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Nothing but consultation: The place of organised civil society in EU policy-making across policies

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*Nothing but consultation: The place of organised civil society in EU
policy-making across policies*

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Abstract

In recent years, not only governance, but also civil society has been a veritable growth industry both in politics and academia. Depending on the author, organised civil society was associated with expectations of increasing input or output legitimacy. With regard to the EU, participation of civil society organisations are officially seen as a means of bridging the gap between the EU and its citizens, as materialised in the EU-discourse of participatory democracy. On the basis of an extensive literature review, the article examines the place of organised civil society in EU policy-making processes, in particular in the following policy fields: social affairs, health, consumer protection, environment, and trade as well as in the Convention process. It does so by evaluating the democratic core norms of participation, representation and accountability and comes to disillusioning conclusions. The inclusion of organised civil society contributes little to the democratic legitimacy of the EU and is instrumental to institutional power games of the European Commission and the European Parliament. Worse, the Commission, through its consultation practices, may be contributing to an aggravation of the democratic deficit. Furthermore, there is little empirical evidence that would confirm the normative expectations of deliberative democracy.

Keywords: civil society, deliberative democracy, democracy, European public space, interest representation, legitimacy, multi-level governance, participation, European Commission, political science

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1 Introduction¹

Since the turn of the century, both the concept of governance and of civil society boosted and there is reason to believe that their simultaneous rise in the scientific and political discourses is not accidental (Kohler-Koch and Rittberger 2006)². Both are reflections of the increasing incapacity and / or unwillingness of the state to take over certain functions on its own. While governance has been predominantly associated with a loss of hierarchy in political steering and consequently the co-existence and interaction of a variety of actors from different territorial and sectoral units, civil society has more clearly been associated to normative expectations of in particular deliberative and participatory democracy (Finke 2007). However, and this is the reason for the same timing of their rise, they both have been associated – from different perspectives, of course – to the input or the output functions of legitimacy (Scharpf 1999). Input legitimacy relates to government *by* the people, and governance, through involving a broader range of actors than traditional government presumably did, theoretically fulfils this goal. The involvement of civil society, a more ancient theme in democratic theory, is clearly connected to the idea of broad involvement of non-state actors, thereby contributing to bottom-up will formation (Habermas 1992). Output legitimacy, in contrast, relates to government *for* the people. From the governance perspective, effective policy performances can only be reached through the incorporation of a variety of actors while from the civil society perspective, civil society is needed to fulfil certain tasks, in particular welfare functions that were previously performed through state and other public actors (Edler-Wollstein and Kohler-Koch 2008). Thus, both streams of the literature are occupied with similar issues, even though from different theoretical and normative perspectives.

The governance and the civil society literatures are inspired by different theoretical and normative considerations (Edler-Wollstein and Kohler-Koch 2008), even though these are not always made explicit. Empirically, both literatures have different focuses. While the governance literature is particularly interested in effective policy-making (Finke 2007), and has a functional understanding of participation (Schmitter 2002), the civil society literature is particularly occupied with democratically legitimate policy-making (Kohler-Koch 2008a), even though consensus about how to achieve input legitimacy is far from being achieved. And while the interest in (newer forms of) governance was an answer first to the development of less vertical forms of politico-economical steering and second to the lasting opposition between intergovernmentalists and neo-functionalists in European integration theory (Kohler-Koch and Rittberger 2006), the interest in civil society has increased proportionally with the crisis of representative democracy in the Western world and system change in the Eastern (European) Countries (Held 1987; Edler-Wollstein and Kohler-Koch 2008).

¹ I would like to thank an anonymous reviewer as well as my colleagues at the Institute for European Integration Research (eif) for helpful and valuable feedback. The usual disclaimer applies.

² The present study is part of the DFG funded project “Democratic Legitimacy via Civil Society Involvement? The Role of the European Commission (Demociv)” directed by Beate Kohler-Koch, MZES, University of Mannheim, http://www.mzes.uni-mannheim.de/fs_projekte_d.html which contributed to CONNEX, <http://www.connex-network.org/>.

| Function | Input legitimacy | Output legitimacy |
|--------------------------|------------------|-------------------|
| Literature | | |
| Governance literature | Weak | Strong |
| Civil society literature | Strong | Weak |

Both concepts have not only received large attention in the respective research communities, but also within the political arena. In particular, the European Union (EU), since the rise of a legitimacy crisis in the early 1990s, has been concerned with improving its public image through better regulation, good governance and within this context, the support of and partnership with civil society (Kohler-Koch and Finke 2007). Foremost, the European Commission (hereafter Commission), in view of its image of a bureaucratic non-accountable “monster” that became particularly virulent in the context of the retreat of the Santer-Commission in 1999, supported these goals and published a number of White and Green Papers, Communications, etc. on issues such governance, communication and transparency in recent years. Politically, the continued efforts of both the Commission and civil society organisations (CSOs) in the direction of increased participation of the latter in politics has recently manifested in the Lisbon Treaty which obliges EU institutions “to maintain an open, transparent and regular dialogue with representative associations and with civil society” (Lisbon Treaty, Art. 8B). However, the Commission does not implement an accreditation system and “wants to maintain a dialogue which is as open as possible”³, leaving the implementation of the participatory rhetoric to the different DGs and services which “are responsible for their own mechanisms of dialogue and consultation”, refusing to take an “over-legalistic approach”, which, in its view, “would be incompatible with the need for timely delivery of policy” (European Commission 2002: 10).

The Commission (and the European Parliament) is always interested in the expansion of its competences for which – in particular in policy fields with a weak treaty base – it is dependent on side-players and experts in order to increase its legitimacy and its expertise and to perform its institutional role (Bouwen 2002). Related activities – top-down mobilisation of societal actors – have been characterised as “participatory engineering” (Zittel 2008; Broscheid and Coen 2003). Similarly, the European Parliament (EP), due to its still rather weak position in the institutional architecture of the EU, has a strategic interest in establishing relationships with CSOs which it has increasingly done (Neuhold 2005). At EU-level, CSOs thus have a legitimating function which ultimately may serve goals of system transformation of the Commission (Cram 2007; Kohler-Koch 2008a), but are also perceived as partners for good governance. At domestic level, the recent revival of the civil society discourse in the political arena is more strongly connected to the output function. While the welfare state and public administrations are on the retreat, civil society has increasingly been called upon to “jump in” functions previously performed by other actors. For CSOs in turn, and in particular for weak interests, the EU offers exit options if partners for their strategic goals are not available or

³ See http://ec.europa.eu/comm/civil_society (accessed 12 May 2008).

insufficiently available at domestic level, by providing access to political, legal, financial, and ideational resources (Kohler-Koch 2007).

The main reasons why both researchers and politicians have increasingly turned to civil society is thus the hope that the latter can compensate for the lost of power and steering capacity of the nation-state; that they connect citizens to the political sphere and act as schools of democracy, thereby combating the crisis of Western-type democracies and fostering their overall identification with the political system (loyalty); and that they make policies more effective through their involvement in the design and the implementation of policies. Another function, namely that of holding democratic institutions and elected representatives responsible for their actions and introducing issues that would otherwise not be on the political agenda, is given less attention in the respective discussions. In *this* contribution, it is the democracy-related expectation towards CSOs, namely their potential contribution to the legitimacy of the EU, that is of interest.

While there is no doubt that democratic theory and the civil society literature have attracted considerable attention since the proclaimed “end of history”, that they are a sign of a normative turn in political sciences and have reached the highest level of European and national political discourses, it is less clear to date what the empirical evidence tells us about the implementation of the *idée directrice* of EU governance, participatory governance. While there is abundant and controversial literature about the theoretical promises and pitfalls of increasing input and output legitimacy of civil society (Dunkerley and Fudge 2004; Finke 2007; Jensen 2006; Kohler-Koch 2008a), systematic evaluation of its de facto inclusion and impact are to date missing, and this is the gap this study seeks to close. The research question is thus what we can learn from the literature about the inclusion of organised civil society into European policy processes. This question is evaluated against the background of the expectation of both politicians and academics that this very inclusion can contribute to a decrease of the democratic deficit of the EU. It is furthermore evaluated against three yardsticks, namely access, representation and accountability, which will be developed further down.

It is fair to conclude that all the articles under review here, no matter what their theoretical background and their field of analysis, come to the conclusion that the empirical reality of participatory governance is at odds with the related EU-discourse, and in such a way that it does not live up to the expectations that the discourse may raise. Of course, some authors are more blinded by the discourse than others who think of it either as a functional discourse for more effectiveness (Büchs 2008) or as a discourse the main aim of which is governmentality (Flear 2008). But the overall assessment is clear and coherent, strongly questioning both the gap between the official EU-civil society discourse and its implementation, and normative democratic theories that have invested much hope in civil society and CSO as a means of bridging the gap between the EU and citizens and thereby addressing the widely assumed democratic deficit of the EU.

I proceed in four steps. In the next section, conceptual clarifications are of order. These concern the concept of CSOs and how it is applied in this study, the choice of policy fields and instruments, the theoretical approach informing the analysis and the selection of the literature under review (2). The third chapter evaluates the contribution of CSOs to input legitimacy at EU-level. In order to do so, it performs a

secondary analysis of the relevant empirical studies since the turn of the century (3). The contribution closes with a conclusion and with suggestions and open questions for further related research (4).

2 Conceptual clarifications

2.1 Definition

The first clarification relates to the definition of CSOs. In the literature, civil society and CSOs are often not neatly differentiated from one another nor explicitly defined. However, both refer to different actors to which different expectations can be associated (Habermas 1992). Whereas civil society in the broad sense can include all those non-state actors which interact publicly and are not driven by market interests (i.e. individual citizens and initiatives, protesters, churches, amongst others)⁴, CSOs are characterised by a higher degree of organisation and continuity. However, agreement over what exactly CSOs are has not been reached so far. For some, they include the social partners, for others not while still others would go as far as including business interest associations into CSOs as became evident in a recent inquiry by Kohler-Koch and colleagues (Kohler-Koch, Quittkat and Buth 2008). In the same inquiry, it is differentiated between Business Interest Associations (BIA, business, industry, producers including agriculture, fisheries, services) which serve self-interests, Union and Professional Interest Associations (UPIA, trade unions, professional groups) which also serve self-interests, and value and rights based General Interest Associations (GIA) which serve public interests. In the context of this work, because of it being part of a larger research project directed by Kohler-Koch⁵, CSOs are defined in terms of GIAs, that is those non-state, non-business and non-union organisations that do not refer to the interest of their members, but to a broader common good and which do so on the ground of generalised values and rights. Another reason for being interested in GIAs is that they are also strongly defending procedural interests which are related to increased participation, transparency, openness and increased responsiveness – demands that are at the heart of this evaluation (Neubert 2003).

2.2 Policy fields

The following fields have been included in the study: social affairs (GD Employment, Social Affairs and Equal Opportunities, abbreviated DG EMPL), health and consumer protection (DG Health and Consumer Protection, abbreviated DG SANCO), environment (DG Environment, abbreviated DG ENV) and trade (DG Trade). They are similar insofar as they belong to the first pillar, they cover policy fields in which we find both market-making and market correcting ambitions⁶, implying that we can expect a significant presence of CSOs as these are typically concerned with market-correcting policies. Still, they vary with regard to the strength of their Treaty base,

⁴ For an intellectual history of the term, see Curtin 2003.

⁵ See footnote 1.

⁶ See Scharpf (1999) for the analytical distinction between positive and negative integration.

ranging from weak (social affairs, health) over medium (environment) to strong (trade). It can be expected that the Commission and the EP have particularly strong incentives to take a proactive stance in those areas which have a weak Treaty base in order to influence future integration. Also, and in particular with regard to DG EMPL, we can expect a high presence of consultations as according to its own words, it has a long-standing history of consulting NGOs and including them in the implementation process⁷ whereas the dialogue with CSOs in the field of trade is comparatively young. Trade is traditionally less dominated by politics and therefore less attractive to CSOs due to the closeness of related policies and interests to the market. Therefore, low degrees of mobilisation can be expected for the field of trade while mobilisation should be higher the weaker the Treaty base is. Finally, due to its outstanding importance, its comparatively high public visibility and political salience, the Convention process leading to the draft Constitution was included. Here, one can expect a high level of interest of CSOs, seeking to introduce their preferences into the Constitution of the EU. Similarly, due to the increased media attention towards the Convention process, one can expect that these preferences cannot completely be ignored by the 'Conventionalist'. Where if not here should there be a public debate about the future of the EU, and when if not there should CSOs be part of this debate? The chosen policy fields differ in their integration history, the specificities of the policies (Lowi 1972), actor constellations, consultation practices in the different DGs and political sensitivities. The diversity of policy fields is thus intended to increase cases and thus the power of the argument.

The chosen policy fields will be analysed at EU-level and not in the domestic contexts, and in particular with regard to the European Commission. This is so for several reasons. First, the Commission has been the European number one promoter of a structured dialogue of the EU with CSOs since several decades already and particularly since the turn of the century (Cram 2007; Fazi and Smith 2006; Kohler-Koch and Finke 2007). As a consequence, CSOs have particularly turned towards the Commission in order to pursue their interests and eventually circumvent their respective national governments. Therefore, we can expect a solid body of literature dealing with policy change at EU-level and the role of CSOs therein. Second, from a theoretical perspective, if we want to know what repercussions EU politics can and do have on national politics, if they bring about transformation, eventually even of systemic nature, then we first need to have a good understanding of EU politics. Third, newer forms of governance are a complement to aggregative democracy and it is therefore only normal that they should be looked for at other sites than parliaments.

Finally, there is a broad range of governance mechanisms in play in the EU ranging from the traditional Community Method to the Open Method of Coordination in terms of legal bindingness, including such different instruments as the Social Dialogue, the Civil Society Dialogue or the Convention, to mention only a few (Obradovic and Vizcaino 2007). Not all of these different instruments will be assessed here. The choice is explained by previous choices mentioned above (policy fields, EU-level) and from the availability of respective empirical studies. These have, in recent years, and with regard to the issues of interest here, focused more on soft modes of

⁷ European Commission 2007, homepage of DG EMPL:
http://ec.europa.eu/employment_social/fundamental_rights/civil/civ_en.htm (accessed 14 July 2008).

governance than anything else. Therefore, it should not come as a surprise that there is a bias in this direction.

2.3 Heuristic model

In order to come to a conceptual model for the evaluation of these questions and the relevant literature, we evidently need to turn towards democratic theory. While there are some authors for which the democratic deficit of the EU is an optical illusion (Majone 1998; Moravcsik 1993, 2005), most interested scholars are today convinced that such a deficit exists and that the EU is in need of its own democratic legitimacy (Hix and Follesdal 2005; Kohler-Koch 2008a; Magnette 2003; Offe and Preuß 2006; Schmitter 2007). While the diagnosis is thus broadly shared, the suggested remedies vary considerably. Basically, proposals depend on the author's view of democracy (liberal – deliberative) and of the EU (intergovernmental – supranational). Liberal democrats will focus on European parliamentarisation while deliberative democrats will concentrate on broader public participation and discussion. Intergovernmentalists will seek to strengthen national actors while supranationalists will support European actors. The main criteria of either model will be shortly recalled now⁸.

In both models, political equality is the core norm. However, both go different ways in reaching and securing it. Conceptions of liberal democracy construct their model around the idea of democratic control of elected representatives by the people, assured by institutionalised procedures and rights, judicial review, checks and balances and the separation of powers (Dahl 1999; Held 1995). They assume that legitimacy is strongly related to the legality of parliamentary and governmental action which should protect the rights and liberties of the citizens. Legitimacy is additionally linked to transparency, a precondition for accountability and public debate. Parliamentary action *can* be anchored in previous societal consultation processes which are ultimately articulated in the parliamentary decision-making process. Participation is seen functionally, as a means to defend interests which are pre-defined, to control or limit power and ensure popular sovereignty. Responsiveness is linked to the final outcome and how different interests are represented there. The political system must ensure basic freedoms such the freedom of association and of opinion, so as to allow for a competition of ideas and interests. The increasing influence of experts is seen with scepticism or refusal as it endangers the political equality of citizens, rendering some more equal than others. It is the parliamentary framework that creates reliable forms and arenas of interest representation not least because there exist institutional safeguards through which parliamentarians can be held accountable. Additional participation from this perspective is only meaningful if it can directly be linked to decision-making and if it has a detectable impact on the final outcome.

The deliberative model of democracy, influenced by social constructivism, is based on the idea of reciprocal justification via reasoned arguments amongst individuals which consider themselves as free and equal (Sabel and Cohen 1997). It calls for a general shift in responsibilities and competences and emphasises the participation of

⁸ Boiling down the alternatives to two does not mean that other models such participatory or communitarian democracy are ignored. It only reflects that in the context of the EU, these are the two most debated options.

citizens. Participation is not functional, but a goal in itself, through which a public sphere and commonly acceptable norms are permanently re-created, thereby finding solutions to conflicts that inevitably arise in pluralistic societies (Gutmann 1993; Habermas 1992). The opinions articulated in the public sphere subsequently feed into the political process. Responsiveness is linked in particular to the argumentative exchange of reasons. The power of the better argument should decide which reasons make it into the final outcome. State institutions provide the necessary institutional safeguards in order to secure that the equality of citizens is respected. From this perspective, the benchmark of democracy is the openness of public discourse and a communication structure that fuels the exchange of convincing arguments and furthers reciprocity. Both models consider policy processes to be democratic if a connection can be established between decision-making and those submitted to the (delegated) and in the latter model, CSOs play a crucial role in the establishment of this link.

However, these abstract models are only of limited help when seeking to evaluate a broad range of literature which is often not explicit about its theoretical design, where approaches tend to vary significantly (Hüller and Kohler-Koch 2008) and which seldom uses theoretically driven variables for the analytical research⁹. For these reasons, and as it is not the objective of this review to suggest a superiority of either model, it is not useful to accommodate the empirical evaluation to either democratic model. Instead, it seems more promising to use an analytical framework which allows for the evaluation of both models. It should be kept in mind, however, that as of now, the respective yardsticks at EU level – and in particular with regard to the Commission – cannot be the same as at the domestic level as central preconditions are not given (Kohler-Koch 2008b; Offe 1998; Schmitter 2007). With these remarks in mind, and drawing on related research (Borrás and Conzelmann 2007; Kohler-Koch and Hüller 2008; Kröger 2007b; Steffek and Nanz 2007), the following three yardsticks are used in the present evaluation.

The first set of questions relates to the issue of *access*. Access refers to the opportunity of citizens to make their ideas and interests known at some stage of the policy-making process (de la Porte and Nanz 2004). In the liberal model, this implies participation rights, particularly in the context of general elections. Deliberative conceptions of democracy have accentuated the role and significance of more decentralised forms of participation (Sabel and Cohen 1997). While access is not a sufficient condition for influencing policy, it is clearly a necessary one (Nanz and Steffek 2005). First of all, we want to know what the nature of CSOs' participation is: is it formal, secured by the Treaties, is it politically "regulated" or a particular programme, linked to specific procedures or is it informal and therefore up to individual preferences (legal basis of access)? Linked to the legal basis is the question how CSOs are connected to the policy-making processes: do they participate in committees and working groups, is participation in conferences and fora important or do online consultations and the alike are most frequent (instruments of access)? Third, it is noteworthy at which point(s) of the policy-making cycle CSOs can participate. Is it a single phase in the cycle of formulating, decision-making, implementation and evaluation or is participation carried through all the way (time of access)? Finally, we want to find out whether particular CSOs are favoured over

⁹ Exceptions include Friedrich 2007; Kröger 2007b; Radulova 2007; Steffek and Nanz 2007.

others, i.e. large ones over small ones, European over national ones, business over rights based etc., by the access points provided by the European institutions (CSO bias).

The second yardstick will be *representation*. Hereby, we refer to the subsequent steps of actual presence, e.g. which actors are present in policy-making, and deliberation. As Kohler-Koch notes, “representation is not a role conferred on actors but emanating from discourse. To make it happen at the EU level civil society organisations need a friendly institutional environment that gives room and opportunities for building a public space” (Kohler-Koch 2008b: 11). At least two conditions need to be fulfilled. Crucially, in order to assure representativity, debates should gather actors from different institutional, organizational and ideational backgrounds so that a broad variety of views are present. Second, for these views not only to be present but also to be represented, *deliberation* is essential. Deliberation is not limited to the presentation of points of views, but includes an interactive communication in which actors exchange ideas in the search of a common good and a solution acceptable to all (Sabel and Cohen 1997) and therewith pass the proof of the discussion (Manin 1996). All actors must be given the opportunity to make their view sufficiently clear. Overall, we are evaluating here whether there exists, at EU-level, interactive debates in which CSOs are present. We are not, in this study, evaluating the second side of representation which would investigate the link between European CSOs and their European, national and / or regional constituencies as it is beyond the scope of this paper.

Third, *accountability* will be assessed. Accountability is a key feature of democracy which demands that those who exercise public power can be controlled in their function, ultimately by the people. It assures that exercising public power is conditional, that citizens have the possibility to hold the participants of a decision-making process responsible, that politicians must be responsive to critical feedback and, in the case of dubious or erroneous behaviour, take the blame and suffer the consequences (Arnull and Wincott 2002; Bovens 2007). Accountability is a central mechanism for checks and balances of power. It is therefore necessary to know whether CSOs (can) have an impact that amounts to political accountability. In newer forms of governance in particular, a functioning public sphere is seen as a means of control and scrutiny (Kohler-Koch and Rittberger 2007). In which parts can accountability be differentiated?

Transparency refers to access to information (Deckmyn 2002) and undoubtedly constitutes one of the preconditions of accountability. What is at stake is the public access to information throughout the different stages of a policy process (Deckmyn 2002; Nanz and Steffek 2005; Vesterdorf 1999). It has been argued that transparency not only encompasses the right of citizen to have access to information but also, more pro-actively, the duty of accountable actors to “ensure that information about policy and actions is provided in an accessible fashion” (Curtin et al. 2007: 8) and understandable for citizens. One could say that the more transparent an organisation or institution is, the more it is willing to expose its actions to public scrutiny and involvement, thereby increasing the likelihood of deliberation and the possibility to hold actors responsible, implying that transparency is a necessary, but not sufficient precondition of accountability. Through transparency, a wide *public debate* becomes possible. Public debate implies that deliberation of involved actors

should occur in a public sphere. Usually, in Western democracy, this refers to both the Parliament and the mass media, but on a smaller level, local citizens' assemblies are also an example of public debate. Public debate is crucial as it is here that all the relevant reasons and political alternatives can be exchanged and discussed in light of the common good. A debate can be called public if one can assume that a large majority knows about it. Third, there should be mechanisms that assure responsiveness of accountability holders to public debate and external input. Particularly from the perspective of deliberative theories of democracy, the concerns of affected citizens should be included in the policy process, and only the power of the better argument should be decisive. Finally, the possibility to sanction wrongdoings should exist, assuring that political power is conditional and dependent upon the approval of the sovereign (Bovens 2007). In the liberal model, this is usually assured through parliamentary control mechanisms, in the deliberative model, public peer pressure, developed amongst others through benchmarking, is assumed to force actors to correct their behaviour. As with representation, there are also two sides to accountability: one considers the relationship between e.g. the Commission and CSOs, the other considers the relationship between CSOs and their constituencies ("material accountability", Kohler-Koch 2008b). Again, however, we shall only evaluate the former here.

Finally, we are interested in how authors conceive of CSOs. What do they perceive as the main pushers and the main constraints with regard to the incorporation of CSOs in EU policy-making processes? What is their overall evaluation of the consultation regime of the Commission and the question of democratic legitimacy of the EU more broadly?

In order to evaluate these questions, already existing empirical field work was systematically researched. The time span of the research was limited to the last ten years' (1999-2008) publications¹⁰. This makes sense insofar as this is the period of renewed and changed attention towards CSOs, both at EU-level and within research. Additionally, research takes time and even more so to be published. For this time span, 26 relevant peer reviewed international journals were systematically reviewed. Additionally, existing data bases from colleagues in Mannheim¹¹ and from Matthias Friese¹² were scanned. Finally, references that appeared in these texts and seemed to be of interest to this contribution were researched individually. Before turning to the review, it is important to note that many of the authors, while addressing CSOs in EU policy-making processes, do not deal with the questions of interest here or do so only in partial ways and therefore can only partially (or not at all) be cited.

¹⁰ With the exception of those few journals which are more recent, such the Journal of Civil Society.

¹¹ The demociv data set was developed in the context of the project "Demokratisierung der EU durch Einbindung der Zivilgesellschaft: Die Rolle der Europäischen Kommission".

¹² Matthias Friese coordinated the postgraduate programme "European civil society and Multilevel Governance" based in Münster. In this context, he has developed, with the help of Dawid Friedrich, an extensive endnote data bank on civil society literature which he kindly shared with the author.

3 Assessment of CSOs in EU policy-making across policies

A first look at the literature shows that researchers tend to address either policies or procedures. It is very rare that studies address both policy *and* the processes leading to them. This can lead to different biases: in the policy literature, authors may not pay due regard to the processes and the actors involved, while in the civil society literature, scholars may paint a picture in which CSOs play a dominant role. This study seeks to deal with this challenge in reviewing – as far as available – both literature streams. A first look also indicates that many of the issues we are interested here are not addressed in any structured way even in those branches of the literature – namely the civil society and the deliberative democracy literature – in which one would expect it. In other words, research designs are often not made explicit and when they are made explicit, they are most of the times not variable based, with evident problems for further theory development (and challenges for the present evaluation). There are a number of other repeating issues, but these shall be discussed in the concluding section while I will now turn to the single policy areas.

3.1 DG EMPL

DG Employment, Social Affairs and Equal Opportunities (DG EMPL), while not always under this name, is the DG with the longest tradition of stakeholder consultation and also sees itself as such (Cram 2007). Not only is this DG one of the oldest but in particular, positive social policy competences have long been absent from the European agenda (Scharpf 1999) and still today remain marginal if compared to the integration of other policy areas (Daly 2006). This situation invited, so to speak, the Commission to look for other venues in order to increase its legitimacy in the field with a view to eventually integrating it (Cram 1993, 2001; Demertzis 2007), not without having to struggle with continued and at times severe resistance of member states against integration in the field, in particular of anti-poverty policy (Kröger 2007a). Within this DG, different policy fields are dealt with: employment¹³, social policy and more particularly inclusion policies (anti-poverty policy), pensions, and equal opportunities, referring to anti-discrimination policies related to gender, ethnic origin, age, and handicap¹⁴.

Due to the lack of competences in the area of social policy, the EU has resorted to the non-binding Open Method of Coordination (OMC) since the turn of the century¹⁵ in order to deal with issues that were perceived as common challenges while nevertheless respecting the principle of subsidiarity, and some authors perceive of this instrument as political engineering by the Commission (Natali 2005; Pochet 2003)¹⁶. The OMC, drawing on deliberative democratic theory, has widely been

¹³ Due to the definition of CSOs as outlined above, the employment sector, that is in particular the Social Dialogue and the European Employment Strategy, are excluded from the analysis.

¹⁴ The articles considered in this section are Della Porta 2007; Eckardt 2005; Fuchs and Payer 2007; Friedrich 2006; Geyer 2001; Haverland 2007; Kröger 2007b; Natali 2005, 2007; Pochet 2003; Quittkat 2008 and Walmsley 2005.

¹⁵ The first OMC, even though not dubbed as such yet, was the European Employment Strategy which was introduced in late 1997.

¹⁶ In the case of the OMC inclusion, there are doubts to this interpretation as the Commission was largely kept outside of the concrete instrumentation of the OMC in early 2000 (Kröger 2007c).

associated to two expectations, namely learning and the involvement of a broad range of actors, with the first increasing effectiveness and the latter decreasing the democratic deficit of the EU (Zeitlin 2005), i.e. increasing legitimacy. In one of the OMCs dealt with by this DG – the OMC inclusion –, broad participation was even made a political priority by defining the fourth of four objectives as the “mobilisation of all relevant bodies”. The conditions for an increased access of CSOs thus seem favourable, even though the OMC does not enjoy a treaty base but is politically regulated.

The two OMCs inclusion and pensions have mainly been developed in and by the Social Protection Committee (SPC) which consists of national delegates and the secretariat which is provided by the Commission (Kröger 2007b; Natali 2005; Pochet 2003). In 2001, the SPC created an Indicator Sub-Group (ISG) which follows the same composition. Overall political responsibility for the process lies with the Council. To these intergovernmental committees which meet regularly, academics are at times invited, in particular with regard to the development of indicators. To a lesser degree, representatives of CSOs may occasionally be invited to a particular meeting. Both groups, however, do not enjoy participation rights (Kröger 2007b). Additionally to the SPC and the ISG, evidence points to the existence of workshops, seminars, conferences and peer reviews taking place in the context of the OMC, both at EU-level and domestically (Friedrich 2006; Kröger 2007b). Since the OMCs are an ongoing process, access happens both in the preparatory phases, i.e. when member states draft their so-called National Action Plans (NAPs)¹⁷ or when new objectives are developed at EU-level, and in the monitoring phase when particular policies are peer reviewed and indicators further developed. However, in the case of the OMC inclusion, these different access venues have been opened (based on rights) only to a very restricted number of actors, namely to the member states and their administrations and to the Commission. Additionally, only a very limited number of people, upon invitation, participated, namely a few researchers and a few NGO representatives, while political parties and the social partners were absent (Kröger 2006; Kröger 2007b). In the OMC pensions, NGOs were completely absent (Natali 2007). Here, in contrast, Eckardt points to the European Central Bank and the European Policy Committee as important actors (Eckardt 2005; Pochet 2003). It is shown that deliberation does not take place in the intergovernmental committees nor in the domestic arenas as meetings leave too little time for discussion, as there are language barriers, in particular since Eastern enlargement, as political discussions do not take place in the committees but are instead left to the Council (Kröger 2007c). With few actors involved, it does not come as a surprise that public debate of these OMCs was limited if existent at all (Friedrich 2006; Kröger 2007b) while the transparency even for researchers was very limited (Kröger 2007c). Responsiveness, in any case in the OMC inclusion, to the demands of NGOs, existed to a limited degree and in the domestic arena consisted of taking on board particular formations in the national reports while at EU-level, the plea to pay more attention to homelessness and to the development of respective indicators was taken up. The control mechanism foreseen in the OMC is public naming and shaming which, however, due to member states’ resistance, did not work (Friedrich 2006; Kröger 2007b). The main constraints to more input legitimacy are seen in the absence of

¹⁷ Called National Reform Programmes since 2006.

clear rules of participation, the weak public sphere (Friedrich 2006), its closedness when compared to hard law processes (Natali 2005), and the resistance of member states to Europeanise social policy (Kröger 2007c).

The second major instrument that has attracted scholarly attention is the directive on occupational pensions which went a long way from first initiatives in the early 1990s to its final adoption in 2003. As we shall see, there is much less relevant information available for this procedure. Evidently, a directive enjoys a sound treaty base. In this procedure, it is the Commission which has the guiding role in the preparatory phase (Haverland 2007; Natali 2005; Pochet 2003) while the Council is the decisive actor when it comes to decision-making. Other instruments mentioned in the context of this directive include the pensions forum of the EP, a communication from the Commission (Natali 2005) and an academic report (Pochet 2003). Besides member states, the Commission and the EP, authors cite the European Central Bank, the European Court of Justice (ECJ), to a limited degree the social partners, for-profit organisations and insurance institutions as involved actors while CSOs as defined in this study do not appear at all. One cannot find any information in the respective contributions whether deliberation occurred and the same holds true for our criteria of accountability. Authors come to different conclusions as to what pushed this process: While Haverland (2007) sees the strength of business as the driving force, Natali (2005) suggests that it was the integrative approach of the EP that made progress possible. Pochet, finally, notes that it was due to the battle between the ministries of finance and of social affairs that the issue came onto the European agenda, at all, and that the former Belgian Minister of Social Affairs, Vandenbroucke, played a central role in organising and framing the European process.

Other than these concrete processes, a number of authors have investigated the instruments, actors and constraints that exist at EU-level and with regard to social policy more broadly¹⁸ or with regard to gender issues (Fuchs and Payer 2007). The instruments of access that these authors address are committees (Walmsley 2005), conferences (Fuchs and Payer 2007; Quittkat 2008), workshops, seminars, working groups (Walmsley 2005; Quittkat 2008), policy forum and bi-annual dialogue with the Social Platform as well as online consultations (Quittkat 2008), the Civil Dialogue (Geyer 2001) and reports (Fuchs and Payer 2007). As some authors point out, these instruments are used in the preparatory phase of policy-making (Fuchs and Payer 2007; Quittkat 2008). All the authors cite the Commission as an actor, while only two mention member states (Geyer 2001; Quittkat 2008). Further actors mentioned include NGOs / CSOs¹⁹, the EP (Walmsley 2005), national administrations and academia (Quittkat 2008). Overall, a quite coherent picture emerges with the Commission and CSOs as the central actors in these forms of consultations and meetings while other actors play a minor role. All of the authors perceive biases in representation, some towards older member states (Fuchs and Payer 2007; Quittkat 2008), others towards larger CSOs²⁰, or towards business and European (umbrella) CSO (Quittkat 2008). No accounts are made of deliberation, transparency and public debates but by Quittkat who indicates that transparency was not given. With regard to responsiveness to the demands of CSOs, Walmsley notes that it becomes more

¹⁸ Geyer 2001; Quittkat 2008, Walmsley 2005.

¹⁹ Geyer 2001; Fuchs and Payer 2007; Quittkat 2008.

²⁰ Fuchs and Payer 2007; Geyer 2001; Walmsley 2005.

likely the closer NGOs cooperate with the Commission, thus that the influence increases with the degree of formalisation of the relationship between the European administration and NGOs (Walmsley 2005). Others mention examples of responsiveness which would, however, remain vague and therefore lead to the frustration of CSOs (Geyer 2001; Quittkat 2008).

While just one study mentions pushers to the participation of CSOs (low participation barriers in online consultations and financial support programmes, Quittkat 2008), discovered constraints are numerous. Some of them are associated to the EU, namely the need to adopt to the requirements of the Commission, in particular its accounting and financing rules and eligibility criteria (Fuchs and Payer 2007; Walmsley 2005), limited financial allocation by the EU to CSOs (Fuchs and Payer 2007; Geyer 2001), or restricted access for the vast majority of NGOs (Walmsley 2005). Others are linked to the institutional, social and political environment of CSOs: lack of resources²¹, rivalry between CSOs, struggle over competences, money and influence²², political differences between CSOs rendering cooperation difficult if not impossible (Fuchs and Payer 2007; Geyer 2001), lack of interest of national constituencies in EU politics (Walmsley 2005), length of EU-membership as well as language barriers (Fuchs and Payer 2007). These barriers amount to structural limitations of CSOs to cooperation (Geyer 2001) and to the incapacity to fulfil the democratic role expected of them in large parts of the civil society literature as well as in political discourses (Walmsley 2005).

Overall, the evaluation of the inclusion of the CSOs in EU social affairs policy-making processes, in particular by the Commission, is critical. Transparency and responsiveness are not given (Quittkat 2008), CSO participation thus amounting to freedom, but no influence (Geyer 2001) and CSOs are conditioned by the consultation practices of the Commission (Fuchs and Payer 2007; Walmsley 2005). It would not necessarily be the most democratic CSOs that are included by the Commission, and this situation may come about because of rather than despite Commission activities. These efforts would compromise the autonomy of the CSOs, would increasingly disconnect them from their constituencies, thereby contributing to their increasing elitism, would influence their activities, submit them to the official policy discourse, support de-politicisation (Walmsley 2005) and support unity in a CSO landscape that is often marked by sharp ideological and strategic differences (Fuchs and Payer 2007).

Besides the studies mentioned so far, one contribution addresses the European Social Forum (Della Porta 2007), which consists of workshops, seminars, fora, demonstration, etc. and which takes place outside of the EU policy processes. It should be nevertheless mentioned here as some features markedly distinguish it from the processes reviewed: It almost exclusively gathers CSOs (as well as some representatives of the social partners and political parties), it has a strong leftist bias, it allows for fundamental criticism of EU policies and politics while essentially being a pro-European forum, and it supports broad public debate, taking opposition into the media and the streets for which there seems to be little place within the policy processes of the EU.

²¹ Fuchs and Payer 2007; Quittkat 2008; Walmsley 2005

²² Fuchs and Payer 2007; Geyer 2001; Walmsley 2005.

3.2 DG SANCO

3.2.1 Health

In contrast to the previous DG, this one is of rather recent nature as it only exists since 1999. It was established under the Prodi Commission and is a direct consequence of the Europeanisation of risk management in the aftermath of the mad cow diseases and their proliferation way beyond the United Kingdom. Both health policy and consumer protection policy have only recently come to top of the European agenda. In May 2000, the Commission published a Communication on the health strategy of the European Community in which openness and transparency were defined as central to the new Community approach to health (Commission 2000). A European Health Forum was announced as part of the new strategy, its goals being information (of the larger public) and consultation (of selected actors). While the EU Health Forum is but one of three stakeholder platforms within DG SANCO²³, it has received particular attention by authors. The EU Health Forum is made up of 1. The Health Policy Forum which offers opportunities for consultations with CSOs and monitoring of existing policies and initiatives. This Forum has a limited number of invited members (50 permanent) and of occasional participants (15) and meets twice a year. The permanent members must be European organisations, have a broad coverage of issues, and be representative for their sector. Eventually, it sets up working groups to deal with particular issues more in depth; 2. The Open Forum, an annual conference to which a broader range of health actors are invited so as to ensure that the entire community has a possibility to voice its ideas and eventually its concerns; 3. A Virtual Forum through which all relevant documents were supposed to be made available but which was never developed due to lack of resources.

As in the previous section, this one covers soft governance (OMC health and long-time care) which is thus politically regulated and hard law (directive relating to tobacco merchandising and other directives) which has a treaty base as well as broader analyses, which do not only focus on one single process²⁴. As we will see, the studies in this policy sector do not pay overwhelming attention to issues related to input legitimacy. To the difference of the OMCs inclusion and pensions, the OMC health and long-time care for the elderly is still very young as it was started in 2004²⁵. Authors cite similar instruments in the context of the OMC as for other policy areas: expert groups (Lamping 2007), project funding and academic reports (Trubek et al. 2008) and policy fora. Nothing is reported about the time of access. With regard to representation, all three studies cite the Commission and member states which are both represented in a High Level Working Group (Lamping 2007). Furthermore, the following actors are mentioned: interest groups and CSOs (Lamping 2007; Trubek et al. 2008), the EP (Trubek et al. 2008) and academic experts (Lamping 2007). Lamping comes to the conclusion that deliberation happens in the High Level Working Group without, however, being more precise about it. None of the studies

²³ The two others are the Food Safety Forum and the Consumer Protection Forum.

²⁴ The articles considered in this section include Duina and Kurzer 2004; Flear 2008; Greer 2006, 2007, Hervey 2008; Lamping 2007; Martinsen 2005; Princen and Rhinard 2006; Trubek, Nance and Hervey 2008.

²⁵ Hervey 2008; Lamping 2007; Trubek et al. 2008

addresses issues of accountability but the text from Trubek and colleagues which indicates that the control mechanism foreseen for this OMC (as for others) is naming and shaming. They do not investigate if this actually happened.

Other studies highlight the process leading to the directive against tobacco merchandising (Duina and Kurzer 2004; Princen and Rhinard 2005), to the anti-cancer policy of the EU (Trubek et al. 2008), to patients mobility (Greer 2006, 2007; Lamping 2007) and the role that the ECJ has played in particular in this regard (Martinsen 2005). Besides the mentioned instruments of the directive and litigation, others such a High Level Working Group (Flear 2008), a programme (Europe against Cancer, Princen and Rhinard 2005), the Health Forum (Flear 2008), the European patients' forum (Trubek et al. 2008), demonstrations (against the Bolkestein directive, Flear 2008; Greer 2007) and networks more broadly are mentioned (communicable disease network, Lamping 2007; Trubek et al. 2008).

For all of these different instruments, all the authors cite both the Commission and member states as actors, indicating that they play a central role in the health sector, no matter which instruments are applied. Other actors include the EP and its health and consumer intergroup (Flear 2008; Princen and Rhinard 2005), the ECJ²⁶, the Economic and Social Committee and experts (Princen and Rhinard 2005), national administrations (Lamping 2007), interest groups (Greer 2006, 2007; Princen and Rhinard 2005), and CSOs (Flear 2008; Trubek et al. 2008). In sum, there thus seems to be a broad range of actors involved – however not necessarily CSOs. Authors do not mention particular biases in the representation of actors but Flear (2008) who notes a bias both towards larger CSOs and towards European (umbrella) CSOs. Deliberation, as the exchange of rational arguments, he goes on to argue, would not be desired; instead, a neo-liberal view would be privileged and pushed.

The articles reviewed here do not address issues of accountability in any length. Flear (2008) is the only who noted that transparency does not exist in the politically driven health processes while Duina and Kurzer (2004) noted that a public debate existed – which is indeed true with regard to the tobacco process. Just as with the Bolkestein directive, however, it remains unclear, whether the larger public was actually knowledgeable about the concrete processes taking place at EU-level, the involved actors, etc. Responsiveness of the Commission is mentioned as response either to the opposition of the ECJ²⁷ or to popular protest outside of the EU policy-making process strictly speaking (Bolkestein directive, Flear 2008). Quite logically, it is also the ECJ that studies mention as the mechanism of control²⁸.

Evaluating what pushed the developments in the area of health, there is a dominant neo-functional interpretation, namely that the strength of supranational actors, in particular the cooperation of the Commission and the ECJ²⁹, their recourse to internal market regulation, and the late and defensive interest of member states³⁰ pushed the trend towards health integration. Other factors mentioned include activism of MEPs and patients groups, strategic funds allocation, information production and

²⁶ Greer 2006, 2007; Lamping 2007; Martinsen 2005.

²⁷ As in the tobacco case, Duina and Kurzer 2004; Greer 2006; Princen and Rhinard 2005.

²⁸ Duina and Kurzer 2004; Greer 2007; Martinsen 2005; Lamping 2007.

²⁹ Greer 2006; Hervey 2008; Lamping 2007.

³⁰ Greer 2007; Lamping 2007; Martinsen 2005.

dissemination and learning in networks (Trubek et al. 2008). As constraints to even further and faster integration, authors cite the lack of a sufficient health services treaty base (Greer 2006; Princen and Rhinard 2005), rivalry between different DGs dealing with the issue of health (Greer 2006) as well as a lack of related expertise in the Commission (Princen and Rhinard 2005). From the perspective of CSOs, rivalry, struggle over competences, money and influences are mentioned as standing in the way of counter-balancing the neo-liberal health discourse of the EU (Flear 2008). Overall, and related to the issues of input legitimacy that are of interest here, Flear not only concludes that actual representation of citizens is not given in EU health processes, but joins Walmsley (2005) when suggesting that the Commission may even contribute to the democratic deficit, rather than decreasing it: “The active citizenship being fostered by the EU is the contrary of what it says it wants: a basis for generating input legitimacy. Or rather, the input is tokenistic, a fig leaf that hardly belies the continued absence of a deeper input by citizens, as well as the EU’s failure to engage in discourse and practices that truly take the subjects of its governance seriously. Rather than producing truly engaged citizens, Euro-biocitizenship is being textured by depoliticising governance discourse and its rationalities” (Flear 2008, forthcoming).

3.2.2 Consumer Protection

In the field of consumer protection, a structured dialogue with CSOs is brand new. A Stakeholder Dialogue Group, the members of which were appointed at the end of November 2007, was created as a result of the DG SANCO 2006 peer review group on stakeholder involvement³¹. Its objective is to advise the DG on the following issues: more transparent comitology, improved consultation, how to include stakeholders who may not traditionally get involved in EU policy-making, who is representative, and when consultation would have most impact on policy-making.

The articles under consideration in this section are all dealing with the issues of Genetically Modified Organisms (GMOs), or the mad cow disease (BSE), and more largely with issues of food safety³². With regard to the type of access, three venues are mentioned: a formal one with a treaty base³³, a semi-formal one which is more politically driven and informal venues (Borrás 2006; Dabrowska 2007). The related instruments resemble the previous ones: hard law in the form of a directive (Skogstad 2003) or a decision (Krapohl 2003) and other, softer mechanisms such as fora (Borrás 2006; Dabrowska 2007), advisory groups to the Commission (Dabrowska 2007), informal hearings (Borrás 2006; Paola Ferretti 2007), conferences (Dabrowska 2007; Wales and Mythen 2002) and online consultations (Dabrowska 2007; Paola Ferretti 2007). Outside of the EU political system, forms of direct action with regard to GMOs have also been observed (Wales and Mythen 2002). As regards the timing of access, authors observe that it takes place in the preparatory phase of policy-making, however after science had already defined the risk, thus reducing the possibilities for influence and agenda-setting (Dabrowska

³¹ http://ec.europa.eu/dgs/health_consumer/sdg/index_en.htm (accessed 14 July 2008).

³² The articles considered in this section include Abels 2002; Borrás 2006; Dabrowska 2007; Krapohl 2003; Paola Ferretti 2007; Skogstad 2003; Strünck 2005; Ugland and Veggeland 2006; Vos 2000 and Wales and Mythen 2002.

³³ Abels 2002; Paola Ferretti 2007; Skogstad 2003; Vos 2000.

2007; Wales and Mythen 2002). Dabrowska also notes access venues during the monitoring phase. Overall, there is wide agreement that participation does not live up to participatory democracy, but instead is a weak model of “due consideration” of all interested parties³⁴. It would only pay lip service to the participatory ideal (Paola Ferretti 2007), entirely depend upon the good will of the Commission (Abels 2002; Dabrowska 2007) and only begin when expertise had already set the agenda (Abels 2002; Wales and Mythen 2002). Participation according to the Commission, so the conclusion, “basically means top-down consultation of sectoral stakeholders” (Abels 2002: 16). It would therefore not be “the magic with which to bridge the democratic gap” (Paola Ferretti 2007: 183).

With regard to representation, the Commission and member states are mentioned by all authors. The next most mentioned actors are academia³⁵, the European Food Safety Agency (EFSA)³⁶, business interests³⁷, the EP which is said to be central for pro-consumer interests³⁸ and CSOs³⁹. National administrations (Dabrowska 2007; Krapohl 2003), the ECJ (Vos 2000) and the broader public (Paola Ferretti 2007) attract considerable less attention. While there is thus a broad range of actors involved in the regulation of GMOs and BSE, representation is nevertheless found to be biased towards the older member states, to the point that Dabrowska (2007) notes the absence of the EU10 member states, or towards specialists (Paola Ferretti 2007). With regard to the second step of representation, deliberation, authors are critical. While Paola Ferretti (2007) only sees unidirectional, top-down communication, others conclude that deliberation does not happen (Dabrowska 2007; Wales and Mythen 2002) while Strünck (2005) speaks of bargaining instead of deliberation. It is concluded that the controversial discussions that existed within member states were silenced in the political process of the EU if they had been accepted on the agenda of consultations, at all. Therefore, it is concluded that the GMO process at EU-level is shaped and dominated by business interests (Paola Ferretti 2007). Equally, the evaluation with regard to deliberative practices is unambiguous: “The new authorization procedure does nothing to improve the mechanisms that would have allowed open consultation, democratic participation nor public deliberation” (Borrás 2006: 69).

Turning to the issue of accountability, transparency is said to have improved (Borrás 2006), to exist (Vos 2002), at least in limited ways (Paola Ferretti 2007), favouring a public debate for some authors⁴⁰, not for others (Dabrowska 2007). However, it remains unclear what exactly is meant by public debate or publicity in these studies and empirical evidence is not provided. With regard to the responsiveness to demands articulated by CSOs, evaluations are divided. While some find that it exists (Skogstad 2003; Wales and Mythen 2002), referring to the introduction of a labelling system due to popular contestations in the case of GMO food, others are

³⁴ Abels 2002; Dabrowska 2007; Paola Ferretti 2007.

³⁵ Abels 2002; Borrás 2006; Dabrowska 2007; Krapohl 2003; Paola Ferretti 2007; Ugland and Veggeland 2006; Vos 2000.

³⁶ Abels 2002; Borrás; Paola Ferretti 2007; Strünck 2005; Ugland and Veggeland.

³⁷ Borrás 2006; Dabrowska 2007; Paola Ferretti 2007; Skogstad 2003.

³⁸ Borrás 2006; Skogstad 2003; Strünck 2005; Vos 2000.

³⁹ Dabrowska 2007; Paola Ferretti 2007; Skogstad 2003; Strünck 2005.

⁴⁰ Abels 2002; Borrás 2006; Wales and Mythen 2002.

more critical: “The new system demonstrates the reluctance of EU institutions to implement the comments of the public. Most national and EU authorities demonstrated rather unmistakable unwillingness to take the public input into account” (Dabrowska 2007: 295). Paola Ferretti, equally referring to the instrument of online consultation, concludes that responsiveness is unclear at best: “Comments are not translated, nor summarized, and no reply is given to the sender. Member states may take the comments into consideration during their assessment. However, the legislation does not specify any procedure in order to substantiate the principle of ‘due consideration’” (Paola Ferretti 2007: 170) and opinions would circulate “between institutions without a clear vision of what is consulted and who takes it into consideration” (Dabrowska 2007: 296). According to some authors, there is a clear unwillingness of EU institutions to take public input into account and it is impossible for the public to verify which arguments have been taken into account and why⁴¹. One of the consequences of this lack of responsiveness is that certain actors turn to more confrontational actions (Dabrowska 2007; Paola Ferretti 2007). No mention is made by any of the authors about control mechanisms.

The central reason for the integration of risk management and regulation, according to Krapohl (2003) and Ugland and Veggeland (2006), was the Europeanisation of the mad cow disease (BSE), leading to changed preferences of some member states. Their uncertainty about the degree of regulation in turn favoured the influence of experts (Krapohl 2003).

Authors discuss a number of reasons why input and influence of CSOs was limited, namely rivalry between different DGs (SANCO and ENV), a paternalistic culture in the Commission which would be afraid of public participation (Dabrowska 2007), and a lack of institutional channels to fuel comments to discussion and decision-making (Paola Ferretti 2007). From a political economy perspective, others argue that (GMO) risk regulation would be governed by a “totalising discourse of science and the privatisation of risk. (...) It is the coupling of totalisation and privatisation that presents us with a powerful limit on democratisation of the relations of risk definition. Despite the recognised social and political dimensions of risk, science, as a totalising discourse still regulates the production of ‘truth’” (Wales and Mythen 2002: 130). Wales and Mythen argue that within the EU political system, critics of biotechnology are either devalued or dismissed. In any case all those who wish to be heard must use the technical language of biotechnology while no other language and standards would be considered legitimate. They therefore conclude that “at a structural level, European expert-based risk regulation has been *designed* to bypass public-political debate. European policy disputes have tended to be conducted through the medium of scientific objectivism, rather than social interest” (Wales and Mythen 2002: 132). They finally link this totalising discourse to a market-enabling logic which has fostered a “departure from the social rights and responsibilities concept of citizenship in favour of an economic brand of citizenship in which responsibility for risk is rendered personal and individualised” (Wales and Mythen 2002: 136). It is exactly a lack of comprehension of these technical details and the technical language by citizens that Dabrowska (2007) also mentions as a barrier to greater influence of CSOs. Others think of the ideological laden nature of the issue and the incapacity of the EP to create a coherent vision (Skogstad 2003) when explaining why a more

⁴¹ Borrás 2006; Dabrowska 2007; Paola Ferretti 2007.

consumer-friendly solution could not be found. Finally, the anchorage of democracy institutions and language barriers are cited as reasons why Eastern European CSOs were by large absent (Dabrowska 2007).

3.3 DG ENV

Environmental policy making has been part of the *acquis* since the Single European Act of 1986 and environmental sustainability became one of the strategic core ambitions of the EU. The topics investigated in this section include biodiversity⁴², chemicals policy⁴³, transport issues (Buhr 2007; Webster 2000), marine policy (Richards and Heard 2005), auto oil and drinking water (Warleigh 2000) as well as broader empirical studies in the field of environment policy⁴⁴. Most of the authors⁴⁵ refer to a formal access venue with a treaty base⁴⁶ and / or informal venues of access⁴⁷. Those who refer to a treaty base are identical with those who refer to a directive as an instrument. Besides this traditional hard law instrument, a broad variety of access venues is mentioned: NGO campaigns⁴⁸, working groups⁴⁹, online consultations⁵⁰, reports⁵¹, conferences⁵², committees (Busková and Pleines 2007; Hallstrom 2004), Green and White Papers of the Commission (Jans 2003; Pesendorfer 2008), public hearings (Buhr 2007; Friedrich 2008), technology and impact assessment (Abels 2002; Friedrich 2008), a Communication (Buhr 2007), the CONECCS data bank⁵³ managed by the Commission, seminars and workshops (Friedrich 2008), a programme (Baker 2003), the EU-NGO biannual dialogue (Busková and Pleines 2007), direct action, and more broadly lobbying and use of the media (Richards and Heard 2005). There is thus a broad variety of participation and consultation instruments in place in DG ENV. With regard to the time of access, authors unanimously mention the preparatory phase of the policy cycle, with many indicating that the window of opportunity for participation would be rather short⁵⁴.

With regard to the actors involved, all authors mention the Commission and almost

⁴² Baker 2003; Fairbrass 2003; Heinelt et al. 2005.

⁴³ Friedrich 2008; Persson 2007; Pesendorfer 2006.

⁴⁴ Busková and Pleines 2007; Gerhards and Lengfeld 2008; Hallstrom 2004; Jans 2003.

⁴⁵ The articles considered in this section include Baker 2003; Buhr 2007; Busková and Pleines 2007; Fairbrass 2003; Friedrich 2008; Gerhards and Legfeld 2008; Hallstrom 2004; Heinelt et al. 2005; Jans 2003; Persson 2007; Pesendorfer 2006; Richards and Heard 2005; Warleigh 2000, and Webster 2000.

⁴⁶ Baker 2003; Buhr 2007; Fairbrass 2003; Friedrich 2008; Heinelt et al. 2005; Jans 2004; Pesendorfer 2006; Warleigh 2000; Webster 2000.

⁴⁷ Buhr 2007; Buskova and Pleines 2007; Fairbrass 2003; Friedrich 2008; Hallstrom 2004; Pesendorfer 2006; Richards and Heard 2005; Warleigh 2000.

⁴⁸ Baker 2003; Friedrich 2008; Heinelt et al. 2005; Pesendorfer 2006; Richard and heard; Warleigh 2000; Webster 2000.

⁴⁹ Buhr 2007; Hallstrom 2004; Persson 2007; Pesendorfer 2006.

⁵⁰ Buhr 2007; Friedrich 2008; Persson 2007; Pesendorfer 2006, with the latter two referring to the REACH process.

⁵¹ Buhr 2007; Pesendorfer 2006; Richards and Heard 2005.

⁵² Friedrich 2008; Hallstrom 2004; Pesendorfer 2006.

⁵³ Stands for Consultation, the European Commission and Civil Society, a data bank closed in early 2008.

⁵⁴ Friedrich 2008; Jans 2004; Persson 2007; Pesendorfer 2006; Richards and Heard 2005; Warleigh 2000.

all refer to the member states. The next most often mentioned actors are CSOs⁵⁵, the EP⁵⁶, business interests⁵⁷, academia⁵⁸, the ECJ (Baker 2003) and employers organisations (Friedrich 2008). Once more, we can thus find a broad variety of actors and interests. Many of the authors perceive a bias towards older and larger member states whereas the EU10 would be clearly underrepresented⁵⁹. Other biases favour larger CSOs⁶⁰ or business interests (Friedrich 2008; Persson 2007). Of all the authors, only one investigated the issue of deliberation in the case of chemicals policy and comes to the conclusion that deliberation did not occur (Friedrich 2008).

Turning to accountability, Pesendorfer (2006) suggests that transparency has improved while Friedrich (2008) and Jans (2003) evaluate it as limited. With regard to public debate, the evaluation is rather positive, and relates to biodiversity conservation, aviation policy and chemical policy⁶¹. Heinelt and colleagues (2005), in contrast, see only partial public debates happening through the EP and campaigns. Responsiveness to CSOs demands is evaluated critically. While Friedrich (2008) notes that there has been responsiveness to the demands of business interests, others argue that CSOs can claim part of the credit for certain Treaty reforms (Warleigh 2000; Webster 2000). Warleigh notes that the chances for responsiveness to the demands of CSOs depend on their ideological proximity to the dominant discourse: "If their perspective falls outside the parameters set for a proposal, they are unlikely to make any impact" (Warleigh 2000: 235-236). The majority of the contributions comes to the conclusion that there exists no responsiveness to CSOs' demands⁶², with some indicating that this is increasingly frustrating CSOs (Richards and Heard 2005). A couple of authors mention control mechanisms such as naming and shaming (Fairbrass 2003) or litigation (Fairbrass 2003; Baker 2003).

Explaining what pushed policies to develop as they did, authors point to international agreements, to increasing public attention and concern, to increasing awareness of the transnational nature of environmental challenges, and to the Commission as a driving force (Baker 2003) or more particularly to Commissioner Wallström who would have pushed the issue of chemicals policy (Pesendorfer 2006). Again, perceived constraints are more numerous. At EU-level, these would relate to insufficient resources within the Commission leading to uncoordinated legislation (Baker 2003); to a lack of internal strategy within the Commission to make the new consultation procedures known within the administration, leading to different practices and a lack of knowledge even within the Commission; to restricted access to MEPs; to the absence of a rule-based participation regime which would set limits to the non-binding practices of functional ad hoc participation (Friedrich 2008; Pesendorfer 2006); and to a perception of environmental groups by EU officials as

⁵⁵ Baker 2003; Buhr 2007; Buskova and Pleines 2007; Friedrich 2008, Heinelt et al. 2005; Persson 2007; Pesendorfer 2006; Richards and Heard 2005 Warleigh 2000.

⁵⁶ Baker 2003; Buhr 2003; Fairbrass 2003; Friedrich 2008; Persson 2007; Pesendorfer 2006; Warleigh 2000; Webster 2000.

⁵⁷ Buhr 2007; Friedrich 2008; Persson 2007; Pesendorfer 2006.

⁵⁸ Buhr 2007; Persson 2007; Pesendorfer 2006.

⁵⁹ Buskova and Pleines 2007; Hallstrom 2004; Persson 2007; Richards and Heard 2005.

⁶⁰ Buskova and Pleines 2007; Fairbrass 2003; Friedrich 2008; Richards and Heard 2005.

⁶¹ Baker 2003; Buhr 2007; Friedrich 2008; Persson 2007; Pesendorfer.

⁶² Buhr 2007; Busková and Pleines 2007; Jans 2004; Pesendorfer 2006; Richards and Heard 2005.

insufficiently trained and informed (Hallstrom 2004). On a macro level, some authors mention the weaker economic development of the Eastern member states as a reason for less developed environmental sensibilisation (Gerhards and Lengfeld 2008) and the efforts more broadly it takes for them to adjust to a market-liberal economy (Hallstrom 2004). The recent nature of EU-membership is also mentioned as an internal CSO constraint (Buskova and Pleines 2007; Hallstrom 2004). Other constraints that relate to the institutional, social and political situation of CSOs are linked to a lack of resources⁶³, with some pointing out that the lack of resources in Eastern member states would be a significant obstacle to “the formation of effective and representative coalitions” (Richards and Heard 2005: 39); to the incapacity to act strategically and to take on both tasks of (external) interest representation *and* (internal) information provider (Heinelt et al. 2005; Warleigh 2000); to rivalry over competences, money and influence; to different ideological priorities and diverging willingness to compromise on particular issues: “It was not unusual for there to be areas of disagreement over organisational strategy between different organisations. The dilemma is how to maximise their profile without compromising their ideological position” (Richards and Heard 2005: 38; Heinelt et al. 2005). Additionally, CSOs from the Eastern member states would believe more in direct action than their colleagues in the Western member states, resulting in much of the work being done separately (Busková and Pleines 2007; Richards and Heard 2005). These findings, however, contrast with other ones who suggest that environmental groups, despite their different aims and approaches, have been able to cooperate, and that they “are careful not to undermine each other and will actively support one another where they are able to do so” (Fairbrass 2003: 25; Friedrich 2008).

The evaluation of authors of the consultation practices of the Commission is very critical. Access would be dependent on its good will and transparency is not given (Friedrich 2008). While the Commission would claim to be open towards the input of CSOs, de facto, it would have a clear preference of expert and technical input (Hallstrom 2004; Pesendorfer 2006), leading to a situation where participation of CSOs and citizens is relatively small (Persson 2007). This corporatist approach (Friedrich 2008) would lead to a situation in which participation in particular from the Eastern member states is limited, in which primarily national and business interests are represented in consultations, and in which there is no room for opposing interests⁶⁴. Additionally, and as mentioned before, not the most democratic CSOs would be those included by the Commission (Hallstrom 2004). The dominance of business interests would result in the bias of the Commission in favour of neo-liberal ideas (Pesendorfer 2006) while access of CSOs would remain symbolic and without real influence (Hallstrom 2004). The involvement of CSOs is therefore not seen to solve the democratic deficit of the EU. Instead, the interest of the Commission and the EP in CSOs is evaluated as functional and instrumental⁶⁵, however conditioning CSOs and seeking to rally their support (Busková and Pleines 2007; Richards and Heard 2005). More generally, the discourse of participatory governance would be problematic as related practices did not result in better or more democratic

⁶³ Busková and Pleines 2007; Hallstrom 2004; Richards and Heard 2007.

⁶⁴ Hallstrom 2004; Pesendorfer 2006; Richards and Heard 2005.

⁶⁵ Friedrich 2008; Hallstrom 2004; Heinelt et al. 2005.

regulation⁶⁶, in particular as the necessary infrastructure for the ‘real’ implementation of a participatory regime would be absent (Friedrich 2008). Therefore, “participatory governance” would not alter, thus far, the intergovernmental, hierarchic logic of European environmental regulation (Friedrich 2008).

3.4 DG Trade

Trade is one of the oldest and best anchored policy fields in the EU. The Treaty of Rome already transferred competences to negotiate and conclude international agreements on trade in goods to the EU. It is the Commission which develops proposals in the area of international trade agreements. The legal framework in place asks the Commission to widely consult before it proposes legislation and to publish consultation documents, when appropriate. Consultation is perceived to supplement, not to replace the procedures and decisions of the legislative bodies that are in place, reflected in the word “a voice, not a vote” (Slob and Smakman 2007).

A structured dialogue, however, is of more recent nature even though one of the oldest in the EU. It was in 1998 that the Civil Society Dialogue (CSD) was born within the DG Trade⁶⁷ which now counts over 600 CSOs⁶⁸, of which, however, only a comparatively small percentage regularly attends meetings in Brussels. As of now, it is one of the most institutionalised efforts of consulting CSOs in the EU. It were the discussions around the Multilateral Agreement on Investment (MAI) negotiations in 1998 that pushed trade Commissioner Lamy towards an enhanced dialogue with CSOs⁶⁹ and eventually including for the first time a delegation of CSOs to the WTO meeting in Seattle in 1999. The CSD is today made up of numerous working groups around different issues of trade policy. The purpose of the CSD is to develop a confident working relationship between interested stake holders in the trade policy field. This objective was broken down to 1) to consult widely; 2) to address civil society concerns on trade policy; 3) to improve EU trade policy through structured dialogue and 4) to improve transparency⁷⁰.

With regard to the type of access⁷¹, authors mention semi-formal, politically driven access venues⁷² and / or informal ones⁷³. The instruments observed include meetings⁷⁴, the Civil Society Dialogue (CSD)⁷⁵, thematic groups (Insausti 2003;

⁶⁶ Friedrich 2008; Persson 2007; Pesendorfer 2006.

⁶⁷ <http://trade.ec.europa.eu/civilsoc/index.cfm> (accessed 14 July 2008)

⁶⁸ Defined in a broader sense than in this study.

⁶⁹ The purpose of MAI was to develop multilateral rules that would ensure international investment was governed in a more systematic and uniform way between states. MAI drew widespread criticism from parts of the CSO landscape and developing countries. France and Australia announced in October 1998 that they would not support the agreement, effectively killing it due to the OECD's consensus procedures.

⁷⁰ http://trade.ec.europa.eu/doclib/docs/2005/june/tradoc_113527.pdf.

⁷¹ The articles considered in this section include Dür and de Bièvre 2007; Gerlach 2006; Insausti 2003; Jarman 2008; Michalowitz 2005; Mohr et al. 2005; Schabbel and Wolter 2004; Slob and Smakman 2007; Woll 2007 and Young and Peterson 2006.

⁷² Dür and de Bièvre 2007; Insausti 2003; Jarman 2008; Michalowitz 2005.

⁷³ Dür and de Bièvre 2007; Insausti 2003; Jarman 2008; Schabbel and Wolter 2004.

⁷⁴ Dür and de Bièvre 2007; Insausti 2003; Jarman 2008; Michalowitz 2005; Slob and Smakman 2007.

⁷⁵ Dür and de Bièvre 2007; Gerlach 2006; Jarman 2008.

Michalowitz 2005), campaigns and CONECCS (Dür and de Bièvre 2007), demonstrations, the Civil Society Contact Group and chats (Insausti 2003), business contact groups (Gerlach 2006) as well as broader networking and publicity strategies (Mohr et al. 2005). Access for CSOs would happen during the preparatory, respectively the agenda-setting stage (Gerlach 2006; Dür and de Bièvre 2007) and at a later stage for business interests (Dür and de Bièvre 2007).

As regards representation, the Commission is mentioned by all authors. In contrast to previous policy fields member states are hardly mentioned as actors (Young and Peterson 2006). CSOs are mentioned by most⁷⁶, as are business interests⁷⁷. Further actors include the social partners⁷⁸, the EP⁷⁹, national administrations (Jarman 2008), the Economic and Social Committee (Insausti 2003) and academia (Slob and Smakman 2007). Amongst this variety of actors, authors perceive biases towards older and larger member states (Jarman 2008; Slob and Smakman 2007), towards business (Gerlach 2006; Michalowitz 2005) and towards larger and European CSOs⁸⁰. Evaluations are unambiguous with regard to deliberation. Some authors say that it would not happen⁸¹. Instead, there would be briefings (Dür and de Bièvre 2007), exchange of information and networking rather than in-depth discussions (Gerlach 2006), contributions would simply repeat well-known positions of the participants while a true dialogue would not emerge (Michalowitz 2005; Slob and Smakman 2007), leading to the conclusion that “the dialogue is a deliberation process that fails to bring about deliberation. (...) Deliberation is an ambition that no consultation process to date has achieved satisfactorily” (Jarman 2008: 30).

With regard to accountability, information is scarce. Some find that transparency would be insufficient (Dür and de Bièvre 2007; Insausti 2003) while acknowledging the existence of a public debate (Insausti 2003). Opinions are divided as to whether there was responsiveness to the demands of CSOs. While Dür and de Bièvre (2007) see responsiveness insofar as the CSD was established, others see more limited or indirect forms of responsiveness (Insausti 2003; Jarman 2008) which, however, once more are not linked to processes within the political system of the EU, but to mobilisation outside of it. Others cannot detect any recognizable influence on policies (Slob and Smakman 2007; Young and Peterson 2006). Commission officials interviewed for the evaluation report of the CSD noted that responsiveness towards CSOs does and should not exist: “While we are willing to listen, we do not take instructions from CSOs. We work for Member States and it is to them that we are accountable.” (Slob and Smakman 2007: 74). Only Insausti (2003) mentions naming and shaming strategies as a way of controlling EU institutions.

As a pusher at EU-level, the internal market programme was detected (Young and Peterson 2006) while a structural constraint relates to the lack of trust between

⁷⁶ Dür and de Bièvre 2007; Insausti 2003; Jarman 2008; Michalowitz 2005, Mohr et al. 2005; Slob and Smakman 2007; Woll 2007; Young and Peterson 2006.

⁷⁷ Dür and de Bièvre 2007; Insausti 2003; Jarman 2008, Michalowitz 2005; Slob and Smakman 2007; Woll 2007; Young and Peterson 2006.

⁷⁸ Insausti 2003; Jarman 2008; Slob and Smakman 2007.

⁷⁹ Mohr et al. 2005; Schabbel and Wolter 2004.

⁸⁰ Dür and de Bièvre 2007; Insausti 2003; Mohr et al. 2005.

⁸¹ Dür and de Bièvre 2007; Gerlach 2006; Jarman 2008; Michalowitz 2005; Slob and Smakman 2007.

business and CSO representatives (Slob and Smakman 2007). Internal constraints of the CSOs that authors mention relate to a lack of financial resources (Jarman 2008; Slob and Smakman 2007), a lack of political resources, that is the incapacity to impress politicians with credible threats linked to employment and growth (Dür and de Bièvre 2007), a lack of knowledge (Slob and Smakman 2007) and political differences between CSOs (Jarman 2008).

Overall, it is positively acknowledged that the consultation has been formalised and that there is more inclusion than there was before the institutionalisation of the CSD (Insausti 2003; Jarman 2008). Furthermore, the design of consultations would have happened in a “co-participatory manner” and there would be a political commitment to the dialogue by the leadership of the DG (Insausti 2003). More generally, the CSD would have proved to be a useful instrument (Slob and Smakman 2007).

It is observed critically that the way the Commission controls the agenda does not allow for opposing interests to be articulated, having caused the withdrawal from the CSD of those with more critical views (Jarman 2008); that transparency is limited (Slob and Smakman 2007) as the Commission would not offer its global vision of trade policy, and does not provide regular and systematic reports of its activities, rendering preparation of meetings by CSOs difficult if not impossible (Insausti 2003); that there does not exist a formal mechanism which would regulate responsiveness and connect the CSD to decision-making (Insausti 2003; Jarman 2008), contributing to the withdrawal of CSOs from the process all together (Insausti 2003). Therefore, CSOs and some of the studies perceive the CSD as an instrumental public relations exercise, pure window dressing (Insausti 2003; Slob and Smakman 2007), aimed at increasing the legitimacy of the Commission (Jarman 2008), with freedom, but no influence (Dür and de Bièvre 2007; Woll 2007), while the risk of cooptation and lost of autonomy of CSOs is omnipresent (Insausti 2003).

3.5 The Convention

The European Convention met in 2002-2003 with the defined goal of drafting a Constitution for the EU. This goal, however, came to a sudden halt with the French and Dutch ‘no’ votes to the draft Constitution in mid-2005. While the Convention process obviously was a formal process with a clear mandate, consultation of CSOs were of semi-formal or informal nature⁸². The instruments observed include the Futurum website for online consultation⁸³, a plenary session of the Convention devoted to civil society⁸⁴ and hearings (Kvaerk 2007). According to Borragán (2007), consultation occurred during the preparatory phase of the policy cycle.

Actors referred to obviously include the Convention⁸⁵, consisting of the Presidency, representatives of the heads of state or government, of the national parliaments, of the EP, of the European Commission, of the governments of the accession candidate countries and of their parliaments. The Committee of the Regions, the Economic and Social Committee, the European Social Partners as well as the European

⁸² Borragán 2007; Cammaertz 2006; Kvaerk 2007; Monaghan 2007.

⁸³ Borragán 2007; Cammaertz 2006; Kvaerk 2007; Monaghan 2007.

⁸⁴ Cammaertz 2006; Kvaerk 2007; Monaghan 2007.

⁸⁵ Borragán 2007; Cammaertz 2006; Kvaerk 2007; Longman 2007; Monaghan 2007; Wright 2007.

Ombudsman enjoyed observer status. Particularly mentioned actors include CSOs⁸⁶, business interests and academia⁸⁷, the Commission (Wright 2007), the Economic and Social Committee (Kvaerk 2007), regional and local authorities (Cammaertz 2006) and social partners (Longman 2007). Authors perceive biases towards old member states and towards English or French speaking representatives (Longman 2007), towards business interests (Borragán 2007), and towards larger, European CSOs (Kvaerk 2007). Kvaerk notes that the Futurum website was biased towards an elite as at best 0.2% of the entire population would have been on the website⁸⁸, and the 0.2% was strongly dominated by rights and value based CSOs (see also Monaghan 2007; Wright 2007). Authors are critical with regard to the occurrence of deliberation. While Wright notes that the general debate at the website was discursive, he also points out to communication rules which were enforced by an employee of the Convention, thereby not allowing for a public sphere in the Habermasian sense (Wright 2007). Crucially, “the working group language regimes were restrictive, being limited normally to two or three languages” (Longman 2007: 98) while the languages of the candidate countries were excluded all together. Longman concludes that not being able to speak in one’s own language reduces the room for deliberation (see also Wright 2007). Other authors confirm the lack of interaction and deliberation on the web site: “It was basically a list of the organisations that had registered and submitted written contributions to the Convention” (Kvaerk 2007: 157; Cammaertz 2006).

According to authors, neither transparency (Cammaertz 2006) nor public debates existed (Cammaertz 2006; Kvaerk 2007; Wright 2007). According to Wright, the budget for the entire Future of Europe debate was 9.5 million Euros: “No formal advertising was undertaken aside from leaflets being placed in libraries and Euro-information centres, and thus the potential for a broader base of participants – beyond the already interested (and, perhaps, segmented) minority – was lost” (Wright 2007: 1171). Authors are divided about the responsiveness of the process. While some concede that responsiveness would exist in vague and limited forms (Borragán 2007; Cammaertz 2006), e.g. by including the principle of participatory democracy in the Draft Convention, others are more sceptical, pointing to the “absence of feedback on contributions. For the bulk of organisations (and individuals), the communication was one-way, and only a few organisations succeeded in opening a dialogue with members of the Conventions” (Kvaerk 2007: 188). Wright comes to a similar conclusion:

“The online debate was not listened to, summarized or otherwise fed into the Convention process. Second, although some politicians made introductory posts to debates, politicians did not directly interact with citizens. In fact, politicians’ messages were positioned separately. The general policy was to discourage interaction between citizens and politicians on the discussion forum. It was feared that this might give people a false impression that the online discussions

⁸⁶ Borragán 2007; Cammaertz 2006; Kvaerk 2007; Longman 2007.

⁸⁷ Borragán 2007; Kvaerk 2007; Longman 2007.

⁸⁸ If one substrate those who have clicked several times on this web page which is highly likely for those who actively followed the process, the elitist character of this online consultation becomes even clearer.

were influencing policy” (Wright 2007: 1172).

Another study cites an activist who sees “the Convention as proof positive of the existence of black holes. You send something but nothing ever comes out. No answers to any letters. No acknowledgement of receipt. Nothing” (Lombardo 2003: 14). Control mechanisms were not mentioned by authors.

Overall, authors positively acknowledge that participation has increased (Borragán 2007; Cammaertz 2006), that the Futurum website increased and fostered debate amongst CSOs and that transparency increased due to CSO involvement (Cammaertz 2006; Kvaerk 2007) and that “the openness, inclusiveness and representativeness of the Convention stand in stark contrast to the preparatory bodies of previous IGCs” (Kvaerk 2007: 191).

Again, however, critical remarks largely outnumber the positive ones. Starting with more technical issues, the lack of user-friendliness of the website was observed (Cammaertz 2006). The internet, as an access venue, is seen as a tool the importance of which should not be exaggerated as it is not linked to the “formal political process, where power, formal rules and face-to-face negotiations (between states) often determine outcomes. The Internet will therefore not save or fix democracy (Hüller 2008); it is only a facilitating technology and, as such, will not lead to more or better democracy at a national or EU level” (Cammaertz 2006: 231). The second constraint was the language regime, only allowing a minority of representatives to speak in their own language (Longman 2007; Wright 2007). In the Convention, the strict asymmetric language regime compromised “certain tenets of democratic equality regarding political deliberation and the working practices of political representatives” (Longman 2007: 103), implying that this political resource “is shared unequally in a forum such as the European Convention, leading to the conclusion that there was something distinctly undemocratic about its workings” (ibid.; see also Wright 2007). Participation is perceived as far from full, being at best “something between pseudo and partial participation – a symbolic gesture towards the inclusion of civil society” (Cammaertz 2006: 241), with a clear lack of public debate with the larger public who remained unaware of the process (Borragán 2007; Kvaerk 2007). Third, there seems to be both an incapacity and an unwillingness of CSOs to interactively engage with citizens and to educate them about EU issues (Monaghan 2007), putting a strong question mark behind official discourses which see CSOs as building the bridge between the EU and its citizens. The most important constraint, however, was the lack of political will by member states to seriously include CSOs (Kvaerk 2007), also expressed in the “gap between the online realm and the ‘offline’ decision-making process” (Cammaertz 2006: 241). The Convention is therefore seen as a good example of the gap between the official EU civil society discourse and its functional implementation (Borragán 2007), the political bill of which are detected in the ‘no’ votes in France and the Netherlands (Kvaerk 2007). Authors conclude once more that the EU may itself be actively contributing to the democratic deficit as mechanisms of accountability to do not exist and as its practices leave no or only little room for opposing interests while those that can be articulated are not listened to, generating “immense deception” (Cammaertz 2006: 242; Borragán 2007).

Observations made in other policy areas such as agriculture (Heard-Lauréote 2007), fisheries (O’Mahony and Coffey 2007), fundamental rights (Bozzini 2007), employment (Radulova 2007), pharmaceuticals (Dorbeck-Jung and Vrieling 2007) or

the internal market with regard to free open source software (Eimer 2007) confirm the findings of the policy areas under particular scrutiny here.

4 Conclusion and outlook

The conclusion is divided into three parts. The first will summarize the findings with regard to our research question: What can we say about the place and role of CSOs in EU policy-making processes across policies after the evaluation of the relevant literature? The next part will discuss these findings more broadly before the last part concludes with open questions for future research⁸⁹.

4.1 Summary

With regard to access, we have seen that there is a broad variety of access venues, ranging from informal meetings between Commission officials and CSO representatives to institutionalised formal committee meetings with a sound Treaty base (Obradovic and Vizcaino 2007). These access venues tend to be similar if not the same across policies and DGs. Still, there is not a single systematic consultation regime implemented by the European Commission, but a plurality of consultation practices. This does not mean that there is no common *idée directrice* to the participatory discourse of the Commission. Rather, it means that while the official discourse is developed in the Secretariat General of the Commission, implementation varies between DGs and policy fields and may at times even be at odds with the official discourse. As we have seen, however, there is a strong bias towards consultations of CSOs outside of legal bodies, in contexts for which there does not exist a Treaty base and which are rather politically driven and rank between semi-formal (conferences, working groups, online consultations, etc.) and informal (ad hoc meetings, phone calls, etc.) (Broscheid and Coen 2007; Curtin 2003). In particular for the semi-formal consultations, specific criteria which would define the role of CSOs, their access and the ways their opinions are taken into consideration are mostly missing. Furthermore, we have seen that access tends to be strongly linked to the preparatory phase of policy-making (Obradovic and Vizcaino 2007). Inclusion in the monitoring and evaluating phases of policy-making are a clear exception to the rule, thereby supporting the impression that the Commission is mainly interested in societal inputs in order to improve its own proposals and to increase its own legitimacy vis-à-vis other European institutions rather than giving CSOs a real role to play throughout the policy cycle (Broscheid and Coen 2003). Finally, many authors show that the access to EU politics is biased. It tends to be European (umbrella) CSOs, based in Brussels, with strong constituencies particularly in the larger and older member states which have a better access to EU policy-making processes than other CSOs whereas the EU10 are clearly underrepresented (Obradovic and Damsma 2007). While some authors also acknowledge a bias towards business interests, this bias does not seem to be as developed as those mentioned previously.

⁸⁹ This section will link the reviewed empirical evidence to more general literature as not all the empirical evidence can be cited here and as no one should be discriminated against. It is important to note that only such literature will be cited in the concluding chapter which is representative of the empirical studies presented in the previous sections.

In return for the open access policy, CSOs are expected to respect the Commission's consultation practices and its decisions, thereby narrowing the circle of actors willing to play this game (Hunold 2005). Overall, access for CSOs to policy processes at EU-level is poorly regulated and does not seem to be equally open to all in all instances and therefore does not fulfil the democratic norm of both liberal and deliberative democracy (Kohler-Koch and Hüller 2008).

With regard to *representation*, it remains unclear how representation comes about in the first place, i.e. who is actually represented in consultations at EU-level and what mandate these representatives have. With regard to the diversity of actors, the Commission and member states clearly appear as the most present and strongest actors. Some studies show a bias towards business while others insist on a privileged presence of older and larger member states as well as larger, European CSOs. Problematically, European umbrella CSOs cannot be said to represent the citizens of the EU. The large majority of all European CSOs are organised as confederations, i.e. associations of associations, implying a structural remoteness from their grassroots constituencies, ideas and preferences (Kohler-Koch, Quittkat and Buth 2008; Obradovic and Vizcaino 2007). Overall, it seems that a broad range of interests is represented in the analysed processes. The notable exception to this rule is that profoundly critical ideas and interests seem to not be part of the consultation practices, either because they have withdrawn from participation due to disappointment or because they turn to alternative sites of contestation from the beginning on, supporting Schmidt's view that European governance can be characterised as governance with *some* of the people (Schmidt 2006). A perceived consequence of this uneven representation is a privileged space, within the Commission, for neo-liberal policies over other policies.

The presence of diverse actors alone does not make for representation. It is additionally necessary, in particular in newer forms of governance that actors actually deliberate, interact with one another in communicative ways, exchange their ideas (information) and eventually come to an agreement or even consensus (openness to ideational changes due to exchange), so that all views are actually *represented* in the final outcome. Unfortunately, not many authors investigated this issue. The evidence that is available does not paint a favourable picture: Invitations to meetings are sent out on short notice (leaving only little time to prepare), the time available in meetings only suffices for vertical information, meetings happen too irregularly to allow for horizontal interactive communication, online consultations only allow for a number of pre-defined answers (multiple choice) and not for original, self-chosen input and are additionally not user-friendly, the Commission only allows for items to be on the agenda which were previously announced and outcomes rather reflect bargaining or even votes (if there was something to decide, at all) rather than deliberative consensus seeking and finding. While the Commission "shies away from 'politicisation'" (Kohler-Koch and Hüller 2008), the other present actors do not seem sufficiently interested in consensus finding and in overcoming at times antagonistic world views. Knowing that important preparations and decisions are eventually taken in other arenas than those in which CSOs participate certainly does not contribute to actors' attraction to common deliberation (Kohler-Koch 2007). Overall, it rather seems fair to conclude that deliberation as such is not desired (Michalowitz 2004), as particularly the Convention experience made clear. While a broad range of actors is thus physically present, representation is deficient as the different positions are at

best shared, but not incorporated into an integrated view nor does bargaining seem to take place within the instruments under scrutiny here. Therefore, we must conclude that representation does not live up to the expectations of either liberal or deliberative democracy.

With regard to *accountability*, the available information indicates restricted, if existent transparency. While several authors acknowledge an improvement in the availability of documents, others notice a clear absence of process documentation. Most authors do not inform about the degree of publicity of a given policy process. There seem to exist quite varying degrees, ranging from not existent or very low (OMCs) to very developed (e.g. MAI, GMOs). However, it remains unclear in the articles under review in how far the EU processes dealing with these issues were actually known or whether public debate mainly happened in limited national public spheres without a link to other member states and / or the European level. Available evidence in any case points in the direction of strongly nationally segmented public spheres with very limited mutual influences and border-crossing (Koopmans 2007). Additionally, national media report in a very selective way about the activities of the European institutions, in particular of the Commission, thereby accentuating the difficulties of the development of a European public sphere (Bijmans and Altides 2007). Finally, attempts of the Commission to lead European debates may even be resisted by national governments (Fehér 2007). It can therefore be concluded that EU processes as such do not enjoy great publicity – or, in other words, operate under a veil of secrecy (Curtin 2003).

One question is whether the Commission is accountable to CSOs, and if so how, the other whether CSOs are accountable to their constituencies. This latter form of “material accountability” (Kohler-Koch 2008b) was not investigated here, but there is evidence to believe that responsiveness to demands of the constituencies is not always fulfilled (Walmsley 2005). The former (“ideational accountability”) only exists in limited ways, if at all. There is no stable accountability mechanism as concerns agenda control (Kohler-Koch and Hüller 2008), the Commission is in no way accountable to CSOs and openly admits this. More often than not, it remains perfectly unclear what is taken into consideration from all the consultation instruments, and what is not, and on which grounds (Curtin 2003). The lack of responsiveness towards CSOs fits well with the fact that their consultation almost exclusively happens in the preparatory phase of policy development in which the Commission is free to take on advice – or leave it. Since a European public sphere does not exist, the Commission is only accountable to the Council while rights and value based CSOs are confined to non-binding procedures (Bouwen 2007).

Overall, it is thus fair to conclude that while access tends to exist, there is no connection to decision-making, a situation aptly described as “a voice, not a vote” (Slob and Smakman 2007; see also Edler-Wollstein and Kohler-Koch 2008). Expectations of both liberal and deliberative democracy are not fulfilled in any sufficient way in the policy process under review here (Kohler-Koch 2008a). While venues for participation and transparency have sometimes increased, equal access is by no means assured nor is equal representation. The consultations only reach a closed circle of elites (Michalowitz 2004) and additionally either do not allow for deliberation or actors are not interested in deliberation. Accountability does most of the times not exist in legal terms and seldom in ideational ways. The only times

CSOs were capable of having an impact on EU policy development were when organised outside of the EU institutions (petitions, demonstrations, Social Forum, etc.). The results of this study therefore put a strong question mark behind the rhetoric of participatory democracy which the European Commission as well as large parts of the literature so willingly use. Remarkably, these results hold true for all the DGs and policy fields considered here.

In a nutshell, the evaluation is that the Commission is only interested in increasing its power in the institutional configuration of the EU – in particular vis-à-vis the European Parliament which is increasingly threatening its position (Bouwen 2007; Neuhold 2005) – in order to bring about system transformation towards more integration (Cram 2007; Kohler-Koch 2008a). To this end, it has developed a participatory democracy rhetoric which in practice however turns out to be both instrumental (Cram 2007; Michalowitz 2004) and corporatist (Obradovic and Vizcaino 2007; Sánchez Salgado 2007). There is a gap between the official discourse which tends towards a universalistic conception of participation and a functional conception of participation which the Commission implements⁹⁰, in which stakeholders are consulted as a means to improve its effectiveness (improved proposals, test-balloons where resistance may come from) and legitimacy vis-à-vis the other European actors⁹¹.

When explaining the observed reality, some authors focus on the CSOs, and point to features which delimit their discursive potential: lack of resources, the political culture of CSOs, the geographical distance to Brussels, length of EU-membership (and thereby of democratic structures), language barriers, ideological competition over influence amongst them, and the need to adopt to the requirements of the Commission. Also, turning towards the EU does not seem to be the priority for the majority of national CSOs (Walmsley 2005, Mohr et al. 2005), probably because they simply have other concerns than to feed the EU with input legitimacy and because the nation-state is where the money mainly comes from (Kohler-Koch, Quittkat and Buth 2008; Walmsley 2005). While CSOs thus make use of exit options where the occasion presents itself, European governance did not substitute national politics, not least because the options it offers are ambiguous. Instead, the lobbying behaviour of CSOs indicates that the national context remains decisive (Kohler-Koch 2006). Others focus more on EU-related political and institutional features, namely insufficient funding allocation, lack of political will to really include CSOs in policy development and decision-making leading to an insufficient or inappropriate infrastructure for participation, institutional battles between the Commission, the EP and the Council, and a political economy that favours individualization and there with business interests.

Authors perceive a range of consequences of the consultation practices of the Commission and with regard to CSOs. CSOs, first of all, are seen to be conditioned by some of them and must adapt to the EU rules if they want to be financed and / or heard⁹². While the demands of the Commission *may* contribute to the credibility of

⁹⁰ Cram 2007; Kohler-Koch and Hüller 2008; Sánchez Salgado 2007.

⁹¹ Bouwen 2002; Curtin 2003; Obradovic and Vizcaino 2007.

⁹² Broscheid and Coen 2007; Kohler-Koch, Quittkat and Buth 2008; Obradovic and Vizcaino 2007; Sánchez Salgado 2007; Walmsley 2005.

CSOs, they are also likely to create burdens for CSOs, in particular for smaller ones, e.g. when these are not able to fulfil rules of co-financing and of having a minimum number of project partners in other member states (Obradovic and Damsma 2007). The price CSOs pay for their inclusion in the Brussels circuit is perceived as a loss in autonomy, which is likely to be problematic with regard to the demands of their constituencies. There is evidence that close contacts by CSOs with the Commission resulted in a halt or even decrease in politicisation strategies while delivering information and services towards the national, regional and local constituencies increased (Walmsley 2005). The incentives of the Commission to CSOs to not primarily act as political, strategic actors can have real consequences. As some have pointed out, there exists by now a “consultation fatigue” amongst CSOs (Fazi and Smith 2006: 43) which has led some of them to withdraw from the consultation processes. The obvious consequence is that if opposing interests cannot be voiced within the system, let alone influence EU policy processes, they will at best vocalise their concerns outside the system (Hilson 2002) and at worse turn to the extreme right (Spier and Scheuregger 2007). Added together, these concerns raise the question whether against official intentions, the Commission may not be contributing to – instead of alleviating – the democratic deficit of the EU⁹³. In any case, the consultative practices contribute little to bridging the gap between the EU and its citizens (Kohler-Koch 2007), and this is why the participatory governance model of the EU has been called a myth (Smismans 2006).

4.2 Discussion

If the methods the Commission uses do little to resolve the pending questions of access, representation and accountability, and if agreeing that the EU is in need of legitimacy, two main – not antagonistic – answers to this situation exist. The first focuses on optimisation strategies at EU-level, e.g. introducing an accreditation system, making access to documents easier, defining criteria which views should be taken into consideration and on which grounds, etc. This position is rather optimistic as concerns the possibility of the creation of a public sphere as means to combat the democratic deficit, and with the help of CSOs. The other position is more hesitant about such possibilities and acknowledges structural limitations to the democratization of international organizations (Dahl 1999b). From this perspective, democracy at EU-level is not possible as there is no common identity which is the prime condition for losers to accept agreements and for people more generally to develop trustful relationships beyond individual contacts (Kohler-Koch 2006; Offe 1998), no common public sphere, and the delegation chain is too long for democratic control by the people to be possible. It is precisely this lack of common identity which keeps national CSOs from being overwhelmingly interested in EU politics – as their members are not – and as their own ambition to act as “socialising agents” (Warleigh 2001) and to increase the (input) legitimacy of the EU is apparently limited (Walmsley 2005). However, such an ambition would be a central precondition for the improvement of representation and accountability. It may therefore be time to question the political expectation towards CSOs to act as a bridge between the EU and its citizens more fundamentally. The other reason for structural limitations to the democratization of the EU is a permanent ambition of EU institutions, in particular of

⁹³ Kohler-Koch 2008a; Michalowicz 2004; Obradovic and Vizcaino 2007; Walmsley 2005.

the Commission and the EP to secure a “pole position” in the institutional architecture of the EU (Bouwen 2007; Scharpf 1997). Insofar, they do not necessarily work towards further democratization, but are primarily engaged in power games and interested in defending achieved powers and dominant interests. These power games amount to considerable structural and institutional constraints to further democratization.

4.3 Questions for future research

1. The overwhelming majority of studies focuses on the national level. If our understanding of EU processes in general, and the inclusion of CSOs therein in particular is to improve, then more empirical studies are needed which particularly address the EU-level.

2. The policy literature pays little attention to questions raised by input legitimacy. The governance and civil society literature, which one would expect to pay more attention to these issues, often remains vague and imprecise⁹⁴. Fundamentally, this literature is too often not variable-based, even the theoretical framework at times remains unclear or implicit. This situation evidently does not contribute to a precise picture of the inclusion of CSOs in EU policy-making processes and therewith renders theory development difficult. It furthermore contributes to keeping up the myth of participatory governance which important parts of the research community have willingly taken over from the political sphere.

3. A particular word is of order with regard to the assumptions of deliberative democracy as this theory stream has been dominating the discussions of newer modes of governance in the EU in recent years. The large majority of the literature does not investigate whether deliberation actually happens, under which conditions and with which results. Those authors that have considered this question come to a sceptical to negative conclusion as regards the de facto occurrence of deliberation. This study has shown that the theoretical dominance of the deliberative model does not pass the empirical test in any sufficient way.

As concerns future research, two black boxes should be addressed. First, studies need to become variable-based, with an explicit theoretical framework. Such research is of utmost importance in order to get a clearer and more founded picture than the available literature allows us to draw⁹⁵. Second, the assumptions of deliberative democracy need more empirical attention. In particular, its neglect of the logic of politics which is dominated by conflict and not by consensus should be reviewed. Here, research should investigate whether a) there is actually interactive communication, b) between whom, c) whether this leads to a consensus in which all the views expressed are mirrored and d) what happens with the consensus once it is found. For there is no sense in having people deliberate and agree on an issue if the common position is later on not linked to decision-making. With regard to CSOs in particular, more knowledge is needed as to why their members are not (very) ambitious with regard to EU policies and politics and how exactly the long chains of

⁹⁴ Those articles that engage in in-depth empirical research clearly come to even more critical conclusions than those which remain at the surface.

⁹⁵ If tentative conclusions were nevertheless possible, then because of the coherence and the quantity of the literature used for his article.

representation and accountability operate.

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