

## “Participation in rulemaking procedures”

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[Outline for discussion]

### A. The status quo: legal vs non-legal forms of participation and the remaining malfunctions of consultation procedures

#### I. Legal vs non-legal

- Participation is a central feature of EU governance.
- Law has been left largely outside the political and institutional developments that have concretised participation as a principle of EU governance and now, since Lisbon, as one of the pillars of EU democracy.
- Sector specific legislation: very broad, open provisions on participation
- Outcome: disparate results. Sophisticated participation procedures but also insufficient account of participation, depending on policy areas.

#### II. Remaining malfunctions of consultation procedures

- Lack of clarity in the selection of participants;
- Inadequate time frames for participation;
- Lack or limited feedback to participants.

### B. Consequences: deficits of rule of law, democracy and effectiveness of consultation procedures

The drawbacks mentioned hinder:

- The ability of participation to ensure *procedural protection*.
- The potential *democratic quality of participation practices*.
- The very *effectiveness of consultation procedures*, as well as the advantages that could result thereof to the political process.

A statutory protection of participation rights: the alternative?

## **C. The way forward: hardening participation**

### **I. Three preliminary reasons**

- a) The Commission's Communication of 2002, despite having led to improvements in terms of transparency and inclusiveness of consultation, has not been consistently applied. Importantly, it excluded from its scope rule-making procedures "outside major policy initiatives".
- b) The Court has not been willing to go ahead with recognising participation rights in rulemaking procedures without a sign from the EU legislator.
- c) The existing sector legislation displays very different degrees of protection of participation that are not always justified by the sector differences.

### **II. Reasons of principle**

Both the rule of law and the principle of participatory democracy require rethinking the role of law in participation in rulemaking procedures.

Some degree of limitation of the discretion of the decision-maker as to who, when, and to how consult is needed in order to:

- Provide procedural guarantees;
- Ensure that citizens have a voice in EU decision-making procedures.

### **III. Problems of practice**

Many contest the desirability of hardening participation. Problems:

- Ossification  
Yet, tests of review of the EU Courts on giving of reasons avoid excessive requirements of justification.
- Empowering the powerful  
Yet, legal forms of participation could potentially minimize the monopoly of established groups.

Whatever the outcome of the discussion:

- Participation is, since Lisbon, one of the foundations of democracy in the EU. It ought to fulfil democratic values such as equality and transparency.
- Ten years of practice of a non-legal approach to participation in rulemaking procedures – tenaciously defended by the Commission – show the respective limits.

#### **IV. A proposal: preliminary observations**

Framework rules that would accommodate sector specificities.

Issues to be addressed:

##### *What*

Also informal rulemaking that establishes obligations applicable to a group of individuals or entities (e.g. guidance documents)?

##### *When*

At a formative phase of the rule.

Except when a reason of public interest would justify otherwise, subject to justification.

##### *Who*

Public participation (open participation).

Interest participation (restricted participation) – Problem: criteria of representativity.

##### *How*

As defined in sector legislation (possible need to revise sector legislation to take general rules into account).

Minimum requirement: concise statement of policy and legal intent that reveals how different public interests were taken into account. Safeguards? (e.g. no need for individual replies).