Realizing the Principle of Participatory Democracy in the EU

The Role of Law-making Consultation

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Abstract
This thesis sheds light on an EU foundational principle, the principle of participatory democracy and assesses its implications for EU multi-level law-making, focusing on how the principle can be given expression through consultation. It is clear from the primary Treaty article giving shape to the principle of participatory democracy, that consultation is a key duty. This doctoral thesis offers a contribution to understanding how law-making consultation can advance the realization of the principle of participatory democracy. It focuses on consultation as a multi-level phenomenon occurring at the EU and national level, using Sweden as the reference case. The thesis first unpacks the principle of participatory democracy, tracing its origins and theoretical underpinnings and identifies key legal rights and obligations flowing from the principle. Drawing on case studies, current law-making consultation practices at the EU level and national Swedish level are assessed to determine to what degree they adhere to or conflict with the identified key legal obligations. Based on this analysis, suggestions are offered to improve the quality of consultations so that the realization of the principle of participatory democracy is significantly advanced.

The thesis demonstrates that the Commission is legally obliged to consult widely and transparently prior to proposing legislation, as well as attend to equality of access to consultation opportunities and provide consultation feedback. The analysis shows that judicial review for certain EU law-making consultation requirements is possible, while procedural hurdles weaken this redress mechanism. The legal analysis also reveals that Member States are under an obligation to interpret national law in light of citizen’s right to participate in the democratic life of the Union. The thesis shows how this Treaty right refers to both representative and participatory democracy mechanisms and includes the right of citizens to know and attempt to influence EU legislative decision-making at the EU and national level. A legal interpretation of the Swedish constitutional duty to consult, in light of the principle of participatory democracy, extends the Swedish government’s obligation to consult in the formulation of its negotiation positions in the Council. In mapping out the legal imperatives of the principle, two main obligations for Commission consultation are identified; active transparency in the form of consultation feedback and procedural equality. In addition, the duty of the Swedish government to consult at the national level in preparing negotiation positions is noted. The case studies demonstrate that the procedural requirement of feedback can be applied effectively to the Commission’s consultations whereas the obligation of attending to equality is less straightforward. The case studies also suggest a gap between the legal imperatives of the principle of participatory consultation practices for selected key obligations at the EU and national level. Five lines of action are suggested in order to elevate consultation to a participatory democracy practice, centered on: feedback, procedural equality, democratic innovation, multi-level coherence and consultation as an EU secondary law strategy.

Keywords: principle of participatory democracy, EU law, consultation, participatory democracy, Commission consultation.

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Gloria Golmohammadi
To Leonora, Liva, Adib
and my wonderful
family of
Golmohammadis,
Reyhanis, Quitts,
Norlins, Bergsmos,
Namdars and Forghanis
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<th>Abbreviation</th>
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<tr>
<td>AG</td>
<td>Advocate-General</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<tr>
<td>FL</td>
<td>Förvaltningslag, Swedish Administrative Procedure Act</td>
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<td>GC</td>
<td>European General Court</td>
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<td>IA</td>
<td>Impact Assessment</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
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<tr>
<td>RF</td>
<td>Regeringsformen, Swedish Instrument of Government</td>
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<tr>
<td>TEU</td>
<td>Treaty on the European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>UN</td>
<td>United Nations</td>
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1. **INTRODUCTION**

1.1. **The participative turn**

Public participation in political life has recently been manifesting in ways that are sporadic, unstable and difficult to measure. While debates at the European and national level highlight the ‘participative turn’ or ‘deliberative wave’ – referring to the traction that more direct or innovative forms of involving citizens and non-state actors in law and policy-making have gained with governments and citizens, at the same time, growing apathy towards different forms of political participation has been observed, including challenges to traditional participation mediums. Participation as such, can naturally serve various functions; ranging from enhancing the quality of legislation to voicing interests and rights. Its merit may be emphasized based on its influence over process or outcome, its value argued in terms of balancing interests or as an expression of human dignity. In complex governance schemes it can serve as crucial democratic input into decision-making. And whether at the local or global level, it is often viewed as a necessary pre-requisite for justice. In both political theory and public law, the centrality of representative democracy as a normative framework has historically led to a focus on political participation viewed through electoral representation. However, challenges facing modern governance are compelling the legal

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1 Compared to traditional forms of political participation, less is known about non-traditional forms of engagement such as online political participation, which has been noted as specifically unpredictable. Jessica T Feezell, ‘Predicting Online Political Participation’ (2016) 69 Political Research Quarterly 495; Dennis Friess and others, ‘Political Online Participation and Its Effects: Theory, Measurement, and Results’ (2021) 13 Policy & Internet 345.


5 This idea is featured prominently in literature on restorative justice, see eg John Braithwaite, ‘Democracy, Community, and Problem Solving’ in Gale Burford and Joe Hudson (eds) Family Group Conferencing (Routledge 2000)

discipline to reflect more systematically on participation outside of the parliamentary process and beyond elections.\(^7\)

The principle of participatory democracy, first enshrined in the Lisbon Treaty’s ‘Democratic Principles’, at a glance promotes such participation beyond the ballot-box. It obliges EU institutions to enter into dialogue with civil society, to consult in its legislative and policy-making activities with ‘parties concerned’ and offer citizens the opportunity to invite legislative action through the European Citizens’ Initiative (ECI) – presumably all in light of citizens’ “right to participate in the democratic life of the Union”.\(^8\) Although their import and legal status is often not clear, there are today several opportunities for citizens and interested and affected actors to engage with EU law and decision-making.\(^9\) This increasing emphasis on citizens participation and participatory governance is not an isolated development. Nor is the demand for participatory decision-making unique to the long-standing debates on democracy deficits within the EU. At the national and local level, experimentation and digitalization are opening up new opportunities for democratic participation beyond the ballot-box. The opportunity to exercise influence on decision-making processes has long been regarded as a cornerstone of democracy and linked to human dignity. However, the ability to participate and contribute to society has in recent times also been linked to our individual well-being in medical terms, identified as an integral part of mental health.\(^10\)

Transcending the political science discourse on democracy, participation is now a highly relevant concept in several scientific fields. The legal dimensions of participation are consequently also gaining traction. In international law, participation is linked to rule of law and access to justice, where the latter has been defined to include “the ability to seek and exercise influence on law-making and law-implementing processes and institutions”, in particular by poor and

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\(^7\) ibid.
\(^8\) ‘Consolidated Version of the Treaty on European Union [2012] OJ C326/13.’ (TEU), Article 10(3) TEU, Article 11 TEU. The link between Article 10(3) TEU and Article 11 TEU is not clear, this is analyzed in chapter 4.1 and 4.2.
marginalized groups.11 While proponents of a legal right to participate have argued for some time that the right to political participation extends beyond political elections and implies a right to be more directly involved in the legislative process,12 recent years have seen an evolution of international human rights law and jurisprudence on the scope of the right to participate.13 Research on the role of civil society in international law-making is surging.14 And at the level of EU-law, strong arguments have for some time been forwarded for a legal right to participate in EU-rule making.15

These developments are arguably occurring against a backdrop of two parallel processes. On the one hand, the opportunities to participate in law and public decision-making have broadened. A growing consciousness on the value of universal participation and the rights of previously excluded or marginalized groups (such as women, minorities, youth, children, non-citizens and migrants) to contribute to decision-making in a globalized world has propelled the re-conceptualization of concepts such as democracy, participation and rights.16 Further affecting this participation awakening are the technological advances of past decades, changing how knowledge is being generated and shared, influencing how citizens organize and mobilize. Governance adaptation such as crowdsourcing legislation is consequently one avenue of legislative experimentation.17 Regular

demonstrations coordinated at a global level, are an example of how citizens mobilizing in new ways can quickly become a mainstream fixture. And, last but not least, through the COVID-19 pandemic, the possibilities of connection through digital spaces, also at scale, have been elucidated.

On the other hand, a process of participation fragmentation and decline and multiplying participation hurdles can be observed, marked by growing apathy towards different forms of political participation, challenges to traditional participation mediums and increasingly hostile participation spaces. Long-term data suggest that political apathy has risen steadily among Europe’s citizens since 1990. Voter turnout across Europe is at one of its lowest points since suffrage rights were extended to the broader population, and citizens, youth in particular, express a disinterest in traditional political participation, as well as in joining political parties, – seemingly founded in part on a skepticism of the value and utility of participation in the current system and an aversion to traditional forms of engagement. The aversion towards traditional fora is important to note, as equating political silence to passivity and exclusion loses sight of its other potentially positive dimensions, encompassing forms of reluctance and even resistance. As non-participation, political silences are no longer solely attributed to the effects of repression, exclusion or lassitude, but to deliberate refusal to play along in a language game the rules of which seem unacceptable.

Connected to this trend is the shift from government to governance, where spaces of influence move beyond the state or state actors to other arenas and from corporatism to pluralism. It is then perhaps not so

18 Oxenham (n 3).
19 ibid.
22 Brito-Vieira and others (n 21).
23 The governance literature is vast, including in relation to the EU, for an overview of some central issues see e.g. Ian Bache, ‘Multi-Level Governance in the European Union’ in David
surprising that public participation is becoming less predictable. A polarized and hostile political climate marked by lacking or vulnerable information distribution leaves some decision-makers concerned with curbing detrimental, uninformed or misinformed public participation.\textsuperscript{24} Such concern is only confounded considering not only the opportunities but also particular challenges online and social media spaces face in terms of transparency, accessibility and inclusiveness.\textsuperscript{25} Beyond concerns of fake news or the reduction of complex issues to simple narratives, at the more fundamental level, recent research highlights the adverse impact on cognitive capacity, ‘human will’ and democracy itself brought on by the so-called attention economy.\textsuperscript{26} Considering these factors, while public participation has been described as a means for the government to inject knowledge and experience into the law and policy process and a means to remedy democratic deficits by promoting participatory practices, they have also been criticized for being too costly, time-consuming, ineffective or merely symbolic – limiting participation to information-sharing or buy-in exercises.\textsuperscript{27} While the

\footnotesize


\textsuperscript{24} For two relatively recent contributions on the challenge of uninformed or misguided political participation, leading to opposite remedial conclusions see Jason Brennan, \textit{Against Democracy} (Princeton University Press 2017); Eitan Hersh, \textit{Politics Is for Power: How to Move beyond Political Hobbyism, Take Action, and Make Real Change} (Scribner, an imprint of Simon & Schuster, Inc 2020).


debates surrounding EU democracy deficit traditionally center on the challenges posed by the multi-level setting and the specificities of EU governance and democracy, such concerns are now compounded when confronted with a deepened ‘crisis’ of democracy, leading to a reckoning with representative democracy not just beyond, but within, the nation state.\(^{28}\) In particular, democratic backsliding within Member States and the rise of populism has been prominent.\(^{29}\) Meanwhile, experimentation with ‘participatory democracy’ practices, including within the EU, has drastically increased.\(^{30}\)

The EU principle of participatory democracy seems well-suited for such times, yet for all the potential with which the principle is poised, its legal ramifications have received less attention.\(^{31}\) Around the time of the ratification of the Lisbon Treaty, the new democratic principles of the Treaty, including the novel feature of participatory democracy, created a stir, which generated legal commentary, primarily centered around raising legitimate and interesting questions about the implications of Article 11 TEU including on whether and how the provisions would and should be fleshed out in secondary law.\(^{32}\) The ambitious RenEUal project of drafting binding EU administrative procedural rules concretizing, inter alia, the principle of participatory democracy for rule-making, while supported by the European Parliament (Parliament), was met with resistance by the Commission

\(^{28}\) Regarding EU democracy deficit debates see chapter 3.2, regarding the broader democracy crises see e.g. Hélène Landemore, *Open Democracy: Reinventing Popular Rule for the Twenty-First Century* (Princeton University Press 2020).


\(^{31}\) Alberto Alemanno e.g. comments on the lack of categorization or taxonomy of participatory democracy instruments connected to the legal principle: Alberto Alemanno, ‘Towards a Permanent Citizens Participatory Mechanism in the EU’ Study Commissioned by the European Parliament Policy Department for Citizens’ Rights and Constitutional Affairs (European Parliament 2022) PE 735.927 15.

and put on ice. So, a decade later, with some intermittent commentary highlighting the “limits” of the principle of participatory democracy, many of the questions raised at the outset, remain largely unanswered.

While legal clarity on many features may be elusive, there is a distinct uptake of ‘participatory democracy’ as a concept being deployed to define an array of EU institutional related practices. Participating in citizens’ initiatives, organizing conferences and break-out events, petitioning the Parliament, complaining to the European Ombudsman, various dialogue activities and participating in Commission consultation have all been labeled as expressions of participatory democracy in the EU, sometimes accompanied with a brief nod to a Treaty article. However, if participatory democracy is suddenly everywhere in the broad sense – it is also nowhere, in any defining or legal sense.

In the meantime, the CJEU has begun to tentatively adopt the language of participatory democracy, highlighting its complementary role: ‘That system of representative democracy was complemented, with the Treaty of Lisbon, by instruments of participatory democracy…‘. On Article 11(3) TEU which elaborates on the Commission’s consultation duties, there is no case law to date, and the legal literature is scant with opposing views on whether legal obligations can be derived from the

34 Acar Kutay, ‘Limits of Participatory Democracy in European Governance: Participatory Democracy in Lisbon Treaty’ (2015) 21 European Law Journal 803. The exception of the European Citizens Initiative (ECI), which was fleshed out in secondary legislation and on which there is a body of case law as well as more legal literature.
36 It is telling that when the Commission in 2021 presented its landmark legislative package in the area of Migration and Asylum (the New Migration Pact), no open consultation had occurred preceding the legislative bills (the package was accompanied by a succinct staff working document and not an impact assessment). The legislative process is included as one of the case studies in chapter 6.
principle and are justiciable. While stakeholder consultation is a stable feature of the Commission’s policy and law-making, the Commission consistently refrains from framing its consultation obligation in legal terms. Meanwhile, the rise (and sometimes fall) of participation and consultation innovations and practices across Europe and within EU institutions raise the broader question of the role of law in the realization of participatory democracy.

The classic challenges that EU law-making poses to participation and engagement at the national and local level are well-known. Sweden provides a particularly pertinent illustration of multi-level law-making in considering public participation, both in terms of Swedish governance culture as well as its legal framework. As regards law-making, Sweden has a distinctive consultative element which boasts a century old pedigree, the Swedish government consultation procedure (in Swedish: remissväsendet, hereafter referred to as Swedish consultation procedure). This consultation procedure is partly constitutionalized and embedded in an overall legal and institutional framework which is permeated by a principle of openness which runs back to 1766, when the freedom of information legislation was adopted by the Swedish parliament – representing the world’s first freedom of information act. However, just as in other Member States, the transfer of normative and legislative power to Brussels is challenging the Swedish model where the traditional course of the law-making process

40 Sweden also was a natural starting point considering the author’s experience of participating in the Swedish consultation procedure and familiarity with Swedish preparation of negotiating positions in the Council.
with its established and publicized junctures for participation is disrupted, e.g. Swedish public participation is occurring too late in the process of EU-law-making, often during the phase of implementation rather than negotiation, while consultation during the negotiation phase is opaque.\textsuperscript{43} There is plenty of scholarly work on democracy deficits and participation in EU law-making in the social sciences. Analyses on legal mandates and frameworks guiding stakeholder and public consultation have been rarer. This has partly changed, with the rise of the EU Better Regulation Agenda and the Commission seemingly doubling-down on its approach, prompting increased attention to the legal implications of public consultations.\textsuperscript{44} However, it is still unclear, whether the principle of participatory democracy implies legally

grounded considerations that need to be taken into account when determining the modalities of consultation, whether the principle gives rise to concrete rights and obligations and whether there is any possibility for legal redress in the event of lapses in the design of a consultation process? And crucially, how do legal imperatives operating on different levels (national and supra) correspond to each other?

1.2. Research aim and questions
This thesis aims to generate new knowledge on an EU legal foundational principle- the principle of participatory democracy – and offers legal and analytical tools for assessing its implications for EU multi-level law-making, focusing in particular to how the principle can be given expression through law-making consultation. In doing so, the research contributes to the discussion on the potential of law in facilitating democratic participation in multi-level settings. It is clear from a reading of the articles in the EU Treaty which give shape to the principle of participatory democracy, that consultation is a key duty. Given the multi-level character of the EU, this thesis treats the EU level and national level, and law-making consultation occurring at such levels, as interrelated and forming parts of one composite legal order. The objective of this thesis is to understand how EU law-making consultation can advance the realization of the principle of participatory democracy. To achieve this, the research is divided into three parts, each guided by a research question.

The first part is devoted to unpacking the principle of participatory democracy, tracing its origins and theoretical underpinnings as well as practical implications for EU law-making. The second part attempts to assess to what degree current EU law-making practices adhere to or conflict with the principle, focusing on law-making consultation as one of the most important mechanisms for giving effect to the principle. The third part constructively engages with current consultation practices to propose concrete steps for re-invigorating the principle in the EU legal order.

The first research question asks: what are the main elements of the principle of participatory democracy and what key rights, standards and obligations for EU law-making does the principle entail? In answering the first question the research explores the theoretical foundations and normative roots of the principle of participatory democracy, which underpin the legal analysis of the principle. It fleshes out the meaning of the principle in its constitutional setting and addresses the question
to what extent the normative content of the principle is justiciable and applicable to EU law-making consultation at the supranational and national level – using Sweden as the reference case. In mapping the normative and legal framework for participation for EU law-making which is associated with – and stems from – the principle of participatory democracy, the research distills the key standards and duties which the principle entails.

Proceeding from the normative and legal framework for participation outlined in the first part of the research, the second question how and to what degree current EU law-making consultation practices at the EU and national Swedish level, adhere to or conflict with the identified key standards and duties, and ultimately with the principle of participatory democracy? The framing of the research question also aims to capture insights into how the multi-level nature of EU law-making affect the modalities for participation and consequently the implementation of the principle of participatory democracy. Therefore, a case study method is adopted which examines consultation practices and outcomes for distinct EU legislative proposals, and assesses whether consultations at the supranational and national level in these cases adhere to the key standards and duties set by the principle of participatory democracy. Through examining in what ways the principle is given effect in current EU multi-level law-making, potential strengths as well as areas of concern are highlighted.

Building on the first two questions, the third question then asks, how can the quality and practice of consultation improve so that the realization of the principle of participatory in the EU is significantly advanced? In particular, how can the coherence between consultation at supranational and national level contribute to such advancement. Building on the previous analysis of e.g. the justiciability of the principle, this section includes an analysis of whether and how existing systems of accountability in the EU may foster or ensure the realization of the suggestions identified.

1.3. Scope – defining and explaining the objects of study
The research approach is oriented towards elucidating a constitutional principle through focusing on a key element and specific concrete application of said principle; namely law-making consultation. The scope is thus illustrated through clarification of the main objects of study; the principle of participatory democracy and EU law-making consultation.
1.3.1. The principle of participatory democracy
Since the Lisbon Treaty, the European Union draws democratic
legitimacy not only from representative democracy, but also from
participatory democracy. The principle of participatory democracy is
primarily enshrined in Article 11 TEU and also finds strong support in
Article 10(3) TEU. An understanding of this principle forms both the
starting point and object of this research.

1.3.2. The framework of EU law-making consultation; what kind of
law making and which consultation?
In seeking to identify the standards and duties associated with EU law-
making or the term EU legislation as featured in the research, this refers
to legislative acts – that is, acts adopted through the ordinary legislative
procedure as defined in Article 294 TFEU. Implementing and delegated
acts fall outside this definition of EU law. This is not to say they could
not conceptually be squeezed into the concept of law, or that their
prominent position does not merit study of the application of participatory
democracy to these acts. However implemented and delegated acts are a product of what can be seen as an administrative
procedure, where the Commission and Council act in a different
capacity, and as such are also fall under a relatively distinct sphere of
legal discourse and research on EU rule-making, particularly when it
comes to participation. Several authors have argued convincingly that
participation in EU rule-making and administrative acts are of particular
importance from a democracy perspective. However, for the purpose
of this thesis, focus rests on law-making and its multi-level nature,
whose procedural guarantees may serve as a touchstone for other forms
of norm creation.

‘EU law-making consultation’ is consequently an umbrella term which

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45 Article 10(1) TEU, Article 11 TEU Case 138/79 SA Roquette Frères v Council of the
European Communities EU:C:1980:249 para 35 cf. also C-418/18 P Puppinck para 65.
46 The Court has found that the right to undertake a European Citizens’ Initiative established in
Article 11(4)TEU also constitutes an instrument concerning the right of citizens to participate
in the democratic life of the Union provided for in Article 10(3) TEU, see C-589/15 P
Anagnostakis v Commission EU:C:2017:663 para 24. This is also analyzed in chapter 4.
47 See e.g. Mendes, Participation in EU Rule-Making (n 15); ‘ReNEUAL - the Research
Furthermore, the logic of broader democratic participation is somewhat distinct from
participation in administrative procedures, although there is some overlap, see Chapter 3.1.
48 Curtin, Hofmann and Mendes (n 4).
49 Including implementing and delegated acts would also considerably broaden the scope of the
research when considering the national level and the specific interplay with established
consultation procedures at the national level would be muddled.
refers to both to consultation operated by the Commission at the EU level and occurring at the national level, in this research exemplified through Swedish law-making consultation, primarily the Swedish consultation procedure. Article 11 TEU focuses on the EU institutions (not Members States) and with regards to consultation specifically the Commission’s obligation to consult. However from Article 10(2) TEU follows that democratic legitimacy in the Union flows from the Parliament as well as Member States, themselves “democratically accountable “ to their Parliament or citizens. Article 10(3) TEU is framed as a right for citizens to participate in the democratic life of the Union. At the Swedish level, laws and regulations guiding participation in law-making may also interact with the implementation of the principle of participatory democracy.

The Commission distinguishes between two types of consultations; open and targeted. A fragmented picture emerges as to the frequency, modalities and effect of these various types of consultation. While the proposed project research is chiefly concerned with the open consultations, an initial analysis reveals that the legal framework is not necessarily tied to the Commission’s vocabulary and practice; the legal imperatives and restrictions on discretion apply overall to the practice of consultation, regardless of whether it is open or targeted. This means that the overall practice will be included, with a focus on the open consultations, which are arguably of particular relevance for the principle of participatory democracy. While the national level is confined to Sweden - the interactions and tension between the legal imperatives at the EU and national level which are illustrated raise questions more broadly relevant for all Member States.

The Commission operates an elaborate and ambitious consultation regime, with roots dating back to the forming of the Union. Its consultations consist of gathering stakeholder input for deciding on policy or legislative initiatives, the latter are then potentially presented to the Council and Parliament. The Commission’s ‘Better regulation’

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guidelines state “stakeholder consultation is a formal process, by which the Commission collects information and views from stakeholders about its policies”. The Commission has traditionally distinguished between open and targeted consultations. A fragmented picture emerges as to the frequency, modalities and effect of these various types of consultation. An initial analysis reveals that the legal understanding of consultation is not necessarily tied to the Commission’s vocabulary and practice; the legal imperatives and restrictions on discretion may apply overall to the practice of consultation, regardless of whether it is open or targeted. However, focus in this thesis will rest on open consultations, as such consultation are arguably particularly relevant for the principle of participatory democracy.

The Swedish consultation procedure in turn, refers to the century old practice of the Swedish government of sending policy and legislative proposals for consultation to different actors before taking an official position on a matter, and in the case of legislation, before presenting it to parliament. In practice, consultation occurs under the facilitation of a commission of inquiry (or advisory commissions), which are ad hoc committee-like bodies set up by a government to provide advice on specific policy issues, with a widespread use in Sweden, dating back to the seventeenth century. The Swedish legislative process is distinct in that the government sends almost all significant legislative initiatives to commissions of inquiry for policy formulation and legal drafting of a draft proposal of the bill, and it is in this context that the consultation procedure occurs. Once the task of the commission is fulfilled, it is dissolved. However, in preparing for negotiating EU-legislation, no such commission is formed, and consultation may be facilitated by the ministry in charge. A somewhat vague and flexible constitutional clause

53 Tanasescu (n 50) 85.
54 A mere cursory glance at Article 11(3) TEU which stipulates the Commission should consult in order to ensure “transparency” for Union action is indicative. For an in-depth discussion, see chapter 4.1.
57 The commission of inquiry’s work is loosely regulated, the government decision to assemble the commission with its mandate is central. See Kommittéförordning (Svensk författningssamling [SFS] 1998:1474).
partly mandates consultation, and while the consultation procedure’s legitimacy and efficiency are debated, its practice in relation to law-making remains widespread. Nine out of ten commissions of inquiry have been estimated to undergo consultation through the procedure.

1.4. Rationale

There would be much more friction and unevenness in elections [...] if, every two years, supporters of representative democracy had to convince people in every community across the country why voting is desirable and explain how to conduct elections.

The above argument from Archon Fung draws our attention to the fact that there is no common understanding or background agreement, analogous to that of elections, about the proper role of public participation in political life and governance. At the risk of stating the obvious, one of the most interesting things about a legal principle of participatory democracy, is that its legal status potentially allows for a conversation on and practice of participation which has a completely different starting point than many current debates about the proper role of public engagement. This starting point rather casts positions on the possibilities, limitations and pitfalls of participatory practices in a new light, and opens up a space for different questions about participation, ideally (perhaps over time) allowing for a collective learning process around such questions and related capacities. The assumption that this potential new direction channeled through law is desirable, is not one that I explicitly defend in this thesis, nevertheless it is an assumption which underlies the thesis and its overall approach.

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58 It is constitutionally enshrined in the Instrument of Government: Regeringsformen [RF] [Constitution] 7:1.
60 Dahlström, Lundberg and Pronin (n 55) 420.
61 This figure includes commission of inquiries which are not dealing with legislation, which means for legislation, consultation basically always occurs. Lars-Erik Eriksson, Marja Lemne and Inger Pålsson, Demokrati på remiss (Fakta Info Direkt 1999) 8.
63 Fung continues to argue that the lack of analogous agreement on political participation beyond elections means “Almost every single time, such champions must develop freestanding explanations and justifications anew—explaining to allies, supporters, and opponents alike why increased public engagement might be desirable in itself, might have good consequences, and what it could look like” ibid.
64 In the framing of the research questions, this question is subsumed by the less controversial supposition that a legal norm carries an implicit demand of its realization, and that legal
The reasons for selecting multi-level law-making consultation to explore the principle of participatory democracy is shaped by the formulation of Article 11 TEU and Article 10(3) TEU and literature on participatory democracy and governance in the EU. In addition to the clear link between the Commission’s duty to consult according to the principle of participatory democracy and its right of legislative initiative, both political and legal theory establish a clear nexus between participating in law-making and democracy.65 For the EU legal order this connection is particularly poignant, considering the crucial role EU law has played in the development of the Union. Law has been a driving force in terms of EU integration and the ensuing empowerment of both the CJEU and domestic courts, as well as global-standard setting externally through EU regulation.66

The composite approach to law-making taken in this thesis is furthermore warranted considering the multi-level governance structure of the EU and the fragmentation of legislative power and opportunities to participate and influence EU law-making. The composite perspective of the EU has been analyzed in terms of democracy which features diverse forms of democratic legitimation operating at the EU and Member state level.67 Composite procedures in the context of EU administrative law signify a decision-making process which involves both national and Union administration, with interdependent but distinct functions, requiring their active participation to reach a decision.68 Jo Shaw also elaborates on a composite concept of

methods assist in this regard. The main arguments for participatory democracy are covered in chapter 3.1. Concerns related to juridification and legal adversarialism surface in relation to the discourse on participation in the EU under chapter 3.2.

65 See chapter 3 which explores this connection further.


citizenship in the EU which links the different levels and spheres in which individuals claim “citizenship rights, carry out citizenship duties and act out citizenship practices, and within which the governance of citizenship occurs”. Having a composite view of citizenship, which sees citizenship in the EU context as well as of the Union, gives a clear picture of how constitutional essentials associated with citizenship are fragmented across various levels and spaces of authority. The idea of composite citizenship rests on the broader notion of ‘demoi-cracy’, defined as ‘a Union of peoples, understood both as States and as citizens, who govern together but not as one’. Following from this understanding, democratically legitimate outcomes ought to emerge from the interplay between relevant actors within the EU system, including Member States and citizens. These perspectives support viewing EU law-making as a composite process. A composite approach promises for a better capture of the interplay of the realities of multi-level governance including the interplay between governance frameworks operating at different levels and the way participation in consultation can move between the levels. It therefore appears as a better approach than viewing the EU law-making process at the EU and national level primarily as two distinct procedures. The Commission and Member States are both acting as ‘key players’ in relation to the same law-making process when they consult, or indeed refrain from consulting. In addition the Member State is arguably acting in a quasi-legislative capacity in relation to the Commission’s proposal for a legislative act in its negotiation activities in the Council. For citizens

70 ibid.
73 The Court hesitates to state the Commission is acting in a legislative capacity, stricto sensu, in preparing proposals for legislative acts. However the Court labels the Commission as a ‘key player’ in the EU legislative process tied to its right of initiative, with ensuing legal effects, in particular due to its power to enable or encumber the exercise of citizens democratic rights in relation to the EU legislative process. See Case C-57/16 P ClientEarth v European Commission EU:C:2018:660 paras 88, 92 and 94. I apply the same term here to the Member State because of its analogous role, as part of the Council and as bearer of the dual-democratic legitimacy according to the framing of democracy in the EU, see Article 10(2) TEU.
74 Cf. Article 10(2) TEU.
and interest-groups nested primarily within the national context, participation through consultation is also possible in both contexts, sometimes simultaneously.

As regards the choice of focusing on consultation, the EU Commission’s consultations has been described as the core of the Commission’s approach to participatory democracy: with hundreds of consultations per year, this mechanism is the most comprehensive scheme of generally accessible societal participation in EU policy-making. Consultations are also the EU's longest-standing, “most widely travelled” participatory channel. At the national level, particularly in Sweden, consultation represents an ever further traveled instrument of law-making per se. As such, the legal status of law-making consultation at the EU and national level is interesting in its own right. The chosen approach therefore has the advantage of analyzing the legal imperatives for both levels and effectively scrutinizing the frequent perception that the Commission’s public consultations has no legal framework.

Finally, barring Treaty change, a consultative role is the current highest form of influence citizens and stakeholders can hope to advance in terms of direct engagement with policy and law-making in the EU. As the terms ‘consult’ and ‘participate in the democratic life’ are neutral with regards to modalities – they can encompass any form of democratic or citizen innovation which may be considered ‘consultative’, the legal language of Article 11(3) TEU and Article 10(3) TEU is relevant and informative for the current efforts of ‘mainstreaming’ of participatory and deliberative democracy practices across the Commission.

77 Asserted e.g. by Tanasescu, see Tanasescu (n 50). A related line of argument is that while Article 11 TEU hypothetically entails legal obligations, it is highly unlikely to ever be enforced by the CJEU, see Smismans, ‘Regulatory Procedure and Participation in the European Union’ (n 6).
78 By this is not intended to say that various form of mobilization, media scrutiny etc. cannot also have a decisive impact.
Through its approach the research further contributes to clarifying the legal parameters for both the Commission’s consultation procedure and the Swedish consultation procedure. From the EU-institutional perspective of the law-making process, legal scholarship and research on the framework for participation as it relates to the Commission’s consultation has been on the rise since Lisbon came into force. While there is quite robust research on lobbying in relation to the Commission’s consultation practices, this research is not primarily concerned with legal analysis. The challenge legal research faces in this field is partly the rapidly evolving framework for action of the Commission’s consultations and the absence of secondary legislation on consultation. Although there is legal commentary on specific features related to the consultation process (e.g. the role and status of impact assessments), there is less of an overview of applicable legal principles and rules, including in light of recent case law. Historically, consultation have been considered to fall outside of the legal framework. This lack of legal analysis however has persisted in the face of a general critique of the quality of EU legislation, the argument for more direct forms of democratic participation as a key complementary source of democratic legitimacy in the EU, and criticism of the Commission's approach to stakeholder consultations - including its lack of inclusiveness, transparency and sufficient feedback, as well as the dominance of market-related interests or interests from older Member States.

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81 "Consultation is recognised in every sense except the legal", Meuwese describes the traditional view in exploring legal implications. Meuwese (n 38) 527.


84 Alemanno, ‘Levelling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission’s Public Consultations in Light of the Principle of Political Equality’ (n 33) 122-127
Despite the deep roots of government-facilitated consultation in Swedish governance, and its prominent position in the Swedish legislative process, it is an understudied area of Swedish politics and especially of Swedish law. Amongst the few in-depth studies existing, there is no analysis of the legal framework guiding this process, including how such a framework relates to negotiating and implementing EU-legislation. There is thus a need for understanding what legal rights and obligations are associated with the Commission’s open consultation and the Swedish consultation procedure.

A well-known issue in law-making also arises from differences in whether the costs and benefits of regulation are concentrated or widely diffused and how this impact whether relevant actors organize themselves to participate in consultation exercises. Another issue is that marginalized groups often lack the means to organize themselves. Capacity to participate in terms of knowledge and means are often lacking and unevenly distributed across populations and geographical spaces, tied in no small part to current and historical injustices or inequality. The research is therefore also well-placed to provide actors (whether practitioners facilitating consultation or potential participants) with better legal information and tools.

1.5. Structure of the thesis
In answering the first research question, the research first outlines the background and theoretical foundations of the principle of participatory democracy, including its roots in democracy theory (chapter 3). Through distilling important insights from democracy theory, a deeper understanding of the legal implications which flow from the principle

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86 An overview of some of the relevant legal issues was compiled in a study by the author commissioned by the government commission of inquiry on participation in the EU(SOU 2016:10 EU på hemmaplan)
88 See e.g. Nicholas Freudenberg, Manuel Pastor and Barbara Israel, ‘Strengthening Community Capacity to Participate in Making Decisions to Reduce Disproportionate Environmental Exposures’ (2011) 101 American Journal of Public Health S123.
89 The legal element has so far been notably absent in the Commission’s newly established Competence Centre on Participatory and Deliberative Democracy, ‘European Commission, Community of Practice of the Competence Centre on Participatory and Deliberative Democracy’ (European Commission, Joint Research Centre) <https://copdemos.jrc.ec.europa.eu/> accessed 24 July 2023. (Commission, Competence Centre on Participatory and Deliberative Democracy)
in relation to consultation are highlighted. Legal interpretation is then used to analyze the legal contours of the principle of participatory democracy in relation to EU law-making – including through exploring the Article 11 TEU in its proper constitutional context, while surveying in detail the opportunities for redress, focusing on law-making consultation (chapter 4). Having analyzed the implications for EU law-consultation at the supra-national level, the second part turns to an often overlooked element of EU law-making consultation, namely consultation occurring at the national level (chapter 5). In exploring how EU law-making consultation at the national level is legally framed and executed, through the analysis on the Swedish consultation procedure as the case example, the interplay and contradictions between consultation as it is framed at the EU and national level can be highlighted, thus further exploring the potentials and challenges in giving effect to the principle of participatory democracy. Based on these legal findings, I chart a detailed legal framework for EU law-making consultation grounded on the principle of participatory democracy at the EU and national level, concluding with relevant key standards.

In answering the second research question focused on to what degree current EU law-making consultation practices at the EU and national Swedish level, adhere to or conflict with the identified key standards and duties, I draw on a case study method is adopted which examines consultation practices and outcomes for distinct EU legislative proposals, and assesses whether consultation at the supranational and national level in these cases adhere to the key standards and duties set by the principle of participatory democracy (chapter 6). Finally, based on the findings thus far, the third question of how the quality and practice of consultation improve so that the realization of the principle of participatory in the EU is significantly advanced, is addressed (chapter 7).

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This approach and its rational are discussed in detail in chapter 2.
2. METHODS AND SOURCES

This thesis expounds on the legal and normative dimensions of the constitutional principle of participatory democracy enshrined in Article 11 TEU and Article 10(3) TEU through exploring the potential for its realization through participation in law-making. It does so through analyzing the legal standards and obligations for EU law-making consultation prompted by this principle, drawing on political theory while relying primarily on legal interpretation, and then using empirical methods to assess adherence to the principle and offering suggestions to advance the realization of the principle of participatory democracy.

This chapter is divided into three parts, the first discusses the methods and rationales that inform the legal analysis and excursion into democracy theory (chapter 3 and 4), the second is concerned with the methods relating to the Swedish case study and related comparability concerns (chapter 5), and the third covers the empirical method drawn on in testing the legal obligations against consultation practices (chapter 6).

2.1. Legal interpretation and democracy theory
The discussion of participation in EU often proceeds from the perspective of its potentials and limitations as a source of efficiency and legitimacy of EU decision-making and its capacity to redress EU democracy deficits.91 This perspective is visible in the increased emphasis and discussion that stakeholder consultation has received within the framework of the EU’s Better Regulation Agenda. Another field of studies on participation begins from a legal perspective. While this field mainly has been concerned with participation as a legal substantive right in decision-making, such legal studies can roughly be divided into two strands; one combines a legal-political approach, the other adopts a strictly legal standpoint of analysis.92 In the first strand, participation has traditionally been analyzed within the fields of competition or administrative law as a right to be heard, and has since evolved beyond its general scope of inquiry, e.g. to include participation in EU rule-making.93

92 The observation is made by Joana Mendes who formulates the strands and analyzes them: Mendes (n 15) 12.
93 ibid.
As outlined in the research objectives and questions, the aim of this research is primarily to contribute to a ‘hard law’ analysis of the principle of participatory democracy. The main method of expounding on the principle of participatory democracy is therefore one of legal analysis. The wording of the articles where the principle of participatory democracy is enshrined, constitute a central part of the analysis. To support the legal interpretation the theoretical foundations of the principle is first explored and the principle is situated in its proper historical and constitutional context in the EU legal and political system. In doing so, the method combines the teleological, historical, and systematic methods of legal interpretation.\(^94\) The logic and method for exploring the theoretical foundations of the principle of participatory democracy are further outlined in the section below. In terms of legal sources, the leading cases of CJEU, as well as relevant EU legislative norms are drawn upon. Assessing the standards raised by participatory democracy for EU law-making also raises the issue of soft law, as the EU Commission’s consultation regime is embedded in soft law regulatory instruments. Indeed, as Van Gestel and Micklitz point out, EU legislation is increasingly turning into a combination of both hard and soft law.\(^95\) While these instruments are not used as a legal source, they are noted in sketching the legal framework for EU law-making consultation, e.g. in the sense that they might have interpretive value through e.g. raising legitimate expectations. For the legal analysis of consultation at the national level, a combination of EU methods and the Swedish legal dogmatic method is adopted (see section 2.2 below.).

Finally, in approaching the third research question which is focused on providing suggestions for reform, the overall approach is reconstructive. According to Möller, a reconstructive approach “is sensitive to both the moral value and the practice it seeks to reconstruct”.\(^96\) In contrast to many philosophical theories that aim for the morally best option regardless of practice, the reconstructive approach, while necessarily morally coherent, opts for a choice which fits the practice.\(^97\) In the context of this thesis, the moral value is represented by practices which advance the realization of the principle of participatory democracy as following from the analysis in the thesis.

\(^94\) ibid.
\(^97\) ibid.
while the practice to which reform is geared refers to current institutional context and practices of the EU law-making consultation by the Commission and the Sweden government which are highlighted in chapter 5.

2.1.1. *Approaching thick vocabulary in constitutional settings*

The principle of participatory democracy requires an in-depth analysis in order to understand and define the legal obligations and standards for law-making practices stemming from this principle. The research therefore employs democracy theory to inform its legal analysis. Although these two perspectives are used as a foundational background and secondary tool in a constitutional analyses and not as legal sources per se, their presence as an analytical lens and the method through which they will be incorporated demand further attention.

The democratic principles of the EU (Articles 9-12 TEU) are rife with ‘historically thick’\(^98\) vocabulary such as ‘democracy’, ‘equality’ and ‘participation’. With this in mind, the legal analysis of the principle of participatory democracy needs to be set in a broader context. One natural direction would be to look at Member States constitutional law. However, the principle of participatory democracy in the EU context is unique in that it has developed as a consequence of the particularities of the EU multi-level setting and in response to the long-standing debates and demands related to its democracy deficit. \(^99\) As a constitutional principle it finds little equivalence in Member States constitution. \(^100\) The normative roots of Article 11 TEU therefore need to be assessed – and democracy theory is well-suited to inform this understanding. Democratic theory has broadened our understanding of democracy and highlighted the importance of participation in public life and decision-making beyond the ballot box. Thus, it has been essential for the emergence of the principle of participatory democracy. Given

\(^{98}\) The term is taken from Koskenniemi: “constitutional vocabularies do not merely frame the internal world of 'moral politicians' conscious of the contingency of their choices. They inform political struggles. Instrumental vocabularies are mastered by technical and administrative bodies and articulate concerns they tend to consider important. By contrast, such constitutional vocabularies as 'self-determination', 'fundamental rights', 'division and accountability of power', and so forth, with all their historical thickness, contest the structural biases of present institutions’ Martti Koskenniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization’ (2006) 8 Theoretical Inquiries in Law 34.

\(^{99}\) For the developments leading up until the principle of participatory democracy, see chapter 3.2. Cf also Felix Uhlmann and Christoph Konrath ‘Participation’ in Ulrich Karpen and Helen Xanthaki (eds), *Legislation in Europe: a comprehensive guide for scholars and practitioners* (Hart Publishing 2017).

\(^{100}\) While legislative consultation is prevalent in EU Member States, Sweden is one of the few Member States that has constitutionalized law-making consultation, ibid.
that the principle of participatory theory builds on democracy theory, delving deeper into the theory can help clarify the assumptions on which it rests, but also unpack its content and critically analyze the practices that seek to promote it.

Debates on how to redress the democratic deficit of the EU sparked a revival of theorizing democracy which also have highlighted the differences between democracy theories. While most of these theories stress participatory practices, some of them are not necessarily compatible. The diversity of perspectives on democracy makes it difficult to select or construct an authoritative definition of participatory democracy from which to draw insights from. Participatory democracy itself is a multifaceted concept which has roots dating back to Athenian democracy but emerged as a theoretical concept in modern times in the 60s.\(^{101}\) Since then, it has multiplied to cover a wide range of practices and is often associated in different ways with deliberative democracy. Consequently, core features and concepts of participatory democracy should be outlined. As participatory democracy in the EU legal framework is complementary to representative democracy, focus should rest on what distinguishes participation from representation. After opting for an initial inclusive understanding of participatory democracy, the debates leading up unto the Lisbon Treaty are surveyed in relation to the concept, concluding with an argument for drawing on Kohler-Koch and Rittberger’s framework which views democratic legitimacy in the EU alongside three dimensions each of which juxtaposes features of representative democracy with elements of participatory democracy. \(^{102}\) These are: instrumental participation as opposed to intrinsic participation, voting versus deliberation and political institutions versus civil society. \(^{103}\) This model serves as a helpful tool for venturing into democracy theory using the legal imperative of complementary as a starting point.


\(^{102}\) Beate Kohler-Koch and Berthold Rittberger, ‘Charting Crowded Territory: Debating the Democratic Legitimacy of the European Union’ in Beate Kohler-Koch and Berthold Rittberger (eds), *Debating the Democratic Legitimacy of the European Union* (Rowman & Littlefield Publisher 2007) 14-17, see also chapter 3.

\(^{103}\) ibid.
2.2. **Multi-level law-making: the Swedish consultation procedure**

The Swedish legal system is a part of the Scandinavian school, generally thought of as a subgroup of civil law or a legal family of its own, sui generis.\(^{104}\) Roman law has never been applied as applicable law in Scandinavia and there are no general civil codes of the French, German, Austrian or Italian model in the Scandinavian countries -also no plans to enact such codes exist.\(^{105}\) On the other hand, statutory law constitutes the basis in most fields of law.\(^{106}\) In sum, the systems are tinged by the Roman law revival, affected in important ways by its proximity to the modern civil law systems, yet set apart by several features both from the common law and the mainstream of the civil law as well as its own unique features.\(^{107}\)

One important commonality of the Scandinavian legal systems is the way they approach legal sources. The dominant legal method in Sweden is the legal dogmatic method, the pivot of which is the doctrine of legal sources. The legal dogmatic method, a method for the interpretation and systematization of current law, interprets a normative system based on authoritative sources. De lege lata is determined by a systematic inquiry into the accepted legal sources in a roughly hierarchical structure; legal text/law, customary law, case law, travaux préparatoires, doctrine and the ‘nature of the matter’ (sakens natur).\(^{108}\) Some scholars have expanded and further systematized the use of sources, categorizing them into sources that shall be applied (legal text and customary law) that ought to be applied (case law and travaux préparatoires), and that may be applied (institutional recommendations, general principles, doctrine and foundational values prevalent throughout society).\(^{109}\) Travaux préparatoires play a significant role in Swedish legislation, much more so than for EU law. It is also in the travaux that results of consultation procedures are published. While Swedish travaux préparatoires have a diminished role as an authoritative source in relation to EU law, the Swedish style of elaboration and explanation placed in the travaux as

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\(^{105}\) Bernitz (n 104).

\(^{106}\) ibid.

\(^{107}\) Glendon, Carozza and Picker (n 104) 60.

\(^{108}\) Lars Björne, *Den nordiska rättsvetenskapens historia. 2 1815-1870: Brymingstiden* (1815) 284.

\(^{109}\) Aleksander Peczenik, *Vad Är Rätt? Om Demokrati, Rättssäkerhet, Etik Och Juridisk Argumentation* (Faculty of Law, Lund University 1995) 214.
opposed to the legal text or the preamble, has been cautiously accepted by the ECJ.  

As regards interpretational techniques, there is a relatively strict norm hierarchy and a set of accepted interpretational techniques which vary in strength and frequency depending on the field of law – primarily literal, purpose-driven, rational or systematic. Sweden has traditionally been a monist legal system, which in the last decades has been challenged and gradually shifted into a somewhat more pluralist universe, not in the least because of the influence of EU law. Indeed, the boundaries between national, EU and international law are not as sharp as they once used to be, which is highlighted in this research through the question of the legal implications of an EU constitutional principle for Swedish facilitated EU law-making.

The answers to the proposed research question depend on the systematic and detailed analysis of EU law and to a lesser degree national law, while promoting and understanding the dynamics between EU and national law. Primarily, the approach is to view the law-making process as composite. However, in some cases it is still useful to compare law-making consultation at the national and EU-level. To the degree that the consultation procedures are addressed as separate entities to be compared – a comparative legal method will need to be adopted. Comparing legal systems across different levels, which are at the same time part of the same system, departs from conventional comparative approaches. The advantages and potential pitfalls of a comparative legal method, specifically as they relate to comparisons between EU and national law have been highlighted by Renaud Dehousse. A general advantage involves comparison as an instrument of elucidation, and more pertinently, as an instrument of unification of law where comparison is necessary to identify similarities and differences between legal structures. And while the evolution of national law is frequently dependent on the developments of EU-law, it is clear that the fundamental differences in structures and levels of both legal systems need to be addressed. Dehousse specifically points to the challenge of

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comparing institutions operating at two distinct levels (comparability), the dependence of relationships that can exist between variables (interdependence), homogenization pressures that occur in cross-level analysis (homogenization) and the difficulty of shifting from one level of the other (transposition).\textsuperscript{113}

The issue of interdependence as confounding factor is of particular relevance. Beyond the dynamic interplay between national and EU law, and the primacy of the latter, the legal analysis relates to two interdependent consultation processes being part of one larger process of EU law-making. When the analysis turns to comparing the legal frameworks, in part to see how these cohere, it includes a “translation” process taking into account the level of comparative analysis and the degree to which distorting factors are present. These methodological considerations have been woven into the research approach; e.g. in attempting to choose relatively clear comparable elements through identifying stages of a consultation process common to both procedures.

2.2.1. Structuring the legal analysis – methodological concerns
As described in the approach section, the legal mapping at the end of chapter 5 follows the chronology of law-making divided into three distinct phases: a consultation is initiated, carried out and processed (the latter including feedback and potential review by external body).

The temporal approach initially appears a natural methodological frame, it allows for systematic review of legal obligations along a consultation process. There are however challenges with this approach. For the Swedish consultation procedure, which is quite linear with well-defined phases, the structure poses no major problems. There is more or less one consultation procedure that precedes the draft legislative bill. Advisory and expert group input is generally gathered before the consultation exercise, and they are also referenced in the draft bill or legislative inquiry report.\textsuperscript{114} The Commission however often has several different consultations for the same legislative proposal, operating at different levels, during different stages and sometimes running in parallel. While its stakeholder input previously systematically fed the whole legislative (and policy) cycle including

\textsuperscript{113} ibid.
\textsuperscript{114} Although this description applies to traditional government consultation and not necessarily the black box of consultation during the EU negotiation phase, presumably the linear approach would not pose a major challenge.
through evaluations and legislative ‘fitness-checks’, this has recently been reformed into various evaluative and preparatory consultations consolidated into a single “call for evidence”\textsuperscript{115}. It is not yet clear how this consultation reform has played out across DGs and legislative and policy files. Structuring a legal analysis according to chronology may be problematic because it does not capture the complexity and multiplicity of the consultation framework and practice. Moreover, the way in which the commission frames its consultation activities may not coincide with its legal obligations\textsuperscript{116}.

Alternative approaches were therefore considered, such as forming the legal analysis solely on distinct workstreams or themes, or on the legal obligations associated with different actors or decision-makers tied to a consultation process. Such approaches however did not align well to the way in which individual consultation exercises are structured. There are also no consistent approaches or rules for decision-making in consultation procedures at the EU or Swedish level. In attempting to define relevant workstreams or themes, it also became clear that they would tend to gravitate and cluster around chronological phases. More importantly, such approaches failed to capture an important legal dimension which was quite clear at the outset of the research, namely that there is a specific legal duty to consult in law-making as opposed to policy making, or even rule-making. This realization demands some form of rationalization as to when a law-making procedure begins, in order to assess legal obligations from this point up until a legislative proposal is put forward. The approach chosen, which was drawn from case law at the EU-level was to define a point in time where there is a demonstrable stated intent to legislate (or e.g. a stated decision to refrain from legislation upon specific consideration) and use this as a point of departure while leaving room for considering and analyzing previous stakeholder engagement and obligations as part of a whole\textsuperscript{117}. For the Commission this point in time is generally the publication of Inception Impact Assessment (IIA)/Roadmap, or its ‘call for evidence’ which states whether the action proposed will have legislative consequences and also publishes an overview of the consultation strategy\textsuperscript{118}. The

\textsuperscript{115} Commission, ‘Better Regulation: Joining Forces to Make Better Laws’ (n 39) 4.

\textsuperscript{116} For instance, the Commission states it is not bound by its minimum standards for advisory or expert input - from a legal perspective the distinction between advisory input and stakeholder input is not entirely clear.

\textsuperscript{117} Primarily Case C-57/16 P ClientEarth; Regeringsrättens årsbok [RÅ] [Supreme Administrative Court Year Book] 1999 ref 76.

\textsuperscript{118} Although at times the Commission clearly states in a White Paper it is considering legislative action (and then uses the responses to its White Paper as its main consultation activity for the
CJEU has for instance connected IIA preparatory documents with access to the legislative process. For the Swedish consultation procedure, traditionally, observing law-making begins with the formation of a government commission mandated to pursue a legislative inquiry (conducted by a government commission – whose output in the event the legislation is passed is considered travaux préparatoires). The Swedish Supreme Administrative Court has indicated that while formal legislative or decision-making preparatory work is the starting point for judicial review on whether the government has fulfilled its administrative obligations – the Court may also take into consideration previous government consultations related to the same theme. However, since the research questions are geared towards looking at consultation on EU law-making that also occurs at the national level, the focus rests on participation in EU law-making before and during negotiating EU law. This means that the point of departure of when EU law-making begins is the same whether viewed from the Commission’s perspective or the Swedish Government’s. However, the end point for the purposes of data collection varies, as the Swedish consultation occurs during and after the Commission has presented its legislative proposal. The end-point for analyzing Swedish consultation has been selected as the adoption of a common Council negotiating position as discussion preparation leading up until this juncture is arguably the most relevant from a Member-State perspective in terms of participation in EU law-making and reflects the insight that participation should be promoted early enough in order to be able to influence and shape legislation.

2.3. Assessing legal adherence through a case study method
The second part of the research (chapter 6) is oriented towards testing key legal obligations identified in the legal analysis against EU law-making against consultation practices at the EU and national level. While the case study method seems appropriate for the purposes of the proposed legislation – as documented in its impact assessment, see e.g. the case study in chapter 6.3.

119 Case C-57/16 P ClientEarth para 84, 92. Further, if there is a clearly stated legislative intent in the form of a White Paper followed by consultation, and this consultation is taken as the main legislative consultation by the Commission, then naturally the White Paper with its ensuing consultation serves as the relevant starting point.

120 RÅ 1999 ref. 76.

121 The Commission has for some time argued that both the European Parliament and the Council are obliged to draw up an impact assessment when larger changes are made to the Commission’s proposal during the negotiation phase.
research question, its main elements need to be approached cautiously and the cases selected carefully.\textsuperscript{122}

In considering the case study method, the objective of the case study in answering the research question can be expressed as two-fold. In the absence of direct case law, the first aim is to demonstrate how identified procedural guarantees flowing from the principle of participatory democracy possibly could be applied to individual cases. Building on the insights of the legal analysis in chapter 4-5, the case study method would allow for a demonstration of how the principle can be operationalized in order to assess whether particular consultation practices adhere or are in breach of the principle, thereby more concretely illustrating the principle’s legal implications.\textsuperscript{123} For this purpose, two key obligations drawn from the legal analysis were selected related to transparency as responsiveness and procedural equality.\textsuperscript{124} The second objective, building on the Swedish study in chapter 5, was to illustrate in practice, how legal rules and consultation practices at the EU and national level interact and impact the realization of the normative goals pursued by the principle of participatory democracy. With regard to the relevant procedural requirement for EU law-making consultation occurring at the national level; this requirement was taken from the Swedish constitutional clause mandating consultation, RF 7:2, interpreted consistently with the principle of participatory.\textsuperscript{125} Through gathering data on how consultation at the national level is structured – in particular, who was invited, and who participated, as well as how the process was facilitated during the negotiation phase – the analysis aims at deepening the understanding of how (constitutional) legal frameworks and practices at the EU and national level interact and impact the realization of the normative goals pursued by the principle of participatory democracy.

\textsuperscript{122} I draw from the main elements outlined by Yin in his seminal work on case study research while adapting to accommodate the legal interpretation: Yin’s main elements are the development of a research protocol, cautious and justifiable case selection on the basis of repetition, a definition of the unit of analysis, the collection of data from multiple and varied sources, a logical manner of linking data with theoretical propositions through pattern matching and other techniques, and finally the interpretation of findings. Robert K Yin, \textit{Case Study Research: Design and Methods} (Fifth edition, SAGE 2014) 27–68.

\textsuperscript{123} The workability of the legal obligations identified, in order to assess if they adequately work as a standalone legal threshold - or whether implementing legislation would be necessary. If a legal imperative is identified but cannot be effectively applied, this too influences an understanding of the implications of the principle of participatory democracy as it stands. Perhaps it even calls for an adjustment of some of the conclusions drawn.

\textsuperscript{124} See chapter 6.1 for more detail.

\textsuperscript{125} See chapter 6.1.
At the outset, it was clear that for the purposes of the research and to allow for the necessarily detailed substantive legal evaluation to occur, a qualitative study based on a few processes, would be preferable to a large quantitative study. Further, a strength of the method chosen (case study) is its capacity for addressing causal complexity. However, considering that case studies are stronger in assessing arguments about causal relationships in particular cases than they are at generalizing the weight of causal factors across a range of cases, developing general propositions and theories based on specific case studies has its limitations. So, while the case study method allows for conclusions e.g. on whether the Commission had adhered to the principle of participatory democracy in the specific cases under study, or whether the legal obligations could be effectively applied to those cases – inferring broader conclusions based on these outcomes, must be approached with caution.

Traditionally, the case-study method is accompanied with a warning-flag of potential verification bias. Proponents of case-study research, however, convincingly argue that while the risk of bias may be real, such bias is no greater than bias towards confirming preconceived notions in other forms of research. In only selecting a few cases, the issue of bias is however crucially relevant for the selection of case studies and needs to be considered. The selection of cases in this thesis have followed a purposeful selection logic, that is the selected cases constitute an a priori strategic selection of certain cases of consultation procedures which would provide rich insights regarding the application of the principle of participatory democracy.

127 ibid 102.
128 ibid 104; see also Stanley Eugene Fish, Is There a Text in This Class? The Authority of Interpretive Communities (12. print, Harvard University Press 2003).
129 Other sampling logic developed in the social sciences discipline includes: extreme or deviant case sampling, intensity sampling, maximum variation sampling, homogeneous sampling, critical case sampling, snowball or chain sampling, confirming and disconfirming sampling, stratified purposeful sampling and purposeful random sampling, see Michael Quinn Patton, Qualitative Research & Evaluation Methods: Integrating Theory and Practice (Fourth edition, SAGE Publications, Inc 2015) However most of these methods imply a larger part devoted to the empirical research, which would be at the expense of the legal focus of this thesis.
2.3.1. **Criteria for selecting cases**

The criteria for the selection of cases are diversity of consultation procedures as regards policy issues, constellations of interests and number of consultation responses. The other criterion is that the cases should reflect current practice. As regards diversity, legislative proposals from different Commission Directorates-Generals (DGs) serve as a proxy to achieve a spread on policy issues, with proposals addressing areas with diffuse and broad as well as high stake and concentrated interests. The underlying logic was that contrasting different consultations would allow for a fruitful exploration of their alignment with the relevant legal imperatives. At the same time the diversity might also allow cautiously (considering the small sample size) inferring some broader implications. The criteria were attended though screening different EU legislative consultations which has been conducted since 2016, while also surveying literature on Commission consultation practices and published information on legislative areas. The year was selected in order as it fit the timeline of this thesis project as well as would allow for legislative proposals which may have taken more time to negotiate and to allow for the legislative procedures to have progressed enough so that they could be included from the Swedish-level perspective. With regards to the number of consultation responses, this refers to the responses to the of the Commission’s open consultations. Looking at available data, the European Court of Auditors calculated the annual average number of participants for Commission public consultations was around 500 participants in 2015 and 2016 and 2000 participants for 2017 and 2018.\(^{131}\) The criteria was therefore chosen that the selected cases selected in their totality should reflect consultation outcomes that were significantly higher and lower than 500 responses. In practice, one challenge that emerged was it was sometimes difficult to determine what should count as a ‘public consultation’. However in order to avoid an overly formulaic approach, which would not be in line with the relatively limited scope of the case studies and their aims, law-making processes were selected without having to pin down the exact number of responses and in advance determine the 'open consultation’ but where an overall indication of the numbers were clear. This led in the end to the four cases having responses ranging from around a hundred replies to over a thousand, with one case seemingly not having conducting any public consultations. In line with the research scope, the selection of the cases

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was also confined by the requirement of a proposal for a legal act, as well as law-making processes for which the Commission had presented its proposal to the Parliament and Council as well as the Council adopting a final negotiating position (the latter in order to assess Swedish consultation up until this point).

To illustrate how the purposeful selection logic was put into practice, the following example is informative. One area of interest which emerged was the digital policy field as it represents an area where much is still unregulated at the EU-level, and where potential legislation targets specific actors (‘tech’ actors) while also affecting citizens through shaping everything from the digital environment to public service delivery and potentially having an impact on fundamental rights. At the same time this is an area of collective action challenges due its broad societal impact. The legislative area also was of interest because of the presence of strong lobby groups. A recent study demonstrated that 612 companies, groups and business associations are currently lobbying the EU’s digital economy policies, spending over €97 million annually, making ‘tech’ the biggest lobby sector in the EU measured by spending levels.132 After surveying the EU legislative agenda in this field, a couple candidates emerged: EU law-making consultations of the Digital Services Act, the Digital Markets Act and Proposal for a Regulation laying down harmonized rules on Artificial Intelligence. After an initial screening, and in balancing the potential with other case study candidates similarly derived, the latter was highlighted as a prospective candidate for the case study.

Aside from the diversity mentioned, according to the selection logic applied, the cases should ideally also display insights in respect of theoretical variations of the examined phenomenon,133 i.e. consultation practices which display a range of adherence to the principle of participatory democracy. This criterion however proved challenging. It would be difficult to establish a priori, that a consultation exercise was legally procedurally defunct or, conversely legally aligned. Beyond the obvious practical challenge, case selection based on the perceived legal adherence of the consultation would also arguably undermine the exercise of the case study. This was solved by approaching the criteria through surveying the literature, reaching out to institutional actors such

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133 Argyrou (n 126) 103–14.
as the RSB and Commission staffers and stakeholder and having informal conversations, with the aim of finding what in the literature or relevant actors could be perceived of as a “best practice” in terms of consultation. One legislative file which surfaced through this process, was the review of the Water Framework Directive. However, because of the COVID-19 pandemic, the legislative process was stalled, and considering the timeline of this research project, was set aside. A “worst case” practice also emerged which was included in the study: the New Migration Pact, a legislative package which was proposed by the Commission without any impact assessment, and no open consultation at all, thus foregoing any scrutiny of the Regulatory Scrutiny Board (RSB), the Commission’s internal and independent review board. The Pact was accompanied by a Staff Working Document, whereas the legislative package included a proposal for establishing, inter alia, detention centers at EU country borders, with the purpose of fast-tracking asylum-seekers with the potential of prompt expulsion. Because Swedish consultation was surveyed up until the Council adopted a negotiating position, the uncertainty surrounding the negotiations of the Migration Pact also made its inclusion uncertain. A preliminary analysis of the case was made, and in the end, as the Council adopted its final negotiation position during the summer 2023, the case was included.

2.3.2. Data collection and case analysis

During the selection of cases, there was no prior knowledge of whether and how the Swedish government ministries had consulted on the legislative proposals. The approach was therefore to request access to documents which would ensure that a full picture was given of any law-making consultation that had occurred. The access to document method is well suited for the Swedish institutional setting where legislation on access to public document provides a strong presumption for access and disclosure. Because of the way access to document requests are filed and processed according to Swedish administrative law and institutional practice, this promised a clear picture of consultation during the negotiation stage. For instance, in Sweden, a request to access a document can be submitted informally through email or over the phone to any public institution, including relevant ministry, team or case officer, and a reply and access is usually given within a few days. This process can often be characterized by an informal dialogue with

134 See chapter 7.3.
135 A final access to document request from the Swedish ministry, following the adoption of the Council position, was made in order for the data collection to be complete.
the relevant civil servant on what kind of documents or information are covered by the request, what documents actually exist and whether re-framing the request can save time on both ends. In the end, this method proved crucial for obtaining relevant information on the consultation at the national level for the New Migration Pact, as there was no standard, written or formal consultation procedure at the national level. However, in interaction with the public servants involved in the negotiations following the access to document request, it became clear informal, but rather high-level hearings were held with various interest-groups, the minutes from which were later obtained. It was also possible to request documents after negotiations had concluded in case there had been any consultation leading up until that point.

In terms of assessing Commission consultations, the main item for analysis is the impact assessment accompanying each legislative proposal, including its annexes and stakeholder reporting. For the one legislative proposal lacking an impact assessment, the attached staff working document served the same function. In addition the Roadmaps/IIAs and consultation documents published were surveyed. To a secondary degree, ‘raw’ consultation data for the open consultations were surveyed as a light check for the Commission’s reporting. In terms of analysis of the case studies, this was predominantly textual and extensive. Some background facts and data, which frame the case and the legislative issue examined, are presented to give a context to the case and in line with the overall method and objective of the research also relying on legal interpretation.
3. Participation in Democratic Theory and the Imperatives of Complementarity

The Lisbon’s Treaty’s democratic principles have, on the one hand, been hailed as a framing of democracy for institutions beyond the state which are neither apologetic nor utopian, but plausible and viable.\textsuperscript{136} On the other hand, the articles have been criticized for being poorly drafted, without clarity as to the relationship and linkages between them or well-defined links to democratic models, and thus characterized as an “accidental meeting” between representative and participatory democracy or an “arbitrary smorgasbord” of instruments and mechanisms promoting participation and transparency.\textsuperscript{137}

This chapter explores the theoretical foundations and normative roots of the principle of participatory democracy, providing groundwork for a legal analysis of the principle. It asks, if participatory democracy is an EU constitutional principle; what assumptions does it rest on, what normative goals does it pursue and what approaches does it promote. Furthermore, who are the main protagonists of participatory democracy? Bearing in mind that orthodox participatory democracy theory frequently challenges the foundations of representative democracy as traditionally understood,\textsuperscript{138} what assumptions need to be held in order to understand and construe participatory democracy as a complement to representative democracy which the democratic principles of the Treaty clearly state that the Union is founded upon?\textsuperscript{139}

While democratic experimentation may be on the rise in the Union, no Member State can arguably be labeled as ‘a participatory democracy’. How then does this fact mediate or potentially bias the interpretation of constitutional language elaborating on a principle of participatory democracy operating at the supranational level? Exploring the


\textsuperscript{137} The former phrase is from Smismans and the latter from Ackerman, Egydi and Fawkes: Stijn Smismans, ‘The Constitutional Labelling of “The democratic life of the EU”: Representative and Participatory Democracy’ in Lynn Dobson and Andreas Follesdahl (eds), Political theory and the European constitution (Routledge 2006) 131; Susan Rose-Ackerman, Stefanie Egydi and James Fowkes, Due Process of Lawmaking: The United States, South Africa, Germany, and the European Union (Cambridge University Press 2015) 236; See also Mendes, ‘Participation and the Role of Law after Lisbon’ (n 32).


\textsuperscript{139} Article 10(1) TEU.
‘normative roots’ in this vein will allow for a constitutional legal interpretation which is transparent with regards to its assumptions and limitations and ultimately more coherent in its teleological interpretation.

The first aim of this chapter is then to address the underlying questions and tensions raised by the principle of participatory democracy, and root these in democratic theory and the debates leading up until the drafting of the article. This endeavor is both descriptive and normative. The descriptive component is primarily to identify the main logos and arguments of participatory democracy as a theory, and see how it has surfaced in democracy debates on the EU. As such it relies on a literature review aiming to capture the important strands of the debates, as well obtain a picture of the path leading up to the drafting of the principle. The normative endeavor lies in the attempt to consolidate an understanding of ‘participatory democracy’ which can be useful for an analysis of the relevant Treaty articles and grounding the legal label “participatory democracy”. For instance, the principle of participatory democracy is sometimes referred to as a principle of democratic participation, a principle of citizen participation, ‘Article 11 TEU’ and legal scholars include and emphasize different Treaty provisions in relation to the ‘principle of participatory democracy’. In general, Article 11 TEU has also been said to combine elements of participatory, deliberative and direct democracy. So while arguably the mainstream legal label of the principle under study is ‘participatory democracy’, it is not universal, and there is vagueness as to the normative framework and imperatives suggested by the same label. Finally, filtering insights from democratic theory may assist in giving direction to one of the research aims of this thesis which is to, based on a reconstructive approach, identify potential lines of action in order to advance the realization of the principle of participatory democracy.

To address these aims, the chapter begins with an overview and brief analysis of the origins and theoretical elaboration of participatory

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141 Beate Kohler-Koch, ‘The Organization of Interests and Democracy’ in Beate Kohler-Koch and Berthold Rittberger (eds), Debating the Democratic Legitimacy of the European Union (Rowman & Littlefield Publisher 2007) 11-17.
democracy, in the end adopting an inclusive definition of the concept which includes deliberative democracy. This broad reading of participatory democracy helps frame the exploration of theorization on participatory democracy in the EU and tracing the path leading up to the Lisbon Treaty. After having summarized the state of play post-Lisbon, the remainder of the chapter is devoted to elaborating on the entry point for understanding the principle of participatory democracy in the Treaty – as a complement to representative democracy. Building on the insights of the rich debate on democratic legitimacy in the Union, I argue for drawing on the framework of complementarity sketched out by Kohler-Koch and Rittberger, with some adjustment and elaboration, to highlight and analyze the most important normative imperatives which serve as an undercurrent to the legal interpretation, as well as guide the identification of the key legal imperatives discussed in later chapters. The selected heuristic tool frames the complementarity of participatory democracy in relation to representative democracy through emphasizing the intrinsic value of participation over the instrumental, deliberation over voting and citizens and civil society over institutions. However in applying this heuristic tool of contrasts, I clarify, based on the discussion in this chapter, the possibilities and limitations of participatory democracy as a complement. Overall, the chapter builds on and adds to existing scholarship which recognizes that participation as elaborated in the Treaty’s democratic principles goes beyond a functional understanding of participation and consolidates an understanding of ‘participatory democracy’ in the EU setting.

3.1. An inclusive reading of ‘participatory democracy’
The practice of ‘participatory’ democracy has permeated various political designs since Athenian democracy. Interest in political participation beyond representation has also been a stable feature of modern democratic theory which traces the importance of citizen participation to the work of Rousseau, Mill and Tocqueville. While

142 In the fifth century BC, the Greeks would gather in the public space of the agora and legislate on the basis of an agenda set by a randomly selected assembly of five hundred other citizens. In India around the same time, public deliberation was occurring through a variety of local institutions. A few centuries later, Icelandic Vikings would gather every summer in a large field south of Reykjavik, at Thingvellir, their place of parliament, and talk through matter of importance. See Landemore (n 28) 1–2.
143 Jean-Jacques Rosseau, The Social Contract (Maurice Cranston tr, Penguin Books 1968); Alexis de Tocqueville, Democracy in America (Harvey C Mansfield and Delba Winthrop eds, University of Chicago Press 2002); John Stuart Mill, Considerations on Representative Government (1st edn, Cambridge University Press 2010); See also Pateman, Participation and Democratic Theory (n 101) 22–44.
the debate and practice of democratic participation is long-standing, the concept of participatory democracy began more intense theorization in the late 1960s amidst a broader cultural quest for more social equality and democracy. Most contemporary accounts have drawn on the contribution made in Carole Pateman’s *Participation and Democratic Theory* which outlines the orthodox position of participatory democracy in contemporary political thought. Pateman’s work, like many of the following accounts, focuses on the educative effects of participation of individuals as well as the influence on the wider society. The theory extends the idea of participation from politics and the state to other areas including the workplace, education, local and national governance structures as well as the family; giving particular emphasis to deliberation and the ‘small-group’ model of democracy. Similarly in his influential work outlining ‘strong democracy’, Baber defines participatory democracy as “self-government by citizens rather than representative government in the name of citizen”. This entails depth of participation as well as political equality beyond granting formal opportunities or rights to participate. Many participatory theorists acknowledge the need for leadership or representative institutions; while at the same time agreeing that institutions and practices in modern representative democracies do not provide for sufficient participation, nor the transformative kind of space which induces the development of the core capacities for ‘self-government’. So while participatory democracy initially was focused on citizens within democratic structures and expanding participation rights and opportunities, particularly for those populations that have been systematically or structurally excluded from the democratic process because of inequities, such as workers and women, it was at the same time deepening and expanding the concept of self-government. As Mills

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145 Rod Dacombe and Phil Parvin, ‘Participatory Democracy in an Age of Inequality’ (2021) 57 Representation 145, 147.
146 Pateman, *Participation and Democratic Theory* (n 101) 22–44.
147 ibid; Zittel (n 144).

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states; “a political act to be done only once in a few years... leaves his intellect and moral disposition very much as it found him.”

This key line of argument held that expanding citizen’s rights to affect policy choices needed to be balanced by self-transformation so that the pursuit of private interests was interwoven with a sense of collective responsibility. It is therefore a vision of what a self-ruling individual is or could be which animates participatory democracy, participation itself provides her with the necessary civic capacities as much as her participation contributes to transformative spaces of democratic action which in turn induce self-transformation. As early as in Rousseau’s work, participatory theorists find the question of how the social order affects the structure of human personality, in particular which aspects of an individual’s character institutions develop. Through participation the individual learns that private and public interests are linked and “the logic of the participatory system is such that he is forced to deliberate according to his sense of justice.” This symbiotic relationship and iterative process means that a major function of participation is educative at the individual level born out of the interrelationship between institutions and the psychological qualities and attitudes of citizens, and justice at the collective level, emphasizing equality as expressed in terms of outcome but also through the inclusive participatory process itself.

Justification for greater participation is not confined to its educative potential but also grows out of the broader desire to enhance legitimacy in democratic governance. As such the overall intrinsic value of participation is emphasized. In considering the intrinsic value of participation, the concept may take on different shades depending on context. Particularly, in legal scholarship and political science, the idea of the inherent value of participation emphasizes somewhat diverse things. In highlighting legitimacy as a function of democratic participation, participatory theorists often focus on the personal ‘internal’ benefits derived from participation. Or they highlight that placing value on participation, increases the capacity of the individuals who take part and enhances trust and systemic efficiency – in a way

151 Pateman quoting Mill, Pateman, Participation and Democratic Theory (n 101) 30.
152 Zittel (n 144) 12.
153 Pateman, Participation and Democratic Theory (n 101) 24.
154 ibid 25.
155 Zittel (n 144).
156 Joshua Cohen, 'Deliberation and Democratic Legitimacy', Debates in Contemporary Political Philosophy (Routledge 2002); Kohler-Koch and Rittberger (n 102); Fung (n 62) 515.
157 Fung (n 62).
which is separate from instrumental understandings of participation’s benefit to public institutions;

The political process is an end in itself, a good or even the supreme good for those who participate in it. It may be applauded because of the educative effects on the participants, but the benefits do not cease once the education has been completed. On the contrary, the education of the citizen leads to a preference for public life as an end in itself.  

In legal scholarship, the emphasis on the inherent value of participation often has less to do with the personal value of feeling good or gains in consciousness, virtue or political capacity. Instead participation is seen as a right in itself, the value of which indeed can be associated with personal and societal desirable outcomes, but is not dependent upon it.  

This thinking is found prominently in the legal rights’ discourse. For example, the right to not be subjected to cruel and inhuman treatment is regarded as fundamental, regardless of whether torture could be construed in utilitarian terms as beneficial regarding information gathering and possibly preventing collective harm. This is not to say, that a purely normative view of legitimacy also is not present in democratic theory, and that there isn’t significant overlap of the normative foundations of legal rights and democracy. The normative assumption of democratic theory begins with the idea of the natural rights of individuals, primarily equality and autonomy. The linkage between political equality and democracy is important to note, with participation developing out of the “logic of equality”.  

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160 The example is not meant to imply that the utilitarian argument for torture prevails according to its own logic. There is empirical research which points to the ineffectiveness of torture, and scientific insights may naturally inform both utilitarian and deontological arguments on torture, see Nayef Al-Rodhan, ‘The Wrongs, Harms, and Ineffectiveness of Torture: A Moral Evaluation from Empirical Neuroscience’ [2022] Journal of Social Philosophy.  
162 Despite his own misgivings about natural law, Kessler’s outline is instructive: Friedrich Kessler, ‘Natural Law, Justice and Democracy—Some Reflections on Three Types of Thinking about Law and Justice’ (1944) 19 Tulane Law Review 34.  
derives in no small measure because democracy, as an overall ideal norm, is a political regime where the ones affected by public decisions can have a say in their formation or act against them, sometimes referred to as the all-affected interests principle. This idea is also mirrored in procedural law, with participation either being framed as defense (uti singuli) or collaboration (uti cives). However, democratic participation moves beyond a narrow application of the all-affected interests principle or participation as defense and collaboration. In order to be fully democratic, political decisions ought to be the result of a procedure in which every citizen enjoys an equal chance to have a say; be it through the electoral process (through elected representatives) or the policy process (through non-electoral input such as public consultations). The emphasis on the latter in participatory democracy theory is also explained with reference to the weak link that elections and party politics establish to citizens as delegation of power is not bound to specific issues but very vague and broad. There is also an understanding that when certain groups cannot influence the political agenda, decision-making, or gain relevant information to assess how well policy alternatives serve their needs e.g. because they are unorganized or excluded, they are likely to be ill served by laws and policies. Participation here follows from the demands of justice, flowing from the inherent dignity of the individual potentially affected as manifested in a claim to participate and based on the epistemic role that individuals and groups can play in determining

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164 ibid.
166 Mendes, Participation in EU Rule-Making (n 15) 33.
167 Alemanno, ‘Towards a Permanent Citizens Participatory Mechanism in the EU’ (n 31) 14.
just outcomes. Regarding the demands of justice, the thinking on rights sheds light on the intrinsic justification for participation. “For rights are not merely judicially enforceable claims to various good things. They are, rather, a set of social realities, procedures by which we show respect for self-government by individuals and groups in their pursuit of a good life.”  

Naturally, the focus on the intrinsic value of participation in participatory democracy has some overlap with regards to representative democracy in that the importance of participation is partly based on the normative proposition of the free, equal and autonomous citizen. However, emphasis in participatory democracy theory rests on interdependence; on citizens acting together to regulate their mutual existence.  

Barber distinguishes the perspective on human nature and identity found in liberal and participatory democracy:

Liberal democracy’s three dispositions […] are linked in a single circle of reasoning that begins as its ends in the natural and negative liberty of men and women as atoms of self-interest…. politics is prudence in the service of homo economicus – the solitary seeker of material happiness and bodily security.

Much of the early theorization on participatory democracy between the 1960s and 1980s was primarily pitched as a critique of the liberal conception of democracy as a competition for political power among responsible elites. During this time, democratic theory was dominated by an empirical democratic school of thought (often applying economic analysis and rational choice theory to political processes), which concluded citizens did not have the will, incentive or capacity to participate, and democracy was indeed to be founded


171 Barber (n 148) 213–261.

172 ibid 20; participatory theorists have retained this critique and expanded upon alternatives, such as the ‘homo cooperativus’, see Patrizia Nanz and Claus Leggewie, No Representation without Consultation: A Citizens’ Guide to Participatory Democracy (Damian Harrison and Stephen Roche trs, Between the Lines 2019) 52–62.

173 Zittel (n 144) 9.

upon this very assumption. Schumpeter as one of the main proponents of this line of thinking argued the ‘classical doctrine’ of democracy which held that placing participation of people center-stage was empirically unrealistic in large societies and that democracy was in essence ‘that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of competitive struggle for the people's vote’. Robert Dahl's work was also grounded in empirical observation and closely considered participation in modern democracies, coming to the conclusion that democracy was more accurately referred to as ‘polyarchy’ because it was essentially ‘a system of decision-making in which leaders are more or less responsive to the preferences of non-leaders'; and this system did appeared to function with low levels of citizen participation. Dahl softened the critical stance towards participation and advocated for participation which would allow citizens to have equal and sufficient opportunities to form preferences and influence the public agenda, but he concluded this was more of a utopian ideal rather than a realistic goal. Against this narrative, participatory democracy theory asserted that citizens under the right conditions could, should and would participate meaningfully in democratic processes. In this context, paving the way for avenues where citizens could not just influence but actually determine the outcome of decisions and democratic processes was a key line of thinking. As individual participation on a larger scale would lead to democratization beyond the political system to areas such as education, the private sector and foreign policy-making, participatory democracy was in this early stage heralded as a strategy for the gradual, non-violent dismantling of capitalism.

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175 Schumpeter (n 174) 169.
178 Pateman, Participation and Democratic Theory (n 101); Barber (n 148); Macpherson (n 149).
179 Grevén (n 150) 225.
The discourse on participatory democracy then took a turn around the 1980s, one the one hand, the crises of the social and political movements that had fostered it led to the decline of participatory democracy theory.\textsuperscript{182} On the other hand, the overly normative stance of participatory democracy was criticized and a lack of empirical research to substantiate its claims was noted.\textsuperscript{183} Scharpf for instance, critiqued the over-emphasis on normative deductionism and argued that participation and the quality of policy outcomes were equally important normative sources of legitimacy.\textsuperscript{184} Acceptance or ‘compliance’ as well as the quality of outputs emerged into focus rather than the electorate input side. Grevén elaborates on how this approach established a juncture between two directions.\textsuperscript{185} One direction treated inputs and outputs as functional equivalents for legitimizing policies so that a decrease in participation could be counterbalanced by an increase in acceptance and the other connected participation to outputs with the assumption that participation could increase the problem-solving capacity and performance of policies and laws, and consequently result in greater acceptence.\textsuperscript{186} This new trend became related to policy research- inherent that shifted focus from participatory citizens to organizations and collective actors.\textsuperscript{187} Connected to this trend, was an emphasis, including from theorists who promoted public participation, on the epistemic role that citizens and overall broad public participation could offer.\textsuperscript{188}

The transitional phase in participatory democracy discourse was not only towards politics in a participatory mode rather than participatory democracy, but also an increased emphasis on the importance of deliberation and the rise of deliberative democracy.\textsuperscript{189} Already from the very beginning, the participatory democracy ideal demanded that the quality of participation was attended to, with an emphasis on


\textsuperscript{183} Grevén (n 150) 235.

\textsuperscript{184} ibid citing Scharpf.

\textsuperscript{185} ibid.

\textsuperscript{186} ibid.

\textsuperscript{187} ibid.

\textsuperscript{188} Joshua Cohen, ‘An Epistemic Conception of Democracy’ (1986) 97 Ethics 26; See also Andre Bächtiger and others (eds), ‘The Epistemic Value of Democratic Deliberation’ in David Estlund and Hélène Landemore, \textit{The Oxford Handbook of Deliberative Democracy} (Oxford University Press 2018).

\textsuperscript{189} Floridia (n 182) 37.
deliberation according to justice and ‘strong talk’.190 However, this element, amongst other systemic questions, remained vague. 191 Deliberative democracy has since then provided further elaboration on the normative foundations of deliberations well as the right conditions and principles for its effective execution in tandem with a robust body of empirical research on deliberative democratic experiments. A distinct feature of the deliberative strand of the discourse on democracy is its focus on process. The process is itself a source of democratic legitimacy and not just the driver of (democratically associated) desirable outcome.192 Habermas captures the requirement in his democratic principle of legitimacy: “only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted”.193 Central to this claim is that interests and opinions are not static and can be swayed by rational exchange, where participants’ social power or status is detached from the conversation.194 In the theoretical stance of deliberative democracy forwarded by Habermas, deliberation is crucially occurring in the public sphere and consequently also unlinked from actual participants.195 For example, in dialogue or consultation procedures there is the issue of the link between actors and the concerns they represent (or should represent) and whether they do so on at equal terms.196 This has led to calls for deliberative democracy models to consider equal and representative participation or, as Dryzek calls it, ‘discursive representation’.197 At the micro-level, policy processes need to be of a deliberative quality based on reflexive procedures of mutual justification of arguments; furthermore, equal access to information is a necessary condition for successful deliberations.198 At the macro-level, and related to the issue of transparency, the publicity of the deliberation process is crucial.199

190 See eg Pateman, Participation and Democratic Theory (n 101) 25; Barber (n 148) 178–198.
191 Florida (n 182) 37.
192 For an elaboration on this point, see Moellers (n 159) 52–54.
193 Habermas (n 165) 110.
194 ibid.
195 On this point, see David Friedrich, ‘European Governance and the Deliberative Challenge’ in Raphaël Kies and Patrizia Nanz (eds), Is Europe listening to us? successes and failures of EU citizen consultations (Ashgate 2013); see also Jürgen Habermas, Sara Lennox and Frank Lennox, ‘The Public Sphere: An Encyclopedia Article (1964)’ [1974] New German Critique 49.
196 ibid.
198 ibid.
199 ibid 490.
There are differences with regards to the type of deliberation proponed by theorists and practitioners.\textsuperscript{200} The central idea here is that if the role of citizens in political decision-making is to be enhanced, there is an expectation that their judgements should not be based on raw preferences but rather on an informed and reflective assessment of the matter in hand.\textsuperscript{201} This considered judgement does not simply require citizens to learn more ‘facts’ regarding the matter at hand, although such information is important.\textsuperscript{202} It requires them to appreciate the views of others with different social perspectives and experiences. Hannah Arendt offers an argument for this form of enhanced political participation. She terms it ‘enlarged mentality’ and it requires the capacity to imaginatively place oneself in the position of others as it “must liberate us from the ‘subjective private conditions’, that is, from the idiosyncrasies which determine the outlook of each individual in his privacy and are legitimate as long as they are only privately held opinions, but are not fit to enter the market place, and lack all validity in the public realm.”\textsuperscript{203}

Whether one names it ‘considered judgment’, ‘enlarged mentality’ of the ‘quality of deliberation’ there are ongoing attempts to measure and evaluate whether this has been achieved through different proxies such as e.g. whether opinions have changed. Within the framework of what he argues are the three basic values of the deliberative model; political equality, participation and deliberation, Fishkin lists five criteria which define the quality of deliberation.\textsuperscript{204} These criteria are information (the extent to which participants are given accurate and reliable information), substantive balance (the extent to which arguments offered by one side are answered by considerations by those who hold other perspectives), diversity (the extent to which major positions in the public are represented by participants), conscientiousness, (the degree to which participants sincerely weigh the merits of the arguments) and

\textsuperscript{200} See e.g. André Bächtiger and others, ‘Disentangling Diversity in Deliberative Democracy: Competing Theories, Their Blind Spots and Complementarities’* (2010) 18 Journal of Political Philosophy 32.


\textsuperscript{202} ibid.

\textsuperscript{203} Hannah Arendt, Between Past and Future: Eight Exercises in Political Thought (Penguin Books 2006) 220–221.

\textsuperscript{204} Regarding the trade-off between these three basic values, Fishkin argues two out of three are generally available but all three at the same time is difficult. James S Fishkin, When the People Speak: Deliberative Democracy and Public Consultation (Oxford University Press 2011) 32–64.
equal consideration (the extent to which arguments offered by all participants are considered on their merits regardless of who offered them).\textsuperscript{205} Fishkin’s criteria place procedural qualities in focus. Habermas, in turn, relates procedural quality and its legitimizing effects directly to the legislative process. For Habermas, decisions about laws typically involve validity claims of both factual and normative character, for instance claims about likely consequences of different legal options, their moral validity, or which alternative is realistic or more efficient.\textsuperscript{206} Legitimate laws must then pass the different types of discursive tests that come along with each of these validity claims.\textsuperscript{207} In most varieties of deliberative democracy, laws need to be publicly justified to those who are subject to them.\textsuperscript{208} The emphasis moves from the point of decision or adoption into the earlier formational processes of discussion and communication, where opinions are formed and preferences shaped.\textsuperscript{209}

In deliberative democracy as proponed by Fishkin, citizens are central to the deliberative process, but the deliberative element may not only be fulfilled by ‘lay’ citizens. According to Mansbridge and others, public deliberation is meant to fulfill three functions in a democracy; the epistemic function of ensuring reasonably sound decisions,\textsuperscript{210} the ethical function of advancing mutual respect among citizens and the democratic function of promoting “an inclusive process of collective choice”.\textsuperscript{211} From this perspective, ‘expert’ participation in political decision-making may contributes to its epistemic quality as expertise is supposed to be a watershed which ensures ‘truth-sensitivity’ of policies and legislation, and is linked to the problem-solving and enlightenment function of knowledge use.\textsuperscript{212} However, it is clear, all these functions

\textsuperscript{205} ibid 33–34.
\textsuperscript{206} Habermas (n 165).
\textsuperscript{207} ibid.
\textsuperscript{208} Dacombe and Parvin (n 145) 152; Simone Chambers, ‘Deliberative Democracy Theory’ (2003) 6 Annual Review of Political Science 307, 309.
\textsuperscript{209} Chambers (n 208).
\textsuperscript{210} This function is elaborated as to “produce preferences, opinions, and decisions that are appropriately informed by facts and logic and are the outcome of substantive and meaningful consideration of relevant reasons... Because the topics of these deliberations are issues of common concern, epistemically well-grounded preferences, opinions, and decisions must be informed by, and take into consideration, the preferences and opinions of fellow citizens", Jane Mansbridge and others, ‘A Systemic Approach to Deliberative Democracy’ in John Parkinson and Jane Mansbridge (eds), Deliberative Systems (1st edn, Cambridge University Press 2012)11.
\textsuperscript{211} ibid 12.
\textsuperscript{212} Thomas Christiano, ‘Rational Deliberation among Experts and Citizens’ in John Parkinson and Jane Mansbridge (eds), Deliberative Systems (1st edn, Cambridge University Press 2012);
cannot be fulfilled by expert or elite engagement – but require broader participation.

Participatory democracy theory clearly suggests that spaces where opinions and preferences are shaped cannot solely exist at the constitutional level. Social groups appear as one central building block for democracy as they can function as spaces for socialization. Workplace and worker cooperatives have been raised as suitable spaces because of their ubiquity and frequent diversity of voices and interests. Neighborhood groups are similarly stressed as a crucial site for developing necessary participatory capacities and local democracy in general is one answer participatory theory stresses, with the caveat that such spaces and initiatives need to be connected to federal or national systems, with an emphasis on accessible and meaningful opportunities to participate. Deliberative democracy in turn is not necessarily concerned with the economic system as the main site for deliberative politics, but the public sphere, and also more recently deliberation through mini-publics located in various sites, within or as an appendage to traditional representative structures, or more radically replacing them. The concept of the public sphere, as outlined by Habermas, is marked by the absence of a state-sanctioned hierarchical relationship and market-sanctioned societal inequality allowing for an exchange based on reason, free of social and political pressures, in turn leading to public opinion embodying moral authority that can hold political decision-making to account. While modern democracy according to Habermas is shaped by the decay of the public sphere due to amongst other things the influence of mass media and the economic imperatives they are run by, emancipatory movements can revitalize the public sphere, and this is often associated with strengthening civil society.

213 Zittel (n 144) 13.
214 ibid.
215 Pateman, Participation and Democratic Theory (n 101) 67–102; See also Peter Bachrach and Aryeh Botwinick, Power and Empowerment: A Radical Theory of Participatory Democracy (Temple University Press 1992).
216 ibid. On this point see also Zittel (n 144) 14.
218 Habermas (n 165) 383ff.
Participatory democracy theory overall, while incorporating elements of direct democracy, frequently emphasizes the role of civil society organizations as mediators or as schools of democracy. In this context it is often stressed that the participation of a few have positive effects on the many and society overall; it contributes to a democratic culture; it has educational and socialization functions and it is not a zero-sum game. Participation in one forum likely spills over to participation in another. Stronger participation may also facilitate the voice of socially excluded communities. Participatory democracy can therefore be said to advance a principle of empowerment of civil society, including facilitating participation of citizens belonging to a minority groups to make their voices heard. Reinforcing and taking this idea further is associational democracy centered on the premise that as many of the affairs of a society as possible are managed by voluntary and democratically self-governing associations.

There is a lively debate about the relationship between participatory democracy and deliberative democracy as well as about what practices and thresholds should distinguish participatory governance with ‘participatory democracy’. The debate has been fueled by a perceived crises of democracy at the national level, reflected in low voter turnout as well as disaffection with partisan politics and the political class, the rise of populism, democratic backsliding and rise of inequality. This chapter adopts an inclusive approach to participatory democracy. I here borrow from Zittel’s encompassing definition in which he argues that participatory democracy should “neither be

\[\text{220} \quad \text{Zittel (n 144) 13–14; for fundamentals of the associative model of participatory democracy, see Cole (n 149); Paul Q Hirst, Associative Democracy: New Forms of Economic and Social Governance (Polity Press 2003).} \]

\[\text{221} \quad \text{Pateman, Participation and Democratic Theory (n 101) 7–10; See also Mansbridge (n 101); For a European perspective, see Magnette (n 91) 144; Tom Van Der Meer and Erik Van Ingen, ‘Schools of Democracy? Disentangling the Relationship between Civic Participation and Political Action in 17 European Countries’ (2009) 48 European Journal of Political Research 281.} \]

\[\text{222} \quad \text{Elodie Fazi and Jeremy Smith, ‘Civil Dialogue: Making It Work Better, Study Commissioned by the Civil Society Contact Group’ (Civil Society Contact Group 2006) 15.} \]

\[\text{223} \quad \text{Hirst (n 220).} \]

\[\text{224} \quad \text{For an argument at the intersection of both these questions, see Pateman, ‘Participatory Democracy Revisited’ (n 138); The Journal of Deliberative Democracy’s issue dedicated to discussing Christina Lafont’s ‘Democracy without shortcuts’ provides a helpful overview of some of the recent salient debates. André Bächtiger, Julien Vrydagh and Nicole Curato, ‘Democracy without Shortcuts: Introduction to the Special Issue’ (2020) 16 Journal of Deliberative Democracy.} \]

\[\text{225} \quad \text{These trends are also nested in broader developments of technological change and globalization, see Landemore (n 28) 26–32.} \]
reduced to those critical authors writing in the 1960s and 1970s who coined the original concept, nor simply to particular strands in this debate”.

The argument is for an understanding of participatory democracy which incorporates various strands of democratic theory, including direct democracy, as well as the theory of deliberative democracy. This inclusive reading of participatory theory comprises a mosaic of concepts and empirical models of democracy; and while relying on different scientific methods and oriented towards varying degrees of conceptualization, they share the basic tenet that participation can be increased through institutional reform and that this is a worthy goal. It is therefore helpful to view them as elements of one conversation. Zittel explains participatory democracy theory along the lines of three democratizing strategies; integrative democratization (focusing on the relationship between institutions and individuals and fostering the civic-minded citizen), expansive democratization (as in increasing the utility of participation through expanding participation rights), and efficiency-oriented democratization (emphasizing political institutions as incentive systems with an emphasis on lowering the costs of participation rather than its benefits). Zittel takes this ‘common debate’ and reconstructs it in order to serve as a theoretical basis to evaluate and inform strategies of participatory engineering, emphasizing the importance of ‘local democracy’. I leave aside his democratizing strategies and use his overall broad reading to further explore the meaning of participatory democracy as it surfaces in the debates surrounding the democracy in the EU, which indeed has drawn on various strands of democratic theory.

However, before turning to participatory democracy in the debates surrounding the EU, a couple issues remain to be untangled under the broad reading of ‘participatory democracy’ adopted. The first pertains to the potential contradiction of including deliberative democracy into an understanding of participatory democracy. Because claims to legitimacy of deliberative democracy do not necessarily reside in participation or participants but in the logic of reason-giving argumentation and discursive representation, some theorists, including Pateman, have contrasted the difference between participatory democracy as a theory of change with a revolutionary

226 Zittel (n 144) 10–11.
227 ibid.
228 ibid 11.
229 ibid 9–26.
230 Elster (n 158) 1.
political ideal, while the focus in deliberative democracy research is on participatory forums which involve few citizens and/or hold little actual decision-making power. 231 One question being asked here is whether deliberative democracy and its proponents are committed to broader participation. 232 A main response from prominent deliberate democracy theorists has been to emphasize that deliberative democracy is committed to not just the quality of participation but also the number of citizens engaged in deliberation, even though such reforms sometimes at the practical level have remained elusive. 233 Indeed, a recurring question in the debates of deliberative democracy has been how more people can be engaged for democratic deliberation as well as the effects of such deliberation can be scaled up. 234 Looking at the research field in general, the mainstream analysis has been that deliberative democracy has passed through an initial normative phase, moving to an empirical one where conditions and effect of deliberations have been scrutinized and refined, to finally the most recent 'systemic' turn which explores the possibility of deliberative systems as well as issues of scale. 235 Regarding the ambitions for change, several prominent deliberative democracy theorists emphasize that deliberative democracy calls for fundamental changes in political decision-making and requires more egalitarian political, social, and economic conditions as deep inequities and privileges upset the communicative equality that deliberation requires. 236 In essence, this signifies that subscribing to the main assumptions and theory of deliberation, implies a commitment to having more or as many as possible involved in such deliberation, i.e. deliberation should not just be happening in a microcosm involving few citizens or elites, no matter how representative, deliberative or empowered such microcosms may be. However, discursive representation may in this context be a useful stepping stone.

231 Pateman, Participation and Democratic Theory (n 101); The argument for their conceptually distinctness can be framed as an “aggregative participatory democracy” that does not value deliberation, and a “liberal deliberative democracy” that that does not require mass citizen participation in deliberation: Elstub (n 175) 188.
234 ibid.
235 Mansbridge and others (n 210); for a critical appraisal of the ‘turn’, see Smith (n 201); for a more detailed analysis of how the deliberative field came to be in different stages, see Floridia (n 182) 36.
In view of the other possible contradiction regarding varieties of participation; participatory democracy theory is open to a various forms of political activity and not just deliberation, Dialogic approaches that induce preference reflection have however in most elaborations of the theory since its inception retained a privileged position. And scholarship has also expanded the notion of what it means to deliberate. This inclusive reading therefore joins those scholars who place deliberative democracy within the broader frame of participatory democracy or see it as its continuation, defense or savior, as well as those theorists who claim that the normative and explanatory potential of the deliberative and participatory approach is not contradictory but enhanced through the presence of the other. Participatory democracy facilitates the inclusion of pertinent reasons and assent from all those affected, as a deliberative interpretation of legitimacy requires. A special role for deliberation in turn makes participatory democracy less vague, contributes to the transformative effects hailed as the dominant paradigm of participatory democracy and has the potential to reduce inequalities by promoting public reasoning.

The second issue relates to the issue of institutional design and its role in scaling participation as well as ensuring equality. The exposition thus far has been concerned with elaboration of participatory democracy theory including its deliberative democracy strand, mainly at the normative and abstract level. However the last couple of decades have seen participatory democracy practices and innovations systematically

237 See e.g. Pateman, Participation and Democratic Theory (n 101) 25; Barber (n 148) 178–198; For an opposing view, Mouffe emphasizes the agonistic value of participation while Mutz argues it is doubtful that political activism and deliberation go together, see Chantal Mouffe, ‘Deliberative Democracy or Agonistic Pluralism?’ (1999) 66 Social Research 745; Diana Carole Mutz, Hearing the Other Side: Deliberative versus Participatory Democracy (Cambridge University Press 2006).


240 Joshua Cohen, ‘Reflections on Deliberative Democracy’ in Thomas Christiano and John Christman (eds), Contemporary Debates in Political Philosophy (Wiley-Blackwell 2009); Elstub (n 175).

241 Elstub (n 177) 199.

242 ibid.
gathered on a large scale and made accessible to practitioners, researchers, interested parties and the wider public through accessible databases, networks and crowdsourcing platforms. Notable examples include Participaedia,243 the LATINNO244 databases - both of which include thousands of various public participation and democratic innovations – as well as robust reports compiling best practice participatory or deliberative exercises, e.g. by the OECD245 and regional democratic research networks with a long-standing record of participatory action research,246 as well as new entities such as the European Union Competence Center on Participatory and Deliberative Democracy. 247 This growing emphasis on the operation of participation, including in particular deliberation, has been an important driver for shaping the basis of institutional reform.248 This literature offers a range of measurement tools that can be used to demonstrate the effectiveness of deliberative democratic reforms through empirical work. As a consequence, the design of participatory democratic institutions has been able to address issues of scale and equality.249 Regarding scale, there are now empirically grounded observations of participatory democracy practices involving millions of citizens regularly engaged in deliberation at the local level, tied to the government policy apparatus, leading to substantive policy and legislative outcomes at the national level.250 The leading practices involving deliberative mass-participation are outside of Europe and

245 OECD Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave (n 2).
247 Commission, Competence Centre on Participatory and Deliberative Democracy (n 89).
248 Floridia (n 182) 36–45; Elstub (n 175) 192.
249 See e.g. Smith (n 201).
250 For example in Brazil, 7 million individuals have participated in at least one national public policy conference on health between 2003 and 2011. The conferences which are jointly organized by the relevant ministry and civil society begin with widely dispersed thousands of conferences held simultaneously at the municipal level open to all, each deliberating and producing a final report and electing delegates to the state level conference, where the process is repeated culminating in a national conference with distilled recommendations for policy, legislative or even constitutional reform. See Thamy Pogrebinschi and David Samuels, ‘The Impact of Participatory Democracy: Evidence from Brazil’s National Public Policy Conferences’ (2014) 46 Comparative Politics 313; The constitutionally enshrined gram sabha village council in India, counts every individual eligible to vote as a member, affecting 840 million people living in approximately 1 million villages in rural India. Significant deliberative and substantive impacts have been noted. See Ramya Parthasarathy and Vijayendra Rao, ‘Deliberative Democracy in India’ in Andre Bächtiger and others (eds), The Oxford Handbook of Deliberative Democracy (Oxford University Press 2018).
exist in a different context, however they substantiate the possibility of such participation as well as how it can be complementary with representative democracy. Regarding equality, many innovations seek to address inequalities and achieve diversity by selecting participants through random sampling (‘mini-publics’ are primarily organized through such sampling) or involving under-represented groups in policy deliberations.\footnote{On consulting through random sampling, see James S Fishkin, ‘Consulting the Public through Deliberative Polling’ (2003) 22 Journal of Policy Analysis and Management 128; On including under-represented groups in policy deliberation, see Archon Fung and Erik Olin Wright, ‘Deepening Democracy: Innovations in Empowered Participatory Governance’ (2001) 29 Politics & Society 5.} A common concern is that the process is not dominated by a few powerful voices, which can be facilitated through institutional design and facilitation.\footnote{Young (n 165); Goodin (n 165); Fung, ‘Putting the Public Back into Governance’ (n 62).} In this context there is a close relationship between equality and inclusion as “collective agendas and decisions are democratic to the degree that those affected by collective outcomes are empowered to influence them”.\footnote{Young (n 165) 39.}

Equality as understood here, is in essence about two values.\footnote{Dacombe and Parvin (n 145) 153.} The first is the value of universal moral equality, referring to the fundamental common humanity and moral worth, which requires abstracting from social circumstances.\footnote{André Bächtiger and Edana Beauvais, ‘Taking the Goals of Deliberation Seriously: A Differentiated View on Equality and Equity in Deliberative Designs and Processes’ (2020) 12 Journal of Deliberative Democracy 1-2.} The second is the value of equity, which refers to fair distributions of power and resources, in turn requiring attending to social circumstances.\footnote{Ibid.} Justice then refers not only to redistribution when e.g. economic inequality distorts empowerment, but also refers to advancing the conditions which enable social group members to develop and exercise their individual and collective capacities.\footnote{Ibid.} For those participatory democrats who also emphasize the epistemic or problem-solving function of democracy, the principle of abstraction is frequently counterbalanced either by diversity focusing on ‘cognitive diversity’\footnote{Hélène Landemore, ‘Deliberation, Cognitive Diversity, and Democratic Inclusiveness: An Epistemic Argument for the Random Selection of Representatives’ (2013) 190 Synthese 1209.} or know-how in terms of specific access to knowledge and realities, e.g. local conditions.\footnote{Joshua Cohen and Charles Sabel, ‘Directly-Deliberative Polyarchy’ (1997) 3 European Law Journal 313, 326–328.} Two points are worth noting with regard to the question on institutional design and equality, the first is
that in terms of participation selection, empirical research strongly suggests that self-selection as a stand-alone recruitment method often produces more homogeneous groups that reflect social inequality, and that this lack of diversity also may negatively impact the epistemic goals of a participatory practice.

Finally, my inclusive reading of participatory democracy is not quite as ecumenical as Zittel’s in terms of the normative imperatives of participatory democracy. Under Zittel’s big tent, what is commonly understood as ‘participatory governance’ as well as the ‘orthodox’ view of participatory democracy both reside. The lowest common denominator here is the promotion of public participation by institutions with a reference to equality. While an inclusive reading of participatory democracy should be attentive to what often is highlighted in empirical accounts of participatory democracy, i.e. that ‘success’ in terms of democratic participation or participatory democratic innovations is context-specific, I contend that for a practice or model to be connected to participatory democracy it must retain some tangible connection to the ideals outlined in this section, namely democracy by the people. An inclusive reading of participatory democracy therefore still entails strengthening participation through increasing the opportunities and meaningfulness of citizens’ participation beyond elections, or at the very least provide meaningful forms of discursive representation for citizens which sufficiently attend to the value of equality. Some ambiguity here is purposefully left in this regards as these very questions lie at the heart of the debate on political participation in the European Union.

3.2. Participatory democracy in the debates on the democratic legitimacy of the European Union

Participation by non-state actors has to varying degrees been a feature of the Union since its very inception. During the early years of the Union, participation was institutionalized through the creation of advisory bodies (Consultative Committee on European Coal and Steel Community and the Economic and Social Committee common to the European Economic Community)- an example of this is how citizens “are called upon to cooperate in the functioning of the Community,” as referenced Van Gend en Loos in support of the uniqueness of the

260 Smith (n 201) 21; see also Urbinati and Warren (n 16) 403–406.
261 Dryzek and Niemeyer (n 197).
262 Smith (n 201).
Community legal order.263 However, doubts regarding the feasibility and desirability of participation in the mainstream empirical accounts of democracy post World War II, were also seemingly reflected in the attitudes of EU leaders, with leading figures such as Monet being wary of democratic and participatory politics.264

Mendes has shown that participation in the form of interest-representation has been a been a constitutive feature of EU decision-making. 265 This can be traced across the practices of committees, agencies, regulatory networks and the Commission throughout the foundational period of the Union leading up until the establishment of the Single Market. 266 Such participation was however primarily promoted and viewed as a remedy of administrative deficits rather than democracy ones, which addressed the limited resources and enforcement capacities of EU administration. 267 Additionally, participation was viewed as a strategy to further expand the reach of Union action and to compensate for lack of competence through soft law and governance.268

The early steps towards economic integration were thus framed in terms which de facto, if not always deliberately, bypassed citizen participation and the approach to integration was not one where democracy was a central factor. 269 A popular ‘permissive consensus’ was said to legitimize integrative action.270 It was first following the legitimacy crises brought by Maastricht Treaty that political participation at the EU level, prominently emerged on the political and public agenda.271 The

263 Case C-26/62 Van Gend en Loos EU:C:1963:1.
264 Monaghan (n 178) 289; See also Featherstone who argues that Monet’s technocratic and elitist conception of the High Authority contributed to the lack of the Commission’s democratic legitimacy up until the Maastricht Treaty. Kevin Featherstone, ‘Jean Monnet and the “Democratic Deficit” in the European Union’ (1994) 32 Journal of Common Market Studies 149, 165.
265 Mendes, Participation in EU Rule-Making (n 15) 80–120.
266 ibid; The ‘Foundational Period’ according to Weiler begins in the 50s up until the mid 70s. JHH Weiler, ‘The Transformation of Europe’ (1991) 100 The Yale Law Journal 2403, 2410–2450.
267 Mendes, Participation in EU Rule-Making (n 15) 119.
269 Characterizing the EU as a technocracy, lacking in transparency and political accountability and marked by bargaining between sectarian interests, see e.g. Erik Oddvar Eriksen and John Erik Fossum (eds), Democracy in the European Union (0 edn, Routledge 2002).
Danish rejection, the French petite ‘oui’ as well as the Irish challenges in ratifying the Treaty indicated an end to the ‘permissive consensus’ on European integration and brought the argument that the EU was suffering from a democratic legitimacy deficit to the fore. This section will consequently focus on in what ways participatory democracy surfaced after the Maastricht Treaty leading up to the drafting of the Lisbon Treaty.

The debate and literature on the EU’s democracy deficit is sprawling and vast, and from the very beginning, the deficits nature, extent, and very existence were contested. Much of this disagreement can be attributed to the different theories of democracy that are used as a normative criteria to assess the EU as well as their diverging underlying assumptions. The main strands of the deficit-argument are many and refer to the disjunction between power and electoral accountability, concerns of executive dominance, delegation of powers to non-democratic spaces and actors, the geographical and psychological distance between Brussel and citizens, the lack of a European demos, complexity and transparency concerns considering multi-level governance, as well as the substantive imbalance between economic and the social issues, the former unduly prioritized at the expense at the latter. The debate in academic and political spheres up until the 1990s focused on the role of enhancing the role and powers of the Parliament. This discussion was gradually complemented by other discourses – including participatory democracy – attempting to address a crisis of legitimacy observed not just at the European level because of

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273 Kohler-Koch and Rittberger (n 102).

274 The overview is primarily drawn from Craig: Paul Craig, ‘Integration, Democracy, and Legitimacy’ in Paul Craig and Gráinne De Búrca (eds), The Evolution of EU Law (Oxford University Press 2021) 31; See also Joseph HH Weiler, Ulrich Halten and Franz Mayer, ‘European Democracy and Its Critique Five Uneasy Pieces’; Follesdal and Hix (n 272).

its specific institutional configurations and multi-level nature, as well as literal and psychological distance from citizen, but also challenges with parliamentary democracy at the national level with its low voter turnout and an overall disillusionment with political parties and the political class. While this led some scholars to stress the existence of a democratic deficit on both the national and the European level, as well as in the relationship between these levels, others argued there was little reason to speak of a EU democratic deficit at when the same deficit was de facto present in national democracies, and the EU should be considered as a regulatory body, rather than a federal-superstate.

Most scholars, however, agree there was a democracy deficit though opinions naturally diverge as to how it can be resolved. Dahl argued that in order to match levels of democratic accountability and control in modern democracies “political leaders would have to create political institutions that would provide citizens with opportunities for political participation, influence and control”. Others point to a the lack of a proper demos in the Union and an all-encompassing political identity, which would make it possible to delegate majority rule which can be consented to. Follesdal and Hix questioned whether a European demos is necessary, suggesting more democratic competition enabled through constitutional engineering. The debate could be characterized in terms of theorists focusing their attention on the quality of what occurs inside EU governance, including questions of representation and accountability and those addressing the quality of what inputs and outputs EU governance delivered, assessing legitimacy primarily on the basis of legislative and policy outcomes or on citizens' active participation and deliberation. The latter has since long been discussed first with Scharpf, who drawing on system-theory, divided democratic legitimacy into output, judged by the effectiveness of the EU's policy outcomes for the people, and input, judged by the EU's responsiveness to citizen concerns as a result of participation by the

276 Saurugger (n 271).
277 Follesdal and Hix (n 272).
278 Moravcsik (n 272).
279 Dahl, On Democracy (n 163) 115.
280 Weiler, Haltern and Mayer (n 274); Scharpf (n 23).
people. Schmidt added to this the normative criteria of ‘throughput’; consisting of governance processes with the people, defined in terms of efficacy, accountability, transparency and inclusiveness. Schmidt demonstrates the challenges the EU has in providing citizens with government by and for the people while performing better in providing government for and with the people.

Kohler-Koch identifies three overarching different problem-solving approaches that emerged to address the European democratic deficit. The first being institutional reform to strengthen representative democracy, the second participation of stakeholders in an EU governance system centered on efficiency, and the third a turn to civil society with demands for enhanced civil society participation, which to a lesser degree also included demands for broader public and citizen engagement. The question of what role citizen and interest-group participation should play in the political process paved the way for a normative body of literature which prominently included the role of civil society. Saurugger argues that following the purposeful activities of several political, bureaucratic and academic actors, the ‘participatory norm’ in the EU emerged which led to the acceptance, inter alia, of the importance of civil society involvement in decision-making processes. The turn towards participation, Heidbreder elaborates in the same vein, was linked to three interrelated dynamics. First, the debate surrounding the EU's democratic legitimacy contributed to the EU decision-making context becoming more politicized, which put the spotlight on civil society as a new actor in EU policy processes. Second, academics shifted their attention from overarching integration dynamics to issues of governance, which raised the interest in the role of interest-organizations to enhance decision-making from both a democracy and effectiveness perspective through “stakeholder inclusion”. Third, practitioners in Brussels became attuned to the potential of civil society as a possible solution to

283 Scharpf (n 23).
284 Schmidt (n 282).
285 ibid.
288 Saurugger (n 271).
290 ibid.
291 ibid.
address legitimacy, accountability, and efficiency challenges in a constantly enlarging Union. There is also wide agreement, that “Commission was to be credited with paving the way for civil society’s entrance into the European system”. By the 1990s, scholars and EU institutions had taken up the concept of participatory democracy as well as democratic participation beyond the ballot-box to analyze the strengths and weaknesses of the phenomenon present at the EU level.

This analysis primarily occurred through the lens of an associative version of democracy and deliberative democracy.

According to the associative variant, the enhancement of the democratic legitimacy at European Union level through the contribution of interest-groups was based on the assumption that interest groups can contribute to efficient and legitimate decision-making as they have greater resources at their disposal compared to individual citizens. Drawing from comparative empirical research focused on neo-corporatism and consociationalism at the national level, several flaws with the associative perspective were however identified, including the questionable democratic credentials of civil society and interest groups, as well as the asymmetries in citizens and interest-groups capacities to organize, privileging institutionalized and professionalized actors. The involvement of groups in the public policy processes could be justified for reasons of system effectiveness, but the democratic quality from the perspective of both representative and participatory models of democracy, were put into question. Calls for stronger representativity criteria for organizations were put forward. The professionalization of interest groups, as well as their frequent seeming lack of genuine link to citizen or constituents called into question their role in promoting the public sphere or representing their constituents. From the associative model, Saurugger distills the arguments developed by participatory

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292 ibid.
293 Kohler-Koch and others (n 286) 24.
294 Saurugger (n 287); Gautier Busschaert, Participatory Democracy, Civil Society and Social Europe: A Legal and Political Perspective (1st edn, Intersentia 2016) 21–34.
295 Busschaert (n 294) 21–34; Saurugger (n 294).
296 Saurugger (n 287) 1278.
297 ibid.
298 ibid.
299 Fazi and Smith (n 222) 24–29.
democracy into three guiding lines for analysis at the EU level. The first is the emphasis by participatory theorists on the regulation of civil society access, the second the enhancement of resources among various groups lacking means to participate and the third the degree to which citizens are represented and can participate in decision-making process, through prominently through grassroots civil society mobilization.

Related to the associative democracy model but more influential, was the influence of deliberative democracy, to which European integration scholar turned. Participatory theorization in the EU based on deliberation can be categorized as macro, micro or meso, expressed particularly through the contribution of civil society. The macro perspective focus on the enhancement of the public sphere and the idea of citizenship. The micro-theories, instead relied on the participatory turn to possess deliberative qualities which would advance the problem solving capacity of the EU. Deliberative democracy in this setting served as theoretical foundation for moving beyond aggregation and bargaining of preferences to processes that would support a discursive structure of forming opinions, a range of different and competing views that would receive ‘fair’ treatment. Central was not giving due to representatives of general interests but rather procedures that require reason-giving and justification for the problems at stake. The theory of ‘Deliberative Supranationalism’ stressed the contribution of European law for “transforming strategic action into deliberative problem-solving”. European law rules and principles would structure the decision-making processes so that they “narrow down the range of arguments that are admissible within debate so that only generally reproducible and justifiable grounds or concerns...can be used”, while also promoting the presentation of all relevant interests and refining

301 Saurugger (n 287) 1277.
302 ibid.
303 Busschaert (n 294) 25–35.
304 ibid.
306 Kohler-Koch, ‘The Organization of Interests and Democracy’ (n 141).
arguments with an eye to the legitimate concerns and interests of those who did not directly participate within the committee system.\textsuperscript{309} The theory was substantiated through empirical observation of the committee system (comitology), but its application to other forms of EU decision-making processes are questionable.\textsuperscript{310} For example, with regard to law-making consultations, the final decision will be taken in another arena, so participants are not as incentivized to ‘deliberate’ and arrive at a common understanding.\textsuperscript{311}

The overall thrust of the micro-theories is that by holding decision and law-making processes to a standard of fairness and increasing accountability and responsiveness through abiding by principles of transparency, openness and participation,\textsuperscript{312} these arrangements would be provided with procedural legitimacy.\textsuperscript{313} This procedural legitimacy was primarily framed as a complement to democratic legitimacy flowing from parliament.\textsuperscript{314} As Closa notes, participation would contribute to deliberation of high quality when the engaged actors “avoid arguments based on vested interest and seek persuasion based on strong arguments appealing to superior moral reason”.\textsuperscript{315} Prominent in these debates, was the role of transparency for enabling deliberation in the public sphere, in laying the foundation for participation in decision-making and for overall accountability.\textsuperscript{316}

\begin{footnotesize}
\textsuperscript{309} Christian Joerges and Michelle Iverson ‘Challenging the Bureaucratic Challenge’ in Erik Eriksen and John Fossum (eds) Democracy in the European Union: Integration through Deliberation (Routledge 2000) 182. Regarding the relevant interests, see ibid.

\textsuperscript{310} Kohler-Koch, ‘The Organization of Interests and Democracy’ (n 141) 261-262.

\textsuperscript{311} Ibid.


\textsuperscript{313} Giandomenico Majone, Regulating Europe (Routledge 1996) 291–294.


\end{footnotesize}
micro-theories, there was criticism that they either were too focused on collective actors, jeopardizing equality, or that participation was formulated in a rather abstract way or was side-stepped by other theoretical concerns.\textsuperscript{317}

The meso theories often focus on the democratic ‘transmission-belt’ and participation catalyst role interest groups and civil society could play, arguing that the EU as a political system is in need of direct legitimacy following the wide range of legislation, rules and policies it produces.\textsuperscript{318} These theories mostly assessed the democratizing potential of participation of civil society according to the ideal of public deliberation.\textsuperscript{319} This thinking held that the European governance would need to meet democratic norms of public control and political equality,\textsuperscript{320} looking beyond functional holders and addressing the citizen as the “ultimate stakeholder” of governance, in order to address the existing democracy deficit.\textsuperscript{321} The concepts of representation and accountability which characterized the middle-ground theories however, arguably do not properly convey the ideal of participatory democracy as they do not ensure citizens will participate in European governance beyond elections.\textsuperscript{322} Still, one strand of this literature however implies a commitment to participatory democracy, in that they see deliberative democracy implies a commitment to wide public participation, where citizens and civil society contribute decisively, and civil society is regarded as a civic space between the state and market.\textsuperscript{323}

\textsuperscript{317} Busschaert (n 294) chapters 2-3; Smismans, ‘The Constitutional Labelling of “the Democratic Life of the EU”; Representative and “Participatory” Democracy’ (n 137) 128-129.
\textsuperscript{318} Jens Steffek and Patrizia Nanz, ‘Emergent Patterns of Civil Society Participation in Global and European Governance’ in Jens Steffek, Claudia Kissling and Patrizia Nanz (eds), Civil Society Participation in European and Global Governance (Palgrave Macmillan UK 2008) 7–8; Busschaert (n 294) 36–37.
\textsuperscript{319} ibid.
\textsuperscript{320} Lord and Beetham (n 314) 453-455; Peters and Pierre (n 23) On governance and democracy challenges, see; Arthur Benz and Yannis Papadopoulos (eds), Governance and Democracy: Comparing National, European and International Experiences (Reprint, Routledge 2007); Deirdre Curtin, Peter Mair and Yannis Papadopoulos (eds), Accountability and European Governance (0 edn, Routledge 2014).
\textsuperscript{322} Busschaert (n 294) 36–37.
\textsuperscript{323} ibid.
Civil society in this context facilitates participation from the grassroots through a framework of governance.\textsuperscript{324}

Regarding the term ‘participatory democracy’ in EU official documents, it can be traced to efforts to enhance non-governmental organizations involvement in European policy-making. \textsuperscript{325} The Commission argues in its 2000 discussion paper on partnership with non-governmental organizations that although “the decision making process in the EU is first and foremost legitimized by the elected representatives of the European people, NGOs can make a contribution fostering a more participatory democracy”.\textsuperscript{326} The European Economic and Social Committee (EESC) in its opinion on the paper replied that ‘participatory democracy requires that parties who are affected by legal provisions should be involved in the opinion-forming process at the earliest possible stage and should be given the opportunity to bring their wishes to bear in this process and put forward their proposals’, adding that; ‘this principle, in particular, chimes with the participatory model of civil society’.\textsuperscript{327} Smismans argues, that ‘participatory democracy’ to a large extent emerged in the discourse on civil society and civil dialogue developed by both the European Commission and the EESC since the end of the 1990s.\textsuperscript{328} This discourse then broadened to other sectors, and became a part of the Commission’s efforts for administrative reform and its governance debate.\textsuperscript{329} In the Commission's White Paper on European Governance participation through civil society organizations held an important place to ensure ‘good governance’ while the concept of ‘civil society organizations’ is here interpreted more broadly to also include economic actors,


\textsuperscript{325} Smismans traces the concept and discusses its evolution. Smismans, ‘The Constitutional Labelling of “The democratic life of the EU”: Representative and Participatory Democracy’ (n 137) 127.

\textsuperscript{326} This phrase is under the title ‘Fostering participatory democracy’: Commission, Commission discussion paper ‘The Commission and non-governmental organisations: building a stronger partnership’ COM/2000/0011 final indent 3.1.4.

\textsuperscript{327} ibid.

\textsuperscript{328} Smismans, ‘The Constitutional Labelling of “The democratic life of the EU”: Representative and Participatory Democracy’ (n 137) 127.

\textsuperscript{329} ibid.
professional associations and business. The connection between ‘participatory democracy’ and the involvement of civil society organizations in European policy was also made by the European and Economic Social Committee (EESC), which defined its own role as guaranteeing the implementation of a participatory model of civil society, enabling civil society to participate in the decision-making process; and thereby contributing to reducing the democracy deficit.

In relation to the issue of a European public sphere and ‘peoples’, the EESC argued that its consultative role, enshrined in the Treaty, and composed of representatives of intermediary organizations, could act as a representation of the people's way of identifying with civil society organizations” and complement the legitimacy of the parliament, while also not monopolizing this role, because European democratic model will contain many “elements of participatory democracy”.

The cementing of the participatory norm also meant that the 1990s saw shift in participation as dialogue with civil society increased. Stakeholders were identified and the Commission supported the creation of forums for exchange. Along with the older consultative bodies of European Economic and Social Committee, as well as social dialogue, European institutions were working with a wide range of consultative committees. During this period a few quasi-political rights were accorded European citizens, including the right to petition before the European institutions and the right to complain to the European Ombudsman. A legal duty to consult was also established

330 Smismsans comments on the Commission using the discourse on civil society involvement and participation to legitimate a variety of (existing) structures of interaction with various actors, "including private lobbyists", ibid; On the influence between academics, experts and stakeholders in relation to the drafting the White Paper, see Saurugger (n 271).
331 The EESC was created through the Treaty of Rome and has advisory powers across a wide range of areas, composed of representatives from national employers’ organizations, trade unions and ‘various interests’ (e.g. professional associations, small and medium enterprises, consumers and social economy organizations): see ‘European Economic and Social Committee | European Union’ <https://europe.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/european-economic-and-social-committee-eesc_en> accessed 9 August 2023.
332 Smismsans, ‘The Constitutional Labelling of “The democratic life of the EU”: Representative and Participatory Democracy’ (n 137) 128.
333 European Economic and Social Committee, Opinion of the Economic and Social Committee on ‘Organised civil society and European governance: the Committee’s contribution to the drafting of the White Paper’ (2001/C 193/21) indent 3.3.1.
334 Smismsans, ‘The Constitutional Labelling of “The democratic life of the EU”: Representative and Participatory Democracy’ (n 137).
335 see e.g. Mendes, Participation in EU Rule-Making (n 15) 94–102.
336 The right to petition the European Parliament and complain to the Ombudsman was added through Article 8d Maastricht Treaty: Consolidated version of the Treaty on European Union
through the Amsterdam Treaty, enshrined in Protocol nr. 2 on the application of the principles of subsidiarity and proportionality: “The Commission should […] consult widely before proposing legislation and, wherever appropriate, publish consultation documents”. 337

Significantly, with the Amsterdam Treaty, the co-decision procedure was extended across existing fifteen legal bases, cementing the EP’s role as a policy and law-making institution. 338 With the evolution of lobbying towards new and restructured European peak associations, a growing number of firms and civil society groups led to the overall interest group population becoming denser—EU officials talked of interest group overload and of bottleneck effects on policy-making. 339 Following this overcrowding as well as the overall democracy and governance debate, EU officials started to explore the regulation of lobbyists and (better) ways to manage access to the policy process. This final phase crystallized in conjunction with the publication of the Commission’s White Paper on Governance in 2001, which in turn influenced the debates leading up unto the drafting of the Constitutional Treaty. 340

3.3. The path leading to the Lisbon Treaty and a ‘principle’ of participatory democracy

Based on the analysis of a “widening gulf between the European Union and the people it serves”, the White Paper marked a change of paradigm for the European Union. 341 The White Paper defined the EU policy process as the result of different influences and mechanisms of

[1992] OJ C191/92 Article 8d; The European Ombudsman was first established by the Maastricht Treaty, yet the idea of a European Ombudsman circulated already in the 1970s, with a resolution by the European Parliament calling for the establishment of a “Community Ombudsman”, see Hierlemann and others (n 9) 112.


338 For a discussion of this shift, see Lord and Beetham (n 314) 453–455; Peters and Pierre (n 23). On the democracy challenges raised by European governance, see; Arthur Benz and Yannis Papadopoulos (eds), Governance and Democracy: Comparing National, European and International Experiences (Reprint, Routledge 2007); Eriksen, Joerges and Neyer (eds) (n 83); Curtin, Mair and Papadopoulos (eds) (n 320).


341 Commission, White Paper Governance 8; On the paradigm shift, see e.g. Fazi and Smith (n 217) 24.
participation beyond the institutional triangle, and also by acknowledging the need to foster citizens’ involvement in the EU process, promote new forms of contact between EU-institutions and different interest groups were promoted, increasing openness in different phases of the decision-making process.\footnote{Quittkat, Christine and Finke, Barbara (n 78); Fazi and Smith (n 222) 24.} The five good governance principles of this new direction were openness, participation, efficiency, accountability and coherence.\footnote{Commission, White Paper Governance indent II.} The White Paper signified a broader qualitative change in the EU’s approach, which to a degree could be expressed in terms of a shift from government to governance.\footnote{David Coen, Alexander Katsaitis and Matia Vannoni, Business Lobbying in the European Union (1st edn, Oxford University Press 2021) 32–38.} The role played by interest groups evolved as EU institutions shifted from straightforward, hierarchical style of policy-making to a looser, more horizontal, and more decentralized one.\footnote{See e.g. Scharpf (n 23); David Coen and Alexander Katsaitis, ‘Chameleon Pluralism in the EU: An Empirical Study of the European Commission Interest Group Density and Diversity across Policy Domains’ (2013) 20 Journal of European Public Policy 1104; Vivien Schmidt and Matthew Wood, ‘Conceptualizing Throughput Legitimacy: Procedural Mechanisms of Accountability, Transparency, Inclusiveness and Openness in EU Governance’ (2019) 97 Public Administration 727.} In turn, this created a variation in legitimacy demand—between input and output—among different EU institutions, and even between different elements within the Commission.\footnote{Mendes, Participation in EU Rule-Making (n 15) 129; It was also framed in terms of promoting new forms of European governance and unveiled as one of four key strategic objectives of the 2000-2005 Commission. Walker (n 340) 44.} The White Paper intended to address, at least to some degree, how to advance the legitimacy of EU law and decision-making.\footnote{Walker (n 340) 44.} An important subtext however, was the corruption scandal leading to the retirement of the preceding Santer Commission, and the desire to distance the new Commission from the practices and attitudes that had characterized the corruption and mismanagement of the old one.\footnote{Commission, General Principles and Minimum Standards (n 39). These standards and the framework of the impact assessment formed a touchstone for Commission consultation up until current practices.}

The White Paper and its principles became the starting point for a series of reforms in the Commission’s working methods including the ‘General principles and minimum standards for consultation and impact assessments’.\footnote{Mendes, Participation in EU Rule-Making (n 15) 129; It was also framed in terms of promoting new forms of European governance and unveiled as one of four key strategic objectives of the 2000-2005 Commission. Walker (n 340) 44.} In the minimum standards, the Commission also took a clearly articulated strong stance against any legal mandate to
participate, arguing that binding rules would unnecessarily bureaucratize the work, become an obstacle to in-house learning; there was an explicit statement the Commission did not want decisions on consultation challenged before the Courts.\textsuperscript{350} The White Paper and the following reforms sparked further discussion on the nature of participation and Europe’s civil society. There was a sense that the Commission had acknowledged, albeit sometimes tacitly, that output-legitimacy must be complemented by input-legitimacy and that participatory democracy could complement and not compete with representative democracy.\textsuperscript{351} Even with the White Paper drawing attention to civil society participation, the instrumental focus of participatory governance largely remained: consultation was conceived primarily to ameliorate limited resources and regulatory challenges – its main raison d’etre was improving quality of decision-making and facilitating compliance, and in some spheres as a strategy to expand the EU:s role and influence through dialogue.\textsuperscript{352} The Commission’s approach to include in its definition of civil society economic actors, seemed to support the functional approach to participation.\textsuperscript{353}

Even so, the EU supported the mobilization of (non-business) civil society organizations, prominently through providing financial subsidies in targeted areas – and this likely contributed to the population of such organizations growing dramatically across the mid-2000s.\textsuperscript{354} The lobbying and participation landscape in Brussels changed in one decade from a business club to a diverse ecosystem which included think tanks, representatives of regions, consultancies, law firms, civil society groups and other non-state actors.\textsuperscript{355} This shift also meant a continuous contact between policy-makers and interest groups.\textsuperscript{356} There was however, a sense, at least in hindsight and in some corners,

\textsuperscript{350} ibid ‘Nature of the document’ para 14.
\textsuperscript{351} Walker (n 340).
\textsuperscript{352} It seemed the turn to “European civil society”, did little more than “to give new appearance and structure to the forms of interest representation that the Commission had since long promoted,” Mendes, ‘Participation and the Role of Law after Lisbon’ (n 32) 1855–1857; Continuity with previous practices could also be seen in the Commission’s own statements in relation to its principle of participation in the White Paper, focusing on efficiency, Commission, White Paper Governance. See also Armstrong (n 324).
\textsuperscript{353} Smismans, ‘The Constitutional Labelling of “The democratic life of the EU”: Representative and Participatory Democracy’ (n 137) 127.
\textsuperscript{354} Coen, Katsaitis and Vannoni (n 344) 33; Andreas Broscheid and David Coen, ‘Lobbying Activity and Fora Creation in the EU: Empirically Exploring the Nature of the Policy Good’ (2007) 14 Journal of European Public Policy 346.
\textsuperscript{355} Coen, Katsaitis and Vannoni (n 344) 33.
that the Commission had taken a wrong turn by focusing too much on organized civil society and interest groups.\(^{357}\)

As participatory democracy entered the discourse surrounding the democratic legitimacy more prominently, the term participatory democracy was used somewhat ambiguously, as was the term ‘civil society’. The principal ambiguity hinged on who the main protagonists of participation were.\(^{358}\) Direct citizen involvement in European policy-making now attracted more attention in the academic debate.\(^{359}\) Yet, the governance debate as we have seen however remained mainly focused not on direct citizen participation, but an alternative form of representation, functional representation or representation via associations and interest groups.\(^{360}\) However, this divide was sometimes not clear and the White Paper itself indicated it was simultaneously reaching out to interest-groups and the broader public, albeit with a emphasis on the former.\(^{361}\) As several scholars noted, European integration literature often equated participatory democracy with civil society involvement rather than direct citizen involvement.\(^{362}\) The Commission in turn, as well as some scholars, equated civil society with all forms of interest groups, leading to accusations of epistemological sliding and ‘lip service’ to participatory democracy and the role of civil society.\(^{363}\) Despite this, direct citizen participation was invoked, especially with regard to legislative process, e.g. Lenaerts argued that in “its broadest interpretation ‘participatory democracy’ is used for ‘the direct involvement in decision-making of those that are most affected by it’.\(^{364}\) Smismans notes that such a conception could


\(^{358}\) Grevén, Michael Th (n 150).


\(^{360}\) Smismans, ‘The Constitutional Labelling of “The democratic life of the EU”: Representative and Participatory Democracy’ (n 137) 128.

\(^{361}\) ibid. This approach has persisted as the Commission still frequently targets ‘citizens’ in its public consultations. The minimum standards also refer to the advantage of consultations engaging the general public more, see Commission, General Principles and Minimum Standards (n 39); Commission Better Regulation Guidelines (n 52) 14–15.

\(^{362}\) De Schutter (n 91); Grevén (n 150).

\(^{363}\) Smismans, ‘The Constitutional Labelling of “The democratic life of the EU”: Representative and Participatory Democracy’ (n 137) 137; Saurugger (n 287).

\(^{364}\) ibid 129, Smismans citing Lenaerts.
imply the decentralization of decision-making to ensure direct citizen participation, but was mainly used by scholars to structure participation in ‘central’ European decision-making, via e-democracy or through the involvement of civil society organizations.365

The developments leading up to the drafting of the Lisbon Treaty reflected a turn in the approach to and rationales for participation which previously had been instrumental and focused on participation as a means to enhance efficiency.366 Participation as a means of connecting the EU with its citizens was widely used by all EU institutions at the time of the Laeken Convention (drafting of the European constitution). 367 The Laeken European Council adopted a new Declaration on the Future of Europe which insisted on addressing the democratic challenge facing Europe, and maintained that EU institutions must be brought closer to their citizens.368 The Laeken Declaration convened a Convention with a mandate to pursue the democracy debate and intended to openly pave the way for the next Intergovernmental Conference. The Convention was conceived as a public forum of deliberation which included representatives of national governments, members of national parliaments, members of the EP, and Commission representatives.369 Moreover, the Forum set up by the Laeken Declaration allowed civil society organizations and non-institutional interest groups to provide inputs into the convention deliberations.370

The 1,264 contributions presented came from 160 different registered organizations, ranging from academic institutions, social partners, churches and religious communities to business associations, professional organizations and other non-governmental

365 ibid. See also Curtin, *Postnational Democracy* (n 359).
366 See e.g. the Presidency Conclusions of the European Council Meeting in Laeken (14 and 15 December 2001) SN 300/1/01 REV 1 ANNEX 1; see also Cuesta Lopez (n 32) 125–127; Mendes, *Participation in EU Rule-Making* (n 15) 1858.
367 Cuesta Lopez (n 32) 126.
368 Presidency Conclusions of the European Council Meeting in Laeken (14 and 15 December 2001) SN 300/1/01 REV 1 ANNEX 1; preceding the Laeken declaration, a declaration attached to the Treaty of Nice also highlighted transparency and democratic legitimacy would need to be addressed. Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Declarations Adopted By The Conference, Declaration on the Future of the Union [2001] OJ 080, 10/03/2001 P, 0085 - 0086 point 6.
369 Cuesta Lopez (n 32) 126.
370 ibid 126–127.
organizations. Safeguarding and promoting a “more participatory democracy” featured in many statements, as did the inclusion of a regular dialogue with civil society, which should lead to consultation of the relevant organizations at an early stage in the framing of Union legislation. The process brought to the fore questions relating to the purpose and nature of participation, was it instrumental or intrinsic, was the input, the process or the outcome the focus? During the proceedings for instance it could be heard that what mattered “is not that the eventual decision can be formally attributed to the will of the citizenry, but rather that those who so wish be given a chance to express their views”.

A principle of participatory democracy first surfaced when the Secretariat of the Convention presented a series of articles on the democratic life of the Union, which included an article on participatory democracy, and linked this proposal to the ongoing debate on how to bring the EU closer to its citizens. The first draft of the Constitution suggested an article that would set out the principle of participatory democracy stating that “the Institutions are to ensure a high level of openness, permitting citizens’ organizations of all kinds to play a full part in the Union's affairs”, which led to the formulation of “The principle of participatory democracy” which consisted of three points, the first was that “Every citizen shall have the right to participate in the democratic life of the Union” now placed under Article 10(3) TEU. This was followed by two articles stating the Union institutions should allow “citizens and representative associations the opportunity to make known and publicly exchange their opinions on all areas of Union action” and maintain “an open, transparent and regular dialogue with representative associations and civil society”. Initially this article

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375 Document from the Praesidium: Draft Title VI of the Constitutional Treaty relating to the democratic life of the Union (2 April 2003) CONV 650/03 Article 34.
376 Bouza Garcia (n 373) 80.
378 Ibid.
was placed under the title ‘The democratic life of the Union’, which included articles on the principle of equality, the European Ombudsman, political parties, transparency, protection of personal data, as well as the status of churches and non-confessional organizations.  

At this stage no mention was made of a principle of representative democracy, although representative democracy followed naturally from constitutional provisions on the Parliament and voting rights recognized under the title of citizenship. Many amendments were however tabled which asked for a specific reference to representative democracy, either as a part of the same article or as a separate one under the same title. When the article was first presented, no debate arose on any of the fundamentals of the principle of participatory democracy, and it was generally well-received.

The social partners welcomed the enhanced participation of civil society but prioritized consolidation and protection of the special position of the social dialogue. Business groups were also enthusiastic, with the European umbrella organization of the chambers of commerce even declaring that participatory democracy constituted a “cornerstone of European integration.” Civil society organizations and other groups were also very active, also reflected in terms of their number of petitions which were “second to none”. Different civil society groups and coalitions also contributed to different articles; e.g. the insertion of the ECI was the result of a differentiated mobilization, most of the civil society organizations that demanded the recognition of consultation were not involved at all in activism for the ECI. Despite the lack of overall opposition to the principle, some reservations likely

379 Document from the Praesidium: Draft Title VI of the Constitutional Treaty relating to the democratic life of the Union (2 April 2003) CONV 650/03.
380 On this point see Smisms, ‘The Constitutional Labelling of “The democratic life of the EU”: Representative and Participatory Democracy’ (n 137) 133.
381 ibid.
382 Kohler-Koch and others (n 286) 31.
383 ibid 33.
385 Kohler-Koch and others (n 286) 32; Despite this, civil society participation in many ways remained a one-sided exchange, see Kværk (n 384) 159; Eleanor Lombardo, ‘The Participation of Civil Society in the Constitution-Making Process’ (CIDEL Workshop Constitution Making and Democratic Legitimacy in the EU 2004) 154.
386 Bouza Garcia (n 373) 19–70.
existed, partly reflected in the many demands that a principle of representative democracy be guaranteed as clearly and strongly, and overall it “would have been difficult to publicly challenge a notion that is so normatively charged”. Clear calls from civil society actors were forwarded to provide a stronger legal basis for the ongoing Commission consultation practices. More specifically, one request was for the article to be more concrete and the general recognition of dialogue was then supplemented by a particular reference to “broad consultations with concerned parties”.

Differences of opinion also emerged between organizations as well as members of the Convention regarding the notion of civil society including the role of citizens in the civil dialogue. On one end, the opinion was expressed that the dialogue should be expanded to “literally everyone”, in particular citizens, and on the other end the opinion that dialogue with organized civil society, often emphasizing, structured dialogue was to be favored. However, even for those advocating the latter the expectation was expressed, that the EU advance engagement of citizens in associations, repeatedly stressing that civil society organizations must be entrenched in citizenship and themselves be open and representative.

During the later stages of the drafting of the articles, mobilization to support the insertion of the ECI (currently Article 11(4) TEU) was successful, despite the somewhat grudging assent of the Commission, who worked to make sure its sole right to initiate legislation remained intact. As the drafting evolved, two articles labeled the principle of representative and participatory democracy, respectively, were included. The titles were later removed but the articles remained in the Lisbon Treaty. When the European Council later in 2007 called for an intergovernmental conference to draft a new treaty which was to avoid constitutional references, the overall question of democracy, however, was not to be avoided. The reform Treaty replicated several of the

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387 Kohler-Koch and others (n 286) 31.
388 Bouza Garcia (n 373) 44.
389 ibid 17.
390 Kohler-Koch and others (n 286) 33–35; Bouza Garcia (n 373) 105.
391 The substantial positions were influenced by institutional links and the party political affiliation, see Kohler-Koch and others (n 286) 36–37.
392 ibid.
393 Bouza Garcia (n 373) 89. See also Smismans, ‘The Constitutional Labelling of “The democratic life of the EU”: Representative and Participatory Democracy’ (n 137).
provisions of the Constitutional Treaty but under a new title: ‘Provisions on Democratic Principles’.\(^\text{394}\)

Though “the Constitutional Convention was not a body that engages in theoretical reasoning” \(^\text{395}\) the Lisbon Treaty undeniably constitutionalized a participatory norm oriented towards bringing the citizens closer to the Union. Both the discourse on participation and the debates leading up until the drafting as well as later iterations demonstrated a notion of participatory democracy clearly as rooted in an understanding of participation beyond a narrow functional purpose, while placing it as a complement to representative democracy.

3.4. **Participatory democracy post-Lisbon, the legal road not taken**

Since the ratification of the Lisbon Treaties, the new title of democratic principles and particularly the novel principle of participatory democracy, prompted some normative and legal evaluations assessing the strength of the EU’s participatory mechanisms.\(^\text{396}\) It also generated analysis of democracy as featured in the Lisbon Treaty in relation to the diverse theories found in the normative literature on the EU’s democratic deficit.\(^\text{397}\)

Early on, scholars noted that while the democratic principles, including Article 11 TEU, seemed to fall short of any aspirational expectations of institutionalizing citizen participation,\(^\text{398}\) participation was now for the

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\(^{394}\) Cuesta Lopez (n 32) 127.


\(^{396}\) See e.g. Cuesta Lopez (n 32); Mendes, ‘Participation and the Role of Law after Lisbon’ (n 32); Juan Antonio Mayoral, ‘Democratic Improvements in the European Union under the Lisbon Treaty: Institutional Changes Regarding Democratic Government in the EU’ (2011) European Union Democracy Observatory (EUDO) Robert Schuman Centre for Advanced Studies, European University Institute; Kutay (n 34); Alemanno, ‘Levelling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission’s Public Consultations in Light of the Principle of Political Equality’ (n 33); Craig and De Búrca, ‘Integration, Democracy, and Legitimacy’ (n 274).

\(^{397}\) Stephen C Sieberson, ‘The Treaty of Lisbon and Its Impact on the European Union’s Democratic Deficit’ (2008) 14 Columbia Journal of European Law 446; Cuesta Lopez (n 32); Kohler-Koch and others (n 286); Kutay (n 34).

\(^{398}\) Carlos Closa, ‘Constitutional prospects of European citizenship and new forms of democracy’ in Giuliano Amato, Hervé Bribosia and Bruno de Witte (eds), *Genèse et destinée de la Constitution européenne: commentaire du traité établissant une constitution pour l’Europe à la lumière des travaux préparatoires et perspectives d’avenir* (Bruylant 2007); Smismans, ‘The Constitutional Labelling of “The democratic life of the EU”: Representative and Participatory Democracy’ (n 137); Shaw, ‘Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism’ (n 69) 638.
first time explicitly linked to democracy. Participation was no longer only to be viewed as solely serving efficiency or output-oriented goals or with reference to its previous role in EU governance. Instead, it was not an aspect itself of democratic legitimacy, closely tied to transparency and equality. While it was clear this shift would have normative implications, it remained less clear how these implications were to be given effect in light of how the democratic principles were framed. The adoption of secondary legislation to operationalize the ECI helped flesh out this instrument and its workings, also promoting judicial review by the Court of the Commission’s administration of citizens’ initiatives. However secondary legislation clarifying other institutional obligations or clearly elaborating other participation rights was never adopted. Nevertheless, relying only on the democratic principles as normative yardsticks including the principle of participatory democracy, the EU governance approach to participation was deemed lacking; for instance lack of transparency of participant selection, consultation format, or lacking feedback to participants. The role of the Court, was highlighted in determining to what extent failure to uphold procedural practices with regard to dialogue and consultation, could be challenged by relevant actors as infringements of the principles of participatory democracy. Furthermore while the democratic principles did speak to the citizen as a political actor within the EU, the connection between the citizens and the exercise of their political rights and the ‘democratic life of the Union’ seemed tenuous.

There was however clear agreement that the participatory democracy as formulated in the Treaty was meant as a complement to representative democracy, echoed by scholars, the German Constitutional Court in its

399 Mendes, ‘Participation and the Role of Law after Lisbon’ (n 32) 1850.
400 ibid 1850–1859.
401 ibid.
404 See e.g. Fazi and Smith (n 222); Christine Quittkat and Barbara Finke (n 78); Alemanno, ‘Levelling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission’s Public Consultations in Light of the Principle of Political Equality’ (n 33) 126-127.
405 Garzón Clariana (n 402); Mendes, ‘Participation and the Role of Law after Lisbon’ (n 32); Alberto Alemanno, ‘Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy’ (2014) 39 European Law Review 72.
406 Cosa (n 398) 1052; Shaw, ‘Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism’ (n 69) 638.
verdict on the German ratification of the Lisbon Treaty and the CJEU in adjudicating the Commission’s discretion in its handling of ECIs.\textsuperscript{407} In the debates following the drafting of the Lisbon Treaty, Kohler-Koch and Rittberger argue that democratic legitimacy in the EU can be viewed alongside three dimensions, each of which juxtaposes features which can be associated with liberal representative democracy in relation to more participatory forms of democracy, emphasizing intrinsic participation, deliberation and civil society as the new complementary features.\textsuperscript{408} While scholars such as Grevén highlighted that citizens had been lost as the main protagonists in the understanding of participatory democracy, others, drawing on empirical observation drew the “obvious conclusion” that participatory democracy in the EU must primarily be expressed through interest-group participation.

The tumultuous years following the ratification of Lisbon Treaty also did little to lessen the debates on democracy in the Union. A number of developments, often related to the legitimacy of EU procedures, occurred in direct response to a series of (at least perceived) crises; the euro crisis, the refugee crises, Brexit, the Covid-pandemic, rule-of-law and political crises in Member States, a climate crisis and finally a war once again on European soil. Against this background, four specific developments post-Lisbon relating to the debates on democracy in the Union have specific bearing on an understanding of ‘participatory democracy’ in the Union.

The first is that the rule of law crises in Hungary and Poland, spurred on debates which emphasized how the rule of law and democracy are mutually supportive, and how the rule of law and fundamental rights not only constitute essential prerequisites for democracy, but also how the rule of law flows from democratic practices, and relies on democratic rotation.\textsuperscript{409} In this context, the interdependent nature of democracy at the EU-level and democracy at the nation-state was once again highlighted and emphasized.\textsuperscript{410} This also prompted discussion on the potential to bring the EU values such as democracy, including through the Treaty’s democratic principles, before the Court.

\textsuperscript{407}VerfG, 2 BE 2/08 of 3062009; C-418/18 P Puppinck para 65.

\textsuperscript{408}Kohler-Koch and Rittberger (n 102) 14-17.


The second development is that, despite strong focus pre-Lisbon, on configuring democratic participation in the EU through the lens of collective actors and through civil society and interest-representation, citizens have emerged more strongly into focus as participation protagonists. One part of this development was naturally the ECI which attracted some scholarly, activist and citizen attention, coupled with a small but distinct body of case law. In addition calls were renewed for including citizen perspectives into the law and policy-making apparatus, including inter alia; engaging more citizens or groups of through the Commission consultation regime, including ‘citizen narratives’ for unregulated areas, expanding upon direct engagement with citizens through citizen dialogues and consultation as well as the practice of mini-publics. The latter featured prominently during the Convention on the Future of Europe and most recently, was integrated by the Commission into its law and policy-making. The literature on these last developments have been somewhat skeptical of their current potential for enhancing democratic legitimacy, but at the same time underlining that further experimentation and improvements over time might allow this form of participation to make a participatory democracy contribution. It is likely the large role that the citizen panels played in the drafting of recommendations and final report on the conference of Europe, may sets a precedent in terms of directly engaging with citizen in broader discussions on EU reform.

The third development relates to lobbying in the EU and the developments post-Lisbon to attempt to regulate it, as well the connection to the role of lobbying in EU ‘participatory democracy’. The important role that interest-groups plays for governance outcomes in the EU in terms of knowledge contribution is widely recognized. Considering the complex task of EU regulation, and the relatively limited resources of the Commission, historically and currently, interest-groups offer specialized knowledge and insights into the field

411 See also chapter 4.
413 See e.g. ‘European Citizens’ Panels’ (n 79).
414 See e.g. Hierlemann and others (n 9).
in which they operate. In offering a reaction to intended legislative measures they also function as a litmus test of their broader impacts and implementation. Scholars have also argued post-Lisbon that ‘participatory democracy’ in the EU must find expression through the participation and advocacy by business firms and economic actors. Aside from the output potential of their contribution, their general role in the deliberative arena in offering contrasting positions to other actors and raising issues for debate is highlighted. Furthermore, the assumption that non-profit groups or civil society act in the public-interest is also contested, the public interest as such open to interpretation.

However, some systemic imbalances of access and influence highlight the problem with ascribing to lobbying the virtue of democratic participation and the challenge of finding its place in a participatory democracy framework. Despite the noted diversification of interest-groups, of the estimated 30,000 permanent lobbyists based in Brussels more than half still represent business interests, and current empirical research suggests that earlier assessments of EU’s system of interest representation as a form of ‘elite pluralism’ still hold true. Empirical research also suggest it is rare for business interests, although diverse, to face off against each other in terms of lobbying and business interests and citizen groups pre-dominantly take opposite and unified positions in policy debates while those groups who can be termed ‘lobbying outsiders’ remain in that category across different levels of governance. Business associations also tend to be more Europeanized than other groups. The dominance of business-interests and elitism is not all-embracing or without nuance in the EU: business interests are not monolithic, and beyond resources, it is well known that the types of interests that mobilize around policy areas

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415 see e.g. Mendes, Participation in EU Rule-Making (n 15) 111–112.
416 ibid.
417 Kohler-Koch, ‘Civil Society and EU Democracy’ (n 300).
418 This number excludes lobbyists that travel daily in and out of Brussels to engage with EU policy-makers. Coen, Katsaitis and Vannoni (n 344) 9.
419 ibid.

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depend on sociological and historical institutional factors. However, concerns about business lobbying are not just a question of an imbalance of influence and voice from a democracy perspective, reflecting a broader understanding of the limits of pluralism. Crucially, the unethical practices of lobbying pose challenges to the democratic process. The OECD in a recent study on lobbying, paints a rather gloomy picture in surveying industry lobbying practices and their effects, especially on major global challenges.\textsuperscript{423} Several of such practices have in recent years been observed in regard to lobbying in the EU, and lobbying by firms in the EU is also on the rise.\textsuperscript{424} This has in turn also led to the mobilization, and sometimes birth, of coalitions and interests groups who address the concerns about the influence of lobbying in the EU decision-making process.\textsuperscript{425} Such practices are also dealt with directly in literature on regulatory capture and it is arguably also from this area that language has migrated to the Agreement on a Transparency Register calling for “ethical” interest representation.\textsuperscript{426}

Efforts to address and regulate interest mediation in EU affairs also led to the establishment of the Transparency Register- an open database listing ‘interest representatives’ organizations, associations, groups and self-employed individuals who carry out activities to influence the EU policy and decision-making process.\textsuperscript{427} After several years of negotiations and public consultations, and iterations of a register which was neither mandatory nor included the Council, an agreement between the Council, Commission and the Parliament was reached in 2021 on a mandatory transparency register.\textsuperscript{428} The agreement sets out what


\textsuperscript{426} “Ethical participation” is not a common phrase in democratic theory (although deliberating according to a sense justice is arguably the same thing). However, the basic requirements for deliberation outlined in deliberative democracy theory clearly preclude “unethical” lobbying as it distorts deliberations.


\textsuperscript{428} See Justin Greenwood and Joanna Dreger, ‘The Transparency Register: A European Vanguard of Strong Lobby Regulation?’ (2013) 2 Interest Groups & Advocacy 139; Kim Fyhr, ‘The Reform of the EU Transparency Register’ (2021) 17 Croatian Yearbook of European Law
interest representation or lobbying activities are covered, the type of information registrants are expected to provide as well as a code of conduct for registrants and a procedure for complaints about registered organizations.\footnote{429 Interinstitutional agreement of 20 May 2021 on a mandatory transparency register [2021] OJ L 207/1.} In accordance with the agreement, the three institutions adopt ‘conditionality’ measures when they decide to make certain interest representation activities conditional upon prior registration in the Transparency Register. In the agreement, a link is made to the dialogue elements of the principle of participatory democracy in Article 11(2) TEU stating that “the transparency of that dialogue, is enhanced by having a common register of the organizations and individuals engaged in EU policy-making and policy implementation”.\footnote{430 Ibid para 6.}

The fourth and final development regards how the EU legislative process has evolved. On the one hand, the tendency to delegate to either the Commission, committee bodies, regulatory agencies or standardization entities, difficult, controversial or significant features of legislation on which no clarity or consensus exists between the main legislative actors – has persisted. On the other hand, in the attempt to make up for what was conceived as the main reason for the EUs democratic deficit – empowering the Parliament – the increase in Parliament powers was paralleled by an overall decreasing interest by the electorate in participating in the European electoral process.\footnote{431 Cuesta Lopez (n 32) 123-124; JHH Weiler, ‘Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision’ (2010) 1 European Law Journal 219, 219; This trend was reversed in the 2019 elections which saw a turnout of 50.66 %, see European Parliament resolution of 26 November 2020 on stocktaking of European elections OJ 2021/C 425/11.} This challenge also played into the turn to alternative modes of democratic legitimization that included an increased emphasis on participation instruments within the EU and allowed direct engagement of citizens alongside other stakeholders.\footnote{432 Such instruments include European Citizen’s Consultations as well as Citizens Dialogues, see Hierlemann and others (n 9) 148–172.} Increasingly, institutional deal-making within the ordinary legislative procedure also took place in the so-called trilogues; informal arenas where the institutional actors hammered out legislation based on proposals presented by the Commission. The combination of their opaque nature and their dominant position in EU law-making – an overwhelming majority of EU legislation processed...
through the ordinary procedure were adopted through the use of trilogues, called into question the democratic legitimacy of these proceedings. Through pressure from various corners — including litigation at the CJEU, critical academic scholarship and pressure from the Ombudsman, transparency to the process increased. Meanwhile, the system of comitology, the multitude of expert committees which has been influential leading up until the Lisbon Treaty, — somewhat decreased with regulatory networks playing an increasing role, where member states delegated policy-making to the Commission, which in turn delegated the crafting of detailed regulatory policy to European regulatory networks. The arrangement was one of ‘double delegation’: member states delegated policy-making to the Commission, which in turn delegated the crafting of detailed regulatory policy to European regulatory networks. Within the regulatory network, the Commission could push for common regulation through policy coordination without directly infringing on national sovereignty (while business could potentially undermine policy through the selective provision of information). This network governance approach came as a precursor to the later strategy of agencification. The shift towards a ‘single regulatory space’ brought the crystallization of what were originally regulatory networks and expert groups. Through agencies, experts were selected and given authority to shape a regulatory space.

433 There is also a stated commitment between EU institutions to secure agreement at first reading wherever possible within the ordinary legislative procedure Joint Declaration (EC) on Practical Arrangements for the Co-decision Procedure (Art 251 EC Treaty) [2007] OJ C 145/2 para 11.
435 Regarding the latter, see e.g. ‘European Ombudsman Strategic Inquiry on the Transparency of Trilogues: Follow-up and First Results | Correspondence | European Ombudsman’ <https://www.ombudsman.europa.eu/en/doc/correspondence/en/88698> accessed 7 August 2023.
438 Coen, Katsaitis and Vannoni (n 344) 47.
439 Rittberger and Wonka (n 437).
441 Coen, Katsaitis and Vannoni (n 344) 47; Currently more than 40 such entities exist, see Lewi-Faur (n 440); Agencification has also been viewed as an attempt to deal with collective
These developments coincided with the Commission’s increased focus on, ‘smart’ and then ‘better law-making’ (currently under the label ‘The Better Regulation Agenda’) which stressed evidence-based law-making, part of a broader global regulatory trend of the late twentieth century. Consultations were integrated into the impact assessment analysis, in many ways a technocratic process centered on evidence collection and evaluation. Additionally, consultation access-points throughout the legislative cycle increased and to a certain degree were streamlined, primarily through a digital access point, the commission’s consultation ‘have your say’ website. Different actors have been established to review the quality of impact assessments, including its participatory element of consultations: the Commission’s internal Regulatory Scrutiny Board (RSB), the Court of Auditors and the European Ombudsman – the latter two initiating (ad hoc) quality control on their own initiative. With these developments and shifts of influence in legislative and policy-making to new (and old) arenas, channels and agencies; non-state actors seeking to access and influence EU action, gravitated along. Unsurprisingly such gravitation often occurred at unequal paces and – and while participation in the form of lobbying, may not have suffered, participation grounded in democratic legitimacy it has been argued, remains elusive.

Against this background, calls to formalize, proceduralize and juridify the law and policy-making process have persisted. Sceptics of action problem or regulatory challenges in a specific field, such as the European securities market, see Andreas Eriksen and Alexander Katsaitis, ‘Accountability through Mutual Attunement: How Can Parliamentary Hearings Connect the Elected and the Unelected?’ (2023) 38 Public Policy and Administration 352.
443 Meuwese (n 38); see also Alemanno, ‘Levelling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission’s Public Consultations in Light of the Principle of Political Equality’ (n 33) 117.
445 see e.g. Kohler-Koch and others (n 286); Alemanno, ‘Levelling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission’s Public Consultations in Light of the Principle of Political Equality’ (n 33).
446 see e.g. Alemanno, ‘Levelling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission’s Public Consultations in Light of the Principle of Political Equality’ (n 33) 125.
judicialization point to the cost and time investments and the adversarial nature brought on by litigation making it an inefficient and detrimental choice. Closely related is the question as to whether (over) judicialization of a certain issues decreases the opportunity to formulate meaningful approaches. Furthermore, there have been concerns in the context of policy and law-making that extending participation rights would further exacerbate inequality and favor the well-funded and well-organized. On the opposing side, it has been argued that judicial review of ex ante evaluations could constrain regulatory decision-making, ensuring that decision-makers would not benefit from stretching the meaning of soft-law instruments, legal ambiguities and junk scientific evidence in their preferred direction and would insulate decision-making processes from the fickle sway of politics. It has also been promoted as necessary for the EU law-making process based on its specificities, noting that given the diminishing role of parliaments in the multi-level setting and the multiplicity of law-makers, the substantive and procedural requirements of legitimate law become even more important. Review of legislation by courts here emerges as a democratic asset as principles of better lawmaking reveal democratic guarantees. Furthermore, parties who are underrepresented in the institutional framework of decision-making can thus be assisted to obtain a motivated answer to the question whether the presumed neglect of their interests was justified. The protection of legally protected

447 For a general argument see Komesar (n 3), for EU specific one, see Busschaert (n 294) 118-119. As stated, the Commission has itself expressed that judicial review of its consultation activities would make the regulatory process too rigid and cumbersome. There are also outstanding general concerns with juridification; that rather than promote cooperation among actors in the system, judicialization tends to encourage defensive action, where parties use courts to make inflexible demands Robert A Kagan, Adversarial Legalism (Harvard University Press 2001)


449 Busschaert (n 294) 119–125.


451 Meuwese and Popelier (n 44) 465; See also Joana Mendes, ‘The Democratic Foundations of the Union: Representative Democracy, Complementarity and the Legal Challenge of Article 11 TEU’ in Adam Lazowski and Steven Blockmans (eds), Research Handbook on EU Institutional Law (Edward Elgar Publishing 2016).

452 Meuwese and Popelier, Patricia (n 44) 465.

453 Meuwese and Popelier, Patricia (n 44); Commenting on the relationship between the RSB and Courts, Popelier suggests that while administrative regulatory oversight is recommendable, it does not make up for a lack of judicial review, see Patricia Popelier, ‘A Legal Perspective on Regulatory Impact Assessments’ (International Symposium- Regulatory Impact Analyses, Luxembourg 23-24 November 2017).
interests that may be neglected in the political process also supports juridification of participation in a rights-based fashion.\textsuperscript{454} Similarly, it has been argued while juridification is not a panacea to the actual lacunae in the overall openness of the EU machinery, it is necessary to secure effectiveness and democratic empowerment of society.\textsuperscript{455}

Regardless of the appeal or distaste for the juridification of participation, the fact remains that through the Lisbon Treaty participation, including in the form of consultation, is now constitutionalized. The question is then rather in what way the legal framing deals with the difficult questions that have followed the gradual opening of EU governance and how this impacts existing and future channels for participation.

3.5. The imperatives and limitations of complementarity

What insights can then democratic theory provide in grounding an understanding of the complementary role of participatory democracy in the EU constitutional framework? The review of the evolution of participatory democracy as a normative goal in the Union, cemented in the Treaties and followed by a range of institutional practices and democratic experimentation, suggest that any relevant analytical approach to understand complementarity, needs to be inclusive enough to capture the varied and rich insights of the debate the role of democratic participation, including deliberation, without losing sight of some of the key goals of participatory democracy theory which inspired the participatory norm and its constitutionalization. The literature review has also highlighted that participatory democracy as featured in EU democracy discourse is used to signify different but related things, often depicted as representing either a functional or a principled understanding of participation. Some of the normative yardsticks to which participatory democracy related activities in the EU, including the Commission’s consultations when construed as such, are inclusion, equality, effectiveness and public review.\textsuperscript{456} Yet these values are all also associated with representative democracy as well. \textsuperscript{457} As participatory democracy in the EU legal framework is complementary

\textsuperscript{454} Mendes argues that participation rights are arguably the ‘appropriate means’ to give citizens and representative associations an opportunity to make their views known according to Article 11 TEU, see Mendes, ‘Participation and the Role of Law after Lisbon’ (n 32) 1862.
\textsuperscript{455} Alemanno, ‘Unpacking the Principle of Openness in EU Law’ (n 405).
\textsuperscript{456} Kohler-Koch and others (n 286) 175.
\textsuperscript{457} ibid.
to representative democracy, focus should rest on what distinguishes participation from representation.\textsuperscript{458}

Kohler-Koch and Rittbergers model then emerges as helpful tool for filtering the insights from democracy theory, using the legal imperative of complementary as a starting point. The heuristic frame of contrasts is broad enough to capture the different strands of the participatory democracy debate in relation to the EU without sacrificing core concerns. One elaboration, as well as one adjustment to the framework, is however in order. First, the adopted framework must naturally be seen in light of the specific nature of the EU, which is that the EU is a multi-level polity characterized by composite procedures. This view is in line with the overall approach of this thesis in approaching law-making.

Second, in adopting this frame, I do not take on Kohler-Koch’s and Rittberger’s assumption that the normative goal of citizen participation in EU policy and law-making must be fulfilled squarely through the intermediary of civil society. This dimension of their framework is therefore broadened to include citizens, as the sole reliance on civil society appears too constractive. It is clear from the debates on the democratic legitimacy of the EU, that the question of direct or even indirect participation of citizens in the EU is contested.\textsuperscript{459} To a certain degree, adding citizens to the framework may an issue of semantics. Kohler-Koch in discussing how participatory democracy as legal and moral norm should be understood in the EU articulates that civil society must contain certain qualitative features to contribute to democratic legitimacy, ultimately deriving its value from what they label “enlightened” participatory citizens within civil society.\textsuperscript{460} In this sense, civil society which is entrenched in citizen-participation attends to the democratic value of citizen-participation. A decade ago, Kohler-Koch argued that when looking at the way EU institutions function as

\textsuperscript{458} Article 10 TEU clearly states the Union is founded upon representative democracy. C-418/18 P Puppinck para 65.

\textsuperscript{459} De Schutter (n 91); Stijn Smismsans, \textit{Law, Legitimacy, and European Governance: Functional Participation in Social Regulation} (Oxford University Press 2004); Beate Kohler-Koch and Berthold Rittberger, ‘Review Article: The “Governance Turn” in EU Studies’ (2006) 44 JCMS: Journal of Common Market Studies 27; Grevén (n 150); Stijn Smismsans, ‘New Modes of Governance and the Participatory Myth’ (2008) 31 West European Politics 874; Stephan Bredt, ‘Prospects and Limits of Democratic Governance in the EU: European Law Journal’ (2011) 17 European Law Journal 35; Curtin, Mair and Papadopoulos (n 320); Mendes, \textit{Participation in EU Rule-Making} (n 15); Mendes, ‘Participation and the Role of Law after Lisbon’ (n 32); Busschaert (n 289).

\textsuperscript{460} Kohler-Koch and Rittberger (n 102).
well as the level of citizen interest in participation opportunities, “the obvious conclusion” is that participatory democracy in the foreseeable future must be given expression primarily through interest-group representation, highlighting how an empirical approach is crucial.\textsuperscript{461} In this context it must be said that the possibility of something resembling regular mass citizen deliberation in policy and law-making with tangible results has, as has been discussed, already been empirically observed, albeit the prominent examples lie outside of Europe. In the European context it is true citizens play a minor role in participatory governance processes compared to interest-groups, civil society and so on. However different forms of direct citizen engagement in the EU have increased over the last decade.\textsuperscript{462} Furthermore, clearly spelling out citizens as the emphasis of participatory democracy, means explicitly paying close attention to the value of equality. It also calibrates the perspective to attend to citizenship and relevant geographical concerns and multi-level EU governance; civil society and the key actors operating within such groups may primarily be located at the European level, whereas citizens are often set in their local or national social and legal contexts. Finally, including citizens in the framework allows for better capture of the developments in democratic theory and practice where political participation beyond the ballot box is clearly not geared towards civil society. Such practices include consulting directly with citizens online, through activism and social movements not confined to civil society as well as the continued and recently deepened experimentation with mini-public at the EU-level and Member State. The following then briefly re-states what each of these dimensions can mean including an assessment of potential implications for participation in EU law-making.

3.5.1. The intrinsic value of participation; participation as the end justifying the means?

As is clear from the analysis thus far, participation as a democratic principle implies a normative shift from an instrumental to an intrinsic view of participation.\textsuperscript{463} This perspective sees participation and the participatory process as an ends and not just a means. Connected to this view is the promotion of more direct participation because of its educative role, serving the self-development and civic virtues of the

\textsuperscript{461} Kohler-Koch and others (n 286) 11.
\textsuperscript{462} see e.g. Hierleman and others (n 9) 74–172.
\textsuperscript{463} Mendes also argues the link established by Article 11 TEU between participation and democracy is a normative yardstick against which to assess the participation practices. Mendes, ‘Participation and the Role of Law after Lisbon’ (n 32) 1860.

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individual, indispensable to the individual’s well-being and providing them with social capital. 464 But beyond this, the intrinsic view on participation, similar to a rights-based one, is grounded on the inherent dignity and equality of each individual with participation as expressing this reality. In the EU setting, the institutionalization of a participatory norm has particularly focused on the opportunity to participate of affected individuals, groups and actors, and the intrinsic perspective adds to this practice that the equality of individuals and groups is central to attend to, and that participation is valuable because it respects and expresses the dignity of persons affected. 465

As a complementary feature, emphasis on the intrinsic value of participation does not imply that functional perspectives of rationality and efficiency, or indeed the overall epistemic function of participation, including deliberation, are abandoned. Rather such considerations must be balanced, and crucially sometimes also defer to, the inherent value of participation by those affected. This signifies paying close attention to both inclusion and equality in the participation process. It implies mindfulness of the importance of reaching out to many, but also the value of including voices which are for various reasons traditionally excluded in the representative democracy framework, marginalized or just not present – particularly in cases when they are affected by EU action. For participation in EU law-making it could imply selection of participants or targeting that is not just based on interest-groups or the perceived need of the legislator for expertise or regulatory efficiency.

One established insight from democracy theory and practice – which largely has been confirmed in the EU-setting- is that self-selection processes on their own carry great risks for exacerbating imbalances and inequalities in terms of access, regardless of the participation medium. This means e.g. that in many situations the duty to consult might also require tailoring the consultation practice to such groups or efforts to facilitate inputs from local actors and non-organized civil society.

464 This is discussed in chapter 3.1. See also Robert D Putnam, Bowling Alone: The Collapse and Revival of American Community (Revised and updated, Simon & Schuster Paperbacks 2020).

465 This is discussed in Chapter 3.1. See also David Feldman, ‘Constitutionalism, Deliberative Democracy, and Human Rights’ in John Morison, Kieran McEvoy and Gordon Anthony (eds), Judges, Transition, and Human Rights (Oxford University Press 2007).
3.5.2. Deliberation as a complement to voting

In the context of the EU, deliberative democracy has framed legitimacy as possibly flowing from deliberation in several contexts, including the comitology system, the open method of co-ordination, civil dialogue, social dialogue and the Commission’s consultation regime. ⁴⁶⁶ Frameworks were also deployed to view EU governance as a holistic deliberative system. Acknowledgement of and responsiveness to difference, adherence to the principle of justification, as well as transparency and publicity of deliberation, consequently meant an emphasis on learning processes that provided central inputs for theorization drawing on deliberation for democratic legitimacy in the EU setting.⁴⁶⁷

In terms of complementarity, the inherent tension between representative and participatory democracy is highlighted in both theoretical and empirical accounts with regard to deliberation.⁴⁶⁸ As touched upon in the discussion of the origins and elaboration of participatory democracy, some empirical research suggests that partisan political participation and deliberation do not go together; “either people will be willing to engage with dissenting others and enjoy the epistemic benefits of exposure to diverse of even conflicting views, or they will be willing to vote, campaign for candidates and generally be engaged as partisans in the political arena”.⁴⁶⁹ Some scholars go further and suggest, that representative democracy is not conducive to deliberation.⁴⁷⁰ Acknowledging this tension without accepting foreclosure, suggests that participation instruments which are based on the principle of participatory democracy should promote a complementary yet distinct vision of democracy, moving away from the methods of contestation, which so often is sought for in debates on EU democracy. Such methods might better find its place in the parliamentary setting. As Mark Warren puts it “because representative functions within a context that combines public visibility with adversarial relations, they must weigh the strategic and symbolic impact of speech. Thus representative institutions have limited capacities for

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⁴⁶⁶ See chapter 3.2, also Cohen and Sabel (n 259); Joerges and Neyer (n 308).
⁴⁶⁸ (at least the way representative democracy is most frequently construed and practiced)
⁴⁶⁹ Landemore (n 28) 37–38; See also Mutz (n 237).
⁴⁷⁰ Landemore (n 28) 35–29.
deliberation, which requires a suspension of the strategic impact of communication in favor of persuasion and argument.” 471

Drawing legitimacy from the participation process would then potentially translate into procedural guarantees,472 or in establishing participation arenas or channels which emphasize deliberation or create an environment which is more conducive to deliberation. This means the decision-maker weighing contributions based on substance and not affiliation. Arguably, it also highlights how certain principles of equality and objectivity play out when placing them in a deliberative rather than an interest-based framework characterized by for instance as diversity and inclusion as well as equal consideration.

To give effect to qualitative features of the participation process the law-making spaces of deliberation would in any case need to include equal consideration of potential participants, as well as equality of access; including ‘active’ transparency and access to information as well as well as meaningful exchange. This may include transparency in criteria for participant selection. Crucially, procedural requirements in the spirit of deliberation means there is some form of exchange which implies at a minimum adequate feedback mechanisms. This may include recording of how participatory input has impacted a decision-making process, including where it has not and why.473 This procedural element would thus fulfill some minimum level of substantive balance, while also accounting clearly for choices to provide opportunity, select, attract or empower potential participants.

In terms of the decision-making power with which deliberative bodies or processes may be endowed with, the complementary role of participatory democracy arguably excludes co-decision and direct law-

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471 Landemore cites Warren on parliaments’ deliberative capacity, see ibid 132.
472 For arguments in this direction see Mendes, ‘Participation and the Role of Law after Lisbon’ (n 32) 1863-1872; Alemano, ‘Levelling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission’s Public Consultations in Light of the Principle of Political Equality’ (n 33) 120-132; See also ‘ReNEUAL - the Research Network on EU Administrative Law’ (n 47).
473 This stands in contrast to current practices where one of the most frequent critiques of the EU Regulatory Scrutiny Board has been the persistent tendency of the Commission to not faithfully represent the outcome of law-making consultation in its impact assessments, see ‘Regulatory Scrutiny Board - Annual Report 2022’ 21 <https://commission.europa.eu/system/files/2023-05/RSB_2022_1.pdf> accessed 7 August 2023.
making power.\textsuperscript{474} And herein lies an important limitation to the idea of complementarity in the EU setting, deliberation can inject legitimacy into the democratic processes through both input, throughput and output but must always be viewed in light of the institutional balance in the EU system. This means that participation in the form of e.g. deliberative spaces can be dispersed in a multi-government setting, but it cannot be configured towards displacement of the role of EU institutions or Member States in e.g. the ordinary legislative process.\textsuperscript{475}

The function of deliberation, in addition to advancing the ideals associated with the intrinsic value of participation discussed, is also epistemic. The epistemic orientation in deliberative democratic theory, we see sometimes leads to a focus on ‘expert’ participation, as expert participation can be seen as promoting ‘truth-sensitivity’ and the function of knowledge use, in line with the idea of evidence based practices and legislation. Consulting those affected is construed in terms of the knowledge they possess as well as the role the might play in the implementation of policies, decisions and legislation. The same orientation may however also lead to focusing on citizen and lay deliberation as “only the man who wears the shoe knows where it pinches,” implying that ordinary citizens possess information experts lack.\textsuperscript{476}

The debates on participatory democracy and the focus on deliberation, have emphasized the centrality of interdependence. In EU deliberative supranationalism, interdependence is seen as reflected through European integration and the EU project itself, as well as being something that EU policy-makers and legislators (including when representing their member states) advance and generate through deliberative interaction occurring at different levels.\textsuperscript{477} One can also think of interdependence in terms of the relationship between e.g. Commission or the Parliament in relation to stakeholders and civil society in terms of knowledge exchange for influence. However in terms of the democratic value of deliberation, which serves as a counterpoint to pluralism and lobbying, interdependence is one

\textsuperscript{474} As we have seen from the debates this is a matter of contention between some participatory and deliberative democrats, and between deliberative democrats, within and beyond the EU context.

\textsuperscript{475} This is somewhat tricky to untangle but would have to be configured based on a constitutional-legal interpretation, which includes attending to institutional balance, see chapter 4.

\textsuperscript{476} Sabel and Simon citing Dewey on this point, Sabel and Simon (n 16) 486.

\textsuperscript{477} Joerges and Neyer (n 308).
underlying assumption which allows for deliberation towards the common good, rather than bargaining and negotiation.\textsuperscript{478} In general, however, one of the dilemmas of consociation is that it may entrench divisions rather than produce a common commitment to the welfare of the whole because, as David Feldman puts it, “it penalizes people who do not define their identities by reference to one of the separate constituent peoples.”\textsuperscript{479}

Finally, participation and ‘consultation’ can be redefined through the lens of deliberation. The range and depth of democratic innovations over the past decade have demonstrated that participation or consultation should not be interpreted with reference to past practices of EU institutions or Member States but rather the opportunity of potential practices to contribute to democratic legitimacy. This means deliberative spaces such as citizens panels and citizens assemblies as well as other practices can be viewed through the lens of the procedural practices discussed.

3.5.3.\textit{Bringing in citizens and civil society}

The third function of participatory democracy as a complement to representative democracy is in its focus on participation by citizens and civil society in contrast to institutions. The question as to what extent the lay citizen is, or should, be involved in EU participatory democracy and governance is a matter of debate.

One reason why involving more individuals in democratic participation is crucial according to participatory democracy, is the broader educative role of participation. Democratic participation requires democratic competence, which must be learned through the exercise of active responsibility.\textsuperscript{480} Participation itself is seen as fostering this capacity building process in an iterative cycle.\textsuperscript{481} Finally, increased citizen participation has also, been promoted for its epistemic advantages, which was touched upon earlier in the discussion of the functions of deliberation. Such research argues that citizen’s narratives, containing situated knowledge through lived experiences, if rightly contextualized, are not only coherent with evidence-based law-making standards, but

\textsuperscript{478} Much of the literature of interest-based representation and lobbying is either pluralist, rational-choice oriented or grounded in deliberative democracy.

\textsuperscript{479} Feldman (n 465) 453.

\textsuperscript{480} This is discussed in section 3.1, see also Braithwaite (n 5) 132–133.

\textsuperscript{481} Pateman, \textit{Participation and Democratic Theory} (n 101).
can make valuable contributions to law-making.\textsuperscript{482} More crucially the broad public participation involving many citizens is valuable and tied to the understanding that when certain groups cannot influence the political agenda, decision-making, or gain relevant information to assess how well policy alternatives serve their needs e.g. because they are unorganized or excluded they are likely to be ill served by laws and policies.\textsuperscript{483} The value of equality of citizens can be fulfilled either through direct citizen participation or through (new) forms of representation including prominently through civil society.

Distinct conceptions of civil society in the EU were identified: civil society has been construed as the representation of different voices and interests in society or as the autonomous participation of organizations in the public sphere.\textsuperscript{484} It has been defined as organizations mediating between spheres of society or simply organizations orientated towards the public good.\textsuperscript{485} In analyzing civil society in the EU, many scholars have opted for the ‘organized civil society’ approach defined mainly as voluntary organizations -distinct from state and market actors – which aim to influence these spheres through activism and activities in a European segmented public sphere.\textsuperscript{486} It is also argued that this approach is better suited to analyze the reality of the EU political system and the way in which interests are organized.\textsuperscript{487}

There are other legitimate reasons for wanting to differentiate market interest from civil society. One of the main goals of participatory democracy is to infuse corporate actors with its rationales and practices – and such change has largely not occurred.\textsuperscript{488} There is also no doubt that the prevalence, or dominance, of market actors in the EU policy process deserves appropriate attention. It is also worth noting that the conceptual divide between market actors and non-profit organizations in certain areas appear increasingly blurry.\textsuperscript{489} This being said it should

\textsuperscript{482} For instance in unregulated areas, see Ranchordás (n 412).
\textsuperscript{483} Fung, ‘Varieties of Participation in Complex Governance’ (n 169) 70.
\textsuperscript{485} ibid.
\textsuperscript{486} De Schutter (n 91) 198–217.
\textsuperscript{487} It accounts for the above-mentioned multiplicity of access points and fundamental plurality of interests in the EU. It also acknowledges the difficulty of drawing a clear line between organizations advocating sectoral and general interests, and better suits the way in which the EU has defined civil society. It thus has a better analytical correspondence with the object that will be analyzed. Kohler-Koch and others (n 286) 8–9.
\textsuperscript{488} See Pateman ‘Participatory Democracy Revisited’ (n 138) 7-10, Mansbridge (n 101).
\textsuperscript{489} Consider for instance the issue of regulating the shared economy.
be kept in minds that the notion of civil society in participatory democracy emphasizes organizations which are oriented towards the common good. This rhymes well with the definition of civil society which the EU institutions in their own views subscribes to as civil society as “social action carried out by individuals or groups who are neither connected to nor managed by state authorities,” and “organizational structure whose members serve the general interest through a democratic process and which plays the role of mediator between public authorities and citizens.”

Central to the democratic legitimacy of civil society in the EU is its mediator role, its ability to channel the voice of citizens and certain groups, its overall connection to citizens as well as its orientation towards the common good.

3.6. Summary
After exploring the theoretical origins of participatory democracy, an inclusive understanding of the concept was adopted which allowed for capture of democracy debates at the European level incorporating contributions written in deliberative, associative and direct democracy traditions. The review also demonstrated how participatory democracy surfaced directly and indirectly in the debates leading up until the drafting of the principle as well as EU institutional documents. In analyzing how an understanding of a “more participatory democracy” emerged in the debates on democracy in the Union it was clear that participation in EU governance was viewed from both a functional and a principled perspective, the latter gaining ascendance in the events leading up to drafting of the Constitution. The participatory norm which was constitutionalized did not just represent a functional understanding but a principled one. Establishing links and contacts to citizens was emphasized. Participatory democracy as featured in the EU democracy literature prominently came across as a right of those affected by a decision, to be able to participate in its formation. However, in the academic literature, the documents of the EU institutions and in drafting process, it was clear the role of participatory democracy was complementary to that of representative democracy. And this complementarity would have to play out in a multi-level polity. In order to distill some of these theoretical insights, I drew on Kohler-Koch and Rittberger’s framework juxtaposing elements of representative democracy in the EU with elements of participatory democracy.

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democracy; emphasizing intrinsic value of participation, deliberation and an emphasis on citizens and civil society as participation protagonists. These elaboration on the meaning of these core elements combined with an overall reading of participatory democracy as an inclusive concept yet still committed to government by the citizens, provides the grounding for the legal analysis in the following chapter.
4. The Principle of Participatory Democracy; Instruments, Obligations, Rights

The principle of participatory democracy represents a turning point in the constitutional framing of democracy on the European continent. Europe has a strong tradition of democracy, but one that in legal terms has been almost exclusively expressed through representative democracy. Noting, for instance, that the European Convention on Human Rights (ECHR) is completely silent on non-electoral participation, Steiner argues that the Convention suggests “the tradition of liberal democracy from which it developed insists firmly but solely upon a government’s commitment to an open political process culminating in periodic contested elections”. The Lisbon Treaty’s Democratic Principles therefore demonstrate an evolution of the European tradition of democracy in ways beyond its supra-national configuration.

The aim of the preceding chapter was to gain a deeper understanding of the underlying theoretical foundations and history of the principle of participatory democracy, distilling insights on its purpose. The analysis highlighted the multi-level character of the EU which should inform an understanding of participatory democracy. It arrived at a framing which stressed how the intrinsic value of participation should complement the instrumental perspective on participation, deliberation complement voting, all secured through strong emphasis on participation by citizens and civil society. Proceeding from these core elements, some possible procedural imperatives were also identified. Based on this understanding, the chapter now explores the principle of participatory democracy, drawing on the method of legal interpretation, and asks how the principle finds expression through EU law-making. What key obligations and rights does the principle entail for EU law-making and, in particular, EU law-making consultation?

After exploring the wording and constitutional context of the principle of participatory democracy enshrined in Article 11 TEU and Article 10(3) TEU, associated rights featured in Articles 20-24 TFEU and 15 TFEU are discussed. The analysis then turns to the relationship between

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492 Steiner (n 12) 96 (emphasis added).
493 The mapping in this chapter follows the duties of the Commission – i.e. law-making consultation at the EU-level, while Chapter 5 is concerned with law-making at the national level.
the constitutional underpinnings of consultation and administrative law more broadly. Specifically, it explores the connection between consultation as featured through Article 11 TEU with the principles of transparency, openness, participation and good administration – which together frame EU administration. While parts of administrative law do not apply to the EU institutions acting in legislative or quasi-legislative capacity and are meant specifically to guide executive or administrative action, parts of EU procedural administrative law may be seen as a concretization of constitutional principles which are applicable overall to the institutions’ actions.

Based on these insights, the analysis explores if and in what way the legal principle of participatory democracy can constitute the ground for judicial review by the CJEU. It also analyzes Article 11 TEU and Article 10(3) TEU as potentially embedded in the procedural review of the Court. Taken together, these insights form the basis for charting a detailed legal framework corresponding to the phases of the EU law-making consultation process and determining key procedural requirements flowing from the principle of participatory democracy.

This section begins by analyzing Article 11 TEU as the main Treaty provision relating to participatory democracy followed by an in-depth analysis of Article 10(3) TEU before it moves on to other related rights.


The provisions of Article 11 TEU establish normative standards binding on the institutions, and can be headlined, in chronological order, as voice, dialogue, consultation and citizens’ initiative. These four points deal with different forms or mechanisms of participation in EU governance with different addressees. The first requires the institutions to, “by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action”, the second that the institutions maintain “an open, transparent and regular dialogue with representative associations and civil society”, and the third that the Commission “carry out broad consultations with parties concerned in order to ensure that

494 Primarily featured in Articles 10 and 11 TEU, good administration is partly codified in Article 41 of the Charter of Fundamental Rights – accompanied by the legislator’s duty (‘shall’) in Article 298(2) TFEU to establish provisions that implement such principles.

495 Mendes, ‘Participation and the Role of Law after Lisbon’ (n 32) 1860.

496 Lock labels these different ‘elements’ of participatory democracy. Lock (n 140).
the Union’s actions are coherent and transparent”.497 The last point provides citizens with the right to prompt the Commission to submit a proposal for legislation – provided the citizens number at least one million.498

While these mechanisms differ in their immediate aims, as participatory democracy instruments they should all be viewed as serving to enhance citizen engagement with the Union and its institutions.499 This is clearly spelled out in the preamble of the regulation laying out the functioning of the Europeans Citizens’ Initiative, stressing how the initiative must be viewed in light of all the mechanisms

[…] by which citizens may bring certain issues to the attention of institutions of the Union and which consist notably of dialogue with representative associations and civil society, consultations with parties concerned, petitions and applications to the Ombudsman.500

Each of these mechanisms will be analyzed in turn.

4.1.1. Voice and dialogue – a framework for ‘ethical’ and transparent interest representation

To begin with, who are the duty-bearers and addressees of Article 11(1) and 11(2) TEU? The fact that the two articles bind not just the Council, Parliament and Commission, but all the EU institutions including the European Central Bank, the European Court of Auditors and the Court of Justice to a standard of voice and dialogue may indeed reflect an oversight on the part of the drafters.501 The application of Article 11(1) and 11(2) TEU would in any case need to be applied in a tailored way, depending on the relevant institution.502 Regarding the legal subjects addressed in the paragraphs, different segments of the public are

497 Article 11 TEU.
498 Article 11(4) TEU.
501 Mendes, ‘Participation and the Role of Law after Lisbon’ (n 32) 1869.
502 ibid.
mentioned in the different points of the article.\textsuperscript{503} In Article 11(1) and 11(2) TEU, citizens, representative associations and civil society are mentioned.\textsuperscript{504} Citizens, in this context, refers to EU citizens as outlined in Article 9 TEU.\textsuperscript{505} Representative associations are not defined in the Treaties but feature in EU institutional documents and generally have the aim of influencing policymaking at the European level.\textsuperscript{506} As such, the openness and transparency of the process demanded by Article 11(1) “is an important step towards controlling these associations and avoiding opacity.”\textsuperscript{507} The separate mention of representative associations and civil society can also be attributed to the special role representative associations have had in social dialogue within the EESC, as well as taken to indicate that civil society should be conceived of as groups whose aim is the public good in some form.\textsuperscript{508} As was discussed in the previous chapter, there is no single or accepted definition for civil society in EU affairs. However, Advocate-General Wahl argues that the EU recognizes the special role that charitable and voluntary associations play in contributing to a just society through, inter alia, “the dialogue between EU institutions and civil society required by Article 11 TEU and Article 15 TFEU”.\textsuperscript{509} This role is indirectly confirmed by the CJEU in recognizing the special status of non-profit organizations in EU internal market law.\textsuperscript{510} The above makes it sufficiently clear that civil society in Article 11(2) TEU does not refer to for-profit economic actors or associations.

\textsuperscript{503} Finding the article unclear, Closa asks who the addressees are, years later scholars are still asking the same question, See Closa (n 398) Hanneke van Eijiken, \textit{EU Citizenship & the Constitutionalisation of the European Union} (Europa Law Publishing 2015); Lock (n 140).

\textsuperscript{504} Article 11(3) TEU.

\textsuperscript{505} Article 9 TEU, See also Lock (n 140); Schrauwen notes that Article 9 refers to “its” citizens, i.e. Union citizens and concludes Article 10 (3) TEU has the same rationae personae. Annette Schrauwen, ‘European Union Citizenship in the Treaty of Lisbon: Any Change at All?’ (2007) 15 Maastricht Journal of European and Comparative Law 55, 56.

\textsuperscript{506} Ruffert (n 140) para 12; Lock e.g. includes trade unions and industry groups, Lock (n 140); Blanke and Mangiameli assert the reference to representative associations is essentially a reference to organised pressure groups and lobbying. Garcia Macho (n 499); Bouza demonstrates that the term was not really defined or discussed during the drafting of the Convention. Although there was a notion that representativeness of sorts was important for an institutionalized civil dialogue, discussions were focused on the broad contribution of civil society to European integration. Civil society organizations and NGOs left the debate about the definition and the characteristics of legitimate partners on ‘stand by’, in order to concentrate on the principles and recognition. Bouza Garcia (n 368) 55–64.

\textsuperscript{507} Garcia Macho (n 494).

\textsuperscript{508} Lock (n 140).

\textsuperscript{509} Case C-113/13 \textit{Azienza sanitaria locale n 5 ’Spezzino’ and Others v San Lorenzo and Croce Verde Cogema cooperativa sociale Onlus [2014]}, Opinion of AG Wahl EU:C:2014:291 para 2.

\textsuperscript{510} ibid.
At a first glance, the demands towards EU institutions to “by appropriate means give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action” as well as maintaining “an open, transparent and regular dialogue with representative associations and civil society” appear broad and vague. The two points of Article 11 TEU have been explained in lay terms as referring to *vertical and horizontal* dialogue – one occurring between citizens and representative associations and the other between institutions and representative associations and civil society.\(^{511}\) There has been some recent rejection of this somewhat confusing terminology.\(^{512}\) What is important is that Article 11(1) TEU calls for an opening of channels for engagement towards citizens and representative associations in all areas of Union action, and Article 11(2) TEU for a *dialogue* in all these areas. The latter goes beyond a listening exercise, requiring reciprocity and response.\(^{513}\)

Civil society organizations as well as the EESC have long called for a specific implementation of Article 11(1)(2) TEU and a ‘structured’ dialogue\(^{514}\) to give permanency and governance to dialogue, similar to the Commission consultation regime, although less ambitious in scope.\(^{515}\) The Council, Parliament and Commission have resisted any attempt for any overall structured or permanent direct civil dialogue related to Article 11 TEU. What exists are specific dialogue practices grounded in other Treaty provisions, primarily the social dialogue and the dialogue with churches and religious communities.\(^{516}\) The Commission for its part maintains civil dialogue groups sectorally for several fields, where the civil dialogue frontier has been led by a few DGs, including established rules for how to manage such groups and requirements on their balanced composition in legally binding

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512 Ibid.

513 Cuesta Lopez (n 32) 135; Lock (n 140).


516 On social dialogue, see Article 153 TFEU and Article 154 TFEU. See also Article 17 TFEU.
decisions.\textsuperscript{517} There are also many different citizen consultation and dialogue activities which have occurred in waves with some occurring regularly. The Parliament has primarily channeled civil dialogue through informal public hearings, with dialogue activities of the Council being more limited. While there are periodic activities and ad-hoc forums, Cuesta-Lopez argues these are “far from the idea of maintaining a regular dialogue”\textsuperscript{518} While the Conference on the Future of Europe, which included pan-European mini-publics, could be viewed as an application of Article 11(1) and 11(2) TEU (and Article 10(3) TEU for that matter), it is arguably not a regular feature of EU institutional operations. The Commission’s consultations could be understood as an expression of Article 11 (1) and 11 (2) TEU, and as such would constitute the exception with its ubiquity for legislative an major initiatives.\textsuperscript{519} However, seeing consultations as a dialogue indicates measures of reciprocity and feedback. In any case, while the mode of the dialogue is not fixed, the demands of its regularity imply a minimum level of structure and continuity.

Beyond mandating positive actions to create dialogue opportunities, Article 11(1) and 11(2) TEU provide impetus for a general frame for EU institutional contacts with non-state actors. The General Court’s reference to Article 11 TEU enshrining “a fundamental principle of transparency” also point to this overarching purpose.\textsuperscript{520} Similarly, Advocate-General Emiliou notes “the requirements of openness and transparency of the public administration” as envisioned in Article 10(3) and Article 11(2) TEU.\textsuperscript{521} The instruments of voice and dialogue now provide the constitutional underpinning for the mandatory Transparency Register which contributes to shaping the overall exchange between the EU institutions and interest-groups. The 2021 Interinstitutional agreement on a mandatory transparency register (Agreement on a Transparency Register) frames the establishment of the register as flowing from the principle of participatory democracy,

\textsuperscript{518} Cuesta Lopez (n 32) 126–126; See also Beger (n 372) 4–5; Lock (n 140).
\textsuperscript{519} Mendes, ‘Participation and the Role of Law after Lisbon’ (n 32) 1852.
\textsuperscript{521} Case C-883/19P HSBC Holdings and Others v Commission, Opinion of AG Emiliou EU:C:2022:384 para 148.
referencing EP’s, Council’s and Commission’s duties according to Article 11(1) and (2) TEU. The Agreement on a Transparency Register further elaborates that the dialogue enshrined in Article 11(2) TEU “enables stakeholders to present their views on decisions that may affect them and hence to contribute effectively to the evidence base on which policy proposals are made”. Furthermore, the agreement states that engaging with stakeholders enhances “the quality of decision-making by providing channels for external views and expertise to be given”. It also states that transparency and accountability are essential for “maintaining the trust of Union citizens in the legitimacy of the political, legislative and administrative processes of the Union”, while transparency regarding interest representation is crucial “in order to allow citizens to follow the activities and be aware of the potential influence of interest representatives”. In accordance with the agreement, the three institutions adopt ‘conditionality’ measures when they decide to make certain interest representation activities and access conditional upon prior registration in the Transparency Register.

With reference to the agreement, the rules of procedure of the Parliament now state that MEPs should adopt the systematic practice of only meeting interest representatives that are registered in the transparency registry, public online all scheduled meetings falling under the agreement. The Commission in turn has communicated its commitment to conditionality with regard to high-level Commissioner officers as well as taken two decisions on disclosure of meetings. In these two decisions (one in relation to Commissioners and Cabinet Members and the other in relation to Director-Generals), the Commission elaborates on the constitutional underpinnings of the limits of its discretion, more precisely its obligations to publicize contacts with interest-representatives. Meetings with organizations and self-employed individuals are framed in the context of fulfilling the

522 Interinstitutional agreement of 20 May 2021 on a mandatory transparency register [2021] OJ L 207/1 preamble; point 1,2.
524 ibid preamble, point 2.
525 ibid preamble, point 3.
526 ibid.
527 On the possibility of the agreement being binding, see Article 295 TFEU.
528 The rules also lay out the obligation for rapporteurs, shadow rapporteurs and committee chairs to publish online for each report, all scheduled meetings with interest representatives. See European Parliament, ‘Rules of Procedure’ 9th parliamentary term, July 2023 Rule 11.
Commission’s dialogue duties according to Article 11(1) and 11(2) TEU as well as its duties to consult widely before proposing legislative acts in accordance with Article 2 Protocol No 2 and Article 11(3) TEU. In the first decision relating to Commissioners and Cabinet Members, this is followed by:

In accordance with Article 10(3) TEU, in order to facilitate the participation of European citizens in the democratic life of the Union and to ensure that decisions are taken as openly as possible, it is important to enable citizens to know what contacts the Members of the Commission and members of their Cabinets have with organizations or self-employed individuals.

These duties and obligations for Members of Parliament and the Commission concretize the demands of the principle of participatory democracy to give voice, and crucially to maintain a transparent dialogue, emerging in part as a citizens’ right to know about the interactions between EU institutions and interest-representation which includes active disclosure and publicizing practices. Overall, the mandatory register gives effect to a constitutional obligation enshrined in Article 11(1) and 11(2) TEU in that it provides “a framework and operating principles for a coordinated approach…as regards transparent and ethical interest representation.” Regardless of whether the institutions would revoke or amend the inter-institutional agreement, the fundamental imperative flowing from Article 11(1) and 11(2) TEU to provide a structure would remain.

The understanding of ‘active transparency’ is important to note as the


530 Commission, Decision of 25 November 2014 on the publication of information on meetings held between Members of the Commission and organisations or self-employed individuals [2014] 2014/839/EU preamble para 3; Article 10(3) TEU is only referenced indirectly in the decision on Director-Generals, likely reflecting that the decision to disclose for Director-Generals only applies to “issues relating to policy-making and implementation in the Union” and not any kind of meeting as it does for Commissioners and Cabinet Members, see Commission, Decision of 25 November 2014 on the publication of information on meetings held between Directors-General of the Commission and organisations or self-employed individuals [2014] 2014/838/EU preamble para 3.

historically dominant EU legal approach is one of ‘passive transparency’, centered on EU institutions providing access to documents - assuming that citizens dispose of certain legal, financial and epistemic resources. Scholarly debates have highlighted the limitations of this approach, including in light of the democratic function that transparency serves.

Adding to the already established link between democratic participation and transparency in the EU courts case law, the more recent comments by the General Court and Advocate-General on the principle of transparency enshrined in Article 11 TEU, as well as the Agreement on a Transparency Register and related Commission decisions, linking Article 10(3)TEU and 11 TEU imply an expansive view of transparency. That is, transparency as mandated by the principle of participatory democracy includes an ‘active’ component.

4.1.2. The Commission’s obligation to consult (Article 11 (3) TEU)
The explicit duty to consult enshrined in Article 11(3) TEU is central to participation in EU law-making. The complementary role of participatory democracy in relation to representative democracy, means the principle should also be viewed in light of the specific constitutional principles which exemplify the particular way representative democracy in the EU has developed, including the principles of subsidiarity and proportionality. For consultation as outlined in Article 11(3), these principles help flesh out its substance in a concrete way. Article 5 TEU, which holds that the use of Union

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535 10(1) TEU states that representative democracy is the founding principle of the Union.

competences shall respect the principles of subsidiarity and proportionality, has been further concretized in Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality annexed to the Treaty (Protocol No. 2).537 Protocol No. 2 states that, before proposing legislative acts, “the Commission shall consult widely”.538 The Protocol also specifies that, in carrying out such consultations, the Commission has to take into account the regional and local dimension of any action envisaged, and that the duty to consult broadly always applies except in cases of “exceptional urgency”. Even then, the Commission has to explain its decision to forego consultation.539 This means that, in general, substantive issues such as controversial legislation or urgency may not as serve as a legitimate reason to forego consultation obligations.

It follows from Article 11 TEU as well as Protocol No 2. that there is a clear legal mandate to consult in EU law-making. The language of Article 11 TEU is also sharper in terms of a consultation duty when compared to previous EU legal texts such as the protocol to the Amsterdam Treaty. ‘Should’ has been replaced by the more prescriptive ‘shall’ and consultation is now featured much more prominently in the current subsidiarity Protocol.540 While, in some respects, the language of Article 11(3) seems to refer back to existing practices of the Commission during the last decade,541 inserting consultation under the Treaty’s catalogue of democratic principles, as has been discussed, is new. By virtue of a participatory democracy practice, the Commission does not have unlimited discretion on whom, when and how to consult.542 In interpreting Article 11 (3) TEU, the Commission is bound by Article 11(1) and (2) TEU which establish general obligations of giving voice and facilitating open and transparent dialogue, thereby signifying participation with different normative grounds than functional rationales.543 This connection is reinforced by Article 10(3) TEU which establishes the right of Union citizens to participate in the

537 ibid.
538 The duty to consult can be linked to specific Treaty obligations to conduct cost-benefit analysis; for instance with regards to environmental and social policy (Art. 191(3) TFEU). However such obligations are subsumed in the context of law-making where the duty to consult applies to all Commission legislative proposals irrespective of policy area.
539 Protocol No. 2 Art 2.
540 Amsterdam Subsidiarity Protocol para 9; Tanasescu (n 50) 58.
541 It has been argued that Article 11 TEU constitutionalizes parts of the Commission’s White Paper on Governance. Lock (n 40); See also Walker (n 340).
542 Making this point in relation to consultation on non-legislation procedures, see Mendes, ‘Participation and the Role of Law after Lisbon’ (n 32) 1871.
543 ibid 1852.
democratic life of the Union. The ECJ has held that this right to participate goes beyond electoral rights. In ClientEarth, the Court granted an environmental organization access to early legislative preparatory documents in light of Article 10(3) TEU. The Court hereby put forward an understanding of democratic participation as framed in 10(3) TEU that encompasses direct forms of engagement with the legislative process.

The emphasis by the Court on Article 10(3) TEU in relation to the legislative process suggests again that Articles 11(1) and 11(2)TEU are more geared towards creating a dialogue climate, rather than reflecting an obligation to respond to items raised for debate on individual legislative or policy files. A notable difference regarding consultation is that the obligation to consult rests with the Commission, invariably tied to the Commission’s right of initiative. The distinction and interplay between the duty to promote voice and social dialogue in general and consultation in particular is indirectly touched upon by the Court in ClientEarth where the Court acknowledges that, while “consultations are also intended to ensure the openness of the Commission’s decision-making process and the participation of citizens in that process”, it is also clear that consultations “are not necessarily to be open to the public as a whole. They do not replace the possibility for those citizens to be granted access to the legislative process through e.g. impact assessment reports”. The Court here acknowledges that there can be different kinds of consultations. However, considering the clear legal duty to consult openly for legislation also enshrined in Protocol No 2, the Court’s statement can arguably not be understood to mean that an open public consultation can generally or lightly be foregone. Finally, while representative associations are mentioned in the first and second paragraph of Article 11 TEU, they are not in relation to the third, here replaced by ‘parties concerned,’ suggesting that ‘representative associations’ play a particular role in ensuring wider public debate, but that they have no privileged role in the specific consultation mechanisms of the Commission.

544 Case C-57/16 P ClientEarth para 84.
545 ibid.
546 ibid.
547 Article 17 TEU. See also Lock (n 140).
548 Case C-57/16 P ClientEarth para 94.
549 On this point see Smismans, ‘The Constitutional Labelling of “The democratic life of the EU”: Representative and Participatory Democracy’ (n 137) 138.
4.1.2.1. Concerning the 'parties concerned': who to consult?
Considering the above analysis, the question of how Article 11 (3) TEU can be understood can be framed as how a consultation exercise can be structured in alignments with its participatory ideal while adhering to the necessary dimensions and procedural goals that flow from the purpose of a consultation medium. Keeping this in mind is helpful when interpreting “broad consultation with parties concerned” featured in Article 11(3) TEU. The term “broad” excludes one-sided consultation. For law-making, Protocol No. 2 adds the duty to take into account the regional and local dimensions. Broad consultations as featured in Article 11 TEU also stands in relation to the term “parties concerned”. The latter term is frequently featured in regulatory policy and legislative theory and appears in several variations: “affected and interested parties”, ”significantly affected and potentially interested parties” as well as “citizens and interested parties”. The concept of ‘parties concerned’ also finds some parallel in the right to be heard established in procedural law.

The Commission’s internal guidelines indicate how the Commission – in its own view – should approach the issue: whom it will affect, who will have to implement, and who has a stated interest in the policy or law. Although the Commission avoids directly linking this suggested approach to the terminology of Article 11 TEU (or any legal obligation for that matter), it seems to correspond with what Article 11 TEU implies. Such determinations, however, are prone to a great deal of subjectivity, considering how democracy theory and practice highlight that ‘who will show an interest’ is linked to access to information and capacity to respond. In this context, it is unfortunate that the Commission in its updated Better Regulation Guidelines and Toolbox consistently focuses on the term “interested parties” as the relevant standard, rather than “parties concerned”, as the latter phrase (which is the Treaty text and the legally relevant one) is not dependent on awareness of the Commission’s activities and proposals. The guidelines

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550 Article 2 Protocol No. 2
553 Commission Better Regulation Guidelines (n 52) 19.
554 ibid 13.
even go so far as to misrepresent the content of Article 11 TEU with a verbatim quote from Article 11 TEU, except for the replacement of that one phrase: “Under Article 11 of the Treaty on European Union (TEU), the Commission has a duty to carry out broad consultations with interested parties to ensure Union action is coherent and transparent” (emphasis added).\footnote{555} This seemingly trivial distinction however conceals a larger problem, as the Commission then commits to “prioritizing stakeholder categories to engage with according to their level of interest in, expertise about, or influence on the initiative”.\footnote{556} This approach then clearly moves away from the meaning of the Treaty text which is centered on who is affected by the legislation instead of their level of interest in it.\footnote{557} Although the latter certainly can be indicative of the former, assuming such equivalence goes against the Treaty text and the empirical insights of democratic theory elaborated on in the previous chapter. By comparison, in the Aarhus Convention, the phrase “the public concerned” is defined as “the public affected or likely to be affected by, or having an interest in, the environmental decision-making”.\footnote{558} Considering that alternative available terminology with a narrower field of application such as “directly affected” or “significantly affected” have been discarded for the more open-ended “parties concerned”, the term should be understood to have a wide-ranging application and arguably as a principle of inclusion. The Commission’s own minimum standards on consultation identify the consultation target groups with “those affected by the policy, those who will be involved in implementation of the policy, or bodies that have stated objectives giving them a direct interest in the policy”.\footnote{559} This then seems like a definition more in line with Article 11 TEU than the unwarranted focus on ‘interest’. The constitutional grounding of the participation of those affected is important considering the complementary role participatory democracy can play in relation to representative democracy, in that it would include parties concerned which may not easily find voice through traditional means of representation.

\footnote{555}{\textit{ibid}.} \footnote{556}{Commission Better Regulation Guidelines (n 52) 19.} \footnote{557}{There seems to be no legal problem with the Commission’s approach to prioritize stakeholders proportionally related to the strength of their connection to the proposed legislation, only its method of placing “interest in” the legislation as a main metric/factor to determine their status as “parties concerned” which is at odds with the wording of the Treaty text as well as its underlying telos.} \footnote{558}{Convention on Access to Information, public participation in decision-making and access to justice in environmental matters (adopted on 25 June 1998), United Nations, 2161 UNTS 447 (UNECE) Article 2, 5.} \footnote{559}{Commission, General Principles and Minimum Standards (n 39).}
Two additional dimensions are worth mentioning. As the link between 10(3) TEU and access to law-making has been confirmed by the CJEU, the right enshrined in 10(3) TEU for all citizens to participate in the democratic life in the Union informs the understanding of “parties concerned”, emphasizing the importance of a genuine link to citizens and necessary depths of the consultation process. Additionally, the logic underlying consulting “concerned parties” is not limited to the concept of citizenship – highlighting necessary width in the circle of parties consulted. The language of Article 11 (3) TEU draws no distinction between whether parties concerned are citizens of the Union or so-called third-country nationals, and where they reside, just as there is no distinction as to whether parties are individuals, businesses, organizations, or other legal persons. However, it should be noted that the right to democratic participation is afforded exclusively to citizens.

4.1.2.2. How to consult; principles and practices
Article 11(3) TEU does not prescribe any specific consultation modalities, which allows for flexibility and adaptability. However, the democratic standards which flow from the principle of participatory democracy must be maintained; primarily, consultations must be conducted in an open and transparent way. As a general rule, this means Article 11(3) TEU requires open internet-based consultation for legislative proposals, which is also spelled out in the Interinstitutional Agreement on Better Law-making.

The phrase “broad consultations with parties concerned” implies that parties should not be limited in expressing their opinions on a proposal at hand. ‘Broad’, then, does not mainly refer to the scope of participants – which the term ‘parties concerned’ primarily operates – but to the

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561 Cf. Schrauwen (n 505) 56.

562 This follows, inter alia, from the stated purpose of consultations in Article 11(3) TEU: transparency and is also spelled out in the inter-institutional agreement on better law-making, see Interinstitutional Agreement of 13 April [2016] on Better Law-Making OJ L123/1 point 19 For an in-depth analysis, see 4.1.2.1.

563 Although implicit in Article 11 TEU, especially in light of Article 2 Protocol No. 2, this obligation is codified in the interinstitutional agreement on better law-making, ibid. Furthermore, the Courts have begun to engage with the Agreement and its provisions, see section 4.
substantive scope of the consultation. This adds a legal emphasis to the question of ‘framing’ relevant issues, as highlighted in participatory democracy theory and the importance of which behavioral research in the last decades has robustly evidenced. Practices which run contrary to this obligation include when consultation occurs at a late stage in legislative drafting or there is over-reliance on closed-question multiple choice questionnaires. However, the term “broad consultations with parties concerned” in no way excludes consultations at different stages of the drafting process, reaching out to different actors depending on their ties to the potential legislation, for instance as a target or implementor of legislation. Actors involved with implementation could, for instance, be more suited for consultation on technical or legal features at a later stage in the law-making process. There is also no explicit statement with regards to the choice of the consultation medium; internet-based, hearings, conferences, workshops, deliberate polling or citizen panels, field-visits and so on. For areas outside of the Union’s exclusive competence, Protocol No 2. places an additional duty on the Commission to consult as widely as possible in preparing legislative proposals, referring presumably to both the circle of participants and the scope of the proposal.

While Article 11 TEU strengthens the opportunities of potential participants in law-making consultation, it does not (nor does Protocol No. 2) place any direct obligation on the Commission to follow the outcome of a consultation or any specific content generated through a consultation procedure. This is also an important feature of the complementary function of the principle of participatory democracy, as it cannot impinge on representative democracy in the EU and the crucial institutional balance which is one of its main features. The obligation to consult, while retaining decision-discretion, implies the consultation process generating perspectives and knowledge providing a basis for taking an informed decision, perhaps even new approaches. Arguably, this can often be achieved when consultation occurs in the early stages of drafting. Whether Article 11 TEU implies any outer limits of substantive discretion is questionable. Rather, the overall duty of the

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565 At the time of writing such questionnaires are quite frequent.
566 See e.g. OECD ‘Best Practice Principles on Stakeholder Engagement in Regulatory Policy Draft’, (OECD 2008a)
567 Article 2 Protocol No. 2.
568 See e.g. Case 138/79 *Roquette Frères*. See also section 4.6 and cited case law in relation to institutional balance as a feature of representative democracy in the EU.
Commission with its sole right of legislative initiative to act in the “best interest of the Union” would rather be guiding.\textsuperscript{569} Considering that the stated purpose of consultations is to ensure coherence and transparency, at a minimum, this requires clarity in the process whether consultation input has been received and has been taken on or not.\textsuperscript{570}

The question of equal opportunity and obligation of equal treatment is tied to the principle of equality. Equality of citizens is a fundamental EU value and a democratic principle of the EU by force of Article 9 TEU. Giving voice to and equal treatment of participants comes through in a consultation setting as procedural equality – meaning potential participants should be able to have equal procedural opportunities to influence decision-making procedures.\textsuperscript{571} Overall, Article 9 TEU underscores the political dimension of EU citizenship. While such an understanding is supported by Article 10(3) TEU, the application of equality in the context of participatory democracy is not without complications. Legitimacy, in a participatory democracy framework, is not necessarily achieved through traditional notions of representativeness, and it is not clear how procedural equality should be measured considering the range of actors potentially participating in a consultation exercise and their respective links to citizens.\textsuperscript{572} All this considered, the Commission must take into account that Charter rights require consultation design to attend to; ensuring equality between women and men,\textsuperscript{573} non-discrimination of people belonging to minorities and other vulnerable and marginalized groups,\textsuperscript{574} as well as the obligation to respect cultural, religious and linguistic diversity\textsuperscript{575} and ensure reasonable accommodation for the needs of persons with disabilities.\textsuperscript{576} Relatedly, the Interinstitutional Agreement on Better

\textsuperscript{569} Article 17 TFEU.
\textsuperscript{570} See section on transparency.
\textsuperscript{571} Mendes, ‘Participation and the Role of Law after Lisbon’ (n 32) 1862; Alemanno, ‘Levelling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission’s Public Consultations in Light of the Principle of Political Equality’ (n 33) 120; See also Grevén (n 150) 236–240.
\textsuperscript{573} Article 23 CFR.
\textsuperscript{574} Article 21 CFR. The Commission has also recently acknowledged the need to address existing hurdles limiting democratic participation and representation for groups susceptible to marginalization, such as people with a minority racial or ethnic background, see Commission, ‘Communication to the European Parliament, the Council, The European Economic and Social Committee and the Committee of Regions: A Union of equality: EU anti-racism action plan 2020-2025’, COM(2020) 565 final, 18 September 2020.
\textsuperscript{575} Article 22 CFR.
Law-making clearly spells out and codifies two procedural requirements implicit for Article 11 TEU; “ensuring that the modalities and time-limits of those public consultations allow for the widest possible participation.” and that “results of public and stakeholder consultations shall be communicated without delay to both co-legislators and made public”.\(^{577}\)

Regarding the more innovative or unconventional participatory practices at the EU level, such as citizens consultation, citizens dialogues and citizen panels, these have occurred outside of the main policy and law-making apparatus and either with noted limited impact or no documentation on their impact.\(^{578}\) It is too early to assess the developments following the Conference on the Future of Europe and the Commission commitment to stream-line so-called citizens panels as well as its nascent practice which began in the Spring 2023.\(^{579}\) While the rhetoric surrounding these citizen-panels certainly has evoked their importance for EU democracy – with (perhaps inadvertent) references to Article 10(3) TEU labelling them as “vital to the democratic life” of the Union – so far it is too early to see if they are used for policy direction or as law-making consultation.

4.1.2.1. The purpose of consulting and its implications; transparency, coherence and participation of those affected

It is clear the duty to consult could encompass a wide range of practices where procedural equality or representativeness would be expressed in different ways. The way in which the Commission is obligated to pursue broad consultations and implicitly ensure procedural equality should further be informed by how participation is gaged in relation to the stated purpose of the consultations in the Treaty – i.e., coherence and transparency.\(^{580}\)

Beginning with the former, the ‘coherence’ of Article 11 TEU in lack of further clarification has broad application and in the Treaty functions as an umbrella term. ‘Consistency’ appears as a constitutional principle

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578 See e.g. Hierlemann and others (n 9).
579 ‘European Citizens’ Panels’ (n 79).
580 There is little analysis these stated goals. The few existing comments stop at taking note; "Interestingly, the aims of these consultations are limited to effecting transparency and coherence—both of which are of course important for good governance—but it is no express aim to make ‘good’ law.", see Lock (n 140); See also noting that Article 11(3) TEU and broad consultations are vaguely defined, see Garcia Macho (n 499).
in several places in the Treaty of Lisbon, elaborated as a fundamental legal obligation of EU institutions. The principle of consistency is featured most prominently in Article 7 TFEU, referring to consistency between the Union’s “policies and activities...its objectives ...in accordance with the principle of conferral of powers.”

Although the English word used in Article 7 TEU is ‘consistency’, a number of language versions refer to consistency as coherence (e.g. German: Kohärenz, French: cohérence, Spanish: coherencia, and in Article 11 TEU: Kohärenz, coherencia). This has led to academics interchangeably referring to the principle of consistency and the principle of coherence in EU law. In the literal sense, however, in English, consistency is not equivalent to coherence. Consistency is often defined as the absence of contradictions, whereas coherence refers to positive connections. Herlin-Karnell and Konstantinides argue that, while EU policies shall be both consistent and coherent, ‘consistency’ -used in the English-language version of the Treaty of Lisbon is better viewed as an all-encompassing principle rather than a precondition to coherence. The rationale for consistency encompassing or being equivalent to coherence (although the literal meaning works the other way around) is to avoid making “a false allegation out of linguistic pedantry” – that is to say the Treaty drafters omitted to pay lip service to the principle of coherence by referring to consistency.

Accepting this rationale means understanding ‘ensuring coherence’ as found in Article 11 TEU is helped by an understanding of the principle of consistency (here implying wider berth than consistency in the literal sense). In providing that the EU institutional framework “shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions” (Article 13 (1) TEU), consistency can be viewed as a systemic principle embedded in

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582 Art. 7 TFEU.
583 Article 11 TEU in Spanish reads: “Con objeto de garantizar la coherencia y la transparencia” while in German „Um die Kohärenz und die Transparenz des Handelns der Union zu gewährleisten“
585 ibid 141.
586 ibid.
the constitutional text of a legal system as an element of the rule of law, helping to ensure legal certainty.\footnote{ibid 142.} The connection between consultation and coherence in Article 11 TEU mirrors a legal anchoring of the overall Better Regulation Agenda (of which consultation was a part prior to the Lisbon Treaty) to the rule of law, which, according to Article 2 TEU, acts as one of the EU’s founding principles.\footnote{Garben and Govaere argue the Better Regulation Agenda’s constitutional legitimacy is supported by Article 2 TEU which refers to the Rule of Law as a EU founding principle. Sacha Garben and others (eds), ‘The Multi-Faceted Nature of Better Regulation’, \textit{The EU better regulation agenda: a critical assessment} (Hart Publishing 2018) 6.} In a legal system founded on the rule of law, the legislative process in its totality is rule-bound. Consistency or coherence also expresses MacCormick’s argument that the law should make sense when considered as a whole through being rational and orderly.\footnote{Neil MacCormick, \textit{Legal Reasoning and Legal Theory} (Oxford University Press 1994).} This goes beyond ‘bare consistency’ and moves closer to Dworkin’s description of ‘a single vision of justice’.\footnote{Ronald Dworkin, \textit{Taking Rights Seriously} (Harvard Univ Press 2001); Von Bogdandy also sees coherence as a justification for the conceptualization and elaboration of constitutional principles, it is a principle underlying the grand plan of the constitutional universe. Von Bogdandy (n 135) 11-54.} Consistency/coherence is consequently expressed in a web of legal obligations in EU law, through loyalty and primacy (vertical consistency), as well as in the principles of good administration and good governance connected to openness and transparency (horizontal consistency).\footnote{Herlin-Karnell and Konstadinides (n 584) 142–143.} Regarding the latter, the English language version of ‘coherence’ for Article 11 (3) also provides a bridge to the EU governance principle of ‘coherence’ as elaborated by the Commission in its White Paper on European Governance. The paper highlights the need for coherence in the face of EU enlargement, increasing diversity, current challenges crossing boundaries of Union sectoral policies, and the fact that regional and local authorities increasingly are involved in forming and implementing EU policies.\footnote{Commission, White Paper Governance title II.}

In sum, Article 13 (1) TEU read together with Article 7 TFEU as well as the values laid out in Article 1 and 2 TEU expresses both the single-vision notion of coherence while also featuring distinct horizontal, vertical and formal facets of coherence.

In the context of consultation, coherence as featured in Article 11 TEU can then be construed as three main lines of action or considerations which should inform consultation design: a.) coherence between a legislative proposal and the values and objectives of the Union,
including the Commission’s duty to initiate legislation that is in the best interest of the Union.\(^{593}\) b.) consistency between the proposal at hand and existing legislation at the Union and national level,\(^{594}\) and c.) coherence between the stated objective of a piece of legislation and the way it materializes those objectives. Regarding the last point, the Commission in its own elaboration of coherence in good governance has placed an emphasis on the challenge of cross-sectoral issues (which pose challenges to evidence gathering and participation) as well as the importance of regional and local authorities as implementors of EU legislation and action.\(^{595}\) The lack of cross-sectoral approaches has also been brought to light by civil society actors as a challenge with regard to consultation and dialogue with the EU institutions.\(^{596}\) Considering the imperatives of participatory democracy theory, the legal emphasis placed on coherence can then best be viewed as a call to a systematic approach to avoid potential structural biases, e.g., proactively reaching on to parties beyond the usual suspects and an emphasis of diversity in participation selection, particularly with regard to a diversity of perspectives.\(^{597}\) Conversely, it may also imply more tailored consultations to avoid the domination of certain actors or interests. Throughout these three expressions of coherence, the principles of subsidiarity and proportionality either represent a constitutional element with which EU legislation must be coherent, or tools which themselves promote coherence in the multi-legislative setting.\(^{598}\)

In understanding how the other stated purpose of broad consultation, namely transparency, informs consultation design, the Treaties’ reference to transparency serves as a baseline. Transparency is featured primarily in Article 15(1), 15(3) and 298(1) TFEU, as well as through the notion of openness in Article TEU. The obligation placed on EU institutions to be open is established in article 1 TEU: “decisions are taken as openly as possible to the citizen” and Article 15 (1) TFEU (“In order to promote good governance and ensure the participation of civil

\(^{593}\) See Article 17 TEU
\(^{594}\) Herlin-Karnell and Konstandinides (n 575).
\(^{595}\) Commission, White Paper Governance.
\(^{596}\) Fazi and Smith (n 222) 39–49.
\(^{598}\) The links between subsidiarity and proportionality and the principle of participatory democracy will be further elaborated on in exploring the opportunities of judicial review of Article 11 (3) TFEU, see below
society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.”) underlines the connection between participation and openness as enshrined in the Treaty. While there are no single definitions of the principles of openness and transparency in EU law, these terms are often used interchangeably.\(^{599}\) Openness as both a principle and practice, it has been argued, encompasses two dimensions: transparency and participation.\(^{600}\) From this perspective, the main element and precondition of participation is transparency, the most concrete manifestation being access to information and correspondingly the right to documents of the EU institutions.\(^{601}\)

The Commission is also, according to the Interinstitutional Agreement on Better Law-Making, obligated to communicate the results of public and stakeholder consultations without delay to both co-legislators and make it public.\(^{602}\) In understanding the connection between participation and transparency outlined in 11 (3) TEU, transparency, as recorded in Article 15 TFEU, serves as means to ensure that civil society participates in the work of the Union.\(^{603}\) In a preliminary draft of the Constitutional Treaty, openness also appeared as a condition of the principle of participatory democracy: “The Institutions are to ensure a high level of openness, permitting citizens’ organizations of all kinds to play a full part in the Union affairs”.\(^{604}\) The right of access to documents is the most developed legal dimension of EU institutional openness.\(^{605}\) It is enshrined in Article 15(3) TFEU and fleshed out in Regulation 1049/2001, and, as a key element of the principle of transparency, which itself is a subset of the principle of openness, also finds support in Articles 1, 10 and 11 TEU.\(^{606}\) Finally, it is also

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\(^{600}\) Alemanno, ‘Unpacking the Principle of Openness in EU Law’ (n 405).


\(^{603}\) Article 15 TFEU, see also Case C-57/16 P ClientEarth v European Commission EU:C:2018:660.


\(^{605}\) Alemanno, ‘Unpacking the Principle of Openness in EU Law’ (n 405) 16–17.

\(^{606}\) Explicitly Article 10(3) TEU, Article 11(2) TEU and Article 11(3) TEU.
established in Article 42 of the Charter. Access to documents has been expressed as the ontological pre-condition for citizen participation in the Union and most concrete expression of the principle of openness as expressed in Article 10(3) TEU and its corollary, transparency. Transparency and openness are recognized as having the potential to enhance democratic legitimacy, in that they serve the ability of citizens and affected parties to participate in governance and allow the same citizens and other relevant actors, such as the media, to hold elected leaders and government officials accountable. Article 11 (3) TEU can then reflect the understanding that just as transparency promotes participation, so too does participation foster transparency – in the sense that information and knowledge is diffused, and possibly generated, through participation. In the two-way corridor of participation and transparency, consultation’s secondary function is one of active transparency.

In particular, through Article 11(3), focus is placed on the underlying logic and reasoning behind norm creation being brought to light through consultation exercises. Transparency here refers to both the logic and input of norm creation – that is, not just the stated intent of the legislator but also those voices seeking to inform and influence the legislator and norm creation process. The duty to hold broad consultation in order to “ensure that Union action is transparent” is then a duty that acts as an exclusionary. It excludes a central role to practices of opaque forms of stakeholder and advisory input or closed-door lobbyism. If transparent consultations are in the periphery of decision-making or merely a secondary medium of input and influence, it is very difficult to see how broad consultations could ever ensure transparency in EU governance or law-making – the stated purpose of Article 11(3) TEU would then be unachievable. This also speaks for a broad interpretation

607 Article 42 CFR.
609 Cornelia Moser, How Open Is ‘Open as Possible’? Three Different Approaches to Transparency and Openness in Regulating Access to EU Documents, vol 80 (Institut für Höhere Studien (IHS), Wien 2001); For a more critical appraisal, see Curtin and Meijer (n 316).
610 Curtin, Hofmann and Mendes (n 4) 17; David Stasavage, ‘Open-Door or Closed-Door? Transparency in Domestic and International Bargaining’ (2004) 58 International Organization
611 Different language versions place equally strong emphasis; „Con objeto de garantizar”, “En vue d'assurer ” „zu gewährleisten”.

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of the kind of activities which fall under the label of ‘consultation’. The exclusionary nature of Article 11(3) TEU is reinforced by the legislator’s choice of word: “ensure” is an absolute as opposed to more declamatory verbs such as ‘promote’ or ‘foster’. Naturally, this also implies that the Commission’s consultation process itself has to live up to such a high transparency standard, implying proactive measures of publication, notice and feedback.

Finally, an additional purpose of consultation is also revealed through the addresses of consultation, namely the already analyzed ‘parties concerned’. Consulting parties concerned encompasses both the instrumental and intrinsic values of participation. It aims to cover those affected parties with relevant knowledge and insights, and protect the inherent value of the participation.

4.1.3. The European Citizens initiative (Article 11(4) TEU)

Article 11(4) TEU establishing the Europeans Citizen’s Initiative (ECI) is fleshed out in secondary legislation and provides a clear framework for its functioning – allowing one million EU citizens to invite the Commission to propose legislation.612 Additionally, online signature collection is specified by means of Commission implementation regulation, 613 and the Parliament’s Rules of Procedure include a number of rules relating to the Parliament engaging with citizen’s initiatives, e.g. through public hearings and debates on the citizen’s initiatives as well rules inviting certain bodies to ascertain to what the degree the Commission has fulfilled its obligations.614 When a citizen’s initiative is registered, organizers have six months to schedule the launch of their signature collection campaign.615 Once the collection starts, there is a one-year deadline to collect a total of one million signatures and reach the designated signature thresholds (which emerge in secondary legislation) in at least seven EU countries.616 Upon receiving the necessary certificates from competent national authorities, a six-month examination period begins: organizers are invited for a

616 ibid.
meeting with the Commission within a month and are invited to participate in a public hearing in the Parliament within three months. At the end of this examination procedure, the Commission issues a response to a ‘successful’ initiative in the form of a communication, explaining “the action it intends to take, if any, and its reasons for taking or not taking action”.

The instrument has, over time, become more accessible as secondary legislation and Commission practice has been reformed, propelled in due to the CJEU finding the Commission mistaken in its initial approach, e.g. refraining to register initiatives, vocal pressure from the Parliament, the European Ombudsman, as well as the findings of the Commission in its own review (after consulting interest-groups) of the original legislation implementing Article 11(4) TEU. While the ECI has attracted much attention due to its strong citizen participatory dimension and potential for influence and agenda-setting, its impact is debated. Even though the ECI was seen as one of the few elements of Article 11 TEU which increased the stakes attached to citizen participation, there are clearly differing expectations, with, e.g. its role explained in terms of fostering debate or providing an opportunity to be heard, rather than influencing the outcome. In terms of ECI initiation and organizing, civil society organizations are the dominant actors rather than individual citizens. That being said, the ECI remains one of the most visible, tangible and justiciable elements of the principle of participatory democracy.

4.2. Citizens’ right to participate in the democratic life of the Union in view of multi-level law-making

The potentially central link between Article 10(3) TEU and Article 11 TEU has already been touched upon in the analysis of Article 11 TEU. However, in order to properly assess this link, a more in-depth analysis

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617 After this hearing, the European Parliament will hold a debate in plenary. EP RoP Rules 222 and 230.
619 In the case of the Stop TTIP ECI, for example, the Commission initially refused to register the ECI based on the institutional grounds that negotiations were ongoing with the Council. The Court argued in reply: “far from amounting to an interference in an ongoing legislative procedure, ECI proposals constitute an expression of the effective participation of citizens the European Union in the democratic life thereof.” Case T-754/14 Efler and Others v Commission, EU:T:2017:323.
620 See Hierlemann and others (n 9) 74–92.
621 For an overview, see Hierlemann and others (n 9).
622 Monaghan (n 178).
is required. How can we then understand the citizen’s right to participate in the democratic life of the Union?

Looking more closely at Article 10(3) TEU, it is drafted in the same style as the citizenship rights listed in Article 20–24 TFEU, which further highlights the strong legal foundation for democratic participation; “every citizen shall have the right to participate in the democratic life of the Union” and “decisions shall be taken as openly and as closely as possible to the citizen” (Article 10(3) TEU). While Article 10(3) TEU is situated under the Treaty Article associated with representative democracy clearly spelled out in Article 10(1) TEU, the formulation of Article 10(3) TEU indicates that the right of participation referred to here is not just one of voting, an interpretation which has been confirmed by the Court, linking it to the right to attempt to influence the EU legislative process. Indeed, it has been noted the wording of Article 10(3) TEU can be given substance in various ways, implying both representative and participatory democracy. In the Treaty establishing a Constitution for Europe, this right was set out in Article I-46, entitled ‘The principle of representative democracy’, leading to its current placement in the Treaty. However, as discussed in the previous chapter, in the initial proposal of the Praesidium on ‘the democratic life of the Union’, the right was included in Article 34, ‘The principle of participatory democracy’. This history and its textual formulation suggest that Article 10(3) TEU should best be interpreted as an overarching right relating to both representative and participatory democracy. This view is now cemented through the case law of the Court. Apart from its assessment in ClientEarth, the Court has stated that the ECI is ”an instrument concerning the right of citizens to

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623 Kris Grimontprez makes this connection, noting that 10(3) TEU is often neglected as a citizenship right by scholars as well as EU citizen reports and deserves much more attention. Kris Grimontprez, The European Union and Education for Democratic Citizenship: Legal Foundations for EU Learning at School (Nomos Verlagsgesellschaft mbH & Co KG 2020) 469.

624 Case C-57/16 P ClientEarth para 84.

625 Grimontprez (n 623) 470–471.

626 Document from the Praesidium: Draft Title VI of the Constitutional Treaty relating to the democratic life of the Union (2 April 2003) CONV 650/03 Article 34.

participate in the democratic life of the Union, provided for in Article 10(3) TEU”, also now expressed in the regulation fleshing out the ECI.

This overlapping function of participation, as expressed through different modes of participation relating to participatory or representative democracy, is similar to that of transparency. The application of the principle of transparency to the EU legislative process is, for instance, on the one hand, grounded in the system of representative democracy – in that citizens need to be able to understand how and why legislative choices are made, as well the substance of legislation, in order to hold their elected leaders accountable to those choices. On the other hand, to the degree that transparency is intended to allow the public to engage more directly in the legislative and policy-process, the principle of transparency serves participatory democracy purposes.

The active link between transparency and democratic participation has been recognized by the CJEU in a string of cases, including ClientEarth, where the Court held that access to documents was prompted, in part, by the right that transparency was intended to secure, namely the right to participate in the democratic life of the Union according to Article 10(3) TEU – which as interpreted by the Court gives citizens the opportunity to learn of Union action and attempt to influence it. From the substantial body of case law on transparency, relevant to the intersection of the principle of participatory democracy and EU law-making, is the Court’s established link between democratic participation and transparency. According to the Public Access to EU

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628 C-589/15 P Anagnostakis para 24.
631 Alemanno, ‘Unpacking the Principle of Openness in EU Law’ (n 405).
632 Case C-57/16 P ClientEarth para 94; Craig (n 436) 341; Transparency here is thus tied to accountability and allows for judicial review. Cf. with the obligation to give statement of reasons for all legal acts according to Article 296 (2) TFEU, see also Jürgen Schwarz, European Administrative Law (Office for Official Publications of the European Communities; Sweet & Maxwell 1992) 1400–1401; Case C-367/95 Sytraval and Brink’s France v Commission EU:C:1997:249 341.
633 See prominently Joined cases C-39/05 P and C-52/05 P Sweden and Turco v Council; Joined Cases C-92-93/09 Schecke and Eifert, EU:C:2010:662 para 68; Case C-280/11 P Info Access
Documents Regulation, the documents held by the EU institutions are subject to the principle of “widest possible access”, subject only to certain specific and strictly interpreted exceptions to disclosure.\(^{634}\) Furthermore, the Regulation provides that even wider access should be granted to “legislative documents” and that these documents should, subject to the discrete enumerated exceptions to disclosure, be made directly accessible by the institutions.\(^{635}\) The Treaties provide that, according to the ordinary legislative procedure, the holders of the legislative function to whom the Commission addresses its proposals are jointly the Council and the Parliament,\(^{636}\) and the obligations to provide reasons for legislative acts, now enshrined in Article 296 TFEU, has been a part of community law since the very beginning.\(^{637}\) However, the Court has further clarified that the key role the Commission plays due to its right to initiate legislation means that the documents it produces as part of its right of initiative, as well as the Council negotiating its position on a legislative file, are all legislative activities and as such cannot rely on any general presumption of secrecy.\(^{638}\) The same goes for documents relating to trilogue negotiations.\(^{639}\) In commenting on the right of access to documents by the institutions during the legislative preparatory phase, the General Court’s comments that “the expression of public opinion with regard to a particular legislative proposal forms an integral part of the exercise of Union citizens’ democratic rights”.\(^{640}\) The General Court also clarifies that the reality of the risk of external pressure, which may constitute a legitimate ground for restricting access to documents related to the decision-making process, needs to be established with certainty through ‘tangible evidence’.\(^{641}\) In these ways, transparency and participation are inextricably intertwined and together may contribute to enhancing democratic legitimacy while increasing accountability through, inter

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\(^{635}\) Ibid preamble para 6, Article 2(4) and Article 12(2); See also Case C-280/11 P Info Access Europe.

\(^{636}\) Article 14(1) TEU and Article 16(1)TEU.

\(^{637}\) Von Bogdandy (n 131) 330.

\(^{638}\) C-280/11 P Info Access Europe paras 74, 75. For the Council, its Rules of Procedure help determine when it is acting in a legislative capacity. See also mandated openness of the Council’s voting record on legislative measures according to Article 16(8) TEU.

\(^{639}\) Case T-540/15 Emilio De Capitani v European Parliament EU:T:2018:167 para 84. See also Curtin and Leino (n 630).

\(^{640}\) Case T-540/15 De Capitani para 84.

\(^{641}\) Ibid para 85.
alia, Article 10(3) TEU.\textsuperscript{642}

4.2.1.\textit{The democratic life of the Union – unlocking the vertical component of Article 10(3) TEU}

The analysis has revealed that the right to participate in the democratic life of the Union refers to practices and rights associated with the principles of representative and participatory democracy. However, the boundaries of the “democratic life of the Union” are not spelled out in the text. Is the scope of the right limited to activities at the EU-level? This question has not received much attention in literature.\textsuperscript{643} The overall sparse legal commentary on this right may be linked to the observation it is often forgotten or omitted by scholars and practitioners, perhaps owing to its absence in the citizen’s rights catalogue in Article 20-24 TFEU.\textsuperscript{644} This omission is not in any way decisive, as the adjustments to this list brought by the Lisbon Treaty clarified that the list is not exhaustive (the word “inter alia” was included), and the introductory paragraphs emphasize the listing of the rights are without prejudice to other rights and prerogatives enumerated in the Treaty.\textsuperscript{645} The question then remains whether and to what extent Article 10(3) TEU can inform the interpretation and application of national laws relating to participating in the democratic life of the Union, implicitly implying a right to participate in EU law-making, including related transparency standards. Can substantive and procedural national legislation – and indeed also EU secondary legislation relating to the democratic life of the Union – then ‘activate’ Article 10(3) TEU? And, relatedly, is it sufficiently clear, precise or unconditional to qualify as a standalone participation right?

As to the former question, it is possible to construe Article 10(3) TEU as targeting EU institutions and, therefore, not being applicable to Member States or other EU agencies or bodies. The context of existing (albeit limited) CJEU case law on Article 10(3) TEU also concerned EU institutions.\textsuperscript{646} However, a legal interpretation which takes into account the text and position of the article, its normative underpinnings, as well as related case law, highlight that Article 10(3) TEU should be interpreted as having a broader reach. Four arguments are developed in this regard.

\textsuperscript{642} Von Bogdandy (n 131).
\textsuperscript{643} See however, von Bogdandy and Spieker (n 405); Ruffert (n 140).
\textsuperscript{644} Grimonprez (n 623) 469–471.
\textsuperscript{645} Article 20 TFEU.
\textsuperscript{646} See e.g. the analysis in chapter 4.3.
Firstly, Article 10(3) TEU specifically refrains from pointing out EU institutional actors as duty holders in stark contrast to Article 11 TEU. In Article 11 TEU, as has been discussed, different institutional actors are pointed out as responsible for, e.g., dialogue and consultation, which clearly delineate, direct and limit institutional obligation at the EU level. This leaves the clear impression that, for Article 10(3) TEU, the citizen’s relationship to the democratic life of the Union is central.

Second, other elements of Article 10 TEU are directed at actors beyond the EU institutions. For instance, in referencing citizens’ rights to be EP, Article 10(2) TEU is referencing rights which are realized primarily through institutions at the national and local level, e.g. through organizing European elections. The Court has clarified in Delvigne that EU law imposes obligations on Member States with respect to the participation of EU citizens in the governance of the EU, notably by guaranteeing the right to vote in elections to the (European) Parliament in the Member State of which the EU citizen is a national.\textsuperscript{647} Similarly, Article 10(2) TEU establishes the role of Member States and their peoples in the democratic legitimacy of the EU. Referring to Article 10(3) TEU, Lenaerts comments that such

\textit{[...]} participation is \textit{primarily} carried out by means of electing the members of the Parliament who are democratically entrusted with the representation of the interests of EU. In order to facilitate such democratic participation and representation, EU law imposes obligations on both the EU institutions and the Member States.\textsuperscript{648}

The last sentence highlights the composite nature of EU democracy, which leads to the third argument. The phrase “the democratic life of the Union” should be understood in a citizen-oriented way consistent with its rights-based formulation and the following reference to subsidiarity in the same article.\textsuperscript{649} It is not just then that the democratic life and functioning of the Union depend upon the democratic life in the Member States, which scholars recently have emphasized in the context of Member State democratic backsliding, but that the “democratic life of the Union” is not just occurring in Brussels or in relation to EU institutions. Following the discussion in the previous chapter, “the democratic life of the Union” is best understood as a multi-level,

\textsuperscript{647} Case C-650/13 Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde EU:C:2015:648.
\textsuperscript{648} Lenaerts and Gutiérrez-Fons (n 627) (emphasis added).
\textsuperscript{649} Article 10(3) TEU – “as closely as possible”.

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composite phenomenon. The second sentence of Article 10(3) TEU which references the principle of subsidiarity, and that decisions should be taken as open and closely as possible to citizens, promotes the understanding that EU democracy is occurring close (or as close as possible) to citizens. Member State governments as well as national and local authorities are also, in their different capacities, a part of the democratic life of the Union, specifically with regard to shaping, implementing and applying EU law. It is therefore clear that, in dealing with shaping EU law, this element of the principle of participatory democracy should inform the interpretation of pertinent legal norms at the national level. Given the Court’s elaboration, a right to know and influence the EU legislative process flows from Article 10(3) TEU, and this could potentially inform national legal provisions related to both transparency and participation.

Fourthly, such an understanding of the principle of participatory democracy in the Union also closes an existing coherence gap between relevant international law obligations, primarily Article 25 International Covenant on Civil and Political Rights (ICCPR), but also other relevant international law instruments. In this case, EU Member States’ obligations according to international law to grant citizens the right of political participation, which includes a non-electoral dimension, have mutated due to the transference of legislative power and competence to the EU-level.

Article 25 of the ICCPR and respective General Comments and jurisprudence of the UN Human Rights Committee define the obligations of States parties regarding the right to participate in public and political life. Any restrictions on direct and indirect political and public participation are allowed under international human rights law only when these are based in law and are objective, reasonable, and non-discriminatory. Article 25 ICCPR not only entails a right to participate – the UN Human Rights Committee’s guidelines clarify that the right of participation includes the opportunity to participate in the

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legislative processes and that the state has a duty to facilitate citizens’
enjoyment of this right.652 Recent years have also seen a progressive
evolution of international human rights law and jurisprudence on the
scope of this right.653 The UN High Commissioner for Human Rights
now asserts that public participation rights following from ICCPR
encompass the right “to be consulted at each phase of legislative
drafting and policymaking; to voice opinions and criticism; and to
submit proposals aimed at improving the functioning and inclusivity of
all State bodies.” 654 Article 25 is understood to require positive
measures to create inclusive and meaningful processes and
mechanisms, 655 including reaching out to underrepresented and
marginalized groups,656 and avoiding cases where private corporations
and lobby groups take precedence over other less-resourced and less-
organized voices. 657 Finally, states also should guarantee full and
effective access to justice and redress mechanisms to those unduly
deprived of their right to participate in political and public affairs.658
National constitutional courts have e.g. disqualified legislation on the
basis of lacking participation – explicitly basing their argument (in part)
on Article 25 ICCPR.659 The application of the ICCPR in the EU
context is interesting, as it not only raises the issue of the EU Courts
upholding international law obligations made by Member States prior
to joining the Union, but also what happens when those very obligations
have mutated due to membership in the Union and a transference and

652 ibid Linking participation as a legal right with direct participation in law-making is not a
new phenomenon in international human rights law, See e.g.; Steiner (n 12).
653 OHCHR, ‘Promotion, Protection and Implementation of the Right to Participate in Public
Following the pandemic, arguments have been made to even stretch this right to include the
right to participate in global health governance, see e.g. https://verfassungsblog.de/the-right-to-
participation-in-global-health-governance/,
654 OHCHR, ‘Promotion, Protection and Implementation of the Right to Participate in Public
Affairs in the Context of the Existing Human Rights Law’ para. 10. See also Convention on the
Rights of Persons with Disabilities.
655 United Nations Human Rights Committee, at paras. 12, 26 and 27 and Independent Expert
on the promotion of a democratic and equitable international order, Report of the Independent
Expert on the promotion of a democratic and equitable international order Alfred-Maurice de
656 OHCHR, ‘Promotion, Protection and Implementation of the Right to Participate in Public
657 ibid. para 22, see also Special Rapporteur on extreme poverty and human rights, Report of
para 72.
658 ibid.
659 See Doctors for Life International v Speaker of the National Assembly and Others [2006]
ZACC 11, 2006 12 SA (CC) 2006 BCLR 1399 (CC), Merafong Demarcation Forum & Others
v President of the Republic of South Africa & Others [2008] ZACC 10, 2008 5 SA 171 (CC)
2008 10 BCLR 968 (CC).
fragmentation of legislative and public power. Through its vertical component, Article 10(3) TEU would contribute to addressing this mutation and fragmentation in a sustainable way, allowing for a coherent interpretation of EU and international law.

Finally, the vertical understanding of Article 10(3) TEU is not only consistent with a textual analysis of the article and the discussed statements of the CJEU – crucially it is grounded in an overall telos of the principle of participatory democracy of enhancing democratic legitimacy and complementing representative democracy through emphasizing and realizing citizen-grounded participation. In unveiling this vertical dimensions of Article 10(3) TEU, there also lies a potential pragmatically appealing prospect for stimulating a greater burden-sharing for the realization of the principle of participatory democracy in the Union, through EU-law refining this right in national contexts and activating Member States, national and local authorities and courts in its implementation – thereby giving practical effect to the right.660

4.2.2. The right to participate in the democratic life of the Union – a standalone participation right?

The question then remains whether Article 10(3) TEU may be attributed direct effect. A few scholars, such as constitutional scholar Matthias Ruffert, contend that Article 10(3) TEU indeed does have direct effect.661 However, in terms of delineating the content of this right, the citizens catalogue in the Treaty is referred to, with the claim that Article 10(3) TEU would only be invoked on a stand-alone basis in exceptional cases.662 This interpretation of Article 10(3) TEU has been picked up in the context of bringing the EU values, including democracy, before the Court, in response to the anti-democratic developments in certain Member States. Departing from the assumption that the democratic legitimacy at the EU level depends on the situation in each Member State, Von Bogdandy and Spieker argue that;

Article 10(3) TEU fulfills even the most demanding conception of direct effect, which requires a provision to

660 Article 19 TEU.
661 Ruffert (n 140); See also Marcel Haag, ‘Art. 10 EUV’ in Hans von der Groeben, Jürgen Schwarze and Armin Hatje (eds), Europäisches Unionsrecht (7th edn, Nomos 2015); on the opposing side however, see Thomas Kröll and Georg Lienbacher, ‘Artikel 10 EUV’ in Ulrich Becker and others (eds) EU-Kommentar (4th edn., Nomos; Făcutas; Helbing Lichtenhahn Verlag 2019).
662 Ruffert (n 140).
contain a right that can be invoked by an individual before courts. Such a right concerns democratic standards at the EU, but also at the national level.  

In this way, they argue that Article 10(3) TEU can translate the value of democracy into justiciable obligations at the Member State level. To the degree that Article 10(3) TEU encompasses the value of representative democracy and associated rights, it is more plausible that Article 10(3) TEU has direct effect. Von Bogdandy and Spieker, addressing the argument that Article 10(3) TEU might be too vague to be justiciable or directly effective, refer to a common European democratic core developed by standard-setters such as the Venice Commission, suggesting the Court can take a case-by-case approach or a regression test to hammer out the exact content of the right in question.  

Because their argument is developed in the context of what arguably constitutes rather severe democratic backsliding at the Member State level, the reasoning is primarily geared towards traditional democratic norms associated with representative parliamentary democracy and the rule of law.  

With regard to the principle of participatory democracy, and in particular thinking of its import for participation in law-making, it would be important to consider there is much more diversity and variation amongst Member States with regard to the legislative process in general, and how participation in law-making is framed and practiced. The same applies in search of equivalents for the instruments of participatory democracy in Article 11 TEU, such as dialogue, consultation or citizen’s initiatives and so forth. From this standpoint, Article 10(3) TEU does not seem sufficiently clear and precise to have direct effect in relation to these practices or as such grant a standalone right to participate in EU law-making at the national level. Similarly, at the EU-level, although Article 10(3) TEU should be understood as offering citizens a right to know and directly attempt to influence the EU legislative process, it is not sufficiently clear and precise in this regard to be considered a standalone right. The question of whether Article 10(3) TEU may have direct effect in other respects does not fall directly within the research scope of this thesis. However, a brief elaboration is in order to ground a coherent understanding of the ‘democratic life’ of the Union.

663 von Bogdandy and Spieker (n 405).
664 ibid.
665 Uhlmann and Konrath (n 99).
The democratic life of the Union can effectively be construed as having a core and a periphery, alternatively understood in terms of concentric circles with a crucial center at the middle. At the center of this ‘life’ are the electoral practices tied to the principle of representative democracy, the founding democratic principle of the Union. Within the center are also the citizen rights of the Treaty as featured in the citizens’ rights catalogue in Article 20-24 TFEU, and the participatory democracy right of the ECI as well as the right of access to documents.\textsuperscript{666} The right to participate in processes and practices at the heart of the democratic life of the Union has direct effect. This would, e.g., be relevant when national measures are required to secure the right to participate in European Parliament elections.\textsuperscript{667} It also comes into play, in line with the arguments of Von Bogdandy and Spieker, when democratic guarantees at the national level, primarily core features of representative democracy, are so jeopardized as to undermine the overall exercise of Article 10(3) TEU.\textsuperscript{668} In addition, similar to the argument made by Matthias Ruffert, there may be instances where the right enshrined in Article 10(3) TEU in relation to the processes and practices at the EU-level has wider berth than their respective framing in the Treaties or secondary legislation. In these circumstances, Article 10(3) TEU would gain particular relevance.\textsuperscript{669} Now, as regards the democratic life of the Union outside of ‘the center’, this includes more direct forms of engagement with the Union, its institutions and bodies, prominently through participation in EU law-making and EU rule-making. The right also includes direct forms of engagement with Member State institutions and agencies to the degree they are acting in a (quasi) EU legislative or EU rule-making capacity.\textsuperscript{670} Other areas included in the periphery of the democratic life of the Union would include dialogue activities and e.g. the citizen panels which the president of the Commission has recently referred to as becoming a regular feature of democratic life of the Union.\textsuperscript{671} These are all part and

\textsuperscript{666} See the next section for an in-depth analysis of the relationship between Article 10(3) TEU and catalogue rights.


\textsuperscript{668} von Bogdandy and Spieker (n 405).

\textsuperscript{669} Cf. Ruffert (n 140).

\textsuperscript{670} That is to the degree they act as gatekeepers or holders of public power which may enable or encumber the exercise of citizens’ and other parties’ democratic rights in relation to these processes.

\textsuperscript{671} "The citizens’ panels that were central to the Conference will now become a regular feature of our democratic life." ‘State of the Union Address by President von Der Leyen’ (European
parcel of the right to participate in the democratic life of the Union. However, considering the more ambiguous status and modalities of these practices, Article 10(3) TEU is not sufficiently clear and precise as to grant direct effect in relation to them. Important, however, is that the relationship between the core and the periphery should arguably not be seen as fixed, but possessing a moveable quality where processes at the periphery over time can gravitate towards the center.

In sum, as argued above, through the principle of consistent interpretation, Article 10(3) TEU can and should inform legal norms at the national level as they relate to participation in EU law-making. Although Article 10(3) TEU does not possess direct effect in relation to participation in EU law-making, the effects of the application of Article 10(3) TEU through consistent interpretation to other norms at the EU and national level need not be trivial.

4.3. Additional rights flowing from the principle of participatory democracy

In addition to the explicitly mentioned rights and obligations that emerge from a closer analysis of Article 11 TEU and Article 10(3) TEU and the embedded link to transparency, the principle of participatory democracy is frequently said to encompasses the right to petition the Parliament and the right to complain to the European Ombudsman. The link between these instruments and the principle of participatory democracy is at an initial glance however somewhat murky. As has been mentioned, the instruments pre-date the Lisbon Treaty and do not correspond neatly to any of the practices outlined in Article 11 TEU. At the national level, although appealing to an Ombudsman or petitioning a national parliament is certainly a citizen’s participation instrument unrelated to voting, it is often associated with representative democracy, e.g. as an instrument to enhance parliamentary accountability or centered on addressing maladministration and a feature of many modern constitutional democracies. Despite this, and while noting that the two instruments are not confined to EU citizens, the right to petition Parliament as well as address the Ombudsman give expression to the citizen’s right to participate in the democratic life of the Union in Article 10(3) TEU. As such, these rights are now explicitly linked to democracy in the Union, and through Article 10(3) TEU

672 In particular with regards to how this right may be given effect; through direct participation, representation, or sortition.
673 See Garzón Clariana (n 402); Lock (n 140).
arguably to both its representative and participatory pillars. This interpretation finds support in the Court’s case law which connects the right to petition to the EU institutions as “an instrument of citizen participation in the democratic life of the European Union” and “one of the means of ensuring direct dialogue between citizens of the European Union and their representatives”.

Articles 20-24 TFEU, which catalogue citizen rights, re-enforce and structure the connection between the Democratic Principles in Title II TEU and citizens’ rights. Article 20 TFEU summarily lists all the citizen’s rights covered in the rights catalogue; Articles 21-23 TFEU then outline citizen rights related to representative democracy (e.g., right to stand in elections as well as freedom of movement), while Article 24 TFEU expounds on citizen rights which could also relate to participatory democracy. Article 24 TFEU begins with a legal basis for legislating on the ECI, followed by the right to petition the Parliament in accordance with Article 227, the right to write any of the institutions or bodies and receive a reply, and the right to complain to the European Ombudsman. These rights are also mirrored in Article 41 of the Charter. In order to understand how these instruments serve as elements of participatory democracy, as well as assess the import for EU law-making, each will be surveyed in turn.

Regarding petitions, while they historically have had relatively low visibility and impact in EU institutional decision-making, petitioning parliament remains the oldest, all-purpose participation option available to anyone wishing to interact with the EU institutional framework of their own accord. According to 227 TFEU, any citizen of the Union,

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675 Article 24 (1) TEU states: “The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens’ initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come.”.
676 Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 227.
677 Every citizen of the Union may write to any of the institutions or bodies …in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language.
678 Every citizen of the Union may apply to the Ombudsman established in accordance with Article 228 TEU.
679 See Art. 41 CFR.
680 Hierlemann and others (n 9) 92–110.
681 Alemanno, ‘Strengthening the Role and Impact of Petitions as an Instrument of Participatory Democracy’ (n 35) 63.
and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the Parliament on a matter which comes within the Union’s fields of activity and which affects him, her or it directly.682 This broadly framed right gives EU citizens and residents a convenient way to address issues that escape the notice and attention of Parliament committees or EU institutions.683 Over the last few years, there have been between 1,000 and 1,500 petitions per year, of which roughly two thirds have been declared admissible.684 However, during the 2014–2019 legislative term,685 the Committee only addressed questions for oral answer to the Commission or the Council 15 times on nine different topics, five of which were followed up by a resolution.686 Meanwhile the Petitions Committee has been recognized as the least popular Committee in the Parliament, with little political currency.687 This may be beginning to change, with the Petitions Committee and its Secretariat attempting to reform its work and raise its profile, in part emphasizing its role for participatory democracy in the EU.688 Indeed, the right to petition can serve a variety of complementary roles, including setting the legislative agenda and providing administrative and political oversight over the EU Commission and Member States. It may also provide a tool for enhancing representation for people and groups that do not currently have one, such as non-EU citizens, immigrants, and minorities. In terms of its current import for EU law-making, its visibility and impact is low. While very rare, it is however possible for the Parliament to follow up on a citizen’s petition by requesting the Commission to take legislative action relating to the substance of a petition.689 Its flexibility, accessibility and low threshold for participation – citizens can on their own accord and in their own time file a petition on an array of matters, and also do so together with other citizens – make it an under-utilized participatory democracy tool, with potential for democratizing both in terms of participation in EU affairs more broadly and participation in EU law-making specifically. The Court has emphasized the role that

682 Article 227 TFEU.
683 Alemanno, ‘Strengthening the Role and Impact of Petitions as an Instrument of Participatory Democracy’ (n 35) 34–37.
684 ibid.
685 ibid 25.
686 Hierlemann and others (n 9) 92–110.
687 ibid.
688 Alemanno, ‘Strengthening the Role and Impact of Petitions as an Instrument of Participatory Democracy’ (n 35) 34–37.
689 ibid 32.
petitions play in fulfilling dialogue as mandated by Article 11(2) TEU.\textsuperscript{690} As regards the European Ombudsman, its profile and impact has steadily increased since its inception, while its independence cemented.\textsuperscript{691} The right to complain against maladministration is well established in the Treaties and Charter. Article 15 TFEU states that the EU should conduct its work as openly as possible, so that any citizen has the right to documents of the Union’s institutions. Relatedly, Article 41 of the Charter establishes that “every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time”. These provisions constitute the EU citizen’s fundamental right to good administration. To uphold that right, any citizen or legal person lawfully residing in the EU has the right to refer cases of maladministration to the European Ombudsman and the Ombudsman has the duty to receive and to deal with those complaints.\textsuperscript{692} The legal foundation for the work of the Ombudsman is found in 228 TFEU which stipulates, inter alia, that, in accordance with her duties, the Ombudsman shall conduct inquiries for which she finds grounds, either on her own initiative or on the basis of complaints submitted to her direct or through a Member of the Parliament.\textsuperscript{693} Over the years, the Ombudsman has increasingly broadened its approach by shifting its focus from a narrower notion of maladministration to the wider and more encompassing idea of good administration. More recently, an increased focus on strategic inquiries has extended the office’s influence. Despite the lack of binding nature, the acceptance rate of proposals of the European Ombudsman is high (between 70-90\% depending on institution).\textsuperscript{694} It is widely recognized that various individual and recent strategic inquiries as well as its ongoing work have substantially impacted the workings of the EU’s public administration.\textsuperscript{695} The European Ombudsman has highlighted her dual role, on the one hand, as a citizen’s instrument, and, on the other, as a specific obligation to ‘protect participatory democracy’, referencing Article 10(3) TEU.\textsuperscript{696} Viewed through this lens, the right

\textsuperscript{690} Case C-261/13 P Schönberger para 17.
\textsuperscript{691} Hierlemann and others (n 9) 110–130.
\textsuperscript{692} Articles 24 and 25 TFEU, Article 43 Charter and 228 TFEU.
\textsuperscript{693} Article 228(1) TFEU.
\textsuperscript{694} Hierlemann and others (n 9) 110.
\textsuperscript{695} ibid 119–121.
to appeal to the Ombudsman rather emerges as a redress mechanism for Article 10(3) TEU and Article 11 TEU. The Ombudsman herself would seem to subscribe to this interpretation, with several of the recent key strategic initiatives, which have been initiated ex officio, being linked to Article 10(3) TEU. 697

4.4. Good administration and participatory democracy
The connection between good administration and participatory democracy, as highlighted by the role of the Ombudsman, has several linkages. 698 Necessary for realizing the principle of participatory democracy are rules related to the gathering, application and dissemination of information and knowledge. 699 Procedural principles ensuring the functions of participatory democracy (and necessary flow of information upon which meaningful participation rests) are tied to the principle of rule of law and to good administration. It is clear from Articles 9–12 TEU that the Union’s executive or administrative arm contributes to the realization of democratic ideals through its preparation of legislation and its implementational activities. 700 Viewed through this lens, parts of EU procedural administrative law may be seen as a concretization of the principle of democratic participation. 701 Good administration appears in EU-law as a right developed through the case law of the EU Courts, derived from general principles on the basis of the rule of law, and partially codified in Article 41 of the Charter. 702 For EU rule-making as well as in the administration of individual cases, there is a strong connection between the principle of participatory democracy and the right to good or sound administration. 703 However, the application and force of administrative law for legislative consultation is complex and more limited. While there are strong arguments for good administration principles —

697 Citing Articles 1(2) TEU and 10(3) TEU, the Ombudsman e.g. states “The Commission expressed the concern that full transparency as regards the work of expert groups might impact negatively on their smooth functioning. The Ombudsman notes however that the Treaty on European Union requires that decisions are taken as openly as possible and as closely as possible to the citizen.[30] The Commission utilises its expert groups as part of its internal decision-making process. The Commission’s rules governing expert groups must therefore comply with the Treaty provisions.” European Ombudsman, Recommendation of the European Ombudsman in her strategic inquiry OI/6/2014/NF concerning the composition of Commission expert groups, 29 January 2016 indent E 52.
698 Curtin, Hofmann and Mendes (n 4) 13–14.
699 Ibid.
701 Curtin, Hofmann and Mendes (n 4) 5, 14–15.
702 Ibid 15.
703 Mendes, Participation in EU Rule-Making (n 15).
including the right to be heard, statement of reasons as well as the duty of care – to be applied to EU executive rule-making, these cannot be immediately transposed to the Commission’s actions as a legislator in law-making. 704 This dilemma is demonstrated in the pre-Lisbon case Atlanta, where the CJEU draws a clear distinction between the right to be heard in the context of individual determinations and norms of legislative nature. 705 The Court has, however, in other contexts stressed that the principle of good administration applies generally to the actions of the European Union in its relations with the public. 706 For actions the Commission takes in relation to consultation, some portions of good administration may consequently apply. Furthermore, EU administrative law concretizes other constitutional principles which are applicable broadly to the Commission. 707 The duty of care (also known as the duty of diligent and impartial examination) is one manifestation of the Commission’s constitutional obligation to promote the general interest of the Union in its legislative mandate as well as the Treaty-bound duty to be completely independent in its actions. 708 Similarly, the general obligation to give reasons according Article 296 TFEU applies to all legal acts, allowing for judicial review. 709

It is also clear that the Commission is obliged to promote the values articulated in the Treaty (human dignity, freedom, democracy, equality, the rule of law and respect for human rights). 710 The values of pluralism and non-discrimination also find expression in the democratic principle of equality of Article 9 TEU which all Union institutions and bodies are obliged to adhere to in all its activities, through Article 8 TFEU obliging the Union to eliminate inequalities in all of its activities, 711 and finally also through Article 18 which prohibits any discrimination on the grounds of nationality within the scope of application of the Treaties. 712

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704 Case C-104/97 Atlanta v Commission EU:C:1999:498.
705 ibid.
706 Case C-337/15 P Ombudsman v Staelen EU:C:2016:823.
708 Article 17 (1)(2)(3) TFEU, and Article 1 TEU.
709 The Court elaborates the duty to give reasons ‘which is justified in particular by the need for the Court to be able to exercise judicial review, must apply to all acts which may be the subject of an action for annulment.’ Case C-370/07 Commission of the European Communities v Council of the European Union, EU:C:2009:590 para 42.
710 Article 2 TEU. On the obligation of the Union to have “an institutional framework which shall aim to promote its values”, see Article 13 TEU.
711 Article 8 TFEU.
712 Article 9 TEU, Article 8 TFEU and Article 18 TFEU.
In addition, the Treaties also established a duty for the EU institutions to ensure consistency, effectiveness and continuity in its policies and actions. These constitutional imperatives are not confined in their application to administrative cases – they apply broadly to the Commission’s work. Consequently, the parts of administrative law and good administration that are manifestations of constitutional obligation are relevant to EU institutions as they apply Article 11 TEU and 10(3) TFEU, including the Commission in its role in the legislative process and including for consultation work. As previously discussed, the Treaty’s ‘democratic principles’ and EU administration also overlap insofar as openness is concerned – this comes clearly into focus through Article 15 TFEU, noting that “in order to promote good governance and ensure the participation of civil society, the institutions, bodies, offices and agencies of the Union shall conduct their work as openly as possible”.

In considering the strong links (concretization) and sometimes overlapping responsibilities prompted by participatory democracy and good administration, as well as other Treaty obligations, it has been demonstrated that case law on good administration needs to be assessed in order to examine which parts may apply to the Commission’s consultation work with regard to law-making. While the duty to careful and impartial examination (as well as statement of reasons which is also a Treaty obligation) would in many respects be applicable, the right to be heard would for instance not on its own apply directly to the Commission’s legislative work (setting EU rule-making aside). Because case law on EU administrative law is primarily concerned with administrative cases, attention must also be given to what degree the Court’s formulation of administrative law principles apply solely to that case-format. The Courts generally tends to be stricter in its review of administrative acts compared to legislative ones. Further, within the framework of the Court’s judicial review of Commission preparation of legislative acts, good governance obligations are commonly neither framed as good administration principles, nor generally as obligations derived from democracy in the broad sense, but requirements in order to fulfil the requirements of proportionality and subsidiarity or for the

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713 See Article 181 TFEU, Article 21 (3) TEU, Article 212 (1) TFEU.
714 Article 15 TFEU.
716 Case C-18/62 Barge v High Authority EU:C:1963:56; Schwarze (n 627) 1406, 1412.
Court to fulfill its obligation of judicial review.\textsuperscript{717}

4.5. Rights and obligations – a snap-shot
The legal analysis thus far has shed light on the rights and obligations for law-making which flow from the principle of participatory democracy, of which a summary catalogue overview is presented below.\textsuperscript{718} The rights are delineated from obligations and listed according to their addressees and duty-bearers followed by a brief comment on the import for EU law-making.\textsuperscript{719} The overall aim is to capture, as a form of snap-shot, the rights and obligations outlined and discussed in the analysis thus far, in order to provide an overview. The rights are formulated at a rather high level. The analysis of the legal framework for consultation in the following chapter analyzes in more details the inter-play between these headline rights and obligations and various soft law instruments, as well as national law at the Swedish level.

4.5.1. Participatory democracy citizen rights
The legal analysis has revealed key citizen and resident rights flowing from the principle of participatory democracy.\textsuperscript{720} These are as follows:
- The right of citizens to participate in the democratic life of the Union.\textsuperscript{721}
  o The right of citizens to know about the EU legislative process and to attempt to meaningfully inform or influence it. This includes the right to:

\textsuperscript{717} See e.g. Case C-310/04 Spain v Council EU:C:2006:521 paras 122, 130 This is analyzed in the section 4.4.
\textsuperscript{718} In highlighting that no taxonomy of legally grounded participatory democracy instruments in the EU exists or has even been attempted, Alemanno suggests as a starting point to organize them according to their rationale, i.e.; agenda-setting tools, input mechanisms, administrative actions and ex post review channels. I take a different approach in this section. Categorizing participatory democracy instruments according to their purpose may have the advantage of clarity and overview for the potential participatory protagonists and assist in constructing a framework for citizen participation in the EU. Such a classification however, is arguably less helpful in attempting to pin down legal rights and obligations flowing from the principle. In addition, several of the instruments and actions discussed in relation to the principle of participatory democracy seem to serve multiple purposes and the strict EU-level approach is a bad fit for the multi-level approach to law-making taken in this research. Cf. Alemanno, ‘Towards a Permanent Citizens Participatory Mechanism in the EU’ (n 31) 15–16.
\textsuperscript{719} For each right I cite the main legal source, or a combination of the most relevant, based on the overall legal analysis in the chapter thus far.
\textsuperscript{720} Article 10(3) TEU.
\textsuperscript{721} Article 10(3) TEU.
• Scrutinize legislative documents and information relating to EU law-making ‘in good time’ in order to attempt to influence that process. 722
  • Scrutinize “all the information which has formed the basis of a legislative act”. 723

• Effectively make their views known before legislative choices have been definitively adopted, so far as both the Commission’s decision to submit a legislative proposal and the content of that proposal are concerned. 724

  o The right of citizens and residents to petition the Parliament. 725
  o The right of citizens and residents to complain (refer) to the European Ombudsman. 726
  o The right of citizens to initiate and participate in European Citizenship Initiatives. 727

    • The right to a reasoned reply from Commission (in event of successful registration). 728
    • The right to hearing in Parliament (in event of successful registration). 729

  o Right of citizens and residents to access to documents of the Union institutions, bodies, offices and agencies. 730
  o Related key rights: the right of every person to good administration, 731 the right to write an EU official and get a reply. 732

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722 Joined cases C-39/05 P and C-52/05 P Sweden and Turco v Council paras 44-45; Case C-57/16 P ClientEarth para 84; See also Article 15(1) TFEU and Regulation No 1049/2001 recital 6.
723 Joined cases C-39/05 P and C-52/05 P Sweden and Turco v Council paras 44,45 and 68; this includes in principle, an obligation to disclose the opinions of the Council’s legal service relating to a legislative process, see also Curtin and Leino (n 630) section 3.1.
724 Case C-57/16 P ClientEarth para 84.
725 This includes any natural or legal person residing or having its registered office in a Member State, see Article 24 TFEU, Article 227 TFEU and Article 44 CFR.
726 Article 24 TFEU, Article 228 TFEU and Article 43 CFR.
727 Article 11(4) TEU and Art 24 TFEU. See also Regulation No 1049/2001.
729 ibid Article 14.
730 Article 15 TFEU.
731 Article 41 CFR.
732 Art. 24 TFEU.
It is clear that the principle of participatory democracy provides a right for citizens to engage with the EU law-making at various stages but with a focus on the early stages of the legislative process – starting from its early stages when the Commission prepares an impact assessment. The right to know about and to attempt to inform and influence the EU law-making process applies to all EU institutions acting in a ‘legislative’ or ‘key-player’ capacity; notably the Parliament, the Council and the Commission. While there is no overarching general right for citizens to participate in consultations, when consultation opportunities are presented, e.g. because they are mandated for legislative proposals, citizens have a right to be treated equally, including with regard to access. While the right to petition, in its current modus operandi, is not particularly directed at EU law-making, it holds potential to further realize the principle of participatory democracy in the Union. The right to complain to the Ombudsman, while a citizen’s instrument, should crucially be seen as an overarching ‘soft’ redress or enforcement mechanism for participatory democracy rights.

4.5.2. Participatory democracy obligations

Several obligations of the EU institutions were noted and are outlined below.

**EU institutions, bodies, offices and agencies:**

- Shall observe the principle of the equality of its citizens, who shall receive equal attention from them.\(^{734}\)
  - promote equal access to participation opportunities and channels of communication.\(^{735}\)
- Shall take decisions as openly and as closely as possible to the citizen,\(^{736}\) and conduct their work as openly as possible to ensure the participation of civil society.\(^{737}\)

\(^{733}\) A ‘key-player’ is how Court labels the Commission’s role in the legislative process, with legal effects for its obligations and discretion. Case C-57/16 P ClientEarth paras 88 and 94.

\(^{734}\) Article 9 TEU.

\(^{735}\) Article 9 TEU, Article 11 TEU, Article 2 Protocol No 2.

\(^{736}\) Article 10(3) TEU.

\(^{737}\) Article 15 TFEU.

\(^{738}\) The following obligations apply overall to EU institutions, but the level and form of their applicability, in particular in relation to the Court and ECB must be assessed on a case-by-case basis. For a discussion of the Court’s obligations, see Alberto Alemanno and Oana Stefan, ‘Openness at the Court of Justice of the European Union: Toppling a Taboo’ (2014) 51 Common Market Law Review 97.
- Give “citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action”.

- Maintain “an open, transparent and regular dialogue with representative associations and civil society”.

The Council, Parliament and Commission

- Establish a framework for ethical and transparent interest representation.
  - Limit the discretion of engagement with interested parties to that framework, currently to those who are registered in the Transparency Registry according to the principle of conditionality.
  - Disclosure obligations for the Commissioners, their Cabinet members and Director-Generals as well as MEPs with regard to contact with interest representatives.

The Commission

- Shall conduct broad consultations with parties concerned in order to ensure Union action is coherent and transparent.
  - Shall consult widely before proposing a legislative act. This includes taking into account the regional and local dimension of the action envisaged, except in cases of exceptional urgency, in which case the Commission shall give reasons for this in its proposal.
  - Before adopting a proposal, conduct public consultations in an open and transparent way, ensuring that the modalities and time-limits of those public consultations allow for the widest possible participation.

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739 Article 11(1) TEU.
740 Article 11(2) TEU.
741 Article 11(1), (2) TEU.
742 Article 11(1) TEU, Article 11(2) TEU and Interinstitutional agreement of 20 May 2021 on a mandatory transparency register [2021] OJ L 207/1.
744 Art. 11(3) TEU.
745 Article 2 Protocol No 2. With the exception for areas in which EU has exclusive competence.
746 Would generally imply a 12-week standard and minimum amount of time, see Commission, General Principles and Minimum Standards (n 39); this is also discussed in section 5.4.
Conduct open internet-based consultations for legislative proposals.747

- Communicate the results of public and stakeholder consultations without delay to both co-legislators and made public.748

- Shall provide consultation feedback, which details the reasoning of whether and how contributions have impacted the proposal.749

- Obligation to actively promote equality of access to consultation opportunities.750

The duty to consult for EU law-making is clearly and unequivocally enshrined in Article 11(3) TEU and as such a central element of the principle of participatory democracy. Article 2 Protocol No. 2 further clarifies that, except for areas of exclusive competence, consultation is a must for law-making and provides the only exception to this duty as ‘exceptional urgency’, while adding an obligation to state the reason whenever this exception is used. Article 11(3) TEU should also be interpreted in light of Article 10(3) TEU. Other constitutionally enshrined principles, such as transparency in Article 15 TFEU and equality in Article 9 TFEU, and the stated goal of consultation in ‘ensuring’ transparency and coherence, in combination with Article 11 TFEU and 10(39)TEU establish an obligation to provide consultation feedback and also actively promote equality of access to consultation opportunities.

4.5.3. Participatory democracy obligations for national and local institutions and courts

The overall key obligation is to interpret national law in light of citizens’ right to participate in the democratic life of the Union.751

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747 This follows from the obligation to consult openly and broadly for legislative proposals in Article 11(3) TEU and Article 2 Protocol No 2. It also provides the floor, for the exercise of citizens’ rights to know and attempt to make their views known in relation to legislative proposals. It is also spelled out in the interinstitutional agreement on better law-making. Interinstitutional Agreement of 13 April [2016] on Better Law-Making OJ L123/1 para 19.

748 2016 IIa on Better Law-making, operationalizing Article 10(3) TEU, Article 11(1) TEU and 15 TFEU

749 Article 11(3) TEU, 11(2) TEU, Article 15(1) TEU, Article 10(3) TEU. Also follows principles of proportionality and subsidiarity, see section 4.4.

750 Article 11(3) TEU, Article 10(3) TEU, Article 9 TEU, Article 2 EU TEU, Treaty and Charter articles on non-discrimination and equality, also Article 25 ICCP.

751 Article 10(3) TEU.
Relevant national law which could be informed by the principle of participatory democracy, potentially constitutionally enshrined, could relate to transparency, participation in law-making (e.g., for negotiation and implementation), good administration and digital rights. However for all such cases, this would largely depend on the formulation of national law, the domestic scope of judicial review, and the space for consistent interpretation.

4.5.4. Summary
In sum, the principle of participatory democracy affects citizens by providing them an opportunity to participate directly and indirectly in the democratic life of the Union (primarily the latter through representative organizations, civil society and interest-representation more broadly). To democratic legitimacy, participatory democracy adds participation and representation of citizens, stakeholders and interests.

Having identified and analyzed the instruments, rights and obligations that flow from the principle of participatory democracy for EU law-making broadly, the next section will focus more in-depth on to what degree the rights and obligations associated with law-making consultation are justiciable, and the path to such review. Article 11 TEU combined with Article 10(3) TEU and Protocol No. 2 charts a path for consultation but in several respects leaves the door open for interpretation over its reach and the question of binding character. While the principle of participation enshrined in Article 11 TEU, in the lack of secondary legislation, does not translate into a specific and enforceable subjective right to participate in law-making consultation, the discussion so far emphasizes it entails legal duties and obligations on the Commission, and that neglect of these obligations could or should entail opportunities for redress which will be explored in the following.

752 Although outside the ambit of this book, it is also foreseeable that legislation which relates to the right to know, such as the right to education could be informed by the principle, the enjoyment of the right is dependent on some basic understanding of the EU. See Grimonprez (n 623) Furthermore, participation is increasingly mediated by digital rights, which would also be informed by Article 10(3) TEU.

753 For Swedish law-making consultation this will be explored in the next chapter.

754 Grimonprez (n 623) 501.

755 On this point there is generally broad agreement, although it is unclear whether a complete lack of consultation could amount to any legal consequence, see e.g. Closa (n 398) 128–129; Mendes, ‘Participation and the Role of Law after Lisbon’ (n 32) 1866; Garcia Macho (n 499); Lock (n 140).

756 Although often indicative of each other, subjective rights and opportunities for redress are not always synonymous.
Because there is a lack of jurisprudence dealing directly with Article 11 (3) TEU, any understanding of the scope of the duties laid down by participatory democracy cannot be separated from the EU Courts’ comments on the overarching principle of democracy as well its stance on judicial review including standing. The following section teases out and discusses these various strands of case law as they relate to the principle of participatory democracy and law-making consultation obligations specifically.

4.6. Legal Redress at the EU-level for breaches of law-making consultation duties

While the analysis so far has outlined some key legal obligations flowing from Article 11 TEU and 10(3), and demonstrated some specific duties and rights associated with law-making consultation, the question remains to what degree these imperatives can be realized through judicial review. The pathway to redress at the EU-level will be assessed looking at the legal opportunities and obstacles relating to standing, annulment and reparations.

In the legal analysis, attention is drawn to how the Court’s jurisprudence reflects the Treaty’s framing of consultation as a feature of democracy and consultation and as a tool to enhance rational and effective law-making,757 in particular through facilitating the principles of subsidiarity and proportionality.758 The question is then explored to what degree the principle of participatory democracy can be enforced as a standalone claim and how it may influence the Court’s proportionality review.

After exploring the possibilities for judicial review, alternative paths to materialize consultation rights and obligations flowing from the principle of participatory democracy are touched upon, including the investigative powers of the European Ombudsman.

757 I use the terms ‘rational’ and ‘effective’, here in a broad sense, referring generally to the Commission’s Treaty obligations to be effective in their duties as well as their stated good governance principle of effectiveness. In other situations, more clarity is required relating to the value and difference between efficacy, efficiency, and effectiveness of legislation. Maria Mousmouti, ‘Making Legislative Effectiveness an Operational Concept: Unfolding the Effectiveness Test as a Conceptual Tool for Lawmaking’ (2018) 9 European Journal of Risk Regulation 445.

758 To a lesser degree coherence as well. Meanwhile, noting the link for subsidiarity and proportionality does not apply equally for domains where the EU has exclusive competence.
4.6.1. Standing

In general, it is clear the CJEU is disinclined to establish participation rights,\(^{759}\) and this is clear in its approach to standing. The Court has limited the scope of participation rights to not include acts of a general nature. It has drawn a clear distinction between access to individual determinations and norms of legislative nature – the leading case being *Atlanta*.\(^{760}\) There, the applicant sought compensation for costs incurred though a Community regulation on the bananas market. The argument was that the right to be heard in an administrative procedure affecting a person could be transposed to the process leading to a regulation: from the perspective of the party it was irrelevant whether their legal situation was affected as a result of an administrative or legislative process.\(^{761}\) The CJEU rejected this argument and held that case law according to a right to be heard related only to acts of direct and individual concern to the applicant. It also held the only obligations of consultation on the EU legislator were those laid down by the Treaty article in question.\(^{762}\) This approach has been confirmed in a string of cases, including *Pfizer* and *Bactria*.\(^{763}\) In *Pfizer*, even though the plaintiff was directly and individually concerned by the norm, the Court found the right to access did not apply. Also, the Courts have been unwilling to draw legal consequences from participation in the legislative process.\(^{764}\) However, years earlier, in *UEAPME*,\(^{765}\) the General Court accepted that lack of democratic legitimation was a relevant argument to support a claim for enhanced consultation duties on the part of the Commission and Council (the legislative procedure in question did not provide for full involvement of the Parliament). Although the case led to an unsuccessful outcome for the applicants in terms of standing, the Court accepted that standing could be granted to stakeholders in such cases,

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\(^{760}\)Case C-104/97 *P Atlanta*.

\(^{761}\) As argued by the appellant, ibid para 31.

\(^{762}\) The Court noted ‘the only obligations of consultation incumbent on the Community legislature are those laid down in the article in question’ ibid para 38.

\(^{763}\) Case T 13/99 *Pfizer v Council* EU:T:2002:209; Case C 258/02 *Bactria*.

\(^{764}\) In Asocarne participation in legislative process leading to a directive did not grant standing whereas in Jégo-Quere law-making participation did not imply the party was individually concerned, see Case C-10/95 *Asocarne v Council* EU:C:1995:406; Case C-263/02 *Commission v Jégo-Quere* EU:C:2004:210; See also Case C-321/95 *P Greenpeace v Commission* EU:C:1998:153; Case T-60/96 *Merck v Commission* EU:T:1997:81.

\(^{765}\) Case T 135/96 *UEAPME*. 

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even if they were appealing against ‘legislation’. The wider applicability of this case is however tenuous. UEAPME played out within the realm of social dialogue, where social partners are co-creators of the law, and the Court did not analyze the democratic legitimacy of the Union.\(^{766}\)

Throughout this case law, the Courts repeatedly emphasizes an absence of stated Treaty rights. It is telling that in Atlanta, the General Court stated:

> In its judgment in Case 138/79 Roquette Frères v Council [1980] ECR 3333, the ECJ held that the obligation to consult the Parliament, as laid down in various places in the Treaty, reflects at Community level the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly.

Representation of the various groups of economic and social life also takes place in the Community's legislative process in the form of consultation of the Economic and Social Committee. In the present action, both the Parliament and that committee were in fact consulted before Regulation No 404/93 was adopted, as provided for in the Treaty.\(^{767}\)

Current Treaty provisions requiring consultation in relation to law-making – and anchoring the right to democratic participation – therefore cast this case law in a different light, prompting rather a reflection on the current different constitutional and legal status of consultation.

How then might the Court view participatory democracy’s import and place within the overarching principle of democracy? Looking at the Court’s case law on democracy, it cautiously began to use the concept of democracy as a legal principle in the 80s, initially primarily to enable judicial review.\(^{768}\) In its case law, the Court has commented on both traditional and novel features of democracy, with representative democracy standing as the bedrock while transparency and

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\(^{766}\) On this point, see Mendes, ‘The Democratic Foundations of the Union’ (n 451).


‘democratic’ governance reflecting the evolution of the concept.\textsuperscript{769} Commenting on representative democracy, the Court has emphasized the fundamental democratic principle that people should take part in the exercise of power through the intermediary of a representative assembly, elaborating on institutional balance.\textsuperscript{770} It has also acknowledged the complexities of the supranational context which may imply unconventional structures of authority and decision-making, for instance in order to supply constitutional goods and fundamental rights.\textsuperscript{771}

Moving beyond representative democracy, in the aforementioned UEAPME case, the General Court explored how participatory democratic mechanisms could complement representative democracy within the context of social dialogue.\textsuperscript{772} The Court found that direct participation of interest representatives, of sufficiently broad spectrum and representativity, would be required to compensate for a lack of Parliament participation, and that such a party could be granted standing. This would require some built-in mechanisms which guarantee that those parties are sufficiently representative. The applicability of UEAPME to an understanding of the principle of participatory democracy and giving it effect, as discussed, is limited. Although it confirmed the Courts’ endorsement of complementary forms of democracy, the case deals with a legislatively distinct situation: the negotiation stage of social dialogue which has its own legal base, and where social partners share legislative power with the EU institutions.\textsuperscript{773} The General Court’s reasoning has been criticized in that it lacked reference and reasoning to the Member States as a source of democracy and that criteria for representativity was not really examined.\textsuperscript{774} Finally, it should be noted that the case also pre-dates the Lisbon’s Treaty’s current constitutional outline of democracy.


\textsuperscript{773} See Articles 154 TEU and 155 TEU.

\textsuperscript{774} This lack of reasoning was noted, see Lenaerts (n 769) 299 An examination of such criteria, or the principles upon which it would be founded, could have provided some form of blueprint for participation procedural guarantees.
In more recent case law, however, the Courts have found reason to elaborate on Article 11(4) and Article 10(3) in cases regarding the ECI and transparency, respectively. As has been analyzed, as regards the ECI, the Courts are guided by specific secondary legislation envisioned in Article 24 TEU which fleshes out the process of the ECI. The current regulation to a large degree codifies what the CJEU established through review of the Commission’s management of the ECIs. In the existing cases dealing with appeals of Commission decisions to refuse to register an initiative, the Courts navigate procedural guarantees enshrined in the (previous) regulation and its foundation in the Treaty while outlining the boundaries of the Commission’s discretion. Looking at the CJEU’s interpretation of the democratic foundations of the ECI, there is some indication of how Article 11 (3) TEU could be applied as well. In _Efler and Others v Commission_, the General Court concluded that the interpretation of the concept of ‘legal act’ found in article 11(4) TEU must be done in view of the broader principle of democracy as well as the improvement of the democratic functioning of the European Union aimed for through Article 11 TEU:

On the contrary, the principle of democracy, which, as it is stated in particular in the preamble to the EU Treaty, in Article 2 TEU and in the preamble to the Charter of Fundamental Rights of the European Union, is one of the fundamental values of the European Union, as is the objective specifically pursued by the ECI mechanism, which consists in improving the democratic functioning of the European Union by granting every citizen a general right to participate in democratic life […].

The General Court’s reasoning implies that the duties enshrined in Article 11 TEU should not be interpreted in a narrow sense, as to undermine their democratizing objectives or in the General Court’s words, “the objective of participation in the democratic life of the European Union”. In a similar line of reasoning, the General Court refuted the Commission’s argument that the right for citizens to participate in the ECI was of lower value than rights enshrined in the Charter, reminding the parties that Article 11 TEU, being primary

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776 Case T-754/14 _Efler_ para 36, 38.

777 ibid para 42.
Union law, enjoyed the same legal value as the Charter and consequently should not enjoy lesser degree of judicial protection.\footnote{Case T-561/14 \textit{One of Us and other v Commission}, EU:T:2018:210 paras 99, 100.} As noted, the Court has also interpreted the right to undertake an ECI as ”an instrument concerning the right of citizens to participate in the democratic life of the Union, provided for in Article 10(3) TEU”\footnote{Case C-589/15 \textit{P Anagnostakis} para 24.}. The EU Courts in its ECI case law also emphasizes the importance of participatory mechanisms in raising items for democratic debate.\footnote{See e.g. Case T-754/14 \textit{Efler} para 43.} The link between participation, democracy and transparency has been explicitly commented on by the EU Courts. In \textit{Schecke}, it expresses that transparency “enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizens in a democratic system”\footnote{Joined Cases C-92-93/09 \textit{Schecke and Eflert} para 68. Lenaerts argues this case law implies that in certain cases it is appropriate to entrust independent agencies with the adoption of policy or individual decisions that take a broader range of stakeholders into consideration, Lenaerts 277.}. In \textit{MyTravel}, the Court held that the application of the principle of openness is not limited to the legislative process, although it is more central for law-making than in the context of administrative procedures.\footnote{Case T-233/09 \textit{Access Info Europe v Council} EU:T:2011:105; Joined cases C-39/05 P and C-52/05 P \textit{Sweden and Turco v Council}.} In balancing the principle of transparency against other legitimate considerations, the General Court highlighted in \textit{Access Info Europe} that transparency enables citizens to participate more closely in the decision-making process and that public access to the entire content of Council documents constitutes the general rule, subject to exceptions which must be interpreted and applied strictly, while generally the Court of Justice has also emphasized that openness contributes to strengthening democracy by enabling citizens to scrutinize all the information and considerations which has formed the basis for a legislative act.\footnote{Case T-540/15 \textit{De Capitani} para 80; Case C-280/11 \textit{P Info Access Europe} para 33; Joined cases C-39/05 P and C-52/05 P \textit{Sweden and Turco v Council} para 46; See also Case T-755/14 \textit{Herbert Smith Freehills LLP v. Commission} EU:T:2016:482.} The Court has specifically established, as formulated in \textit{Turco}, that the possibility for citizens to find out the considerations underpinning legislative action, is a precondition for the effective exercise of their democratic rights.\footnote{Case T-540/15 \textit{De Capitani} para 80; Case C-280/11 \textit{P Info Access Europe} para 33; Joined cases C-39/05 P and C-52/05 P \textit{Sweden and Turco v Council} para 46; See also Case T-755/14 \textit{Herbert Smith Freehills LLP v. Commission} EU:T:2016:482.} In \textit{Client Earth}, the Court solidifies this relationship and establishes a clear legal link between citizen’s right to participate in the democratic
life of the Union and related rights such as transparency that allow the realization of this right. This understanding is e.g. reinforced in *De Capitani v Parliament* in relation to trilogue documents.

These determinations are in a sense an interpretation of transparency in the light of the democratic objective pursued by the principle. The analysis of Article 11 TEU and the linkages established in jurisprudence between access to the legislative process and an evolving conception of democracy therefore suggest the EU Courts at this juncture are well placed to intervene where consultation duties are breached (see below, under annulment).

However, the procedural path leading to judicial review for such determinations would be cumbersome, to say the least. First, there is the Courts’ case law favoring both limited standing and judicial review in direct challenges as well as for claims to reparations. Hypothetically, a breach of Article 11 (3) TEU – possibly in combination with 10(3) TEU – would trigger liability with regard to infringement of the Treaties or essential procedural requirements for law-making. For access to a direct challenge, the claim would either have to be brought by one of the privileged actors (Member States et al.) or the Courts’ current view on standing for private parties, rooted in *Plaumann* and solidified through *Inuit*, where the Court specifically held that the Lisbon Treaty did not alter its established case law on standing, would have to shift as a result of the principle of participatory democracy. Some commentators have noted that the Court’s position on standing is probably untenable in light of the constitutionalizing of

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785 Case C-57/16 P ClientEarth.
786 Case T-540/15 De Capitani.
787 See also Curtin and Leino (n 630).
788 Alemanno, ‘Unpacking the Principle of Openness in EU Law’ (n 405).
789 It may be incorrect to draw the conclusion that the Courts are hesitant to enforce the various elements of Article 11 TEU as there has been no litigation. See also Mendes, ‘The Democratic Foundations of the Union’ (n 451).
participation, while others remain highly skeptical of the Court’s willingness to intervene at all in such cases.\textsuperscript{792}

Another argument in favor of a shift in the Court’s jurisprudence on standing, which surfaced in the previous section, and which is largely overlooked, is that of international law. The right to participate in public affairs according to Article 25 ICCPR encompasses the right “to be consulted at each phase of legislative drafting and policymaking; to voice opinions and criticism”,\textsuperscript{793} with an emphasis on guaranteeing full and effective access to justice and redress mechanisms to those unduly deprived of their right to participate in political and public affairs.\textsuperscript{794} Following also from the interpretive demands of viewing EU law and international through a lens of coherence could prompt the Court to interpret Article 11(3) and its stance on standing in light of the international law obligations made by Member States prior to joining the Union, since these obligations have been transferred to the Union to the degree legislative power now rests with the Union.

Overall, however, considering the Court’s current stance, a shift on standing currently seems unlikely. According to Article 263(2) TFEU the Court shall have jurisdiction in actions brought either by a Member State, the Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. This means nevertheless the possibility remains for the privileged parties to bring a claim to the Court, or for other parties to seek redress through an indirect claim.

\textsuperscript{792} The potential for review in this regard is contested. For views favoring the Court would or should grant standing and intervene see Alberto Alemanno, ‘The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission’s Walls or the Way Forward?’ (2009) 15 European Law Journal 382, 392–394; Ymre Schuurmans and Wim Voermans, ‘Better Regulation by Appeal’ (2011) 17 European Public Law 507; Mendes, ‘Participation and the Role of Law after Lisbon’ (n 32) 1873–1875; Meuwese (n 38); On the opposing side regarding the outlook see e.g. Smismans, ‘The Constitutional Labelling of “The democratic life of the EU”: Representative and Participatory Democracy’ (n 137); Lock (n 140); García Macho (n 499); As well as more ambiguous regarding feasibility and desirability, see Busschaert (n 294) 110–120.

\textsuperscript{793} OHCHR, ‘Promotion, Protection and Implementation of the Right to Participate in Public Affairs in the Context of the Existing Human Rights Law’ para 10.

4.6.2. Annulment

A direct or indirect challenge of a legal act based on Article 11(3) TEU could be directed at several of the grounds of annulment, since the legal basis for consultation is now clearly written into primary law, such as the absence of a procedural requirement or infringement of the Treaties.

Overall, the analysis in the previous sections of the relevant Treaty articles as well as in Protocol no 2. revealed strong and clear language in primary law on the obligation to consult. A direct or indirect challenge of a legal act based on Article 11(3) TEU – e.g. flawed or absent legislative consultation could constitute a breach of procedural requirement of or infringement of the Treaties. Such cases may involve situations where there has been no consultation, significant group/parties concerned have not been consulted, consultation timeframes have clearly been inadequate or there is a serious deficiency in transparency and feedback (e.g., if the Court has failed to share how participatory input has impacted its legislative work). References to, inter alia, Article 10(3) TEU, Article 9 TEU and Article 15 TFEU as well as to a lesser extent the Interinstitutional Agreement on Better Law-Making and Article 25 ICCPR could support such claims.

In fact, the EU Courts have now also recently tentatively to engage with the provisions of the Interinstitutional Agreement on Better Law-Making, in cases brought by Member States for the annulment of an act. 795 In two such cases, the relevant plea invoking the interinstitutional agreement related either to an allegedly flawed impact assessment (for a directive) or the lacking consultation in relation to a non-legislative act. 796 Even though the pleas were not successful, the way the Courts engaged with the provisions of the interinstitutional agreement; assessing the discretion the provisions in question afforded, alternatively determined whether the party in question had lived up to the relevant requirements of the agreement, thus indirectly confirming the status of the interinstitutional agreements in mandating procedural requirements for consultation. 797

Overall, considering that the principle of participatory democracy is a relatively untested legal concept, it is still unclear though which

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796 Case C-128/17 Poland v Parliament and Council paras 21-29; Case T-626/17 Slovenia v Commission paras 240-250.
797 The principle of participatory democracy or related provisions were not mentioned ibid para 43.
breaches would be considered grave and what the boundaries of the Commission’s discretion are. Although there does seem to be some tentative agreement that a very serious direct breach of Article 11(3) TEU – such as no consultation at all – might amount to a ground from annulment. While initially this might seem to highly limit the potential of Article 11(3) TEU, it should be remembered that a recent stocktaking exercise demonstrated of all proposals linked to the Commission work programme Annex and II between 2015 and 2018 shows that 28% were not accompanied by an impact assessment and no consultation, mostly with the justification of urgency.\(^{798}\) While that figure represents a lumping together of law-making, rule-making and other policy proposals, such instances may not be the aberration one might think.\(^{799}\)

Because consultations are ‘legally embedded’\(^{800}\) within the Impact Assessment (IA) as evidence supporting rational law-making, it is worth considering what role, if any, the principle of participatory democracy plays in such assessment, bringing a different perspective on the importance of consultation. This requires first an understanding of how consultation is currently featured in the Court’s review.

4.6.2.1.\textit{Procedural review and the principle of participatory democracy}

In the last decade, the Court has shifted towards focusing on procedural elements in its review, which at least in part can be connected to the trend of rationalizing the legislative process and evidence-based law-making as well as the Court’s historical overall deference to the legislator in terms of review.\(^{801}\) Law-making consultation is here featured explicitly in the context of evidence gathering and implicitly as an element of impact assessments – the latter’s appearance in case law drawing the attention of scholars.\(^{802}\) The prominent feature of


\(^{799}\) See chapter 6.6.

\(^{800}\) The term is taken from Anne Meuwese, ‘Embedding Consultation Procedures: Law or Institutionalization?’ (n 38).


consultations in IA:s as well as the rise of IA:s as an element of the Court’s review has been seen as a way of legally embedding consultations. If more information is available to courts, they are more likely to use it when they review regulation, and if consultation is combined with IA, courts might raise their evidentiary standards.803

The relevant case law begins prior to the insertion of Article 11 TEU but stretches beyond the ratification of the Lisbon Treaty. The EU Courts have confirmed that an EU institution can demonstrate the proportionality of its action through providing a reasoned impact assessment. The prominent case is Spain v Council where the Court, after highlighting the lack of an impact assessment by the Community legislature, found a breach of the general principle of proportionality and annulled the regulation in question.804 The judgment implies that the duty to investigate fully and impartially all aspects of a case prior to taking a decision should include analysis of the potential impact on collateral aspects.805 Similarly, in Vodaphone, the Court emphasized the Community’s legislature must base its choice on objective criteria, explore possible measures and examine whether objectives pursued by the chosen measure justify negative economic outcomes for a party.806 In this case, the Court relied on an IA report in its proportionality review. In its substantive assessment of proportionality, it assessed the quality of the decision-making procedure. In the joined cases Sungro SA and Others v. Commission and Council, the General Court made an implicit argument to uphold the impact assessment as an essential procedural requirement in EU law-making. 807 In Luxembourg v Parliament and Council, the ECJ assessed the legality of a measure under the principle of proportionality through establishing whether there was proof of the duty of care by means of an IA report drafted prior to the entry into force of a measure.808

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803 Meuwese and Popelier, Patricia (n 44); Alberto Alemanno, ‘Courts and Regulatory Impact Assessment’ in Claire A Dunlop and Claudio M Radaelli (eds), Handbook of Regulatory Impact Assessment (Edward Elgar Publishing 2016); Meuwese (n 444).
804 Case C-310/04 Spain v Council EU:C:2006:521 para 123.
805 See, e.g. the situation in ibid. it connects with the duty of care
806 Case C-58/08, Vodafone and Others EU:C:2010:321 para 55.
Popelier here distinguishes between two mechanisms: formal process review and procedural rationality review.\textsuperscript{809} Cases like Spain v Council and Vodaphone fall under the latter category as procedural rationality review covers situations in which an act is challenged for failing a substantive check (mostly proportionality) which includes the duty to legislate on the basis of evidence.\textsuperscript{810} Formal process review is when an act is challenged directly because of a procedural requirement – in this case because no IA was conducted, or the IA that was carried out was faulty.\textsuperscript{811} The Court has recently confirmed that it must review compliance with not only the substantive but also the procedural safeguards provided for by Protocol No 2 (which demand assessments on subsidiarity and proportionality).\textsuperscript{812} Examples of formal process review are then Afton Chemical and Pillbox 38, where the Directive in question was challenged on the ground of an absent IA – the legislature had chosen another path than the one proposed by the Commission; and consequently that course of action had not been examined within the context of an IA.\textsuperscript{813} Similarly, in Philip Morris and in Poland v the European Parliament and the Council, issue was taken directly with the IA.\textsuperscript{814}

In Afton Chemicals, the Court emphasized that although its judicial review is limited in scope, the Community institutions must be able to show the Court that, in adopting a legal act, they actually exercised their discretion, which presupposes taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate.\textsuperscript{815} The Court here points out that this line of reasoning holds even though the Court clarified that the impact assessment undertaken by the Commission is not binding on the Parliament or Council.

\textsuperscript{809} Popelier (n 453) 11–12.
\textsuperscript{810} ibid 12.
\textsuperscript{811} ibid.
\textsuperscript{812} Case C-547/14 Philip Morris Brands and Others EU:C:2016:325 para 217; Case C-358/14 Republic of Poland v European Parliament and the Council of the EU EU:C:2016:323 para 113.
\textsuperscript{813} Case C-343/09 Afton Chemical Limited v Secretary of State for Transport EU:C:2010:419 para 30-40; Case C-477/14 Pillbox 38 (UK) Limited, trading as Totally Wicked v Secretary of State for Health EU:C:2016:324 para 64-66.
\textsuperscript{814} Case C-547/14 Philip Morris para 226; Case C-358/14 Poland v Parliament and Council para 123.
\textsuperscript{815} Case C-343/09 Afton Chemical.
The specific role of impact assessment and its legal bearing is, however, unclear and the EU Courts case law is not always consistent.\footnote{Case C-310/04 Spain v Council EU:C:2006:521 compare with Opinion of AG Sharpston, Case C-310/04 Spain v Council Opinion of A.G. Sharpston EU:C:2006:179 §§82, 89.} It has been noted that the Court’s relatively stringent procedural review in \textit{Spain v Council} has been followed by a more overall lax approach.\footnote{Jacob Öberg, ‘The Rise of the Procedural Paradigm: Judicial Review of EU Legislation in Vertical Competence Disputes’ (2017) 13 European Constitutional Law Review 248.} One relevant observation in this regard is that in \textit{Vodafone, Luxembourg}, as well as subsequent cases \textit{Estonia v Parliament and Council} and the so-called Tobacco Directive cases, the IA provided the Court with arguments to support the conclusion that the measure was compliant with proportionality.\footnote{Julian Nowag and Xavier Grousset, ‘From Better Regulation to Better Adjudication?’ in Sacha Garben and Inge Goverae (eds), \textit{The EU better regulation agenda: a critical assessment} (Hart Publishing 2018) 185–202.} The IA therefore plays a dual role in the review of the courts; it is a procedural requirement in the contexts of gathering evidence (here connected to the administrative principle of duty of care) and also an aid in the substantive element of proportionality review, establishing a “presumption of legality”.\footnote{Ibid.} The danger here is that, instead of proper procedural review, impact assessments and consultations – in particular justification on subsidiarity and proportionality – become a box-ticking exercise.\footnote{Schuurmans and Voermans make this case in relation to the IA, while not explicitly discussing consultation. Schuurmans and Voermans (n 792).} These reflections align with previous observations that the Courts’ review may be turning into a drafting guide for practitioners/legislators rather than a real check on discretion.\footnote{Stephen Weatherill, ‘The Limits of Legislative Harmonization Ten Years after \textit{Tobacco Advertising}’; How the Court’s Case Law Has Become a “Drafting Guide”’ (2011) 12 German Law Journal 827.} Despite this, the shift towards procedural proportionality has in certain corners been defended (providing it is stringent enough) as it poses lesser challenges to institutional balance of democratic decision-making.\footnote{See Öberg (n 817).}

The jurisprudence on impact assessments and the need for careful examination of all facts does also not answer the question what role or connection there is between evidence gathering and consultations. While the Commission attempts to draw a line between stakeholder and expert input, demonstrated in its separate guidelines as well as transparency on reporting in dealing with the two, there is often large overlap between expert input and “parties concerned”, including those
who are affected or have a stated interest in a given issue. The relatively novel references of the Courts to the requirements of subsidiarity justifications as enshrined in Protocol No. 2 point to a trend which might spill over to the consultation demands in the protocol.823

Considering the current approach of the Court in its subsidiarity and proportionality review, the principle of participatory democracy calls for an amplification of the role of consultation in the Court’s review in the following way. Within procedural rationality review, it calls for re-framing the understanding of “evidence” as being grounded in links to citizens, including citizens lived experiences and situated knowledge. This is not only supported by the intrinsic value of participation which arguably fits less within the Court’s current proportionality review but also the instrumental value of participation in assessing consequences and impacts of regulation. The legal amplification prescribed by the principle of participatory democracy becomes more acute when fundamental rights are impacted by the Commission’s proposal, when the Commission is proposing legislation in previously unregulated domains, and when the Commission proposes legislation which deals with heavy “ethical balancing”, including in areas of complexity. The principle of participatory democracy also informs formal process review through highlighting procedural requirements related to consultation beyond the requirement of its mere existence; notably that the Commission is required to adequately document how participatory input has impacted its legislative proposal, and that adequate time for consultation has been ensured. The principle of participatory democracy then highlights the necessity of participation to ensure that the proposal is in harmony with the legal requirements of subsidiarity and proportionality.

Finally, with regard to the role that the interinstitutional agreements can play Poland v Parliament and Council II is indicative. Here the Court looked at the content and quality of the impact assessment, as well as other available information to the legislators to draw the conclusion that the Parliament and the Council had taken into account the available scientific data and information in order actually to exercise their discretion.824 In addition, the Court stated

823 Nowag and Grousset also take note of the novel mention of Protocol No. 2: Nowag and Grousset (n 818).
824 Case C-128/17 Poland v Parliament and Council.
[... ] concerning the Republic of Poland’s contention that the Parliament and the Council amended substantial aspects of the proposal for a directive and ought therefore to have updated the impact assessment, in accordance with point 15 of the Interinstitutional Agreement on Better Law-Making, suffice it to note that that provision does not, on any view, contain a definite obligation for the institutions concerned. It provides only for the option to carry out such an update where the Parliament and the Council ‘consider this to be appropriate and necessary for the legislative process.’

Following from this statement, e contrario, a breach of a provision in the agreement which would be framed as a binding obligations could therefore possibly lead to annulment.

Having explored direct claims based on the principle of participatory democracy as well as when they may be embedded (relating to proportionality and subsidiarity) or related to provisions in the Interinstitutional Agreement on Better Law-Making, the issue of compensation is briefly discussed.

4.6.3. Compensation for Damages

Settled case law in terms of damages call for three conditions to be met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious – i.e., the EU institution or body must have manifestly and gravely disregarded the limits on its discretion; and there must be a direct causal link between the breach of the obligation on the author of the act and the damage sustained by the injured party. Regarding the first requirement, as earlier stated, it is highly doubtful whether the language of Article 11 TEU supports the establishment of individually enforceable rights. Although the case could be made, that read in combination with Article 10(3)TEU such a right is implicit, the overall assessment, in line with the textual analysis of Article 11 TEU, is against this claim. The necessary severity of the discreional breach in order for reparations to be granted also means the types of consultation breaches that could be potentially considered would arguably be limited. This means that

825 ibid para 42.
827 ibid.
828 Speaking in general about the legal redress of Article 11 TEU, Smismans is sceptic the CJEU would disqualify any type of activity beyond the unlikely scenario that there would be no
the principle of participatory democracy, as it stands, is unlikely to find expression or be ensured through such claims.

4.6.4. Conclusions on the potential for judicial review

The overview of existing jurisprudence demonstrates that there may be distinct pathways through which the principle of participatory democracy in relation to law-making consultation is ensured. The democratizing function of consultation has indirectly been touched on in the Courts’ elaboration of democracy. The ECJ relied on the citizen’s right to democratic participation in 10(3) TEU in order to strengthen access to the legislative process in its early stages. However, it is also clear that direct challenges based on the principle of participatory democracy face procedural obstacles. Unless the Court shifts its settled law on standing, direct challenges by the privileged actors and indirect challenges open to the public would be the avenue potential litigants would have to tread.

Law-making consultation has indirectly surfaced in determinations on subsidiarity and proportionality as IAs gradually have come under the scrutiny of the Courts. The analysis highlights the challenge in legally embedding consultations in impact assessments because the legal imperative and force of consultation based in Article 11(3) TEU and also Article 10(3) TEU does not necessarily align with the foundations and goals of impact assessments.\(^{829}\)

A textual reading of Article 11 TEU and Article 2 Protocol 2 clearly indicates that the presence of consultation in the legislative process is a must and that it would not be a leap for the courts to explicitly enforce consultation – indirectly the Court already has.\(^{830}\) Furthermore, the Court have now clearly begun to engage with the inter-institutional agreement on better law-making and scrutinized whether the institutions have lived up to the standards and provisions set by that agreement. Since the agreement codifies some of the obligations which flow from the principle of participatory democracy, this makes enforcement more tangible. However, Courts’ case law related to impact assessment and participation in the legislative process by non-institutional actors is primarily output-oriented. The legal analysis has, however, demonstrated how the principle of participatory democracy

\(^{829}\) This distinction is important as literature on impact assessments sometimes legally lumps consultation and impact assessments together.

\(^{830}\) Meuwese noted this already in 2011, see Meuwese (n 38).
can and should be embedded in the Court’s procedural review to legally amplify the role for consultation and emphasize its democratizing function; both through its procedural rationality review and process review.

In sum, a complete lack of consultation constitutes a clear legal breach of principle of participatory democracy (breach of Treaty) and the outlook for redress in terms of annulment is good – but the procedural path may prove difficult beyond privileged actors. Furthermore, a claim based on the principle of participatory democracy in terms of a procedural breach of consultation obligations – e.g. not providing enough time to allow for consultation, or not consulting specific groups/individuals, or not being sufficiently transparent in its IA – is unlikely while not impossible to succeed as a standalone annulment claim. It has a much stronger chance of success if embedded in the proportionality review of the Court (as highlighted above) and is one of several factors which put the disputed legislation in question. What may likely influence the Court’s willingness to intervene, in both the case of a standalone or embedded claim based on Article 11(3)TEU, Article 2 Protocol 2 and Article 1 (3)TEU (especially for proportionality review), is whether, outside of the Commission’s procedural lapse, whether any substantive harm has occurred because of the lapse. This is likely to be influenced by the nature of the case, and by what happens after the Commission presents its legislative proposal including whether the Parliament and Council attempt to make up for this lapse.831

4.6.5. Realizing the principle of participatory democracy through ‘soft accountability’?

While a legal principle by definition makes an implicit demand of legal redress in the event of its breach, legal principles, in particular constitutional principles, find expression through many means. Realizing the principle of participatory democracy, including its implications for law-making consultation, need not only be achieved through the Courts. In recent years, the European Ombudsman has been instrumental in pointing out maladministration while promoting accountability and transparency of the EU institutions. The Ombudsman, with its legal basis in the Treaty dating back to Maastricht, has among its main concerns to deal with cases of maladministration, focusing on transparency and accountability, procedural rights and the public participation in EU decision-making. In this chapter, the Ombudsman’s role in relation to participatory democracy emerged in

831 See chapter 6.
terms of a guardian role. Through her investigative powers, and in laying out recommendations to be followed by the EU institutions, the Ombudsman has also indeed prompted reforms in several important areas with linkages to the principle of participatory democracy, notably with regard to trilogues, transparency in the Council and enhancing the regulatory and accountability framework surrounding lobbying and expert groups. 832

Related particularly to the principle of participatory democracy and consultation is the Ombudsman work on reforming the Commission’s system for advisory and expert-groups. Following the Ombudsman’s investigation and recommendations, the Commission has reformed its expert-group system through putting in place horizontal binding rules which included making calls for experts open, as well as transparency requirements of “complete” minutes, which should also be made accessible to the public, 833 including demonstrating how the expert groups reached their conclusions. 834 The Commission’s response to the EU Court of Auditors recommendations on the Commission’s consultation practices were by comparison non-committal. 835 Considering the high level of acceptance of the Ombudsman’s solutions or recommendations, as well as her insights into EU administration the Ombudsman’s office is well-placed to contribute to a realization of the principle of participatory democracy, including in specific instances when the principle has been breached with regards to consultation design. 836 This is not to deny the fact that, for politically salient issues, the Ombudsman may have less acceptance rates. 837 Furthermore, the oversight procedure – similar to judicial review – is rather lengthy and usually takes about two years, although the fast-track procedure might be able to address this issue. 838 Although no one-stop shop remedy, the Ombudsman emerges as an important accountability mechanism for participatory democracy. This is particularly true as it has been

833 ibid.
834 ibid, for a detailed account.
835 See European Court of Auditors (n 131) under title ' Replies of the Commission'.
836 See e.g. Kostadinova (n 832); Maarten Hillebrandt and Päivi Leino-Sandberg, ‘Administrative and Judicial Oversight of Trilogues’ (2021) 28 Journal of European Public Policy 53; Hierlemann and others (n 9) 110–30.
837 Hierlemann and others (n 9) 115–118.
838 On this points, see Hillebrandt and Leino-Sandberg (n 836) 67–68.
observed that litigation, e.g. in the area of transparency, may have been held back by the requirement that applicants need to demonstrate a direct disadvantage deriving from an access (to document) refusal – which excludes the reliance on a general, societal interest in e.g. improving trilogue transparency, as well being ordered to pay the cost of the defendant and intervening parties. 839

4.7. Procedural requirements from a democracy theory perspective
The legal analysis identified several rights and obligations flowing from the principle of participatory democracy as well as revealed a (cumbersome) path for judicial review. The Commission’s obligations to consult in EU law-making were analyzed, which included both broadly framed obligations such as the obligation to consult widely, as well as more specific duties including to conduct internet-based consultation.

In order to identify the most important of these obligations, the strength of the legal argument as well as the insights from democratic theory in the preceding chapter may serve as a guide. As discussed in the previous chapter, the core complementary drivers of participatory democracy were the intrinsic value of participation, deliberation and a focus on citizens and civil society as participation protagonists. As regards the inherent value of participation, it connects directly to the Commission’ obligations to consult broadly and undergirds the procedural equality of potential participants, including reaching out actively beyond the usual suspect to ensure they are informed of their participation opportunities, thereby reaching the “parties concerned”.

The constitutional legal interpretation of the principle of participatory democracy, grounded in the telos of the principle to facilitate citizen-grounded participation and legitimize Union action, has prompted a broad interpretation of the right of citizens to participate in the democratic life of the Union. The right is seen as stretching out not only horizontally beyond elections to law-making, but also vertically throughout the EU multi-level structure, potentially informing the interpretation of national law. This interpretation of the democratic life of the Union also comports with theorization of participation in the EU setting and the emphasis in participatory democracy of affording those affected by a decision the right to take part in formation.

839 ibid.
In thinking about the deliberative quality of consultations, enhanced feedback and transparency would shift the process in a more deliberative direction. The latter would attend to important procedural qualities that are necessary for deliberation as well as serve promoting the right of citizens to know about EU action (in order to be able to influence Union actions). While there is no obligation for the Commission to reply individually to consultation replies, the purpose of consultation as stated in Article 11(3) TEU to ensure transparency means it must detail whether and how participation input has been taken on.

This chapter has outlined key rights and obligations which flow from the principle of participatory democracy, and analyzed their import for law-making, focusing on how the principle can find expression through EU law-making consultation. It has further assessed to what degree the principle is justiciable and reached the conclusion that, while indeed, judicial review exists for EU law-making consultation, procedural hurdles make such review difficult. The Ombudsman, while lacking the full force of judicial review, appears structurally well-placed to review law-making consultation processes.

Justiciability is one part of the puzzle in giving the principle of participatory democracy effect. Another potential crucial element is how the principle of participatory democracy can operate at the national level with regard to EU law-making.
5. Participatory Democracy as Multi-Level Consultation – Charting a Path

An analysis of the way a constitutional principle finds expression in a multi-level setting must pay attention to the legislative contexts at the different levels. This chapter explores how the principle of participatory democracy operates at the national level with regard to EU law-making consultation by using the Swedish consultation procedure as the case example. Based on those findings, detailed framework for EU law-making consultation is charted for EU and national Swedish level.

The CJEU states that the “instruments of participatory democracy” have as their objective “to encourage the participation of citizens in the democratic process”. The previous chapter highlighted the obligations outlined in Article 11 TEU and Article 10(3) TEU and their implications for the EU law-making, with a focus on the Commission’s consultation. Because Article 11(3) TEU solely places a duty on the Commission to consult, presumably, the principle’s operating article has limited impact on Member States actions – in this case the consultation design and framing which occurs at the national level. Article 10(3) TEU prescribes a “right for citizens to participate” in the democratic Union, which we know from CJEU case law is a right that goes beyond participating in elections. The analysis in the previous chapter demonstrated that this right extends to EU law-making at the national level. However, if consultation and participation in law-making is a key element of the principle of participatory democracy, what does this mean for law-making at the national level? How does this understanding inform relevant legal norms operating at the national level?

This chapter begins with a few initial considerations on the EU law-making process as a composite one, followed by analyzing in detail, the Swedish legal framework for EU law-making consultation. It then charts a path for multi-level consultation including both national and EU-level. Because there is in principle no specific legislation in relation to EU-law making consultation, the general framework for law-making consultation is first outlined, with specific concerns raised by EU law-making addressed in context.

840 C-418/18 P Puppinck para 65.
5.1. **Considerations on EU law-making as a composite process**

As case law on access to document confirms, from the very beginning, when the Commission uses its right of initiative to consider whether to put forward a legislative proposal,\(^{841}\) various actors engage or attempt to influence the legislative process, part of a continuous exchange between the Commission and interest-groups and stakeholders. As the legislative preparatory process proceeds, a multitude of actors gravitate towards the process as it unfolds. At the outset I have argued for viewing this process as it unfolds at the EU and national level, as a composite process. A brief reflection on the law-making process as composite will help to frame the legal analysis at the national level.\(^{842}\)

When the Commission and a Member State government consults on the same legislative file, one can schematically think of it as a sequential order. This is also mainly the way the process unfolds. The Commission conducts e.g. an open consultation and the Member State then consults in preparation of its negotiation position after the Commission has presented its legislative proposal to the Council and Parliament. Later, in the event of successful adoption, the government consults in preparing the implementation of the EU legal act. However, in reality the process may be more fluid, with the actors in the law-making consultation process taking on different roles at different stages. To begin with, consultation at the EU and national level can occur simultaneously. The Member State can itself conduct consultations on the Commission’s White Paper or legislative proposal. While for most Member States, OECD data suggests the negotiation phase is neglected in terms of domestic stakeholder consultation, in a few Member State the government functions as a potential multiplier, posting all Commission consultations, on its own webpage.\(^{843}\) In Sweden, the government is required to submit a memorandum to the Swedish

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\(^{841}\) A study from 1998 found that the impetus for only 5 per cent of Commission proposals came from the Commission itself. Rather the drivers were international obligations, requests from other EU Institutions, Member States, or other actors, or adaptation of EU law to “new social, technological, and economic data” Damian Chalmers, ‘The Democratic Ambiguity of EU Law Making and Its Enemies’ in Damian Chalmers and Anthony Arnall (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 321.

\(^{842}\) Initially, Commission decision-making on a legislative file occurs in a rather centralized way, usually, a lead DG will be given the task of drafting the proposal. Adoption by the Commission will be subject either to the written procedure, where the proposal is circulated around the Cabinets of Commissioners and upon no objection adopted, or the oral procedure, where adoption follows a short meeting of the Cabinets to iron out any differences; ibid.

Parliament when negotiating EU legislation and for important policy issues and these may be preceded by consultation.\footnote{\textsuperscript{844}} In addition, the relevant government ministry may itself reply to the Commission consultation and then later facilitate consultation on the same legislative proposal at a later state. Similarly, a national agency or institution can take part in the Commission’s consultation, and later represent the government in negotiations in the Council. Civil society groups and other non-state actors at the national level may participate either in the Commission’s consultation or in the government facilitated one, or both. Both the Commission and Swedish government, when they consult, act as key players in the legislative process, albeit with distinct roles in the legislative process. In this way the law-making process, as well as consultation, involves both the Commission and the Member State, in this case Sweden, with distinct but interdependent functions, both necessary to conclude the process.

5.2. **The Swedish consultation procedure, between tradition and modernity**

The Swedish consultation procedure is the process whereby legislative or policy proposals are referred to a large number of state or municipal authorities, interest groups, organizations and business interests, who are invited to submit written responses. The procedure is used by various parts of the Swedish government during the preparation of policies and is particularly institutionalized in the concluding phase of commission of inquiry that study, prepare and formulate new policies and legislation.\footnote{\textsuperscript{845}} An overwhelming majority of commission of inquiry consult.\footnote{\textsuperscript{846}} Nine out of ten government commissions of inquiry have been estimated to consult through the standard procedure.\footnote{\textsuperscript{847}}

Although openness and transparency have been hailed as the strengths of the Swedish consultation procedure,\footnote{\textsuperscript{848}} it has been pointed out that

\textsuperscript{844} This follows from the constitutional obligation of the government to inform and consult the parliament on EU affairs including for decisions in the Council. Regeringsformen (1974:152) [RF] [Constitution] 10:10; See also Riksdagsordning (Svensk författningssamling [SFS] 2014:801) (RO) 7:14; SOU 2016:10 EU på hemmaplan 109.

\textsuperscript{845} Erik Lundberg and Erik Hysing, ‘The Value of Participation: Exploring the Role of Public Consultations from the Vantage Point of Interest Groups’ (2016) 39 Scandinavian Political Studies 1.


\textsuperscript{847} ibid.

the Commission often surpasses the Swedish model in terms of openness and transparency, particularly in terms of promptly publishing responses and ‘feedback’.\textsuperscript{849} This assertion however fails to capture the full picture. An important difference between the Swedish consultation procedure and Commission consultation, is that the Swedish procedure is generally targeted; a list is compiled of relevant addressees that are asked to submit responses. Other actors and the general public may also respond, even though they are not directly addressed. While the public in theory has access to the consultation documents and responses, it is not as accessible as the Commission webpage. Clearly, the structure surrounding consultations has not been designed to involve the general public in consultation or for them to as the Commission puts it: ‘Have your say’\textsuperscript{850} At the same time, and perhaps most significantly, the Swedish practice of publishing the list of specifically selected participants identified and contacted by the executive body, makes it more transparent with regard to the consultation strategy, what participation selection has looked like and who in the end has contributed to the policy process. The travaux then generally includes detailed responses to the various positions which have emerged in the consultation and whether they have been taken on board. Sweden’s strong constitutional enshrined principle of transparency creates a general presumption of access to public documents, which is stronger than for access to EU documents.\textsuperscript{851} Of course, the significantly smaller average number of responses to the Swedish consultation makes an overview of the process and outcome much easier as well.

The formal process of government-facilitated written consultations runs throughout all policy areas and has deep roots in Swedish governance. However, this process received relatively little scholarly attention compared to the interest in new forms of participation.\textsuperscript{852} As other

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\textsuperscript{849} Tarschys, Daniel and Johansson, Linda (n 41).
\textsuperscript{851} See 5.3 below for a more detailed legal analysis. Also Sweden’s history of public institutional openness and transparency has created a culture where ‘access’ is institutionalized and basic knowledge of the legal requirements of the duty of providing access to documents and the basic legal framework have largely been mainstreamed. And crucially, access is swift. The Swedish government’s overview is instructive, see Regeringen och Regeringskansliet, ‘The Principle of Public Access to Official Documents’ (Regeringskansliet, 2 March 2015) [https://www.government.se/how-sweden-is-governed/the-principle-of-public-access-to-official-documents/] accessed 8 August 2023.
\textsuperscript{852} The few exceptions in recent years include Lundberg (n 83); Lundberg and Hysing (n 845); ‘Riksrevisonen, Förändringar Inom Kommittéväsendet, Granskningsrapport 2004:2 (Swedish National Audit’s Office Report)’; Marcusson analyses how participants develop their
commentators have pointed out, this is somewhat curious, as many previous studies have shown that this type of consultation is valued by interest groups as an important part of their overall strategy for influencing policy and legislation.\(^{853}\) Among the few existing studies on the Swedish consultation procedure, there is little or no analysis of the legal framework that guides this process, including how such a framework relates to negotiating and implementing EU-legislation.\(^{854}\)

The present analysis is conducted against the backdrop of two seemingly dichotomous narratives about Swedish government consultation. The first can be summarized as follows: the Swedish Consultation Procedure is a crumbling institution which is losing its role as an arena for social agency, influence and change. As norm creation is increasingly delegated either to state authorities or the EU. The Swedish committee structure -the hub of legislative consultation- is diminishing in importance.\(^{855}\) Privatization, de-corporatism, and increasing pluralism contribute to shrinking the role for government commissions.\(^{856}\) Actors are directing their gaze and effort towards Brussels, rather than towards national arenas. Alternative forms of participation and influence such as lobbying, and media engagement appear more effective and appealing.\(^{857}\) Closely associated with this bleak picture of the Swedish consultation procedure are observations that Swedish law-making consultation is not aligned to the EU legislative process and rather takes on the role of ex-post control.\(^{858}\) As


\(^{853}\) Lundberg (n 85) 2.

\(^{854}\) A study with an overview of potential issues was however presented by current author to the 2016 Commission of Inquiry on participation, although this study pre-dated relevant case law on procedural review and did not consider the potential impact of EU law on consulting during negotiating EU law, see Gloria Golmohammadi, ‘Likhet innan lagen. Det svenska remissförfarandets rättsliga ramverk och delaktighet vid beredningen av EU-frågor och lagstiftning’ (2015) Rapport till Utredningen om delaktighet i EU, Dir. 2014:112.

\(^{855}\) in Swedish: Kommittéväsendet.

\(^{856}\) Lundberg and Hysing (n 845) 1–3; For contrasting historical perspective, see Olof Ruin, ‘Participatory Democracy and Corporatism: The Case of Sweden’ (1974) 9 Scandinavian Political Studies 171.

\(^{857}\) It has been argued that this form of consultation has been displaced by other means of influencing policy: lobbying, professional opinion formation/technocrat and media campaigns. See Statens Offentliga Utredningar [SOU] SOU 1999:121 Avkorporativisering och lobbyism – konturerna till en ny politisk modell [government report series]; Per Ola Öberg and Torsten Svensson, ‘Civil Society and Deliberative Democracy: Have Voluntary Organisations Faded from National Public Politics?: Civil Society and Deliberative Democracy’ (2012) 35 Scandinavian Political Studies 246.

\(^{858}\) Hettne and Reichel (n 43).
is clear from the previous chapter, this narrative finds a parallel at the EU level with regard to Commission consultations. Notably, at the Swedish national level, criticism with regard to skewed participation in consultations is clearly not as prominent.

An opposing narrative of the Swedish consultation procedure has also emerged in the last decade. Written government consultations are in this context described as one of the most important forms of democratic influence in Western democracies.\textsuperscript{859} Not only have such consultations increased in relevance and frequency in the last decade within a number of countries, but also within international organizations.\textsuperscript{860} National channels of influence have been identified as key instruments in the aggregation of societal interests towards the EU.\textsuperscript{861} The importance of consultation in both maintaining and evolving democracy has in this context been underlined. The rapid development of Commission consultations has also been taken to indicate that legislative consultation is here to stay.

This somewhat brutal categorization does neither justice to the few existing nuanced commentaries on the Swedish consultation procedure, nor accurately reflect the naturally more complex reality. Such one-sided descriptions also tend to be more prescriptive rather than descriptive. The seemingly polarized positions, often with a narrow definition of outcomes, also miss relevant perspectives. A relatively recent survey study with qualitative follow-up interviews of interest groups participating in government consultations in Sweden across a range of policy areas, indicates that participation in written consultations remains highly valued.\textsuperscript{862} In many instances participation was not solely or primarily seen as a guarantee of influence on policy or legislative outcomes (consultations frequently occur late in the legislative process) but as a communicative tool, a means of strategizing and engaging in discourse, developing internal policy, maintaining status and government connections, expressing civic duty as well as a

\textsuperscript{859} On these trends, see Anne Rasmussen, ‘Participation in Written Government Consultations in Denmark and the UK: System and Actor-Level Effects’ (2015) 50 Government and Opposition 271, 271–272; On the ubiquity of consultation in Member States, see OECD, \textit{Better Regulation Practices across the European Union} 2022 (n 843) chapter 2.

\textsuperscript{860} ibid.

\textsuperscript{861} Interests that can be traced to actors who prefer to operate at the national arena, see Jan Beyers, ‘Gaining and Seeking Access: The European Adaptation of Domestic Interest Associations’ (2002) 41 European Journal of Political Research 585, 587; For the Swedish context, see Lundberg and Hysing (n 845).

\textsuperscript{862} Lundberg and Hysing (n 845).
way to exchange information and knowledge.\textsuperscript{863}

5.3. The legal landscape of law-making consultation
This section analyzes law-making consultation and begins with setting law-making consultations in the broader context of Sweden’s constitutional set-up, outlining some fundamental characteristics of Swedish constitutional law and the system of judicial review in particular.

5.3.1. The Swedish constitutional landscape
Sweden is a constitutional parliamentary democracy with a ‘weak’ monarch as the head of state.\textsuperscript{864} The Swedish constitution, the so-called Basic or Fundamental laws (Grundlagarna) form the bedrock of the Swedish legal system. The Swedish four fundamental laws together act as a constitution; the Instrument of Government the Freedom of the Press Act, the Fundamental Law on the Freedom of Expression and the Act of Succession.\textsuperscript{865} The most prominent of the fundamental laws is the Instrument of Government (RF), outlining basic principles for governance and political life in Sweden, defining rights and freedoms, and balancing the powers of the state.\textsuperscript{866} It is also in the RF that provisions on law-making consultation as well as judicial review can be found. The latter is a somewhat unique feature, and in the absence of a constitutional court, is available for all levels of courts, administrative and general, and to public authorities as well.\textsuperscript{867}

The main provision on judicial review is set out in RF, chap. 11:14 and reads as follows:

\begin{quote}
Judicial review Art. 14. If a court finds that a provision conflicts with a rule of fundamental law or other superior statute, the provision shall not be applied. The same applies if a procedure laid down in law has been
\end{quote}

\textsuperscript{863} ibid.
\textsuperscript{865} These are: Regeringsformen (Instrument of Government) RF, Successionsordningen (Act of Succession) SO, Tryckfrihetsförordningen (Freedom of the Press Act) TF, Yttrandefrihetsgrundlagen (Freedom of Expression Act) YGL. The parliament’s work is regulated in Riksdagsordningen (The Riksdag Act) (RO)
\textsuperscript{867} Ortwein (n 864) 414; While potentially empowering to lower courts, arguably it also dilutes the power of judicial review. Arguing in this vein, see Joakim Nergelius, ‘Judicial Review in Swedish Law – A Critical Analysis’ (2009) 27 Nordic Journal of Human Rights 142.
disregarded in any important respect when the provision was made.

In the case of review of an act of law under paragraph one, particular attention shall be paid to the fact that the Riksdag is the foremost representative of the people and that fundamental law takes precedence over other law. 868

As evident from the text of the provision, it is directed at two situations; first, instances where a provision does not conform with the constitution or higher ranking law and second, where the legally established procedure has been set aside in any significant way during the making of the law. 869 In both cases the legal rule may not be applied by the Swedish courts. 870 Judicial review in Sweden (and the Nordic countries more broadly) is somewhat of a unicorn. Historically it has been regarded with caution as the courts in Sweden have had a relatively limited role. 871 The Instrument of Government dates back to 1809 and was at the time influenced by Montesquieu’s separation of power. 872 However, the current Instrument of Government is not based on the idea of a separation of powers into legislative, executive and judiciary branches and checks and balances, but is monistic, with the citizens of the country as its single power center. Judicial review was not incorporated in the constitutional text until 1979 and then only with reservations that follow from the requirement of a ‘manifest error’ as well as elaborations in travaux préparatoires on the restraint required of the courts to avoid undermining popular Swedish democracy. 873 At the same time, in the absence of a Swedish constitutional court, judicial review can be performed at all levels of adjudication. Lower instance courts are in fact, obliged to perform judicial review ex officio, although it is only the Supreme Courts that do so with the effect of setting a precedent. However, judicial review remained very limited as the

869 RF 11 § 14
870 RF 11 § 14
871 Nergelius (n 867).
872 Ortwein (n 864) 412.
The status quo of judicial review in Sweden was naturally upset through the implementation and acceptance of European law beginning in 1995. The review by the courts was expanded as Swedish domestic legislation could be set aside through the direct application of EU law and the ECHR, which had an impact on the culture of adjudication.\(^{874}\) It was then the first time gradually broadened through constitutional reforms in 2010.\(^{875}\) The amendment of the judicial review clause in the constitution meant that a provision that conflicts with the Constitution or a superior statute, or suffers of a significant procedural error may not be applied, even if the error is not ‘manifest’.\(^{876}\) Regarding procedural errors, the amended judicial review clause covers laws that were adopted in significant breach of a legally grounded requirement as to law-making procedure. It is clear the review encompasses competence issues. For instance, in one case the Supreme Court set aside an ordinance which should have been legislated by parliament and not government.\(^{877}\) Similarly, if parliament enacted a law relying on the incorrect voting majority this too would lead to successful review.\(^{878}\) While the ‘manifest error’ requirement has been removed, procedural breaches still have to be significant. The 2010-reforms added a judicial review clause which emphasizes the position of the Parliament. One implication of this addendum is that despite these judicial review reforms, review of legal rules enacted through parliamentary statute remains slim. While there is historical caution towards judicial review, in addition to the developments that European law have brought, the Swedish Courts and in particular the Swedish Supreme Court have in the last decade been more active in the exercise of substantive review.\(^{879}\) This has caused some controversy and has


\(^{875}\) The reform with regards to judicial review was also meant to make Swedish judicial review more coherent with the demands of EU law and review prompted by the ECHR. Proposition [Prop.] 2009/10:80 En reformerad grundlag [government bill] 145–148.

\(^{876}\) ibid.

\(^{877}\) Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 1996 s 370 (NJA 1996 s 370).

\(^{878}\) Eka (n 866) 579; Erik Holmberg and others, *Grundlagarna: Regeringsformen, Successionsordningen, Riksdagsordningen* (Tredje upplagan, Norstedts Juridik 2012) 546.

\(^{879}\) Commenting inter alia, about how president of the Supreme Court implied in a radio interview the Court was in part responding to the legislator’s passivity and being overburdened
been met by criticism.\textsuperscript{880} For instance, in the Manga-case, the Supreme Court did not accept the criminalization of possession of non-realistically drawn (Manga) child pornography, going against the stated intent of the legislator.\textsuperscript{881} In the Mefedron-cases, the Court went against settled case law and reduced the sentencing for drug crimes although the issue concurrently was being reviewed by a government commission of inquiry.\textsuperscript{882}

This criticism was partly substantive and partly a critique of the rise of juridification in Sweden.\textsuperscript{883} This rise in judicial activism however has not been expressed through any significant procedural review. It is first in the Swedish Court’s recent adjudication on the consultation procedure (see below) that such review is firmly established. Bearing this in mind, the following section explores the main legal foundation for law-making consultation in Sweden, RF 7:2; analyzing its structure and recent cases where the courts for the first time have challenged a law and exercised judicial review based on this very clause.

5.3.2. Analyzing the Swedish constitutional imperative to consult
Similar to the EU setting, the role of consultation is highlighted in the Instrument of Government with one constitutional clause being its primary legal foundation. Reference to consultation is found in the chapter of the RF dealing with the work of the Government, RF 7:2:

Preparation of business Art. 2. In preparing Government business, the necessary information and opinions shall be obtained from the public authorities concerned. Information and opinions shall be obtained from local authorities as necessary. Organisations and individuals shall also be given an opportunity to express an opinion as necessary.\textsuperscript{884}

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\textsuperscript{881} Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 2012 s 400 (NJA 2012 s 400).

\textsuperscript{882} Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] NJA 2011 s 357 (NJA 2011 s 357).

\textsuperscript{883} Taxén (n 879).

This paragraph expresses that the government should open up for participation in all areas of its mandate, including legislation. The obligation to consult applies in both the legislative setting as well as when the government is the deciding authority in specific individual cases.\textsuperscript{885} The constitution prescribes a consultative obligation ‘as necessary’. The constitution does not further elaborate on when it is necessary or required to obtain statements (the Swedish word in the constitution “yttrande”, which could also be translated with “expression”, it encompasses lay and expert opinions, neutral statements as well as technical advice) or which considerations should influence who is consulted.

The lack of specificity in this area seems to reflect a conscious choice on the part of the legislator. In conjunction with the birth of this constitutional clause (RF 7:2) the head of the ministry charged with drafting the legislation stated in travaux préparatoires that the government’s investigative preparatory mandate should not be locked down in legislation so that it may take whatever shape appropriate in relation to its aims.\textsuperscript{886} The travaux préparatoires to the Instrument of Government further state that detailed regulation in this area risks hampering the work of the government, making it unnecessarily bureaucratic and more difficult to adapt to societal change.\textsuperscript{887}

The constitutional text clearly attaches a functional role to participation in relation to legislative or policy outcomes: participation in decision-making by external actors is mandated only to the extent necessary or required. However, in deciding on when to consult and which form the consultation should take, the purpose of consultation should be considered. The travaux préparatoires highlight that the Swedish consultation procedure aims to secure high quality legislation as well as serve as a ‘democratic anchor’.\textsuperscript{888} The term ‘as necessary’ according to travaux préparatoires can therefore not exclusively be evaluated from efficiency or functional perspective. This dual function is also emphasized by the government in communication externally regarding the consultation procedure.\textsuperscript{889} The main focus of the constitutional

\textsuperscript{885} Eka (n 866).
\textsuperscript{887} ibid.
\textsuperscript{888} ibid.
clause is however clearly the quality of the governments work. The travaux préparatoires to the 1974 reform of the Swedish constitution state that the consultation procedure was constitutionally incorporated because it was considered important for the Swedish political process that the government throughout its work consults authorities, organizations, and other groups.\textsuperscript{890}

In light of Article 10(3) TEU, and in line with EU law requirements of consistent interpretation, it could be argued that the secondary function of Swedish government consultation highlighted in the travaux, its democratic anchor, increases in importance for EU law-making. In this context the phrase “as necessary” in the last sentence of RF 7:2 “Organisations and individuals shall also be given an opportunity to express an opinion as necessary” should be viewed in light of the principle of participatory democracy and Article 10(3) TEU: Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.

Similar to Article 11 TEU, RF 7:2 is somewhat vague and declamatory and its legal force and scope has remained uncertain. Despite its constitutional position and the long history of legislative consultation in Swedish governance, its veracity has rarely been directly challenged before court. Quasi-judicial bodies such as Parliamentary Auditors, the Swedish Ombudsman, the Council on Legislation as well as the Parliamentary Committee on the Constitution have highlighted the relevance of the consultation procedure and that as a rule it should considered mandatory as well as stipulated some requirements concerning the design of this procedure. The Council on Legislation, consisting of former Swedish Supreme Court justices has a constitutional obligation to conduct legislative preview.\textsuperscript{891} The Council’s opinions giving green or red light to government bills proposing new legislation therefore carry special significance.\textsuperscript{892} However, their opinion is only advisory, and recently for politically salient proposals, the government has pushed through legislation despite a negative opinion from the Council.

It was only in 2018 that the Swedish Courts for the first time exercised

\textsuperscript{890} Prop. 1973:90 287. The autonomy of certain Swedish authorities (municipalities in particular) within Swedish governance explain why public authorities, for the purpose of consultation, legislatively seem to take on the guise of external actors.

\textsuperscript{891} RF 8:20-22

judicial review in respect of the government consultation procedure, basing their assessment on RF 7:2. The judgments contribute in large part to clarifying the scope of RF 7:2 while leaving a few central questions unanswered. The analysis of these two cases is followed by Supreme Administrative Court’s judgment in HFD 2022 ref 50 which builds on and elaborates on these cases with regard to the demands in RF 7:2.

5.3.2.1. Procedural review on Swedish law-making consultation
In September 2018, two courts in Sweden delivered judgments in two unrelated cases where the Courts they reviewed the legislation by examining whether the requirement for consultation was observed. The Supreme Court as well as the Migration Court of Appeal (the highest Swedish court in its field of law) assessed in two separate cases whether the government had upheld the constitutional demand for public consultation. 893 The Supreme Court judgment (NJA 2018 s. 743) constitutes the stronger precedent, partly because it was more detailed and explicit and partly because the Supreme Court carries more legal clout than the Migration Court of Appeal (Miöd UM12649-18) whose jurisdiction is limited to migration and asylum cases. In the Swedish context the two cases are groundbreaking in that they clearly established that judicial review encompasses the government consultation procedure. Although this had been previously claimed in doctrine, it had never been verified in case law. 894 Through these cases the courts also interpreted the scope of judicial review according to the more recent amendment of the Constitution.

The two cases dealt with two disparate legal rules. The main question in the Supreme Court case was whether a legal reform establishing stricter sentencing for illegal possession of arms should be given effect. The Migration Court of Appeal however, was deciding whether to apply a new law establishing lower evidentiary standards in residency cases for minors. Despite the differences of the laws, there were a number of similarities in how the government had conducted its law-making consultation. In both cases, the consultation timeframes were very short; three weeks for the law regarding residency for minors and four weeks (coinciding with a public holiday over the summer) for the weapons law. 895 The government had consequently disregarded what was considered the standard practice of three months. While the three-

893 Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 2018 s 743 (NJA 2018 s 743); Migration Court of Appeal judgment 23 Sep 2018 UM12649-18 (HFD).
894 Eka (n 892).
895 NJA 2018 s. 743 para 17-18 and Miöd UM12649-18 section 3.3.
month timeframe is not locked in any binding legislation, the Council on Legislation and the government have emphasized it as a relevant signpost for consultation timeframes. As a result of the short timeframes, several actors had declined to comment on the legislative proposals or noted the short deadline. Further, substantial objections were in both cases raised against the proposal itself and the Council on Legislation had issued a negative opinion for both legislative proposals, stating that the constitutional duty to consult according to RF 7:2 had not been upheld.

In both cases, the courts agreed that the government consultation procedure falls under the scope of judicial review of RF 11:14. Similarly, the Supreme Court and the Migration Court of Appeal were also clear on the limited judicial review Swedish law permits when dealing with laws passed by Parliament. Apart from these basic similarities, the Courts diverged in their focus and analyses of RF 7:2 and their position as to the discretion the government had in relation to law-making consultation.

A close reading of the judgments demonstrates two somewhat diverging explorations of the scope of RF 7:2 and government discretion. While the Migration Court of Appeal stressed the important role consultation plays, it mainly emphasized the broad discrentional scope RF 7:2 affords the government. Migration Court of Appeal noted consultation is not framed as an absolute duty. In the final analysis, the Migration Court of Appeal concluded the government is best placed to decide how to prepare legislation and determine what is necessary. It here stressed that the mode of consultation and participation is deliberately not regulated in the Instrument of Government. Besides the focus on broad discretion, the Migration Court of Appeal found important that the government had continued with some preparatory work after the Council on Legislation red-lighted the proposal, also noting that judicial review in Sweden plays a special role when basic fundamental rights are in question. The Migration Court of Appeal concluded the case at hand did not touch upon a potential breach of any fundamental rights. In addition, it noted that the challenged law bestowed rights and privileges upon private persons. These comments from the Migration

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896 ibid.
897 Miöd UM12649-18 section 4.1, see also Prop. 1973:90 179, 287, 288.
898 Miöd UM12649-18 section 4.1.
899 ibid.
900 ibid.
901 ibid.
Court give some indication of when consultation duties weigh heavier and judicial review should be stricter. Overall, the Migration Court of Appeal’s judgment leaves the government with relatively broad discretion with regard to legislative preparatory work.

The Supreme Court took a somewhat different direction and delivered more precise standards as to judicial review in relation to legislative consultation. The Supreme Court highlighted that legislative consultation is a central part of “the established order” for the Swedish legislative process and that it should be upheld even in crises situations.\(^{902}\) There is consequently a mandatory legal duty to consult.\(^{903}\) The Supreme Court further elaborated that this means a flawed consultation procedure may lead to a legal norm (with flawed or lacking pre-legislative consultation) being set aside after judicial review.\(^{904}\) The Supreme Court also clarified its role in relation to the Council on Legislation in terms of legislative review. The Council on Legislation’s advisory ex-post role is more encompassing than the Supreme Court’s ex ante review.\(^{905}\) The Supreme Court also highlighted the fact that judicial review according to the constitution is particularly limited in examining a law passed by parliament.\(^{906}\) However, the Supreme Court stressed that the courts in the end have to come to their own conclusions regarding the validity of the law and cannot rely alone on the parliaments reasoning and judgment.\(^{907}\) Considering that the Constitution emphasizes that Parliament is the main interpreter of the Constitution – if and in what way Parliament has reacted or commented on a negative opinion of the Council on Legislation is then a determining factor in judicial review.\(^{908}\)

Based on these points of reference, the Supreme Court determined that a legislative consultation procedure that runs over a couple of weeks is too short and should be considered a breach of the requirement of the government’s duty to consult.\(^{909}\) It also noted that the established

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\(^{903}\) NJA 2018 s 743 paras 28-31.  
\(^{904}\) NJA 2018 s 743 paras 32-39.  
\(^{905}\) NJA 2018 s 743 paras 32, 37.  
\(^{906}\) NJA 2018 s 743 para 38.  
\(^{907}\) NJA 2018 s 743 para 39.  
\(^{908}\) ibid.  
\(^{909}\) NJA 2018 s 743 para 40.
practice and guidelines for consultation timelines is three months.\textsuperscript{910} However, the Court further argued that this breach – i.e. the inadequate consultation timeframe – could not in and of itself be viewed as the ‘significant breach’ required by law on judicial review in order for the legal rule to be set aside.\textsuperscript{911} According to the Supreme Court, a significant breach is at hand could be when flawed legislative preparation has impacted issues related to the rule of law and legal certainty. \textsuperscript{912} One such instance the Court elaborated, is when consultation is absent in combination with an insufficient examination of the consequences of the legislation. In the current case, while the timeframe was too short, the lapse in consultation had not entailed that the potential consequences for private persons were left unexplored or unforeseeable.\textsuperscript{913} Consequently, the breach was not significant enough to warrant that the legal rule be set aside. The stricter sentencing was consequently applied.

In sum, the two cases clarify that the government consultation procedure may be subject to judicial review and that flawed consultation may lead to the invalidation of a legal rule. However, given that judicial review is limited to significant breaches of legally established procedure a lapse in consultation design or practice must either be significant or point to unforeseen consequences in order for the norm to be set aside. Too short timeframes are not in and of themselves to constitute such a breach. Whether the Council on Legislation has flagged the consultation as inadequate is important, as well as to what degree Parliament has responded to such an opinion of the Council.

The Supreme Court’s reasoning was picked up by the Council on Legislation in its ex-post review of the governments’ controversial bill related to the Cementa-case,\textsuperscript{914} where the Council on Legislation stated that according to NJA 2018 s. 743, the consultation period of one week for the draft legislative bill did not live up to constitutional demands. This alone, the Council on Legislation stated, was sufficient cause for issuing a negative opinion.\textsuperscript{915} However, the government and parliament disregarded the opinion of the Council on Legislation and signed the

\textsuperscript{910} NJA 2018 s. 743 para 29.
\textsuperscript{911} NJA 2018 s. 743 para 40.
\textsuperscript{912} ibid.
\textsuperscript{913} ibid.
\textsuperscript{914} Environmental Court of Appeal, M 1579-20, 6 June 2021 (MÖD M 1579-20).
\textsuperscript{915} The Council on Legislation did however also take issue with substantive issues in the legislative proposal, e.g. that it may violate EU and international law, as well as the constitutional requirement of a law being ‘general’ in scope. ibid.
bill into law (the legislative bill was intended to secure critical access of cement for the Swedish industry through limestone mining on the Swedish island of Gotland). The law, which provided for a time-bound exception to the duty of submitting an environmental impact assessment, was intended to by-pass the Environmental Court of Appeal’s judgment to deny the company Cementa license to mine because of its lacking environmental impact assessment, and avert a serious economic and societal consequences because of the lack of cement. Following their participation rights granted by the Aarhus Convention, several environmental organizations appealed the law before the Supreme Administrative Court with one of its pleas relating to the insufficient consultation process. The Supreme Administrative Court in HFD 2022 ref. 50 rejected the plea in a rather succinct way focusing on whether the short timeframe was excusable.  

In the end the Supreme Administrative Court determined, that a crises may legitimately shorten the timeframes considerably. In this case, the fact that the government had still conducted a consultation considering the urgency of the situation (without a permit to operate the companies could not remove water from the mining sites which threatened to damage the operations, rendering them inoperable), the Supreme Administrative Court found the short timeframe acceptable.

While the cases provide important direction in terms of understanding the obligations that RF 7:2 lay down, there is still much left unanswered by the Swedish courts. None of the cases dealt with the secondary purpose of law-making consultation— namely its democratizing function. Further, there was no discussion of the application of administrative law principles in interpreting the discretion of the government. This could be a conscious decision of the Swedish Courts, or merely a consequence of the case being mainly about timeframes rather than other dimensions of the consultation design. It is also an open question to what degree the duty to consult applies to EU law-making, and what opportunities of redress, if any, are available at the national level. There is also no discussion of EU-law and international law obligations of providing opportunities for citizens to participate directly in the law-making process and how these may coincide or go beyond the mandates in RF 7:2 and if and how they play out in judicial review.

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916 Högsta förvaltningsrättens årsbok [HFD] [Supreme Administrative Court Year Book] HFD 2022 ref 50.
917 HFD 2022 ref 50 paras 34-37.
918 ibid.
Charting the government’s discretion in consultation therefore demands a broader outlook through placing RF 7:2 in its constitutional setting and looking at how the Swedish courts have interpreted the governments’ discretion in analogous situations.

5.3.2.2. The principle of government consultation in constitutional context

The idea that public participation is intimately connected to justice and the rule of law is reflected in Swedish legal tradition, including through the constitutional centrality of the freedom of information and the principle of public access to official documents. Dating back to 1766 it represents the world’s first constitutionally recognized right of freedom of information. It is also demonstrated in the robust rules established in administrative law for the right to be informed and heard as well as the principle of access to public documents the duty to serve (serviceskyldigheten).

The Supreme Administrative Court, in exercising judicial review of whether the government had adequately stated the reasons for its decision to deny state aid, discussed the application of administrative law principles to the work of the government. The Supreme Administrative Court noted that although the provisions in the Administrative Procedure Act (Förvaltningslag 2017:900 – FL) which place a duty to state reasons, do not directly apply to the government, the act and administrative law principles are generally adhered to by the government in its work. The Supreme Administrative Court then reminded of the relevance of the RF 1:9 which obliges courts, administrative authorities and others performing public administration functions to pay regard to the equality of all before the law and shall observe objectivity and impartiality. The Supreme Administrative Court opined that stating reasons is a precondition for reviewing whether impartiality and objectivity have been upheld.

This line of reasoning also applies to the transparency of the decision-making on consultation and the consultation process itself. The Supreme Administrative Court reviewed the government’s decision to

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919 Manninen (n 42).
920 See for e.g. 4, 5, 16 och 17 §§ Förvaltningslag as well as relevant passages of Förvaltningsprocesslagen, insert citation
921 Högsta förvaltningsrättens årsbok [HFD] [Supreme Administrative Court Year Book] HFD 2011 ref 10.
922 HFD 2011 ref. 10
shut down the nuclear reactors of Barsebäck (RÅ 1999 ref. 76) based on a law adopted with the purpose of scaling back Sweden’s use of nuclear energy.\textsuperscript{923} The decision by the government was contested by several firms operating within the energy sector (some of whom were running the facilities in question).\textsuperscript{924} The plaintiffs contested the decision arguing that the government had inadequately prepared the decision as well as the legality of the law upon which the decision was based.\textsuperscript{925} The Supreme Administrative Court accepted the governments’ position that the law-making process should be seen as a part of the preparation of the contested decision and highlighted that the proposals had been subject to broad public consultations.\textsuperscript{926} In addition, the Court reiterated that it was government established practice to follow the principles expressed in FL and explicitly mentioned the general demands on public administration including the duty of investigation as well as the duty of service outlined in FL as relevant.\textsuperscript{927} Referring to travaux préparatoires, the Court held that public authorities are obligated to investigate and prepare issues to the degree required.\textsuperscript{928}

In examining the Supreme Administrative Court’s reasoning on the application of Swedish administrative law principles and the Administrative Procedure Act to the government’s work two underlying assumptions of the Supreme Court emerge. The first is that the established practices of the government in adhering to administrative law principles has some legal value; either because they generate some form of legitimate expectations or demonstrate a consciousness of a legal obligation (there is no argument however that they amount to customary law). The second is that the administrative law principles and the provisions of the FL flesh out the duties laid out by the constitution, duties which are directly applicable to all state actors, including the government. Most notably this includes the principles in the constitution (RF 1:9) of equality, objectivity, impartiality, non-discrimination, as well as the purpose of public institutions to serve the common good of the people from which all public power is derived.\textsuperscript{929} From this perspective, to the extent these administrative law regulations and principles can be derived from underlying constitutional principles and values, they apply not only to

\begin{footnotes}
\item[923] RÅ 1999 ref. 76.
\item[924] RÅ 1999 ref. 76.
\item[925] RÅ 1999 ref. 76 title 5.1 and 5.2.2.
\item[926] RÅ 1999 ref. 76
\item[927] RÅ 1999 ref. 76. title 5.2.1.
\item[928] Cf. 8 § Författningsprocesslag (1971:291 FPL)
\item[929] RF 1:9 and RF 1:2.
\end{footnotes}
public authorities under the auspices of the government, but also to the government itself. This legal structure finds parallel in EU-law as demonstrated in the analysis of Article 11 TEU in constitutional context in chapter 4.

The case law applying administrative law more broadly to the government’s work, primarily concerns direct forms of exercise of public authority towards a private party (myndighetsutövning). The government is here acting not as a legislator. The application of administrative law principles to the government’s internal work is more tenuous although the reasoning of the Supreme Administrative Court indicates that the principles apply broadly to the governments’ work. Overall, case law cautiously supports that the FL applies to the work of the government, beyond individual cases. This has also been supported directly by the influential opinions of the Swedish Parliamentary Ombudsmen. Although the Swedish Ombudsman’s opinions are not strictly legally binding, they are generally respected and adhered to by public authorities and the government. Further, government internal codes of conduct / guidelines clearly state that it is important that general administrative law principles (partly codified in FL) are followed in all areas of the governments work. Such guidelines serve as interpretative aids in case law in on the scope of responsibility of the conduct of public authorities.

The most relevant administrative law principles and rules of the FL in relation to consultation are those which deal with preparing and processing administrative cases. The principle of investigation in Swedish administrative law demands that authorities investigate matters in accordance with their demands. The duty to consult can therefore cautiously be connected to the general principle of investigation (similar to the duty of care at the EU level) and general principles of Swedish administrative law. Other key principles are the principles of objectivity, transparency and general demands on public administration of cases. According to 9 § FL, each case involving a

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930 See Regeringsrättens årsbok [RÅ] [Supreme Administrative Court Year Book] RÅ 1991 not 546.
931 HFD 2011 ref. 10, RÅ 1999 ref. 76 and RÅ 1991 not. 546.
933 see e.g. Regeringen, Gula boken, Departementsserien Ds [government ministry series] (Ds 1998:39).
934 See e.g. 4-9, 23-26 § § FL.
935 23, 26 § § FL. See also Ds 1998: 39 14.
private party should be administrated as simply, quickly and inexpensively as possible without risking the quality of the decision.\footnote{936} The principle of efficient and quick administration has also specifically been highlighted in the Committee on the Constitution’s reviews of the governments work.

Overall, it is clear that administrative law which concretizes constitutional obligations is relevant to an interpretation of the scope of RF 7:2 and the government’s discretion in law-making consultation. While the government is not directly subjected to the laws of the FL, it is clearly obliged to follow constitutional principles, whether they have found further concretization in administrative law or not. The clause on consultation should then be read in conjunction with the general principles expressed in the Swedish constitution: that public institutions should serve the common good and strive for universal participation and equality, that children’s rights should be cared for and that public administration should consider equality before the law as well as objectivity and impartiality.\footnote{937} Beyond this, certain administrative law principles may be cautiously applied to the government’s internal work; e.g. the principle of investigation and efficiency are helpful tools in unlocking and understanding what RF 7:2 refers to when stating “as necessary”.

5.3.2.3.\textit{Bringing in EU law from the sidelines}

The analysis in chapter 4 made the case for an interpretation of the principle of participatory democracy, as applicable to EU law-making consultation also at the national level. Article 10(3) TEU is framed as a right, and as can be recalled, drafted in the same style as the citizenship rights listed in Articles 20–24 TFEU.\footnote{938} It stipulates that “every citizen shall have the right to participate in the democratic life of the Union” and that “decisions shall be taken as openly and as closely as possible to the citizen”. As stated, the wording of Article 10(3) TEU indicates that the right of participation referred to here is not just one of voting. The reference to closeness and openness of EU decision-making makes this clear. Moreover, as was analyzed in the previous chapter, the applicability of Article 10(3) TEU to participating in the EU legislative process has been confirmed by the CJEU. In chapter 4, it was argued that Article 10(3) TEU does not create rights which are justiciable as

\footnote{936} 9 \S FL.
\footnote{937} See RF 1:1
\footnote{938} The link between Title II TEU and the citizenship rights in Articles 20–24 TFEU is moreover guaranteed by the ECI, inserted into Article 11(4) TEU by the Lisbon Treaty, also with a legal basis in Article 24 TFEU.
the provision cannot be considered sufficiently clear, precise and unconditional. However, this does not mean that it does not hold interpretative value. The question then is if, and in what way Article 10(3) TEU can inform the interpretation of laws which prescribe actions for national actors related to the democratic life of the Union.

Supporting the notion of a citizen’s right to participation beyond the ballot-box is also international human rights law. As discussed in the previous chapter, international human rights law also recognizes a right to participate in political decision-making.939 As is clear from Article 25 of the ICCPR, as well as the interpretive General Comments and jurisprudence adopted by the UN Human Rights Committee, restrictions on direct and indirect political and public participation are allowed under international human rights law only when these are objective, reasonable and non-discriminatory.940 Article 25 ICCPR must also find expression in a real opportunity to exercise this right.941 This includes the opportunity to participate in the legislative processes which the state has a duty to facilitate,942 and which includes the right “to be consulted at each phase of legislative drafting and policymaking; to voice opinions and criticism; and to submit proposals aimed at improving the functioning and inclusivity of all State bodies”.943 How far this principle extends in shaping an interpretation of the legal obligation to consult in the Swedish case, has not been dealt with in literature or case law. There is no case law before the Human Rights Committee on political participation with regards to law-making with regard to Sweden. The Human Rights Committee’s case law on the right to participate in public affairs in general is furthermore rather sparse and primarily concerns voting rights.944 However, the international law perspective supports an interpretation of intrinsic participation, procedural requirements to give expression to the right as well as facilitating enjoyment of the right to participate. Contrary to the EU, Sweden is a party to the convention (and its protocols) and is therefore...

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939 Article 25 ICCPR.
940 UNHCR, General Comments Article 25 para 4
941 Ibid para 1.
943 Ibid.
944 The UN HRC case database reveals some cases involving Article 25 ICCPR, none of which deal with participation in law-making.
constitutionally obligated to uphold the articles of the ICCPR. As discussed, it is however, furthermore unclear where legal accountability can be placed when the State’s duty to facilitate the right to participate in the legislative process is transposed to the EU level through EU harmonization. In any case, the interpretation of Article 10(3) TEU (and also Article 11 TEU) is coherent with Article 25 ICCPR and the application of the principle of participatory democracy to the national level helps close this gap.

In order to analyze in what way the principle of participatory democracy interacts with the national framework for consultation, it is necessary to first outline how the current Swedish consultation procedure is operated for EU law-making. It is clear that the outlined legal framework for law-making consultation applies when EU norms are implemented. There is in effect no difference in the legislative process whether the law has been internally initiated or is derived from EU law. The national process for implementing EU directives therefore follows the regular legislative procedure including consultation. One key difference for the Swedish internal procedure compared to EU consultations is that the government is under obligation, following form the principle of loyalty (4:3 TEU), to take all necessary steps to implement EU legislation in time (in case of a breach, the Commission can initiate infringement procedures according to 258 TFEU). As the Lisbon Treaty has streamlined the infringement procedure, this means the risk for economic sanctions in the event a member state does not implement a directive in time has increased. At the same time the room to implement legal acts according to national traditions has decreased as the legal acts are increasingly being adopted as either regulations or full-harmonization directives.

Because the substance of a piece of legislation is already fixed when EU acts are adopted there is limited room left to influence the outcome of the legislative process during the implementation phase. Investigations, consultation and legislative checks from parliament...
therefore have a diminished or changed role. In some areas, EU legislation occurs in phases which are not aligned to the Swedish process. Framework legislation is adopted by the Council and Parliament followed by delegated and implementing acts. In addition, technical standards adopted by the Commission complement the legislation. Experiences from e.g. the area of financial instruments, shows that law and rule-making procedures combined can take quite a long time. Implementation deadlines can also be quite short, which puts a strain on the structured and sometimes formalized Swedish legislative process. The government has stated in travaux préparatoires to legislative reforms to enhance democracy that it is vital that interested and concerned parties are involved throughout the legislative process and that anchoring the work early and broadly increases the opportunities for consolidated Swedish positions as well as improved implementation. Such statements although not legally binding per se, could serve as interpretational aids for the Court in establishing government discretion in the event of judicial review.

With regard to Swedish positions in negotiations on EU legislation, it is not clear to what degree the constitutional demands on consultation are not applicable as for implementing EU legislation or in preparing legislation derived from the national level. According to RF 7:3, government decisions are decided upon at a ministerial meeting. A senior government officer’s participation in e.g. EU Council of Ministers, has traditionally not been interpreted, a government case or matter. The consultation provision of RF 7:2 which only is applicable for government matters is therefore not directly applicable to preparing Swedish positions in negotiations on EU directives or regulations. The question is whether this mainstream interpretation is still tenable in light of the principle of participatory democracy.

948 ibid.
949 Skarp (n 946) 22.
951 Förordning med instruktion för Regeringskansliets (Svensk författningssamling [SFS] 1996:1515) from the 1 § Ordinance (1996:1515) with instruction for Government offices it is clear that the ministries should assist the government and the cabinet members in their work; See also Konstitutionsutskottets betänkande 2012/13:KU10 [parliamentary committee report] 107.
953 ibid.
In travaux préparatoires preceding Sweden’s EU Accession Act it was maintained that the consultation procedure should retain its position in Swedish governance, including within EU cooperation.\(^{954}\) This position has been reiterated by the Committee on the Constitution, which also has emphasized that determinations on the form and scope of the consultation procedure in relation to EU negotiations or proposals for EU directives, should be principally the same as for nationally based legislation, and that opinions should be documented.\(^{955}\) The Prime Minister’s Office’s instructions for rules on EU issues (Statsrådsberedningens EU cirkulär), referring to RF 7:2, states that ministries should involve parties concerned already during the negotiation stage in order to harness their knowledge and competence.\(^{956}\)

In general, it is however first when the Commission presents its thoughts or proposals that the government formally announces its position.\(^{957}\) This is often done through memorandums submitted to the Swedish parliament.\(^{958}\) Internal surveys suggest that ministries conduct consultations while the Commission is still in its early preparatory stages; many times informally and sometimes formally.\(^{959}\) In some cases ministries send preparatory statements, e.g. memorandums, suggestions and white papers from the Commission for consultation. At the same time the consultations of the Commission may also go directly to Swedish authorities.

In an attempt to somewhat synchronize the Swedish process with the realities of EU law-making a form of early semi-formal consultation, the co-called EU thematic consultation (EU-sakråd) were officially launched 2017.\(^{960}\) The thematic consultations are supposed to complement traditional written consultations, are organized in the form of hearings and occur early in the decision-making process. In the EU context it entails discussion of e.g. policy papers, EU’s future agenda etc. This has somewhat increased visibility of the government’s preparation of its position in EU policy and law-making. However, the

\(^{954}\) See Konstitutionssutskottets betänkande 2012/13:KU10 [parliamentary committee report].
\(^{955}\) ibid.
\(^{956}\) Statsrådsberedningen, Riktlinjer för beredningen av EU frågor för Regeringskansliet, Cirkulär 3.
\(^{957}\) SOU 2016:10 EU på hemmaplan 109.
\(^{958}\) ibid.
\(^{959}\) ibid.
thematic consultations are highly limited in range and frequency across ministries.\footnote{ibid.}

It is thus clear that while there are some additional considerations, for implementing EU law, the Swedish constitutional clause operates more or less in the same manner in the context of EU law making. However, when it comes to negotiating EU law, the situation is more complicated. There is currently a distinction drawn between the duty to consult for EU law-making at the implementation stage and the possibility to consult in the context of Sweden’s participation in the formation of EU law during legislative negotiations. The main reason can be traced back to the standard legal interpretation that the Swedish governments participation in EU law-making, specifically negotiating in the Council, formally does not qualify as government issues/matters of government under RF 7:3 where such matter need to be taken a collegial body.\footnote{Cf. the travaux to the constitution, clarify that the government has a collective character (i.e. Sweden does not have ministerial rule). However the criteria surfacing in the travaux is vague, government matters are all issues which demand a form of decision from someone in the government. Proposition [Prop.] 1973:90 Grundlagsutredningen [government bill] 179, 184.} The categorization of Sweden’s participation in the EU law-making process affairs as not being a “government matter” is not an uncontested view. This interpretation is not reflected in the legal text itself, but the travaux related to Sweden’s accession to the EU.\footnote{Proposition [Prop.] 1994/95:19 Sveriges Medlemskap i Europeiska Unionen [government bill]. 458-460 (Prop. 1994/95.19).} At that time, the travaux expressed the stated ambition and expectation that the Swedish consultation procedure would keep its central role for the government’s work, noting the often lengthy legislative procedures in the EU which would give ample time to consult nationally.\footnote{ibid.} The travaux préparatoires to Swedish EU accession furthermore noted, as a positive phenomenon, the double opportunities that would be provided for interest-groups to consult: at the national and EU-level through engaging directly with EU institutions.\footnote{ibid.} However, the question is whether the standard interpretation of what is government business becomes increasingly untenable as transparency, participation and accountability mechanisms intended for political decision-making – which Swedish positions in EU negotiations in essence are – do not apply to decision-making – effectively turning law-making consultation during the negotiation phase frequently into a black box. The Committee on the Constitution has touched upon this issue, and
summarily concluded that the government should clarify that the rules and practices which apply for government matters and decision, also apply for EU-matters.\textsuperscript{966} Thus far, this has not occurred.

In a welcome development, the OECD recently tracked data on EU law-making consultation during negotiation and transposition stage for EU Member States, which demonstrates that with few exceptions, consultation during the negotiation stage is generally lacking amongst Member States, including for Sweden.\textsuperscript{967} While the OECD data is not so granular, a recent quantitative study of Swedish EU law-making, the first of its kind, reveals an even gloomier picture. A systematic review of 2209 memorandums on ‘EU-proposals’ between 2001-2019 to which the Swedish government (ministries) was obliged to present the Swedish position in to the Swedish Parliament demonstrates that that consultation during negotiation is largely absent.\textsuperscript{968}

The graph below, from Strömvik’s report asks the question: how frequently has consultation occurred (literal translation of ‘Figur 1’). The red line represents those cases for which no consultation occurred.\textsuperscript{969} The latest figures for 2019 show that in 80% of the cases, no consultation whatsoever occurred, see graph below. Furthermore the study revealed, that in those few cases where consultation was reported, it was often with one or a couple of public agencies.\textsuperscript{970} In the rare case non-state actors were involved, information was lacking on who these actors were and what were their contributions.\textsuperscript{971} The overall picture indicates this to be an area of real concern. For most other Member States, the situation appears similar.\textsuperscript{972}

\textsuperscript{966} Konstitutionsutskottets betänkande 2014/15:KU10 [parliamentary committee report] chapter 5; The committee states the government should clarify that routines and rules applicable to government business and matters, also apply to EU-matters. Statens Offentliga Utredningar [SOU] 2008:118 Styra och ställa [government report series].
\textsuperscript{967} OECD, Better Regulation Practices across the European Union 2022 (n 843) chapter 3.
\textsuperscript{969} The green line represents completed consultation and the blue line ‘ongoing’ consultations.
\textsuperscript{970} Strömvik (n 968).
\textsuperscript{971} As the discussed study dealt with memorandums on all types of EU initiatives and proposals, and not specifically legislative ones, it is unclear whether legislative proposals were more robustly consulted. ibid.
\textsuperscript{972} Most EU Member States do not apply their regulatory toolkit to EU law before it is adopted at EU level, nor rely on impact assessment to define their negotiation position. Similarly, the majority of individual Member States does not engage with domestic stakeholders to form a negotiating position. See OECD, Better Regulation Practices across the European Union 2022 (n 843).
In line with the EU principle of consistent interpretation, the principle of participatory democracy would therefore influence the interpretation of the Swedish constitution in two crucial ways. The first is the phrase in RF 7:2 the phrase “as necessary” in the sentence “Organisations and individuals shall also be given an opportunity to express an opinion as necessary” (emphasis added), should be understood and measured against the democratizing function of participating in law-making and citizen’s rights to participation in the democratic life of the Union. This statement should therefore be interpreted as establishing a general presumption for consulting broadly with non-state actors for EU law-making. This interpretation is possible within the lexical meaning of the constitutional clause. As discussed, it also finds some support in the travaux to the Instrument of Government emphasizing that consultation should serve as a ‘democratic anchor’ and would simultaneously align to international law obligations with regards to political participation. This interpretation however, would require a shift in the established practice of focusing heavily on agency consultation and would also represent a shift away from established legal scholarship on the constitutional provision.

The second way in which the principle of participatory democracy informs the understanding of RF 7:2 is that it extends the duty to consult, not just to the implementation of EU-law but also to the

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973 Note that while the principle of participatory democracy is only applicable to EU law-making, Article 25 ICCPR is applicable to all Swedish law-making. This however fall outside of the scope of this book.
negotiation of EU law. Again, such an interpretation is possible within the lexical formulation of the constitutional clause. It would however contradict some statements in the travaux, case law and Swedish legal doctrine that participating in EU law-making negotiations does not fall into definition or category of “government matters”. At the same time such an interpretation aligns some EU accession travaux and pre-legislative statements, which posit that the Swedish consultation procedure shall maintain its important role also post EU accession.974

Crucially, depriving citizens of the opportunity to participate in EU law-making also through national channels would de facto interfere with their right according to Article 10(3) TEU, especially considering there is no unequivocal right to participate in Commission consultation. Having considered these important but generally overlooked,975 elements of the legal imperatives of Swedish government consultation, it is clear that the legal obligations stemming from RF 7:2 should likely be applicable to the EU law-making in general, including the negotiation phase. The following section outlines a framework for EU law-making consultation for both the EU and national level, grounded in the principle of participatory democracy.

5.4. **Multi-level consultation, charting a coherent framework**

The analysis thus far has scrutinized the principle of participatory democracy and related rights at the EU level and gained insight into the potential interplay with national law guiding EU law-making consultation. This section charts a detailed framework for EU law-making consultation which is associated with – and stems from – the principle of participatory democracy, while paying attention to the institutional practices and soft law instruments which currently govern consultation and may interact with the implementation of the principle. First, the applicable rules for Commission consultation are outlined, followed by the legal framework which applies to Swedish EU law-making consultation. Finally, the legal frameworks are juxtaposed, and implications for the implementation of the principle of participatory democracy, discussed.


975 An argument for the potential impact of international human rights law (and not EU law or Article 10(3) TEU) on the Swedish obligation to consult has however been raised; See Golmohammadi (n 854) 8-9. Furthermore, although the legal dimensions are generally overlooked, there have been calls for formalization of the government’s work during the negotiation phase with regards to participatory input. See Thorbjörn Andersson, ‘EU-Rättens Påverkan På Svensk Lagberedning’ [2020] SvJT 1, 26.
5.4.1 Commission consultation

5.4.1.1 A consultation is initiated

It is clear that the principle of participatory democracy, as well as the constitutional legal foundations (prominently Article 2 Protocol No. 2) outlined above constitute not only the backbone but much of the flesh of the legal framework for law-making consultation at the EU-level. Secondary legislation directly dealing with consultation is notably absent. What exists beyond constitutional imperatives are soft-law instruments guiding consultation practice, such as minimum standards, guidelines and toolboxes.976 These are not legally binding per se, although they may inform the interpretation of the scope of legally mandated consultation duties and in certain cases carry legal weight through establishing legitimate expectations. To this one should add, quasi-legal instruments such as inter-institutional agreements, rules of procedure, and finally various hard law that does not primarily deal with consultation but is relevant for various elements of a consultation exercise and sketching the contours of the Commission’s discretion. To the degree these various instruments are relevant for a legal framework they will be discussed or incorporated into the legal analysis. Noting the CJEU’s willingness to enforce self-imposed duties, Better Regulation standards may lead to binding procedural requirements.977 The Lisbon Treaty has clarified that interinstitutional agreements may be binding. The assumption has also been made that the contracting parties expressly intend to be bound by the agreement if the wording is ‘clear’ or ‘sufficiently precise and unconditional’.978 As discussed, the Court has also engaged directly with the provisions of the Interinstitutional Agreement on Better Law-Making, e.g. in a case brought by a Member State for the annulment of a directive.979 The interinstitutional agreement was invoked in relation to an allegedly flawed impact assessment for a directive.980 Even though the plea was not successful, the way the Court engaged with the provisions of the interinstitutional

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979 Case C-128/17 Poland v Parliament and Council.

980 Case C-128/17 Poland v Parliament and Council paras 30-47.
agreement, in particular in assessing the discretion the provisions in question afforded, confirms the status of interinstitutional agreements. In addition it is worth stating that the Better Regulation Guidelines and accompanying Toolbox, can be seen as complementing, expanding and refining the General Principles and Minimum Standards. Although the language and content of both must always, as was seen in chapter 4.1, be assessed in light of the principle of participatory democracy (e.g. when the language of the guidelines e.g. misrepresented the Treaty article with ensuing effects).

When should a consultation procedure be initiated?
When the Commission is preparing legislation, it is legally obliged to broadly consult parties concerned, ensure that a genuine link to citizens is established, including that local and regional dimensions are observed.\textsuperscript{981} This means paying attention whether parties concerned are organized, if at all. Both the normative and functional rationales underpinning the legal duty to consult highlight the importance of initiating consultation at a stage when it can inform the actual outcome of the proposal at hand, including at the agenda-setting stage.\textsuperscript{982} Considering that the duty to consult is also enshrined in Protocol No 2, it means consultation should be exercised at a stage where it can inform determinations on scope and content according to the principles of subsidiarity and proportionality.\textsuperscript{983}

The Commission itself states that law-making (measures accompanied by an impact assessment) should be consulted upon.\textsuperscript{984} Although the consultations on policy and rule-making are mandated by Article 11 TEU, there is a stronger mandate to consult for law-making.\textsuperscript{985} As discussed, the ECJ has linked reports underlying Inception IA:s as tied to the “legislative process”, and according to Commission new practice,

\textsuperscript{981} Article 10 (3) TEU, Article 11 TEU, Protocol No. 2.
\textsuperscript{982} For legislative proposals, Protocol No. 2 states this should occur before the proposal, Article 2 Protocol No. 2. Similarly, the consultation goals of ensuring transparency and coherence require consultation early enough, Article 11(3) TEU. The minimum standards also clarify ‘to be effective, consultation must start as early as possible’ Commission, General Principles and Minimum Standards (n 39) 18.
\textsuperscript{983} A possible implication is here that consultations should not start before the end of the one-month feedback period for the impact assessment or roadmap, since the feedback has to be taken into account when developing the consultation documents. This point was raised by the German Handelsverband during 2018 Better Regulation Stocktaking exercise, \textit{Consultation Reply of German Handelsverband to Commission Stocktaking on Better Regulation (2018)} on file with the author.
\textsuperscript{984} Commission, Better Regulation Toolbox (n 976).
\textsuperscript{985} Article 2 Protocol No. 2.
parties concerned as well as the main elements of the consultation strategy, including tools and timing, are now conveyed through the ‘call for evidence’. The call for evidence can be in lieu of an ‘initiative, an impact assessment a fitness check or a ‘back-to-back’ (evaluation and impact assessment at the same time). A rational point of departure in order to observe the constitutional obligations concerning law-making consultations is then the point when there is a stated intent or consideration to legislate. Allowing a minimum access to documents, and some form of feedback at this stage gives stakeholders the opportunity to voice concerns about whether a legislative act is an appropriate instrument.

However, one important point is here worth drawing attention to; in many cases there has been input and informal consultations before the publication of a ‘call for evidence’, for instance through the advisory groups the Commission maintains or the result of an evaluation of legislation in which stakeholders have been consulted or other fora such as the Fit for Future Platform. Although such consultations from the Commission’s perspective are not subject to minimum standards, Article 11 TEU with its emphasis on transparency as a consultation goal and Article 10(3) TEU demand that such input is somehow referenced, at a minimum in summary form, at some point in the legislative preparatory work. Considering the CJEU has highlighted the link between a right to participate and relevant knowledge informing such action; it should be clear when the Commission is consulting whether targeted consultations or significant input on the particular topic have already occurred through advisory committees with stakeholders. This approach is also reinforced by the Commission’s own Principles and Minimum Standards stating that the consultation procedure should be clear and should include all necessary information to facilitate responses.

During the preparation of the IA the policy desk is still central but the
consultations strategy is approved and strategies and documents are discussed and endorsed by the Inter-service (steering) group (ISG). The ISG is an ad hoc group created were different Commission DGs are represented: “An ISG steers the impact assessment process and contributes to the preparation of the 'call for evidence and the draft impact assessment report. The ISG should be set up immediately after the initiative is validated.” 992 The department responsible and the ISG work together, with internal consultation prompted also by Commission’s legal obligation to act as one collegiate body and in order to comply with its rules of procedure. 993

Who has the right to decide on consultation?
There is no specific legal framework dealing with authority to consult, the Commission is here bound by mainly principles of administrative law of good administration, the Commission’s rules of procedure, and at the practical level department-internal guidelines and handbooks. Consultation work is generally decentralized according to the Directorate-General and the lead Commission service is ultimately responsible to prepare the consultation strategy in the early stages of preparations, including that consultations adhere to legal norms and minimum standards, including when consultation work is outsourced. 994 The DG competent for the field in question plays the key role in formulating policy and legislation within the Commission – in accordance with policy set at the level of the Commissioner in charge (assisted by her or his cabinet) and the Director-General. 995

DGs are usually divided into a number of directorates, further divided into units. For each policy area there will be a competent unit, the “department responsible” in Commission jargon. 996 From the Commission’s rule of procedure, it is clear the department responsible is required to ensure from the beginning of its preparatory work that

992 “The ISG should prepare and discuss all the key elements of the impact assessment and the policy initiative. The group should discuss the draft impact assessment report before it is submitted to the Board.” Commission, Better Regulation Toolbox (n 976) 51, see also William Robinson, ‘Drafting EU Legislation in the European Commission, A Collaborative Process’ (2014) 2 The Theory and Practice of Legislation 256-260.
993 The President of the Commission is to decide on the internal organization of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body, Article 17(6)(b) TEU. The Commission is also required to consult with other departments, Commission, Rules of Procedure [C(2000) 3614] OJ L 308, consolidated version 23 April 2020, Article 21(ECRoP).
995 Robinson (n 992) 255.
996 ibid.
there is effective coordination between all the other Commission departments concerned, this includes liaison within other units within the DG, as well as the Commissioner’s cabinet.\textsuperscript{997} The ISG plays a central role in this regard.\textsuperscript{998} Commission departments may be represented at different levels, with technical experts dealing with technical matters themselves but more fundamental or political matters being raised to the level of the Commissioners’ cabinets. The first draft of legislation is generally produced by technical experts in the department responsible.\textsuperscript{999}

Because consultation takes place during different stages of the policy cycle different structures of decision-making are relevant. In the early stages of the proposal the policy desk is most involved, although consultations are often greenlighted.\textsuperscript{1000} During the preparation of the Impact Assessment the consultations strategy is approved and coordinated by the Inter-Service Group.\textsuperscript{1001}

\textit{What should be consulted?}

As stated, Article 11 TEU demands that the scope of the consultations is broad, and in line with Protocol No. 2 and part of the consultation strategy should allow for input on proportionality and subsidiarity.\textsuperscript{1002} According to the minimum standards, consultations should involve the problem to be tackled and its impacts; the issue of subsidiarity and the EU dimension to the problem and available policy options, and when modifying existing interventions the scope for efficiency improvement (regulatory cost reduction).\textsuperscript{1003} The scope of the consultation is also defined by its goals whether that be gathering ideas, collecting opinions, gather data and knowledge.\textsuperscript{1004} While there is merit and logic to narrowing the focus of consultation procedures and clarifying which questions the Commission particularly is interested in, severely curtailing the opportunity to comment on the different IA elements or the legislative proposal more broadly would go against the legal obligation to consult.\textsuperscript{1005} This calls into question the relatively common

\textsuperscript{997} Article 21 ECRoP.
\textsuperscript{998} Commission, Better Regulation Toolbox (n 976)51.
\textsuperscript{999} Robinson (n 992) 255.
\textsuperscript{1000} ibid.
\textsuperscript{1001} Commission, Better Regulation Toolbox (n 976) 51.
\textsuperscript{1002} Article 11 (3) TEU, Article 2 Protocol No 2.
\textsuperscript{1003} Commission, Better Regulation Toolbox 18.
\textsuperscript{1004} Commission Better Regulation Guidelines (n 52).
\textsuperscript{1005} Article 11 TEU ‘broad consultation with parties concerned’, see also the analysis chap 4.1.2.
Commission practice of selective, sometimes leading consultations questionnaires where stakeholders have little or no opportunity to provide further feedback.\textsuperscript{1006}

Adhering to the principle of openness demands that the objectives of the consultation activity should be clearly communicated.\textsuperscript{1007} Indeed all major elements of the consultation strategy must be included, e.g. in the ‘call for evidence’. This is also necessary in order to allow for the administrative and judicial review.\textsuperscript{1008}

\textit{Who should be consulted?}

The minimum standards define three stakeholder types, those affected by the policy; those who will have to implement it and those who have a stated interest in the policy.\textsuperscript{1009} From the analysis in the previous chapter, it is clear that this basic outline corresponds to a large degree to the legal obligation to consult ‘parties concerned’ according to Article 11 TUE. As stated, Protocol No. 2. obliges the Commission to consult as widely as possible before proposing legislation. The principle of participatory democracy and the particular right of every citizen to take part in the democratic life of the Union (Article 10(3) TUE) also means a genuine link to citizens needs to be established. It is worth pointing out that the “parties concerned” as enshrined in Article 11 TUE implies a different-logic than organizing potential stakeholders according to their level of interest.\textsuperscript{1010} However, the most recent Better Regulation Guidelines on the one hand support targeting stakeholders based on their interest, and on the other hand suggest a step-by-step mapping which is more focused on who might be potentially affected, while also clearly spelling out the democratizing function of consultation.\textsuperscript{1011} The step-by-step identification method, is arguably in

\textsuperscript{1006} This has been a subject of recurring criticism and was also prominently featured in the replies to the latest Commission stocktaking exercise on the Better Regulation Agenda. Commission, Taking stock of the Commission’s Better Regulation Agenda, COM (2019) 178 17.

\textsuperscript{1007} Article 11 TUE, Article 15(1)(3) TUE and 298(1) TFEU, informing this legal assessment is also the EU Courts elaboration of the connection with transparency and democratic participation, see analysis in Chap 4.

\textsuperscript{1008} See e.g. Case C-310/04 Spain v Council EU:C:2006:521 and Case C-58/08, Vodafone and Others EU:C:2010:321. See also analysis in sections 4.2 and 4.4.

\textsuperscript{1009} Commission, General Principles and Minimum Standards (n 39) 19.

\textsuperscript{1010} For instance: “Sort stakeholder groups according to the level of interest, influence, and expertise on the initiative to which the consultation refers.” Commission, Better Regulation Toolbox (n 976) 463.

\textsuperscript{1011} Here the general public and citizens are included as a stakeholder category and the leading questions on the step-by-step approach include asking who is directly, indirectly and potentially targeted. See ibid 463–465.
line with the constitutional obligation to consult. While gaging which actors to specifically target, representativeness should be considered. From a legal point of view this link can be construed by looking at the democratic legitimacy of parties e.g. through gauging what the mandate of the organization is, what links it holds to citizens including its capacity to give voice to its members or certain groups/interests.

Establishing equal access goes beyond equal application of procedural rules, especially in relation to groups that run the risk of being excluded this includes poor and marginalized groups, non-organized interests and regional actors. The OECD found in its 2016 review (where the Better Regulation Guidelines had been implemented for some time) that there was no mechanism in place in the Commission consultation to ensure a balance of representation of participants.\(^{1012}\) Adding to these general considerations, through its Interinstitutional Agreement with the Parliament and Council, the Commission has also made a binding commitment to particularly encourage the direct participation of SMEs and other ‘end-users’ in the consultations and to include public internet-based consultations in this effort.\(^ {1013}\) The new Better Regulation Toolbox clearly expresses an ambition to target citizens in both lay and expert capacity.

As has been clarified, an opportunity to exercise the right to participate requires positive measures. This includes the Commission reaching out to groups in the consultation process, going beyond mere notice. As was explored in the third chapter, self-selection participation processes as a standalone participation strategy, tend to enhance inequalities in access. The legal democratic imperatives operating law-making consultations, as well as the duty of the Commission has to combat inequalities in all of its activities, require tailoring the consultation strategy beyond posting a consultation exercise on the internet. In certain cases the duty to consult goes beyond mere notice (e.g. through the Transparency Register) especially in efforts to facilitate inputs from local actors and non-organized civil society. Within the EU framework this could imply coordination with law-making consultation at the national and regional level where such may exist. However it should be pointed out that where the Commission outsources parts, or all of the consultation

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exercises, it retains responsibility for upholding its legal obligations in this regard.

Depending on the proposal at hand and the objective of the consultation, the Commission may have a duty to provide all language versions of its consultations.  

Transparency and targeted consultations
The Commission has recently committed to publishing the outcomes of its targeted consultation, although how this commitment will manifest itself is too early to say. The criteria for selection of participants is also something which needs to be clarified and publicized, including when there is pre-selection of participants. Closed-door consultations with participants selected according to ad hoc criteria defined by the Commission is clearly contrary to Article 11 TEU.\(^{1015}\) It is not clear-cut from a legal perspective whether Article 11 TEU and the principle of transparency require the publication of the names of stakeholders in targeted consultations. At a minimum, if names are not published, a more detailed list of selection criteria should be made public, in order for the democratizing purpose of consultations to be fulfilled.

5.4.1.2. A consultation is exercised
Consultation timelines
According to the General Principles and Minimum Standards for consultation of interested parties, a general minimum consultation period of 8 weeks applies for initiatives accompanied by an IA (which includes legislation) which the current guidelines have expanded as a “minimum standard” of 12 weeks with 14 weeks over the summer.\(^{1016}\) The Ombudsman has considered non-adherence to the minimum standards as maladministration. The application of the General Principles and Minimum Standards to the Commission consultation is as stated uneven and calls have been made for these principles and standards to be binding. They do however inform the hard law duty to consult. The legal duty to consult implies that parties should be granted adequate time to respond while balancing with the need for effective public administration. Procedural equality also implies that different circumstances in the Member States, for instance holiday schedules, need to be considered when setting timeframes, for instance over the

\(^{1014}\) Commission Better Regulation Guidelines (n 52) 13.

\(^{1015}\) Mendes, ‘Participation and the Role of Law after Lisbon’ (n 32) 1870.

\(^{1016}\) Commission, General Principles and Minimum Standards (n 39) 21; Commission, Better Regulation Guidelines (n 52) 15.
summer. This is enforced by the Commission’s binding commitment in the interinstitutional agreement on Better Regulation to “ensure that the modalities and time-limits of those public consultations allow for the widest possible participation”.\textsuperscript{1017} Certain practices which infrequently occur, such as shortening the deadlines once they have been posted are arguably not legal. From a legal perspective, based on the duty to consult enshrined in Article 11 TEU, Protocol No. 2., as well as the discussed case law in the previous chapter on the Court’s review following the principle of subsidiarity, various consultation activities within a consultation strategy should be seen holistically.\textsuperscript{1018}

\textit{Ongoing (active) transparency and process administration}
Adhering to transparency standard while carrying out a consultation means publishing the results as soon as possible. The Commission’s binding commitment to its institutional counterparts (Parliament and Council) likewise states that the results of public and stakeholder consultations shall be communicated without delay to both co-legislators and made public.\textsuperscript{1019}

\textbf{5.4.1.3. \textit{A consultation is processed}}
To give effect to qualitative features of the participation process the consultation process would need to include equal consideration of potential participants, transparency and access to information as well as meaningful exchange. Equal consideration is reinforced by the principle of political equality in Article 9 TEU as well as non-discrimination clauses Article 21 CFR.\textsuperscript{1020} The procedural requirements of meaningful exchange also imply adequate feedback mechanisms. This includes taking into account the input received and recording input and the degree to which it has been considered.\textsuperscript{1021} This is also a requirement of the General Principles and Minimum Standards. The obligation of meaningful exchange stands in contrast to current practices where one of the most frequent critiques of the RSB has been the persistent tendency of the Commission to not faithfully represent the outcome of law-making consultation in its impact assessments.\textsuperscript{1022}

\textsuperscript{1017} Interinstitutional Agreement of 13 April [2016] on Better Law-Making OJ L123/1 point 19.
\textsuperscript{1018} The non-specific language of Article 11 TEU as well as Article 2, Protocol No. 2, do not support a formalistic interpretation of consultation.
\textsuperscript{1019} Interinstitutional Agreement of 13 April [2016] on Better Law-Making OJ L123/1 point 19.
\textsuperscript{1020} See also Cuesta Lopez (n 32) 131-132.; Alemanno, ‘Levelling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission’s Public Consultations in Light of the Principle of Political Equality’ (n 33).
\textsuperscript{1021} Grounded in the theoretical foundations and formulation of the principle of democracy, including the principle of participatory democracy.
\textsuperscript{1022} See e.g. ‘Regulatory Scrutiny Board - Annual Report 2022’ (n 473) 18.
Adequate feedback mechanisms which allow for transparency and review, however does not bind the Commission to follow the outcome of a consultation process. The substantive dimensions of the commission’s discretion are not bound by the facts that certain perspectives, views or data came to the Commission through the medium of consultation instead of, say, desk research or political input. There is also the question of how to weigh responses. Many civil society and regional actors (in particular those with large membership) have lamented how the Commission seemingly equally weights responses regardless of membership base or size.\(^{1023}\) From a legal perspective, such complaints are relevant to the representativeness of the consultation outcome and for ensuring that such documentation does not misrepresent the outcome, including when analyzing representativeness of responses. As has been discussed in chapter 4 above, such considerations also come into play in determining the consultation strategy and selecting participants for targeted consultations. However, the legal duty to consult does not constrain the Commission’s discretion in weighing response according to any fixed scheme or based on any principles of representativeness. This being said, if consultation replies point to a serious legal deficit in a proposal, this can of course strengthen the case in event of judicial review.

The processing of a consultation exercise includes scrutiny by the RSB. Each proposal from the Commission is accompanied by an explanatory memorandum setting out the context of the proposal, the results of the consultations and the impact assessments, the legal background including details of the choice of type of act and the legal basis and compliance with the principles of subsidiarity and proportionality, commentary on the provisions and details of any budgetary implications.\(^{1024}\) The RSB discusses the proposal on the basis of a quality checklist outlining its preliminary view on the quality of the report relative to the requirements of the relevant guidelines and identifies priority issues for discussion at the meeting; delivering its

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opinion within 2-3 days following its meeting, delivering either a green, yellow or red light. 1025

5.4.1.4. Summary
The mapping has suggested how giving the principle of participatory democracy for law-making effect, is impacted by soft-law instruments and established practice. It has also shown, how in theory, such consultation standards can be applied, highlighting transparency and feedback standards, procedural standards relating to sufficient timeframes as well as obligations to promote procedural equality.

In order to gain a more comprehensive view of how the principle of participatory democracy interacts with and permeates the multi-level legislative setting, the following outlines the framework and imperatives for law-making consultation at the national Swedish level.

5.4.2. Swedish consultation – EU law-making consultation in the national setting
Consultation by public actors and in particular authorities is frequent and includes referrals in a variety of settings and spaces, including policy and norm-creation at delegated levels. As previously discussed, (see approach and methods) the Swedish consultation procedure refers to government-facilitated consultation in the legislative process. The consultation procedure is legally anchored in a constitutional clause which obliges the government to prepare legislation and consult concerned parties in government matters (RF 7:2). Meanwhile, other legal principles and norms guide the conduct of the actors during the actual proceedings. Similar to the analysis of law on Commission consultation, the legal framework for the Swedish Consultation Procedure is outlined following the main stages of consultation; a consultation is initiated, exercised and submissions received and incorporated. Additionally, issues raised regarding consultation on EU norms at the national level will be specifically addressed.

5.4.2.1. National consultation is initiated
When a legislative or policy need arises, the government receives an impulse (for instance from a head of a government ministry) to authorize the ministry to form a committee which will lead a

1025 For an overview ‘Regulatory Scrutiny Board’ <https://commission.europa.eu/law/law-making-process/regulatory-scrutiny-board_en> accessed 9 August 2023; The board previously was names Impact Assessment Board, see Robinson (n 992) 257.

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government commission of inquiry. The committee is administratively a part of the ministry but principally and legally it constitutes an independent authority, reporting directly to the government, and to a large degree operating within the remit issued by the government itself.\textsuperscript{1026} When a commission of inquiry is preparing an issue, the matter is generally sent out for consultation. In some instances, the commission of inquiry is mandated from the beginning to prepare legislation while in other cases, part of the investigation is to determine whether legislation is necessary. There is currently no explicit difference in the way legislative proposals are prepared by a committee depending on whether they are derived from EU law or internally at the national level. The national procedure for implementing an EU directive therefore follows the regular legislative procedure, whereas for negotiating EU laws the legal framework \textit{in practice} it would seem is only applied indirectly or not at all. Laws are then formulated through the process of the commission of inquiry (a legislative investigation most frequently at the ministerial level) consultation and a final decision by the government on a proposal to Parliament, where the legislative proposal is then adopted or discarded. A decisive difference is that currently, for negotiating EU legislative acts, no government commission of inquiry is formed, but the department responsible facilitates consultation. The following section outlines the questions raised in connection with the initiation of a consultation procedure. What are the guiding legal norms and principles with regard to when and how a consultation procedure should be initiated and who should be heard? Is there any legal impetus in constructing the timeframes and modalities of a consultation process?

\textit{When should a consultation procedure be initiated and what form should it take?}

The Instrument of Government as well as relevant case law outline a duty for the government to consult as a matter of order.\textsuperscript{1027} For law-making such a duty is mandatory and should be upheld also in crises situations.\textsuperscript{1028} The quality of the preparatory material as well as the need for democratic anchoring should be guiding in decisions on consultation. While the former traditionally takes precedence, the latter has also been emphasized in \textit{travaux préparatoires} as well as by the government, underlining the importance of the consultation procedure’s

\textsuperscript{1026} See Kommittéförordning (1998:1474).
\textsuperscript{1027} RF 7:2, NJA 2018 s. 743, see also Miöd UM12649-18 and HFD 2022 ref 50.
\textsuperscript{1028} ibid.
capacity to promote debate and participation in social discourses. Article 10(3) TEU and international human rights law place a new emphasis on the democratic anchoring function of 7:2 IG, and establishes a presumption to consult when Sweden is participating in EU law-making. This can either happen in conjunction with Commission consultation, or later, when the Commission has presented a legislative proposal to Council and Parliament. Internal Swedish ministerial guidelines emphasize that Commission consultation should prompt a reflection of whether consultation facilitated by the government is warranted.

*Who has the right to decide on consultation?*

Considering the constitutional flexibility on law-making consultation, decision-making authority becomes a decisive factor for the various dimensions of a consultation procedure. The ministry usually decides on if and how an existing proposal or report should be sent for consultation. From the Ordinance (1996:1515) with instruction for government offices, it follows that each ministry’s internal regulation (arbetsordning) should account for who is mandated to make decisions on consultation. This can also be stated in specific decisions. (16, 30-32 §§). Internal guidelines applicable to all ministries indicate that a senior officer generally should decide on such matters. Although the ministry has freedom to decide who has the authority, such decisions of the ministry should be laid down in written internal regulations/guidelines. The internal work order/rules of procedure of the government as well as established practices seem to indicate some level of threshold with regard to the position of the officer in question.

Beyond the preferences and professionalism of the deciding officer, the Ordinance (1998:1474) on Commission of Inquiries indicates that the mandate of the government commission of inquiry, internal guidelines within each ministry as well as the perspectives of the appointed chief investigator and case officer of the commission of inquiry should play a decisive role in decisions on consultation. These elements together

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1030 Statsrådsberedningen, Riktlinjer för beredningen av EU frågor för Regeringskansliet, Cirkulär 3.
1031 Tarschys, Daniel and Johansson, Linda (n 41).
1034 Kommittéförordning (1998:1474) 7, 8 §§.
outline the legal signposts for who should weigh in on the when and how of a consultation procedure.

Who should be consulted?
Within the ministry, often for each government commission of inquiry, a list is compiled containing relevant public authorities as well as other interested parties to be consulted. Sometimes the consultation document outlines questions which the government wishes participants to answer or the document highlights which part of the proposed legislation that the government would specifically value contributions on.  

With regard to legal rules or principles determining which parties should be consulted, as stated, the overarching constitutional clause of RF 7:2 is primarily geared towards the governments’ ruling function. Consultation duties in the clause are recounted, seemingly hierarchically, with public authorities first, municipalities second and different organizations coming third with finally private citizens coming last. The priority and structure of the constitutional text also seems to be mirrored by actual participation outcomes in consultation procedures. 

As previously discussed, according to RF 7:2 consultation procedure serves a dual aim of securing quality in the government’s work and democratic anchoring. Ideally these two purposes are mutually reinforcing, in practice however, decisions require prioritization and e.g. mass participation cannot be accommodated for most legislative procedures. The wording of RF 7:2 emphasizes the quality of the government’s work. To interpret the standard of consulting to the degree required, in RF 7:2 the clause should be read in conjunction with other constitutional principles which also aligns the approach more tightly with Article 10(3) TEU. This means paying due regard to fundamental principles such as that all public power is derived from the people, that the public institutions should strive for universal participation and equality, that children’s’ rights should be cared for, as well as that all public administration should consider equality before the law as well as objectivity and impartiality. In addition, there is a legal obligation for Swedish authorities to assess the impact in the

1036 Tarschys and Johansson 17.
1037 SOU 1999:144 56.
1038 See RF 1:1.
process of law-making, which is a part of the commission of inquiry’s work.\textsuperscript{1039}

What does it then mean that an actor is concerned or affected by the legislation (the Swedish word \textit{berörd} literally means “touched by”? The legal sources do not give much specific guidance as to when is an actor concerned and affected. Parallels can be drawn to standing in administrative procedural law and related case law,\textsuperscript{1040} although such parallels are of limited value considering the differences between the exercise of direct and indirect public authority and the government acting as an administrator and a legislator.

While it is not easy to gauge to what extent the legal imperatives outlined thus far are followed by the ministries’ (see below), it is clear that the efforts made to specifically address parties during consultation, are key, most often through the construction of consultation lists.\textsuperscript{1041} The legal framework applicable to the consultation procedure does not detail specific interests or quantitative or qualitative criteria to determine whether a consultation list is well balanced/appropriate. Nevertheless, the constitutional demands on consultation combined with the mentioned ordinances and case law clearly point to certain questions which should be raised when determining the scope of consultation and who should be approached. These questions are: What is the purpose of the proposed legislation? Who could be affected by the legislation and who might have an interest in the issues raised by the proposal? Who will participate in the implementation of the rules on the table? Who has special competence and knowledge regarding the issues on the table? What is the capacity to participate of potential interested parties? Although such questions are frequent in soft law instruments at the EU-level for the Commission work, they are glaringly absent in Swedish government work. How various ministries, departments and units approach this question is opaque. There are no indications that there is any overall systematic approach or review on these issues. To abide by the constitutional demands on the government to work for universal participation the question of the form of consultation is also raised (hearings, e-consultations etc.). The principle of objectivity and impartiality in administrative law and procedure also ensures that determinations regarding a consultation cannot be

\textsuperscript{1039} Kommittéförordning (1998:1474) 14-16 §§.
\textsuperscript{1041} Rasmussen (n 851) 6–8.
grounded in any form of favoritism, personal gains nor economic advantages to specific public institutions or public officials.\textsuperscript{1042} From the same principle also follows that redundant or irrelevant material should be prevented in consultation exercises.\textsuperscript{1043}

\textbf{5.4.2.2. National consultation is exercised}

\textit{Consultation timelines}
The standard practice of three months serves as a baseline for consultation timeframes and though first only mentioned in internal guidelines and communications, it was then confirmed by Swedish Courts as an important signpost.\textsuperscript{1044} For EU law, there is also, as mentioned, an existing legal obligation for the Member States to implement EU law on time. In deciding on a consultation procedure there is some quantitative data which suggest that government authorities tend to reply less frequently (or less extensively) when consultation procedures are short.\textsuperscript{1045} Although the legislative framework leaves room for flexibility with regard to timeframes, the consultation cannot be so short as to reduce real opportunity to participate, especially from interested parties with limited resources. The timeframe of the consultation also needs to be weighed against the purpose of the proposed legislation itself and the importance of e.g. conducting broad consultation or receiving technical input. Case law demonstrates that 3-4 weeks constitutes a breach of RF 7:2 although the breach in itself is not so significant as to lead to the law being set aside through judicial review. The legal flexibility is consequently also applicable for consultation on Swedish positions in negotiating EU-law. Also in this context, consultation cannot be so short as to reduce real opportunity to participate, including for interested parties with limited resources.\textsuperscript{1046} This also speaks for consultation in the early legislative phase.

When the ministry has sent over the proposal to the addressees, there are three options for any potential participation: to reply when being specifically addressed, to refrain from replying and to reply

\textsuperscript{1042} SOU 2010:29 149 ff.
\textsuperscript{1043} ibid. The committee traces procedural rules requiring that unnecessary evidence to be rejected, was traced back to the constitutional principle of objectivity.
\textsuperscript{1044} NJA 2018 s. 743 and Miöd UM12649-18.
\textsuperscript{1045} Replying less in this context refers either to no reply at all or a ‘no comment’ reply, see SOU 1999:144 56.
\textsuperscript{1046} This would follow from RF 7:2, as interpreted in light of the principle of participatory democracy as featured in Article 10(3) TEU.

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spontaneously. The latter refers to parties responding to a consultation although they were not directly addressed. The former includes replies with no substantive content (e.g. a reply which states that the party has no comments). The following details the rules applicable to parties participating in a consultation procedure.

**Rules applicable in drafting responses**

In responding to a consultation procedure, public authorities are governed by the Administrative Procedure Act. The rules in 5 -8 § FL express what should characterize the interaction between authorities and private persons as well as between public authorities, i.e. what is considered the standard for good administration. In 6 § FL it is stated that the authority should provide information and assistance to persons in areas which fall under the authority’s work mandate so that they can protect their interests and rights. Queries should be answered as soon as possible, and it has been established that within the categories persons or ‘private parties’ businesses, organizations and representatives of the media are included.

Travaux préparatoires underline that the paragraphs aim to strengthen the “spirit of service” in public administration and that it is vital that public authorities’ dealings are shaped/characterized by a commitment to assist citizens. The rules are applicable to all administrative work, including in participating in government consultations. The work of municipalities also falls within the scope of the paragraphs. Any questions regarding an authority’s work regarding consultations should therefore promptly be replied to. A public authority’s reply to a consultation can be requested by any person and the authority should then normally be required to provide the document within the right of access to public documents. An authority’s reply is considered a public document already when it is drafted.

8 § FL further states that authorities have a duty to assist each other within their areas of work. This paragraph aims to promote effective

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1047 This categorization is deployed by the Commission of inquiry on democracy: SOU 1999:144 56.
1048 SOU 2010:29 187.
1049 6 § FL. See also chapter 10 ibid.
1051 Tryckfrihetsförordningen (1949:105) [TF] [Constitution] 2 chapter; Offentlighets- och sekretesslag (Svensk författningssamling [SFS] 2009:400) 6 chap. 4 §.
1052 TF 2:7.
public administration. It is considered crucial that authorities strive to achieve coherence and common agreement, even when they have different specializations and areas of work.\textsuperscript{1053} Authorities and agencies should cooperate, partly to further the aim of public administration and governance overall become more coherent and effective, partly because it should be easier for private persons to deal with them.\textsuperscript{1054} In this vein, the duty to cooperate is also aimed at harnessing the advantages to be gained for private persons and the State as a whole. The third point in the article also enshrines a duty to provide information regarding the work of the authority.\textsuperscript{1055} To which degree authorities, officers and other actors cooperate regarding consultation procedures is unclear, even though informal contacts between public officers often characterizes the work within the public sector.\textsuperscript{1056}

The previously mentioned principles of objectivity and impartiality as expressed in RF 1:9 also apply to public institutions’ participation in a consultation exercise as well as the government’s considering their replies. Internal guidance for the ministries indicates that in balancing responses from the consultation parties, it should be considered whether a party is replying with particular expertise or is speaking from a position of interest.\textsuperscript{1057} These two positions are not necessarily juxtaposed, sometimes the special interest may be why a party should be included in a consultation process. A reading of the constitution’s RF 1:9 together with relevant legislation which constitutes the “standard of good administration” means that authorities’ actions should be guided by citizens’ interests as well as by the interest of the State, e.g. through being open and transparent about points of reference and motives of the positions taken in their reply. These legal obligations fall on public institutions replying to a consultation procedure, and naturally not on private parties.

\textit{Mandate to reply to a consultation procedure}

To what degree drafting a consultation reply is formalized within public

\textsuperscript{1053} Prop. 1985/86:80 23.
\textsuperscript{1054} For authorities at the national level, additional legislation is applicable, for instance in the ordinance for public authorities, see Myndighetsförordningen (Svensk författningssamling [SFS] 2007:515) 6 §.
\textsuperscript{1055} SOU 2010:29 187.
\textsuperscript{1056} The Swedish National Audit Office e.g. noted that the government’s efforts in relation to the financial crises benefited greatly from the personal informal contacts between the officer at the Swedish Riksbank and the Swedish Financial Supervisory Authority, see ‘Riksrevisionen, Granskningsrapport 2011:9, Myndigheternas Insatser För Finansiell Stabilitet - Lärdomar i Ljuset Av Utvecklingen i Baltikum 2005–2007, (Swedish National Audit’s Office Report)’.
\textsuperscript{1057} SOU 1999:144.
institution varies and reis often mediated by available resources and how often a party participates (this is also often the case for non-state actors). For authorities which frequently respond to consultations, e.g. Swedish Municipalities and Regions or the judiciary, there are routines for working with consultations, often set in writing within the internal guidelines and codes of conduct. This is, however, not always the case. For several large and established public institutions it is still unclear who is drafting a consultation response and whether the whole authority supports the statement. At universities it has been noted that fewer consultation replies are drafted when the consultations are directed towards specific faculties rather than the university as such.\textsuperscript{1058} The Royal Institute of Technology (KTH) has also expressed that the Institute yearly receives thousands of consultation requests, which in many cases demand a drafter who has specific expertise within an area. The consultation replies therefore often take the character of a personal expert opinion which is distributed in the name of the institute or faculty.\textsuperscript{1059} This is the case for many universities where e.g. law faculties are routinely requested to reply for all legislative proposals and often have internal routines for handling such requests.\textsuperscript{1060} However, research on routines for drafting consultations is lacking, including for non-state actors.\textsuperscript{1061} With the rapid increase of EU legislation in several areas, which in certain parts is perceived as more technical, participation in consultations has increasingly become a matter of priority depending on resources.

Regardless of internal guidelines all public servants within public institutions who work with a consultation procedure are subject to legislation on conflict of interest. Conflict of interest rules follow from the previously mentioned constitutionally anchored principles of objectivity, impartiality, as well as equality before the law. These principles are further codified in the Administrative Procedure Act for work at the municipal level. Rules on conflict of interest encompass direct and indirect exercises of public power including inter-governmental issues.\textsuperscript{1062} The Parliamentary Ombudsman has also applied these rules to one case involving the drafting of a consultation reply. In this case, Parliamentary Ombudsman found that the rules of

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\textsuperscript{1058} ibid.
\textsuperscript{1060} This is based on the author’s own observations.
\textsuperscript{1061} For an interesting exception, see Marcusson (n 852).
\textsuperscript{1062} Proposition [Prop.] 1983:73 Ny författningslag [government bill] 76; JO 2005/06 351.
\end{flushleft}

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conflict of interest in the Administrative Procedure Act applied to an author of a consultation reply which had been penned on behalf of the Royal Institute of Technology. The Ombudsman elaborated that a breach of the rules of conflict might also amount to criminal liability according to the Swedish Penal Code on misconduct/dereliction of duty. Actions which were functionally linked to the exercise of public power fell within the application of the Penal Code’s rule on misconduct of public officials’ clause. In the specific case, the Parliamentary Ombudsman did not pursue prosecution, but concluded that the public official had a conflict of interest and should not have been allowed to be involved in the drafting of the consultation reply, or should have abstained or resigned as soon as it became clear a conflict was at hand. While FL lists a set of circumstances in which a public servant is in a conflict of interest – including any circumstance which from an objective standpoint raises doubts as to impartiality, for criminal liability either intent or negligence is necessary.

Spontaneous replies
The opportunity to reply to an open government consultation is available to any party who wishes to engage in the consultation. Commissions of inquiry are published electronically on the government’s homepage. The question is to what degree this presents a real opportunity for individuals and different groups, including minorities or vulnerable groups, to participate. The limited existing research in this area indicates strong participation interest from parties not specifically addressed in a consultation procedure. Meanwhile as chapter 3 discussed, research in legislative theory and practice, shows that the legitimacy and quality of a consultation greatly depend on who is invited to participate.

Agency consultation
One of the interesting effects of the EU legal order, is that legislative power extends not only from Brussels to the traditional national legislator but is also decentralized to various national agencies within the Member States. Several studies have demonstrated that Member States agencies have throughout retained a larger role in both the law-making process as well as in implementation. In Sweden, this developments both inform and re-enforce dynamics and allocation of

1063 JO 2005/06 351.
1064 Brottsbalken (1962:700) [Penal Code] BrB.
1065 Lundberg (n 85).
1066 SOU 2016: 10 96.

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power already characterized by powerful and independent public agencies and relatively small ministries.\footnote{Constitutionally, there is no such thing as ministerial government in Sweden and traditionally, the government as a rule acts as a collective, see e.g. Thomas Bull and Ian Cameron, ‘The Evolution and Gestalt of the Swedish Constitution’ in Armin Von Bogdandy, Peter M Huber and Sabrina Ragone (eds), \textit{The Max Planck Handbooks in European Public Law} (1st edn, Oxford University PressOxford 2023) 631.} This is one reason why legislative proposals are drafted by ad-hoc commission of inquiries, as resources within ministries and their respective units are limited. Agencies assist the government through providing competent staff as well as relaying information about the ongoing discussions. Agency staff participates continually in the various informal networks or in the many expert groups assisting the Commission in its legislative work. In these early phases of the law-making process there is an opportunity for the agencies themselves or in direct liaison with the Commission, to shape and influence the Commission’s proposal.

There has been some discussion on whether the role of government agencies is somewhat ambiguous, double-hatted/debellated.\footnote{On this issue, see SOU 2016:10 EU på hemmaplan 96.} A large number of Swedish authorities participate in these network and expert groups and it is during this early phase that authorities have the greatest opportunities to influence the legislative process. In cases where the agency acts on behalf of the ministry it is common that the agency actually has drafted its own instructions which are then accepted with minor changes by the ministry.\footnote{Hettne and Reichel (n 43) 56.} Despite this rather significant role in influencing both EU law-making as well as Swedish positions in the law-making process, it is uncommon for Swedish agencies or authorities to engage in any form of formal consultation with interested or concerned parties before the Commission presents its formal legislative proposal.\footnote{SOU 2016: 10 96.} It is also rare that the authorities inform such actors or the public about its work in this area although a few authorities publish information about such meetings taking place and the general thrust of the outcome of the deliberations.\footnote{ibid.} Unless it is clear that the agency is acting as a representative of the Swedish government, it is unlikely that it would be subject to the same legal framework for consultation as the government. Up until 2018 and somewhat paradoxically, the agencies were bound by diametrically opposite rules for public consultation. Standing directly under administrative law they were obliged to be cautious in consulting non-state actors in the
preparation of their tasks and cases: in each instance, the agency was bound to thoroughly consider whether consultation really was necessary.\textsuperscript{1072} This has in a 2018 reform of the administrative act been changed to a more neutral clause on consultation meant to indicate that consulting is a natural part of agencies and authorities work, stating the agency may consult, as necessary.\textsuperscript{1073} While the legal rules for agency consultation are now better suited to the role Swedish agencies play in EU policy and law-making, the long-standing tradition of caution in terms of agency-consultation means that in general, there is less experience with formal or robust consultation.

5.4.2.3. \textit{National consultation is processed}

The full expression of RF 7:2 demands that the government demonstrates that it has taken into account all, or at least part of, the opinions and statements received. Considering that the consultation procedure stands under judicial review, transparency in how the government has conducted the consultation, what replies it has received and how it has reacted to these replies, is crucial for the exercise of the such review.\textsuperscript{1074} The Government ‘Handbook of Legislative Proposals’ details how consultation replies should be compiled.\textsuperscript{1075} According to the handbook, an inventory of consultation replies should be attached to the legislative proposal and also receive mention in the section outlining how the proposal has been drafted. When the method of attached compilation is used, it is suitable to address consultation comments more elaborately under the reasoning and analyses of the proposal. The Handbook further elaborates that any account of the consultation outcome should not be too lengthy. The substance of the consultation replies should be summarized briefly while comparing the consultation statements with the proposal of the commission of inquiry\textsuperscript{1076} If a person or party is concerned with how the results of a consultation procedure have been presented, there is an opportunity to turn to the Parliamentary constitutional committee, a standing committee in the Swedish Riksdag/Parliament. The Committee prepares matters concerning the constitution and the Parliament Act, but its functions go beyond those of a regular parliamentary committee.

\textsuperscript{1072} From the discussion on the reform in the travaux preparatoires, it does not seem agencies’ participation in EU affairs was considered. See Proposition [Prop.] 2016/17:180 En modern och rättssäker förvaltning [government bill] 171–172.
\textsuperscript{1073} 23, 26 §§ FL. 
\textsuperscript{1074} See NJA 2018 s. 743, NJA 2018 s. 743, Miöd UM12649-18, and HFD 2022 ref 50.
\textsuperscript{1076} Ds 1997:1.
It has a supervisory role in relation to the government which is constitutionally guaranteed (13 chap IG). The Parliamentary constitutional committee scrutinizes the work of the Government and its ministers and informs the Parliament of its findings. It ongoingly oversees the work of the Government releasing annual reports, and in certain instances special reports after a complaint has been lodged with the Committee, in which a hearing can be initiated. The Committee on the Constitution can then decide whether or not a member of the government (or Parliament) is to be prosecuted. More common is that the Committee criticizes a cabinet member, which in more severe cases, can result in a motion of no confidence.

During 2013 the Committee on the Constitution e.g. investigated the Government’s preparation of the proposal 2011/12:160 Compensation for victims of abuse or negligence in the care of public institutions.\textsuperscript{1077} The claimant alleged that consultation replies had not been adequately recounted and that a dissenting opinion had been removed from the proposal. The committee, basing their assessment on the Handbook of Legislative Proposals, found that the consultation procedure had been adequately represented.\textsuperscript{1078} The only internal comprehensive review of the consultation procedure, which was conducted in 1999 found that although there sometimes occurred somewhat skewed presentation of the consultation procedure, instances of misconduct were very rare.\textsuperscript{1079} The robust rules on access to public documents may in this regard serve as a safeguard. In the last decade, however, there has been some criticism that the written account of the result of consultation procedures as featured in legislative proposals is skewed and selective.\textsuperscript{1080} Consultation replies drafted by public institutions become accessible to the public as soon as they are finished/ready whereas for non-governmental organizations, their consultation replies become public when they are submitted to the authority.\textsuperscript{1081}

For consultation during the EU law-making negotiation phase, the detailed instructions of the internal guideline ‘Handbook of Legislative Proposals’ might give some indication as how consultation replies should be compiled. For consultation on the implementation of EU law these guidelines, which are not binding, would be directly applicable. However, they are not directly applicable to Sweden’s participation in

\textsuperscript{1077} Konstitutionsutskottets betänkande 2013/14:KU20 [parliamentary committee report] 2.

\textsuperscript{1078} ibid.

\textsuperscript{1079} SOU 1999:144.

\textsuperscript{1080} Ramberg (n 59).

\textsuperscript{1081} Cf. 2 chapter TF.
EU law-making in the negotiation phase as these do not result in a ‘legislative proposal’ or a ‘travaux’ and the level of detail might be too cumbersome for the purposes of opening up the negotiation phase. However, the underlying principle of transparency and reporting on who has been consulted would still apply.

5.5. **Multi-level law making: insights and considerations**

The analysis of how the principle of participatory democracy interacts – at least in theory – with EU and national law, soft law and institutional consultation practice, has yielded several insights. While there are similarities between the EU and national legal frameworks, for example, there is no explicit legally binding regulation or directive guiding the consultation work, they also differ. For instance, the legal framework at the EU and national level is differently framed in terms of whether it is a democratizing tool (see table below). The analysis of the Commission’s consultation framework highlighted how procedural guarantees flowing from the principle of participatory democracy can be applied to consultation practices ‘embedded’ in soft law; prominently the requirement of adequate feedback, ensuring diversity and procedural equality with regard to participants, as well as providing sufficient time-frames and neutral consultation documents. In terms of key procedural requirements for the Commission, with strong legal basis and democratizing potential; ‘active’ transparency features prominently. The commission’s obligations can hence be understood as clarifying how targeted groups are identified and reached out to, and how participatory input is received and processed. The ideal of ensuring transparency through a principle of participatory democracy finds expression in the pro-active publication and communication in this regard. In providing feedback, a deliberative quality is added to the consultation process. The active element of transparency is related to ensuring equal access.

At the national level, the detailed analysis of the Swedish legal (and institutional) framework indicated how RF 7:2 informed by the principle of participatory democracy implies legal obligations to both consult and report on consultation during the negotiation phase. The differences in consultation approaches and legal frameworks at the EU-level and Swedish national level also provide best case examples from which the other can learn. For instance, the Commission’s consultations seem much more plural and at least in theory, accessible to the public through its single access point, in contrast to the Swedish consultation modus operandi which is fragmented and centered on agency consultation. Meanwhile, Swedish courts have exercised judicial
review on consultation timelines, thereby clarifying some procedural guarantees for law-making consultation. This despite the fact that the Swedish legal basis in terms of language is much weaker than the legal basis for Commission consultation. The Swedish courts’ approach, although not to be taken as a blueprint, demonstrates the possibilities and functionality of judicial review in this area. However, even when the understanding of RF 7:2 is informed by the principle of participatory democracy, and its application is stretched out to negotiating EU-law, judicial review would still be elusive at the national level, as there is no Swedish law to contest. At the Swedish level, soft accountability frameworks might be able to push the government to adhere to consultation obligations in negotiating EU-law.¹⁰⁸²

A table juxtaposing some of the insights gained from the analysis is presented in the next page. Overall, the legal analysis points to potential consultation deficiencies at the Swedish level (based on an outdated understanding of RF 7:2) when considering the standard set by Article 10(3) TEU and citizens’ right to participate in the democratic life of the Union. However, both Commission and Swedish government adherence to the principle needs to tested in practice to better understand the obstacles and opportunities towards giving the principle of participatory democracy effect throughout the multi-level law-making process.

¹⁰⁸² For instance through the Council on Legislation and the Committee on the Constitution.
Table 1. EU law-making consultation

<table>
<thead>
<tr>
<th>Principle of Participatory Democracy</th>
<th>EU-level (Commission consultations)</th>
<th>National-level (Swedish government consultation)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes, primarily through Article 11 TEU and 10 (3) TEU</td>
<td>Primarily through Article 10 (3) TEU</td>
<td></td>
</tr>
<tr>
<td>Constitutional anchor</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Strong legal links to democracy rational</td>
<td>Yes</td>
<td>Weak democracy rationale in constitutional clause. Primarily 10(3)TEU and Article 25 ICCPR.</td>
</tr>
<tr>
<td>Efficiency rationales based in law</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Secondary legislation / clear procedural rules</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Judicial Review</td>
<td>Untested. Likely yes on basic elements, and procedural hurdles for access to review</td>
<td>Yes, procedural and substantive review but weak. No review for negotiating EU law.</td>
</tr>
<tr>
<td>Soft law instruments</td>
<td>Many, including detailed Better Regulation handbook and minimum standards for consultation</td>
<td>Few</td>
</tr>
<tr>
<td>Oversight</td>
<td>Mainly soft and self-imposed through Regulatory Scrutiny Board. Based in law through European Ombudsman,</td>
<td>Based in constitution but advisory: Council on Legislation, Parliamentary Ombudsmen. Through Article 10(3) oversight extended to negotiating EU law.</td>
</tr>
<tr>
<td>Clear rules on decision-making authority for consultation</td>
<td>No (with the exception for College of Commissioners)</td>
<td>Yes</td>
</tr>
</tbody>
</table>
6. TESTING THE LEGAL FRAMEWORK; CASE STUDIES

Proceeding from the legal and normative framework flowing from the principle of participatory democracy outlined in the previous chapters, this chapter answers the questions to what degree current EU law-making consultation practices at the EU and national Swedish level, adhere to or conflict with identified key obligations.

Commission consultations have been increasing over time, with an average of 100 each year over the last ten years. While participation levels vary widely across exercises, a typical Commission consultation received in average 500 responses in 2015–2016 and 2,000 responses in each of 2017–2018. Although consultation for Swedish legislative proposals and implementing EU-legislation is ubiquitous, there is no comprehensive data on Swedish law-making consultation during the negotiation phase with the only existing study indicating scant and fragmented consultation.

Testing four legislative consultations against two key procedural requirements at the EU-level and one overall assessment at the national level, prompted by the principle of participatory democracy, will help to assess to what degree the principle of participatory democracy is given effect in consultation activities. The section begins with a rationale of the two relevant procedural requirements and how they will be measured (see also methods chapter) followed by a discussion on the selection of cases. The analyses then turns to each of the four consultation case studies.

6.1. Key procedural requirements elicited from the principle of participatory democracy

The consultation processes will be tested against two procedural requirements which have emerged as significant from the congruence between the theoretical foundations of the principle of participatory democracy as well as the legal analysis of the principle of in the previous chapters, as well as one requirement based in Swedish law, but informed by the principle of participatory democracy. These requirements are as follows:

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1083 European Court of Auditors (n 131).
1084 Ibid.
1085 Strömvik (n 966).
1086 See chapter 4.5 which grounds these requirements in legal analysis as well as democratic theory.
- Transparency as responsiveness: Has the Commission adequately detailed whether, how and why consultation has impacted the Commission’s proposal?\textsuperscript{1087}
- Procedural equality: Has the Commission adequately promoted procedural equality?\textsuperscript{1088}
- The Swedish case: has the Swedish government adequately consulted organizations and individuals?\textsuperscript{1089}

The first requirement on responsiveness is assessed primarily by how the Commission has detailed in its impact assessment and/or equivalent document(s) accompanying the legislative proposal whether and how the open and targeted consultations have impacted the Commission’s work on the legislative proposal.

The requirement in Article 11 (3) TEU to “ensure transparency” in the Union’s actions through “broad consultations with parties concerned” implies – as has been argued in the previous chapter that it should be clear how consultations are impacting the Commission’s legislative work. This interpretation of Article 11 TEU not only finds strong support in the actual wording of Article 11 TEU and the constitutional interpretation developed in chapter 4, but also in the overall logic of participatory democracy as a complement to representative democracy in the Union as elaborated on in chapter 3 which highlighted inter alia the importance of promoting meaningful exchange,\textsuperscript{1090} as well as in the established links between transparency and participation in the Treaty,\textsuperscript{1091} and the confirmation of this link through case law.\textsuperscript{1092} These features combined provide a strong rationale for this particular form of transparency as a key procedural requirement of the principle of participatory democracy. It also seems an interesting starting point of analysis as the lack of adequate consultation feedback mechanisms is a recurring critique of the Commission’ legislative preparatory work, raised repeatedly by external actors and notably civil society, over the last decade while also featuring implicitly in the feedback of the RSB to numerous consultation procedures. It is also a main critique of recent EU experimentation with participatory democracy practices such as EU

\textsuperscript{1087} See also chapter 3.5, 3.6, 4.1, and 4.2.
\textsuperscript{1088} ibid.
\textsuperscript{1089} This language is taken from RF 7:2, “as necessary” has been replaced with adequately.
\textsuperscript{1090} See relevant sections of chapter 3 and 4.
\textsuperscript{1091} See relevant sections of chapter 4.
\textsuperscript{1092} Case C-57/16 P ClientEarth para 94.
citizen’s consultations, and other participation mechanisms, that they lack a standardized feedback mechanism. It also holds promise as a relatively clear legal obligation which may not need to be further fleshed out through additional procedural rules.

The assessment here does not aspire to definitively answer how the legislative proposal actually has been impacted by the consultations. Notwithstanding that this would prove methodologically cumbersome, as there is no legal requirement for the Commission to follow advice or input from stakeholders, assessing to what degree input has been taken on is legally less relevant. It is the transparency of what the Commission has done with stakeholder input which is the central feedback mechanism in question, not the actual causal link between input and output. It is therefore important to distinguish between consultation transparency/design and consultation outcome; while the latter may and should be indicative of the quality of the former, they are not synonymous and causal links may be informed by various factors external to consultation design and the process.

The second dimension which the case studies explore is to what degree the Commission’s consultation strategy reflects the legal obligation of procedural equality of participants in order to achieve a diversity of opinions and reach relevant “parties concerned”.

In assessing whether the Commission’s obligations have been met, two elements which span across consultation design and outcome appear specifically legally relevant: the geographical balance of Member States represented and to what degree there is a balance of economic and non-economic interests, paying attention to whether outreach has occurred for equality purposes, e.g. to vulnerable groups and citizens. This approach is grounded in the language of Article 11(3) TEU and Article 10(3) TEU, as well as the role that civil society and citizens play in a participatory democracy framework. In deciding on a balance between economic and non-economic interests inspiration was also drawn from the European Ombudsman’s work in issuing recommendations to the commission on the composition and transparency of its expert groups. The approach is also sensitive to

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1093 This theme runs through the assessment of different participation instruments, Hierlemann and others (n 9).
the specific context of EU Commission consultations where geographical representation is important but has been challenging for the Commission, as well as the noted dominance of market interests.\textsuperscript{1095}

Finally, building on the analysis of the legal framework for Swedish consultation in chapter 5, the indicator draws on the language of the applicable Swedish constitutional clause mandating consultation, RF 7:2. However, in applying it to the negotiation phase, it is interpreted through the lens of the principle of participatory democracy, stipulating that citizens have the right to participate in the democratic life of the Union, the focus resting on democratic participation. Through gathering data on how consultation at the national level is structured; in particular who was invited, and who participated, as well as how the process was facilitated during the negotiation phase the analysis aims at deepening the understanding of how (constitutional) legal frameworks and practices at the EU and national level interact and impact the realization of the normative goals pursued by the principle of participatory democracy.

6.2. Selection of cases
Four consultation processes have been selected; the Commission’s consultation on the Proposal for a Regulation laying down harmonized rules on Artificial Intelligence (the Artificial Intelligence Act), the Proposal for a Directive of the European Parliament and of the Council amending Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures (Revision of the Eurovignette Directive); Proposal for a new Directive on representative actions for the protection of the collective interests of consumers and Regulation on Asylum and Migration Management (New Migration Pact).\textsuperscript{1096}

\textsuperscript{1095} Alemanno, ‘Levelling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission’s Public Consultations in Light of the Principle of Political Equality’ (p 33).
This exercise illustrates in what ways concrete current consultation designs or practices either may adhere to, or fall short of, the legal requirements of participatory democracy, while also testing how well the identified legal obligations can be applied. At the time of writing, the first and last case studies cover legislative proposals which has been presented to Parliament and Council and are in the process of being negotiated, while the other two cases have been adopted. For all cases, the Swedish national level consultations occurring in conjunction with the Commission’s release of its legislative proposal, i.e. during the negotiation phase, are being reviewed and assessed against the requirement to consult as informed by the overarching EU principle of participatory democracy.

The chosen consultations have been selected mainly with a view of capturing the diversity of consultation procedures through diversity as regards policy issues, constellations of interests and number of consultation responses, in order to allow for a fruitful exploration of their alignment with the relevant legal imperatives as well as cautiously infer some broader implications (see method section). The four case-studies – while all reflecting current practice – cover different thematic policy areas, were organized by different DGs and deal with legislative issues where different constellations of interests are concerned: diffuse and broad as well as high stake and concentrated. The consultation responses of the four case-studies vary numerically between around a hundred to several thousands. The various proposals also deal with issues where certain geographical regions in the EU have a specific stake (e.g. vignettes,) where there is intense lobbying (tech/AI) and where there are clearly defined actors (consumers, business) and broad impacts as well as minorities impacted that are outsiders to the national democratic process (asylum and migration). In terms of minorities, these are particularly susceptible to majoritarian bias and vulnerable for the malfunctioning (bias) of the democratic process.

While the cases were selected with diversity in mind, which can give some insight into broader trends and practices, it is clear that such a small sample makes no decisive claim of representativeness of the Commission’s consultation practices. However, especially as regards the interplay between EU and national level frameworks and consultation outcomes, four different legislative consultation should be able to give some indication as to broader trends. The case-study format however does explore how current consultation practices may be

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1097 In fact, testing the robustness of the legal findings in chapter 4.
individually and legally evaluated as well as hint at trends. This approach highlights opportunities and also challenges with a legal analysis in the lack of more precise procedural rules fleshing out the principle of participatory democracy, while assessing dynamics between the EU and national level.

With the view of exploring more in-depth the intersection between EU law-making frameworks at the supra and national level, consultations occurring during the negotiation phase of EU legislation at the Swedish level are assessed. As the legal analysis in chapter 5 demonstrated, the legal framework for law making consultation at the national level during the negotiation phase is very weak, while one large-scale study indicates systemic deficiencies, providing an interesting point of departure.

6.3. Case study 1: The Artificial Intelligence Act
Background: The proposed Artificial Intelligence Act is the first step of a broader regulatory approach with the stated goal of “creating EU global leadership in trustworthy AI”. When the Artificial Intelligence Act was proposed by the Commission in April 2021, it was promoted as the first-ever legal framework on AI, and was widely acknowledged as an instrument which would use the size of the European market as leverage to propagate the EU approach to the regulation of AI to other markets. With momentum gained from the successful extraterritorial application of the GDPR, the upcoming EU AI regulation promised to be the next big “Brussels Effect.” The proposal advances a risk-based approach; defining areas of intervention for AI systems according to the level of risk they carry e.g. some which cause unbearable risks to fundamental rights, some which constitute high-risk applications (not prohibited but subject to conditions to manage their risk) and some constituting limited or negligible risk applications.

After the proposal was released, fast-paced development within the AI field as well as ensuing scandals generated an enormous amount of...

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1100 On the Brussels effect, see Bradford (n 65).
interest into AI and also put into question whether the scope and approach of the proposal was ‘tough enough’. These developments, which were also widely reported in the media, included the Dutch benefits scandal in 2021 (which included, inter alia, 1000 children taken out of their homes and placed in state custody as a result of the false accusations of fraud against their parents driven by algorithmic racial profiling of Dutch authorities), the rollout of ChatGPT, a UK Court ruling that harmful social media content contributed to a teenager’s death in 2017, as well as public warning calls by leading AI figures.

In dealing with regulation with wide-ranging implications for numerous actors and sectors, the proposal attracted much attention. The main stakeholder activity of the legislative proposal was the consultation Commission’s White Paper on AI, where more than 1 215 contributions were received from a wide variety of stakeholders. The White Paper on AI had been preceded by the work of the Commission’s High-Level-Working Group (HLWG) on AI, and the connected European AI Alliance multi-stakeholder platform, with some grumblings of industry-capture of the HLWG:s recommendations. It was however through

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the publication of the White Paper on AI in February 2020, that a clear intent to legislate was articulated, presenting distinct policy options for a regulatory approach for artificial intelligence, The White Paper on AI, in addition to presenting regulatory options, discussed the question of liability for potential harms caused by AI, while presenting its overall strategy for promoting “European excellence in AI”. The public consultation on the White Paper on AI included a set of closed questions that allowed respondents to select one or more options from a list of answers. In addition to the given options, respondents could provide free text answers to each question of the questionnaire or insert position papers with more detailed feedback.

Following the consultation, the Commission published its inception impact assessment which received replies in the form of 133 responses. Finally, the Commission additionally organized a stakeholder conference, held targeted technical consultation with undisclosed experts, standardization bodies and experts on biometric data. The result of all consultation activities were detailed primarily in the Annex to assessment and featured somewhat in the text of impact assessment. These consultations activities, and their detailing in the IA and inception impact assessment, including the annexed consultation report, form the basis of analysis of whether the Commission has aligned its consultation design and reporting according to the main obligations of adequate transparency/responsiveness and promoting procedural equality of potential participants. The raw consultation data, in the form of an excel file which details all the received submissions,

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1109 See Commission, White Paper on AI (n 1098).
1110 ibid.
1112 As outlined in the inception impact assessment, ibid.
as well as a file with attachments, was posted on the Commission’s webpage and has been surveyed as well as a light check.  

6.3.1. Has the Commission adequately detailed whether and how consultations have impacted the legislative proposal? The following documents have been screened to assess whether the Commission has lived up to transparency requirements; the IA, the report on the public consultation annexed to the IA, the IIA and published reports of related activities e.g. the stakeholder conference report. The stakeholder consultations feature in the impact assessment in four ways. Firstly, the Commission refers to the public consultations lumped together with other sources as evidence for its framing of the issue or broader approach e.g.:

The analysed evidence includes results of the public consultation on White Paper on AI, responses to the inception impact assessment, stakeholder consultations carried out within the framework of this impact assessment, European Parliament resolution of 20 October 2020 with recommendations to the Commission on a framework of ethical aspects of artificial intelligence, robotics and related technologies, European Council Presidency Conclusion of 21 October 2020, ongoing work of international organizations, as well as secondary literature*1115 or “These requirements have also largely been supported by stakeholders in the consultation the White Paper consultation.1116

This occurs in two instances in the IA. Although the relatively early and commendable timing of the Commission’s consultations – in this case preceding the IIA – generally supports the consultations potential impact on framing the regulation, such statements in the IA do little to further this claim or tease out in which way.1117 Also statements such as “largely been supported” obscure the fact that the consultations on that

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1114 The ‘light check’ refers to whether the detailed reporting in the IA is faithful to the overall outcomes.
1115 Artificial Intelligence Act IA 13.
1116 Artificial Intelligence Act 42.
1117 The lack of clarification of the how stakeholder consultations helped shape the framing of the issue may also create the false impression that the responses of the stakeholder opinions were homogenous enough to support the Commission’s 6-point problem assessment.
very point comprised very diverging views spread out across the number of stakeholders.\textsuperscript{1118}

The second way in which the Commission refers to the stakeholder consultations is through 12 textboxes relaying statistics from the consultation as well as two statistical “Figures” (see below for one such “box”). Noting the type of some of the questions asked (e.g. “how important you think it is that AI may endanger safety”) is telling in terms of how relevant stakeholder input is expected to be.\textsuperscript{1119}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Stakeholders views:} & In the Public consultation on White Paper on AI, 83\% of all respondents consider that the fact that AI may endanger safety is ‘important’ (28\%) or ‘very important’ (55\%). Among SMEs, 72\% found safety to be an important or very important concern, whereas only 12\% said it was not important or not important at all. This position was even more pronounced among large businesses, with 83\% saying that safety was (very) important and only 4\% finding the issue unimportant. 80\% of academic and other research institutions and 88\% of civil society organisations agreed that safety was a (very) important concern. Among EU citizens, 73\% found safety to be an important or very important issue. Of those stakeholders who said safety was not a (very) important concern, 43\% were EU citizens (which make up 35\% of all respondents) and 20\% were SMEs (7\%).
\hline
\end{tabular}
\end{table}

None of the 12 boxes or the two figures elaborate on whether or how the breakout of opinions has influenced the legislative proposal, or which input has substantively been taken on. In any case, in a few instances (in relation to the responses on the possible ban of biometric scanning and the definition of AI) it is possible to deduce that there was a diversity of responses, which might indicate there was no majority view for the Commission to lean on. In general, the link between the statistic presented in the text-boxes and relevant chapter of the IA is not clear – perhaps reflecting that the boxes were inserted at a late stage of drafting of the IA –likely a direct response to the criticism of the RSB that the Commission needed to better use the results of the stakeholder consultation including better presenting minority views and discuss them in a more balanced way.\textsuperscript{1120}

It is also not clear how the Commission weighs the presented statistics of the consultations. The Commission has stated in relation to public consultations generally, that it does not consider responses to its consultation activities to be representative, and that the responses to consultation constitute:

\textsuperscript{1118} Cf. Artificial Intelligence Act IA 42 and Artificial Intelligence Act IA Annex, 14.
\textsuperscript{1119} For the box retelling consultation outcomes for this question, also shown on page, see Artificial Intelligence Act IA 16.
\textsuperscript{1120} For these comments of the RSB, see Artificial Intelligence Act IA Annex 2-5.
[...] a gathering of opinions that tries to ensure everyone gets heard. The influence that public consultations have on evidence-based policy-making depends more on the quality of the contributions than on the number of contributions.\textsuperscript{1121}

The Commission at times re-iterates this in its consultation reports and IA:s, which the Court of Auditors also considers best practice. In light of the responses not being representative (with no such claim or aim) the mere presentation of statistics with no discussion of how the Commission views the responses or whether and how “the quality of the responses” have impact the outcome, the added transparency to such synthesis reporting is low.

The third way in which stakeholder consultation is featured is an actual response or discussion on some of the content of consultation responses. While succinct, the IA contains four such instances. The first example surfaces in one paragraph regarding biometric identification systems.\textsuperscript{1122} Here the Commission, noting the call from civil society to ban the use of facial recognition, as well as an ECI with this stated aim, gives a succinct one-sentence rationale for discarding this approach as it would “prevent their use in duly justified limited uses for security purposes”.\textsuperscript{1123} Second, with regard to the option of not putting further restrictions on remote biometric identification, it “would not effectively address the high risk to fundamental rights posed by this system and their current potential for arbitrary use without an effective oversight mechanism and limitations on their permitted use.”\textsuperscript{1124} Third, on the issue of prohibition of certain harmful AI practices, the Commission states it had considered, but eventually discarded, certain prohibitions requested by NGOs regarding e.g. predictive policing, use of AI for allocation of social security benefits and in border and migration control, as new requirements for trustworthy AI would aim to address the

[...] problematic uses and ensure that the AI systems used in sensitive contexts would be sufficiently transparent, non-discriminatory, accurate and subjected to meaningful human

\textsuperscript{1121} European Court of Auditors (n 131) 44 and 4 Annex (reply of the Commission).
\textsuperscript{1122} While this discussion surfaces in the context of presenting the Commission’s non-preferred regulatory policy option, table 7 on 63 clarifies the discarding of the relevant approaches is also relevant for the Commission’s preferred option.
\textsuperscript{1123} Artificial Intelligence Act IA 46.
\textsuperscript{1124} ibid.
oversight, either the need to prohibit outright the use of AI in these contexts that could also be beneficial, is subjected to appropriate safeguards. 1125

Fourth, the Commission also discusses that in contrast to its risk-based approach, an alternative would be to place the assessment of the risk as a burden on the provider of an AI system and foresee in the legislation “only general criteria for the risk-assessment”. 1126 The Commission acknowledges this could make the risk assessment more dynamic and capture high-risk user cases, but mentions the option was discarded with the explanation that “economic operators would face significant legal uncertainty and higher burdens and costs for understanding whether the new rules would apply in their case”. 1127 While the Commission does not directly link its discussion here to consultation input, its rationale is followed by “consultation statistic” box which demonstrates that businesses were against putting the risk on the providers whereas civil society was for it. 1128 The Commission finally mentions that a fundamental rights impact assessment which was recommended by other EU institutions and “some stakeholders” was discarded as the existing requirement to provide a Data Protection Impact Assessment for high-risk AI aims at protecting a range of fundamental rights and could be interpreted broadly, meaning “new regulatory obligation was considered unnecessary”. 1129

The fourth way is through the annexed consultation report, which lies outside of the general text of the IA. Here there is a more detailed report on the total outcome of the public consultation. In this report responses to the survey have been assessed in terms of stakeholder category – business, civil society, academia, public authority or citizen. In addition, there are two sections summarizing the position papers as well as the feedback from the Initial Impact Assessment. The content of the stakeholder consultation report is all in all a numerical and statistical breakdown of responses across various themes. A telling example:

60.7% of online respondents supported a revision of the existing Product Liability directive to cover particular
risks engendered by certain AI applications. 63% of respondents supported that national liability rules should also be adapted for all AI applications (47%) or specific AI applications (16%) to better ensure a proper compensation in case of damage, and a fair allocation of liability.\footnote{Artificial Intelligence Act IA Annex 55.}

Further, the stakeholder report covering the position papers, where stakeholders had freely reacted and presented ideas, is similarly comprised of a head-counting exercise across domains:

Among business stakeholders, business associations are the ones that mentioned costs the most. Out of all mentions of costs from all stakeholders (75 in total), 56% came from business stakeholders. Academic stakeholders also mentioned costs more often than other types of stakeholders, but also not very often overall.\footnote{Artificial Intelligence Act IA Annex 18.}

The report is a detailed, and at times sophisticated, presentation of who said what, in relation to whom. However, there is no analysis or reporting on if or how this made any difference whatsoever to the Commission, what the Commission thought of the responses and so forth. As in the IA, the Commission also gives no indication of how it weighs its somewhat excessive “head-counting” on who preferred what option, in light of the overall response diversity and rate of consultation responses – considering the Commission itself is very aware the responses are in no way a representative sample. It is also not possible to deduce whether the noted coalescence of certain responses made any difference as in some cases the Commission proposal accords with the outcome of certain responses, in some cases not.

Was there any description of targeted stakeholder consultations?
The consultation report details that in addition to the open consultation and the IIA feedback, the Commission organized one conference, seven online technical consultations and had undisclosed meetings with stakeholders in some Member States as well as a few bilateral meetings with countries outside the EU.
Regarding the technical consultations, the report mentions the theme of each consultation and for each session, the date is indicated as well as the total number of experts participating (except for the children’s rights session) as well as which group of stakeholders was present (e.g. “mainly from academia”). For two online sessions the names of the organizations represented are mentioned. Beyond the theme discussed, there is no mention of the outcome or content of the consultations. The report also details that due to the pandemic, planned outreach activities in Member States were canceled or had to move online. The Commission states that it however discussed the approach in meetings with stakeholders in several Member States, including France, Germany and Italy. They also exchanged views with international bodies, in particular the Council of Europe, the G8 and G20 as well as the OECD. It is also mentioned that the EU approach was also discussed in bilateral meetings with a number of third countries, for example Japan and Canada.

Regarding the conference, which was the Second European AI Alliance Assembly, the themes discussed are mentioned in the annex as well as that 1900 participants across different stakeholder groups participated. Although not mentioned in the IA Annex, a report from the conference was published which details the content of the panel discussions, which questions were taken from the audience and the outcome of the two participant polls taken. While there is no mention of how the conference impacted the proposal of the Commission, one can merely note discussion and elaborations on the implementation of some of the highlighted features of the White Paper, consensus on some of the elements of the Commission’s suggested proposal and diverging views or opposition to the approach on others. Also, the chosen themes of the conference, e.g. conformity assessments and standardization, indicates the direction and shape which the Commission’s work at that time was taking.

1134 Artificial Intelligence Act IA Annex 6, 21.
1136 E.g. there was widespread support for regulating high-risk AI, most participants supported horizontal regulation beyond AI, there were diverging views on biometric identification and standardization: ibid.
Finally the content of the targeted and technical consultations, or additional meetings, was not further detailed or discussed by the Commission in any of its published or available documents.

6.3.1.1 Assessment
First, it is worth noting that the results of the Commission’s public consultation and feedback, as per standard procedure were published; including the synthesis report and all replies and position papers were available in zip-files on the Commission’s website. However, regarding the reporting on the targeted consultation, the Commission was very circumspect. In this respect, the Commission did not report on any of the outcomes of the targeted consultations whatsoever. At least through indicating the number of experts, designated theme and the date of the respective meetings, the information provided here by the Commission displays some information while allowing for further inquiry. And in fact, the initial description of the targeted consultations in the IIA also prompted civil society to request that other targeted consultations should be held.1137

Setting aside the issue of the targeted consultations, there is no doubt that the Commission has adhered to its own the standard practice, and at times going beyond, regarding the publication and presentation of the consultation outcome. However, with regard to the question of how stakeholder feedback and public consultations have impacted the legislative proposals, transparency is seriously lacking. Considering the extensive consultations of the Commission and the thorough debate initiated, the numerous responses garnered to its consultation activities and the Commission’s detailed statistical reporting on the outcome it is it quite remarkable that only a few sentences in the 100-page IA address the consultation responses, providing a brief rationale for why the Commission discarded certain prevalent views presented by stakeholders (and indeed by other EU institutions). The breakdown of stakeholder views in the figures and textboxes provide little clarity on their relevance, or lack thereof, to the regulative proposal chosen by the Commission Service, presumably reflecting a late cosmetic add-on in response to the criticism of the RSB.

1137 “The document mentions targeted consultations organised with ‘technical experts, conformity assessment bodies, standardisation bodies and experts on biometric data.’ We request that consultations also be arranged with civil society organisations and with representatives of groups likely to be adversely affected by these systems.” Access Now, Feedback Response, IIA Artificial Intelligence Act, on file with the author.”
It is somewhat telling that the RSB requested the Commission Service in question to: “better use the results” and discuss the outcome in a “more balanced way” whereas the Commission responded by presenting a statistical breakdown, with no discussion of these results including the minority views, nor “using” (or stating how it has used) the results better.\footnote{For these comments of the RSB, see Artificial Intelligence Act IA Annex 2-5.} Considering the combination of the lack of transparency with regard to content and outcome of the targeted consultations and the meager response of how the Commission viewed the rich stakeholder contributions, the overall assessment consequently for the legislative work associated with the Artificial Intelligence Act is that the Commission in this law-making process has not lived up to its legal obligation according to the principle of participatory democracy.

It must, however, again be stated that this observed legal lapse is not a judgment on whether the Commission did, in fact, take on the views and inputs of stakeholder. For this very proposal, a close look at the responses of the stakeholder consultations, a comparison between the White Paper and the IA and final proposal, the discourse surrounding the proposal, including stakeholder’s publicized views, indicate a number of areas where the Commission might very well have listened to concerned parties and adjusted the course of its legislative work. For instance, one of the most prevalent concerns from stakeholders in response to the White Paper was the lack of clarity in the definition of high-risk AI applications, which amongst others could cause legal uncertainty to business and stifle innovation, while also creating loopholes for fundamental rights breaches. It would seem, taking note of these concerns, the Commission adjusted its framework for determining whether an AI application poses a significant risk. It also included new areas corresponding to some stakeholder suggestions and sectors as high-risk per se.

Another area where the Commission seems to have drawn on the consultation, is in moving away from language which assumes AI uptake in and of itself is a goal worthy of pursuing, to rather stressing it is the uptake of ethical and trustworthy AI which acts as a force for good in society which is the goal. That is the Commission moved away from an innovation for innovation’s sake argument. There are also clear indications in the IA that the Commission has drawn on a very high number of “user cases” provided by various stakeholders and other sources. It is therefore possible that the Commission de facto additionally drew on input from numerous citizens and businesses’
experiences. The additional lack of transparency here is problematic as the user cases are not featured in the published responses of the consultation processes, nor elaborated on in the IA. The question of which kind of user cases were used and how they were selected and what they demonstrated is therefore left unanswered.

6.3.2. Has the Commission adequately promoted procedural equality?
This questions will be address through looking at consultation time frames, geographical diversity and the balance of economic and non-economic interests, in particular efforts to reach out to vulnerable groups.

Overall diversity: Of the 1 216 contributions received, 353 were from companies or business organizations/associations, 406 from citizens, 152 on behalf of academic/research institutions, and 73 from public authorities. Civil society’s voices were represented by 160 respondents and 72 respondents contributed as ‘others’. All member states were represented through consultation replies (i.e. stakeholders who were from those member states), although 73 per cent of responses came from eight countries of which seven were member states. Most of the submitting parties came from Germany (251 German responses). Belgium was second with 162 responses, whereby many of the respondents were EU-wide organizations with a seat in Brussels, or global companies with a Brussels office.

Citizen diversity: Responses from individual citizens amounted to 406 of which 372 were EU-citizens. However, a large number of respondents chose to report their contributions anonymously where country of residence/citizenship was not published. Cross-referencing the number of citizens which allowed their details to be reported, with the number of citizens the Commission reported to have replied

1140 ibid.
1141 One of the top countries that responded was the Unites States with 60 responses, the UK officially still an EU member state at least for part of the consultation period. Ibid.
1142 Of the 450 position papers submitted, among the position papers, 72 came from non-governmental organizations, 60 from business associations, 53 from large companies, 49 from academia, 24 from EU citizens, 21 from small and medium enterprises (SMEs), 19 from public authorities, 8 from trade unions, 6 from non-EU citizens, 2 from consumer organizations, with 94 not specified. ibid 15-17; ‘Open consultation replies AI Act’, on file with the author.
demonstrated that 274 citizens preferred to remain anonymous. However, for citizens who allowed their personal details to be published, those respondents (in total 132) were from 20 Member States, and 9 countries outside of the EU. 87 per cent of the replies were from EU Member States. 24 per cent of the responses came from Germany (32 replies), followed by Italy (14), Spain (12) and France (11). The remaining Member States had between 1 and 8 citizen replies. Information on which survey language anonymous respondents used (published in the raw consultation data) indicates that at least a few of the other Member States were represented by citizens, at least 18 Member States.

Vulnerable groups and affected communities: In terms of specific outreach, the lack of transparency about the Commission’s targeted consultation, including its regional outreach in certain Member States,

1144 Austria, Belgium, Bulgaria, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden, United Kingdom, see ‘Open consultation replies Al Act’, on file with the author.
1145 Albania, Brazil, Canada, Costa Rica, Côte d’Ivoire, India, Japan, Norway, United States, see ‘Open consultation replies Al Act’, on file with the author.
1146 Austria 2, Belgium 2, Bulgaria 1, Denmark 8, Finland 2, Greece 2, Hungary 2, Latvia 1, Luxembourg 1, Netherlands 4, Poland 2, Portugal 4, Romania 8, Slovakia 1, Sweden 1 and United Kingdom 5, ibid.
1147 With regard to the following stakeholder feedback of the IIA, the overall geographical diversity of the was quite broad, although citizen response was relatively low (7 EU citizens).
makes it difficult to draw any valid conclusions about whether the Commission made any attempts to alleviate bias and inequality through outreach. What is clear from screening the numerous replies, is that many of the citizen replies come from individuals who have been working or publishing in the field of AI. However, many replies from citizens also seem to be concerned with one or another feature e.g. biometric identification (perhaps connected to the ECI) as well as other features such as manipulation. For instance, one group which seems to be vulnerable and affected by this proposal are children and families, which find little to no voice in the proposal.1148 There is no visible attempt to reach out to affected communities beyond AI-‘insiders’, although the Commission has stated there have been regional consultations in several Member States.

Overall assessment: Overall the consultation drew an impressive amount of citizen responses, and the geographical representation, although not balanced, included all members states and citizens from most member states, as well as citizens from non-EU states as well as EU citizens living outside the EU. The overall approach of the Commission comes across as outward-oriented. However, in screening consultation replies, much of the participation, including citizens, consist of people inside the AI-bubble (the lack of transparency of targeted consultations and their outcome which makes this assessment difficult, is in itself telling). The indication in the IA of a large number of user cases might suggest participation, but again the lack of transparency makes this difficult to assess. While the overall balance as well as the large number of citizen replies indicate that the Commission has lived up to its legal duty to promote procedural equality and access to the consultation – in reaching ‘parties concerned’, there is still much left to improve with regard to outreach to potentially affected groups.

6.3.3. Has the Swedish government adequately consulted organizations and individuals?

The White Paper on AI was not sent out for public consultation, but the Swedish government published a memo to the Swedish Parliament on its initial reaction to the Commission’s legislative intent. The Artificial Intelligence Act, i.e. the proposal for a regulation, was sent for public consultation by the Ministry for Infrastructure, on the 25th of May 2021,

1148 Regarding the exposure to algorithmic-based persuasive design, see 5 Rights Foundation (n 26).
with a response deadline the 25th June, i.e. a four-week consultation.\textsuperscript{1149} The following is noted.

- Of the 128 parties which officially were invited to comment on the proposal over 100 were public authorities (including around 10-15 public research institutions/universities), 10 were business associations/companies, 5 organizations directly concerned with fundamental or human rights, a few were unions and professional organizations as well as a couple of tech/AI organizations.\textsuperscript{1150}

- Of the 128 parties invited, 100 responded and the responses were published by the Ministry on the government webpage.\textsuperscript{1151} 9 additional responses came in to the Ministry from parties and authorities not officially invited to reply, these were not published but kept on file with the ministry.\textsuperscript{1152}

- Several authorities cited the inadequate time-frame to digest the complex material and provide an adequate response and several refrained from providing any comment, including the Ombudsman for Children in Sweden.\textsuperscript{1153} However, the majority of the replies were substantively robust.

- Of the 5 invited parties which specifically deal with fundamental rights, none replied except Amnesty International Sweden, which replied with a template response in English, laying out the Amnesty’s international headquarter response to the Commission’s proposal.\textsuperscript{1154}

- Of the unpublished consultation replies, two respondents, the Swedish Consumer Organization and the Swedish Consumer Authority criticized the government for not inviting them to the public consultation, arguing the proposed legislation would have direct and substantial impacts on Swedish consumers.\textsuperscript{1155}

\textsuperscript{1149} The consultation document and replies can be found on the website. Unpublished replies are on file with the author. Regeringen och Regeringskansliet, ‘Remiss Av Europeiska Kommissionens Förslag till Förordning Om Harmoniserade Regler För Artificiell Intelligens’ \textless https://www.regeringen.se/remisser/2021/05/remiss-av-europeiska-kommissionens-forslag-till-forordning-om-harmoniserade-regler-for-artificiell-intelligens/> accessed 9 August 2023 (Consultation on Commission’s proposal AI Act).

\textsuperscript{1150} ibid.

\textsuperscript{1151} ibid.

\textsuperscript{1152} Accessed through a request for access to public documents. Unpublished replies ‘Kommissionens Förslag till Förordning Om Harmoniserade Regler För Artificiell Intelligens’ on file with the author.

\textsuperscript{1153} See available replies on website, Consultation on Commission’s proposal AI Act.

\textsuperscript{1154} ibid.

\textsuperscript{1155} Unpublished replies ‘Kommissionens Förslag till Förordning Om Harmoniserade Regler För Artificiell Intelligens’ on file with the author.
• Many replies were technically and legally sophisticated, engaging deftly with the complex issues and in detail with the draft Articles. A couple of authorities indicated they had also participated in the Commission’s previous consultations on the draft. Overall there was much support for legislative action, but a large number of respondents had serious issues with the proposal across various thematic areas.

Assessment: The Swedish government has overall lived up to its consultation duties in that it has consulted transparently, relatively broadly and published consultation documents as well as almost all of the replies. However, it is also clear that the government did not adequately reach out to civil society or citizens while the consultation timeframe is also, considering the substance and volume of the proposal, very condensed. Considering that the Artificial Intelligence Act is expected to take 1-2 years of negotiation before a legislative deal is reached, it is hard to justify why consultation could not be extended by a couple weeks.

The revision of the Eurovignette Directive (1999/62/EC) is a part of the 2015 Energy Union Strategy, in which the Commission announced a comprehensive road transport package promoting in particular more efficient pricing of infrastructure, and currently part of the European Green Deal.\footnote{Esther Kramer, ‘Revision of the Eurovignette Directive’ (EPRS | European Parliamentary Research Service 20017) PE 603.273.}

The Eurovignette Directive on the charging of heavy goods vehicles for the use of certain infrastructures provides rules to be followed by the Member States which decide to introduce road charges (tolls or vignettes), although they are not mandatory. Together with its two updates, the regulatory framework aims at ensuring that revenues are invested in infrastructure maintenance, that discrimination on the market is prevented and that some main external costs -such as congestion, noise and air pollution -are internalized.\footnote{Ibid 2.}

The revision of the Directive - the legislative proposal in question - would extend the scope of the Directive to cover not only heavy goods...
vehicles but also heavy duty vehicles and light duty vehicles i.e. it would encompass passenger cars, minibuses and vans as well as coaches and buses. The proposal emphasizes the application of the ‘polluter pays’ and ‘user pays’ principles by gradually phasing out the use of time-based user charges (vignettes), to gradually replace time-based user charges by distance-based charges. The proposal for revision of the Directive was advanced in tandem with a separate proposal for a Council Directive amending Directive 1999/62/EC as regards certain provisions on vehicle taxation (based on different Treaty provisions) and had been preceded by previous attempts to revise the Directive which for political reasons were scrapped. The negotiations of the revision of the Eurovignette Directive had been stalled for several years and finally, after many complex and drawn-out negotiations reached their conclusion in July 2021 with a text which both the Parliament and Council accepted. The Impact Assessment report relies on a previous Impact Assessment prepared in 2013, accompanying a proposal for Fair and efficient road pricing, which was one of the attempted revisions which were not adopted in view of “political opportunity reasons”.

In preparing the proposal, a combination of consultation methods were used: a standard 12-week online open public consultation, a targeted consultation through thematic seminars with stakeholders and Member States, a conference on the planned road initiatives on 19 April 2016, and 21 interviews with stakeholders selected on the basis of specific data needs carried out by the contractor preparing the IA support study.

The open public consultation ran from 8 July to 5 October 2016, with late contributions accepted. The open consultation contained two sets of questions: the first aimed at understanding the perceptions of

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1158 ibid.
1159 ibid 1.
1160 ibid 2.
1163 ibid.
users addressed to the general public, and a second, more technical one to experts. Respondents were also given the opportunity to provide any further comments. Some respondents also submitted additional documents providing further relevant information. The questionnaires were based on the issues identified by the evaluation. The issues covered included the quality of road infrastructure, the fairness of road pricing (taxes and charges), the problems of congestion and CO₂-emissions, as well as the scope of EU legislation in the field. There were 135 responses to the questionnaires as well as 48 additional documents which had been attached to the replies of which 27 were of relevance.

6.4.1. Has the Commission adequately detailed whether and how consultations have impacted the legislative proposal?

The following documents have been screened to assess the indicator of transparency; the IA, the report on the public consultation, the report on interviews with SMEs and the IIA. The consultation replies have also been surveyed as a light-check.

As in the previous case study, the input from the stakeholder and public consultations is presented in an annexed consultation report as well as throughout the report. The stakeholder report features some basic statistics on the respondent, and then reports on the responses across thematic domains. The following documents have been screened to assess the indicator of transparency: the IA, the report on the public consultation, the report on interviews with SMEs and the IIA. The consultation replies have also been surveyed as a light-check.

As in the previous case study, the input from the stakeholder and public consultations is presented in an annexed consultation report as well as throughout the report. The stakeholder report features some basic statistics on the respondent, and then reports on the responses across thematic domains. However, in contrast to the previous case study, the report also contains a dedicated section where the outcome of the targeted consultations and the conference are reported in detail. For the targeted consultations, contributions are described in terms of content and trends of responses and according to specific contributor e.g. tolling company, transport SMEs, Member State(s) and so forth (i.e. not to the broader categories of business, civil society, public authority and citizens). There is also an approximately one-page dedicated section on the “conclusion and use of the results” which highlights the key take-away points for the Commission. Here it is stated that the results of all the consultation activities were used in designing the policy options and that in selecting measures, the ”most rejected ones were discarded after the initial screening and the retained measures were grouped options with increasing level of regulatory intervention, so that decision

1164 ibid 8-19.
1165 ibid 12-16.
1166 ibid 18.
makers have the possibility to judge on the desired level of ambition”.

In addition to the consultation report there is a specific report annexed on the consultation with SME representatives (SME-test). A detailed stakeholder consultation strategy is also published as a part of the IA.

Moving onto the general text of the IA, stakeholder feedback is referenced directly in several instances throughout the impact assessment, here embedded in the text and reasoning. For instance; discussing the phasing out of vignettes, “While some Member States that currently apply vignette schemes are not in favor, the majority of stakeholders agree that this is a necessary next step in the harmonization of charges.”

Similarly the result of the feedback is contextualized in light of other available information. Further, in discussing the discarded policy options the Commission indicates how the consultations have informed the decision to discard certain policy options.

“The most ambitious policy option introducing a full internalization of external costs as suggested by the 2011 White Paper has also been discarded. This option is supported by some environmental NGOs in particular and remains a long-term goal of the European transport policy, but it does not currently appear to be achievable due to excessive implementation costs and for reasons of subsidiarity. Indeed, regarding certain aspects, it appears that Member States are best placed to act. For example, whether or not to apply road charging or congestion charging on a given part of the network can best be assessed at local/regional level.”

Regarding the policy option of introduction of rules on the liability of the keeper of a toll road to maintain the given road section in sufficiently good/safe condition the Commission notes: “Even though the measure received almost as much support from respondents to the on-line public consultation as the monitoring and reporting requirements, it would effectively introduce a legal obligation to ensure that the objective of achieving fair road quality is met.” The Commission indicates that the option has been discarded as it was considered not to respect subsidiarity requirements as stakeholders that

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1167 ibid.  
1168 ibid 8.  
1169 ibid. 79.  
1170 Eurovignette IA Part 1/2 23.  
1171 Eurovignette IA Part 2/2 83
were interviewed did not support attempting to improve road maintenance by way of rules relating to the potential liabilities and that liability issues were best dealt with at Member State level.\textsuperscript{1172}

The only area where the Commission’s consultation reporting is flawed regards the response from citizen and consumer organizations.\textsuperscript{1173} The Commission lumps the two actually distinct groups of ‘citizens’ and ‘consumer organizations’ masking that 9 citizens responded to the consultation (of which 6 from Hungary) and 7 ‘consumer’ organizations of which 6 were motorist clubs. This fact is only clear when looking at the raw consultation data.\textsuperscript{1174} From this data it is also clear, these motorist’s clubs often have a very large number of members e.g. the responding German motorist club had 9 million members and the Austrian one had 2 million.\textsuperscript{1175} It is somehow misleading to report these organizations and the interests they represent, together with citizens more broadly. While in a sense the motorist clubs are ‘representing’ their 2 million members, they are only representing one distinct feature of their members interests. For instance, in Austria, most individuals who own a car are members of the motorist club ÖAMTC, as they provide good insurance and exemplary and quick service in the event of malfunction or accident.\textsuperscript{1176} However the idea that those 2 million members actually support the ÖAMTC position in relation to the Commission’s piece of legislation is of course a very open question, highlighting once again the issue of representativity of actors.

In any case, regardless of whether the responding citizens and consumer organizations are indicative of citizen and consumer positions, the Commission fails to adequately report on the overall oppositions from the responding citizens and consumer organizations to the Commission’s proposed line of action.

\textit{6.4.1.1. Assessment}

For this consultation process it is clear that the targeted and technical consultation have been reported with detail and care, including the responses by interviewees and while in cases allowing for anonymity describing in detail responses which allow to follow the evolution of the thinking of the Commission in responses to the consultation. The dedicated section in the consultation report of conclusions and use of

\textsuperscript{1172} ibid.
\textsuperscript{1173} ibid 16.
\textsuperscript{1174} Commission, Eurovignette Consultation replies, \textit{on file with the author}.
\textsuperscript{1175} ibid.
\textsuperscript{1176} Based on the author’s experience living in Vienna.
results, allow of a clearer picture of how participatory input has impacted the legislation. Further, general statements in the consultation report on how consultations have been taken into account are actually accompanied by embedded and clear descriptions of how consultation outcomes correlate to the development of the legislation. A main issue regards the reporting on citizens and consumer interest organizations. However, considering the overall reporting, the detailed reporting on the outcome of the targeted consultation and the embedded and clear reasoning on policy choices related to consultation throughout the IA, the Commission has fulfilled the transparency and meaningful exchange requirements prompted by the principle of participatory democracy. Worth considering is that in contrast to the Artificial Intelligence Act, this legislative proposal has a much more defined scope. Not only does it revise exiting legislation, but the current revision has been rehashed and so not only is there good evidential data but also drawing up a consultation strategy may be a more straightforward exercise. In addition, considering that one previous attempt at revising the Eurovignette Directive failed for political opportunity reasons, it seems the Commission has harnessed the consultation to assist in staking out a legislative path which addresses concerns of affected parties, while also being politically feasible.

6.4.2. Has the Commission adequately promoted procedural equality?

Overall diversity: The Commission received 135 responses to the questionnaires as well as 48 additional documents of which 27 were of relevance, covering several stakeholder groups.\textsuperscript{1177} The breakdown of these categories can be seen below.

The respondents were from 20 different EU Member States with the highest number of responses received from Belgium (24), Germany (20), Spain (19), Austria (11), and Hungary (8).\textsuperscript{1178} In addition, a set of targeted interviews received contributions from 21 different stakeholders, including nine Member States (four EU-15 and five EU-13).\textsuperscript{1179}

\textsuperscript{1177} Commission reported on these including transport undertakings and their representatives, consumers, citizens and their representatives, public authorities, the construction industry, public transport associations, and tolling service/solution providers, also noting there was a relatively high number of coordinated responses (36, i.e. 27\%), indicating that standard replies circulated by associations to their members and sent in high numbers; Eurovignette IA Part 2/2 9.

\textsuperscript{1178} ibid.

\textsuperscript{1179} Ibid Section 2.3.1.
Citizen diversity: While the commission has lumped together citizens/consumer organizations as one group, only 9 responses were from citizens (6 from Hungary, 1 from Spain, 1 from the Czech Republic and 1 from Portugal).\textsuperscript{1180} The 7 organizations which stated they represented consumers/citizens were from France, Austria, Germany, Spain, Hungary and Switzerland and the consumer organizations were mostly motorist clubs, often representing large membership (e.g. the German motorist club representing 19 million members and the Austrian motorist club representing 2 million users).\textsuperscript{1181}

Outreach and balance of economic and non-economic interests: Specific attempts were made to reach out to SMEs and Member States, however the environmental associations and citizens which had been targeted in the consultation strategy were largely absent, with no indication outreach was made. The few consumer organizations which responded, represented a large membership-base (in the millions) but all in all the organizations came from only 5 Member States and one non-EU country.

Chart 3: Overall diversity balance of interests

\begin{figure}[h]
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\includegraphics[width=0.5\textwidth]{chart3.png}
\end{figure}

6.4.2.1.\textit{Overall assessment}

It is clear that the Commission achieved, including through its targeted study-outreach, broad geographical representation throughout the

\begin{wrapfigure}{r}{0.5\textwidth}
\begin{itemize}
\item \textsuperscript{1180} ibid compare with Commission, Eurovignette Consultation replies, on file with the author.
\item \textsuperscript{1181} Eurovignette Consultation replies, on file with the author.
\end{itemize}
\end{wrapfigure}
Union. However, the response rate from citizens and the geographical representation from citizens and consumer organizations combined were low and seemingly inadequate. That being said the consumer organizations represented a membership base which is very large, with potential representativity issues noted. While the central aspect of geographical balance of citizens and consumer organizations is lacking, even if one considers that not all EU countries will be affected the same due to different tolling systems and taxation schemes, it is worth pointing out some crucial strengths of the outreach of the Commission.

One strength of the consultation strategy and outcome, from a legal perspective, is that the Commission has clearly identified which parties it believes are most concerned by this legislation by targeting and reporting specific groups; e.g. ‘public transport associations’, ‘transport undertakings’, ‘the construction industry’, ‘tolling providers’ – broad categorizations of ‘civil society’ or ‘business’ are avoided, which is helpful and transparent in understanding how the commission has approached its legislative task of consulting “parties concerned”. And when certain relevant parties were considered difficult to reach, a special interview study was commissioned which broadened the geographical base. Furthermore, the Commission generally engages with the consultation input in a very clear and transparent way, allowing the reader to understand how the consultation input has impacted the proposal. However, when looking at the consultation strategy, the targeted ‘environmental associations’, were completely missing in the consultation outcome. It is unclear whether this lapse was rectified through participation in any of the conferences, but highly unlikely as no environmental association is mentioned in the consultation report or the impact assessment. And the Commission has not attempted to address this through targeted consultations, or better outreach to citizens. This lack of action on the Commission’s part must however also be seen in its legislative context.

The legislative initiative had been proposed several times as a part of the Commission’s green deal, with the Parliament repeatedly requesting strengthening of the legislation in the field. As an expression of i.e. the polluter pays and user pays principles, the legislation was intended to incentivize the use of cleaner vehicles and ultimately result in lesser negative impact from transport, lower level of externalities, including primarily reduced CO2 emissions. However, as stated, previous attempts to address this through legislation and revise the previous Eurovignette had been blocked by the Council. In this context it is understandable that the consultations are focused to stake out a
legislative path, focusing on the obstacles to successfully legislate. While the Commission generally “targets” citizens, it is not unusual for only a few responses to this type of legislative proposal. All this considered, the lack of geographical representation of a stated consultation target ‘citizens’, and the complete lack of the targeted environmental organizations suggest the Commission has lapsed in its legal duty. However, the strengths of the Commission’s consultation and the legal context mitigates this lapse. Clearly, the case study highlights the difficulty in applying the stated indicator in a straightforward way, and how important context is. It however also signals, that citizens and environmental organizations, although targeted in theory, are sometimes not considered a priority stakeholder to listen to.

6.4.3. Has the Swedish government adequately consulted organizations and individuals?

The commission’s proposal was sent by the ministry for initial consultation to some actors on the 2 June 2017 with a deadline 31 August 2017. The Proposal was then sent as a part of a consultation of the Commission’s legislative package which included 6 legal instruments. This consultation was published on 14th June with the same deadline 31 August 2017. The following is noted.

- Preliminary responses from four responders were published in an early memorandum presented to parliament.
- 40 were invited to participate, of which 20 were authorities, 10 unions and 10 business and industry associations.
- Of the 31 replies, 18 authorities (1 university), 3 unions, 10 were business and industry associations.
- Responses were quite varied across all actors, with public authorities being overall more positive or neutral towards the Commission’s proposal (with some reservations), while a few

1183 Swedish consultation replies Commission Eurovignette Proposal, on file with the author
1185 Remiss av Europeiska kommissionens förslag inom ramen för sitt mobilitetspaket Dnr: N2017/03932/MRT; Swedish consultation replies Commission Eurovignette Proposal, on file with the author
1186 Ibid.
business and industry organizations were decidedly against the proposal.\textsuperscript{1187} 
- Subsidiarity issues with the proposal were raised by several actors.\textsuperscript{1188} 
- No civil society organization or NGO was invited.

Assessment: The Swedish government overall has met the criteria in terms of actually consulting, in a timely way. However no civil society, NGO or citizens’ group was invited while the publication of consultation replies was lacking. Because of this, the legislative consultation did not occur to the degree required.

6.5. \textbf{Case study 3. Proposal for a new directive on representative actions for the protection of the collective interests of consumers} 

On 11 April 2018, the Commission published a proposal for a new directive on representative actions for the protection of the collective interests of consumers. Presented as part of the 'New Deal for Consumers' package, the proposal would enable consumers across the EU to use representative actions to collectively demand compensation from companies that infringe their rights. The proposal is a follow-up to the Commission's 2017 fitness check of EU consumer and marketing law, which suggested that due the rise of cross-border trading and e-commerce, the risk of infringements affecting large numbers of consumers is increasing.\textsuperscript{1189} It came in the wake of the 2015 Volkswagen emissions scandal (Dieselgate) and the 2017 mass cancellation of Ryanair flights, which signaled that even when faced with mass harm situations, EU consumers were having difficulties accessing efficient remedies.\textsuperscript{1190} However, beyond these events, the proposal represents efforts over many years to improve and harmonize collective redress in Europe in the areas of antitrust and consumer law.\textsuperscript{1191} The main EU legislation on collective legal actions for consumers, before the current proposal, was the 2009 Injunctions Directive, which requires Member States to put in place procedures for

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{1187} ibid.
\item \textsuperscript{1188} ibid.
\item \textsuperscript{1189} Nikolina Šajn, ‘Representative Actions to Protect the Collective Interests of Consumers A New Deal for Consumers’ EPRS | European Parliamentary Research Service 2.
\item \textsuperscript{1190} ibid.
\end{enumerate}
\end{footnotesize}
stopping infringements of EU consumer rights. However the Directive was limited in scope, including that only 'qualified entities' can initiate injunctions proceedings. The Commission issued a recommendation in 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States, but a Commission report in 2017 found that Member States had implemented the recommendation only to a limited extent with large differences in the way representative actions functioned across Member States.

For two years, the Commission proposal went through protracted and difficult negotiations by the Parliament and the Council. Given the complexity of the issues and the diverging views between Member States, interinstitutional discussions were expected to be long and difficult. For Member States where no collective redress instruments were available, the new proposal would mean significant procedural changes into their national systems. For Member States where collective redress was already in place, stakeholders were worried that the new rules could undermine their existing national mechanisms. On top of this, the proposal also faced strong resistance and criticism from business and the industry, drawing parallels to the potential for abusive litigation like in the US system.

In preparing the proposal, the Commission relied on various consultation inputs, including consultation organized in conjunction with its Fitness-Check of related consumer legislation (including the injunctions directive), a call for evidence on redress through collective action running between 22 May 2018 to 15 August 2017 feedback on its IIA and targeted consultations with the relevant networks of Member

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1193 Šajn (n 1189) 2.
1195 Šajn (n 1189) 2–4.
1196 ibid.
State authorities, legal practitioners, consumer organizations and business associations.\textsuperscript{1198}

\textbf{6.5.1. Has the Commission adequately detailed whether and how consultations have impacted the legislative proposal?}

The Commission in its impact assessment relies on numerous previous consultations, including the 2011 public consultation on collective redress. This raised the question which consultation exercises should be assessed with regard to the obligation to consult in law-making. The starting point for this assessment is the stated intent to legislate, that is the IIA. However an overly formalistic application of this starting point would mean that the large consultations during 2016-2017 which culminated in the publication of the IIA and the stated intent to legislate, would be not be included. In the IIA it is also stated that considering the broad consultation just concluded, the Commission will only be conducting additional targeted consultations prior to the release of the IA. Considering that from the relevant consultation documents it was relatively clear there was a possibility of a legislative approach to collective action, these activities have been included as well. The following documents and consultation activities have consequently been screened to assess the indicator of transparency; the impact assessment including its consultation reports, the consultations on the Fitness-Check, and the Commission’s call for evidence on redress through collective action as well as the published feedback to the IIA, and targeted stakeholder results.\textsuperscript{1199} Consultation activities carried out in the context of the assessment of the implementation of the 2013 Recommendation on Collective Redress were not included because the long amount of time that had passed in relation to the current proposal, and overall more tenuous link to the current proposal.


\textsuperscript{1199} The ‘open consultation’ preceding the IA is explicitly not focusing on redress but the other legislative proposal covered by the impact assessment. It has been lightly surveyed as it indirectly serves as a basis for the issue of redress, as it e.g. investigates the digital environment for consumers. However, the Commission explicitly excluded the issue of redress from this consultation and dealt with this separately in the ‘call for evidence’.
Initially, it must be stated that the legislative documents are highly difficult to navigate for various reasons. For the case study purpose this is particularly true as half of the IA relates to a legislative proposal that was adopted a year earlier than the case studied, and consultations were sometimes on issues overlapping between the different legislative proposals, which were part of the same package, but passed at different stages through different instruments and consulted through different, yet sometimes overlapping means.

Besides the annex which contains a consultation report which details the outcome based on stakeholder breakdown, the impact assessment is peppered with consultation outcomes, many of which amount to a reporting of outcomes rather than an understanding how these have informed the legislative work. The IA however also admits transparently when there were diverging opinions and discusses them in-depth, as well as when it didn’t succeed in reaching groups it had hoped to consult. One such example is the fact that business organizations and companies were consistently against the strengthening of collective redress. There are also accounts of which organizations participated in targeted consultations and some information about the selection process. The IA also cites examples of mass harm situations and ineffective mechanisms to tackle them, citing individual consultation replies. Further, the Commission services indicate where certain consultation replies have contributed to certain conclusions e.g. “Consumer organizations confirm that the Commission guidance has not led to improvement of transparency of online marketplaces”.

1201 For example: ‘It was challenging to reach specific type of businesses, such as online marketplaces and free digital service providers.’ ibid. Part 2/3 (Representative action for consumer protection IA part 2/3) 7.
1202 ibid 11-12.
1203 ibid 16.
1204 Representative action for consumer protection IA part 1/3 24.
1205 Representative action for consumer protection IA part 1/3 31.
The Commission also notes that while business organizations observe significant differences in Member State implementation of the relevant EU consumer legislation (CRD and the UCPD) they prefer adopting further guidelines and recommendations, citing specific position paper.\textsuperscript{1206} The Commission to a certain extent also responds directly to the concerns and views of large companies:

There are no viable alternatives to the mechanism for consumer redress under option 3. In order to build redress actions on the existing category of “measures eliminating the continuing effects of the infringements” in the ID, redress actions would need to follow the existing modalities of the injunction procedure, such as the limitation of representative action to qualified entities.\textsuperscript{1207}

The report seems to have incorporated the initial appraisal of the RSB that stakeholders views needed to better be reflected in the assessment.\textsuperscript{1208} Suggesting in its final opinion, that the Commission had failed to show significant stakeholder and Member State support for its action, the RSB stated:

The revised report does not sufficiently demonstrate the need for legislative action at EU level on collective redress in view of the 2013 Commission Recommendation on this topic.\textsuperscript{1209}...(the) report could expand on the motivation and arguments brought forward by Member States and other stakeholders in favor of an EU legislative initiative on collective redress.

In addition to engaging in several instances with the substance of the consultation outcomes the Commission also details which networks by name that it invited to its targeted consultations as well as what was discussed with which expert groups.\textsuperscript{1210} However whereas the content of the main targeted consultation was reported, the consultation with expert groups were not.

\textsuperscript{1206} Representative action for consumer protection IA part 1/3 24.
\textsuperscript{1207} Representative action for consumer protection IA part 1/3 43-44.
\textsuperscript{1209} ibid 3.
\textsuperscript{1210} Representative action for consumer protection IA part 2/3 16.
**Assessment**

Despite the challenges in surveying the IA, as well as the lapse in reporting the on consultation with expert groups, the embedded and detailed discussion of the stakeholder participation indicates the Commission has lived up to its obligation of providing account of how participatory input has influenced the legislative proposal. The fact that the targeted consultations were well-reported also support this.

6.5.2. *Has the Commission adequately promoted procedural equality?*

The Commission in its impact assessment relies on numerous previous consultations, making it highly difficult to draw up a definitive geographical map of respondents. This especially so because it sometimes draws consultation results which raise the question to what degree the respondents were commenting on the content of the current legislative proposal. In addition, on two questions the Commission draws on general responses to the public consultation which was targeting another part of the Consumer Deal Package, raising the question whether all those respondents should be incorporated when assessing the geographical reach of the consultations on collective redress. In a similar vein, The Commission also cites results from the 2017 Consumer Scoreboard, which is an EU-wide representative survey of consumer experiences and opinions, for 2017 the number of participants was 26599 representatively surveyed from all Member States as well as Norway and Iceland. Although the responses which were drawn upon were relevantly related to assessing the need for collective redress, however, the question is whether those responses should be seen as participating in law-making (e.g. consumers were not commenting on any aspect of a potential legislative approach and crucially also not choosing to present their views in the context of a legislative process). In the end, while the use of such surveys can be relevant for a legal obligation to consult, in this context the general-purpose Scoreboard was not included.\textsuperscript{1211}

The Fitness-Check covering six directives including the injunctions directive saw 436 replies with an overwhelming 216 replies from

Germany followed by 48 Belgium, 24 from UK and 15 from France. The rest of the replies originated other Member States, between 1-13 replies per Member State. In this consultation there was a predominance of business interests with 40% firms and 20% business, with 22% of the replies being consumers, 5% consumer associations and 6% public authorities as well as 7% other.

By contrast, the replies from the call for evidence, less numerous albeit solely focused on the issues of redress, saw more participation from consumer organizations and public authorities. The call for evidence received 50 replies spread rather evenly across 17 Member States comprising 5% consumers, 28% consumer associations, 10% civil society groups, 26% business associations 3% companies 15%, public authorities or ministries and 12% other.

In addition, there were 23 responses across 16 Member States to the IIA on the revision of the Injunctions with an even spread mix of economic and non-economic actors as well as 3 were citizens. The open public consultation accompanying the IA, (with 414 responses spread over 26 Member States including 94 individual citizens) was directed at other consumer protection rules than collective redress, while containing one or two questions relevant for redress as well.

Finally, a targeted consultation on the revision of the Injunctions Directive was held with 90 replies coming in from 26 Member States and three non-EU countries (all Member States were represented except Hungary and France). The respondents were 48 Member States authorities (nation consumer protection authorities, European consumer centers, national ministries, national competition authorities), 21 business associations (nation and EU-wide), 16 consumer associations (nation and EU-wide), 5 Other (chamber of commerce, legal practitioners).

The overall results hardly fit neatly into a pie-chart of geographical representation. However, the outcome, as well as the targeted

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1212 Results available on the consultation website, see ‘European Commission, Public Consultation for the Fitness Check of EU Consumer and Marketing Law’ (n 1198). A few additional replies which came in late were not included in the statistics.
1213 Ibid.
1214 Replies available at ‘European Commission, Call for Evidence on the Operation of Collective Redress Arrangements in the Member States of the European Union’ (n 1198).
1215 Replies available on the consultation website, see ‘European Commission, A New Deal for Consumers – Revision of the Injunctions Directive’ (n 1198).
1216 Representative action for consumer protection IA part 2/3 18-19.
consultation of the Commission, suggest there has been a strong ambition of the Commission to have broad, sometimes universal Member States representation, which is reflected in the various consultation outcomes. Citizens voices were promoted through various means and there was strong participation from both consumer associations, business, and professional circles. Overall the Commission has adequately promoted procedural equality.

6.5.3. Has the Swedish government adequately consulted organizations and individuals?

The proposal was sent out for public consultation on 5th May 2017 with a deadline of 15 June 2017. The following is noted.

- Of the 70 parties which were invited to comment, 32 were public authorities of which 2 were universities, 7 professional organization, 15 related to business and industry, 9 civil society and other groups (e.g. representing elderly, ethnic minorities, disabled, environmental organization.) and 7 consumer organizations.
- 42 replied of which 32 were authorities (2 universities), 6 represented business interests.
- Substantively, opinions broadly diverged along similar lines manifested at the European level where consumer organizations and consumer authorities, were positive to the legislative initiative whereas business and industry were strongly against.
- Legal and professional organizations tended also to be negative with the argument that the way the legislation constructed group proceedings was largely alien to Swedish market law, in one

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1217 Remiss Fi2018/01710/KO’ Europeiska kommissionens förslag till Europaparlamentets och rådets direktiv om gruppans för att skydda konsumenters kollektiva intressen, och om upphävande av direktiv 2009/22/EC’ Finansdepartementet 2018; Swedish consultation replies representative action, on file with the author.

1218 ibid.

1219 ibid.


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instance highlighting how the proposal may be incompatible with the Swedish constitution.\textsuperscript{1221}

- Following the adoption of the proposal November 2020 at the EU-level, a commission of inquiry was formed to analyze the implementation of the directive and put forth a draft implementing bill (the commission submitted its report June 2022).\textsuperscript{1222}

Assessment: The Swedish government through consulting broadly and transparently, across the spectrum of non-state actors, including with adequate timeframes, has for this legislative consultation met the bar of ‘to the degree required’ or as necessary.

6.6. Case study 4: Regulation on Asylum and Migration Management (New Migration Pact)

Following the large increase of asylum seekers entering the European Union (EU) in 2015,\textsuperscript{1223} a substantial amount of which were escaping persecution and unrest as a result of the protracted Syrian war and humanitarian catastrophe, the Commission unveiled a ‘European Agenda on Migration’ in May 2015 in an effort to develop and coordinate policy responses at the EU level.\textsuperscript{1224} In order to further harmonize the EU asylum acquis and rectify noted shortcomings, the Commission started a comprehensive overhaul of the Common European Asylum System in 2016.\textsuperscript{1225} One such shortcoming was the ‘Dublin system’, a mechanism through which Member States establish which nation is in charge of processing an asylum application from a non-EU country or a stateless person. Within the reform framework, on important laws and the overhaul of the Dublin system, Member States were unable to come to an agreement. With the aim of resolving the structural weaknesses in the context of national reception, asylum, and return systems of EU Member States, the Commission submitted a "new

\textsuperscript{1222} Statens Offentliga Utredningar [SOU] 2022:42 genomförande av EU:s grupptalandirektiv [government report series].
\textsuperscript{1223} The total number of asylum applicants in the EU during that exceeded 1.3 million. See e.g. Wouter van Ballegooij and Cecilia Navarra, ‘The Cost of Non-Europe in Asylum Policy’ (EPRS | European Parliamentary Research Service 2018) PE 627.117.
\textsuperscript{1224} Commission, communication from the Commission on a New Pact on Migration and asylum COM (2020) 609 final.
Pact on migration and asylum" (hence, "the new pact") in September 2020.\textsuperscript{1226} The pact aimed to "turn the page" on the years that followed the 2015 migrant wave and Member state clashes.\textsuperscript{1227} Political tension had ensured between frontline states in the South, who faced the task processing asylum claims, transit states in Central Europe, who criticized ineffective border controls, and destination states in the North, who were ultimately responsible for hosting and integrating refugees.\textsuperscript{1228} The new pact consisted of five legal instruments, three recommendations, and one document providing guidance.\textsuperscript{1229} Pre-entry processes at external borders, responsibility sharing and solidarity mechanisms, a special mechanism for crises and force majeure, and new governance practices in the areas of asylum and migration made up its main components.\textsuperscript{1230} The center-piece of the pact was the proposed Regulation on Asylum and Migration Management, which would replace the current Dublin Regulation and relaunch the reform of the Common European Asylum System.\textsuperscript{1231}

The Pact drew much attention upon its release and was also criticized by various civil society organizations, who argued the pact overly focused on border controls and that its approach to solidarity mechanisms would allow EU countries to continue to intensify pushbacks at the external borders, with concrete elements of the package breaching fundamental rights and the Refugee Convention, especially non-refoulement.\textsuperscript{1232} Member states were equally divided and because of the polarized positions, progress was stalled until new momentum was found in the Spring 2022, when the war on Ukraine had

\textsuperscript{1227} ibid.
\textsuperscript{1230} ibid.
again brought the issue to the fore.\textsuperscript{1233} By June 2023 both Parliament and Council had adopted their respective common positions and a finish line for the legislation was in sight.

Neither the Regulation on Asylum and Migration Management, nor the Pact was accompanied by any impact assessment, and no online public consultation was conducted. The Parliament, condemned the lack of impact assessment and commissioned its own substitute impact assessment, the conclusions of which were critical of the substance and overall approach of the legislative package.\textsuperscript{1234}

From the accompanying SWD, it is clear that the Commission did not hold any open public consultation on the legislative proposals.\textsuperscript{1235} The Commission published a Roadmap on the New Pact on Migration and Asylum, which was available for stakeholders’ comments for 4-week, between 30 July and 27 August 2020.\textsuperscript{1236} It generated in total 1829 replies from 1753 unique respondents.\textsuperscript{1237} The feedback on the Roadmap was also summarily noted in the document attached to the proposal.\textsuperscript{1238} However, the Roadmap clearly stated that it did not aim for any legislative impacts, but was a precursor to a pending “communication on the Migration Pact” and gave very little detail on any direction the Commission was taking with regards to the Pact.\textsuperscript{1239} As such it is questionable whether the feedback on the roadmap can be considered EU law-making consultation.

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\textsuperscript{1233} Liboreiro (n 1205).
\textsuperscript{1237} ibid.
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6.6.1. Has the Commission adequately detailed whether and how consultations have impacted the legislative proposal?

The SWD provides very little information regarding the substance, outcome or impact of the consultations which did occur. Under the rubric “consultations with civil society”, more than half of mentioned ‘consultations’ refer to desk research which includes publications by civil society or non-state actors, as well as continuous interactions with civil society dating back to 2016.\textsuperscript{1240} For instance the document reads:

Civil society was also engaged through a number of meetings and conferences, since the proposed 2016 CEAS package. The Tampere 2.0 conference, held on 24-25 October 2019 in Helsinki, aimed to facilitate the future negotiations by conducting a series of thematic discussions on why a common system is necessary and on how the current rules should be amended.\textsuperscript{1241}

The document then continues to mention how the recommendations of the Tampere conferenced resulted in focusing on the root causes of migration, issues such as lack of trust between Member States and so forth. After this listing of broad thematic recommendations, the document then moves on to another topic. There is no information whether or how these “recommendations” were put to use, nor anything about who participated in the conference. Overall, these vague and declamatory references to conferences and events sometimes dating years back, offer little value in terms of transparency and feedback. They may have contributed to the Commission’s overall knowledge-base, but they cannot be viewed as legislative consultation. Instead, the consultation that seemingly has occurred with regard to legislative package seems to be the consultation with the Parliament, Member States, the feedback on the Roadmap and potentially a few targeted consultations during 2020 which are mentioned in the document.\textsuperscript{1242}

References in the documents to the targeted consultations basically only include the date and that the Commissioner herself was involved, and in one case the CSO present for that consultation; “Commissioner Johansson held targeted consultations with civil society organizations (CSOs) on 14 February 2020” and “with representatives of the Initiative

\textsuperscript{1240} Commission SWD Asylum and Migration Pact 25-26.
\textsuperscript{1241} Commission SWD Asylum and Migration Pact 25.
\textsuperscript{1242} Ibid.
for Children in Migration on 27 January 2020”. It is also mentioned that “during her visits to Member States Commissioner Johansson regularly consulted with relevant local non-governmental organizations.” There is no way to see which issues were discussed, which CSOs were involved and how they impacted the proposal. One can also question whether these consultations included concrete elements or lines of action related to the Pact or whether general issues were discussed.

The references to Member States and the Parliament also do not include any detail on the content or outcome of these deliberations. Finally, there is the feedback on the Roadmap. First it must be stated it is unclear whether responses to the Roadmap can be considered law-making consultation when the Commission refers to the Roadmap as preparing a ‘Communication’ meant not to have any significant impacts.

The Communication will present the overall context, logic and rationale of various legislative and non-legislative initiatives which the Commission intends to put on the table together with the Communication setting out the New Pact. In line with the Better Regulation Guidelines, an impact assessment will not be prepared as the Communication itself is not intended to have significant direct impacts.

Nevertheless, as the SWD is the only document accompanying the legislative proposals and refers to the Feedback on the Roadmap, it is worth looking at the reporting surrounding the feedback.

With regard to the feedback received, the Commission summarized the outcome of the numerous feedback replies in three paragraphs and a chart detailing which member states participants in the feedback came from. Notably, the Commission summarily states that “in terms of the tone/attitude of the replies towards the New Pact, the largest number were mostly neutral, followed by negative, positive and mixed replies”. In a footnote the reader can surmise, that in fact, a small sliver of feedback replies were positive towards the initiative and over
700 were negative with over 800 neutral. Looking at the actual replies, most of these 800 seem to be from citizens (many are noted as anonymous) with many replies not directly commenting on the content of the Pact and others expressing diverse views ranging from relaying strong anti-immigration sentiments, to Black-Lives-Matter activism to thoughtful citizen-oriented replies on the wished for approach to asylum and migration.\textsuperscript{1248} None of this diverse and somewhat disorienting responses are mentioned or dealt with in the SWD.

The Commission further makes brief mention which themes each category of respondent focused on, with little further detail provided; for example:

Non-governmental organizations and academic research institutes stressed the need to reform the Dublin Regulation and improve the implementation of the rest of the asylum acquis. They also underlined the need for safeguards in the asylum acquis, especially for women, children and other vulnerable groups. Some of them warned against the externalisation of migration policy, the introduction of a screening phase and the extension of the border procedure.\textsuperscript{1249}

After the end of this paragraph, the Commission moves on from consultation to another chapter in the working document. The phrase “the Commission has taken into consideration” is repeated several times in the few paragraphs dedicated to consultation in the SWD and introductory paragraphs with reference to national authorities or organizations, but there is no explanation how the Commission has taken their views into consideration, especially or even which legislative proposal the Commission is talking about. It is not clear what outcome or insights were derived from the targeted consultation, including whether these consultations related to the legislative package, some of the voluntary recommendations of the Pact, or just broader issues related to migrations e.g. brought on by COVID-19. There is no acknowledgment that a vanishingly small portion of the consultation replies were positive to the content of the Pact and what implications this has. Finally, the explanatory memorandum which is embedded in

\textsuperscript{1248} Compare Commission SWD Asylum and Migration Pact 27-28 and Commission, New Pact on Asylum and Migration, Roadmap Feedback (n 1238)

\textsuperscript{1249} Commission SWD Asylum and Migration Pact 28.
the proposal for a regulation offers no more insight, as it is a condensed form of the already succinct reporting on consultation in the SWD.\textsuperscript{1250}

It is clear that the Commission has not lived up to its transparency obligations. The vague and sweeping statements offer no clarity on the origin, substance and impact of the ad-hoc ‘targeted’ consultation that did occur, nor the numerous replies to the publication of its roadmap. The explanatory memorandum embedded within the actual proposal for a regulation, is a condensed form of the already very succinct reporting on the staff working document.\textsuperscript{1251} While Member States have clearly been consulted, the outcome of these consultations is also not reported. The contrast with the Commission’s reporting in all other examined cases is stark, where consultation is reported through reports, statistics, annexes, descriptions and so forth.

Overall the Commission’s reporting on consultation is less than forthcoming, seemingly representing a problematic approach in terms of adhering to the principle of participatory democracy and the consultation obligations it entails. At the same time the legislative process highlighted some of the challenges that occur when citizen in larger numbers are brought into the process and the kind of different demands and expectations it places on public institutions which may well lead to retreat by public institutions rather than engagement. As on one of the ‘anonymous’ (presumably citizen) feedback replies state:

\textit{[…] this is an initiative of profound significance for the future of Europe and its citizens. Yet its existence and this possibility to comment is a well-kept secret, it seems. About 2000 people have commented by today which is the last day, out of a population of 500 million or so. The level of ambition of the EU in this matter appears illustrative of its attitude toward listening to the EU citizens, and is one more reason to question the legitimacy of this whole initiative.}\textsuperscript{1252}

\textsuperscript{1251} ibid.
\textsuperscript{1252} Individual Feedback Reply, Roadmap New Pact Asylum and Migration, \textit{on file with author}. 
6.6.2. Has the Commission adequately promoted procedural equality?

For the legislative proposal under review, the Commission failed to conduct an open consultation, however its Roadmap did generate significant reaction. Of the 1753 unique respondents, 1657 were citizens, fifty were organizations, six were public administrations and forty fell under the ‘other’ category.1253 While replies were numerous, in part due to a campaign activating citizens, replies only originated from 10 Member States, showing little geographical representation.1254

Crucially, countries with a disproportionately strong interest and experience with issues related to asylum and migration and the issue of solidarity e.g. Greece, were not represented at all in the consultation. The 4-week deadline and lack of advertising likely contributed to this effect, although the framing of the Roadmap may also have contributed to the lack of replies. The Roadmap’s reasoning as to why no impact assessment is necessary is worth recounting:

The Communication will present the overall context, logic and rationale of various legislative and non-legislative initiatives which the Commission intends to put on the table together with the Communication setting out the New Pact. In line with the Better Regulation Guidelines, an impact assessment will not be prepared as the Communication itself is not intended to have significant direct impacts.1255

It is therefore unclear what respondents thought they were replying to – which is confirmed after a screening of the replies, especially the citizens who stood for the overwhelming amount of replies, and would give declamatory feedback related to asylum and migration and the overall role of the EU.

It is clear the Commission consulted thoroughly with all Member States (and to some degree the EP) in order to make progress on the political gridlock. However, with regard to consultation with non-state actors the Commission made little effort, to the point where it seems as if such

1253 see Commission, New Pact on Asylum and Migration, Roadmap Feedback (n 1238).
1254 Germany (1205 EU citizens, 9 non-EU citizens, 3 NGOs, 2 academic research institutes, 2 companies, 27 other respondents), followed by Estonia (165 EU citizens), Austria (101 EU citizens), Hungary (50 EU citizens), Sweden (35 EU citizens), Belgium (23 NGOs, 2 other respondents), the Netherlands (14 EU citizens, 4 NGOs), France (13 EU citizens, 1 academic research institute, 1 other respondent), Italy (13 EU citizens, 1 NGO) and the United Kingdom (5 EU citizens, 5 NGOs), see ibid.
1255 Commission, New Pact on Asylum and Migration, Roadmap Feedback (n 1238).
engagement was deliberately avoided. Indeed, the introductory statement of the document containing the Proposal for a Regulation is revealing:

The political profile of migration over recent years and the negotiations on the 2016 proposals mean that there has already been a rich and detailed debate on the issues covered by this Regulation.\textsuperscript{1256}

This seems to reflect the view that the substantial consultation had been done before in relation previous efforts to legislate the field of asylum and migration. There may be merit to the argument that the main points of the legislative package had been covered during broad and substantive consultation in other contexts than the specific legislative proposal at hand (although reform efforts within the same area). However, such an approach to consultation can arguably only make sense if the Commission then clearly states its opinion in this regard and accounts for how such input was taken into account, including where it may have influenced the proposal at hand. Even if those consultation had been properly relayed, there furthermore is something inherently problematic, from a legal standpoint, in fulfilling a Treaty obligation to consult through relying on consultations conducted years before the legislative proposal was presented, especially on such a salient topic as migration. This is probably also why the Commission did not explicitly refer to previous rounds of consultations in the document attached to the New Pact of Migration and Asylum.

Overall, while Member State consultation seemed commendable, and there was numerous feedback to the Roadmap announcing a pending Communication on the Migration Pact, the Commission did not sufficiently promote procedural equality. Indeed, failing to have open public consultations, its framing in the Roadmap, and the lack of established links of the targeted consultations with the legislative proposal at hand- it could be argued the Commission failed to consult at all in breach of the principle of participatory democracy, and the relevant primary law requirements. In particular, Article 2 of Protocol

\textsuperscript{1256} This statement is followed by “In addition, the Commission consulted the European Parliament, Member States, and stakeholders on a number of occasions to gather their views on the New Pact on Migration and Asylum.” However as reported, the actual description and reporting of such consultation with regard to consultation with non-state actors seems to be highly limited see Proposal for a regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] COM(2020) 610 final. 14.
No. 2 statements that” before proposing legislative acts, the Commission shall consult “widely” can hardly be considered fulfilled through principally only consulting Member States and the Parliament. Nor is there anything to suggest there is a case of “exceptional urgency” at hand which would relieve the Commission of its consultation duty according to the protocol’s requirements.

6.6.3. Has the Swedish government adequately consulted organizations and individuals?

Written or open consultations on the Migration Pact were not conducted. However, hearings were held between 2021 and 2023 within the framework of ‘Asylforum’ - a dialogue forum held between the government and civil society and which the government organized on a regular basis. The hearings were held on 2021-03-23, 2021-06-30 (video-conference), 2021-09-29, 2022-05-30 and 2023-02-02. Complete and detailed minutes existed for 3 of the 5 hearings which were obtained. Some email exchange on the others was also received. The following is noted.

- Except for one hearing, they were not exclusively gathered for the purpose of consulting on the Migration Pact, however it was a prominent agenda point for several of the meetings.\textsuperscript{1258}
- One of the meetings was specifically assembled with regard to the Pact and was on video-conference.
- Invitations to attend were sent out approximately one month in advance, with the exception of the video-conference which was sent out with a week’s notice.
- The in-person meetings were frequently high-level with the minister herself/himself participating and a few senior-officials as well as a couple case officers and advisers. Participation from the stakeholders was limited to 1 or 2 persons per organization.\textsuperscript{1259}
- Between 16-18 organizations were invited to attend each in-person hearing (the same 16 organizations were invited to each hearing which then expanded to 18 organizations).\textsuperscript{1260}

\textsuperscript{1257} Invitations and minutes to ‘Asylforum’, on file with the author.
\textsuperscript{1258} ibid.
\textsuperscript{1259} ibid.
\textsuperscript{1260} ibid.
The groups were exclusively civil society, fundamental rights and grass-roots groups (e.g. refugee rights groups, volunteering associations, religious communities etc.)

13 specific individuals (representing groups associated within the ‘Asylforum’) were invited to the video conference on the Migration Pact.1261

In addition, three public authorities – the Swedish Migration Board, The Swedish Police Authority and the Swedish Security Service- had been consulted throughout during the negotiations sometimes taking a leading role.1262

The exchange on the Migration Pact (and in general) was dialogue-oriented, sometimes seeming like a Q&A of the government.1263

- Frequently the government shared information and updates1264
- The organizations were well-informed with specific insight and experience on asylum matters1265
- The organizations shared their concerns about several elements of the Migration Pact from a fundamental rights and human rights perspective, including also detailed elements about its workability.1266
- In a few instances, the government and organizations seemed to deliberate about the positions of the government, the latter sometimes called to account to explain further its position, and organizations sharing their perspective and views.1267

Assessment: Swedish Government has overall lived up to its consultation duties through consulting in a regular and deliberate way with a variety of civil society organizations and groups. However the lack of transparency, publicity and proper documentation is arguably in breach of the government’s consultation duties.

1261 ibid.
1262 Email conversation with Swedish Ministry of Justice case officer about parties consulted
1263 Invitations and minutes to ‘Asylforum’, on file with the author.
1264 ibid.
1265 ibid.
1266 ibid.
1267 Ibid.
6.7. **Reflections on case studies and implications**

The assessment of Commission consultations on four legal proposals against three key legal obligations of the principle of participatory democracy has demonstrated three things. The first is that the procedural requirement of transparency and responsiveness: i.e. how participatory input has impacted a proposal, can be applied effectively. The second is that the obligation of providing procedural equality is difficult to apply in a streamlined and meaningful way, at least as it has been conceived of as a legal threshold and applied in these case studies. However, it remains a key challenge in giving effect to the principle of participatory democracy. And third, the visualization of how consultation has continued at the national level in Sweden has highlighted how the principle of participatory democracy at the EU-level interacts with constitutional imperatives and national practices at the national level – identifying relevant gaps as well as opportunities for the realization of the normative goal of the principle of participatory democracy.

With regard to adequate responsiveness, it is clear that while the Commission performed admirably across the first three legislative consultations in *presenting* and publishing the results of its open consultation outcomes and replies, reporting on the targeted consultations was less stellar, which for the first and particularly the last case was seriously lacking. Meanwhile, as has been argued, merely reporting on consultation outcomes is insufficient. The different outcomes in the cases however highlight that the legal obligation can be realistically achieved in different settings through various means. With regard to the case related to the Regulation on Asylum and Migration Management, even presenting and publishing the results were poorly conducted.

In the first case study, the legal assessment demonstrated that the Commission had failed to provide adequate feedback. Because, as noted, there is a rather strong case to be made that for this particular law-making process, stakeholder consultations and input actually had a significant impact on the Commission’s final proposal in specific instances, it is worthwhile to pause and reflect on a few possible reasons as to why the Commission consistently refrains to report on such impact in any meaningful way.

The first and obvious reason, which this research seeks to directly address, is that the Commission does not see itself as legally bound to provide such feedback. Absent an understanding of its legal obligation
in this regard, such feedback becomes an issue of convenience, and as such becomes prey to a number of factors.

One such factor may be complexity of attribution. The seeming simplicity of meaningful exchange through “giving feedback” on how stakeholder and citizen input impacts a legislative proposal, belies the complexity of the various forces which influence the Commission’s legislative work and the entry points for such influence. As stated earlier, the multiplicity of entry points does not necessarily fit with a linear chronological narrative of impact. An illustrative example for this very legislative proposal is that the first leaked draft of the Artificial Intelligence Act had a 5-year moratorium on biometric identification which then was scrubbed at a very late stage before release of the Commission proposal for a regulation.\textsuperscript{1268} Further, many of the concerns or viewpoints of stakeholders in this consultation process are also echoed in research, raised by international organizations such as the Council of Europe, promoted by outside business entities in other spaces, championed through mass citizen mobilization (ECI initiatives), or featured implicitly in discussions during AI conferences and seminars. Attributing developments in the legislative proposal to a specific consultation process, response or stakeholder group may not only be difficult, but often disingenuous.\textsuperscript{1269} It is often the amalgamation of information, thoughts, experiences, or indeed various coordinated lobbying efforts, surfacing in different spaces, presumably which also may evolve and contribute to new perspectives – which combined engenders impact.

The question then arises, does this mean that adhering to the suggested legal obligation is impossible or even not relevant? No. The transparency prompted by the principle of participatory democracy does not require that it is possible to trace impact back to a certain element of a legislative proposal or to a particular stakeholder group or consultation response. Such an obligation would furthermore rest on the flawed assumption that preferences and positions are static and best understood as pitted against each other, running counter to the very assumptions of interdependence and deliberation which participatory democracy rest on. It does however, require generosity in sharing how a proposed piece of legislation has evolved in relation to participatory input, and this can be foreseeably achieved despite the complexity of


\textsuperscript{1269} Cf. Case C-57/16 P ClientEarth para 107.
the legislative process. Arguably such approaches also came through in the case studies, e.g. the Commission in the Eurovignette Directive was detailed and forthcoming in how it had used the results of the consultation, e.g. when it disagreed with certain stakeholder or input, and also when it had adjusted course. It would also seem that this kind of transparency not only provides important underpinnings for the participatory democracy, but perhaps ironically, also for the instrumental arguments for participation concerned with ‘evidence-based’ regulation.

Another reason is the fear of exposure – here meant to cover a set of concerns which relate to fig-leaf participation and participation fatigue. If participation input is not really having any impact on the Commission’s legislative work, or only participation from certain actors, (regardless whether this may legitimate or not depending on the quality of those responses) then to adhere to transparency in the context of providing meaningful exchange could arouse fears that this would undermine the Commission’s approach and credibility, prompting criticism or participation fatigue. The latest evaluation of the Commission’s stock-taking exercise of its Better Regulation Agenda demonstrated that Commission staff felt consultations were a time-consuming and cumbersome exercise where the outcome generally did not justify the time and energy spent on it, and the outcome often was disappointing.1270 If this indeed reflects the general sentiment, or even just a strong current of thought amongst the Commission services, it provides fodder to the hypothesis that a fear of exposure is underlying the reticence to open up the decision-making process. This fear may very well also factor in, in the reluctance to detail the participants and content of targeted consultations. There may be legitimate reasons for why the Commission does not take on the input of “parties concerned”, and it is under no legal obligation to do so.

Consideration must also be given in case ‘too much’ transparency can have detrimental results on the quality of governance and very process of learning necessary in complex governance.1271 Naturally this is related to the overall political climate surrounding the Commission. One important point is however, that the legal dimension of the Commission’s obligation steers the question towards how best to

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1271 Curtin and Meijer ‘Does Transparency Strengthen Legitimacy? (n 316).
generously share how participatory input is related to the legislative work and not whether such information should be shared.

The third and final reason, related to a lack of awareness of the legal imperatives to provide meaningful exchange in the consultation context, is that to provide feedback is of course a skill that needs to be practiced and refined. And it is naturally connected to the thought that was put into drawing up a consultation strategy and the execution of such a strategy.

With regards to the second obligation of procedural equality through promoting diversity and outreach to specifically affected groups or communities, it is clear that there are difficulties in applying the legal threshold in a meaningful way with the legal assessment on all four cases left vague. The nature of EU law-making consultation and the complexity in achieving procedural equality makes it difficult to define a legal threshold which defines “parties concerned” without becoming too arbitrary. Consider e.g. the case study on representative actions for the protection of the collective interests of consumers, where the Commission drew on numerous consultations over the past two years, which because of the legislative statement over the years were still relevant, making it difficult to establish a threshold for any kind of geographical Member State diversity. As regards outreach to vulnerable groups or citizens, the cases also demonstrated how difficult it is to analyze, from a legal perspective, absent profound deficiencies in stakeholder targeting and outcome, whether the “parties concerned”, including links to citizens has been reached. At the same time, the first two case studies confirm what observers have long noted, that there is a lack of outreach beyond the well-defined existing networks with a dominance of corporate interests.

The challenge in achieving sufficient breadth and depth to adequately reach the “parties concerned” to be consulted are particularly clear when looking at the first two cases. In the first case, the Artificial Intelligence Act is a piece of legislation that has broad and significant impacts across society, however the legislation is framed in a complex way, sometimes with technical language and very difficult for “outsiders” and regular citizens or vulnerable groups to understand.\textsuperscript{1272} However, the ethical balancing which is reflected in e.g. liability clause

\textsuperscript{1272} Indeed, even public authorities may find it difficult to understand. The author’s impression when in contact with the Swedish Ombudsman for Children to inquire about their lack of response to the consultation Commission’s AI proposal, was that there was little understanding of the proposal’s potential to impact children.
require an understanding of the potential harm that AI can cause as well as the potentials and the costs associated with mitigating or eliminating that harm – as well as the consequences of not regulating.

In an area where legislation is lagging behind technology, citizens have first-hand experience which could prove instructive. It is particularly interesting to see that for the Artificial Intelligence Act there were no documented efforts to reach out groups vulnerable to the adverse effects of AI-driven practices; consider e.g. the exposure to and effect of algorithmic-driven persuasive design on children and young people or the negative effects that dependency on algorithmic-driven decision-making in the public sector has had on vulnerable groups.1273

Overall, it would seem that a meaningful way which gives expression to equality, which is also more open to review in a straightforward way, is the obligation to have an internet-based open consultation, which is open to the public. This occurred for three of the cases analyzed, and not for the New Migration Pact legislative package.

With regard to what the case studies reveal in how consultation played out at the national level, this specific gap was not mitigated by public consultation at the national level for the Artificial Intelligence Act. Here, the public consultation in Sweden added valuable participation to EU law-making in terms of the experience and expertise of agencies and public authorities, but no participation from civic groups or fundamental rights groups, nor citizens – despite the (in proportion very) few that were invited specifically to participate. The opposite is true for the third case study on collective action. Here the consultations of the Swedish ministry diversified the participation scheme; including groups working with ethnic minorities, pensioners, and various professional organizations. In addition, the case on the Regulation on Asylum and Migration Management, demonstrating how national level consultation can complement EU level consultation through bringing in actors from the grass-roots while also featuring more deliberate elements in smaller settings. Several of the grassroots organizations that participated in Asylum forum and the debates on the New Migration Pact and the Swedish position, would likely not be involved in Commission consultations or made their voice heard. However they represent considerable experience from one of the key ‘destination’ Member States in terms of asylum and migration. The current lack of

1273 Although children’s rights experts were mentioned as consulted through targeted means, there was no reporting.
publicity limits the scope of such activities however, while also raising the question how much publicity and transparency is helpful. It is very possible that some of the more deliberative and potentially valuable exchanges that came through in the minutes would be lost as publicity is gained. This dilemma finds some parallel to the debates on trilogues.

As regards the discrepancy in terms of how the national level consultation relates to the EU-level, a main factor could be different institutional traditions and capacities between ministries. Another reason is however the particular challenge of a new legislative area (AI has not been regulated before), there is a lack of imagination or understanding as to who is most urgently concerned. This bias was confirmed at the Swedish level through the outrage of the Swedish Consumer Agency and the Swedish Consumer Association at being “left out” of the official consultation list.

Considering recent studies indicating low levels of consultation at the Member State during the negotiation phase, a surprisingly “positive outcome in terms of adherence to the principle of participatory democracy was that in all four cases some kind of consultation at the national level had occurred. At the same time, as expected, in most cases consultation at the Swedish level means consulting with agencies.

Regardless of specificities, it is clear the gaps demonstrated by the Swedish public consultations, for these specific case studies, are an outcome of constitutional design. By default, the legal emphasis is placed on consulting with authorities, which is clearly reflected in the domination of agency consultation. Unless significantly re-interpreted, in light of the principle of participatory democracy, Swedish EU-lawmaking public consultation as currently practiced, is unsuited to fulfilling the legislative goals of EU law-making consultation. However the cases have also revealed the potential of consultation at the national-level towards giving effect to the principle and that more consultation is perhaps occurring during the negotiation phase than what initial studies or OECD have suggested. Such consultation however is happening outside of the public eye and public scrutiny, contrary to the ‘normal’ law-making consultation.

Finally the case related to the EU Migration Pact, demonstrates how the Commission can for high-profile legislative files for which there is significant political pressure, disregard its constitutional duty to consult, while also setting aside its commitment in the Interinstitutional
Agreement on Better Regulation, reflecting a persistent approach to consultation as discretionary choice.
7. ELEVATING CONSULTATION TO A PARTICIPATORY DEMOCRACY PRACTICE

The case studies have confirmed a normative gap between the principle of participatory and consultation practices for selected key obligations. How can the principle of participatory democracy then be effectively implemented; how can the quality and practice of consultation improve so that the realization of the principle of participatory in the EU is significantly advanced? In particular, how can the coherence between consultation at the supranational and national level contribute to such advancement?

As mentioned in the second chapter, the overall approach taken to answering these questions and formulating suggestions is reconstructive, attending to both the moral value and the practice it seeks to reform. The moral value is here represented by the values that undergird the principle of participatory democracy and the key rights and obligations that the principle entails at both the EU and national level (as elaborated in chapter 3-5). Being mindful of the practice which the suggestions for reform are directed at, means an awareness of the institutional environment and consultation practices (as featured in chapter 5-6). This chapter therefore begins with a reflection on the insights gained from unpacking the principle of participatory democracy. This leads to suggestions for improvements clustered around the core complementary elements of participatory democracy in the EU: the inherent value of participation, deliberation and citizens and civil society.1274 Across these three domains, five lines of action to elevate consultation to a participatory democracy practice are outlined; enhancing procedural equality, feedback through active transparency, drawing on democratic innovation, and strengthening multi-level coherence. For each line of action concrete suggestions for how to improve consultation are offered and analyzed.1275 The chapter concludes with a discussion of whether and in what way the suggestions presented can be realized through existing accountability mechanisms and whether legal reform is necessary.

1274 Three key elements drawn from the analysis of participatory democracy theory in chapter 3 in terms of the inherent value of participation, deliberation and citizens and civil society
1275 Based on observations from the case studies, the chapter also discusses the imperative of resisting the narrative of episodic crises in EU law-making and concludes with a final reflection.
7.1. **Suggestions for improving EU law-making consultation**
The suggestions for consultation practices are based on a legal interpretation of the principle of participatory democracy as presented in this thesis, rooted in legal methods, particularly a teleological method of interpretation which is mindful of the normative ideal the principle aims to fulfill.

7.1.1. *Attending to the inherent value of participation*
In participatory democracy theory participation has an intrinsic value and is seen as an ends itself. From this follows that the equality of individuals and groups is central to attend to, and that participation is a way of showing respect for and expressing the dignity of persons affected. This understanding informs the interpretation of the Commission’s obligation to consult ‘parties concerned’ in light of the principle of equality which established the equality of all citizens, “who shall receive equal attention from its institutions”.1276 The congruence of these elements can be construed as an obligation for the Commission to provide procedural equality for its consultation activities, in terms of ensuring equal access to law-making consultation. Insights from democracy theory on the limitations of self-selection procedure in establishing equality, strongly suggest that ensuring procedural equality requires positive action. The case studies demonstrated on the one hand, the difficulty in applying this procedural criteria in an open-ended way, and on the other hand, clear deficiencies in the Commission’s consultation practices with regards to procedural equality. The latter confirms what has also been observed at scale.1277 The following line of action is consequently focused on procedural equality and how to improve it as featured in consultation.

7.1.1.1. *Ensuring equal access: reaching out to the ‘unusual’ suspects*
The case studies explored in the previous chapter support the claim that at the EU-level there is no clear mechanism or policy to ensure or even promote procedural equality and avoiding exacerbating imbalances of access.1278 Neither is there any visible strategy to widely consult beyond those who generally would have information about the consultation exercise, e.g. unorganized civil society, citizens, affected communities or vulnerable groups. Whereas national actors would be better poised

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1276 Article 9 TEU.
1277 Article 9 TEU and Article 11 TEU, see also chapter 4.1.
to facilitate broader public participation (especially for law-making where there is usually some institutional practice or legal framework to build on\textsuperscript{1279}) or reaching out beyond the usual suspects, it would seem such grassroots-level consultation is occurring very sporadically at the national level, with the case studies reflecting a slightly better outcome than what has been noted in larger quantitative studies. At the Swedish national level, the legal analysis and the case studies demonstrated that EU law-making consultation overall (whether it refers to implementing or negotiating EU laws), is not geared towards democratic participation and skews heavily towards inter-governmental and agency consultation – which is reflected in the framing of the constitutional clause directing legislative consultation. Civil society constitutes a fraction of such consultations and citizens, or the broader public are not targeted at all, even though citizens may spontaneously decide to answer a consultation (without being directly invited). Specifically with regards to government facilitated consultations in preparing its negotiation position, such national-level consultation is frequently not done publicly (e.g. through publishing the list of invited parties as well as their replies) with wide divergence with regard to ministry practice.

Three concrete suggestions could significantly improve consultation practice on procedural equality with regards to Commission consultation;\textsuperscript{1280} the first is to enhance outreach efforts through concrete measures to diversify and expand participation by directly inviting specific stakeholders which are identified as under-represented to contribute to the consultation. The crucial step to be taken here is that such ‘invitation lists’ would also be published. similar to the Swedish consultation participant lists that are published. If correctly framed, e.g. it is clear that a direct invitation to participate in an open or targeted consultation is just one element of an overall consultation outreach strategy -such efforts may serve as a multiplier, triggering participation in previously unreach networks or locality. Increasing the publicity of public consultations, including through social media, as to attract broader attention is certainly part of such outreach and a stated aim by the Commission in its recent revised Better Regulation Guidelines. Adhering to multilingualism has also been highlighted as having the potential to expand the reach of Commission consultation and

\textsuperscript{1279} OECD, Better Regulation Practices across the European Union 2022 (n 837) chapter 3.
\textsuperscript{1280} For a comprehensive scheme of suggestions to improve Commission consultations to align them with the principle of equality in EU law, see Alemanno, ‘Levelling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission’s Public Consultations in Light of the Principle of Political Equality’ (n 33).
mitigating geographical imbalance. Considering the Commission’s current penchant for various ‘checks’ on legislation for specific actors; e.g. the SME-test and a the more recent ‘youth-check’ it would be foreseeable to introduce a check for ‘procedural equality’ or ‘equality of access’ efforts to ensure at least efforts to reach ‘parties concerned’ or widely consult have been made. As was demonstrated in the case studies, the obligation to conduct an open internet-based consultation should also not be taken for granted.

The second suggestion is to focus on capacity-building within the Commission to design consultation processes which are more inclusive and do not exacerbate inequalities; this includes thinking about the administrative capacities of the Commission. The overwhelming majority of EU officials e.g. have uniform educational backgrounds. Diversifying and enhancing the epistemic capacities, to include e.g. participatory governance techniques, and the ability to draw on behavioral insights, would be possible factors to including considering this in hiring practices.

The third suggestion is to strengthen the infrastructure for national and local consultation through giving visibility for existing national legislative consultation policy and legal frameworks, and codifying them. For instance, when the Commission consults on a legislative proposal and Member States are notified accordingly, this would act as a trigger for further consultation at the national / local level. While there are various European networks and ties between regions, cities and municipalities, and the Commission does consult regionally, this is distinct from systematically drawing on national, regional or local state actors acting as consultation multipliers, based on their responsibility to

1281 European Court of Auditors (n 131) 31–33.
1284 see e.g. Alemanno, ‘Levelling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission’s Public Consultations in Light of the Principle of Political Equality’ (n 33) 126.
1285 Commission, Competence Centre on Participatory and Deliberative Democracy (n 89).
1287 ibid 129.
1288 This would live up to the requirements of Article 10(3) TEU and international human rights instruments (e.g. political participation Article 25 ICCPR).
contribute to the realization of citizen’s rights to contribute to democratic life of the Union.\textsuperscript{1289} At the Swedish level, the legal analysis revealed that according to internal guidelines the ministries should consider whether the open consultations conducted by the Commission should prompt broader consultations with society, including the general public. This internal guideline, which is very unevenly and lightly applied, should be more visible, preferably by making it legally binding. The approach to pay attention to legal and institutional frameworks at the national level pays mind to how the principle of participatory democracy is a citizens’ right to participate in the democratic life of the Union.

7.1.2. Advancing the deliberative nature of consultations

One of the key complementary functions of participatory democracy in the EU setting is to advance deliberation. Acknowledgement and responsiveness of difference, the adherence to the principle of justification, transparency and consequently an emphasis on learning processes have provided central inputs for theorization drawing on deliberation for democratic legitimacy in the EU setting. Giving effect to deliberative law-making spaces would also need to include equal consideration of potential participants as well as the discussed equality of access. It would require ‘active’ transparency of the Commission; to be transparent in its consultation strategy and to adequately provide information on how consultation replies informed the process as a form of meaningful exchange. This obligations is drawn from the stated goal of consultations in Article 11 TEU of ensuring transparency as well as the right of citizens to know and attempt to influence directly the EU legislative process. Two lines of action are then offered which could enhance the deliberative nature of consultations; feedback through active transparency and advancing democratic innovations.

7.1.2.1. Feedback through active transparency

The legal duty to transparently demonstrate whether and how consultations have impacted the proposal, as has been noted, goes beyond publishing consultation contributions and a statistical or summary presentations of consultation replies. For both the Commission and the Swedish national government in negotiating EU laws, the case studies have highlighted how such feedback is largely lacking, as well as a particular need for more clarity and transparency.

\textsuperscript{1289} For an existing practices that seemingly takes a similar approach, see ‘Get Involved | European Youth Portal EU Youth Dialogue’ \texttt{<https://youth.europa.eu/eu-youth-dialogue_en>} accessed 12 August 2023.
with regards to targeted consultations. With regard to the Commission, besides the potential negative effects of opaqueness in terms of participation fatigue and depriving citizens of their democratic rights, it also makes it difficult to understand if the Commission has lived up to its duty to present legislation in the best interest of the Union. For the Swedish government, the lack of insight into how ministries consult during negotiations on new EU law poses serious accountability and democracy challenges, as well as a difficulty in assessing the impact of the negotiating position. The following practices would then need to be adopted to improve consultation practices and align them to the principle of participatory democracy.

For the Commission, reporting on the impact of consultations (or lack thereof) on the thinking and process of legislative drafting, is central. Although no duty exists to reply individually to each consultation contribution or position the duty does entails describing how the outcome and substantive contributions has influenced the thinking and drafting of the legislation. This could be achieved through noting it in the impact assessment or in any document accompanying the legislative proposal. National cases also serve as instructive examples – e.g. French and Swedish travaux often address for each element of a law the positions offered, replying directly whether and how this has influenced the final draft as well as providing justification when the proposal deviates from consultation positions. While such an approach in its entirety may not be feasible or desirable for consultation at the EU level, which often includes several hundreds of replies, a meaningful narrative or impact which includes how a legislative proposal has evolved in relation to main consultation positions and insights across the spectrum is not only feasible but necessary in order for law-making consultation ‘to ensure that Union action is coherent and transparent’ (Article 11(3) TFEU) as well as adhere to ‘good governance’ and ‘ensuring the participation of civil society’ according to Article 15 TFEU.

The legal duty of transparency and feedback, which follow from the principle of participatory democracy and related standards for openness need not be approached in a formulaic manner. Considering that targeted consultations follow a different format than open public consultations, transparency and feedback requirements may align to the mode of such consultations. If such consultation is conducted in an

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1290 Article 17 TFEU.
1291 See chapter 4.3.
expert group or a smaller deliberative setting, it may for instance not be meaningful or desirable to publish the contributions of each member of a targeted group.\textsuperscript{1292} However such flexibility is naturally incumbent on the overall transparency of such settings. For permanent expert committees whose work feed into the legislative process, the Commission has recently confirmed in a legally binding Decision that there is an obligation to disclose who such expert members are, what interests they represent, and to have such experts registered in the Transparency Registry.\textsuperscript{1293} Additionally, as discussed in chapter 5, the horizontal rules in mentioned Decision require minutes from such meetings to be ‘meaningful and complete’ and published in a timely manner.\textsuperscript{1294} While ad-hoc expert groups as well as expert gatherings for conferences or workshops are not covered by the Commission Decision – when such groups or conferences are part of legislative preparation and consultation, transparency requirements are still legally due. Publishing minutes or even reporting on the outcome of such targeted consultations is however far from established or mainstreamed practice, and in controversial or significant legislation, it would seem often eschewed – as the case studies also indicated. The updated Better Regulation Guidelines, now indicate that the Commission itself now has the view that targeted consultation activities should also be reported on.\textsuperscript{1295} In order to adhere to the legal imperative – similar to the discussed duty for established expert groups – such reporting would not in all cases need to attribute responses to any specific expert, but can rather follow Chatham House Rule (which was long the practice of EU expert committees, and is still the frequent practice of e.g. European Central Bank).\textsuperscript{1296} Again, such application of transparency requirements, demands that there is an overall transparency with regard to members and compositions of targeted consultations.

At the national level, the case studies confirmed that in negotiating EU law, transparency is largely lacking. To report on who has been invited to consult, to publish the contributions to a consultation exercise, are

\textsuperscript{1292} See chapter 4.3.
\textsuperscript{1293} See Commission, Decision of 30 May 2016 establishing horizontal rules on the creation and operation of Commission expert groups C (2016) 3301 final.
\textsuperscript{1294} European Ombudsman, ‘Decision of the European Ombudsman in Her Strategic Inquiry OI/6/2014/NF Concerning the Composition and Transparency of European Commission Expert Groups’ (n 832) ANNEX.
\textsuperscript{1295} In cases where the publication of targeted consultation activities contributions would lead to disproportionate workload, the DG responsible for conducting consultations should contact SG.A2’ Commission, Better Regulation Guidelines (n 52) 21.
\textsuperscript{1296} See the demand by the European Ombudsman for note-taking on meetings of expert committees.
much needed steps to take at the national level to ensure that procedural requirements flowing from the principle of participatory democracy with regards to EU law-making are met. These transparency requirements, particularly with regard to feedback, might at times need to be balanced against concerns for maintaining the integrity of the national negotiating position. In addition, as the national hearings in the case studies indicated, there may also be the need to be creative in the approach to transparency to protect the deliberative nature of such hearings.

Overall however, for other EU countries, such as Finland, whose ministries receive approval of their negotiation mandate from Parliament, and such mandates are public and subjected to public consultation, transparency does not seem to have proved a significant obstacle. The force of Article 10(3) TEU in the interpretation of national laws guiding legislative consultation, depends in part on the content of such law, and how far the active duty to promote the participation of all citizens in the democratic life of the Union can be extended, before crossing the boundary of e contrario interpretations.

In the Swedish case, the robust transparency and disclosure laws which are constitutionally enshrined, combine with the imperatives outlined in the previous chapters as called for by the principle of participatory democracy, create a strong presumption for transparency. Even without the principle of participatory democracy, deviations from such a presumption would need to laid down in law. Even in cases, where access to documents could be denied on the basis of legislative exceptions; post-negotiations such information could likely in an overwhelming amount of cases be released, which would contribute to an overall climate of democratic participation and accountability, if not facilitate participation in that particular law-making process. The Swedish Government’s publication on its website of consultation replies in response to its consultation on the Commission proposal of the AIA, as illustrated in the first case study, provide a good example of a practice that could be further developed and mainstreamed. The consultation invitees and their responses were published, with the

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1297 OECD, Better Regulation Practices across the European Union 2022 (n 843).
1298 Although publication of consultation replies would need to be complete, as opposed to the Swedish government’s practice in that case, where contributions from authorities which were not specifically invited to participate were not published (coincidentally these unpublished replies also criticized the government for the lack of taking into account the potential impact of the proposal on Swedish consumers and citizens).
option of being silent on how they may impact the Swedish position on the legislative proposal.

7.1.2.2. Advancing democratic experimentation with consultation

Because Commission consultations and Swedish law-making consultation have primarily been approached as a better regulation and not a participatory democracy tool, it is right to question how much experience has been gained in drawing on the democratizing potential of consultations.

The focus on the deliberative quality of participation, is emphasized in participatory democracy in general, and in the EU in particular. Emphasizing the democratic quality of law-making consultation aligns with the Commission’s plans to integrate deliberative citizen panels into its pre-legislative work. 1299 However, it also means thinking about the deliberative quality of consultations overall. For instance, the deliberative quality of targeted consultations would be one area of learning, while including citizens in structured deliberation another. Thus, it is clear that for certain areas and consultations, sortition to obtain a representative sample of Europeans is a promising path, which could lead to the formation of mini-publics. In other instances, the Commission may wish to draw on citizens representing a specific community of interest or experience. Here gains with regard to the overall quality and effectiveness of legislation could be made. The deliberative quality of consultation conferences and workshops is also an area of learning, where there is every indication that the deliberative elements of conferences often are confined to a Q&A. Emphasizing the deliberative quality across consultation modalities is important (to which the above improvement on feedback would also contribute). For while citizen’s panels in the near-future may provide input for selected key legislative proposals, the time and cost of running them, make them unlikely bread and butter candidates of Commission law-making. In this regard organizing mini-publics in a de-centralized way seems promising, as long as the input is directly fed into the legislative process. Through Article 10(3) TEU and its vertical component, such decentralization also would have a common legal foundation, which could help shape the discretion in the implementation of such decentralized democratic innovations.

As was noted in the analysis of Article 11 and 10(3) TEU as well as the main Swedish provision guiding consultation RF 7:2, there are few

1299 European Citizens’ Panels (n 79).
limits of the modalities for the consultation and participation called for. As regards Sweden, it is unlikely in the near-future that the country would of its own accord establish mini-publics as such practices are uncommon in Swedish government administration and so far the Swedish Parliament has overall seemed disinclined to pursue such innovations and reforms.\textsuperscript{1300} However, the informal hearings that already occur, in relation to negotiating EU law, seem a good starting point to increase the regularity of such deliberative fora, attending to transparency of participant selection.

7.1.3. \textit{Bringing in citizens and civil society}
One reason why involving more individuals in democratic participation is crucial according to participatory democracy, is the broader educative role of participation for citizens. Furthermore, as discussed in the third chapter, public participation involving many citizens is tied to the understanding that when certain groups cannot influence the political agenda, decision-making, or gain relevant information, they are likely to be ill served by laws and policies.\textsuperscript{1301}

Citizen participation has also been emphasized because of the epistemic value they bring to the policy and law-making process. The legitimizing function of engaging citizens can be fulfilled either through direct citizen participation or through (new) forms of representation, prominently through civil society. Article 10(3) TEU framed as a citizen’s rights to participate in the democratic life of the Union constitutes the legal bedrock for a citizens oriented approach to participation in EU affairs beyond the ballot-box. However, as the case studies demonstrated, citizens are either absent from EU law-making consultation or the process in confined to the few initiated. As was discussed in chapter 3, empirical research into interest-groups shows that consultations are still likely best understood as a form of elite pluralism, with citizens in the back-seat. The analysis of the Swedish consultation procedure, as well as the case studies, also highlighted how citizens operate in a national context. An important step towards making EU law-making more accessible is consequently enhancing access at the national level. In this respect three lines of action are offered; to advance coherence between the legal framework, to promote consultation requirements in EU-secondary as a democratizing strategy and to not forego participation by citizens and civil society in times of urgency.

\textsuperscript{1300} Konstitutionsutskottets betänkande 2020/21:KU24 [parliamentary committee report].
\textsuperscript{1301} Fung, ‘Varieties of Participation in Complex Governance’ (n 169) 70.
7.1.3.1. Advancing coherence between consultation legal norms and practices at different levels

The case studies confirm how law-making consultation at the Swedish national level, during the most meaningful stage in terms of potential impacts i.e. the negotiation stage, is sporadic, inscrutable, unevenly practiced across ministries and overall inadequate. The legal framework which exists, is generally thought to only apply for implementing EU law, and not for negotiating EU law. Swedish national laws guiding consultation, as currently interpreted by the Swedish government and legal commentators, contribute to this type of consultation. However, such interpretations are lacking as they fail to take into consideration the principle of participatory democracy. This thesis has argued for a significant re-interpretation of this legal framework in light of EU law, which still falls within the bounds of consistent interpretation.\footnote{As well as international law obligations, primarily according to Article 25 ICCPR.} If this interpretation is applied it would contribute to the coherence of multi-level law-making consultation.

**The national level; consulting when it is meaningful**

Internal ministerial guidelines which demand a consideration of whether open consultations conducted by the Commission should prompt broader consultations in the Swedish context, including the general public, provide a foundation to build on. Such internal guidelines, which are currently very unevenly and lightly applied, should be strengthened, made more visible and binding. The pending EU legislation on AI, because of its likely profound and broad impact for decades to come, provides one example of where broader consultation with the general public would definitely be warranted. Unlike other EU Member States, which on their webpages provide a single access point to the Commission’s consultation, Sweden does not.

**Better burden sharing and coordination**

Facilitating timely and meaningful EU law-making consultation at the national and local level includes better institutional linkages between the Commission and national facilitators/initiators of such consultation and a clearer framing of the shared responsibility. A simple alternative would be for legislative proposals to be signaled by the Commission for national consultation procedures at an early stage. Inter consultation or joint routines would also be helpful This could serve as a starting point for the responsible national ministry to make an independent
assessment of whether and how national consultation should be conducted.

Another way to facilitate shared responsibility and a coordinated approach is to enhance cooperation with regards to public participation in the legislative process. The suggestion from the Conference on the Future of Europe which the Commission has committed to consider, namely drafting a Charter of EU Citizen’s Rights, should not only include a catalogue of rights (which would include e.g. Article 10(3) TEU), but also how these rights can be accessed by citizens, and not just in relation to EU institutions. This would provide an opportune place to outline more clearly how realizing the principle of participatory democracy, and particularly the right to participate in the democratic life of the Union, is a shared agenda and which (legal) obligations rest with Member States, including for law-making consultation.

7.1.3.1. Consultation requirements in EU secondary law

Instances where consultation is required per EU secondary legislation, either by EU agencies or Member States or designated national authorities surfaced in the analysis in chapter 4 in the context of elaborating on the reach of the principle of participatory democracy. Whereas it is clear how embedding such consultation requirements in secondary law, and linking them to Article 10(3) TEU, could give effect to the principle of participatory democracy through enhancing participation in EU rule-making – the effects of such embedded consultation in relation to EU law-making would be more indirect, but nonetheless potentially important. For instance, both the Water Framework Directive and the chemicals REACH regulation include a number of specific consultation obligations for the Commission and relevant agencies. In this context the relatively new practice of the Commission to combine back-ward and forward-looking analysis in one consultation round is relevant – that is, the Commission has

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1303 The legislative approach taken in the Water Framework Directive is instructive, where Member States “Member States shall ensure that, for each river basin district, they publish and make available for comments to the public, including users”, also further stipulating relatively detailed procedural obligations for such consultation Article 14 (1-3) Directive (EC) 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L 327.

committed to consulting on the evaluation of the effect of EU legislation and the potential impact of intended legislative reforms in one open consultation round under its ‘call for evidence’ (previously evaluation and impact assessment consultation were done separately).\textsuperscript{1305} Such consultation on the implementation and application of EU legislation within Member states (in this case at the local and regional level) give expression to the principle of participatory democracy in relation to EU law-making in three different ways.

Firstly, such consultation features \textit{indirectly} as EU law-making consultation in that the results and outcomes of such consultations are reviewed by the Commission in conjunction with the review of the legislation and thus feed into evaluation and reforms of EU secondary legislation. Second, they build the capacity of Member States and member state authorities to consult with interested parties. Thirdly, such consultation raises the awareness of citizens and interested parties about the application of EU law and may well have spill-over effects in terms of more direct participation in EU law-making consultation at the national or EU-level. The prevalence of legal rules in EU secondary law, which mandate public participation in the application of EU law, as well as in EU rule-making, would build such capacity. While enhancing this form of consultation is only indirectly relevant to EU law-making, there is much to suggest a holistic approach is helpful and that such consultation could play an important role in building up and strengthening both citizens and local and regional capacity – which could be vital to giving effect to the principle of participatory democracy. Such a holistic approach could be supported by research which could look into the intersection of democratic participation in EU law-making, EU rule-making and the implementation and application of EU-law as well as the legal frameworks guiding these processes at the EU and national level.

The strong value attached to participation, can also arguably be demonstrated in the explicit legal rule, that the Commission can only forego its legislative consultation duties in cases of extreme emergency.

\textit{7.1.3.1. Resisting the narrative of crises}

The case study on the Migration Pact, provides an example of a trend: when there is a sense of urgency, often combined with politically sensitive or controversial legislation, soft-law or self-imposed procedural guarantees, are the first to be discarded. In such situations it

\textsuperscript{1305} See e.g. Commission, Better Regulation Toolbox (n 976) 50.
is often vulnerable groups and citizens which are deprived of voice. Some of the statements of the Commission in its 2022 communication on the latest Better Regulation Guidelines are illustrative of the approach:

During the COVID-19 crisis, the Commission has had to propose a number of initiatives as a matter of urgency. ….. The explanatory memoranda set out the underlying rationale for the proposals, but the impacts could not be fully assessed in advance due to the lack of time and the rapidly evolving situation. In such cases, the analysis and all supporting evidence will be set out in a staff working document published with the proposal or at the latest within 3 months of its publication. This document will set out clearly how and when the act will subsequently be evaluated.\textsuperscript{1306}

The Commission further explains in a footnote “That is, when an IA should have been prepared according to the provisions of the Better Regulation Guidelines but was not following a discretion by the Commission.”\textsuperscript{1307} When the Commission states that a decision to set aside Better Regulation Guidelines is a matter of Commission discretion, it conveniently fails to mention the CJEU case law, which sets the outer bounds to this discretion in terms of impact assessments’ relationship to the proportionality of EU action. More importantly, with regard to the principle of participatory democracy, the Commission fails to mention – and this is one case where the Better Regulation approach contradicts the legal analysis presented in this thesis that the Commission’s discretion is not just influenced by self-imposed guidelines, but by Treaty Articles and primary law on consultation, which is a procedural democratic guarantee. As was highlighted in chapter 4; Article 11 TEU demands that the Commission “shall consult” and according to Article 2 Protocol No. 2. for legislative proposals only “exceptional urgency” allows for discounting “wide consultation”. While certain instances during the COVID-19 pandemic, may have qualified under this narrow exception, it is clear that the Commission’s misplaced sense of discretion has been applied to several legislative acts over the last couple of years, including the case study in the former chapter on the New Migration Pact. The fact that the Commission completely refrains from justifying its deviation from this legal

\textsuperscript{1306} Commission Better Regulation Guidelines (n 52).
\textsuperscript{1307} ibid.
obligation with reference to the exception outlined in Article 2 Protocol No. 2 or Article 11(3) TEU raises the question what the Commission’s understanding of its legal obligations are, in this regard.

Furthermore, understanding ‘exceptional urgency’ requires a contextual perspective on current times with political upheaval and crises emerging as a new normal. Consider just a selection of the smorgasbord of crises during the past decade; the financial crises leading up to the Lisbon Treaty, refugee waves framed as crises, the deteriorating rule of law situation in a number of Member States with cascading effects, fiscal upheaval, Brexit, the spread and effects of COVID-19, the ongoing climate crisis and most recently Russia’s war on Ukraine.1308 Not to mention the additional domestic political and societal upheavals within Member States occurring simultaneously. The point here is not to make a definitive statement on how less or more severe these crises are or the urgency they place on legislative action. Some of the devastating effects of such crises, speak for themselves. The point is rather, that caution must be applied when interpreting a narrowly-framed exception (“exceptional urgency”) to a constitutionally enshrined democratic and procedural guarantee and that, in light of evidence, the Commission’s view of its unbound discretion in this regard seems particularly unsuited to provide the right frame for this type of judgement. Absent a correct interpretation of such narrow exceptions, considering the times, the question is what procedural or democratic guarantees we would be left with.1309

Similar patterns are discernable at the national level and were touched upon in chapter 7 in relation to law-making in Sweden. The obligation to provide sufficient timeframe during law-making consultation, was frequently put aside in cases of perceived ‘urgency’ and/or controversial legislation. The examples of Swedish migration legislation adopted as a response to the ‘migration crises’ and legislative reform imposing harsher penalties was in this context also discussed.


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Contrary to the inaction on account of the false perception of the Commission’s unbound executive discretion with regards to consultation, in Sweden a few such cases have been subjected to judicial review by Swedish Courts, and in other cases addressed publicity through the scrutiny of institutional watch-dogs such as the Council on Legislation.

7.2. Ensuring the realization of improvements
The reconstructive and practicable approach in this chapter implies that the advanced suggestions if adopted with the understanding that they represent binding legal standards and obligations, offer enough guidance to reform the European Commission and Swedish government practices to align them to the EU principle of participatory democracy. However, the Commission’s persistent refusal to recognize the existence of a legal framework for public consultations, the inadequate link in the language for consultations (consultation documents, guidelines etc.) to their democratizing function and the principle of participatory democracy, and the obstacles towards judicial redress, combine to shape a distorted perception of the Commission’s own discretion. Although the Commission has undoubtedly gradually opened its consultations, in particular its recent commitment to publish the results of targeted consultations (how this will be implemented remains to be seen). However, the Commission’s stance on discretion with regard to urgent legislation, suggests that reform on procedural equality according to the principle of participatory democracy currently remains elusive. While it seems that the overall trend is moving in the direction of gradual alignment with the standards imposed by the principle of participatory democracy - and an amplification of legal language surrounding consultations would certainly speed-up this trend, progress is still slow. To speed up advancements, mechanisms for enforcement would be necessary.

As for the Swedish consultation procedure, the completely overlooked EU and international law dimensions of Swedish consultation in Swedish political and legal discourse, suggest a gradual approach. It would seem then that a more stringent accountability model is necessary for the realization of the principle of participatory democracy with regards to law-making. With regards to judicial review, as the analysis has demonstrated, judicial review based on the principle of participatory democracy with regards to consultation at the EU level is both weak and narrow. While the CJEU may well be open to some form of (weak) review of procedural requirements for law-making consultation, such litigation has not yet occurred since the Lisbon
Treaty came into force. It therefore remains an unreliable enforcement mechanism, with arguably limited deterring effects. However, and this should be re-iterated, based on the legal analysis in chapter 4, strategic litigation in this area may well bear fruit.

 Judicial review of legislation on the basis of flaws in law-making consultations exists, so far for one procedural element, i.e. timeframes, but others could follow. To what degree legal obligations apply to consultation ensuring the negotiation phase has not been tested in Swedish Courts. Neither have the implications of Article 10(3) TEU and international human rights been debated in Swedish courtrooms. While these legal arguments deserve to be tested in Court, and in my view it is only a matter of time before Article 10(3) TEU begins to trickle its way down into domestic adjudication on array of issues, judicial review in the Swedish context is still a rather weak, and for the purpose of participatory democracy, blunt instrument.

 At the EU level, a promising existing accountability mechanism which can serve to protect the imperative of the principle of participatory democracy, is the European Ombudsman, who through her investigations and opinions has contributed to substantial reform in EU governance, including good governance reform of the Commission’s expert system and lobbying transparency, and also recently has commented on the performance of the Commission for individual consultation activities. At the national level, the role of institutions such as the Swedish Council on Legislation, could potentially serve a similar guardian role. As was highlighted in chapter 5, the Council on Legislation relies on law-making consultation as a key tool in their own constitutional review of legislation and has emerged as a form of consultation watchdog, often critiquing a lack of consultation. If the Council on Legislation, was attuned to the requirements of the principle of participatory, their ex ante review of legislation would also take this into consideration.

 Another potential avenue would be a soft accountability approach, where a spotlight is increasingly placed on consultation practices and their flaws. One challenge at the EU level is that because the European public sphere is being less developed, EU institutions may be less sensitive to the selective pressure of naming and shaming. The

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1310 European Ombudsman, Decision on how the European Commission carried out a public consultation concerning the ‘Sustainable Corporate Governance initiative’ (case 1956/2021/VB).
1311 Case C-280/11 Council v Access Info Europe AG Opinion Cruz Villalón para 67.
Commission, as it is in many ways ahead of Member States with regard to being in an ongoing dialogue about its own working methods and consultation practices, and on the issues where it has taken a principled stance, may also be less inclined to change its position. However this is an area where more empirical data would be helpful, to draw any definitive conclusions. At the national level, pointing to those few Member States which are consulting more systematically and transparently during EU law-making, including in the formation of their negotiation positions, could provide helpful pressure at the political level while also encouraging officials to have the ‘nerve’ to try out different and more open ways to consult.

The final – and most straightforward avenue – is through codifying existing standards for EU law-making consultation in an EU regulation with clear redress mechanisms and rules on judicial review. While this would guarantee immediate progress, the strong stance of the Commission against such legislative action makes it an unlikely solution. However, at the national level, legal reform, may still provide a possible solution.

In any case, it is clear that the legal framework of Swedish EU law-making can and should be significantly re-interpreted in light of the principle of participatory democracy in order to abide by EU and international law. It would also aid in better harnessing this distinct feature of Swedish governance, but in an evolved form, to maintain its relevance in light of ongoing EU integration, as well as contribute to the realization of the principle of participatory democracy.

7.3. **Summary and conclusions**

This thesis has drawn out the contours of the legal principle of participatory democracy in the Union and explored how its realization can be advanced through enhancing EU law-making consultation as one of the main expressions of the principle. After exploring the theoretical origins of participatory democracy, an inclusive understanding of the concept was adopted which allowed for capture of democracy debates at the European level incorporating contributions in the deliberative and associative traditions. In analyzing how ‘participatory democracy’ emerged in the debates on democracy in the Union participation in EU governance was viewed from both a functional and a principled perspective, the latter gaining ascendancy in the events leading up to drafting of the Constitution. The participatory norm which was constitutionalized did not just represent a functional understanding but an intrinsic one. Links and contacts to citizens was emphasized.
Participatory democracy as featured in the EU democracy literature was often articulated in terms of a right of those affected by a decision, to be able to participate in its formation. However, in the academic literature, the documents of the EU institutions and in drafting process, it was clear the role of participatory democracy was complementary to that of representative democracy. And this complementarity would have to play out in a multi-level polity. In order to distill some of these theoretical insights, Rittberger and Kohler-Koch’s framework juxtaposing elements of representative democracy in the EU with elements of participatory democracy was drawn upon; emphasizing intrinsic value of participation, deliberation and an emphasis on citizens and civil society as participation protagonists.

Proceeding from this understanding, in chapter 4 and 5, I then drew on legal interpretation to analyze how the principle finds expression through EU law-making and in particular EU law-making consultation. An overview of key mechanism, rights and obligations that the principle entails for law-making consultation at the EU and national level were identified. The legal analysis revealed that the principle of participatory democracy entails a mix of rights and obligations for citizens and EU institutions, respectively, with Article 11 TEU and 10(3)TEU acting as portal paragraphs and legal hubs for rights and duties either flowing from or connected to the principle.

Clearly, the principle of participatory democracy provides a right for citizens to engage with EU law-making at various stages and through various means, where case law so far has placed an emphasis on the early stages of the legislative process when participation is meaningful. The right of citizens to participate in the democratic life of the Union according to Article 10(3) TEU includes the right to be informed of the EU law-making process, in particular to effectively make their views known before legislative choices have been definitively adopted, so far as both the Commission’s decision to submit a legislative proposal and the content of that proposal are concerned. This means citizens and interest groups have the right to access pre-legislative documents. The right to know and attempt to inform and influence the EU law-making process applies to all EU institutions acting in a legislative capacity or as ‘key-players’ in the legislative process; notably the Parliament, the Council and the Commission. While there is no overarching general

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1312 The mapping in this chapter follows the duties of the Commission – i.e. law-making consultation at the EU-level, while Chapter 5 is concerned with law-making at the national level.
right for citizens to participate in consultations, however, when consultation opportunities are presented, citizens do have a right to be treated equally, including with regard to access. The right to petition Parliament, in its current modus operandi, while not particularly directed at EU law-making, may still influence the legislative process and holds potential overall to further realize the principle of participatory democracy in the Union. The right to complain to the Ombudsman, while a citizen’s instrument, is connected to both representative and participatory democracy, and is best seen as an overarching ‘soft’ redress or enforcement mechanism for participatory democracy rights. In addition, the right to participate in legislative agenda-setting thought participation in an ECI as well as related derivative rights are outlined.

Beyond general obligations for EU institutions to conduct their work as openly as possible in order to ensure the participation of civil society as spelled out in Article 15 TFEU, the duty to promote voice and a regular dialogue, finds expression in the institutions obligation to abide by legally binding commitments in the Interinstitutional Agreement establishing the Transparency Registry, which establishes transparency and accountability for the actors seeking to influence the legislative process. The overall obligation of transparency is connected to the duty enshrined in the Treaty to state the reasons for legislation and the participatory democracy element of transparency is justiciable with regards to access to legislative documents.

The legal interpretation Article 11(3) TEU advanced in chapter 4, demonstrated that the Commission, before adopting a proposal is under a legal obligation to consult widely, in ‘an open and transparent way’, ensuring that the modalities and time-limits of those public consultations allow for the ‘widest possible participation’ – while taking into account the regional and local dimension of the action envisaged, except for cases of exceptional urgency, in which case the Commission is obliged shall give reasons for its decision to forego consultation. The analysis also demonstrated the Commission has a duty to communicate the results of public and stakeholder consultations without delay to both co-legislators and the public. Furthermore, and crucially, the Commission also is obligated to actively promote equality of access to consultation opportunities, and provide consultation feedback. Finally the legal analysis demonstrated that Member States are under the obligation to interpret national law in light of citizen’s

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1313 See chapter 4.1.
right to participate in the democratic life of the Union (Article 10(3) TEU).

The question then remained to what degree these rights and obligations with regard to law-making consultation are justiciable. The overview of existing jurisprudence demonstrated that there may be distinct pathways through which the principle of participatory democracy in relation to consultation is ensured. However, it is also clear that direct challenges based on the principle of participatory democracy face procedural obstacles. Unless the CJEU shifts its settled law on standing, indirect challenges may be the only avenue which is open to potential participants. While a complete lack of consultation constitutes a clear legal breach of the principle of participatory democracy (breach of the Treaty) and the prospect for redress in terms of annulment is good, the procedural path may prove difficult beyond privileged actors. Furthermore, a claim based on the principle of participatory democracy in terms of a procedural consultation breaches, e.g. not providing enough time to allow for consultation, not consulting specific groups, or not being sufficiently transparent in its consultation reporting, is unlikely to succeed as a standalone annulment claim.\footnote{1314} Overall, the analysis in chapter 4 substantiates the claim, that judicial review for EU law-making consultation exists, with procedural hurdles weakening this redress mechanism. Until the procedural path widens, based on her track-record and systematic reviews of EU institutional practices relating to the principle of participatory democracy, the Ombudsman appears structurally well-placed to review law-making consultation processes and contribute to enforcing participatory democracy rights and obligations.

Having identified and analyzed key rights and obligations associated with the principle of participatory democracy, as well as assessed how they are given effect with regard to justiciability, chapter 5, sketched a legal framework for EU multi-level law-making consultation, based on an in-depth analysis of law-making consultation at the national level using Sweden as the reference case. After surveying the legal and policy framework for law-making consultation in Sweden, a patchy, yet constitutionally enshrined legal framework for law-making consultation, could be elicited. The Swedish constitutional text primarily attaches a functional role to participation in relation to legislative or policy outcomes: participation in decision-making by

\footnote{1314} The criteria of being sufficiently clear, precise and unconditional is unlikely to be granted for more abstract procedural obligations.
external actors is mandated only to the extent necessary or required. However, in deciding on when to consult and which form the consultation should take, the purpose of consultation should be considered, while travaux préparatoires highlight that government consultation aims to secure high quality legislation as well as serve as a democratic anchor. The legal analysis, covering relatively recent case law from the Swedish Supreme Court, the Supreme Administrative Court the Migration Court of Appeal clarified that the government consultation procedure may be subject to judicial review in Swedish courts and that flawed consultation may lead to the invalidation of a legal rule/law. However, given that judicial review in the Swedish system is limited to significant breaches, a lapse in consultation design or practice must either be significant or point to unforeseen consequences in order for the norm to be set aside. The legal analysis in chapter 5 also highlighted that neither the existing case law nor the literature, contain any discussion of the application and relevance of EU-law and international law to law-making consultation. I then argued that key elements of the principle of participatory democracy in Article 10(3) TEU, as well as international law obligations deriving primarily from Article 25 ICCPR, are relevant to the interpretation of the Swedish constitutional clause mandating consultation. Having considered these important but generally overlooked elements of the legal imperatives of Swedish government consultation, a legal interpretation where the EU principle of participatory democracy was advanced which should inform the interpretation and application of RF 7:2 according to the principle of consistent interpretation; thereby extending the Swedish government’s obligation to consult to in the formulation of its negotiation positions, and not just its implementation of EU law. The fifth chapter concluded with mapping out the legal imperatives in respect of different consultation stages. This analysis highlighted two main participatory democracy obligations for Commission consultation; active transparency in the form of consultation feedback and procedural equality/equality of access, while a duty to consult at the national level in preparing the Swedish negotiation position and action for EU law-making was noted.

Having addressed the first research question and analyzed the substance of the principle of participatory democracy and its import for law-making, chapter 6 then turned to assess to what degree current EU law-making consultation practices at the EU and national Swedish level, adhere to or conflict with identified key obligations and rights – and

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1315 See Prop. 1973:90 287.
ultimately with the principle of participatory democracy. The case studies demonstrated that procedural requirements of transparency and responsiveness: i.e. how participatory input has impacted a proposal, can be applied effectively to the Commission’s consultations whereas the obligation of ensuring procedural equality is less straightforward. With regard to adequate responsiveness, it is clear that while the Commission performed admirably across three of four legislative consultations in presenting and publishing the results of its open consultation outcomes and replies, reporting on the targeted consultations was less stellar, and in several cases – seriously lacking. Meanwhile, as has been argued, merely reporting on consultation outcomes is insufficient. The case studies also showed that such procedural equality seems to remain a key challenge in giving effect to the principle of participatory democracy. The case related to the EU Migration Pact further demonstrated how the Commission can still, for high-profile legislative files for which there is significant political pressure, disregard its constitutional duty to consult, while also setting aside its commitment in the IIA on Better Regulation.

With regards to the obligation of procedural equality through promoting diversity and outreach to specifically affected groups or communities, it is clear that there are difficulties in applying the legal threshold in a meaningful way with the legal assessment on all three cases left vague. The nature of EU law-making consultation and the complexity in achieving procedural equality makes it difficult to define a legal threshold which defines “parties concerned” without becoming too arbitrary. At the same time, the first two case studies confirm what observers have long noted, that there is a lack of outreach beyond the well-defined existing networks with a dominance of corporate interests.

At the national level, this specific gap was not mitigated by any public consultation conducted by the Swedish government. Regardless of specificities, it is clear that the gaps demonstrated by the Swedish public consultations for these specific case studies, are in part an outcome of constitutional design. By default, the legal emphasis is placed on consulting with authorities, which is clearly reflected in the domination of agency consultation. The principle of participatory democracy however demands a re-interpretation of the demands of Swedish EU-lawmaking public consultation which would place a greater emphasis on non-state actor, crucially civil society and potentially citizens.

Based on the analysis in previous chapters and the findings of the case studies, this final chapter addressed the third research question oriented
towards improving consultation practices to align them with the principle of participatory democracy. Five lines of action were suggested in order to elevate consultation to a participatory democracy practice: feedback, procedural equality, democratic innovation, multi-level coherence and consultation as an EU secondary law strategy. For each line of action concrete suggestions for how to improve consultation were explored. Based on observations from the case studies, the chapter also discussed the imperative of resisting the narrative of episodic crises in EU law-making.

The legal analysis developed in this thesis and suggestions to elevate them to the requirements flowing from the principle of participatory democracy, contribute to the ongoing discourse and learning about how to promote meaningful participation in EU multi-level governance and ultimately the evolving understanding and practice of democracy in the EU. The analysis and findings also raises questions and highlights areas for further research. For instance, how may the principle of participatory democracy be realized in other Member States, considering their constitutional and legal frameworks? What other practices and legal domains might Article 10(3) TEU be applicable to? How does the current generation and application of knowledge impact the citizens’ right to participate in the EU at the national level? How do the procedural guarantees outlined in this thesis apply to democratic innovations or other forms of political participation? Crucially, research could further explore the intersection of democratic participation for EU law-making, EU rule-making and the implementation and application of EU-law as well as the legal frameworks guiding these processes at the EU and national level.

Naturally, the realization of the principle of participatory democracy through law-making consultation is in no way a panacea to the democracy and governance challenges facing the Union. Indeed, the EU principle of participatory democracy is in many ways a very modest formulation of participatory democracy as it features in democratic theory. Giving the principle effect through broad public consultation, characterized by deliberative feedback elements, transparency and procedural equality with solid links to citizens, is also not straightforward or easy. However, in the words of Advocate-General Villacruz: “it has never been claimed that democracy made legislation easier”. 1316 The EU principle of participatory democracy has been

1316 Case C-280/11 Council v Access Info Europe, AG Opinion Cruz Villalón para 67.
formulated to contribute to the underlying purpose of the Union “to deepen the solidarity” and create “an ever closer union among the peoples of Europe”.\textsuperscript{1317} Only when there is a unified and deepened understanding of this constitutional principle, only when it has been given proper effect, is it possible to assess whether it adequately serves its role and purpose to this end. The legal dimensions of the principle of participatory democracy, expounded in this thesis hopefully, demonstrate the potential of law in prompting Member States and national actors to take up a more integral role in facilitating democratic participation in the Union.

\textsuperscript{1317} Article 1 TEU.
Alltsedan Lissabonfördraget hämtar EU sin demokratiska legitimitet inte endast från representativ demokrati, utan även från deltagardemokratii. En läsning av de artiklar i EU:s fördrag som ger form åt EU:s princip om deltagardemokrati ger vid handa att en central komponent av principen, är Kommissionens samråd av berörda parter i EU:s policy och lagstiftningsarbete samt medborgarnas rätt att delta i unionens demokratiska liv. Denna doktorsavhandling behandlar hur lagstiftande samråd kan främja förverkligandet av principen om deltagardemokrati, med fokus på samråd som ett flernivåfenomen som förekommer på EU-nivå och nationell nivå, med Sverige som referensfall. I detta syfte leds avhandlingen av tre forskningsfrågor.

8.1. Forskningsfrågorna och metoden

Med utgångspunkt i det kartlagda ramverket, är nästa fråga till vilken grad nuvarande samrådsförfaranden på EU och nationell svensk nivå efterföljer de rättsliga krav som följer av EU:s deltagardemokratisk princip. Genom en fallstudie-metod analyseras fyra samrådsförfaranden på EU och nationell svensk nivå för att se om de lever upp till de processuella krav som följer av den deltagardemokratiska principen. På detta sätt identifieras möjliga styrkor och svagheter i samrådsförfarandena.

Slutligen ställs frågan hur lagstiftningskonsultation kan förbättras så att den deltagardemokratiska principen realiseras med särskilt fokus på hur de rättsliga och faktiska ramverk för konsultation som finns på nationell och EU nivå kan sammanlänkas samt vilka mekanismer som kan bidra till ett sådant förverkligande.
8.2. **Den teoretiska grunden**

En analys av den demokratiteori som ligger till grund för principen om deltagardemokrati utmynnar med fördel i att deltagardemokrati definierades inklusivt, omfattande både deliberativ och direkt demokrati. Denna definition ramar in utforskningen av hur deltagardemokrati framväxter i debatterna kring EU:s demokratiunderskott. Den delaktighetsnorm som i upptrappningen till utarbetandet av EU:s konstitution och senare i Lissabonfördraget fick fäste i EU-fördragen, reflekterade inte bara en funktionell förståelse av delaktighet utan även en syn på delaktighet med ett inneboende värde där delaktighet av civilsamhället samt medborgarna betonades. Deltagardemokrati som koncept i EU-debatterna beskrevs ofta med hänvisning till en rätt för individuen att delta aktivt i formandet av beslut och lagar som påverkar en. Deltagardemokrati i EU sammanhang artikulerades däremot som ett komplement till representativ demokrati. För att vidare sälla fram de centrala implikationerna av dessa impulser, anamnades Kohler-Koch och Rittbergers komparativa ramverk där de uppställer centrala element i EUs representativ demokrati i förhållande till motsvarande centrala element i deltagardemokrati. Utifrån detta komparativa ramverk, bidrar deltagardemokrati med det inneboende värdet av delaktighet (i förhållande till det instrumentala värdet), deliberation (som ett komplement till val/omröstning) samt fokus på medborgare och civilsamhället som delaktighets protagonister (i förhållande till den traditionella betoningen på institutioner).

8.3. **Den deltagardemokratiska principen; rättigheter och skyldigheter och möjligheten till prövning i domstol**

Med utgångspunkt i denna förståelse i kapitel 4 och 5 analyseras hur principen finner utryck genom konsultation i EUs lagstiftningsförfaranden. Nyckel-mekanismer, rättigheter samt skyldigheter identifierades. Den rättsliga analysen visar att EU:s princip om deltagardemokrati innefattar flera rättigheter och skyldigheter för medborgare och EU-institutioner med Artikel 11 FEU och Artikel 10(3) FEU som portalparagrafer. Det star klart att principen om deltagardemokrati innefattar en rätt för medborgare att delta i EU:s lagstiftningsförfarande där EU-domstolens praxis lägger tyngdpunkten på en möjlighet att delta tidigt i lagstiftningsförfarandet då möjligheten att påverka är större. Rätten för medborgare att delta i Unionens demokratiska liv enligt Artikel 10(3) FEU inkluderar rätten att ha tillgång till information om EU:s lagstiftningsförfarande, så att medborgarna har en möjlighet att göra sin synpunkter hörda innan beslut kring lagstiftning.
Avhandlingen visar även att kommissionen har en rättslig skyldighet att genomföra omfattande och öppna samråd innan den föreslår lagstiftning, samt att säkerställa lika tillgång till samrådsmöjligheter och ge återkoppling på samråd. Påståendet underbyggs också av att det finns möjlighet till domstolsprövning av vissa krav på samråd i samband med EU-lagstiftning. Däremot försvagar processuella hinder möjligheten till lagprövning. Den rättsliga analysen visar också att medlemsstaterna är skyldiga att tolka nationell lagstiftning i ljuset av medborgarnas rätt att delta i unionens demokratiska liv. En rättslig tolkning av den svenska konstitutionella skyldigheten att genomföra samråd i form av remissväsendet, i ljuset av EU:s princip om deltagardemokrati, utvidgar den svenska regeringens samråds- skyldighet till att omfatta utformningen av dess förhandlingspositioner i Rådet. I kartläggningen av de rättsliga kraven identifieras två huvudsakliga skyldigheter för kommissionens samråd som härrör från principen om deltagardemokrati: aktiv öppenhet i form av återkoppling från samråd och processuell jämlighet samt skyldighet att samråda på nationell nivå vid utarbetandet av svenska förhandlingspositioner.

8.4. Lagstiftningsamråd i EUs flernivå styre, det svenska remissförfarandet

Efter att ha identifierat och analyserat viktiga rättigheter och skyldigheter som är förknippade med principen om deltagardemokrati, skisserar kapitel 5 en rättslig ram för samråd baserat på en djupgående analys av samråd om EU-lagstiftning på EU och nationell nivå med Sverige som referensfall.

Vid beslut om och när samråd ska ske och vilken form samrådet bör ha, ska syftet med samrådet beaktas. Medan förarbetena betonar att regeringens samråd syftar till att säkerställa lagstiftning av hög kvalitet samt fungera som ett demokratiikt ankare. Den rättsliga analysen, som omfattar relativt ny rättspraxis från Högsta domstolen, Högsta förvaltningsdomstolen och Migrationsöverdomstolen, klargjorde att regeringens samrådsförfarande kan bli föremål för rättslig prövning i svenska domstolar och att bristfälligt samråd kan leda till att en rättslig regel/lag ogiltigförklaras.

Eftersom domstolsprövningen i det svenska systemet är begränsad till väsentliga överträdelser, måste en brist i samrådsförfarandet vara väsentlig eller peka på oförutsedda konsekvenser för att normen ska kunna åsidosättas. Den rättsliga analysen i kapitel 5 visade också att
varderken den befintliga rättspraxisen eller litteraturen innehåller någon diskussion om tillämpningen och relevansen av EU-rätten och internationell rätt för remissväsende. Avhandlingen visar hur viktiga delar av principen om deltagardemokrati i artikel 10 (3) FEU, liksom folkrettsliga skyldigheter som främst härör från artikel 25 ICCPR, är relevanta för tolkningen av den regeringsformens (RF) 7:2 som föreskriver samråd/ remiss.

8.5. *Fallstudie: principen om deltagardemokrati i praktiken*

Efter att ha behandlat den första forskningsfrågan och analyserat innehållet i principen om deltagardemokrati och dess betydelse för lagstiftning, övergick kapitel 6 till att bedöma i vilken grad rådande hantering av samråds för EU-lagstiftning på EU-nivå och nationell svensk lever upp till de identifierade skyldigheter och processuella krav som följer av principen. Fallstudierna visade att krav på återkoppling kan tillämpas effektivt på kommissionens samråd medan skyldigheten att säkerställa processuell jämlikhet inte kan tillämpas lika enkelt. Samtidigt är det, som har hävdats, otillräckligt att bara rapportera vilka svar som inkommit genom samråd. Fallstudierna visade även att processuell jämlikhet alltjämt är utmanande och ett hinder för en effektiv realisering av principen om deltagardemokrati. Fallet med anknytning till EU:s migrationspakt visade ytterligare hur kommissionen fortfarande kan, för högprofilerade lagstiftningsärenden för vilka det finns betydande politiska påtryckningar, avsevärt åsidosätta sin konstitutionella skyldighet att samråda. Samtidigt bekräftar fallstudierna vad observatörer länge har noterat, att det saknas uppsökande verksamhet bortom existerande väldefinierade nätverk och aktörer samt att företagsintressen alltjämt dominerar.

Samråd som skedde på nationell nivå kompenserade generellt sett inte denna brist. Detta förefaller delvis vara ett resultat av grundlagens utformning. Regeringsformen betonar samråd med myndigheter, vilket tydligt återspeglas i övervikten av statliga aktörer och myndigheter. Såvida RF 7:2 omtolkas väsentligt, i ljuset av principen om deltagardemokrati, är svenskt EU-lagstiftande offentligt samråd olämpligt för att uppfylla de målen med EU-lagstiftnings samråd enligt artikel 11 FEU och 10 (3) FEU.

8.6. *Slutsatser*

Baserat på analysen i tidigare kapitel och resultaten av fallstudierna, tog detta sista kapitel upp den tredje forskningsfrågan inriktad på att förbättra hanteringen av samrådd för att anpassa dem till principen om
Fem handlingslinjer föreslogs för att lyfta samråden ur demokrati synvinkel: återkoppling, processuell jämlighet, demokratisk innovation, sammanhållning på flera nivåer och samråd som en EU sekundärrättsstrategi. För varje handlingslinje undersöktes konkreta förslag på hur man kan förbättra samråden.

Den juridiska analys som utvecklats i denna avhandling och förslag för att anpassa samråd till principen om deltagande demokrati, bidrar till den pågående diskursen om hur man kan främja ett meningsfullt deltagande i EU:s flernivåstyre och i slutändan stärka demokratin i EU. Av vikt är att svensk rätt ska tolkas i ljuset av principen om deltagardemokrati enligt Artikel 10(3) FEU; medborgarnas rätt att delta i Unionens liv.

Analysen och resultaten väcker också frågor för vidare forskning. Hur kan till exempel principen om deltagande demokrati förverkligas i andra medlemsstater, med tanke på deras konstitutionella och rättsliga ramar? Hur gäller de processuella garantier som beskrivs i denna avhandling för demokratiska innovationer eller andra former av politiskt deltagande?

Naturligtvis är förverkligandet av principen om deltagande demokrati genom lagstiftnings samråd inte på något sätt ett universalmedel för de utmaningar som unionen står inför när det gäller demokrati och styrning. Att ge principen effekt genom ett brett offentligt samråd, som kännetecknas av deliberativa återkopplingselement, transparens och processuell jämlighet med stark anknytning till medborgarna är inte enkelt. Den rättsliga analys och de argument kring principen om deltagardemokrati, som utvecklats i denna avhandling, visar däremot förhoppningsvis befintlig potential att på rättslig väg uppmana medlemsstater och nationella aktörer att ta en större roll i främjandet av demokratiskt deltagande i unionen.
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