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Enhancing Multi-level Democracy by Organizing Civil Society Input

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Abstract:

In political theory and political practice an activated civil society is seen as a solution to the EU's democratic deficit. The EU-Commission actively engages in relating to civil society. Any judgement on the impact of this engagement on the democratic quality of the EU depends on an appraisal of the factual influence of the Commission's activities on the structuration of civil society itself and on the preference for a particular normative theory of democracy. We share the normative view and the function ascribed to civil society in Jürgen Habermas' theory of deliberative democracy. In this perspective, we explore the EU-Commission's engagement with civil society. We first give account of the evolution of this engagement by using the heuristic concept of 'generations'. We then introduce the concept of 'consultation regime' which helps us to develop causal hypotheses concerning the consequences for the structuration of civil society. We differentiate four models of consultation regimes which condition civil society in distinctive ways: For each model we describe a set of the Commission's relevant actions and relate them to the likely effects on the structuration of civil society and the potential for enhancing democratic legitimacy in the EU multi-level system. When confronted with the empirical reality, we have to take notice that the present consultation policy does not support the diversity of civil society organizations and their self-reflective public interaction in a way that is sufficient for enhancing the democratic legitimacy of the EU.

1. Introduction

With the deepening of European integration, more and more decisions are taken which have a strong influence on the daily life of European citizens. In political practice and political science the integration process has increasingly elicited questions about the legitimacy of EU-governance.¹ Answers to these questions broadly fall into three categories. A minority claims that EU-institutions generate sufficient legitimacy to back EU-governance in a normatively satisfactory way. The majority of observers, however, agree on the verdict of the democratic deficit of the EU. They are, nevertheless divided into two camps according to the cures they suggest. The first suggests to decrease the demand for legitimacy. Proponents of this view either argue for lowering the normative standards for legitimacy or suggest a change in the system like a re-location of power from the Commission to the elected executives in the EU-Council that would reduce the pressure for legitimacy. Both proposals share the view that integration should not proceed because only at on the national level normatively appropriate mechanisms are

¹ Kohler-Koch/Rittberger (forthcoming in Journal of Common Market Studies) show a correlation between deepening integration and the publication of literature on the democratic deficit.

available that give governance democratic legitimacy. The third category is constituted by those who neither want to lower the normative standards nor redress the course of integration. Thus, the only answer is an increase in the supply of legitimacy. Usually, it is suggested that it will be generated by institutional reform.

There are, however, societal prerequisites for a successful democratization of EU-governance. While institutions and procedures are necessary ingredients of legitimate governance, they are not sufficient. There is a broad consensus that democratic governance also depends on certain societal conditions but scholars diverge in their assessment of the *nature* of a normatively satisfying social precondition and/or the possibility to *create* the necessary conditions for a democratic polity at the EU-level. Sociologically informed normative theories of democracy consider *organized civil society* as an important prerequisite for functioning democratic governance. In most Western nation states, the existence of civil society preceded democracy and ultimately paved its way. Via civil society organizations citizens claimed and gained inclusion into the political system. With the formation of the present democracies, specific patterns of interaction between government and civil society evolved.

In the EU, by contrast, institutional mechanisms to bolster democratic governance were introduced prior to the surfacing of a European civil society. It is rather the object of political engineering: EU institutional actors have begun to engage with civil society representatives and aim at setting favourable conditions for the emergence of a genuine, i.e. trans-national civil society in order to increase the legitimacy and effectiveness of the system. They have devised strategies to support the organization of civil society and to give it access to EU governance. It is plausible to assume that different strategies will have divergent effects on civil society and that these might vary in their contribution to enhanced and sustainable democratic legitimacy. From a practical as well as normative point of view it is thus worthwhile to explore how different strategies may affect the structuration of civil society and what this entails in terms of democratic legitimacy. Our aim is to develop a theory based analytical frame which can be applied to empirical research.

Sociologically informed normative theories of democracy differ on the question which form and structure of civil society is necessary for normatively satisfactory decision-making. In the next section of this paper, we will hence outline the normative theory of democracy which guides our efforts: the deliberative theory of democracy. Mainly conceived by the German sociologist and philosopher Jürgen Habermas in the early nineties it is one of the most vibrant normative as well as empirical research-programmes on democracy today. It has also been invoked and applied in

research on enhanced democratic legitimacy of EU-governance.² We will clarify the role deliberative democratic theory accords to civil society in effective and legitimate governance. We will show which structural characteristics civil society must exhibit if it is to fulfil its role. We will conclude that civil society's main task is to establish functioning public spheres. In the public sphere deliberation takes place which is connected both to the citizens and the institutions and actors of the political system. We will argue that in order to contribute to the establishment of such public spheres, civil society needs to fulfil at least two conditions: it must be diverse and it must be sufficiently engaged in self-reflective public interaction. More precisely, therefore, the question of our paper is whether the strategies and means employed to organize civil society input in EU governance are likely to enhance or hamper diversity and self-reflective public interaction in European civil society.

In the third section of our paper, we will explore the strategies and measures employed by the European Commission to relate to civil society. We will concentrate on the Commission because of its privileged position in EU policy making and its ambition to be an agenda setter in European politics. In addition, since the Commission has dedicated itself to transparency and civil society involvement and intensified its efforts to cooperate with voluntary associations for more than a decade now, it has developed into a major player in this respect.³ We will abstract from differences in the strategies and means of civil society involvement which actually exist between certain policy areas because of the exploratory character of our paper.

For the exploration of the Commission's policy we will employ two heuristics: the concept of 'generation' and the 'regime' concept. The 'generation' concept will help us to reconstruct stages in the evolution of the Commission's engagement with civil society and to accentuate continuity and change over time. In order to systematically explore the effects of the Commission's engagement we need, however, a theory based approach that suggests certain causal mechanisms. Therefore, we will use the 'regime' concept as a second heuristic device. According to the standard definition regimes consist of principles, norms, rules and procedures around which actors' expectations converge (Krasner 1982, Levy 1995). We will elaborate the principles, norms, rules, and procedures which constitute the 'consultation regime' of the European Commission.

In our fourth section, we will look in a systematic way on probable causal pathways linking the consultation regime to effects on the structure of civil society. We start from a sociological neo-

² See CIDEL, a project on "Citizenship and Democratic Legitimacy in the EU" co-ordinated by ARENA in Oslo within the EU's Fifth Framework Programme involving 10 partner institutions.

³ Smismans argues that among institutional actors of the EU the Commission is by far the most vigorous supporter of civil society involvement (2003).

institutional approach (March/Olsen 1989) suggesting how and why institutions can empower and constrain actors and we propose three specific pathways: the logic of capacities, the logic of commitment and the logic of competition. Combining regime characteristics with the three different pathways will provide hypotheses concerning regime effects which are relevant for civil society action and its impact on the emergence of a European public sphere. In order to arrive at a more elaborate design, we will set apart four ideal type models of the 'consultation regime'. We will choose the variations according to their relevance for conditioning civil society's contribution to deliberative democracy.

In the conclusion we will give a first tentative assessment of the presently existing consultation regime, of its in-built dynamics and of its potential to support EU democracy.

2. Legitimization of European Governance: Normative Theory of Democracy and Civil Society

The answer to our question whether and, if so, how organized civil society input can enhance multilevel democracy depends on the respective understanding of what precisely constitutes "democracy". Normative theories of democracy detail this understanding in at least four crucial dimensions. First, rather than merely define the term 'democracy', normative theories of democracy offer a justification for democracy as a norm or value which also serves to evaluate existing modes of legitimization. The ultimate justifying goal or moral foundation of any modern normative theory of democracy is the private and public autonomy of citizens, i.e. the members of the political community in question (Kohler-Koch/Rittberger forthcoming; Held 1995). From this goal or moral foundation, normative theories of democracy secondly go on to identify sets of equal subjective rights aiming at individual autonomy and the possibility to claim and defend it vis-à-vis the other citizens and the community as a whole. Based on these rights and meant to secure their enjoyment, theories of democracy thirdly project different institutions for governance put in some sort of system of checks and balances by each other and made responsive and accountable through the participatory rights of the citizens. Finally, dependent on the definition of autonomy as well as on the character of institutions or the kind of rights granted to the citizens, theories of democracy point to additional societal conditions which have to be fulfilled to make the democratic polity work legitimately and effectively.

On the questions what exactly the autonomy of the citizens is, how much we can hope to realize, how the realization can be achieved and, if so, which sets of rights and which institutional design is necessary and sufficient to this end, normative theories of democracy differ and are in constant

debate. We cannot go into this debate here and therefore do not justify our preference for the normative theory which informs the reasoning of our paper: the theory of deliberative democracy as developed primarily by Jürgen Habermas in his "Between Facts and Norms" (1996). Sticking to the four general dimensions of normative democratic theories just outlined, we will describe the central tenets of the Habermasian theory of deliberative democracy and its relevance for the question of democratic legitimacy of EU-governance.

It is one of the most distinctive characteristics of Jürgen Habermas' deliberative theory of democracy that it tries to reconcile private and public autonomy by claiming their equal and mutually constitutive character (Rehg 1996). For Habermas, public autonomy presupposes private autonomy while private autonomy presupposes public autonomy.⁴ The mutually constitutive relationship is explained and spelled out in the context of communicative rights. They are at the centre of deliberative democracy. Tying the democratic process to the generation of legitimate law, Habermas stipulates that the system of communicative rights "states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalized" (1996: 102). This claim is ultimately founded on discourse ethics. According to the discourse ethical principle only those norms can claim moral validity to which all those who are affected could agree in principle within an undistorted discourse (Habermas 1983). Applied to democracy, the principle holds that only those laws can claim legitimacy to which all subjected to these laws could in principle agree in an undistorted discourse.

In other words, the model of deliberative democracy contends that in the end democratic legitimacy depends on the possibility that democratic decisions are accepted on the basis of good reasons alone. The "forceless force" of good reasons, however, can only unfold in an undistorted discourse. Therefore, it is the specific function of communicative rights to facilitate undistorted discourse. These rights relate back to private and public autonomy as preconditions for and objective of democratic decision making. Private autonomy with "the greatest possible measure of equal individual liberties" is the necessary precondition of undistorted discourse: Only these liberties guarantee that citizens will give or withhold their consent to specific norms through the

⁴ In liberal and republican theories of democracy, the conflict between private and public autonomy is solved by putting one in a derivative relationship to the other. Liberal theories thus derive public from private, republican private from public autonomy. However, due to this hierarchization, both theories run into serious difficulties when pressed in regard to their democratic content: Liberal theories cannot convincingly explain, why their should be democracy at all as long as a legally protected private sphere in which freedom can develop to some degree is granted. Taken to the extreme, the republican model democracy may degenerate to a means for the ethical self-constitution of a bounded society in which individual liberties may be severely restraint or have only functional value (Habermas 1999).

force of good reasons alone. But citizens "achieve autonomy only by both understanding themselves as, and acting as, authors of the rights they submit to as addressees" (1996: 126). Communicative rights institutionalizing public autonomy therefore result in "[b]asic rights to equal opportunity to participate in processes of opinion- and will-formation in which citizens exercise their political autonomy and through which they generate legitimate law" (Habermas 1996: 123). Through laws citizens seek to secure and enhance their public and private autonomy and to calibrate the relationship of both. Thus, autonomy is also the result and ultimate goal of democratic law making.

The discourse ethical foundation of deliberative democracy suggests that the ideal of legitimate democratic decision-making would be public deliberation aiming at a reasoned consensus. This ideal, however, rests on two demanding presuppositions: that all citizens actually could exercise and effectively claim their communicative rights and that the citizens possess the necessary cognitive, motivational, and organizational capacities to engage in principally open-ended deliberation. Habermas concedes, that in regard to both presuppositions, decision-making through deliberation is subject to severe constraints. It is therefore the precise function of democratic institutions to guarantee the effective exercise of communicative rights and to absorb the deliberations of public discourse and channel them into legitimate decision-making.

One of the most remarkable innovations of Habermas' deliberative theory of democracy is that he conceptualizes the separation of powers in democracies as an institutionalization of different deliberative arrangements. While these arrangements generate legitimacy through their capacity to base decisions on good reasons, they also address the need for timely and effective governance as well as the problem of cognitive and motivational constraints of the relevant actors. Habermas claims that the internal institutional designs of the legislative, executive and judicative power ensure that their decisions can at least be understood as being based on good reasons. Each of the powers concentrates on one set of reasons: the legislative on the ethical question of collective self-realization, the executive on the pragmatic question of effective application and implementation of law, and the judicative (here: the supreme court) on the moral question whether a specific law equally considers the liberty and benefit of all.

So far, we have described deliberative democracy's conception of autonomy, subjective rights and institutions for governance. They are linked by the notion of "good reasons". In the enlightenment tradition, autonomy is basically the capacity and opportunity to act for good reasons alone. Communicative rights aim at securing both. Institutions for governance are designed to make those rights effective and to take reasoned decisions given the real world constraints of ideal discourse. This conception relies, however, on a communicative and societal

infrastructure. As non-institutionalized stand-in for undistorted discourse, deliberations in the public sphere have important functions. First and foremost, through constantly re-interpreting private and public autonomy in the light of changing societal environment, deliberations in the public sphere expose new themes and issues for governance. Building up societal consensus in the public sphere generates communicative power which “lays siege” to political institutions and forces them to take up the relevant themes and issues. Second, in order to offer decisions based on good reasons, the institutionalized deliberations in the formal arenas of democratic decision-making feed on the reasons generated in the public. Third, it is the public which ensures the cohesion and coherence of certain types of reasons used in formal arenas. Only in the public sphere ethical, pragmatic and moral reasons are balanced against each other and set in relation. Fourth, while the foremost aim of the formal arenas of decision-making is to close debate at some point by decision, in the public sphere debate is always kept open and thus retains the potential for better reasoned decisions. Finally, the public exercises control by scrutinizing the reasons provided by actors in institutionalized deliberative arrangements. In short, for their effectiveness and legitimacy, institutionalized democratic decision-making procedures depend on a functioning public sphere.

The public sphere, however, is itself dependent on a societal infrastructure as its deliberations need to be organized to some degree. This infrastructure is provided by civil society. Habermas conceptualizes the public sphere as a “communication structure rooted in the lifeworld through the associational network of civil society” (1996: 359). He argues that the “institutional core [of civil society] comprises those non-governmental and non-economic connections and voluntary associations that anchor the communication structures of the public sphere in the society component of the lifeworld. Civil society is composed of those more or less spontaneously emergent associations, organizations, and movements that, attuned to how societal problems resonate in the private life spheres, distil and transmit such reactions in amplified form to the public sphere” (1996: 367). Habermas thus distinguishes civil society's organizational core from those interest groups which in his understanding only prey on the infrastructure of the public in order to mobilize support which increases their influence in the institutionalized decision-making process. The entities Habermas envisions as organizational core of civil society, by contrast, are intermediaries genuinely relating citizens' experiences in the private sphere to the formal political decision-making processes via the public sphere

In regard to this conceptual distinction between the institutional core of civil society on the one hand and the organizations resembling the image of the more traditional lobbying organization on the other, four points seem worth mentioning. First, we think that this distinction is best

understood as referring to the communicative practices of organizations rather than to the type of interests they represent. Second, in our opinion Habermas' emphasis on "non-economic and non-political connections" must not be understood as excluding political parties or economic interest organizations from civil society *a priori*.⁵ Third, every organization's actions are constrained by certain pragmatic imperatives. In regard to interest representation, these imperatives might distort the genuine transmission of themes and issues between the lifeworld and the political system and rather create vested interests. We see no reason, however, why certain types of organizations should be exempted from the influence these imperatives exert *a priori* and to sort them out from a normative point of view. Furthermore, civil society organizations are primarily responsive to their membership. But membership is always exclusive. The reason for this exclusiveness is the limited capacity of every private citizen to engage herself in associations rather than denial of access by organizations. To us, two conclusions seem to follow from these points: On the one hand, a functioning civil society should be defined by its structural characteristics rather than by a certain type of voluntary association. On the other hand, civil society must be tightly connected to the public sphere in its constituting practices.

This means first, that civil society has to represent the diversity of lifeworldly interests in the public. It must ensure the inclusion of a maximum range of voices in public deliberations. This implies that, secondly, the influence of civil society has to be exerted through the public sphere: "Not influence per se, but influence transformed into communicative power legitimates political decisions" (1996: 371). Sociologically speaking, the public sphere therefore depends on a diverse civil society. Normatively speaking, however, the public sphere precedes civil society. The reason is that also civil society organizations have to cope with pragmatic imperatives and the problem of exclusiveness. The public sphere, by contrast is the realm which makes associational activities transparent for non-members, too. But it is through the detour of deliberations in the public sphere that also their members can form independent opinions necessary for the exercise of their public autonomy. In addition, not all interests and issues can be organized to the same extent and at the same costs. While lobbying in the political system often requires substantial financial and human resources, the principal openness of the public sphere lowers the barriers for interest representation.

If at all, it is in the public sphere that the fate of a political argument depends on the merit of good reasons alone rather than on organizational capacity. The opportunity to contribute to public discourse is defined by the communicative rights accorded to each individual. Thus, a

⁵ In a later passage of the relevant chapter in "Between Facts and Norms", Habermas for instance explicitly includes political parties in civil society.

diverse civil society can only develop on the basis of a legally protected private sphere (1996: 371). But Habermas maintains that this is not a sufficient condition for civil society's reproduction: "[B]asic constitutional guarantees alone, of course, cannot preserve the public sphere and civil society from deformations. The communication structures must rather be kept intact by an energetic civil society" itself (1996: 369). Third, therefore, civil society must be engaged in its own reproduction and the reproduction of the public sphere. In Habermas' opinion this can only be done by self-reflective horizontal interaction of civil society organizations in the public. The resulting discourse is reflective in the sense that it constantly communicates a "subtext" about civil society's identity and role in the political system: "Whatever the manifest content of their public utterances, the performative meaning of such public discourse at the same time actualizes the function of an undistorted political public sphere as such" (1996: 369).

To sum up: From the vantage point of deliberative democratic theory, it is via the public sphere that citizens achieve their public autonomy and meaningfully exercise their participatory rights. The precondition for being subjected to the force of the better argument alone is citizens' private autonomy constituted by basic individual liberties. Civil society contributes to enhanced democracy insofar as it contributes to a vibrant public sphere. It does so when it represents the diversity of lifeworldly interests and engages in self-reflective public and horizontal communicative interaction.

When asking how this theory can be applied to the question of the EU democratic deficit, it is worth recalling that autonomy is the ultimate normative foundation of democratic theory. While the effective protection and exercise of autonomy may necessitate different institutional means in different contexts, there is no reason why this standard should be applied less rigorously at the level of the EU. It seems unquestionable that EU-governance has an impact on the private and public autonomy of its citizens. From the standpoint of a normative theory of democracy, the EU must thus be accountable in terms of democratic standards aiming at securing autonomy. Based on the theory of deliberative democracy, there have been three basic approaches to the democratic deficit of EU-governance. The first concentrates on the immediate conditions of deliberation in EU opinion- or decision-making bodies. These conditions are provided by rules and procedures which can be more or less conducive to a deliberative style of decision-making (Jacobson/Vifell 2003, Joerges/Neyer 1998, Joerges 2000; Porte/Nanz 2004). The second approach focuses on the general institutional set up of a deliberative supranational polity and elaborates on the deliberative division of labour between institutions (e.g. Schmalz-Bruns 1999,

2001, 2002).⁶ The third approach looks at the emergence of a European public sphere as the non-institutionalized check of institutionalized decision-making in the EU (Kantner 2002, Peters 1999, Risse 2002). Because each of these approaches emphasizes a different important aspect they clearly can complement each other fruitfully. Still, one important component is lacking: civil society.

Concentrating on institutionalized rules and procedures, the first approach does not pay much attention to the inclusiveness of deliberative processes and the problems which may arise due to the fact that the specialized deliberations in institutions do not take into account all three sorts of reasons (pragmatic, ethical and moral). By contrast, the institutional design of deliberative supranationalism ensures completeness of the institutional order in this regard. However, this concept is not very explicit on the societal preconditions of deliberative decision-making and their existence at the European level. Deliberative supranationalism does not direct its attention to a transnational public sphere or civil society. Approaches focusing on the emergence of a European public sphere fill the first part of this gap. But without backing of a diverse, publicly and self-reflectively communicating civil society, the public sphere may be captured by professionally organized media campaigns. These may be able to produce some sort of permissive consensus, but citizens will not constructively engage in the initiation and formulation of policies.

We therefore contend that the normative thrust of deliberative democratic theory can only be secured by legally guaranteed rights, public discourse and deliberative decision-making institutions complementing each other in the protection and enhancement of private and public autonomy. As for the rest of the paper, we aim at clarifying the consequences of the EU-Commission's consultation regime for the emergence and structure of a European civil society. From the vantage point of deliberative democracy, civil society can assume its proper role for enhanced democratic legitimacy when it is able to contribute to the emergence of a European public sphere by representing the diversity of lifeworldly interests and engaging in public, self-reflective and horizontal communicative interaction.

⁶ Rainer Schmalz-Bruns for instance suggested looking for institutional substitutes for the separation of powers and their procedural designs on international level (1995: 362-365). The result would be institutional settings in which “arguing’ as a mode of interaction is protected by adequate procedural barriers against its displacement by the mode of ‘bargaining’” (1995: 366. Our translation).

3. Organizing Civil Society Input in the EU

The European Commission has traditionally sought to consult external experts and interests. From the very beginning, the Commission was aware that it could only exercise its exclusive right to initiate European policies in an effective way when it would be able to give good reasons to its arguments and gain stake-holder support for its proposals. Consultation strategies have varied over time with the evolvement of different stages of European integration and shifting political objectives. To grasp the Commission's consultation policy and its likely effects on civil society and the production of a European public sphere, we employ a twofold heuristic.

In order to grasp the Commission's changing strategies to organize societal input, we will bring up the concept of *generations*.⁷ It serves as a heuristic tool to accentuate continuity and change. However, because we want to go beyond a systematic description of the Commission's policy and aim at investigating how it affects the structure of civil society and the European public sphere we need an analytical concept with explanatory power. Therefore, we use the concept of *regime* as a second heuristic device. We draw on a sociological neo-institutionalist understanding of *regime* as it has been developed in the regime debate in International Relations. Regimes are institutions structuring cooperation among independent but interdependent actors by spelling out principles, norms, rules, and procedures around which actors' expectations converge (Krasner 1982, Levy 1995).

We take from regime theory that variations in regime characteristics have an effect on patterns of cooperation. The theoretical challenge is to link specific regime properties to action patterns and effects on the structuration of civil society and the European public discourse. For analytical purposes we distinguish between 4 ideal type models of the Commission's consultation regime. They are designed in a way that they correspond to 4 distinct kinds of civil society engagement and civil society contributions to a European public sphere conducive to the concept of deliberative democracy. Our empirical task will be to find out what kind of consultation regime has evolved from the successive generations of consultation. In an empirical research projected just started, we will examine the general characteristics of the EU consultation regime and distinctive variations when put into practice by different institutional actors such as individual General Directorates of the Commission.

⁷ This draws on the conception of the three "generations" of human rights which have developed over time in international relations. Each generation of human rights is built on the achievements of the former but adds new components. Several generations live and develop parallel to each other; together they form a family though each generation has a distinctive profile. For an attempt to categorize societal participation in European administrative proceedings by "generations" see Bignami (2003) who, however, uses the concept in a different way than we do.

The Commission has stepwise, and at the beginning more at the dictates of chance, developed a policy of consultation and cooperation with external, non-governmental actors. Since the early 1990s, Commission documents reveal the emergence of a more reflective approach in line with a more elaborate conception of “good governance”. Most noteworthy was the shift in language from “consultation“ to “participation” and finally “civil society”. But significant changes also occurred in the implementation of the Commission’s consultation policy though not all General Directorates have followed the general trend and variations across policy fields persist. Both the Commission’s conception of good governance and its activities are fraught with ambiguities and inconsistencies and it has been questioned whether they are consistent with even a rather modest conception of democratic legitimacy.⁸

A *first generation* governing the Commission’s relation with societal actors dates back to the early days of European economic integration. It was dominated by the objective to enhance the quality of the Commission's regulatory output in EEC policies. To this aim, the Commission established close relations with economic experts, with business, and with the European associations of trade and industry, of farmers, of the diverse professional interests and with employers’ associations and trade unions. Their input and support was perceived a necessary prerequisite for improving the quality of decisions and the efficient implementation of Community policies. There was hardly any dispute on objectives, and procedures were mostly informal allowing the Commission the largest possible degree of discretion in the involvement of societal actors.

The consultation of general interest groups (“NGOs” in the narrow sense of the term) was – apart from the noteworthy exception of the Economic and Social Council (ESC) – irregular and ad hoc. The Commission addressed a rather small circle of general interest representatives such as environmental and consumer organizations which were perceived as directly affected by common market policies. Consultation was mostly ad hoc and happened in bilateral contacts, multi-lateral meetings and issue-oriented hearings with directly concerned experts and stakeholders (from industry, agriculture, trade unions and selected NGOs). In 1992, the Commission has appreciated this type of dialogue as “valuable to both the Commission and to interested outside parties” (Commission 1992).

With the *second generation* the Commission responded to what it perceived as fading permissive consensus. In its reading, this fading was exposed in the failure of the Maastricht Referendum in Denmark and its near failure in France. In response to an increasingly critical stance in the

⁸ see f. e. the comments on the Commission’s White Paper on European Governance, Joerges et al. 2001 or Kohler-Koch forthcoming.

member states' populations, the Commission was no longer exclusively focussing on the epistemic quality of its policy proposals but became concerned with a broader public acceptance of EU politics in the member states. 'Bringing the EU closer to the people' was introduced at the 1996 Turin Summit 1996 and became the norm to follow by all EU institutions.

Facing an intensifying debate on a European legitimacy deficit during the 1990s, the Commission has expanded consultation to new actors and introduced new instruments for consultation. It developed a more systematic policy of funding which aimed at giving support to the representation of weak general interests and was meant to stimulate networking amongst the respective groups. The Commission changed its policy from including interests more or less directly affected by common market policies such as environmental and consumer's groups and also addressed general interest groups in fields like human rights and women's rights. In addition, the Commission has strived to include individual citizens into EU policy making. In order to establish good practice in public-private interaction, all types of organized societal actors were encouraged to develop and adhere to a self-imposed "code of conduct" and, in order to improve transparency, associations were requested to register in a newly implemented "database of civil society organizations" (CONECCS).

The second generation of consultation policy is characterized by broadening and deepening of societal involvement. Existing instruments such as consultation and funding have been adjusted to new political objectives and extended to new actors. Some degree of institutionalization has been achieved and civil society actors became accepted as 'partners'. At the same time, the Commission was drawn into system-wide efforts to increase transparency and access to documents in all stages of the policy process which has enhanced the general conditions for civic engagement in EU politics (de Leeuw 2003; Peers 2002).

The transition to a *third generation* was accentuated by the publication of the 2001 White Paper on European Governance. The White Paper is the most explicit and comprehensive attempt so far to define the principles and norms of involving civil society and to discuss the adequacy of involvement instruments (Commission 2001). These instruments were elaborated further in the 'follow-up process' substantiating and putting into practice the claims of the White Paper to ensure "openness" and "participation".

The Commission has extended the scope and variety of instruments to give a wide range of European, national and local societal groups and individuals an opportunity to make their voices heard in the EU policy making process. In its communication on consultation of December 2002 which supplements the White Paper, the Commission has regulated the involvement of "civil society" by setting "minimum standards" for consultation (Commission 2002). The importance

of “civil society” has been underlined further by introducing the principle of “Participatory Democracy” in the EU Constitutional Treaty. This upgrading of societal participation falls, however, short of any legally binding duty which can be judicially enforced by third parties (Bignami 2003: 17).

Supporting the third generation of consultation policy is a new effort to enhance transparency. The Commission has taken an increasingly active stance in recent years manifested in launching the European transparency initiative in November 2005 and published a Green Paper in April 2006 (Commission 2006). The transparency initiative goes well beyond the EU information policy of the 1990s establishing information rights and granting access to EU documents (Bignami 2003; Brüggemann 2005): By disclosing information on actors involved in Community policies, on their contribution to political processes and consultations, and on beneficiaries of Community funds, the initiative provides insight in the ongoing EU policy process.

When assessing continuity and change in the successive generations of the Commission’s consultation policy, it looks as if there had been a major shift. The indication would be the increasing use of the “civil society” terminology in Commission documents and a re-definition of objectives. The instrumental logic which was so pronounced in the first generation of consultations has been gradually replaced by the commitment to partnership and cooperation. On closer examination, however, it becomes obvious that the Commission retains a considerable degree of discretion which confines the autonomy of societal actors. Furthermore, a careful reading of the documents and observation of rules and practices in channelling the access to consultation disclose that the Commission still leans toward an output oriented concept of good governance. A certain preference for an instrumental approach is also evident in the Commission’s funding strategy: More often than not, funding is closely linked to the thematic programmes of the Commission GDs and their specific information and consultation needs (Friedrich forthcoming). The reasoning supporting the Commission's European Transparency Initiative also gives rise to second thoughts when arguing that the administrative burdens associated with transparency are "a necessary investment in public support" (Commission 2006: IV).

4. The Consultation Regime, the Structure of Civil Society and the Public Sphere

The generation heuristic was meant to give us an idea of the evolution of the EU-Commission's consultation policy. We now ask how a consultation regime may have an impact on the structuration of civil society and the European public sphere. In a next step we will differentiate

between 4 ideal type models of a ‘consultation regime’ which are supposed to correspond to distinct ways of channelling civil society action and support or suppress a European public discourse conducive to strengthening deliberative democracy.

Before we turn to explore the Commission’s consultation regime, we have to address the question on what grounds we call it a *regime*. In international relations regimes are mostly negotiated agreements and partners adhere to its stipulations because they share authorship. Why call the consultation policy of the Commission a *regime*? The reason is that the Commission is responding to external demands and that in the course of interaction the meaning, rules and routines are changing. To put it in a nutshell: A regime is what people make of it: It is neither under the control of the authors of a policy nor is it fixed. Ambiguity is a trademark of regimes, the link between principles, norms, rules, and procedure is not necessarily logically consistent and because this makes them open to rival interpretation they have an inbuilt dynamic.

The second pertinent question is why we should expect the consultation regime to make a difference in the performance of Europe’s civil society. From neo-institutionalism (March/Olsen 1989) we draw that institutions empower and constrain actors. March and Olsen argue: “There are constitutive rules and practices prescribing appropriate behaviour for specific actors in specific situations. There are structures of meaning, embedded in identities and belongings: common purposes and accounts that give direction and meaning to behaviour, and explain, justify, and legitimate behavioural codes. There are structures of resources that create capabilities for acting.” And because institutions are more or less enduring they are “relatively invariant in the face of turnover of individuals and relatively resilient to the idiosyncratic preferences and expectations of individuals” (March/Olsen 2006: 3).

Though rules and procedures are seen by many as the building blocks of a regime, the principles and norms that go with them make a difference. The principles and norms of a consultation regime define the common purpose: They identify what kind of input is appropriate and give legitimacy to one approach over the other. Furthermore, defining the objective of a consultation in a distinct way is equal to classifying actors as being more or less important. Different principles and norms of a consultation regime, therefore, empower and constrain actors differently. Rules and procedures have an equally discriminating effect. They exert a gate-keeping function on access and voice. Consultation procedures may be designed in a way that give precedence to expert advice and contribute to forging epistemic communities whereas other procedures may support the public exchange of dissenting opinions.

On this basis it is safe to argue that not all consultation regimes will be conducive to enhancing deliberative democracy as we read it. However, it is not easy to decide which regime

configuration will have a positive effect because regime components do not translate one to one into action patterns. Therefore, to arrive at sound theoretical assumptions, we, at first, recall the crucial characteristics that civil society has to exhibit to shore up a European public sphere and then introduce three causal mechanisms that relate regime attributes to civil society features.

We remind the reader that in our conception civil society is not comprised of a certain type of associations. It is rather founded on a particular 'logic of social action' (Gosewinkel et al. 2004): Civil society is on the go when the diversity of life-worldly interests is represented in public deliberation and when the interaction of a self-reflective public accumulates to communicative power. Crucial characteristics of civil society presence in EU consultations are 'ownership', diversity, publicity, and reasoning. '*Ownership*' stands for the independence of those who raise their voice from EU institutions; full ownership is equal to being autonomous in the definition of the legitimacy of an argument, to put any salient issue on the agenda, to have the right to be heard and that the arguments presented are taken into due consideration. '*Diversity*' refers to the inclusiveness of the debate. A comprehensive representation of views ought not to be hampered by unequal abilities to get organised and to articulate a concern in public. '*Publicity*' necessitates not just transparency and access to the fora of exchange but also that interaction takes place under public scrutiny. '*Reasoning*' refers to the need of justification and the scope of arguments which should not be narrowed down to a uni-dimensional understanding of rationality.

In order to specify the likely causal mechanisms relating a consultation regime to civil society action, we suggest three pathways : Capabilities, commitment and competition.

Consultation is for the most part a matter of supply and demand, of costs and benefits dependent on the salience of the issue at stake and the distribution of resources. It is common knowledge that apart from the dilemma of collective action (Olson 1994), general and diffuse interests have more difficulties than narrow and partial interests to get organised and raise their voice. This incapacity is aggravated by the multi-level construction of the EU system. The diffusion of jurisdiction across levels and across a multitude of decision-making arenas makes an effective contribution to the consultation process a costly business. This starts a 'vicious circle' for general interest groups: Due to their weak starting position they have little influence and because they have little to offer to their constituencies, they have even less capacity to mobilise social interests and gain strength.

A consultation regime may redress the weakness of general interests and thereby contribute to a broader and more balanced representation of interests. Rules and procedures may reduce transaction costs and they may do this in a discriminatory way. The most obvious intervention in favour of increasing the plurality of views is the funding of civil society organizations. But also

the framing of principles and norms is essential: When favouring economic efficiency, priority will be given to those who can supply expert knowledge, whereas emphasizing input legitimacy will support the voicing of general and diffuse interests. Any such 'affirmative action' may incite a 'virtuous circle': It may induce civil society organizations to invest in efforts to be represented at the European level as the prospect of influence becomes brighter.

To sum up: Policy consultations in the EU function very much like a market where actors exchange highly valued goods (Bouwen 2004) and where the power over resources is decisive (Kohler-Koch/Eising 2005: 48). But just as in any other market, the allocation mechanisms are framed by institutions. A consultation regime can increase the capacity of civil society to develop ownership and to voice a diversity of positions in the public debate. By doing so, the regime has consequences for the structure of European civil society and can improve the conditions for a more vibrant public sphere.

Institutions do not just make actors more or less capable to play by the rules but also set the norms and rules of appropriate behaviour. Depending on the framing of principles and norms and the design of rules and procedures, a consultation regime will to different degrees support the commitment to strengthening civil society action. This applies to all actors involved because even those organizations that represent general interests and speak in the name of civil society are of two minds. Civil society organizations, by definition, are dedicated to furthering the open and public exchange of reasons that bring into open the diversity of views and stimulate public deliberation but they are also subject to the logic of interest representation. As organizations they have to look for sustainable support by members, supporters and donors and, therefore, have to act in favour of their own constituency. Pushing the interests of their group makes them adhere to the same logic of lobbying that traditionally is pursued by self-interested pressure groups and that runs counter to the proclaimed open dialogue in civil society.

The Commission on its part has to square the circle and organise the consultation process in a way that fulfils the demands of output and input legitimacy. Whereas problem-solving efficiency is mostly equated with mobilizing expert advice, responsiveness to the wider interests in society and the diversity in tastes and values is linked to interacting with civil society. A regime that stipulates the principle of 'participatory democracy' and the norm of 'a wider involvement of civil society' may tip the balance in favour of input legitimacy. A sceptical assessment will question that a merely 'declaratory regime' that is not supported by corresponding strict rules and procedures will have such an impact. Social institutionalists point to empirical evidence that even opportunistic actors might be captured in what has been called "argumentative entrapment" (Risse 2000: 17). Those who do not share a 'principled belief system' (Goldstein/Keohane 1993)

may, nevertheless, out of purely instrumental considerations agree to institutionalizing participatory principles and norms. As soon as an actor such as the Commission, has publicly committed to these principles it is under pressure to comply. This pressure increases with the number of other important actors speaking out in favour of the principle and with rising expectations concerning the public accountability of the Commission. Ambiguities in the phrasing of the principles and norms of a regime and inconsistencies between its individual components invite divergent interpretations and alleviate any commitment. When, however, the entrapment works and the Commission is acting in favour of an open and non-discretionary "civil society" involvement, the range of organizations and individual voices that seek and gain access to the EU policy-formulating process will become more diverse. To the extent to which the new actors personify the idea of a self-reflective public and engage in communicative interaction, this particular regime becomes more robust.

Furthermore, if civil society begins to communicate in the setting of such public multilateral dialogue, a Habermasian "subtext" about the identity of the actors involved in the communication process may emerge and implicitly commit the respective organizations to the reproduction of civil society at the European level through their self-reflective, public and horizontal communicative interaction.

As participation increases with the opening to 'civil society', an additional mechanism, namely competition, may reinforce this interaction. Already now "ear-time" is scarce when societal interests want to get access to the Commission. With the expansion of the consultation regime to even more actors the competition to get the attention of the Commission will become even more intense. Depending on issue and actor properties competition may encourage some organizations to turn to the public. The capability to mobilize some sort of public attention might compensate for lack of direct access.

Important to our argument is now, that reverting to the public in order to increase the responsiveness of the Commission might have the side effect of an increased and wider public discourse. Political mobilization does not translate directly into political influence; rather, it has to be channelled through the communicative power of the public sphere. Competition is supporting this process: Also civil society organizations compete over the attention and support of the public and are, therefore, engaged in a strategy of differentiation. They will explicitly associate *with* or dissociate *from* specific concerns and advocates. The more open a consultation regime is, i.e. the more it stipulates to consider all relevant interests and contributions, the less likely it is that civil society organizations simply forge strategic alliances or engage in short-time lobbying

coalitions because this might devalue the sincerity of their arguments in the long run. This will hit them more than other organizations because arguments is all they have to offer.

When a regime is mainly built on providing expert advice to policy-makers, an extended public debate will be considered an encroachment on the consultation process undermine its efficiency. This way it is not just the competition stemming from structural conditions but also the institutional framing of appropriate behaviour which makes a difference. Other things being equal, in a regime more open to civil society voices, competition might lead to publicity whereas in a more technocratic consultation regime competition will be managed by discretionary intervention and bilateral acquiescent interaction between the Commission and organizations.

In the following, we will present our four models of consultation regimes. They can be attributed to different principles, norms, rules, and procedures. These variations are expected to cause divergence in EU-society relations and to have different effects on civil society involvement in EU affairs. Individual models may be close to real life patterns of EU consultation developed over the three generations and reflect evolutions in the EU system of governance. Even so, they should be taken as theoretical abstractions from reality designed in a way to emphasize variant consequences for the structuration of civil society and the European public sphere. The ‘expert model’ depicts a consultation regime geared to the functional needs of a uni-dimensional system. The ‘expanded expert model’ is addressed to a more complex system which gives room to a more pluralist structure of interest representation. The ‘partnership model’ is based on a different conceptualization of state-society relations as it is prevalent in the debate on EU governance. Last, not least, the ‘civil society model’ reflects a concern with the wider implications of policy-making in the EU.

The *expert model* is embedded in an understanding of the EU as a supranational market generating system. The overriding principle governing consultations is the respect for the Treaties. The ensuing norms are to contribute to the efficient translation of Treaty provisions into common policies and to refrain from questioning the political ‘acquis communautaire’. Consultations shall support the Commission in its endeavour to find optimal solutions to preset objectives and support efficient decision-making. High priority is put on expert knowledge and consensus orientation. The regime corresponds to a technocratic reading of EU policy-making which is based on the factual belief that a ‘one best solution’ to problem solving is possible and on the (normative) recognition of the authoritative setting of policy objectives by governments. The rules of the expert regime model are implicit and no formal procedures are envisaged: Apart from Treaty provisions, it is up to the discretion of the EU institutions to decide who should be consulted, when and how.

Consultation patterns will vary according to the perceived need of EU institutions, most pronounced in the case of the Commission. Interaction with societal actors will be highly selective, under the full control of the Commission and mostly in the form of bilateral interactions. When compared to the necessary ingredients of civil society action, none is present: The regime does not grant ‘ownership’ to non-state actors; it does not invite diversity, stays away from public discourse, and accepts no other rationality than the well-functioning of the market. All the structural deficiencies that impede civil society to get involved in EU affairs and give input to public deliberation are accentuated by this regime. No instruments are provided to redress the inferior capacity of diffuse interests to raise their voice; the commitment of civil society organizations to inclusiveness and an open public debate runs counter to the regime’s emphasis on consensus and acceptance; competition is confined to in-door exchange relations. Rather than leading to a public sphere as required for normatively satisfactory democratic governance, the resulting form of interest intermediation will be a closed shop where privileged actors meet.

The *expanded expert model* fits the reading of the EU as a ‘regulatory state’ (Majone 1996) that due to its extended jurisdiction has an impact on a broad range of interests in society. But in spite of the high salience of EU policy making, the legitimacy of the system is still based on the fundamental constitutional agreement between member states and a technocratic, functional approach to problem-solving. Therefore, there is no shift in the guiding principle of the regime: Consultations should contribute to the regulatory success of the EU. The norm is that stakeholders should be heard because they are expected to contribute to the now wider agenda of efficient problem solving. There are, however, no general (let alone democratically sanctioned) rules and procedures envisaged to regulate the access of stakeholders to the consultation process. Thus, the definition and the selection of stakeholders is still up to the Commission.

The acknowledgement that stakeholders should have a say in EU policy making introduces, however, a new implicit understanding of appropriateness. The recognition that interest representation should spread beyond both sides of industry works in favour of introducing more multilateral fora and enlarging established consultative committees ‘with socio-economic representation’. Furthermore, the discretion of the Commission could be put under siege. Public reference to the normative connotations of ‘including stakeholders’ could exert pressure on the Commission to be less restrictive in its criteria or less selective in their application. This gives weak general interests some bargaining power and adds to their capacity to make themselves heard.

A more inclusive practice may emerge but the regime, still, does not grant societal interest groups 'ownership'. The consultation regime is also very restrictive concerning the other dimensions of civil society: The diversity of positions is confined to the preconceived mission of the 'regulatory project'. The *Leitidee*, rules and organised practices work hand in hand to sustain the predominance of EU institutions, especially of the Commission, in defining what is at stake in EU regulation and, consequently, what constitutes a legitimate stakeholder view. Though non-state actors are invited to bring in the 'general' expert knowledge, their input is expected to add to the well functioning of the system as it stands. Their contribution is important to improve system performance. And because this objective is beyond debate, dissenting votes are not particularly welcomed and even if they are expressed, they receive little publicity. In other words, the expanded expert regime is fully in line with the logic of output legitimacy.

Will capabilities, commitment and competition gear interaction patterns in this regime in a particular way? The expanded expert regime will stimulate consultations to be conducted on a broader basis. Besides expertise needed for more diverse policy areas, the implementation of deeper regulatory policies becomes more dependent on public acceptance. Therefore, it will be worthwhile for a greater number of interest groups to get organized at the European level and this also applies to civil society actors. Increased competition may as well motivate closer collaboration to augment capabilities by combining forces and lowering costs through synergy-effects. The strength and proliferation of actors competing for influence will, however, not change the nature of the consultation regime.

The objective is to serve the functional requirements of the common enterprise and – apart from governments – it is up to the Commission to define what is needed. The Commission is consequently still the gatekeeper to channel access. In line with the established principle and norms of the regime it will grant access to organizations that deliver expert knowledge and insight indispensable for efficient problem solving and political acceptance. The Commission will be engaged in a multitude of bilateral relationships and can pick and chose among civil society associations suitable candidates for cooptation. Using public attention to elicit responsiveness by the Commission is thus unlikely to happen. An open public debate, let alone a self-reflective public discourse are absent because all organizations, including civil society associations, have internalized the competition rules and are trapped in a balance of power game. The resulting pattern of interest intermediation is pluralist lobbying.

The "*partnership model*" constitutes a new orientation in principle because it acknowledges the political character of the EU and the need to gain democratic input legitimacy in addition to intergouvernementalism. Besides strengthening mechanisms of representative democracy

through an institutional up-grading of the European Parliament, the direct input of societal associations is called for. Consultations should conform to the principle of 'partnership' and respect the norm of including a broad array of interests. Thus, civil society organizations representing general interests come to the fore. Though the right to be consulted is generally acknowledged, it is only institutionalized in selected policy programmes on the initiative of the Commission. Consequently, rules and procedures vary considerably between policy fields. Whereas in some fields they give elaborate guidelines to implement the right to be consulted, rules and procedures in other fields are still informal and pliable to the needs of the Commission. The Commission has authorship in the institutionalization of consultation rights and in the handling of informal consultation practice.

Introducing the principle of partnership and shifting attention to input legitimacy does, however, affect actors' orientations and has an impact on patterns of interaction. The final decision whom to consult, how and when might still be up to the Commission but its discretion is effectively restricted by the convergent expectations generated by the regime. With increasing emphasis on linking EU policy to the people, it is in the interest of the Commission to comply with the new understanding of appropriateness. It implies a commitment to involve civil society already in early stages of policy development and even agenda setting and to engage not only the 'general interests' already well organized and established at the European level but also take in the diverse voices at the grass-roots level. In line with this commitment, the logic of appropriateness calls for encouraging and supporting the organization of interests which seem important as expressions of lifeworldly diversity. The regime, therefore, provides rules, procedures and instruments to support interests not yet well represented and to make consultation more open and easily accessible. Both, the legitimacy attributed to civil society associations, their active involvement in the consultation process and the material support they get in terms of funding and organizational assistance will boost their capacity to act.

Also, the increasing number of organizations makes it necessary to further expand multilateral consultation. Open consultation procedures are developed and information policy is geared up in order to provide or create the necessary knowledge basis for constructive dialogue. The commitment to a general and equal right to be heard further necessitates transparency in regard to the Commission's reception and utilization of civil society input. As there is no longer a principal or pre-defined limitation on interest representation, ethical and moral arguments are fully accepted as legitimate contributions to opinion-formation.

A distinctive feature of the partnership regime is, however, that it is geared to selected policy fields and, as a consequence, its implementation is dependent on some pre-conceived notions of

policy relevance and on the deficit-analysis the Commission makes in light of its perceptions and interests. Though the numbers of organizations engaged in the European consultation process broadens, partnership is selective and because consultation is aimed at specific policy outputs, expertise and acceptance is still a highly valued currency. The regime provides instruments to enhance the capacity of weak actors to deliver and, thus, contributes to lessen the distortions of unequal competition. But the structural difficulties to organise and articulate the lifeworld interests are not significantly lower than before. Rather, the opening of a multitude of consultation opportunities adds to the costs of interest representation and may overburden especially those who defend general interests.

Above all, it is the sector approach that gets in the way of an emerging European public sphere. Even if the regime encourages interaction between different kinds of interests in an open multilateral consultation process and even if this debate might have public resonance across levels of governance, it is still a segmented public. Eriksen has made a strong argument that such 'segmented publics' which are evolving in certain policy fields are demanding with regard to producing an overarching communicative space that would qualify for democratic policy. (Eriksen 2005: 355). Besides, only few policy fields qualify for producing public resonance so that the patterns of interest intermediation resulting from the partnership model of consultation rather correspond to public elite competition.

Using the label "*civil society*" already indicates that this model is supposed to set principles, norms, rules, and procedures for consultation in a way that paves the ground for an optimal involvement of civil society and the emergence of a European public sphere. It corresponds to an understanding of the EU as a political system that demands democratic legitimacy but in its present state lacks the adequate societal infrastructure. A fitting consultation regime is considered to alleviate the problem.

'Ownership' is constituted in principle and supported by norms, rules and procedures. The right to have a voice in a consultation process is extended indiscriminately and the exercise of this right is not conditioned on grounds of functional expediency. Formal rules define the criteria for granting access, providing information, and organizing the consultation process. To minimize the danger of a selection bias, rules are defined in public negotiations and implementation is subject to monitoring.

Because the representation of diversity is not only conditioned by rights but also by resources, the regime includes measures for capacity building. The choice of instruments and the selection of recipients for funding are norm based and legally formalised so that they are no longer at the discretion of the Commission. Furthermore, procedures are institutionalized to monitor the

effective implementation of the right to be heard and to hold the Commission accountable for giving ‘due regard’ to consultation input.

The principle of transparency is substituted by the principle of publicity. The regime calls for an active information policy adding the obligation to publish information to the already existing right to ask for and get information on demand. The objective is that the inputs of all actors involved as well as the Commission’s evaluation of the arguments presented are displayed in public. To avoid that providing information degenerates into a PR exercise and because publishing consultation procedures always is a tricky balancing act between rival interests and functional needs of the negotiation process, criteria have to be agreed upon and spelled out in public to allow for accountability. Publicity will be further advanced by prioritizing multilateral consultation procedures and discriminating bilateral consultations because the latter are likely to contravene the right to equal participation and will not bring out controversial positions in public.

The procedures of this consultation regime stipulate meetings on a fairly regular basis and in short intervals so that the discourse is continuous and the exchange of arguments can lead to accumulated knowledge.

In such an institutional setting the unequal endowment with capabilities is not longer a serious drawback for the articulation of civil society. The availability of material support and general access criteria help to organise diffuse interests and to give expression to a wider variety of views. The diversity and number of actors at the European level thus increases and subsequently the competition for public attention. The plethora of civil society's voices calling for attention can not be filtered by the Commission authoritatively without recourse to an emergent public opinion. This way positions will prevail that are backed by the communicative power of a European public sphere. To the extent that the consultation regime brings out the diversity of civil society’s concerns and supports communicative interaction, reality will come close to the normative expectations set out in the theory of deliberative democracy.

5. Enhancing Democratic Legitimacy by Organizing Civil Society Input?

We argue that the regime approach in combination with the logic of capacity, commitment and competition provides sound hypotheses concerning the potential effect of a consultation regime on the structuration of civil society and a European public sphere. In order to assess the likely impact of the Commission’s consultation policy as it evolved over several generations, we have introduced four distinct consultation regime models. The four models exhibit distinct features

according to the variations in principles, norms, rules, and procedures. They are designed in a way which allows for propositions on civil society development more or less distant from the ideal constellation of deliberative democracy. This way they provide a useful analytical tool to assess the potential benefit of the present day activities of the Commission to organize civil society input with regard to the proclaimed aim of enhancing democratic legitimacy.

It goes without saying that such an assessment needs systematic and in-depth empirical research.⁹ When on the basis of our preliminary evidence we relate the present consultation policy and practice of the Commission to the four models, we first have to emphasize that there is not one but there are many consultation regimes. Even at the level of principles and norms, let alone at the level of rules and procedures the differences between pillars of the EU are striking. But even within the institutions of the EC variations are noteworthy. Although the Commission aims at establishing a uniform consultation regime, principles and norms are not interpreted in the same way; different rules and procedures apply so that in practice consultation patterns vary across policy fields and administrative units.

Second, we can say that reality is closer to the ‘partnership model’ than to the ‘civil society model’. ‘Ownership’ is acknowledged in principle but with an ambiguous reading: some read it as an unconditional right to be consulted and to be free to define on their own the rationale of the consultation exercise whereas others want to condition consultation input on ‘functional relevance’. Furthermore, ‘ownership’ just like ‘diversity’ is limited because the principle is not backed by institutionalized, let alone legal rules and procedures. The Commission has discretionary powers and is exercising them although the discretion might be mitigated by ‘blaming and shaming’ whenever daily practice apparently contradicts declared principles and norms.

The visibility and transparency of the consultation process has markedly increased in the last decade due to a policy of open access to documents, the introduction of new instruments such as online consultation, and more emphasis on multilateral exchange. The efforts of the Commission to give EU policies even more public resonance is, however, fraught with rival intentions, above all the quite obvious intend ‘to sell Europe’ (Brüggemann 2005). For the same reason public deliberation is restricted; the Commission has stated that opening the consultation process must

⁹ We pursue these objectives within a recently started project on “Democratic Legitimacy via Civil Society Involvement - The Role of the European Commission” at the Mannheim Centre of European Social Research MZES.

not invite protest (Commission 2001) and that dissent may be expressed on certain policy issues but the consent on the value and the importance of the EU must not be jeopardized.

However, a regime cannot be changed by an individual actor, even if an actor is as powerful as the Commission in respect to the consultation process. A regime is an institution which is relatively enduring because of the interplay of its components and because of the converging expectations of a multitude of actors. Therefore, exploring the intentions and actions of the Commission will not suffice to project the further development of the regime. Rather, we have to look for driving forces which change the conditions for collective action.

Some of the driving forces are endogenous to the consultation regimes, others are exogenous. Among the endogenous forces, the entrapment effect of 'rhetoric' action has already been mentioned above. The more pronounced and ambitious the rhetorical commitment to 'involving civil society' and 'participatory democracy', the more the EU is faced with raising expectations concerning its democratic credentials. The readiness of some interest groups to redress their organization from NGO to 'civil society' may be triggered by sheer tactical considerations, but it adds up to the visibility of the civil society debate. In addition, the forging of an 'epistemic community' might occur by the way the media and some social science circles support this framing.

Some authors claim that a vibrant civil society discourse will be spurred by the interaction of governing authorities and stakeholders (Eder/Trenz forthcoming). New modes of EU governance and governance networks make policy makers more dependent on public support. Though public resonance might at first be limited to segmented policy fields, the growing number of policies under EU jurisdiction and the spread of cross-cutting issues might have a spill-over effect and mobilize a broader public. Whereas up to now EU governance only meets "detached political contestation" (Kohler-Koch/Rittberger forthcoming), sector spill-over and a higher salience of new policy issues may combine in the future. With the EU moving into more contested policy fields such as civil liberties the fading 'permissive consensus' will trouble EU institutions even more and encourage them to engaged in 'pre-emptive' actions.

In all these instances, however, actors are engaged in a mixed motive game and only a careful exploration of the institutional constraints, driving forces and process dynamics will reveal whether or not a given consultation regime will provide potential for activating civil society and bring a European public sphere into being that lives up to the high expectations of deliberative democracy.

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