

Civil Society Participation in EU Climate Law-Making: A Critical Evaluation of the European Commission's Consultations in Connection with the European Climate Law, by Odile Ammann and Audrey Boussat

10 MAR
2023

Summary

This blog post presents the findings of an article published in the *European Journal of Risk Regulation*, in which we examined whether the European Commission's consultations in the area of climate law-making live up to the strong commitment to civil society participation enshrined in the EU treaties. We evaluated these consultations based on three primary law principles that structure civil society participation in the EU, namely the principles of democracy, openness, and transparency. The article highlights four key issues: the discretion of the Commission in the context of consultations; the accessibility of consultations; the representativeness of submissions; and the feedback provided to respondents after a consultation. Our study seeks to contribute to the still nascent literature on climate legislation, which remains understudied in legal scholarship compared to the booming scholarly field of climate litigation.

How Does And Should Civil Society Participate In EU Climate Law-Making?

The question of how to tackle the consequences of anthropogenic climate change is a notoriously vexed issue. In the context of climate mitigation measures, lawmakers need to reconcile various potentially conflicting interests, namely those of citizens and other members of civil society, whose wishes are not necessarily in line with the recommendations of climate scientists and the priorities of political institutions. The difficulty is compounded by several specificities of environmental and climate law-making: the existence of areas of scientific uncertainty (especially regarding the consequences – not the existence – of anthropogenic climate change); the substantial number and broad range of persons and entities affected by climate change; and, finally, the urgency to take effective climate mitigation measures.

Qua supranational organization, the EU can play a leading role in the area of climate mitigation, both within its borders and beyond. However, the democratic legitimacy of EU law-making processes is often called into question, including from the perspective of civil society involvement. And yet, the Lisbon Treaty introduced several provisions on representative and participatory democracy. This includes art. 11(3) of the TFEU, which states that “[t]he European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent”. Moreover, the EU is a party to the Aarhus Convention, which provides that the public must be involved in environmental law-making processes at an early stage.

Evaluating The European Commission's Climate Consultations: Two Case Studies

Our article focuses on two consultations closely related to the European Climate Law (ECL), which entered into force in 2021 and forms part of the European Green Deal. These consultations pertained to policy documents containing, *inter alia*, greenhouse gas (GHG) emissions reduction targets that were subsequently enshrined in the ECL. The first consultation took place in 2018 and pertained to the “Clean Planet for All” Communication (CPAC), which defines climate neutrality as an objective for 2050. The second consultation was held in 2020 concerning the 2030 Climate Target Plan (CTP), which provides for an intermediary GHG emissions reduction target of 55% compared to 1990 levels. Because no consultations were held on the ECL as such, these two closely related consultations warrant our attention.

We evaluated the Commission's climate consultations based on the primary law principles of democracy, openness, and transparency. As shown in previous work, these principles are the three main normative pillars of civil society participation in EU law-making. The principle of democracy corresponds to citizen involvement in law-making and has various components, such as equality and participation. The principle of openness requires institutions to actively engage with civil society. The principle of transparency is a more passive dimension of openness that is reflected in publicity requirements and the right of access to documents (for further details, see Ammann 2021).

Four Areas Of Improvement

As already mentioned, our paper highlights four key issues which will now be discussed briefly: the Commission's discretion in the context of consultations; the (in)accessibility of consultations; issues of representativeness; and, finally, issues pertaining to the feedback provided to respondents. Of course, additional case studies would be needed in order to clarify whether these are case-specific or recurring issues.

1. Discretion

The Commission has some leeway regarding when, how, and even whether to consult. This discretion can be problematic from the perspective of democracy and openness unless exceptions to the principle of consultations are interpreted narrowly. In the case of the ECL, an additional consultation did not seem necessary because civil society had already had the opportunity to express itself on the CPAC and the CTP.

The aforementioned principles of democracy and openness may also be strained by the length and content of the questionnaires, depending on how the European Commission designs the consultations. The two questionnaires contained more than sixty questions, which can discourage participation. This challenge can to some extent be overcome by asking closed questions. In fact, the two questionnaires mostly relied on this option. While closed questions enable participants to give their views straightforwardly, they may also hinder effective participation, as respondents are limited to predefined options.

The questionnaires also featured open questions and (limited) space for comments. Moreover, respondents could submit additional position papers. However, given the length of the questionnaires, it is unclear whether participants would have had enough resources to make this extra effort. Shorter questionnaires offering a broader spectrum of potential answers would be more appropriate.

2. Accessibility

A second area for improvement is the accessibility of consultations. Of the three primary law principles mentioned above, transparency is the one that the Commission takes most seriously. For instance, both questionnaires and reports are available online, e.g. on the webpage dedicated to participation in the EU legislative process. However, some of these documents are only available in English, which creates a barrier for potential participants who are not fluent in English. This is particularly problematic in the field of climate law, as some individuals may be prevented from shaping policies that directly affect them.

The duration of the consultation period (three months) seems appropriate from the perspective of openness and democracy: it does not cause excessive delays (which is important in climate matters) while giving participants enough time to respond. However, consultations that take place exclusively online appear problematic regarding the principles of democracy and openness, as many potential participants may not be able to use digital tools. Moreover, without active dissemination and awareness-raising measures, the consultation may lack visibility and be missed by potential respondents. This leads us to our next point, namely the representativeness of consultations.

3. Representativeness

A third difficulty pertains to the representativeness of the submissions. We identified some positive aspects in relation to the principles of democracy and openness. Not only was participation open to all (which is commendable from the point of view of equal participation and climate issues), but each consultation also generated several thousand responses, three-quarters of which came from individuals. An overrepresentation of the economic sector could not be observed in these two cases (though of course, interest groups may have relied on alternative channels of influence). Various conflicting individual interests were expressed. While reconciling them is challenging, it seems essential to give room to diverse views.

Still, several issues can be noted. First, anonymous participation is possible, which makes it difficult to assess the representativeness of consultations (although in our two cases, only a few participants remained anonymous, and those who did were mainly individuals). Representativeness may also be difficult to assess due to astroturfing, i.e., multiple identical responses that result from a deliberate effort of interest groups to engineer participation. Accordingly, it is important that the Commission highlights the existence of organized campaigns in its consultation reports, which it did in our two cases. Finally, in terms of geographic representativeness, a significant share of responses came from Germany, namely 35% for the CPAC consultation and 53%

participants for the CTP consultation. Even if in both cases, responses came from almost all Member States, these figures show that there is room for improvement in terms of geographic balance.

4. Feedback

Finally, we looked at the feedback that the Commission provided to respondents after the consultations had ended. Two types of reports shed light on the results of a consultation: an in-depth report (120 pages for the CPAC consultation and 273 pages for the CTP consultation) and a shorter version of fewer than twenty pages (see here for the CPAC and here for the CTP). The in-depth reports are exhaustive but very lengthy. Even interested respondents are unlikely to read them. The shorter synopsis reports are more accessible but incomplete. Thus, they do not, as such, fulfil the criterion of transparency unless they are considered in conjunction with the in-depth reports.

What seems particularly problematic is the Commission's lack of responsiveness to the submissions it receives: in its reports, it does not explain whether and how the input of the consultations influenced the law-making process. Yet, according to the Better Regulation Guidelines, respondents must "know how, and to what extent, their input has been taken into account" (see also .art. 296 TFEU, which provides that "[l]egal acts shall state the reasons on which they are based"). Participants' responses can easily be ignored, which defeats the purpose of consultation and aligns neither with the participatory prong of democracy nor with the principles of openness and transparency.

Conclusion: A Call For Greater Attention To The Democratic Legitimacy Of Climate Legislation

To ensure that consultations are even more in line with the primary law principles of transparency, democracy, and openness, the Commission needs to make additional efforts in the future. This holds especially true for the principles of democracy and openness. As shown in previous work, transparency is often prioritized by the EU institutions to the detriment of other important requirements enshrined in EU primary law. Yet, in environmental and climate matters, the early and effective consultation of civil society is particularly important to elaborate legislation that is not only evidence-based but also democratically legitimate.

Our paper aims to contribute to the still nascent literature on climate legislation, a topic that remains understudied in legal scholarship compared to the booming (and, by now, crowded) scholarly field of climate litigation. There is no doubt that climate litigation is an important development that warrants the attention of legal scholars. However, before jumping on the climate bandwagon, we should not forget that climate mitigation policies are mostly crafted by the legislative and executive branches, and not in the courts. Despite their significant implications for the future of climate policy, these law-making processes and their democratic credentials have not yet received the scholarly attention they deserve.

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Suggested citation: O. Ammann and A. Boussat, "Civil Society Participation in EU Climate Law-Making: A Critical Evaluation of the European Commission's Consultations in Connection with the European Climate Law", *REALaw.blog* available at <https://realaw.blog/?p=2347>