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Issue edited by Dr Przemysław Biskup (University of Warsaw)

Jan Labitzke

University of Gießen Institute for Political Science

The European Commission's Online Consultations: the Contribution of a New Participations Tool to Overcome the EU's Lacking Legitimacy

Abstract

Not only the 'euro crisis' and the debate on a (more or less) common refugee policy has the European Union as a whole and particularly the European Commission searching for new democratic legitimisation of their decisions. However, the EU's multiple crises have intensified this debate a great deal. Since the beginning of the new millennium, the Commission has increasingly used online consultations as a new and innovative tool for more participation, especially against the background of the White Paper on Governance published in 2001. A few years later in 2004, the Treaty establishing a Constitution for Europe, stressed the significance of consultations under article I-47, which was titled "The Principle of participatory democracy" and additionally established the European Citizens' Initiative (ECI). These instruments are now codified in Art. 11 TEU.

Both the White Paper and the complementation of representative democracy by the "principle of participatory democracy" in the constitutional treaty, were meant to help resolve the much-discussed democratic deficit of the EU by improving the input- and output-legitimacy of European decision-making process.

This article is a discussion of the European Commission's treatment of online consultations (based on own perennial empirical research and in-depth-analysis of selected case examples of different consultations). They will be discussed and theoretically categorised against the backdrop of theories of participatory democracy and participatory governance, ultimately in order to evaluate their (possible) contribution to the democratisation of the European Union.

1. Introduction

The aim of online consultations is to give the civil society the opportunity to participate in the EU law-making process. While there had been only very few online consultations of the European Commission before the release of the White Paper (for example, only nine online consultations were held in 2000) (Quittkat 2013: 90), their number has increased since the beginning of the new millennium, both due to the increasing use of the internet as well as the White Paper on Governance published by the European Commission in 2001, that enhanced the status of consultation processes (Labitzke 2016: 22). Nowadays, the Commission organises roughly 100 online consultations each year. Currently (end of August 2016), the internet platform “Your Voice in Europe”, which is the single access point for online consultations of all Directorates General, lists 35 open online consultations. Their topics range from guidelines for social legislation in road transports and the capital markets union to prevention of terrorism and the monitoring of CO₂ emissions.

The broader use of online consultations is associated with the expectancy to improve the input legitimisation of decision-making in the European Union and consequently to contribute to the solution of the European democratic deficit.

This paper gives an overview on the European Commission’s handling of online consultations as a new tool of participatory governance, in order to evaluate its quality in terms of participatory democracy.

2. The European Union in search of more democratic legitimacy

Not only the ‘Euro crisis’ and the debate on a (more or less) common refugee policy keeps the European Union as a whole, and particularly the European Commission, searching for new democratic legitimisation of their decisions. However, the EU’s multiple crises have intensified this debate a great deal. Since beginning of the 1990s, the lack of democratic legitimacy of the European decision-making process has become more and more obvious. The Maastricht Treaty referendums have been symptomatic for this: among referendums, which were held in three of the then EC-12 Member States

(Ireland, France and Denmark), only the voters in Ireland clearly approved the treaty (68.7%), while in France (one of the six founding Member States) only a tight majority of 51.1% of the voters supported the treaty, whereas in Denmark 50.7% of all voters rejected the treaty in the first referendum. Only after some concessions were made (regarding first of all social policies and the possibility for an opt-out concerning the European Monetary Union), the Maastricht Treaty became approved in Denmark by 56.8% of votes cast.

However, the bumpy ratification process was only an indication of a more profound problem. For decades, the European integration process was supported by a “permissive consensus” of the citizens in the Member States as Lindberg and Scheingold had shown in their famous study published in 1970:

“Our conclusion would be [...] that in general a permissive consensus did emerge. The Community enterprise was seemingly taken for granted as an accepted part of the political landscape, making it relatively easy to mobilize support for projects to advance or protect the economic programs of the Community. Moreover, support extended to strengthening existing supranational institutions even at the cost of some loss of some national sovereign prerogatives. Finally, opportunities for playing on national cleavages in order to block progress were relatively slim.” (Lindberg and Scheingold 1970: 62)

But in the meantime, important things have changed. At the time of Lindberg’s and Scheingold’s study, the European Community still consisted of the six founding member states, the competencies of the Community were much more limited and thanks to the Luxembourg Compromise each Member State could veto decisions, if it which were regarded as incompatible with “a vital national interest”. However, in early 1990s the Community already consisted of 12 Member States (which had increased its heterogeneity), the Single European Act had substituted the de facto unanimity requirement in the Council’s decision-making process by qualified majority voting and had also broadened the Community’s competencies (which were broadened once more by the Maastricht Treaty). Thus, the transition from an intergovernmental unanimous

decision-making to a supranational rule-making heightened the need for legitimacy of the European decision-making processes, particularly because of the contemporaneously eroding permissive consensus. Against the background of the Maastricht referendums Karlheinz Reif asked if this permissive consensus had reached its end (Reiff 1993). He concluded that the citizens were withdrawing, or had already withdrawn, their support for the elitist method of decision-making in the EU. The debate was ignited by the decision of the German Federal Constitutional Court regarding the Maastricht Treaty, which tied the further participation of Germany in the European integration process to the safeguarding of the principle of democracy at the European level:

“The principle of democracy does not prevent the Federal Republic of Germany from becoming a member of a compound of States [Staatenverbund] which is organised on a supranational basis. However, it is a precondition of membership that the legitimacy and influence which derives from the people will be preserved within an alliance of States.” (German Federal Constitutional Court 1994)

All this led to a very lively discussion (see: Grimm 1995, Kielmansegg 1995, Höreth 1999) on the democratic deficit in the European Union, not only within the public debate but also among scholars. Some political scientists diagnosed a “substantial democratic deficit” caused by the lack of a European demos, heterogeneity of the European citizens, a missing sense of common identity and solidarity and/or a lack of intermediate structures, e.g. European parties, which make it difficult or even impossible to set up a working democracy at the European level.¹

¹ According to Phillipe Schmitter (2000: 3) this type of criticisms is (due to the German nation-building process) passed by German scientists: “It is very tempting to assert that, because the EU does not have the necessary and sufficient elements that produced democracy in country ‘X’ some time ago, then it cannot possibly be democratized now. For reasons that are obscure to me, this seems especially characteristic of German scholars who postulate a ‘universalistic’ sequence whereby an ethnos must precede a demos, and the latter can only be created by an explicit constitutional act whereby this demos or people ‘submits itself to a political order of its own invention.’ Perhaps, it is because Germany was one of the few European states where ‘a belief in communality’ (*Gemeinsamkeitsglauben*) preceded the formation of its national state or because of the strength of legal formalism in its juridical tradition (*Verrechtlichung*). Elsewhere in Europe, the state was often established long before a ‘feeling of belonging to a (single) community’ existed among its subjects and, indeed, played a significant role in

Others contested the issue of a European democratic deficit, bringing forward the argument that the European Union is a “regulatory state” which deals mostly with “efficiency-oriented policies [...] [which] are basically legitimated by results” (Majone 1998: 28). Also Andrew Moravcsik argued that the European Union “is an exceptionally weak and dependent state structure” with restricted financial means and adequate checks and balances (Moravcsik 2000: 5). From a third perspective the EU suffers from an “institutional democratic deficit” that can be solved by institutional reforms, e.g. by enhancing the competencies of the European Parliament and/or by controlling the Commission more strictly (Grande 1996, and Höreth 1999: 42).

Real politics chose the latter: the Maastricht and the subsequent treaties strengthened the role of the European Parliament by broadening its rights concerning law-making process and appointment of the Commission. Nevertheless, facing the democratic deficit by only fostering the representative democracy of the European Union was not considered enough. Especially the European Commission was in search of more democratic legitimacy. While the European Parliament and the national governments represented in the Council are directly elected by the European people, the Commission is only legitimised indirectly. As Featherstone noted, this lack of legitimacy did not only raise concerns from the point of view of democracy theory, but also set at risk the Commission’s capacity to act effectively:

„Moreover, the backlash against the Maastricht Treaty also suggests that the leadership role of the Commission is undermined by the very nature of the institution itself. Indeed, its institutional form has not kept pace with the ‘deepening’ of the EC: what might have been acceptable for the early stages of integration no longer seems appropriate in the 1990s. [...] The very form of today’s EC Commission weakens its capacity to exert political leadership. It is too vulnerable to attack as a result of its lack of accountability and democratic legitimacy.” (Featherstone 1994)

bringing about such a feeling. My [...] hunch is that the moment for a dramatic act of ‘self-constitutionalization’ has long since passed in the EU and that the *ethnos-demos-politeia* sequence is going to have to be inverted - or, it will not lead to a stable democratic regime within contemporary Europe”.

3. The White Paper on Governance and the development of online consultations.

Around the turn of the millennium, the Commission itself and its new President Romano Prodi recognised the legitimacy deficit of the European Union. Accordingly, Prodi explicated during a speech in the European Parliament:

„The enlarged Europe will certainly need strong institutions. But they must be democratically legitimate institutions that operate in a transparent and accountable way and enjoy the full confidence of the citizens. People want a much more participatory, "hands-on" democracy. They will not support the European project unless they are fully involved in setting goals, making policy and evaluating progress. And they are right.” (Prodi 2000)

To tackle these deficits, Prodi announced in his speech a White Paper on reform of EU's decision-making structures. The White Paper on Governance was published in July 2001. It claimed to respect the principles of “good governance” (openness, participation, accountability, effectiveness and coherence) and acknowledged that measures to improve the input-legitimacy of the European Union were necessary:

“[I]ts legitimacy today depends on involvement and participation. This means that the linear model of dispensing policies from above must be replaced by a virtuous circle, based on feedback, networks and involvement from policy creation to implementation at all levels.” (European Commission 2001: 8)

In order to reach this objective, the Commission urged broader and better consultations with the European civil society during the development, adoption and implementation of new policies, since “[m]ore effective and transparent consultation [should be] at the heart of EU policy-shaping” (European Commission 2001: 12).

According to Pauline Cullen (2005: 6) and Dawid Friedrich (2006: 11), online consultations are the only concrete result (besides CONECCS, the registration website for Civil Society Organisations) of the White Paper debate.

Scholars received the White Paper very sceptically.² Erik Oddvar Eriksen (2001: 4), for example, noted, that it „reflects a rather limited conception of democracy“.

Nevertheless, the consultation of the European civil society within the policy circle was picked up yet again during the internal deliberations of the Convention on the Future of Europe and became the centrepiece of Art. I-47 of the draft Treaty establishing a Constitution for Europe. Since this article was titled “The Principle of participatory democracy“, it evoked high expectations, especially because of its position directly after Art. I-46 (“The Principle of representative democracy”) which dealt with the representation of the citizens by the European Parliament and of the Member States by the Council:

“While the Commission, at the most, claimed that consultation was to ‘supplement’ parliamentary processes, the draft Constitution enthusiastically embraces civil society participation as equal to, or, indeed, in some aspects superior to electoral politics.” (Bignami 2003: 31)

However, the provisions of Art. I-47 of the Constitutional Treaty (now Art. 11 TEU) did not go beyond the participation conception of the White Paper. They are more or less limited to codify (in a very general phrasing) the already existing practices of consultation without triggering a “regulatory paradigm change” (Kohler-Koch 2013: 31). The only real innovation can be found in the last paragraph of the article, which is the introduction of the new “European Citizens’ Initiative”.

Therefore, the establishment of the online consultation regime and the introduction of the European Citizens’ Initiative are the only tangible results of the discussion how the EU’s democratic deficit could be solved by improving its input-legitimacy via more

² See for example: Kohler-Koch 2001, Wind 2001, Lahusen 2003: 80-85, Nickel 2010, Friedrich 2006.

participatory democracy. However, it remains questionable if these promises are kept and the raised expectations are met.

4. The democratic quality of online consultations

The Commission links the application of online consultations closely to its so-called impact assessments (European Commission 2002: 15), i.e. the assessment of effects of an initiative on the economic, social or environmental issues.³ Impact assessments on their part

“are prepared for Commission initiatives expected to have significant direct economic, social or environmental impacts. These can be: legislative proposals; non-legislative initiatives (white papers, action plans, financial programmes, negotiating guidelines for international agreements) that define future policies; implementing measures and delegated acts.” (European Commission 2014)

The online consultation procedure usually starts with the publication of a consultation document, e.g. a draft piece of legislation, an outline of policy initiatives or a green paper.

Depending on the type of online consultation, the Commission publishes along with the consultation document a web questionnaire (standardised type of online consultation) or a number of open questions (half-standardised). Non-standardised consultations do not ask any questions at all. The web questionnaire must be filled in directly on the Commission’s website. During the half-standardised and non-standardised procedures participants can answer freely the Commission’s questions or add their own remarks by sending contributions via e-mail to the Commission. Most online consultations are open to all interested parties and citizens, even if some have specific target group. Only few of them are closed consultations with a limited group of participants (Quittkat 2013: 91). Normally, participants can send in their contribution within 12 weeks from the start of the consultation. Thereafter, the Commission evaluates

³ However, studies have shown that this link is not as close as stated by the Commission (Bozzini 2009).

the received contributions and shall publish a summarising report of the results of the consultation. These results on their part shall be incorporated in the further policy development of the Commission:

“Contributions will be analysed carefully to see whether, and to what extent, the views expressed can be accommodated in the policy proposals”.

To evaluate how the Commission handles online consultations, how it deals with the received contributions and if this tool can be classified as serving participatory democracy, a prior study (Labitzke 2016) analysed four consultation processes in different policy fields (European Emission Trading System, pharmacovigilance, regulations on bank accounts, and the initiative to introduce a European gender quota for corporate boards) in-depth. Therefore, all 845 contributions to these four consultations were read, evaluated and summarised by a modified frequency analysis. The gained analysed content of the contributions to the online consultations was confronted with the summarising report published by the Commission and the follow-up document, i.e. the revised draft pieces of legislation. Furthermore, to gain a deeper insight into the handling of online consultation by the Commission and its internal decision-making process, interviews were conducted with the Commission officers in charge of the different consultations. The main findings, which are explained in more detail in the study itself can be summarised as follows:

4.1 Quality and function of the summarising report

Length and quality of the summarising reports differ from consultation to consultation. One has to keep in mind that the reports are written by only few officials or even a single person, so individual factors are also relevant. Nonetheless, it is possible to identify some similarities. Primarily, the reports are summaries in two senses. First, they are usually limited to a rendition of the content of the contributions and do not provide a deliberation of arguments by the Commission. Second, they are no complete documentation of all received contributions and do not include every single request, idea

or proposal of the participants. They will, however, provide an overview on the lines of discussion and conflicting interests. All interviewed officials of the Commission stressed that they had tried to deliver a balanced summary that contains all relevant aspects and positions. However, they had to admit that it is up to them to decide what they consider relevant and what they want to mention in the report.

This selection process is not completely arbitrary. The topic of the consultation, questions asked in the consultation document, and the Commission's interests influence the selection of aspects mentioned in the summary. Furthermore, the officials confirmed during the interviews that they usually pay more attention to the contributions of larger European civil society organisations (CSOs). Nonetheless, that does not mean that contributions of smaller CSOs, or of single citizens have no chance to enter the summary report. As several interviewed officials explained, their contributions are especially considered if they are of high quality, if they are well-argued and supported by data, or if they offer a creative solution for a raised problem. Yet, it is up to the Commission and its officers to decide what they consider "well-argued" or "creative".

This leeway in decision-making becomes visible especially when the Commission summarises the answers to very open consultation questions (e.g. "What other aspects would you like to raise?" or "Do you have additional comments?"). As the study of the case examples has shown, participants use these questions to provide lots of diverse and often very detailed remarks, proposals and requests. But out of this broad input only a selection can be found in the summary report. Once again, it is up to the officials to decide what they cite in the summary. These omissions are particularly problematic when not only additional ideas are skipped but criticism regarding the Commission's initiatives is left unmentioned.

Moreover, the comparison of the summary reports with the own content analysis of the contributions sent in has shown that some are summarised in a wrong, imprecise or over-generalised way. Since the officials often try to summarise contributions of the same group of stakeholders (e.g. industry, environmental organisations), this can blur divergent positions within the same group of stakeholders. Other (over-) generalisations are owed to the use of expressions like "some stakeholders asked for" or "some business

representatives wanted”. Often officials avoid citing a specific participant. They argue that they want to give priority to the content and not to the originator and do not want to prefer one participant by citing him/her while other contributions are not mentioned. But this vague description of originators of a certain position decreases the transparency of the summary.

The interviewed Commission officials are aware of the limitations of the report. They underlined that it is not possible to summaries tens, hundreds or even thousands of contributions in detail in a report limited to few pages. However, as they asserted during the interviews, the limited validity does not affect the further discussions within the Commission since the officials keep in mind contributions not mentioned in the summary, too. Hence, especially third parties (e.g. citizens, organisations) should be conscious that the summary reports can only provide an overview but must not be mistaken for a complete and unpartisan rendition (Labitzke 2016: 272).

4.2 Impact of online consultations on the policy initiatives of the Commission

It is the Commission’s decision how the received consultation input is summarised, and similarly the Commission is also in control of the further process when it comes to incorporate this input in the further law-making process.

Primarily, the Commission deals with this input during the impact assessment process. During this assessment, the Commission analyses different policy options and their possible impact on the European society. Against the background of objectives that were set internally within the Commission, the assessment group analyses how different policy options would help reach those targets.⁴

⁴ As mentioned before, these targets and criteria for evaluation are set by the Commission itself. As long as the Commission does not act on order of the Council or to implement prior decisions, it has leeway to decide which initiatives it wants to take and which political objectives it wants to pursue. Nevertheless, these initiatives and objectives must be justifiable to third parties. For example, they can be justified by provisions of the treaties (e.g. consumer protection, or fostering of the internal market), or fundamental decisions like the Europe 2020 Strategy. Thus, the definition of objectives and criteria is not completely arbitrary.

The examination of the impact assessments has shown that in all studied case examples the impact assessment report referred to the held online consultations. However, the impact of the consultation on the follow-up document differed: While the Commission's draft proposal for the introduction of fees for pharmacovigilance was changed after harsh criticism of the participants of the consultation, the consultation on gender imbalances in corporate boards had little impact on the Commission's proposal since (as asserted in the conducted interview) the fundamental decisions had been made by the Directorate General before the consultation had started. However, even if consultations cause change in the Commission's proposal they do not determine the outcome. In fact, as confirmed during the interviews, it is the Commission or the assessment group itself that decides which of the participant's proposals are picked up. The decision criteria, which were mentioned by the interviewed officials, are well-argued requests and their evaluation against the background of the pursued objectives. One official summarised this procedure with the words: "We discussed what sounded reasonable".

None of the studied cases gave reason to assume that the online consultation process could be a kind of "online voting". As the interviews showed, the Commission does not automatically adopt the positions that are preferred by the majority of participants, or in the words of another official:

"Well, we study the input, we take it into due consideration and we try to strike the right balance, because obviously the views differ and there again, it's not about a question of how many replies you got advocating option A or option B, but it's also a bit, what the impacts would be, whether it's something that would address the problem at hand and will it address it in the most cost effective way, and things like that."

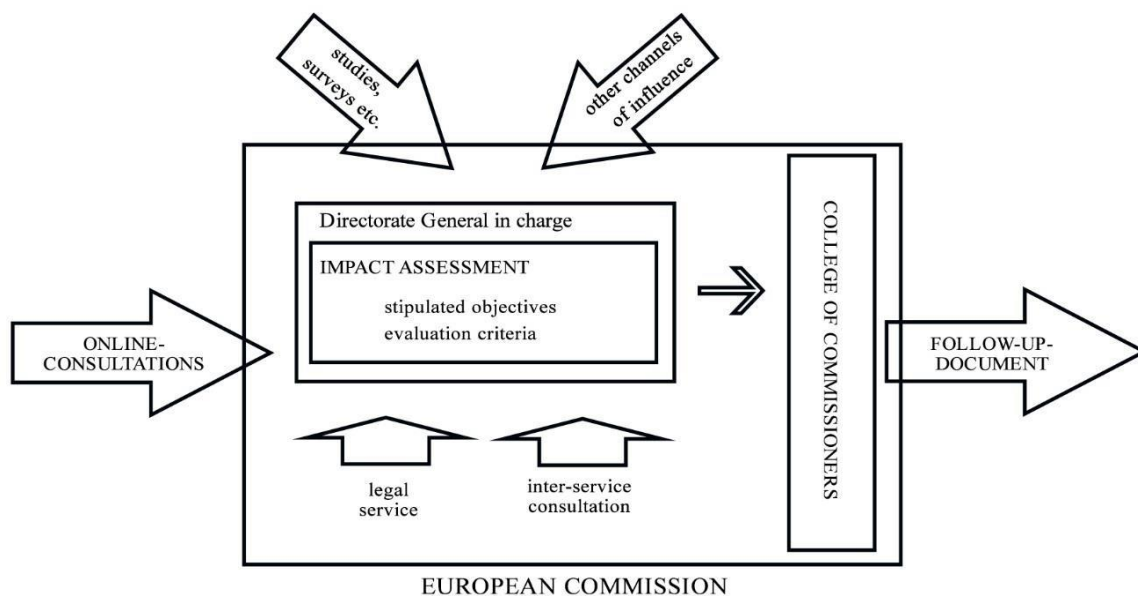
In contrast, the Commission acknowledges the contribution and deliberates (again: against the background of its own objectives and criteria) what the preferred and "best" solution could be, which is illustrated by this quote of an official:

"At the end of the day we need to decide what we think is best. Of course again, we take into account stakeholders' views, we take into account basically as objectively as possible what the impact assessment shows as the preferred option,

even if in theory it could go completely against stakeholder views, so we try to strike a balance but it's a bit of an art rather than a science, I would say“

Furthermore, one must not forget that online consultations are only one of several input channels that influence the Commission's policy formulation. As mentioned in the studied impact assessment reports, the Commission considers the results of scientific studies and surveys, too. There are also other consultations like meeting with stakeholders, statements of the Commission's legal service, there are remarks and requests of other Directorates General, there are discussions within the college of commissioners etc. (Labitzke 2016: 272). Figure 1 illustrates that internal decision-making process and the different channels of influence.

Figure 1: The European Commission: internal decision making-processes and channels of influence



Source: Labitzke 2016: 281

4.3 Benefits of online consultations for the Commission

As shown, online consultations are not an instrument that hand decision-making rights to the participants, but that rather provides the Commission, its Directorates General and the assessment groups with input and feedback that can be used by the Commission to make its own decisions.

Thus, online consultations have a service function for the Commission. They help the Commission to consider all relevant aspects of a topic. Especially the feedback from different Member States can help the Commission to better understand the possible impacts of its initiatives within the 28 different jurisdiction and to identify new policy options. Online consultations provide the (tightly staffed) Commission with knowledge and expertise and can also work as an “early warning system” that informs the Commission about conflicts and divergent interests.

Moreover, online consultations do not only improve the Commission’s policymaking by providing new ideas, information and expertise, but also help to advocate the chosen policy option by referring to contributions that support that opinion. Accordingly, one of the interviewed officials explained:

“[W]e can always refer back to the consultation when we are negotiating in the Parliament and in the Council. If it’s the case of co-decision or something there, that basically refer back to results of the online consultation and say, ‘look, these stakeholders think this is a good idea and they confirm the impacts of whatever’, so in that respect it is certainly useful.”

Also the selection of the consultation format (standardised, half- or non-standardised) depends on the Commissions’ preferences: “It depends on what we want to get” or “What do we think would bring the most useful results”, officials said (Labitzke 2016: 282).

4.5 More participatory democracy through online consultations?

Trying to analyse online consultations against the background of participatory democracy, they can be classified as a low-level participatory governance arrangement

that does not fulfil the requirements to be characterised as participatory democracy. This conclusion is a result of the combination of research on different forms of participation of citizens in political decision-making processes and a specific definition of participatory democracy:

The first one led to the development of different “participation ladders” that rank different forms of participation depending on the influence of participants on decision-making. Bryan Brunes (2003), for example, developed an “Extended Ladder of Participation” which is based on different prior ladder models, beginning with the “Ladder of Citizen Participation” of Sherry Arnstein (1969). In Bruns’ model (see Fig. 2) consultations are placed on the second lowest rank, only undercut by one-way information of the public by the “power-holders”.

Figure. 2: Extended Ladder of Participation

Enable	9. Framework providing status and recourse for organizations and individuals, Accountability based on organizational charter, reporting and auditing requirements, property rights, contracts, liability, etc.
Advise	8. Provision of information, guidance and other technical assistance as input to decisions, guidance for voluntary compliance, e.g., extension, statistical information and research, promotion of voluntary initiatives and coordination
Establish autonomy	7. Autonomous decisions by communities, organizations, or individuals, subject to compliance with specific laws and regulations, e.g. regulatory review for issuance and renewal of permits and licenses, enforcement of environmental standards
Delegate authority	6. Decisions by a group or organization with specific authorization, e.g. devolution by legal mandate, management concession, operating franchise, commission delegated power for final decision, court-sanctioned dispute settlement
Partner	5. Joint decisions by mutual agreement, cooperation where both sides hold veto power, e.g. some co-management agreements, intergovernmental organizations, public-private partnerships, contracts
Collaborate	4. Stakeholder representatives “at the table,” active as team members in formulating and recommending alternatives, although final decision by one party. Task forces, working groups, negotiated rulemaking
Involve	3. Interactive discussion and dialogue, as a supplement to an existing internal decision process. Workshops, town hall meetings, some advisory groups
Consult	2. Two-way communications, receiving input, listening, exchange of views. Public hearings, written comments, question & answer sessions, interviews, focus groups, questionnaire surveys, etc.

Inform

1. One-way information dissemination about problems, analysis of alternatives and decisions, e.g. announcements, lectures, brochures, press releases, press releases, websites, reports, etc.

Source: Bruns 2003

It seems obvious that some lower rungs of the participation ladder cannot be classified as participatory democracy, as long as democracy – as Giovanni Sartori said – must not mean everything, i.e. must fulfil certain criteria to be named so. Other participatory governance arrangements like “autonomous decisions by communities” (rang 7) can be certainly called participatory democracy. Therefore, we have to ask where the threshold is, which marks the transition from participatory governance arrangements that should not be classified as participatory democracy and those that fulfil the requirements to be called that way. Linze Schaap and Arthur Edwards (2007: 664):

„define democracy as a political system in which the members of the demos have an equal effective input into the making of binding decisions

In a very similar way, Beate Kohler Koch (2013: 4) concludes:

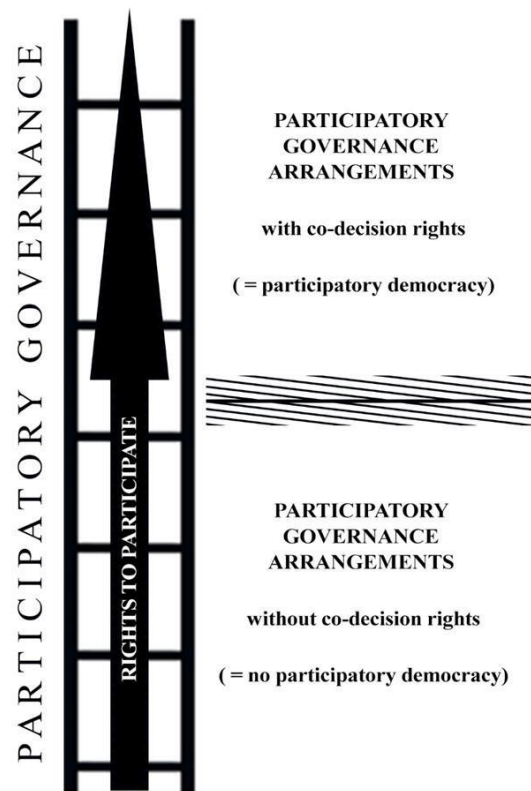
„[D]emocracy is more than the free and responsible opinion-forming by the citizens and the public expression of their preferences. It requires the inclusion of citizen demands in the process of policy formation, so that they have an impact on output.”

And also the above mentioned Sherry Arnstein (1969: 216) asserts:

„[P]articipation without redistribution of power is an empty and frustrating process for the powerless.“

Accordingly, the threshold between mere participatory governance and participatory governance arrangements that are qualified to be called participatory democracy is indicated by the transfer (or denial of the transfer) of co-decision rights from the power holders to the participating citizens. When participatory governance arrangements do not equip citizens with co-decision rights, these arrangements remain below the threshold to participatory democracy (see Fig. 3) (Labitzke 2016: 83).

Figure 3: Two classes of participatory governance



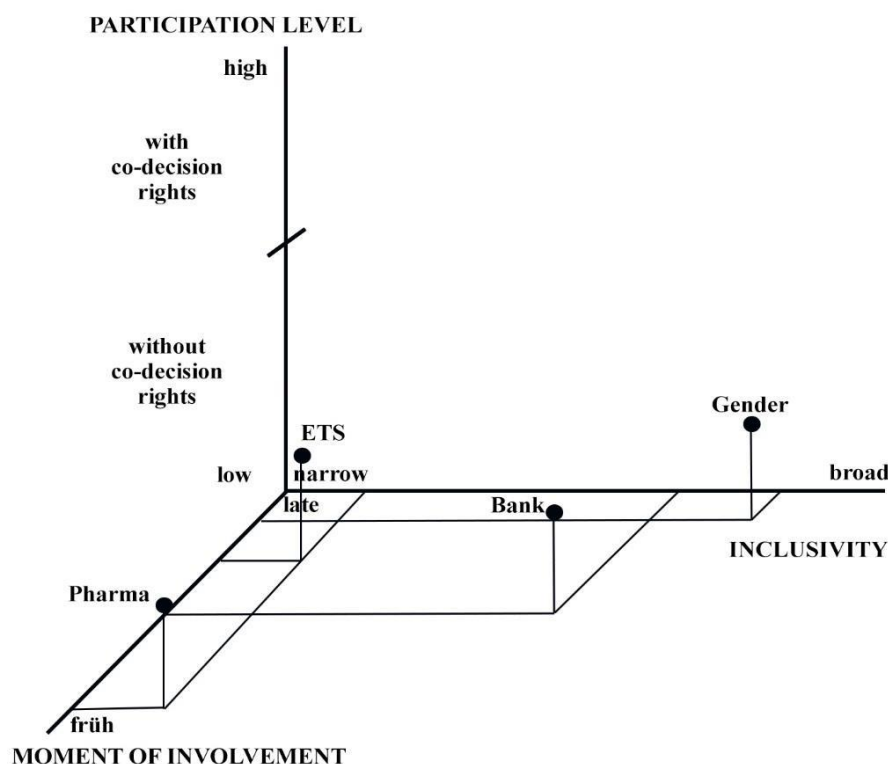
Source: Labitzke 2016: 95

Having said that, online consultations may give civil society a voice during policy shaping by the Commission that do not lead to a redistribution of power and that do not guarantee an effective impact on the political outcome. Instead, they are mainly used as tools serving the needs of the Commission, and not as an expression of participatory democracy.

As Meredith Edwards (2008: 3) argued, participatory governance arrangements can be analysed by asking *who* gets involved, *when* they get involved and *how* they get involved. The shown participation ladders only ask how people get involved in decision-making processes. Therefore, it might be helpful for further analysis of participation arrangements to further develop the ladder model by adding a second and third dimension, so that we can insert not only the rung of participation, but also the policy stage in which participation is possible and the inclusiveness of participation in a coordinate system (see Fig. 4) (Labitzke 2016: 96).

As argued before, online consultations are a participatory governance arrangement of lower rank, below the threshold of participatory democracy. Considering also the stage when the different consultations were held by the Commission and the inclusiveness of participation,⁵ the different studied consultation processes can be arranged in the coordinate system as shown in Fig. 4.

Figure 4: Participatory Governance Continuum



Source: Labitzke 2016: 309.

5. Conclusions

As discussed, the possible contribution of online consultations to an improved democratic legitimacy of the European decision-making process is very limited. For the

⁵ For more details see: Labitzke 2016: 307.

participating citizens it is neither possible to affect the political outcome in an effective way, nor is it possible to veto decisions of the institutions through this instrument. They cannot even set the agenda on the European level. Since this new governance tool did not lead to any redistribution of power, it should not be glorified as a turn to more participatory democracy despite of suggestions made in Prodi's speech and the Draft Constitutional treaty.

Nevertheless, the EU is still in need of more legitimacy: the Eurobarometer survey preceding the last European elections showed that only 44% of the European citizens are satisfied with the functioning of EU's democracy. Moreover, the demand for legitimacy will rise even when the EU should manage to face its multiple crises in a collaborative, supranational way, when more or permanent financial transfers within the EU or Euro-zone will become necessary, or when the number of refugees will rise again. Of course, the democratic deficit can still be addressed by broadening the competencies and control rights of the European Parliament. However, after the ratification of the Lisbon Treaty and the self-empowerment of the Parliament to choose the President of the Commission after the last elections, the remaining leeway to improve the Parliament's rights has become narrower.

Another option could be to develop online consultations further to a tool of real participatory democracy. To this end, it would be necessary to transfer co-decision-making rights to the online consultation process and its participants. In turn, other institutions, like the Parliament and the Council would need to transfer decision rights to the civil society. This voluntary renunciation of power is not only improbable but also dubious from the standpoint of democracy theory. It is correct (as shown above) that participation without co-decision rights does not meet the criteria of participatory democracy, but reversely not every exercise of co-decision power is automatically democratic. If co-decision rights were transferred into the online consultation procedure, it would be necessary to safeguard other indispensable democratic requirements as well, like equal access and representation. It is very questionable if these requirements could be fulfilled.

One can easily find many reasons to argue against more participatory democracy (e.g. problems of equal representation, overburdening the citizens, negative effects on the problem-solving capacity of the political system) (Schmidt 2010: 246). However, if the European Union does not risk more participatory democracy it cannot expect to increase its input legitimacy (and especially the European Commission).

This is also valid for the above-mentioned European Citizen's Initiative (ECI) stipulated by the Lisbon Treaty. After its introduction in 2009 by the Lisbon Treaty it took three more years to complete establishment of the ECI with the required implementation rules. As a consequence, the experience with the ECI is still very limited. But even the wording of the article already shows that its impact can only be very limited:

“Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European 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 Treaties. [...]” (Art. 11[4], Treaty on European Union).

As Duinkerken argued, the ECI does not leave the framework of the representative-democratic EU system. It does not provide citizens with new decision rights but gives them only the possibility to direct an enquiry to the Commission, which keeps control over acceptance and further development of the initiative (Duinkerken 2014: 43).

Thus, one of the remaining possibilities to enforce the control of citizens over political decisions in the EU is to develop the ECI to a real and decisive referendum. This, however, could raise new problems within the EU's multi-level system:

Law-making referendums could evoke initiatives outside of the EU's competence framework (doctrine of the principle of conferral). Furthermore, they could undermine the sensitive weighting of votes in the Council that also safeguards the interests of smaller Member States, and it could create conflicts with the case law of the European Court of Justice and erode the Commission's monopoly of legislative initiative.

Maybe a more calculable risk of more democracy could be more adapted into the EU's framework: not a law-making, but an abrogative referendum (as it is known, for example, in Italy). The limitation to abrogative referendums has the advantage that the Commission's monopoly right of initiative remains unaffected, no new law could be made without the consent of the Parliament and the Council, or in conflict with the jurisdiction of the Court. However, the European citizens would gain the power to retract European decisions they do not agree with.

In the White Paper on Governance the European Commission (2001: 12) asserted:

“Participation is not about institutionalising protest. It is about more effective policy shaping based on early consultation and past experience.”

Yet, in the light of EU's multiple crisis the Union should offer its citizens a democratic way to articulate protest. An abrogative referendum could be a possibility to do so.

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