

# Towards a permanent citizens' participatory mechanism in the EU

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## **Abstract**

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, examines the EU participatory system and its existing participatory channels against mounting citizens' expectations for greater participation in EU decision-making in the aftermath of the Conference on the Future of Europe. It proposes the creation of a permanent deliberative mechanism entailing the participation of randomly selected citizens tasked to provide advice upon some of the proposals originating from either existing participation channels or the EU institutions, in an attempt at making the EU more democratically responsive.

This document was requested by the European Parliament's Committee on Constitutional Affairs.

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Manuscript completed in September 2022

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## LIST OF ABBREVIATIONS

<b>AFCO</b>	Committee on Constitutional Affairs of the European Parliament
<b>CJEU</b>	Court of Justice of the European Union
<b>CoFoE</b>	Conference on the Future of Europe
<b>DG</b>	Directorate-General
<b>ENO</b>	European Network of Ombudsmen
<b>ECI</b>	European Citizens' Initiative
<b>EU</b>	European Union
<b>IIA</b>	Inter-institutional agreement
<b>PETI</b>	Committee on Petitions of the European Parliament
<b>SOTEU</b>	State of the European Union
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union

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## EXECUTIVE SUMMARY

This study assesses the EU participatory system and its existing participatory channels against mounting citizens' expectations for greater citizen participation in EU decision-making in the aftermath of the Conference on the Future of Europe.

First, the study systematises and examines each existing participatory mechanism, from the right of petition, the request for access to documents and the complaint to the European Commission and European Ombudsman to the European Citizens' Initiative, in terms of their accessibility, responsiveness and effectiveness.

Second, it demonstrates how these mechanisms' individual and collective ability in helping citizens to contribute to the Union's democratic life remains limited due to a variety of structural factors, ranging from low EU (participatory) literacy and the fragmentation of the EU participatory channels to unequal access to the very same tools.

Third, the study argues that part of these limitations that have historically limited the democratic potential of EU citizen participation might potentially be overcome by the introduction of an innovative representative participatory process, generally embodied by citizens' assemblies. The key feature of this approach is the direct involvement of citizens, who are randomly selected to represent the cultural identities and the diversity of society – beyond partisan divisions, particular interests, and nationalities – in the decision-making process. As such, the representative deliberative model seems particularly fitting for the EU, generally scarcely, unequally populated, and little deliberative, policy process.

Fourth, the study examines what it would take to embed a randomly selected citizens' assembly within the EU legal order. After contextualising this effort within the ongoing, broader debate around the institutionalisation of representative deliberative models, it puts forward a model of an EU representative deliberative process that could be set up without Treaty changes and operate in sync – not in competition – with existing EU participatory channels. Under such a model, a permanent Citizens' Chamber, populated by randomly selected citizens with previous deliberative experience, would regularly discuss novel initiatives generated either from the bottom-up, by citizens through existing EU participatory channels, or from the top-down, by the EU institutions within their prerogatives, with the aim to propose on a yearly basis the convening of one or more *ad hoc* EU Citizens' Panels to advise on those very same themes. The proposed model not only intends to provide citizens with a permanent voice in the decision-making process, but also with a systematic monitoring system to ensure they are heard. The aim is to increase accountability and reinvigorate the agenda-setting power of common citizens through the creation of an integrated deliberative and participatory ecosystem of democratic engagement and innovation to be embedded, without Treaty change, into the existing EU decision-making and institutional architecture.

## 1. INTRODUCTION<sup>1</sup>

In the aftermath of the Conference on the Future of Europe (hereinafter 'Conference' or 'CoFoE'), the role citizens play in EU decision-making is at the forefront of political conversation and, potentially, institutional reform. The Conference concluded its work on 9 May 2022, putting forward a report on the final outcome that includes 49 proposals to the three convening EU Institutions, namely the European Parliament (hereinafter 'Parliament'), the Council of the European Union (hereinafter 'the Council') and the European Commission (hereinafter 'the Commission')<sup>2</sup>. Several plenary proposals and citizens' panel recommendations coming from the Conference do call for greater citizens' involvement through a variety of mechanisms of participation, ranging from the centralisation of all existing mechanisms into a single point of entry (one-stop-shop)<sup>3</sup> – such as the European Citizens' Initiatives (hereinafter 'ECIs'), petitions and complaints to the Ombudsman – to the establishment of a new deliberative format, such as citizens' assemblies<sup>4</sup>. Upon the conclusion of the Conference, the Commission President argued that the latter "form of democracy [a deliberative panel made of randomly selected citizens] works [-- --] and should become part of the way we make policy"<sup>5</sup>. Likewise, Parliament, in its resolution on the follow-up to the conclusions of the Conference, calls for "the continuous involvement of citizens' participation and consultation in [the EU decision-making] process"<sup>6</sup>, without however making an explicit reference to the creation of permanent citizens' assembly<sup>7</sup>. On the other hand, the 2021 working document of the Committee on Constitutional Affairs (AFCO) on citizens' and civil society's participation in the Conference on the Future of Europe highlights the added value of developing a permanent mechanism for citizens' participation in EU decision-making. Also, in its previous resolution, Parliament highlighted "the importance of permanent participatory mechanisms to further facilitate and encourage citizens' participation in EU decision-

<sup>1</sup> This study builds upon more than a decade of scholarship and teaching devoted to the law of participation in the EU legal order. It also benefited from the research and editing assistance of Sébastien Fassiaux, PhD Candidate at Universitat Pompeu Fabra, to whom I am grateful. The usual disclaimer applies.

<sup>2</sup> See [report of the final outcome of the Conference](#).

<sup>3</sup> Ibid; see, in particular, plenary proposals 36–38 on European Democracy and the recommendation 29 of European Citizens' Panel 2 on 'European democracy / values and rights, rule of law, security': "We recommend 1) to increase the frequency of online and offline interactions between the EU and its citizens (ie. by asking citizens directly about EU matters and by creating a user-friendly platform to ensure that every citizen can interact with EU institutions and EU officials), and 2) in order to ensure that citizens can participate in the EU policy-making process, to voice their opinions and to get feedbacks, we recommend to create a charter or a code of conduct or guidelines for EU officials. Different means of interactions should exist so that every citizen can participate. We recommend this because several means to reach EU institutions exist (online platforms, representatives' bodies), but they are not known, not effective and not transparent. There are huge differences in accessibility between countries. More frequent and better-quality interactions will lead to a sense of ownership of EU citizenship".

<sup>4</sup> See recommendation 39 of European Citizens' Panel 2 on 'European democracy / values and rights, rule of law, security': "We recommend that the European Union holds Citizen's Assemblies [-- --] [that] should be held every 12-18 months [-- --]... Participants must be selected randomly, with representativity criteria [-- --]. In case citizens' proposals are ignored or explicitly rejected, EU institutions must be accountable for it, justifying the reasons why this decision was made".

<sup>5</sup> Speech by President von der Leyen at the closing event of the Conference on the Future of Europe, May 9, 2022; followed up by the Commission Communication on the Conference on the Future of Europe, Putting Vision into Concrete Action, COM(2022) 404 final, Brussels, 17.06.2022.

<sup>6</sup> European Parliament resolution of 4 May 2022 on the follow-up to the conclusions of the Conference on the Future of Europe, 2022/2648(RSP), para 5.

<sup>7</sup> The European Parliament's resolution of 9 June 2022 on the call for a Convention for the revision of the Treaties focuses instead on two major proposed Treaty amendments: (i) reforming voting procedures in the Council to enhance the European Union's capacity to act, including switching from unanimity to qualified majority voting, in areas such as sanctions, the so-called 'passerelle clauses', and in emergencies; (ii) providing Parliament with the right to initiate, amend or revoke legislation, and with full rights as a co-legislator on the EU budget. In addition, the Parliament calls for more EU powers in health, energy, defence, and social and economic policies. See European Parliament resolution of 9 June 2022 on the call for a Convention for the revision of the Treaties, 2022/2705(RSP), para 5.

making beyond the act of voting and other existing channels and instruments". It also called for "possible mechanisms for the active participation of citizens in the consultation process in order to influence the annual Work Programme of the Commission and the State of the Union address" and proposed that such "a mechanism could work on an annual basis, starting in the first months of each year with national and regional citizens agoras that should prepare the priorities to be discussed in a transnational European citizens agora, which could be concluded on Europe Day, [-- --] in order to feed into the consultation mechanism that leads to the establishment of the annual Work Programme of the Commission"<sup>8</sup>.

In the meantime, more than 70% of Europeans, according to the recent polls, expect a more regular and meaningful involvement with the EU level of government<sup>9</sup>.

It is against this backdrop that this study assesses the EU participatory system and its existing participatory channels against mounting citizens' expectations for greater participation in EU decision-making. It puts forward a set of recommendations addressing some of the major, structural obstacles that prevent EU decision-making from realising its democratic potential by establishing a representative deliberative process to renew the existing EU participatory channels.

This may pave the way to the creation of an integrated deliberative and participatory ecosystem of democratic engagement and innovation to be embedded into the existing EU decision-making and institutional architecture.

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<sup>8</sup> [European Parliament resolution of 7 July 2021 on Citizens' dialogues and Citizens' participation in the EU decision-making, 2020/2201\(INI\)](#), para 64. See also para 63, in which the European Parliament stated that the Conference on the Future of Europe "will bring an important contribution in the further development of citizens' participation in the EU policy-making process and pave the way for the establishment of new permanent mechanisms for citizens' participation".

<sup>9</sup> Conference on the Future of Europe, *Report on the final outcome*, May 2022.

## 2. GENESIS AND EVOLUTION OF EU CITIZEN PARTICIPATION

After being a non-issue for several decades, the role citizens – and more broadly civil society – should play within the Union became central to EU political discourse back in the late 1990s<sup>10</sup>. After the first European Social Policy Forum, the Commission Directorate for Employment, Social Affairs & Inclusion launched a 'civil dialogue' with the declared dual aim of linking the views of EU citizens to EU institutions, and to explain political discourse to the public<sup>11</sup>. In the same year, the 1997 Treaty of Amsterdam had for the first time established an obligation of European Institutions to adhere to the principles of democracy<sup>12</sup>. It is in the 2000 Commission White Paper on European Governance (hereinafter 'White Paper') that citizen participation was recognised as one of the pillars of good governance well beyond the social policies. Citizen participation throughout the entire policy cycle was highlighted as key to ensure the quality, relevance, and effectiveness of EU policymaking<sup>13</sup>. Likewise, in the same year, Declaration No. 23 of the future of the Union annexed to the Treaty of Nice expressed "the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States"<sup>14</sup>. As witnessed by a 20-year debate preceding the Lisbon Treaty<sup>15</sup> and launched by the publication of the White Paper, the rationale for this insertion is to make up for citizens' inability to signify – under the current arrangements – their desire for change in the EU political agenda and, more broadly, to vote out those who pursue such an agenda.

Yet the concept of participation in the White Paper, as epitomised by the dominant rhetoric of connecting citizens with the EU institutions, remained nebulous as it "oscillates between output- and input-oriented conceptions of civil society and participation"<sup>16</sup> and refers to – by thus confusing them – both individual citizens and civil society organisations. Due to its focus on participation of organised interests, the White Paper perceived participation in instrumental ways as a means to improve efficiency and effectiveness of European policymaking, thus neglecting unorganised citizens. The draft Treaty establishing a Constitution for Europe recognized the principle of representative democracy as foundational<sup>17</sup>, and introduced for the first time the principle of participatory democracy<sup>18</sup>.

As a direct response to the negative French and Dutch referenda on the Constitutional Treaty, the 'real' challenge became – and continues to be – how to find direct channels of communication with individual citizens, capable of operating both locally and transnationally. That was the aim pursued by the 2005 'Plan D for Democracy, Dialogue and Debate', developed at the request of the European

<sup>10</sup> See, e.g., S. Smismans, "The Constitutional Labelling of 'the democratic life of the EU': representative and participatory democracy", in L. Dobson & A. Follesdal (eds), *Political Theory and the European Constitution*, London: Routledge, 2006, pp. 122-138.

<sup>11</sup> Commission of the European Communities, Promoting the role of voluntary organisations and foundations, COM(1997) 241 final.

<sup>12</sup> Article 6(1) TEU as amended by the Amsterdam Treaty.

<sup>13</sup> For a critical analysis, see e.g., K.A. Armstrong, 'Rediscovering Civil Society: The European Union and the White Paper on Governance', *European Law Journal*, 2008, vol. 8, pp. 102-32.

<sup>14</sup> Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Declarations Adopted by The Conference, Declaration on the future of the Union, OJ C 80, 10.3.2001, p. 85–86.

<sup>15</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ C 306, 17.12.2007); entry into force on 1 December 2009.

<sup>16</sup> B. Kohler-Koch & B. Finke, 'The institutional shaping of EU-Society relations: A contribution to democracy in the EU law-making process', *Journal of Civil Society*, 2007, vol. 3, pp. 209-10.

<sup>17</sup> Article I-45.

<sup>18</sup> Article I-46.

Council, by Margot Wallström, Commission's Vice-President and Commissioner for Communication<sup>19</sup>. Plan D called for innovative models for citizen's communication by providing a framework and funding opportunities for a structured dialogue on European politics. In addition to being a 'listening exercise', it set out a "long-term plan to reinvigorate European democracy and help the emergence of a European public sphere, where citizens are given the information and the tools to actively participate in the decision-making process and gain ownership of the European project"<sup>20</sup>. As such, Plan D played a key role in framing the subsequent developments by pioneering the first online mechanisms enabling citizens to exchange and debate with the EU institutions, although on an ad hoc basis<sup>21</sup>. In particular, the ensuing participatory trend, having been largely driven by a vast, influential academic literature<sup>22</sup>, has heavily influenced EU institutional reform since then. Participation has suddenly been assumed to result in increased democratic legitimacy, and that regardless of who, how and when it actually participates. It is against this backdrop that the Lisbon Treaty – amid the vicissitudes of the Constitutional Treaty – introduced a new Title II to the Treaty on European Union (TEU)<sup>23</sup> devoted to 'Democratic Principles' (Articles 9–12 TEU)<sup>24</sup>. These provisions establish participatory democracy as one of the EU's normative bedrocks, making clear that representation can no longer be the sole means to EU legitimacy<sup>25</sup>. In line with the dominant theories of participatory democracy<sup>26</sup>, they contain explicit references to the role of EU citizens and civil society organisations in the governance of the Union and introduced, or merely institutionalised, several participatory devices enabling citizens to directly engage with the institutional apparatus.

<sup>19</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. "The Commission's contribution to the period of reflection and beyond: Plan-D for Democracy, Dialogue and Debate", COM(2005) 494 final, 13.10.2005.

<sup>20</sup> *Ibidem*, pp. 2-3.

<sup>21</sup> For an analysis, see e.g., A. Fischler-Hotzel, 'Democratic Participation? The involvement of citizens in Policy-making at the European Commission', *Journal of Contemporary European Research*, 2010, vol. 6, pp. 343-44.

<sup>22</sup> See e.g., O. de Schutter, N. Lebeccis & J. Paterson, 'Governance in the European Union', *Cahiers of the Forward Studies Unit*, Luxembourg: European Publication Office, 2001; K.A. Armstrong, 'Rediscovering Civil Society: The European Union and the White Paper on Governance', *European Law Journal*, 2002, vol. 8, 102-32; S. Smismans, 'The EU schizophrenic constitutional debate. Vertical and horizontal decentralism in European governance', *EUI-RSCAS Working Papers*, 2006; B. Kohler-Koch & B. Rittberger, *Debating the Democratic Legitimacy of the European Union*, Rowman & Littlefield, 2007, pp. 16, 40; G. Abels, 'Citizens' deliberations and the EU's democratic deficit. Is there a model for participatory democracy?', *Tübinger Arbeitspapiere*, No. 1/2009; A. von Bogdandy, 'The European lesson for international democracy: the significance of Articles 9 to 12 EU Treaty for International Organizations', *European Journal of International Law*, 2012, vol. 23, pp. 315-334; V. Cuesta-Lopez, 'The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy', *European Public Law*, 2010, pp. 123-138, 132; H.J. Blanke & S. Mangiameli, *The Treaty on European Union (TEU): A Commentary*, Springer, 2013.

<sup>23</sup> Treaty on European Union, signed on 7 February 1992; also called 'Maastricht Treaty'.

<sup>24</sup> In the draft Treaty establishing a Constitution for Europe (TECE), presented to the European Council in Thessaloniki on 20 June 2003, this was originally titled 'The Democratic Life of the Union'. For a detailed analysis, see, e.g., C. Closa, 'European Citizenship and New Forms of Democracy', in G. Amato, H. Bribosia & B. de Witte, *Genèse et destinée de la Constitution européenne: commentaire du Traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir*, Brussels: Bruylant, 2007, p. 1050.

<sup>25</sup> A. Warleigh, 'On the Path to Legitimacy? A Critical Deliberativist Perspective on the Right to the Citizens' Initiative', in C. Ruzza & V. Della Sala, *Governance & Civil Society in the European Union: Normative Perspectives*, vol. 1, Manchester University Press, 2007, p. 64.

<sup>26</sup> See, e.g., D. Held, *Models of Democracy* (3rd ed.), Stanford University Press, 2006.

## BOX 1: Democratic Principles (Articles 9–12 TEU)

### TITLE II

#### PROVISIONS ON DEMOCRATIC PRINCIPLES

##### *Article 9*

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

##### *Article 10*

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.
3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.
4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

##### *Article 11*

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 an open, transparent and regular dialogue with representative associations and civil society.
  3. The European 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 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.
- The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.

##### *Article 12*

National Parliaments contribute actively to the good functioning of the Union [-- --].



### 3. THE LAW OF EU PARTICIPATORY DEMOCRACY

Since the Lisbon Treaty, the Union derives its democratic legitimacy not only from representative democracy – which remains its founding democratic principle – but also from participatory democracy<sup>27</sup>. Under the former, citizens take part in the political process through their elective representatives – Parliament and the governments gathering in the Council of the European Union (hereinafter ‘the Council’) – whereas under the latter, citizens participate directly via a multitude of channels of participation<sup>28</sup>. As such, citizens – with their actions and omissions – are also entitled “to participate in the democratic life of the Union”<sup>29</sup> and form an additional source of legitimacy for the Union<sup>30</sup>. This outcome, crystallised in Article 10(3) TEU, originates in an earlier, two-decade effort, initiated by the Maastricht Treaty, to define the democratic nature of the EU legal order, in particular its own specific democratic model. One of the answers to such a long quest for a more democratically legitimate Union has been to enhance citizen participation through broader access to the EU<sup>31</sup>. The assumption being that citizen participation could make up for EU citizens’ inability to signify – under the current arrangements – their desire for change in the EU political agenda and, more broadly, close the gap between power and electoral accountability in the Union<sup>32</sup>.

As previously discussed, while participatory practices always existed in the history of the Union to legitimise EU policymaking<sup>33</sup> – the ‘Provisions on Democratic Principles’ of the Treaty of Lisbon<sup>34</sup> – by giving “expression to the principle of democracy in the EU legal order”<sup>35</sup> – recognised for the first-time participation as an *autonomous*, democratic principle on which the Union is founded. This is further empowered and operationalised by other principles, such as openness and transparency<sup>36</sup> as well as equality<sup>37</sup>.

<sup>27</sup> See Article 10 TEU.

<sup>28</sup> See A. Schrauwen, ‘European Union Citizenship in the Treaty of Lisbon: Any Change at All?’, *Maastricht Journal of European and Comparative Law*, 2008, vol. 15, p. 55; S. Besson & A. Utzinger, ‘Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora’s Box’, *European Law Journal*, 2007, vol. 13, pp. 586.

<sup>29</sup> Article 10(3) TEU provides that ‘every citizen shall have the right to participate in the democratic life of the Union’ and that ‘decisions shall be taken as openly and as closely as possible to the citizen’.

<sup>30</sup> A. Schrauwen, ‘European Union Citizenship in the Treaty of Lisbon: Any Change at All?’, *Maastricht Journal of European and Comparative Law*, 2008, vol. 15, p. 55; S. Besson & A. Utzinger, ‘Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora’s Box’, *European Law Journal*, 2007, vol. 13, p. 586; A. Warleigh, ‘On the Path to Legitimacy? A Critical Deliberativist Perspective on the Right to the Citizens’ Initiative’, in C. Ruzza & V. Della Sala, *Governance & Civil Society in the European Union: Normative Perspectives*, vol. 1, Manchester University Press, 2007, p. 64.

<sup>31</sup> J. Habermas, ‘Three Normative Models of Democracy’, *Constellations*, 1994, vol. 1, pp. 1-10; S. Smismans, ‘New Modes of Governance and the Participatory Myth’, *West European Politics*, 2008, vol. 31(5), p. 874; Beate Kohler-Koch, ‘Governing with European Civil Society’, in B. Kohler-Koch et al., *De-mystification of Participatory Democracy*, Oxford University Press, 2013. On whether participation results in increased democratic legitimacy, see A. Kutay, ‘Limits of Participatory Democracy in European Governance’, *European Law Journal*, 2015, vol. 21(6), pp. 803-818.

<sup>32</sup> P. Craig, *EU Administrative Law*, Oxford University Press, 2012, pp. 295, 297-298; C. Moser, ‘How open is ‘open as possible’? Three different approaches to transparency and openness in regulating access to EU documents’, *Institute for Advanced Studies*, Vienna, 2001, pp. 5-6.

<sup>33</sup> For a detailed, historical reconstruction of the EU participatory practices and rationale, see J. Mendes, *Participation in European Union Rulemaking: A Rights-Based Approach*, Oxford University Press, 2011.

<sup>34</sup> Articles 9–12 TEU.

<sup>35</sup> K. Lenaerts, ‘The Principle of Democracy in the case law of the CJEU’, *The International and Comparative Law Quarterly*, 2013, vol. 62(2), pp. 271-315, at p. 275.

<sup>36</sup> See, on this principle, e.g., A. Alemanno, ‘Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy’, *European Law Review*, 2014, vol. 1, pp. 72-90.

<sup>37</sup> See, on this principle, e.g., A. Alemanno, ‘Leveling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission’s Public Consultations in Light of the Principle of Political Equality’, *European Law Journal*, 2020, vol. 26, pp. 114-135.

As a result, in constitutional terms, participation is no longer expected to play an exclusively instrumental role to ensure the delivery of EU regulatory functions through the collection of information. Participation also carries an autonomous, non-instrumental meaning: to allow citizens<sup>38</sup> to take part in – and possibly control – the process of governance to which they are subject<sup>39</sup>. In normative theory, participatory democracy entails the multiplication of opportunities for citizens' participation beyond elections<sup>40</sup>. This entails acquiring some forms of control over those who decide for us, and, more broadly, having a say on those decisions.

Therefore, the rationale pursued by 'democratic participation' transcends the idea of participation as defence (*uti singuli*), typical of administrative law, and stands closer to the idea of participation as collaboration (*uti cives*)<sup>41</sup>. As such, it hints to an additional, complementary yet autonomous rationale of participation, that of democratic input and control beyond elections that EU citizens are called upon to play to contribute to the democratic functioning of the EU<sup>42</sup>.

As a result of this broader interpretation of citizen participation, participatory democracy can no longer be equated with participation as a defence and as 'participation collaboration' – according to the traditional administrative law conceptions – but must be understood as pursuing an additional, complementary rationale, that of 'participation as democracy'<sup>43</sup>. As such, it must include a wide range of channels for the people enabling them to play a role in the policy process by means of an effective access to the process and voice within it<sup>44</sup>.

Indeed, as soon as one approaches EU participatory democracy from such a broader perspective, its underlying principle – as expressed by "the right to participate in the democratic life of the Union" – finds normative expression in a variety of "instrument(s) concerning the right of citizens to participate in the democratic life of the Union, provided for in Article 10(3) TEU"<sup>45</sup>. It is worth noticing that the majority of these instruments predates the entry into force of the Lisbon Treaty, and some are attached to Union citizenship<sup>46</sup>. Let's examine the EU-wide mechanisms available to citizens "to participate in the democratic life of the Union", as provided for in Article 10(3) TEU, and offer a first systematisation of these mechanisms, before assessing whether and to what extent each of them contribute to increasing citizen participation in the Union democratic life.

<sup>38</sup> On whether such a right of participation is limited to EU citizens, see, e.g., Annette Schrauwen, 'European Union Citizenship in the Treaty of Lisbon: Any Change at All?', *Maastricht Journal of European and Comparative Law*, 2008, vol. 15, pp. 56-58.

<sup>39</sup> See P. Craig, *EU Administrative Law*, Oxford University Press, 2012, p. 296. See, e.g., S. Saurugger, 'The Social Construction of the Participatory Turn: The Emergence of a Norm in the European Union', *European Journal of Political Research*, 2010, vol. 49(4), p. 471.

<sup>40</sup> See, e.g., D. Della Porta, *Can Democracy be Saved?*, Polity Press, 2012, p. 187.

<sup>41</sup> S. Cassese, 'La partecipazione dei privati alle decisioni pubbliche – Saggio di diritto comparato', *Rivista trimestrale di diritto pubblico*, 2007, pp. 13-41.

<sup>42</sup> See, for an analysis of this broader rationale of participation, S. Cassese, *ibidem*.

<sup>43</sup> *Ibidem*.

<sup>44</sup> T. Larsson, 'How Open Can a Government Be? The Swedish Experience', in: V. Deckmyn & I. Thomson, *Openness and Transparency in the European Union*, Maastricht: European Institute of Public Administration, 1998, pp. 39-52.

<sup>45</sup> Judgment of 12 September 2017, *Anagnostakis*, C-589/15 P, ECLI:EU:C:2017:663, para 24; judgment of 4 September 2018, *ClientEarth*, C-57/16 P, ECLI:EU:C:2018:660, para 84; judgment of 22 March 2008, *De Capitani*, T-540/15, ECLI:EU:T:2018:167, para 41. This idea originates in pre-Lisbon time from the *Sweden and Turco* case (judgment of 1 July 2008, *Sweden and Turco*, Joined Cases C-39/05 P and C-52/05 P, ECLI:EU:C:2008:374, para 46).

<sup>46</sup> While several participatory mechanisms are formally attached to EU citizenship (such as the right to make petitions to the European Parliament, to complain to the European Ombudsman and to register an ECI), their use is not exclusive to EU citizens. Therefore, citizens, and not necessarily EU citizens, are given the right to participate in the Union democratic life (A. Schrauwen, 'European Union Citizenship in the Treaty of Lisbon: Any Change at All?', *Maastricht Journal of European and Comparative Law*, 2008, vol. 15, p. 62).



## 4. THE EU PARTICIPATORY TOOLBOX

The European Union today provides a wide array of participatory opportunities to its citizens to engage with – and potentially influence – EU decision-making<sup>47</sup>. Based on the broad concept of democratic participation as it stems from the previous section and most recent case-law<sup>48</sup>, it is possible to map out the major participatory mechanisms existing under EU law. Those include:

- Requests for access to documents of the EU institutions<sup>49</sup>,
- Petitions to Parliament,
- Public consultations by the Commission<sup>50</sup>,
- Complaints to the European Ombudsman<sup>51</sup>,
- Complaints to the Commission<sup>52</sup>,
- European Citizens' Initiative<sup>53</sup>.

As shown by this list<sup>54</sup>, these mechanisms range from the oldest instrument of participatory democracy, the right to petition<sup>55</sup>, to the most recent one, the European Citizens' Initiative (ECI) – the first transnational participatory democracy instrument allowing at least seven EU citizens coming from seven different Member States to suggest new policy initiatives in any field where the EU has power to propose legislation (such as the environment, agriculture, energy, transports or trade) after collecting one million signatures.

### *A taxonomy*

No taxonomy of those instruments exists or has even been attempted. By taking as a starting point their common 'democratic participatory' rationale, it is possible to organise them along their actual

<sup>47</sup> In normative theory, participatory democracy entails the multiplication of opportunities for citizens' participation beyond elections. See, e.g., D. Della Porta, *Can Democracy be Saved?*, Polity Press, 2012, p. 187.

<sup>48</sup> Advocate General Bobek noticed that EU Courts have recognized the right to participate in the democratic life of the Union as finding normative expression not only in the European Citizens' Initiative (ECI), but in other "pre-existing channels of interactions between the citizens and the EU institutions". See Opinion of Advocate General Bobek in C-418/18 P, *Puppinck and others v European Commission*, delivered on 29 July 2019, para 73.

<sup>49</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.05.2001, pp. 43-48.

<sup>50</sup> Article 11(3) TEU.

<sup>51</sup> Article 20(2)(d) TFEU and Article 24 TFEU.

<sup>52</sup> Article 24(3) EC provides: 'Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 13 TEU in one of the languages mentioned in Article 55(1) TEU and have an answer in the same language'. See also Article 41 of the Charter of Fundamental Rights of the EU.

<sup>53</sup> Article 11(4) TEU and Article 24 TFEU. This is the most recent EU participatory mechanism, which in turn represents the first transnational participatory democracy instrument – allowing at least 7 EU citizens coming from 7 different member states to suggest new policy initiatives in any field where the EU has power to propose legislation (such as the environment, agriculture, energy, transport or trade) after collecting one million signatures.

<sup>54</sup> Some commentators sometimes include citizens' dialogues organized by the European Commission. However, due to their ad hoc nature and lack of an expressed legal basis in the EU Treaties or secondary law, this study does not consider them as EU participatory tool, but a mere sub-category of Commission-driven consultations. Surprisingly enough, the same commentators tend to exclude the right of access to documents from the existing EU participatory instruments, despite representing the ontological pre-condition for citizen participation in the Union. See, e.g., D. Hierlemann et al., *Under Construction, Citizen Participation in the European Union*, Verlag Bertelsmann Stiftung, 2022.

<sup>55</sup> In *Schönberger*, the CJEU recognized the right to petition as an "instrument of citizen participation in the democratic life of the European Union". The Court mentioned that "[i]t is one of the means of ensuring direct dialogue between citizens of the European Union and their representatives". See judgment of 9 December 2014, *Schönberger v European Parliament*, C-261/13 P, ECLI:EU:C:2014:2423, para 17.

purpose. These participatory channels include not only *agenda-setting tools*, such as petitions to the European Parliament and the ECI, but also *input mechanisms* in policy formation, such as public consultations on new initiatives, as well as a multitude of *administrative actions*, such as requests for access to documents to the EU institutions and complaints to the European Ombudsman and the Commission, as well as *ex post review channels*, such as Lighten the Load – within the REFIT Platform, now renamed Fit For Future Platform. The latter enables any stakeholder to put forward a suggestion on how an existing policy can be simplified and improved to be more effective and reduce regulatory burden<sup>56</sup>.

What these participatory channels have in common is that – regardless of their immediate aims and scattered origin – they enable citizens to play a role ‘in the Union’s democratic life’<sup>57</sup>, and do so beyond the electoral moment. These mechanisms normatively substantiate participation, as the possibility to pro-actively interact with – and hold accountable – the EU institutions and bodies. By opening the Union’s doors, they give citizens a chance to “publicly exchange their views in all areas of Union action”<sup>58</sup>. As such, by exercising an informational, agenda-setting or oversight function, they all carry a potentially legitimacy-enhancing role in the Union’s democratic life. Ultimately, access to all these is based on an understanding that citizen’s participation might be a further avenue to realise the overarching value of ‘democracy’ as enshrined in Article 2 TEU.

In the following sub-sections, we will briefly explain each participatory mechanism and its (underlying participatory) rationale. We will also examine how often the mechanism is used (statistics) and how accessible it is (accessibility) and assess what procedural response (responsiveness) and substantive response (effectiveness) one may expect.

#### 4.1. Requests for access to documents of the EU institutions

The right of access to documents represents by far the most developed legal dimension of EU institutional openness. It is enshrined in Article 15(3) of the Treaty on the Functioning of the European Union (TFEU)<sup>59</sup> and operationalised in Regulation 1049/2001<sup>60</sup>. This text has been under revision since 2008<sup>61</sup>, and its underlying right of access has been upgraded to a fundamental right (so-called ‘freedom of information’) by the Charter of Fundamental Rights of the European Union<sup>62</sup>.

<sup>56</sup> Besides these formal mechanisms of participation, there exist more channels of communication that are available to EU citizens, such as letters and complaints that can be addressed to the EU institutions and bodies any time, and that have not been formalised under EU primary or secondary law.

<sup>57</sup> Article 10(3) TFEU.

<sup>58</sup> Article 11(1) TEU.

<sup>59</sup> Article 15(3) TFEU reads: “Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph”.

<sup>60</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43-48. The legal basis for this regulation is contained in Article 15(3) TFEU second subparagraph. Please note that access to environmental information is covered by an additional legal regime, the Aarhus Directive on public access to environmental information (Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41, 14.2.2003, p. 26-32).

<sup>61</sup> There are currently two pending proposals for amending Regulation (EC) No 1049/2001, namely: (i) the 2008 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, COM(2008)229 final 2008/0090 (COD)14; and (ii) the 2011 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, COM(2011)137 final 2011/0073(COD)15.

<sup>62</sup> Article 42 of the Charter of Fundamental Rights of the European Union, OJ C 364/11, 8.12.2000.

Access to documents represents the ontological pre-condition for citizen participation in the Union<sup>63</sup>. Unless an EU document is made available through the publication in the Official Journal of the EU<sup>64</sup> or via the Institution's website<sup>65</sup>, public access can be requested. As such, this participatory mechanism is the most concrete manifestation of the principle of openness and its corollary, transparency of the EU<sup>66</sup>, which are instrumental to the enjoyment of the Treaty-sanctioned right to participate in the democratic life of the Union<sup>67</sup>. This is further confirmed by the language used in Article 10(3) TEU insofar as it expressly combines the recognition of the right to citizen participation with the duty of the EU to take decisions "as openly and as closely as possible to the citizen". It is indeed widely recognized that transparency and openness are instruments to satisfy democratic criteria, especially the ability for citizens to participate in governance and to hold leaders accountable<sup>68</sup>. As none of the EU institutions and bodies has committed itself to absolute transparency, they are subject to certain specific and strictly interpreted exceptions to disclosure<sup>69</sup>. As a matter of principle, any EU document is public to the extent there is no exception or other restriction to the contrary<sup>70</sup>.

#### 4.1.1. Rationale

Access to documents enables citizens and civic intermediaries to scrutinize the political processes and to engage with them either directly or by means of public debate. As such, it enables citizens to play an oversight role on the Union's democratic life, both at the legislative and administrative level. This may in turn lead to the adoption of further participatory action, be it a complaint to the European Ombudsman, a petition to Parliament or even a letter to any EU institution and body. As such, access to documents is also instrumental to procedural justice<sup>71</sup>, and in particular to the duty of care, which in turn consists of "the duty of the competent institution to examine carefully and impartially all the relevant aspects in the individual case, the right of the person concerned to make his views known and

<sup>63</sup> While most EU documents are either published in the Official Journal of the EU or rendered public through the Internet, many are not released into the public domain. See Opinion of Advocate General Sharpston of 10 April 2008 in *Heinrich*, C-345/06, ECLI:EU:C:2008:212, para 129.

<sup>64</sup> Article 297 TFEU and Article 13(1) of Regulation 1049/2001.

<sup>65</sup> Many documents are also available on the Register of Commission Documents, Register of Delegated Acts and other corporate registers managed by the Secretariat-General, while others can be found on websites managed by Directorates General or EUR-Lex.

<sup>66</sup> For an overview of this principle, see, e.g., M. Levitt, 'Access to the File: the Commission's Administrative Procedures in Cases under Articles 85 and 86', *Common Market Law Review*, 1997, vol. 34(6), p. 1413; D. Curtin, 'Citizens' Fundamental Right of Access to EU Information: An Evolving Digital Passepartout', *Common Market Law Review*, 2000, vol. 37(1), p. 7; S. Peers, 'The New Regulation on Access to Documents: A Critical Analysis', *Yearbook of European Law*, 2001, vol. 21(1), p. 385; M. Broberg, 'Access to Documents: A General Principle of Community Law', *European Law Review*, 2002, vol. 27, p. 194; M. De Leeuw, 'The Regulation on Public Access to European Parliament, Council and Commission Documents in the European Union: Are Citizens Better Off?', *European Law Review*, 2003, vol. 28, p. 324.

<sup>67</sup> See Article 10 TEU.

<sup>68</sup> C. Moser, "How open is 'open as possible'? Three different approaches to transparency and openness in regulating access to EU documents", Institute for Advanced Studies, Vienna, 2001, p. 4. For a critical perspective, D. Curtin & A.J. Meijer, 'Does Transparency Strengthen Legitimacy?', *Information Polity*, 2006, vol. 11(2), p. 109.

<sup>69</sup> Article 1(a) and recitals 4 and 11 of Regulation 1049/2001.

<sup>70</sup> There are two types of exceptions to the right of access to EU documents: some are "absolute", meaning that if the EU institutions establish that harm could be caused in those areas, they have the duty to withhold the information. The rest are "relative" exceptions, which means that even if some interests can be harmed by disclosure, the EU institutions are obliged to provide access anyway, if there is a higher public interest in having that information (this is known as an 'overriding public interest').

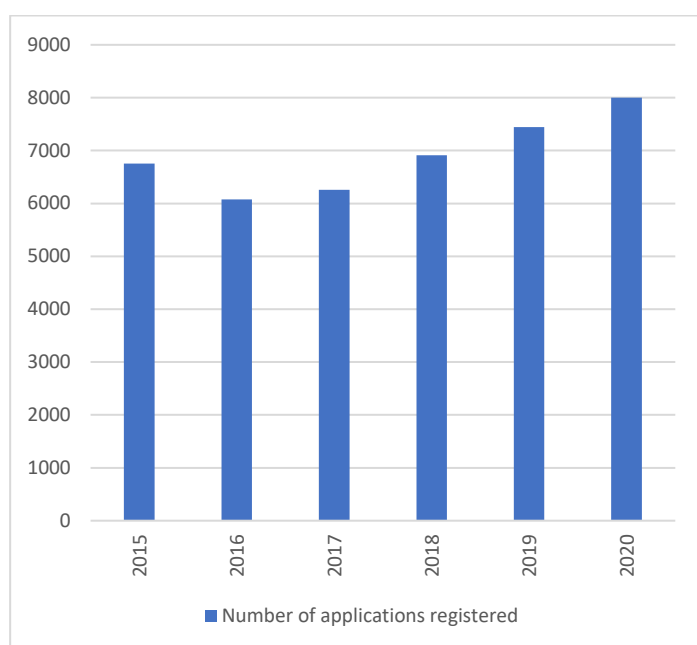
<sup>71</sup> For an account of procedural justice, see, e.g., K. Röhl and S. Machura (eds), *Procedural Justice*, London: Routledge, 1997.

to have an adequately reasoned decision"<sup>72</sup>. All documents released pursuant to the Regulation enter the public domain and become publicly available<sup>73</sup>.

#### 4.1.2. Statistics

The number of requests for access to documents made to the European Commission has remained overall stable over the last years, and in 2020 we witnessed a slight increase.

Figure 1: Total number of applications for access to documents registered by the European Commission (2015–2020)



Source: European Commission<sup>74</sup>

When it comes to the social and occupational profile of applicants<sup>75</sup>, most initial applications originated, as in the previous years, from citizens, followed by academic institutions, and companies, legal professionals, and journalists and, finally, non-governmental organisations<sup>76</sup>.

#### 4.1.3. Accessibility

Access to documents is one of the most accessible mechanisms of participation available to citizens. The right of access to documents is open to both EU and non-EU citizens<sup>77</sup> regardless of the underlying

<sup>72</sup> See, e.g., judgment of 21 November 1991, *Technische Universität München*, C-269/90, ECLI:EU:C:1991:438, para 14; judgment of 18 September 1995, *Nölle*, T-167/94, ECLI:EU:T:1995:169, para 73; judgment of 11 July 1996, *Métropole télévision and Others*, Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93, ECLI:EU:T:1996:99, para 93; judgment of 15 January 2015, *Ziegler and Ziegler Relocation*, T-539/12 and T-150/13, EU:T:2015:15, para 97.

<sup>73</sup> Confirmatory decision of the Commission, doc. SG.B.2/MM/Ttf D(2005).

<sup>74</sup> Report From the Commission on the application in 2020 of Regulation (EC) No 1049/2001 regarding, public access to European Parliament, Council and Commission documents, COM/2021/459 final, 9.8.2021.

<sup>75</sup> Applicants may indicate on the application form of the Europa Website, their social/occupational profile by selecting one of the nine following categories: citizen, academic, lawyer, journalist, non-governmental organisation, company, Member of the European Parliament, subnational or Member State authorities.

<sup>76</sup> Annual Report from the Commission of on the application in 2020 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, COM(2021) 459 final, 9.8.2021.

<sup>77</sup> The Treaty of Amsterdam generously extended the right of information beyond "EU citizens" to "any natural or legal person residing or having its registered office in a Member State". See text of Article 255(1) EC as amended by the Treaty of Amsterdam, and Article 2 of Regulation 1049/2001.

motivations driving individual requests for information<sup>78</sup>. In practice, no EU institution or body bothers checking the identity of the applicant and processes the request irrespective of whether the applicant really fulfils the criteria of Article 2 of the Regulation, or even when it is patently evident that she does not<sup>79</sup>. Even anonymous requests are accepted<sup>80</sup>. This is further evidenced by recent official reports, which do not mention the applicants' identity as an invoked exception to the right to access documents.<sup>81</sup>

#### 4.1.4. Responsiveness

The Regulation defines the procedural conditions governing the relevant EU institution's response to the applicant. Upon the filing of a request for access to document<sup>82</sup>, EU institutions then have the obligation to answer within 15 working days. In exceptional cases, for example when you ask for a large number of documents, an extension of 15 further working days can be applied to the request. The treatment of initial access to documents requests is handled on a decentralised basis by the various Commission Directorates-General and services<sup>83</sup>. Should the institution refuse access, by invoking one of the exceptions under Regulation 1049/2001, individuals may then request that the institution review their decision (a so-called 'confirmatory application').<sup>84</sup>

Those seeking public access to documents may institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the TFEU if the institution has rejected, in full or in part, their confirmatory application. They can argue that the exceptions invoked do not apply or that there is an overriding public interest in the document(s) being disclosed. Failure by the institution to reply within the prescribed time limit is also considered a negative reply and entitles the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman<sup>85</sup>, under the relevant provisions of the Treaty<sup>86</sup>. The Ombudsman seeks to deal with such complaints as swiftly as possible and, to this end, has put in place a fast-track procedure<sup>87</sup>. The number of public access related complaints almost doubled from an average of 45 per year in the years 2014 to 2016 to an average of 82 per year between 2017 and 2019, when the fast-track procedure was in place.

#### 4.1.5. Effectiveness

Under Regulation 1049/2001, all EU documents should as a matter of principle be publicly accessible, except for those that fall within explicitly protected interests. However, several of these exceptions to

<sup>78</sup> Article 2 of Regulation 1049/2001 (beneficiaries and scope).

<sup>79</sup> Bart Driessen, *Transparency in EU Institutional Law*, London: Cameron, May 2008, p. 9.

<sup>80</sup> *Ibidem*.

<sup>81</sup> Report From the Commission on the application in 2020 of Regulation (EC) No 1049/2001 regarding, public access to European Parliament, Council and Commission documents, COM/2021/459 final, 9.8.2021, pp. 20-22.

<sup>82</sup> As the EU does not provide a one-single entry point to file requests for access to documents, a dedicated portal has been established by Access Info Europe: [www.AsktheEU.org](http://www.AsktheEU.org).

<sup>83</sup> Report From the Commission on the application in 2020 of Regulation (EC) No 1049/2001 regarding, public access to European Parliament, Council and Commission documents, COM/2021/459 final, 9.8.2021, p. 4. Each Directorate-General and service appoints at least one legal expert for this task, acting as 'access to documents coordinator'. Confirmatory requests are dealt with by the Secretariat-General.

<sup>84</sup> See Article 7 of the Regulation.

<sup>85</sup> See Article 8 of the Regulation.

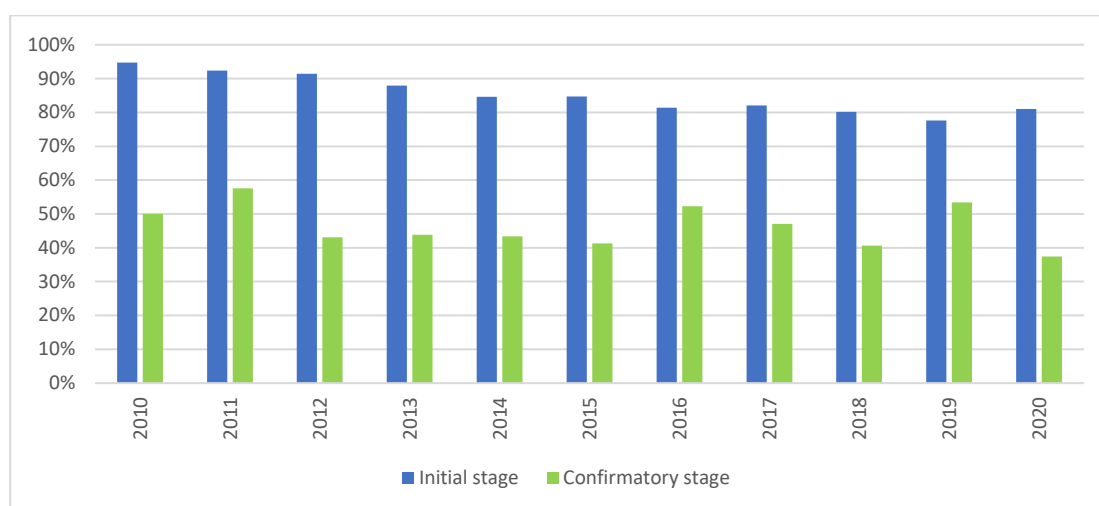
<sup>86</sup> See Article 228 TFEU, Article 20(2) let. d) TFEU and Article 24 TFEU.

<sup>87</sup> See European Ombudsman, *Review of the Ombudsman's Fast-Track procedure*, Ref. Ares(2021)1297199 - 16/02/2021. The Ombudsman will then take a decision within five working days on whether or not she can open an inquiry into the complaint and aims to take a final decision on 'access to documents' inquiries within 40 working days (from when she received the complaint).

disclosure have been interpreted such that documents covered by them do not have to be disclosed if their release would harm a protected interest, unless there is an “overriding public interest in disclosure” exists in the circumstances. This suggests that if an institution considers that any of these exceptions apply to a document that must still determine first whether, in the circumstances, a public interest in disclosure exists and then weigh that interest against the harm that might result to the interest protected by the exception. As such, this approach represents an explicit acknowledgment by the EU legislature that even in cases where harm to a protected interest might exist – and might even potentially be significant – the public’s interest in receiving access to that document can still trump an exception to disclosure. However, in the absence of a definition or an indication as to the nature of the existence of such overriding public interest, this concept has been crafted by the sole Court of Justice of the European Union (hereinafter ‘CJEU’) which has resulted in the concept’s operation not aligning with its underlying purpose<sup>88</sup>.

When it comes to measuring the effectiveness of the instrument, the most immediate proxy is offered by the percentage of requests that are satisfied. Statistics for the year 2020 for requests made to the European Commission show that the requested documents were fully or partially disclosed in almost 81% of the 8,001 cases at the initial stage, and wider or even full access was granted in 37.4% of the 265 cases reviewed at the confirmatory stage.

Figure 2: Total number of requests for access to documents satisfied by the European Commission (2015–2020)



Source: European Commission<sup>89</sup>

These numbers have been relatively stable over the past decade, although with a slight trend towards less requests being satisfied, both at the initial and confirmatory stages ( $\pm$  -10% since 2010, progressively happening over time). At the initial stage in 2010, 2011 and 2012 there were 94.6%, 92.4% and 91.4% respectively of requests fully or partially satisfied – compared to 80.2%, 77.6 and 81% in 2018, 2019 and 2020 respectively. At the confirmatory stage in 2010, 2011 and 2012, there were 50%, 57.63% and 43.13% respectively of requests fully or partially satisfied – compared to 40.7%, 53.4% and 37.4% in 2018, 2019 and 2020 respectively.

<sup>88</sup> See, e.g., judgment of 4 September 2018, *ClientEarth*, C-57/16 P, ECLI:EU:C:2018:660, para 51 and the case-law cited.

<sup>89</sup> Annual reports from the Commission on the application of Regulation 1049/2001, available at [https://ec.europa.eu/info/publications/reports-public-access-european-parliament-council-and-commission-documents\\_en](https://ec.europa.eu/info/publications/reports-public-access-european-parliament-council-and-commission-documents_en).



#### 4.1.6. Conclusions

The implementation of the principle of transparency as a right of access to documents was – and still remains – specific, unidirectional and bottom-up: its enjoyment requires citizens' action vis-à-vis a given institution to attain a given piece of information.

Despite being quite open and user friendly in its initial application, the systematic delays by the EU institutions in providing a response compounded with the administrative complexities of the confirmatory process and underlying case law weaken the participatory potential of the right to access to documents in the EU. The reform of Regulation 1049/2001 is long overdue.

### 4.2. Petitions to the European Parliament

The right to petition represents the oldest<sup>90</sup>, most accessible, permanent, and general-purpose participatory mechanism for any individual who intends to enter into contact with the EU institutional apparatus. As such, EU petitions represent, at least on paper, the cornerstone of participatory democracy in the EU, by giving citizens a voice and take their policy concerns directly to the heart of Parliament, and of the whole Union, so as to influence its administrative, legislative and ultimately political agenda<sup>91</sup>.

According to Article 227 TFEU, "(a)ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Union's fields of activity and which affects him, her or it directly".

The right to petition applies to any individual resident on the EU territory, including minors and illegal migrants, as well as companies and organisations, and a petition may relate to issues of public or private interest. In Parliament, petitions are dealt with in the Committee on Petitions (hereinafter 'PETI Committee'), a dedicated parliamentary committee in charge of the whole petition life cycle.

#### 4.2.1. Rationale

The right to petition plays different and complementary functions, from administrative and political oversight over the Commission and the Member States to legislative agenda-setting, while offering a unique mechanism of representation for individuals and minorities – such as non-EU citizens, migrants, and minors – who currently lack representation.

First, petitions are useful tools for detecting breaches of Union law and enable Parliament and potentially other EU institutions and bodies to assess the transposition and application of EU law and its impact on EU citizens and residents. As such they provide a path towards remedy by initiating the most appropriate course of action, including by opening a dialogue with the concerned institutions or Member States, by filling in legislative or policy gaps, or by taking any other appropriate initiatives. By drawing Parliament's attention, and more broadly that of the EU, to detect an issue on the application of EU law at member state level or consider a position on a specific EU related matter, it offers a permanent feedback mechanism turning citizens not only into watchdogs of the application of EU

<sup>90</sup> Despite being present from the very beginning of the European parliamentary history, the right to submit petitions to the European Parliament was not explicitly provided for in the Treaties establishing the European Communities until the 1992 Maastricht Treaty. While its formal recognition dates back the Treaty of Maastricht and is associated with the EU citizenship (Article 24 TFEU – no recognition in the TEU), petitions were already accepted as a custom by the Common Assembly of the European Coal and Steel Community and the European Parliament well before 1992.

<sup>91</sup> It is one of the main rights granted by the Treaties to Union citizens, as provided by Articles 20, 24 and 227 TFEU, as well as by Article 44 of the Charter of Fundamental Rights of the EU.

law<sup>92</sup>, but also, more broadly, actors in the Union's democratic life. The right to petition provides EU citizens and residents with a simple means of contacting the European institutions with complaints or requests for action in relation to "orphan" or "dormant" issues that fail to get the attention and action of Parliament or other EU institutions, in particular concerning problems related to the application of EU law at the national and local levels. In this sense, petitions potentially shed light on issues that would otherwise be forgotten or remain unaddressed, and create a positive dynamic for citizens, for the institutions and for democracy in the EU.

Second, a petition can also – although indirectly – play an important law-making function in allowing the aggrieved to be heard, by expressing their concerns, as well as putting forward some legislative preferences.<sup>93</sup> Therefore, by bringing to the EU institutions' attention new policy ideas, needs and preferences, also beyond ongoing legislative files, petitions may play an agenda-setting role, similar to that sought by an ECI.

Third and last, the bottom-up, political scrutiny and oversight combined with the law-making function inherent to the EU petition system unveil yet another, broader role played by the right of petition, that of a mechanism of participatory democracy<sup>94</sup>. This has been confirmed by the CJEU, in *Schönberger*, where it qualified the right to petition as an "*instrument of citizen participation in the democratic life of the European Union. It is one of the means of ensuring direct dialogue between citizens of the European Union and their representatives*"<sup>95</sup>. Seen from such a perspective, petitions represent an instrument of participatory democracy.

#### 4.2.2. Statistics

The overall number of petitions filed on an annual basis remains extremely modest in relation to the total population of the EU. This reveals not only that citizens' awareness about this participatory instrument remains very low but also that its overall effectiveness is what ultimately bars greater inception. There was just one petition – in 1958 – in the first five years of activity<sup>96</sup>; fewer than 10 between 1964 and 1974; and, finally, a progressive increase in the four years from 1975 to 1978<sup>97</sup>, with an average however of fewer than 10 petitions per year. By then a total of 128 petitions were lodged to the European Parliamentary Assembly, renamed 'European Parliament', from 1962 on<sup>98</sup>. After witnessing some growth in 1980s and 1990s, the number of petitions steadily increased until 2014 but it has been declining since then. After a record-high peak in 2013 and 2014, the overall number of

<sup>92</sup> Committee on Petitions, Report on the outcome of the Committee on Petitions' deliberations during 2018, 2018/2280(INI), January 2019, let. L and M.

<sup>93</sup> See Report on the Activities of the Committee on Petitions 2013, 2014/2008(INI), Rapporteur: Jarosław Leszek Wałęsa, p. 4 ("whereas such petitions as have been addressed to the Committee on Petitions have often provided useful inputs to other committees of the European Parliament which have the responsibility of formulating legislation designed to establish a socioeconomically and environmentally more secure, sound, fair and prosperous basis for the future of all European citizens and residents").

<sup>94</sup> A. Alemanno, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy', *European Law Review*, 2014, vol. 1, p. 72; M. Nentwich, 'Opportunity Structures for Citizens' Participation: The Case of the European Union', in A. Weale & M. Nentwich, *Political Theory and the European Union*, Routledge, 1998, p. 125.

<sup>95</sup> Judgment of 9 December 2014, *Schönberger v European Parliament*, C-261/13 P, ECLI:EU:C:2014:2423, para 17.

<sup>96</sup> Originally, the admissibility assessment belonged to the President of the European Coal and Steel Community's (ECSC) Common Assembly, who forwarded the petition to the competent committee – the Committee on Rules of Procedure –, which decided whether the petition fell under the competence of the ECSC. Only in the affirmative, the petition was forwarded to the High Authority (today's European Commission), to the Council, or to one of the committees of the Assembly, for the preparation of a report.

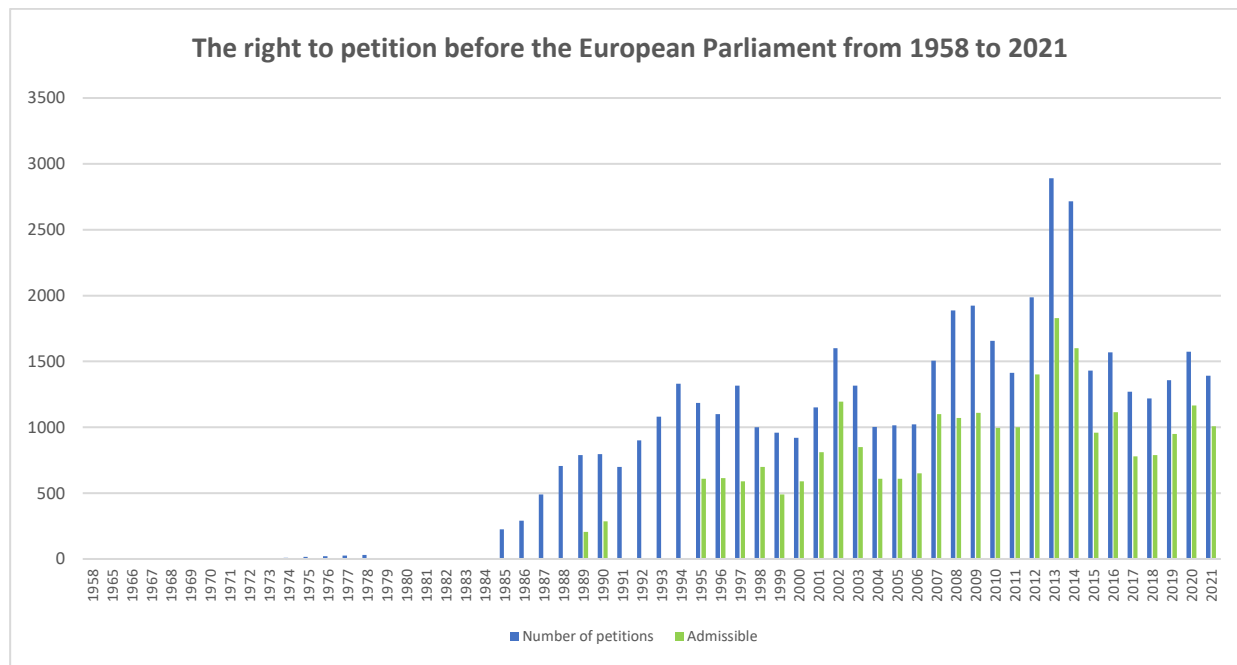
<sup>97</sup> See European Parliament, 'The citizen's appeal to the European Parliament: petitions 1958-1979', *CARDOC Series n°4*, 2009.

<sup>98</sup> *Ibidem*.



petitions has dropped despite the possibility to lodge the petitions online<sup>99</sup>, where registered petitions can also be read and supported by other citizens<sup>100</sup>. The number of petitions lodged before Parliament has indeed been decreasing over the last decade.<sup>101</sup> However, the number of users supporting one or more petitions on Parliament's Petitions Web Portal in 2021 was 209 272, which represents a very considerable rise as compared to the 48 882 users recorded in 2020<sup>102</sup>, but a disappointing result when comparing with the figures – in the order of millions of citizens reached out every year – attained by online campaigning organisations operating across the continent, such as Avaaz, Change and WeMove.

Figure 3: Total number of petitions submitted to the European Parliament (1958–2021)



Source: Alberto Alemanno based on raw data provided by the PETI Committee.

When it comes to the identity of petitioners, in its first phase of development (1953–1979), over half of the petitions came from two categories of actors: associations representing organised interests – mostly universal as opposed to private interest – and Community (then EU) officials<sup>103</sup>. No surprise, these were, at least originally, the two groups more likely to be aware of – and accustomed to – making their voice heard within the European decision-making bodies. Some petitions were submitted by national Members of Parliament. Today the picture is more diverse<sup>104</sup>.

<sup>99</sup> The Petitions Web Portal, which came into operation on 19 November 2014, was established during the 2009-14 legislature to allow an easier submission of petitions, more interaction and information services. However, it also initiated a filter mechanism designed to 'prevent non-petitions' from being registered.

<sup>100</sup> These actions of support to a petition entails the registration to the dedicated platform and are therefore not immediately open to anyone.

<sup>101</sup> A. Alemanno, 'Strengthening the role and impact of the right of petition as an instrument of participatory democracy in the European Union', Study requested by the PETI committee and published by the European Parliament, PE 694.837 - October 2021.

<sup>102</sup> European Parliament, Secretariat of the Committee on Petitions.

<sup>103</sup> European Parliament, 'The citizen's appeal to the European Parliament: petitions 1958-1979', *CARDOC Series n°4*, 2009, p. 16.

<sup>104</sup> Today's petitions originate not only from individual citizens, but also local communities, NGOs, voluntary associations, and private businesses.

#### 4.2.3. Accessibility

Petitions, being open to any EU resident, regardless of nationality, legal status or age, as well as to any resident association or movement, also offer a unique mechanism of representation for individuals and minorities, who currently lack representation. As such, petitions are one of the most open EU participatory mechanisms. Indeed, neither minors nor illegal migrants – or EU mobile citizens who regularly reside in another EU country different from where they carry the nationality – are entitled to fully exercise political rights within and across the EU. Yet these politically disenfranchised may all turn to the EU petition system in order to participate in the Union's democratic life, thus allowing Parliament to represent the needs and interests of those citizens who are not part of the political community.<sup>105</sup> Petitions offer the politically powerless and a variety of diffused interest-holders a means of participation that is formal, public and does not presuppose a legal status. Legally, a petition supported by one and sole individual is enough to bring an issue to the Union's attention through Parliament and to trigger a response of the latter, regardless of the legal status and political power of the petitioner. This suggests that the EU petition system offers – by design – a structural protection for minority participation, be it in terms of individuals and diffused interests represented, in EU decision-making. Ultimately, the right of petition is a political right conferred to a wider community of individuals than EU citizens and third-country nationals, aimed at ensuring that the Union operates democratically and takes into account the needs and aspirations of its inhabitants. In addition, the right of petition is the only EU participatory mechanism – together with the ECI – that enables, by design, the initiator to collectivise action both before (massed petitions) and after (additional support) the petition has been submitted<sup>106</sup>, and a mere signature may suffice to prompt an institutional response.

However, the relatively high percentage (26.5 %) of inadmissible petitions in 2021 demonstrates that there is still a widespread lack of clarity about the scope and limits of the Union's areas of responsibility<sup>107</sup>.

#### 4.2.4. Responsiveness

There is no exclusive course of action with regard to the treatment of petitions. Depending on the circumstances, the Committee on Petitions may take – either through discussion at a regular meeting or by written procedure – a variety of actions, taking individual, specific or particular circumstances into account<sup>108</sup>. In any event, approximately two thirds of the petitions received every year are examined in substance by the PETI Committee<sup>109</sup>.

If the PETI Committee needs to elicit reactions and information, it can request assistance from other EU institutions, generally the Commission and, for example dispose of a fact-finding visit or organise a public hearing. Depending on the outcome of its investigative efforts and answers received, the PETI Committee may take a decision and for example to submit a short motion for a resolution to

<sup>105</sup> See European Parliament, Report on the activities of the Committee on Petitions 2013, 2014/2008(INI), Rapporteur: Jarosław Leszek Wałęsa, p. 3.

<sup>106</sup> Under Rule 227(4) of the Rules of Procedure of the European Parliament.

<sup>107</sup> European Parliament, Secretariat of the Committee on Petitions

<sup>108</sup> In addition to Article 226-230 of the Rules of Procedure, see Guidelines – Committee of Petitions, 2015, updated in 2018: "These guidelines are without prejudice to Title IX of the European Parliament's Rules of Procedure concerning the work of the Committee on Petitions and to any other provision of the Rules of Procedure, and are not, under any circumstances, binding on the Members or the Secretariat of the Committee".

<sup>109</sup> A. Alemanno, 'Strengthening the role and impact of the right of petition as an instrument of participatory democracy in the European Union', Study requested by the PETI committee and published by the European Parliament, PE 694.837 - October 2021.

Parliament<sup>110</sup> or to draw up an own initiative report<sup>111</sup>. However, petitions may be closed by the PETI Committee at various stages of the procedure, and not only in the final phase of the examination cycle<sup>112</sup>.

#### 4.2.5. Effectiveness

Under the existing legal framework, Parliament alone carries the obligation to examine and respond petitions, by seeking a solution<sup>113</sup>. This makes Parliament – via its PETI Committee – not only functionally and institutionally autonomous in its handling of the petitions, but also the only institution legally responsible for that handling *vis-à-vis* petitioners. However, as most issues and questions raised by petitioners cannot be addressed by the PETI Committee alone (due to its lack of executive power), its work and success heavily rely on third-party cooperation. In particular, the solution sought by the petitioner depends on both internal (other parliamentary committees) and external cooperation, notably the Commission, other EU bodies and agencies, as well as the Member States' national, regional, and local authorities. In addition, when a petition raises problems related to the transposition and application of EU law, its effective treatment is linked to the level of cooperation that the Commission, sometimes other EU bodies, and Member States will offer to Parliament.

What happens when the PETI Committee, based on its examination, collection of information, and fact-finding, calls on the Commission to take action against a Member State, but the Commission refuses to follow suit? In those circumstances, Parliament's duty to satisfy petitioner's right – as it is imposed on the PETI Committee – conflicts with the Commission's freedom in exercising its administrative discretion. Therefore, as the Commission enjoys almost unlimited discretion in ensuring the application of EU law (through *inter alia* the triggering of Article 258 TFEU)<sup>114</sup>, the right to petition does not automatically lead to the solution of the problem raised by the complainant. Under settled case law, the Commission has discretion whether to start or discontinue an infringement proceeding<sup>115</sup>.

After being left to the serendipity inherent to any case-by-case approach, this tension has however crystallised over time. In 2017, the Commission has established a new policy determining in what situations it intends to open infringement actions. In the Communication "EU Law: Better Results through Better Application", the Commission states that it would "give high priority to infringements that reveal systemic weaknesses which undermine the functioning of the EU's institutional framework"<sup>116</sup>. Individual cases by typically not falling under this category are not considered – as a matter of principle – by the Commission as a potential trigger for an infringement action. Yet, as

<sup>110</sup> Provided that the Conference of Committee Chairs is informed in advance and there is no objection by the Conference of Presidents. See Article 227(2) of the Rules of Procedure of the European Parliament.

<sup>111</sup> Rule 54(1) of the Rules of Procedure: "A committee intending to draw up a non-legislative report...on a subject within its competence on which no referral has taken place, may do so only with the authorisation of the Conference of Presidents". This generally deals with the application or interpretation of Union law or proposed changes to existing law.

<sup>112</sup> PETI Committee Guidelines, para 15 ('Closing a petition').

<sup>113</sup> Article 227 TFEU. See also Article 44 of the Charter of Fundamental Rights of the EU.

<sup>114</sup> The other being the European Ombudsman but whose mandate is limited to 'maladministration', as will be discussed below.

<sup>115</sup> Communication from the Commission to the Council and the European Parliament, "Updating the handling of relations with the complainant in respect of the application of Union law", COM(2012) 154 final, 2.4.2012, p. 8. See judgment of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, ECLI:EU:C:2013:738, para 67; judgement of 6 December 1989, *Commission v Hellenic Republic*, C-329/88, ECLI:EU:C:1989:618; judgment of 1 July 2014, *Commission v Germany*, C-317/92, ECLI:EU:C:1994:212; judgment of 14 September 1995, *Lefebvre v Commission*, T-571/93, ECLI:EU:T:1995:163; judgment of 19 May 2009, *Commission v Italy*, C-531/06, ECLI:EU:C:2009:315.

<sup>116</sup> Communication from the Commission — EU law: Better results through better application, C/2016/8600, OJ C 18, 19.1.2017, p. 10–20.

highlighted by Parliament, “the refusal to investigate citizens’ complaints, including individual cases, thoroughly and promptly in line with the Commission’s approach in its 2016 communication ... may prevent a rapid understanding of possible serious systemic shortcomings, thereby perpetuating multiple rights infringements at the expense of numerous citizens”.

While the Commission enjoys full discretion in determining whether to commence a proceeding<sup>117</sup>, the question is whether it has a procedural obligation to assess, in an unbiased way, whether and how to exercise its discretion, and to define and explain its position to the petitioner through the PETI Committee. The existence of a policy preventing the Commission to do so on a case-by-case basis may therefore infringe upon the principle of loyal cooperation, which governs its relations and cooperation with Parliament<sup>118</sup>.

Being limited to political oversight, the supervisory function played by Parliament has therefore a lower intensity than the one exercised by the Commission over the Member States’ compliance with EU law.

#### 4.2.6. Conclusions

To sum up, the right of petition is and remains the most accessible, permanent, and general-purpose participatory mechanism within the current EU opportunity infrastructure<sup>119</sup>. It offers the most accessible means for citizens to contact the European institutions with complaints or requests for action in relation to “orphan” or “dormant” issues that fail to get the attention and action of other European Parliament committees or EU institutions, in particular concerning problems related to the application of EU law at the national and local levels.

Yet, despite the PETI Committee’s openness and its considerable level of responsiveness, there exists structural shortcomings – ranging from the limited publicity surrounding its use all the way to its excessive dependency on unwilling third-party actors such as the Commission – that continue to significantly curtail its effectiveness. This may explain why the right of petition has never become the primary infrastructure by which citizens participate in the Union’s democratic life. Yet it appears undisputed that “if fully respected in its essence, the right to petition may strengthen Parliament’s responsiveness to EU citizens and resident”<sup>120</sup>. Because of all of the above, petitions remain the participatory mechanism with the higher untapped democratic potential.

### 4.3. Public consultations by the European Commission

Historically, the Commission has a long tradition of consulting interested parties and being ‘open to outside input’<sup>121</sup> when formulating its policies. Yet this became institutionalised only by the Lisbon

<sup>117</sup> Communication from the Commission to the Council and the European Parliament, “Updating the handling of relations with the complainant in respect of the application of Union law”, COM(2012) 154 final, 2.4.2012, p. 8. See judgment of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, ECLI:EU:C:2013:738, para 67; judgement of 6 December 1989, *Commission v Hellenic Republic*, C-329/88, ECLI:EU:C:1989:618; judgment of 1 July 2014, *Commission v Germany*, C-317/92, ECLI:EU:C:1994:212; judgment of 14 September 1995, *Lefebvre v Commission*, T-571/93, ECLI:EU:T:1995:163; judgment of 19 May 2009, *Commission v Italy*, C-531/06, ECLI:EU:C:2009:315.

<sup>118</sup> For an empirical study of the EU Commission’s changing enforcement policy through Article 258 TFUE, see R.D. Kelemen & T. Pavone, ‘Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union’, 27 December 2021, available at SSRN: <https://ssrn.com/abstract=3994918>.

<sup>119</sup> European Parliament, Report on the outcome of the Committee on Petitions’ deliberations during 2018, 2018/2280(INI), Committee on Petitions, January 2019.

<sup>120</sup> Annual Report of the PETI Committee, 2016, let. H.

<sup>121</sup> Commission Communication, ‘An Open and Structured Dialogue between the Commission and special interest groups, SEC/92/2272 final, 2.12.1992.

Treaty in 2009<sup>122</sup>. The declared rationale, format, as well as legal basis relied upon by the Commission when holding public consultations have changed over time, in parallel with the transformations of the broader political context of EU integration. Today, the EU institutions are required to ('shall') "give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action", and, under Article 11(2) TEU, they must do so through "an open, transparent and regular dialogue". More specifically, Article 11(3) TEU requires the Commission to hold "broad consultations with parties concerned" on all its initiatives<sup>123</sup>, including non-legislative ones. Consequently, through the Commission's '[Have your say](#)' portal, individuals and organisations can give feedback on roadmaps and impact assessments of upcoming legislation, participate in 12-week public consultations on initiatives under preparation – or evaluations of the performance of existing EU actions – and comment on draft delegated and implementing acts.

#### 4.3.1. Rationale

Originally, in a first phase dating back to the early days of EU integration, consultations were developed as a means to secure the efficient performance of the Commission's decision-making prerogatives<sup>124</sup>. Subsequently, in a second phase starting in the mid-90s, consultations gained an additional, higher-level rationale: that of legitimising the Commission's policy work, both epistemically (through information collection) and socially (through wider participation)<sup>125</sup>. In other words, consultations, by providing an early opportunity in the preparatory process, became – and continue to be – the privileged remedy to compensate for the absence of a traditional political right of initiative in the hands of the EU Parliament. More recently, a third phase started: amid the Better Regulation agenda, consultative processes were also recognised as a way to improve the quality of legislation<sup>126</sup>. This led the consultations to be integrated into and become part of the impact assessment analysis, a fundamentally technocratic process centred on evidence collection and evaluation<sup>127</sup>. By approaching public consultations through the prism of the impact assessment system, the Commission continues to instrumentally approach public input as yet another element to consider while evaluating the prospective impact of its proposals.

Yet, since the Lisbon Treaty, according to Article 11 TEU, "the European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent". While this development has paved the way to, but not yet successfully concretised into a new, fourth phase of the Commission's consultative practice, it has planted the seed for a renewed understanding of public consultations, and their democratic potential. This participatory trend, which has been largely driven by a vast, influential academic literature<sup>128</sup>, has inspired the hazardous process of the EU institutional reform since then.

<sup>122</sup> Article 11(3) TEU.

<sup>123</sup> Article 11(3) TEU: "The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent".

<sup>124</sup> See, e.g., J. Mendes, *Participation in European Union Rulemaking: A Rights-Based Approach*, Oxford University Press, 2011; P. Staszczuk, *A Legal Analysis of NGOs and European Civil Society*, Kluwer, 2019, pp. 128-9.

<sup>125</sup> See, on this point, J. Greenwood, *Interest Representation in the European Union*, MacMillan, 2007, p. 2. See also, Protocol No. 7 on the implementation of the principles of subsidiarity and proportionality annexed to the Treaty of Amsterdam.

<sup>126</sup> Interinstitutional Agreement on Better Law-making, OJ C 321/1, 31.12.2003. The Commission announced in its 2010 Communication on Smart Regulation in the EU its intention to further strengthen the voice of citizens and stakeholders by extending the minimum consultation period from 8 to 12 weeks as of 2012 and by carrying out a review of its consultation policy.

<sup>127</sup> A. Meuwese, *Impact Assessment in EU Lawmaking*, Kluwer, 2008.

<sup>128</sup> See, e.g., O. de Schutter, N. Lebessis & J. Paterson, 'Governance in the European Union', *Cahiers of the Forward Studies Unit*, Luxembourg: European Publication Office, 2001; K.A. Armstrong, 'Rediscovering Civil Society: The European Union and

### 4.3.2. Statistics

The number of public consultations organized by the Commission has been growing over time, with an average of approximately 100 per year over the last decade<sup>129</sup>. Yet this gradual institutionalisation of consultative practices – which has been driven more by the Better Regulation agenda than their Treaty recognition – has not translated into a higher participation rate or a more 'representative' response. When it comes to the level of participation attained, public consultations are supposedly designed to reach a wide spectrum of respondents, who offer feedback on a voluntary basis<sup>130</sup>. The truth is that participation levels vary considerably among initiatives – with the 2018 public consultation on summertime producing 4.6 million responses (the highest number ever received in any public consultation by the Commission)<sup>131</sup> to the 2016 public consultation on the European Pillar of Social Rights with 16 500 responses – but tend to stay in the low figures. According to the 2019 audit conducted by the EU Court of Auditors, the average participation to a Commission's consultation is of 500 responses in 2015–2016 and 2 000 responses each in 2017–2018<sup>132</sup>. Moreover, on average, just over a third of the sample of consultations examined received over 1 000 responses, while over a third received under 75<sup>133</sup>.

As for their level of representativeness<sup>134</sup>, the response to consultation typically shows a geographical imbalance, with a gradient of participation between the Member States in the northern and Western Europe and those in the south and east. It is also characterised by a limited plurality in the interests represented<sup>135</sup>. Studies on the EU population of interest representatives have found that the participation of different types of interest is not equal<sup>136</sup>. In particular, the consultation process is essentially dominated by corporate representatives<sup>137</sup>, and to a lesser extent by civil society

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the White Paper on Governance', *European Law Journal*, 2008, vol. 8, pp. 102-32; S. Smismans, 'The EU schizophrenic constitutional debate. Vertical and horizontal decentralism in European governance', *EUI-RSCAS Working Papers*, 2006; B. Kohler-Koch & B. Rittberger, *Debating the Democratic Legitimacy of the European Union*, Rowman & Littlefield, 2007, pp. 16, 40; G. Abels, 'Citizens' deliberations and the EU's democratic deficit. Is there a model for participatory democracy?', *Tübinger Arbeitspapiere*, No. 1/2009; A. von Bogdandy, 'The European lesson for international democracy: the significance of Articles 9 to 12 EU Treaty for International Organizations', *European Journal of International Law*, 2012, vol. 23, pp. 315-334; V. Cuesta-Lopez, 'The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy', *European Public Law*, 2010, pp. 123-138, 132; H.J. Blanke & S. Mangiameli, *The Treaty on European Union (TEU): A Commentary*, Springer, 2013.

<sup>129</sup> See European Court of Auditors, "'Have your say!': Commission's public consultations engage citizens, but fall short of outreach activities", Special Report No 14/2019. These figures exclude the top consultation for the year in question.

<sup>130</sup> *Ibidem*.

<sup>131</sup> Most of the responses came from citizens from Germany whose participation rate as a country was approximately 4% of its entire population. See European Commission, Summertime Consultation, 31 August 2020.

<sup>132</sup> These figures exclude the top consultation for the year in question. See European Court of Auditors, "'Have your say!': Commission's public consultations engage citizens, but fall short of outreach activities", Special Report No 14/2019.

<sup>133</sup> *Ibidem*.

<sup>134</sup> On the distinction between representation of EU civil society and its representativeness, see B. Kohler-Koch, 'Civil Society and EU democracy: 'astroturf' representation?', *Journal of European Public Policy*, 2010, 17(1), pp. 100-116.

<sup>135</sup> See, e.g., B. Kohler-Koch, *Civil Society Participation in Demystification of Participatory Democracy*, Oxford University Press, 2013.

<sup>136</sup> See, e.g., R. Eising, 'The Access of Business Interests to EU Institutions: Towards Elite Pluralism?', *Journal of European Public Policy*, 2007, vol. 14(3), p. 399; D. Coen & A. Katsaitis, 'Chameleon Pluralism in the EU: An Empirical Study of the European Commission Interest Groups Density and Diversity Across Policy Domains', *Journal of European Public Policy*, 2013, vol. 20(8), p. 1104; J. Greenwood, *Interest Representation in the European Union*, MacMillan, 2007, p. 2.

<sup>137</sup> A. Rasmussen & B.J. Carroll, 'Determinants of Upper-Class Dominance in the Heavenly Chorus: Lessons from European Union Online Consultations', *British Journal of Political Science*, 2014, vol. 44(2), p. 446.



organisations<sup>138</sup>, public authorities and research centres. Besides a few exceptions<sup>139</sup>, lay citizens are almost absent from the current consultative process<sup>140</sup>.

#### 4.3.3. Accessibility

All Commission public consultations are, as a matter of principle, open to anyone. This is because “for maximum usefulness and inclusivity, it is important to consult as widely as possible (while avoiding ‘consultation fatigue’), giving all interested parties the opportunity to contribute to the timely evaluation or development of effective policies”<sup>141</sup>. To do this, all relevant stakeholders are provided with a reasonable period (minimum 12 weeks), in which to make informed and effective contributions<sup>142</sup>. Despite public consultations being constitutionally stamped as a democratic practice, there is no recognition in primary law of an actual right for ordinary citizens and other affected parties to participate in the EU policy process. As a result, the current consultation mechanism provides no guarantee of involvement of affected parties in procedures that concern them<sup>143</sup>. In other words, the rhetoric of ‘new governance’ accompanying the use of the instrument and ensuing ‘constitutionalisation’ have not yet translated into the recognition of a set of subjective participation rights<sup>144</sup>. Indeed, despite some expectations that these provisions might have ‘upped the stakes’<sup>145</sup>, no major development has occurred over the last years and virtually no attempt has been made by complainants to invoke those consultative rights before EU Courts. In these circumstances, the Commission remains *de facto* free in deciding what initiatives are subject to consultation, how to frame those consultations and, ultimately, what to do with their findings.<sup>146</sup> Yet, as public consultations remain “the most effective device for interest-representation and citizen participation in rulemaking”<sup>147</sup>, this outcome appears deeply problematic.

Moreover, the overall framing of public consultations – typically consisting of a semi-structured survey guiding the responses – is marked by social bias<sup>148</sup>. Despite the self-commitment to employ a

<sup>138</sup> On the separate issue of ‘representativeness’ of the single civil society organization at the EU level, see, e.g., O. de Schutter, ‘Europe in Search of its Civil Society’, *European Law Journal*, 2002, vol. 8(2), pp. 198-217; P. Nanz & J. Steffek, ‘Global Governance, Participation and the Public Interest’, *Government and Opposition*, 2004, vol.39(2), pp. 314-35; A. Kutay, ‘Limits of Participatory Democracy in European Governance’, *European Law Journal*, 2015, vol. 21(6), pp. 803-818.

<sup>139</sup> One of the most notable exceptions was the response to the consultation on the functioning of the existing EU summertime arrangements in July 2018. It received more than 4.6 million responses, mostly from citizens but mainly from Germany whose participation rate as a country was approximately 4% of its entire population. See European Commission, Summertime Consultation, 31 August 2020.

<sup>140</sup> For an initial analysis, R. Badouard, ‘Combining inclusion with impact on the decision? The Commission’s online consultation on the European Citizens’ Initiative’, in R. Kies & P. Nanz, *Is Europe Listening to Us? Successes and Failures of EU Citizen Consultations*, Routledge, 2013, pp. 153-172; C. Quittkat & B. Finke, ‘The European Commission consultation regime’, in: B. Kohler-Koch, D. de Bièvre & W. Maloney (eds.), *Opening EU-Governance to Civil Society: Gains and Challenges*, Mannheim: CONNEX Report Series, 2008, pp. 183-222.

<sup>141</sup> In full respect of the general rules set out in the Commission Communication, ‘Towards a reinforced culture of consultation and dialogue – general principles and minimum standards for consultation of interested parties by the Commission’ (COM(2002) 704).

<sup>142</sup> Commission Staff Working Document, Better Regulation Guidelines, SWD(2021) 305 final, 3.11.2021.

<sup>143</sup> This is even expressly excluded outside of initiatives with impact assessments; evaluations; fitness checks; consultative Commission communications; and Green Papers. See Commission Staff Working Document, Better Regulation Guidelines, SWD (2017) 350, 7.7.2017, p. 71.

<sup>144</sup> See, e.g., J. Mendes, *Participation in European Union Rulemaking: A Rights-Based Approach*, Oxford University Press, 2011.

<sup>145</sup> P. Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform*, Oxford University Press, 2010, p. 77.

<sup>146</sup> A. Alemanno, ‘The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission’s Walls or the Way Forward?’, *European Law Journal*, 2009, 15(3), pp. 382-400.

<sup>147</sup> C. Harlow, ‘The Limping Legitimacy of EU Lawmaking: A Barrier to Integration’, *European Papers*, 1/2016, pp. 29-54, 38.

<sup>148</sup> Insights of behavioural studies make apparent that consultation processes can be affected by the type of questions asked, what information is given, how the stakeholders are primed, and how engagement is facilitated. See F. Cafaggi & G. Sillari,

'stakeholder friendly language'<sup>149</sup>, most consultation documents and surveys employed by the Commission remain highly technical, to the point of *de facto* precluding wide participation, thus preventing a "democratically relevant discussion about goals from taking place"<sup>150</sup>. Ultimately, the Commission's departments are interested in sophisticated technical input and, therefore, tend to discount the submissions from citizens and public interests, these being characterised by value judgements instead. This significantly reduces the overall openness of this participatory mechanism. This is rendered more acute by the limited number of languages, generally English, French, and German, generally available in most consultations<sup>151</sup>. This contradicts the principle of multilingualism that must govern all interactions between the EU institutions and third parties. Yet, by now we know that when the survey is made available in all EU official languages, this translates into higher participation<sup>152</sup>. Multilingualism should thus be taken seriously to guarantee a higher degree of openness of the consultation system.

#### 4.3.4. Responsiveness

Respondents' feedback on legislative proposals is published online at the time of submission on 'Have Your Say'. This *per se* is the first and foremost 'response' they receive from the Commission. Although stakeholders should receive adequate and thorough feedback through a synopsis report, prepared at the end of the consultation activities, it belongs to each Commission Directorate-General (DG) to determine whether and how to do that. Generally, a synopsis report is attached to the impact assessment or the evaluation report as an annex and accompanies the initiative through inter-service consultation to the Commission's adoption<sup>153</sup>. While the Commission acknowledges that "providing effective feedback will contribute to the overall transparency of the Commission's policymaking, enhance its accountability and credibility, and potentially lead to better responses to future consultations", its 'feedback' practice remains scattered and underdeveloped. This reduces the incentives for many organisations to participate in future consultations as their investment does not seem to be recouped by adequate individual procedural feedback<sup>154</sup>.

#### 4.3.5. Effectiveness

As previously discussed, the Commission lacks a constraining and whole-encompassing legal framework determining not only *whether* and *how* to consult external actors, but also to provide feedback to their input. Even if the Commission's Better Regulation guidelines foresee that public consultations must be organised for some types of initiative,<sup>155</sup> these guidelines are not systematically

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'Behavioral Insights in Consultation Design: A Dialogical Architecture', *European Journal of Risk Regulation*, 2018, vol. 9(4), pp. 603-631.

<sup>149</sup> Commission Staff Working Document, Better Regulation Toolbox (2017), p. 378.

<sup>150</sup> M. Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political', *European Law Journal*, 2015, p. 592.

<sup>151</sup> Commission Staff Working Document, Better Regulation Toolbox (2017), p. 378.

<sup>152</sup> See European Court of Auditors, "Have your say!": Commission's public consultations engage citizens, but fall short of outreach activities", Special Report No 14/2019.

<sup>153</sup> For legislative proposals, the explanatory memorandum generally contains a reference to the outcome of the stakeholder consultation.

<sup>154</sup> A. Alemanno, 'Stakeholder Engagement in Regulatory Policy' in *Regulatory Policy in Perspective: A Reader's Companion to the OECD Regulatory Policy Outlook 2015*, Paris: OECD Publishing, 2015.

<sup>155</sup> In particular, initiatives with impact assessments; evaluations; fitness checks; consultative Commission communications; and Green Papers. See Commission Staff Working Document, Better Regulation Guidelines, SWD(2021) 305 final, 3.11.2021, p. 71.



and consistently followed across DGs. Despite having established minimum consultation standards<sup>156</sup>, their respect is left to the good will of each Commission DG, as they cannot be legally enforced before courts. Ultimately, the Commission enjoys unconstrained discretion to determine what initiatives are subject to consultation, how to frame those consultations and, ultimately, *what to do* with their findings.<sup>157</sup> In particular, the current mechanism for providing feedback to participants in consultations seems inadequate, being largely underdeveloped. By essentially consisting of explanatory memoranda accompanying legislative proposals, the mechanism does not allow participants to understand the extent to which their contribution played some – or any – role in the Commission's decision-making. Yet, evidence suggests that when the feedback is inadequate or non-existent, the trust relationship between the citizens and the administration can be damaged<sup>158</sup>. The CJEU recently clarified that the Commission is "in no way [-- --] required to respond, on the merits and in each individual case, to the remarks it may have received"<sup>159</sup>. However, the current feedback policy risks to dissuade participation<sup>160</sup>, in particular of those who are financially weaker or have gained a negative participatory experience<sup>161</sup>, thus contributing to further constraining equal access to public consultations and ultimately reducing the overall effectiveness of public consultations as a participatory mechanism. As it was noticed, "poor practice, shallow commitment and a lack of tangible results or feedback breeds public cynicism and undermines trust in government"<sup>162</sup>. While the Commission's feedback to each and every individual submission cannot realistically be expected and guaranteed, the feedback provided must be more timely, complete and certain so as to ensure an effective feedback loop between those who have 'shown up' and the policymakers. The idea of a 'reasoned opinion', which must explain whether and how comments which were made during the consultation were taken into account, or – as the case may be – why they were disregarded would advantageously be pursued<sup>163</sup>.

As it has been thoroughly discussed in the literature, this situation of unpredictability and overall uncertainty surrounding public consultations could potentially be addressed by the recognition of participatory rights<sup>164</sup>. However, the 'juridification' of participation has historically been opposed by

<sup>156</sup> Commission Communication Towards a reinforced culture of consultation and dialogue – general principles and minimum standards for consultation of interested parties by the Commission (COM(2002) 704). See, on this initiative, D. Obradovic & J.M. Alonso Vizcaino, 'Good Governance Requirements concerning the Participation of Interest Groups in EU Consultation', *Common Market Law Review*, 2006, vol. 43(4), pp. 1049-1085.

<sup>157</sup> See, e.g., J. Mendes, *Participation in European Union Rulemaking: A Rights-Based Approach*, Oxford University Press, 2011.

<sup>158</sup> G. Sgueo, "Strengthening democracy through 'design thinking'", in European Parliament Research Service, *Ten Issues to Watch in 2020*, PE 646.116 – January 2020, pp. 10-11.

<sup>159</sup> Although this judgment dealt with the situation that follows the disclosure of an impact assessment, under Regulation 1049/2001, this reasoning can be extended by analogy to the public consultations. See judgment of 4 September 2018, *ClientEarth*, C-57/16 P, ECLI:EU:C:2018:660, para 107.

<sup>160</sup> See, e.g., M.C. Marchetti, 'La partecipazione della società civile ai processi decisionali europei: verso una democrazia partecipativa in Europa?', *Cittadinanza Europea*, 2012, vol. 2, p. 101.

<sup>161</sup> On the phenomenon of cynicism due to past record, see A. Alemanno, 'Stakeholder Engagement in Regulatory Policy' in *Regulatory Policy in Perspective: A Reader's Companion to the OECD Regulatory Policy Outlook 2015*, Paris: OECD Publishing, 2015.

<sup>162</sup> OECD, 'Mind the Gap: Fostering Open and Inclusive Policymaking: An Issue Paper', Third Meeting of the Steering Group on Open And Inclusive Policy Making, GOV/PGC/OPEN(2008)1, March 2008.

<sup>163</sup> D. Curtin, H. Hofmann & J. Mendes, 'ReNEUAL Model Rules on EU Administrative Procedure – Book II: Administrative Rulemaking', 2014, II-5, 1(a).

<sup>164</sup> See, e.g., J. Mendes, *Participation in European Union Rulemaking: A Rights-Based Approach*, Oxford University Press, 2011; J. Mendes, 'Participation and the Role of Law After Lisbon: A Legal View on Article 11 TEU', *Common Market Law Review*, 2011, vol. 48(6), pp. 1849-1878. See also D. Ferri, "Participation in EU Governance: A 'Multi-Level' Perspective and a 'Multifold' Approach", in C. Fraenkel-Haeberle, S. Kropp, F. Palermo & K.P. Sommermann, *Citizen Participation in Multi-Level Democracies*, Brill Nijhoff, 2015, pp. 348, 363.

the Commission<sup>165</sup> and resisted by the CJEU<sup>166</sup>. It is generally argued that the recognition of participatory rights would (i) slow down, potentially ossify, EU policymaking<sup>167</sup>; (ii) subject to judicial review policy decisions to the point of intruding into their merits; (iii) enhance corporate influence in decision-making to the detriment of ordinary citizens<sup>168</sup>. Yet, in the absence of the recognition of participatory rights or other enforcement mechanisms around public consultations<sup>169</sup>, participation is already compromised as is the equal treatment of those who intend to participate. In other words, the absence of participatory rights does not only fail to offer equal opportunities of access, but also crystallises such inequality by preventing affected parties from countering disparity of access through the invocation of their rights. As a result, the current consultative practice rewards informationally and financially endowed stakeholders over those who are not.

#### 4.3.6. Conclusions

Given the Commission's unrestrained discretion regarding who, how and when to consult and how to respond, as well as the structural disparities of access and resources, participation to a public consultation has become a prerogative of those who are not only epistemically but also financially better placed and, therefore, can afford to contribute to the frequent, resource-intensive, and highly technical public consultations. As such, the incentives to contribute to a public consultation remain modest, as proven the modest number of responses submitted and the limited representativeness of the interests contributing to the consultations. This reality challenges the participatory potential of public consultations and tarnishes its declared goals.

### 4.4. Complaints to the European Ombudsman

Since 1992, it exists a right to complain to the Office of the European Ombudsman, who is competent to investigate complaints about maladministration in the activities of the Union institutions, bodies, offices, or agencies<sup>170</sup>, under Article 228 TFEU, Article 20(2) let. d) TFEU and Article 24 TFEU as well as the Statute of the Ombudsman and the Implementing Provisions adopted by the Ombudsman under Article 14 of the Statute. Maladministration occurs if an institution or body fails to act in accordance with the law or the principles of good administration, or violates human rights, and can include administrative irregularities, unfairness, discrimination, or the abuse of power, for example in the managing of EU funds, procurement, or recruitment policies. It also includes the failure to reply, or the refusal or unnecessary delay in granting access to information in the public interest. It is not required for complainants to have been affected by the issue(s) complained about, and they do not have to be EU citizens to have their complaint judged admissible.

<sup>165</sup> A. Alemanno, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy', *European Law Review*, 2014, vol. 1, pp. 72-90.

<sup>166</sup> See, on this point, 'the leading authority', judgment of 11 December 1996, *Atlanta*, T-521/93, ECLI:EU:T:1996:184, paras 70-74. See also Opinion of Advocate General Warner of 14 February 1979, *NTN Toyo v Council*, 113/77, ECLI:EU:C:1979:39, p. 1262 ("...there is no doubt that the right to be heard is subject to the general proviso that it must be compatible with the requirements of efficient administration").

<sup>167</sup> This 'over-legalistic approach' would be "incompatible with the need to introduce policies in due time and with public expectations that the European institutions dealing with issues of substances rather than focus on the procedures" (Commission Communication, 'Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards of Interested Parties by the Commission', COM (2002) 704 final, 11.12.2002.

<sup>168</sup> P. Craig, *EU Administrative Law*, Oxford University Press, 2012, pp. 295, 297-298.

<sup>169</sup> A. Alemanno, 'Leveling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission's Public Consultations in Light of the Principle of Political Equality', *European Law Journal*, 2020, vol. 26, pp. 114-135.

<sup>170</sup> Except for the CJEU acting in its judicial role.

Matters pertaining to national administrations, even when they are implementing EU law, are excluded from the Ombudsman's office<sup>171</sup>, and the Ombudsman cannot investigate matters that are subject to legal proceedings.

A complaint must be made within two years of the date when the person affected became aware of the facts. The complainant must first have contacted and tried to resolve the matter with the institution in question. Possible instances of maladministration come to the Ombudsman's attention mainly through complaints, although the Ombudsman also conducts inquiries on its own initiative<sup>172</sup>.

#### 4.4.1. Rationale

Together with the right to petition, the right to submit a complaint to the European Ombudsman can be considered one of the privileged instruments for strengthening the relationship between citizens (and EU residents) and the EU. This is because these mechanisms provide the most accessible ways for citizens to address political institutions, notably to react to the application of EU law and policy. As such, it can be seen as a form of 'advocacy democracy', falling somewhere in between representative democracy (e.g., elections) and direct forms of deliberation by citizens (e.g., referenda). This form of democracy seeks to expand the means of political participation, in which "citizens participate in policy deliberation and formation – either directly or through surrogates such as public interest groups – although the final decisions are still made by elites"<sup>173</sup>. However, while the right to petition is a form of direct participation, since petitioners do not normally need an intermediary to exercise this right, the right to complain to the Ombudsman is an indirect form of participation. This is because the Ombudsman acts as a mediator or even substitute for the complainant in her/his relationship with the entities to which the complaint is addressed.

This explains why, while petitions endeavour to strengthen democracy by promoting citizens' participation and engagement with the EU, by narrowing the distance between those represented and their representatives, by promoting greater transparency, and by ensuring information flows, the Ombudsman is directed more towards the ensuring the good administration.

#### 4.4.2. Statistics

The number of complaints lodged before the European Ombudsman has remained constant<sup>174</sup>. Most complaints however do not fall inside the mandate of the European Ombudsman, mostly because they do not concern the work of the EU administration. The vast majority of complaints and inquiries are directed to the Commission and have to do with an alleged lack of accountability and transparency, culture of service and proper use of discretion.

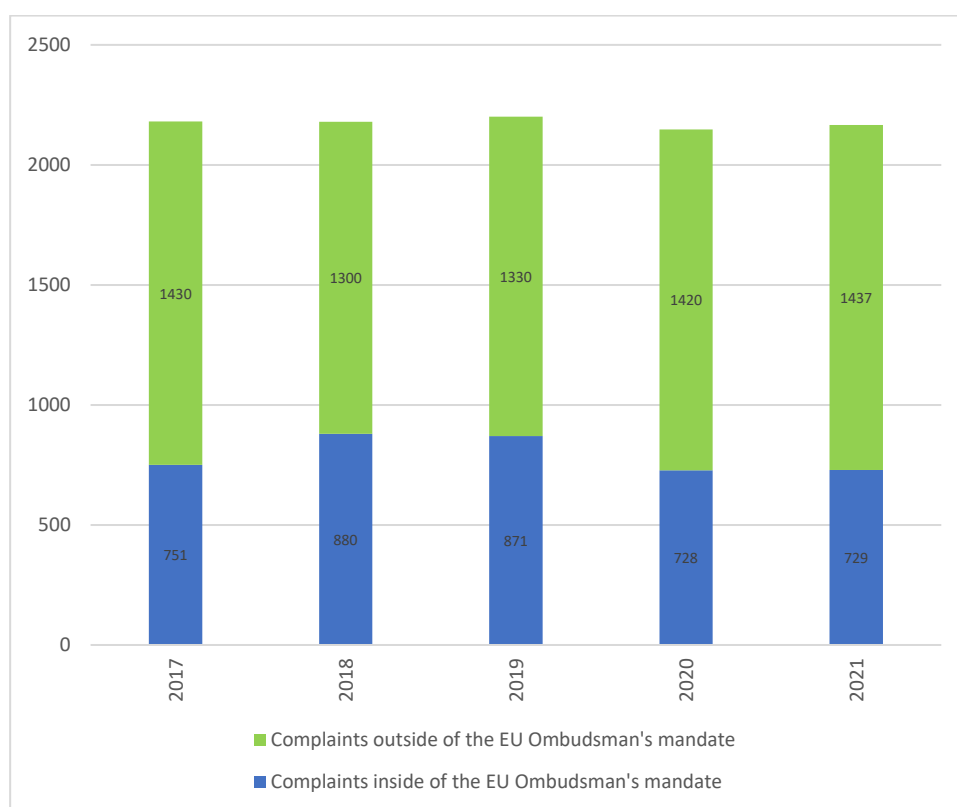
<sup>171</sup> A. Tsadiras, 'Of Celestial Motions and Gravitational Attractions: The Institutional Symbiosis Between the European Ombudsman and the European Parliament', *Yearbook of European Law*, 2009, vol. 28(1), p. 435.

<sup>172</sup> In 2000, it was included in the list of citizens' rights in the Charter of Fundamental Rights of the EU, which was then constitutionalized in the Lisbon Treaty (2007). Since then, the European Ombudsman has been the principal actor ensuring that the EU institutions implement the Charter in their own operations.

<sup>173</sup> B.E. Cain, R.J. Dalton & S.E. Scarrow, *Democracy Transformed?: Expanding Political Opportunities in Advanced Industrial Democracies*, Oxford University Press, 2003, p. 11.

<sup>174</sup> European Ombudsman, Annual Report of Activities, 2021.

Figure 4: Total number of complaints lodged before the European Ombudsman (2017–2021)



Source: European Ombudsman<sup>175</sup>.

#### 4.4.3. Accessibility

Any citizen or resident of EU countries or EU-based association or business is entitled to lodge a complaint to the European Ombudsman. As such, access to the exercise of such a right is particularly wide. The complaint must, however, be made within two years of the date when the person affected became aware of the facts. Moreover, before the European Ombudsman will open an inquiry, the complainant must first have contacted the institution concerned to try to solve the problem. The logic pursued by this mechanism is for the issue to be resolved at this stage, so as to avoid the lodging of the actual complaint. Often, the individual is simply looking for an explanation, a reason, an apology, or advice, and the administration itself is best placed to provide this. A settlement proposed by the institution is quicker and ultimately more satisfying all round and helps promote the image of the EU and its institutions as being citizen friendly.

#### 4.4.4. Responsiveness

Once it receives a complaint, the Ombudsman office checks whether to open an inquiry. At this initial stage, it first has to determine whether the issue is within the office's mandate. Only in 2021, the European Ombudsman processed over 1 400 complaints that did not fall within her mandate, mostly because they did not concern the work of the EU administration<sup>176</sup>. Second, it has to determine whether the complaint is admissible. This is not the case when the complainant has not first tried to resolve the matter directly with the EU institution or body, or has not offered enough information, or another body

<sup>175</sup> European Ombudsman annual reports, available at <https://www.ombudsman.europa.eu/en/our-strategy/annual-reports>.

<sup>176</sup> European Ombudsman, Annual Report of Activities, 2021, p. 28. Over 40% of such complaints came from Spain, Poland, and Germany.

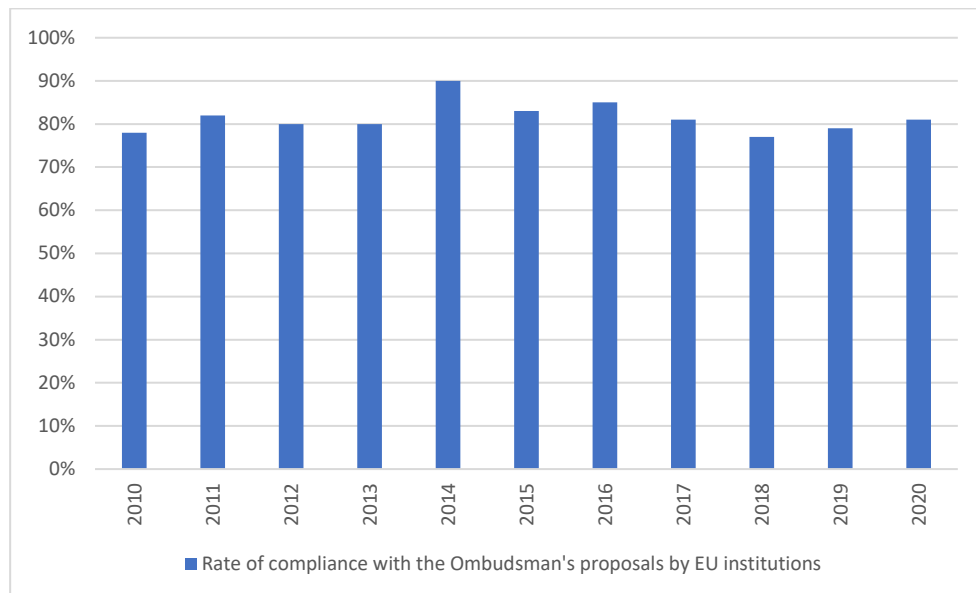
is better placed to deal with the matter. In any event, the Ombudsman replies to all those seeking help in the language of their complaint or of their preference. The replies clarify the Ombudsman's mandate and, as far as possible, advised complainants what other bodies could help<sup>177</sup>. Where the European Ombudsman establishes that maladministration has occurred, its recommendations are referred to the institution or body concerned, which then has three months in which to inform the Ombudsman of its views. The Ombudsman office, similarly to the PETI Committee, is highly dependent on the relevant institutions' responsiveness in satisfying the demand of the complainant.

#### 4.4.5. Effectiveness

The Ombudsman is not expected to blame or sanction. Nor does it wish to encourage a defensive reaction, let alone a defensive culture. This is because maladministration is a broader concept than illegality. The fact that a decision was adopted without breaching the law does not necessarily mean that it was adopted in conformity with principles of good administration. Good administration implies looking proactively for alternative solutions which, while also legal, are more citizen-centred. The complainant, after all, may specifically have opted to complain to the Ombudsman rather than go to the CJEU. Therefore, whenever possible, the Ombudsman tries to achieve a positive-sum outcome that satisfies both the complainant and the institution complained against. Similar to what occurs with the petition system, the EU institutions' cooperation is essential for success in achieving such outcomes that help enhance relations between the institutions and citizens and can avoid the need for time-consuming litigation.

The acceptance rate of the Ombudsman's recommendations, that is, the percentage of positive replies to the total number of proposals (solutions, recommendations, and suggestions), was of 81% for cases closed in 2020<sup>178</sup>.

Figure 5: Rate of compliance with the Ombudsman's proposals by EU institutions (2010–2020)



Source: European Ombudsman<sup>179</sup>.

<sup>177</sup> With the complainant's agreement, the Ombudsman also transferred complaints to suitable members of the European Network of Ombudsmen (ENO).

<sup>178</sup> European Ombudsman, Annual Report of Activities, 2021.

<sup>179</sup> European Ombudsman annual reports, available at <https://www.ombudsman.europa.eu/en/our-strategy/annual-reports>.

#### 4.4.6. Conclusions

The accessibility of the EU right of complaint to the European Ombudsman, combined with the high rate of compliance with its decisions, make this participatory mechanism particularly relevant to individuals. However, similarly to the PETI Committee, the Office of the European Ombudsman is highly dependent on the relevant institutions' responsiveness in satisfying the demand of the complainant, as mediated by the European Ombudsman. This explains why a limited, yet significant, percentage of Ombudsman's decisions remain unaddressed. These 'hard' cases operate as a reminder of the inherent limits of this participatory mechanism.

### 4.5. Complaints to the European Commission

Whenever an individual considers that a Member State has adopted a measure or practice contrary to EU law, she can – under Article 17 TEU – lodge a complaint to the Commission<sup>180</sup>. Often, when issues come to the fore — car emission testing, water pollution, illegal landfills, transport safety and security — it is not the lack of EU legislation that is the problem but rather the fact that the EU law is not applied effectively<sup>181</sup>.

#### 4.5.1. Rationale

A complaint enables members of the public, businesses, and civil society to contribute significantly to the Commission's monitoring by reporting shortcomings in the application of EU law by the Member States. Indeed, the goal pursued by the right to complain is to enable the European Commission to discharge its duty, according to Article 17 TEU, of ensuring the application of EU law, by acting as 'guardian of the Treaties'<sup>182</sup>. Indeed, any complainant seeks to have the European Commission to ask the relevant Member State to put an end to the illegal measure or practice under EU law. In this area, the Commission has powers of investigation, prevention, sanction, and authorization. One of their primary tools in that regard is the capacity to launch infringement proceedings<sup>183</sup>. This is the only procedure that allows the CJEU to measure the conduct of a Member State directly against EU law<sup>184</sup>. An infringement proceeding consists of several steps, and is initiated either on the Commission's own initiative, or in response to complaints, or even a petition. In practice, it means that when the Commission finds that a Member State has failed to fulfil an obligation under EU law, it first consults with the State concerned<sup>185</sup>. Only if these informal consultations do not lead to a termination of the breach can the Commission open formal (pre-litigation) proceedings which, if unsuccessful, may lead the Commission to bring the State before the CJEU.

#### 4.5.2. Statistics

Trends for complaints to the Commission have remained relatively stable in the past years. Between 2016 and 2020, the Commission received an average of 3 650 complaints per year, without large variations between years. However, new EU Pilot files – a mechanism allowing exchange of information between the Commission and the Member States for the correct application of EU law – and new

<sup>180</sup> Article 17 TEU establishes the Commission as the 'guardian of the Treaties', which indirectly implies the right to complain before it in case of incorrect application of EU law.

<sup>181</sup> Every year, the European Commission draws up an annual report on its monitoring of the application of EU law in response to requests from the European Parliament and the EU countries.

<sup>182</sup> Consolidated Version of the Treaty on European Union [2008] OJ C115/13 ("TEU"), Article 17(1) establishes the Commission as the "Master of the Treaties" and Article 4 TEU establishes the principle of sincere cooperation.

<sup>183</sup> Article 4 TEU; Article 17 TEU; Articles 258–260 TFEU.

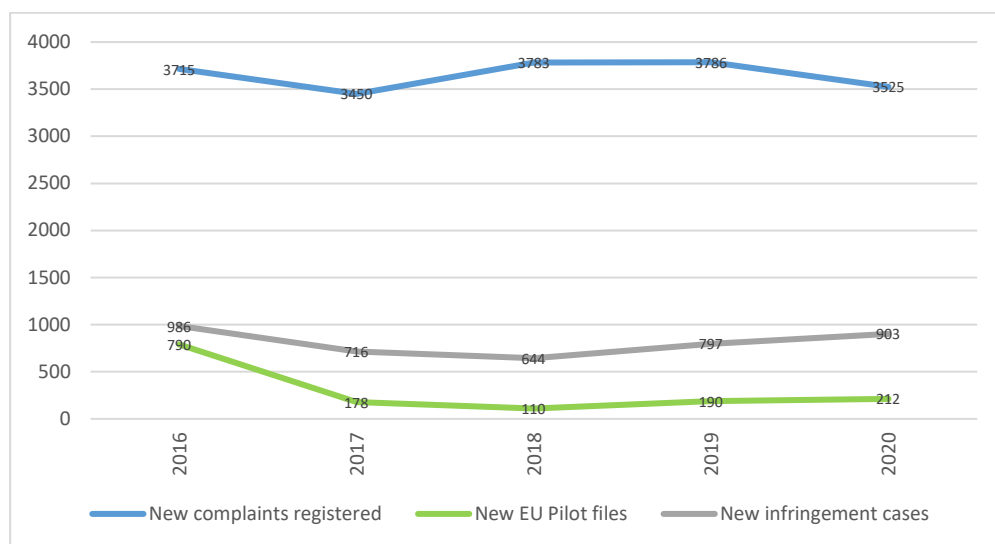
<sup>184</sup> K. Lenaerts, I. Maselis & K. Gutman, *EU Procedural Law*, Oxford University Press, 2014, p. 161.

<sup>185</sup> Article 258 TFEU.

infringement cases have increased between 2018 and 2020: around 40% and 93% increase respectively, although the number of EU Pilot files did decrease substantially since 2016.

In 2020, most complaints came from Spain (612 complaints), Italy (419 complaints), and France (362 complaints)<sup>186</sup>. That year, new complaints related to justice and consumers (1 243 complaints), the environment (397 complaints), employment, social affairs, and exclusion (384 complaints), the internal market, industry, entrepreneurship, and SMEs (332 complaints)<sup>187</sup>.

Figure 6: Complaints to the European Commission and investigations about potential breaches of EU law (2016–2020)



Source: European Commission<sup>188</sup>.

#### 4.5.3. Accessibility

All complaints are registered through a dedicated webpage and complaint handling system, generally referred to as 'CHAP'. The Commission can only take up a complaint if it is about a breach of EU law by authorities in an EU country<sup>189</sup>. If the complaint is about the action of a private individual or body (unless those national authorities are somehow involved), it must be solved at national level (through courts or other ways of settling disputes). In any event, the Commission cannot follow up matters that only involve private individuals or bodies, and that do not involve public authorities.

#### 4.5.4. Responsiveness

Within the 12 months that follow the lodging of a complaint, the European Commission is expected to assess it with the aim to decide whether to initiate a formal infringement procedure against the Member State in question<sup>190</sup>. If the issue that is raised is especially complex, or if the European Commission needs to ask for more information or details, it may take longer than 12 months to reach

<sup>186</sup> Commission Staff Working Document, General Statistical Overview, Accompanying the document, Report from the Commission Monitoring the application of European Union law 2020 Annual Report, COM(2021) 432 final, 23.7.2021, p. 17.

<sup>187</sup> *Ibidem*.

<sup>188</sup> Commission Staff Working Document, General Statistical Overview, Accompanying the document, Report from the Commission Monitoring the application of European Union law 2020 Annual Report, COM(2021) 432 final, 23.7.2021.

<sup>189</sup> In application of Article 17 TEU.

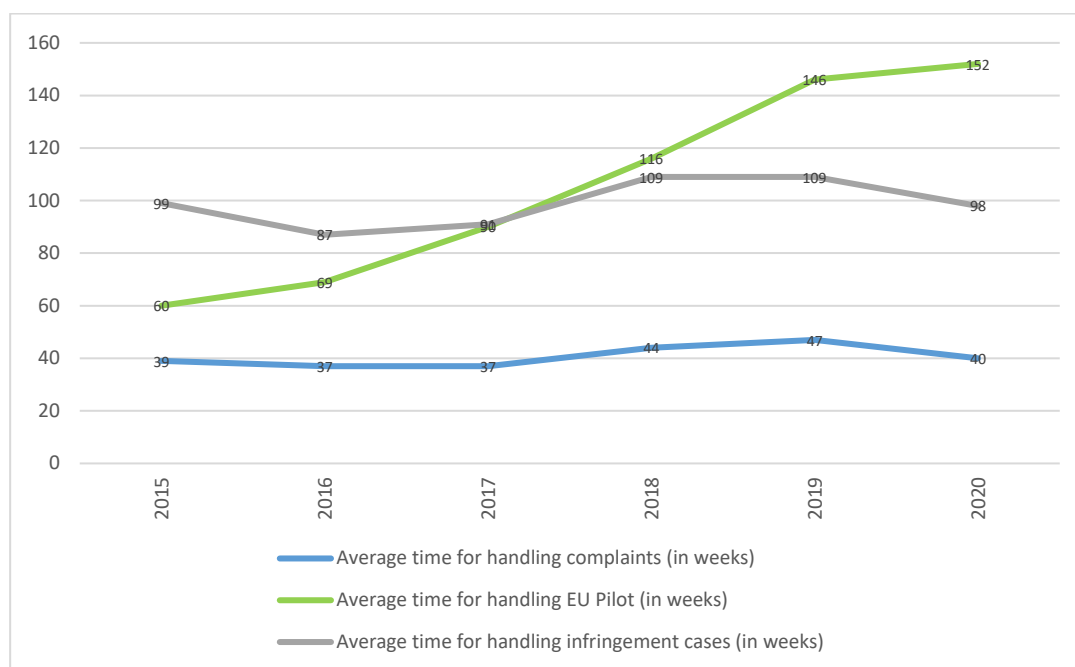
<sup>190</sup> See European Commission, *How to make a complaint at EU level*, [https://ec.europa.eu/info/about-european-commission/kontaktiniai-duomenys/problemos-ir-skundai/skundai-del-es-teises-pazeidimu/kaip-pateikti-skunda-es-lygmeniu\\_en#administrative-steps-to-submit-a-complaint-to-the-european-commission](https://ec.europa.eu/info/about-european-commission/kontaktiniai-duomenys/problemos-ir-skundai/skundai-del-es-teises-pazeidimu/kaip-pateikti-skunda-es-lygmeniu_en#administrative-steps-to-submit-a-complaint-to-the-european-commission).



a decision. If the European Commission decides that the complaint is founded and initiates a formal infringement procedure against the country in question, it will inform the complainant and inform her about how the case progresses.

If the European Commission thinks that the underlying problem could be solved more effectively by any of the available informal or out-of-court problem-solving services, it may propose the complainant to have her file be transferred to those services. If the Commission decides the underlying problem does not involve a breach of EU law, it will inform the complainant by letter before it closes the file.

Figure 7: Responsiveness of complaints to the European Commission: time taken to investigate potential breaches of EU law (2015–2020)



Source: European Commission<sup>191</sup>.

#### 4.5.5. Effectiveness

As it is the case for any complaint to the European Ombudsman, there is no right to a favourable decision following the lodging of a complaint to the Commission. However, given that complaints are an important means of detecting infringements of EU law, the Commission has stepped up its efforts to improve the handling of complaints<sup>192</sup>. This led the Commission to establish dedicated problem-solving mechanisms, such as the Single Digital Gateway (for all Single Market-related services)<sup>193</sup>, SOLVIT (which provides information and assistance to citizens and deals with problems of misapplication of EU law by national authorities in cross-border situations)<sup>194</sup> and the European Consumer Centres Network (which provides advice and assistance to consumers on their rights concerning purchases made in another country or online and on settling relevant disputes with

<sup>191</sup> Commission Staff Working Document, General Statistical Overview, Accompanying the document, Report from the Commission Monitoring the application of European Union law 2020 Annual Report, COM(2021) 432 final, 23.7.2021.

<sup>192</sup> Communication from the Commission — EU law: Better results through better application, C/2016/8600, OJ C 18, 19.1.2017, p. 10-20.

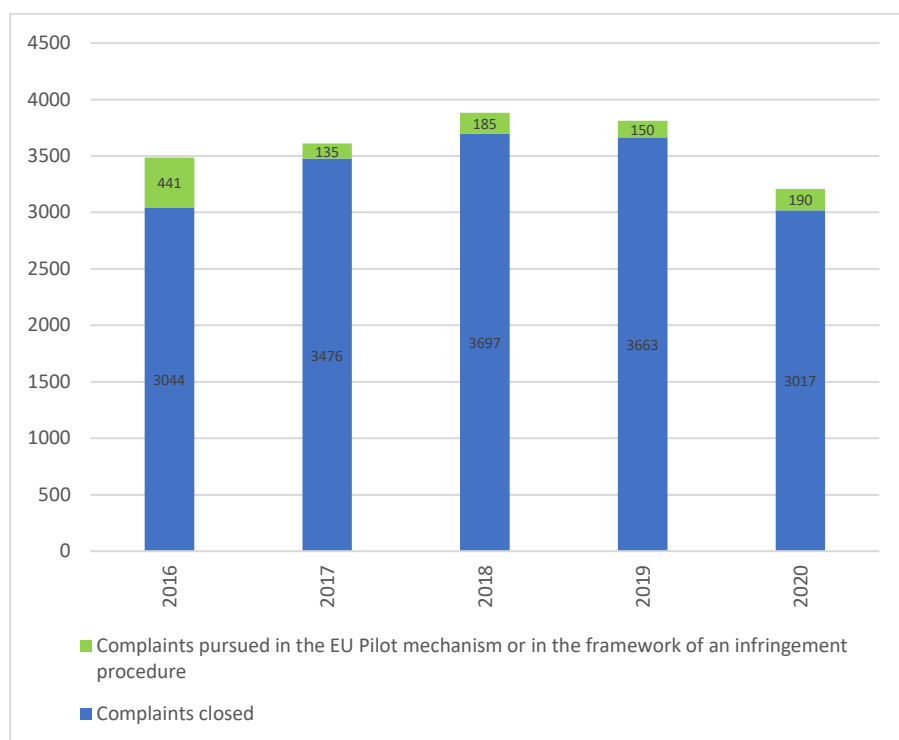
<sup>193</sup> Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012, OJ L 295, 21.11.2018, pp. 1–38.

<sup>194</sup> See [https://ec.europa.eu/solvit/index\\_en.htm](https://ec.europa.eu/solvit/index_en.htm).



businesses)<sup>195</sup>. Yet, as the Commission enjoys an almost unlimited discretion in ensuring the application of EU law (through inter alia the triggering of Article 258 TFEU)<sup>196</sup>, the right to complaint does not always lead to the solution of the problem raised by complainant. Under settled case law, the Commission has discretion whether to start or discontinue an infringement proceeding.<sup>197</sup> Moreover – as previously discussed, in 2017, the Commission established a new policy determining in what situations it intends to open infringement actions. In the Communication ‘EU Law: Better Results through Better Application’, the Commission states that it would “give high priority to infringements that reveal systemic weaknesses which undermine the functioning of the EU's institutional framework”<sup>198</sup>. As a result, individual cases, by typically not falling under this category, are not considered – as a matter of principle – by the Commission as a potential trigger for an infringement action, thus rendering individual complaints unlikely to lead to action.

Figure 8: Effectiveness of complaints to the European Commission: complaints leading to investigations (2016–2020)



Source: European Commission<sup>199</sup>.

<sup>195</sup> See [https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/european-consumer-centres-network-ecc-net\\_en](https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/european-consumer-centres-network-ecc-net_en).

<sup>196</sup> The other being the European Ombudsman but whose mandate is limited to ‘maladministration’, as will be discussed below.

<sup>197</sup> Communication from the Commission to the Council and the European Parliament, ‘Updating the handling of relations with the complainant in respect of the application of Union law’, COM(2012) 154 final, 2.4.2012, p. 8; see judgment of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, ECLI:EU:C:2013:738, para 7; judgement of 6 December 1989, *Commission v Hellenic Republic*, C-329/88, ECLI:EU:C:1989:618; judgment of 1 July 2014, *Commission v Germany*, C-317/92, ECLI:EU:C:1994:212; judgment of 14 September 1995, *Lefebvre v Commission*, T-571/93, ECLI:EU:T:1995:163; judgment of 19 May 2009, *Commission v Italy*, C-531/06, ECLI:EU:C:2009:315.

<sup>198</sup> Communication from the Commission — EU law: Better results through better application, C/2016/8600, OJ C 18, 19.1.2017, p. 10-20.

<sup>199</sup> Commission Staff Working Document, General Statistical Overview, Accompanying the document, Report from the Commission Monitoring the application of European Union law 2020 Annual Report, COM(2021) 432 final, 23.7.2021.

#### 4.5.6. Conclusions

The complaints to the Commission offer an accessible avenue for any member of the public, businesses, and civil society, which may significantly contribute to the Commission's monitoring by reporting shortcomings in the application of EU law by the Member States. However, the wide margin of discretion enjoyed by the Commission in determining whether to open an infringement proceeding, combined with its new administrative practice, render this mechanism little appealing to most citizens. This has been expressly acknowledged by the same Commission, whose dedicated complaint's portal warns complainants as follows: "Please note Commission action in response to complaints is unlikely to directly resolve your personal situation:

1. The Commission is not obliged to open formal infringement procedures – even if it considers a breach has occurred.
2. If the Commission does formally follow up your complaint, its aim is a general one – to ensure the laws of the Member State in question are brought fully into line with EU law and correctly applied"<sup>200</sup>.

#### 4.6. European Citizens' Initiative

Finally, the Treaty of Lisbon introduced an additional mechanism – possibly the most notable one – of EU participatory democracy: the European Citizens' Initiative (ECI)<sup>201</sup>. The legal basis of the ECI is set forth in Article 11(4) TEU, which defines both the scope and limits of such a right, and Article 24 TFEU, which determines the procedural aspects of the ECI by requiring its implementation by means of a Regulation: Article 11(4) provides that "(n)ot 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 the citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. According to Article 24 TFEU, Parliament and the Council adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 TEU and every citizen of the Union shall have the right to petition Parliament.

The ECI is the world's first transnational participatory democracy instrument – allowing at least seven EU citizens<sup>202</sup>, coming from seven different Member States, to suggest new policy initiatives in any field where the EU has power to propose legislation (such as the environment, agriculture, energy, transport, or trade) after collecting one million signatures<sup>203</sup>. Once an initiative is declared admissible and gathers

<sup>200</sup> See 'Complaint form for breach of EU law', available at [https://ec.europa.eu/assets/sg/report-a-breach/complaints\\_en/](https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/).

<sup>201</sup> On these provisions, see, e.g., A. von Bogdandy, 'The European lesson for international democracy: the significance of Articles 9 to 12 EU Treaty for International Organizations', *European Journal of International Law*, 2012, vol. 23, pp. 315-334. On the process of adoption of the implementing regulation, see B. Kaufmann, 'Transnational 'Babystep': The European Citizens' Initiative', in M. Setälä & T. Schiller (eds), *Citizens' Initiatives in Europe. Challenges to Democracy in the 21st Century series*, Palgrave Macmillan, London, 2012, pp. 233-234.

<sup>202</sup> The organizers shall be citizens of the Union and of the age to be entitled to vote in elections to the European Parliament and must be natural persons. They need to set up a "Citizens' Committee" of at least seven persons who are residents of at least seven different Member States. Whereas the signatories need to be citizens of the Union and have the age to vote in elections to the European Parliament. See Article 3(2) of Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, OJ L 65, 11.3.2011, p. 1-22.

<sup>203</sup> The literature on ECIs is particularly vast when compared with other existing participatory mechanisms. See, e.g., M. Dougan, 'What Are We to Make of the Citizens' Initiative?', *Common Market Law Review*, 2011, 48(6), pp. 1807-1848; G. Smith, 'The European Citizens' Initiative: A New Institution for Empowering Europe's Citizens?', in M. Dougan et al. (eds), *Empowerment and Disempowerment of the European Citizen*, 2012; J. Organ, 'EU citizen participation, openness and the European Citizens' Initiative: The TTIP legacy', *Common Market Law Review*, 2017, 54(6), p. 1713. See also A. Warleigh, 'On the Path to Legitimacy? A Critical Deliberativist Perspective on the Right to the Citizens' Initiative', in C. Ruzza & V. Della

one million signatures – with minimum thresholds reached in at least seven countries –, the European Commission must decide whether to take action<sup>204</sup>.

Between 1 April 2012 and 1 June 2022, the Commission registered 102 initiatives and rejected 26 of them<sup>205</sup>. Only six initiatives reached one million signatures and only those six have received formal feedback from the Commission.

As these figures make manifest, this outcome is a long way from the expectations, and very distant from creating a genuine bottom-up process of legislative initiative effectively capable of enabling EU citizens to participate in the Union's democratic life.

#### 4.6.1. Rationale

The ECI had originally been introduced by the Treaty establishing a Constitution of Europe<sup>206</sup> with the aim of establishing new dialogue among political institutions, civil societies, and people in order to "translate the social realm shaped by citizens making use of their rights and freedoms ... into a political will"<sup>207</sup>. The mechanism was ultimately introduced in the Lisbon Treaty, but – due to the slow adoption of the implementing Regulation<sup>208</sup> – it took three years for the first ECI to be registered from the entry into force of the Treaty in 2009. This Regulation laid down the procedures and conditions for the introduction of ECIs and applied from 1 April 2012<sup>209</sup> was reviewed in 2019 to render the instrument more accessible, less burdensome, and easier to use for organisers and supporters, and to strengthen its follow-up in order to achieve its full potential as a tool to foster debate.

The participatory democratic rationale behind ECIs has also been explained by the General Court of the EU: "[T]he principle of democracy, which, as it is stated in particular in the preamble to the EU Treaty, in Article 2 TEU and in the preamble to the Charter of Fundamental Rights of the European Union, is one of the fundamental values of the European Union, as is the objective specifically pursued by the ECI mechanism, which consists in improving the democratic functioning of the European Union by granting every citizen a general right to participate in democratic life"<sup>210</sup>.

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Sala, *Governance & Civil Society in the European Union: Normative Perspectives*, vol. 1, Manchester University Press, 2007, p. 64.

<sup>204</sup> The procedure consists of three steps: (i) registration; (ii) collection of support, and ultimately; (iii) submission of a successful initiative, which is one that meets the threshold of one million supporters, to the Commission for examination.

<sup>205</sup> D. Hierlemann et al., *Under Construction: Citizen Participation in the European Union*, Verlag Bertelsmann Stiftung, 2022, p. 79.

<sup>206</sup> In the very last session of the Convention, German MP Jürgen Meyer promoted the introduction of a new mechanism of participatory democracy as part of a broader article on EU democracy (see Jürgen Meyer, Suggestion for Amendment to Article I-46 of the Treaty Establishing a Constitution for Europe. Similar proposals were presented by J. Borrell, C. Carnero, D. L. Garrido, Suggestion for Amendment to Article 34 of the Treaty Establishing a Constitution for Europe, J. Voggenhuber, R. Wagener, N. McCormick, E. Lichtenberger, M. Nagy, Suggestion for Amendment to Article 34 of the Treaty Establishing a Constitution for Europe. Although the Presidium formally refused the introduction of this proposal, in one of the last meetings of the Convention, President Giscard d'Estaing announced a series of last-minute amendments to the proposed Constitution. Consequently, the ECI was included within the Article I-46(4) ('Principle of participatory democracy'). See, e.g., A. Auer, 'European Citizens' Initiative: Article I-46.4 Draft Convention', *European Constitutional Law Review*, 2005, 1(1), pp. 79-86.

<sup>207</sup> D. Szeligowska & E. Mincheva, 'The European Citizens' Initiative – Empowering European Citizens within the Institutional Triangle: A Political and Legal Analysis', *Perspectives on European Politics and Society*, 2012, 13(3), pp. 270-284.

<sup>208</sup> Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, OJ L 65, 11.3.2011, p. 1-22.

<sup>209</sup> Following a revision of the instrument, updated rules are applying since 1 January 2020, with the adoption of Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative, OJ L 130, 17.5.2019, p. 55-81.

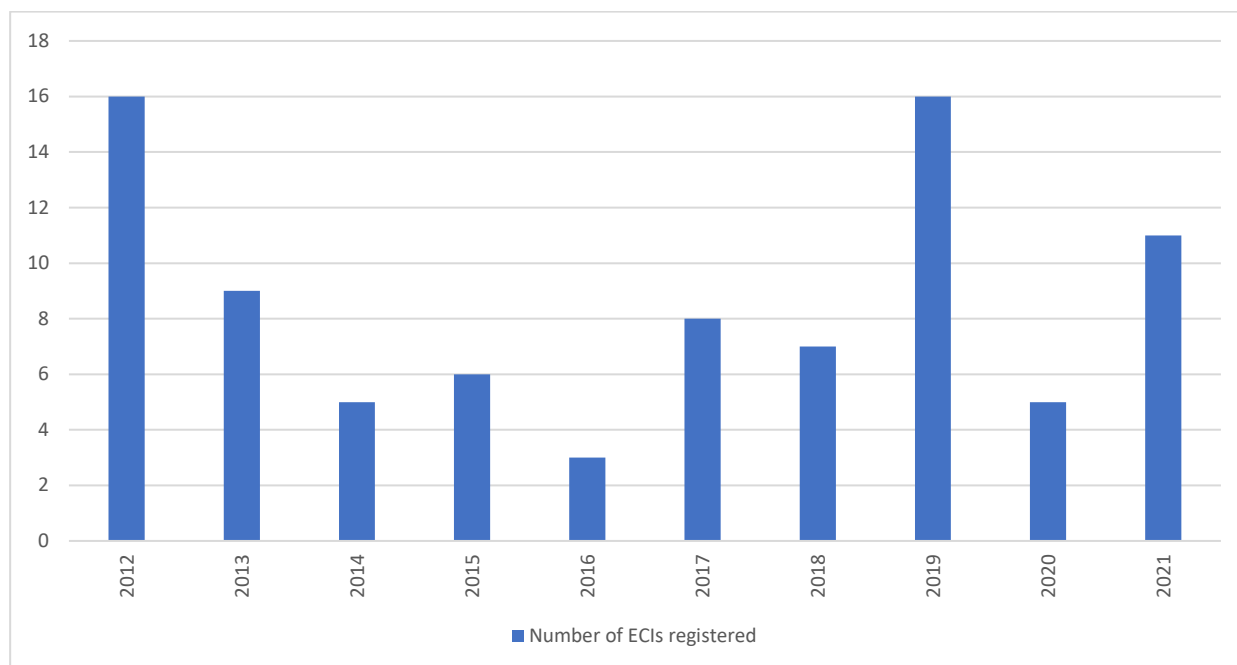
<sup>210</sup> Judgment of 10 May 2017, *Efeler v European Commission*, T-754/14, ECLI:EU:T:2017:323, paras 37-38.

As discussed below, while the ECI was supposed to become a powerful agenda-setting tool in the hands of citizens, it soon revealed little accessible, burdensome, unresponsive, and overall ineffective mechanism.

#### 4.6.2. Statistics

The number of ECIs introduced has remained constant since their inception in 2012, for a total of approximately 102 initiatives and 10 million signatures collected overall. The latter figure must be assessed against the potential 450 million eligible signatories within and across the Union.

Figure 9: Total number of ECIs registered (2012–2021)



Source: European Commission<sup>211</sup> and Bertelsmann Stiftung<sup>212</sup>.

The six initiatives having reached one million signatures are: “One of us” (1 721 626 signatures)<sup>213</sup>; “Right2Water” also known as “Water and Sanitation are a Human Right! Water is a Public Good, Not a Commodity!” (1 659 543 signatures)<sup>214</sup>; “Stop Vivisection” (1 173 130 signatures); “Minority SafePack – one million signatures for diversity in Europe” (1 123 422 signatures); “Ban glyphosate and protect people and the environment from toxic pesticides” (1 070 865 signatures); and “End the Cage Age” (1 397 113 signatures)<sup>215</sup>.

<sup>211</sup> Registry of ECIs held by the European Commission, available at [https://europa.eu/citizens-initiative/find-initiative\\_en](https://europa.eu/citizens-initiative/find-initiative_en).

<sup>212</sup> D. Hierlemann et al., *Under Construction: Citizen Participation in the European Union*, Verlag Bertelsmann Stiftung, 2022.

<sup>213</sup> One of the first registered ECIs in the European Union and the one that obtained – thus far – the largest support. Its goal was to advance the protection of human life from conception in Europe – within the limits of EU competences. Based on the definition of the human embryo as the beginning of the development of the human being, which was given in a CJEU judgment (judgment of 18 October 2011, *Brüstle v Greenpeace*, C-34/10, ECLI:EU:C:2011:669), ‘One of Us’ asked the EU to end the financing of activities which presuppose the destruction of human embryos, in particular in the areas of research, development aid, and public health.

<sup>214</sup> The main objective of the campaign was that EU legislation should require national governments to ensure and provide all citizens with sufficient clean drinking water and sanitation. Right2Water was the first ECI that succeeded in collecting one million signatures.

<sup>215</sup> Signature figures are from the European Commission’s ECIs registry.

### 4.6.3. Accessibility

Whereas other participatory mechanisms described above do allow non-EU citizens to take part in them, only EU nationals can initiate or support an ECI. Moreover, those citizens must as a general rule be old enough to vote in European elections (minimum age varies across Member States depending on national rules) to validly register and/or support an ECI. However, the Regulation nudges EU Member States “to set the minimum age for supporting an initiative at 16 years ... in order to enhance the participation of young citizens in the democratic life of the Union”<sup>216</sup>. At the time of writing, in Austria, Belgium, Greece, and Malta, the voting age for the EU elections is 16 years old.

Formally speaking, the procedure to register an ECI appears to be quite accessible. Signature collection is allowed both on paper and online. If it happens online, the organizers can either use the Commission’s central online collection system (free of charge) or create their own individual system. Thus, ECI organizers do not necessarily need large IT capacities to collect signatures in the different Member States. However, there are major structural obstacles for making ECIs truly accessible to ordinary citizens – not only to become organizers themselves, but also to actually be aware of existing ECIs and support them. First, the one million signature threshold and the minimum thresholds in seven different Member States means that, “in practice only well-resourced, well-networked and well-organised citizens stand a chance”<sup>217</sup>. All of the six initiatives that reached the one million signatures threshold were supported by large networks of NGOs and financially supported by resourceful foundations, associations, or unions, receiving sponsorship between €24 000 and €392 000<sup>218</sup>. Second, both the Commission<sup>219</sup> and the literature<sup>220</sup> point to a lack of visibility of ECIs as a mechanism, which is then reflected in its low participation rates. Only 10 million EU citizens have supported an ECI with their signatures in the past decade, including over 8 million for the six ECIs that have met the relevant thresholds to be valid. This suggests that (i) only 6 out of 102 ECIs sufficiently caught the attention of the public to gain enough salience to obtain enough signatures; (ii) the 96 remaining ECIs collected – on average – only around 21,000 signatures each. Moreover, the overall rejection rate for submitted ECIs is relatively high (25% today, down from 30% in 2018), and points to the difficulty for citizens to understand the extent of the Commission’s possible scope of action<sup>221</sup>.

### 4.6.4. Responsiveness

The time limits for the Commission to act on ECI submissions and for organizers to gather support for their initiative are rather short, making the whole process relatively fast. The Commission first notifies the group of organizers within two months after they make the request to register the ECI<sup>222</sup>. Once the ECI is registered, the organizers must set a kick-off date within six months, as of which they will have 12

<sup>216</sup> Recital 7 of Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative, OJ L 130, 17.5.2019, p. 55–81.

<sup>217</sup> D. Hierlemann et al., *Under Construction: Citizen Participation in the European Union*, Verlag Bertelsmann Stiftung, 2022, p. 79.

<sup>218</sup> According to the European Commission’s ECI registry.

<sup>219</sup> Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No 211/2011 on the citizens' initiative, COM(2018) 157 final, 28.3.2018.

<sup>220</sup> See, e.g., D. Hierlemann et al., *Under Construction: Citizen Participation in the European Union*, Verlag Bertelsmann Stiftung, 2022, p. 80; L. Bouza Garcia & J. Greenwood, ‘What is a Successful ECI?’, in M. Conrad et al. (eds), *Bridging the Gap? Opportunities and Constraints of the European Citizens’ Initiative*, Baden-Baden: Nomos, 2016; M. Conrad & A. Knaut, ‘Introduction: The ECI at Three - More Constraints than Opportunities?’, M. Conrad et al. (eds), *Bridging the Gap? Opportunities and Constraints of the European Citizens’ Initiative*, Baden-Baden: Nomos, 2016, pp. 10–15.

<sup>221</sup> Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No 211/2011 on the citizens' initiative, COM(2018) 157 final, 28.3.2018.

<sup>222</sup> Article 6(2) of Regulation (EU) 2019/788. The deadline is four months when the organizers are requested to update the ECI, when they do not show that the Commission would have the power to make a legislative proposal.

months to collect signatures<sup>223</sup>. If the organizers do manage to collect the required number of signatures in at least seven different Member States, they have three months to present them to the competent national authorities<sup>224</sup>, which then have another three months to validate them<sup>225</sup>.

After obtaining the last certificate from the national authorities, the organizers have three months to submit their initiative to the Commission<sup>226</sup>, after which starts the examination period. Within a month, the Commission receives the organizers who can then explain in detail the objectives of their initiative<sup>227</sup>. Within three months, the organizers can present their ECI at a public hearing at the European Parliament, which can also decide to hold a plenary session – possibly leading to the adoption of a resolution<sup>228</sup>. Within six months, the Commission must explain the actions it will take (or not) to respond to the ECI<sup>229</sup>.

Overall, there exists a highly detailed proceduralised framework guaranteeing responsiveness along the ECI cycle.

#### 4.6.5. Effectiveness

When it comes to the ECI's effectiveness, the first decade of this transnational democratic instrument revealed a constant source of frustration both for its organisers, supporters, civil society actors as well as commentators. None of the six initiatives that reached the one million signature threshold translated into concrete EU policy action. The Commission's response on these initiatives remained vague since it retains large discretionary power as to whether to act (legislatively) or not. Only three of these six initiatives have had (or might have) some material impact on the legislative process: "Right2Water" (existing directives were modified and a regulation was adopted)<sup>230</sup>; "Stop Glyphosate" (a regulation was adopted, extending the authorisation of the substances but for limited use and shorter period of time); and "End the Cage Age" (the Commission promised to address the issue by the end of 2023). Thus, this frustration originates from the fact that, despite its depiction as an 'agenda-setting' mechanism for citizens, ECIs remain broadly ineffective at setting meaningful policy proposals in motion<sup>231</sup>.

In *Puppinck and Others v Commission*, the Court clarified the examination by the Commission and the resultant outcome of a successful ECI<sup>232</sup>. Mr. Puppinck and his six fellow organizers of the successful ECI 'One of Us' 'invited the Commission to introduce a ban on the "financing of activities which presuppose the destruction of human embryos". The Commission, however, decided not to follow any of the requests submitted<sup>233</sup>. The organizers thus sought an action for annulment against the Commission's

<sup>223</sup> Article 8 of Regulation (EU) 2019/788.

<sup>224</sup> Article 9(7) of Regulation (EU) 2019/788.

<sup>225</sup> Article 12 of Regulation (EU) 2019/788.

<sup>226</sup> Article 13 of Regulation (EU) 2019/788.

<sup>227</sup> Article 15 of Regulation (EU) 2019/788.

<sup>228</sup> Article 14(2) of Regulation (EU) 2019/788.

<sup>229</sup> Article 15(2) of Regulation (EU) 2019/788.

<sup>230</sup> In its Communication of 19 March 2014, the Commission set out the actions that it committed to implement. It decided to act in different areas related to the initiative (increase transparency, stimulate innovation, etc.) and made a legislative proposal to revise the Drinking Water Directive including the obligation for the Member States to ensure access to water for the most vulnerable groups.

<sup>231</sup> A. Karatzia, 'The European Citizens' Initiative and the EU Institutional Balance: On Realism and the Possibilities of Affecting EU Lawmaking', *Common Market Law Review*, 2017, 54(1), pp. 177-208.

<sup>232</sup> Judgment of 23 April 2018, *One of Us and Others v Commission*, T-561/14, ECLI:EU:T:2018:210; and its appeal, judgment of 19 December 2019, *Grégor Puppinck and Others v Commission*, C-418/18 P, ECLI:EU:C:2019:1113.

<sup>233</sup> Communication from the Commission on the European Citizens' Initiative "One of us", COM(2014) 355 final, 28.5.2014.

refusal to act before the General Court. The latter found that, under the ECI implementing regulation, the Commission is not bound to follow a successful ECI but retains discretion as to “the action it intends to take, *if any*”<sup>234</sup>.

This largely explains why, in the words of an observer, “there is currently a mismatch between, on one hand, the expectations of EU citizens from the ECI and, on the other hand, the ECI’s capacity to lead to legislative output”<sup>235</sup>.

#### 4.6.6. Conclusions

Despite the initial enthusiasm for this new participatory instrument – both within civil society and commentators –, the realities of its day-to-day operation cast doubts on its ability to deliver on its democratic participatory potential. Limited visibility of the instrument, lack of user-friendliness in the registration and collection of signatures, combined with low effectiveness, have disempowered this instrument, to the point of disincentivising its use among citizens and civil society at large.

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<sup>234</sup> Judgment of 23 April 2018, *One of Us and Others v Commission*, T-561/14, ECLI:EU:T:2018:210, para 74.

<sup>235</sup> E. Longo, ‘The European Citizens’ Initiative: Too much democracy for EU polity?’, *German Law Journal*, 2019, 20(2), pp. 181-200.



## 5. THE REALITIES OF EU CITIZEN PARTICIPATION

Through its rich toolbox, citizen participation has been elevated to become one of the foundations of democracy in the EU. Being directly connected to democratic principles such as equality, openness, and transparency, each of the EU-wide participatory mechanisms breathes life into the realm of EU participatory democracy. As discussed, the latter complements – at least in principle – representative democracy.<sup>236</sup> However, as it emerges from our analysis, when examined more closely in terms of their accessibility, responsiveness, and effectiveness, these mechanisms' ability in helping citizens to contribute to the Union's democratic life appears limited. In other words, if one measures each mechanism's ambitions against the reality of participatory democracy today, it finds no major Copernican revolution in how citizens participate to the Union's democratic life beyond elections. This is the case due to a variety of structural factors surrounding the use of the EU participatory toolbox, which prevent it from unleashing its democratic, participatory function. This section attempts at identifying and examining the most relevant ones, which are:

- Low EU (participatory) literacy
- Fragmentation of the EU participatory system and lack of self-awareness among its users
- Unequal access to EU participation
- Limited integration in EU decision-making

### 5.1. Low EU (participatory) literacy

Most of the EU citizens' participatory channels previously discussed remain largely unknown to EU citizens and residents<sup>237</sup>. It is therefore no surprise that – as it emerges from the statistics presented above – only a few hundred thousand individuals and organisations do engage directly with the EU institutions and bodies, on a yearly basis, through the available participatory channels. While EU avenues of participation are supposedly open – and designed – to reach to a wide spectrum of respondents – who use them on a voluntary basis –, the truth is that participation levels tend to stay in the low figures. This outcome appears all the more surprising insofar as virtually all EU avenues of participation – including the consultations and various forms of initiatives, complaints, and requests – have moved online since the early 2000s. In other words, although the advent of e-consultation has greatly facilitated participation by individual members of the public and all types of interest representatives, this has not necessarily translated into a higher uptake, through an increased rate of participation and improvement of the opportunity structure of the EU policy process<sup>238</sup>.

This situation reflects – and is part of – a broader phenomenon of low EU literacy within the continent. A recent Eurobarometer study conducted among the European youth suggests that a majority (55%) of respondents say they do not understand much, or anything, about the EU<sup>239</sup>. Literacy is not only modest within the general population but also among civil society organisations, which represent – in

<sup>236</sup> Since the Lisbon Treaty, the Union derives its democratic legitimacy not only from representative democracy – which remains its founding democratic principle (German Constitutional Court in its judgment of June 30, 2009, BVerfG, 2 be 2/08) –, but also from participatory democracy. See on this point, e.g., A. Kutay, 'Limits of Participatory Democracy in European Governance', *European Law Journal*, 2015, vol. 21(6), p. 814.

<sup>237</sup> See Standard Eurobarometer 89, Spring 2018, European Commission, June 2018, p. 47.

<sup>238</sup> See, e.g., C. Quittkat, 'The European Commission's Online Consultations: A Success Story?', *Journal of Common Market Studies*, 2011, vol. 49(3), p. 654.

<sup>239</sup> European Parliament Youth Survey, Key Findings, Flash Barometer, 2021.

average – less than 10% of the overall number of petitions submitted<sup>240</sup>. Given the general purpose, openness, and 'low-cost' nature of virtually all participatory instruments, one might reasonably expect civil society to rely more often on those mechanisms. This appears all the more true, as the composition of civil society that engages at EU level is largely dictated by which groups the Commission chooses to fund and set up in the first place<sup>241</sup>.

Low literacy – both in EU participatory channels and, more broadly, in the EU – is multi-factorial in nature. First, it can be associated to a lack of integration of EU studies into the school curriculum<sup>242</sup>. As stated, "the lack of courses on the European Union, including a strong dimension of education for democracy and human rights, within schools' curricula limits the emergence of active European citizens"<sup>243</sup>. Interestingly enough, several of the recommendations stemming from the Citizens' Panels gathered within the CoFoE expressly call for such a lacuna to be filled<sup>244</sup>. In particular, recommendation 38 reads: "We recommend that the EU creates and implements programmes for schools about what is being done in the EU in terms of the existing mechanisms of participation. These programmes should be included in the school curricula about European citizenship and ethics with content adequate to the age. There should also be programmes for adults. There should be lifelong learning programmes available to citizens to further their knowledge about the possibilities of EU citizen participation". In its explanatory comment, citizens emphatically added: "As European citizens, we need to know how to use our rights. By virtue of being European citizens, we are entitled to this knowledge".

Second, the significant level of openness common to all EU participatory channels does not always translate into an equivalent level of publicity of this instrument. This becomes particular apparent when one examines the rather technical framing of the various mechanisms, formats, and dedicated platforms. But there is something more foundational, and therefore structurally problematic, in the publicity of the various EU participatory channels that transcends their initial filing and public knowledge of that filing. As of today, the public is not in a position to find all participatory mechanisms in one place, but those are rather scattered across a variety of low traffic webpages of the EU institutions and has no chance to gain access to a list of all requests for access to documents, complaints, and petitions filed.

However, as argued in a previous study<sup>245</sup>, the creation of a one-stop shop centralising all participatory mechanisms could remedy the current limited literacy and awareness about the existence and use of the very same instruments. As such, by playing a pedagogical role, this effort could also overcome the current mismatch between the expectations of citizens and the ability of these participatory instruments to lead to a full satisfaction of their demand. Time has come to leverage on the online platform to make these mechanisms not only more accessible (what it is not) but also more public, by providing in real time the information produced during the process both to the user and the public.

<sup>240</sup> Since 2013, the percentage of petitions submitted by NGOs went down to 10% or less. Before, it was significantly higher. However, their admissibility rate tends to be higher than the average petition.

<sup>241</sup> R. Sánchez Salgado, 'Giving a European dimension to civil society organization', *Journal of Civil Society*, 2007, 3(3), 253-69.

<sup>242</sup> K. Grimonprez, *The European Union and Education for Democratic Citizenship: Legal foundations for EU learning at school*, Nomos, 2020.

<sup>243</sup> F. Asderaki, & O. Sideri, "Teaching EU Values in Schools through European programs during COVID-19 pandemic. The 'Teachers4Europe: setting an Agora for Democratic Culture' Program", *HAPSc Policy Briefs Series*, 2020, 1(1), pp. 259-270. See also V. Symeonidis, 'Revisiting the European teacher education area: the transformation of teacher education policies and practices in Europe', *Center for Educational Policy Studies Journal*, 2018, vol. 8(3), pp. 13-34.

<sup>244</sup> Conference on the Future of Europe, Report on the Final Outcome, May 2022, Annex I - Recommendations of the four European Citizens' Panels.

<sup>245</sup> A. Alemanno, 'Strengthening the role and impact of the right of petition as an instrument of participatory democracy in the European Union', Study requested by the PETI committee and published by the European Parliament, PE 694.837 - October 2021.

This appears all the more important as recent statistics suggest that two thirds of EU citizens and individuals who have actively participated agree that participation increased their knowledge of the EU (62%), and just over half agree that it made them feel: more positive about the EU (54%), that they have something to contribute to debate (54%), and that they can influence what happens in the EU (52%)<sup>246</sup>.

## 5.2. Fragmentation of the EU participatory system and lack of self-awareness among its users

Another major, yet overlooked, structural issue curbing the use of existing EU participatory mechanisms has to do with their highly fragmented and scattered nature. While participatory democracy entails the multiplication of opportunities for citizens' participation beyond elections<sup>247</sup>, the creation of those opportunities within the EU has not occurred in a systematic fashion. As a result, the aims and scope of the different EU participatory channels have not necessarily been considered. More critically the EU legislator has not necessarily contemplated how these mechanisms relate to one another<sup>248</sup>. Thus, for instance, given its general-purpose nature, the right to petition is the participatory instrument that has suffered the most from the multiplication of EU participatory channels. Historically, the wide scope (both *ratione personae* and *ratione materiae*) of the right to petition made it the most suitable entry point into the EU participatory infrastructure. However, following the creation of the right to complain to the European Ombudsman and the right to register an ECI, the right to petition has considerably been reduced in scope. As a matter of principle, both a complaint to the Ombudsman<sup>249</sup> and a request underlying an ECI fall under the scope of a petition under Article 24(2) and 227 TFEU and must be construed as *lex specialis* vis-à-vis the right of petition. In other words, what citizens seek to obtain through these mechanisms could be attained through a petition. However, by carving out special areas from within the petition's scope, the EU legislator has introduced dedicated instruments, notably the right to complain to the Ombudsman in order to protect citizens from EU maladministration<sup>250</sup>, and the right to register an ECI in order to enable citizens to set the political agenda<sup>251</sup>.

This illustrates how the right to petition has historically been overshadowed by the multiplication of participatory specialised channels, such as ECIs and Ombudsman complaints. By failing to enlarge the user base, the EU has enabled these new instruments to cannibalise the scope of action and, therefore, the problem-solving ability of petitions vis-à-vis citizens. Ultimately, rather than enhancing the visibility of petitions as the ultimate last resort for citizens to engage with the EU, these instruments have outshined the petitions system. When measured against the goal pursued by the whole EU participatory infrastructure, this outcome appears not only unintended but also paradoxical.

<sup>246</sup> European Parliament Youth Survey, Key Findings, Flash Barometer, 2021.

<sup>247</sup> In normative theory, participatory democracy entails the multiplication of opportunities for citizens' participation beyond elections. See, e.g., D. Della Porta, *Can Democracy be Saved?*, Polity Press, 2012, p. 187.

<sup>248</sup> On this point, A. Alemanno & J. Organ, 'The Case for Citizen Participation in the European Union: A Theoretical Perspective on EU Participatory Democracy', in A. Alemanno & J. Organ, *Citizen Participation in Democratic Europe: What next for the EU?*, Rowman & Littlefield / ECPR Press, 2021.

<sup>249</sup> H. Hofmann et al., *Administrative Law & Policy of the European Union*, Oxford University Press, 2011, p. 773.

<sup>250</sup> Under Article 228 TFEU, the European Ombudsman's remit is confined to the EU institutions, bodies, offices and agencies and matters pertaining to national administrations, even when they are implementing EU law, are excluded from its office. See also A. Tsadiras, 'Of Celestial Motions and Gravitational Attractions: The Institutional Symbiosis Between the European Ombudsman and the European Parliament', *Yearbook of European Law*, 2009, vol. 28(1), p. 435.

<sup>251</sup> Under Article 11(4) TEU, an ECI is an invitation to 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 Treaties".

The bottom line is that citizens are not offered with a clear menu of participatory choices that might clarify why one channel should be chosen over another one and when. Unless a citizen is already aware of the existence of the participatory tool suitable to her/his need, she/he won't be assisted in identifying the appropriate one.

This is structurally problematic insofar as the separate participatory infrastructures are inherently competing with one another. This is particularly the case for complaints to the Commission<sup>252</sup> and petitions to Parliament.

Today's fragmentation of the EU participatory infrastructure entails a further negative consequence. It prevents actual users from being aware to be part of a broader community of individuals and organisations that tries to engage with the EU institutional machinery. When one sums up the total number of individuals and organisations that rely on the EU participatory infrastructure to gain access to the EU, that figure is considerably higher than the communities that gather around each of the existing instruments<sup>253</sup>. An example being provided by the hundreds of thousands who support an ECI or the thousands that support a petition to Parliament. Yet, the existing fragmentation among and within participatory channels prevent the EU from naming, assisting, and bringing together such a broader community of citizens. This larger community remains not only invisible to the many – due to its lack of salience to the public –, but also deeply unaware of its own existence. The ensuing lack of self-awareness represents another obstacle towards the full recognition, and use of these participatory instruments.

### 5.3. Unequal access to EU participation

The previous two structural factors behind the EU flawed EU participatory system reveal a third one, which is possibly the most unsurmountable today. Upon decades of consultations and other participatory mechanisms, the EU institutions endure on the working assumption that each and every party affected by a given action (or inaction) is equally able and likely to contribute or react to at the EU level<sup>254</sup>. Yet, today, the EU, when offering its participatory opportunities to the public, can no longer assume that all stakeholders benefit from the same opportunities of information, access and influence, and ultimately work in a level playing field. As also mentioned on page 33, given the structural disparities of access and resources, participation to and engagement with the EU has become a prerogative of those who are not only epistemically, but also financially, better placed and, therefore, can afford to contribute to the technocratic, highly technical, and generally resource-intensive forms of participation.

The current unequal opportunities access to the preparatory phases – as well as other moments – of the EU decision-making process entail some major consequences damaging the democratic and legitimation potential of participation.

<sup>252</sup> Complaints to the European Commission for any measure or practice attributable to a Member State which they consider incompatible with a provision or principle of EU law are registered through a dedicated webpage ([https://ec.europa.eu/assets/sq/report-a-breach/complaints\\_en/](https://ec.europa.eu/assets/sq/report-a-breach/complaints_en/)) and complaint handling system, generally referred to as CHAP.

<sup>253</sup> When one considers the yearly average number of petitioners (1,200, plus thousands of supporters), complainants to the European Ombudsman (900), ECIs (50 initiators plus hundreds of thousands of supporters), requests for access to documents (7,500), and participants to the EU Public Consultations (several thousands), the number of individuals engaging with the EU appears all of a sudden greater than generally perceived. The EU institutions do not provide such as data.

<sup>254</sup> For an early analysis of the issue of equal access to public consultations, see, e.g., C. Quittkat, 'The European Commission's Online Consultations: A Success Story?', *Journal of Common Market Studies*, 2011, vol. 49(3), pp. 653, 655.

First, as a result of such unequal access to – and limited representativeness of stakeholders' participation in – consultations, the EU institutions may be more or less exposed to different types of substantive interests. As such, the ensuing policy process risks of being biased in its evaluations, due to the selective responsiveness to those interests that were represented over those that were not. Absent robust, inclusive, and representative forms of public engagement, policies themselves are flawed, based on mistaken assumptions about their context, users, and preferences. As stated more than two decades ago, "[T]he richness of social, cultural, and scientific knowledge is not taken into account by the European legislative system, despite the organisation of sophisticated consultation prior to the announcement of legislation"<sup>255</sup>. Insofar as administrative mechanisms, such as complaints and petitions, also play an agenda-setting function, the unequal access to their operation may also produce distortive effects on EU decision-making.

Second, in the absence of recognition of effective participatory rights, the exercise of public authority by the EU institutions, notably the Commission's unbounded discretion, may negatively affect the legal sphere of those individuals who were not placed in a position to participate<sup>256</sup>.

Third and last, in these circumstances characterised by systemic access asymmetries, the democratic meaning of participation – as ensuring equal opportunities of receiving attention and, therefore, gaining access to the policy process<sup>257</sup> – appears to be ultimately structurally compromised<sup>258</sup>. This outcome defies and counters all rationales generally adduced in support of participatory practices. In particular, in these circumstances, how can participation continue to be assumed as always resulting in increased democratic legitimacy? Today's misalignment between the EU participatory practices and the principle of political equality does not only constrain the legitimisation potential of participation. It actually disallows it to the point of de-legitimising EU policymaking, and overall decision-making. As stated, the risk is that "by engaging citizens or their representatives in governance [-- --] the participatory democracy discourse might be used to make socially unacceptable policies legitimate"<sup>259</sup>. Indeed, even policies that have been adopted through impeccable democratic procedures may be perceived as forms of arbitrary domination, unless they are accompanied by a "public forum that allows all those who have preferred alternative outcomes to see for themselves that their views have been argued and reasons given for setting them aside"<sup>260</sup>.

## 5.4. Limited integration in EU decision-making

In addition to the problem of a structurally unequal access, existing EU participatory channels also tend to be disconnected from day-to-day decision-making. The 'Stop Glyphosate' ECI, which demanded that the usage of this pesticide cease, exemplifies such a trend<sup>261</sup>. Despite reaching well above the required one million signatures, this ECI could not formally be considered in the then ongoing EU decision-

<sup>255</sup> O. de Schutter, N. Lebessis & J. Paterson, 'Governance in the European Union', *Cahiers of the Forward Studies Unit*, Luxembourg: European Publication Office, 2001, p. 4.

<sup>256</sup> J. Mendes, 'Participation and the Role of Law After Lisbon: A Legal View on Article 11 TEU', *Common Market Law Review*, 2011, vol. 48(6), pp. 1849-1878.

<sup>257</sup> According to Article 9(1) TEU, "[i]n all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies..."

<sup>258</sup> On the principle of political equality and its implications for participation, see, e.g., A. Gallego, *Unequal Political Participation Worldwide*, Cambridge University Press, 2014.

<sup>259</sup> A. Kutay, 'Limits of Participatory Democracy in European Governance', *European Law Journal*, 2015, vol. 21(6), p. 816.

<sup>260</sup> P. Pettit, *Republicanism. A Theory of Freedom and Government*, Oxford University Press, 1997.

<sup>261</sup> "Ban Glyphosate and Protect People and the Environment from Toxic Pesticides" was the fourth European Citizens' Initiative to have met the requirements set out in Regulation (EU) No 211/2011 of the European Parliament and of the Council on the Citizens' Initiative.



making process<sup>262</sup>. There is no explicit link between an ECI request relating to an upcoming EU decision and that actual ongoing process<sup>263</sup>. As illustrated by this scenario, under the current Treaty framework, the participatory and representative components of EU democracy are like ships that pass in the night. This is true also for a complaint brought to the Ombudsman, or a petition lodged to the Parliament. These mechanisms are not designed to be able, even if judged well-founded, to intersect with and, therefore, affect ongoing EU decision-making. The question is thus to not only overcome the systemic inequalities characterising access to EU participation mechanisms, but also to better connect them to EU decision-making.

The interface between participation and representation emerges today as one of the – if not *the* – most intractable, and undertheorised, problems of our democracies. It reflects the current difficulty to do justice to the ‘expansion of the political’ within the current constitutional and political culture<sup>264</sup>. As participatory inputs are set to emerge, e.g., think of the European citizens’ assembly (as well as national ones) within the CoFoE, the question arises how to accommodate these inputs into institutional mechanisms governed by – directly or indirectly – elected, and therefore representative, institutions.

Therefore, EU participatory avenues must not only be revamped and democratised, but also better connected with representative democracy. Treating EU democracy as a system means to recognise that each democratic channel carries its own democratic value and that its weaknesses can be compensated for elsewhere<sup>265</sup>. The very same CoFoE failed to provide clarity on how its own input will be followed up at the political level. Once adopted, the Conference’s report was presented to the Joint Presidency<sup>266</sup>, with each of the three EU institutions expected “to examine swiftly how to follow up effectively” to this report, within the sphere of competences and in accordance with the Treaty<sup>267</sup>. This rather byzantine process failed to legally guarantee any joint institutional response to the citizens’ input. Ultimately, it is up to the European Council alone to decide, upon the request of “the Government of any Member State, the European Parliament or the Commission”, whether to amend the Treaties<sup>268</sup>. No formal position has been adopted by the EU Council – at the time of writing – despite the expressed demands by Parliament to re-open the Treaties under Article 48 TEU.

## 5.5. Conclusions

Low EU (participatory) literacy, fragmentation of the EU participatory system, unequal access to such a system, limited self-awareness of its users and its limited integration with EU decision-making represent the major structural reasons preventing EU participatory democracy from becoming, as required by the Treaty, a needed component of the EU model of democracy. However, as illustrated by the next section, all of these limitations might potentially be overcome by the introduction of an innovative participatory process – characterized by its deliberative nature among citizens drawn by lot (generally referred to as ‘mini-publics’) – into the EU institutional architecture. This appears the major

<sup>262</sup> Communication from the Commission on the European Citizens’ Initiative ‘Ban glyphosate and protect people and environment from toxic pesticides’, COM (2017) 8414 final, 12.12.2017.

<sup>263</sup> See Commission Implementing Regulation 2017/2324 of 12 December 2017 renewing the approval of the active substance glyphosate in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011, OJ L 333, 15.12.2017, p. 10-16.

<sup>264</sup> C. Taylor, P. Nanz & M. Beubien Taylor, *Democracy: How Citizens Are Building from the Ground Up*, Harvard University Press, 2020, p. 18.

<sup>265</sup> See J. Parkinson & J. Mansbridge (eds), *Deliberative Systems*, Cambridge University Press, 2012.

<sup>266</sup> Joint Declaration on the Conference on the Future of Europe, see n. 1, under letter a); Article 23 of the Rules of Procedure of the Conference on the Future of Europe.

<sup>267</sup> Article 23 of the Rules of Procedure of the Conference on the Future of Europe.

<sup>268</sup> Article 48 TEU.

learning gained from the recently concluded one-year long CoFoE. Despite all the criticisms it initially drew and its limitations, the Conference – and in particular its four Citizens' Panels – succeed not only in testing the representative deliberative model on a transnational basis, but also in proving it viable<sup>269</sup>.

#### BOX 2: Citizens' Assemblies

*Citizens' assemblies* are a form of direct citizen participation in policymaking, a type of 'mini-publics'<sup>270</sup>. Citizens' assemblies bring together randomly selected citizens (and residents) representative of a larger public with respect to the key socio-demographic characteristics such as gender, age, geographic location, education etc. Assemblies are convened to engage citizens in an open and informed deliberation on a given policy issue and produce recommendations in relation to the debated issue. Citizens' assemblies can differ in size, scope (local, regional, national), tasks (agenda-setting, scrutiny, evaluation, etc.), permanence and other characteristics. The topics for deliberation can be selected by governing authorities or citizens themselves. Deliberative mini-publics are rarely given powers to take decisions. While proposals to delegate powers to mini-publics, and even replacing existing decision-making institutions, have been put forward, they all presuppose constitutional reform insofar as they alter the powers of representatives, which are constitutionally defined.

<sup>269</sup> See, e.g., Alberto Alemanno and Kalypso Nicolaidis, *Citizen Power Europe*, in A. Alemanno and P. Sellal, *The Groundwork of European Power*, RED (Revue Européenne du Droit), Issue 3, January 2022, published by Groupe d'études géopolitiques, Paris.

<sup>270</sup> D.M. Farrell, et al., 'Deliberative Mini-Publics: Core Design Features', Centre for Deliberative Democracy and Global Governance working paper 2019/5, Canberra: Centre for Deliberative Democracy and Global Governance, 2019, p. 5.



## 6. WHAT CAN REPRESENTATIVE DELIBERATIVE PROCESSES OFFER THE EU?

The post-Lisbon EU has constitutionally embraced a model of democracy according to which citizens' participation forms an additional source of legitimacy for the Union in its day-to-day decision-making<sup>271</sup>. Yet, as demonstrated by our study, the EU participatory model remains underdeveloped and, as a result, has failed to deliver on its original promise of enabling citizens to play a role "in the Union democratic life"<sup>272</sup>. Given the structural constraints to effective participation, this cannot flourish, and therefore it cannot make up for EU citizens' inability to signify their desire for change in the EU political agenda. Hence the EU leaders' decision to try out something new to break "the unsustainability of the status quo"<sup>273</sup> when launching the CoFoE. As such, the Conference marked a major departure from its traditional approach to citizen engagement. By convening four citizens' assemblies entailing the participation of 800 randomly selected citizens, the Union has – for the first time – proactively sought citizen input to its decision-making<sup>274</sup>. Rather than assuming that all individuals have the same knowledge of – and access to – EU institutions, the Union embraced, albeit on a temporary basis, a new participatory mechanism – generally referred to as representative deliberative processes – capable of addressing some of the existing shortcomings of the EU participatory system. In particular, by relying on sortition, deliberative processes seem to overcome – by design – the challenge of low literacy of and unequal access to participation in EU decision-making. This is due to two core features of the representative deliberative processes<sup>275</sup>, which are both novel at the EU level. First, they are *deliberative* in that participants reach recommendations or conclusions on a particular issue "after receiving information and engaging in a careful and open discussion"<sup>276</sup>. Second, they are *representative*, being composed as 'mini-publics' whose participants broadly constitute "a representative subset of the wider population", delivered through random selection<sup>277</sup>. As such, mini-publics – as experiences through the Conference's European Citizens' Panels – emerge as a more realistic, and enticing, alternative to involve the grassroots level in deliberation on political issues<sup>278</sup>.

<sup>271</sup> On the genesis and constitutionalization – as well as limitations – of participation in the EU legal order, see, e.g., S. Smismans, "The Constitutional Labelling of 'the democratic life of the EU': representative and participatory democracy", in A. Follesdal & L. Dobson (eds), *Political Theory and the European Constitution*, Routledge, 2006, p. 122; A. Kutay, 'Limits of Participatory Democracy in European Governance', *European Law Journal*, 2015, vol. 21(6), p. 814.

<sup>272</sup> Article 10(3) TEU.

<sup>273</sup> J. Habermas, 'Democracy in Europe: Why the Development of the European Union into a Transnational Democracy is Necessary and How it is Possible', *ARENA Working Paper* 13/2014, p. 3.

<sup>274</sup> Even if the model of the intergovernmental conference (IGC), foreseen in Article 48 TEU, has gradually integrated forms of oversight such as national parliament involvement, there are no Treaty changes unless the Member States take the initiative. See, on this point, D. Hodson & I. Maher, *The Transformation of EU Treaty Making: The Rise of Parliamentary Referendums and Courts since 1950s*, Cambridge University Press, 2018.

<sup>275</sup> This is characterized by: (i) being commissioned by public authorities; (ii) participants being randomly selected and demographically stratified; and (iii) one day or longer of face-to-face deliberation. See, e.g., OECD, *Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave*, Paris: OECD Publishing, 2020.

<sup>276</sup> See, e.g., D.M. Farrell, et al., 'Deliberative Mini-Publics: Core Design Features', Centre for Deliberative Democracy and Global Governance working paper 2019/5, Canberra: Centre for Deliberative Democracy and Global Governance, 2019, p. 5.

<sup>277</sup> *Ibidem*.

<sup>278</sup> For a lengthy and original scholarly treatment of this democratic innovation, see H. Landemore, *Open Democracy*, Princeton University Press, 2020.

The representative deliberative model, as typified by citizens' assemblies, seem particularly fitting for the EU<sup>279</sup>. First, unlike the nation state, the EU lacks a narrative structure which makes the political process visible and accessible to large audiences. In particular, only few citizens are directly – or at least fully aware of being – exposed to the work of the EU, and therefore only seldom deliberate about EU politics in their daily lives. In other words, while some political talking is embedded in the national system of norms, the same cannot be said for the EU. Yet, thanks to the Citizens' Panels, both political parties and media commentators may be encouraged to position themselves, by engaging with the incipient pan-EU conversation<sup>280</sup>. As such, while "it is impossible to give everyone a 'say' in the literal sense of having one's individual voice heard by all other members of the polity"<sup>281</sup>, the deliberative moment is apt to compensate for the lack of a genuine, pan-EU political and media space. This suggests that – as it occurred in Ireland after the abortion and same-sex marriage referenda<sup>282</sup> – the previous deliberative experiences may potentially unleash a virtuous cycle of 'constitutional pedagogy' and ensuing political engagement<sup>283</sup>. This provided that the citizens' assemblies, if institutionalised, may become a publicised affair, capable of inspiring a wider societal debate that, in turn, feeds into the deliberations and conclusions<sup>284</sup>.

Second, deliberative processes entailing the participation of randomly selected citizens may help the Union to overcome the structural inequalities of access to EU decision-making. As such, should they get institutionalised within the Union<sup>285</sup>, citizens' panels could get the EU as close as it can to an ideal of equal access to (and, potentially, influence on) decision-making. This prospect, however, must consider that no democratic innovation, including representative deliberative processes, operates in a political vacuum. Whatever rational solution randomly selected citizens have put forward, this might be torpedoed and killed by professional actors who prefer a different outcome<sup>286</sup>.

Third, institutionalising deliberative formats, such as representative deliberative processes including a permanent European Citizens' Assembly system, can provide EU decision-making with something that manifestly lacks: the ability to test ideas beyond entrenched political divides and a laboratory for a genuine cross-national political conversation in Europe. That is where the deliberative added value of sortition plays out: randomly selected citizens could be presented with various courses of action and then issue a recommendation presenting the pros and cons of each option. They could also have the possibility to formulate additional alternative scenarios, by steering the conversation away from the sticking points.

Ultimately, deliberative formats inject a new logic into political decision-making that appears antithetical to the one governing representative decision-making. It is indeed characterised by equality

<sup>279</sup> The more representative institutions are found to be deficient, the more justification there might be for the use of mini-publics. See J.W. Kuyper & F. Wolkenstein, 'Complementing and correcting representative institutions: When and how to use mini-publics', *European Journal of Political Research*, 2019, vol. 58(2), pp. 656-675.

<sup>280</sup> A. Alemanno, 'Unboxing the Conference on the Future of Europe and its democratic raison d'être', *European Law Journal*, 2022, vol. 26(5-6), pp 484-508.

<sup>281</sup> J. Mansbridge et al., 'The Place of Self-Interest and the Role of Power in Deliberative Democracy', *Journal of Political Philosophy*, 2010, vol. 18(1), p. 64.

<sup>282</sup> See, e.g., J. Suiter, D. Farrell & E. O'Malley, 'When do deliberative citizens change their opinions? Evidence from the Irish Citizens' Assembly', *International Political Science Review*, 2016, vol. 37(2), p. 198.

<sup>283</sup> J. Matsuoka, *Let the People Rule: How Direct Democracy Can Meet the Populist Challenge*, Princeton University Press, 2020.

<sup>284</sup> G. Abels, A. Alemanno, B. Crum, A. Demidov, D. Hierlemann, A. Renkamp & A. Trechsel, *Next level citizen participation in the EU: Institutionalising European Citizens' Assemblies*, Bertelsmann Stiftung, 2022.

<sup>285</sup> *Ibidem*.

<sup>286</sup> M. Setälä, 'Connecting deliberative mini-publics to representative decision-making', *European Journal of Political Research*, 2017, vol. 56(4), pp. 846-866. See also L. Lessig, *They Don't Represent Us: Reclaiming Our Democracy*, William Morrow, 2019.

of access, the absence of vested interests, and genuine deliberation. This is not to suggest that they come free of limitations and challenges. Citizens' assemblies are often perceived as lacking authority: its randomly selected citizens have not been given a personal mandate, and the methodology that has selected them might be flawed and non-transparent. As a result, also the quality of their deliberation might be questioned, as well as their ability to bridge all kinds of political disagreements existing in society.

To sum up, far from providing a 'silver bullet' for remedying the EU's democratic malaise, an EU deliberative process, if carefully designed, could shed a new light on the EU participatory system, by acting as a valuable corrective to some of the critical shortcomings from which EU decision-making suffers at present.

It is against this backdrop that the next sections discuss whether and how citizen-driven deliberative processes could be embedded into the institutional architecture, their potential contribution to the EU participatory system, and individual mechanisms.

## 7. THE CHALLENGES OF INSTITUTIONALISING REPRESENTATIVE DELIBERATION

While deliberative processes are spreading in what has recently been defined a “deliberative wave”<sup>287</sup>, they tend to be temporary in nature – being predominantly ad hoc exercises and typically ‘one-shot’ experiences – that do not stick<sup>288</sup>. When compared with other democratic innovations<sup>289</sup>, such as participatory budgeting<sup>290</sup>, institutionalisation of deliberative mini-publics is the exception, not the norm. As a result, the question whether they could/should be institutionalised – and how that might be done – remains not only under-theorised but also practically unaddressed<sup>291</sup>. And that despite the mounting number of calls towards this objective, all the more so in the EU context<sup>292</sup>.

Here are a few methodological considerations.

First, it is imperative to understand why and how to embed deliberative processes within the EU. The reasons justifying – and, conversely, the limitations circumscribing – institutionalisation may indeed vary from jurisdiction to another, based on a variety of socio-cultural, political, and constitutional variables. As discussed in the previous section, given the absence of a pan-European ‘democratic critical infrastructure’<sup>293</sup>, that is a system helping citizens to associate with one another through intermediary powers – such as genuine European political parties<sup>294</sup> and a pan-EU media sphere<sup>295</sup> – the EU’s major driver for embracing deliberative mini-publics can be found in the Union’s endless search for democratic legitimacy.

<sup>287</sup> See OECD, *Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave*, Paris: OECD Publishing, 2020.

<sup>288</sup> Only 14 out of the 289 examples mapped by the 2020 OECD report relate to cases of institutionalised practices. See OECD, *Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave*, Paris: OECD Publishing, 2020.

<sup>289</sup> Democratic innovations are processes or institutions developed to reimagine and deepen the role of citizens in governance processes by increasing opportunities for participation, deliberation and influence. See, e.g., Istub, S., and O. Escobar, eds., *The Handbook of Democratic Innovation and Governance*. Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing.

<sup>290</sup> For an analysis of the reasons for and ongoing effort at turning temporary democratic innovations into sustainable long-term institutions, see OECD, ‘Eight ways to institutionalise deliberative democracy’, *OECD Public Governance Policy Papers*, No. 12, Paris: OECD Publishing, 2021; D. Courant, ‘Deliberative Democracy, Legitimacy, and Institutionalisation. The Irish Citizens’ Assemblies’, *IEPHI Working Paper Series*, n°72, 2018 (he reasons for a move towards institutionalising representative deliberative processes).

<sup>291</sup> For some early reflections, see M.E. Warren, ‘Institutionalizing Deliberative Democracy’ in S.W. Rosenberg (eds), *Deliberation, Participation and Democracy*, London: Palgrave Macmillan, 2007. See also S. Niemeyer & J. Jennstal, ‘Scaling Up Deliberative Effects – Applying Lessons of Mini-Publics’ in A. Bächtiger et al. (eds), *The Oxford Handbook of Deliberative Democracy*, Oxford University Press, 2018.

<sup>292</sup> For recent proposals of an EU citizens’ assembly see, e.g., G. Smith, ‘The European Citizens’ Assembly’, in A. Alemanno & J. Organ, *Citizen Participation in Democratic Europe: What next for the EU?*, Rowman & Littlefield / ECPR Press, 2021; G. de Búrca, ‘An EU Citizens’ Assembly on Refugee Law and Policy’, *German Law Journal*, 2020, vol. 21(1), p. 23. For a less detailed call for permanent citizen participation in EU process see, e.g., A. Kavrakova, ‘Participation of European citizens in the EU legislative procedure’, *ERA Forum*, 2021, vol. 22, pp. 295–310 (2021); L. Cooper et al., ‘The Rise of Insurgent Europeanism: Mapping Civil Society Visions of Europe 2018-2020’, *LSE Ideas*, 2021.

<sup>293</sup> On the concept of democracy’s critical infrastructure, see J.-W. Müller, ‘Democracy’s critical infrastructure: Rethinking intermediary powers’, *Philosophy & Social Criticism*, 2021, vol. 47(3), pp. 269-282. See also J.-W. Müller, *Democracy Rules*, Allen Lane, 2021, pp. 90-138.

<sup>294</sup> See on this point, e.g., J. Priestley, ‘European Political Parties: The Missing Link’, Jacques Delors Institute Policy Paper n°41, 2010; S. Van Hecke, A. Andriane-Moylan et al., ‘Reconnecting European Political Parties with European Union Citizens’, *International IDEA Discussion Paper 6/2018*.

<sup>295</sup> See e.g., M. Brüggemann & H. Schulz-Forberg, ‘Towards a Pan-European Public Sphere? A Typology of Transnational Media in Europe’, in H. Wessler et al., *Transnationalization of Public Spheres. Transformations of the State*, London: Palgrave Macmillan, 2008.

Second, institutionalising citizens' assemblies does not necessarily entail the setting up of a *permanent* body, but it more modestly refers to the possibility of "incorporating deliberative activities into the rules of public decision-making structures and processes of a community, in a way that is legally-constituted"<sup>296</sup>. This is also true in the framework of EU democracy insofar as institutionalisation's ultimate aim is to ensure continuity, regardless of political change.

Third, a related question to be asked when considering institutionalisation is whether the deliberative processes would replace old institutions or merely add new institutions and procedures while maintaining old forms and methods. Based on past experiences of institutionalisation, the latter, which can be referred to as the "add on" method, appears the most likely to occur<sup>297</sup>. No institutionalisation experience has led to the suppression of existing institutions to leave room to deliberative formats. Indeed, as will be discussed further, the setting up of permanent deliberative processes along the lines of the deliberative format previously described does not automatically entail the reform of existing EU bodies and structures. This is at least true for jurisdictions with permanent citizens' assemblies which could be established without having to amend any country's constitution<sup>298</sup>. What has been advanced and demonstrated with reference to the nation-state seems also true for the EU<sup>299</sup>. Yet the 'add' on approach does not rule out that, in the medium/long term, a deliberative body – such as a citizens' assembly – may replace an existing institution, such as for instance the second chamber, be it a Senate, House of Lords or, in the EU context, the Council of the EU.

Fourth, to assess the 'feasibility' – both in legal and practical terms – of a legally-enshrined deliberative process within the EU institutional architecture requires to develop a clear understanding of that process' defining features. This study takes as a point of reference an ideal, conventional type of deliberative process – generally referred to as 'mini-public' – analogous to the Citizens' Panels experienced within the CoFoE, and advisory in nature<sup>300</sup>. This can be broadly defined as an assembly made of randomly selected citizens representative of a wide cross-section of society who, "after receiving information and engaging in a careful and open discussion", gather – over a defined period of time – to learn, deliberate, and develop collective recommendations addressed to decision-makers<sup>301</sup>.

Fifth, institutionalisation is about designing a model enabling representative government and citizen-driven deliberative processes to coexist, thus becoming complementary and mutually reinforcing<sup>302</sup>. Given the Union's endless search for democratic legitimacy, this prospect appears particularly enticing. Yet shifting from ad hoc projects to a legally constituted and legally available structure is a widely

<sup>296</sup> OECD, 'Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave', *OECD Publishing*, Paris, 2020, p. 13. On this point, see also Sintomer, who maintains that institutionalization means that their organization cannot be let to the arbitrary of rulers (Y. Sintomer, 'From Deliberative to Radical Democracy? Sortition and Politics in the Twenty-First Century', *Politics & Society*, 2018, vol. 46(3), pp. 337-357).

<sup>297</sup> There are no precedents in which the creation of a deliberative process and its institutionalization has led to the suppression of an existing institution and/or procedure.

<sup>298</sup> L. Patriquin, *Permanent Citizens' Assemblies: A New Model for Public Deliberation*, Rowman and Littlefield, 2020.

<sup>299</sup> It has been demonstrated that, even with the establishment of a citizens' assembly, the decision-making institutions of states continue to operate exactly as they do now, including the legislature, the executive (cabinet), the courts, the civil service, the police, and the military.

<sup>300</sup> Deliberative processes rarely entail the authority to take decisions. While proposals to delegate powers to deliberative processes, and even replacing existing decision-making institutions, have been put forward, they all presuppose constitutional reform insofar as they alter the powers of representatives, which are constitutionally defined.

<sup>301</sup> See, e.g., D.M. Farrell, et al., 'Deliberative Mini-Publics: Core Design Features', *Centre for Deliberative Democracy and Global Governance working paper 2019/5*, Canberra: Centre for Deliberative Democracy and Global Governance, 2019, p. 5.

<sup>302</sup> For a thorough analysis of the benefits generally associated with the institutionalization of deliberative processes, see OECD, 'Eight ways to institutionalise deliberative democracy', *OECD Public Governance Policy Papers*, No. 12, Paris: OECD Publishing, 2021.

consequential move. In particular, the incorporation of sortition, which is inherent to any model of deliberative processes – be it citizens' assembly or a jury – is set to alter the architecture of representative democracy, by forcing a reflection on the role of representation and its relationship with deliberative processes, outcomes, and actors<sup>303</sup>. This appears all the more true and complex in the transnational, multilevel and multilingual EU governance context, where – as we will discuss – institutionalisation raises a series of context-specific questions related to the EU underlying constitutional and institutional legal framework, as well as its overall model of democracy. Questions range from the impact of mini-public's output on the EU legal principle of institutional balance (governing the relations among EU institutions) to its relationship with existing participatory mechanisms, such as the right of petition or the ECI. As discussed below, much of the answer to these questions depends on the chosen model of deliberative processes, which is in turn defined by a great variety of variables, notably its scope (general purpose versus specific purpose), tasks (agenda-setting versus scrutiny), the point in the policy cycle where this is embedded (preparatory, co-decision, evaluation), its composition (citizen-only or hybrid) and ultimate authority (advisory versus decision-making).

Ultimately, institutionalising citizens' assemblies means to legally foresee the possibility to activate and rely upon a deliberative model when its use is deemed useful/necessary, rather than establishing a permanent process or body to such an effect.

Let's now turn to identify and systematise some theoretically conceivable processes for embedding a representative deliberative model into the EU institutional framework.

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<sup>303</sup> C. Chwalisz, 'A New Wave of Deliberative Democracy', *Carnegie Europe*, November 2019.



## 8. MODELS FOR THE ESTABLISHMENT OF AN EU REPRESENTATIVE DELIBERATION PROCESS

This section intends to ascertain what are the theoretically conceivable models for embedding representative deliberative processes into the EU institutional framework. While there exist different options for designing EU deliberative mini-publics, those largely depend on the following variables:

1. *Nature*: should the deliberative format be permanent or 'on-demand', and upon the request of citizens, institutions, or a mix of both (hybrid)?
2. *Scope*: should the deliberative format have a general purpose or a specific one?
3. *Role*: should the deliberative format have an agenda-setting or scrutiny power?
4. *Positioning in the policy cycle*: at what stage of the policy cycle should it be added?
5. *Composition*: Should the deliberative format be made by citizen-only or hybrid, by mixing citizens with elected representatives?
6. *Authority*: Should the deliberative format have mere advisory authority or be entrusted with decision-making power?

No doubt: these features are somehow intertwined, and some do overlap. Yet they can – and should be – examined separately when identifying what are the transnational deliberative models conceivable within the EU legal order<sup>304</sup>. Here is a brief examination of each of the previously identified variables.

First, the *nature* of any model of deliberative processes varies depending on the circumstances and actors defining its activation. One may distinguish three existing routes to institutionalization:

- Permanent, via the establishment of a stable structure for representative citizen deliberation; or
- On (institutional) demand, via the establishment of requirements for public authorities to organise representative deliberative processes under certain conditions; or
- On (citizens') demand, via the establishment of rules allowing citizens to demand a representative deliberative process on a specific issue<sup>305</sup>.

Second, *scoping* has to do with whether an EU deliberative mini-public would be a general-purpose institution in the sense that it would be empowered to deal with *all* issues falling under EU competencies, or even beyond that (general purpose), or rather play a more circumscribed function (specific purpose). The latter might be limited by design to a given set of issues, such as long-term issues (e.g., climate change, future generations<sup>306</sup>), or specific tasks, such as constitution-making<sup>307</sup> or

<sup>304</sup> See, e.g. Plenary Proposal 36, notably its paragraph (7): "Holding Citizens' assemblies periodically, on the basis of legally binding EU law. Participants must be selected randomly, with representativeness criteria, and participation should be incentivized. If needed, there will be support of experts so that assembly members have enough information for deliberation. If the outcomes are not taken on board by the institutions, this should be duly justified; Participation and prior involvement of citizens and civil society is an important basis for political decisions to be taken by elected representatives.

<sup>305</sup> This classification of institutionalization routes builds upon and enriches Claudia Chwalisz' in OECD, 'Eight ways to institutionalise deliberative democracy', *OECD Public Governance Policy Papers*, No. 12, Paris: OECD Publishing, 2021.

<sup>306</sup> See, e.g., K. Kulha, et al., 'For the Sake of the Future: Can Democratic Deliberation Help Thinking and Caring about Future Generations?', *Sustainability*, 2021, vol. 13, p. 5487.

<sup>307</sup> M. Patberg, *Constituent Power in the European Union*, Oxford University Press, 2020.



ex post evaluation<sup>308</sup>. Examples of specific purpose deliberate formats include a European citizens' assembly being established to cover climate change (e.g., institutionalisation of the French Climate Convention) or not empowered to deal with EU foreign affairs. Another illustration could be a permanent citizens' assembly exclusively dedicated to institutional reform.

The third variable refers to the actual *role* entrusted to the deliberative body. Regardless of whether it is a general purpose or specific purpose deliberative advisory mechanism, it can be assigned either an agenda-setting or a scrutiny role (or both in exceptional circumstances). While in the case of the former citizens may autonomously define the issues to be deliberated upon<sup>309</sup>, under the latter the focus of their deliberation is pre-defined by design and, therefore, limited to a given set of issues and sub-issues (e.g., the policy initiatives currently in preparation or those pre-selected by the commissioning authority). Practice suggests that topics are generally decided and defined top-down by public decision makers, and not by the mini-public's participants<sup>310</sup>. A multipurpose deliberative mechanism, covering both agenda-setting and scrutiny, is theoretically conceivable, yet empirical evidence suggests that randomly selected bodies tend to be effective when they have been entrusted with clearly defined and narrower tasks<sup>311</sup>. Combining both into one deliberative body might therefore not be ideal<sup>312</sup>.

The fourth variable helping us identifying different models of deliberative processes has to do with the *point of the policy cycle* incorporating the deliberative format. The standard EU policy cycle can be broken down into: (i) a preparatory phase – entirely managed by the Commission and characterised by the preparation of an impact assessment entailing a public consultation<sup>313</sup>–; that is followed by (ii) a co-decision phase, driven by Parliament and Council; (iii) adoption by the same institutions; (iv) implementation, essentially by national authorities; and (v) evaluation, performed by the Commission services by relying on the Fit for Future Platform (formerly REFIT) engaging into an ex post review. Against this backdrop, one can imagine a European citizens' assembly playing a role in a pre-preparatory phase (defining the issues the Commission and other institutions, such as the European Council, might begin to examine and bring forward), at preparatory phase (by providing an opinion on an ongoing legislative file or initiative in parallel to preparation of the impact assessment), at the co-decision phase (offering an advice to the co-legislators upon the Commission's proposal and possibly advancing some amendments), and ultimately at the evaluation phase (providing advice on whether and how to reform a given EU policy or legislation). Depending on the chosen step(s) of the policy cycle, an EU deliberative format could either play an agenda-setting or scrutiny role. In essence, it could be invested with an agenda-setting role exclusively in two situations: (i) when its intervention is foreseen at the early stage of the policy cycle, i.e., before the Commission has started to examine and prepare its proposal, by either putting forward an idea for a new initiative or expressing an opinion upon an initiative that is already circulating – be it coming from the Council, Parliament (i.e., resolution based on an own initiative report), an EU Citizen Initiative or a petition; (ii) when its involvement is forecasted at

<sup>308</sup> See, e.g., M. MacKenzie, 'A General-Purpose, Randomly Selected Chamber', in I. González-Ricoy & A. Gosseries (eds), *Institutions for Future Generations*, Oxford University Press, 2016, pp. 282–299.

<sup>309</sup> For an early proposal of 'mini-populi', see R.A. Dahl, *Democracy and its Critics*, Yale University Press, 1989, pp. 340–41.

<sup>310</sup> See, e.g., OECD, 'Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave', *OECD Publishing*, Paris, 2020.

<sup>311</sup> G. Smith, 'The European Citizens' Assembly', in A. Alemanno & J. Organ, *Citizen Participation in Democratic Europe: What next for the EU?*, Rowman & Littlefield / ECPR Press, 2021, p. 154.

<sup>312</sup> This is the rationale behind the Ostbelgien's model where an agenda-setting Council operates independently from the actual assemblies.

<sup>313</sup> Generally referred to as 'pre-legislative', this preparatory phase also exists for non-legislative initiatives, such as EU programmes, communications or other initiatives that do not follow the ordinary legislative process.

the very end of the policy cycle, that is at the ex post evaluation stage (i.e., the choice of and timing of the policy to be reformed). The role played by an EU citizens' assembly at any other stage of the policy cycle – that is, in between the pre-preparatory stage and the evaluation – is set to be limited to a scrutiny role. This is because, within those stages, the existing EU institutions retain agenda-setting power, with the Commission's right of initiative remaining intact. Yet, their respective actions would suddenly be subject to the scrutiny of a representative deliberative format.

The fifth variable refers to the *composition* of the deliberative process. While these tend to be exclusively made of randomly selected citizens – who might be accompanied by experts and facilitators – (wholly citizen-led), another possibility is to mix citizens with elected representatives within the same deliberate format. In the latter scenario, those responsible for decisions, i.e., the elected representatives, also engage in a deliberative process with a cross-section of society. This collaborative feature of deliberative processes remains quite uncommon. It was tested by the Irish Constitutional Convention, organised in 2012–2014, which entailed the participation of 66 randomly selected citizens and 33 members of the Irish Parliament<sup>314</sup>. The same hybridity was experienced within the so-called 'plenary' of the CoFoE, which unprecedentedly mixed representatives of the Commission (3), the Council (54 representing the 27 EU governments), Members of the European (108) and national (108) parliaments with ordinary citizens (108), coming from both the European Citizens' Panels (80) – of which a third should be younger than 25 – and national (27) ones, as well as other individuals representatives of public local interests (Committee of the Regions, 18), private and public interests (European Economic and Social Committee, 18), as well as social partners (12), civil society organisations (8), and local and regional representatives (12), and the President of the Youth Forum (1)<sup>315</sup>. Mixed deliberative formats are generally associated to enhanced inclusivity and deliberative quality of representative democracy in three different ways. First, by exposing decision makers to a larger variety of societal viewpoints, they encourage representatives to question their own views and overcome biases. Second, by engaging into deliberative – as opposed to aggregative (e.g., voting) – practices, they help decision makers to be more open-minded and less partisan than they usual are in parliamentary committees. Third, after being part of deliberative processes, decision makers tend to be keener on taking into account on the proposed recommendations and make them theirs. Yet, mixed deliberative bodies also present major downsides, insofar as the representatives' presence risks altering the nature of a deliberative process, by injecting partisanship and hierarchies within the deliberative forum and ultimately engaging into cherry-picking<sup>316</sup>. The scarcity of the available evidence does not allow yet to capture the quality of mixed deliberation<sup>317</sup>.

The sixth and last variable refers to the *authority* entrusted to the deliberative process. Should they enjoy some decision-making authority or merely advisory power? Deliberative processes and bodies are rarely given powers to take decisions. While proposals to grant them autonomous decision-making power have been put forward – with some advancing to have them replace existing decision-making

<sup>314</sup> See, e.g., J. Suiter, D. Farrell & C. Harris, "The Irish constitutional convention: a case of 'high legitimacy'?", in M. Reuchamps & J. Suiter (eds), *Constitutional Deliberative Democracy in Europe*, ECPR Press, 2016, pp. 33–52.

<sup>315</sup> In addition, the plenary can invite "key stakeholders", whereas the High Representative of the Union for Foreign Affairs and Security Policy "shall be invited when the international role of the EU is discussed". See Article 16 ('Composition') of the Rules of Procedure of the Conference on the Future of Europe.

<sup>316</sup> For an analysis of the mixed nature of the plenary of the Conference on the Future of Europe, see A. Alemanno, 'Unboxing the Conference on the Future of Europe and its democratic raison d'être', *European Law Journal*, 2022, vol. 26(5–6), pp 484–508.

<sup>317</sup> For an excellent analysis of deliberative processes as collaborative and mixed institutions, see M. Setälä, 'Advisory, Collaborative and Scrutinizing Roles of Deliberative Mini-Publics', *Frontiers in Political Science*, 2021.

institutions<sup>318</sup> –, their establishment presupposes constitutional reform. This is true insofar as they alter the constitutionally defined allocation of powers. In the EU context, any conferral of autonomous decision-making authority to a deliberative body would require the adoption of one of the Union legal acts mentioned in Article 288 TFEU. Instead, as will be further discussed below, the conferral of mere advisory power to such a body would not necessarily require the adoption of an act of secondary law and may be effected by the conclusion of an inter-institutional agreement (IIA) building upon a previously identified legal basis. Yet, in both circumstances (decision-making or advisory power), the establishment and operation of an EU deliberative process would need to take place within the boundaries defined by the EU legal order.

By selectively combining these six, different variables and looking at existing comparative experiences, this study puts forward one representative deliberative model for the EU which could be established without Treaty change.

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<sup>318</sup> See, e.g., E.J. Leib, *Deliberative Democracy in America: A Proposal for a Popular Branch of Government*, Penn State University Press, 2004; P.-E. Vandamme & A. Verret-Hamelin, 'A Randomly Selected Chamber: Promises and Challenges', *Journal of Public Deliberation*, 2017, vol. 13(1), p. 5; J. Gastil & E.O. Wright, 'Legislature by Lot: Envisioning Sortition Within a Bicameral System', *Politics & Society*, 2018, vol. 46(3), pp. 303-330.

## 9. TOWARDS AN INTEGRATED PARTICIPATORY AND DELIBERATIVE MODEL FOR THE EU

The model for an EU representative deliberative process advanced by this study sits 'upstream' – and therefore outside – of the EU policy-cycle. As such, it entrusts such a mechanism with an agenda-setting role which may transcend existing EU competences in order to expand the political priorities of the Union.

The proposed model consists of a permanent institution the Citizens' Chamber (hereinafter 'the Chamber') – and a temporary institution – the Citizens' Panel (hereinafter, 'the Panel') –, both populated by randomly selected citizens coming from all over the EU<sup>319</sup>. The citizens sitting in the Chamber would regularly meet to deliberate on the themes that could be entrusted to the latter, through the convening of an EU Citizens' Climate Panel, an EU Climate Panel on Electoral Reform, an EU Climate Panel on Gender Inequality, etc.). This dual-pronged model of deliberative process would be activated by – and the proposals to be considered by the Chamber be based on – the ideas, needs and complaints generated either from the bottom-up, by citizens – through an ECI<sup>320</sup>, a petition<sup>321</sup> or any other existing participatory mechanism – or from the top-down, by Parliament – through own-initiative reports<sup>322</sup>, the Council – through its requests to the Commission<sup>323</sup> –, as well as the European Council through its conclusions.

All these input – be they from the bottom-up or the top-down – would be constantly collected in a public register, to be curated by the Secretariat of the Chamber (which would in turn be hosted by an EU advisory institution, such as the European Economic and Social Committee), and be made available to – and deliberated upon – by the randomly selected citizens sitting in the Chamber. The Chamber's members would be randomly selected among EU citizens and residents with a previous experience of citizens' assemblies – be it at a local, national or EU level – and be appointed for two years<sup>324</sup>. Their task would be to rank the top existing themes that could be proposed for the convening of one or more dedicated EU Citizens' Panel<sup>325</sup>. The Chamber would have two main tasks: (i) to select one or more topics and make a proposition to the EU institutions to formally convene dedicated Citizens' Panels on a yearly basis; (ii) to monitor the EU institutional response and implementation of the developed policy recommendations, all along the EU policy cycle.

The proposal to convene one or more EU Citizens' Panels put forward by the EU Citizens' Chamber would then be directed to the following institutions:

1. EU Council – insofar as it is tasked to provide "the necessary impetus for [the Union's] development and [its] general political directions...";

<sup>319</sup> The composition of both bodies (the Citizens' Chamber and the Citizens' Assemblies) should aim to represent the population in terms of gender, age, education, and residence.

<sup>320</sup> Article 11(4) TEU and Article 24 TFEU. This is the most recent EU participatory mechanism, which in turn represents the first transnational participatory democracy instrument – allowing at least seven EU citizens coming from seven different Member States to suggest new policy initiatives in any field where the EU has power to propose legislation (such as the environment, agriculture, energy, transport or trade) after collecting one million signatures.

<sup>321</sup> Articles 20, 24 and 227 TFEU, as well as by Article 44 of the Charter of Fundamental Rights of the EU).

<sup>322</sup> Article 225 TFEU.

<sup>323</sup> Article 241 TFEU.

<sup>324</sup> This has two aims: avoid parliament-like long terms and leverage on the experience gained within and across the Union through existing and prospective deliberative processes.

<sup>325</sup> One may also entrust the Chamber to not only formulate the questions to be asked for deliberation as they stem from existing initiatives and input, but also propose other topics for deliberation (self-tasking).

2. the Commission – the holder of a quasi-monopoly on the right of initiative.
3. Council and Parliament, as co-legislators.

This proposal is then formalised by the three main institutions, the Commission, the Council, and Parliament, via a joint decision on convening one or several Citizens' Assemblies within the framework of their respective prerogatives. By this joint decision, the EU institutions commit themselves to the process, namely convening the Panel and following up on the recommendations. The modalities governing the adoption of such a decision, and more broadly, the operation of the EU deliberative process can be enshrined into an Interinstitutional Agreement<sup>326</sup>.

Upon the completion of deliberation by each individual Panel, the Secretariat of the Chamber prepares an official report that summarizes the policy recommendations developed by citizens. The report is approved by the Citizens' Panel and is sent out to the EU institutions as the official outcome of the citizen deliberation. The members of both the Citizens' Assembly, assisted by the Citizens' Chamber members and Secretariat, would then jointly present their recommendations to the three EU institutions – the Commission, Parliament, and Council - that have convened the deliberative exercise.

The same institutions would then be expected to respond individually – within the limits of their prerogatives and rules of procedure – to the received policy recommendations. Based on their individual responses, the three EU institutions would then deliberate on a common institutional response, which would then be announced on the occasion of the annual State of the European Union (hereinafter 'SOTEU') address.

This response may be incorporated into the European Commission Working Plan, and – when the recommendations do affect pending initiatives – into the legislative work of the Parliament and Council. The Citizens' Chamber would be responsible for the systematic monitoring of the implementation and follows up on the actions of the EU institutions.

The Citizens' Chamber, as well as any EU institution, could propose at any time to convene – or, where more appropriate, re-convene – the relevant Citizens' Panel – for one or more meetings to provide further guidance to the institutions, as the initiative moves along the policy cycle. This could occur during any of the following steps: (i) during the pre-legislative phase, in parallel to the public consultation and preparation of the impact assessment; (ii) during the legislative phase, by envisaging the possibility to mix some randomly selected citizens with members of the European Parliament (relevant parliamentary committee) and/or Council (working group). To that end, the three Institutions report, on a regular basis throughout the year, on the implementation of the common position.

The SOTEU address, delivered by the Commission President in Parliament in September each year, could mark the beginning and concluding event of each deliberative cycle (as the three institutions would learn about the citizens' recommendations and announce the follow up to the output received in previous cycle by announcing the incoming Citizens' Panels). In other words, on this day the EU

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<sup>326</sup> Article 295 TFEU allows the European Parliament, the Council and the European Commission to conclude binding agreements between themselves, to organise their cooperation. IIAs thus provide a framework for coordination among EU institutions, and can be legally binding as concerted measures of self-organisation. B. Driessen, 'Interinstitutional conventions and institutional balance', *European Law Review*, 2008, 33(4), 2008, p. 553. See also the very critical opinion of the Council Legal Service on the 2010 Framework Agreement between the Commission and the Parliament, Council of the European Union, 15018/10, Brussels, 18 October 2010. As for the case law, Advocate General Sharpston recalled: "[w]hether the Interinstitutional Agreement at issue here is binding is to be determined by consideration of the wording and the context of that agreement" (Opinion delivered on 11 April 2019 in the case *Czech Republic v Parliament and Council*, C-482/17, EU:C:2019:321, para. 93).

institutions convene Citizens' Panels, receive policy recommendations from citizens and report on the state of implementation.

*Conclusions on the proposed EU integrated participatory and deliberative process*

Unlike other proposals currently circulating aimed at institutionalizing citizens' assemblies at the EU level, the proposed model does not introduce deliberative processes as yet another, stand-alone and competing participatory channel aimed at proposing new initiatives. It rather conceives it as an additional, yet complementary, mechanism to vet, i.e., to provide advice upon some pre-existing initiatives. This indicates that the activation of a European Citizens' Chamber would depend on the expressed demand of any of the actors who enjoys a direct (i.e., the Commission) or indirect (i.e., the citizens, Parliament, the Council and the European Council) right of initiative. The exact modalities for such a request and its evaluation could be further hammered down in the proposed IIA. Yet, one could imagine that the consideration whether to convene a European Citizens' Panel be in some circumstances made quasi-automatic, such as in the case of popular demand (e.g., threshold of 100 000 signatures of a registered ECI has been met within the first three months of this year-long policy cycle) or be made dependent on a majority vote of the Member States, or the College of the Commission.

Therefore, EU participatory avenues must not only be revamped and democratized, but also better connected with both representative and deliberative democracy. Treating EU democracy as a system means to recognize that each democratic channel carries its own democratic value and that its weaknesses can be compensated for elsewhere<sup>327</sup>.

The proposed model, by circumscribing the role to ideas previously identified by actors already legitimated to put forward their ideas to the EU decision-makers, would not *per se* alter the right of initiative of the Commission and the principle of institutional balance. Instead, should it confer the mini-public the ability to autonomously cherry pick one or more themes and initiatives to deliberate upon – as it is the case in the Ostbelgien's model – this might actually change such a balance. Yet, as it would ultimately belong to the Commission to decide whether to act or not upon the citizens' recommendation, it is argued that also this self-tasking authority could be conferred upon the deliberative process. The CJEU's case law supports this stance. In *Efler v European Commission*<sup>328</sup>, the Commission argued that a European Citizen Initiative could not ask to end negotiations on an international agreement (the then TTIP) as this would infringe the principle of institutional balance. The General Court of the EU found that such a request "does not infringe the principle of institutional balance, characteristic of the institutional structure of the European Union"<sup>329</sup>, in so far as it is for the Commission to decide whether it will accept the ECI by presenting, in accordance with Article 10(1)(c) of Regulation No 211/2011, by means of a communication, its legal and political conclusions on the ECI, the action it intends to take, if any, and its reasons for taking or not taking that action".

This integrated, participatory and deliberative model not only intends to provide citizens with a permanent voice in the process of decision making, but also a systematic monitoring system to ensure they are heard. The ultimate aim is to increase accountability and reinvigorate the agenda-setting power of common citizens.

<sup>327</sup> See J. Parkinson & J. Mansbridge (eds), *Deliberative Systems*, Cambridge University Press, 2012.

<sup>328</sup> Judgment of 10 May 2017, *Michael Efler and Others v European Commission*, T-88/16, ECLI:EU:T:2017:32.

<sup>329</sup> See, to that effect, judgment of 14 April 2015, *Council v European Commission*, C-409/13, ECLI:EU:C:2015:217, para 64.



## 10. CONCLUSIONS

After 70 years of integration, it is no exaggeration to argue that the EU continues to evolve through processes that do largely marginalise citizens. It remains virtually impossible for an EU citizen to express his/her desire for change of the Union's direction. If the post-Lisbon EU has constitutionally embraced a model of democracy under which citizens participation form an additional source of legitimacy for the Union in its day-to-day decision-making<sup>330</sup>, this has not translated into a major transformation in how citizens participate to the Union's democratic life (beyond elections)<sup>331</sup>.

This is immediately due to a participatory practice characterised by unequal access to, limited representativeness of and ultimately disparate influence of participants in EU decision-making<sup>332</sup>, but is also a function of a broader set of structural features characterizing EU democracy. As previously discussed, in the absence of a "critical democratic infrastructure"<sup>333</sup>, the participatory instruments that have been created are detached from citizens' political opinion-formation and will-formation – which solely occur at the domestic level –, and ultimately contribute very little to the legitimacy of the EU governance. Seen from this perspective, the possibility of embedding a representative deliberative process into the EU institutional architecture would offer an opportunity to compensate for the current shortcomings of EU participatory democracy, notably its limited accessibility, responsiveness, and effectiveness.

No other available democratic participatory innovation can bring citizens into the heart of the EU decision making in such an inclusive, representative, and informed manner, and constructively contributing to provide citizens with political voice in the space between elections. Therefore, the EU should seriously consider institutionalising some forms of deliberative processes into its institutional architecture. However, the identification of neither the rationale for setting up a citizens' assembly in the EU nor its actual design can occur in a vacuum. Both should rather be defined against the current role played by citizens in EU decision-making, within the existing constitutional framework. While the creation of representative deliberative processes may potentially transform the architecture of representative democracy also in the Union, their institutionalisation does not automatically alter the EU institutional framework. As demonstrated, the EU legal order may validly accommodate a deliberative process, and that without necessarily requiring a Treaty change. Should a European deliberative process be aligned to the model proposed – combining a permanent body with one or more on demand citizen-made bodies convened on a yearly basis –, this could be legally established and operate within the existing EU institutional, and constitutional architecture. While the exact institutional design of a European deliberative format remains to be further refined, the model of European deliberative process that we have proposed appears worth experimenting.

Rather than conceptualising the creation of an EU deliberative mechanism as yet another autonomous participatory opportunity, competing with existing ones – from the ECI to the right to petition –, the most promising deliberative format must be designed in full sync with these mechanisms so as to enhance their own uptake, effectiveness and ultimately legitimacy.

<sup>330</sup> On the genesis and constitutionalization – as well as limitations – of participation in the EU legal order, see, e.g., S. Smismans, "The Constitutional Labelling of 'the democratic life of the EU': representative and participatory democracy", in A. Follesdal & L. Dobson (eds), *Political Theory and the European Constitution*, London: Routledge, pp. 122-138; A. Kutay, 'Limits of Participatory Democracy in European Governance', *European Law Journal*, 2015, vol. 21(6), p. 814.

<sup>331</sup> A. Alemanno, 'Europe's Democracy Challenge: Citizen Participation in and Beyond Elections', *German Law Journal*, 2020, 21(1), pp.35-40.

<sup>332</sup> A. Alemanno, 'Leveling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission's Public Consultations in Light of the Principle of Political Equality', *European Law Journal*, 2020, vol. 26, pp. 114-135.

<sup>333</sup> On this concept, see J.-W. Müller, *Democracy Rules*, Allen Lane, 2021, pp. 90-138.



The institutionalisation of such an integrated, participatory and deliberative model presents three major, mutual advantages. First, having a European Citizens' Chamber capable of convening ad hoc Citizens' Panel both outside and within the EU policy-cycle would enable the Union to measure the intensity of popular preferences and broader political appetite for their enactment. Second, insofar as the trigger for the initiation of the EU deliberative process lies on existing participatory mechanisms, this may popularise them to the point of bringing them to the next level. Third, it would also contribute to enhance the EU institutional, and therefore political, responsiveness to those very same initiatives, by establishing a new level of accountability. Doing so in the EU context, characterised by a virtual monopoly of the right of initiative by the Commission, would enable to rebalance that one-sidedness with the right of initiative indirectly exercised by the Parliament, the Council of the EU and the European Council as well as by the citizens themselves. As such, the possibility to embed a deliberative process appears a promising democratic innovation capable of compensating for the current shortcomings of both EU participatory and representative democracy. Ultimately, the EU needs an integrated participatory and deliberative system for its unique democratic model to thrive.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, examines the EU participatory system and its existing participatory channels against mounting citizens' expectations for greater participation in EU decision-making in the aftermath of the Conference on the Future of Europe. It proposes the creation of a permanent deliberative mechanism entailing the participation of randomly selected citizens tasked to provide advice upon some of the proposals originating from either existing participation channels or the EU institutions, in an attempt at making the EU more democratically responsive.

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