act of collective solidarity, the EU commits to improving
the social and economic position of Europe’s poor. Alternatively, it might
mean modernising social welfare protection to prevent Member States
breaching EU rules on fiscal restraint. Whatever the interpretation, it is less
clear that the sort of separation that Majone has in mind works well in the post-
Single Market context embodied in the Lisbon Strategy. And of course, we still
need to keep in mind the point that EU economic law has a potential
impact on domestic social policy choices. In sum, one cannot categorically
dismiss social welfare policies as matters merely for domestic democratic
legitimation, when the tendency of EU policies from the 1990s onwards has
been for EU law and policy to have an increasing influence on those choices
and to seek to do so.

Moravcsik opens up a second line of attack on the ‘radical democrats’ in
arguing that increasing participation does not increase legitimacy. He does this
by suggesting that insulated institutions are often more popular than
democratic institutions. In conflating popularity with democracy no space is
left open for making sense of democracy even – or perhaps, especially – where
governments or decision-makers are unpopular. Moravcsik expands on his
theme, however, in also suggesting that the issues that voters find most salient
– healthcare, education, law and order, pensions and social security, and
taxation – are not primarily matters of EU competence, whereas those matters
that do fall within EU competence – trade policy, removal of non-tariff
barriers, and so on – are of low political salience. Therefore, so the argument
goes, the domestic arena supplies the necessary democratic legitimation for
the issues that voters find salient and for which the EU lacks competence.
To be sure, as has already been indicated, there has not been an expansion
of EU legislative competence in the fields Moravcsik identifies as being of
high political salience. Nonetheless, it is in precisely these fields that the EU has sought to develop OMC as a way of enhancing EU influence but without expanding legislative competence. For present purposes the fact that OMC might attempt to steer policies in exactly the areas of pensions, social protection and healthcare must at least beg the question as to how to ensure legitimation beyond the traditional ‘regulatory policy’ domains of the EU. However, in a now-familiar move, Moravcsik dismisses these areas as either ‘modest’ or ‘atypical’ (2002: 607, fn 1). The application of OMC is, therefore, simply categorised as a field of disproportionate attention by those scholars of European integration interested in democratic constitutionalism. To be sure, if OMC in fact makes little difference to these spheres then we need to take Moravcsik’s motivating hunch – that we need to be careful about an abstract over-supply of democratic legitimation – a little more seriously. But conversely, if OMC does impact upon the substantive policy preferences of Member States in these fields then we do need to ask how democratic legitimation is to be ensured and what role civil society might play in this process. Moravcsik is right to ask us to look at ‘real-world’ practice: the problem for him is that OMC is in the real-world and it has ambitions to make the real-world social inclusion policies and social protection systems of Member States more effective.

Agonistic Constitutionalism

While Moravcsik may be unduly dismissive about the role of deliberative democracy in EU governance, nonetheless, ‘radical democrats’ ought not to assume the democratic high-ground merely by default. We need to analyse more closely the claims that radical democrats make for more participatory modes of governance inclusive of civil society actors. In this section, we consider Tully’s ‘agonistic constitutionalism’ and in the following section, we analyse ‘directly-deliberative polyarchy’.

For Tully, radical democracy requires a theoretical and critical re-orientation away from the ‘abstract and prescriptive’ and towards the ‘contextual and dialogic’; that is oriented not towards ‘agreement on universal principles or procedures’ but to renegotiation and revisability; and that is concerned with the contextual practice of democratic governance within and beyond the traditional institutions of constitutional democracy (Tully 2002: 217–21). The methodological orientation, therefore, is towards analysis of the ‘practices of democratic freedom’ and the ‘democratic struggle on the ground’ as fought by democratic activists in a form of ‘globalisation from below’ (ibid: 219–20). Although Tully points us in the direction of the practices of governance, he is less specific about actual or possible institutional structures of governance for the realisation of radical democracy.
It is this weakness that proponents of ‘directly-deliberative polyarchy’ highlight and seek to address (see below). Nonetheless, one can see the way in which the broadening out of governance processes like OMC to embrace civil society might (ideally) constitute a form of democratic struggle on the ground and contribute towards the sort of inclusive democratic practices Tully envisages.

A stronger objection to Tully relates to the relationship between democratic freedom and constitutionalism. For Tully, societal pluralism is generative of disagreement and contestation that goes all the way down to the constitutional level. That is to say, not only must constitutionalism frame a negotiated process of political disagreement, it must also put itself to the test by being the object of disagreement: democratic freedom must preserve the ‘calling into question and presenting reasons for the renegotiation of the prevailing rules of law, principles of justice and practices of deliberation (Tully 2002: 218). In this way Tully seeks an inclusive form of democratic constitutionalism, open not only to political practices of inclusion (including a role for non-governmental organisations and civil society), but also to an inclusive constitutionalism capable of being contested and renegotiated but within constitutionalism.

For Christodoulidis (2003), however, the constitutional optimism of Tully fails because constitutionalism cannot at one and the same time maintain its structuring properties (its institutionalisation) and render them up for deliberation: a performative contradiction. Drawing on systems theory, he suggests that the need for law to reduce complexity and for constitutional law even more so to structure and guide expectations, defeat practices of democratic freedom that seek to invoke and yet transgress constitutional norms. Civil society’s engagement with constitutionalized practices of democratic freedom can never, for Christodoulidis, escape the structuring effects by which constitutionalism defines civil society’s presentation and representation. Better then, so the argument goes, for civil society to remain outside of constitutionalism and to maintain its critical potential through its under-determination (and here the anti-globalisation movement is suggested as a case in point).

In many ways, Christodoulidis’s critique of constitutional optimism is more than an attack on the possibilities of constitutional pluralism or constitutional agonistics: for him, constitutionalism of itself is a foreclosing process. Viewed from the interior perspective of systems theory, in which law must achieve normative closure even if it remains cognitively open to its environment, not surprisingly the idea of constitutional openness is a contradiction in terms. But, there is only a performative contradiction in an inclusive constitutionalism if the only constitutionalism worth the name is ‘exclusive’ by virtue of it having definitively established determinative internal rules (a
completed institutionalisation) in respect of a pre-constructed or presupposed environment (the demos). One cannot rule this out, of course, but it does require to be demonstrated and it also requires to be defended against the possibility of challenge (consider, for example, the manner in which constitutionalism in the United Kingdom has – on differing grounds – adapted to the renegotiation of the constitutional order upon membership of the EU: see Armstrong 2003b). While we can accept that constitutionalism is a structuring discourse, it is not inevitably a wholly foreclosing discourse (see Gerstenberg, 2002 discussed further below).

Nonetheless, Christodoulidis’s depiction of civil society might be seen as a valiant attempt to rescue civil society from the sort of neutering that Ashenden sees in Habermas’s work (see above). And yet, in working against constitutionalism, Christodoulidis ends up producing a kind of mirror-image idealization of civil society. Whereas Habermas offers us a civil society that is all talk and no action within the confines of democratic constitutionalism, Christodoulidis suggests a civil society that can have no voice within democratic constitutionalism for fear that in the act of authorship it betrays its critical potential. We are left then with the convulsive actions of disorganised civil society as the beacon for radicalism. Ironically, then, both Habermas and Christodoulidis share a tendency to idealise civil society – the former bringing civil society’s relationship to the political system within the embrace of democratic constitutionalism, the latter by keeping civil society outside its grasp. Both end up undercutting civil society’s political engagement within democratic constitutionalism.

There is a point here, however, that does need to be taken seriously: at what price does civil society enter into governance structures? As commentators have noted (especially in the context of the recent debates around civil society generated by the White Paper on Governance – see Armstrong 2002; Curtin 2003), the rediscovery of civil society as a source of legitimation for EU policies has been accompanied by a desire to governmentalise and indeed civilise civil society. Constitutionalisation and institutionalisation may be purchased at too high a cost for civil society: but if instead of seeing this as an inevitability we view it as a danger, and if instead of viewing rules and processes as fixed rather than open to examination and contestation, then what we have is a challenge for inclusive constitutionalism rather than its defeat. And at the more practical and political level at which Christodoulidis rightly asks us to position civil society, it is worth keeping in mind that civil society has a choice whether to seek to act inside or outside the structures of institutionalized governance (including OMC). The fact that OMC opens up a space for civil society does not mean it has to fill it. Indeed, the very threat of ‘exit’ or non-participation may enhance the ‘voice’ of civil society both within existing governance structures and over those structures.
Following Foucault, Tully’s inclination is to see claims as to limits of thought and action in genealogical terms and from this to suggest the possibility ‘to think and act differently’ (Tully 1999). The emergence of new modes of governance at this historical juncture may provide a basis for rethinking the possibility for an inclusive system of democratic governance in which civil society can play a role. What precisely that role should be and what the institutional architecture for its operationalisation should look like is perhaps what proponents of directly-deliberative polyarchy seek to contribute to the cause of radical democracy and democratic experimentalism.

‘Directly-Deliberative Polyarchy’

For Cohen and Sabel (2003), neither the ‘unitary sovereignty’ perspective of Habermas nor the ‘technocratic’ ‘principal-agent’ world-view of Majone and Moravcsik offer adequate critical and conceptual vantage points from which to make sense of EU governance, and especially its newer modes of governance. While travelling some way with Tully, nonetheless, there is discontent with Tully’s lack of practical and institutional specification of the architecture of democratic experimentalism. Instead Cohen and Sabel suggest a model of ‘directly-deliberative polyarchy’ (DDP). In this final part of the chapter the potential of DDP to offer a conceptual basis by which to account for civil society’s involvement in new modes of governance is explored. The theory is outlined and then analysed in respect of: (a) its proposal as an ‘alternative’ approach to democratic constitutionalism; (b) the scope and extent of substantive deliberation; and (c) its account of civil society.

Co-ordinating decentralised deliberation

DDP offers a model of collective problem-solving and decision-making premised upon decentralised deliberation and reason-giving on substantive matters of policy in areas such as education, health and welfare. The mere fact of decentralisation is not enough: rather decentralised decision-making needs to open out to the influence of similar processes taking place in other localities. The mutual exchange of information and the development of techniques of monitoring and evaluation demand the networking of decision-making processes at all levels and the revisability of decisions in light of new information. Deliberation, therefore, requires co-ordination oriented towards mutual influence and learning (Cohen and Sabel 1997: 326). Thus, the role of ‘central’ governmental units is to collect and disseminate information; to co-ordinate multiple processes of substantive decision-making; and to ensure that decisions taken in one field have regard to broader contextual factors.

DDP seeks to decentre legislatures and courts as arenas for resolving substantive social conflicts and instead looks towards what Gerstenberg and
Sabel term ‘a horizontalised and polyarchical conception of constitutionalism’ in which constitutional practices extend out into society (2002: 327–8). For Gerstenberg – and this point is important keeping in mind the discussion of the alleged performative contradiction of agonistic constitutionalism – constitutional principles are always legally indeterminate until applied in practice and, therefore:

the goal is that interpretative conflict, rather than being absorbed by the courts, is worked out in deliberative political forums where parties to a conflict with diverging normative outlooks and perceptions of social pathology are required to engage one another in a process of mutual learning and of collaboratively figuring out what indeterminate constitutional provisions mean under given circumstances. (2002: 173)

This is not mere interpretative wiggle-room: it is an assertion of the indeterminacy of law and the attribution of meaning in the concrete circumstances in which interpretative claims are invoked and contested. The obligation on courts is then less to resolve conflicts by reference to agreed constitutional standards and more to promote ‘jurisgenerative’ deliberative processes of conflict resolution in which constitutional norms and values are stakes in the argument or ‘enabling constraints’ (Gerstenberg 2002: 189; Gerstenberg and Sabel 2002).

As Cohen and Sabel (2003) admit, deliberation also requires democratisation. Following Michelman (1999) they propose five preconditions for democratic deliberation:

1. protection of rights of association, free speech and participation;
2. norms of transparency;
3. co-ordination of deliberation across different ‘units’ (territorial, societal and governmental units);
4. accountability of deliberations in specific areas with wider public debates; and
5. individual rights to contest decisions.

In the same way that courts are decentred from the task of constitutional dialogue, democratic processes meeting these preconditions extend out beyond the legislature to include new modes of governance.

In terms of civil society, DDP potentially opens up an important space for civil society. DDP is concerned to create inclusive processes by which actors – including civil society actors – identify common problems and seek solutions. Civil society can do more than signal its discontents and desires to the formal state apparatus: it can use its knowledge and skills to highlight problems and suggest solutions. Civil society can also take on shared
responsibilities in implementing agreed policies and evaluating their effectiveness, feeding back perceived strengths and weaknesses into the policy design. In short, we move from a conceptualisation of civil society as normatively ‘privileged locus’ of critique and resistance without power (Ashenden 1999) to one that accounts for civil society as a potential participant in democratic experimentalism. Instead of civil society appearing as the bridge between the public and private spheres, as influencing the political system while remaining outside of governance, as an abstract idealisation, DDP brings civil society directly into governance as a concrete political and legal actor.

**DDP and European constitutionalism**

It will be apparent from the brief description of OMC given at the start of this chapter that there is a resonance between OMC processes and DDP’s prescription of centralised co-ordination of decentralised processes of substantive decision making. But how should we judge OMC’s contribution to European constitutionalism when viewed from the perspective of DDP?

There is a sense that while claiming that DDP offers an ‘alternative’ perspective on problems of democratic constitutionalism, nonetheless when applied in the EU context it takes for granted or presupposes a fairly substantial pre-existing institutional and constitutional architecture at national and transnational levels. Is this something to be transcended or transgressed as the alternative strategy of DDP takes hold, or is there a co-existence/cohabitation/contestation of ‘old’ and ‘new’ constitutionalism mirroring ‘old’ and ‘new’ governance? Perhaps the difficulties encountered in the Convention drafting the Constitutional Treaty point to the difficulties in accommodating new governance like OMC within a re-worked, but nonetheless traditional constitutionalism. Proponents of DDP are open to the accusation of simply side-stepping the issue of whether there are or are not accepted constitutional norms and institutional structures that provide a basis for future experimentation, and if so, how should one account for the legitimacy of such ‘enabling constraints’ in the first place. This weakness has particular relevance for Gerstenberg’s desire to spread around constitutionalism and constitutional interpretation: it tells us that we have a stake in constitutional interpretation, but it does not tell us what is the text to be interpreted, how it came into being, why certain values have been constitutionalised yet others have not, and whether certain values ought to be constitutionalised. If DDP ends up piggy-backing on certain constitutional givens, it looks more like a ‘second front’ in radical democracy, rather than an alternative.

A different way in which we might think about this issue is whether the more traditional institutions of polyarchy (that DDP states will be decentred
rather than dissolved) supply a default position in the event that deliberation and contestation in the experimental realms of new modes of governance boil over into conflict or continually produce irresolution. The more that experimental designs provide ‘exit’ options to return conflicts to traditional institutions for ‘ultimate’ resolution, the less that proponents of radical democracy can justify treating DDP as an ‘alternative’ to mainstream democratic constitutionalism rather than an ‘addition’. Even if it is not assumed that traditional governance institutions supply a default position, there remains an ambiguity about just how much experimentation is to be expected. In the context of the EU, notwithstanding the vogue for OMC, the traditional Community Method has hardly disappeared. In other words, it is unclear how much of the architecture of ‘traditional’ democratic constitutionalism is presupposed and how much remains once experimental democracy takes hold.

**Substantive deliberation and OMC**

At the core of DDP is a demand for deliberation on matters of substance. Yet, there are obviously different degrees of substance from the comparatively minor to more major decisions. While democratic experimentalism may break out with regard to some substantive issues, there must inevitably be an anxiety about tokenism and direct deliberation on some topics but not on others, or that deliberation takes place within a policy context that has already been set. Of course, this sort of problem is something that proponents of DDP can use as a critical tool by which to judge new governance. Indeed it has relevance for the OMC processes being undertaken in the context of the Lisbon Strategy. For example, while there is evidence from the OMC process on inclusion that points to a developing institutionalisation of ‘processes about processes’ (for example, in participative processes surrounding the production of NAPincls), it is less obvious that this is provoking deliberation on the substance of national policies. And, while DDP would suggest the need for linkage between social and economic co-ordination processes, the trend towards the streamlining and co-ordination of the different OMC processes (European Commission 2003) raises the fear that the anti-poverty agenda is in fact being sidelined both by economic imperatives and by a focus on the use of OMC to reform social protection systems rather than to make a ‘decisive impact on poverty’. It is perhaps one of the greatest concerns surrounding the OMC process on social inclusion that whatever the level of civil society participation in this process, and even if it were ultimately to promote deliberation on the substance of policies, nonetheless, it is a process subsumed within a broader macro-economic framework and value-system that is less open for debate.

All of which raises the question whether certain sorts of constitutionalised value pre-commitments are required to ensure that deliberation remains open
to the full-range of substantive concerns. As Wilkinson suggests, constitutional optimists who embrace visions of agonistic or experimental democracy run the risk of purchasing a cosmopolitan idealism at the cost of ‘any specification of the substantive values of post-national community’ (2003: 472). Again, this returns us to the issue of what sorts of constitutional pre-commitments DDP presupposes or requires.

Finally, there is, of course a crucial connection between the scope and space for deliberation and the use of DDP to account for civil society. It makes little sense to account for civil society in OMC from the perspective of DDP if civil society is excluded from substantive deliberation, or if deliberation takes place on some substantive topics but not others. In short – and to this extent we return to Moravcsik’s inclination – unless and until OMC processes generate wide-ranging substantive deliberations, we need to avoid over-stating the constitutional significance or quality of civil society’s engagement with the processes surrounding OMC.

**DDP and civil society**

It is perhaps paradoxical that while proponents of DDP clearly have in mind an active role for civil society in governance processes, nonetheless, the dimensions of this role are somewhat under-specified. Proponents of DDP do recognise that ‘the extent to which deliberative polyarchy ramifies past the technical elite into civil society is an open question’ (Cohen and Sabel 2003). However, the issue is not just whether DDP reaches out to civil society, but to what extent civil society has the capabilities and power to reach into DDP to be a meaningful participant in governance. There is more than a degree of optimism about the extent to which civil society will engage in open deliberation on matters of substance. While one can find intriguing local experiments of this sort (especially in the realm of social inclusion), our everyday experience tells us that getting individuals to involve themselves in, and remain committed to, decision-making processes is a tall order. Moreover, there are institutional constraints on participation from the venue of meetings and their timing to the very language and discourses used. We also need to recognise the extent to which democratic experimentalism and its engagement with civil society will be resisted by traditional institutions of representative democracy. These are important issues when considering civil society’s ability to engage in OMC processes.

If DDP is right to seek to bring civil society within governance processes, it also needs to develop an understanding of civil society as an object of governance. We have already noted this point in discussing Christodoulidis’s anxieties about an inclusive constitutionalism that brings civil society within governance. To some extent, new modes of governance like OMC have avoided some of the problems associated with the ‘representativeness’ of civil
society encountered in respect of access to EU consultation processes (on which see Curtin 2003). On the other hand, and especially in the OMC process on inclusion, there are funding-ties and close relationships between transnational NGOs and the European Commission. If DDP gives us a way of thinking about OMC how should it react to these sorts of concerns? Perhaps because DDP avoids an idealisation of civil society (whether inside of democratic constitutionalism like Habermas or outside of it like Christodoulidis), it can seek a critical perspective on OMC and civil society that is vigilant towards processes of institutionalisation and co-option that conflict with the goal of an inclusive and open system of governance. Concerns about who gets to participate in governance and under what conditions can be internalised as part of that which requires to be explained and justified in respect of the substantive deliberations in issue.

It will be obvious from the discussion in this and the previous sections that the issue is not whether OMC is DDP. Rather, the aim has been to suggest that DDP offers us a critical perspective from which to account for OMC and for civil society, and to hold up for judgement the legitimacy of OMC. That judgement depends not merely on civil society’s involvement but also on DDP’s other dimensions – substantive deliberation, co-ordination, democratisation, and horizontalisation of constitutionalism. And it is a judgement that is always in the making. There is a need for constant justification of the legitimacy and effectiveness of governance processes along these dimensions. What this means, however, is that at most all we can say is that new governance processes like OMC can at best make provisional claims to legitimacy that are challengeable when analysed in practice. OMC is not DDP, but DDP does give us a way of thinking about the legitimacy of OMC and the role of civil society in OMC processes.

CONCLUSIONS

The ambition of this chapter has been to adopt a reflexivity towards how we think about civil society in the EU. In particular, it has sought to trouble a certain tendency to invoke a form of Habermasian civil society in contexts that are otherwise antagonistic to (or at least in tension with) Habermas’s ideal of procedural democracy. Alternative interpretations of democratic constitutionalism have been explored and their insights and limitations discussed. In the end, it is suggested that directly-deliberative polyarchy’s critical orientation best equips us to think about, and account for, civil society in new modes of governance in the EU.

When viewed from the perspective of DDP there is much to be pessimistic about the normative quality of OMC processes as they now stand. At the same
time, the ambition to mobilise all actors (public and private, national and sub-national); the development of new, even if provisional, working arrangements between NGOs and government officials; the development of multi-level interactions between social and political actors in different aspects of the OMC process are to be welcomed. There is something interesting going on here and it is important that we understand it and relate it back to issues of democratic constitutionalism rather than treat it as somehow apart from such concerns or merely overshadowed by the real constitutional work of producing a Constitutional Treaty for the EU. To return to Tully, new modes of governance challenge us to reconsider what we accept as the limits of democratic constitutionalism. The OMC processes being developed offer us a new perspective from which to reflect on civil society’s contribution to legitimate European governance.

NOTES

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4. Civil society and legitimate governance in a flexible Europe: critical deliberativism as a way forward

Alex Warleigh

INTRODUCTION

Legitimate Governance in the EU: Involving the Citizen, Managing Diversity

The role of civil society in legitimising EU governance is beginning to attract widespread attention. Because civil society acts as an intermediary between the citizen and the state, energising and drawing upon civil society would potentially do much to reduce the EU’s ‘democratic deficit’. It could breach the knowledge and interest gap that exists between the great majority of citizens and the practitioners of EU politics. It could ‘upskill’ citizens, making them more capable of engaging with EU governance in a meaningful way. As an effort to entice such engagement, and also as a result of it, increasing the role of civil society in EU governance could make the catalogue of EU competences more in keeping with those which citizens regularly demonstrate they think suitable for the Union, which often differ significantly from those it has acquired over time through its own efforts and as gifts from the member states (Blondel et al. 1998). Additionally, increasing the role of civil society in EU governance could help rekindle practices of active citizenship at national and sub-national levels, because the innovations in democratic governance that are required by reform of the quixotic EU polity cannot be carried out solely at ‘EU level’. Instead, they require attention to practices of governance at all levels of the ‘fused’ Euro-polity, meaning that efforts to reinvigorate EU democracy should have benefits for, and in turn benefit from, such efforts at national level (Schmidt 2003a; 2003b; Warleigh 2003b).

Because civil society empowerment can imply limiting the role of public authorities in both pro-market and pro-citizen ways, the idea attracts support from both the left and the right wings of the political spectrum (Keane 1988).
Along the ‘more or less Europe’ cleavage, support for the notion is similarly widespread. Eurosceptics cannot coherently oppose the empowerment of civil society in EU governance, because their key arguments are based on the Union’s perceived illegitimacy. Thus, from this perspective, empowering civil society would in all likelihood be a nail in the coffin of the Union and is therefore to be welcomed. On the pro-integration side of the debate, those who seek to deepen European integration have also come to support a role in that process for civil society for the opposite reason: they consider it likely to enrich the fabric of European integration, weaving denser strands of mutual understanding and co-operation across member state borders. Importantly, this role goes at least some way beyond the system-building hopes that neofunctionalists held for private interest groups, towards a genuine embracing of the idea that civil society empowerment in EU governance is of inherent democratic value (see the Commission’s White Paper on European Governance (CEC 2001)).

The problem faced by this new consensus is the sad fact that there is no currently-existing ‘European’ civil society to allow into EU governance practice. Rather, there are pluralistic civil societies in each of the member states, which correspond to varying understandings of what civil society can and should do, and which seek to engage with the various EU and global issues according to different, often nationally-determined criteria. Indeed, they may fail to mobilise at EU level entirely. Thus, the first task to accomplish in giving civil society a new role in EU governance is to ‘Europeanise’ the various national civil societies – that is, to facilitate the acquisition of an explicitly EU-related dimension of behaviour and ideas in such entities. Obviously, there is an institutional aspect to address here: all the civil society-Europeanising in the world would ultimately be futile if EU governance structures are not reformed to allow greater civil society participation in EU decision-making. However, the more important task is to construct a European public space, in which citizens can be socialized into EU governance and begin to feel part of the EU system instead of simply supporting or rejecting it as a result of analyses of the Union’s capacity to cater to certain of their functional interests.1

My argument, then, is that the process of Europeanising civil society requires two things. First, an explicit, objective, and continuous acknowledgement by the member states and those civil society groups which benefit from and influence EU policy that the EU is, in essence, ‘a good thing’. Whatever its shortcomings, the EU serves to generate at least some beneficial public goods and policy which would otherwise either not exist or be less plentiful. Thus, in line with observations by Jachtenfuchs (1998), Zürn (2000) and Schmidt (2003a, 2003b) that political organizations beyond the nation-state level are a rational requirement of those who seek to produce public
policy in the face of economics-driven globalisation, serving to increase both policy delivery capacity and the ability to have a meaningful voice, I maintain that the essential utility of the EU needs to be hammered home relentlessly. I make no apology for this utilitarian element of my argument; civil society will never be Europeanised if citizens fail to appreciate the EU’s fundamental usefulness.\footnote{3}

The second requirement is a version of deliberative democracy based on flexible integration,\footnote{3} active citizenship and a real acceptance of diversity as a normative good (rather than a problem), which I call ‘critical deliberativism’. This approach, which aims to make deliberative democracy practicable in the real-world context of the EU, is perhaps not so ‘pure’ as many theorists would wish, but it does have the benefit of being operationalisable. As I make clear below, critical deliberativism is a critical theory, that is, it is one which is clearly normative and which also seeks to provide the means whereby change can be effected. To that extent, it is both model and tool, both objective and means of realisation. This makes it no less coherent; however, it does make it 
engaged – and thus prescriptive.

The structure of the chapter is as follows. First, I set out in some detail the core features of critical deliberativism, setting it out as a theoretical framework for the Europeanisation of civil society and evaluating its strengths and weaknesses as a theoretical model. Second, I discuss the various barriers that exist to implementation of the model and the Europeanisation of civil society. Third, and finally, I suggest practical action that could be taken to overcome these barriers.

FINDING A WAY FORWARD

Evaluating Critical Deliberativism Conceptually\footnote{4}

How can EU democracy be improved in order to support, foster and draw strength from the Europeanisation of civil society? The key is to invest in deliberative rather than liberal democracy,\footnote{3} explicitly adapting deliberative democracy to the unusual context of the EU – a part-formed transnational polity which has deep roots in its member states, but which also transforms those member states.

For proponents of deliberative democracy, optimal governance requires that all those affected by a public policy should engage in a process of deliberation about it. This means they must exchange their views, seek to understand other actors’ perspectives and needs, and reach a mutually agreeable outcome. The object of the process is not to reach a bargain or package deal. Instead, it is to seek understanding of different perspectives and reach a consensus view about
the best way forward on a given single issue. Actors deliberate because they are part of the same system, and therefore dependent upon both it and each other to achieve their objectives. They know that in the absence of a hegemon able to dictate outcomes to them, all actors will gain from negotiation of a common interest, whether the issues at hand are those of policy or those of principle.

Deliberative democracy is thus essentially participatory rather than representative in essence. For deliberativists, what ultimately counts is outcomes based on agreement-through-participation. Input legitimacy, not output legitimacy, is key. It is through such processes of active citizenship that senses of system legitimacy and community are built; deliberativists assume the need for ongoing construction of political communities rather than their prior existence. They also argue that deliberativism can provide a convincing explanation of why actors should engage politically with each other (because they are bound by the same political system and need to shape it according to their preferences), and a method by which they can do so despite differences in culture, understanding and preferences (deliberation). Deliberativism is thus both a mechanism and a theory of democracy.

Deliberativism has assets which are particularly helpful in international or transnational systems such as the EU. First, it can serve as a way of making decisions in each separate policy area/regime. This matters because EU competence varies tremendously across different policy areas, ranging from no or small powers (for example tax) to dominance of a policy field in which it has effectively replaced national decision-making (for example agriculture, competition). Where the EU has power, it works according to a variety of decision rules, meaning that there is no single EU way of making legislation. Thus, the EU needs an overall approach to decision-making which can deal with this variety. Currently, the overall approach is a kind of quasi-liberal democracy based on inter- and intra-institutional bargaining. Deliberativism is equally capable of application at this meta-level, although it would require a culture shift in the institutions of the Union. Actor sets and power balances between them may change according to policy area; the deliberative method of decision-making, however, is quite as applicable to foreign and security policy as it is to, say, environmental policy. Indeed, it is ‘best suited to those decisions which are important, or otherwise intractable, or both’ (Dryzek 2000: 174) because it is based on seeking to understand and make compatible the different perspectives, preferences and interests of the concerned actors.

Second, deliberativism can be the means by which new policy regimes are created at EU level, as a function of agreement to extend the EU’s scope. Third, deliberativism can adapt existing policy regimes as perceived needs change – it could either deepen or dilute integration in a given area, or simply adopt a new policy style without altering the level of EU competence. It
arguably does this better than either representative or aggregative kinds of politics and democracy because it seeks explicitly to identify and generate a new consensus based on an appreciation of changed needs and the impact of this on all concerned parties. Other forms of decision-making might do this, but are more likely either to ignore changed circumstances for longer (the problem of inertia, which would be less common under deliberative democracy, where individuals have an incentive to address barriers erected by vested interests, and the latter have less power to determine outcomes), or to produce sub-optimal outcomes based on package deals rather than attention to the particular issue at hand. This ‘joint decision trap’ (Scharpf 1988) has been particularly problematic in the EU. Crucially, deliberativism offers a way to adopt or adapt policies as needs change through ‘consent and voluntary compliance’ (Dryzek 1990: 106–107), a particularly helpful benefit given the EU’s weak capacity to enforce policy implementation despite the principle of state liability for non-compliance with Union policy.

Fourth, deliberation is also a suitable mechanism for use in inter-institutional relations, a bonus given the continued reliance upon network governance and overlapping rather than separated powers at EU level. Currently, the EU decision-making system depends on the creation of inter-and intra-institutional alliances of issue-specific and instrumental nature, based on marginal utility and short-term pragmatism (Warleigh 2000). Deliberativist approaches to EU governance would help the Union make the transition from being a network-based system of policy-making to being a system based on ‘network democracy’ (Jachtenfuchs et al. 1998; Warleigh 2002b).

However, no theory is capable of translation into real-world practice without adaptation. This is all the more likely in a complex polity such as the EU. Thus, what is required is a critical approach to theory which seeks to follow the path set out by the Frankfurt School (Geuss 1981). In other words, useful theory must:

- emancipate actors from inappropriate belief-systems and structures;
- seek to enlighten actors by helping them uncover their real interests and produce new forms of knowledge;
- pursue reflective rather than objective conceptualisations (that is adaptable and adapted theoretical frames rather than supposedly neutral laws such as those desired in natural science).

In the present case – critical deliberativism – these requirements are met as follows. First, the model proposed here seeks to enlighten actors by freeing them from the ideational stranglehold of liberal democracy. Second, it seeks to allow actors to uncover and assert their true interests by following on from this
ideational change and allowing citizens to develop new understandings of how democratic governance in the EU should work. Third, and perhaps most importantly, critical deliberativism espouses a commitment to reflect upon its own suitability, adapting itself and borrowing where necessary and coherent from other theoretical models in order to reflect the particular nature of the EU and the limits to ‘pure deliberation’ that this imposes.7

The first such limitation is the absence of an EU public sphere. True, deliberation is an excellent means to generate this (Christiano 1997), and a strong normative attachment to an active civil society is deliberativism’s main value, because it requires citizens to be active participants in political life rather than consumers of decisions made for them. However, at least while this public sphere is in its formation stage there will also be occasions when it will also require the construction of supporting institutions to both foster this process and ensure the system continues to function when deliberation either fails to work properly or is unable to produce the required outcome. Ultimately, perhaps, the role of representative institutions could be reduced, or even removed. However, for at least the medium term, there must be some element of representative democracy in a ‘critically deliberative’ EU in order to overcome the linguistic divide. Processes of deliberation may have, in the short to medium term, to focus on national bases, or at most on cross-border bases where there is no significant language divide (for example France, Luxembourg, Wallonia). This means that deliberativism and representative democracy are not mutually exclusive; rather, it is a question of emphasis and finding the best way in a given polity to balance them (Dryzek 2000). Consequently, striking the right balance between institutions – the mechanisms whereby citizens can translate their deliberations into effective policy – and the deliberations themselves is always controversial. Even Jürgen Habermas, perhaps the most well-known thinker in the field, has been criticised for being too open to ideas of representative democracy in his version of deliberativism (Chambers 1996; Eriksen 2000).

The second limitation is that of output legitimacy (Lord and Beetham 2001). At the level of individual policies, any form of deliberation is more likely than the current system to produce outcomes seen by the majority as legitimate. However, at the general, or macro, level, there is a danger that pure deliberation could bring the EU into disrepute. Recall that certain deliberativists argue that where no consensus can be reached, policy initiatives should fall. The value of an EU which too often failed to produce policies would be open to question. Thus, there would need to be a mechanism to ensure that wherever necessary arbitration could produce a workable, if perhaps sub-optimal, outcome – preferably by political rather than judicial means (Bellamy and Castiglione 1996). Critical deliberativism accepts the need for such an arbitration mechanism. However, it should be remembered
that in an EU based on flexibility, the need to use such institutions/processes would be limited.

The third limitation is linked to the balance between leaders and led. Although deliberativism favours input by the citizen, it is obvious that there will be limits to the capacity and will of citizens to take part in the required deliberative processes. Thus, critical deliberativism is an attempt to match the normative attractiveness of deliberation with the more mechanical, utilitarian issues of public policy production and system oversight, by using the representative and adjudicative mechanisms discussed directly above. (Many scholars of deliberative democracy have acknowledged this issue of ‘deliberation fatigue’, so critical deliberativism has deep intellectual roots here; see *inter alia* Christiano 1997; Pogge 1998; Dryzek 2000).

The fourth limitation of deliberative democracy is ideational. For many citizens, as well as members of the various elites, ‘democracy’ means liberal democracy, usually as expressed in their own member states. The fact that liberal democracy depends on majoritarian institutions, themselves requiring the existence of a single demos or people, is taken to mean either that EU democracy is a contradiction in terms or that it is possible only with the destruction of the member states and their various national identities/sovereignties. Thus, efforts to democratise the EU have so far been piecemeal and ultimately unsuccessful, because they have half-heartedly sought to apply a model that was developed alongside, and for, nation-states to a transnational polity with significant powers but neither a common national identity nor the capacity to generate it by force or bribery-through-redistribution. Nonetheless, non-liberal models of democracy in the EU are obliged to demonstrate not just practical utility but also their very credentials as democratic frameworks to an at-best sceptical citizenry. This is partly the result of the cynicism encouraged by previous underwhelming attempts at democratic reform, and partly because the very difference from the dominant conceptual frame of such ideas about reform is so clear. Critical deliberativism could make a very helpful contribution here by producing a workable alternative model of EU democracy in which citizens and civil society are explicitly empowered to agree solutions to problems of policy-making and democratic governance. Moreover, the existence of familiar kinds of institutions in a critical deliberativist EU would reduce the height of the conceptual leap required and thus make it easier to accomplish.

The fifth, and perhaps the most significant, limitation is the lack of member states willing to take difference seriously, rather than as a rhetorical commitment to ‘unity in diversity’. Overcoming this problem requires the embracing of flexibility as the baseline of European integration, as both normative principle and procedural device. Although the idea of flexible integration is often feared by those who defend European integration, who see
it as closet intergovernmentalism, it is impossible to see how, in any real-world scenario, the member states of the Union and their citizens are going to agree, accept and live with a uniform EU system. The only way citizens and states are going to see the Union as legitimate is if it generally does what they want it to do, and does not oblige them to adopt policies, or share national sovereignty, in areas that they consider should be the sole preserve of their member state. If our priority is democratic reform of the EU, rather than deepening or diluting it, then flexibility is the only way to permit the different, and changeable, elite and popular views of good EU governance to be cashed out (Pogge 1998, Warleigh 2002a, 2002b; Scharpf 2003).

Thus, attention must be focused on what might be called community-building, or demos-formation. By this I mean the creation of a deeper sense of shared political identity and interests, at both elite and popular levels. The current lack of shared political identity, however construed, results in a lack of willingness either to make sacrifices for citizens of other member states or to shift national/group positions in order to accommodate the needs and interests of actors from other member states. Citizens expect their leaders to return from Brussels having insisted on the national interest and made no important concessions to the other member states; leaders are content to make bargains with each other, but not to generate new shared understandings and consensuses. A clear example is the lack of will in the EU-15 to reform agricultural and cohesion policies sufficiently to allow the countries which acceded to the Union in 2004 to receive fair treatment. It is simply unrealistic to expect the EU as it currently is to reflect the kind of solidarity expected (or at least generally invoked) at national level. What is necessary for the sake of democracy in the polycentric and multi-level EU polity is to deploy the means of increasing a sense of shared values and interests from which a deeper sense of community could arise. Critical deliberativism, with its emphasis on the generation of agreed policy outcomes based on mutual understanding and, if necessary, the shifting of preferences in order to reach an accommodation, would be likely to be a significant asset in this respect.

This means, in turn, that member states must accept a new understanding of solidarity. Instead of seeking to replicate redistributive policy at EU level based on aspirations to shared identity that are crushed on the rocks of national determination to get a slice of the regional policy pie, or enjoy cosy log-rolling games in Council, member states must agree not to play dog-in-the-manger. Such an agreement would be to the benefit of all member states: they would thereby get more of what they want from the EU with fewer costs. It would also benefit citizens, who would thereby in all likelihood obtain an EU far more closely attuned to their own preferences, which remain primarily decided by and with national rather than transnational mechanisms. The referenda in Sweden and Denmark about adopting the euro are excellent cases in point. In
a flexible EU, where the bogeyman function of ‘Brussels’ is removed, citizens are far more likely to develop a sense of shared values with citizens of other member states and to engage with EU policy/polity-making processes. It should be no surprise then that 60 per cent of EU citizens express the view that a flexible EU is to be welcomed.

BARRIERS TO CIVIL SOCIETY EUROPEANISATION

Evaluating Critical Deliberativism’s Potential ‘On the Ground’

When seeking to apply critical deliberativism, there is a tension between the two parts of its nature (its use as a tool and its provision of a normative frame). These two features of critical deliberativism do not contradict each other, but they do mean that in what follows I refer to critical deliberativism sometimes as a normative model and sometimes as a tool to be used in operationalising that model. This kind of tension is perhaps more likely in critical theories than theories of other kinds, because (as mentioned above), critical theories seek explicitly to be the means of, as well as plans for, social change.

The practical problems that are likely to be encountered when seeking to apply critical deliberativism and thereby Europeanise civil society are of two principal kinds: practical, and institutional.

The practical problems involved in implementing critical deliberativism to Europeanise and empower civil society are significant. First, there is the fact that apathy and cynicism regarding politics has become widespread across the member states (Mény and Knapp 1998: 462–6). Although the shift from government to governance in Western states has empowered many non-governmental actors, the civic culture of Almond and Verba (1963) is under duress. Critical deliberativism has the potential to reverse this trend by delivering the means whereby citizens can engage more meaningfully with the political process and fostering a culture in which it is considered both useful and proper to do so, but in order not to exhaust the willingness to deliberate/engage politically of most citizens, it might be wise to reserve deliberative processes for major issues such as enlargement or whether to adopt the euro (Pogge 1998). Alternatively, it might be suitable to allow citizens to choose the policy areas in which they want to be most active, and accept that different levels of public engagement according to policy area may be inevitable (Schmitter 2000). It may even be that a representative assembly is required either to harness sectorally-based expertise/interest (Schmitter 2000; Warleigh 2002a) or to ensure adequate supervision of the executive and the smooth overall functioning of the system (Lord and Beetham 2001).

A second problem is that those citizens and civil society groups which do
seek to engage with EU policy-making and governance often do so in the absence of a clear understanding of how the Union works, or what it does. This makes activism very difficult, and often demoralising, because failure is the almost inevitable result. In turn, there is a lack of credible agents of, and advocates for, such engagement. National governments and EU institutions are not suited to this advocacy role, because they suffer from legitimacy doubts and obvious conflict-of-interest issues of their own. Many civil society groups who do engage with Union governance are not internally democratic and cannot, or do not, serve to socialise their members into the EU system (Warleigh 2001). Other possible mechanisms for channelling civil society views into the EU policy-making process, such as the Economic and Social Committee, are notoriously weak. The resultant agency gap therefore needs to be filled.

A further practical problem is that civil society and its proper function in public decision-making are understood differently in the various member states, according to their respective political cultures and takes on liberal democracy. Creating an acceptable joint understanding for Union politics may be difficult; respecting the various traditions while advocating civil society engagement will require adroit management. This is particularly true given the continuing cross-border communication problems between citizens of the member states, especially regarding the absence of a common language at popular level. Using the internet to empower those who have the necessary skills, equipment and ability in English (the de facto common language of the elite) to participate in web-based discussion forums might go some way towards alleviating this problem, but it cannot represent more than a partial, young-and-wealthy favouring solution.

The institutional problems involved in implementing critical deliberativism to Europeanise and empower civil society are similarly daunting. The institutional arrangements of the Union are the product of several package deals, shaped by both opportunistic advances towards federalism and periodic limitations imposed to preserve national autonomy or limit the capacity of the Union to ‘intrude’ into national politics and systems. Certainly, the EU’s complexities and continuing lack of transparency do little to encourage civil society mobilisation. Recent and ongoing attempts to improve the transparency of EU decision-making offer some grounds for optimism. Nonetheless, the gap between what the EU does, and what citizens want it to do, persists (Blondel et al. 1998); a Union that has significant power in policy areas that citizens would rather see addressed at national, local/regional or even global levels, and no or few powers in areas that they would like to see tackled at Union level, is not likely to be considered legitimate.

Attempts to increase the role of civil society in EU governance have so far been less than impressive. Civil society groups have been increasingly active
in EU lobbying in recent years, but this involvement, even when successful, does not match the regular input of favoured private interest groups (Balanyá et al. 2000). Moreover, EU actors’ approach to civil society groups has often been open to question; the Commission in particular has been guilty of trying to limit consultation to favourite NGOs which will essentially defend the Commission’s policy preferences, and sometimes even its role in the institutional process itself. This is a clear case of institutional self-interest winning out over genuine openness to input from a wider range of voices, although at least the Commission has recently been encouragingly overt about the criteria NGOs that aspire to having its ear must meet (CEC 2001).

A further set of problems is related to flexibility. So far, the idea that flexible integration could be part of the EU’s normative renewal has yet to gain currency at elite level. Occasional threats to create a ‘hard core’ of member states (a directoire in all but name) are made by Paris and Berlin when the integration process fails to go sufficiently far along the route preferred by the Franco-German axis. This is bullying, not recognition of diversity. Similarly, the idea that member states can be allowed extra time to achieve common goals is unable to cope with the idea that certain member states may not want to achieve those goals at all. In the face of enlargement to Central and Eastern Europe, the then 15 member states agreed in the Nice Treaty to establish a reasonably workable process of ‘enhanced co-operation’ so that, if necessary, some of them could proceed more quickly than others with integration in particular areas of secondary legislation. But this conservative use of multi-speed integration is highly circumscribed. ‘Enhanced co-operation’ cannot be used to create new competences for the EU, so member states which wish to proceed towards, for example, a common foreign policy or a joint economic government for the EU will still have to proceed at the pace of the slowest ship in the convoy.13

The practical and institutional problems of civil society Europeanisation are impressive. They represent substantial barriers to overcome in the EU legitimisation process. In the final section of the chapter, however, I set out some ideas about how to overcome these problems and thus go some way towards legitimising EU governance.

EUROPEANISING CIVIL SOCIETY

Some Suggestions for A Reformed EU Governance Style

There are three levels to consider when applying critical deliberativism in order to foster the Europeanisation of civil society: the macro, the meso and the micro. The macro level is concerned with the normative basis of European
integration. The meso level focuses on how the EU governance system works. The micro level deals with political behaviour by individual citizens and groups. The reader is asked to remember that critical deliberativism is not a ‘pure’ version of deliberative democracy. Instead, it seeks explicitly to appropriate practices and ideas from other democratic traditions where this is coherent and where this helps to achieve the desired goal – in this case, the Europeanisation of civil society as part of the democratisation of EU governance.

At the macro level, it is necessary to replace the federation-by-stealth model of the Community Method with one based on flexibility. This would involve espousing as a normative good in its own right the gradual evolution of the Europolity, seeing it not as a state-in-waiting but as a transnational joint governance system in keeping with functionalist rather than federal principles (Warleigh 2002a, 2003a). It is profoundly undemocratic to force countries which wish to proceed further in European integration than some of their partners to remain at the lowest common denominator level. Likewise, it is profoundly undemocratic to oblige more cautious member states to accede to policy regimes governing issues that they would prefer to keep at national (or more broadly international) level. Such a shift in emphasis would help remove the biggest threat perceived by Eurosceptics, namely the subjugation of the nation state and the attendant crisis of national identity. It would thus also facilitate progress towards, and even achievement of, federalism by that sub-set of member states which wants it. It would also encourage civil society groups to engage with EU politics on the basis of their functional needs and ambitions. Thus, the process of Europeanising civil society would be facilitated by placing civil society wishes about particular policy sectors and issues, rather than about whether there should be ‘more or less Europe’ at the heart of the policy process.

At the meso level, critical deliberativism requires a shift in EU governance style towards a more participatory politics with increased transparency. It does not require a replacement of the EU system in its entirety; such changes may come over time if they are the will of civil society, but not in anticipation of such preferences.

As a first step, the Council should legislate in public, and the basis of agreement in conciliation meetings between Council and Parliament under the codecision process (who made which concession, and why) should be made public after the decision has been reached. This would enable citizens to understand the basis on which legislation is agreed, and bolster the transparency and accountability of decision-making at EU level.

Member state contributions to the EU budget should be re-branded and turned into an EU levy or tax on individual citizens (off-set by a reduction in citizens’ national tax bills). This would foster a sense in which citizens
appreciate the importance of the EU, and also increase the likelihood of their being interested in it. If the Union spends ‘their’ money, citizens are more likely to ask what is done with such funds and seek to control them more effectively.

The European Parliament should be elected with a single electoral procedure and on the same day in every member state, providing a symbolic unity. It, rather than the Commission, should have the power to propose new legislation. The Parliament should also focus even more clearly than at present on its committees rather than its plenary session, in order to foster a deeper culture of credible commitment between MEPs (as makers of commitments to civil society groups or citizens) and civil society groups themselves (as those seeking commitments by policy-makers). The Parliament should elect the President of the Council of Ministers, an EU Finance Minister (to preside over the budget and keep the European Central Bank accountable), and a Foreign Affairs Minister. The Parliament should also be empowered to act as the ultimate adjudication mechanism in cases where a deliberation process is convened, but ultimately fails. Taken together, these measures would both increase the powers of the Parliament and deepen its ability to control the EU executive. They would also increase its relevance to the citizen, and establish a replacement for the relationship between elected representative and constituents which cannot meaningfully exist at EU level given the transnational nature of the EP electorate and the sheer size of the EP constituencies.

The Commission should be downgraded to a civil service, officially ceding leadership of the integration process to the elected EU institutions (Council; Parliament). This would remove the spectre of a ‘European government’ so feared by Eurosceptics while continuing to provide the necessary bureaucracy for the Union. This would facilitate the Europeanisation of civil society by shifting the emphasis of the integration process further from technocracy and more towards politics proprement dit.

The European Ombudsman should be empowered to investigate maladministration of EU policy by national and regional governments. This would have the virtue of providing an EU-wide instrument for civil society to use in ensuring good governance, and provide the synoptic view necessary to achievement of that function.

The Committee of the Regions should be abolished; it has served no useful purpose, and the sub-state authorities that occasionally seek to use it have better means of influencing EU policy via domestic structures and institutions.

The Economic and Social Committee (ESC) should be re-invented to include only civil society representatives (that is no ‘social partners’), and should have the power to request the European Parliament to issue a
legislative proposal. To be represented on the ESC, groups would have to gain the support of a million citizens from at least a third of the member states. This would make them, effectively, ‘European’ rather than national organisations. To ensure the effectiveness of the ESC, its membership could be capped at 200 organisations, with periodic referenda (perhaps alongside EP elections) called to choose which groups should be removed from the Committee in order to allow new members to join.

Structural changes to facilitate active citizenship – and thus foster the Europeanisation of civil society – must be introduced. Such changes could include pan-EU referenda on major issues such as accession by new states, regular national deliberations about major EU policy initiatives, and a realignment of EU competence to make it more in line with stated public preferences for EU policy powers (preceded by an EU-wide referendum on that issue). Member state opt-outs from EU policy would be decided by national referenda. National referenda would also allow states which initially sit out of a policy to adopt it subsequently. A key change here would be allowing the EU to wield power in policy areas which generate colour, excitement and drama rather than those that deal with dreary technical or regulatory issues – remembering always that flexibility would protect the wishes of those citizens/states which wish to opt-out of integration in these policy fields. Thus, a substantive EU foreign policy, and defence policy, could be desirable.

Compulsory education until school-leaving age in both civics (including the workings of the EU as well as national systems and the principles of democracy) and a selected common second language for the EU should be instigated. Further rights of EU citizenship (such as the right to vote in national and regional elections in one’s member state of residence rather than one’s member state of nationality), should be created. The goal of such changes is to create the framework for more active citizenship, both nationally and transnationally.

However, in some ways most important are the changes required at the micro level – that of the political behaviour of individual citizens and groups. The Europeanisation of civil society equates to the creation of a political (but not ethnic or cultural) Euro-demos – a ‘community of citizens linked to each other by strong democratic bonds and pressing to acquire a measure of effective control through formal or informal means over government’ (Chrysochoou 1998: 89). Structural changes such as those indicated immediately above are essential, but they are only the first step. They would give citizens the potential to mobilise effectively and the trust that such mobilisation, once begun, should be effective. What counts most in the making and sustaining of EU democracy, however, is what citizens actually do with the structural mechanisms they are given. This is where the greatest
The benefit of critical deliberativism can be seen, because it seeks to generate and sustain a sense of political community between EU citizens.

CONCLUSIONS

The Need for Critical Deliberativism

In this chapter I have argued – somewhat combatively – for the replacement of liberal democracy-inspired ideas of EU reform by a coherent strategy based on an adapted form of deliberative democracy. In essence, my argument is value-neutral on the ‘more or less Europe?’ issue. It seeks instead to ensure that whatever outcome, or outcomes, arise from the integration process are normatively justifiable, bind nobody who has not explicitly consented to them, and encourage active participation by citizens in their own governance. In other words, I privilege democracy over European integration, seeing the latter as a means to help breathe new life into the former rather than vice versa.

From the perspective of civil society, a critical deliberativist model of democracy is crucial, because it seeks as an explicit and priority objective the fostering of an EU-wide sense of demos, or shared political identity. This kind of demos is defined civically, or politically, rather than in ethnic or cultural terms; it does not seek to generate a ‘totalising “Euro-identity” which smothers those of the member states and their component regions’ (Warleigh 2003a: 114). It seeks instead to create a system which citizens will be more readily able to ‘own’ than the present EU incarnation, because it reflects their own preferences for EU competence more closely and offers a useful set of mechanisms for civil society participation in governance. It also offers a mechanism by which a deeper sense of transnational demos might be created, since joint action to solve problems by actors from different countries may well increase a sense of shared interests and values. However, critical deliberativism is also capable of distinguishing between shared interest/values that actually exist and those that do not. A Finn and a Cypriot, for example, may both care passionately about animal welfare and seek to influence EU policy on transport of live beasts, but have nothing else in common. A critical deliberativist EU democracy would take this limited commonality as a normative good, or at least as a neutral issue; a more superficial understanding of EU democratisation would see such shared values as the proof of an EU identity and then suffer perpetual disappointment.

This emphasis on civil society Europeanisation (demos-creation) as the key component of legitimacy and democratisation is vital, because the acquis démocratique (Lord 2001: 642) of the EU shows that the many half-measures of reform so far adopted have failed sufficiently to replicate liberal democracy.
As a result, they have alienated rather than attracted the majority of citizens. This is because liberal democracy cannot meaningfully be replicated at EU level without the self-abnegation of the nation-states that compose the Union. Thus, the real achievements of the European Union – including a wealth-generating single market, its own currency, an increasing role in world affairs, the introduction of stronger environmental and consumer-protection policies in many of its member states – risk being eclipsed by public hostility or, even worse, apathy.

At the time of writing, the need for normative renewal of the integration process could not be clearer – the collapse of negotiations on the Draft Constitutional Treaty in December 2003 shows the difficulties in continuing to use the Community Method, as does the Commission’s inability to distinguish between its own interests and those of the EU. A Union on the cusp of becoming a truly continental power is groping around for both a sense of direction and a new propulsion device. Empowering civil society, and facilitating its Europeanisation, would allow the EU to generate more legitimacy in both structural and policy-making terms. This legitimacy could then be used to encourage a greater sense of demos in EU citizens, creating a virtuous circle and fostering the discovery by EU citizens and civil society groups of shared interests and values. Despite the institutional, practical and ideational difficulties that confront it, critical deliberativism offers a means by which EU governance could be rendered more legitimate. EU democracy is possible, but only if we start fostering it now.

NOTES

1. The legitimacy-building qualities of EU public goods and policies have not been sufficient. Although the EU has produced greater public welfare, prosperity and security than would in all likelihood have existed without it, the ‘democratic deficit’ persists and deepens. Output legitimacy – the creation of support for the EU through public goods production – is part of the necessary process, but input legitimacy – the creation of support for the EU by the provision of new participatory mechanisms – is currently much more important.
2. Because such advocacy is a conditio sine qua non of the early stages of the democratisation process, I devote much of this chapter to elaborating a new theoretical frame for EU democracy. I take it as read that without such interventions, EU citizens are never likely to care enough about the EU to want to democratis it. The theoretical frame for European integration proposed here makes it more likely that elites would undertake such advocacy, and also that citizens would be receptive to it. In addition, it provides the means whereby, over time, citizens would become less dependent upon it, having internalised new norms of EU governance.
3. For a detailed discussion of the link between flexibility and democracy in the EU, see Warleigh (2002a). It might usefully be noted here, however, that flexibility embodies and defends diversity, avoids coercion into unwanted structures and policies, and allows the pursuit and regular recalibration of varying popular and elite preferences.
5. Liberal democracy is not suitable for transnational political systems, because it ultimately
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relies upon majoritarian institutions which are themselves reliant upon a national demos and sense of solidarity (or sense of ‘we-ness’). Such ‘we-ness’ does not exist in the EU. Instead, whatever means of democratisation is chosen for the EU must seek to generate a deeper and broader sense of shared identity.

7. For work along similar lines, see Habermas (2000) and Dryzek (2000).
8. In the traditional fable, farmyard animals go hungry because the farm dog, who cannot eat hay, nonetheless lies on top of the manger and refuses to let the animals who could benefit from the food it contains get near it.
9. Flash Eurobarometer 159, p. 28. Sixty per cent support for a flexible EU is the average for 25 member states (that is including the 10 2004 accession countries). The general support for flexibility is 58 per cent in the EU-15, and 68 per cent in the 10 2004 entrants. Only in Malta did less than 50 per cent of citizens express support for a flexible EU; however, even there, 41 per cent were in favour, and only 27 per cent opposed. Data available at: http://europa.eu.int/comm/public_opinion/flash/fl159_fut_const.pdf, accessed 23 February 2004.
10. In empirical work I undertook to investigate the dynamics of civil society groups in EU-level interest representation, many NGO actors confided that understanding how the EU actually works was one of their main barriers to mobilisation, although this could be modified in some cases by joining an umbrella organisation operating out of Brussels. Similarly, EU officials and politicians stated that the main problem they encountered with lobbying by NGOs was the inability of many such groups to follow the legislative programme of the Union, supply useful and timely policy advice, and understand the limits, as well as the possibilities, of EU action. See Warleigh (2000).
11. For institutional suggestions about filling the agency gap, see below, especially with regard to the ESC and European Parliament.
12. The issue here is one of ownership. For an institution to be considered legitimate, it must not only function well (however that may be defined in value terms), but it must also be considered worthwhile – that is it must produce public policy and/or public goods that citizens want from it. For the EU, the situation is complex because it has rival goods and policy producers at local, regional, national and global levels: thus, it must take care to be active in the areas of policy which really do correspond to where it, rather than other levels of policy-making, is best placed to act. At present, the EU does not do this: its powers are in only two cases (environment and development policy) in keeping with those the member states repeatedly say they consider to be useful or appropriate for it (Blinder et al. 1998). As a result, the EU can appear either as irrelevant (it cannot make policy in areas citizens want), or as a power-grabber (it intrudes into areas citizens consider should be left to the (sub-) national, or even global, levels).
13. The best example of what flexibility can bring to the EU is the single currency. The euro was initially set up with 11 of the 15 member states in 1999; Greece joined subsequently when it met the convergence criteria, and the UK, Sweden and Denmark chose to opt-out – possibly permanently.
14. For this reason, flexibility must be applied in its à la carte variant. Multi-speed models (which assume that all states want the same thing, but only a few of them are capable of achieving it at any given time), and concentric circles models (which divide the EU up into so many divisions of membership, instead of allowing states to choose whether or not to integrate on an issue-by-issue basis) are incapable of providing a suitable democratic basis for the EU because they do not allow freely-chosen patterns of diversity to be its baseline.
15. At present, EP committee commitments to civil society actors can be abandoned during the conciliation process or overturned by the EP plenary vote. MEPS should not become ‘hostages’ to civil society groups. They should be free to make commitments and then to change or alter them if necessary to achieve an agreement with Council. However, accountability and transparency requires that what happens in conciliation committees is publicised even if the conciliation discussions themselves remain private.
16. The price of opting out would be the agreement not to develop a contradictory policy to that adopted by the other member states.
At the present time, I favour the choice of Spanish as this language. As a result of the US cultural influence and soft power, many citizens of the EU have some level of English fluency already. However, this plays into the hands of native speakers such as the British and Irish, who are generally extremely lazy about engaging with other languages as a result. Spanish is a major world language of European origin, and has no ‘baggage’ attached to it as the language of either of the two principal EU powers, France and Germany. Native speakers of Spanish would in all likelihood choose English as their ‘compulsory second language’.

REFERENCES


PART II

The legal and institutional context
5. Group litigation before the European Court of Justice

Olivier De Schutter

INTRODUCTION

Three different kinds of arguments are traditionally put forward in favour of ‘associational’ or ‘organisational’ standing, implying the possibility for organisations to bring judicial proceedings for the safeguard of the values which they seek to defend. A first argument is based on the idea that certain illegal acts of the administration, or unconstitutional acts adopted by the legislator, risk being left unremedied if associations are not recognised a locus standi in order to seek their judicial review. This is the case, in particular, with respect to violations which concern large and diffuse interests, which no individual litigant would otherwise be under an incentive to challenge, or where no individual litigant may even have standing to sue, in systems where the admissibility of the action is made conditional upon a demonstration that the interest is sufficiently ‘individualized’, that is, specific to the individual applicant rather than common to an open category of persons of which the litigant is a member. We may call this the ‘rule of law’ rationale for the recognition of the locus standi of groups. It is this argument which has been predominant in the areas of environmental law and consumer law, precisely because of the diffuse character of the interests which these branches of law seek to protect. Here, the objective of recognising associational standing is to make it possible for organisations to act as ‘private Attorneys General’, to use the expression made famous by Judge Jerome Frank, in order to contribute to the preservation of the rule of law: the absence of sufficiently directly and individually affected interests should not constitute an obstacle for the exercise of judicial review, as otherwise, the most widespread or diffuse violations (especially when they are hardly noticeable by individuals) would be the most immune from control by the judiciary.

A second argument in favour of associational standing focuses, not on the contribution of this form of standing to the expansion of the scope of judicial review and the preservation of legality, but on the adjudicatory process itself. The argument, here, is that judicial reasoning should be based on a contextual...
understanding of the issues at stake with the case to be decided, on the exercise of deliberation, and on a procedural form of rationality rather than on a substantive or formalistic approach to the requirements of the law. The moment of adjudication should be an occasion for the ‘revision of the normative histories that make political communities sources of contestable value and self-direction for their members’ (Michelman 1988: 1493): in its purest civic-republican formulation, the judicial decision will be legitimate to the extent that it is adequately informed and that it is the outcome of a truly deliberative process, in which all the relevant interests are represented and bring to the judge their diverse perspectives. Let us call this the ‘participatory-adjudicative’ rationale for the improvement of the legal standing of groups.

Finally, a third argument in favour of organisational standing is that it may serve to reinvigorate civil society organisations, and thus encourage their greater implication in the decision-making process, whether in administrative proceedings or in lawmaking (Harlow 1992, 2002). This is the ‘participatory-democracy’ rationale for opening the gates of litigation to groups. By providing citizens concerned with the public interest with the tool of litigation as part of the panoply of means through which they may seek to impact on policy- and law-making, organisational standing might create an incentive for such public-minded citizens to form associations and invest in civic action. And it may also constitute an incentive for policy-makers and legislators to better take into account the arguments put forward by the organisations thus formed, in order to limit the risk that, confronted with their refusal to do, civil society organisations will seek to challenge in court the administrative or legislative act adopted in the absence of significant consultation. According to this third argument, thus, the recognition of associational standing would be valuable especially insofar as it serves as a leverage mechanism to promote participatory democracy, or at least enhanced forms of implication of the civil society in the administrative and legislative processes.

This chapter contends that the discussions of associational standing before the European courts have been obscured by a failure to clearly distinguish between these different rationales which may support it (a characteristic example is Cygan 2003). It seeks to explore the question of the role of associations before the European Court of Justice, especially in the context of actions for annulment, as currently regulated by Article 230 al. 4 EC. We will see that the current judicial attitude, which is to exclude associational standing in principle while providing for certain exceptions to that exclusion, does not make it possible for organisations – even when they would appear to be well qualified and representative at the European level – to adopt the position of ‘private Attorneys General’ and to transform themselves into ‘privileged applicants’ contributing by their actions to the preservation of legality in the
EC legal order. On the other hand, such associations may under certain well-specified conditions intervene before the Court of First Instance or the European Court of Justice, thus contributing – to the extent that these jurisdictions are competent – to the fully deliberative character of the judicial process, and ensuring that the court is made aware of all the implications of the case it is presented, even those exceeding the situation of the applicant affected by the challenged act. Moreover, the linkage we may identify in the case-law of the European Court of Justice between the procedural rights of certain organisations to be parties to administrative proceedings, on the one hand, the right of those organisations to file an action for the annulment of the act adopted on the basis of those proceedings, on the other hand, may constitute an important incentive for the creation of associations and their active implication in the political or administrative decision-making process. Therefore, of the three arguments traditionally presented in favour of associational standing, only the first one really has weight in our context, if it is to justify a liberalisation of the rules of standing in order to authorise organisational standing in the filing of actions for annulment. Associational standing, in other terms, may be one way to overcome the difficulties entailed by the restrictive reading made by the European Court of Justice of the conditions imposed on the introduction of actions for annulment by private applicants. But the current system both makes it possible for associations to contribute to providing the judge with the diversity of perspectives required for a fully informed judgment to be adopted, and contains incentives for associations to be set up and invest in the decisional processes. Moreover, as the gap in the availability of judicial review, which presently still exists in the Treaty of Rome, has been largely remedied in the Treaty establishing a Constitution for Europe now proposed for ratification (OJ C 310 of 16.12.2004), the prospects for the recognition of associational standing are today minimal or inexistent. Indeed: the pressure to recognise associational standing is less strong now than it may have been even very recently, because another direction has been chosen by the drafters of the Constitutional Treaty in order to ensure that the principle of the rule of law in the Union is (almost) fully respected.

In order to justify these claims, the chapter proceeds as follows. A second section shall recall the principle according to which associational standing is not recognised in the current case-law of the European Court of Justice. The third section describes three exceptions to the rule according to which associational standing is not recognised in the context of actions for annulment before the Court of First Instance or, previously, the European Court of Justice. The fourth section then relates the existing case-law, developed essentially with regard to associations of undertakings, to the present status of civil society organisations in the decision-making process of
the Union. The fifth section briefly describes intervention as an alternative to the introduction of a direct action for annulment. The sixth section offers a brief conclusion.

THE PRINCIPLE: THE EXCLUSION OF ASSOCIATIONAL STANDING IN ANNULMENT PROCEEDINGS

The judgment delivered on 14 December 1962 by the European Court of Justice in the Joined Cases of Confédération nationale des producteurs de fruits et de légumes and others v. Council of the European Economic Community (Joined Cases 16 and 17/62, [1962] ECR 471) is best remembered for its restrictive reading of the conditions under which a private applicant may seek the annulment of a Community act of a general nature, which anticipated the Plaumann case decided the following year (Case 25/62 [1963] ECR 95). The reading proposed by the Court of what was then Article 173 al. 2 of the EEC Treaty, and is now Article 230 al. 4 EC, has been criticised almost since the judgment was first delivered (Rasmussen 1980; Arnulf 1995; Neuwahl 1996). Despite the recognition by the European Court of Justice itself that the reading it felt compelled to maintain may be overly restrictive of the right of access to a court where the individual sought to protect his fundamental rights, and despite the more recent finding by the Court of First Instance that it might conflict with the right to an effective judicial remedy proclaimed in Article 47 of the Charter of Fundamental Rights, it will require a revision of the Treaty to overcome the most contested implication of that case-law – the prohibition it imposed on a private applicant to seek before the European judicature the annulment of a Community act, even where the adoption of that act directly affected him and where no effective remedy was elsewhere available.

It is not the purpose of the present contribution to examine the reality of that problem nor, indeed, the adequacy of the answer which the Treaty establishing a Constitution for Europe seeks to offer. Rather, the focus here is on another aspect of Confédération nationale des producteurs de fruits et de légumes that has been less frequently noticed. The Court considered in this judgment that the requirements set by the Treaty of Rome for the admissibility of actions for annulment by private persons would be too easily circumvented if, by grouping themselves in an association, producers – each of whom, individually, would not present the 'direct and individual interest' required for the recognition of their locus standi – could present the association they have formed together as having an interest in the preservation of the interests of all its members. ‘One cannot accept the principle’, said the Court, ‘that an association, in its capacity as the representative of a category of businessmen,
could be individually concerned by a measure affecting the general interests of
that category.’ It explained that:

Such a principle would result in the grouping, under the heading of a single legal
person, of the interests properly attributed to the members of a category, who have
been affected as individuals by genuine regulations, and would derogate from the
system of the Treaty which allows applications for annulment by private individuals
only of decisions which have been addressed to them or of acts which affect them
in a similar manner.

This case-law results in the exclusion of associational standing, understood
as the standing of associations based on the social aims they seek to pursue, or
the collective interests they have elected to speak for. This article questions
whether this exclusion still is justified, and whether it conflicts with the rise
of civil society organisations in the current modes of governance within the
European Union.

It may be useful, as a preliminary matter, to clearly distinguish the kind of
interest seeking legal recognition in the particular context of associational
standing from the interests invoked under other forms of standing. Article 230
EC in its current form, and the corresponding provision (Article III-365) in the
Treaty establishing a Constitution for Europe now presented for ratification by
the Member States, provide that either institutional actors or private applicants
may seek the annulment of legal acts under the conditions they specify.
Whether these actors may file an action for annulment because they are
recognised an institutional role in the preservation of legality within the legal
order of the Union,8 because it is considered that they have an institutional
interest in ensuring the protection of their legal prerogatives,9 or when they are
private applicants, because the act which they challenge is of ‘direct and
individual concern to him or her’, or constitutes ‘a regulatory act which is of
direct concern to him or her and does not entail implementing measures’, the
interests which lead to the recognition of a \textit{jus standi} remain defined by the
legal order of the Union. These interests are, in other terms, defined
objectively and \textit{ex ante}. They do not result from the choices made by the
applicant; rather, they are imposed on the applicant – whether an institutional
actor of an individual – ‘from above’, and quite independently of the wishes
of the applicant him- or herself.

By way of contrast, the kind of ‘collective’ interest seeking legal
recognition in the context of associational standing is defined by the exercise
private persons make of their freedom of association. These private persons
may be natural or, as in \textit{Confédération nationale des producteurs de fruits et
de légumes}, legal persons. They form an association and they choose, using
this association as an instrument, to pursue certain goals. Through the medium
of the association, they act as self-appointed spokespersons for the interests
they seek to defend. These interests are defined subjectively, and what is vindicated is their recognition, *post hoc*, by the judge. This makes for the subversive character of associational standing, in the positive sense that it may surprise expectations and present a character of unpredictability: when the ‘collective interest’ is invoked as a basis for legal standing (*locus standi*), the powers of the judge are not defined by the legal order itself which confers jurisdiction upon the action; instead, these powers are defined – and they may be expanded – by private initiative, simply because of the identification of certain aims by the group of persons whose objective it is to pursue their realisation. The refusal of the European Court of Justice to recognise and give effect to ‘collective’ interests thus defined is a refusal to be thus subverted, and to have the balance of powers between the judge and the other powers transformed by the private initiative of zealous citizens. Instead, the legal recognition of the collective interest (and of associational standing) would make it possible for groups to act as private Attorneys-General – taking it upon themselves to ensure the preservation of legality, however artificial the connection of the collective interest with the individual interests of either the members of the group or of the group itself may be.

The principle is, therefore, that an association representing a category of persons may not present as its own, individual interest, those of the collectivity of its members joining their forces in order to pursue certain goals. Neither may an association present as its individual interest the preservation of legality, even where the alleged violation adversely impacts upon the social objective it seeks to pursue through its activities. Groups are treated just the way individuals are. They may no more pretend to define what their interests are than individuals may pretend that they are affected, say, by pollution occurring away from their neighbourhood because they are nature lovers or because, as active citizens, they are concerned that the environment is being damaged. There are three exceptions, however, to the principle thus stated. It is by examining these exceptions that we will be able to appreciate whether the approach of the European Court of Justice to associational standing – a dismissive approach, to put it abruptly – is in tension with the current tendency to improve the participation of civil society organisations in decision-making processes within the European Union.10

**THE EXCEPTIONS**

Even where it has the capacity to file proceedings before the Court of First Instance,11 and where it would have an interest in the proceedings, considering the social aims it pursues and the impact the challenged act may have on the fulfilment of those aims, the organisation will only be considered
to have the quality\textsuperscript{12} to file an action in annulment in exceptional circumstances.\textsuperscript{13}

**The Group as Negotiator**

A first exception is that the group whose institutional position as a negotiator has been affected by the act the annulment of which is sought, may be considered to be directly and individually concerned by that act. The introduction of this exception dates from the joined cases of *Kwekerij Gebroeders van der Kooy BV*,\textsuperscript{14} decided in 1988. In one of these cases, the applicant organisation (*Landbouwschap*) was seeking the annulment of a decision from the Commission prohibiting a State aid in the form of a preferential tariff for the supply of gas to horticultural producers. Relying on *Confédération nationale des producteurs de fruits et de légumes*, the Commission considered that the action should be considered inadmissible, as the collective interest of the horticultural producers may not be seen as of ‘individual’ concern to an organisation representing them. This orthodox position had the support of Advocate General Gordon Slynn. The Court however disagreed. It considered that the contested decision affected the ‘position as negotiator’ of the *Landbouwschap*.\textsuperscript{15} The Court noted that ‘in that capacity the Landbouwschap has taken an active part in the procedure under Article 93(2) (of the EEC Treaty)\textsuperscript{16} by submitting written comments to the Commission and by keeping in close contact with the responsible officials throughout the procedure’ (para. 22). It added that

\begin{quote}
the *Landbouwschap* is one of the parties to the contract which established the tariff disallowed by the Commission, and in that capacity is mentioned several times in [the challenged decision]. In that capacity it was also obliged, in order to give effect to the decision, to commence fresh tariff negotiations with Gasunie and to reach a new agreement’.\textsuperscript{17}
\end{quote}

The circumstances present in *Kwekerij Gebroeders van der Kooy BV* were rather exceptional, and the cautious language of the Court, which refused in its judgment to make explicit what the decisive factor was which implied that the decision to prohibit the State aid was of direct and individual concern to the *Landbouwschap*, made it difficult at the time to predict what the fate of that case-law would be. However, instead of being distinguished, this case-law was expanded in future cases. Indeed, it was extended to the situation where the organisation negotiating on behalf of a category of producers complained that the Commission had taken no action against what constituted allegedly a State aid prohibited by the EC Treaty, and was seeking the annulment of the decision of the Commission not to open proceedings.\textsuperscript{18}
The Group as a Substitute for its Members

A second situation where the organisation will be recognised a right to bring annulment proceedings as a representative of its members is, quite simply, where its members would have that right individually, but have chosen to act through the organisation. Here, the organisation substitutes itself to its members, whose action for annulment would have been admissible in any event. The standing recognised to the organisation does not result in extending the jurisdiction of the European judge. It constitutes nothing else really than a procedural device facilitating the treatment of claims which, if lodged individually by all the potential litigants, would have been less manageable.

In the joined cases of *AITEC and Others*, the Court of First Instance considered, thus, that Associazione Italiana Tecnico Economica del Cemento (AITEC), an Italian cement producers’ association, could seek the annulment of the decision of the Commission authorising an aid of the Greek government to a Greek cement producer. Although AITEC was defending the interests of the Italian cement industry as a whole, it had put forward the situation of three of its members, whose competitive position on the Italian market had been affected by the imports of Greek cement benefiting from the aid at issue, according to the Court, to an extent sufficient to consider that they were individually concerned within the meaning of Article 173 al. 3 of the EC Treaty (now Article 240 al. 4 EC):

*In those circumstances, it must be stated that the applicant has defended the individual interests of certain of its members whilst at the same time attempting to protect those of the sector as a whole. [The] applicant [organisation], in bringing its action, may be regarded as having substituted itself for at least three of its members who could themselves – in view of the matters set out in the application – have brought an admissible action. In the present case, therefore, the Court considers that the collective action brought by the association presents procedural advantages, since it obviates the institution of numerous separate actions against the same decisions, whilst avoiding any risk of Article 173 of the Treaty being circumvented by means of such a collective action.*

Such a procedural substitution of an organisation to its members nevertheless presupposes that the interests of those members, the protection of which strictly speaking is the real object of the litigation, are adequately represented by the organisation. Therefore the Court of First Instance requires that the organisation is acting in accordance with its statutes in lodging the application (the statutes must specify that the association has among its objects to protect the economic interests of the sector), and that its representation of the interests of its members has not met with any objections. This verification ensures that the substitution of the organisation to its members respects the interests of those represented.
The Group as a Party to Administrative Proceedings

The third exception to the exclusion of the collective interest in the context of annulment proceedings is certainly the most remarkable. In *Metro v. Commission*, a case decided in 1977, the European Court of Justice had decided that the applicant company could be considered to be directly and individually concerned, as required then under Article 173 al. 2 of the EEC Treaty, where it had filed a complaint on the basis of Article 3(2), b), of Council Regulation No. 17/62 of 6 February 1962 alleging that a selective distribution system from which it was excluded was in violation of Articles 85 and 86 of the EEC Treaty (now Articles 81 and 82 EC), and where that request had not been complied with. The Court considered that ‘it is in the interests of a satisfactory administration of justice and of the proper application of Articles 85 and 86 [of the EEC Treaty] that natural or legal persons who are entitled, pursuant to Article 3(2)b) of Regulation No. 17, to request the Commission to find an infringement of Articles 85 and 86 should be able, if their request is not complied with either wholly or in part, to institute proceedings in order to protect their legitimate interests’.23

It is notable that the action for annulment, here, is brought to ensure judicial review of the validity of the decision of the Commission, and not simply in order to ensure the protection of the procedural rights of the applicant. Therefore, in adopting secondary legislation in which it grants certain procedural rights of participation to interested parties (Lenaerts and Vanhamme 1997), the European legislator extends the right of private applicants to bring annulment proceedings, although the conditions under which such proceedings may be brought are defined in primary law, by what is now Article 230 al. 4 EC. Insofar as associations of undertakings are recognised as interested parties in the context of the administrative procedure which may lead the Commission to conclude that competitors of those undertakings have violated the provisions of the Treaty relating to competition, these associations may challenge, under Article 230 al. 4 EC, the decision by the Commission not to take action against the alleged violation.24

What *Metro* illustrates in the area of competition law also occurs, *mutatis mutandis*, in the area of anti-dumping measures adopted by the Community against imports from third countries.25 The applicable regulation here provides that investigations into any alleged dumpings shall normally be initiated upon a written complaint by any natural or legal person, or any association not having legal personality, acting on behalf of the Community industry.26 In order to determine when the complaint is actually representative of the Community industry, the regulation defines the level of support the complaint must have among the Community producers of the product concerned.27 Once it decides to initiate anti-dumping proceedings, the
European Commission notifies this, indicating the product and the countries concerned, and stipulating when the interested parties may ‘make themselves known, present their views in writing and submit information if such views and information are to be taken into account during the investigation’.30 Interested parties may also apply to be heard by the Commission, if they make a written request ‘showing that they are an interested party likely to be affected by the result of the proceeding and that there are particular reasons why they should be heard’.31 The Regulation also defines in general terms how hearings will be organized by the Commission between all the parties (the importers, exporters, representatives of the government of the exporting country and the complainants which have made themselves known), in particular with respect to access to information and exchange of information.

The impact of the recognition of such procedural rights in the course of the administrative procedure is illustrated by the case of Fediol.32 There, invoking Council Regulation (EEC) No. 3017/79 of 20 December 1979 on protection against dumped or subsidized imports from non-EEC countries,33 one of the predecessors to Council Regulation (EC) No. 384/96 of 22 December 1995, the applicant association Fediol (Federation of EEC seed crushers and oil producers) had complained about the export-subsidising practices of the Brazilian government, requesting the Commission to adopt protective measures. The Commission investigated the matter, entering into negotiations with Brazil, and finally informed Fediol that it was inappropriate to take action, as Brazil had removed most of the contested measures, as the economic impact of the remaining measures was negligible and as, moreover, the interests not only of the European industry were to be taken into account, but those also of the consumers. When Fediol challenged that decision, the Commission objected that the action for its annulment should be declared inadmissible. The Court disagreed. Its reasoning began with an uncontroversial point, considering that complainants

must be acknowledged to have a right to bring an action where it is alleged that the Community authorities have disregarded rights which have been recognized specifically in the regulation, namely the right to lodge a complaint, the right, which is inherent in the aforementioned right, to have that complaint considered by the Commission with proper care and according to the procedure provided for, the right to receive information within the limits set by the Regulation and finally, if the Commission decides not to proceed with the complaint, the right to receive information comprising at least the explanations guaranteed by Article 9(2) of the Regulation [stating that the Commission shall inform any representatives of the country of origin of export and the parties known to be concerned and shall announce the termination in the Official Journal setting forth its basic conclusions and a summary of the reasons therefor].34

But the Court went further. It added that
...in the spirit of the principles which lie behind Articles 164 and 173 of the [EEC] Treaty [now Articles 220 EC and 230 EC, as amended by the Nice Treaty], complainants have the right to avail themselves, with regard both to the assessment of the facts and to the adoption of the protective measures provided for by the Regulation, of a review by the Court appropriate to the nature of the powers reserved to the Community institutions on the subject.

It follows that complainants may not be refused the right to put before the Court any matters which would facilitate a review as to whether the Commission has observed the procedural guarantees granted to the complainants by Regulation No. 3017/79 and whether or not it has committed manifest errors in its assessment of the facts, has omitted to take into consideration any essential matters of such a nature as to give rise to a belief in the existence of subsidization or has based the reasons for its decision on considerations amounting to a misuse of powers. In that respect, the Court is required to exercise its normal powers of review over a discretion granted to a public authority, even though it has no jurisdiction to intervene in the exercise of the discretion reserved to the Community authorities by the aforementioned Regulation.35

Article 164 of the EEC Treaty, now Article 220 EC, provides that the European judicature ‘shall ensure that in the interpretation and application of this Treaty the law is observed’. The Court derives from this very broad provision that the action brought by Fediol must be considered admissible: as the Regulation ‘acknowledges that undertakings and associations or undertakings injured by subsidization practices on the part of non-member countries have a legitimate interest in the initiation of protective action by the Community’, the Court considers that ‘it must therefore be acknowledged that they have a right of action within the framework of the legal status which the Regulation confers upon them’.36 The judgment of 4 October 1983 in effect says that once the European legislator has identified that certain actors have an interest in the adoption of a Community act, these actors should be recognised the power to contribute to the preservation of legality within the EC legal order, by bringing annulment proceedings against the decision not to adopt the act they request. As indicated by the reference to Article 220 EC, the reasoning is based, less on the need to ensure the effective protection of the rights of the applicants, than on the need to ensure that no act adopted within the EC legal order will be immune from judicial review. And remarkably, the significance of Article 230 al. 4 EC (then Article 173 al. 2 EEC) was made dependent on the identification, by the European legislator, of ‘interested parties’.

The Court summarises its case-law creating this exception to the lack of recognition of associational standing by stating that ‘Where a Regulation accords applicant undertakings procedural guarantees entitling them to request the Commission to find an infringement of Community rules, those undertakings should be able to institute proceedings in order to protect their legitimate interests’.37 The reasoning has been applied also where complaints have been filed for State aids in alleged violation of the EC Treaty. As already

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mentioned, Article 88(2) EC provides that, before deciding that a State aid is not compatible with the requirements of undistorted competition within the common market, the Commission must give notice to the parties concerned in order that they may submit their comments. The parties which filed such comments, especially where their complaints were at the origin of the investigations launched by the Commission, would be considered to be individually concerned by the decision finally adopted by the Commission at the close of that investigation, provided at least that the position on the market of the applicant undertakings ‘is significantly affected by the aid which is the subject of the contested decision’.38

This case-law may be relied upon by associations of undertakings. In the case of AIUFFASS and AKT39 for instance, the applicants were an association representing through its member associations 90 per cent of European weavers of yarns of artificial and synthetic fibres, and an association based in the United Kingdom whose sole member represented the interests of 80 per cent of the United Kingdom textile and apparel industry. They had submitted their observations to the Commission when the United Kingdom had notified that it intended to grant an aid to an undertaking based in Belfast, active in the textile sector as a manufacturer of synthetic and cotton fabrics. The Court considered that these associations were individually affected by the decision authorising the aid addressed to the United Kingdom, because ‘the applicants have been active in relation both to the general policy on State aid and to specific aid projects in the textile sector in the interests of their members or of members of their members operating in the same sector as the recipient undertaking. Consequently, the position of both AIUFFASS and AKT as interlocutors of the Commission was affected by the contested decision’ (para. 51). Although the Court mentions the case-law of Kwekerij Gebroeders van der Kooy BV and CIRFS, implying that the applicant associations were affected in their position as negotiators for a sector, the decision of the Court to consider the action for annulment admissible also is based on its finding that both associations are ‘interested persons’ under Article 88(2) EC (then Article 93(2) EC Treaty).40

Again, the recognition to certain parties of procedural rights in the administrative procedure preceding the adoption of the challenged Community act, and the exercise of those rights implying an active participation in that procedure, lead the Court to recognise that the act, once adopted, may be considered to be of individual concern to those parties.

The consequences are potentially far-reaching, because of the expansive reading the European judicature has on occasion made of this case-law. First, even where no procedural rights have been formally granted to certain parties in either the Treaty or in secondary legislation, but where the applicant in an action for annulment has taken an active part in the administrative procedure, for instance by filing the initial complaint, and seeks a judicial review of the
decision closing the procedure, he may have a right to bring annulment proceedings, either in order to ensure that the obligation of the institutions to examine diligently and impartially the individual situation on which they are to take a decision will be complied with, or, alternatively, on the basis of the general right of access to a court which the European Court of Justice has derived from Articles 6 and 13 of the European Convention on Human Rights and which Article 47 of the EU Charter of Fundamental Rights now mentions.41 Second, the exercise of procedural rights afforded to the applicant in the administrative proceedings prior to the adoption of the Community act may not be required. Consider, by way of illustration, the role recognised to workers’ organisations in the context of concentrations of undertakings, and the consequences it produces on their locus standi in annulment proceedings before the Court of Justice. After works councils of the undertakings concerned and a trade union (Fédération Générale Agroalimentaire-CFDT) had sought the annulment of the decision of the Commission under the applicable Regulation42 to authorise a concentration resulting from the acquisition of Perrier by Nestlé provided certain conditions were fulfilled – including, among those conditions, the sale to a competitor by Vittel, a subsidiary of Nestlé, of the Pierval plant employing 119 workers – the Court of First Instance had to decide whether the applicant organisations had the standing required to challenge the contested decision, under Article 173 al. 2 EC Treaty.43 For reasons on which the parties did not fully agree,44 the applicant organisations had not exercised the right which Article 18(4) of the Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings recognises them, to make their views known to the Commission – a provision which, according to the Court, ‘manifests an intention [of the European legislator] to ensure that the collective interests of those employees [of the undertakings concerned] are taken into consideration in the administrative procedure’.45 The Court of First Instance considered that, by making individual mention of the recognized representatives of the employees of the undertakings which are the subject of the concentration. Regulation No. 4064/89 constitutes them into ‘a closed category clearly defined at the time of adoption of the decision, by expressly and specifically giving them the right to submit their observations in the administrative procedure’,46 thus differentiating them from all other persons potentially affected by the decision and implying that the decision may be considered of ‘individual concern’ to them.47 The Court of First Instance refused to accept the argument of the Commission that the right of the applicant organisations to seek judicial review of its decision was conditional upon their participation in the administrative procedure, that is, upon the exercise by these organisations of the procedural rights recognised to them by Article 18(4) of Regulation No. 4064/89.48 Under the Vittel case-law
therefore, the exercise of procedural rights on the one hand, the recognition by the European legislator of procedural rights on the other hand, may constitute alternative conditions – rather than conditions which would have to be fulfilled cumulatively – justifying the recognition of locus standi in the context of annulment proceedings.

CIVIL SOCIETY ORGANISATIONS

These cases, the reader may be thinking, are far removed from the question of the role of civil society organisations before the European Court of Justice. But they are not. At a first level, most obviously, the case-law which has been mentioned may be relied upon by associations. This is true of associations of undertakings, as certain of the examples presented illustrate. But it may be true also of other associations, acting in the public interest or for the defence of the rights of their members who are not economic actors. For example, in what may be considered to be a relatively straightforward application of Metro v. Commission, the Court of First Instance decided that the BEUC and the National Consumer Council (NCC), representing the United Kingdom consumers, could seek the annulment of the decision of the Commission not to launch an investigation into the agreement concluded between the association of car traders dominant in the United Kingdom and the Japan Automobile Manufacturers Association restricting the export of Japanese cars to the United Kingdom. Considering that this agreement was contrary to Article 85(1) of the EEC Treaty and that the restrictions on access to the market resulting from the agreement constituted an abuse by the British association of a dominant position, contrary to Article 86 of the EEC Treaty, the BEUC and NCC had filed a complaint with the Commission, on the basis of Article 3(2) of Regulation No. 17/62 of the Council of the EEC of 6 February 1962. The Court of First Instance agreed that the action for annulment was admissible, recalling that the European Court of Justice had consistently held that it is in the interests of the proper administration of justice and of the correct application of Articles 85 and 86 of the Treaty that natural or legal persons who are entitled to make a request pursuant to Article 3(2)(b) of Regulation No 17 should be able to institute proceedings in order to protect their legitimate interests if their request is not complied with either wholly or in part (judgment of the Court of Justice in Case 26/76 Metro v Commission [1977] ECR 1875, paragraph 13).

At a more fundamental level however, what the cases presented in the previous section illustrate is that the rise of procedural rights to be consulted in the EU decision-making process produces a trickle-effect on the access to
the European Court of Justice by the groups who are either consulted in that process, or should have been consulted but have been unjustifiably excluded therefrom. The potential for development of associational standing on this basis remains limited, however, as the Court has not affirmed the existence of a general right to be consulted for all persons interested in the adoption of a particular act. Therefore whether or not a group may seek the annulment of that act, either because of an alleged violation of its procedural rights or because, although it has been consulted, it believes that the author of the act has committed an error of appreciation, will depend on the prior identification, by the European legislator, of the interested parties. Moreover, despite the recognition in Article I-47 of the Treaty establishing a Constitution for Europe of the principle of participatory democracy, even the most generous reading of this case-law could not extend it in order to recognise a right of an organisation to seek the annulment of a European law in the course of the preparation of which the applicant organisation would have been consulted.

Two recent developments may be read as meaning that, in the future, the consultation of civil society organisations in the system of the European Union will be made more systematic. A first development is part of the initiatives adopted by the European Commission, since 2000 especially, in order to improve European governance. The Commission has adopted a White Paper on European Governance in July 2001, which proposes a number of ways to encourage the involvement of stakeholders in the shaping of the policy and legislation of the Union, as well as the openness and accountability of the institutions. The White Paper states that the Commission should ‘organise a systematic dialogue with European and national associations of regional and local government, while respecting national constitutional and administrative arrangements’, in order to ensure that ‘regional and local knowledge and conditions are taken into account when developing policy proposals’. It also announced that it would propose a code of conduct setting minimum standards for consultations, in order to ‘reduce the risk of the policy-makers just listening to one side of the argument or of particular groups getting privileged access on the basis of sectoral interests or nationality, which is a clear weakness with the current method of ad hoc consultations’. In the view of the Commission, the standards contained in such a code of conduct ‘should improve the representativity of civil society organisations and structure and structure their debate with the institutions’. Following in this respect on the White Paper on European Governance, the Commission adopted at the end of 2002 a communication defining the general principles and minimum standards for the consultation of interested parties by the Commission. The communication defines ‘consultations’ as ‘those processes through which the Commission wishes to trigger input from outside interested parties for the shaping of policy prior to a decision by the Commission’. The minimum
standards relating to consultation recognise the notion of collective interest: among the groups which, under these minimum standards, should be targeted for consultation, the communication mentions ‘bodies which have stated objectives giving them a direct interest in the policy’.

A second development concerns the inclusion, in the Draft Treaty establishing a Constitution for Europe, of the principle of participatory democracy. Article I-47 provides in particular that

The Union Institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

The Union Institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent.

Neither of these developments, however, should have an impact on the access of civil society organisations to the Court of First Instance and the Court of Justice. The general principles and minimum standards for the consultation of interested parties by the Commission have been formulated, rather than in a legally binding instrument, in a communication, precisely in order to avoid that ‘a Commission proposal could be challenged in the Court on the grounds of alleged lack of consultation of interested parties’. The Commission considers that such an approach based on the recognition of a legal right to be consulted, which it calls ‘over-legalistic’, ‘would be incompatible with the need for timely delivery of policy, and with the expectations of the citizens that the European Institutions should deliver on substance rather than concentrating on procedures’. It will not be possible for any organisation excluded from consultations in alleged violation of the standards the Commission set for itself; nor is there anything in the case-law relating to Article 230 al. 4 EC which would suggest that, in the absence of procedural rights granted to organisations, the fact that they may be consulted in the course of the adoption of a particular legislative proposal will suffice to justify that they will be considered as directly and individually concerned by the instrument adopted at the outcome of that process. As to the van der Kooy – CIRFS line of cases, which created an exception to the exclusion of associational standing where the position of the organisation as negotiator for a sector was affected, it never applied beyond the adoption of decisions by the Commission at the end of administrative proceedings in the domain of State aids. The Metro case-law has developed in the context of competition law and anti-dumping proceedings, where complainants are recognised a right to seek the annulment of the decision of the Commission rejecting their complaint by deciding not to institute proceedings. It would constitute a very bold, and
probably unjustified, extension of this case-law to seek to transpose it to the adoption of all regulatory acts. It is doubtful, finally, that the principle of participatory democracy embodied in Article I-46 of the Treaty establishing a Constitution for Europe will modify this, at least until that principle leads to the adoption of further implementing acts, investing certain organisations with procedural rights to be consulted.

INTERVENTION BEFORE THE EUROPEAN COURT OF JUSTICE

Of course, the filing of annulment proceedings does not constitute the only avenue through which associations may gain access to the European Court of Justice. Apart from the other forms of direct action which they may seek to use – none of which, however, creates a possibility for the ‘collective interest’ to emerge – associations may rely on the possibility of intervening in the cases presented to the Court of First Instance or the Court of Justice.

Already in the Confédération nationale des producteurs de fruits et de légumes and others v Council of the European Economic Community case of 1962, Advocate General M. Lagrange had considered in his Opinion to the Court that the exclusion of associational standing in the context of annulment proceedings under what was then Article 173 of the EEC Treaty was compensated by the possibility for organisations to intervene in the proceedings before the Court, in the context of direct actions. The Court has also relied on this argument in later cases. Of course, the validity of the argument will depend on what role we intend an enlarged access to justice of associations to fulfil. The possibility of intervention does not answer the concerns of those who believe that no act adopted by the institutions of the Union should be immune from effective judicial review, and that therefore, where no private person is concerned directly and individually and the privileged applicants (the Member States and the European Parliament in particular) have no incentive to seek that review, interested organisations should be recognised a right to do so. In that sense, the possibility of intervention may not be seen as compensating for the exclusion of associational standing in the context of actions for annulment. As we have seen however, other rationales are also put forward in favour of associational standing. If the purpose is to ensure that the judicial process includes all relevant perspectives, and does not underestimate the weight of certain collective interests potentially distinct from both the interest of the Community or Union which it is the role of the Commission to defend, and the individual interest of the applicant in the context of annulment proceedings, the intervention by a representative organisation may be seen as an adequate
alternative to the introduction by the organisation itself of an action for the annulment of an act of the Union. Even under this logic, however, the conditions of intervention may be seen as relatively restrictive. Under Article 40 al. 2 of the Statute of the Court of Justice of the European Communities, the right to intervene shall be open to any other person [other than the Member States or the Institutions, who are recognised a right to intervene under Article 40 al. 1 of the Statute] establishing an interest in the result of any case submitted to the Court, save in cases between Member States, between institutions of the Communities or between Member States and institutions of the Communities.

In exceptional cases, this right of intervention has been interpreted generously, as making it possible for certain representative organisations to file what may be called amici curiae briefs, even in the absence of an interest of their own in the result of the proceedings: the notion of collective interest, we may say, is therefore taken into account in the definition of which ‘interest’ must be established in order for an association to be authorised to intervene before the Court. However, the formulation of Article 40 al. 2 of the Statute of the Court implies that no intervention may be envisaged either where the Court is requested to interpret the requirements of Union law or to pronounce itself on the validity of secondary legislation by giving a preliminary ruling upon referral from a national court. Indeed, in the context of preliminary rulings, the Court is not requested to decide on a ‘case’; it is asked, rather, to cooperate with the national jurisdiction in order to facilitate the correct application of European law. Nor will an intervention by organisations be possible in interinstitutional cases, as Article 40 al. 2 of the Statute excludes intervention by private parties ‘in cases between Member States, between institutions of the Communities or between Member States and institutions of the Communities’. Moreover, under Article 40 al. 4 of the Statute, the application to intervene ‘shall be limited to supporting the form of order sought by one of the parties’; therefore, it will not be sufficient for an organisation to demonstrate that it has an interest in the development of the case-law of the Court or the interpretation it will give to the rules it is called upon to apply – the ‘interest’ justifying a leave to intervene must be in the outcome of the case, its holding for the parties immediately concerned.

The restricted possibilities of intervention in the context of referrals made by national jurisdictions to the Court of Justice is especially troublesome. Under Article 23 al. 2 of the Statute of the Court, there is no room for intervention by private parties before the European Court of Justice in the context of preliminary rulings. As a result, it may be difficult in certain cases for the European Court of Justice to fully appraise whether the situation it is presented with by the referral is representative of the totality of situations
arising under the contested national rule an appreciation of the compatibility of which by the national jurisdiction requires an interpretation of Union law. The absence of third-party interventions other than those enumerated under Article 23 al. 2 of the Statute in favour of the institutions or the Member States (or EEA Member States) deprives the Court from the competing perspectives those other parties could potentially bring to the picture it is given, thus raising the risk of instrumentalisation of the referral procedure by inventive litigants, or even, in certain cases, of collusion between the parties to the main proceedings. Another difficulty is that the quality of the contradiction before the Court of Justice is made to depend on the relative openness of national jurisdictions to interested parties, despite the many differences which may exist between the Member States concerning the possibilities of intervention before their courts – and, indeed, despite the differences which remain between national rules of procedure concerning the conditions required for litigants to have standing to sue.

CONCLUSION

The overall picture is, it must be recognised, rather disappointing. The question of associational standing in the context of actions of annulment – the right for an organisation to lodge proceedings against an act adopted by the institutions based on its interest in defending the value for which it was constituted – presents a certain analogy, in the way it has been treated in the case-law, with the more classical question of the *locus standi* of private parties in general. Since 1962, the European Court of Justice has erected a barrier in its case-law, which it since has found difficult to lower even where there might have been obvious reasons to do so, indeed, even where the Court itself seems to have recognised that such valid reasons may exist. The alternative open to associations – to intervene before the Court of Justice and the Court of First Instance on the basis of Article 40 of the Statute – hardly compensates for this. Although it may arguably satisfy the ‘participatory-democracy’ rationale for widening the access of groups to the Court of Justice (such an extension may serve to encourage civil society organisations to implicate themselves in the decision-making process) as well as the ‘participatory-adjudicative’ rationale (associational standing may contribute the legitimacy of the judicial decision, resulting from an adjudicatory process in which representative actors have been participating), the alternative of intervention does not answer adequately the ‘rule of law’ argument favouring associational standing. According to this argument, certain illegal acts of the administration, or unconstitutional acts adopted by the legislator, risk being left unremedied if associations are not recognised as *locus standi* in order to seek their judicial review: where
violations concern large and diffuse interests, which no individual litigant would otherwise be under an incentive to challenge, or where no individual litigant may even have standing to sue, in a system where the admissibility of the action is made conditional upon a demonstration that the interest is sufficiently ‘individualized’, that is, specific to the individual applicant rather than common to an open category of persons of which the litigant is a member, the granting of standing to associations should be seen as means to avoid the resulting impunity for the illegality of the acts adopted. Although the Treaty establishing a Constitution for Europe offers a partial solution to this question, from the point of view of the recognition of associational standing, the solution has a paradoxical ring to it. If anything, the fact that such a solution has been identified in the Constitution makes it less plausible, rather than more, that organisations will be recognised a right to lodge actions for annulment in the name of the value their members have chosen to defend collectively, because filling the gap in the availability of judicial review will appear less urgent tomorrow than it may have appeared in the past.

There is, nevertheless, one promising dimension to the case-law which has been discussed. It is in the link it establishes between the participation of certain interested organisations in the administrative procedures preceding the adoption of a Community act, and the admissibility of those organisations in the context of annulment proceedings against that act once it is adopted. Should this link be confirmed in the future, the development of consultative processes in law- and policy-making in the Union, even if limited to regulatory (as opposed to legislative) acts, might influence further developments before the Court of First Instance and the Court of Justice, encouraging them to open their gates more broadly to associations in general, and to civil society organisations in particular. This report has emphasised that this link is still a fragile one, and that it is still to be seen more as a potential development in the future than as an acquis of European constitutionalism. Caution is required. But it does illustrate the interdependency of the progress of a decisional culture based on consultation and a transformation of the judicial function in order to make it more welcoming to collective interests. The future will tell how far along the route of associational standing the recognition of this interdependency will lead us.

NOTES

1. This has been largely the focus of the debate of organisational standing under Article III of the United States Federal Constitution, restricting the jurisdiction of federal courts to deciding ‘cases and controversies’ (Stone 1972 and 1985–1986; Sunstein 1992). The restrictive approach adopted by the United States Supreme Court in _Lujan v. Defenders of Wildlife_, 112 S.Ct. 2130 (1992), has served to highlight the importance of this question. See
also for a broader perspective, Parker and Stone (1978); and, for a call upon courts to create remedies in order to ensure that deficient administrative performance is effectively sanctioned, the path-breaking article by Stewart and Sunstein (1982).

2. Associated Industries, Inc. v. FCC, 134 F.2d 694, 704 (2nd Cir. 1943). On this rationale, which also justifies a generous reading of the requirements of standing in order to authorise suits by public-minded citizens, for instance in the context of taxpayer suits, see Jaffe (1961) and (1968); and Davis (1995: 386–91).

3. In defence of an approach to adjudication based on pratical reason, which they contrast with ‘foundational’ approaches, see Faber and Frickey (1986–1987: 1645–8).


6. The solution currently envisaged to what is widely perceived in the academic community as an insufficient protection of the right to an effective remedy for the individual affected by an act of a general nature, still will appear to many unsatisfactory (see Biernat 2003). Article III-365 of the Treaty establishing a Constitution for Europe states that any natural or legal person may institute annulment proceedings against ‘an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures’. The extension of the locus standi of private applicants concerns therefore only non-legislative acts – regulations, not European laws, among the acts which are considered directly applicable.


8. The Member States, the European Parliament, the Council of Ministers or the Commission, may seek the judicial review of any act of the Union, under Article III-365 al. 2 of the European Constitution. This competence has been recognised to the European Parliament since the Treaty of Nice entered into force on 1 February 2003.

9. Under Article III-365 al. 3 of the European Constitution, the Court of Auditors, the European Central Bank and the Committee of the Regions may seek the judicial review of acts adopted by the Union or its institutions for the purpose of protecting their prerogatives.

10. In presenting these exceptions and in locating them within the broader debate concerning the improved participation of civil society organisations in European governance, I will use indifferently the terms of ‘group’, ‘association’, or ‘organisation’, without distinguishing between them. Generally, the expression ‘group’ would refer to a less structured collectivity of persons than would the other two expressions; and the notion of ‘association’ clearly suggests the idea of a legal personality being attached to the group, whilst ‘organisation’, although suggesting the idea of a structured whole, does not necessarily imply a distinct legal personality. Although these connotations matter, I chose to use these expressions as synonyms in this chapter partly to simplify style, and partly because the capacity of the ‘group’ to bring an action in annulment before the Court of First Instance will not depend on that group being recognised a legal personality by the national legal order from which it originates. All that is required in the case-law of the European Court of Justice is that the group thus formed is endowed with ‘the necessary independence to act as a responsible body in legal matters’, under its rules and constitutional structure (Case 18/74, General Union of
The legal and institutional context


11. See the preceding note.

12. On the distinction between the existence of a legal ‘interest’ and the ‘quality’ to bring proceedings, as defined by the rules of the Treaty stipulating the conditions under which an action for annulment may be brought, see the Opinion of Advocate General W. van Gerven in the Case C-70/88, European Parliament v. Council, [1990] ECR I-2041, at pp. I-2058–2059.


16. This provision (now Article 88(2) EC) stipulates that, before deciding that a State aid is not compatible with the requirements of undistorted competition within the common market, the Commission must give notice to the parties concerned in order that they may submit their comments.


20. Ibid., para. 60.

21. Ibid., para. 61–2.


26. Article 5(1) of Council Regulation No. 384/96. Only under special circumstances may it be decided to initiate an investigation without the Commission having received a written complaint by or on behalf of the Community industry requesting the initiation of such investigation; this shall be done, then, ‘on the basis of sufficient evidence’ (Article 5(6)).

27. See Article 5(4) of Council Regulation No. 384/96.


30. Article 6(15) of Council Regulation No. 384/96.


32. Council Regulation (EEC) No. 3017/79 of 20 December 1979 on protection against dumped or subsidised imports from countries not members of the European Economic Community,
OJ L 339 of 31.12.1979, p. 1 (corrigenda to this Regulation were published in the OJ L 62 of 7.3.1980, pp. 40 and 41, and in OJ L 89 of 2.4.1980, p. 22). Article 5 of that Regulation provided that any natural or legal person injured or threatened by dumped or subsidised products imported from non-EEC countries could file a written complaint with the Commission.

34. Case 191/82, at para. 28.

In fact, the European Court of Justice does not clearly distinguish in its case-law between the first and the third exceptions to the principle that the collective interest of groups is not taken into account in the application of Article 230 al. 4 EC, as described in the present typology. Therefore it considers that ‘… an action for annulment of a measure brought by an association which is not the addressee of the measure is admissible in two sets of circumstances. The first is where the association has a particular interest in acting, especially because its negotiating position is affected by the measure which it seeks to have annulled [citing the judgment in Van der Kooy, cited above]. The second is where the association, by bringing its action, has substituted itself for one or more of the members whom it represents, on condition that those members were themselves in a position to bring an admissible action (see the judgment of 6 July 1995 in Joined Cases T-447/93, T-448/93 and T-449/93 AITEC and Others v Commission [1995] ECR II-1971, paragraph 60)’ (Joined cases T-481/93 and T-484/93, Vereniging van Exporteurs in Levende Varkens and others and Nederlandse Bond van Waaghouderen van Levend Vee and others v Commission of the European Communities, [1995] ECR II-2941).

40. Case T-54/99, max.mobil Telekommunikation Service GmbH v. Commission, [2002] ECR II-213 (‘It is in the interests both of the sound administration of justice and of the proper application of the competition rules that natural or legal persons who request the Commission to find an infringement of those rules should be able, if their request is rejected either wholly or in part, to institute proceedings in order to protect their legitimate interests’ (para. 56)).
43. The Court of First Instance, however, considered that the challenged decision had not been adopted by the Commission in violation of the procedural rights recognized to the workers’ representatives under Regulation No. 4064/89. See para. 61-64 of its judgment of 27 April 1995.
44. Case T-12/93, at para. 39.
45. Case T-12/93, at para. 40.
46. Case T-12/93, at para. 41.
47. Case T-12/93, at para. 47.
48. The action for the annulment of the decision was declared inadmissible, however, because although the challenged decision was of ‘individual’ concern to the applicant organisations, they were not ‘directly’ concerned, in the absence of any automatic or inevitable impact of the transfer of Pierval on the individual employment contracts or the collective rights of the employees. That latter aspect, however, is purely incidental.
50. Case T-37/92, Bureau Européen des Unions des Consommateurs and National Consumer Council v Commission of the European Communities, [1994] ECR II-385. Prior to this judgment delivered by the Court of First Instance on 18 May 1994, the legal commentators were divided as to the chances of success of such an action; for example Christianos (1992: 223–4) in favour of such an admissibility, and Krämer (1988: 348) expressing a more sceptical position.

51. See, for instance, Case C-170/89, Bureau Européen des Unions de Consommateurs v Commission of the European Communities, [1991] ECR I-5709, paras. 28–30, and the casenote by J. Hooijer, C.M.L. Rev., 1992, pp. 157–62. In the case of Technische Universität München (Case 269/90, Technische Universität München, [1991] ECR I-5469), the Court did identify a ‘duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case’, as well as ‘the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present’ (at para. 14). This judgment could have been the departure point of a case-law imposing on the institutions an obligation to hear all parties concerned before the adoption of decisions, when they may possess information otherwise not in the hands of the Commission, or have expert knowledge which, as part of its general duty to examine carefully and impartially all the relevant aspects of the individual case, the Commission should consider. Later cases, however, lead to conclude that Technische Universität München only applies where the decision de facto specifically concerns one particular trader, and in situations in which the characteristics of the matter in question are, by their nature, best known to the applicants: see, for example, Joined cases T-481/93 and T-484/93, Vereniging van Exporteurs in Levende Varkens en others and Nederlandse Bond van Waaghouders van Levend Vee and others v Commission of the European Communities, [1995] ECR II-2941, para. 56–59 (although the Commission adds that in the case concerned, where at stake were emergency interim measures for the protection of the health of animals and humans, the need for a decision to be swiftly adopted seems irreconcilable with a broadening of the right to consultation).

52. It would seem that, in the eyes of the public and some commentators, this development was in immediate response to the fraud and mismanagement scandals which led in March 1999 to the fall of the Santer Commission. In fact, the reflection on the reform of European governance has been launched since 1996–1997 within the European Commission, especially under the Forward Studies Unit created by J. Delors. See for a set of consultation papers collected after a seminar held in 1996–1997, De Schutter et al. (2000).


56. In two other communications also following upon the White Paper on European Governance, the Commission examined how legislation making could be improved and be made more responsive to the diversity of contexts in which it is to apply (Communication from the Commission, ‘European Governance: Better Lawmaking’, COM(2002) 275 final of 5.6.2002), and defined the general principles of impact assessment, which it seeks to impose, since 2003, to all major initiatives (Communication from the Commission, ‘Impact Assessment’, COM(2002) 276 final of 5.6.2002).


58. Ibid, 15–16.


60. Ibid, 10 and 15 (‘Neither the general principles nor the minimum standards are legally binding’).

61. By its very nature, the action which a private person may file before the Court of First Instance for failure to act in order to seek a finding that ‘an institution of the Community has failed to address to that person any act other than a recommendation or an opinion’ (Article 232 EC), although it may be relied upon by an association, will concern its
individual interest to be addressed an act, and not the collective interest that person seeks to defend. The same applies to actions seeking compensation for damages where the extra-contractual liability of the institutions is engaged (Article 235 EC and Article 288 al. 2 EC).

Finally, although the intervention of unions is frequent in the disputes arising between the Community and its servants (Article 236 EC), the nature of the claim precludes organisations from directly relying on this form of action.

62. Of course, they may also be parties to proceedings before national jurisdictions, in which case, if the national court decides to refer a question to the European Court of Justice under Article 234 EC, they will take part in the proceedings before the Court. This question is not addressed in this chapter.


65. The same rule was previously formulated by Article 37 al. 2 of the Statute of the Court. In the following discussion, the Rules relating to intervention before the Court of First Instance of the European Communities shall not be addressed separately. Indeed, Article 53 of the Statute of the Court of Justice of the European Communities extends to the Court of First Instance the rules contained in Title III of the Statute. Moreover, Articles 115 and 116 of the Rules of Procedure of the Court of First Instance are almost identical in their wording to Rule 93 of the Rules of Procedure of the European Court of Justice. Therefore a separate treatment of intervention before both courts is not warranted.

66. See, for example, the intervention of the Consultative committee of the Bar Associations of the European Community (CCBE – Commission consultative des barreaux européens), in Case 155/79, AM & S v. Commission of the European Communities, [1982] ECR 1575 (intervention in order to clarify, by a comparative study, the status of the privileged correspondence between a company and its legal counsel); even more remarkable has been the authorisation to intervention granted to the International Federation of Human Rights Leagues (FIDH) in the context of an appeal from a judgment of the Court of First Instance, in a case concerning the compatibility with the right to respect for private life of pre-employment medical examinations in the European public service: see Case C-404/92 P, X v. Commission, [1994] ECR I-4737. The authorisation to intervene, granted by an order of 19 July 1993 (unpublished), is all the more remarkable considered that the Belgian League of Human Rights had been denied the right to intervene in the proceedings before the Court of First Instance (Joined Cases T-121/89 and T-139/90, X v. Commission, [1992] ECR II-2195 (judgment of 18 September 1992)), although the ‘interest’ it claimed in favour of its intervention was of the same nature as that put forward by the FIDH in the later cassation proceedings before the Court of Justice. The representativity of the FIDH – as demonstrated, according to the order of the President of the Court of Justice, by its consultative status with the United Nations and the Council of Europe – seems to have played a role, as well as the ability of the FIDH to offer to the Court expert advice as to the requirements of Article 8 of the European Convention on Human Rights, in a situation where the implications of that provision were not, at the material time, fully clarified. The FIDH was thus placed in the typical position of a ‘friend of the court’, rather than in the position of that of a party having an interest in the proceedings because its rights or interests could be affected by the outcome of the case. Unprecedented at the time, with the exception perhaps of the role played by the CCBE in the AM & S case mentioned above, this use of the intervention procedure has not been replicated since, to the knowledge of the author.

67. Article 93 of the Rules of Procedure provides that the application to intervene must identify ‘the form of order sought, by one or more of the parties, in support of which the intervener is applying for leave to intervene’.

68. See, for example, the Order of 15 November 1993, Case C-76/83, Scaramuzza v. Commission, [1993] ECR I-5715, para. 10.

69. The rules relating to referrals under Article 234 EC are applicable, mutatis mutandis, to referrals made under Article 35(1) of the EU Treaty or under Article 150 of the EAEC Treaty.
REFERENCES


6. Civil society organisations and participatory administration: a challenge to EU administrative law?

Carol Harlow

FROM CITIZENSHIP TO CIVIL SOCIETY

The term ‘civil society’ is one of a number of words and phrases, such as ‘globalisation’, ‘good governance’, ‘transparency’ and ‘accountability’, which have entered the language in the context of debates about transnational institutions and sources of power. Even here, it is a relative newcomer, having, I believe, made its initial entry in justification of the growing role of NGOs or non-governmental organisations in international affairs. Modern systems of democratic government are built on the concept of citizenship and envisage ‘citizens’ as the force to whom an electorate government is ultimately responsible or, in the modern expectation, ‘accountable’ (Mulgan 2000). Increasingly this relationship is analysed in terms of legitimation with legitimacy conferred on those who wield power by the approval of the citizens, usually through the process of democratic elections (Barker 1990).

But the structures of international governance are not democratic in character, or at least only indirectly so. International institutions are not democratically elected and citizens take part in international affairs only through the medium of state machinery, which may or may not connote democratically elected government.

This democratic deficiency should not in principle affect the European Union, whose Treaties commit the Member States to democratic institutions and whose Parliament is democratically elected. Yet election has not been judged sufficient to fill the so-called ‘democratic deficit’ of the EU. Despite eclectic argument over the respective roles of Parliament and Council, the first directly elected, the second indirectly elected but argued by some to be more democratic (Andersen and Burns 1996), a feeling of ‘democratic deficit’ seems to persist (Lord and Beetham 2001). On one view, this stems from the
fact that European citizens do not elect a government: they elect governments, which represent them on the European Council and Council of Ministers (Andersen and Eliassen 1996). On this view, the deficit would be cured by changes to the anomalous status of the European Commission to make it look more like an elected national government. An alternative analysis sees the European Union as devoid of ‘citizens’ and so, in the absence of a demos competent to bestow legitimacy, in a permanent – though surely somewhat theoretical – state of democratic deficit (Weiler 1995; Chryssochoou 1996). On yet another view, democratic deficit is the functional basis of the EU system of governance, enabling the transnational superstructure to be reconciled with strong nationalist underpinnings (Gustavsson 2000).

This is all well known, and I have rehearsed the argument largely to set a framework for consideration of the Civil Society Organisation (CSO), a further linguistic newcomer to the world of transnational governance. The question must arise as to why this change has been made, or perhaps simply come about. Without looking closely at the question, I suggest a link with the shift, clearly discernible in recent years, from representative to participatory and deliberative democracy as a legitimating device for transnational systems of governance, especially the European Union. This idea is attractive to the European Commission; it serves as a device both for building a European demos and, perhaps more important, for legitimating the Commission’s autonomous and free-floating policy-making functions. The Commission’s White Paper on European Governance (2001) (WPG) may today look somewhat outdated, perhaps even superseded by the proposed Constitutional Treaty, but because the WPG gives the most complete account of the Commission vision for EU governance, it receives detailed discussion in this chapter (pp. 134–6).

The subject of this chapter is not civil society but ‘civil society organisations’, however. Again, the terminology is novel and also, as Deirdre Curtin (2003) observes, elusive. Perhaps it simply sweeps up the ramshackle network of campaigning organisations – non-governmental and quasi-non-governmental organisations – which, in the shorthand form of NGO and QUANGO, we think we understand. If so, it blurs an important distinction. By definition, an NGO is non-governmental; a QUANGO is in contrast a ‘hands off’ government agency, a creation of public law subject to many of its controls but not directly in the hands of government. In other words, an NGO exists in the private sector, is an emanation of civil society and, legally speaking, a creature of private law; a QUANGO is not. That is a distinction of importance to this chapter, which argues that CSOs, like the citizens they represent, ought to be net beneficiaries of the administrative law system; entitled to administrative law protections and to access the machinery of administrative justice but subject to the controls of private law. For my
purposes in this chapter, a CSO is an organisation representative of civil society, with a special sort of ‘representative’ quality, derived from the fact that a CSO is born and lives within civil society, a creature of and regulated by private law. This definition has the advantage of aligning with that adopted by the Commission in its Communication (European Commission, 2002). CSOs are defined there as ‘the principal structures of society outside of government and public administration, including economic operators not generally considered to be “third sector” or NGOs’. This definition is claimed as ‘being inclusive and demonstrates that the concept of these organisations is deeply rooted in the democratic traditions of the Member States of the Union’.

GROUPS AND ADMINISTRATIVE LAW

Although European administrative law systems differ in their objectives, they have a common core. Loosely based on a variant of separation of powers theory, all cede lawmaking power to the legislature and policy-making to the executive (Lindseth 2004). The term ‘executive’ is in fact an uncomfortable compendium of several disparate functions: at the highest level, government is responsible for public welfare and security. For this purpose, it is endowed with power to be exercised ‘in the public interest’. In this sense therefore government is deemed to be the primary representative of the public, a modernist assumption challenged in post-modern times. Classical administrative law systems also confer on government powers of policy-making, executive terrain on which courts usually hesitate to trespass. Finally, the term ‘executive’ is seen to comprise an ‘administration’, whose sole function is seen as the execution of the policies of the policy-maker expressed as legislation enacted by a separate legislature. This classical depiction, known to Americans as the ‘transmission belt theory’ of government, is unable fully to explain developments of the late twentieth century.

Since administrative law developed in the nineteenth century, in a period when ‘command-and-control’ theories of law were fashionable, it is unsurprising that its primary function was viewed as control. ‘The primary purpose of administrative law’, states a leading English textbook, is ‘to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse’ (cited Harlow 1999a: 263–6). But these systems also served to protect the private interests of citizens, to whom administrators ‘owe legally correct procedural and substantive action’ (Shapiro 2001: 369). The objectives of administrative law systems vary and where the balance lies between these two functions is also variable. But separation of powers theory, which, in some form or other, infuses every western constitution, seemed to dictate a division of the control function: prospective control was exercised by
the lawmaker, which settled the limits of executive power; the (administrative) judge took responsibility for retrospective control (Harlow and Rawlings 1997: 75–8). Within limits, French administrative law acknowledged an autonomous rule-making power vested in the executive, which fell within its competence to oversee (Heyriès, 28 June 1918 Rec 651; Labonne, CE 8 August 1919 Rec 737; Jamart, CE 7 February 1936 Rec 172) but, not surprisingly, this did not entail rights of prior public participation.

However formulated, procedural protections as developed by courts derive essentially from trial-type procedure and thus take on the ‘individuated’ decision-making character of a court of law (Galligan 1996). Common law systems observe the rules of natural justice, the first of which provides for someone to be ‘heard’ in his own defence. Perhaps the individualism that marks common law systems of administrative law partly reflects their origin as private law systems of public law; in other words, as systems where the control function is allocated to the ‘ordinary courts’ applying the ordinary principles of the common law, a key element in the English formulation of the rule of law principle (Cassese 2000). However this may be, we see the emphasis reflected in English standing rules, traditionally narrow and restricted to those who seek to protect their legal interests or possess at least a substantial interest in the matter before the court (de Smith, 1980). These tests easily allowed standing to corporate bodies, which acquired the status of individuals, but left little room for associational standing. Thus a representative action in the sense of a claim from a membership organisation to represent the interests of the membership would fail unless individual members could show a substantial interest in a decision under attack; still less was a true ‘public interest action’, or action brought by a CSO claiming to represent the public interest, likely to find favour. The traditional position is represented by the Rose Theatre case, fought unsuccessfully by a group of actors determined to save the remains of Shakespeare’s Rose Theatre from development. In this case it was conceded that, if one or more of the members had had standing, the Trust could have sued in its own name but not otherwise (R. v Environment Secretary ex p. Rose Theatre Trust [1990] 1 QB 504). The same individualistic tendency can be observed elsewhere – notably, as already mentioned, in the due process protection afforded by the common law.

In French administrative law too, where the standing rules are, as shown below, much wider, the droits de la défense, first singled out for protection in disciplinary proceedings, are similarly individuated (Téry CE 20 June 1913 Rec 736). This arrêt de principe has been said by leading commentators to mark an important stage in the protection of individual rights by the Conseil d’État (Long et al. 1993: 166). EC law follows the same pattern, as Nehl remarks, describing the need for ‘a reasonable degree of participation and protection in favour of individuals who are likely to be adversely affected by
the outcome of administrative decision-making’ (Nehl 1998: 2). But note in Nehl’s modern statement of due process requirements the word ‘participation’, to which we shall soon have occasion to return.

In the common law world, credit must go to the American academic, Professor Kenneth Culp Davis, for drawing attention to the role played by administrative rule-making in putting the finishing touches to the encircling framework of ‘before-and-after’ control. His classic text (Davis 1969) marks the point when campaigning groups began to realise the need for access to policy- and rule-making processes. Slowly, they began to exert pressure for administrative law to develop new process rights. Trial-type rights to contest decisions by which one was affected were well developed but decisions often involve the application of rules that divest the decision-maker of discretion. The time to contest rules was before rather than after they were made and new process rights would be necessary to provide for prior consultation and participation in rule-making procedure. Here the United States was well ahead. A significant step had been taken with the Administrative Procedure Act, 1946, which provides in its ‘notice-and-comment’ procedure for an opportunity to be given to ‘interested persons’ to participate in rule-making procedure, sometimes orally, sometimes through a documentary process. Note, however, the emphasis in this statutory provision on individual interest, reflecting the classical bias of administrative law. The transformation of administrative law required two further steps: first, courts must step in to render rule-making procedures enforceable; second, rights of consultation should extend to groups. Perhaps because this reflected the traditional pattern of political participation, this reform was, as we shall see later, more easily achieved through the administrative than the individualist judicial process.

Alongside, the 1970s brought arguments for a ‘reformation’ of administrative law (Stewart 1975; Chayes 1976). Behind this essentially American reform movement lay the vision of the court as an alternative forum for political decision-making, providing a platform for groups disadvantaged in the political process (Dahl 1957; Weiler 1968). The reformists argued for administrative law to change its focus dramatically and to open both courts and decision-making to a wider group of participants. The judicial process at first became more responsive, and standing was widened to allow representation of ‘diffuse’ and ‘intangible’ interests, notably by environmental CSOs in the celebrated case of Sierra Club v Morton 405 US 727 (1972), which sent waves throughout the common law world (Cane 1995). In the same period, intervention rights were granted to third parties and began to be widely used by pressure groups. More important still, the prohibition on judicial policy-making was partially lifted so as to allow the judiciary to play a comprehensive and forceful role in public administration. This they did through ‘hard look review’ (Vermont Nuclear Power Corp. v Natural
Resources Defense Counsel Inc 435 US 519 (1978); Stewart 1978) and through the medium of the 'structural injunction', in which judges set out detailed programmes for implementation of judicial decisions by administrators (Rosenbloom and O’Leary 1996: 283–9, 313–14). A further important change dating from this period took the form of a Freedom of Information Act and Government-in-the-Sunshine Act based on a general, rather than an individual 'right to know'. When added to the procedural rights already ceded by the Administrative Procedures Act, these changes were highly significant. The generosity was to prove short-lived; the ‘hard look review’ of Vermont Yankee was seriously eroded by a formalist Supreme Court (Chevron USA Inc v NRDC 476 US 837 (1984); Sunstein 1990) and the same formalist Court later set its face against the public interest action (Lujan v Defenders of Wildlife 504 US 555 (1992); Sunstein 1992).

During the activist period of reform, however, American ideas spread through the common law world, invoking in response dramatic changes to the English rules of standing. In the leading case, a trade association was granted associational standing to challenge on behalf of its members tax amnesties negotiated by the Inland Revenue with trade unions in respect of tax offences committed by print-workers (R v Inland Revenue Commissioners ex p National Federation of Self-Employed and Small Businesses Ltd [1981] 2 WLR 722). Since one taxpayer’s affairs cannot be said directly or substantially to affect third parties, this case takes a long step towards the public interest action (Harlow 1992b, 2002b). In the judgments, the reference to groups is specific: it was said that it would be ‘a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited taxpayer’ were prevented by ‘outdated’ technical rules of standing from bringing the matter to court’ (Lord Diplock). The way was now open to mobilise administrative law in the interests of participatory, or at least ‘consultative’, democracy. Consultation, participation, openness and transparency were to become the watchwords of the movement for a pluralist, transformed administrative law.

The move to an interest-representation model of administrative law was unexpectedly overtaken by a radical transformation of the political scene, ushering in a period of privatisation and liberalisation, coupled with slimming-down and attrition of the public sector. Perhaps surprisingly, the new watchwords of ‘economy, efficiency and effectiveness’ did not result in total demolition of procedural guarantees of participation and consultation in the administrative process. These were retained, together with procedures aimed at securing ‘transparency’, in the interests of management and the market (for the UK, Harlow and Rawlings 1997: ch 5; for the US, Freeman 1997; 2000a, 2000b). This brought a further transformation of administrative law in which the public/private boundary was eroded to the point that, in Shapiro’s phrase,
everyone involved in the decision-making can fairly be viewed as a partner’ (Shapiro 2001: 372). The thrust of the reforms had nonetheless changed: collectivism was out-of-fashion; administrative reform was now based on market theory, management-oriented and once more markedly individualistic in character.

It should not, however, be assumed that all administrative law systems, at all periods, or even all the administrative law systems of the Member States, treat groups alike. German standing rules are narrow, making a sharp distinction between the private rights of individuals, the protection of which is entrusted to an independent judiciary, and issues of public interest, which are not justiciable. German legal theory recognises restrictive standing rules as operating at a constitutional level to prevent both the politicisation of legal claims and the judicialisation of executive policy-making (Afilalo 1998: 31); to put this differently, German standing rules have for constitutional reasons escaped ‘reformation’ (Greve 1989). In sharp contrast, French administrative law was quick to recognise rights of citizen action, developing sophisticated rules to structure group standing rights at an early stage. In 1906, an action by a Bordeaux residents’ group formed to protect the ‘interests of the locality’ was held admissible by the Conseil d’Etat. The claim was founded on a collective right, vested in users of a public service, to challenge the way in which public services operate (CE 21 Dec 1906 Syndicat des Propriétaires et Contribuables du Quartier Rec 962 concl Romieu). Control is retrospective; the group can only challenge the administration of an existing service and is not entitled to challenge policy, for example, by questioning whether a given service should be installed. Associational standing was later granted to trade unions to sue in the general interest of the membership but even in these early cases when the group claim to standing was founded on individual interest, specific authorisation to act had to be shown (CE 28 Dec 1906, Syndicat des Patrons Coiffeurs de Limoges Rec 977 concl Romieu). This reasoning lays the basis for consideration of what today would be called ‘representativity’: in other words, the representative quality of a CSO claiming associational or representative standing to represent the views or interests of someone else.

Over the years, French administrative courts, building on these foundations, have construed representative rights expansively. The concept of collective interest serves as an appropriate basis for challenge to general regulatory measures, avoiding the problem posed by EU law, where a ‘direct and individual’ interest is required (the Plaumann rule, below). The French administrative judge has shown willingness to move from associational to representative standing, for example, in allowing a lawyers’ association to challenge regulations dealing with the detention of illegal immigrants, a matter in which their interest could not be said to be directly at stake (CE (Ass) 7 July 1978, Syndicat des avocats de France, Rec 297, RDP 1979 concl Théry).
Today, public interest actions are commonplace in French courts, offering on occasion a way to circumvent the more restrictive and individualistic rules of EC law.

EC LAW AND CIVIL SOCIETY ORGANISATIONS

There is no special reason why EC administrative law, based initially on French law, should have followed the narrow, individualist path. One reason must be that standing for private parties originated as exceptional: like international tribunals, the ECJ existed to resolve inter-state disputes, with Member States and institutions accorded privileged standing. Again, the standing tests are directly incorporated into the Treaties, rendering reform difficult. Art 230 (ex 173) provides that ‘any natural or legal person may … institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former’ (emphasis mine: see further, De Schutter in this volume). A further reason is that EU administrative procedures largely originate in the main area of direct administration, namely the Commission’s competition directorate where the target is normally specific: i.e., either an individual or more usually a corporate entity (Lenaerts and Vanhamme 1997). Again, the underlying culture of the ECJ, strongly based on a formalist, rule of law ethos has to be taken into consideration. A common though simplistic justification for the rule of law doctrine is that it leaves the individual free to plan his or her affairs (Hayek 1944; Cotterell 1995). The central doctrines of EC administrative law, incorporated by the ECJ as a set of ‘general principles’, conform to this pattern, embracing the doctrines of legal certainty, legitimate expectation, proportionality and procedural fairness (Schwarze 1992, 1993).

Discussing access to information in the EU, Dyrberg distinguishes ‘public access’ in the sense that ‘any member of the public may at any moment request access to the files that any public authority holds and that this authority may only refuse access on specifically enumerated grounds’, from an information policy centred on a press office and ‘the right to access to the file that a party in the administrative procedure may have as part of that party’s right to a defence’ (Dyrberg 1999: 158). It is the second administrative law right, I have argued elsewhere (Harlow 1999b), that grounds the more general right of ‘public access’ or ‘access to government information’. This evolution differs greatly in tone from the ‘government-in-the-sunshine’ formula in use in the United States or Sweden’s ‘publicity principle’, acknowledged since 1766 (Larsson 1998). In the earliest usage, the administration is treated as an
individual with property rights to which are opposed property rights vested in
an individual or corporate body. This equation is in fact reflected in the
provisions of the Code of Conduct introduced by the Council and Commission
in response to Declaration 17 of the Maastricht Treaty of European Union,
which asks for ‘improved access to information’ by the public. Two of the
principal mandatory exceptions to the handing out of information by the
institutions cover the protection of the ‘individual’ and of privacy and the
protection of industrial and commercial secrecy (EC Council and
Commission, Code of Conduct). It is also reflected in the case law. Several
cases concern discovery of documents for the purpose of competition
proceedings and access is justified (or not) on the basis of the process right ‘of
every person to a fair hearing by an independent tribunal’ (Case T-124/96
right is construed much more widely, due to the current emphasis on
citizenship and a growing reluctance by citizens to accept ‘secrecy on behalf
of the institutions which are meant to be at their service [and] ways of
governance that they are unable to question’ (Dyrberg 1999: 170). This
citizenship right is a step on the way to citizen participation but by no means
yet a complete reformation.

A similar argument could be mounted in respect of the right to reasoned
decisions, viewed by Martin Shapiro as the basis of all judicial review
(Shapiro 1992). Perhaps surprisingly, given the era in which it originated, TEC
Article 253 (ex 190) provides for reasoned decisions, in which reference is to
be made to any proposals or opinions on which the text is based. Regulations
and directives are forms of lawmaking, both being of general application. In
this formal sense, a decision is more specific and targeted, binding only those
to whom it is addressed. Standing rules are premised on this distinction. The
‘reasoned decision’ provision must be regarded as exceptional that it applies
to all three categories of legal act recognised by TEC Article 249: regulation,
directive and decision. As Craig and de Búrca (2003: 117) point out, national
systems of government typically do not insist on the reasons for legislation
being incorporated in the law. Nonetheless, the stricter EU provision brings
into play administrative law protections for individuals affected by decisions,
with the Court’s reasoning that ‘in imposing upon the Commission the
obligation to state reasons for its decisions, Article 190 (now 253) is not taking
mere formal considerations into account but seeks to give an opportunity to
the parties of defending their rights [and] to the court of exercising its
supervisory functions’. Significantly, this early judgment adds that the
procedure will also allow ‘all interested nationals’ an opportunity to evaluate
the way in which the Treaties are being applied (Case 24/62 Germany v
Commission [1963] ECR 63, 69). There is some suggestion that the court may
afford greater protection to individuals passing over less detailed statements in
legislative matters than they require for individuated decisions (Craig and de Búrca 2003: 119).

To summarise, the advancing European Communities did not at first follow the path of Stewart’s Anglo-American ‘reformation’ and, at the start of the 1990s, the watchwords of the ‘transformed’ administrative law – consultation and participation, openness and transparency – were far from top of the agenda in the Communities. The prevalent style was paternalist rather than participatory, providing, for example, for the use of EcoSoc and the social partners as machinery for consultation in rule-making procedures. Again, the comitology procedures, used by the Commission when enacting regulations for the implementation of EU legislation, are ‘representative’ only in the sense that they represent the interests of the Member States. In practice committee members are chiefly public servants, unelected and nominated by their employers. Far from representing civil society, these committees are, like quangos, firmly situated in the public sector. Indeed, the European Parliament views them as a threat to institutional balance: used to eliminate the only representative EU organ from its rule-making procedure (St John Bradley 1992).

But by the 1990s, with the Treaty of Maastricht proclaiming further integration, the democratic deficit was causing concern and the extent of democracy in EU rulemaking procedures began to be seriously explored (Weiler, Haltern and Mayer 1995). Paul Craig’s evaluation of EU rule-making procedures contains a strong ‘reformative’ argument for participation, transparency and participatory procedures in rulemaking (Craig 1998, 2000). Craig focuses, however, on the primary lawmaking process, especially where the European Parliament is involved, and does not – as he easily might have done – extend his argument on to the terrain of administrative law. Around the same period, however, the comitology procedures were coming increasingly under fire (Joerges and Vos 1999). Criticism was directed at their undemocratic nature (Joerges and Neyer 1997; Rhinard 2002) and also at their non-participatory procedure. Arguments were heard for the replacement of committees by American APA procedures (Dehousse 1999). Although some reforms followed the intervention of the European Parliament, with an important inquiry into the functioning of comitology committees during the BSE crisis (European Parliament, 1997; Shackleton, 1998), these cannot be said to go far in the direction of participatory procedure or adequate reform of the present closed-circuit rulemaking system. EU rulemaking procedure awaits a transformation not catered for by the Draft Constitution (Bergström and Rotkirch, 2003).

Like all executives, the Commission has policy-making functions, which generate papers, proposals, circulars, memoranda, guidance and other forms of ‘soft law’, which may be treated either as unenforceable but binding ‘rules’ or
as rules that are not yet rules. The Council too is increasingly developing executive powers in Justice and Home Affairs, often delegated to their officials and the manifold committees that have grown up around the Council. The policy decisions taken emerge as Common Positions or Framework decisions, forms of rule-making involving only the Council and lacking the protections of the First-Pillar procedures or ‘Community method’. In attacking these policies, decisions and rules, CSOs cannot always rely on support from the Courts. One difficulty is that the ECJ tends to treat the Commission sympathetically, viewing it as … building the Community. Thus the Commission is allowed much latitude in the matter of discretion, as notably in cases involving its discretion to bring infringement proceedings for violation of the Treaties by Member States (TEC Article 226). According to the prevailing jurisprudence, the Court is likely to hold legal challenges to the administrative act inadmissible, on the grounds either that third parties do not have standing to sue or that administrative decision is incomplete: to put this differently that it has not yet reached the stage of finality at which it can be annulled (see for an illustration the recent max.mobil case: Case C-141/02P Commission v T-Mobile Austria GmbH (22 February 2005)). As we shall see later, however, the Council has been more severely treated in respect of the transparency of its proceedings.

This restrictive jurisprudence creates ‘gaps’ in control by the community courts over administrative action not expressed as final legal forms. A different type of ‘gap’ occurs when EU activity spans both community and national competences, involving actors at both levels. The celebrated Mullaghmore case illustrates the extent of this second gap. The affair involved a successful application by the Irish Government to the Commission for structural funding to be used for development of an area of natural beauty and special scientific interest by building a visitor centre to open up access and promote tourism. This anti-ecological plan met heavy resistance from local inhabitants, together with a number of environmental CSOs. These groups had some success in blocking development through legal action at national level. Not entirely satisfied, the Irish National Trust and World Wide Fund for Nature (hereafter WWF) took the fight to EU level, asking the Commission to take infringement proceedings under TEC Article 226, their case being that the Irish Government had failed to make the essential environmental impact assessments before applying for development funds. Not surprisingly, the Commission, in essence required to challenge its own policies, refused to take action and WWF applied to the ECJ for annulment of this decision. Following precedent, the CFI ruled the application inadmissible on grounds of lack of standing (Case T-491/93 An Taisce and WWF (UK) v Commission [1994] ECR II-733 (CFI) upheld by the ECJ in Case C-325/94 P An Taisce and WWF (UK) v Commission [1996] ECR I-3727 (ECJ)). Based on rather specious reasoning, the decision creates an
'accountability gap', seriously undermining the important work of CSOs in law enforcement by barring access to the courts with greatest responsibility for ensuring the legality of Commission decision-making and capable of annulling unlawful EU decisions.

Almost perversely, the narrow test of standing which marks this case has been applied by the ECJ to exclude actions challenging EU regulatory measures in the only court competent to annul them. The reasoning has been that regulatory measures, if applicable to more than a small class of people, cannot be said to affect them ‘individually’ (Case 25/62 Plaumann v Commission [1963] ECR 95; Harlow 1992b). In this way, the Community Courts have almost closed their doors to public interest actions (though a crack has, as we shall see, been left open). In Stichting Greenpeace Council (Greenpeace International) v Commission (Case T-585/93, [1995] ECR II-2205), the leading decision on public interest litigation before the Community courts, the Commission had made a decision to make structural funding available for the construction of power stations in the Canary Islands. The development was the subject of planning decisions, vulnerable to challenge under Spanish law in local courts. But Greenpeace wished to attack the Commission policy, taking the view that, without structural funding, many projects detrimental to the environment would not even be contemplated. Greenpeace therefore joined with residents and local fishermen to challenge the Commission’s funding decision on ecological grounds. Interpreting the Treaty articles very strictly, the CFI ruled the application inadmissible, on the ground that the applicants were not ‘individually’ affected; the development would affect them only ‘in the same manner as any other local resident, fisherman, farmer or tourist who is, or might be in the future, in the same situation’. Greenpeace appealed the decision (Case C-321/95 Stichting Greenpeace Council (Greenpeace International) v Commission [1998] ECR I-1651), advancing the classic public interest argument that environmental interests are by their very nature, common and shared or, in technical terminology, ‘diffuse’: the rights relating to those interests were therefore liable to be held by a potentially large number of people and, in these circumstances, there could never be a closed class of applicants satisfying the standing criteria adopted by the CFI. As in the WWF cases, Greenpeace argued that a legal vacuum had been created. It was difficult to pinpoint responsibility for a decision shared by actors at so many different levels of governance. But the ECJ was unresponsive; it upheld the CFI in asserting that the rights of private parties were fully protected by the national courts. It has been suggested by one Advocate-General that standards set by Community environmental directives might give rise to rights enforceable in national courts (Cases 361/88, 59/89 Commission v Germany [1991] ECR 2567, 2602 at 2632 (A-G Mishko)). Only then would a path open into the ECJ through a
preliminary reference to the Court of Justice, the only other route being to ask the Commission to bring infringement proceedings, which it is not obliged to do.

These restrictive principles make it hard for CSOs to use courts to break into the administrative policy-making process in the area of environmental policy, where their participation is most needed (Macrory 1992). The position is worsened by the rules on third-party intervention, which block interventions, or briefings from campaigning groups, in cases between third parties, even where the case has a strong environmental dimension. These are in fact the commonest form of intervention by CSOs in other administrative law systems. Experience in the permissive United States suggests that there would be many briefs from environmental CSOs, especially those global groups, such as WWF and Greenpeace, which we have seen already trying to break into EU decision-making via the Community Courts. The activity would probably extend to TEC Article 226 infringement cases brought by the Commission, such as the landmark ‘disposable beer bottles case’ (C302/86 Commission v Denmark [1988] ECR 4607), where the values of the marketplace entrenched in the Treaties famously clashed with national environmental legislation. Again, the ‘Belgian waste’ case (C290 Commission v Belgium [1992] ECR I-4431) took place at a time when a wide-ranging debate concerning the best methods of waste disposal was under way in Europe and, in a sense, formed part of that debate (Gerardin 1993), the case for a ban on import of waste products being argued on that occasion both by Belgium and also by other Member States, which have privileged intervention rights.

The role of environmental groups in supplying empirical and scientific evidence in national courts is well-proven and deserves to be replicated in the ECJ. The viewpoint of CSOs may differ from that of governments and, in an action of such significance, it is clearly arguable that space ought to be made for the representatives of civil society through a (written) public interest intervention. Somewhat ironically, judicial intransigence contrasts rather sharply with what is going on in administrative and legislative fields. Thus the directive on civil liability for damage caused by waste borrows from Italian law the idea that ‘common interest groups’, engaged in work concerning protection of nature and the environment shall be given a statutory right to sue. More recently, the Commission has been working with international bodies in terms of the Aarhus Convention for participation by civil society and environmental groups in environmental policy-making, using this Convention to stimulate participatory trends in the Member States (Lee 2002).

Jégo-Quéré v Commission provided the perfect opportunity for the Court to resile from its position on standing but, though pressed by the academic community, by the CFI, and by its own distinguished Advocate-General, to close the gap, it flatly refused to reconsider. The case did not involve a CSO
but a private company, which challenged a general regulation. The CFI, in a convincing judgment (Case T-177/01, Jégo-Quéré v Commission [2002] I-2365) had held the application admissible. Alongside, Advocate General Jacobs, in a contemporaneous case presented to the ECJ, had delivered a formidable opinion in favour of widened standing for individuals. Yet in both cases, the ECJ refused to budge (Case C-50/00 P Unión de Pequeños Agricultores v Council [2002] I-6677; Case C-263/02P Commission v Jégo-Quéré et cie SA [2004] ECR I-03425). Once again the ECJ unconvincingly described the system of legal remedies established by the Treaties as ‘complete’. It is sufficient to ensure legality that applicants can apply to their national jurisdiction and ask for the point to be referred as a preliminary question to the ECJ. Association Greenpeace demonstrates the cumbersome procedure. Here Greenpeace wished to challenge the inclusion by the appropriate French Ministry of genetically modified maize in an official list of plant species. This listing followed a Commission decision and was taken in accordance with the provisions of an EU Directive that seemed to make listing mandatory. Arguably, however, the proper notification procedures had not been followed and when Greenpeace contested the interpretation of the Directive, a reference to the ECJ followed. This time the problem presented from the opposite angle, causing the ECJ to stress the duty of national courts to make references on the validity of EU law, a matter on which it alone is competent (Case C-6/99 Association Greenpeace France and others v Ministère et de la Pêche [2000] ELR I-1651). For CSOs, this case has pros and cons. On the one hand, it allows restrictive standing provisions to be circumvented, provided that national law enables this to be done; on the other hand, the procedure is cumbersome and likely to be long drawn out, with no guarantee that the national courts will ultimately refer. From the standpoint of participative democracy, can this set of indirect and tangential procedures really provide adequate judicial support for access to the complex, multi-level policy and decision-making process?

Slightly more encouraging are developments in freedom of information policy, a central pressure point for advocates of deliberative and participative democracy. In the Mullaghmore cases above, WWF went on to apply under the joint Code of Conduct on public access to documents (EC Council and Commission, 1990) for access to the documentation on which the Commission had based its refusal to take infringement proceedings. Again the Commission refused, basing its refusal on the mandatory exception in the Code on access to information that protects the public interest in court proceedings and investigations. This time WWF was partially successful. The case was ruled admissible since, in cases involving access to information, standing rules are generously construed. This relaxation is based on the fact that, under the Code, no interest was necessary to ask for access to official documents, an exception
taken up by the regulation that now governs public access to information (Article 2 of Regulation EC 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43). In accordance with its settled case law, the CFI also ruled in favour of WWF that the Commission must make a reasoned decision (Case T-104/95 WWF (UK) v Commission [1997] ECR II-313).

In general, transparency is an area of administrative law in which CSOs can count their successes. In a series of cases before the CFI, bullish on this issue, the reasoning of the court has moved swiftly from the limited, individual right of access that forms the basis of the earlier cases towards recognition of a general public right to know. Originally, as we have seen, both the right to reasoned decisions guaranteed by the Treaties (Article 253, ex 190) and the right of access to official documentation were justified primarily in terms of legal process. The dual reasoning of the original passage from Germany v Commission (cited above) contains the basis for the transition and public interest is now more frequently highlighted to the profit of CSOs. Much progress has been made, due in large measure to the willingness of CSOs and other committed representatives of civil society, including for these purposes, the press, to push their case. Thus the very first access to information case was brought jointly by a journalist and the newspaper that employed him (Case T-194/94 Carvel and Guardian Newspapers v Council [1995] ECR II-2769). Norup Carlsen was an attempt by an association of Danish citizens opposed to Danish accession to the Maastricht Treaty to get a sight of legal opinions presented to the Council and Commission relating to the legal base of Directive 79/409 on the protection of migratory birds (Case T-610/97 Norup Carlsen and others v Council [1998] ECR II-485). In a more recent case, a Member of the European Parliament, who represented the Green Party in Finland and the EP, was enabled to acquire important information on EU armaments policy (Case T-14/98 Hautala v Council [1999] ECR II-2489; Case C-353/99P Hautala v Council (No. 2) [2001] ECR I-9565). A further case involving the union of Swedish journalists is still more significant for CSOs. The journalists’ group sought to confirm their suspicion that entry to the European Union had diminished the celebrated ‘right to know’ of Swedish citizens. Accordingly, they asked for the same set of controversial policy documents from the Swedish Government and the EU Council of Ministers, receiving 80 per cent of the documents requested from Sweden and 20 per cent from the Council. Benefiting from the relaxed rules of standing in access to information cases, the Swedish journalists pursued the matter in the CFI, where the Council decision was annulled on the grounds that inadequate reasons for the refusal had been given and that the proportionality test had not been properly applied (Case T-174/95 Svenska Journalistförbundet v Council [1998] ECR II-2289). These were important cases for representative
democracy, helping to open up the secretive Third Pillar decision-making to public scrutiny and fill the accountability gap referred to earlier.

With assistance from Member States anxious for the principle of open government, the European Parliament and CSOs have worked for ‘transparent’ regulation. It must be said that the new governing legislation (Regulation EC 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission Documents, 2001OJ L 145/43) may level down as well as up. Article 4(5) allows a Member State to ‘request’ an institution not to disclose its documentation without consent, while Article 5 provides for consultation between the Commission and national governments’ respect of documents requested from a Member State but originating from the EU – the **Svenska** situation. From the standpoint of CSOs, however, the ethos of the Regulation is attractive. In its Preamble, the Regulation affirms the principle of participatory democracy, firmly stating that ‘Openness enables citizens to participate more closely in the decision-making process’, while contributing also to making administration more accountable to the citizen and generally helping to strengthen democracy. But transparency has some way to go before it achieves the status of the fundamental citizenship right for which Deirdre Curtin has continued to argue (Curtin 2000). The European Parliament has battled heroically; the CFI has done its best; the jury is out on the ECJ. But transparency is not apparently seen as sufficiently fundamental to figure in the European Charter, where the right to protection of individual personal data gets a specific mention in Article 8 of Chapter I, while openness figures only obliquely under the head of right to good administration in Article 41 of Chapter 5. This protects the administrative right ‘of every person to have access to his or her file’ and the obligation of the administration to give reasons for its decisions but this is hardly unqualified recognition by the institutions of Curtin’s proposition that ‘a right to public knowledge of government deliberations, albeit a qualified one, is … necessary for effective democratic control’ (Curtin, 1998: 392). A change of heart from those national governments, such as France, the United Kingdom and Germany, whose commitment to open government is avowedly limited is necessary before further progress can be achieved.

In focusing on this case law, it is important not to overlook the Commission contribution towards building up a consultative and participatory administration. The Commission has always had a reputation for accessibility and from an early stage has shown an interest in building up a corps of friendly lobby groups to which it could turn for advice (Mazey and Richardson 1993). Its own proceedings in practice often provide opportunities for CSOs to make representations; in areas of influence, such as public procurement, it has promoted procedural codes. This good administrative practice has provided a
springboard for judicial intervention. Thus when a complex dispute evolved between the Commission and the Dutch Government concerning hidden subsidies to Dutch horticulturalists through preferential gas tariffs, agreements were negotiated, challenged and re-negotiated several times. Finally, the Landbouwschap, a membership association with statutory powers, brought the matter to court, claiming representative status on the ground that it had negotiated earlier agreements on behalf of glasshouse growers; to replace the association with individuals would be unreasonable, as the efficiency of the administrative process would be decreased. On this basis, representative standing was granted to a trade association but not to a group of growers that had not participated earlier, when the application would otherwise undoubtedly have been ruled inadmissible under the Plaumann ‘open class’ rule (Cases 67, 68, 70/85 Van der Kooy v Commission [1988] ECR 219).

Perhaps more significantly, the ECJ has used this line of jurisprudence to justify standing and interventions by BEUC, the main European consumers’ lobby, recognised by the Commission as the representative of national consumers’ associations. In (C-170/89 Bureau Européen des Unions des Consommateurs v Commission [2001] ECR I-5709), the Commission, acting on a complaint from the Chemical Manufacturers’ Federation, had opened anti-dumping procedures in respect of the import of audiocassettes from outside the Community. BEUC asked to be heard and submit written observations in these proceedings, a request granted by the Commission. It later asked for access to Commission documentation, which was denied. BEUC then applied for annulment of the faxed letter in which the Commission refusal was communicated. Although the ECJ held the action admissible on the ground that BEUC was ‘directly affected’ by the Commission letter, it went on to support the decision to deny access to the documentation. BEUC mounted the cunning argument that consumer interests could be best expressed by a representative body, the alternative of membership consumer groups being both ‘unreasonable and unpracticable’. The Commission procedure is interesting as a foretaste of its White Paper on European Governance (European Commission, 2001).

TOWARDS PARTICIPATORY ADMINISTRATION?

Feeding into – though not yet acting as a foundation for – experiments in participatory administration, we find a growing theoretical literature dealing with direct and participatory democracy as a basis for transnational governance systems (Cohen and Sabel 1997; Gerstenberg and Sabel 2002) and with Commission experiments with participative policy-making as a modality of ‘new governance’ (Scott and Trubek 2002). With the Commission’s White
Paper on European Governance (WPG), these ideas spill over into the world of administration, albeit at an unrealistic level. The objective of the Commission in this Paper is not to reform the existing administrative system; that is supposedly undergoing thoroughgoing reform following the Report of the Committee of Independent Experts (1999); European Commission (2000); Cram (2001). The Commission’s objective is to tackle disenchantment with the existing administrative system, largely attributed to lack of transparency.

From the Commission’s viewpoint, it is primarily the complexity of the existing arrangements and not the performance of the institutions that generates disenchantment and apathy in citizens. Asked by the European Council to review the transparency of regulation, the Commission responds in terms of efficiency, by describing the current rule and policy-making process as too slow and cumbersome. The Commission hopes to speed up policy-making and regulatory procedures at the primary level by reforming the Council; at secondary level, the intent is to revise and eventually abolish existing comitology procedures, where necessary substituting agencies (White Paper at 31). In exchange, a very different form of participation is on offer: a wide range of non-governmental actors, in practice mainly CSOs, is to be included in the policy-making process.

Just as the origins of ‘soft law’ lie in failure in the political arena, as, for example, in the area of state aids, where the Commission not unnaturally found it hard to secure the co-operation of Member States in reforms (Della Cananea 1993), so the Commission, faced with a growing anti-integrationist mood and demands for subsidiarity, has developed an interest in modalities of ‘new governance’. To take some examples, the Commission long since introduced the ‘partnership principle’ in the area of structural funding, enabling it to work directly with the institutions of civil society inside a Member State that might not otherwise welcome its interventions (Council Regulation 2052/88 on Structural Funding OJ L185/9 (15 July 1988)). The partnership principle provides for business and voluntary organisations to meet together with representatives of national and regional government at policy round tables. In this amorphous structure, the Commission, in the terminology of new governance, has an enabling function: ‘to enable socio-political interactions; to encourage many and various arrangements for coping with problems and to distribute services among the several actors’ (Rhodes 1997: 13). Brief mention has been made already of the Commission’s use of the Aarhus Convention, which underpins new cross-border participatory rights granted to individuals affected by cross-border planning decisions and the CSOs which purport to represent them. In the field of social policy, representatives of the ‘social partners’ participate in a form of co-operative rule making in the fields of technical standard setting and social policy regulation (Smismans 2004). The Commission is now adding the ‘Open
Method of Coordination’, described by one commentator as an exercise in decentralisation and multi-level partnership (Regent 2003: 207) and first used in social policy and in administration of the eurozone (Hodson and Maher 2001). It hopes now to expand OMC, as ‘a way of encouraging co-operation, the exchange of best practice, and agreeing common targets and guidelines for Member States’. It concentrates on harmonisation through co-regulation, aiming to form partnerships with private sector actors and perhaps also CSOs through consultation with, and the participation of, ‘interested parties’ and the ‘actors most concerned’. It thus forms a central part of an experiment in deliberative and participatory democracy and one that is making steady progress (de Búrca 2003).

The most interesting case on rights of participation in rule-making procedures is open to various interpretations. An administrative lawyer or student of governance may wish it to attain a wide, general influence; a specialist in social policy will probably read it as specific to the distinctive rule-making procedures operating in that area. Article 3 of the Agreement on social policy annexed to TEC Protocol No. 14 (now embodied in TEC Articles 138-139) provides that the Commission ‘shall have the task of promoting the consultation of management and labour at Community level’. A double consultation is provided for: first at a stage before the Commission submits regulatory proposals and again when, after consultation, the Commission, considering regulation to be desirable, makes proposals. These proposals, following consultation, may or may not lead on to collective agreements made by the social partners. These can crystallise into a Council decision on a proposal by the Commission or otherwise be implemented at national level, typically using soft law methods. In UEAPME, the Commission established a list of potential consultees on which UEAPME figured as representing the views of small business concerns. UEAPME was consulted and responded by a letter in the consultations but not in the round of negotiations that follow in the formal stages of the rule-making process. UEAPME challenged this procedure in an action before the CFI (Case T-135/96 UEAPME v Council [1998] ECR II-2335; Armstrong, Chapter 3 in this volume). The Council argued that UEAPME had no standing to sue in the Community Courts; the Commission does not control the final negotiatory round, which was in issue; and the final document was in the nature of an agreement between private parties and did not emanate from the institutions, the suggestion here being that the process was not justiciable.

The Council’s arguments were rejected by the CFI. Reasoning that ‘the participation of the two institutions in question has the effect … of endowing an agreement between management and labour with a Community foundation of a legislative character’, the CFI happily accepted jurisdiction. This part of the ruling was imaginative, effectively extending public law rules of
accountability to private (or in this case non-institutional) parties. But the CFI then went on to address UEAPME’s argument that, without its participation, the procedure was insufficiently representative and unbalanced. This part of the argument was less successful, despite the warning note sounded when the CFI remarked that the rulemaking took place ‘without recourse to the classic procedures’. Although the CFI accepted that it was incumbent on the Commission and the Council to verify the consultees’ representativity, and actually scrutinised the list maintained by the Commission, it was at the end of the day easily satisfied. UEAPME, which had to a limited extent participated at the first stage of the proceedings, was denied standing to sue.

To sum up, the CFI used classical administrative law reasoning to interpret a statutory framework for consultation in such a way as to place responsibility for procedural correctness squarely on the public actors; but once again it left them with substantial discretion as to whom they wished to consult. The outcome was problematic in precisely the way foreseen by Shapiro, complaining that the public/private border has been blurred. ‘The decision-making process is no longer seen as one in which private activity occurs around government decision-making, or seeks to influence government decision-making. Rather, the very distinction between governmental and non-governmental has been blurred, since the real decision-making process now continually involves, and combines, public and private actors’ (Shapiro 2001: 369). To reformulate this problem in terms of a participatory administrative law, the transnational authority has first taken over the national function of lawmaking – which may be representative and may be participatory but admittedly may not. It has then handed over its own rule-making responsibilities to private sector bodies. This process might be seen by some as a move to deliberative democracy but a cynic would be more likely to see both a subversion of representative democracy and serious slippage from the ideal of participatory democracy. By no stretch of the imagination can the outcome be described as whole-hearted recognition of the participatory rights of civil society and their representatives.

TRANSFORMATION?

The controls of administrative law have been built up painfully over two centuries and represent one side of our experience of representative democracy. In the transnational governance system that peers over the horizon, democratic institutions are fragile and in consequence, courts have had to act more boldly and play a larger part (Shapiro 1980; 1999). This may (or may not) prove to be a permanent feature of transnational governance systems and legal orders.
It is in the international context that NGOs and CSOs have evolved and developed the function of filling gaps left by the absence of strong representative institutions. This role has not been planned; it has evolved incrementally from situation to situation over the last quarter-century or more (Greenwood 1997). At first NGOs learned to lobby; then to utilise the legal system as a campaigning tool (Harlow and Rawlings 1992); finally to demand representational and participatory rights. In contrast to the campaign for transparency conducted in the Council (Granger 2004), the initiative for participatory rights has been supported primarily by the Commission, with the Council and its Constitutional Convention focusing on representative participation by national parliaments. The Commission sees participation as a means to fill the democratic deficit and foster the growth of European citizenship, which will in turn enhance its own legitimacy. Thus, in sharp contrast to the protections of the earlier American APA, which largely follow the classical path of administrative law systems in focusing on the interests of those likely to be affected, the Commission’s interest lies in participation and deliberation by CSOs.

As yet there has been no real response from administrative law to the problems of participatory administration and new governance but the ‘soft law’ and ‘new governance’ measures with which the Commission is now experimenting could herald a transformation of EU administrative law as great as Stewart’s American ‘reformation’ (Stewart 1975). The Commission hopes in time to ‘create a transnational space’ for trans-European citizen debate and discussion and ‘structured channels for feedback, criticism and protest’ in which, through information technology, civil society and its CSOs, from grassroots organisations to transnational leaders in the field, can participate. To this end, the WPG promised to review existing consultation processes, establish minimum standards for consultation and publish a Code of Conduct. The first steps have now been taken. A Commission-sponsored and maintained register of CSOs and of the fields in which they operate has been set up open to public scrutiny and participation on the CONECCS website. These initiatives are intended to facilitate CSO networking and participation and to structure the connections of CSOs and the institutions. Courts could, of course, utilise UEAPME as a foundation stone for ‘hard look’ review of consultation and participation procedures. This could be valuable. Much consultation is a sham; easily manipulated consultation exercises are not taken seriously, degenerating into a way to buy legitimacy without sacrificing control. By forcing administration into ‘synoptic dialogue’, Shapiro argues, courts can rectify this situation (Shapiro 1992). This is a big and controversial step, however. At present, it may be best to maintain the format of the Metro jurisprudence, leaving consultation to administration but protecting procedural rights once granted. Nor has the time has yet come for a codification of
administrative procedures (Harlow 1996), as this is likely to curb procedural experimentation.

In short, the new consultation procedures envisaged by the OMC, together with the supporting structures, mark a hesitant step towards civil society participation in governance; on the other hand they do highlight latent dangers. To resolve the problem of EU ‘democratic deficit’, the Commission needs CSOs to be ‘representative’, a criterion not met (as argued in the opening section of this chapter) by bodies with governmental links, such as QUANGOs. CSOs will need to show closeness to the citizen to provide the legitimacy on which the legitimacy of the Commission is to be founded; there will be little or no improvement in legitimacy if a handful of key officers dominates CSO policy-making (Warleigh 2001: 623). In its White Paper on Governance, the Commission also indicates that CSOs should be accountable: their internal structures must measure up to Commission standards, reflecting principles of good governance, openness and accountability developed for purposes of public accountability. CSOs may be required ‘to tighten up their internal structures, furnish guarantees of openness and representativity and prove their capacity to relay information or lead debates in the Member States’ (European Commission 2001: 17). This policy line is now under way with a Draft Recommendation to Member States on best practice for ‘good governance’ of non-profit organisations (European Commission 2005).

Two courses are open to those who accept the idea of increased accountability for CSOs. On the one hand, the relatively relaxed controls of private law over CSOs could be tightened. English law shows how easily the concept of a contract contrary to public policy is invoked to import public law due process values into private contract law (Bonsor v Musicians Union [1954] 1 Ch 479; Breen v Amalgamated Engineering Union [1971] 2 QB 175) or to challenge disciplinary rules of private bodies on grounds of discrimination (Nagle v Fielden [1966] 2 QB 633). Shareholder power can force public accountability rules on corporate and commercial bodies. The laws regulating non-profit organisations can be tightened. These may, for example, be positively precluded from campaigning, as charitable institutions are under English law if they wish to maintain their tax-free status (McGovern v Attorney-General [1982] Ch 321; Weiss 1983). But ECHR Article 11, replicated in the EU Charter, warns us to be cautious in advancing down this path. Freedom to associate is a fundamental human right of equal value to press and media freedom. The traditional public/private boundary, used in the introductory section to distinguish CSOs, born into and living within civil society, from QUANGOs and other quasi-public bodies, needs on this occasion to be respected. Not every opinion is of equal value but, as Voltaire might have said, the right to voice it is.
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7. When EU civil society complains: civil society organisations and ombudsmanship at the European level

Peter Bonnor

INTRODUCTION

The links between EU ombudsmanship and civil society organisations are numerous. They nevertheless appear to be unexplored in the academic literature, and this chapter is therefore a first tentative step at examining the issue. Before doing so in detail, it seems helpful to give a general introductory idea of the relationship between civil society organisations (CSOs) and ombudsmanship in Europe.

The relationship may seem simple: CSOs can complain, they do complain, and sometimes they get what they want, sometimes not. In actual terms, the issue is a little more complex. It is complex in two particular respects: first, CSOs do not only complain to obtain redress (for example ‘money back’ claims). They also complain to promote general interests. Second, CSOs’ exercise of their right to complain is in many respects a two-way thing because ombudsmen themselves benefit from the input that CSOs provide. Frequently, it is not only a question of what the ombudsman can do for CSOs, but also a question of ‘what can CSOs do for the ombudsman’.

These complexities are apparent in recent statements by some national European ombudsmen who have expressly formulated a relationship with civil society. The first Greek National Ombudsman – Professor Nikiforos Diamandouros, a political science Professor of high reputation and European Ombudsman (EO) as from 1 April 2003 – informed the European Parliament during his EO election campaign that ‘I have been an active member of national and international organizations devoted to the empowerment of civil society and to familiarizing citizens with their rights at both the national and the European levels’. Professor Diamandouros imported this devotion into his circumscribing of the Greek Ombudsman’s role: ‘The Ombudsman’s long-term aims are, firstly, to contribute to the consolidation of the state of law and
the principle of equality of all citizens before the law, serving not only the
letter but also the substance of legality, and secondly, to strengthen the forces
of civil society and the principle of pluralism, which are expressed by the
institution, creating an additional mechanism of accountability, control and
balance of state power’ (Pavlou 2000: 4, quoting the Greek Ombudsman’s
1998 brochure ‘The first year’).

In similar terms the Hungarian Ombudsman: ‘The Ombudsman has a duty
and an interest to co-operate with civil society organizations. These
organizations identify the problems involved in regulation and implementation
in their own specialized fields; they have very useful proposals to help solve
these problems. In this way, they genuinely help the Ombudsman in his work’
(European Ombudsman, Liaison Letter March 2003, No. 9: 43–44). The
Hungarian Ombudsman refers to active co-operation with more than 50 CSOs,
and concludes that ‘Harmonious action between the Ombudsman and NGOs
is essential, if critical issues are to be dealt with appropriately’. The fact that
ombudsman and CSOs can develop a close interaction or even
interdependence is, therefore, an accepted and apparently natural aspect of
modern European ombudsmanship.

The chapter analyses the most important EO-CSO interactions, relating
them to core issues in the current civil society discourses. Having made the
above quotes from national ombudsmen, it should be noted that the chapter is
not comparative but retains its level of analysis at the EU level.

Structure

The Ombudsman is still a somewhat novel institution. The chapter therefore
begins with a short look at some EO-basics. It then discusses those review-
areas in which the EO-CSO interactions have been most intensive. Possible
and desirable future developments are discussed throughout the text, and
summarised in the concluding remarks.

The chapter is accordingly structured as follows:

- The EO in a nutshell
- Methodology and figures
- The Contracting Civil Society – EO review of contract disputes between
  CSOs and the European Commission
- Civil information Society – the case of public access to documents
- Civil Society co-guarding Community law? The European
  Commission’s complaint procedures in the framework of Article 226 EC
- The EO guarding ‘notice and comment’? The Commission’s new
  consultation rules
- Concluding remarks.
THE EO IN A NUTSHELL

The European Ombudsman Office was introduced by the Treaty of Maastricht (1993). The EO’s institutional status and working methods are now set out in Article 195 ECT (ex 138E, as amended by the Treaty of Amsterdam); the EO Statute; proposed and adopted by the European Parliament and the Council, following hearing of the Commission; and the Implementing Provisions, adopted by the EO himself in accordance with the Statute. The Treaty provision stipulates the EO’s main tasks, which are to:

receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role

conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted directly or through a Member of the European Parliament.

The EO is therefore first of all a complaint body, but one which – like most of its national counterparts – also has the power to conduct own initiative inquiries, and which in all cases has a very broad discretion to decide whether an inquiry on any given matter should be initiated. The first EO, Mr Jacob Söderman (former Finnish Parliamentary Ombudsman), prioritised individual complaints, resorting to own initiative inquiries only when a need for this became apparent from a number of individual complaints, or when special circumstances made this appropriate.

In the context of civil society, it is important to emphasise that the right to complain is not limited by any conditions of ‘individual’ or ‘specific’ interest in the matter complained about. Any citizen or legal person in the EU can therefore complain about any kind of suspected maladministration. In the light of the very restrictive locus standi requirements to the Community courts, the novelty of this broad access to review is evident.

The term ‘maladministration’ first of all refers to breaches of EC/EU administrative law. It is also generally accepted to include breaches of good administration that would not always be relevant or possible to raise in claims before the Community courts. As for the political versus administrative issue, the dividing line can be a difficult one to draw. The first EO incumbent adopted a fairly traditional distinction, classifying for instance substantive legislative matters as ‘political’, thus placing such matters outside the scope of his mandate.

The EO’s case-handling procedure is initially akin to a court-like written
fair-hearing procedure: the complaint is sent to the institution concerned, which submits an opinion on which the complainant is invited to make observations. If the EO concludes that there was maladministration on the part of the institution or body, there are a number of reaction tools at the EO’s disposal: a critical remark; a friendly solution and/or a draft recommendation; a special report to the matter to Parliament if the draft-recommendation is not accepted (see Bonnor 2000). All the decisions are published on the EO’s homepage, and the most important ones are included in the annual report.

METHODOLOGY AND FIGURES

In light of the EO’s review basis, it seems prudent to associate the present analysis with the EU’s current main source of rules and principles on CSOs, that is the Commission’s CSO-Communication (2002) ‘Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission’. This Communication contains a broad definition of CSOs.

As for numbers and origin, the statistics in the EO reports refer to complaints made by ‘associations’, ‘individuals’ and ‘companies’. Applying the broad definition of CSOs, the majority of ‘association’ complaints fall within the concept of civil society organisations. With 4 per cent, the figure for ‘associations’ is at first glance not impressive. However, this figure is based on the total caseload, that is including the very large proportion of complaints that are outside the EO’s mandate or within the mandate but inadmissible (approximately 70 per cent). Of the total number of full-scale inquiries conducted so far, ‘associations’ count for approximately 10.5 per cent.

The EO’s annual reports, in which the most important EO decisions are published, have been used as the primary empirical source for the present chapter. In the reports 1996–2003, 67 inquiries based on CSO complaints have been identified (note that this does not reflect any official classification by the EO). Out of these, seven inquiries were based on concerted complaints on a specific matter, out of which five related to environmental issues, and one to free movement. Fifty-six inquiries were based on CSO complaints submitted by formally established organisations/associations, out of which 14 related to the environment, 17 to what we may broadly term ‘civil liberties and accountability’, five related to business, six related to culture and education, four related to humanitarian issues, and four related to equality issues. The remaining inquiries related to more indistinct categories of complainants and issues.
As is well known, the implementation of EU aid programmes are often contracted out to organisations, many of which are CSOs. The contracts are usually made with the European Commission, and may be ordinary contracts or funding agreements.

It is clear that contractual problems of CSOs are not generally considered to be the most absorbing issue in EU civil society discourses, and understandably so. However, paying some attention to the issue is important for two particular reasons.

First, it is a good reminder of the fact that CSOs are individual organisational actors. The current focus on CSOs as bottom-up stakeholders in a pluralistic democracy should not cause us to overlook the fact that we are dealing with actors that have concrete practical implementation concerns. A main concern is naturally the financing of their activities, which is often satisfied by public sources (Smismans 2003: 478) through direct support or project funding. This raises numerous questions, not yet resolved in the civil society debate, of independence and objectivity. One key question is the ‘inequality of contract’ that is sometimes perceived to exist to the detriment of CSOs. The brief account below demonstrates that this issue can, in some respects, be usefully addressed through EO reviews.

The second point is a more fluid consideration. The EU aid policy often appears to contain an element of *quid pro quo*, in the sense that aid is not simply granted out of altruistic motives or to respond to citizens’ needs. It also seems intended to enhance the EU’s legitimacy amongst citizens. CSOs are convenient, providing flexible expertise, contacts with the grass-roots, and often more ‘legitimacy’ (acceptance, trust …) than the Community institutions themselves.

The EO cases regarding contract disputes between CSOs and the EU administration are numerous. Out of the 67 CSO cases in the EO’s annual reports 1996–2003, 21 concern aid-programmes. In most cases, the main problem is alleged payment failures by the Commission. Most aid-contracts or projects are laden with rules or principles on ‘sound financial management’. In this respect, one of the demonstrated qualities of the EO is to unblock disputes. In several cases, the fact of complaining to the EO has led the Commission to reconsider and settle the matter with the CSO. The mere fact of a complaint having been made to the EO allowed the Commission services involved to reconsider the dispute *inter se*, and to draw in the general services of the Commission for deeper consultation (for example the Legal Service). It is not rare that the hands-on Commission officials actually wish to let CSOs have the benefit of the doubt, but find themselves unable to avoid a dispute due to the strictness of financial or contractual rules and principles. The
EO’s interventions can therefore allow a re-establishment of trust and confidence.

The EO can furthermore address general practices or rules in the aid-schemes. In case 1165/2001, the European Environmental Bureau (EEB) had been advised by its auditors to set up a reserve fund. The EEB is the European environmental umbrella organisation ‘financially mainly dependent on funding from the European Commission (up to 50%) and from government grants’. None of the Commission grants were used for setting up the reserve fund. The Commission nevertheless interpreted the EEB’s financial rules to imply that the reserve fund essentially resulted in the EEB making a ‘profit’ from receiving the EU aid, something that appears to rank second only after ‘corruption’ in the eyes of aid providers. The EO found in favour of the EEB.

The EO has also been called on to clarify the Commission’s degree of responsibility with regard to indirect aid-recipients. As is well-known, aid-programmes involving CSOs are often organised as complex multi-layer projects, involving vague lines of hierarchy and several indirect relationships. In one case, the indirect aid-recipient was a national CSO that worked for the direct aid-recipient, a local council in an EU Member State. The EO concluded that the contract was only between the Commission and the local council, establishing no obligations on the Commission vis-à-vis the complainant. In the light of the decentralised co-operation which underpinned the programme, the Commission could not ‘answer for a project nor have responsibility for every practical problem which could occur in the framework of a project’. The EO’s line of reasoning resembles that of the Court in cases on external aid, where the Commission’s responsibility rarely extends beyond the recipient national authorities (that is the direct aid recipients) (Kalbe 2001). The question arises if this allows the Commission to hand out large sums of aid to one direct ‘aid distributor’, thereby avoiding responsibility for the ‘administration’ that the aid gives rise to. This would for instance be the case with regard to the intermediary organisations that the Commission frequently uses to manage particular aid programmes. In one case involving such an organisation, the EO unequivocally concluded that ‘the Commission remains responsible … for the quality of the administration which it carries out through an intermediary organisation’.

Concluding Remarks

The cases show that the EO is able to procure settlements of CSOs’ contractual disputes with the European Commission, and willing to address general problems in the aid-practice. In some cases, the Commission seems to have recognised systemic shortcomings and attempted to learn from the EO inquiries. The EO’s dispute-resolution in this field is therefore positive for
the individual CSOs, which obtain cheap and often quick redress or ‘settlement’. It also enhances the equality for smaller CSOs (that is, not Oxfam-size organisations) that would otherwise not have sufficient resources to challenge the Commission. It is, furthermore, a positive support for those officials within the Commission who in the post-1999 climate of financial control (re Santer Commission crisis) may feel forced to unduly disrupt projects that are being carried out by CSOs that, like many others, simply find it difficult to understand the Commission’s rules and practices of financial management.

One constructive comment, however, seems to be in place. It concerns the EO’s hesitation to make greater use of his own-initiative powers in the field of contracts. First, the EO has in a number of cases concluded that the ultimate reaction tool, that is referral to Parliament through a special report, is not suitable in this type of case unless they raise ‘issues of principle’ (see case 1165/2001 referred to above). It does seem relevant, however, to point out that contract cases will, by their very nature, often contain ‘factual issues’ to such an extent that they are almost inevitably considered to be cases ‘not raising issues of principle’. They are therefore at risk of not enjoying the full benefit of the EO’s powers, despite the wider significance of enhancing control over the money relationship between CSOs and the public administration.

A second consideration is that many CSOs may refrain from complaining due to a fear of being ‘blacklisted’ for future projects. In the lack of evidence to the contrary, complaints from CSOs regarding contracts could therefore reasonably be dealt with as the tip of the iceberg. By making greater use of own-initiative powers – eventually inviting, on a confidential basis, anonymous submissions from CSOs and other interested parties – the constructive impact of the EO could possibly be enhanced in this field.

CIVIL INFORMATION SOCIETY: THE CASE OF PUBLIC ACCESS TO DOCUMENTS

Introduction

Unlike the issue discussed above, ‘transparency’ is generally appreciated to constitute a basic theme in EU discourses on civil society (Dyrberg 2003). Transparency issues are furthermore well known to interested EU actors, and are a natural element in constitutional and administrative reforms. The following analysis is limited to the most pertinent EO-CSO interaction on this issue: CSO complaints concerning requests for documents.

The relevant EU development on access to information goes back to Declaration 17 to the Treaty of Maastricht (1992), which stated that
The legal and institutional context

‘transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration’, and which recommended the creation of rules on public access to documents. The Commission and the Council adopted such rules in 1993 and 1994\(^\text{14}\) (hereinafter ‘the old rules’). The Treaty of Amsterdam (1996) followed up on this development by introducing the declaratory provision that decisions are to be taken ‘as openly as possible’ (Treaty on European Union the general declaration in Article A (now Article 1)). It also introduced Article 255 ECT, which gives a right of access to documents held by the three main institutions. Detailed rules on this right were laid down in Regulation 1049/2001\(^\text{15}\). The preamble of the Regulation emphasises that in the Community legal order, the issue of public access to documents is linked to citizenship, legitimacy, effectiveness, accountability, democracy and fundamental rights. As most legislation, the regulation contains compromises, but it has overall been received positively by experienced public access practitioners (Dyrberg 2003).

The users of the EU rules on public access to documents are, as in Member States, primarily professionals, that is journalists, researchers, businesses and politicians. As one would therefore expect, complaints made by CSOs dominate the EO’s public access practice. It is, however, a particular aspect of the EO’s practice that the majority of the public access decisions that have been considered important enough to be published in the annual reports here concerned are based on complaints submitted by only one CSO. Out of the 13 relevant inquiries reported, eight were based on complaints submitted by the British civil liberties organisation STATEWATCH. Given the focus of this chapter, it seems appropriate and useful to provide a separate account of how this organisation has both gained and procured results through the EO.\(^\text{16}\)

The STATEWATCH Cases

The public access issues in the STATEWATCH cases are significant, and have been addressed within two broad categories:

(a) reason-giving standards and access-exceptions; and
(b) the exercise of the access right.

As for reason-giving and access-exceptions, the matter is fairly simple. In so far as the cases have concerned reasons for the application of the express access-exceptions contained in the public access rules, the EO has implemented the approach of the Court of First Instance. This implies that the reason for a refusal based on one of the exceptions stipulated in the rules must contain the particular reasons for which the institution considers that disclosure of the requested documents comes within the scope of one of the
exceptions provided for in the rules. Thus, when the Council refused STATEWATCH access to documents on the ground that ‘they contained detailed national positions and … the Council’s interest in protecting the confidentiality of its proceedings therefore outweighed [STATEWATCH’s] interest in obtaining access’ (emphasis added), the EO concluded that the reason was much too broad in that the word ‘therefore’ would effectively exclude all documents containing national positions. The Council was asked to reconsider, and released some of the documents.17

The other category concerning the exercise of the access right contains a larger number of examples of STATEWATCH cases which have revealed shortcomings in the access rules and the administrative practices, or cases which have addressed systemic problems of an organisational or institutional nature. These are briefly examined in the following.

The lack of an EU public access culture was early on evidenced by the fact that it was often difficult to know about the documents that one might like to request, a situation caused by the almost entire lack of registers. The new public access regulation 1049/2001 (in force from December 2001) introduced, for the first time, a general registration duty in EC law: ‘To make citizens’ rights under this Regulation effective, each institution shall provide public access to a register of documents’ (Article 11). In an earlier complaint, STATEWATCH had successfully argued for such a registration duty before the EO,18 who found that the principle of good administration required the maintenance of adequate records must be maintained. The Council accepted the EO’s draft recommendation to keep the records in question.

The Council’s constructive response in the case just referred to should be contrasted with its response in case 917/2000. In that case, STATEWATCH complained to the EO about the Council’s failure to register all the documents put before its preparatory bodies. The Council considered that to do so would impose too heavy an administrative burden. In March 2001 – that is nine months before the entry into force of the new public access regulation (introducing the registration duty quoted above) – the EO made a draft recommendation to the effect that ‘The Council should maintain a list or register of all the documents put before the Council and make this list or register available to citizens’. The EO reasoned that the concern about ‘administrative burden’ was ‘not in accordance with good administrative practice let alone basic democratic standards’. The Council seemed to accept the spirit of the draft recommendation, but not, however, its content. In its opinion, the Council formulated new categories of documents, such as ‘ephemeral’ documents and documents with a short ‘useful life’. It also referred to circulated ‘drafting suggestions’ which replace or supplement oral interventions during meetings. According to the Council, to register all such
documents would be so cumbersome as to amount to a flagrant breach of the principle of good administration. The Ombudsman had, in other words, misinterpreted the principle of good administration. The Council’s opinion on the EO’s draft recommendation was made on 28 May 2001, only two days before the Council, together with the European Parliament, adopted the new public access regulation. In his subsequent response to the Council’s refusal, the EO could therefore refer to the new registration duty quoted above. His response was set out in a special report to the European Parliament. Having referred to the unconditional terms of the registration duty, the EO made the somewhat caustic remark that “The regulation does not appear to distinguish between documents according to their “useful life”” (p. 11). During its inquiry into the EO’s special report, the Parliament’s Committee on Petitions called the Council’s Director with responsibility for public access to account. The Committee was informed that the Council had changed its transparency policy, and that its officials had been instructed to follow the EO’s recommendation. The Parliament adopted a special report in favour of the special report on 17 December 2002.

This case is therefore a good example of a CSO making a well-formulated expertise input into an area of EU administration through the EO, procuring positive results at several levels: the complaint obtained the maximum possible reaction from the EO; wrong administrative practices and legal perceptions were revealed and corrected; and the accountability-machinery of the EO and the European Parliament was reinforced through a positive precedent. Naturally, the case took place in a complex context, involving negotiations on the new public access regulation. The pressure on the Council was therefore manifold. It is realistic, however, to assume that the EO’s involvement resulted in a problem-formulation and response that would probably not have been equally speedy and effective if the case had been handled by the Parliament or the courts.

The question of the nature or origin of the documents has been the subject of several other STATEWATCH cases. In case 1087/10.12.96, the Council stated that it was beyond the EO’s competence to inquire into refusals concerning documents produced within the Third Pillar (Justice and Home Affairs). The EO rejected this view, and was later confirmed in his legal interpretation by the Court of First Instance.19 Another case concerned the ‘authorship rule’ under the old access rules, which provided that the institutions had no competence to give public access to documents that they themselves had not produced. Documents made by other organisations were excluded. In case 1056/25.11.96, the Council argued that documents produced together with US authorities were not in the nature of ‘documents’ for the purpose of the access rules. The EO adopted a different interpretation.

One could perhaps sympathise with the Council’s interpretation in the case
just referred to, but the authorship rule did in some cases give rise to rather
creative interpretations. In case 916/2000, the Council argued that documents
held by its General Secretariat were not ‘Council documents’, and therefore
not within the Council’s rules on public access to documents. The EO
responded, with a conspicuous degree of under-statement, that he ‘was
however not aware of any provision in the Treaty or in Community law acts
that would suggest that the General Secretariat ought to be considered as an
institution or body separate from the Council’ (para 2.6). In the end, the
Council gave in, following a draft recommendation by the EO. More credible
doubt was raised in case 1056/25.11.96, referred to above, where the
distinction between the Council of Ministers and the Council Presidency came
up for discussion. In the course of the EO’s inquiry, the Council ‘settled’ the
matter by adopting the view that its Presidency is not ‘another institution’
within the meaning of the (old) access rules.

Significant for CSOs in particular, the EO has rejected attempts to thwart
the ‘second agenda’ that sometimes lie behind requests for access to
documents. In case 1053/25.11.96, it was the nature of the access requests that
was in dispute, related to provisions in the old access rules, which provided
that the Council could propose a ‘fair solution’ in respect of ‘repeat
applications’ and/or those applications which relate to ‘very large documents’.
The Council had on that basis provided access to five out of 14 documents.
The Council’s interpretation contains some legally interesting points, but it
was essentially motivated by an increasing irritation over STATEWATCH’s
repeated requests for large numbers of documents. It was felt that
STATEWATCH was testing the access rules rather than ‘honestly’ seeking to
satisfy its specific information needs. The EO naturally detected this, and held
that ‘Access to documents cannot … legitimately be blocked by the Council
because of a possible negative attitude towards the purposes for which a
request has been made, or the person who has made it’. He therefore rejected
the Council’s interpretation.

Concluding Remarks

It seems accurate to say that STATEWATCH has been a golden goose for the
EO, and the EO for STATEWATCH. What is particularly interesting, however,
is that the benefits procured by this interaction have gone beyond the simple
redress-scenario where the EO successfully fought for justified own-interest
access claims submitted by STATEWATCH. While STATEWATCH has
indeed obtained concrete redress in the form of release of specific documents
(necessary for its works as a civil liberties organisation), it is equally clear that
STATEWATCH has pursued a broader transparency agenda. Perhaps for this
reason, a particular quality of the STATEWATCH inquiries is the fact that
most of the crucial problems they have brought to light have been systemic, either directly in respect of the rules themselves or in respect of the administrative organisation to which they apply. This can be contrasted with the public access cases before the Court of First Instance, the majority of which has concerned the administration’s use of the exceptions set out in the access rules.\textsuperscript{20}

This observation is not made to fictitiously suggest that an intriguing and automatic systemic impact suddenly materialises when civil society organisations and ombudsmanship meet. Rather, it is merely made to point out that the STATEWATCH cases are an example of how a CSO has successfully detected the potential systemic impact that an ombudsman may have, and how the EO incumbent in question chose to respond positively to this wooing. Basic features of ombudsmanship have of course contributed heavily to make possible this interaction: free access to the EO’s review; a relatively speedy handling of the files; and an assurance that the EO would at least be able to follow up on the matter, both quasi-judicially as well as quasi-politically (draft recommendations, special reports).

It is possible to conclude, therefore, that the interaction between STATEWATCH and the EO has resulted in a generally positive supplementary impact on the development of transparency in the European Union, and demonstrated significant potentials for future such impacts. To highlight this one success story must of course provoke the question why many more transparency-interested CSOs have not made use of the EO. The concluding remarks at the end of this chapter will attempt to address the issue of the non-complaining CSOs.

CIVIL SOCIETY CO-GUARDING COMMUNITY LAW?

Introduction

While academic discourses on CSOs appear to concern primarily rule-making legitimacy, the implementation aspect is increasingly gaining ground.\textsuperscript{21} However, circumscribing a precise role for CSOs in the implementation of legislation seems considerably more difficult than circumscribing their function in the drafting of legislation (where ‘consultation’ is the key-word). One EU example of how CSOs can be better drawn into the implementation-process is the EO’s work to improve the European Commission’s complaints procedures under Article 226 ECT.

Under Article 226 ECT, the Commission may take Member States before the Court of Justice when these in its opinion act contrary to Community law. The power is purely discretionary, and the Commission may consider it more
expedient not to use it even when a breach is clearly taking place. Policy-
considerations therefore frequently and naturally form part of the
Commission’s role as ‘the Guardian of Community law’.

To obtain information about possible breaches of Community law, the
Commission relies primarily on so-called infringement complaints submitted
by citizens, businesses and organisations. Until the mid-1990s, the
Commission was nevertheless reluctant to accord such ‘infringement
complainants’ formal procedural rights, a practice which the Court endorsed
by finding that infringement complainants are not parties, in law, during any
stage of the procedures relating to Article 226 ECT. In law, therefore, the
complainants had neither procedural nor substantial rights, but constituted
mere sources – albeit the main sources – of information for the Commission’s
monitoring of Community law. It was not surprising, therefore, that
dissatisfied infringement complainants turned to the European Ombudsman
from early on.

The Ombudsman’s Vision

Many of the complaints to the EO have been grass-roots movements, local
groups of various sorts (often environmental), business associations and so
forth. In short, members of Organised Civil Society. Out of the 67 CSO cases
identified in the EO’s annual reports 1996–2003, 18 concern the
Commission’s handling of infringement complaints.

To an EC lawyer, a pro-active response from the Ombudsman to these
complaints was not obvious. Generations of European integration students
have been taught that the Commission is inevitably weak, having the
unenviable task of coercing unruly Member States into respecting the Law. It
should have ample room to pursue its well-thought out strategies to bring non-
complying Member States into the fold.

The EO decided to begin an own-initiative inquiry into the Commission’s
handling of infringement complaints in 1996, following the Newbury Bypass
case. In this illustrative case, an informally organised CSO – consisting of
some 30 citizens who made a concerted complaint action – alleged
maladministration by the European Commission in deciding not to open
infringement proceedings against the United Kingdom under Article 169 ECT
(now Article 226). They believed that the UK had breached Community law
by failing to carry out an environmental impact assessment of the Newbury
Bypass road in Berkshire, England. The complainants had submitted their
infringement complaints to the Commission in 1994. In October 1995, the
Commission issued a press release concerning the applicability of the directive
in question. The press release stated that the Commission’s interpretation
applied directly to the facts of the Newbury Bypass complaints. Subsequently,
the Commission wrote to the complainants, stating that it had completed its investigation and had decided to close the file, since no breaches of Community law had been found. The complainants were referred to the press release for a more detailed explanation.

The complainants alleged before the EO that the Commission had deprived citizens of an authoritative ruling from the Court of Justice, that the Commission’s legal interpretation was motivated by political considerations, or was the result of political pressure; that the Commission should have informed the registered complainants of its decision to close the file before announcing it through a press release.

The EO found that the Commission’s interpretation of the Community law seemed correct. He then turned to the procedural aspects of the case. On the issue of the press release, the EO noted that ‘An administrative process of this kind normally concludes with a reasoned decision communicated to those who have participated in the process. The Ombudsman considers that, as a matter of good administrative behaviour, the Commission should have informed the registered complainants of its decision before, or at least at the same time as, announcing the decision publicly through a press release’ (Part 3.2).

Summarised like this, the EO’s response may seem entirely unspectacular. However, it introduced two highly significant novelties, namely the idea that a new review body (the EO) can examine the Commission’s legal interpretation in relation to Article 226 infringement complaints, and, second, the idea that infringement complainants should possess procedural rights. It is no overstatement to say that the Commission’s Legal Service of that time found this development legally misunderstood, if not to say absurd. The EO therefore had to justify his view, and did so in outlining the following rationales for his decision to initiate an own-initiative inquiry into the matter:

- The rationale behind the Ombudsman Office itself, namely ‘the commitment of the Union to open, democratic and accountable forms of administration’ and the Ombudsman’s specific task to ‘enhance the relations between the Community institutions and European citizens’.
- The fact that the Ombudsman had received several complaints concerning Article 226.
- The increasing expectations of European citizens, that the institutions are transparent.
- The likelihood of improving administrative efficiency by introducing practices of hearing complainants before closing the files on their infringement complaints.
- The likelihood of improving the relations between the Commission and European citizens, an assumed by-product of allowing citizens to ‘participate more fully’ in these administrative procedures.
To a lawyer, the lack of black-letter legal rationale arguments revealed that the EO was fully aware that he was proposing a development very foreign to the Community’s practices to date. At least to start with, it was necessary to rely heavily on politico-administrative values and goals.

In late 1997, after having received the Commission’s response, the EO closed the own-initiative inquiry, noting that the Commission had committed itself to a constant development and improvement in the procedural position of the complainant in the Article 169 (now 226) procedure. ‘The citizens will thereby have the possibility to put forward views and criticisms concerning the Commission’s point of view before it commits itself to a final conclusion that there is no infringement of Community law.’

The cases that followed show a particularly fruitful EO interaction with CSOs. Many CSOs have submitted ‘high quality’ complaints (that is pertinent and well-argued) that have significantly contributed to the EO’s step-by-step development of his review approach as well as the specific duties and rights related to the Article 226 complaint procedure. It is beyond the scope of this chapter to analyse all the cases, but a summary of some procedural and substantial outputs resulting from these cases may convey a useful impression of their importance:

- The EO may assess whether the Commission has taken relevant technical considerations into account in forming its view on factual aspects of the implementation of Community law. The EO is normally not, however, in a position to assess the merits of an alternative scientific view.
- In cases where the Commission has commenced action to correct a breach of Community law, it is not within its otherwise broad discretion to shelve the matter. According to good administration and the requirement of due diligence, ‘the Commission should actively seek to make the Member State concerned put an end to the infringement’.
- In cases where the Commission conducts on-site inspections on the basis of an infringement complaint, the Commission services should take steps also to meet with the complainant concerned.
- The Commission must consider whether a possible infringement by a Member State may make its funding of national projects inconsistent with that infringement (for example structural funding of projects that may breach EC environmental law).
- If the Commission has a justified reason for not registering an infringement complaint, it must nevertheless inform the complainant of its reasons.
- If the Commission exercises its discretionary powers to close an infringement case despite evidence of an infringement, it must be
transparent as to whether an infringement has taken place or not.32

● It is a possible instance of maladministration, in the form of impartiality and impropriety, if a Commission official who is deeply involved in dealing with an infringement case also holds a post in a political party in the very Member State that the case concerns and acts publicly in that capacity at a time when the case is being dealt with.33

The Commission’s response can best be described as ‘gradually convinced’. In April 1999, it published an improved form for infringement complaints34 which included a reference to the improved ‘administrative guarantees for the benefit of the complainant’ (p. 7). In October 2002, that is more than five years after the EO’s decision to conduct an own-initiative inquiry into the subject, the Commission published a new set of rules ‘on relations with the complainant in respect of infringements of Community law’ (hereinafter the relationship communication).35 It is worth noting that the Commission has given the Ombudsman the full ‘credit’ for this positive development, by expressly addressing the relationship communication to the Ombudsman, and later emphasising that they were introduced ‘at the instigation of the European Ombudsman’.36 This is not simply important from the point of view of ‘who gets the credit’, but is also legally significant in that the EO’s decisions on infringement complaints will thereby carry significant weight as interpretative sources (‘precedents’).

The relationship communication firmly establishes the procedural rights of infringement complainants fought for by the EO.37 However, while this ‘codification’ is truly a milestone, an equally significant aspect lies in a reference in the later Communication on ‘Better Monitoring of the Application of Community Law’ (hereinafter the ‘monitoring communication’). Referring to the relationship communication, the monitoring communication states that ‘All complaints received by the Commission are registered, without any selection, but the action to be taken in response to a complaint is determined on the basis of the priority criteria referred to under 3.1. and on the basis of whether it can be handled using complementary procedures’ (p. 13). The priority criteria in paragraph 3.1, entitled ‘Effective use of the available instruments in accordance with the seriousness of the infringements’, are the following:

1. Infringements that undermine the foundations of the rule of law (the key-words are here ‘primary’ and ‘uniform application’ of Community law, as well as human rights/fundamental freedoms, and the Community’s financial interest).
2. Infringements that undermine the smooth functioning of the Community legal system (the key-words are here protection of the EU’s exclusive
powers and common policies; repetition of breaches; and cross-border infringements).

3. Infringements consisting in the failure to transpose or the incorrect transposal of directives.

By publishing such explicit priority criteria, the Commission has introduced a kind of Community interest test into the Article 226 complaint procedures. This means that the Commission is unlikely to remain alone in circumscribing these priority criteria. At least the ‘professional’ complainants – notably CSOs – are likely to explicitly introduce them into their infringement dialogues with the Commission, and so the EO will probably sooner or later have the opportunity to review their scope.

Concluding Remarks

The new status quo of the Commission Article 226 complaint procedures would probably have been rejected as pure ‘Euro-fiction’ by Commission hardliners in 1995. However, the newly elected EU Ombudsman, Jacob Söderman, refused to see the logic of what to him appeared an appalling treatment of citizens and organisations. He understood that if the Union wished to give substance to its newly created political face, including that of EU citizenship, the Union would have to deliver the concrete benefits that it claims to have created for its citizens. One way not to do so is to neglect those grass-roots who invest their energies in a better implementation of Community law. The end result has been an unequivocal acceptance of individual specific duties vis-à-vis infringement complainants, as well as an acceptance that the Commission’s priorities must be transparent and, by implication, subject to interpretation and debate.

THE EO GUARDING ‘NOTICE AND COMMENT’? THE COMMISSION’S NEW CONSULTATION RULES

Introduction

The preceding parts have shown how CSOs have interacted with the EO in areas of administration which are open to all citizens, whether organised or not: contracting, public access to documents, and submission of infringement complaints to the Commission. The present part concerns an area which is specifically focused on CSOs: the Commission’s recently published communication on ‘General principles and minimum standards for consultation of interested parties by the Commission’ (hereinafter the
The purpose of this part is to briefly discuss the potential future relevance of EO reviews with regard to these consultation rules. To this writer’s knowledge, consultation rules or practices in law making have not been dealt with in the EO’s practice so far. The consultation communication may change that.

The Consultation Communication and Review

The Commission’s attitude to potential future challenges to its consultation practice is set out in its consultation communication, in which it notes that some of those consulted during the drafting of the communication ‘questioned the Commission’s decision to set consultation standards in the form of a Commission communication (i.e. in the form of a policy document) instead of adopting a legally-binding instrument. They argued that this would make the standards toothless and the Commission would be unable to ensure the consistency and coherence of its consultation processes.’ For present purposes, it is important to make one or two legal-technical observations on this issue.

First, the Commission has not stated that the consultation rules are non-justiciable, that is unable by their very nature to constitute normative bases for a court or court-like review. It has merely stated that it wishes to prevent such reviews. Second, the fact that the rules are contained in a communication cannot conclusively prevent those rules from having effects on Community law as ‘soft law’. In any case, and as explained on pp. 143–4, the EO’s review-basis extends beyond the assessment of legality, including broader rules of good administration. Also mentioned was the fact that the EO has so far attempted to leave untouched issues of politics, which comprises the way in which the Community institutions legislate. This, however, by no means excludes reviews of the consultation rules. As the consultation communication confirms, the consultation practices are voluntary and by no means part of the ‘formalised and compulsory decision-making process according to the Treaties’, but intended only to ‘give interested parties a voice, not a vote’ (p. 5, top).

The Commission is well aware that the EO is not excluded from reviewing semi-political ‘soft law’ instruments (the EO has, for instance, frequently invoked the Charter of Fundamental Rights). The question is, therefore, what kind of review one could imagine. This, of course, is an exercise in guesswork, and shall therefore be kept short.

It is clear that the EO can assess compliance with several of the technical ‘minimum standards’ laid down in the consultation communication (p. 19). They stipulate, for instance, the kind of information that should be included in publicity and consultation documents. The minimum standards also include
specific publication duties. The more interesting ‘million Euro question’ is therefore to what extent civil society could usefully turn to the EO with regard to what we may refer to, for analytical convenience, as the ‘substantive’ aspects of the consultation practices:

(a) the determination of ‘relevant parties for consultation’, and
(b) the determination of the adequacy of the consultation undertaken.

The EO’s institutional and procedural context will naturally be crucial. In that respect, the following main factors can be pointed out.

First, although the Commission’s voluntary soft law consultation practices are not part of the formal legislative procedures (as noted above), it remains clear that consultation has a higher political content than say the Commission’s implementation of its code on good administrative behaviour. This factor speaks against a deep EO review of the substantive consultation practices.

Second, the Office of EO may be seen not to have an obvious inherent institutional authority to become the arbiter on consultation. In addition to the Commission itself, institutions such as the Parliament, the Economic and Social Committee and the Committee on the Regions possess a more natural mandate to shape the EU’s consultation practices.

Third, the Commission’s consultation practices are intended to apply to all levels of the regulatory process, which from the EO’s point of view could create a natural distinction between consultation relating to (a) legislative activity involving the Parliament formally, and (b) consultation relating to more autonomous bureaucratic policy-making by the Commission. With regard to the first category, this may make it natural for the EO to adopt a restrained style of review, simply because the Parliament itself should be able to put right any perceived inadequacies in the consultation initially conducted by the Commission. The matter could, however, be different with regard to the Commission’s more autonomous bureaucratic policy-making, such as takes place in dialogue with CSOs previous to the presentation of formal legislative proposals. In the light of the Parliament’s permanent consternation over its outsider role in ‘comitology’ – a field explicitly excluded from the scope of the consultation communication (p. 16) – a perception that a new avenue of influence in non-legislative policy-formulation could be obtained through support to EO-inquiries on CSO-consultation may materialise. Such a perception could possibly be perceived of as an encouragement for the EO to conduct more proactive and in-depth inquiries in this field.

Fourth, the EO’s actions need not be ‘advertised’ in the field of consultation as a new area of review, since the well-known and successful transparency agenda of the EO Office offers ample opportunities for review of consultation
practices: reason-giving, access to information, ‘transparent’ criteria for selection of CSOs to be consulted, and so forth. The consultation communication could initially be regarded as simply a minor step to codify existing duties of good administration.

**Concluding Remarks**

Whatever importance one attributes to the above observations, it remains an important basic fact that the Union legislators could introduce a comprehensive hard-law consultation system if they so wished. That they have not done so would justify a cautious approach on the part of the EO. Therefore, on the one hand, the EO’s competence could be firmly asserted in this field by conducting deep reviews of procedural issues, but at the same time applying a minimalist review in respect of substance. This would have the advantage of maintaining a review presence without causing inappropriate turmoil in an incipient consultation system. The reply to the question posed in the heading for this part may therefore be that the EO is possibly a guardian of notice and comment in waiting.

**CONCLUDING REMARKS**

The CSO-EO interactions examined above demonstrate that the national developments briefly referred to in the Introduction are also to some extent taking place at the EU level. Thus, very different kinds of CSOs have complained to the EO about highly different issues, indicating a broad sectoral understanding and acceptance of the EO. We have also seen that the benefits have not been one-way, as pertinent and well-argued complaints by CSOs have in several respects assisted the EO to rapidly promote the broader politico-administrative aims of his office. Indeed, the strong ‘abstract’ links between the CSOs and the EO are obvious: several themes often associated with civil society are equally fundamental in the EO context, for instance democratic values such as accountability, transparency and ‘closeness to the citizen’.

An important contradiction is, however, undeniable. If the ‘success stories’ of the CSO-EO interaction are so manifest and manifold, why do more CSOs not complain to the EO? It cannot but puzzle that EO inquiries based on CSOs amount to only around 11 per cent in a context where the proportion of the administration’s own CSO-interaction is so considerable. It seems relevant, therefore, to briefly consider some of the more evident possible causes and to put forward, in a purely objective mode, the measures that could be taken to address those causes (if, that is, they should be addressed at all).
Ignorance of the right to complain to the EO, or of how to complain, is a first possibility that should be considered real. EO decisions rarely make headlines, even in Brussels, and many of the CSOs that have made use of the EO do not appear to be linked to other CSOs through which a positive first-hand experience of the EO would automatically be channelled. A way to remedy this would be for the EO to systematically collect information on the CSOs with which the Community institutions frequently communicate (for instance through the Commission’s CSO register), and to contact these organisations directly.

Relationship concerns may be essential also. CSOs will normally wish to maintain good relations with the Community officials in question, and are therefore likely to accept compromises rather than creating a dispute through the EO. A greater emphasis on own-initiative inquiries, based on the few CSO complaints that do arrive would be one way of addressing this problem.

The duration of inquiries is a returning issue for any review body, and an issue for the EO also. While the EO’s inquiries are usually a great deal shorter than the proceedings of the Court of First Instance, an extended use of more informal preliminary inquiries could be considered. Greater attention to the existence of preceding appeal procedures could also be introduced, for instance with regard to public access to documents. To those who request documents, receiving a ruling on a public access dispute 6-12 months after the dispute has been through the formal appeal procedure provided for in the legislation may often be problematic.

In addition to these remedies, it is, of course, also open to the EO to establish more formal and permanent relationships with civil society organisations. Umbrella organisations could spread information about the EO, and the EO could perhaps adopt a more systemic-orientated approach in handling CSO complaints. The EO could furthermore to a greater extent recognise the published work of CSOs as an important source of information for targeted own-initiative inquiries.

To address the ‘lack’ of EO-CSO dialogue through these or other measures may seem entirely consistent with the role played by organised interests in the EU. However, it is relevant to recall that the EO, as all European parliamentary ombudsmen, has no power to issue binding decisions to the administration. The effectiveness of the EO’s work therefore depends crucially on a broadly perceived legitimacy of the office, in particular in the EU where the EO has a comparatively weak parliament to back up any decisions and recommendations. It is undoubtedly of great benefit that the large majority of complaints to the EO are made by individual citizens, as this removes the credibility of any attempt to rebut the EO’s findings on the basis that the EO is merely the extended arm of organised interests. Thus, while some increase in the interaction between the EO and civil society organisations would
probably produce benefits at several levels, there are good reasons to caution against the notion of a ‘European civil society ombudsman’. This conclusion may, of course, seem to be premised on the finding that Civil Society has not yet acquired a central place in the understanding of democracy at the EU level. Rather than this, however, the conclusion is based on the impression that parliamentary ombudsmen are still primarily perceived of as mechanisms to resolve disputes between the public administration and individual citizens. Any proposal to change this perception at the EU level would, in this writer’s view, be a misguided attempt to tamper with the EO’s firm basis in the concept of European citizenship.

NOTES

1. The present chapter was presented in May 2003, and slightly updated as the European Ombudsman’s Annual Report for 2003 became available. Peter Bonnor has worked as a lawyer for the European Ombudsman since January 2004. The usual disclaimer applies.


4. It may be noted that the proposed European Constitution, which expressly refers to the right to complain to a European Ombudsman, has not attempted to alter the nature of the EO.


7. P 6: ‘Problems can arise because there is no commonly accepted – let alone legal – definition of the term “civil society organisation”. It can nevertheless be used as shorthand to refer to a range of organisations which include: the labour-market players (i.e. trade unions and employers’ federations – the “social partners”); organisations representing social and economic players, which are not social partners in the strict sense of the term (for instance, consumer organisations); NGOs (non-governmental organisations), which bring people together in a common cause, such as environmental organisations, human rights organisations, charitable organisations, educational and training organisations, etc.; CBOs (community-based organisations), i.e. organisations set up within society at grassroots level which pursue member-oriented objectives, e.g. youth organisations, family associations and all organisations through which citizens participate in local and municipal life; and religious communities. So “civil society organisations” are the principal structures of society outside of government and public administration, including economic operators not generally considered to be “third sector” or NGOs. The term has the benefit of being inclusive and demonstrates that the concept of these organisations is deeply rooted in the democratic traditions of the Member States of the Union.’

8. The reports are those for 1996–2003. Please note that from 2004, the categories ‘companies’ and ‘associations’ were, for statistical reasons, joined.

9. To illustrate, it is a normal contractual requirement that Community aid should be explicitly acknowledged, that is the Blue Flag must be waved at some point during the aid-receiving World Disabled Sailing Championship (Decision on complaint 630/6.6.96) or the occasional Film Festival (Decision on complaint 23/97). And the very substance of some aid-receiving projects does, it is submitted, unequivocally confirm the impression that there is more to it than technocratic European integration. Thus, one EO case witness of a Euro 50,000 payment by the Commission to an NGO that provided psychological assistance to victims of terrorism in the Basque Region of Spain (Decision on complaint 669/98).


11. Decision on complaint 605/21.5.96.

12. Decision on complaint 630/6.6.96 – involving the Dutch ‘Foundation for International
Cooperation on Projects and Other Activities for Humanitarian Affairs’.  
13. Decision on complaint 533/01.4.96 (Commission would review procedures to ensure quicker procedures and replies).
16. The other cases are: Decision on complaint 586/3.5.96, concerning requests for information on individual commissioners’ salaries and allowances; Decision on complaint 506/97, concerning wrong application of exception on documents relating to court proceedings; Decision on complaint 1128/2001, concerning the public interest as regards international relations, and non-interference with use of the information released (ECHR right to freedom to hold opinions and to receive and impart information and ideas without interference by public authority); Decision on complaint 1795/2002, concerning access to European Convention agendas and minutes (as it relates to the Council); Decision on complaint 1795/2002, concerning access to European Convention agendas and minutes (as it relates to the European Convention).
17. Decision on 1057/25.11.96.
18. Decision on complaint 1055/25.11.96. See also Decision on complaint 1054/25.11.96.
23. Following the introduction of rules of good administration into the infringement complaint procedure, the Community courts have consistently confirmed this position, see Petrie and Others v. Commission, T-191/99, ECR 2001, II-3677, paragraph 70.
24. Decision on 206/27.10.95 et al.
26. Decision on complaint 813/98, ‘Bridge strengthening works in environmental protection area’, concerning a complaint by a UK environmental association which made certain claims or conjectures about the effects of a bridge-strengthening programme.
30. For example Decision on complaint 1561/2000.

34. Official Journal C 119/5 – the Commission’s 2002 Communication on relations with complainants (below) clarified that the new form was produced as a ‘result of the European Ombudsman’s own initiative enquiry’.

35. ‘Commission communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law’, OJ C 244/5.


37. See Annual Report 2002: 120 (‘Further Remark’).

38. See the complaint procedures in the field of competition law, in which the concept of Community is applied. For an example in the EO’s practice, see EO decision 829/22.8.96, Annual Report 1998: 62.


41. ‘Consultation mechanisms form part of the activities of all European Institutions throughout the whole legislative process, from policy-shaping prior to a Commission proposal to final adoption of a measure by the legislature and implementation’ (p. 4 of the consultation communication).

REFERENCES


When EU civil society complains

PART III

The policy and associative context
8. European institutions and the policy discourse of organised civil society

Carlo Ruzza

INTRODUCTION

This chapter starts from the assumption that associations can have a positive effect and contribute to a democratisation of supranational systems of governance and examines the conditions under which a democratising effect can develop. It concentrates on the role of public-interest associations in their relation with European institutions, and more specifically on social movement related associations, which it argues are a distinctive type, and proceeds to illustrate their characteristics and impact. In the empirical part of this chapter, a methodology is proposed to examine the specific ways in which they can contribute to democracy. This is based on an analysis of their policy discourse as reflected in policy documents and a comparison with institutional documents.

It is argued that the major contribution of movement-related associations can be the representation of sectors of the population that would otherwise be excluded from the policy process, the contribution of policy knowledge relatively unaffected by vested interests, and monitoring functions on the relations between vested interests and European Union institutions. In order to effectively provide these contributions social movements related associations must on the one hand remain independent – that is, free from extensive cooptation which would constitute an institutional capture. On the other hand, their policy discourse must be at least in part compatible with the values and objectives of institutions. Either cooptation or excessive radicalism and unwillingness to co-operate would make their contribution ineffective.

Utilising this normative standard the chapter then proceeds to examine their policy discourse and compare it with the discourse of European Union institutions. To achieve a structured representation of the different policy issues emphasised by associations and EU institutions, this chapter utilises a comparative content analysis of institutionally approved texts as indicators of the concerns and policy positions of the EU and associational field. A text analysis of policy documents is useful to examine whether there is congruence
between as well as within the social movement sector and the institutional sector in terms of their policy agendas, normative assumptions and perception of problems.

Similarities and differences are examined and the conclusion is reached that overall they contribute positively to the democracy of institutions of the European Union.

OCS AT EUROPEAN LEVEL

Public-interest associations often find it difficult to gain access to the institutions of the European Union. It is expensive to set up offices in Brussels; activists require highly specialised legal and technical competence if they are to operate effectively; and organisations need sufficient personnel and resources to be able to address the different phases of the policy process. Nevertheless, over the years a large number of public interest associations have opened offices in Brussels. Among them are representatives of an impressive array of social causes and political positions, including activist groups which not long ago were known only for their spectacular protest tactics.

This has happened because the centre of gravity of several policy areas has shifted to Brussels. So too have lobbyists, political advisers and technical experts, but increasingly political activists and voluntary workers as well. The aim of this chapter is to examine the consequences of this re-location of advocacy and the prospects for the overall democracy of the European system of governance. It will do so by looking at the interaction between campaigners and EU institutions in certain key areas of social activism: environmental policy, anti-racism, and regionalism. In these areas I will compare policy documents of EU institutions and civil society and investigate differences and common frames. This comparison will allow an analysis of the mutual influences between EU institutions and activist groups and will suggest some normative considerations with respect to issues of EU legitimacy. First, it is necessary to delimit this sector and elucidate its relevance in relation to the broader sector of voluntary organisations.

The voluntary sector as a whole is only a small part of a large and internally differentiated multi-organisational field of interest representation. Within this field, each different type of associations relates differently to ideal democratic standards such as those that the Commission emphasises and that it recommends as normative guidelines for the entire associational sector (European Commission 2000; Warleigh 2001). Idealised standards that recur in Commission documents include transparency, internal democracy, accountability, quality of information, representation of social interests.
Naturally, not all associations can provide these qualities with the same effectiveness. As they have different social bases, amount of resources and skills, different kinds of organisations are more likely to excel on some of these qualities and be deficient in others.

As Mark Warren points out, although they compete, different types of organisations constitute an integrated ecology of associations (Warren 2001). In some circumstances they balance each other and provide different democratic goods to governance structures. For instance, business associations might provide useful technical knowledge and information on the preferences of an important sector of society; they might effectively guarantee internal democracy as there are no exit barriers that stimulate internal consensus and push out dissenters as identity oriented groups might do (Warren 2001). But their ability to represent society might be limited. This limitation could then be counterbalanced by the inclusion of public pressure groups. And it would be the task of decision-makers to ensure that a good mix of organisations are represented. Any such mix would at a minimum include a balance of vested interests and public pressure groups. As the two fields are very different, in the rest of this chapter it is necessary to further restrict the kind of associations to be considered. A first delimitation is then to concentrate on public interests.

However, even the field of public pressure groups is internally too fragmented to be considered as unique in its contribution to democracy. Church-related groups, service delivery associations for poverty relief or the homeless, and social movement groups tend to interface governments’ institutions in different ways, with different demands and bring different features to the policy process. In addition, sometimes they joined forces and came to constitute distinctive multi-organisational coalitions. In this chapter, I concentrate on a specific type of association: institutionalised social movement organisations active at the European Union level. They often form stable or semi stable coalitions with sectors of left-liberal parties, activists working within institutional realms, and will come to constitute what I would like to call ‘movement advocacy coalitions’ (MACs henceforth), which I posit that now constitute an identifiable sector.

This sector is now formed by a large and internally differentiated set of organisations, both at EU level and within Member States. However, whilst its composition varies somewhat from policy sector to policy sector, they all have in common their belonging to interconnected social movement families, whose main members are the right-wing family of exclusionary movements and the left-liberal family of social movements that emerged with the so-called ‘New Movement’ of the 1980s. It is this latter family that is more present in Brussels as the outcome of a process of institutionalisation and diffusion. They are distinctive in their interconnected ideological features and ability to resort to various forms of social protest whilst also expressing an advocacy approach
through the concerted alliance in multi-actor coalitions. In this advocacy activity, they vary somewhat. For instance, on issues of anti-racism the MAC comprises such diverse types of organisation as churches, charities and multi-faith groups, self-help groups, development organisations, poverty relief and institutionalised social movement organisations. On environmental issues the MAC does not include churches but it includes scientific organisations. These various advocacy coalitions often co-ordinated efforts with the help of institutional actors and member-state based organisations.

The umbrella groups of institutionalised social movements and the coalitions that they have formed in the EU reflect the transformation of important aspects of social idealism in Europe at the beginning of the new century. Although a large part of the social movements sector prominent in the last few decades has become substantially institutionalised (Eder 1996; Rootes 1997; Giugni and Passy 1998), and increasingly co-ordinates efforts with a growing array of public-interest organisations, voluntary associations, advocacy groups and NGOs, it still retains certain features distinctive of protest organisations and its links with the social movement sector in Member States.

For several of the activists of these movement-inspired advocacy coalitions, operating efficiently in Brussels has required them to acquire a wide set of skills which include coalition-forming skills, legal competence, negotiating and technical skills not often found in the social movement sector and to develop policy frames somewhat at variance with the discourse and the tactics of their social movements of reference. The acquisition of these skills has meant that a distance between the movements as they appear in Member States and their Brussels incarnation has emerged. The broadly based Brussels MAC are entities that might have undergone a transformation to be better equipped to deal with the EU policy environment, but could also be the outcome of selection processes whereby EU institutions come to relate to increasingly coopted formations. This is an empirical question which needs to be considered if their contribution to democracy is to be properly assessed.

**Movements and NGOs**

Direct social movement impact through protest activities in Brussels is only one avenue of representation for the movement sector. Movements could bring their protest to Brussels, but very seldom have the resources and skills to do so. It is too expensive to relocate the activists that such actions would require, and given the opaque nature of the EU policy process it would be fairly ineffective and costly. For these reasons movements are more effective in their role as policy advisers or information providers and accordingly as warning indicators of reactions in Member States. Brussels can therefore be seen as a
de-territorialised space upon which movement advocacy converges from several Member States. In this role movement actions are best accomplished through broad advocacy coalitions of networks of movement organisations and like-minded institutional allies. This is not only because of the high cost of re-locating protest activities from member states to Brussels but also because the opaque nature of the policy process hinders the individuation and exploitation of conventional political opportunities. The ‘social movement’ form is an historical development based on the centralised character of the nation-state which is likely to take on different features in a supranational space as the EU (Marks and McAdam 1996) where effectiveness is rooted in their ability to engage in deliberative activities and compromise more than in reliance on political protest addressed to a unified state.

Movements in Brussels need to act through broader movement-inspired advocacy coalitions, which comprise movement activists as well as sympathisers, external supporters, instrumental and principled allies in a variety of organisations and institutions. Pro-movement sentiments can be expressed and represented in political arenas by civil society organisations either directly at the EU level or at member state level, with subsequent implications at EU level. The various organisations and individuals that seek to influence decision-making in Brussels can choose among several avenues for interest representation. Different institutions can be addressed at the same time or at different times; different strategies and different levels of governance can be utilised. This availability of multiple channels of representation in Brussels applies to all social interests. They find receptive institutional channels in a variety of settings – parliamentary committees, specific units of DGs, political parties, regional offices – and are embodied by a variety of organisations, such as trade unions, Commission-sponsored networks, churches, and specific organisations in the voluntary sector. There is, in effect, a dialogue in progress between the main policy ideas of certain social movements and institutional frameworks. This dialogue takes place in an institutional environment which is naturally reliant on a variety of structures created in different time periods to facilitate the solution of policy controversies through institutionalised debate between civil society actors and institutions (Smismans 2004).

To illustrate the outcomes of this dialogue, this chapter analyses movement activities in three policy areas and in these contexts examines the discursive connections between movements and institutions. I have selected key texts of three advocacy coalitions which are among the most salient families of social movements active in Brussels: environmentalism, anti-racism and regionalism. A brief description of these movements will situate them in historical context.
Environmentalism

The environmental coalition refers to one of the most successful movements’ attempts to influence policy. Over the last 35 years – this being the short history of environmental policy in EU institutions – environmental regulation has been successful. And success arrived relatively early for this movement. In 1967–1987 the Commission introduced over 200 directives, regulations and decisions in a manner relatively unaffected by political events (Majone 1989: 165; Judge 1993: 114). This led early commentators to define this policy area as ‘remarkable’ (Hildebrand 1993: 23) and an undeniable success (Johnson and Corcelle 1989: 2). As Majone points out, European environmental regulation significantly increased in a period of general de-regulation and profoundly shaped environmental policy in member states (Majone 1993).

Like the other cases, this one focuses on the institutionalised sector of the environmental movement. Arising largely from pressure applied by public opinion and environmental movements, environmental policy has grown into a comprehensive set of concerns marking out new problem areas like climate change, and it spreads across a variety of other policy areas, such as tourism, agriculture and transport. European institutions are crucial for environmental regulation, both because of the integrated character of European economies and because of the cross-border nature of many environmental threats. For this reason, institutions such as the European Commission and the European Parliament have aroused substantial interest among environmental movements, whose lobbying initiatives have attempted to offset the powerful influence of industrial lobbies and public pressure groups. Social movement groups like Greenpeace, Friends of the Earth and others have permanent representation in Brussels. This study will explore the nature of their interaction with the composite Brussels institutional environment, highlighting the gradual but undiminishing institutionalisation of this policy area and of its advocates. It is instructive that Wilson, writing in the late 1980s, noted, with others, that environmentalists were excluded from the policy process together with representatives of consumer groups and tax-payers (Wilson 1990: 71). Their disruption was then understood as a tactic of last resort. However, early in the new century, this is no longer the case. Many of the groups once excluded from regular consultation are now part of it in many countries, and this is certainly the case of environmentalists in Brussels, who are by no means marginal.

Anti-racism

The field of anti-racism is part of a broader field, preoccupied with preventing social exclusion, which includes related concerns such as poverty and gender
discrimination, and which broadly belongs to social policy. As Geyer notes, despite the concerted efforts of many, social policy has always been hindered by resistance from member states, a variety of interest groups and notably capital, by institutional constraints in this area and by the limitations of social policy in member states. And this history of the sector is not set to be reversed in any major way in the near future (see Geyer 2000: 2). Racism as a form of discrimination can be connected with other forms of discrimination like gender discrimination, which was expressly mentioned in Article 119, although the original treaties made no references to racism. The issue appeared prominently on the political agendas of member states in the 1970s, but at the EU level it became important only in the mid-1980s with a set of EP studies and declarations. But it was not until the Amsterdam Treaty of 1997 that a solid legal basis was provided by article 13, which outlaws racial discrimination. Since then, a set of initiatives has emerged at EU level, but this policy area remains weak, generally only trailing initiatives in member states (Geyer 2000: 171).

Anti-racism is part of a broad family of movements which combat various forms of social exclusion by addressing such issues as disability rights, women’s social exclusion, gay rights, old-age issues, and the more strictly related issue of migrants’ social exclusion. Anti-racism is a movement that receives the oft-professed public support of EU institutions. Moreover, it enjoys a widespread but less determined institutional activism within EU bodies.

**Minority ethno-regionalism**

Since the 1970s ethno-regionalist movements have re-emerged in Europe. The recent affluence of some of the regions in which these movements are prominent, such as Catalonia and the Basque country, has trickled down to the local ethno-territorial movements with cultural and media prominence. A cultural revival of local traditions as a reaction to globalisation has led to the re-discovery of political grievances against state capitals and their ruling elites in several member states. The process of regionalisation under way in all the large member-states has given greater legitimacy to regionalism.

European policies discussed and co-ordinated with regional authorities empower European regions, and those with strong independentist movements can take advantage of these political opportunities, utilising them to promote those movements’ objectives if this empowers local elites, or if these movements acquire electoral importance. In addition, they can form alliances with other peripheral regions and collaborate in resisting what they perceive as the state’s internal colonialism. However, the integration of Europe also entails a degree of cultural homogenisation that may be seen as further
undermining aspirations to protect local cultures and traditions that many ethno-regionalist movements already believed to be threatened by nation building and state building. Movement supporters therefore consider a complex set of factors in defining their relation to the EU. Nonetheless, a general consensus on empowering regions has emerged – as distinct from a more radical emphasis on regionalism – and it chimes with the regionalisation project pursued by EU elites as part of a strategy to defuse the national-supranational conflict.

As will be clear from this short introduction to the case studies, the three families of advocacy coalitions differ greatly in terms of policy impact, this being determined by how policy fields operate – that is, by the typical dynamics of the complex recurrent interaction between organisations and the individuals that support each of the movement coalitions. This, together with the impact of other political channels of representation have determined outcomes that differ in terms of the closeness to movements’ positions, the policy content that was Europeanised, the policy instruments adopted, the policy ideas pursued, and the timing of Europeanisation. Here I will only focus on their ideas and the way they are reflected in policy documents and report on the comparative analysis that was undertaken of themes emerging in the policy documents of OCS and EU. This would allow me to assess the contribution of each movement advocacy coalition towards the democratization of the EU level system of governance.

DEMOCRACY AND MOVEMENT ADVOCACY COALITIONS

Movement advocacy coalitions like other formations of organised civil society can play an important role in the democratization of a variety of political contexts (Rossteutscher 2005), but their role can be particularly relevant with respect to the European Union where the issue of the ‘democratic deficit’ has attracted significant attention and a variety of proposed solutions which not infrequently encompass a stronger role of functional groups (Schmitter 2000).

The three advocacy coalitions that are considered here have in common that they represent weak and under-resourced sectors of the European population: constituencies that are often excluded from inputs in policy making. For this reason the European Union encourages their role and promotes their inclusion in sometimes formal, and often informal policy consultations. However, the organisations that are consulted are generally chosen by institutional actors. These lead to the possibility of bureaucratic and political capture of associations. In other words, there is the risk that the selected organisations would be compliant to the expectations of the institutional domain. Excessive
compliance would undermine any potential contribution to democracy. On the other hand, policy advice which is radically incompatible with institutional expectations would also limit their impact and therefore undermine the contribution to the democratisation of European Union structures. Therefore, I would like to argue that a positive role of organised civil society requires both realism and independence. These two qualities can be assessed by comparing discourse on the three movement advocacy coalitions in relation to the discourse of institutions.

If it is essential that these movement advocacy coalitions be on the one hand independent and on the other hand effective, we would expect that they share core values of the European system of governance while also promoting specific differences. We can then assess their level of dependence by comparing their policy discourse with the discourse of institutions. If they merely reproduce the discourse of institutions we could argue that they only enjoy limited autonomy. The three MACs would then be mere instances of regulatory capture. On the other hand, if a high level of criticism precludes any possibilities of collaboration, we could argue that they play no role in the democratisation of the decision-making process.

Of course, a purely critical role may well still have a democratising impact when for instance it is mainly addressed to the public sphere, that is to publicise aspects of the democratic deficit and stimulate the search for solutions. In such a case, associations would exercise a democratisation role in terms of the previously mentioned Warren’s second category and possibly first category, but not in terms of their impact on the institutional domain. In terms of institutional dynamics it is instead important that MACs have an impact on institutional agenda setting procedures, on the values that inspire policy makers and on the evaluation of outcomes and that this impact counterbalances the often mentioned dominance of industrial and business lobbies. Thus it is useful to evaluate these normative concerns by considering which are the political values present in institutional policy documents and whether they are representative of wider social constituencies such as those represented by MACs.

To comparatively assess similarities and differences of policy discourse between MACs and their institutional ambits of reference we now need to devise and conduct a comparative empirical test of the dominant approaches in the two fields.

**METHODOLOGY: FRAME ANALYSIS OF THE RELATIONS BETWEEN OCS AND EU INSTITUTIONS**

The methodology of content analysis of policy documents addressed the
need to examine systematically the relationship between the policy agenda advocated by MACs and the EU agenda.

There is a static and long-term relation which is sometimes of competition whereby OCS and EU institutions produce contrasting and self-serving framings or even congruent framings. This process has been examined through a comparative exploration of themes present in programmatic documents. The analysis focused on identifying aspirations, examining the perception of problems to be addressed by policies and the criticism of actors involved in the policy process and of normative political principles with a guiding impact on policy making.

To analyse these dimensions a type of content analysis known as ‘frame analysis’ was utilised. This methodology attempts to identify and classify recurrent concepts in policy documents and to relate them to specific kinds of actors. It also attempts to identify how these concepts change, merge or differentiate over time and across different types of actors. In practice the analysis was performed with the help of a small team of six researchers and only focused on the last 10 years and on the aggregate difference between OCS and institutions.¹

The technique of frame analysis comes from a central tradition in social movement research and also in policy analysis (Snow et al. 1980; Rein and Schon 1994; Alink et al. 2001).

Briefly, a first reading of the materials identifies and lists the main themes appearing in a set of texts. The occurrence of these categories is then counted by a team of analysts, which gives a more exact assessment of their prominence and allows a characterisation and comparison between different types of documents.

As of particular relevance was the comparison between social movements’ discourse and the discourse of institutional actors, a set of documents representative of the main organisations of each type active in environmental, regional and anti-racist policy was selected for analysis.

The document sources utilised for the EU field included web presentation pages of relevant institutions. These consisted of Directorate General web pages presenting the specific policy remit (DG Environment, DG Region, DG Employment and Social Affairs – Section on Anti-racism); agencies and consultative institutions (environmental agency, COR, European Monitoring Centre); the European Parliament (web pages describing the thematic areas).

Second, the Commission’s programmatic action plans and institutional evaluations of action plans were considered. For institutions recent action plans in the various fields and the main reactions by the institutions were considered. In the field of environment the last two action plans were examined (fifth and sixth AP), one in anti-racism (first AP) and programmatic documents in regional policy. reaction to APs by the parliament in the form of
resolutions, other resolutions indirectly connected to APs, and the opinions of all consultative bodies on the action plans were also considered.

For OCS the primary materials consisted of: reactions to EU action plans by EU networks as well as large OCS organisations established in Brussels and submissions to the European Convention on the Future of the European Union, programmatic documents and web presentation pages of these organisations. For the Environmental sector were considered: European Environmental Bureau (EEB), Climate Network, WWF Europe, Greenpeace Europe, Birdslife, Friends of the Earth Europe, International Friends of Nature, Transport and Environment. For the Regionalist sector: European Bureau for Lesser Used Languages (EBLUL), Association of European Regions (AER), Association of European Border Regions (AEBR), Council of European Municipalities and Regions (CEMR), Congress of Local and Regional Authorities (CLRAE). Also considered were associations of regions and a sample of regional offices from the type of regions examined in the text – regions with prominent ethno-nationalist advocacy coalitions: Sardinia, Veneto, Catalunya, Pays Basque. For the Anti-racist sector, documents produced by European Network Against Racism (ENAR), Starting Line Group and Migration Policy Group were classified. A balanced number of similar sources were considered in each sector.

The selected texts constitute a sample which indicates the issues which are of concern to many policy makers and activists, agenda-setting efforts and preferred policy solutions.²

A team of five coders read the texts using paragraphs as the unit of analysis. A paragraph was classified into one or more of the frames previously identified when it matched a central defining statement. Thus, when two or three frames were present in a text two or three occurrences were counted. A total of about 1000 paragraphs per sector were coded (ENV=1000, REG= 998, AR= 1074). They thus constitute our unit of analysis, which refers to a total of approximately 134 documents (Ar: 44, Reg: 43 Env: 47).

In addition to the frames identified other variables were coded. These are: policy sectors (ar, env, reg), type of actor (the various OCS organisations or institutions), type of document, and year of selected texts. A set of modifiers were also produced, which were called performative codes and were coded as separate variables. These refer to the relational content of the actions referred to by the specific frames utilised. In other words, through a grounded theory approach it was observed that the actions most recurrent in the texts were criticisms (coded as ‘to criticise’), requests of political intervention in favour of a specific cause (coded as ‘to advocate’), analytical evaluations of specific states of affairs of issue areas (coded as ‘analysis’). This was useful as it allowed the analysts to achieve a specification of the action context in which certain themes emerged.
FINDINGS

The findings concern first the identification of the dominant frames, second the internal composition of the frames identified and third the relations among frames, which have been analysed across sectors and types of actors. After a quantitative report on the dominant frames, it will only be possible to discuss qualitatively the internal variations of one of the frames identified: the frame named ‘importance of civil society’ which refers to the reasons why civil society is considered important by OCS organisations and by EU institutions. Similarly, due to space limitations, the relations among frames can only analyse the main quantitative differences across sectors and within sectors.

Frames identified

Table 8.1 is a list of the main codes that emerged (whose meaning is self-explanatory). They constitute the discursive universe of policy making in these sectors in Brussels.

Table 8.1  Common codes identified in all policy sectors

<table>
<thead>
<tr>
<th>Frames identified</th>
<th>Total (%)</th>
<th>EU (%)</th>
<th>OCS (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Implementation</td>
<td>20.1</td>
<td>22.5</td>
<td>17.7</td>
</tr>
<tr>
<td>To improve knowledge</td>
<td>13.5</td>
<td>16.4</td>
<td>10.6</td>
</tr>
<tr>
<td>Horizontality</td>
<td>12.8</td>
<td>16.0</td>
<td>9.6</td>
</tr>
<tr>
<td>Importance of civil society</td>
<td>13.0</td>
<td>8.1</td>
<td>19.6</td>
</tr>
</tbody>
</table>

Table 8.2  Frames identified in the environmental sector and their percentage over total number of paragraphs scored

<table>
<thead>
<tr>
<th>Frames identified</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sustainable development</td>
<td>21.8</td>
</tr>
<tr>
<td>Horizontality</td>
<td>16.3</td>
</tr>
<tr>
<td>Implementation</td>
<td>15.0</td>
</tr>
<tr>
<td>Importance of civil society</td>
<td>14.9</td>
</tr>
<tr>
<td>Market driven approach</td>
<td>14.1</td>
</tr>
<tr>
<td>Effectiveness of public policy</td>
<td>10.2</td>
</tr>
<tr>
<td>Sustainability</td>
<td>9.8</td>
</tr>
<tr>
<td>To improve knowledge</td>
<td>9.7</td>
</tr>
</tbody>
</table>
Table 8.3  Frames identified in the anti-racist sector and their percentage over total number of paragraphs scored

<table>
<thead>
<tr>
<th>Frame</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Implementation</td>
<td>32.7</td>
</tr>
<tr>
<td>Discrimination</td>
<td>24.8</td>
</tr>
<tr>
<td>Application of public policy/principles</td>
<td>22.6</td>
</tr>
<tr>
<td>Co-operation-Partnership-networking</td>
<td>18.2</td>
</tr>
<tr>
<td>To improve knowledge</td>
<td>18.0</td>
</tr>
<tr>
<td>Member States responsibility</td>
<td>15.2</td>
</tr>
<tr>
<td>Analysis</td>
<td>14.7</td>
</tr>
<tr>
<td>Equal opportunities</td>
<td>13.3</td>
</tr>
<tr>
<td>Importance of civil society</td>
<td>13.2</td>
</tr>
<tr>
<td>Dissemination</td>
<td>12.6</td>
</tr>
<tr>
<td>Human rights</td>
<td>10.5</td>
</tr>
<tr>
<td>Solution</td>
<td>10.5</td>
</tr>
<tr>
<td>Effectiveness of public policy</td>
<td>10.2</td>
</tr>
</tbody>
</table>

Table 8.4  Frames identified in the regionalist sector and their percentage over total number of paragraphs scored

<table>
<thead>
<tr>
<th>Frame</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Horizontality</td>
<td>18.4</td>
</tr>
<tr>
<td>Development</td>
<td>16.8</td>
</tr>
<tr>
<td>Cooperation</td>
<td>16.5</td>
</tr>
<tr>
<td>Subsidiarity</td>
<td>14.3</td>
</tr>
<tr>
<td>Financial information</td>
<td>14.2</td>
</tr>
<tr>
<td>Analysis</td>
<td>13.2</td>
</tr>
<tr>
<td>To improve knowledge</td>
<td>12.5</td>
</tr>
<tr>
<td>Co-ordination and planning</td>
<td>12.1</td>
</tr>
<tr>
<td>Implementation</td>
<td>11.6</td>
</tr>
<tr>
<td>Importance of civil society</td>
<td>11.0</td>
</tr>
<tr>
<td>Supporting</td>
<td>10.3</td>
</tr>
</tbody>
</table>

Perspectives on the importance of civil society

A first contextual discourse analysis concerns the role of civil society and the type of roles that different actors wish to attribute to NGOs and other associations. More OCS involvement is generally seen as desirable and advocated in a variety of functions. Institutions and OCS organisations generally agree across roles and sectors, even if with some differences of emphasis. This makes it possible to identify a prevalent EU model of shared
understanding of OCS ideal features. This model will first be delineated with reference to institutional documents and then integrated with reference to additional elements which are distinctive of the discourse of OCS.

First, both Institutions and OCS see civil society as a necessary and welcome source of participation in policy making, as it emerges for instance in a DG Social Affairs text:

In all of this the Commission has paid great attention to the contribution which civil society can make. Much of what has to be done can only be achieved with the contribution of civil society organisations and concerted actions between public authorities and civil society. It is generally recognised that the organisations of civil society can help promote a more participatory democracy, chiefly because they can reach out to the poorest and most disadvantaged population groups and give a voice to those who are debarred from using other channels. Their specific skills and their connections at local, regional, national and international level may also prove useful and contribute to policy design and to the management, follow-up and assessment of actions.

Second, among the valued contributions of OCS are frequently stressed its ability to help institutions gathering information and communicating with the public. For instance an environmental document stresses its role in making sure that policy making ‘involves all stakeholders in the process and are communicated in an effective way’.

Third, OCS is seen in its capacity to disseminate the awareness of desired lifestyles (such as environmental or non-discriminatory ones). This implies that OCS is given a rather direct role in implementing policy objectives related to attitudinal change, which are frequently described in relevant action plans and programmatic documents of the three policy sectors, such as those pertaining to attitudinal changes towards more environmental or multiculturalist or anti-discriminatory awareness.

Fourth, OCS is seen as supporting aggrieved citizens – such as local victims of pollution incidents – against more powerful social actors such as business and governments. These objectives are connected with the needs of engendering more transparency and accountability in politics and, as for instance indicated in a DG Environment presentation, ‘the empowerment of citizens’ and more generally to improve representation.

Fifth, all actors see OCS as necessary partners for dialogue with societal forces. The listing of these desirable attributes sometimes occurs jointly. For instance the 5EAP states: ‘the active involvement and participation of non-governmental organisations (NGOs), both environment and consumer oriented, as well as trades unions and professional associations will be crucial to the general process of awareness-building, to the representation of public interest and concern, and to the motivation and engagement of the members of the general public themselves’.
Other frequently made points are references to the need to redress the imbalance of resources between OCS and other actors. For instance a Commission document reviewing the 5EAP notes: ‘the problem with NGOs is that they do not have the resources to contribute to the legislative process (for example, with respect to the Chemicals-IPC Directive). Dialogue cannot succeed at a technical level without an equality of resources, but dialogue and partnership should definitely be the road.’

The policy documents stress the transnational character of OCS as a means to reach a broader constituency. For instance an institutional document in the field of anti-racism states: ‘the Commission encourages their role of independent information providers supporting organisations taking part in combating and preventing discrimination, enabling them to compare and contrast their approaches with experience in other regions of the Community.’

This transnational character which might be understood in terms of attributing OCS a role of co-ordination in vertical governance is also supplemented by reflections on the role of OCS in terms of horizontal governance. As recognised in the 2001–2006 action programme to combat discrimination, the Commission emphasises the ‘networking character’ of policy making and in this respect the specific role of OCS. A Commission document advocates for instance ‘the promotion of networking at European level between partners active in the prevention of, and the fight against, discrimination, including non-governmental organisations.’

This benefit of reaching ‘distant regions’ is also stressed in relation to OCS’ role in reflecting local knowledge in the policy making process. The Commission and OCS claim that associations are a source of local knowledge, as for instance evidenced in a DG Social Affairs communication, which states that ‘NGOs are essential partners in the fight against racism and play a vital role in combating that scourge on the ground’.

The theme of local knowledge is stressed not only in relation to improving implementation, that is in terms of a relation that emanating from the centre reaches the periphery, but also in terms of decision-making and representation from the periphery to the centre. For instance a Commission document in the anti-racist sector reviewing the relevant action plan notes:

As for civil society organisations, the added value of their participation in decision-making, and during the design and evaluation of projects, centres around their capacity to question programme goals and methods on the basis of a different and legitimate perception of needs. The target groups’ own organisations, in particular, achieve good results because they know and understand needs and aspirations on the ground, they provide sustainable long-term services and are gaining legitimacy in dialogue with politicians.
The role of OCS in OCS documents

The same objectives stressed by Institutions are indicated by OCS organisations. In addition they put forward demands for additional accessibility and a wider role both at EU and at national level, as evidenced in this quotation from a position paper of ENAR: ‘NGOs, unions and other civil society groupings should be actively consulted in the formulation, implementation and assessment of a national action plan.’

OCS organisations also see themselves as having an impact at community level. For instance a website presentation of BirdLife International states:

BirdLife International works to help local communities to address the links between environmental problems and human welfare. This approach aims to enable local people to become self-sufficient through: increasing their sense of ownership and responsibility, allowing local people to learn new skills, ensuring local people’s needs are taken into account. Creating a sense of empowerment in the community results in more positive and sustainable biodiversity conservation.

A general willingness to engage does not prevent frequent criticism of EU institutions. For instance, criticising the Commission a joint EEB, WWF and FOE document states: ‘while the Commission recognises the role business has to play, it does not refer to the existence of a civil society that expresses itself in different interest groups, including environmental, workers’ and socially oriented organisations. Its only reference is to consumer organisations at one point’.

The criticisms typically raised against OCS are sometimes redirected towards the EU institutions. For instance a joint EEB, WWF and FOE document reverses the typical criticism of lack of accountability of OCS organisations, which is redefined in terms of a duty of the Commission to be accountable for the input it received from OCS: ‘proposals include early warnings on new policy initiatives and legislation, invitations for input in early stages of the process and, very importantly, an explanation on what the Commission has done with the input.’

Finally it is important to note a general divergence from the neo-liberal and market-orientated ethos of the Commission. This is evidenced for instance by an emphasis on the role of the state that does not appear in Commission documents. An EEB proposal for an environmental action plan notes: ‘as this inequity is structural, the EEB is not in favour of a withdrawing state, it sees the state as having an important role in steering society and bringing balance between stakeholders’.

A strong state is also a precondition for a proper acknowledgment of the role of OCS. The same document continues by noting that ‘this is also a matter of democratisation, as citizens organisations usually can count with more confidence with the public than governments or business’.
To sum up, Institutions and OCS are in agreement in delineating some key features that they would like to encourage in the relation between institutions and OCS but there are also some disagreements. I will now move on to the specific content of OCS and institutional discourse in the three policy sectors.

Cross-sectoral Findings

The first important finding is that there are commonalities in the policy frames identified within European policy documents which distinguish them from OCS documents. In general EU documents stress the economic dimension more than OCS (EU = 58.1 per cent OCS = 41.9 per cent), and focus on a smaller number of frames. We can note that whilst a common discourse has developed within EU institutions, the themes emerging from OCS are more varied. The fact that this has not happened within OCS may hinder its ability to co-ordinate tactics and strategies. On the other hand it allows the organisations of civil society to play their role as democratic expression of a variety of visions.

Common frames that characterise EU institutions and OCS in the three policy sectors are horizontality (that is the integration of sector specific objectives into other policy areas), implementation, improving knowledge and importance of civil society. These are general frames that are fairly uniformly shared by EU and OCS documents such as the frame of civil society, which refers to the desirability of involving civil society. This diffusion also refers to the balance among sectors as it emerges from Table 8.5.

Table 8.5  Percentage of ‘importance of civil society’, ‘implementation’ ‘horizontality’ ‘improve knowledge’ frames in the three sectors

<table>
<thead>
<tr>
<th></th>
<th>Importance of civil society</th>
<th>Implementation</th>
<th>Horizontality</th>
<th>Improve knowledge</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>AR</td>
<td>13.2</td>
<td>32.7</td>
<td>4.4</td>
<td>18.0</td>
<td>1074</td>
</tr>
<tr>
<td>ENV</td>
<td>14.9</td>
<td>15.0</td>
<td>16.3</td>
<td>9.7</td>
<td>1000</td>
</tr>
<tr>
<td>REG</td>
<td>11.0</td>
<td>11.6</td>
<td>18.4</td>
<td>12.5</td>
<td>998</td>
</tr>
<tr>
<td>TOT</td>
<td>13.1</td>
<td>20.1</td>
<td>12.8</td>
<td>13.5</td>
<td>3072</td>
</tr>
</tbody>
</table>

This finding shows that there is in Brussels a general agreement that civil society is important and should be more involved in the policy process.

The environmental sector shares with the regional sector an emphasis on the frame of horizontality, which is less marked in the case of anti-racism, as shown in Table 8.5. This is possibly due to the fact that anti-racism has largely
defined itself in the realm of social policy where the EU common policy is limited and no diffusion is easily attainable and cannot therefore be claimed.

As a theme, implementation is understood differently in the three sectors. In the environmental sector the main emphasis is on the effectiveness of implemented policies10 (10 per cent) and on the monitoring system (6 per cent), while the anti-racists and regionalist actors stress the need for the application of policies. Moreover anti-racists ask for the implementation of principles (rather than policies).

However, in general terms, implementation remains a crucial concern of all movement-related areas where reluctant governments and hostile sectors of EU institutions can delay or avoid implementation. This emerges clearly in the anti-racist sector where we can observe that all actors taken together criticise the implementation of policies.

The relative novelty of the anti-racist sector is also reflected by its emphasis on improving knowledge. This frame has two different meanings: dissemination of knowledge and deeper understanding, which refers to the necessity to acquire information for a better understanding of problems. The main emphasis is on the first meaning in all sectors.

**Tendency to advocate and to criticise**

EU institutions and OCS also express a different propensity to advocate and to criticise. This difference varies in different policy sectors. This emerges clearly from Table 8.6.

This table shows that the social movement character of NGOs is reflected in their generally more critical stance and advocacy attitude. In absolute terms the most critical stance is expressed by environmental OCS organisations, thus revealing their unequivocal social movement character. If we compare the overall level of criticism across the three sectors, we note that there is a substantial difference with regionalism (1.6 per cent) being far less likely to express criticism than the other sectors (ENV 14 per cent and AR 11.6 per cent).

With reference to the common frames, Table 8.7 shows that EU institutions stress implementation more than OCS in the anti-racist sector. The opposite takes place in the environmental sector. This suggests that while implementation is a crucial concern of anti-racists who have recently seen the approval of a set of important initiatives connected to Article 13, such concern with implementation is more relevant for environmentalists who have achieved the implementation of environmental regulation to a much higher degree over the years.

The importance of civil society is emphasised by OCS in the environmental and regionalist sectors (in fact in the regionalist sector it is only stressed by
Table 8.6  EU institutions and OCS emphasis on expressing criticism and advocacy in different policy sectors (percentages within sectors)

<table>
<thead>
<tr>
<th>Policy Sector</th>
<th>To advocate</th>
<th>To criticise</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>EU Inst. (N)</td>
<td>OCS (N)</td>
</tr>
<tr>
<td>Anti-racism</td>
<td>55.0 (369)</td>
<td>45.0 (116)</td>
</tr>
<tr>
<td>Environment</td>
<td>39.2 (130)</td>
<td>60.7 (141)</td>
</tr>
<tr>
<td>Regionalism</td>
<td>33.4 (206)</td>
<td>66.5 (16)</td>
</tr>
</tbody>
</table>
OCS) while in the anti-racist field the distribution is more balanced. The need to improve knowledge and horizontality are emphasised most frequently by EU institutions.

Table 8.7 Policy sectors by type of ‘common frames’ to advocate

<table>
<thead>
<tr>
<th></th>
<th>EU advocate</th>
<th>OCS advocates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Implementation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Anti-racism</td>
<td>55.1</td>
<td>44.9</td>
</tr>
<tr>
<td>Environment</td>
<td>42.3</td>
<td>57.7</td>
</tr>
<tr>
<td>Regionalism</td>
<td>52.2</td>
<td>47.8</td>
</tr>
<tr>
<td>Improving knowledge</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Anti-racism</td>
<td>57.8</td>
<td>42.2</td>
</tr>
<tr>
<td>Environment</td>
<td>-*</td>
<td>-*</td>
</tr>
<tr>
<td>Regionalism</td>
<td>51.4</td>
<td>48.6</td>
</tr>
<tr>
<td>Importance of CS</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Anti-racism</td>
<td>53.2</td>
<td>46.8</td>
</tr>
<tr>
<td>Environment</td>
<td>18.2</td>
<td>81.8</td>
</tr>
<tr>
<td>Regionalism</td>
<td>0</td>
<td>100</td>
</tr>
<tr>
<td>Horizontality</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Anti-racism</td>
<td>50.0</td>
<td>50.0</td>
</tr>
<tr>
<td>Environment</td>
<td>61.1</td>
<td>38.9</td>
</tr>
<tr>
<td>Regionalism</td>
<td>60.0</td>
<td>40.0</td>
</tr>
</tbody>
</table>

Note: * Only few instances were identified

There is a frequent usage of the concept of ‘to criticise’ in the environmental and anti-racist sectors, we note that it mainly refers to the sector-specific codes (sustainable development and sustainability of the environmental sector, mainstreaming of the anti-racist sector and cohesion or proximity of the regionalist sector) rather than the ‘modes of operation’ that we codified in common frames (implementation, importance of civil society, improving knowledge and horizontality). Therefore, common frames refer to shared and approved concerns. The only exception in this regard is represented by the frame implementation in the anti-racist field: as we noted above OCS and EU institutions criticise implementation (OCS: 68.1 per cent, EU institutions: 31.9 per cent). This makes implementation the most important concern in the anti-racism field, differentiating it from environmental and regionalist sectors.
Sectoral Frames

There are then differences across policy sectors.

Anti-racism

In the anti-racist field a clear finding is the high degree of isomorphism of the discourse of Institutions and of OCS. This emerges from Table 8.8, in which most important frames are listed. There are some differences of emphasis.

**Table 8.8 Percentage of anti-racist sectoral frames by type of actor and by performative codes**

<table>
<thead>
<tr>
<th></th>
<th>To advocate</th>
<th>To criticise</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>EU Inst</td>
<td>OCS</td>
</tr>
<tr>
<td>Importance of discrimination</td>
<td>15.7</td>
<td>34.9</td>
</tr>
<tr>
<td>Co-operation, networking</td>
<td>14.2</td>
<td>12.0</td>
</tr>
<tr>
<td>Role of member states</td>
<td>27.1</td>
<td>34.3</td>
</tr>
<tr>
<td>Market</td>
<td>28.1</td>
<td>2.4</td>
</tr>
<tr>
<td>N</td>
<td>203</td>
<td>166</td>
</tr>
</tbody>
</table>

Here one should note that the code Importance of discrimination in association with ‘to advocate’ has been utilised to indicate an emphasis on anti-discrimination, or it indicates the need to fight discrimination. Moreover we can specify that EU institutions use the frame ‘to combat’ which generally refers to the explicit utilisation of the word ‘combat’ much more than OCS to stress this aim. The frame ‘to combat’ is almost always utilised by Institutions (88 per cent of the time) and occurs in EU documents in association with the word ‘discrimination’ illustrating the adoption of what one may regard as a movement-inspired metaphor by the Institutions. Interestingly, OCS does not use it, as it does not use ‘mainstreaming’ revealing a preference for moderation in the language utilised.

Significant stress also emerges on the importance of co-operation and forming networks (18.2 per cent over the total of paragraphs) among the relevant actors in combating racism. This is particularly evident from the recurrent emphasis on information exchange and exchange of good practice (5 per cent). Institutions focus on combating discrimination and do so with particular attention to the economic dimension which includes combating the markers of discrimination in the labour market, such as unemployment (7 per cent). Conversely, OCS pays markedly less attention to economic issues whilst sharing the rest of the policy agenda.
In terms of differences, in the table we also notice that OCS emphasises the role of member states more than EU institutions (34.3 per cent against 27.1 per cent). Role of member states is a supercode (that is as mentioned a conjunction of two codes) which encompasses importance of member states and member states responsibility, and refers to their responsibility (particularly for implementing EU legislation) or refers to their importance as a distinctive level of government to whom an attribution of responsibility for effectiveness is made. In addition, OCS also stresses the role of local authorities (4.4 per cent).

Other recurrent frames are: equal opportunities (13 per cent), which is linked with ‘advocate’ (6 per cent) and ‘human rights’ (10 per cent). These are sector specific frames, like affirmative action (3 per cent), ‘different but equal’ (3.4 per cent), which is a catchphrase adopted mainly by EU institutions.

The juxtaposition between a multicultural and an assimilationist policy frame often appears unclear as both are no longer easily identifiable, possibly because the necessity of a combination of both approaches is now taken for granted.

Regionalism

In the field of regionalism, most frequently used sectoral frames are co-operation (16.5 per cent) among actors at different levels of governance, subsidiarity (14.3 per cent), co-ordination and planning (12.1 per cent), exchange of practices (4.9 per cent) and sharing responsibilities among actors (4.7 per cent). Thus there is substantial agreement on a perception of insufficient information and a preferred policy style which favours a non-confrontational approach and co-operation among different levels of governance – that is, horizontally among subnational levels of governance, and between cross-border subnational units.

However, as represented in Figure 8.1, EU institutions and OCS diverge in terms of different emphases on political or economic areas of concern. Thus democracy (7.1 per cent), the importance of civil society (11.0 per cent) and minority rights (8.6 per cent) and citizenship (3.8 per cent), all political concerns – are almost exclusively stressed by OCS. Conversely, the economic dimension stressed by institutions emphasises development (16.8 per cent), implementation (11 per cent) and financial information (14.2 per cent). Proximity, despite being mentioned in a key policy document as an overarching EU concern only appears very seldom (4 per cent). It might be that this is still an emerging frame integrating and replacing the consolidated emphasis on subsidiarity (14.3 per cent) which is particularly stressed in connection to civil society (65.3 per cent versus 34.7 per cent). In this domain institutions often reiterate their perception of their own importance (Europe is useful: 7.5 per cent), which however is not shared by OCS (93.8 per cent versus 6.3 per cent).
Environmentalism

In the environmental field institutions and OCS agree on the importance of the frame of sustainable development and sustainability, which are however slightly more central to the concerns of OCS actors as represented in Figure 8.2.

Market driven approach (14.1 per cent) occur frequently in this field, and refers for instance to the perceived necessity to remove public subsidies and achieve a better environment through market-driven policy instruments. It also refers to voluntary agreements and specific measures such as eco-tax and eco-audits which incorporate environmental costs in financial reports.

In this field OCS expresses a recurrent critical stance of institutional approaches, which on second-level documentary analysis appears particularly strong and technically informed. In addition, it is notable that OCS criticises member states and the ineffectiveness of institutions (6.4 per cent), particularly the Commission.

DISCUSSION

Our findings show that overall the three movement advocacy coalitions express policy discourse which is both compatible with a policy discourse of European institutions but which stresses some factors and underplays others. This then suggests a constructive role of the EU organised civil society and
specifically of its institutionalised social movement component. In particular, the Neo-liberal values of European institutions are criticised and a more interventionist role of the state is advocated to redress what they perceive as a discrimination of peripheral locations and racial minorities into strengthened regulations against the neglect of the environment that they see as a consequence of a purely market-oriented approach.

This chapter has examined the discursive claims of EU institutions and OCS. In general we have observed a substantial convergence of themes among the actors. At the level of EU policy formation I examined the strategic considerations of EU actors and how they are reflected in the ideational component of policy making. This included the discursive justifications employed in processes of agenda setting and identification of preferred policy solutions. In line with the present focus on civil society it explored, on the one hand, the content of the frame ‘importance of civil society’. On the other hand I considered the relations between the preferred policies of EU institutions and their goals and the goals of organised civil society.

In general terms, on the basis of the findings it can be argued that there are dominant and converging elements that allow one to define a EU model of civil society involvement from which there are some deviations. This model is characterised by an overarching emphasis on participation which is actualised
mainly in terms of a consultative role (reflecting an awareness of the consequences of proposed legislation rooted in their first-hand knowledge of their communities’ needs) and an information-providing role (which reflects their technical knowledge). To a lesser extent there is evidence of a desire to include OCS in debates on the merits of proposing legislation in a dialogical role inspired by models of deliberative democracy. There is little evidence of a desire to include or requests to be included in autonomous unencumbered decision-making. In addition, an EU model of civil society also includes an emphasis on its role in connecting different levels of governance and in relating to other non-state actors in horizontal network governance.

Deviations from this model include the perspective of several OCS associations which emphasise a stronger state as guarantor of their inclusion in deliberative fora and as guarantor of their role of providing information, and as provider of resources. Similarly, deviations from this model, but in the opposite direction, are expressed by institutional actors who dissent from any interventionalist agenda to redress the imbalance between private and public associations, and occasionally from institutional actors (mainly in non-social-policy roles) who dissent from any perspective that promotes the inclusion of non-state actors in policy making.

As for the sectoral frames, the analysis has identified commonalities and differences in the policy frames identified in OCS and EU documents. Both the EU and OCS are worried about implementation of EU policies, and concerned about utilising civil society to improve knowledge of problems and information on the preferences of the population. However, EU institutions focus more on the economic dimension of these policy areas whereas OCS stresses non-material aspects or other policy aspects. Nonetheless, within each sector, there is substantial agreement on the goals to be pursued.

NOTES
1. For a more complete description of the methodology of frame analysis see Ruzza (2004).
2. All classified documents and database files are available on the web, at the address: www.soc.unitn.it/users/carlo.ruzza.
3. This refers to the diffusion of a policy principle throughout two or more policy sectors.
10. Implementation was considered too internally differentiated to be considered as a self-standing code. It was, therefore, specified into two dimensions: effectiveness of implemented policies, which refers to the necessity to increase the effectiveness of already implemented measures; and application of public policy, which refers to the observation that already decided norms and regulations had to be implemented.

11. The first type of sentences would include for instance advocacy for anti-discrimination measures – for instance ‘new anti-discrimination policies are needed’, the second refers instead to the emphasis on eliminating instances of perceived discrimination, such as in ‘there are high levels of racist incidents and discrimination’.

12. Financial information has always been understood in its meaning of information on available financial resources for regional development.

13. As mentioned we included documents from regional offices. We deemed it important to differentiate our sample of OCS from our sample of regional offices which is of a different kind and also of necessity much more limited and therefore somewhat arbitrary. Only a very few regional offices were examined – mainly to see whether their discourse differed substantially from other organizations. However, we did not note relevant differences between regional organizations and regional bureaux.

14. This refers to the grounded theory concept of constantly re-examining primary sources.

REFERENCES


European institutions

INTRODUCTION

There is a growing literature on civil society in general and on the role civil society can (and should) play in the multi-level system of EU policy making (from the EU white paper on governance (Com (2001) 428 final) to for example Rucht 2001, Heinelt 2002 or Curtin 2003). However, little is known about the existing structures and mechanisms of interest intermediation through civil society actors in the political system of the European Union and its member states and how civil society actors actually contribute to policy developments in the European Union.

Based on own research on environmental policy and consumer protection and, within each field, on one particular legal act, this chapter tries giving some answers to the following questions:

1. How far can civil society influence policy making within the multi-level system of the EU? More precisely, are there specific points of access?
2. Which internal problems do civil society actors face when wishing to become politically influential and are they able to solve them?
3. Which contextual settings challenge or favour the influence of civil society actors – especially when decisions are being applied in the ‘world of actions’?

The environmental policy case in point is the Fauna-Flora-Habitats Directive of the European Union. It was adopted in 1992 and is the first major piece of EU legislation providing for the designation of special conservation areas (being combined in a European network of conservation areas under the name ‘Natura 2000’). Following this directive, member states are required to take all appropriate steps that ensure the maintenance of selected fauna, flora and habitat in specifically conservation areas. Development plans or projects
likely to have significant effects on such types of flora, fauna and habitat are subject to impact assessments. The World Wildlife Fund for Nature (WWF), the Royal Society for the Protection of Birds (RSPB) as well as the European Environmental Bureau (EEB) were actively involved in lobbying during the negotiation process of the directive. Subsequently, domestic environmental groups have become involved in the implementation of the directive in the member states as well as in its application in individual cases.

In the field of consumer protection our case is the Novel Food Regulation. This regulation both specified procedures for placing ‘novel foods’ on the market and also included specific labelling requirements for such products. Because most of these foodstuffs contain or consist of genetically modified (GM) organisms, this issue has triggered much public and controversy including conflicts between, on the one hand consumer protection and public health and, on the other technological innovations and industrial interests. In 1998, BEUC (The European Consumers’ Organisation) started a ‘Campaign for Consumer Choice’ arguing that key consumer rights to information were not met and that only clear labelling would ensure that consumers can choose whether or not to buy GM food. This campaign has been supported and taken down to the domestic level by consumer organisations in the member states.

Research on the two case studies has covered the entire policy process at the EU level. Of special concern has been how actors, such as BEUC, have intervened and performed a role as interest intermediators. Another question was whether the interests pursued by civil society actors became part of the public debate and political action in individual member states. The cases chosen were Germany and Greece.

Our argument is developed in four sections. First, a couple of definitions are suggested that underline the relevance of focusing on particular actors (as parts of civil society). We then address the question as to whether civil society actors have both influenced the legislative process at the EU level and participated in implementation at the domestic level. Third, empirical findings are presented on problems and abilities of civil society actors to co-operate, to mediate internal tensions and to co-ordinate their activities in the multi-level system of the EU. Finally, specific contextual settings and challenges of influencing policy making by civil society actors are reflected upon. Although we only look at two policy areas there might be some room for generalisation.

THE CONCEPTUAL BACKGROUND OF THE CHAPTER

The project starts from the assumption (see Heinelt 1997, 1998, 2002) that a democratic polity should not be conceived in terms of one single ‘regime’ but
instead ‘as a composite of “partial regimes”’ (Schmitter 1993, 4; for the concept of regime composition see also Schmitter 1992). This is because it consists of a complex web of institutions with more than one form of interest articulation and intermediation as well as binding decision-making processes. From such a perspective, a political system may be imagined as outlined in Figure 9.1.

In this model the ‘civic infrastructure’ of locally based associations, pressure groups and movements surround – as a ‘peripheral context’ – the ‘core sector’ of the political system consisting of the parliament and the government. The ‘core sector’ of the political system is embedded in various sectors of interest intermediation – including the sector of civic interest

![Figure 9.1 Sectoral composition of the political system](image_url)
intermediation – that function according to different political modes of governance (majority decisions, hierarchy, bargaining and arguing). They are differently aligned and complement each other (see Heinelt 2002: 102 f.).

The sector of civic interest intermediation is directly linked to civil society. It shapes policy making by way of debates (or of argumentative communication) between participants which relate to each other in a reciprocal dialogue. In as far as such discourses with equal opportunities for participation are inherently related to the public space, they may ‘frame’ policy making (see for the framing-approach Roose 2003: 47–8) both within the overall political system and in the other sectors of interest intermediation.7

However, such a notion of civil society reflects what can be called the ‘vision oriented alternative’ in the debate on civil society (Nullmeier 1991). It is linked to reflections on a general function of civil society in which considerations about conditions for bringing about this function are relatively abstract because of ‘the non-contextual and rationalist specification of discourse’ (Nullmeier 1991: 18; translated). ‘Contextualising’ civil society by looking for concrete conditions and limits of public discourses and an ‘enactment’ of the (potential) general function of civil society in a given society is lying at the heart of an ‘intermediation-oriented alternative’ in the debate on civil society (according to Nullmeier 1991). Such a perspective is appropriate – if not necessary – for empirical analyses. But a distinction between ‘functional’ and ‘empirical’ considerations on civil society – or on functions and representative/agents of civil society (for an historical account on this see Gosewinkel and Rucht 2004: 37–9) – implies well-known methodological problems.8 On the one hand, specific functions can be fulfilled in different ways and by different actors. This may blur clear categorical boundaries needed in empirical analyses. On the other hand, the better categories are spelled out the more restrictive they are.

This indeed is the case for the actors chosen by us for empirical analysis. We do not include the entire ‘intermediary sector’ under the label of ‘civil society’ – that is those actors situated in the triangle between state, market and ‘households’.9 We give emphasis to fora for self-articulation and political debate (argumentative exchange) and to associations oriented at civic goods (Schmitter 1981: 125) as the ‘institutional heart’ of civil society (see Habermas 1992: 443–4), ‘whose purpose [like especially the demand for and the protections of human or political and civic rights; inserted by the authors] would (allegedly) benefit everyone, but which only very indirectly, very unconceivably or very belatedly benefit one-self alone’ (Schmitter 1981: 125). Furthermore, ‘the slightly more self-serving causes of consumer protection [and] environmental conservation’ (Schmitter 1981: 125) are also
relevant in this respect.\textsuperscript{11} We therefore exclude the ‘third sector’ – with its orientation to self-help and quasi-market service provisions – as well as organised interests like trade unions and business/employer organisations pursuing partial interests. To put it precisely, we are looking for collective actors orientated at civic interests trying to influence societal binding decisions by arguing (‘the power of argument’).\textsuperscript{12}

This differentiation is in line with other definitions of civil actors. Neubert (2003) for instance differentiates ‘civil actors’ along two criteria – form of activity (self-help or aid organisations versus interest-mediation) and beneficiaries of the activity (members versus non-members). Following this, one can ideally distinguish between (a) member-oriented interest groups (for example trade unions and business/employer organisations), (b) member-oriented self-help groups or organisations, (c) non-member-oriented interest groups (for example environmental organisations or human rights organisation) and (d) non-member oriented welfare (charity) or aid organisations (Neubert 2003: 259). Strictly speaking, only non-member-oriented groups (in the field of environmental policy and consumer protection) are subsumed by us under civil society organisations.

Finally, the emphasis given to arguing is important not only in order to be able to distinguish civil society actors from those actors (like trade unions and business/employer organisations) who possess bargaining power in the sense of resources (beyond knowledge) which are essential for reaching a solution or solving a problem/conflict. The reference to argumentative power is also crucial as it helps to draw a line between civil society actors and those who cross the border between protest meeting for articulating ‘good reasons’ and acts of violence.

The ‘unclear status’ of citizens’ action groups (marked in light grey in Figure 9.2) is expressing the methodological problem of distinguishing between a ‘functional’ and ‘empirical’ perspective mentioned above. Depending on the interest they are actually pursuing, for example NIMBY or non-NIMBY interests, they deserve the label civil society actors – or not. The same may apply for corporate actors (for example for trade unions) depending on the interests they are pursuing and the power they are employing (bargaining or argumentative power). The opposite may also be the case. A bravely arguing and public-interest-minded actor will lose its status as a civil actor as soon as it does not rely any longer on arguing – and as soon as it develop an interest in itself.\textsuperscript{13} The clearness of defining civil actors may be blurred by looking for ‘civil actions’ (‘ziviles’ Handeln; Gosewinkel and Rucht 2004: 38), that is the enactment of functions related to civil society. However, what counts for empirical purposes is an integrated view at ‘sequenced moments’ where some (the dominant ones) may be characterised by civil actions and some others not.\textsuperscript{14}
Civil Society Actors in the Multi-Level System of EU Policy Making

Civil Society Actors at the EU Level

Considering the role civil society organisations play in agenda-setting and decision making at the EU level and looking at their relations with the Commission, the European Parliament and the Council (as EU core institutions) the following emerged in our empirical research.

Contacts to the Council, be they direct ones or mediated by representatives of individual national governments have played only a limited role for civil society organisations when trying to influence the negotiation and the final decision on the mentioned two policy instruments. This strongly contrasts with ‘traditional’ interest groups (like business/employer organisations) which

<table>
<thead>
<tr>
<th>Beneficiaries of the activity</th>
<th>Kind of activities</th>
<th>Members</th>
<th>Non-members</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Articulation of political interests</td>
<td>Pressure interest groups</td>
<td>Advocatory groups</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Trade unions</td>
<td>Human rights organisations</td>
</tr>
<tr>
<td></td>
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<td>Business associations</td>
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<td>Self-help groups or organisations</td>
<td>for example, Caritas, CARE</td>
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Figure 9.2 Typology of voluntary associations (due to Neubert 2003: 259)

CIVIL SOCIETY ACTORS IN THE MULTI-LEVEL SYSTEM OF EU POLICY MAKING

Civil Society Actors at the EU Level

Considering the role civil society organisations play in agenda-setting and decision making at the EU level and looking at their relations with the Commission, the European Parliament and the Council (as EU core institutions) the following emerged in our empirical research.

Contacts to the Council, be they direct ones or mediated by representatives of individual national governments have played only a limited role for civil society organisations when trying to influence the negotiation and the final decision on the mentioned two policy instruments. This strongly contrasts with ‘traditional’ interest groups (like business/employer organisations) which
habitually lobby national governments for influencing Council decisions and by this the policy development at the EU level (see for example Streeck 1995; Bouwen 2001; Bouwen 2004: 356-61; Streeck et al. 2005). The limited importance of contacts of civil society actors to the Council or national governments to influence decision making at the EU level is due to the fact that the Council is the forum for reconciling the distinctive intentions and powers of the member states. Albeit not losing sight of common objectives, member states’ representatives are more focused on defending their national interests. The influence of national interests prevails in the Council and it is therefore crucial for the member states’ representatives to identify and to know about divergent national or domestic interests.

However, for reflecting and defining these interests, contacts to civil society actors can become important insofar as concerns expressed in domestic discourses can hardly be refused. Furthermore, representatives of national governments can be receptive to interests pursued by civil society organisations when they are similar to their own positions. This has been the case in GM food where consumer groups but also environmental organisations (for example Greenpeace) have been effectively articulating their concerns in domestic debates and influenced the position of national governments (especially in Germany where a red-green coalition government was in power between 1998 and 2005 and a ‘green’ minister was responsible for consumer protection since 2002 but as well in Greece under the former PASOK government).

The Commission has a central role in the EU legislative process due to its formal right to initiate legislation and thus its responsibility for the drafting of legislative proposals. The drafting of proposals requires a substantial amount of expert knowledge. Often, legislation has to be developed from scratch. Particularly, for new legislative proposals, quite specific policy expertise is indispensable. Considering that the Commission is a very small bureaucracy, which is permanently understaffed, there is often no room for hiring new specialists. The Commission is therefore dependent on external resources to obtain the necessary expertise (see Bouwen 2001: 25–6). Here civil society actors, as will be shown in the next section, play a crucial role in providing the Commission with information, expertise and strategies.

Information and expertise provided by civil actors are even more important for the Commission insofar as they can be related to so-called ‘articulated European interests’, that is public interests and not just concerns and demands of certain (self-interested) stakeholders. Including such interest groups in the legislative process and referring to such interest offers the Commission the opportunity to increase the acceptance of and to generate legitimacy for her initiatives. This became obvious in the analysed cases. Environmental groups were in a position to point to a public interest to protect areas with
particular types of endangered fauna, flora and habitat (not least for future generations). The same applied for consumer groups who articulated a public interest of consumer protection and the personal right of individual consumers to be informed about available products and to make informed choices among them.

The European Parliament’s role in the Community’s legislative procedure has increased from having, initially, only a limited consultative role to co-operative competencies, and in certain areas these powers have reached the level of co-decision with the Council of Ministers (see for an overview Rittberger 2003 and Maurer 2001: 120–30). However, it is the Parliament’s task to make amendments to the proposed legislation and to take decisions (Kreppel 1999). In fulfilling this function, the Parliament – or more precisely: members of the European Parliament (MEP) – needs information that allows assessing the legislative proposals made by the European Commission. This information can often be effectively provided by civil society organisations. This has become clear by the fact that the 48 amendments proposed by the EP for the FFH Directive were more or less the same as those of the environmental groups engaged in the debate about this instrument (see for more details Heinelt and Meinke 2002).

Another example, based on our research, would be the actions developed by Greenpeace and others with respect to the admission of MONSANTO’s genetically modified RoundUp-Ready soya bean into the European market in 1996. Not only did Greenpeace, but also Friends of the Earth and the BUND started an immense public campaign against ‘gene-soya’, they also tried to influence actors at all different layers of the European multi-level system, like the EP, national governments and parliaments in order to push for cultivation bans, import bans and labelling requirements of genetically modified soya beans. These lead to a public discourse, in which environmental and consumer protection groups merged with positions of parties and party factions across the different factions of the EP or wings of them (see Behrens et al. 1997: 119–20, Rücker 2000: 222). As a consequence, in November 1996, the EP adopted a resolution, in which the Parliament called on the Council ‘to accept Parliament’s advice to include in the Novel Food Regulation a labelling requirement for all food containing genetically modified material when detectable.’

This points to a particular function of the European Parliament for civic interest intermediation within the EU system. Although the selection of candidates for the European Parliament is still strongly based on national parties (see Norris 1997) and although the EP is a place for party mediated representation it has become a forum for articulating positions generated by a broad spectrum of non-governmental organisations operating at supranational level as well as by decentralised active pressure groups, movements, experts,
counter experts and advocates (for contacts between MEP with interest groups – especially with environmental organisations and consumer associations, see Wessels 1999: 109–12). These contacts are important for MEPs to perform their role at the European level. It is not only specific knowledge which has to be mobilised – like in the case of the Commission – but, in addition, inter-party coalitions have to be formed for obtaining and safeguarding influence in the negotiations between the Commission, the Council and the EP (see Maurer 2001: 146–8, 199). This is the case especially under the co-decision-making procedure where ‘the Parliament, acting by an absolute majority of its members, has the power to propose amendments to the Council’s common position, or to reject it’ (Greenwood 1997: 47). An important organisational form to build such coalitions are so-called Intergroups of the EP which are surrounded and supported by non-governmental actors, including civil society organisations (Judge and Earnshaw 2003: 198–9). ‘[…] the Intergroup on Consumer Affairs, partly created by the efforts of a one-time chairman of the consumer organisation, BEUC, is one expression of this’ (Greenwood 1997: 47).

Furthermore, civil society organisations can be important for MEPs to create and to retain links with their electorate back home (beside those via their national parties) because they can provide information about domestic public discourses and political arenas.17 By leaning on contacts to domestic civil actors and on the information about debates on particular issues ‘at home’, MEPs can increase their independency from national party politics which is important for performing their role in the EU context – not least in building issue-related coalitions in the EP.

Considering the above, it is possible to say that the European Parliament is increasingly developing the function of a ‘deliberative discourse forum’.18 The loose coupling of the arenas (Benz 2000) of parliamentary debates and of public discourses is crucial to the argumentative influence of civil actors. This is even more important when considering the growing (co-)decision competences and the related veto or bargaining potential of the EP (Wessels 1999: 108–9). More precisely, insofar as civil society actors join forces with members of the EP and as the latter support the arguments of the former, argumentative power is complemented by bargaining power.

LOCAL, REGIONAL AND NATIONAL CIVIL SOCIETY ACTORS AND THEIR ROLE IN IMPLEMENTING EUROPEAN LEGISLATION

Actors of civil society have not only demonstrated an ability to influence EU legislation in the policy domains of consumer and environmental protection.
They are also quite relevant actors when it comes to implement and to apply this legislation.

As will be shown in a moment, in the case of GM-food consumer groups have concentrated at the EU level on the demand for ‘consumer choices’, that is for labelling of genetically modified or ‘contaminated’ food to give consumers the chance to make informed choices. The implementation of the Novel Food Directive and related EU legislation into national law has been accompanied by campaigns of domestic consumer as well as of environmental groups by which they expressed their concerns and tried to inform the public about the possible dangers of GM-food. At the same time, they have demanded clear labelling and have monitored the practice of labelling.

The role played by environmental groups in implementing the Fauna Flora Habitats Directive was different. Due to capacity building which was achieved through the organisation of the Habitat network (see below), domestic environmental groups were able not only to influence national positions but also to monitor the directive’s implementation processes. The latter was very important, because the implementation of the FFH-Directive took a very long time.

For example, in Germany the FFH-Directive was transferred into national law in 1998, that is four years later than originally required. The main reason behind this was that the Federal government and the German Länder had to agree on how to integrate its provisions into national law. Due to this delay, environmental organisations started almost immediately after the adoption of the FFH-Directive to draw up so-called ‘shadow lists’ of areas which were potentially covered by the directive. These lists gave important indications about areas able to achieve FFH-status, even though not officially included in the national lists of areas which had to be submitted by the member states. The ‘shadow lists’ were important for the monitoring by the Commission, that is if areas potentially of European relevance had been registered and submitted by Germany.

Shadow lists have not only been important in Germany. They also gained importance in other member states. Due to the questionable status of some areas, environmental organisations became ‘watchdogs’ of the Commission in claiming that certain areas could be of FFH-relevance and should therefore be protected by the FFH regime.

This was crucial for the Commission, insofar as civil society organisations assumed the role of a functional equivalent of own monitoring agencies in general. Environmental organisations provided the Commission with information and enabled it to undertake compliance checks in member states.

Just to give some examples from Germany, local citizens’ organisations as well as the NABU (Naturschutzbund Deutschland), the BUND (Bund für
Umwelt und Naturschutz) and the IFAW (International Fund for Animal Welfare) made the Commission aware of the destruction of the conservation area ‘Mühlenberger Loch’ in Hamburg and the fact that the proposed compensation areas were not adequate (see Meinke and Heinelt 2003). In the case of a forest, the ‘Kellerwald’, proposed by Germany as a conservation area of special European interest, changes took place after a new government came into office in 1999 in the respective Land (Hesse). The new government allowed the felling of parts of this natural forest. Also here, environmental groups like Greenpeace called upon the Commission to force the government to withdraw this decision.

This ‘watchdog’ function of environmental groups was mutually rewarding for both parties involved. Because of their access to the Commission environmental groups – and the ‘good reasons’ put forward by them – became politically important in the domestic or local context. Yet, this did not lead in all cases to the result that an actual preservation of the contested area was achieved (see Meinke and Heinelt 2003 and pp. 211–12 below).

In cases like Greece, where, due to lacking personnel and expertise the national administration (the responsible ministry) was not in a position to implement the FFH-Directive properly, the role of environmental groups was even more important. Based on their members’ scientific knowledge but also on expertise gained through networking with European environmental organisations (and the Commission) as well as with environmental groups from other member states Greek environmental groups were able to facilitate the implementation of the directive – not least in respect of the designation of conservation areas.

DIFFERENT LOGICS AND FORMS OF COLLECTIVE ACTION FOR CIVIL SOCIETY ACTORS IN MULTI-LEVEL SYSTEMS

In considering interest intermediation of civil society actors in the multi-level system of the European Union, a number of differences occurred across the analysed policy domains. The most obvious ones shall briefly be described.

The EU-umbrella organisation of consumer groups, BEUC,27 has had only minor problems to organise its members around one common topic. It focused on ‘consumer choice’, that is on strict rules for labelling genetically ‘contaminated’ products to give consumers a choice to buy these products or not. The opposite applied to the EEB. This umbrella organisation in the field of environment protection28 faced severe problems to reach an agreement on a common position among its members. Albeit there was an agreement among
member organisations to protect areas with endangered fauna, flora and habitat types, there have been a number of problems about how far, under which conditions, and so on, this should be done. One of the contested issues was whether this should be done in a strict way by preventing further human interference, or in a way such that a ‘sustainable’ complementarity between ecological, social and economic objectives can be achieved.

Similar problems among BEUC’s members arose in the field of novel food. However, here the situation was different. Considering the issue against the free-trade background of the WTO regime, a strict prohibition of GM-food in the EU seemed unrealistic. Hence, ‘consumer choice’ was adapted as a common position among BEUC’s member organisations.

These differences between the internal interest intermediation under the umbrellas of BEUC and EEB can be interpreted by different logics of collective action. BEUC was able to organise its members around one basic demand and one crucial interest (‘consumer choices’). This implies demands of the kind ‘Different amount of the same good’. In the case of the FFH Directive and the difficulties of the EEB to co-ordinate collective actions of environmental organisations it appeared that there were many and manifold demands and interests: or to put it precisely: Demands for different goods had to be handled.

As a result it is obvious that there are (and actually have been) different conditions for interest-articulation and interest-organisation. Because all consumer groups pushing for consumer protection demanded ‘different amounts of the same good’, close co-operation and a high degree of concertation under the umbrella of BEUC was possible.

Conversely, in the field of environment protection local, domestic and European environmental groups demanded a wide range of ‘different goods’. At the European level, they shared the understanding that the first Commission’s draft of the Fauna Flora Habitat Directive should not be watered down during the legislative process. While here high environmental standard-setting was demanded, at the national level environmental organisations also had to take into account special national conditions for nature conservation. Because of divergent interests and demands for collective action environmental organisations have chosen labour sharing and co-ordination in a network.

From the beginning, the EEB closely monitored the development of the Fauna Flora Habitat Directive. In 1988, one of its member organisations, the Royal Society for the Protection of Birds (RSPB) wrote a commentary to the first draft of the Commission. Additionally in 1989, the EEB organised a workshop on the issue and published a special edition of Metamorphoses (a three-monthly newsletter of the EEB) addressing the directive. These activities were not seen as sufficient, at least not for some member organisations. The
EEB was criticised on the grounds that it was not able to provide internal services, like the distribution of information to members. More importantly, it was criticised for not having been able to organise effectively a process of internal interest intermediation, to articulate and to represent concerted positions and to exercise political influence by lobbying the EU authorities. In fact, the EEB had difficulties in reaching a commonly agreed position which was, on the one hand, sufficiently substantial for entering the lobbying process on details of the directive and, on the other hand, sufficiently flexible to allow for particular domestic requests of its members.  

As a result the main lobbying activities on the Fauna Flora Habitat Directive were carried out by some of the EEB’s members, that is the RSPB and World Wild Fund for Nature (WWF). Both organisations hired a consultant who formerly has worked with the Commission and who closely followed the negotiating process of the Fauna Flora Habitat Directive trying to influence it in the sense of his two main ‘principals’ (that is the RSPB and the WWF). However, the information gained by the RSPB and the WWF through these contacts with the EU institutions was published in a regular newsletter sent to local, regional, national and European environmental groups with an interest in the issue. The Habitat network, which was hereby established, contained more than 200 groups active at each of the EU’s multi-level layers (see Weinber 1994: 617). The network was built up with the aim to gain capacities for influencing regional or national member state positions. This led to different kinds of actors pushing for different kinds of issues at the European and the member state level. While the overall objective of adopting a directive with the highest possible environmental standard, was not questioned, environmental organisations in the member states were enabled to address specific national circumstances with respect to nature conservation and to follow own policy objectives. For instance, while the Dutch Waddenzeevereniging pushed for an integration of nature conservation with issues of promoting sustainable tourism, the overall approach at the European level was to guarantee areas of conservation with only a limited human interference. A network of co-ordination, based on loose coupling and relatively unspecific agreements, was the most appropriate means in this case where it was difficult to reach an internal concertation of positions. This kind of network-based co-ordination also turned out to benefit the involved actors in another respect: network members active in lobbying and providing expertise to the Commission, the Parliament or even the Council could – through the Habitat network – supply information to those acting at the domestic or regional and local level. These latter were always informed about what was going on at the EU level and were therefore able to actively influence national positions. Vice versa, by organising the Habitat network, the RSPB, WWF and EEB were in the position to provide the Commission and the Parliament
during the negotiation process on the Fauna Flora Habitats Directive with specific expertise about the situation and the debates on nature conservation in the individual member states. Furthermore, by working with the RSPB, WWF and EEB, the Commission and the Parliament gained information from organisations accepted as ‘reliable partners’. The provided information could also be used in negotiations as a kind of accumulated ‘European knowledge’ reflecting general and not just narrow-minded (national) perspectives.

The two cases demonstrate first of all the challenges civil society actors are facing in the multi-level system of the EU. They have to cope internally with different demands and positions of national and sub-national members, and they have to manage this diversity in a way that largely common arguments are fuelled into the negotiations at the EU level. At the same time, the autonomy of domestic actors has to be respected, and domestic actors have to be supported by a ‘downward’ flow of information in their attempt to influence national or local debates and the implementation of the directive argumentatively.

Furthermore, the two cases provide insights about how to solve these challenges. In the first case, consumer organisations successfully developed and pursued a strategy by which an uncontested objective (the right and the option of consumers to make a choice) was put forward. By this, existing controversies about GM-food in general could be internally handled and the ability to act collectively was achieved. In the second case, environmental organisations only agreed on basic common positions and left it open to the different organisations to support these positions and to develop their own ones – be it at the EU, the national or the local level. Additionally, they organised a network having two basic functions. First, a dense flow of information was secured. Second, the network also provided an ability to act collectively at different levels in case the involved actors thought this to be necessary or even appropriate.

However, although civil society organisations may be characterised as distinctive collective actors in the sense highlighted above (pp. 199–200), that is relying on argumentative power and pursuing non-member oriented objectives, the just mentioned challenges apply not only to them but to collective actors in general. This is especially true within a multi-level system where the contradiction between the ‘logic of influence’ and the ‘logic of membership’ (Streeck 1989) is hard to resolve by transforming collective actors into corporate ones through granting certain actors a monopoly of representation by an authority (the state) ultimately responsible and capable of taking binding decisions (Streeck and Schmitter 1992). The same is true for the mentioned strategies to overcome these challenges. They are not reserved for civil society actors but also suitable for collective actors in general.
POLICY FIELDS MATTER

‘Policy determines politics!’ (Lowi 1972) seems to apply also for interest mediation through civil society actors. What make a difference are (a) the kind of the problem (or the problem definition) and (b) the perception of policy impacts (emphasised by Lowi 1972). Furthermore, (c) the kind of discourse and public attention plays a crucial role. Here one can distinguish between discourses and public attention in what has been called the ‘three worlds of action’ (Kiser and Ostrom 1982), that is on the ‘constitutional choice level’ where normative (or even ethical) issues are addressed, on the ‘collective choice level’ where it comes to decisions on legislative regulations, and the ‘operational choice level’ or the ‘world of action’ where their application is taking place. Finally, (d) ‘policy institutions’ (John and Cole 2000: 249) or institutional settings with particular rules at the operational level matter because they are determining the options for civil society actors in bringing certain policy outcomes (or impacts) about. Why and in which way these aspects matter can be demonstrated by the analysed cases of the Novel Food Regulation and the FFH Directive in the following way.

In the case of the Novel Food Regulation the kind of problem (or the problem definition) was foremost information and choice options for consumers. But one has to emphasise that this problem definition relies (especially on the side of consumer organisations) on an issue re-labelling (Windhoff-Hèritier 1987: 57): the problem at this stage has been no longer GM-food or not but the opportunity for consumers to make their informed choices. When it came down to regulative intervention (that is the rules for declaration), the likely distribution of gains and losses remained ‘open’. The matter, how far consumers would have a choice between GM food and normal food, is a decision which generally does not discriminate between GM food producers and normal food producers. The labelling decision had created a situation with unclear future impacts thus increasing the likelihood of a win-win situation (at least in the perception of actors). Or in other words: the situation can be characterised by a positive-sum-game making a consensual policy-process more likely. In such a policy-making process civil society actors more easily gain influence by way of the specific power resource at their disposal, that is argumentative power or reasoned arguments.

With respect to the form of the discourse and the public attention in the case of the Novel Food Regulation debating and negotiating have generally been a matter for experts at both the ‘constitutional’ and ‘collective choice level’, although parts of this debate have also influenced public opinion. However, expert discourses influenced the ‘operational choice level’ which means that the policy issue could become subject of a public campaign – not at least by a strong involvement of civil society actors.
The ‘policy institution’, that is the particular arena with its certain rules determining the course of decision making, relevant for impacts of Novel Food Regulation is the market. Within them the individual choices of consumers to buy GM food or normal food are taken, and by guiding mechanism (the ‘invisible hand’) of the market a co-ordination of societal interaction takes place regarding the supply of producers.

The case of the FFH Directive is clearly different. Already the problem (definition) implies conflicts, namely about land use. The related regulative intervention results in a prescription or even a prohibition of a particular use of a certain area. Hence re-distributional effects are involved in this case. Because these effects imply both losers and beneficiaries, the societally binding decisions are more easily perceived in terms of a zero-sum-game. The result has been a more or less conflictual policy process right from the beginning where vested interests have tried to make use of bargaining power whereas environmental groups have been facing severe difficulties to gain influence by argumentative power or reasoned arguments.

Regarding discourses and negotiations at the ‘constitutional’ and ‘collective choice level’, experts have been dominant as well because the discourses and negotiations have become highly expertocratic in the sense that ecological arguments are being put forward in a rather detailed scientific manner. In contrast to the GM-food case, there only has been a limited diffusion of the meaning and significance of these controversies to public opinion. However, at the ‘operational choice level’ the environmental or general ecological discourse of experts is confronted with (a) other strong discourses (for example, of concrete measures to secure or achieve economic competitiveness or to develop major infrastructures) and (b) a more or less diffuse public opinion (reflecting different interests of land use). Instead of public arguing (through campaigns) – like in the application of the Novel Food Regulation – it is more likely under such conditions that environmental groups are forced to rely on protest and legal proceedings, that is to mobilise bargaining power based on certain legal rights. Thereby, substantially (ecologically) reasoned arguments have to be replaced (or at least complemented or transformed) by formal legal arguments (which implies that civil society actors have to ‘employ’ legal experts – as their counterparts).

This is connected to particular ‘policy institutions’ crucial for the application of the FFH-Directive in the ‘world of action’. Here hierarchical decisions of a public authority by planning or planning permission are decisive to governing or to reach a particular (and intentional) societal binding decision (instead of leaving the co-ordination of societal interactions the ‘invisible hand’ of the market, as in the before mentioned case).

However, concrete features of these ‘policy institutions’ differ between member states. How important a particular design of ‘policy institutions’ can
be in respect of the ability and power of civil society organisations to act is
demonstrated by the Greek implementation of the FFH-Directive. Here
‘monitoring agencies’ are established for the individual conservation areas in
which different stakeholders (including environmental groups, local
authorities, representative of particular local interests – like hunters or hotel
owners) are involved. The main task of these bodies is to manage ‘their’ area,
and therefore to solve conflicts resulting out of different user interests. Such a
design of ‘policy institutions’ allows for horizontal interest intermediation and
mutual adjustment of interest, instead of being forced or even attracted to take
cases of conflict to court or to solve them in an other form (for example by
bureaucratic intervention) by hierarchical imposition – and not by reasoned
arguments.

RESULTS AND FURTHER QUESTIONS

It clearly results from our analyses that beside the Commission the European
Parliament also offers important access-points for civil society actors.
Furthermore, the EP has developed the function of a ‘deliberative discourse
forum’ important for civil society to bring their ‘good reasons’ not only into
the political debate at the EU level but also into European-wide public
discourses – although these discourses may be limited to a sectoral public
space of an issue-specific discourse community.

For the Commission, civil society actors can be important as knowledge
holders and for legitimating their proposals. Furthermore, civil society actors
gain a crucial role for the Commission as ‘watch dogs’ regarding the
implementation of EU policies (that is for monitoring/compliance checks).
Leaning on such Commission contacts promotes the relevance of civil society
actors at the domestic (or local) level because other actors and opponents may
more easily pay attention or even listen to reasons and concerns articulated
argumentatively by them.

However, there are many reasons as to why the aspects and concerns
articulated by civil society actors are overheard. The two most important of
these are, first, that the more conflicting the issue is, the harder it is for civil
society actors to influence policy making by arguing. Second, the more an
issue is being ‘resolved’ hierarchically – be it by administrative intervention or
court decision – the less civil society actors are able to bring reasons to bear
and have to move in the closed realm of expertocratic and legalistic disputes.

However, a closer look at the member states may be advisable (for further
research) for identifying features of ‘policy institutions’ (and their design
principles) which favour the ability of civil society actors to act, to exercise
their specific political power resource, that is, that of argumentative power,
and to reach binding decisions by mutual adjustments. The briefly mentioned example of the Greek ‘monitoring agencies’ established for individual conservation areas is pointing in that direction.

Although civil society organisations are regarded as very special collective actors (in respect of their interest, the dominant mode of interest-mediation and so on) they are confronted with well-known problems of collective action. Different logics of collective action have to be acknowledged and case-specific appropriate forms of co-operation and co-ordination have to be found. As demonstrated by the ‘consumer choice’ campaign and the Habitat network this can be successfully achieved – but not always without internal tensions and conflicts. However, why should collective actors devoted (at least by themselves) to pursue civic interests by deliberation be redeemed from solving the challenges of interest concertation? ‘Only a philosopher could imagine that interpersonal communication is a purely cooperative game entirely oriented towards uncovering The Truth’ – to quite Goodin (2004: 9) again.

NOTES

1. We are grateful to colleagues who made comments on earlier versions of this contribution. This applies especially to Rainer Schmalz-Bruns, Stijn Smismans and last but not least to Jürgen Grote. This final version, of course, is exclusively the responsibility of the authors.


5. There are pragmatic reasons for selecting these two countries. But the selection can also be justified by a ‘most different cases-design’.

6. See for the basic structure of this model and the expressions used, Peters (1993, 330–340) and Habermas (1992, 429–35). The model presented here is also based on ideas developed by Schmitter (1993: 4–5).

7. This model may be useful to explain various forms of interest intermediation and different modes of governance at the national level (and it was in fact initially developed for this purpose; see Heinelt 1997). In considering civic interest intermediation in a multi-level system, that is in a system with two or more layers (for example the EU, the national and the sub-national or local implementation level), it is questionable whether this model is applicable at least for two reasons (see Kohler-Koch 1998): First, because a common European public space does not yet exist, it seems difficult for civil society to influence European policy making by discourses. However, beyond the question if there exist a common or general European public space (or not), one can point to the importance of sectoral public spaces developed by issue-specific discourse community (Eder 2000) in which civil society actors can play a crucial role. Furthermore, the horizontal (cross-national) linkages between the locally rooted civic infrastructure as well as the (vertical) linkages between it and policy making at upper levels – especially at the EU one – can be questioned, and thereby the empirical status (or reality) of a ‘European’ civil society. Again, in replying to this question emphasis can be given to an issue-oriented or a sector-specific formation of ‘European’ civil society. Additionally, the request on the empirical status of the
disputed matter has to be answered empirically, which is the topic of the mentioned research project.

8. See for a similar debate on the distinction between ‘logical’ and ‘historical’ Heinelt 1980: 79–84.


10. We prefer the expression civic goods in favour of public goods or public interests because their notion is not only vague but highly contested and gives room for intensive scholarly debates (see for an on-going discussion in Germany Münkler and Bluhm 2001 and Schuppert and Neidhardt 2002). In cases where we use the expressions public goods or public interests we are addressing and focusing on their social and temporal dimensions (see Offe 2001) and give (therefore) special emphasis to global and future concerns.

11. In his quoted paper from 1981 Schmitter added (as an expression of the ‘Zeitgeist’ of this time?) to ‘the slightly more self-serving causes of consumer protection [and] environmental conservation’ socialist revolution. Furthermore, he stated in a footnote: ‘Leaving aside the fact that some of the contributors to such causes may quite realistically anticipate individually appropriable, selective benefits in the form of lawyer’s fees, service contracts, public jobs etc.’ (Schmitter 1981: 125).

12. Argumentative power is understood as a sort of social power based on linguistic conventions and hegemonic concepts of rightful behaviour, that is on cognitive and evaluative components. Arguing can have an ‘enlightenment’ function by which not only a mutual adjustment of interests but also the endeavour of the Truth can be achieved (as proponents of deliberative democracy emphasises). However, one should not be sure about that. The option of ‘civic indoctrination’ (Schmitter 1981: 193) should not be denied per se.

13. It should not be denied that civil society organisations can develop an interest in themselves, that is that the ‘iron law of oligarchy’ (Michels) also applies to them. This option may be present especially under conditions where an organisation gets ‘licensed’ (and funded) by a public body for representing certain public interests so that ties to its membership may be weakened. However, against the background of our empirical findings such a development – well-known in the case of corporate actors as the discrepancy between the ‘logic of membership’ and the ‘logic of influence’ (Schmitter and Streeck 1981; Schmitter and Streeck 1999) – is counter-balanced in the case of civil society organisations by the fact that the pursuit of civic interests is not bound to particular organisations with functionally defined domain and a monopoly to define and to select certain interests. Civil society organisations are forced to permanently secure the backing by their ‘supporters’ (a lot of them do not have formal members!) because these can (more or less) easily turn to other groups or set up new ones to pursue a civic interest. More importantly, ‘supporters’ are ‘fluid’ because the interest in and the support of civic goods has to be reproduced permanently – otherwise it will get lost. This is different from interests in self-oriented objectives (at least ‘materialistic’ ones). Further reflection on the notion of interest and related differences between civil society organisations and ‘traditional’ organised interest groups would go beyond the scope of this contribution. A lot of fruitful hints can be found in Schmitter 1981 which has not been published unfortunately.

14. See for a similar approach Goodin’s attempt at ‘sequencing deliberative moments’ (2004), where he argued in respect to deliberative politics: ‘Only a philosopher could imagine that interpersonal communication is a purely cooperative game entirely oriented towards uncovering The Truth’ (Goodin 2004: 9). And he concludes: ‘Firstly it depends presumably on having all of the deliberative virtues on display at some point or another in the decision process. Secondly, it presumably depends on the deliberative virtues coming in the right combinations and the right order’ (Goodin 2004: 25).

Civil society participation

17. For the weakening ties between MEPs and their constituencies and domestic parties see Maurer 2001: 1999.
18. For perspectives of strengthening this function see Maurer 2001: 385.
19. BEUC (Bureau Européen des Unions de Consommateurs), the European Consumers’ organisation was founded in 1963 and has until today 35 members from 26 countries. For BEUC and other Brussels-based consumer groups see Greenwood (1997), 193–204.
20. The European Environmental Bureau was founded 1974 and has until today 134 members from 25 countries. For EEB and other Brussels-based environmental groups see Greenwood 1997: 185–92.
21. This is related to the notion of ‘countryside’ for example in the UK, see Roose (2003), 103.
22. See for a similar differentiation (between ‘two logics of collective action’) Offe and Wisenthal (1980) who referred to differences between interest mediation by trade unions and employer organisations.
23. Hey and Brendle (1994: 388–422; 666–70) explained in general the difficulties of the EEB to act as an umbrella organisation. They point to a diverse membership and competition between the EEB and big member organisations.
24. On the specific lobbying experiences and capacities of the RSPB with fit to the dialogue-based form of interest intermediation at the EU level see Roose (2003), 215–19. See for an overview about the related ‘contentious repertoire’-approach Roose (2003), 51–3.
25. A corporate actor is a composite actor who has a high degree of autonomy in defining its purposes from the actors participating in it or supporting it, whereas a collective actor is a composite actor whose purposes are dependent on and guided by the preferences of their members’ (Scharpf 1997: 54) or supporters.
26. For the application of Lowi’s dictum ‘Policy determines politics!’ to policy areas see Heinelt (2003).
27. Kooiman’s (2002) distinction between ‘meta governance’, ‘first order governing’ and ‘second order governing’ as well as Heinelt’s (2006) reflection on ‘the three worlds of democratic actions’ can be conceptually linked to these considerations.

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10. European trade-union strategies: between technocratic efficiency and democratic legitimacy

Roland Erne

INTRODUCTION

The democratic nature of the EU, or the lack of it, has never been so important (Schmitter 2000; Erne et al. 1995). It is generally acknowledged that the existing governance structures and mechanism of the EU ‘are not able to provide democratic legitimation for the EU polity as a whole’ (Héritier 1999: 208; European Commission 2003a: 38). Indeed, a democratic polis needs as well as constitutional bodies, a tight network of intermediate institutions and social organisations such as the unions, other civil society associations and the media (Lepsius 1993). These offer more possibilities for citizens’ participation in the political system and thus an increase in its legitimacy. Hence, the making and performance of European civil society organisations is linked to the constitution of a democratic EU polity.

This chapter analyses one potential agent of Euro-democratisation, namely organised labour. Although unions have often played an important role in national democratisation processes, this does not necessarily promise a similar role for them at the EU level. Authoritarian regimes typically prohibit free trade-union activity and consequently impel unions to take part in democratisation movements, but the current institutional setting of the EU provides alternative options for organised labour, namely Euro-democratisation, Euro-technocracy and (re-)nationalisation.

I will assess the tensions between these options in a comparison of the different strategies of trade unions in two transnational company merger cases. While the unions and European Works Councils involved seem to have adopted a Euro-democratic strategy in the ABB-Alstom merger case, they apparently pursued a Euro-technocratic strategy in the parallel Alcan-Pechiney-Algroup case. The adoption of different strategies seems surprising since it was the same European, German and French unions that played a decisive role in both cases. This indicates that unions have a range of options,
something which leads one to reject any kind of determinism regarding the role of civil society organisations in the EU integration process.

EURO-DEMOCRACY, EURO-TECHNOCRACY AND RE-NATIONALISATION

How do trade unions relate to the European integration process? To investigate this question, I differentiate between two dimensions of trade union action, each covering two categories: Europeanisation versus re-nationalisation, and democratic versus technocratic action (see Figure 10.1).  

Euro-technocracy describes a process leading to an expansion of ‘apolitical’ decision-making by experts at the EU level, disconnected from partisan politics, whereas Euro-democratisation aims to raise the accountability of decision-making as well as the access and participation of citizens in EU politics. The strongest indicator for a Euro-technocratic strategy of organised labour would be its active support of ‘regulatory’ EU decision-making (Majone 1994). In our merger cases, this would suggest the acceptance of the technocratic modus operandi of the Commission’s competition policy. By contrast, organised labour contributes to Euro-democratisation, if it
encourages European collective action and a politicisation of the EU policy-making. As political mobilisation frequently led from ‘contestation to democracy’ at the national level (Giugni et al. 1998), a similar process is plausible at the EU level, too. Increasing European collective action would contribute to the rise of a European public sphere and to a politicisation of the EU-integration process (Imig and Tarrow 2001). In fact, (European) democracy requires a public sphere in which political leaders are obliged to legitimise their political actions (Wolton 1993). Euro-democratisation is only likely to happen if the process of European integration becomes political in its character. Moreover, while I would question the necessity of a pre-existing ‘national unity’ (Rustow 1970) or a ‘demos’ (Grimm 1995) as a condition for democratisation, I would still argue that democracy also requires a feeling of communality among its citizens. Yet, collective action could also contribute to the rise of a common identity. People start recognising that they belong to the same polity as soon as they begin to act together, even if they might contest its policies.

Given the increasing importance of EU policy-making, a Euro-democratic strategy of organised labour’s activities seems imperative. Richard Hyman (2001: 175) argued that supporting the emergence of an active European civil society and citizenship should be an important task for unions. In turn, some unions have actually increased their EU-level actions, as demonstrated by the recent emergence of transnational demonstrations and strikes (Lefèbure 2002). Most studies, however, emphasise that EU-level unionism is primarily based on union executives and experts (Turner 1996; Dolvik 1997; Gobin 1996). This can be explained by the compatibility of these activities with the EU’s technocratic mode of functioning. EU institutions may favour procedural union participation in European policy-making, because they require the unions’ compliance, expertise and legitimacy to act in some policy fields. In turn, Euro-technocracy could also be a valuable EU-polity option for organized labour, as it provides access to European policy-making. However, this strategy might also imply that unions have to marginalise some of their original objectives, given the selective interest of Community institutions regarding the participation of trade unions in its decision-making process.

The trade unions might also adopt a democratic re-nationalisation strategy. In fact, the history of the labour movement is profoundly linked to the national welfare state (Pasture and Verberckmoes 1998). However, a democratic re-nationalisation strategy seems to lose its feasibility, precisely because national policies face firm restrictions in an integrated European and global economy. In turn, a technocratic re-nationalisation strategy may emerge (Streeck 1999). Its typical sign is a particular design of social pacts, not as (social democratic) compromises between conflicting class interests, but as monistic alliances to enhance the national competitiveness (Rhodes 1997). Eventually, a national
‘competition state’ (Cerny 1990) would replace the national welfare state. However, in relation to transnational company mergers, the prospect of any re-nationalisation strategy is very restricted. National governments cannot decide whether and under which conditions to allow, or to block, transnational company mergers. In fact, according to the EU law, only the European Commission can do that. Therefore, if the unions fail to influence the European Commission, it can be assumed that they will not have any impact whatsoever in this field.

COMPETITION POLICY – A CASE OF TECHNOCRATIC DECISION-MAKING

The European competition policy represents a paradigm case of technocratic decision-making. This is not so much because its actors are technocrats, but rather because the notion of overt political debate and conflict is absent in this policy field. Although the Council adopts the European competition law by a qualified majority, the European Parliament has no co-decision role in this policy area. Since the national parliaments cannot co-determine the European law-making process, the democratic legitimacy of the European competition policy is very weak. Yet, some scholars have argued that there can be legitimate EU policy-making beyond the classic democratic constitutional state: namely the decision-making by committees in the EU, in which the concerned interest groups would be represented and would, thus, produce through their deliberation a corresponding, issue-specific European demos (Joerges 2001: 7). However, while some EU committees recognise social conflicts and try to come to decisions that are acceptable to a large number of interest groups, the decision-making procedures in the field of EC competition policy do not aim to make the logic of market integration compatible with other social concerns and interests. While competition lawyers, economists and experts from the concerned companies and EU member states advise the Commission in its conduct of the competition policy, the Commission is free to choose which ideas and proposals to adopt (McGowan 2000). It implements autonomously the EC competition policy and holds extensive investigation, decision and fining powers. Finally, the College of Commissioners adopts the decision of its Directorate-General for Competition whether, or under which conditions, to allow European mergers and acquisitions.

This mode of functioning raises the problem of accountability. Nonetheless, supporters of technocratic decision-making have argued that it would be legitimate if compared with the supposed ‘negative consequences’ of the ‘election pressures’ for the ‘quality of legislation’ (Majone 1994: 94). Hence, the existence of an objective and universal criterion for the definition of the
decision-making ‘quality’ is taken for granted. The assumed impartiality of the decision-makers is very questionable. In fact, regulative agencies frequently tend to be shaped – and at times even captured – by powerful political interest groups and paradigms. J. J. H. Weiler et al. have demonstrated that technocratic regulations often mask ‘ideological choices which are not debated and subject to public scrutiny beyond the immediate interests related to the regulatory management area’ (1995: 33). In fact, the technocratic structure of the European competition policy depends on the prevalence of the free market doctrine, which is indeed a political paradigm.

According to the political will of the Commission the effects of a proposed concentration ‘on competition’ must be the only criterion of its merger control policy (Rakovsi 2002). Additional concerns, such as labour, have been excluded from the cognitive image of the reality that guides the functioning of the EU competition policy. Employment issues are not part of the ‘frame of references’ – or ‘référentielle’ (Muller 1994) – of the Commission’s competition policy. Given this setting, it would be reasonable to expect that unions have no role to play in this policy field. However, since 2000 unions have increasingly been trying to influence the European competition policy (Rakovsi 2002). Their specific activities, however, have differed considerably. While, for instance, the ABB-Alstom workers’ representatives tried to politicise the competition policy, the Alcan-Pechiney-Algroup workers’ representatives adopted a strategy that was compatible with the technocratic competition policy référentielle of the Commission.

THE EURO-Democratic ABB-ALSTOM CASE

On 10 April 2000 almost 2000 European ABB Alstom Power (AAP) workers demonstrated in Brussels to protest against the post-merger restructuring plan of AAP to cut a fifth of its workforce. They also protested against the lack of information and consultation and urged the management to resume European negotiations to prevent the negative social consequences of the merger. Finally, they urged the Commission to take full account of the employment policy objectives of the Amsterdam Treaty in its competition policy (EMF 2000). This demonstration also generated significant press coverage, especially in France. Although it was not the first EU-level union demonstration, it was the first time that a European Works Council, national unions and the European Metalworkers’ Federation (EMF) had jointly organised such an event (Lemaître 2000). The ABB Alstom unions triggered European collective action and thus contributed to the creation of a European public sphere and a politicisation of the EU-integration process, that is to Euro-democratisation, according to my analytical framework. The
The following sections will now describe the chain of events, which led to this outcome.

**Organized Labour’s First Reactions after the ABB-Alstom Merger**

Both the ABB and the Alstom EWC learned about the ABB-Alstom merger project via the press. ABB and Alstom informed and consulted their EWCs, but only after the approval of the merger project by the European Commission. The EWCs maintained that they had not been consulted in good time by either the management or the Commission. The Alstom EWC wrote to the president of the European Commission questioning the Commission’s authorisation of the ABB Alstom Power merger, because it had not consulted the workers’ representatives and did not consider any aspects other than those of competition policy. Moreover, the Alstom EWC urged the Président-Directeur Général (PDG) of Alstom to meet its EWC. Subsequently, these letters were translated into German, French, English and Spanish and distributed – together with an additional leaflet – in most European Alstom sites. Commission President Romano Prodi responded that the Commissioner in charge of the EC competition policy was not available at the moment but would be willing to meet an EWC delegation later. Conversely, the Alstom management agreed to meet the EWC. At this meeting in July 1999, the central human resources director of Alstom declared however that he was no longer competent to say anything about Alstom’s former power-station sector. This statement further strengthened the outrage of the workers’ representatives: it was too early to discuss the merger, because it had not taken place and then it was too late to discuss it, because it had already taken place.

**The Mannheim Seminar**

In November 1999, the German IG Metall union organised an international ABB Alstom trade union seminar in Mannheim. It gathered approximately 40 people, that is the general secretary of the EMF, ABB and Alstom EWC members, union officials and experts from 20 unions out of 11 different countries. Compared with the failure to bring together all European employee organisations during the previous BBC-ASEA merger, which led to the creation of ABB in 1988 (Hammarström 1994), the ample participation at the Mannheim meeting represents remarkable progress. The seminar participants infered from the reports of the EWC representatives and union experts that the AAP management was planning a company restructuring that would threaten 12000 of the 58000 AAP jobs. The participants expected that the restructurings would hit AAP plants proportionally, which triggered a certain feeling of common interest. This led to the unanimous adoption of a
Mannheim declaration. It urged the management to secure employment, prevent plant closures and to inform and consult the worker representatives. Furthermore, the declaration proposed a European day of action.

**Politicking the Conflict – the European Parliament**

As the answer of Commission President Romano Prodi to their letter did not satisfy the AAP worker representatives, the French CGT unionist and secretary of the Alstom EWC discussed the AAP case with MEPs from the radical United Left group. Subsequently, the Alstom EWC wrote a letter to all groups of the European Parliament emphasising that neither the Commission nor the management consulted the two EWCs, even though the AAP merger might lead to 10,000–15,000 dismissals. On 19 January 2000, several social democratic, green and communist MEPs received a delegation of 25 AAP works councillors and unionists from six countries in Strasbourg. In turn, on 17 February 2000 the EP adopted a resolution ‘On restructuring of European industry, with special attention for the closure of Goodyear in Italy and the problems of ABB Alstom’. It emphasized that the Alstom EWC was not informed either before or after the merger and that ‘the Commission, when authorising the merger between ABB and Alstom, did not evaluate the possible social consequences of this operation, thus not respecting Article 127(2) of the EC Treaty’ that states that ‘the objective of a high level of employment shall be taken into consideration in the formulation and implementation of Community policies and activities’ (European Parliament 2000). The EP suggested to the Commission: 1) not to authorize mergers, if the companies concerned did not respect European social legislation, especially on information and consultation of the (European) employee representatives; 2) to undertake without delay an evaluation of the directive on collective dismissal and propose effective sanctions; and, 3) to speed up its re-examination of the EWC directive, in order to strengthen the EWC’s information and consultation rights. The Commissioner for Employment and Social Affairs, Anna Diamantopoulou, concluded the day before in another meeting with an Alstom EWC delegation that in her opinion the management in the AAP case had not respected the information and consultation rights of the ABB and Alstom EWC. She also promised to write to the French minister of employment and to urge Commissioner Monti to respect the social obligations of the Treaty.

**Negotiating a new European Works Council**

After the criticism from the European Parliament, the French Government and the Commissioner Diamantopoulou, the AAP management pressed for a rapid
negotiation of a new AAP EWC, to prevent to be taken to court for an infringement of the workers’ consultation rights. At the first meeting with the AAP workers’ representatives, the Chief Executive Officer (CEO) asked the workers’ representatives whether they agreed to consider this ‘Special Negotiation Body’ (SNB) as provisory EWC. Most worker representatives reacted positively. They believed that this step of the management would be a good sign for future labour-management relations. However, these hopes were rapidly dashed, when they realised that the management only recognised the SNB in order to speed up the implementation of a restructuring plan, which included the reduction of the AAP workforce by 20 per cent.

The Brussels Demonstration

The announcement of the collective dismissal plan reinforced the motivation to organise a European action day. Almost 2000 AAP workers participated in the European demonstration on 10 April 2000 in Brussels, that is at the location of both the central AAP headquarters and the European Commission. While most protesters came from the various French, German and Belgian AAP plants, Italian, Portuguese and Swiss unionists also participated at the multi-coloured European AAP demonstration. The demonstration also produced headlines in the national and the concerned regional press, especially in France.

The ABB Alstom Power (AAP) case underlines that a European trade unionism is slowly emerging, not only among the extraordinarily committed AAP EWC members and union activists, but also at the level of the rank-and-file. The ABB Alstom unionists did not accept the massive post-merger collective dismissal plan and thought that their protest should also reach the AAP central headquarters in Brussels. Moreover, they protested against the European Commission, because they felt that they had no ‘voice’ in its (merger control) policy. This virtually impelled the AAP unions to adopt a Euro-democratic EU-polity strategy.

Effects of Organized Labour’s Activities in the ABB Alstom Case

The AAP demonstration did not prevent the restructuring plan, but did contribute to delaying and reducing the amount of the planned dismissals, especially in France and Germany. Although the management refused negotiations about the restructuring plan at the EU level, the demonstration was a success in the eyes of the local AAP unionists. It considerably increased their self-confidence in view of the subsequent, successful mobilisations and social plan negotiations in France and Germany (Altmeyer 2001, Heller 2000).

The ABB Alstom resolution of the European Parliament (2000) and the
ABB Alstom demonstration also highlighted the need for better European employee consultation rights and an integration of social concerns in the EC competition policy. In autumn 2000, the ETUC (2000) drafted a merger manual for EWC representatives, which refers to the ABB Alstom resolution of the European Parliament and to Article 127(2) TEC: ‘The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Community policies and activities.’ This was not the first time that the conflicting relation between the social and competition policy objectives of the EU became an issue at the EU-level. However, whereas in 1999, a judgment of the European Court of Justice triggered a debate about the extent collective agreements were sheltered from competition law (Bruun and Hellsten 2001; Vousden 2000), the AAP workers’ representatives and, as a result of their action, the ETUC and the European Parliament turned the debate upside down by reviewing the extent European competition policy is sheltered from the EC Treaty’s social and employment provisions. I cannot enter further into the debate here about the relationship between the EC social and competition law. Nevertheless, it is evident that the EU’s social, employment and competition objectives conflict with each other. The Commission has to find a balance between conflicting objectives in carrying out its competition policy. But such a reconciliation of interests would question the technocratic decision-making logic of the Commission, since any reconciliation of conflicting interests implies political choices. Conflicting interests can be reconciled in various ways, favouring one or the other of the involved parties. But if the Commission acknowledged this fact, it would undermine the legitimacy of its competition policy, which is based on the technocratic assumption that there is always only one solution available. It is therefore not very surprising that the Directorate-General for Competition continues to reject any politicisation and democratisation of its merger-control policy. Yet, the following Alcan-Pechiney-Algroup case study also demonstrates that in 2000 the General-Directorate for Competition started to integrate the European workers’ representatives in the conduct of its merger control policy, which can also be understood as a pragmatic reaction to the politicisation threats expressed by the European Parliament and unions.

THE EURO-TECHNOCRATIC ALCAN-PECHINEY-ALGROUP (APA) CASE

Immediately after the announcement of the APA merger project, the concerned EWC leaders set up a joint working group within the European Metalworkers’ Federation (EMF). It aimed to limit the negative social consequences of the merger and sought corresponding negotiations with the management of the
APA companies. Moreover, the working group also lobbied the Commission to prevent the authorization of the merger. The Commission recognized the EMF as a sufficiently interested party and invited it to its APA control merger hearing. In turn, the workers’ representatives adapted a language that fitted well into the technocratic logic of the Commission’s merger control policy. Finally, the Commission blocked the Alcan-Pechiney leg of the APA merger, which suggested that organised labour successfully adopted a Euro-technocratic strategy in the APA case.

Organised Labour’s First Reactions

On 11 August 1999, the executives of the Montréal-based Alcan, the Paris-based Pechiney and the Zürich-based Algroup announced a three-way merger project to create APA, which would be the largest aluminium company in the world (Amernic and Craig 2001). The companies expected that the merger would increase profits by US $600 million, due to the resulting post-merger ‘synergies’, such as the projected 5 per cent reduction of the combined 91000 APA workforces. The merger plan worried the workers’ representatives of all three companies. Without delay, the EWC leaders of Alcan, Algroup and Pechiney agreed a joint meeting within the EMF and urged the managements of the three APA companies to organize an extraordinary EWC meeting.

The First Extraordinary Meetings of the Three European Works Councils

At its extraordinary meetings, the EWC representatives primarily tried to obtain additional information about the APA merger and its consequences. They also used the EWC as a tool to foster a co-ordinated transnational response to the announced post-merger redundancies. The Algroup’s EWC leaders carefully prepared their extraordinary EWC meeting in Rotterdam (26.08.1999). At this meeting, the management was confronted with a well-co-ordinated set of questions and requests from the EWC leaders and union experts. They urged Algroup’s CEO to guarantee a wide-ranging involvement of the EWC during the whole merger process.

Pechiney’s management did not present any supplementary information to the worker representatives either at the extraordinary French Group Works Council (31.08.1999) or at the extraordinary EWC meeting (07.09.1999). Nevertheless, the Pechiney EWC quickly acquired a broad overview of the redundant activities of the APA companies, due to an analysis of its French consultancy firm; the union-related Secafi Alpha. The Pechiney EWC forwarded the Alpha study to the two other EWCs, and Secafi Alpha established close working relations with ISA Consult and IMU-Institut, the
consultancy firms of the German works councils of Alcan and Algroup, respectively.

Although the management did not spell out the concrete employment consequences of the APA merger, the Alcan EWC did not question the management at its EWC meeting (8 September 1999). Nevertheless, the Alcan worker representatives also discussed the reports from the EWC meetings of Algroup and Pechiney and agreed to establish the joint EMF working group of APA’s EWC leaders.

The First Joint Meeting of APA EWC Leaders in Brussels

On 22 October 1999, delegations of the three APA EWCs and their trade union co-ordinators met each other in Brussels in the framework of the EMF to discuss the APA merger case. This meeting was not only meant to exchange information, but also to discuss and adopt a joint European APA strategy of organised labour. At the EMF meeting the worker representatives from the three corporations agreed on the following two lines of action: first, to seek EU-level negotiations with the three corporations on a new APA EWC and on a transnational job security agreement; second, to urge the Commission to involve the EMF in its APA merger-control decision-making process.

However, it is noteworthy that neither of the two approaches was backed up by a mobilisation of organised labour’s rank-and-file or by any other attempt to raise public awareness. The EMF and the European workers’ representatives of APA did not try to politicise the APA merger case. This mirrored the frustration of the Pechiney’s EWC representatives about the ‘merely rhetorical’ commitments of politicians in earlier restructuring cases. Moreover, the APA workers’ representatives hoped that they could reach an agreement with management without having recourse to collective action, given the management’s interest in a trouble-free merger process.

Negotiating Transnational Job Security Agreement?

At the EMF meeting in Brussels a so-called ‘group of six’ was empowered to resume negotiations with the APA management about a wide range of issues, ranging from the set up of a new APA EWC to the adoption of a job security agreement. In mid-December the central human resource directors of Alcan Europe, Pechiney and Algroup eventually agreed to meet the EWC leaders and to discuss the mechanisms for establishing a future APA EWC. However, the three APA companies did not agree among themselves about several issues, such as the involvement of union officials in the discussions. Nevertheless, on 27 January 2000, the EMF/EWC ‘group of six’ eventually met the three APA Human Resources directors in Zürich. Apart from the implicit recognition of
this EMF working group as negotiation partner, the meeting did not produce any results. There was a decision to meet again on 24 February 2000, but this meeting never took place. On 18 February 2000, the Pechiney EWC withdrew its two members of the ‘group of six’ since it no longer wanted this group to start negotiations about post-merger company restructurings with the central APA management (see Levy 2002; Verdier 2000).

It is worth mentioning that the departure of the Pechiney EWC representatives also resulted from organised labour’s technocratic, top-down approach in the APA case. Incidentally, the Pechiney EWC member and CGT delegate, Claude Verdier, explained that he opposed transnational negotiations due to the lack of involvement of the national unions and the rank-and-file in this process:


Should one negotiate at the EU-level? Negotiate in the name of whom? In the name of a supranational body that is out of reach of the trade unions and the workers? Negotiate with what objective? With the objective to trade one company site against another, rather in one country than in another? Oppose the European countries against the rest of the world, while the merger covers 49 countries on three continents? What a huge gap between this and what we stand for! (Verdier 2000:7, translated by the author)

However, this top-down approach nevertheless did produce some results, not in relation to the failed negotiations with the management, but regarding the EMF’s second objective; that of influencing the Commission’s merger control decision.

Influencing the Commission’s APA Merger Control Decision

The role of organised labour in the APA merger has to be seen in a wider context. The Commission must consult the employee representatives of merging undertakings, if they have requested to be heard and show that their representative status is recognised under the relevant law. However, the Commission did not consult any employee representatives before the Total/Fina-Elf (21 January 2000) and the APA merger (1 February 2000) hearings. This mirrors indecisive union action in the first place. The employee representatives were usually not aware that they had to submit an explicit request to be heard by the Commission (Article 18 (4) Merger Regulation). Moreover, the Commission and the undertakings concerned
usually showed no interest in enhancing the participation of organised labour in the merger control procedure. Some companies, such as ABB and Alstom, avoided informing and consulting their EWC representatives prior to the authorisation of the merger by the Commission, which effectively circumvented the right of the employee representatives to be heard by the Commission. Therefore, the recognition of the EMF as a sufficiently interested party in the APA case by the Commission constituted an important step forward for organised labour.

At their first meeting in Brussels, the EWC leaders of the three APA companies also chose to contact Mario Monti, the Commissioner in charge of the competition policy. However, the main concern of the workers’ representatives, that is the negative employment consequences of the merger, was not mentioned in the letter that the EMF general secretary, Reinhard Kuhlmann, wrote to the Commissioner. They assumed that even massive post-merger collective dismissals would not prevent the Commission from approving the APA merger. Whereas Kuhlmann identified some positive aspects of the merger, he stressed that APA probably would acquire a dominant position in some product markets. Kuhlmann explicitly asked to be heard in the course of the Commission’s APA merger control procedure and requested a meeting with concerned officials. Hence, the EMF framed its objections with regard to the APA merger in a language that was completely compatible with the logic of the Commission’s merger-control policy. Kuhlmann’s letter to the Commissioner Monti proved to be effective. An informal meeting between the two took place, following the Commission’s decision to study the APA case in more detail. However, on 14 January 2000 the EMF still did not know the date of the Commission’s APA merger hearing, not to mention any other substantive information about the Commission’s proceedings.

On 21 January 2000, the DG Competition invited the EMF to its joint Alcan/Pechiney and Alcan/Algroup merger hearing that was scheduled for 31 January and 1 February 2000. But the EMF secretariat did not forward it at once to the EWC leaders and union experts of APA. Therefore, the invitation of the Commission reached the APA EWC representatives on 25 January 2000. This demonstrates major deficiencies of the significantly understaffed EMF secretariat. However, it is even more striking that the Commission did not e-mail the EMF the preparatory APA hearing documents until after office hours on the Friday before the Monday morning meeting of 31 January 2000.14

The very short time frame of the Commission’s merger control procedure caused crucial difficulties for the employee representatives. It is difficult to imagine how workers’ representatives of different countries and companies, which met each other for the first time only some weeks previously, could prepare a hearing in a co-ordinated way. Bottom-up consultation processes in democratic organisations are necessarily more time-consuming than the
respective top-down processes in managerial hierarchies. Thus, the workers’ representatives at the hearing had no chance to prepare the hearing jointly, which further increased the mutual suspicions among the European APA workers’ representatives. However, at the hearing itself the emerging tensions within organized labour remained under the surface.

In its initial investigation the Commission came to the temporary conclusion that the two notified Alcan/Algroup and Alcan/Pechiney mergers would be incompatible with the common market. But the Commission gave the representatives of the undertakings to be merged, its clients and competitors and the employees representatives the opportunity of being heard on that matter. The hearing focused not only on the overall impact of the merger, but tackled the competition problems in each individual product market with the intention of identifying remedies, such as disinvestments, that would permit a conditional endorsement of the concentration. While the APA managements tried to dismiss the reservations of the Commission, the representatives of APA’s clients and competitors emphasised their worries with regard to the merger. The workers’ representatives neither constantly endorsed nor discharged the reservation of the Commission concerning the APA merger. They did not back all reservations to prevent the merger, because they had no particular interest in damaging the competitive position of the three APA companies. However, they were also aware that the only available state intervention that could prevent the APA merger – and the ensuing collective dismissals – consisted precisely in the Commission’s merger control procedure. Therefore, they supported the concerns of the Commission regarding the most critical parts of the APA merger operation, such as the resulting joint dominant position of Alcan’s Alunorf and Pechiney’s Rhenalu aluminium rolling plants. Furthermore, the workers’ representatives also presented evidence, which proved that the Pechiney management instructed local customer relation employees to transfer sensitive customer data from one plant to another, in order to bypass the predictable disinvestment requirements of the Commission concerning the aerosol can sector.

Finally, the Commission concluded that the Alcan/Pechiney merger would create a dominant position in the markets for beverage can body stock, aerosol cans, can sheet and aluminium cartridges. On 14 March 2000, it conditionally approved the Alcan/Alusuisse merger as an independent concentration, while Alcan and Pechiney withdrew their merger notification (Giotakos 2000: 11). With this withdrawal, the three APA companies were trying to gain additional time to find a series of remedies that would eventually alleviate the Commission’s concerns concerning the Alcan/Pechiney merger. But while APA proposed solutions for almost all product markets, Alcan failed to sell its participation in the Alunorf rolling plant (Giotakos 2000: 11). As a result, Alcan(-Algroup) and Pechiney finally abandoned the APA project. Obviously,
the APA workers’ representatives were pleased with this outcome. The approved integration of Algroup into Alcan set off fewer ‘synergy effects’ – or better fewer ‘collective dismissals’ – than planned in the APA project.

Effects of Organized Labour’s Activities in the APA Case

The negative response of the Commission regarding the APA merger case seems to suggest that the union’s adoption of a Euro-technocratic strategy was rather successful. But due to the confidentiality of the deliberations of the Commission, it is not possible to measure the impact of organised labour’s arguments in the final decision-making process. Nevertheless, it is evident that the lobbying of the EWC representatives supported the Commission’s negative assessment. Given the Commission’s lack of information concerning the internal functioning of the Alunorf joint venture, it had based its initial argumentation essentially on rational choice theory. Therefore, the Commission at last supported the involvement of employee representatives, seeing that it added empirical substance to the Commission’s appraisal. This conclusion is also confirmed by the more open-minded attitude of the DG for Competition about the role of unions in its competition policy. Although the director of the DG Competition still refuses to consider social and employment aspects, he has explicitly recognised that the information provided by unions and work councils can compensate the Commission’s information deficits with regard to the companies to be merged:

Mais souvent les travailleurs, qui connaissent parfaitement leur terrain, peuvent contribuer à combler le déficit d’information entre les entreprises notifiantes et la Commission et aider cette dernière à apprécier le cas en meilleure connaissance de causes, y compris sur les questions de concurrence. (Rakovsi 2002: 21)

But often the workers, who know their terrain perfectly, can contribute to fill the information gap between the notifying companies and the Commission, and help the latter to evaluate the case with a better understanding of it, including matters of competition. (Rakovsi 2002: 21; translated by the author)

In 2001 the EWC leaders of APA evaluated their action positively, despite the tensions between the Pechiney and Alcan/Algroup EWC representatives. However, in summer 2003 this positive evaluation dramatically changed again, after Alcan launched a successful takeover bid against Pechiney. Once more, the EWC representatives of Alcan and Pechiney tried to influence the Commission. The EWC of the two companies again mandated the EMF, which in turn requested to be involved in the merger control procedure of the Commission. However, on 29 September 2003 the Commission cleared the Alcan takeover bid for Pechiney without entering into the second phase of its
examination procedure and without hearing any third parties including the EMF. Although the review of the Commission ‘highlighted serious concerns in a number of markets, Alcan was able to address these concerns by offering to divest a number of businesses’ (European Commission 2003b).

Hence, the situation in the 2003 Alcan-Pechiney takeover was entirely different if compared to the APA case. In the first APA merger case all APA companies had to accept the disinvestments requirements of the Commission. The 2003 takeover of Pechiney allowed Alcan to enforce unilaterally the disinvestments requirements of the Commission against the will of the Pechiney management (Rodier 2003). Hence, the worker representatives of Pechiney and Alcan could not hope anymore that severe disinvestments requirements would finally prevent the takeover, in contrast to the first APA merger case. It is therefore not very surprising that both the workers’ representatives and the management of Pechiney regretted that the APA merger failed in 2000. Without doubt, it would have allowed a ‘more balanced and consensual development’ than the final Alcan takeover (Secafi Alpha 2003). This suggests that the prospects of a Euro-technocratic strategy of organised labour in the field of competition policy are much more limited than one might have thought after the initial blockage of the APA merger. In fact, one has also to bear in mind that the Commission approves approximately 90 per cent of the notified mergers and takeovers before entering into the second phase of its anti-trust procedure and thus, without a formal hearing of the concerned third parties (McGowan 2000: 137). Therefore, the adoption of a mere Euro-technocratic union strategy does in almost all merger and takeover cases not seem to be very promising. While it certainly makes sense to be involved in the ‘technocratic’ merger control procedure, organised labour would increase its chances to reduce the negative consequences of post-merger company restructurings if it would also mobilise its membership and politicise the company concentrations.

CONCLUSION

By applying a typology of various strategies that trade unions might adopt in response to the EU and, especially, European competition policy-making, this chapter demonstrated that the unions have a range of feasible options. This implies the rejection of any kind of structuralist determinism. The chapter presented two cases that questioned the suggestion that organised labour has no role whatsoever in the European merger control policy. While the analysed unions adopted a Euro-democratic strategy in the ABB Alstom Power case, the same unions adopted a Euro-technocratic strategy in the parallel APA case. The EWCs and the European trade-union organisations provided a useful
framework for transnational trade-union co-operation, but they did not predetermine the adoption of a specific strategy. This questions the conclusions of Corinne Gobin (1996) and Jean-Marie Pernot (1998), who argued that the rising access of local and national unionists to EU politics would engender a dissemination of a Euro-technocratic jargon and policy style, rather than a rise of European collective action.

Both company merger announcements triggered a transnational trade union reaction. This seems to confirm the suggestion that ‘historically, as markets expanded unions had to enlarge their strategic domain to keep workers from being played off against each other, undermining wage and labour standards’ (Martin and Ross 1999: 312). However, in both merger cases, transnational trade-union co-operation was limited to the core of Western Europe. This suggests that expanding markets do not sufficiently explain transnational trade union co-operation. However, the findings of my case studies also do not confirm the notion that the competition for local production capacities must preclude transnational trade union co-operation (see Streeck 1999; Hancké 2001).

The regulation of transnational company mergers takes place exclusively at the EU level. Therefore, the Commission and the European Parliament represented a focal point for the analysed EWCs and unions. Already in an early stage, both the ABB-Alstom and the Alcan-Pechiney-Algroup workers’ representatives addressed the Commission. However, only in the APA case were European workers’ representatives invited to a merger control hearing. This suggests that the different accessibility to the Commission’s DG Competition might explain the differences between the two cases. While the APA merger was likely to produce a dominant position in different product markets, the ABB Alstom merger was unproblematic from the point of view of the EC competition policy. Therefore, the Commission’s merger control officials had no interest in hearing the ABB Alstom representatives. After the APA case they acknowledged that organised labour could provide useful information in tricky merger cases. This suggests that organised labour can only aspire to have a say within the technocratic EC merger control procedure, if a case is ‘problematical’ and if the Commission is in need of additional internal information, that is in approximately 5 per cent of the notified merger cases. In all other cases, organised labour cannot make itself heard within the Commission’s regulatory decision-making process. This considerably reduces the scope of a Euro-technocratic strategy. The absence of ‘voice’ within the institutional framework of the EC competition policy is likely to increase the interest of organised labour in Euro-democratisation. Incidentally, the same also seems to apply to the European Parliament, which also has no co-decision power in this policy area. This might explain why it turned out to be a useful partner of organised labour in the ABB Alstom case. However, the adoption of
a democratic Europeanisation strategy could, ironically, also create more leverage for the pursuit of a Euro-technocratic strategy. In fact, the more the Commission is challenged politically, the bigger is its interest in integrating latent protests in order to sustain the myth of an ‘apolitical’ merger-control policy.

The difference between a technocratic and a democratic polity orientation of organised labour also reflects the ability of the involved unionist to politicise the respective markets. The more the unionists succeed in politicising the ‘markets’ in which the companies operate, and the more governmental institutions are willing to intervene in the economy, the more the unions adopt a democratic polity strategy. In the ABB Alstom Power case, the (French) state is still the major client of the company’s products. Correspondingly, Alstom is more sensitive to political pressures than the aluminium companies that sell their products neither to the state, nor to other end users that care about the political and social implications of the aluminium production process. This might explain why the Alstom EWC representatives demonstrated a higher affinity to political trade-union action than their Pechiney colleagues.

Finally, the ABB Alstom case suggests that the different cultural backgrounds of the national unions do not preclude European collective action. However, the ABB Alstom demonstration as well as the eventual breakdown of the EMF working group in the APA case also demonstrate that transnational trade union co-operation is critically dependent on mutual ‘learning and trust-building’ (Klebe and Roth 2000) and ‘intense discussion processes’ (Kelly 1998: 127) amongst activists and workers. Probably, this points to the most important difference between the two cases: in the ABB Alstom case, the leading German and French trade unionists already knew each other from the prior Alstom EWC. Moreover, they also made their European activities public, through leafleting and the press. The leading European APA representatives, on the other hand, who did not know each other, even failed to involve all members of the respective EWCs in their European activities. This illustrates that Euro-democratisation is difficult but not impossible.

NOTES
1. This research is based on document analysis, participative observations and expert interviews. I have studied documents of the German, French and European work councils involved and the corresponding company-level, national and European metalworkers’ union organisations. I have concluded 30 semi-structured interviews, with European, national, and enterprise-level trade union leaders, work councillors and business consultants. The research on which the article is based has been supported by the Irish Research Council for the Humanities and Social Sciences, the Swiss Research Foundation, the French Institut de
Recherches Economiques et Sociales and the European University Institute.

2. On 22 September 1994 the Council approved the European Works Council Directive (94/45/EC), which requires companies with more than 1000 employees, and at least 150 employees in each of two or more member states, to negotiate the set up of a European Works Council with its employees’ representatives. The Directive seeks to ensure that the employees’ representatives in multinational companies are informed and consulted by the central European management on matters of a transnational nature affecting the employees’ interests (see Müller and Platzer 2003).

3. The verb ‘to nationalise’ has different meanings: first, the transfer of a branch of industry from private to state ownership and, second, to make something distinctively national. In this article re-nationalisation is used to refer to its second meaning, as a concept that is opposed to Europeanisation.

4. This typology provides us with an analytical framework, which facilitates the analysis of the various strategies that actors can pursue regarding the future European integration process (Erne 2002). Nevertheless, this typology should not be read as an instruction manual for political action. Real-life actors can hardly afford to pursue a simple, clear-cut strategy, because real situations are hardly ever clear-cut. The typology does not aim to put every case into one specific category, but this does not mean that one has to give up using clear-cut typologies, since they can facilitate the explanation of the incongruencies and ambiguities of the cases in question.

5. Autonomy is the essential precondition of any democratic polity. Democracy as a system of self-determination is only possible if the respective polity has the capacity to affect the processes that shape the lives of its citizens. Governments can only be held accountable if they can implement the will of the citizens. Correspondingly, a decline of the autonomy of the nation-state erodes not only the essence of the democratic (welfare) state, but also the effectiveness of any democratic re-nationalisation strategy.

6. However, if citizens have divergent preferences, this assumption turns out to be problematic: What might be a ‘good’ regulation for one citizen might be a ‘bad’ one for another.

7. Yet, the EC Treaty states that the Commission must place its policies in the framework of the attainment of the Treaty’s fundamental objectives, which includes employment and social objectives. It is noteworthy that the Court of First Instance stated in 1995, that is before the reinforcement of the Treaty’s employment objectives through the Amsterdam Treaty (see Article 127 (2) EC), that the Commission may reconcile its assessment of whether a concentration is compatible with the common market, ‘with the taking into consideration of the social effects of that operation if they are liable to affect adversely the social objectives referred to in Article 2 of the Treaty. The Commission may therefore have to ascertain whether the concentration is liable to have consequences, even if only indirectly, for the position of the employees in the undertaking in question, such as to affect the level or conditions of employment in the Community or a substantial part of it’ (Case T-96/92, Comité Central d’Entreprise de la Société Générale des Grandes Sources and others v Commission, ECR 1995, II-01213, para. 28).

8. The EMF is the umbrella organisation of almost all national metalworkers’ unions of Europe.

9. According to the French labour law the works council of a company can commission an independent analysis of the company’s annual accounts as well as specific studies in case of major company restructurings at the expense of the management. This provision created a market for union-related consultancy firms, such as the CGT-related Group Alpha (Clavel-Fauquenot and Marignier 2000). The German Betriebsverfassungsgesetz includes similar provisions regarding company restructurings.

10. Incidentally, in September 1999 the United Steelworkers of America – the union that organises the Alcan workforce in the US and in Canada – rejected the proposal of the three APA EWCs and the EMF to discuss the APA merger also within the International Metalworkers’ Federation.

11. Incidentally, the EMF secretariat and the IG Metall adopted the same strategy as in the parallel Ford-Visteon case, which led to a binding EU-framework agreement (European Foundation for the Improvement of Living and Working Conditions 2001: 77–81).
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15. That is the Group Alpha consultant and an additional member of the Pechiney EWC as well as IG Metall official in charge of the Alcan EWC. The Swiss and German union officials in charge of the Algroup EWC as well as the secretary of the Pechiney EWC could not attend the Commission hearing, because its date conflicted with the date of another APA working group meeting.
17. ‘Economic theory suggests that the existence of a joint venture can lead either to anticompetitive parallel behaviour of the parent companies or to independent behaviour having equivalent effects.’ European Commission, Letter to Alcan Aluminium Limited and Alusuisse announcing their mega-merger plan’, Critical Perspectives on Accounting, 12, 763–95.

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The policy and associative context


11. Inventing the people: civil society participation and the enhabitation of the EU

Laura Cram

The political world of make-believe mingles with the real world in strange ways, for the make-believe world may often mold the real one. In order to be viable, in order to serve its purpose, whatever that purpose may be, a fiction must bear some resemblance to fact. If it strays too far from fact, the willing suspension of disbelief collapses. And conversely it may collapse if it strays too far from the fiction that we want them to resemble. Because fictions are necessary, because we cannot live without them, we often take pains to prevent their collapse by moving the facts to fit the fiction, by making our world conform more closely to what we want it to be. We sometimes call it. Quite appropriately, reform or reformation, when the fiction takes command and reshapes reality.

(Morgan 1989: 14)

INTRODUCTION

The central thrust of this chapter is that one of the most interesting features of the involvement of civil society in EU level activities and structures is the implication it has for the creation of a ‘people’ for the EU. The increasing involvement of civil society actors at the EU level has been encouraged in large part by a self-interested ‘fiction’ developed by, for example, the Commission and EESC (see, for example, Smismans 2003) concerning the relationship between civil society involvement at EU level and participatory democracy. Drawing upon empirical evidence as well as insights from the literature on the role of the state in facilitating the process of nation building, it is demonstrated that as this link has been increasingly institutionalised it begins to become a reality, ‘enhabiting’ the EU in the daily practices of the actors involved or ‘inventing a people’ for the European Union which will be entitled to demand a greater input into the democratic processes of the EU. In this way, the ‘fiction’ may become a self-fulfilling prophecy.

The example of women’s organisations in Ireland, the UK and Greece is
used to demonstrate the complexities of the impact of civil society involvement in practice. How organisations and individuals experience the opportunities and constraints presented by participation in the EU level structures and activities was found to be fundamentally affected by three factors: the domestic political context; the characteristics of the groups being targeted; and the role of collective beliefs and values at the domestic level. These played a key role in affecting the initial propensity of those involved in women’s organisations in all three countries to become active at the EU level as well as tempering the impact of European level activities on these domestic actors.

No great surge in identification with the EU was observed in any of the countries examined regardless of how positive or negative their direct experience with the EU. However, despite very variable experiences in practice, what had begun to become evident in all three cases was a sense of what has been called ‘banal Europeanism’ (Cram 2001a). Drawing on Billig’s notion of ‘banal nationalism’, the EU, it is argued, is becoming inhabited in so far as individuals increasingly ‘forget to remember’ that the current situation is not how things always were. From this perspective, the EU institutions become accepted as legitimate operators in a given area of activity regardless of the individual or group’s experience (positive or negative). Negative experience may result in criticism and suggestions for reform but few suggestions were made that the EU was not the appropriate operative level for such activities. Such complaints may, in fact, further confirm the acceptance of the EU as a legitimate if inadequate forum for civil society involvement thus fuelling the fiction further.

In practice, the impact on groups and individuals of civil society involvement at the EU level is highly variable. Indeed, many observers have argued that the involvement of civil society falls far short of the standards which might be expected: in terms of who participates (Magnette 2003); how civil society participation is conceived and works in practice (Armstrong 2002 and this volume); the motives behind the recent focus on civil society (Smismans 2003) and the implications of misconceived doctrines for practice (Smismans 2003). These critiques notwithstanding, a ‘fiction’, which holds that the participation of groups and individuals from civil society plays an important role in enhancing participatory democracy at the EU level, is becoming increasingly commonplace and indeed is codified in the proposed Constitution for Europe. The institutionalisation of practices based upon this ‘fiction’ may, it is argued here, have an important role to play in ‘inventing the people’ (Morgan 1989) or in encouraging the development of a polity at the EU level. Thus, however flawed current practice, it may play a fundamental part in shaping the reality of the environment in which civil society actors will operate in future.
CIVIL SOCIETY PARTICIPATION

The Fiction

Believing that Europe, reunited after bitter experiences, intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning and social progress; and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world’

(Treaty Establishing a Constitution for Europe, October 2004, emphasis added)

The importance of the societal dimension of European integration has long been recognised. As Jean Monnet said when establishing the European Coal and Steel Community in 1951, ‘we are uniting people, not forming coalitions of states’ (Duchêne 1994: 363). Indeed, it has been argued that Monnet ‘was interested less in perfected constitutional blue-prints than in shaping human patterns of response to induce a change of process’ (Duchêne 1994: 367). Willy Brandt (1972) sought to affect a ‘human face’ for Europe, and ‘social solidarity was a central theme for Jacques Delors (Drake 1995; Ross 1995). However, for just as long as the importance of the societal dimension has been recognised, it has also been highly controversial. There is, meanwhile, a long history of treaty preambles which state the need to bring Europe ‘closer to the people’ and of simultaneous Member State resistance to providing meaningful practical measures for this in the accompanying treaties. In Article I-47 (2) of the Constitution for Europe, however, an explicit link has, for the first time in an EU treaty, been made between the involvement of civil society at the EU level and the enhancement of participatory democracy in the EU. This reflects very strongly a ‘fiction’ which has been promoted for some time, by both the Commission and EESC.

The Commission, acting as a ‘purposeful opportunist’, has from its early days sought to generate a constituency of support for its activities by involving a wide range of actors within the policy process. Particularly in areas where its powers were limited, the involvement of a broad range of actors was used to identify salient issues and to generate grounds to push for the extension of the Commission’s competence (Cram 1997). Initiatives such as that for a ‘People’s Europe’, meanwhile, sought to engage with and appeal to the wider European public at a more general level. It has similarly been noted that the concept of EU citizenship was used by both the Commission and the European Parliament to enhance their own positions (Warleigh 2001).

Statements such as: ‘The European Union enters the new century with a renewed and strengthened commitment to promoting solidarity and moving
closer to the citizens’ (COM (2000) 79 final p. 4, ‘Building an Inclusive Europe’) come as little surprise from the Commission and many such examples exist. However, the most explicit linking of the involvement of civil society at the EU level and the enhancement of participatory democracy by the Commission came in the form of the White Paper on European Governance (Commission 2001) in which the Commission specifically recognised that the legitimacy of the Union today ‘depends on involvement and participation’ (p. 11). The Commission argued that ‘Five principles underpin good governance and the changes proposed in this White Paper: openness, participation, accountability, effectiveness and coherence. Each principle is important for establishing more democratic governance’ (p. 10). Meanwhile, ‘Democracy depends on people being able to take part in public debate’ (p. 11); ‘Providing more information and more effective communication are a pre-condition for generating a sense of belonging to Europe’ (p. 11). Civil society, the Commission continued, ‘increasingly sees Europe as offering a good platform to change policy orientations and society. This offers a real potential to broaden the debate on Europe’s role. It is a chance to get citizens more actively involved in achieving the Union’s objectives and to offer them a structured channel for feedback, criticism and protest’ (p. 15). At the same time, the EESC, seeking to revitalise its role in the EU policy process sought to emphasise ‘The role and contribution of civil society organisations in the building of Europe’ OJ C329, 17.11.99, p. 30. The EESC was rewarded with a change in Article 257 of the Nice Treaty recognising it as a representative of the ‘social components of organised civil society’.

The entrepreneurship of these two institutions did not, of course, go unnoticed by the European Parliament which argued in response to the Commission White Paper: ‘Consultation of interested parties […] can only ever supplement and never replace the procedures and decisions of legislative bodies which possess democratic legitimacy; only the Council and Parliament, as co-legislators, can take responsible decisions on the context of legislative procedures…’ (European Parliament resolution on the White paper on European Governance, A5-0399/2001)

As Smismans has observed:

Both the Commission and the ESC use the discourse on civil society and civil dialogue as an element of legitimisation for their activities and institutional position…with the introduction of the concept of civil society both the Commission and the ESC have reshaped the political debate on ‘EU democracy’. The discourse introduces elements of ‘participatory democracy’, defined as the possibility for those concerned by the decision to participate in the policy process. (2003: 484)

It is difficult to disagree with Armstrong’s observation that ‘the discourses of
democracy, governance and civil society seem like rather oversized constitutional cloaking for the thin frame of improving transnational consultation processes (Armstrong 2002: 12). However, as Edelman (1967) has argued the symbolic dimension of politics must never be underestimated. The import of such ‘fictions’ becomes clear when the language and content of the new clause in the proposed Constitution for the EU is examined. For the first time participatory democracy is presented as a goal of the EU and the link between the attainment of this goal and the involvement of civil society is made explicit.

**Article 1-47 The Principle of Participatory Democracy**

1. The Institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain open, transparent and regular dialogue with representative associations and civil society.
3. The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent.
4. Not less than one million citizens who are nationals of a significant number of member states may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution. European laws shall determine the provisions for the procedures and conditions required for such a citizens’ initiative, including the minimum number of Member States from which such citizens must come.

(Treaty Establishing a Constitution for Europe, October 2004)

**The Practice**

If, as Banaszak (1996: 39) has argued, ‘political opportunity structures affect not only the resources and opportunities of a movement but also affect the development of collective beliefs and values’, the impact of the participation (or non-participation) of organisations in EU institutions and programmes might be expected to provide some interesting insights into the implications of civil society participation at the EU level. In particular, this approach raises questions about the extent to which collective beliefs and values of these participants might begin to shift in favour of the EU structures or the extent to which the EU has been brought ‘closer to the people’. Here, the example of women’s organisations in Ireland, the UK and Greece is used to demonstrate the complexities of the impact of civil society involvement in practice.

Insights offered by theories of political opportunity structures (Eisinger 1973, Tilly 1978, McAdam 1982) suggest that the constraints and opportunities created by the domestic political process may be crucial in
determining the ability of any group or movement to act effectively. In this study, the domestic environment within which the women’s organisations operated and which ‘filtered’ the impact of the EU’s gender equality regime differed starkly between the three countries examined. The evolution, structure and strategies of a movement, meanwhile, proved to be relevant in explaining the attitudes of the movements and their memberships to participation in state structures and how they responded to new opportunity structures. In addition, as resource mobilisation theories (Jenkins 1983; McCarthy and Zald 1977) suggest, the relative coherence, membership resources and available skills of the three movements helped to explain the ability and propensity of each movement to collaborate at the EU level. The characteristics of the group or movement, in turn, it was found helped to explain the extent to which individual or collective values prevailed within any given group. Finally, the norms of behaviour as emphasised by historical institutionalist approaches (Thelen et al. 1992; March and Olsen 1989) proved to be crucial. Identifying the lenses through which individuals view their situations and how opportunities and constraints were perceived by these individuals and the role of collective beliefs and values in this process constituted an important element in understanding how values, loyalties and identities are formed and/or maintained.

Overall, it was found that the Irish women’s organisations are in the strongest position to respond to the opportunities available at the EU level. In Ireland, the Equality Authority and the Office of Director of Equality Investigations as well as the Department of Justice, Equality and Law Reform are the key institutional actors. The Equality Authority has been an active litigator but has operated without major confrontation with the national regime. Many cases did not come from women’s organisations per se but from trade unions and individuals with cases to pursue. To understand the impact of EU laws within the domestic environment, existing links between law and social processes at the national level must, of course, be understood. As Maher has argued (1998: 237): ‘Where a new norm is introduced which may disturb those links, that norm will be shaped by existing links and may be modified in practice if not in form’. As will become clear, how identical provisions at EU level have impacted upon the domestic equality regimes of each of the three countries has differed fundamentally, not least, according to the institutional structures in place.

In terms of resources, Irish women’s organisations enjoy a much more secure funding position than their UK or Greek equivalents. As well as providing core funding for the National Women’s Council of Ireland (NWCI) (the national umbrella group for women’s organisations), national state funding since 1993 accounts for much of the growth in women’s groups (Galligan 1998: 60). The women’s organisations in Ireland, coming from this
starting point, have on the whole been fairly effective in accessing EU funds and taking advantage of opportunities available at the EU level, although there has been some worry that this may have ‘absolved the national government to some extent of its responsibilities’. Relations between women’s organisations and domestic institutions also form a central aspect of the domestic context which influences the ability and inclination of organisations to respond to new opportunities at the EU level. The NWCI in Ireland is one of eight members of the Community and Voluntary Pillar which constitute one of the four partners (along with government, social partners and farming) which drew up the national agreement ‘Partnership 2000’. In this context, it is perhaps unsurprising that the women’s movement in Ireland is relatively vigorous. In Ireland, debates over the relative benefits of ‘insider’ and ‘outsider’ status have largely been resolved in favour of the former (Galligan 1998; Lovenduski and Randall 1993).

In short, in Ireland the institutional infrastructure exists, information is readily available and the domestic climate is favourable to EU participation. Some of the smaller organisations have problems with the complexities of EU application and budgetary procedures and the need to raise matching funds and there is a common complaint from all about the iniquities of project based funding. However, on the whole the domestic institutional context, the characteristics of the movement and the collective beliefs and values which prevail facilitate an active response to the new ‘opportunity structures’ at the EU level. This is reflected in the experiences which organisations have of participation. When asked ‘Please describe the impact of the European Union on your organisation and on the environment in which you operate’ some typical responses are: ‘Impact has been huge, provided funding for special projects that benefited our members and their communities’; ‘Having two EU projects provided the resources to enable us to provide the services for women that were badly needed. It raised the status of the organisation with local policy makers and funders making it easier to secure further funding. The transnational partnerships broadened the focus of the organisation and was a valuable source of new ideas and methodologies’.

The UK, like Ireland, has fairly developed structures for dealing with equality issues. In the UK, the Equal Opportunities Commission (EOC) and the Equality Commission (Northern Ireland), the UK Minister for Women and the Women’s Unit (Cabinet Office) form the formal equality infrastructure. Since the advent of devolution11 in the UK, the roles of the EOC Scotland and EOC Wales have expanded. A Deputy Minister with responsibility for equality has been appointed in Scotland and an Equal Opportunities Parliamentary Committee and an Equality Unit have been established. The Scottish Women’s Consultative Forum; Women in Scotland has also come to play an increasing role.12 In Wales the Welsh Women’s Coalition and the Equal Opportunities
Commission have been working together to take the National Assembly’s action plan on equality of opportunity forward. In Northern Ireland, the role of the Civic Forum has been central to women’s participation in the governance process. The Northern Ireland Women’s European Platform plays a central role in articulating women’s demands.

Examination of the litigation strategies of the three countries indicates the very different patterns of incorporation of EU law into the national legal order and the importance of domestic institutions in shaping the responses of groups to the new ‘opportunity structures’ at the EU level. The EOC (UK) stands out as having adopted an active litigation strategy in a confrontational manner with the domestic regime (Barnard 1995; Alter and Vargas 2000). The EOC’s aim was to utilise EU law as a tool to force change in the domestic equality regime. The role of the EOC has been central in explaining the development of the gender equality regime within the UK. The EOC’s status as a Non-departmental Public Body with statutory powers and duties is important. Lovenduski and Randall (1993) have explained the early reluctance of the EOC to adopt a confrontational strategy in case the Conservative government should remove the limited powers it enjoyed. Like the equality Authority in Ireland, the EOC did not always reach out to women’s organisations per se but to trade unions and individuals with cases to pursue.

In relation to the funding of organisations, marked differences appear again. In contrast to the situation in Ireland, in the UK national funding is in the main restricted to the Women’s National Commission (WNC) (the officially recognised national umbrella group for women’s organisations) with some provision for service providers. Other organisations are largely left to fend for themselves. Lack of resources and information are the main reasons cited by UK women’s organisations to explain their lack of participation in EU level projects. A point often made is that ‘small organisations are left out in the cold’. This can make dealing with EU budgeting procedures difficult, as one UK organisation commented, ‘we had a mixed experience of utilising ESF moneys. The primary difficulty is working with payment in arrears when we do not have contingency funds to cover ‘up front’ costs’. In terms of relationship between the organisations and domestic political institutions, the WNC in the UK is the officially recognised independent representative of women’s views and works closely with the Women’s Unit in the UK Cabinet Office but enjoys no equivalent status to the NWCI in Ireland. The women’s movement in the UK generally is in a considerable state of disarray. The decline of interest in the UK has been in part attributed to internal ideological dissenion, to a general lack of momentum and, of course, to the harsh ideological climate of the Thatcher era (Lovenduski and Randall 1993: 95–101). New challenges are also emerging within the UK as a result of devolution.
Overall, in the UK, the active role played by the EOC has contributed to a general feeling that the EU is a ‘good thing’ for women. This was reflected in the moderately pro-European self-identification of the organisations. Women’s organisations in the UK do not, however, have access to the same level of information or expertise on EU matters which the NWCI provides in the Irish context. Although the WNC is seeking to take on a more active role in relation to EU issues, it has not to date been the main interlocutor with the EU for women’s organisations.20 The UK organisations, in the main, had a very poor knowledge of the various funding programmes and fora for participation available at the EU level. Two-thirds of respondents felt that they had insufficient access to the relevant information.21 Organisations which are struggling to survive are aware of the import of the EU but are unable to make this a priority. Again, how activities were experienced or failed to be experienced were affected by these factors. Fairly typical responses are: ‘No impact – do not have the resources to pursue funding and joint projects’; ‘None as we have not participated mainly due to lack of knowledge, however, we are keen to get involved if we have support and can gain funding to provide services women need. The main reason for lack of involvement is staff shortage and lack of time.’22

In Greece, meanwhile, there is a weak institutional structure for equality policy, the women’s movement is weak, it has little status in the Greek infrastructure and continues to experience internal ideological dissent. The General Secretariat for the Equality of the Sexes23 is the body with formal competence in the domestic gender equality regime. It is notable that in Greece no independent statutory body exists in the area of equality. Meanwhile, Greece has been much slower than Ireland or the UK to take up the litigation route (although a number of rulings have followed EU principles without explicitly referring to EC Law (Banks 1997). In Greece the lack of an equivalent body to the EOC or the Equality Authority is significant. Greek litigation has been heavily reliant on motivated individuals. Greek legal experts cite fear of the consequences of failure as one of the primary disincentives for the pursuit of private litigation (Commission 2000a). The existence of the EU ‘Network of Legal Experts’ was, however, particularly important in Greece. Indeed, the Greek national expert has been a central figure in encouraging the pursuit of the legal route in Greece.24 In Greece, the General Secretariat for Equality is itself severely underfunded.25 There is little funding for women’s organisations in Greece: ‘to put this in perspective, there is only one women’s refuge for the whole of Greece’.26 One of the most common responses from Greek organisations is that it is difficult for them to participate in EU initiatives as it is almost impossible to raise the requisite 50 per cent of funding from national sources. This has resulted in one or two large organisations, and the women’s sections of some political parties, who
enjoy good contacts at the EU level, dominating relations with the EU. This is not, however, a problem which is restricted to Greece. Greece has no umbrella organisation equivalent to the NWCI or the WNC. Interestingly, however, in response to the establishment of the European Women’s Lobby in 1990, 37 organisations came together to form the Ad Hoc Co-ordination of Women’s Organisation for the EWL. This co-ordination has no legal status, and is a further example of the initiative of dynamic individuals despite the lack of an infrastructure in the Greek context.27 The challenges faced by the Greek women’s movement in transition from dictatorship to democracy and the strictures of operating within a ‘party-state’ structure (Featherstone, 1994) have taken their toll on the movement and on contemporary relations with governmental bodies. Greece, in particular, continues to experience considerable divergence of goals on the part of the various women’s organisations. The debate concerning ‘insider’ and ‘outsider’ status continues: hence, in part, the lack of an umbrella organisation. This is significant in terms of the fairly significant number of Greek organisations which choose not to participate in EU level structures because this is perceived as a threat to their autonomy. The existence of some dynamic individuals has enabled some limited response to the new ‘opportunity structures’ at the EU level. This has led to a polarisation of experiences of the EU.28 Thus while for some: ‘the existence of EU funding has made collaboration (in Greece) possible when it could not happen internally’, for others it remains: ‘very difficult to get the necessary support from our institutions to be able to match funding from the EU’. For others still, the EU does not ‘reflect our priorities.’

Clearly, the domestic political context, the characteristics of the movement and the role of collective beliefs and values played a key role in filtering the impact of the involvement of these representatives of civil society in the activities and structures of the EU. What then were the implications of these various experiences for the relationship between these actors and the EU?

The self-categorisation of organisations in relation to the EU was illuminating in this context.29 Respondents from Ireland were, perhaps unsurprisingly, the most likely to categorise themselves as strongly pro-European or pro-European with two thirds of respondents falling into these categories. Almost half of the respondents from the UK categorised themselves as neutral with the remaining half divided between pro-European (the next largest category) and strongly pro-European. An interesting feature of the UK returns was the disproportionate number of strongly pro-European responses which emerged from Northern Ireland and from Scotland, thus demonstrating further the importance of the domestic political context. Greece registered the most divided responses with some strong anti-European views expressed alongside a large majority of pro-Europe or strongly pro-Europe
responses. The lack of neutral responses from Greece reflected the fairly stark divisions which exist within the women’s movement.

Irish women’s organisations perceived themselves most strongly as having benefited from the opportunities available at the EU level. The individuals involved, however, continued to see themselves overwhelmingly as ‘more Irish than European’. Indeed, several respondents with very positive experiences of participation at the EU level continued to see themselves as solely Irish. In Greece, meanwhile, almost all respondents included some element of Europeanism in their self-identification. Respondents predominantly recorded themselves as either ‘Greek and European’ or ‘European and Greek’. Even respondents with no experience of participating in EU projects and those who would like to see the EU play a smaller role in the future tended to identify themselves as somewhat European. In the UK the question of identity is complicated by the four national contexts within the UK. Nevertheless, overall many more respondents identified themselves as somewhat European than might have been expected. Perhaps most interesting was the use made by Scottish and Northern Irish respondents of European identity as an alternative to British identity. As one respondent stated: ‘I do not see me as British just Irish and European. I am more proud to be European than British.’

Once again the impact of activities at the EU level was filtered by the domestic context. In Ireland, the EU was not viewed as a threat to Irishness but as facilitating the ability of Ireland to act on its own. A number of interviewees commented that Europe allowed Ireland to get out from the shadow of Britain. In this respect, the EU was not seen as presenting a better or alternative route but a complementary one. In Greece and the UK, however, where women’s organisations have been much more marginalised, the EU was viewed by respondents as an alternative channel offering potential advantages. In both these cases, it was less the extent to which the individual involved had participated in or benefited from EU projects than their sense that something better than their domestic situation might be available at the EU level which inclined them to view themselves as more or less European.

One of the most interesting results of this study was the extent to which the EU had simply become an accepted part of the everyday lives of those observed. No participants in any of the countries recorded an anti-European stance but when asked if they would like to see the role of the EU increase, decrease or stay the same, some stated that they would like this role to decrease. Yet, even these respondents could not imagine their country withdrawing from the EU. While few individuals identified strongly as Europeans, membership of the EU had increasingly become the norm, simply part of their daily lives. The concept of banal Europeanism is useful in this context (Cram 2001a). Building upon Billig’s (1995: 42) notion of ‘banal
nationalism’ it can be argued that the increasing involvement of civil society actors in the activities and structures of the EU encourages the process of the enhabitation of the EU in so far as individuals ‘forget to remember’ that the current situation is not how things always were.

INVENTING THE PEOPLE

The Enhabitation of the EU

Polities rarely emerge entirely of their own volition: as Weber (1977: 486), has argued, the transformation of ‘peasants into Frenchmen’ emerged only through the expansion of universal education, military service and improved communications. The role of the state in fostering an environment conducive to association should not, meanwhile, be underestimated. De Tocqueville reminds us of the potential long term implications of fostering associative behaviour:

   By chance men share an interest in a certain matter; maybe the management of a common enterprise or the conclusion of an industrial operation; they meet and join together, gradually familiarizing themselves thus with the idea of association. The more the number of these minor communal matters increases, the more men acquire, even unknowingly, the capacity to pursue major ones in common. Civil associations, therefore, pave the way for political associations; on the other hand, political associations develop and improve in some strange way civil associations. (de Tocqueville 2003[1835-1840]: 604)

   In similar vein, Skocpol (2003: 40) argues that ‘the early US state [in short] created favourable conditions for associations, social movements, and mass-mobilizing parties – all of which, in turn, continuously roiled and transformed national politics and government’.

   Extensive discussion of the creation of territorially delimited polities or peoples has been carried out within the literature on the role of the state in the process of nation-building. This chapter does not deal with the thorny question of whether or not the EU can be conceived of as a state but simply argues that there are many insights to be gained from this literature for our understanding of how the actions of institutions and the codification of dominant ‘fictions’ at the EU level might impact upon the environment within which civil society has to operate and ultimately upon the relationship between the EU and these actors.

   There is a powerful argument from scholars of nationalism that states generally precede nations (Keating 1988), that national states frequently emerge from multiple centres (Breuilly, 1982) and that nationalism does not
simply emerge but is actively created: ‘It is nationalism which engenders nations, and not the other way round’ (Gellner 1983: 55). From this perspective, the role of popular ‘fictions’ in ‘inventing the people’ may be of significant interest to scholars of the EU.

Renan (1990: 19) wrote in 1882 that the very existence of a nation ‘is a daily plebiscite’. Nationalism is, thus, less a romanticised notion of emotional attachment to a homeland or culture than a choice, or act of will, even a calculated decision concerning the costs and benefits of affiliation. Renan (1990: 11) also emphasised the importance of the collective forgetting of inconvenient pasts for the maintenance of contemporary national identities. To describe the citizens of the EU as a ‘people’ might seem far-fetched. However, processes of collective forgetting, in which disparate histories (even warfare) are glossed over, are not uncommon in the creation of nations. It is, of course, notable that one of the last minute amendments to the preamble to the Constitution for Europe (October 2004) refers to a Europe ‘reunited after bitter experiences’ (emphasis added) suggesting a common historical legacy. As Anderson (1991: 201) reminds us: ‘A vast pedagogical industry works ceaselessly to oblige young Americans to remember/forget the hostilities of 1861–1865 as a great “civil” war between “brothers” rather than between – as they briefly were – two sovereign nation-states’. In similar vein, Billig (1995: 38) argues that ‘the nation which celebrates its antiquity, forgets its historical recency’. Of course, part of the raison d’être of the EU was to create lasting habits of peaceful co-operation between previously warring nations and to tie Germany irrevocably into a union with its European neighbours. In many respects, the collective forgetting of these relatively recent past hostilities has been highly successful. To some extent, this collective forgetting takes place through the normalisation or domestication of previously unfamiliar practices. Thus, as patterns of behaviour shift, what at first appeared ‘new’ gradually becomes unremarkable.

Billig (1995: 42), building on Bourdieu’s concept of the habitus, calls the process of collective forgetting enhabitation and argues that this constitutes a key aspect of nationalism: ‘Patterns of social life become habitual or routine, and in so doing embody the past. One might describe this process of routine-fornation as enhabitation: thoughts, reactions and symbols become turned into routine habits and, thus, they become enhabited. The result is that the past is enhabited in the present in a dialectic of forgotten remembrance’ (Billig 1995: 42). This argument strikes a clear chord with, for example, Deutsch’s arguments concerning the process of social learning through which shifts in identification might be reinforced: ‘And, as with all learning processes, they need not merely use this new information for the guidance of their behaviour in the light of the preferences, memories and goals which they have had thus far, but they may also use them to learn, that is, to modify this very inner
structure of their preferences, goals and patterns of behaviour’ (Deutsch 1966 [1953]: 117). Indeed, the notion of inhabitation is highly reminiscent of the learning of ‘integrative habits’ as a result of prior cooperation, emphasized by Mitrany (1966 [1943]), Deutsch (1966 [1953], 1957) and Haas (1958). It is precisely these routines and habits which, by acting as daily reminders of belonging, Billig argues (1995: 43), ‘serve to turn background space into homeland space’.

As Edelman (1985 [1967]: 195) has argued, ‘the study of the construction of meaning must focus upon the interpretations of the subjects more than upon the observation of objects’. The symbolic impact of the linking of civil society involvement, the role of the EU institutions and the delivery of participatory democracy should not be underestimated. Deutsch (1966 [1953]: 170), for example, argued that communications and symbols were central to an understanding of the emergence of a ‘national consciousness’. Thus, ‘a person, an organization, or a social group – such as a people – can do more than merely steer some of its behaviour by balancing its current experiences with its recalled traditions. It can achieve consciousness by attaching secondary symbols – that is symbols about symbols – to certain items in its current intake of outside information, and to certain items recalled from memory’ (Deutsch 1966 [1953]: 170).

There is little doubt that the ‘fiction’ being promoted by the Commission and EESC was initially based on basic self-interest. However, as is demonstrated by the codification of this ‘fiction’ in the proposed Constitution for the EU, the actions of the self-interested may also have lasting consequences. As Deutsch argued, ‘in trying to gain and exercise power for its own ends, the efforts of nationalists may transform a people into a nationality’ (Deutsch 1966 [1953]: 104). This point is also made by Breuilly (1982: 65) in relation to the process of unification nationalism in nineteenth-century Europe: ‘Nationalism was more important as a product than as a cause of national unification’. Moreover, even criticism of the actions of EESC and the Commission and of their ability to deliver even equitable access to appropriate actors in civil society may have the perverse effect of reinforcing the dominance of the ‘fiction’ that the delivery of participatory democracy is an appropriate task for these institutions or even an accepted good in the context of the EU. Indeed, following de Tocqueville (2003) and Skocpol (2003), opposition may even encourage further associative action and hence increase participation at the EU level. Morgan’s (1989: 63) discussion of the ascendancy of the concept of popular sovereignty is instructive here: ‘Insofar as Royalists rejected popular sovereignty altogether, they were arguing a lost cause. But in challenging Parliament’s claim to be the sole repository of that sovereignty, they expanded the dimensions of the fiction and contributed to its future success as the basis of modern government’. 
Billig (1995: 43–46) makes an important distinction between ‘banal’ nationalism and ‘hot’ nationalism. He (1995: 44) notes that the term ‘nationalism’ is frequently reserved by scholars to refer to ‘outbreaks of “hot” nationalist passion, which arise in times of social disruption and which are reflected in extreme social movements’. What is often neglected, he argues, is the day-to-day reinforcement of national consciousness which is so crucial to the maintenance of national regimes: ‘All over the world, nations display their flags, day after day. Unlike the flags on the great days, these flags are largely unwaved, unsaluted, unnoticed. Indeed, it seems strange to suppose that occasional events, bracketed off from ordinary life, are sufficient to sustain a continuingly remembered national identity. It would seem more likely that identity is part of a more banal way of life in the nation-state’ (Billig 1995: 46).

From this perspective, the institutionalisation of the institutionally generated ‘fiction’ concerning their contribution to participatory democracy in the practices of civil society may play an important role in encouraging the enhabitation of the EU in the lives of the actors involved, the rise of ‘banal Europeanism’ or the ‘invention’ of people for the EU.

**CONCLUSION: STRANGER THAN FICTION**

In this chapter it has been argued that a self-interested ‘fiction’, generated initially by the Commission and EESC and concerning the link between increased civil society involvement and the delivery of participatory democracy, is codified in the proposed Constitution for Europe. Although many commentators have recognised the flawed nature of the understandings of both civil society and participatory democracy upon which this fiction is based, it is argued here that this fiction is likely to have a significant impact upon the activities of civil society actors and the environment in which they operate. Not least, as commentators become increasingly focused upon the operational failures or inherent inability of civil society involvement to deliver enhanced participatory democracy at the EU level, there is a risk of ‘forgetting to remember’ that whether the EU’s direct democratic credentials are, or should be, improved or not and whether this can or ought to be achieved through the direct participation of civil society actors at the EU level, should be a matter of debate and choice and not accepted as a given.

The institutionalisation of the fiction, and its acceptance as a ‘self-evident truth’ (Morgan 1989: 14), encourages the increased involvement of actors at the EU level. This is likely, it is argued, to contribute further to the ‘enhabitation’ of the EU and the increasing spread of ‘banal Europeanism’ (Cram 2001a). Moreover, as we have seen, states generally precede the formation of the polities upon which they come to depend. The encouragement
by the state of associative behaviours may, according to de Tocqueville (2003) and Skocpol (2003) have important implications for the emerging polity. As became clear from the earlier examination of the women’s organisations from three different domestic contexts, in practice, the experience of civil society groups’ participation in EU activities is highly variable. Viewed from this perspective, however, the ‘fiction’ of civil society’s role in increasing participatory democracy may have an important role to play in ‘inventing the people’ (Morgan 1989) and may ultimately play a role in ‘enhabiting’ the EU or in shaping the reality of the environment in which civil society actors operate.

NOTES

1. It should be noted that Morgan (1989: 14–15) takes care to stress that this is not intended to be a pejorative term but to express the process of story-telling through which ‘self-evident truths’ become self-evident.
2. European Economic and Social Committee.
3. This chapter draws upon empirical research which was funded by the Economic and Social Research Council Grant No. L213 25 2023.
4. This is rather reminiscent of Haas’s (1958) argument that even a negative long run view of the EEC reinforces the process of European integration.
5. For a more detailed analysis of the work programme leading up to the publication of this White Paper see Cram (2001b).
6. Both bodies were established under the Employment Equality Act, 1998. The Equality Authority replaced the Employment Equality Agency which previously performed this role within a more limited sphere. The Equality Authority is mandated to: work towards the elimination of discrimination and prohibited conduct under equality legislation; promote equality of opportunity in relation to the matters to which the equality legislation applies; provide information to the public on the working of the Parental Leave Act, 1998; provide information to the public on, and keep under review the working of equality legislation, the Maternity Protection Act, 1994 and the Adoptive Leave Act, 1995; keep under review the working of the Pensions Act, 1990 as regards the principle of equal treatment. The Office of the Director of Equality Investigations is the main locus of redress of first instance for equality cases which arise under both employment equality and equal status legislation.
10. Survey responses.
11. The relatively new status of many of the devolved institutional structures makes it difficult to examine the impact of Europeanisation as distinct from the impact of devolution on relations between women’s organisations and the institutional structures. However, there is a general sense which emerges from survey and interview responses of having adopted a more ‘European’ model of governance within the devolved structures. The marked disparities in self-identification of women’s organisations from Northern Ireland and Scotland (see below) deserves, however, further investigation.
15. For the year 2000/1 a budget of £285 000 was allocated to the WNC. Only £50 000 of this budget is programme budget the rest covers staffing and running costs. Interview, London, September 2001.
Inventing the people

17. Survey response.
22. Survey responses.
23. Law 1228/82 the ‘Council for the Equality of the Sexes’, which was a consultative body reporting directly to the Prime Minister, operating as an independent service unit of the Ministry of the Prime Minister’s Office. With Law 1558/85 this was upgraded to the status of ‘General Secretariat for the Equality of the Sexes’. Today it is the government agency responsible for gender equality issues and is supervised by the Ministry of the Interior, Public Administration and Decentralisation.
25. Approximately £18 500 is used to fund activities carried out by women’s organisations for projects organised with the co-operation of the General Secretariat for Equality and a further £18 500 for organising conferences and other events. Interview, Athens, May 2001.
27. Interview, Athens, October 2000.
28. Of course some variation of experience is evident in all three cases but it is more stark in the Greek case.
29. The information presented in the following paragraphs is based on survey responses and individual interviews with members of women’s organisations in Ireland, the UK and Greece.
30. Of course some variation of experience is evident in all three cases but it is more stark in the Greek case.

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The policy and associative context

12. The professionalisation of interest representation: a legitimacy problem for civil society in the EU?

Sabine Saurugger

INTRODUCTION

Confronted with ever increasing criticism about its inherent democratic deficit, the European Union calls increasingly often upon the European civil society in its institutional reform projects (Commission 1992, 1997, 2001, 2002). European institutions define civil society in a broad way. Trade unions, non-governmental organisations, civic and religious associations, professional associations and grassroots organisations as well as business interest organisations are understood as civil society. Linking these groups to the European decision-making process is related to a new understanding of representation. On the one hand, territorial representation is considered to be the basis of a democratic European political system, on the other hand, forms of representation based on elements stemming from deliberative and associative democracy make their way to the institutional and even constitutional debates in the EU. Direct civil society participation is seen as a means to decrease the so-called democratic deficit and bring the European decision-making process closer to the individual citizen.

Given this normative conception of civil society participation in the EU decision-making process, empirical findings show an increasing professionalisation of interest representation at the European level. This phenomenon may take two specific forms:

1. On the one hand, business interest groups but also civic associations appeal more and more often to ‘representation professionals’ to represent their interests, for example, law firms, consultancies or lobbyists which leads to an increase in the number of these firms.

2. On the other hand, interest groups, may they be civic groups or economic interest groups, reorganise their internal organisational structures frequently. There are fewer staff coming from the grassroots level than
being employed after training in law or communication.

This means that we have to question the automatic links we draw between civil society representation and democracy (Saurugger 2003). The better informed and organised a group, the greater its chances are to gain access to the European institutions. Expertise and perceived efficiency are central access goods for civil society (Saurugger 2002; Bouwen 2002). However, this may lead to an expertise-representation gap (March and Olson 1998): the better structured and organised a group is, and the more it is therefore able to offer necessary expertise, the less its members feel represented.

The chapter is divided into three main parts. The first part analyses the concept of representation and alternative forms of democracy, in particular associative democracy. Some elements of this form of democracy can be found in the EU’s reform projects designed to link civil society closer to the decision-making process. The second part will then present an analysis of the ‘inevitable’ professionalisation of collective action, a concept very much linked to Weberian studies on the professionalisation of politics. Finally, the third part will show the limits of the European idea of associative democracy, based on empirical studies of the phenomenon of professionalisation at the European Union level.

FROM REPRESENTATION TO DELIBERATIVE AND ASSOCIATIVE DEMOCRACY

Linking civil society closer to policy-making processes implies a general concept of participative democracy. Without considering the totality of ‘democratic innovations’ (Saward 2003: 116), I will concentrate on two contemporary ideas of democracy: deliberative and associative democracy. Both consider civil society under the angle of a new form of political representation, and it is particularly the first concept which is put forward in the discussions regarding a European civil society. However, a closer look at official documents with regard to organised civil society shows a striking similarity with the academic debate on associative democracy, as we will see in a moment.

Deliberative democracy has been the dominant new strand in democratic theory over the past 15 years. This model, as well as the concept of associative democracy, arose out of the concern that dominant aggregative conceptions of democracy, which focus on voting and elections, were deeply inadequate. Instead, democracy must involve discussions on an equal and inclusive basis (Habermas 1987). Deliberative democracy looks at transforming people’s preferences through open and inclusive discussion, not merely to design
electoral procedures to reflect them (Bohman 1998). The communicative interaction and the taking into consideration of civil society are its central characteristics (Habermas 1978, 1987; Ferry 2000). According to this conception, a real public space, conceived along criteria of publicity and public discourse, would allow to establish the conditions of a complex participative democracy, where dialogue is continuously taking place between the political authorities and public opinion, between scientific expertise and political decision-making. However, in order to make this space of discourse and publicity reality, it is necessary to link it closer to the citizens.

The concept of deliberative democracy is particularly critical vis-à-vis the majority rule. There seems nothing especially worthy, in democratic terms, about an aggregate majority of views which simply reflect popular ignorance. On the one hand, deliberative democracy deals with the rejection of the representation concept, defended by strong social groups, such as environmental movements, representing new values that are ignored by traditional political parties. The deliberative conception downgrades the importance of the direct versus representative debate in democratic theory: each is less than adequate to democratic purposes if it fails to be sufficiently deliberative as well. On the other hand, it brought about mechanisms aiming at widening the participation of citizens in political life and at motivating the non-political masses (Murswieck 1985). Deliberative democracy looks at transforming people’s preferences and attitudes through open and inclusive discussion in which participants are given equal respect. In this sense it seeks to go beyond the ‘mere’ design of mechanisms to register the preferences that people already have (Saward 2001: 564). However, the studies of social movements show that contrary to the wish of reinstalling a system of direct representation by including citizens in national decision-making, the new approach reproduces elitism inside the system. Only the most competent and experienced individuals, capable of presenting their expertise, are selected and become the privileged interlocutors of public authorities and therefore reproduce the cleavage between masses and elites (d’Arcy and Saez 1985). Whereas deliberative democracy concentrates in particular on the element of process (that is linking civil society to the deliberative process) and how to decide on the appropriate setting of deliberative forums, associative democracy is more interested in the element of the institutional framework that would allow civil society to participate in policy-making procedures.

The concept of associative democracy is neither new nor particularly connected to the European political system. Its origins can be traced back to the pluralist conceptions of Dahl (1961, 1970) and Truman (1951) as well as to neocorporatism (Schmitter and Lehmbruch 1979, 1982). Associative democracy links both concepts, in underlining the freedom to associate as well as the policy implementation tasks associations perform in political systems.
Several authors (Hirst 1994, Cohen and Rogers 1995, Bellamy 1999, Schmalz-Bruns 1995, Grande 2000) plead this cause strongly when they remind the existence of consensual and corporatist political systems. They stress new forms of responsibility and accountability at the local level, reducing the role of the central State. Associations seek a ‘dispersed centralised democracy’ which combines ‘individual choices of liberalism with the public provision of collectivism’ (Hirst 1994: 189). In the logic of this argument, these ‘abnormalities’ of the classic model of collective representation can be considered as ‘modern’ forms of democratic systems. As in consensual systems, the central decisions are taken unanimously and the political process is more generally characterised by a consensual approach rather than by a search for majorities. From an institutional point of view, three characteristics should be underlined:

1. crucial decisions should be taken unanimously;
2. territorial and political interests of public and private actors must be considered in the policy-making processes; and
3. institutional guarantees are foreseen to protect minorities in the case of the majority decisions.

To guarantee citizens’ participation in these consensual and corporatist systems, one must take into account two options: on the one hand the strengthening of interest groups’ organisational capacities to control political power and on the other hand institutional checks and balances. It is especially the first option which interests me in the context of civil society participation in the EU’s decision-making processes. Private organisations possess better resources than individual citizens, which can be used in the representation of their interests in the public sphere.

The model of associative democracy, by binding the neocorporatist agenda to the requirements of the theory of liberal democracy, assumes that interest groups can be at the same time instruments to improve the efficiency of policy-making and assure citizens’ participation. In situations where political parties do not supply adequate access to citizens to allow them to participate in the decision-making processes, interest groups can offer opportunities for such participation.

In their concept of associative democracy, Cohen and Rogers (1995) emphasise not only the management capacities of these associations, but also their potential contribution to the democratic order. So, associations can strengthen popular sovereign power and political equality, improve distributive equity, civil consciousness, economic performance and strengthen the capacities of the State. If their participation is beneficial, they nevertheless have to meet a certain number of conditions: associations must cover vast...
domains of interest, which must be clearly defined; the groups involved are relatively encompassing with respect to potential membership; they must be capable of disciplining their members to whom they are accountable; they need a stable and generally accepted organisational structure; and, finally, they have to possess a quasi-public status which strengthens at the same time the power of the association over its members and its responsibility for the general interest (Cohen and Rogers 1995: 61).

While Cohen and Rogers’ vision of associational democracy is more oriented towards a top-down state fostering of appropriate associations for making public decisions and public services, Hirst’s understanding involves considerably more genuine decentralisation and localism. In Hirst’s associative democracy, the existing structures of liberal democracy are to be supplemented, and in some cases replaced, by a range of new institutions, mostly local associations such as religious and cultural organisations, interest groups and trade unions. Publicly funded according to a formula reflecting the quality, the coverage and the character of their provisions, these associations would take over much of the delivery of welfare services (Hirst 1994; Hirst and Bader 2001). With respect to the direct-representative divide, associative democracy adopts a new structure and radically modifies elements of representation and participation. The direct element is exercised not primarily through voting, but rather via participation in and through associational life. One’s needs are represented through associations which gain or lose materially according to how well they are perceived to serve the relevant interests.

The documents issued by the European institutions seem more influenced by Cohen and Rogers’ model than by Hirst’s. At the European level, organised civil society should be linked to the decision-making process as associations strengthen popular sovereign power and the legitimacy of EU institutions. These institutions, by consulting the organised civil society show that they are ready to take societal views into account. In particular the Commission’s proposals are thought to become more difficult to overthrow by the Council and the Parliament if they are based on a broad civil society consultation.

During the 1990s, we notice, as at the national level, an ascent of the ideas linked to the concept of participative democracy at the European level. The European Union, more than any other form of transnational governance, seems at present confronted with a dilemma opposing the efficiency of the system and the participation of its citizens (Dahl 1994, Scharpf 1999). Democratising the European Union and strengthening the participation of the citizens in the policy-making process would lead to a decrease of the Union’s efficiency. If, on the contrary, the efficiency of the system is improved, by establishing effective mechanisms to react to political problems which arise at the same moment at the national and international level, the participation of the citizens in the processes decreases.
If this analysis seems to apply more and more to the European level, criticised as opaque and technocratic, it nevertheless presents some shortcomings. The normative requirements of Cohen and Rogers’ form of associative democracy are only partially visible when looking at the activities of interest groups at the community level. Private actors active at this level, and, in particular those trying to influence the decision-making processes are not solely associations. Empirically, one observes national and European interest groups, organised associations as well as individual firms, which become increasingly numerous to choose the European level as their level of action (Coen 1997, 1998). They do not only differ by their organisational shape, but also by their financial and social resources, their capacity to produce expertise and to obtain access to the community institutions as well as their unequal participation in the central European decision-making entities – committees (Saurugger 2001). Even more so – the concept of associative democracy is put in jeopardy through the increasing professionalisation of interest representation, whose foundations can be found in the studies of political professionalisation.

THE PROFESSIONALISATION OF INTEREST REPRESENTATION

The phenomenon of the professionalisation of representation is an old one. From the moment a truly political activity appeared, scholars started to be interested in political staff as a research object and to look for a truly political and not economical explanation. Max Weber’s work can be established as a starting point (Weber 1963) to understand the professionalisation of political representation. According to Weber, the appearance of ‘a new sort of professional politicians’ is correlative of the development of the modern State. In the feudal society, every lord had to face his own expenses regarding administration, justice and war and thus possessed the instruments of political domination. Besides his political activities, the feudal lord had to exercise simultaneously the judicial, economic, and military management of his activities. The monarchy finally managed to expropriate the aristocracy of these means of domination and to assure for itself the monopoly of legitimate physical violence.

The centralisation by the monarchy of the means of political domination as attributes of state power is linked to the disappearance of a type of organisation in which all the managerial functions of society were simultaneously exercised by the same individuals. Their replacement leads to the bureaucratic state in which the functions are specialised and exercised by employees whose work is divided and centralised similar to a factory. Cut off
from the means of management and engaged in a more and more specialised activity, politicians are increasingly obliged to make a living of their activities, to live not only ‘for’ politics but also ‘on’ politics and to become professional politicians. The appearance of professionals as politicians also implies the appearance of competition for the conquest and the exercise of political power (Offerlé 1999).

The political division of labour presented in the above analysis can also be observed in the context of interest representation. The studies on unions and their professionalisation at the national level shows evidence of a similar phenomenon – struggles of power and a greater labour division. The empirical research on the professionalisation of interest representation at the European level should concentrate in particular on this aspect. In the same way an economic company gives a ‘brandname’ to its products to ensure the monopoly of a clientele and to dominate the market, the political principles, doctrines and programmes are, as underlines Schumpeter (1942), the brand-names which allow the professional politician to distance himself from competition, to establish and manipulate a clientele and to secure a dominant position in the competitive fight for political power. This is linked to the principle of political representation: the incapacity of the masses to manage their own interests makes the existence of professionals necessary who take them in charge. However, in the context of interest representation, it is important to ask of which nature is the relation between represented and representatives. Is the professionalisation of interest representation only one step further to efficient policy making?

A number of studies on ‘new social movements’ (Meyer and Tarrow 1998; Imig and Tarrow 2001) have addressed this question. Social movements can be defined as collective challenges to existing arrangements of power and distribution by people with common purposes and solidarity in sustained interaction with elites, opponents, and authorities. David Meyer and Sidney Tarrow underline in their study (1998) that professionalisation and institutionalisation may be changing the major vehicle of contentious claims – the social movements – into an instrument within the realm of conventional politics. Rather than putting forward utopian visions as demands or calling for comprehensive reforms in the ways political decisions are made, bringing ‘participatory democracy’, ‘power to the people’, or ‘grassroots democracy’, these professionalised social movements are less interested in changing the rules of institutional politics than in exercising greater influence within it – they wish to represent their interests.

Simultaneously, this phenomenon leads to a reorganisation of organisational structures. Increasingly, core activists today support themselves through social change efforts, as organization becomes a career option and social movements related organizations differentiate. Hereby we observe a similar transfor-
mation to political representation. Activists may move from movement to movement for both political action and employment. Professionalisation in this context is also about drawing boundaries between accredited persons and others (Moore 1996).

When looking at the political consequences of this professionalisation, Meyer and Tarrow observe a similar phenomenon as do March and Olson (1998). Although the fuzzy boundaries between professional activists and their constituencies may support the ethos of democracy, they may also undermine the prospects of sustained and effective mobilization. Ironically, a movement organization concerned with effecting democratic reforms in the polity may be most effective by abandoning certain democratic and amateurish political practices (see also McCarthy and Zald 1987). Different studies on the professionalisation of social movements however show that the professionalisation of these movements must be understood as a larger phenomenon than solely the bureaucratisation of the group. Linked to the formula of the network, professionalisation also means the establishment of different networks at different times. They have greater discretionary resources, enjoy easier access to the media and have cheaper and faster geographic mobility and cultural interaction. These features have made permanent, centralised, and bureaucratic organisations less important than they once were in attempts to advance effective challenges to elites or authorities (Kriesi et al. 1995).

However, these network structures are managed by professionals; a long experience in organising events, demonstrations or connections to the media are required in order to gain access to the highest positions. This development can also be observed at the European level and puts the grassroots legitimacy of organised civil society in jeopardy.

ORGANISED CIVIL SOCIETY MEETS THE EU:
INCREASED PROFESSIONALISATION REQUIREMENTS

At the European level, one of the central questions must therefore be: how do European citizens engage in collective action when attempting to influence European policies? Gary Marks and Doug McAdam reason that when they encounter the institutions of the European Union, Europeans model their behaviour around the techniques of interest representation that are accepted by European officials – they lobby them instead of engaging in more contentious behaviour (1996), or at least they must use these action repertoires in order to gain influence. Brussels based groups represent their interests through lobbying, organise conferences and carry out expert studies for the Commission, while country-based groups rather engage in more contentious
forms of politics (Guiraudon 2001). The collective action of non-state actors can therefore be qualified as professionalisation.

It is however important to differentiate between two forms of professionalisation of interest representation, as I pointed out in the introduction. On the one hand, professionalisation means that business interest groups but also civic associations appeal more and more often to ‘representation professionals’: law firms, consultancies or lobbyists. On the other hand, we observe that less interest group staff, in both civic and economic interest groups, are coming from grassroots levels than being employed after a formation in law or communication.

‘Interest representation professionals’

Regarding the first aspect, the German sociologist Christian Lahusen recently published a first quantitative research report on the number and organisation of professional lobbyists at the European level (Lahusen 2002). Until then no data were available on the numbers of commercial interest representation in the European Union. Lahusen differentiates amongst four forms of organisations: law firms, political consultancies, public relation consultancies and economic and management consultancies. Together they are some 300 companies established at the European level. The development of professional consultancies have benefited from the growing number of interest groups and organisations engaged in interest representation in the EU because of the higher demand for monitoring, counselling and lobbying services. Most European consultancies were founded around 1990. However, the establishment of these groups has evolved unevenly among the different types of consultancies. There has been propensity to establish law firms, and this fact has led to exponential growth of this segment during the 1980s and 1990s: while 16 law firms were established between 1976 and 1985, this number increased by 5.3 times in the following ten years. A similar observation can be made for the political consultancy sector. The two other sectors, finally, have been developing far less, both in regard to the absolute number of newly established companies and to the pace of this growth. Today’s consultancy market is therefore dominated by law firms and, to a lesser degree, by political consultancies.

Regarding the size of the consultancies, Lahusen’s findings confirm the assumption of a strong fragmentation of the market. Fifty per cent of all consultancies have seven or less employees, and only seven of them employ more than 50 staff. Distinguishing between the different types of consultancies, one can see that this fragmentation is particularly obvious amongst political consultancies: while consultancies employ an average of 57 staff members, this number drops to 18 and 20 employees per law firm and public relations agency and to ten staff members per political consultancy.
Regarding the question of the professionalisation of civil society, one of the most interesting results of Lahusen’s study concerns the different types of clients these firms possess. Individual companies play the leading role amongst customers. More than half of the consultancies work for government institutions, and every second consultancy delivers services to trade associations which rely on commercial services when representing the interests of their membership. Finally, every fourth consultancy indicates to work for non-governmental organisations, although the study does not distinguish which missions (environmental, cultural, social, and so on) these NGOs work on. The study does however differentiate amongst clients and sectors of consultancies. Thus, looking at political consultancies there is a higher proportion of companies servicing trade associations. This is also true for law firms. These findings confirm the co-operation between commercial consultancies and trade associations. E&M consultants, on their part, are significantly more involved with government institutions and NGOs while PR consultants are above average only as far as NGOs are concerned.

A closer look at the elite staff of the most important consultancy firms show that a large number have been recruited directly after their studies at the College de Bruges. Consultancy or law firms such as Baker & McKenzie also attribute grants to students of the College (Schnabel 1998). Whereas the College de Bruges, and its dependency, the College in Natolin, were among the first to ‘produce’ the elite of professional lobbyists, other academic places have started to offer lobbying classes to their students. In France, business schools and well-known elite schools offer classes on ‘Lobbying in the EU’, a development reinforced by the study reform which underlines the necessity to train the student to become a ‘future professional’. One of the central elements of these classes is the simulation game which is included in the student’s final marks and is therefore taken very seriously.

Thus, at the European level we see an increase of the lobbying market since the Single European Act of 1986. However, the pace of this growth has slowed down strongly since the early 1990s, without coming to a halt though. Rather, the growth is slower and showing a strong move towards the institutionalisation and professionalisation of the consultancy firms. While the data shows that consultancy firms still predominantly serve individual companies, they have successfully managed to enlarge their range of customers. In fact, government institutions, NGOs and trade associations are important new customers. Consultancies have become an important provider of services and skills to the specialised interest at the European level.

**Institutionalisation and ‘Expertification’**

Regarding the second understanding of professionalisation – the reinforced
in institutionalisation and expertification of their organisational structures – we observe a similar phenomenon at national and European levels. By joining the logic of linking civil society more strongly to the decision-making processes at the European level, European institutions and in particular the European Commission strengthen the capacities of individual citizens by cofinancing a certain number of European associations, while offering them a privileged access to the public arena, that is consultative committees (Christiansen and Kirchner 2000, Zürn 1996, Saurugger 2004). At the national level, research undertaken by Erik Neveu and others (Neveu 2002) on the relationship between civic interest groups and government officials has also underlined the importance of public incentives for the professionalisation of interest representation. In France, public authorities stimulated the development of some of the groups. It is the newly created Ministry of Consumers, which, from 1951 on, grouped together different structures in the field of consumption in the federal Consumers Union which obtained the status of an official and exclusive interlocutor on these issues. The Rueff-Armand report of 1959 underlines the contribution of mobilised consumers to the economic modernisation of society. The establishment of new structures within the Ministry of Economy followed the publication of this report. Created in 1967 with the legal status of a public establishment, the Consumers’ Association was one of the catalysts of consumer policies through its journal *Fifty Million Consumers*. For its part, the Ministry of Environment organised, from 1975 on, training courses for the executives of associations and social movements. But the participation in bureaucratic negotiations is also very time consuming. One of the causes of the crisis of the French unionism can be found in the absorption of its executives in a myriad of committees and bureaucratic commissions which accentuates even more the differentiation between representatives and represented.

The tight link between administrations and social movements can again be seen in the connections which tie up ‘new’ ministries or, at the European level, Directorate generals, (Environment, Consumers, Gender) with the mobilised groups. Because these ministries are often in a dominant position in the politico-administrative structures, not possessing ‘old boys ties’, nor budgets or rich external services, these administrations look for the support of associations which intervene in the specific policy field. These activities however suppose a huge work of expertise on the associations’ side which contributes to modelling the style of the militancy and leads to reinforced internal professionalisation. This phenomenon can also be observed at the European level. The organisational structures of civil society are reformed in order to better correspond to the perceived access structure of the European political system.

Research on groups representing interests of farmers and electricity
producers has shown a similar phenomenon. In the majority of European interest groups working in these areas, less grassroots personnel, coming from a national background with training in either agronomics or engineering are recruited, whereas more communication and law professionals (for example, coming from the College de Bruges or European management schools) can be found in strategic expertise jobs. Thus, the DBV (Deutscher Bauernverband – German Farmers’ Union) has recruited an Austrian graduate from the College de Bruges. Their French counterpart, the FNSEA’s representative in Brussels has studied at the IEP Paris, as has the FNSEA’s specialist for European affairs in Paris. Both are specialists in communication and have participated in a large number of simulation games on EU negotiations. All staff members of COPA (Comité des organisations professionnelles agricoles de l’UE) responsible for lobbying the EU have a university degree. They have never worked for any of the national Farmer’s Unions before or had a career in the farming sector (Hrabanski 2004).

Regarding the electricity sector, the staff of the Brussels’ offices of the main electricity firms have increasingly often received commercial or communication training. This situation leads the engineers deploring that their Brussels’ colleagues follow the commercial rather than the security strategies in representing the interests of the electricity producers. Technical expertise must be reformulated by professional lobbyists before being represented in negotiations.

This replacement of activists by communication professionals can also be found in other policy areas. The recruitment logic of associations at the European level corresponds more to a career logic than to an activist one. The example of the European Women’s Lobby shows after the gradual retreat of the founding mothers the emergence of a frontier between elected representatives and staff members. This frontier is a result of the establishment of a meritocratic recruitment procedure. Associational ‘civil servants’ seem to emerge (Cavaille 2004: 13).

In the field of trade unions, this institutional professionalisation is at the origin of important critiques regarding the ‘high level unionism’ or the ‘elite and expert unionism’ (Gobin 1997, Pernot 1998). The European trade unionists are considered to be the new elite, integrated in the universe of European high-ranking civil servants and other professionals. Here we observe clearly a competition between different modes of trade unionism which questions the legitimate basis of unionism (Wagner 2005).

It is however important to note that the career logic does not systematically replace the activist logic in the organised civil society structures at the EU level. In three of the four groups – farmers, the European Women Lobby and Trade unions – activists still represent the majority amongst the elected representatives. It is in the secretariats that we see a professionalisation of the
association, where individuals move from association to association in order to pursue their career path. This phenomenon is, however, growing in importance.

In all European and national interest groups studied, we have observed a greater internal work division leading in some cases to an in-depth organisational reform. During our semi-directive interviews, the persons underlined the absolute necessity of being able to speak a specific Brussels-talk, to possess moveable social capital and, in particular to being able to transform the presentation of requests (in form of expertise, taking part in committee structures, learning how to use the media). These results show a general tendency when compared to social movement and civic society studies mentioned above. A higher number of interests representation professionals are recruited by interest groups, both of civic and economic nature, which lead very often to internal conflict and the establishment of new organisational structures.

CONCLUSION

What are, then, the implications of this transformation of interest representation for the European political system? Is it efficient and effective for European institutions to call for wider civil society involvement if this involvement means more interest representation mediated by commercial lobbyists or professionals? And, finally, what do these research results mean for the new understanding of political representation such as the concept of associative democracy?

This study has attempted to underline the inherent ‘civil society participation dilemma’ the EU seems confronted with in its attempts to reduce its so-called democratic deficit. More civil society involvement in the EU political system also requires a more clearly structured civil society. Organisational reform which equips civic and economic interest groups with the required action repertoires seems the result of the attempts to link civil society closer to the EU decision-making process.

In order to speak about an associative democracy at the European level, the European institutions have to strengthen the interest groups’ organisational capacities to control political power. As Cohen and Rogers underline, if their participation is seen as beneficial, they nevertheless have to meet a certain number of requirements, as we have outlined earlier: associations must cover vast domains of interest, which must be clearly defined; the groups involved are relatively encompassing with respect to potential membership; they must be capable of disciplining their members to whom they are accountable; they need a stable and generally accepted organisational structure; and, finally, they
must possess a quasi-public status which strengthens at the same time the power of the association over its members and its responsibility for the general interest (Cohen and Rogers 1995: 61). If all this ‘professionalisation of interest representation’ is to be achieved, aren’t we confronted with a ‘legitimacy dilemma’ of the organised civil society? In order to make the European Union more democratic in linking civil society to the decision-making processes, the same civil society must show a number of structural characteristics that make it suitable to participate in this process: institutionalised structures, capacity to produce expertise, social and financial resources. This increased efficiency may however lead to a decreased democratic legitimacy and accountability. The absence of regulation entails the imbalance noticed between the actors possessing financial and social resources, as well as expertise to represent their interests and those who do not correspond to these requirements. The European system, at present described as ‘pluralist’, is, on the contrary, very closed to interest groups without personal contacts with European civil servants, or to those which do not possess either necessary resources or the economic legitimacy needed for access in the current situation of economic crisis as Pieter Bouwen shows in his chapter.

NOTES

1. See in particular Article 46 of the European Conventional Treaty, Title VI: ‘Principles for a participatory democracy’.
2. This civil society definition is so broad that it can be compared to the definition of interest groups (Jordan and Richardson 1987; Smith 1993, Offerlé 1998).
6. In particular influenced by the fact that these students have done an internship in one of the EU institutions.
7. In particular the Instituts d’Etudes Politiques (IEP).
8. These research results are based on semi-directive interviews with French and German interest groups active at the EU level.

REFERENCES


13. Business interest representation and legitimate European governance

Pieter Bouwen

INTRODUCTION

There is agreement in the field of European interest politics that business interests are much better represented in Brussels than other societal interests (Mazey and Richardson 1999: 121). The majority of the national and European interest groups and consultants in Brussels represent producer interests (Greenwood 1997: 101; Buholzer 1998: 13; Schmitter 2000). This chapter starts from the observation that whereas there have been numerous studies contrasting the participation of business interests in European public policy with the participation of diffuse and/or non-business interests (Pollack 1997), no research has been undertaken comparing the access of different forms of business interest representation to the EU institutions. Indeed, while the unequal participation of business interests as opposed to consumer groups, environmental groups and human right groups, and so on, has been extensively analysed, the access of different organisational forms of business interest representation to the EU policy-making process remains understudied. Four main organisational forms of business interest representation can be distinguished: national and European business associations, individual company action and political consultants (Bouwen 2002: 373).

The aim of this chapter is to analyse the extent to which the participation of these different organisational forms of business interest representation in EU decision-making contributes to the legitimacy of EU governance. First, it will be argued on the basis of a theory of access that the differences in the degree of access that the organisational forms have, is likely to have significant repercussions on the legitimacy of EU governance. The main reason is that the different forms of business interest representation do not have the same potential to contribute to the legitimacy of EU governance (Bouwen 2001). Second, an empirical investigation of business interest participation is undertaken to systematically assess the empirical relevance of the normative propositions and consequently make inferences about the contribution of
business interests to the legitimacy of EU governance. It needs to be emphasised that this theoretical and empirical inquiry into the implications of business interest representation for the legitimacy of EU governance does not want to divert attention from the problematic overrepresentation of business interests in the EU multi-level system. Nevertheless, the representation of non-business interests is deliberately not studied in this chapter in order to allow an in-depth analysis of the contribution of business interests to legitimate European governance.

Legitimacy has become a major issue for the European institutions since the Single European Act and the Treaty of the European Union. These major treaty revisions led to a significant transfer of political decisions and allocations from the national to the European level. Some authors have argued that this new institutional infrastructure has substantially weakened democratic influence and control at the national level, and that there has been a failure to compensate for this by establishing equally strong democratic institutions and processes at the European level (Christiansen 1997; Höreth 1999; Bellamy and Castiglione 2000). They claim the European institutions suffer from a ‘democratic deficit’ and propose institutional reforms in order to increase the legitimacy of European governance. Others, however, find little evidence that the EU suffers from a fundamental democratic deficit (Mény 2002; Moravscik 2002; Crombez 2003). Notwithstanding fundamental disagreement in the literature, the current debate on the democratic calibre of European governance legitimises the focus taken up in this chapter on the contribution that different forms of business interest representation can make to the legitimacy of the EU decision-making process.

For a long time, the academic and political debate on Europe’s democratic deficit has focused on the issue of territorial representation (Smismans 2003a). It follows that the parliamentary model has been used as a framework for defending the steady increase in the European Parliament’s competencies and its control over the European Commission (Dehousse 1998: 601; Lodge, 1996: 193). The issue of functional representation has remained surprisingly absent in the debate. In contrast with the European Parliament, which is composed of territorial representatives, the Economic and Social Committee (ESC) can be regarded as a functional assembly (Smismans 2000: 6). The ESC brings together ‘representatives of the various economic and social components of organised civil society’. More concretely, the ESC is composed of representatives of the various categories of economic and social activity such as representatives of producers, farmers, carriers, workers, dealers, craftsmen, professional occupations and the general public. While the ESC embodies a forum for functional representation within the EU institutional framework, the well-developed and widespread lobbying practices and multiple forms of interest group participation at the European level provide an alternative
channel for the representation of functionally defined interests *vis-à-vis* the EU institutions.

Only recently, certain authors have come to view the participation of interest groups in the European policy-making process as an additional source of legitimacy for the European polity (Andersen and Burns 1996; Wessels 1999; Smismans 2003a). An important reason for this is that the field of European interest politics that studies the functional representation of private interests in EU policy-making has not mainly dealt with the legitimacy of European governance, but with other issues. This literature has focused much more on characterising the overall system of interest representation, that is on determining whether it should be characterised in terms of pluralism or corporatism, and on depicting the different channels used by interest groups to influence the EU institutions (Streeck and Schmitter 1991; Bennett 1997; Kohler-Koch and Quittkat 1999; Bouwen 2002). However, there is disagreement about the extent to which functional representation can contribute to the democratic legitimacy of European governance. Whereas some authors regard it as substituting for the traditional basis of democratic legitimisation, that is the parliamentary model (Héritier 1999), others tend to view it more as a source of complementary legitimacy (Lord and Beetham 2001).

Also the EU institutions themselves, in particular the European Commission and the Economic and Social Committee, have taken up the issue of functional representation. Referring to their interactions with numerous interest groups and intermediary organisations, both European institutions have developed a legitimating discourse around the concepts of ‘civil society’ and ‘civil dialogue’ (Smismans 2003b). They argue that functional representation through the systematic involvement of civil society organisations in European policy-making may constitute a form of participatory democracy, complementing traditional representative democracy. Civil society is considered to play an important role in giving voice to the concerns of citizens and delivering the services that meet people’s needs. The organisations that make up civil society mobilise people and support.

Apart from trade unions, non-governmental organisations, professional associations and grass-roots organisations, the Commission and the ESC also consider business interest representation (e.g. employers’ organisations or sectoral business associations) to be an important part of Europe’s civil society. This is clearly in contrast with a specific strand in the literature on European civil society that considers only those groups as civil society organisations that are non-profit organisations and serve the general interest. This literature rests on the assumption that a clear distinction can be made between a political society composed of parties and political organisations, an
economic society composed of organisations of production and distribution and a civil society composed of associations, social movements and other forms of political communication (Cohen and Arato 1997). In the real world, however, the borders between civil society, state and market might not always be easy to draw. On that basis, it seems plausible for EU policy-makers to include different organisational forms of business interest representation in their list of civil society organisations.

It is the aim of this chapter to study the legitimating role that different organisational forms of business interest representation might play by participating in the EU policy-making system. In the next section, a new theoretical framework for studying European business lobbying, the ‘logic of access’, is discussed, and the implications of the framework for the legitimacy of EU governance are investigated. After these theoretical considerations, the third section presents an extensive empirical investigation of the interaction between business interests and the EU institutions in the EU financial services sector in order to make inferences about the relevance of this interaction for the legitimacy of the EU governance.

NORMATIVE IMPLICATIONS OF THE LOGIC OF ACCESS

It is the aim in this section to establish a link between the field of European interest politics and the debate on the legitimacy of the European Union. The starting point is the presentation of a theoretical framework for the study of business lobbying in the European Union. In this framework, the concept of ‘access goods’ plays a central role. Afterwards, this concept is used to establish the relationship with the EU legitimacy debate.

A theoretical framework to study corporate lobbying

The logic of access provides a theoretical framework for the study of business lobbying in the European Union. The framework seeks to improve our understanding of how business interests gain access to the EU institutions and potentially influence the making of legislation at the European level. More specifically, the logic of access has been developed in order to explain the access of different organisational forms of business interest representation to the three major players in the EU legislative process, that is the European Commission, the European Parliament and the Council of Ministers (Bouwen 2002 and 2004). The degree of access to these institutions is explained in terms of a theory of the supply and demand of access goods. Whereas business interests are responsible for the provision of access goods, the EU institutions want certain goods from business interests in return for ‘access’ to the EU
agenda setting and policy-making process. In short, in order to gain access to a specific EU institution, business interests have to provide the access good(s) demanded by that institution.

Access goods concern information that is crucial in the EU policy-making process (Bouwen 2002: 369). Three access goods can be identified. They concern three different kinds of information, and can be specified as follows:

1. Expert knowledge (EK): This access good concerns the expertise and technical know-how needed from the private sector to understand the market. This kind of information is indispensable for the development of effective EU legislation in a particular policy area. Example: The technical expertise provided by Barclays Bank to help EU officials and politicians to understand the particularities of the capital adequacy rules for commercial banks.

2. Information about the European Encompassing Sectoral Interest (IEESI): This access good concerns the information needed from the private sector about the European encompassing interest (EEI). In our sectoral approach, the EEI concerns the needs and interests of a sector in the European economic arena, i.e. the internal market. Example: The information provided by the European Banking Federation about the needs and interests of its members with regard to new capital adequacy rules for commercial banks.

3. Information about the Domestic Encompassing Sectoral Interest (IDESI): This access good concerns the information needed from the private sector about the domestic encompassing interest (DEI). In our sectoral approach, the DEI concerns the needs and interests of a sector in the domestic market. Example: The information provided by the Belgian Bankers’ Association about the needs and interests of its members with regard to new capital adequacy rules for commercial banks.

The importance of expert knowledge in the EU decision-making process has been widely acknowledged in the literature (Buholzer 1998; Pappi and Henning 1999). The European Commission, for example, does not often have this kind of technical market expertise. Even though the Commission does have a lot of technical know-how at its disposal, it is too distant from the market to be well informed.

The two ‘encompassing access goods’ have not been previously identified. It is therefore necessary to study the meaning of the concept, ‘encompassing interest’, in more detail. An interest is more encompassing when more interested parties are involved in the formulation of the interest. An aggregation of individual interests or interested parties takes place. The involved parties can be individual companies or associations.
association can, for example, be said to represent an encompassing interest because it is specialised in bundling the needs and interests of its member companies. Since the aggregation of interests takes place at the national sectoral level, the domestic encompassing sectoral interest is concerned. For the European encompassing sectoral interest, interests are aggregated at the European sectoral level. Two variables determine the ‘encompassingness’ of an interest represented by an interest group (Schmitter and Streeck 1999: 58). First, the demarcation of the interest group’s organisational domain is important. It determines the variety of interests and thus the kind of members the association wants to represent. Second, the representativity of the interest group plays a crucial role (Buholzer 1998: 55; Salisbury 1979: 222). It is based on the density of the interest group and is the basis upon which the interest group is recognised as a legitimate interlocutor by the public authorities. This detailed discussion of the different access goods is now used to study their implications for the legitimacy of the EU policy-making process.

Identifying the relationship between access goods and legitimacy

Before engaging in the discussion of the legitimacy of EU governance, it is important to first make a distinction between ‘input’ and ‘output’ legitimacy (Scharpf 1999: 6). Input legitimacy concerns democratic decision-making at the European level. In accord with the demands of input legitimacy, the democratisation of the European governance system should take place by involving citizens and interested groups as much as possible in the decision-making and monitoring processes. Output legitimacy concerns the EU’s general effectiveness in dealing with problems and generating policy outputs. Indeed, improved policy outputs engender an increased social acceptance or the increased legitimacy of the policy-making process. This is a technocratic or utilitarian source of legitimacy.

Scharpf’s distinction between input and output legitimacy is based on the input-output dichotomy in David Easton’s political system theory (1965: 112 and 1967: 32). In accordance with Easton’s ideas, Scharpf distinguishes a source of legitimacy both at the input and the output side of the EU policy-making process (Scharpf 1999: 6). He views the European Union as a political system and consequently applies the notions of input and output legitimacy at the systemic level. It is important to emphasise that, in contrast with Scharpf, in this chapter the notions of input and output legitimacy are applied at the sub-systemic or meso-level. Indeed, the theoretical framework and empirical study in this chapter are situated at the sectoral or meso-level and it is at this level that the two notions of legitimacy are applied. It will be argued that at the sectoral level a distinction can be made between business interest
representation as a source of both input and output legitimacy. This is further clarified in the following paragraphs.

In order to bridge the gap between the EU legitimacy debate and the literature on EU business interest representation, it is argued that a relationship can be identified between access goods, on the one hand, and input/output legitimacy, on the other hand. Input legitimacy is directly related to the two encompassing access goods, that is information about the European encompassing sectoral interest and information about the domestic encompassing sectoral interest. These access goods provide input legitimacy to the EU institutions because they serve as a source of information about encompassing and representative interests. Different interested parties have participated in the articulation of these interests, and the transfer of this information by the business interest representatives allows the interested parties to participate indirectly in the EU policy-making process. It is important to point out that the input legitimacy at the sectoral level would still considerably improve when not only business but also non-business interests would provide encompassing access goods to the EU institutions. Even though the logic of access has originally been developed in order to study the behaviour of business interests, it might be possible to apply the same logic to non-business civil society actors and consequently also investigate their capacity to provide access goods (Bouwen 2001). A balanced provision of access goods by both business and non-business interests would lead to the highest degree of input legitimacy. However, in this chapter we deliberately focus only on the contribution different organisational forms of business interest representation make to the input legitimacy of the EU institutions.

Output legitimacy is, on the other hand, closely linked with the access good, expert knowledge. This access good provides the EU institutions with the necessary expertise to deal with their problems efficiently. It increases the EU’s general effectiveness and thereby increases the EU institutions’ output legitimacy. Furthermore, output legitimacy is also related to the two encompassing access goods. The more encompassing the access goods provided by interest groups are, the more likely these interests groups can contribute to the implementation of EU legislation and consequently to effective generation of policy outputs (Bouwen 2002: 371). Why is this? In order to provide an encompassing access good, different individual interests have to be aggregated within the interest group. This means that more encompassing access goods are provided by interest groups which can aggregate more individual interests, thereby enhancing these groups’ potential to contribute to the implementation of EU legislation.

Because of the relationship that has been identified between access goods and legitimacy, the capacity that business interest representatives enjoy to provide these goods to the EU institutions determines the degree (more or less)
and the kind of legitimacy (input/output legitimacy) these interest representatives can provide. Therefore a systematic investigation of the capacity of business interests to supply the different access goods is indispensable. According to the logic of access, different organisational forms of business interest representation enable the provision of different access goods (Bouwen 2002: 372). In the EU, four main organisational forms of business interest representation can be distinguished: national and European associations, individual companies and political consultants. The following paragraphs investigate the capacities of these organisational forms to provide access goods.

The resource asymmetry between large and small firms explains the superior capacity of large firms to provide access goods. In comparison with associations or consultants, large firms are directly active in the market and they are therefore particularly good at providing expert knowledge. The strategies of large firms can be national or European. The capacity of an individual firm with a domestic strategy to provide information about the domestic encompassing interest remains low. The encompassingness of its interest is limited because only a single domestic firm is concerned. For the same reasons, large individual firms with a European strategy cannot claim to provide information about the European encompassing interests.

Associations are not as good as individual firms at providing expert knowledge because they have fewer resources and they have to deal with a wider range of issues. It has become something of an orthodoxy throughout the EU institutions that trade association officials are ‘industrial civil servants’ who lack the expertise needed to inform policy formulation (Greenwood and Webster 2000: 5). Because of their multi-layered organisational structure, associations are too distant from the market reality. European associations are specialised in building consensus positions by channelling the different opinions of their member associations. They aggregate the interests of their member associations, which, for their part, are already the result of a bundling of the needs and interests of these national associations’ member companies. This extensive consultation mechanism allows the European associations to present an encompassing European perspective on their sector and thereby to provide good quality information about the European encompassing interest. Similar reasoning can be applied to national associations. They represent the national sectoral interest and can therefore provide high-quality information about the domestic encompassing interest. Like other associations, national associations tend not to be very good at providing expert knowledge.

In contrast with individual companies and associations, consultants have a very limited capacity to provide access goods. Because consultants do not represent their own interests, they cannot provide the two encompassing access goods. Moreover, they can only provide expert knowledge when they
are specialised in a particular policy area. In Brussels, specialised consultants are an exception, however.

The preceding analysis allows us to derive a number of normative implications of the logic of access. While a clear relationship has been established between access goods, on the one hand, and input/output legitimacy, on the other, the investigation has also shown that the different access goods are provided by different organisational forms of business interest representation. Based on these two findings, it is possible to derive the extent to which the different organisational forms can contribute to the input or output legitimacy of the EU institutions with which they interact. Whereas the capacity of individual companies, and to a much lesser extent of consultants, to provide expert knowledge enables them to contribute only to the output legitimacy of the EU institutions, the specialisation of national and European associations in providing encompassing access goods guarantees that they will be able to contribute to both the input and output legitimacy of the EU policy-making process. A systematic overview of the business interests’ supply of access goods and their consequential capacity to contribute to the input or output legitimacy of the EU institutions is presented in Table 13.1.

**Table 13.1 Relationship between access goods and legitimacy**

<table>
<thead>
<tr>
<th>Access good</th>
<th>Legitimacy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual firm</td>
<td>EK</td>
</tr>
<tr>
<td>European association</td>
<td>IIEESI</td>
</tr>
<tr>
<td>National association</td>
<td>IDESI</td>
</tr>
<tr>
<td>Consultant</td>
<td>(EK)</td>
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</table>

NORMATIVE JUDGEMENTS BASED ON EMPIRICAL EVIDENCE

The need for empirical research on the EU’s democratic deficit

In the previous section, it was clearly shown that, through the provision of access goods, the interaction of the different organisational forms of business interest representation with the EU institutions has a direct impact on the legitimacy of these institutions. In order to assess the extent to which business interests can contribute to the legitimacy of the EU policy-making system, it is indispensable that the level of participation or the degree of access that different organisational forms enjoy to the EU institutions be studied. Indeed,
a specific organisational form will only be able to contribute to the legitimacy of an EU institution when the organisational form enjoys effective access to that institution. It can be concluded that a systematic empirical analysis of the participation of the different forms of business interest representation in the EU policy-making process constitutes a solid basis for a judgement about the contribution business interests can make to the legitimacy of the EU policy-making system.

In this section, an empirical study is undertaken, which aims to address a bias in the existing literature on the EU’s democratic deficit. This literature is characterised by a misplaced separation between normative reflection on political values and the empirical analysis of political systems (Lord 2001). An important negative consequence is the methodological underdevelopment of the area of inquiry concerned with the EU’s democratic legitimacy. Normative analyses of the democratic deficit are incomplete if they fail to include an empirical assessment of the institutional and societal possibilities for realising norms or values. Furthermore, when empirical evidence is taken into account in these studies, it mostly concerns anecdotal or ad hoc evidence. In order to remedy this situation, an extensive empirical study has been undertaken in the EU financial services sector. Its aim has been to systematically map out the participation of different organisational forms of business interests representation in the EU decision-making process. Access of business interests to the relevant institutions in the policy-making cycle, that is Commission, Parliament and Council, is taken as an indicator of the participation of these interests in the decision-making process.

The EU financial services sector has been chosen in order to allow an empirical check of the access of business interests. Over the past decade, Europe’s political leaders have focused their attention on the construction of the Economic and Monetary Union, but they failed to develop the regulatory infrastructure required for the integration of the Member States’ financial services markets (Zavvos 1994: 27–32; Dyson and Featherstone 1999). Since the success of the single currency cannot be guaranteed without well-functioning financial markets, the European Commission devised the Financial Services Action Plan in 1998 in order to inject new momentum into the task of building a single financial market (Mogg 1999: 11). The numerous legislative measures proposed by the European Commission since 1998 have had important distributive effects on the financial services providers, and, through lobbying and public consultation, they have consequently generated intense interactions between these private interests and the EU public authorities. Given the increased participation of financial services providers in the EU policy-making process over the past few years, this has become a particularly interesting policy area for the study of the potential contribution of these business interests to the legitimacy of EU policy-making in this sector.
Mapping the participation of business interests in EU decision-making

In order to map the participation of business interests in the EU decision-making process, it is necessary to systematically investigate the access that the different organisational forms of business interest representation have to the European Commission, the European Parliament and the Council of Ministers (Bouwen: 2004). However, both the EU institutions and the business interests may have interesting information about access. Since we are interested in relative access of the different organisational forms, in gathering data here it has been necessary to focus on the EU institutions. The latter are approached by the different forms in order to gain access and are therefore in the best position to evaluate the relative access granted to business interests. Business interests are mostly unaware of the access enjoyed by other private interests, and it is therefore extremely difficult for them to correctly assess the relative access they have to the EU institutions. Rather than studying business interests directly, the entire empirical investigation is therefore based on 63 semi-structured interviews with EU officials and politicians belonging to the three EU institutions. Rather than studying the Commission, the Parliament and the Council at the systemic level, the focus on the EU financial services sector constrains us to situate the empirical investigation at the sub-systemic level. Concretely, this means the Internal Market Directorate General in the Commission, the Committee on Economic and Monetary Affairs in the Parliament and the Council of Economics and Finance Ministers (ECOFIN) in the Council. When the names of the EU institutions are used in the rest of this chapter, they point in fact to these sub-systemic institutional realities.

A set of structured questions was developed in order obtain comparable and quantifiable data about the access of the four organisational forms of business interest representation. The interval scale measurement of the degree of access is calculated on the basis of the method of paired comparison (Guilford 1954; Swanborn 1993). This is a one-dimensional scaling method that allows ordinal scale values to be converted into interval scale values. The ordinal scale values were collected in the semi-structured interviews in which all the respondents had to rank the degree of their contact with the previously mentioned four organisational forms of business interest representation. The respondents, that is officials and politicians, had to indicate which of the four organisational forms they have had contact with, taking the usefulness and the regularity of the contacts into account. The resultant rankings indicate which organisational forms the respondents have chosen as their first, second, third and fourth choice. After converting the ordinal scale values into interval scale values, these latter were used to calculate the relative access values of the four organisational forms. In the next section, the relative access values are taken...
as an indicator of the participation of business interests in the EU decision-making process. 13

**Empirical results: unequal participation of business interests**

The percentages that result from the calculation of the relative access values are reported in Figure 13.1. From a comparative inter-institutional perspective, individual firms have a higher degree of access to the European Commission (34 per cent) and the Council (37 per cent) than to the European Parliament (20 per cent). Clearly national associations have a proportionally higher degree of access to the Council of Ministers (43 per cent) than to the Parliament (37 per cent) and the Commission (21 per cent). In addition, the data in the graph show that European associations have a much higher degree of access to the European Parliament (38 per cent) and the European Commission (43 per cent) than to the Council of Ministers (11 per cent). Finally, consultants have a very low degree of access to the three EU institutions (Parliament = 5 per cent, Commission = 2 per cent and Council = 9 per cent). The results of the empirical investigation show clearly that the different organisational forms have unequal access to the EU institutions. In other words, the different forms participate unequally in the EU decision-making process. This begs the following question: is the unequal participation

![Figure 13.1](image-url)
of the different organisational forms of business interest representation problematic for the legitimacy of the EU policy-making process? This question is dealt with in the next section.

Consequences for the legitimacy of the EU institutions

Earlier in this chapter, the extent to which different organisational forms can contribute to the input and output legitimacy of the EU institutions was derived. However, a precondition for this contribution is their effective interaction with and access to the EU institutions. Based on the results regarding the relative access of the different organisational forms reported in Figure 13.1, it is possible to determine the extent to which the different organisational forms of business interest representation contribute to the input and output legitimacy of the three main EU institutions. More concretely, the higher the degree of access, the more intensive the interaction between the business interests and the EU institutions. This entails a potential stronger contribution to the input and/or output legitimacy of the concerned institutions. Table 13.2 demonstrates the improved input and output legitimacy enjoyed by the EU institutions as a result of the degree of access of the different organisational forms to the EU institutions.

<table>
<thead>
<tr>
<th>Table 13.2 Improvement of legitimacy through business interest participation</th>
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<tbody>
<tr>
<td>Input legitimacy</td>
</tr>
<tr>
<td>------------------</td>
</tr>
<tr>
<td>European Commission</td>
</tr>
<tr>
<td>European Parliament</td>
</tr>
<tr>
<td>Council of Ministers</td>
</tr>
</tbody>
</table>

The assessments of improved legitimacy in Table 13.2 are based on the following reasoning. Whereas a relative degree of access of less than 30 per cent in Figure 13.1 is considered to be too low in order to result in an improvement of input and/or output legitimacy, a degree of more than 30 per cent is judged to contribute to a weak contribution to input and/or output legitimacy. A strong improvement is the result of a weak improvement of two different organisational forms.

When this reasoning is applied to the European Commission, it follows that the high degree of access that European associations (43 per cent) and individual companies (34 per cent) have to the Commission leads respectively


to a weak improvement in the institution’s input legitimacy and a strong improvement in its output legitimacy. This might be an important reason for the Commission’s attempts to encourage the interaction with intermediary groups and organisations. Both European (38 per cent) and national associations (37 per cent) have a high degree of access to the European Parliament. It follows that these two collective forms of business interest representation contribute to a strong improvement in both the input and output legitimacy of the supranational assembly. This could help to explain the privileged access European Parliamentarians give these representative forms of business interest representation. Finally, the relatively high degree of access that European associations (43 per cent) and individual firms (37 per cent) have to the Council of Ministers contributes respectively to a weak improvement in the input legitimacy and a strong improvement in the output legitimacy of this intergovernmental institution. The systematic interaction of Member States officials with national associations and individual companies seems to provide the Council of Ministers with an additional source of political legitimisation. It should be pointed out that the consultants’ low capacity to provide access goods and gain access to the EU decision-making process limits their ability to contribute to the improvement in the legitimacy of the EU institutions.

CONCLUSION

The logic of access and the empirical findings that have been presented in this chapter provide interesting new material for the normative discussion of Europe’s democratic deficit. This approach made it possible to bridge the gap between the EU legitimacy debate and the literature on EU business interest representation in two important ways. First, by refocusing the EU legitimacy debate from the classical issue of territorial representation on the issue of functional representation. And second, by establishing a relationship between the new concept of ‘access goods’ and the existing notions of input/output legitimacy. While it has been argued that input legitimacy is directly related to the provision of the two encompassing access goods, it is argued that output legitimacy is linked with both Expert Knowledge and the encompassing access goods. It has become clear that the capacity of different organisational forms of business interest representation to supply the above-mentioned access goods determines the degree (more or less) and the kind of legitimacy (input/output legitimacy) these business interests can provide to the EU institutions. Whereas the capacity of individual firms to provide Expert Knowledge allows them only to contribute to output legitimacy, the capacity of national and European associations to provide encompassing access goods
enables them to contribute to both the input and output legitimacy of the EU institutions.\textsuperscript{16}

This result clearly shows the different capacity of different organisational forms of business interest representation to contribute to the legitimacy of the EU institutions. Thus, the normative claim of this chapter is straightforward: EU institutions should preferably interact with collective forms of business interest representation, that is European or national associations, because they can make the most important contribution to the legitimacy of the EU institutions. It is interesting to note that the European Commission itself has openly declared in the past that it prefers to deal with collective forms of interest representation, that is associations, over individual organisations.\textsuperscript{17} Moreover, taking into account the Commission’s supranational perspective, the European Commission clearly stated to prefer dealing with associations at the European level rather than with national associations.

Even though \textit{ad hoc} contacts with individual companies or consultants will remain indispensable for the EU institutions in order to obtain the expert knowledge they require to fulfil their institutional role (Bouwen 2002: 378), they should preferably develop a solid relationship with associational representatives. Only the latter can simultaneously contribute to the input and output legitimacy of the concerned institutions. However, an important caveat needs to be made. Associations are not by definition capable of contributing to the two kinds of legitimacy. ‘Fig leaf’ associations constitute a real problem. They are apparent associations and are often established by a single firm. Their main objective is to conceal the real organisational form of the business interests concerned in order to improve their institutional access. It needs be emphasised that only associations that can provide encompassing access goods will be able to contribute to both input and output legitimacy.

The empirical analysis in the three main EU institutions was situated at the sub-systemic level, that is the Internal Market Directorate General, the Committee on Economic and Monetary Affairs and the ECOFIN. The results of the empirical investigation have shown the unequal participation of the different organisational forms of business interest representation in the EU decision-making process and the effects that entails in terms of input and output legitimacy. First, the high degree of access of European associations and individual companies to the European Commission leads to a weak improvement of the Commission’s input legitimacy and a strong improvement of its output legitimacy. Second, the important degree of access of both European and national associations to the European Parliament contributes to a strong improvement of the supranational assembly’s input and output legitimacy. Finally, the results also show that European associations and individual firms contribute to a weak improvement of the Council of Ministers’ input legitimacy and a strong improvement of its output legitimacy.
Through the detailed study of the contribution of business interests to the legitimacy of the EU institutions at the sub-systemic level, this chapter has attempted to contribute to the investigation of the overall legitimacy of EU governance. Indeed, it is assumed that legitimacy at the sub-systemic level of the EU polity is likely to contribute to the legitimacy of the polity as a whole (Smismans 2004). However, in order to assess fully the overall impact of interest representation on legitimate European governance, the theoretical and empirical investigation of business interest representation needs to be complemented by a theoretical and empirical study of the different forms of non-business interest representation. It might be fruitful to apply the logic of access to non-business interests in order to investigate the extent to which these civil society actors can contribute to the legitimacy of the EU institutions through the provision of access goods. This could be an interesting agenda for future research.

NOTES

1. The views expressed in this chapter are purely those of the author and may not be regarded as stating the official position of the institution for which the author is working. I am grateful to Dirk De Bièvre, Christoph Engel, Dieter Kerwer and Leonor Moral Soriano of the Max Planck Institute in Bonn and to the participants of the Workshop on ‘European Governance and Civil Society’ in May 2003 at ‘Sciences Po’ in Paris for their interesting comments. Finally, I would like to thank Stijn Smismans for his constructive feedback and Darrell Arnold for the language corrections.

2. For a definition of the concept of legitimacy and its implications take a look at Schmitter (2001).

3. This is the definition in the revised version of Article 257 of the EC Treaty since the ratification of the Treaty of Nice.


6. Also Franz Pappi (1999, p. 258) identifies expert knowledge as a crucial resource demanded
by the EU governmental actors in exchange for the control of policy decisions and the monitoring of information.

7. René Buhholzer (1998, p. 54) identifies legitimacy as an important exchange good (*Tauschgood*). As discussed in this chapter, the notions of legitimacy and encompassingness are closely related. It is therefore not surprising that Buhholzer’s *Tauschgood*, legitimacy, and the two encompassing access goods have similar characteristics. Also Franz Pappi’s (1999, p. 257) notion of public support as exchange resource can easily be related to the two encompassing access goods.

8. A parallel can be drawn to the well-known distinction between corporatism and mesocorporatism in the industrial relations literature. Whereas the concept of corporatism refers to a situation at the systemic level, mesocorporatism focuses on a phenomenon at the sectoral level (Schmitter, 1979; Cawson 1985).

9. Along the same lines, Smismans (2004) uses the input- and output dichotomy to analyse the legitimacy of different institutional settings for functional participation at the meso-level.

10. The different parties who participate in the articulation of the common or encompassing interest often have a different degree of influence over the final common position. Some parties are more resourceful than others and can therefore exercise more influence in the negotiation and deliberation process.

11. Two additional variables co-determine the extent to which private interest groups can contribute to compliance with EU rules. The first variable is the capacity of interest groups to control their members. Not in all interest groups do the organizational structures and decision-making mechanisms allow a high degree of control over membership (Greenwood and Webster 2000, p. 2). The second variable is the relationship between private interest groups and public authorities. A close, co-operative relationship can be the basis for a neo-corporatist arrangement of private interest government, whereby private interests are made co-responsible for the implementation of legislation in an effort to reduce the authorities’ implementation costs (Streeck and Schmitter 1985).

12. At most, organisational forms can provide, at least to some extent, each of the three access goods. When they succeed in this, it is possible to develop a ranking of the organisational forms’ capacity to provide the different access goods (Bouwen 2002, p. 378). In order to streamline the argument we only focus here on the access goods that can be best provided by the different organisational forms.

13. For a more detailed description of the methodology and the calculations see Bouwen (2004).


15. See Note 4 for the multiple initiatives by the European Commission to improve its direct interaction with civil society organisations.

16. When consultants are specialised in a particular policy area, they can also provide Expert Knowledge and thereby contribute to the output legitimacy of EU policy-making.

17. Commission communication: ‘An Open and Structured Dialogue Between the Commission and Special Interest Groups’ (93/C 63/02).

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The policy and associative context


Conclusion
14. Civil society and European governance: the interdisciplinary challenge of reflexive deliberative polyarchy

Stijn Smismans

CIVIL SOCIETY’S CHALLENGE TO EU STUDIES

The relationship between civil society and European governance constitutes both an analytical and a normative challenge to EU studies. This book has only taken a first step to reply to these challenges.

The Analytical Challenge

Beginning with the EU lobbying literature one has gradually obtained a better picture of the involvement of interest groups and associations in European policy-making. In addition to the initial more descriptive accounts, there has also been a further development of different theories to explain the dynamics of this reality, such as epistemic communities (Haas 1992; Richardson 1995), advocacy coalitions (Sabatier 1998; Ruzza 2004), political opportunity theory (Ruzza 2004; Hilson 2002), theory of demand and supply of access goods (Bouwen 2002); or policy network analysis (Schneider et al. 1994; Conzelmann 1995; Richardson 1995; Kohler-Koch 2002). The ‘civil society–European governance’ perspective provides additional lenses to examine this reality and to place it in a broader framework.

The governance dimension allows us to analyse not only the role of civil society participation in agenda-setting and policy-formulation, but also to address the role of civil society organisations at multiple stages of policy-making, such as in the implementation and control of EU regulation (for example Heinelt and Meinke in this volume) or in the implementation of EU programmes (for example Etherington 2002). It is not merely a question of assessing their access and influence, but of understanding modern governance in which multiple actors interact in different policy instruments and modes of governance. There is still some way to go in linking studies on interest
groups and civil society organisations with policy analysis. A promising linkage may be the one between policy network analysis and the study of tools and instruments of policy-making (see Kohler-Koch and Eising 1999). An important research agenda, for instance, remains open with regard to public–private interactions in new modes of governances such as the Open Method of Co-ordination (for example Armstrong in this volume and 2003; Smismans 2005) or networking agencies (Smismans 2004a: 285–91).

It is important in this respect to adopt a broad interpretation of the concept of governance. The European Commission, for instance, has taken an instrumental and restrictive definition in its White Paper on European Governance, focusing on civil society participation in its policy shaping role but not in its role as a civil service or policy manager. ‘Governance is conceptualized as having a great deal to do with participation and consultation but nothing to do with how the Commission actually treats those citizens who apply for grants, compete for contracts, or are designated to spend Commission money’ (Sbragia 2002: 4). Yet it is not merely a question of taking into account all stages of policy-making. The civil society concept also introduces us into the debate on where governance is or should be public and where private. In its broader interpretation governance includes all forms of institutionalised social steering, and it is not limited to the steering provided by public authorities. As Guy Peters (2000: 44) argues, a ‘governance approach’ would then start from the assumption that governance will occur and then asks how, and through what institutional mechanisms it occurs in particular settings. The role of private governance, in particular in a transnational setting, such as standardisation mechanisms – and its interaction with European policy-making – is a promising avenue for further research. More generally, one could place the EU civil society–governance debate in a more global context, in which multi-level governance does not only mean taking into account the territorial ‘sub-levels’ of the European polity and their interaction with civil society, but also the normative settings beyond the European level. In international relations, the role of NGOs became an attractive topic of debate more than a decade ago. Until now, this debate has taken place independently from the civil society debate in the EU context. The reality though, is one in which the European regulatory and normative setting is placed in a more global context of socio-economic steering, and it is in this multi-level context that civil society organisations try to play a role. Dealing with these levels entirely separately is artificial.

As this book has shown, the normative value-laden character of the civil society concept also raises new analytical research questions. Sabine Saurugger, for instance, has put the claims of associative democracy to the test by analysing the increasing professionalisation of EU interest representation.
Carlo Ruzza has used frame-analysis to assess the democratic contribution of civil society organisations. Questions of collective action, such as the available strategies for organisations to gain access to European policy-making (for example Erne in this volume; Bouwen and McCown 2004), have entailed normative questions, such as the representative character of different types of organisations (Bouwen, Saurugger), or the contribution of such collective action to the formation of a European public sphere (Erne, Cram). Contributions like those of Erne and Cram bring the debate on civil society and the European public sphere beyond the social movement and collective action debate in which civil society actors contribute mainly to the formation of a European public sphere through protest outside of governance mechanisms. The question, though, of how civil society involvement in governance relates to protest or more politicised movement activities in the common formation of a European public sphere remains an important topic for further research. Little also remains known about the internal participatory organisation and representative character of European civil society actors. Moreover, to what extent there is a need to test the representativity of civil society organisations remains itself a subject of discussion. Political scientists dealing with social movements may baulk at this idea and consider analysing of representativity of organisations a non-issue. It may be surprising, but in this book it is an administrative law scholar – a discipline traditionally concerned with questions of accountability of governance – who warns most explicitly of the need to be cautious in applying public law criteria such as representativity and accountability to civil society actors that act in governance mechanisms. Carol Harlow calls for respect of the traditional public/private boundary.

How one replies to the question of representativity depends on the normative lenses that are used. However, the normative challenge of the civil society–European governance relationship is no less important than the analytical one.

The Normative Challenge

The normative challenge of the interaction between civil society and European governance concerns both political theorists and lawyers. Their task of providing some guidance and tools to structure the role of civil society organisations in European governance is particularly difficult for three interrelated reasons.

First, although political theory has dealt extensively with civil society, it has hardly dealt with complex modern governance structures where civil society provides an intermediating role between the political, economic and private sphere. Theories on civil society, social capital, or communautarianism are
actually ill-suited to providing guidance on public–private relationships in today’s modern governance mechanisms, since they precisely stress the independence of civil society from (public) governance. While democratic theory has taken as primary focus the relationship between citizen and polity, in terms of individual rights and political representation on a territorial basis, the idea of participation of civil society organisations in public governance has not really entered into the core of democratic discourse. Theories of interest intermediation, like (neo)pluralism and (neo)corporatism may be better placed to shed light on public–private relationships in governance, but one should recall that both have above all been used as descriptive models. In particular authors on neo-corporatism have stressed that they do not intend to present a normative model.2 Neo-pluralism did develop into a normative proposal, although it had initially started as an analytical model.3 As a normative frame, it has greatly inspired the shaping of interest intermediation in US administrative law (Stewart 1975; Sunstein 1985–86; Shapiro 1988: 36–54). Yet one still needs to understand whether neo-pluralism – also criticized in the US context – can be of normative inspiration for the European polity (see Smismans 2004a: 447–455).

The same problem emerges in relation to one of the few normative models that have placed the role of civil society organisations at the centre of democratic theory, namely associative democracy. Contrary to much of the civil society literature, associative democracy does not reduce the role of civil society to an independent sphere that can only influence the traditional democratic institutions through parliamentary politics. Acknowledging the intermediating role of civil society organisations and their self-governing potential, associative democracy seems an interesting model to think about public–private relations in modern governance. Yet the model is particularly difficult to adjust to the EU context. Cohen and Rogers’ model of associative democracy (1995), for instance, builds strongly on the potential of public authority to shape the activity of associations, and links the (re-)design of interest intermediation to the accomplishment of specific policy objectives such as distributive equity. Whereas several authors have already questioned such artefactuality of associations and put into doubt the desirability of such far-reaching state intervention from a democratic point of view (Hirst 1995: 102; Offe 1995; Schmitter 1995: 169), the feasibility of this approach is even lower at the European level where public authority lacks the power for such intervention. Moreover, the social democratic redistributive agenda implied in Cohen and Rogers’ model (Schmitter 1995: 117; Katzenelson 1995: 196) stands very far from the current integration project as (still or maybe ever more) mainly constituted as a market building and regulatory project. On the other hand, more bottom-up approaches to associative democracy, such as the model of Hirst (1994 and 1995), building up associations by political campaigning...
and voluntary action in civil society rather than by state crafting, tend to go along with the main civil society literature that conceptualises associative activity as rather independent from public governance.

Both the examples of neo-pluralism and associative democracy show that in addition to our first problem – namely, the lack of democratic theories that deal with the role of civil society in interaction with governance rather than as a sphere outside governance – one has to face a second problem, namely that normative theories, be they in political theory or in public law, have strongly developed within the framework of the nation state and have a hard time adjusting to the reality of multi-level governance. This problem is well-known, but it is worth recalling that while political theory and public law have tried to adjust to the idea of multi-level government, they are still in their infancy in dealing with the horizontal governance dimension. The idea of the European Union as a polity with multiple vertical layers is common to both lawyers and political theorists, and can be traced back to the shadow of federalist thought that has accompanied European integration from the start. The complexity of public–private relationships in European governance is only more recently a theme of academic research and has for the moment mainly been approached from an analytical perspective, using for instance the conceptual lenses of policy analysis, network analysis and studies of modes of governance (for example Héritier (ed.) 2002). Lawyers have only taken a first step to look at the legal aspects of the horizontal governance dimension (for example Scott and Trubek 2002). Political theorists on the other hand, contributed strongly to the ‘normative turn’ in EU studies during the 1990s, building on the democratic deficit debate and trying to make sense of the sui generis non-state character of the European polity – rethinking, for instance, the idea of a demos and of citizenship – but their analysis falls short of providing a normative framework for the complexity of European governance mechanisms and theorising public–private relationships in a multi-level polity. This relates obviously to our first remark regarding the shortcomings of political theory in general in addressing the complexity of public–private relationships.

The third difficulty in guiding the role of civil society in European governance lies in the underdeveloped relationship between public law on the one hand, and political and democratic theory on the other hand. Questions of institutional design regarding public–private relationships cannot be limited to abstract considerations but have to meet with the institutional and legal tools available. As Willke (1992: 383) argues, there is a strong need to ‘bring legal theory back in very close relation with democratic theory’, a relation which has been weakened by decades of disciplinary specialisation. This is true in general for constitutional and administrative law in relation to political theory, but this is even more the case when dealing with the interplay between
governance and civil society. As far as civil society theories stress the independence and informal nature of this social sphere, the interaction with legal approaches can only be thought of in terms of providing the legal tools to protect this sphere from public intervention. Yet, these theories do not offer much to guide lawyers in structuring the active involvement of civil society organisations in governance mechanisms. Moreover looking at the role of civil society in governance, lawyers cannot limit their analysis to public law but bump up into private law. This has two further complications; namely private law has even less developed relations with political theory than public law. Moreover, the increasing involvement of private actors in public governance, or vice versa the reliance on private governance mechanisms challenge the distinction between public and private law, and thus a basic normative frame of legal thought itself.

Faced with this three-fold problem, the recent debate on European constitutionalism has done little to contribute to our normative thinking on the complexity of European governance mechanisms and relations with civil society. It is in the nature of constitutionalism to bridge the distance between public law and political theory, and of European constitutionalism to place constitutional thinking in a non-state context. The recent European constitutional debate has indeed contributed to stretching out constitutionalism to the non-state context and bridging between law and political theory. However, the debate that has led to the signature of the Constitutional Treaty can still be described in terms of ‘traditional EC constitutionalism’, as characterised by, among others, a concentration on the formal institutional power-structure, and definition of rights as a constraint of EU power, in opposition to ‘new governance’ characterised by fluid sharing of powers, policy integration, multi-level governance including a wide array of civil society actors, and the definition of rights which should positively shape the conduct of all actors within this system of governance (De Búrca 2003). The lack of attention for this ‘fluidity’ does not need to surprise as constitutionalism in general has not come to grips with the horizontal governance dimension.

CIVIL SOCIETY AND EUROPEAN GOVERNANCE: THE NEED TO MAKE DELIBERATIVE DEMOCRACY MORE REFLEXIVE

Deliberative Democracy, Once Again?

Given the particular challenge of ‘civil society and European governance’ to political theory and law, this book commenced with a theoretical section
authored by scholars in this field. Invited to provide a normative theoretical contribution to this book, Magnette, Armstrong and Warleigh, independently from one another, relied strongly on deliberative democracy – and in particular on directly deliberative polyarchy – in their search for a normative framework for EU–civil society relations. This is neither a mere coincidence nor a mere attempt to be in tune with the ‘deliberative turn’ that has dominated democratic theory since the 1990s (Saward 2000: 5). The ‘deliberative turn’ allows us to go beyond existing models of interest representation such as neo-pluralism and neo-corporatism which treat ‘interests’ as a given, and to look at interest intermediation as a participatory sphere in which actors will adjust to each other by rational argument. Habermas’ writings appear attractive in as far as they pay particular attention both to the importance of civil society and to the role of procedures and law in ensuring a democratic set-up. The latter focus also contributes to bridging the gap between political theorists and lawyers. Yet as Armstrong convincingly argues in this volume, Habermas does not provide an answer to the relationship between civil society and public institutions in contemporary complex governance.

Habermas stresses the importance of civil society in providing a complex communication network of informally organized publics – from private associations to the mass media – constituting the ‘public sphere’ (Habermas 1996: 275) which may influence political decision-making. Yet his ‘two-track process of collective decision-making’, with on the one hand, the spontaneous energy and informal deliberation of civil society, and on the other hand the deliberation within the formal structures of representative democracy has been repeatedly criticised (Cohen 1998: 18; Forbath 1998: 273; Fine and Smith 2003), in particular in that the relationship between the two is reduced to the influence of the public sphere on traditional politics via parliamentary representation. Put differently, the link between civil society and ‘the State’ lies in ‘politics’ via territorial representation, whereas ‘administration’ retains its neutrality and complex public–private governance interactions are difficult to conceive.

Directly deliberative polyarchy (DDP) may then appear as an attractive alternative. It ‘decentralises’ political decision-making into lower-level units where citizens examine their choices in the light of the relevant deliberations and experiences of others, upon which information on these local experiments is pooled at a more central level that will ensure monitoring and encourage mutual influence and learning and revisability of objectives and instruments. As Armstrong says, ‘we move from a [Habermasian] conceptualisation of civil society as normatively “privileged locus” of critique and resistance without power to one that accounts for civil society as a potential participant in democratic experimentalism … DDP brings civil society directly into governance as a concrete political and legal actor.’ From this perspective,
diversity – such as in the EU – is seen as a favourable condition, enabling multiple learning in decentralised experiments, rather than an obstacle (also Warleigh in this volume).

However, as also results from the first part of this book, there are shortcomings in the model of DDP, in particular as a normative framework for European governance. One can sum up the difficulties in two main arguments.

First, DDP stresses direct participation and is thus not content with classic forms of consultation of stakeholders. As Magnette rightly argues, for the same reason DDP also refuses to rely on the vigilance of the stakeholders who hold the regulators accountable. Yet this stress on ‘directness’ impedes not only delegation to regulators made accountable to stakeholders, but makes it also difficult to conceive of ‘functional representatives’ acting on behalf of citizens rather than having individual citizens participating directly. As Armstrong says: ‘while proponents of DDP clearly have in mind an active role for civil society in governance processes, nonetheless, the dimensions of this role are somewhat under-specified’. DDP is not clear on how it conceives the role of civil society organisations. The amount of citizens participating directly in forums of deliberation and experimenting will always be limited – due to functional differentiation and complexity in society, even in a much decentralised setting. Which means that most deliberation and experimenting will take place via functional representatives who relate to citizens by associative interaction and representation. In particular in the context of a supranational polity as the EU – dealing with often very technical issues, and where more centralised pooling requires knowledge of foreign languages – one needs to give in on the directness requirement.

Second, the scope of DDP is not clear, in particular in relation to traditional democratic institutions. Cohen and Sabel have built DDP on Dahl’s concept of polyarchy, namely it ‘refers to systems in which virtually all adults have rights of suffrage, political expression, association, and office-holding, as well as access to diverse sources of information; in which elected officials control public policy; and citizens choose those officials through free and fair elections’ (Dahl 1989: 221, quoted by Cohen and Sabel 1997: 318). For Dahl, democracy may be defined as rule by multiple minority oppositions, that is depending on the particular decision being taken, different groups have access and power to control the decision making outcome due to a competition in an ‘open contest for electoral support’ (Dahl 1956). Partially compatible but not identical with this, DDP has used the concept also to refer to ‘the permanent disequilibrium created by the grant of substantial powers of initiative to lower-level units’ (Gerstenberg and Sabel 2002: 292). However, there is a tension between these two dimensions of polyarchy which is not worked out in the model. As Armstrong says ‘the more that experimental designs provide “exit” options to return conflicts to traditional institutions for “ultimate” resolution,
the less that proponents of radical democracy can justify treating DDP as an “alternative” to mainstream democratic constitutionalism rather than an “addition”. … It is unclear how much of the architecture of “traditional” democratic constitutionalism is presupposed and how much remains once experimental democracy takes hold’. The scope of DDP is thus unclear. As also argued by Magnette, although DDP is presented as an alternative to deliberation at a distance by a political elite and even as the principle of a new constitutionalism, it does not seem to be a comprehensive doctrine aimed at replacing all the other modes of democratic regulation.

To summarise; as a normative framework to think about the relationships between civil society and European governance DDP may stress too much the directness of participation and too little the existence and interaction of different normative narratives. The following section will pay attention to the existence of different normative narratives to look at civil society in European governance. On this basis the final section will plead for reflexive deliberative polyarchy that can compensate for the lack of ‘directness’ by creating awareness of and taking into account different disciplinary languages.

The Legitimacy of European Governance and Different Normative Narratives

The idea that different normative narratives may inspire the legitimacy of the European polity is not new. Several authors have argued that different sources of legitimacy are fused in the EU (Weiler et al. 1995; Héritier 1999; Wessels 1999; Lord and Magnette 2004; Smismans 2004a). According to Wessels (1999: 267), ‘features known from (neo-)corporatist approaches merge with those of technocratic policy-making mixed with parliamentary elements and that of the rule of law. The EU as polity would then be based on a new mix of several different concepts of legitimacy’. In a comparable sense, Héritier argues that alongside the given formal structures of intermediate democratic legitimisation of the Council, and the direct legitimisation of the EP, substitute elements of democratic legitimisation can be identified in the European polity. Among them she names what one can consider as civil society’s participation in European governance, namely the establishment of ‘supportive networks’ that seek to secure input-legitimisation by allowing the actors concerned to take part in policy-shaping (Héritier 1999).

Weiler and collaborators (1995) also linked different sources of legitimacy to different modes of European governance. They distinguished three models of European governance – international, supranational, and infranational – to which correspond different models of democracy – respectively consociationalism, pluralism/competitive elitism and neo-corporatism. Lord and Magnette (2004: 190), though, argue rightly that there are shortcomings in
this ‘partitioning’ of sources of legitimacy according to modes of governance or by policy sector, since even single issue areas often turn out to be dependent on a variety of legitimating approaches, and the mix of legitimacy approaches to be found in any single policy domain may change over time. I have made this argument elsewhere (Smismans 2004a) precisely in relation to different models of civil society participation in European governance. Each of such forms of participation has its own normative assumptions, and one should take into account how such different models, as potential different sources of legitimacy, are combined within a particular policy sector, that may change over time.

The obvious question is then how these different sources of legitimacy stand towards one another. Lord and Magnette (2004: 188) argue that each vector of legitimacy – identified in their case as indirect, parliamentary, technocratic and procedural legitimacy – has elements of both compatibility and exclusivity in its relations with the others, and that the boundaries of conflict and complementariness between the vectors are unlikely to be static. Lord and Magnette (2004: 198) even argue that the permanent tension between the different vectors of legitimacy that are to be found in the European arena can finally be considered an answer to one of the oldest dilemmas in democratic theory; namely: in what measure one generation adopting a constitution can establish ‘rules of the game’ that subsequent generations are obliged to accept. From this perspective the perpetual conflict between approaches to EU legitimacy softens any tendency towards constitutional determinism and can be considered a virtue insofar as it feeds a continuous process of constitutional deliberation, whose political opportunity structure is not a one-off constituent assembly but a seemingly iterative series of conventional deliberations and intergovernmental conferences (IGCs).

Yet the problems related to the diversity of sources of legitimacy and legitimating narratives are not entirely resolved by the argument that there would be a continuous process of constitutional deliberation. First, one should ask to what extent the process of constitutional deliberation really integrates the many sources of legitimacy. I have shown elsewhere (Smismans 2004b), for instance, that the constitutional debate in the Convention and the IGC preparing the constitutional treaty, has largely ignored the horizontal governance dimension in terms of public–private relationships and civil society involvement; an issue which has been dealt with – and only under certain aspects – within the ‘sub-constitutional debate’ of the White Paper on European governance and its follow-up. Second, one should ask who is participating in this constitutional deliberation. This includes the ‘traditional’ question as to what extent the constitutional debate, such as the debate that has taken place in the Convention and the IGC preparing the Constitutional Treaty, links to the broader public or remains a topic for an elite who has not been able
to create a broad public debate on it (Deloche-Gaudez 2001, De Schutter 2002, De Búrca and Aschenbrenner 2003). The French and Dutch no-vote to the Constitutional Treaty underline this dramatically. Moreover, it is not merely a question of the link between political representatives and broader public, but also of the language of the constitutional and normative debate, namely it is the language of constitutional lawyers and political theorists. It appears self-evident that the normative debate on the European polity is dominated by the language of constitutional law and political theory. Yet this is not entirely unproblematic.

One tends to ignore that there are many different perspectives and languages beyond constitutional law and political theory to look at the European polity, each of which may function as sources of its legitimacy. Economists, for instance, conceptualise European integration and its legitimacy in very different terms than do lawyers. Or still, private lawyers will have a different view than public lawyers. These different languages, or ‘different communicative functions or systems within the processes of governance, such as law, politics, economics, administration, sciences, etc.’ (Sand 1998: 278), provide their own legitimating discourse on the European polity.

This implies that the problem of compatibility and exclusivity between different vectors of legitimacy may be more profound than one expects at first sight. It is not merely a question of combining indirect with parliamentary and procedural legitimacy, all of which can fall within the same language of constitutional thought, but having to deal with different languages.

The easy way out would be to argue that each communicative system provides its own legitimating arguments for the European polity, independently from one another, in which case constitutional thought would be simply one framework amongst the others. However, while within the processes and institutions of governance these different systems of communication will run parallel and separately, they are also mutually interdependent. Inger-Johanne Sand (1998: 279), for instance, described convincingly the European integration process as an interaction, overlapping and contrasting different social and communicative functions and their rationalities. Economists suggested more intensive forms of trade harmonisation. Partially on this basis, the political processes have pronounced quite general goals and issued directives on creating a common and inner market; further interpreted and reframed, though, by legal interpretation; whereas the administrative strata of the Commission have displayed many elements of a relative independence in their preparatory, policy-making and implementing work.

The problem of multiple languages and different normative narratives is particularly present in the institutions and processes of governance of modern societies that are highly differentiated socially and communicatively. The
‘civil society–governance’ debate is at the core of this problem. As results also from the different conceptual lenses provided in this book, the legitimacy of public–private relationships in EU governance can only be addressed with recourse to different languages. Thus part of it could refer to traditional political theory in parliamentary terms, which could go hand in hand with traditional constitutional theory. Yet other parts need to refer to the language of administrative law since there is hardly any place in traditional political and constitutional theory to think about the legitimacy of the involvement of civil society organisations in delegated regulation or in implementation of EU policy. In their turn, administrative lawyers have difficulties in addressing the legitimacy of the role of the social partners in socio-economic governance, the normative narrative of which is mainly provided by labour law. Still many public lawyers are puzzled in dealing with EU governance mechanisms as far as they will have to enter the terrain of private law. Or when soft law mechanisms or horizontal co-ordination structures take entirely over from hierarchy to the extent that law seems entirely to have abdicated. Therefore, reflexive deliberative polyarchy may be proposed as a solution. To think about the legitimacy of the relationships between civil society and European governance one needs to take into account different languages since knowing only one of them would provide only a very partial picture. To encourage this taking into account of different languages, I propose that deliberative polyarchy would be made more reflexive. At a minimum level reflexion means the awareness of the self-referential character of subsystems and the acknowledgement that there are other languages related to intertwining realities. Normatively reflexion means taking into account contextuality and encouraging subsystems to take into account their effects on other subsystems, that is ‘re-introducing the consequences of actions of social subsystems into their own reflection structure’ (Teubner 1983: 257).

Reflexive Deliberative Polyarchy

Above we have identified two weaknesses of DDP, namely its stress on direct participation which seems particularly difficult to realise in the European polity, and its unclear status vis-à-vis other normative narratives. This is not to say that reflexivity is entirely absent in DDP. DDP is not limited to encouraging decentralised deliberation but also implies the pooling of experience from such local experiments, namely ‘it requires institutionalization of links among local units – in particular, the institutionalization of links that require separate deliberative units to consider their own proposals against benchmarks provided by other units’ (Cohen and Sabel 1997: 325). Gerstenberg (1997: 353) even argues that DDP ‘institutionalizes reflexive capacities concerning society as a whole or undesired external effects of the
single subsystem within the functional systems themselves’. However, DDP tends to underestimate the complexity of different languages and their legitimating narratives. DDP does not start from a systems theory that considers interaction among systems as particularly difficult. Contrasting DDP to systems theory, Gerstenberg and Sabel (2002: 340) argue that ‘local knowledge is neither tacit nor fully and self-referentially systematic. Coordination among local collaborators is necessary because of the diversity of their views and possible because … the exploration of the ambiguities internal to each shades into exchange with the others. But as local co-ordination yields new ambiguities of its own, there is both need and possibility for inter-local exchange through a new centre that frames discussion and re-frames it as results permit.’ However, the heterogeneity of participants (Cohen and Sabel 1997: 333) within local units may be less spontaneous to realise than DDP seems to suggest. Moreover a new centre at a higher level that allows inter-local exchange may indeed provide opportunity to re-frame discussion, but the (partial) self-referentiality of subsystems implies that it is more likely for such higher level centres to be created within rather than across subsystems.

To this one should add that it is much more problematic to realise direct citizen participation than DDP seems to suggest. From a bottom-up democratic deliberative perspective, the ideal would be that each citizen could participate in all subsystems of which he/she bears the consequences. Such direct-democratic ideal is obviously unrealistic in a modern globalised and communicatively diversified and functionally differentiated society. Citizens have neither the time nor the will or knowledge to engage in direct deliberation in the multiple subsystems of modern society, and ‘decentralised deliberation’ needs, therefore, mainly to take the form of the ‘second-best solution’, namely that of decentralised deliberation by functional representatives, often presented under the banner of ‘the stakeholders’. This solution is second-best not only because citizens do not participate directly, but also because functional representatives tend to be part of subsystems with their own self-referentiality and limited communication with ‘the outside world’. Therefore, encouraging ‘reflection’ is an important additional normative device for democratic institutional design.

Reflexive deliberative polyarchy (RDP) thus builds on DDP but stresses the importance of reflection. It takes over the idea of polyarchy as granting substantial powers of initiative to lower-level units, but also in the traditional sense of electoral contest and parliamentary politics – Magnette’s warning in mind that DDP does not guarantee ‘enlightened understanding’ in the citizenry at large. RDP does not either give up the ideal of direct citizen deliberation, based on the adjustments of each other’s positions through rational argumentation in direct interaction, going down to the lowest and smallest unit. Yet it is aware of the difficulties of realising such direct participation and
therefore accepts that decentralised participation in terms of normative favouring of deliberation by all types of stakeholders can be a second-best option insofar as the individual citizen often cannot be involved. To compensate for this giving in on ‘directness’, RDP stresses in particular encouraging reflexion.

It requires attention to the particular difficulties created by the (partial) self-referentiality of subsystems. It encourages reflexion in institutional terms of interconnections between subsystems and in terms of taking into account arguments ‘from outside’ (that is not spontaneously provided through deliberation as far as the heterogeneity of actors in deliberative fora is constrained by the self-referentiality of subsystems).

RDP is particularly attractive as a normative frame for European governance where both direct citizen participation and parliamentary representation are extremely difficult to realise given the supranational nature of the polity. In contrast to DDP, RDP allows for a central role for civil society organisations and stakeholders in European governance. Their less ‘direct’ nature of deliberation may be compensated by a search for reflexive taking into account of the reality beyond their own subsystem.

RDP is a normative frame for institutional design that encourages policy actors to take account of other communicative subsystems intertwined with their own. This is not only a question of policy effectiveness but also of creating awareness of and interaction between the different legitimating narratives of subsystems.

CONCLUSION

Even if one would take a ‘traditional’ lobbying perspective and intend to assess how interest groups influence European policy-making, there remains an interesting agenda for research. If ever the Constitutional Treaty (OJ C310/1 of 16/12/2004) was to be ratified, for instance, this may change the institutional balance in relation to certain policy sectors (Craig 2004). Will this change patterns of EU–civil society interactions? The strengthening of the co-decision procedure, for instance, as the ordinary legislative procedure, may make the EP ever more attractive as a focus for lobby activity. Moreover, while much attention has been paid to the effects of enlargement on the main Community Institutions, little has been said on the consequences for interest intermediation in the EU. How should, for instance, EU officials deal with an ever increasing number of interest groups? Will this increase not overburden current consultation structures such as advisory committees or online consultations? How does an increased number of participants (and languages) influence the patterns of interaction – deliberation, bargaining, negotiation –
within committees? Seen from the bottom up, is it still worth an organisation trying in this competitive setting to lobby the Commission or would it not be better to get its view through by lobbying at the national level? Or will enlargement and an increased number of civil society organisations lead, above all, to a further professionalisation of interest representation as analysed by Sabine Saurugger in this volume?

The civil society–European governance perspective broadens the research agenda considerably since it stresses the taking into account of the role of civil society actors in governance at multiple levels that are intertwined and go from the local to the global and since it entails new analytical questions starting from normative claims. The normative debate itself can best be inspired by analytical insights, but is particularly challenging as all existing normative narratives can hardly fit the complexity of modern governance and can at best provide some normative thoughts in bits and pieces.

To go beyond mere normative thoughts in bits and pieces, I have suggested reflexive deliberative polyarchy as a normative frame for European governance. It builds on DDP in taking over the idea of polyarchy and deliberation, but stresses the importance of reflexion – as encouraging awareness and taking into account of languages of other subsystems – as a way to compensate for the difficulty in ensuring direct citizen involvement.

Taking into account different languages and their legitimating frames is also what this book is all about. Put differently, this research is not only a book about civil society and legitimate European governance, it is also an exercise in interdisciplinarity that may contribute to a broader reflexivity that pervades from academia to policy-makers.

NOTES

1. Focusing on the EU, Richardson searches the common ground in the research perspectives stressing the importance of epistemic communities and the role of ideas on the one hand, and policy networks on the other hand.
2. Thus Schmitter (1979: 8) argues that ‘defining corporatism in terms of its praxis, the concept is liberated from its employment in any particular ideology or system of ideas’.
4. Other characteristics according to De Búrca are an emphasis on functional limitation and a neo-liberal bias.
5. It has also been argued (Fossum 2005) that the Constitutional Treaty may precisely threaten the constitutional reflexivity that has thus far been the hallmark of the Union’s emerging post-national constitutionalism because it includes overly high thresholds against change.
6. The subordinate nature of the White Paper debate is a political choice to present the discussed issues as non-constitutional ones. This does not imply that these issues, that touch upon the fundamental values and institutional set-up of the European polity, cannot be considered as of constitutional importance. I have argued (Smismans 2004b) that we should take into account both the vertical and horizontal dimension of governance in our constitutional thinking about the EU.
7. My concept of reflexion builds mainly on reflexive law theory, which itself is strongly indebted to Luhmann (see King 2001). For a detailed account of the common ground and differences between reflexive law and directly deliberative polyarchy, see Smismans (2005). The autopoietic interpretation of reflexive law theory stresses the self-referentiality and closer of the subsystems. The ‘cognitive openness’ of subsystems is sought in processes such as a ‘hypercycle’ or ‘structural coupling’ (Teubner 1993). Yet, the final verdict is that ‘despite all “reflexivity”, law is still a closed autopoietic system operating in a world of closed autopoietic systems. It is impossible to break down the barriers which result from this double closure, (Teubner 1993: 97). However, reflexive law theory has not stuck to this strong autopoietic reading (neither to the highly abstractly defined mechanisms of hypercycle or structural coupling), and has given a more ‘optimistic’ and normative interpretation to the potential of reflection and reflexive law in encouraging interrelations between subsystems. (See, for instance, Orts 2001.) I build on this latter strand.

8. For an example of RDP as applied as a normative frame in European governance, namely in relation to the Open Method of Co-ordination, see Smismans 2005.

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