

Legal scholarship and Art 11 para 1 - 3 TEU

On the origins

In discussing the origins of Art 11 TEU, the close relationship to (and mostly identical wording of) Art I-47 of the Constitution Treaty is widely noted.¹ This development was also construed as elevating preexisting participatory rights to “constitutional” rank² as well as providing a legal basis for (or codification of) the preexisting close interaction of the Commission and members of the EP with lobbying groups.³ It can however also be seen before the backdrop of Community courts having previously given little assistance in the way of developing participatory democracy⁴ as well the Commission’s initial reluctance vis-à-vis legally enforceable consultation rights.⁵

The role for European democracy

Long before the genesis of Art 11 TEU, the roles of civil society in general and participatory models as well as discursive democracy in particular were already discussed in the 1999 Opinion of the Economic and Social Committee on "The role and contribution of civil society organisations in the building of Europe".⁶ Despite the many changes in EU primary law, today’s scholarship in many ways still echoes key points raised in this document: Art 11 para 1 to 3 TEU are for the most part seen as supplementing the legitimacy of the increased powers of the Union⁷ or even as spelling out the broad concept of democracy at the EU level with participatory democracy placed besides the principles of democratic equality and representative democracy.⁸ As such, these provisions already reflect the extensive debate on the democratic deficit in the EU prior to the Lisbon treaty.⁹

¹ *Huber* in Streinz (Ed) EUV/AEUV², Art 11 EUV (2012) para 1; *Berramdane / Rossetto*, Droit de l’Union européenne² (2013) 168; *Blumann/ Dubouis*, Droit institutionnel de l’Union Européenne⁵ (2013) 219; *Kaufmann-Bühler* in Lenz/Borchardt, EU Verträge Kommentar⁶, Art 11 EUV (2012), para 1; *Macho* in Blanke/Mangiameli (Eds), The Treaty on European Union, Art 11 EUV (2013) para 1; *Craig*, The Lisbon Treaty (2010) 66f

² *Kaufmann-Bühler* in Lenz/Borchardt, EU Verträge, Art 11 EUV, para 1

³ *ibid*, para 7, *Huber* in Streinz, EUV/AEUV, Art 11 EUV, para 17, see also *Macho* in Blanke/Mangiameli, The Treaty on European Union, Art 11 EUV, para 16, *Fülöp* in *Mayer/Stöger* (Eds) EUV/AEUV, Art 11 EUV (2014) para 3,8. *Nettesheim* in Grabitz/Hilf/Nettesheim (Eds), Das Recht der Europäischen Union, Art 11 EUV (54. Ergänzungslieferung 2014) para 5; *Marianne Dony*, Droit de l’Union européenne⁵ (2014) 51

⁴ *Craig*, The Lisbon Treaty, 67f

⁵ *Craig*, The Lisbon Treaty, 68f

⁶ Official Journal C 329, 17/11/1999, 30

⁷ *Kaufmann-Bühler* in Lenz/Borchardt, EU Verträge, Art 11 EUV, para 1, *Huber* in Streinz, EUV/AEUV, Art 11 EUV, para 3

⁸ *Huber* in Streinz (Ed) EUV/AEUV², Art 11 EUV (2012) para 1 see also *Ruffert* in Callies/Ruffert (Eds), EUV/AEUV,⁴ Art 11 AEUV (2011) para 3. For a summary of the discussion see also *Nettesheim* in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, Art 11 EUV, para 2

⁹ *Nettesheim*, Demokratisierung der Europäischen Union und Europäisierung der Demokratietheorie, in Bauer/ Huber/ Sommermann (Eds), Demokratie in Europa (2005) 143 already referred to the discussion as hard to chart due to the sheer number of contribution while going on to provide a list of some of the more important ones in his footnote 1 (143f)

Generally speaking, elections to both national parliaments and the European parliament are still regarded as the most important feature of the principle of democracy.¹⁰ The participation enshrined in Art 11 paragraphs 1 to 3 TEU (in the following referred to simply as para 1 to 3) is not generally considered as a possible replacement of the legitimacy provided by elections¹¹ (a view seen as supported by the German Federal Constitutional Court)¹² but rather as playing a supplementing¹³ or even a complementary¹⁴ role. When mentioning the German Federal Constitutional Court it should be noted that there were concerns within German legal scholarship that its concern regarding democratic legitimacy didn't necessarily reflect European legal scholarship as a whole rather more of a *querelle allemande*.¹⁵ The publications cited in this summary alone show that while German scholarship may have voiced more concerns than others, they were definitely not ignored by other scholarly traditions. Paul Craig's statement that Art 11 TEU (including para 4) "should not be ignored" in the overall evaluation of democracy within the EU¹⁶ make it very clear that the provisions discussed are hardly considered a universal cure for these concerns.

Still, a possible compensatory role for the lack of representative democracy in the context of the theoretical challenge of establishing a post-national democracy has been considered.¹⁷ Moreover, Art 11 para 1 to 3 TEU respond to the limits of electoral accountability in the current constitutional framework of the EU as compared to national systems, especially with the Commission, Council and European Council in mind – even after empowering the European Parliament in the Lisbon Treaty.¹⁸ In any case, Art 11 TEU is seen as part of the answer to concerns that an erosion of sovereignty at the state level may correspond to an erosion of democracy itself.¹⁹

More generally, such participatory elements have been regarded as a democratic necessity as elections alone would not suffice.²⁰ Beyond this, it can also be seen as a further step towards an understanding of politics as a deliberative process with broad participation of the various interest present in today's society.²¹ As such, it is considered as a key element to deliberative understandings of democracy,²²

¹⁰ Huber in Streinz, EUV/AEUV, Art 11 EUV, para 2. This is made especially clear in Priollaud/Siritzky, *Le traité de Lisbonne* (2008) 57, wo davon die Rede ist, dass "le fonctionnement de l'Union" auf der repräsentativen Demokratie "fondé" sei.

¹¹ Kaufmann-Bühler in Lenz/Borchardt, EU Verträge, Art 11 EUV, para 2, Huber in Streinz (Ed) EUV/AEUV², Art 11 EUV (2012) para 3

¹² Kaufmann-Bühler in Lenz/Borchardt, EU Verträge, Art 11 EUV, para 2. On the critical assessment by the GFCC of democracy at the EU level in general and its relation to Art 11 TEU consider also Macho in Blanke/Mangiameli, *The Treaty on European Union*, Art 11 EUV, para 3

¹³ Nettesheim in Grabitz/Hilf/Nettesheim (Eds), *Recht der Europäischen Union*, Art 11 EUV, para 5

¹⁴ Macho in Blanke/Mangiameli, *The Treaty on European Union*, Art 11 EUV, para 10, 21

¹⁵ Alexis von Komorowski, *Demokratieprinzip und Europäische Union* (2010) 166

¹⁶ Craig, *The Lisbon Treaty*, 70

¹⁷ Ruffert in Callies/Ruffert (Eds), EUV/AEUV,⁴ Art 11 AEUV (2011) para 2

¹⁸ On this problem Craig, *The Lisbon Treaty*, 72f

¹⁹ See Macho in Blanke/Mangiameli, *The Treaty on European Union*, Art 11 EUV, para 2

²⁰ Oberdorff, *Le principe démocratique dans l'Union européenne*, in Brosset et al (Eds), *Le traité de Lisbonne* (2009) 181 (192f)

²¹ See Macho in Blanke/Mangiameli, *The Treaty on European Union*, Art 11 EUV, para 26. Nettesheim in Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, Art 11 EUV, para 2

²² See on this aspect Ruffert in Callies/Ruffert (Eds), EUV/AEUV,⁴ Art 11 AEUV (2011) para 5

though the special regard for interest groups can also raise suspicions of corporatism.²³ Two thirds of all registered interest groups represent the interests of employers or producers²⁴ which seems to back concerns that civil society organizations may not be truly representative with more powerful and well-organized organizations being privileged in the consultation process.²⁵

The principle of participatory democracy is defined as aiming for the inclusion of concerned and interested persons, representative organizations and other contributing parties to civil society.²⁶ The provisions can be seen as illustrating the will to bring the Union closer to its citizens by employing new technologies, especially the internet.²⁷ The potential for “e-démocratie” for the distribution of information, the development of discussions and an eventual participation in the decision-making process has also been noted in this context.²⁸ Seen as a tool of making the Union exit a perceived isolation (“vase clos”),²⁹ the provisions respond to increased societal and political importance of various elements of civil society³⁰ with the principle of democratic equality to be upheld in this area as well.³¹ As part of the tradition of a “Citizen’s Europe” and as aimed at helping individuals experience European integration in such a way that they will make it their concern,³² the basic considerations on which Art 11 TEU rests are traced more to political science than to legal scholarship.³³ The influence of the 2001 White Paper on European Governance is often highlighted in this context.³⁴ The “aspiration contained in” para 1 to create a communications pathway is seen as especially closely connected to it as well as to the EU aim of political integration.³⁵

Legal obligations, no subjective rights?

A key challenge to these instruments is the possible perception as implementing elements of participatory democracy is for the most part considered a *legal requirement* for EU institutions,³⁶ with a special focus on the Commission.³⁷ This is however not a unanimous conclusion³⁸ and the presumed

²³ Ruffert in Callies/Ruffert (Eds), EUV/AEUV,⁴ Art 11 AEUV (2011) para 12

²⁴ Nettesheim in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, Art 11 EUV, para 13

²⁵ Abdelkhaleq Berramdane/Jean Rossetto, Droit de l’Union européenne² (2013) 169

²⁶ Huber in Streinz, EUV/AEUV, Art 11 EUV, para 2

²⁷ Priollaund/Siritzky, Le traité de Lisbonne (2008) 57

²⁸ Oberdorff, Le principe démocratique dans l’Union européenne, in Brosset et al, Le traité de Lisbonne, 181 (194f)

²⁹ Claude Blumann/Louis Dubouis, Droit institutionnel de l’Union Européenne⁵ (2013) 219

³⁰ Kaufmann-Bühler in Lenz/Borchardt, EU Verträge, Art 11 EUV, para 2

³¹ Ruffert in Callies/Ruffert (Eds), EUV/AEUV,⁴ Art 11 AEUV (2011) para 13

³² Huber in Streinz, EUV/AEUV, Art 11 EUV, para 2

³³ Kaufmann-Bühler in Lenz/Borchardt, EU Verträge, Art 11 EUV, para 3 see also Ruffert in Callies/Ruffert (Eds), EUV/AEUV,⁴ Art 11 AEUV (2011) para 2, more specifically on Art 11 para 2 TEU *ibid*, para 9

³⁴ Huber in Streinz, EUV/AEUV, Art 11 EUV, para 6, Macho in Blanke/Mangiameli, The Treaty on European Union, Art 11 EUV, para 10, Ruffert in Callies/Ruffert (Eds), EUV/AEUV,⁴ Art 11 AEUV (2011) para 2f, 8, 11ff. Nettesheim in Grabitz/Hilf/Nettesheim, Recht der Europäischen Union, Art 11 EUV, para 3, 7. See also Priollaund/Siritzky, Le traité de Lisbonne (2008) 57; Oberdorff, Le principe démocratique dans l’Union européenne, in Brosset et al, Le traité de Lisbonne, Le traité de Lisbonne, 181 (194)

³⁵ Macho in Blanke/Mangiameli, The Treaty on European Union, Art 11 EUV, para 11f

³⁶ Schwarze, RN1

³⁷ Kaufmann-Bühler in Lenz/Borchardt, EU Verträge, Art 11 EUV, para 5, on the special role of the Commission in the context of Art 11 para 2 TEU see also Huber in Streinz, EUV/AEUV, Art 11 EUV, para 25

³⁸ Rejecting a legal duty for the institutions stemming from para 1 though with a different conclusion for representative organisations in the context of para 2 Nettesheim in Grabitz/Hilf/Nettesheim, Recht der Europäischen Union, Art 11 EUV,

legal requirements can be quite narrowly construed.³⁹ In terms of a legal requirement to optimize democracy, we encounter a sharp distinction drawn between national and EU levels by German commentators: In explicit contrast to German constitutional law, this such a requirement is called into question with regards to the general principle of democracy at the EU level. The more specific provisions on participatory democracy are seen to call for a deepening and expansion of participatory opportunities for EU citizens in public affairs.⁴⁰ As for the extent of the “appropriate means” the institutions are legally required to set in motion, we encounter rather cautions scholarly assessments.⁴¹ However, *no* (subjective) *rights* are seen to have been directly bestowed upon the citizens by para 1-3⁴², but rather options and chances which the institutions, especially the Commission, are required to provide, including a comprehensive information policy and engagement of the public.⁴³ Such rights have been seen as depending on being concretized by secondary law.⁴⁴

In the specific context of para 1, the lack of such a right was also being logically derived from the perception that it does not prescribe that any specific steps be taken. This approach does however lead to a derivative right or EU citizens and representative organizations to non-discriminatory participation at the measures taken by institutions in implementing this provision.⁴⁵ However, Art 11 has also been construed as turning participatory elements into a constitutional principle of the EU.⁴⁶ More generally, a narrow interpretation of was seen as going against the *telos* of Article 11 in light of the aims stated in para 1 to 3 themselves.⁴⁷ Moreover, the overlap of para 1 to 3 has been named as a reason for a general presumption against any narrow interpretation of the terms employed to describe the addresses within civil society.⁴⁸

Further implications of each paragraph

Art 11 para 1 TEU

Turning to the individual paragraphs, para 1 is seen as being aimed at information and exchange, enabling citizens to bring their concerns to the attention of EU institutions.⁴⁹ As such, it is closely

para See also *Macho* in Blanke/Mangiameli, The Treaty on European Union, Art 11 EUV, para 12 on Art 11 para 1 TEU as well as more generally *ibid* para 24f

³⁹ For example, *Ruffert* in Callies/Ruffert (Eds), EUV/AEUV,⁴ Art 11 AEUV (2011) para 7 limits the legal requirements of EU institutions according to Art 11 para 1 TEU to the area of their concrete actions, being mostly relevant prior to lawmaking.

⁴⁰ *Huber* in Streinz, EUV/AEUV, Art 11 EUV, para 4

⁴¹ For the *Untermaßverbot* see *Huber* in Streinz, EUV/AEUV, Art 11 EUV, para 10

⁴² *Kaufmann-Bühler* in Lenz/Borchardt, EU Verträge, Art 11 EUV, para 6

⁴³ *ibid*

⁴⁴ *Fülöp* in Mayer/Stöger (Eds) EUV/AEUV, Art 11 EUV (2014) para 4, 8

⁴⁵ *Huber* in Streinz, EUV/AEUV, Art 11 EUV, 11f

⁴⁶ *Fülöp* in Mayer/Stöger (Eds) EUV/AEUV, Art 11 EUV (2014) para 3

⁴⁷ *Craig*, The Lisbon Treaty, 70

⁴⁸ *Fülöp* in Mayer/Stöger (Eds) EUV/AEUV, Art 11 EUV (2014) para 8

⁴⁹ *Kaufmann-Bühler* in Lenz/Borchardt, EU Verträge, Art 11 EUV, para 5

linked with the creation a European public space.⁵⁰ The legally prescribed task of supporting a certain kind of communication has raised concerns as to their exact delineation vis-à-vis fundamental rights.⁵¹

Art 11 para 2 TEU

Para 2 can be construed as another tool to achieve a European public space or even a school of democracy in the sense of Tocqueville.⁵² Its earlier incarnation in the constitution treaty had been hailed as an especially noteworthy expression of the democratic principles of openness and transparency, reinforced by para 3.⁵³ The reality is sometimes described less positively, with its frequent use as a legitimatory tool for previously made decisions being highlighted. On the other hand a real power to decide must remain with the institutions working for the common good so as to avoid a feudalizing effect.⁵⁴

It can be seen as establishing a duty on the part of the institutions to actively seek to enter into dialogue with the actors named therein.⁵⁵ Another aspect to be highlighted is the reading of para 2 as a dialogue not typically directed at individuals but rather at representative organizations and other organized (“überindividuell”) actors of civil society.⁵⁶ As for the question which organization is representative, it can be thought of as prescribing an open, transparent and regular dialogue groups in all areas of society which are “not entirely insignificant”.⁵⁷ Engaging these groups can have a multiplication effect which can address the difficulties of communicating with 500 million citizens albeit with the inherent risk of reducing the individual to a mere part of such a group.⁵⁸ On the other hand, such groups can be seen as a necessary precondition for effective exchange within the area of communication as well as the individual’s possibility to assert his interest or to demand for someone to be held responsible.⁵⁹

The choice of the wording used in para 2 (“representative associations and civil society”) has been considered noteworthy as the former ought to be part of the latter according to the prevailing understanding of the term civil society. The longstanding special role of interest and lobby groups may help to explain this.⁶⁰ The reference to representative organizations can be interpreted as one to organized pressure groups carrying out lobbying work.⁶¹ The role of lobbies has been criticized but

⁵⁰ For more detail see *Nettesheim* in Grabitz/Hilf/Nettesheim (Eds), *Das Recht der Europäischen Union*, Art 11 EUV, para 9

⁵¹ *Huber* in Streinz, *EUV/AEU*, Art 11 EUV, 7ff

⁵² For an extensive catalogue of normative expectations see *Nettesheim* in Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, Art 11 EUV, para 17

⁵³ *Weber*, *Europäischer Verfassungsvertrag und partizipative Demokratie*, in Jörn Ipsen/Bernhard Stürer (Eds), *Europa im Wandel*, (2008) 661 (668)

⁵⁴ *Nettesheim* in Grabitz/Hilf/Nettesheim, *Recht der Europäischen Union*, Art 11 EUV, para 22

⁵⁵ *Fülöp* in Mayer/Stöger (Eds) *EUV/AEU*, Art 11 EUV (2014) para 6

⁵⁶ *Huber* in Streinz, *EUV/AEU*, Art 11 EUV, para 14

⁵⁷ *ibid*, para 15

⁵⁸ *ibid*, para 15f

⁵⁹ *Nettesheim* in Grabitz/Hilf/Nettesheim, *Recht der Europäischen Union*, Art 11 EUV, para 18

⁶⁰ *Nettesheim* in Grabitz/Hilf/Nettesheim, *Recht der Europäischen Union*, Art 11 EUV, para 16 (referring to para 3, though clearly a typing error given to content and location of the commentary)

⁶¹ *Macho* in Blanke/Mangiameli, *The Treaty on European Union*, Art 11 EUV, para 16

also defended. Not only has it been seen as playing a key part in the development of European integration. The Commission itself made clear that it plays an important and legitimate role within the EU policy making process.⁶²

The requirements for the dialogue to be “open, transparent and regular” have been considered as overlapping,⁶³ and a “dialogue” itself as requiring a process not directed at reaching specific decisions but rather enabling an ongoing communication between the institutions and key elements of civil society presuming the institution’s willingness to listen to opposing arguments, to consider them and to incorporate them into the decision-making that follows. It is not regarded as a dialogue in the sense of para 2 if the engagement of civil society is considered primarily as a publicity tool and merely used to “explain” and promote decisions.⁶⁴ The openness on the other hand is described as being characterized by a confidence-driven communication on the side of the institutions in which they share relevant information.⁶⁵ Transparency on the other hand is seen as less of a constitutional principle on its own than an integral part of any concept of democracy on all levels both national and European⁶⁶ which also includes the process of selecting dialogue partners from civil society.⁶⁷ With regards to the regularity of the dialogue, its need for creating trust is stressed and a legal requirement for keeping the communication relationship steady and making it more so. This is seen to imply the need to provide the dialogue with a clear legal basis and to structure it.⁶⁸

Art 11 para 3 TEU

Para 3 may stand apart in two ways. Firstly, concerning its relationship with human rights it was suggested that the task of consulting concerned parties according to para 3 falls more in line with concepts of rule of law (or rather the not entirely corresponding German “Rechtsstaatlichkeit”) than with democracy.⁶⁹ In this context one commentary stresses that broad consultations give interested parties a voice, not a vote.⁷⁰ The inherent one-way nature of consultation does not keep this instrument from being considered as the strongest form of dialogue albeit limited to concerned parties in one commentary.⁷¹

Secondly, it remains questionable if the term dialogue even applies to it, though it has often been applied. It was e.g. seen as clarifying that civil society dialogue also encompasses a comprehensive consultation of concerned parties.⁷² All of the first three paragraphs of Art 11 have been considered as

⁶² *Nettesheim* in Grabitz/Hilf/Nettesheim, *Recht der Europäischen Union*, Art 11 EUV, para 20

⁶³ *Huber* in Streinz, *EUV/AEUV*, Art 11 EUV, para 19

⁶⁴ *ibid*, para 20

⁶⁵ *ibid*, para 21

⁶⁶ *ibid*, para 22

⁶⁷ *ibid*, para 23

⁶⁸ *ibid*, para 24

⁶⁹ *ibid*, para 7

⁷⁰ *Macho* in Blanke/Mangiameli, *The Treaty on European Union*, Art 11 EUV, para 25

⁷¹ *Kaufmann-Bühler* in Lenz/Borchardt, *EU Verträge*, Art 11 EUV, para 7

⁷² *Huber* in Streinz, *EUV/AEUV*, Art 11 EUV, para 27

a tool to establish dialogue between civil society and the institutions,⁷³ with a sharp delineation between the three made difficult by an overlap in content as well the addressed and obligated parties.⁷⁴ The consultation of addressees of specific measures taken by the EU has occasionally been regarded as a legal requirement for EU institutions stemming from due process itself and being separable from para 3.⁷⁵

The special role of the Commission in para 3 has been traced to its monopoly in initializing EU legislation.⁷⁶ This monopoly has always made it the key contact for interest and lobby groups,⁷⁷ though the Commission has been seen to react to the privileged access of some groups (as well as the desire not to delay decisions) a code of conduct outlining key elements of the consultation process.⁷⁸ The term “concerned parties” in para 3 is interpreted in a broad way to include all those interested irrespective of their reasons though any selection needs to be coherent following objective/reasonable (“sachlich”) criteria.⁷⁹ Coherence and transparency, albeit mentioned in para 3, are not the primary goal or subject of dialogue. Transparency is however seen as key insofar as without both it and an open information policy no reasonable dialogue can be conducted.⁸⁰

Art 11 TEU's relationship with Article 17 para 3 TFEU

Looking at institutionalized dialogue, Art 17 para 3 TFEU comes to mind. Not unlike the provisions of Art 11 para 1 to 3, this provision constitutionally enshrines a preexisting dialogue.⁸¹ The general focus of this provision has been seen as the dialog of religious and “philosophical and non-confessional” organizations with the EU and not the dialogue amongst themselves.⁸² With no organs of the EU named, they can all be presumed to be legally bound to carry out such dialogue (checken in Callies)⁸³ or at least not to permanently refuse dialogue.⁸⁴ On the other hand, another interpretation in light of Art 11 TEU reaches the conclusion that Art 17 TFEU doesn't address all organs of the Union - supposedly even less so than that provision, with the Commission and to a lesser extent the European Parliament and Council taking the center stage.⁸⁵

Similarities to Art 11 TEU are also readily apparent in many respects. Firstly, it also entered primary law with the Treaty of Lisbon with its wording taken from the Constitutional Treaty.⁸⁶ When it comes

⁷³ *Fülöp* in Mayer/Stöger (Eds) EUV/AEUV, Art 11 EUV (2014) para 1

⁷⁴ *ibid*, para 8

⁷⁵ *Huber* in Streinz, EUV/AEUV, Art 11 EUV, para 31

⁷⁶ *Ruffert* in Callies/Ruffert (Eds), EUV/AEUV,⁴ Art 11 AEUV (2011) para 8

⁷⁷ *Nettesheim* in Grabitz/Hilf/Nettesheim (Eds), Das Recht der Europäischen Union, Art 11 EUV (54. Ergänzungslieferung 2014) para 14

⁷⁸ *Berramdane/ Rossetto*, Droit de l'Union européenne² (2013) 169

⁷⁹ *Huber* in Streinz, EUV/AEUV, Art 11 EUV, para 28

⁸⁰ *Kaufmann-Bühler* in Lenz/Borchardt, EU Verträge, Art 11 EUV, para 8

⁸¹ *Budischowsky* in Mayer/Stöger (Eds) EUV/AEUV, Art 17 AEUV (2012) para 28f

⁸² *ibid*, para 30

⁸³ *ibid*, para 30

⁸⁴ *Waldhoff* in Callies/Ruffert (Eds), EUV/AEUV,⁴ Art 17 AEUV (2011) para 19.

⁸⁵ *Classen* in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, Art 17 AEUV (2014) para 41.

⁸⁶ *ibid*, para 1.

to legally enforceable rights for those groups seeking to enter into dialogue, they are largely considered as non-existent in general⁸⁷ or vis-à-vis an individual religious organization⁸⁸ despite a legal obligation of EU organs to enter into dialogue. The exact delineation with Art 11 para 2 TEU has also been identified as being problematic due to the groups covered in Art 17 TFEU being members of civil society and thereby covered by the further provision as well.⁸⁹ This however doesn't appear to be the understanding of these groups given the privileged status granted to them in Art 17 TFEU.⁹⁰ The latter has in fact been seen as a specially emphasized form of the very dialogue provided for by Art 11 para 1 and 2 TEU,⁹¹ which is aimed at including these organizations for their special role in the process or European integration.⁹² This special role has led to a narrow interpretation of the term “philosophical and non-confessional organisations” by excluding groups directed at particular interests (“partikular ausgerichtete Interessensverbände”) in light of the “other” civil society targeted in Art 11 TEU.⁹³ On the organisations according to Art 17 TFEU are seen as reading the world in its entirety with the aim of attributing purpose to it.⁹⁴ However, as far as their own particular interests are concerned, these organisations can be covered by Art 11 para 3 TEU.

Accepting the identity of religious communities is seen as influencing the content of the dialogue. According to this interpretation, attempts at changing their specific views cannot be the subject of such dialogue, which is seen as contrasting Art 11 TEU where influencing the positions of representative organizations (e.g. asking unions for moderation in their negotiations for higher salaries or asking employer organisations to secure jobs) is seen as falling within the scope of this dialogue.⁹⁵

Conclusion

While their exact place within the development of European democracy remain contentious, para 1 to 3 of Art 11 TEU clearly have a role to play in it according to the perspective of legal scholarship. For all the open questions as to their implementation, they are generally seen as legally binding the institutions. The need to, in the words of Paul Craig, “put some flesh on the bare bones of these provisions”⁹⁶ is easily apparent. With a little over half a decade having passed since the implementation of the Lisbon treaty, this survey aims to provide a clearer picture on both the actual structure and the perception on the flesh the institutions have added to these bones so far.

⁸⁷ *Budischowsky* in Mayer/Stöger, EUV/AEUV, Art 17 AEUV, para 32. More specifically on concrete talks and a the frequency of dialogue *Waldhoff* in Callies/Ruffert, EUV/AEUV, Art 17 AEUV, para 19

⁸⁸ Explicitly stated in Markus *Kotzur* in Geiger/Khan/Kotzur (Eds), EUV/AEUV⁵, Art 17 AEUV (2010) para 6

⁸⁹ *Budischowsky* in Mayer/Stöger, EUV/AEUV, Art 17 AEUV, para 34

⁹⁰ *ibid*, para 34

⁹¹ *Waldhoff* in Callies/Ruffert, EUV/AEUV, Art 17 AEUV, para 19

⁹² *Classen* in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, Art 17 AEUV (2014) para 5, 12

⁹³ *ibid*, para 24, 47

⁹⁴ *ibid*, para 47

⁹⁵ *ibid*, para 46

⁹⁶ *Craig*, The Lisbon Treaty, 77