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# The Participation of Civil Society in European Union Environmental Law-Making Processes: A Critical Assessment of the European Commission's Consultations in Connection with the European Climate Law

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## Abstract

The question of how best to tackle anthropogenic climate change is a thorny one: besides scientific uncertainty regarding the consequences of climate change, another difficulty is that the recommendations of climate experts may clash with the priorities of citizens, interest groups and political institutions. With the European Green Deal, the European Union (EU) recently made significant advances in climate policy; at the same time, and as is well known, the EU and its institutions have long been criticised for their “democratic deficit” and for their failure to involve all civil society actors equally in EU law-making processes. This article sheds light on the legal framework governing civil society participation in EU law-making, and more specifically on the Commission's consultations pursuant to Article 11(3) of the Treaty on European Union. It then critically assesses selected features of two consultations conducted by the Commission in connection with the European Climate Law, which it evaluates from the perspective of the EU primary law principles of democracy, openness and transparency. Through this analysis, and by suggesting how future climate consultations could be further improved, the article aims to contribute to the (still nascent) legal scholarship on civil society participation in environmental and climate policy.

**Keywords:** civil society; climate change; consultations; democracy; European Climate Law; European Commission; openness; participation; transparency

[The European Green Deal] must put people first, and pay attention to the regions, industries and workers who will face the greatest challenges. Since it will bring substantial change, active public participation and confidence in the transition is paramount if policies are to work and be accepted. A new pact is needed to bring together citizens in all their diversity, with national, regional, local authorities, civil society and industry working closely with the EU's institutions and consultative bodies.<sup>1</sup>

<sup>1</sup> European Commission (hereinafter: EC), The European Green Deal, 10 December 2019, COM(2019) 640 final (hereinafter: EGD), 2.

## I. Introduction

While today there is an overwhelming scientific consensus on the existence of anthropogenic climate change, the question of how to tackle this multi-faceted issue remains thorny. Disinformation is common and actively fuelled by special interest groups, sometimes with the help of scientific experts.<sup>2</sup> Moreover, ultimately, climate mitigation measures need to be taken by political institutions based on democratic processes, which warrants consulting citizens and other interested parties (which we refer to as “civil society”; *infra*, Section II.1).

The division of labour and of responsibilities between science and politics may lead to tensions between climate experts’ recommendations on the one hand and the preferences of political institutions, citizens and interest groups on the other. Examples include Swiss voters’ rejection of the proposed revision of the Federal CO<sub>2</sub> Act in June 2021<sup>3</sup> and the Yellow Vests protests in 2018–2019 in response to the French government’s decision to increase fuel taxes. Recent attempts at strengthening the position of citizens in climate policy have produced mixed results. One prominent example is the French Citizens’ Convention for Climate established in 2019 to deliberate climate issues: while this initiative was initially commended for its innovativeness and inclusiveness, many commentators – including the members of the Convention themselves<sup>4</sup> – have criticised the reluctance of the French government and legislature to adopt the Convention’s proposals and the influence of special interest groups on the process.<sup>5</sup>

How do these tensions play out in the European Union (EU)? As a supranational organisation, the EU has the potential to effectively address the intricate collective action problem of climate change, both within the Union and beyond.<sup>6</sup> At the same time, it has been repeatedly criticised for its “democratic deficit”<sup>7</sup> and for its failure to involve all civil society actors equally.<sup>8</sup> Yet, EU primary law contains a strong commitment to civil society participation.<sup>9</sup> Moreover, the Aarhus Convention, which the EU ratified in 2005, provides that the public must be able to participate in environmental law-making.<sup>10</sup>

<sup>2</sup> S Götze and A Joeres, *Die Klimaschmutzlobby: Wie Politiker und Wirtschaftslenker unsere Zukunft verkaufen* (Munich, Piper 2020). For earlier practices of disinformation, see “Die schwarze Lobby: Wie die Ölindustrie eine jahrzehntelange Desinformations-Kampagne führte” (*NZZ am Sonntag*, 12 December 2021); N Oreskes and EM Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues From Tobacco Smoke to Global Warming* (London, Bloomsbury Press 2010).

<sup>3</sup> The revised version of the CO<sub>2</sub> Act aimed at implementing the Paris Agreement of 2015 by introducing new environmental taxes, stricter regulations for vehicles and buildings and subsidies for investments in climate-friendly technologies.

<sup>4</sup> L Eguy, “Les citoyens de la convention climat demandent à Macron d’agir” (*Libération*, 13 October 2020).

<sup>5</sup> LR Moscovenko, “Convention citoyenne pour le climat versus lobbys: un combat inégal” (*EURACTIV France*, 9 February 2021).

<sup>6</sup> See, eg, Art 191(1) of the Treaty on the Functioning of the European Union (TFEU). See also A Bradford, “The Brussels Effect” (2012) 107 *Northwestern University Law Review* 1.

<sup>7</sup> A Føllesdal and S Hix, “Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik” (2006) 44 *Journal of Common Market Studies* 533.

<sup>8</sup> A Alemanno, “Beyond Consultations: Reimagining EU Participatory Politics” (*Carnegie Europe*, 5 December 2018) <[carnegieeurope.eu/2018/12/05/beyond-consultations-reimagining-eu-participatory-politics-pub-77873](https://carnegieeurope.eu/2018/12/05/beyond-consultations-reimagining-eu-participatory-politics-pub-77873)> (last accessed 8 April 2022); A 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” (2020) 26 *European Law Journal* 114; O Ammann, “Transparency at the Expense of Equality and Integrity: Present and Future Directions of Lobby Regulation in the European Parliament” (2021) 6 *European Papers* 239.

<sup>9</sup> See especially Art 11 of the Treaty on European Union (TEU).

<sup>10</sup> See especially Arts 1 and 6–8 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998.

In this article, we examine how the EU primary law principles of democracy, openness and transparency are implemented in EU environmental – and, more specifically, climate – law-making processes. These three principles structure civil society participation in the EU.<sup>11</sup> Our focus lies on the European Commission (EC), which must “promote the general interest of the Union” and has the exclusive right of legislative initiative.<sup>12</sup> Article 11(3) of the Treaty on European Union (TEU) in particular tasks the EC with “carry[ing] out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent”.

Consulting civil society at the pre-legislative stage is especially important in environmental and climate law-making: the Aarhus Convention emphasises that its Parties “shall provide for *early* public participation, *when all options are open* and effective public participation can take place”.<sup>13</sup> So far, environmental law scholarship has mostly been focusing on the judicial branch, and climate litigation is a booming field of research.<sup>14</sup> This judicial angle is certainly relevant and in line with recent developments around the globe, including in Europe.<sup>15</sup> Yet, environmental and climate policy is not primarily the product of judicial decisions: it is, first and foremost, expressed in environmental and climate legislation. Hence, examining the activity of other (non-judicial) institutions is crucial in order to add to the existing literature.

In this article, our aim is to assess whether the consultations that the EC conducts pursuant to Article 11(3) TEU in the field of climate policy align with the three aforementioned principles of EU primary law. More specifically, we provide a critical evaluation of the consultations conducted by the EC prior to the adoption of the European Climate Law (ECL), which entered into force in July 2021 and forms part of the European Green Deal (EGD). As the ECL has significant implications for the future of EU climate policy, studying civil society participation in the context of its elaboration allows us to shed light on the EC’s recent practice of consultations in the field. While the EC did not conduct consultations on the ECL specifically, it relied on the results of two prior consultations carried out on closely related topics, namely the “Clean Planet for All” Communication (CPAC) and the 2030 Climate Target Plan (CTP; *infra*, Section III).

We proceed as follows: first, we clarify the main concepts connected to the EC’s consultations, as well as the legal framework that governs them (Section II). We then move on to our two case studies, namely the consultations conducted by the EC on the CPAC and the CTP. After providing a brief overview of these consultations (Section III), we evaluate them in light of the EU primary law principles of democracy, transparency and openness (Section IV), before concluding (Section V).

This article is a legal (ie a normative and not a fully-fledged empirical) study, though we occasionally draw on political science studies. As our focus lies on the EC, we do not assess the consultative practices of other EU institutions or Member States, nor do we look at fields of environmental policy other than climate policy. The European Economic and

<sup>11</sup> For an overview, see Ammann, *supra*, note 8.

<sup>12</sup> Art 17(1) and (2) TEU.

<sup>13</sup> Art 6(4) of the Aarhus Convention (emphasis added).

<sup>14</sup> Examples abound. For recent contributions, see C Heri, “Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability” (2022) *European Journal of International Law* (advance access); A-J Saiger, *Nationale Gerichte im Klimaschutzvölkerrecht: Eine rechtsvergleichende Untersuchung zum Pariser Übereinkommen* (Baden-Baden, Nomos 2022); B Mayer, “The Contribution of Urgenda to the Mitigation of Climate Change” (2022) *Journal of Environmental Law* (advance access). See also the Climate Litigation Databases of Columbia Law School’s Sabin Center for Climate Change Law <[climatecasechart.com](http://climatecasechart.com)> (last accessed 26 October 2022).

<sup>15</sup> J Setzer and C Higham, “Global Trends in Climate Change Litigation: 2021 Snapshot” (*LSE*, July 2021) <[www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation\\_2021-snapshot.pdf](http://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf)> (last accessed 26 October 2022).

Social Committee (“the voice of organised EU civil society”<sup>16</sup>) and the European Committee of the Regions (which, as its name suggests, represents regional and local interests) are not part of our analysis either, as these advisory bodies fulfil a distinctive function in the EU legislative process that differs from civil society input solicited by the EC in the pre-legislative phase.<sup>17</sup> Our findings are also limited by the fact that the consultations conducted by the EC on the CPAC and the CTP serve as our main case studies; further work would be needed to determine whether these findings are case-specific or more broadly applicable. Despite these limitations, the analysis that follows may prove useful for future environmental and especially climate consultations by the EC and as a contribution to the (still nascent) legal scholarship on civil society participation in environmental and climate policy.

## II. Setting the stage: consultations by the EC

Considering the fluctuating terminology that can be encountered in EU policy documents and scholarship, a legal analysis of the EC’s consultations in relation to climate mitigation legislation requires clarifying the main relevant concepts at the outset: the *participants* in these consultations (Section II.1), the concepts of *participation* (Section II.2) and *consultation* (Section II.3) and the specificities of *EU environmental and climate law-making* (Section II.4).

### I. Participants in EC consultations

Article 11(3) TEU tasks the EC with “carry[ing] out broad consultations with parties concerned”. The term “parties concerned” is mentioned several times in EU primary law, albeit in relation to subject matters that differ from EC consultations.<sup>18</sup> Meanwhile, EU law, legal and political science scholarship, policy documents and other legal instruments pertaining to civil society participation in environmental law-making, such as the Aarhus Convention,<sup>19</sup> use inconsistent terminology to describe the participants in law-making processes in general and in EC consultations in particular.<sup>20</sup> Commonly used terms include “citizens” (Articles 10(3) and 11(1) TEU), “representative associations” (Article 11(1) and (2) TEU), “civil society” (Article 11(2) TEU), “the public” or “the public concerned” (Article 2(4) and (5) of the Aarhus Convention), “stakeholders” (a term used in the EC’s Better Regulation Guidelines (BRGs) and in scholarship<sup>21</sup>) and “interest groups”

<sup>16</sup> Alemanno, “Levelling the EU Participatory Playing Field”, supra, note 8, 130. See also European Economic and Social Committee, *The EESC: A Bridge between Europe and Organised Civil Society* (Luxembourg, European Economic and Social Committee 2003).

<sup>17</sup> Art 13(4) TEU. According to Smismans, “[t]he extent to which the ESC [Economic and Social Committee] represents the complexity of civil society organisations in contemporary European society is certainly open to question”: S Smismans, “European Civil Society: Shaped by Discourses and Institutional Interests” (2003) 9 *European Law Journal* 473, 492. Moreover, the Committee of the Regions seems reticent as regards the involvement of civil society actors, see *ibid*, 485 f.

<sup>18</sup> Art 108(2) TFEU (“parties concerned”); Arts 186, 191(4), and 212(3) TFEU (“third parties concerned”).

<sup>19</sup> Supra, note 10.

<sup>20</sup> Eg EC, “Communication from the Commission, Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission”, 11 December 2002, COM(2002) 704 final (hereinafter: EC, Consultation and Dialogue), 4 (though this Communication predates Art 11(3) TEU): “Depending on the issues at stake, consultation is intended to provide opportunities for input from representatives of regional and local authorities, civil society organisations, undertakings and associations of undertakings, the individual citizens concerned, academics and technical experts, and interested parties in third countries.”

<sup>21</sup> Eg H Hermansson, “The European Commission’s Environmental Stakeholder Consultations: Is Lobbying Success Based on What You Know, What You Own or Who You Know?” (2016) 5 *Interest Groups & Advocacy* 177, 177 f., defining stakeholders as “any organization including firms, interest groups, trade unions, NGOs and sub-national governmental bodies that has an expressed interest in the policy outcome and participate in the consultative process”.

(a concept that is frequently encountered in political science scholarship<sup>22</sup>). These various terms partly overlap and are hence often used interchangeably: for example, stakeholders are persons or groups that have an *interest* (a *stake*) in (ie who are *concerned* by) an issue. Yet, their meaning is not always congruent: not all stakeholders are interest *groups*; not all interest groups are *representative* associations; nor are citizens identical with civil society or the public. Considering the vast array of potential participants in EU law-making processes, conceptual clarity seems essential.

As the EC must conduct “broad” consultations (Article 11(3) TEU), an extensive interpretation of the term “parties concerned” seems appropriate. According to EU legal scholars, this expression encompasses “not only the addressees of EC measures, but all interested circles”;<sup>23</sup> for instance, Article 11(3) TEU applies to affected third-country nationals.<sup>24</sup> Prior to the adoption of Article 11(3) TEU, the EC also referred to the notion of “interested parties” in the context of consultations.<sup>25</sup> A broad interpretation is in line with the EC’s observation that “all relevant interests in society should have an opportunity to express their views”.<sup>26</sup> Scholars further point out that this broad understanding is apposite given that participants in consultations do not have legal authority and given the EU primary law principles of participatory democracy<sup>27</sup> (see *infra*, Section II.2) and of equal consideration of EU citizens (Article 9 TEU).<sup>28</sup> Last but not least, a broad definition is especially suited to consultations on climate issues, which typically “concern” many individuals and organisations (*infra*, Section II.4).

In this article, we choose to refer to “civil society”, a term that also appears in Article 11(2) TEU and Article 15(1) of the Treaty on the Functioning of the European Union (TFEU),<sup>29</sup> and which we use as a synonym for “parties concerned”. While civil society is an essentially contested concept,<sup>30</sup> it is understood to encompass both individuals and organised groups and to designate “the interface between the public and the private”.<sup>31</sup> The EC too refers to civil society and more specifically to “civil society organizations”, which it views as “facilitators of a broad policy dialogue”; its conception of civil society is broad, especially because it seems to include “organisations representing social and economic players”<sup>32</sup>. The EC’s understanding of civil society has been criticised for being ambiguous<sup>33</sup> and misleading,<sup>34</sup> as some

<sup>22</sup> Eg AS Binderkrantz, J Blom-Hanse and R Senninger, “Countering Bias? The EU Commission’s Consultation with Interest Groups” (2021) 28 *Journal of European Public Policy* 469; A Bunea, “Explaining Interest Groups’ Articulation of Policy Preferences in the European Commission’s Open Consultations: An Analysis of the Environmental Policy Area” (2014) 52 *Journal of Common Market Studies* 1224.

<sup>23</sup> PM Huber, “Art. 11 EUV” in R Streinz (ed.), *EUV/AEUV* (3rd edition, Munich, C.H. Beck 2018), para 29. For similar views, see S Heselhaus, “Art. 11 EUV” in M Pechstein, C Nowak and U Häde (eds), *Frankfurter Kommentar EUV/GRC/AEUV* (Tübingen, Mohr Siebeck 2017), para 50; T Lock, “Article 11 TEU” in M Kellerbauer, M Klammert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights – A Commentary* (Oxford, Oxford University Press 2019).

<sup>24</sup> Heselhaus, *supra*, note 23, para 52.

<sup>25</sup> EC, Consultation and Dialogue, *supra*, note 20.

<sup>26</sup> *ibid*, 5. As the EC notes, this is not incompatible with the advisable practice of conducting targeted consultations; moreover, exceptions apply where “access to consultations is limited for practical reasons” (*ibid*, 11).

<sup>27</sup> Heselhaus, *supra*, note 23, para 52.

<sup>28</sup> Huber, *supra*, note 23, para 29. According to Heselhaus, in light of Art 9 TEU, restricting participation to specific groups or creating any kind of distance from citizens requires a justification. Heselhaus, *supra*, note 23, para 4.

<sup>29</sup> Arts 300(2) and 302(2) TFEU, which pertain to the Economic and Social Council, are not relevant for our purposes.

<sup>30</sup> S Besson, “La constitution de la société civile” (2005) *Revue fribourgeoise de jurisprudence* 323, 327.

<sup>31</sup> N Barber, *The Principles of Constitutionalism* (Oxford, Oxford University Press 2018) p 121.

<sup>32</sup> EC, Consultation and Dialogue, *supra*, note 20, 5 f.

<sup>33</sup> Smismans, *supra*, note 17, 480.

<sup>34</sup> P Magnette, “European Governance and Civic Participation: Beyond Elitist Citizenship?” (2003) 51 *Political Studies* 144, 149.

consider that the term usually excludes business interests. Smismans, for instance, argues that the notion of “civil society” is used by the EC as part of “a legitimating discourse for all its existing interactions, including those with all sorts of private lobby actors”.<sup>35</sup> Be that as it may, the term “civil society”, even more than the notion of “parties concerned”, enables us to highlight the inclusive character that consultations should display. As our two case studies show, some improvements are still necessary in terms of inclusiveness (eg as regards the accessibility and representativeness of EC consultations; *infra*, Sections IV.2–4).

## 2. Participation

Another important concept is participation. The provision that inspired Article 11 TEU (ie Article I-47 of the Draft Treaty Establishing a Constitution for Europe) was titled “Principle of Participatory Democracy”.<sup>36</sup> Today, Article 10(3) TEU guarantees EU citizens’ “right to participate in the democratic life of the Union”. Like Article 11(3) TEU, this provision belongs to the TEU’s “Provisions on Democratic Principles”<sup>37</sup> and is non-justiciable.<sup>38</sup> In its White Paper on European Governance (WPEG), the EC identified participation as one of the five “principles of good governance” (besides openness, accountability, effectiveness and coherence) that should help reform the EU and restore citizens’ trust.<sup>39</sup>

Participation comes from the Latin word *particeps* (participant), “the one who takes part” (*partem capere*). Participation in law-making is “the involvement of individuals or groups – who are not part of the elected or appointed legal decision-making bodies – in preparing, making or implementing collectively binding decisions”.<sup>40</sup> Participation is deemed especially important in environmental and climate matters, as was already acknowledged in the 1992 Rio Declaration on Environment and Development.<sup>41</sup> Ensuring participation is one of the main obligations of the parties to the Aarhus Convention<sup>42</sup> and the United Nations Framework Convention on Climate Change (UNFCCC).<sup>43</sup> This emphasis on participation can be traced back to the already mentioned fact that environmental issues usually affect a wide circle of individuals and groups (see also *infra*, Section II.4).

More generally, under various conceptions of legitimacy, participation is considered to strengthen the legitimacy of law-making processes. In terms of democratic legitimacy, participation is deemed to increase *input legitimacy* (government by the people) “because it enriches public deliberation with new arguments”.<sup>44</sup> It also serves *output legitimacy* (government for the people) by feeding valuable knowledge into the law-making process, which in turn is expected to lead to more informed law-making outcomes.<sup>45</sup> Securing output legitimacy is especially important for the EC given its weak democratic

<sup>35</sup> Smismans, *supra*, note 17, 481.

<sup>36</sup> Treaty Establishing a Constitution for Europe [2004] OJ C310/01.

<sup>37</sup> Title II TEU.

<sup>38</sup> Huber, *supra*, note 23, para 30.

<sup>39</sup> EC, “European Governance – A White Paper” COM(2001) 428 final (hereinafter: WPEG), 10.

<sup>40</sup> F Rauschmayer, J Paavola and H Wittmer, “European Governance of Natural Resources and Participation in a Multi-Level Context: An Editorial” (2009) 19 *Environmental Policy and Governance* 141, 142.

<sup>41</sup> UN General Assembly, Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3–14 June 1992), A/CONF.151/26 (Vol. I), 12 August 1992, Principle 10.

<sup>42</sup> Art 1 Aarhus Convention. While not defined, the notion of participation is mentioned throughout the treaty text (see, eg, the Convention’s preamble, as well as its Arts 6–8).

<sup>43</sup> Art 6(a)(iii) UNFCCC.

<sup>44</sup> VC Lopez, “The Lisbon Treaty’s Provisions on Democratic Principles: A Legal Framework for Participatory Democracy” (2010) 16 *European Public Law* 123, 124.

<sup>45</sup> *ibid.* On input and output legitimacy, see F Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford, Oxford University Press 1999) p 6 ff.



accountability.<sup>46</sup> Between input and output, participation is further considered to foster *throughput legitimacy* (government *with* the people), a procedural criterion that concerns “the efficacy, accountability and transparency of the EU’s governance processes along with their inclusiveness and openness to consultation *with* the people”.<sup>47</sup> Finally, participation is beneficial for *sociological legitimacy* because it can be expected to strengthen the acceptance of legislation. The WPEG thus sees participation as a way to improve the “quality, relevance, and effectiveness of EU policies”.<sup>48</sup>

Yet, not *any* kind of participatory instrument can achieve these objectives; more opportunities for participation do not automatically lead to greater democratic legitimacy.<sup>49</sup> Among other criteria, participation needs to ensure equal representation in order to be democratically legitimate; in this context, “the openness and inclusiveness of consultations, as well as the equality of representation, can be considered to be reliable indicators of the democratic quality of a participatory process”.<sup>50</sup> Participatory instruments should also be available to non-organised individuals and not just tailored to organised interests.<sup>51</sup> As a matter of fact, some scholars criticise the EC’s conception of participation for privileging “already organised groups”.<sup>52</sup> We will return to these equality considerations in the context of our two case studies (*infra*, Section IV).

### 3. Consultation

Consultation is one channel through which participation can be enabled.<sup>53</sup> The term goes back to the Latin verb *consultare* (to deliberate, to debate frequently or to interrogate). While participation revolves around those who take part (the participants), consultation focuses on the act that triggers participation. This difference in perspective is relevant because soliciting participation usually means defining the terms of (and hence shaping) this participation.

Consultations may occur at different stages of the legislative process, but they typically happen in the pre-parliamentary phase. In the EU, Article 11(3) TEU enshrines a duty of the EC “to carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent”. The limited resources of the EC render it all the more dependent on external input and expertise.<sup>54</sup> The EC’s conception of consultation

<sup>46</sup> D Coen and A 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, 1105 f., 1117.

<sup>47</sup> VA Schmidt, “Democracy and Legitimacy in the European Union Revisited: Input, Output and ‘Throughput’” (2013) 61 *Political Studies* 2, 2 (emphasis in original).

<sup>48</sup> WPEG, 10.

<sup>49</sup> BE Cain, “More or Less: Searching for Regulatory Balance” in G-UE Charles, HK Gerken and MS Kang (eds), *Race, Reform, and Regulation of the Electoral Process: Recurring Puzzles in American Democracy* (Cambridge, Cambridge University Press 2011).

<sup>50</sup> C Quittkat, “The European Commission’s Online Consultations: A Success Story?” (2011) 49 *Journal of Common Market Studies* 653, 655. See also IM Young, *Justice and the Politics of Difference* (Princeton, NJ, Princeton University Press 2000) p 124: “representation and participation mutually require each other for politics to be deeply democratic”. One difficulty, however, is that “there is no good benchmark for judging whether a certain balance of interests is sufficient”: A Rasmussen and BJ Carroll, “Determinants of Upper-Class Dominance in the Heavenly Chorus: Lessons from European Union Online Consultations” (2013) 44 *British Journal of Political Science* 445, 446.

<sup>51</sup> Alemanno, “Beyond Consultations”, *supra*, note 8, 124.

<sup>52</sup> Magnette, *supra*, note 34, 148. As Magnette notes, the WPEG defends a conception of participation that amounts to “non-decision” and that is highly indeterminate (ie not backed by precise proposals; *ibid*, 150).

<sup>53</sup> As the EC highlights, consultations are only one channel via which it interacts with civil society, besides other (formal and informal) channels: EC, “Commission Discussion Paper, The Commission and Non-Governmental Organisations: Building a Stronger Partnership”, 18 January 2000, COM(2000) 11 final, 8 f.

<sup>54</sup> Hermansson, *supra*, note 21, 181; Ammann, *supra*, note 8, 248 f.

is set out in various policy documents, especially its WPEG of 2001, its 2002 Communication “Towards a Reinforced Culture of Consultation and Dialogue” and its Better Regulation Guidelines (BRGs), which were last updated in 2021.<sup>55</sup> Its practice of carrying out consultations is even older than the WPEG, though these past consultations were *ad hoc* and not streamlined.<sup>56</sup> Quittkat and Finke identify three phases in the development of the EC’s consultation practice:<sup>57</sup> a first phase of informal and closed consultations with experts and mostly economic stakeholders, which lasted until the 1980s; a second phase during which consultations also included the European social partners and non-governmental organisations (NGOs); and, finally, a third phase that started at the turn of the century and is reflected in the WPEG, where the EC presents consultations as a driver of democratic participation.

Since the early 2000s, the EC has been relying on online consultations, including in environmental policy.<sup>58</sup> Yet, just as participation does not automatically strengthen democratic legitimacy (*supra*, Section 2), the democratising potential of digital consultations is not self-evident. Political scientists note that individuals seldom respond to the EC’s online consultations and that, even when they do, their input is hardly acknowledged.<sup>59</sup> Another consideration is the way in which questionnaires are designed: some online consultations are “reduced to simple opinion polls, organised as multiple-choice questionnaires not even leaving a leeway for deviant opinions”.<sup>60</sup> At the same time, empirical research shows that participation usually increases when questionnaires mostly consist of closed questions and preformulated answers.<sup>61</sup> In other words, to strengthen democratic legitimacy, online consultations must be designed in a way that stimulates participation without excessively constraining it.

#### 4. Specificities of environmental and climate law-making

What makes consultations in the context of environmental and especially climate law-making distinctive? Environmental (including climate) law-making is characterised by the following *general features*. First, as a policy area, it is often confronted with significant scientific uncertainty,<sup>62</sup> one of the overarching themes of this special issue. While anthropogenic climate change is a well-established fact, areas of doubt remain, especially regarding its consequences.<sup>63</sup> The precautionary principle, one of the guiding principles

<sup>55</sup> EC, “Better Regulation Guidelines” SWD(2021) 305 final, 3 November 2021 (hereinafter: BRG 2021). For an overview, see A-E Christopoulou, “Public Consultations Unpacked: The Commission’s Participatory Regime Under the 2021 Better Regulation Agenda” (*European Law Blog*, 20 January 2022) <[europeanlawblog.eu/2022/01/20/public-consultations-unpacked-the-commissions-participatory-regime-under-the-2021-better-regulation-agenda](https://europeanlawblog.eu/2022/01/20/public-consultations-unpacked-the-commissions-participatory-regime-under-the-2021-better-regulation-agenda)> (last accessed 8 April 2022). In this article, we also refer to the 2017 version of the BRGs, which was available at the time of the two consultations under consideration: EC, “Better Regulation Guidelines” SWD(2017) 350, 7 July 2017 (hereinafter: BRG 2017).

<sup>56</sup> J Labitzke, “Consultation Processes as a Practice of Legitimacy in the EU Legislative Process” (2012) 20 *Journal of Contemporary European Studies* 323, 324.

<sup>57</sup> C Quittkat and B Finke, “The EU Commission Consultation Regime” in B Kohler-Koch, D de Bièvre and W Maloney (eds), *Opening EU Governance to Civil Society: Gains and Challenges* (Mannheim, Universität Mannheim 2008) p 187 ff.

<sup>58</sup> *ibid.*, 205 ff. Quittkat defines online consultations as “consultations that are announced on the Internet and that allow for answers by electronic mail or online questionnaires”: Quittkat, *supra*, note 50, 653.

<sup>59</sup> B Kohler-Koch, “Civil Society and Democracy in the EU” in B Kohler-Koch and C Quittkat (eds), *De-Mystification of Participatory Democracy: Governance and Civil Society* (Oxford, Oxford University Press 2013) p 11.

<sup>60</sup> Quittkat and Finke, *supra*, note 57, 186.

<sup>61</sup> *ibid.*, 209.

<sup>62</sup> L Mehta, HN Adam and S Srivastava, “Unpacking Uncertainty and Climate Change from ‘Above’ and ‘Below’” (2019) 19 *Regional Environmental Change* 1529.

<sup>63</sup> J McDonald, “The Role of Law in Adapting to Climate Change” (2011) 2 *Wiley Interdisciplinary Reviews: Climate Change* 283, 289.



of environmental law (see also Article 191(2) TFEU), is one way of responding to this challenge. Second, as already mentioned, environmental and climate issues affect a particularly large number and wide range of persons, be it individuals or organisations. Third, and relatedly, environmental and climate issues involve many conflicting interests, which renders the forging of political compromises especially challenging and makes consultations all the more important.<sup>64</sup> A fourth characteristic is the urgency to act:<sup>65</sup> the pressure to take climate mitigation measures further complicates the law-making process and makes it harder to reach political compromises. It can also act as an additional constraint on consultation procedures.

As regards environmental and climate law-making *in the EU*, it is worth recalling the following specificities. First, environmental (including climate) issues are a shared competence of the EU and its Member States (Article 4(2)(e) TFEU). Second, such issues are deemed of transversal relevance: they “must be integrated into the definition and implementation of the Union’s policies and activities” (Article 11 TFEU). Third, the past years have witnessed significant developments in the field of EU environmental and climate policy. While the Lisbon Treaty only brought about minor changes in this area<sup>66</sup> and was followed by a period of stagnation,<sup>67</sup> the EC has since distinguished itself as “one of the strongest promoters of environmental interests of the Union”.<sup>68</sup> This has especially been the case since the EU ratified the Paris Agreement (2015), which led to the EGD (2019) and to the ECL (2021). Finally, as already highlighted, both the Aarhus Convention and the UNFCCC, two treaties to which the EU is a party, require strengthening participation in the field of environmental policy.

### III. The EC’s consultations in connection with the ECL

This section provides a brief overview of the consultations conducted by the EC in connection with the ECL, namely the consultations on the CPAC and the CTP. Next, we assess these consultations in light of EU primary law (Section IV).

The ECL is the first act of secondary law implementing the EGD. The EGD aims to establish a greener economic growth strategy as well as climate neutrality by 2050.<sup>69</sup> It has been a priority on the agenda of EC President Ursula von der Leyen, partly due to growing demands coming from civil society.<sup>70</sup> One of the first steps envisioned in the EGD was to develop the ECL, a legally binding<sup>71</sup> instrument enshrining the 2050 climate neutrality objective and an intermediate greenhouse gas (GHG) emissions reduction target for 2030.<sup>72</sup>

<sup>64</sup> Rauschmayer et al, *supra*, note 40, 141.

<sup>65</sup> EC, “Proposal for a regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law)” COM(2020) 80 final, 4 March 2020 (hereinafter: ECL Proposal), 1.

<sup>66</sup> D Benson and A Jordan “European Union Environmental Policy After the Lisbon Treaty: plus ça change, plus c’est la même chose?” (2010) 19 *Environmental Politics* 468.

<sup>67</sup> Regarding the early 2010s, see Hermansson, *supra*, note 21; regarding the Juncker Commission, see A Čavoški, “A Post-Austerity European Commission: No Role for Environmental Policy?” (2015) 24 *Environmental Politics* 501. See also Y Steinebach and C Knill, “Still an Entrepreneur? The Changing Role of the European Commission in EU Environmental Policy-Making” (2017) 24 *Journal of European Public Policy* 429, 429.

<sup>68</sup> Čavoški, *supra*, note 67, 502.

<sup>69</sup> EGD, 2.

<sup>70</sup> B Pérez de las Heras, “European Climate Law(s): Assessing the Legal Path to Climate Neutrality” (2021) 21 *Romanian Journal of European Affairs* 19, 19; M Siddi, “Coping with Turbulence: EU Negotiations on the 2030 and 2050 Climate Targets” (2021) 9 *Politics and Governance* 327, 331 and 334.

<sup>71</sup> The ECL (European Parliament and Council Regulation (EU) 2021/1119 of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) 401/2009 and (EU) 2018/1999 [2021] OJ L243/1) is a regulation pursuant to Art 288 TFEU.

<sup>72</sup> See Arts 2 and 4 ECL; EGD, 4–5.

As emerges from the EC's proposal<sup>73</sup> and amended proposal,<sup>74</sup> no EC consultation took place on the ECL *as such*. This can be explained by the fact that in 2018 and 2020 civil society had been given the opportunity to express itself on two related EC communications: the CPAC, which defines climate neutrality as an objective for 2050;<sup>75</sup> and the CTP, which provides for a 2030 GHG emissions reduction target of 55% compared to 1990 levels.<sup>76</sup> The ECL enshrines the targets previously set out in these two non-legally binding policy documents. Given that the ECL represents a milestone in EU climate policy and establishes the framework for the adoption of delegated acts,<sup>77</sup> it seems important to scrutinise these two consultations, as they are closely linked to the ECL.

The CPAC consultation ran from 17 July to 9 October 2018. The online questionnaire<sup>78</sup> contained seventy-four questions to which the EC received 2,805 valid responses. Out of these, 2,078 came from individuals and 727 from professionals or organisations.<sup>79</sup> One aim of the consultation was to identify an appropriate GHG emissions target for the EU by 2050. The options available to respondents were: (1) reducing emissions by 80% compared to 1990 levels; (2) reducing them within the range of 80–95%; or (3) achieving a balance between emissions and removals (net zero). Just over half of respondents (53%) chose this third option. The target of climate neutrality set out in the CPAC's final version aligns with this result. After the consultation, almost all contributions and two reports (a nineteen-page synopsis report<sup>80</sup> and a 120-page in-depth report<sup>81</sup>) were published online.

The CTP consultation took place from 31 March to 23 June 2020. The online questionnaire<sup>82</sup> contained sixty-one questions to which the EC received 4,031 valid responses. Of these, 3,302 came from individuals and 729 from organisations.<sup>83</sup> One question pertained to the appropriate GHG emissions reduction target for 2030, for which 77% of respondents chose the most demanding of the three proposed options,<sup>84</sup> namely a reduction of at least 55% compared to 1990 levels. This target is enshrined in the final version of the CTP. After

<sup>73</sup> ECL Proposal, 5.

<sup>74</sup> EC, "Amended proposal for a regulation of the European Parliament and of the Council on establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law)" COM(2020) 563 final, 17 September 2020, 2–3.

<sup>75</sup> EC, "A Clean Planet for All: A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy" COM(2018) 773 final, 28 November 2018.

<sup>76</sup> EC, "Stepping up Europe's 2030 climate ambition: Investing in a climate-neutral future for the benefit of our people" COM(2020) 562 final, 17 September 2020.

<sup>77</sup> Pérez de las Heras, *supra*, note 70, 29; V van't Lam, L van der Maden and K Eeckhout, "The European Climate Law Explained" (*Stibbeblog*, 12 October 2021) <[www.stibbeblog.nl/all-blog-posts/environment-and-planning/the-european-climate-law-explained](http://www.stibbeblog.nl/all-blog-posts/environment-and-planning/the-european-climate-law-explained)> (last accessed 8 April 2022).

<sup>78</sup> EC, "Future Climate and Energy Policy – A Strategy for Long-Term EU Greenhouse Gas Emissions Reductions" <[ec.europa.eu/clima/system/files/2018-10/questionnaire\\_en\\_0.pdf](http://ec.europa.eu/clima/system/files/2018-10/questionnaire_en_0.pdf)> (last accessed 8 April 2022; hereinafter: CPAC Questionnaire).

<sup>79</sup> EC, "Report on the Results of the Public Consultation" (28 November 2018) <[ec.europa.eu/clima/system/files/2019-02/report\\_en.pdf](http://ec.europa.eu/clima/system/files/2019-02/report_en.pdf)> (last accessed 8 April 2022; hereinafter: CPAC In-Depth Report), 6.

<sup>80</sup> EC, "In-Depth Analysis in Support of the Commission Communication COM(2018) 773" (28 November 2018) <[ec.europa.eu/clima/system/files/2018-11/com\\_2018\\_733\\_analysis\\_in\\_support\\_en.pdf](http://ec.europa.eu/clima/system/files/2018-11/com_2018_733_analysis_in_support_en.pdf)> (last accessed 8 April 2022), Annex 7.1 (hereinafter: CPAC Synopsis Report).

<sup>81</sup> CPAC In-Depth Report.

<sup>82</sup> EC, "Public Consultation for the EU Climate Ambition for 2030 and for the Design of Certain Climate and Energy Policies of the European Green Deal" <[ec.europa.eu/eusurvey/runner/eu\\_climate\\_ambition\\_2030?surveylanguage=en%20](http://ec.europa.eu/eusurvey/runner/eu_climate_ambition_2030?surveylanguage=en%20)> (last accessed 8 April 2022; hereinafter: CTP Questionnaire).

<sup>83</sup> EC, "In-Depth Report on the Results of the 2030 Climate Target Plan Open Public Consultation" (7 October 2020) <[ec.europa.eu/clima/system/files/2020-12/2030\\_ctp\\_opc\\_report\\_en.pdf](http://ec.europa.eu/clima/system/files/2020-12/2030_ctp_opc_report_en.pdf)> (last accessed 8 April 2022; hereinafter: CTP In-Depth Report), 12.

<sup>84</sup> The two other options available to respondents were that the GHG emissions reduction target should (1) remain unchanged (ie amount to at least 40%; 9% of the answers) or (2) be increased to at least 50% (14% of the answers). See CTP In-Depth Report, 15.

the consultation, all contributions, a thirteen-page synopsis report<sup>85</sup> and a 273-page in-depth report<sup>86</sup> were published online.

#### IV. Assessing the EC's consultations through the lens of EU primary law

In this section, we evaluate the EC's consultations in light of three principles of EU primary law that (as shown in previous work<sup>87</sup>) govern the participation of civil society in EU law-making: *democracy*, *openness* and *transparency*. These principles are also reflected in the EC's BRGs, which highlight four general principles that should structure consultations: (1) effectiveness, (2) coherence and, importantly for our purposes, (3) participation and (4) openness and accountability (transparency being a component of openness).<sup>88</sup>

*Democracy* is an umbrella category that stands for citizen involvement in law-making processes.<sup>89</sup> Among its many dimensions, two are particularly relevant for our purposes: equality requires treating citizens equally and giving "equal attention" to them (Article 9 TEU); participation means that individuals and civil society organisations must be able to express their views in EU law-making processes (Article 11 TEU; *supra*, Section II.3). *Openness* demands that the EC proactively engages with civil society to strengthen democratic participation (see, eg, Articles 1, 10(3) and 11(2) TEU and Article 15(1) TFEU). *Transparency*, a component of openness, is more passive and is achieved via publicity measures and the right of access to documents, among other means (see, eg, Article 11(2) TEU and Article 15(2) and (3) TFEU).

Based on an analysis of ECL-related consultations through the prism of these principles, five main issues can be highlighted: the EC's discretion in the context of consultations (Section IV.1), the general (Section IV.2) and linguistic (Section IV.3) accessibility of consultations, the representativeness of submissions (Section IV.4) and the feedback provided by the EC (Section IV.5).

##### I. The EC's discretion in the context of consultations

The EC enjoys some leeway on when, how and even whether to consult.<sup>90</sup> The BRGs state that consultations are mandatory for initiatives with impact assessments, evaluations conducted alongside impact assessments, communications with the explicit purpose of launching a consultation process and green papers, while consultations are recommended for evaluations of broad public interest and fitness checks.<sup>91</sup> The EC has the option of *not holding consultations* in some cases, including "where there is a need for urgent action or where the feedback would bring little added value".<sup>92</sup> As already mentioned, in the case of the ECL, two consultations had already been carried out on related topics, which warrants the conclusion that no additional feedback was needed. While this flexibility allows for a more efficient use of resources, it also gives the EC the exclusive power to decide *ex ante* when feedback would not be appropriate or useful. This discretion is potentially

<sup>85</sup> EC, Commission Staff Working Document, "Stakeholder Consultation – Synopsis Report" SWD(2020) 178 final, 17 September 2019, <[eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0178&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0178&from=EN)> accessed 8 April 2022 (hereinafter: CTP Synopsis Report).

<sup>86</sup> CTP In-Depth Report.

<sup>87</sup> Ammann, *supra*, note 8, 252 ff. See also A Alemanno, "Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy" (2014) 39 *European Law Journal* 72.

<sup>88</sup> BRG 2021, 14; BRG 2017, 69.

<sup>89</sup> Ammann, *supra*, note 8, 252 f.

<sup>90</sup> Alemanno, "Levelling the EU Participatory Playing Field", *supra*, note 8, 123; Alemanno, *supra*, note 87, 79 f.

<sup>91</sup> BRG 2021, 16; by contrast, the BRG 2017 prescribed mandatory consultations in the case of fitness checks (see at 70 f.).

<sup>92</sup> BRG 2021, 16; BRG 2017, 71 (speaking of "no added value").

problematic from the perspective of democracy and openness, unless exceptions are interpreted narrowly.

Another aspect of the EC's discretion pertains to the *design of the questionnaires* used in the consultations (which is also relevant from the perspective of accessibility; *infra*, Section 2). A first issue is *length*: the questionnaires we examined contained sixty-one and seventy-four questions, respectively. While such large numbers of questions generate more precise and nuanced results, the obvious downside is that potential respondents may be discouraged from participating. Lengthy questionnaires also stand in a tension with the BRGs' minimum standard of clarity, which requires that "all consultations . . . be clear and concise".<sup>93</sup> Another difficulty is that respondents may not have input on every single issue. While the questionnaires anticipate this by stating that there is no need to answer every one of their questions,<sup>94</sup> the issue of length is not entirely solved, as going through all of the questions remains time-consuming.

A second design issue pertains to how *questions* are phrased. Closed questions – on which both questionnaires mostly relied – are a double-edged sword. On the one hand, choosing among predefined answers makes it easier to express one's opinion; moreover, providing a synthesis of answers to closed questions involves less discretion on the part of the EC. On the other hand, closed questions make it harder for respondents to convey their point of view with precision and limit the possibility of formulating proposals. Open questions or additional comment boxes give more options to respondents; however, in the two consultations we studied, such boxes were nearly always limited to 200 or 1,000 characters. In the CTP consultation, no less than sixty-six respondents complained about the way in which the questions were phrased, stating that they steered participants in specific directions.<sup>95</sup> Besides open questions and spaces for comments, the EC gives respondents the option of submitting position papers if the questionnaire does not sufficiently allow them to voice their opinion.<sup>96</sup> Yet, given the length of the questionnaires, many participants probably will not take advantage of this additional option.

To summarise, the discretion enjoyed by the EC has some advantages, such as the efficient use of resources. However, it can also significantly constrain participation (eg through how the questionnaires are designed). This may be problematic from the perspective of the participatory dimension of democracy and from the angle of openness, two principles that would be better achieved by using shorter questionnaires and less constricting wording.

## 2. The general accessibility of consultations

A second dimension that warrants further consideration pertains to the general accessibility of consultations (which is a precondition to effective participation). *Prima facie*, EC consultations are highly accessible: they all take place online via the "Have Your Say" web portal,<sup>97</sup> a single point of access that enables participation at different stages of the legislative process. The website makes it possible to browse current and past initiatives by keywords, topic, stage of the process, feedback period, type of act and document category.<sup>98</sup>

<sup>93</sup> BRG 2021, 15; BRG 2017, 69.

<sup>94</sup> CPAC Questionnaire, 2; CTP Questionnaire, 2.

<sup>95</sup> CTP Synopsis Report, 10.

<sup>96</sup> CPAC Questionnaire, 26; CTP Questionnaire, 3.

<sup>97</sup> EC, "Have Your Say" <[ec.europa.eu/info/law/better-regulation/have-your-say\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say_en)> (last accessed 8 April 2022).

<sup>98</sup> EC, "Initiatives" <[ec.europa.eu/info/law/better-regulation/have-your-say/initiatives\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives_en)> (last accessed 8 April 2022).

While online consultations may remove obstacles to participation in specific situations, several issues arise in relation to accessibility. First, online consultations are not as *inclusive* as they appear. In 2018, when the CPAC consultation took place, the share of households with internet access varied widely (eg 98% in the Netherlands, 78% in Lithuania, 76% in Greece and 72% in Bulgaria).<sup>99</sup> While consultations do not only target individuals, it seems problematic to exclude up to a quarter of the population of some Member States, and all the more so in relation to climate issues, which affect everybody. Online consultations may thus be problematic from the perspective of equality (even if the aforementioned percentages increase every year<sup>100</sup>), as they are not easily accessible by some sections of the population.

Second, an online call is arguably *not sufficient* to trigger participation. Active dissemination via various channels is necessary to ensure that potential respondents know about the consultation. Among the minimum standards listed in the BRGs, outreach requires “ensur[ing] adequate awareness-raising and publicity” and using appropriate communication tools.<sup>101</sup> In relation to the ECL, several public events<sup>102</sup> were organised in parallel to the decision-making process, which enabled the EC to draw attention to the latter and to gather helpful information. Yet, given the limited representativeness of responses to both consultations (see *infra*, Section IV.4), the EC could probably have engaged with its target audience more effectively, in line with the principle of openness.

Third, accessibility also hinges on the *duration* of the consultation period. One of the five minimum standards set out in the BRGs requires ensuring “sufficient time for participation” (ie “as a rule”, a period of twelve weeks).<sup>103</sup> This is the time that participants were given in the two consultations under scrutiny. A consultation period of twelve weeks avoids significantly slowing down the law-making process, which is especially important in environmental and climate matters (*supra*, Section II.4). Meanwhile, short deadlines have a disparate impact on participants with limited resources, such as non-organised individuals or small organisations.<sup>104</sup> While a consultation period of slightly less than three months seems reasonable, it remains on the shorter side. In Switzerland, for instance, “[t]he duration of the consultation period is *at least three months*” (emphasis added), though exceptions are possible in the case of urgency.<sup>105</sup>

Fourth, regarding the accessibility of *consultation results*, nearly all submissions pertaining to the CPAC and CTP were published online in their original language, together with two kinds of reports (a synopsis and an in-depth report; *supra*, Section III). This is in line with the BRGs, which list the “publication of contributions and results” among the five minimum standards applicable to consultations.<sup>106</sup> This publication practice appears to satisfy the requirements of transparency and openness, but it creates issues in terms of linguistic accessibility (*infra*, Section IV.3).

To conclude, while the general accessibility of consultations seems satisfactory from the perspective of transparency, further improvements are necessary from the perspective of

<sup>99</sup> Eurostat, “Households with access to the internet at home” <[ec.europa.eu/eurostat/databrowser/view/ISOC\\_R\\_IACC\\_H\\_custom\\_2239549/default/table?lang=en](https://ec.europa.eu/eurostat/databrowser/view/ISOC_R_IACC_H_custom_2239549/default/table?lang=en)> (last accessed 8 April 2022).

<sup>100</sup> In 2021, the share of households with internet access amounted to 99% in the Netherlands, 87% in Lithuania, 85% in Greece and 84% in Bulgaria (see *ibid*).

<sup>101</sup> BRG 2021, 15; BRG 2017, 69–70 (referring to “publication” instead of “outreach”).

<sup>102</sup> A stakeholder event took place in July 2018 in relation to the CPAC. Another one, not directly linked with a consultation but meant to discuss the implementation of the EGD and the ECL, was organised by the EC in January 2020. Stakeholder events for the CPT were cancelled due to the pandemic.

<sup>103</sup> BRG 2021, 15; BRG 2017, 67, 70.

<sup>104</sup> On this aspect, see K Kappler, “Shrinking Space Deutschland? Die Zivilgesellschaft als Akteurin beim Zugang zu Recht” in B Huggins et al (eds), *Zugang zu Recht* (Baden-Baden, Nomos 2021).

<sup>105</sup> Art 7(3) and (4) of the Federal Act on the Consultation Procedure (SR 172.061).

<sup>106</sup> BRG 2021, 15 (see also *ibid*, 21 f.); BRG 2017, 70 (“Acknowledgement of feedback”).

democracy and openness. Issues connected to unequal access need to be addressed, and communication around consultations needs to be more proactive to raise awareness.

### 3. The linguistic accessibility of consultations

One dimension of accessibility concerns linguistic aspects. This issue arises at two stages of the consultation process: when the questionnaire is published and at the post-consultation stage.

Regarding the *questionnaires*, the one pertaining to the CPAC was published in all official EU languages, and participants could respond in any of them.<sup>107</sup> In the framework of the CTP consultation, the EC stated that all linguistic versions would be made available online.<sup>108</sup> This promise was eventually fulfilled, but only at least two weeks after the launch of the consultation (and probably even later).<sup>109</sup> Even if responses could be submitted in any EU language, an English-only questionnaire represents a major (if temporary) linguistic obstacle to participation and is problematic from the perspective of democracy (including equality) and transparency. Turning to the *feedback* provided post-consultation, the CPAC synopsis report was published in English, while the CTP synopsis report was made available in all official EU languages. Both in-depth reports, which were compiled by a private contractor, were published in English only.

To be meaningful, consultations must enable participants to understand the issue at hand, to submit feedback and to understand how their submissions were processed (on the feedback stage, see *infra*, Section IV.5). Consultation documents exclusively available in English are problematic because they prevent effective participation for many potential respondents. Of course, translating a document into twenty-three languages is resource-intensive, and the EC needs to carefully choose which documents to prioritise for translation. This order of priority should depend, among other considerations, on the primary users of the documentation: translating in-depth reports that are probably used primarily by a specialised audience or as internal working documents is arguably less pressing than translating a consultation questionnaire. At the very least, the synopsis reports and especially the questionnaires should be made available in all EU languages. Linguistic inaccessibility raises issues from the perspective of the principle of democracy due to the variable English proficiency levels of potential respondents and the obstacles to participation this creates. It also stands in a tension with the principles of transparency and openness, which are only guaranteed for some participants.

### 4. The representativeness of consultations

A fourth issue pertains to the *representativeness* of consultations, which is linked to the EU primary law principles of democracy and openness: judging from the responses received by the EC, was equal participation achieved in these two cases?

Several positive features can be highlighted in terms of representativeness. First, there were *no explicit barriers* to participation in the sense that the consultations were not restricted to specific categories of respondents. This is particularly appropriate in the

<sup>107</sup> EC, “Strategy for Long-Term EU Greenhouse Gas Emissions Reductions” <[ec.europa.eu/clima/news-your-voice/consultations/strategy-long-term-eu-greenhouse-gas-emissions-reductions\\_en](https://ec.europa.eu/clima/news-your-voice/consultations/strategy-long-term-eu-greenhouse-gas-emissions-reductions_en)> (last accessed 8 April 2022).

<sup>108</sup> EC, “2030 Climate Target Plan” <[ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12265-2030-Climate-Target-Plan/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12265-2030-Climate-Target-Plan/public-consultation_en)> (last accessed 8 April 2022).

<sup>109</sup> On 15 April 2020, a French-speaking respondent complained that the CTP questionnaire was only available in English: see *ibid.*, Reference 512875.00 F.



field of climate policy, given the large circle of affected individuals and organisations (supra, Section II.4). Moreover, one of the BRGs' minimum standards requires adopting a "consultation strategy [that] targets all interested parties".<sup>110</sup> Second, both consultations elicited a *relatively high number of responses* (2,805 for the CPAC and 4,031 for the CTP). To compare this with other consultations on EC communications conducted between 2018 and 2020, the consultation on the European Climate Pact generated a similar level of participation (3,510 submissions),<sup>111</sup> while other consultations triggered significantly fewer responses (683 for the Sustainable and Smart Mobility Strategy,<sup>112</sup> 326 for the European Democracy Action Plan<sup>113</sup> and 462 for the new EU strategy on safe and affordable medicines<sup>114</sup>). Third, approximately three-quarters of respondents were *individuals*<sup>115</sup> and not businesses or environmental NGOs, for instance. This could be because many individuals in the EU are concerned about climate change<sup>116</sup> and because the questions were relatively easy to grasp for laypersons.<sup>117</sup> In any case, the self-selection bias<sup>118</sup> that is often observed in consultations and that leads to an overrepresentation of the economic sector was not noticeable in these two cases. In this regard, the EU law principles of democracy and openness seem to have been achieved (though this does not mean that some interest groups did not use alternative, less visible and more exclusive channels to make their voices heard, which may raise issues in terms of transparency and equality).

Nevertheless, several difficulties can be noted. First, democracy and transparency issues may arise when respondents participate *anonymously*, a possibility explicitly provided for in the BRGs.<sup>119</sup> Anonymous submissions make it more difficult to determine whether equal participation is guaranteed; moreover, opting for anonymity enables interest groups to conceal their identity when making self-interested proposals (though it does not protect them from requests for access to documents, as both questionnaires emphasise). Interestingly, the option of anonymity was mainly used by (self-declared) individuals.

<sup>110</sup> BRG 2021, 15 (on mapping stakeholders, see *ibid*, 19); BRG 2017, 69 (referring to "relevant parties" instead of "interested parties").

<sup>111</sup> EC, "European Climate Pact" <[ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12219-European-Climate-Pact/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12219-European-Climate-Pact/public-consultation_en)> (last accessed 8 April 2022).

<sup>112</sup> EC, "Sustainable and Smart Mobility Strategy" <[ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12438-Sustainable-and-Smart-Mobility-Strategy/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12438-Sustainable-and-Smart-Mobility-Strategy/public-consultation_en)> (last accessed 8 April 2022).

<sup>113</sup> EC, "Protecting European Democracy from Interference and Manipulation – European Democracy Action Plan" <[ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12506-Protecting-European-democracy-from-interference-and-manipulation-European-Democracy-Action-Plan/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12506-Protecting-European-democracy-from-interference-and-manipulation-European-Democracy-Action-Plan/public-consultation_en)> (last accessed 8 April 2022).

<sup>114</sup> EC, "Pharmaceuticals – Safe and Affordable Medicines (New EU Strategy)" <[ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12421-Pharmaceuticals-safe-and-affordable-medicines-new-EU-strategy-/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12421-Pharmaceuticals-safe-and-affordable-medicines-new-EU-strategy-/public-consultation_en)> (last accessed 8 April 2022).

<sup>115</sup> CPAC Synopsis Report, 293; CTP Synopsis Report, 2.

<sup>116</sup> A 2021 Eurobarometer survey found that "93% of citizens consider climate change to be a serious problem with 78% considering it to be very serious". See EC, "Eurobarometer Survey: Europeans Consider Climate Change to Be the Most Serious Problem Facing the World" <[ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_3156](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3156)> (last accessed 8 April 2022).

<sup>117</sup> The CTP Questionnaire consisted of two parts: the first one aimed to collect general feedback on overall climate goals and on possible measures in different sectors. The second part was aimed at experts and pertained to the design of specific policies. This is in accordance with the BRGs' minimum standard of clarity, which requires that "questionnaires that are very technical in nature include a set of more general questions for non-specialists" (BRG 2021, 15). By contrast, the BRG 2017 merely asks that documents "include all necessary information to facilitate response" (at 69).

<sup>118</sup> Christopoulou, supra, note 55.

<sup>119</sup> BRG 2021, 21; BRG 2017, 83.

A second difficulty is *astroturfing*,<sup>120</sup> which takes the form of organised campaigns and multiple identical submissions.<sup>121</sup> Astroturfing may jeopardise representativeness by conveying a false impression of genuine civil society engagement while participation is actually engineered. Some small campaigns occurred in relation to the CPAC consultation, whereas the CTP consultation led to a campaign that made up 8% of responses.<sup>122</sup> From the perspective of democracy and transparency, it is crucial that the EC highlights the existence and relative weight of such campaigns (as it did in its reports on the two consultations<sup>123</sup>) to dispel misleading impressions of spontaneous civil society involvement. Another issue is *geographical representativeness*. While for both consultations submissions originated from all but one Member State,<sup>124</sup> the largest share of responses (35% in the CPAC consultation and 53% in the CTP consultation) came from Germany. This overrepresentation is problematic from the perspective of democracy and openness. Further research would be needed to identify the reasons for this imbalance and the ways in which it could be remedied, but the example shows that participation in other countries – especially those most vulnerable to climate change – needs to be promoted more.

To conclude, while representativeness is satisfactory in some respects (such as the consultations' open framing and the participation of individuals), other dimensions of representativeness (eg geographical representativeness) require improvement. Of course, as the EC highlights, consultations are “in most cases not statistically representative of the target population”; statistically representative data need to be collected by other means, such as Eurobarometer surveys.<sup>125</sup> Nevertheless, this does not entail that the EC should not aim to achieve at least some level of representativeness, which is linked to accessibility (supra, Sections IV.2 and IV.3) and, more generally, to the EU primary law principles of democracy and openness.

## 5. The feedback provided by the EC

The feedback stage happens after the end of the consultation period, once the contributions have been processed. The BRGs provide clear guidance on the provision of feedback (the third and final phase of the consultation) and on the content of the synopsis report.<sup>126</sup>

The *in-depth reports* are a first step towards showing that the EC acknowledges the submissions and does not only conduct consultations *pro forma*. They contain statistics on the categories of respondents and present the answers to the various questions in an easily readable manner. In this regard, the principle of transparency – which requires more than the mere availability of information – seems fulfilled (on linguistic accessibility, however, see supra, Section IV.3). On the other hand, the in-depth reports are very lengthy, which defeats transparency. The *synopsis reports* offer more concise summaries of the submissions. They explain the methodology used to assess the contributions, provide an overview of respondents and contain a selection of answers to the main questions. Their length (approximately ten pages) makes them accessible and easy to read; yet, these reports are too short to adequately reflect the results of the consultations – and, therefore, to satisfy transparency requirements – on their own (ie without the in-depth reports).

<sup>120</sup> On this phenomenon, see M Durkee, “Astroturf Activism” (2017) 69 *Stanford Law Review* 201.

<sup>121</sup> On the EC's approach to campaigns, see EC, Better Regulation Toolbox, November 2021 (hereinafter: BRG Toolbox 2021), 472 ff.; EC, Better Regulation Toolbox, July 2017 (hereinafter: BRG Toolbox 2017), 417 ff.

<sup>122</sup> CPAC Synopsis Report, 292; CTP Synopsis Report, 4.

<sup>123</sup> CPAC In-Depth Report, 5; CTP In-Depth Report, 24 f.

<sup>124</sup> CPAC consultation: no contribution from Cyprus; CTP consultation: no contribution from Malta.

<sup>125</sup> BRG 2021, 22; BRG 2017, 84.

<sup>126</sup> BRG 2021, 22; BRG 2017, 86. See also BRG Toolbox 2021, 484 f.; BRG Toolbox 2017, 446 f.

The major weakness of the feedback provided by the EC is its *lack of responsiveness* to the submissions. The EC does not explain whether and how this input influenced the law-making process, which goes against the BRGs' recommendation "[to make known to respondents] how, and to what extent, their input has been taken into account and to understand why certain suggestions have not been taken up".<sup>127</sup> This lack of responsiveness is problematic from the perspective of the participatory prong of democracy and with regard to openness and transparency.

Overall, consultation results are easily readable, though issues remain in terms of linguistic accessibility (supra, Section IV.4) and length. Moreover, to achieve meaningful participation, openness and transparency, the EC should explain the weight given to these submissions; otherwise, participants' responses can be easily ignored, which defeats the purpose of consultation.

## V. Overall assessment and conclusion

How are we to evaluate the consultations conducted by the EC in connection with the ECL? Based on the five main issues we have highlighted (supra, Section IV), were the applicable principles of EU primary law – democracy, openness and transparency – sufficiently taken into account in the context of these two consultations?

Regarding *democracy*, when looking at its participatory dimension, positive aspects include the adequate duration of the consultations and the grassroots participation triggered by the consultations; improvements remain necessary as regards the length and biased formulation of the questionnaires. Regarding the equality dimension of democracy, it is crucial to translate the most relevant documentation addressed to civil society in all of the EU's official languages. Moreover, online consultations have their advantages, but they become problematic when they *de facto* exclude significant subsections of the population in some Member States.

In terms of *openness*, the moment chosen to consult civil society seems appropriate. Other positive features include the fact that participation was open to all and that respondents came from different sectors and Member States. However, participants from some Member States were overrepresented. Another weakness is the absence of detailed feedback from the EC highlighting how the responses influenced the law-making process.

*Transparency* is the EU primary law principle that was best implemented in the consultations we focused on, as a significant amount of information was made available online. Nevertheless, improvements remain necessary (eg by providing information on how submissions were taken into consideration, as well as in terms of linguistic accessibility and length). This matches the observation that the EU institutions tend to prioritise transparency in their approach to civil society participation while neglecting other important requirements of EU primary law.<sup>128</sup>

To ensure that participatory instruments such as consultations are even more in line with the primary law principles of transparency and especially of democracy and openness, and in order to strengthen the democratic legitimacy of EU law-making processes not only through commitments on paper but also in practice, the EC will need to conduct additional efforts in the future, including and especially when consulting civil society on environmental and climate issues. In this context, the early and effective consultation of civil society is particularly important and makes it possible to elaborate legislation that is both evidence-based and democratically legitimate.

<sup>127</sup> BRG 2021, 22; BRG 2017, 86.

<sup>128</sup> Ammann, supra, note 8.

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