



Civil dialogue and participatory democracy in the practice of the European Union institutions

STUDY



European Economic and Social Committee

Civil Dialogue and Participatory Democracy in the Practice of the European Union Institutions

This study aims to design a mapping of the existing structures of civil dialogue(s) and to analyse the situation in order to identify what exists, thereby underlining the patterns and recurring elements. It intends to fill the present gap in knowledge in the very EU institutions which lack a coherent and comprehensive view of what has so far been put in place.

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following a call for tenders launched by the European Economic and Social Committee. The information and views set out in this study are those of the author(s) and do not necessarily reflect the official opinion of the European Economic and Social Committee. The European Economic and Social Committee does not guarantee the accuracy of the data included in this study. Neither the European Economic and Social Committee nor any person acting on the European Economic and Social Committee's behalf may be held responsible for the use which may be made of the contents therein.

Abstract

The European Union is at its core a model of transnational governance based inter alia on democracy and the rule of law. There are two key findings of our survey: On one hand, that civil dialogue is based on the primary or constitutional law of this Union and addresses the specific challenges of transnational democracy. On the other hand, that implementation remains a challenge.

Our survey and mapping of its results, legal basis and other relevant data clearly show that the status quo can still stand considerable improvement, as was stated repeatedly by the EESC. Nonetheless, in the area of “vertical dialogue” we were able to ascertain significant silver linings: most notably the openness of DG Agri (ahead of other DGs) and its approach of careful be-legalization of the dialogue’s framework. Nonetheless, we find ourselves in agreement with the Ombudsman’s call for a rigid conflict of interest policy, reviewing and monitoring scheme.

Based on our findings, we present a roadmap towards a single open online tool in order to save money, gain broad compliance and ultimately address the ongoing challenge of implementing the requirements of Art 11 paragraph 1 and 2 TEU.

Summary

DG Agri in particular has demonstrated that civil dialogue can be a reality. Their openness was reflected by their reaction to this survey, for which we are thankful. Fully aware that every DG faces unique challenges, we still believe this DG can be seen as a role model to emulate. Based on our own findings in our survey, that cover experiences of CSO's and RA's throughout most of the DG's, we can gladly report, that we face a fairly positive calculus of those who are actively involved in the vertical civil dialogue under Article 11(2) TEU. This is our prime finding: Civil dialogue has a long way to go, but considerable progress has been made in key areas. We continue immediately with conclusion based recommendations on how to carry out this enrichment.

1. Our Concept - True Constitutionalism

According to the core criterion of our main task, mapping "what exists" (done quite literally in the Annex), we have made a commitment on the premise to proceed along certain lines, primarily the Union Treaties. Only then did we utilize other sources - secondary law and opinions, f. ex. such ones of the EESC, our own field-survey, qualified statements, literature and scholarship's expertise, and finally backstage-"rumour" and other findings - as relevant, but of significantly less importance than the normative prerogatives. We proceeded with the awareness a legal positivist approach can provide, with a strong sense for the special role of the Unions "holy shrines" and the Lisbon Treaty's spirit to constitutionalize Participatory Democracy in favour of *"increasing ... the legitimacy of the Union"*. This explains our parameters and centres of focus. Unfortunately, our contractual obligations did not allow us to await the EU Commission's official reaction to the EU Ombudsman's ambitious own-initiative suggestions for the Commission's further positioning concerning a reform of the civil dialogue. We have little doubt though, that this has the potential to truly leverage new and supposedly long-term foundations for dealing with the civil dialogue.

2. Our Chief Concern - A Gap between the Treaties' Orders and the Factual Implementation

We respect that there may be good reasons for a certain delay in installing an institution-wide covering vertical civil dialogue throughout almost all of the institutions (except for the EU Court(s), the European Council, the ECB ...), as is ordered under Article 11 (2) Union Treaty and under Article 15 (1) TFEU, because there is indeed wide leeway for best implementation, because the scholarly expertise is hardly homogenous, not to say contradictory, and because there are organisational obstacles, hindrances and hurdles. But we recommend not be complacent with the state as it is now - and we substantiate this vague proposal by very concrete and very far reaching recommendations. We believe

this to be the logical consequence of *bringing the European citizens closer to Europe* (as was the inaugural call of President *Juncker*) and of constitutional loyalty.

We cannot find any legitimate reason for ignoring the clear order articulated in Article 11(1) Union Treaty, that the *institutions shall, by appropriate means, give citizens (...) the opportunity to make publicly known and exchange their views ...* We did not accept the vindication that lots of general communication efforts were done as a surrogate implementation of this order, because 11(1) refers without any doubt to participatory democracy and this has its very own Lisbon concept that does not match with a concept of blunt information and communication. So we recommend to urgently close this gap, even aligning with the message on legitimacy contained in President *Juncker's* call for *bringing the European citizens closer to Europe*.

3. Our Empirical Findings on "What Exists" - Hopeful Voices, Some Mutual Annoyance

Unfortunately some of the institutions and in particular some of the DG's refused to engage with this study.. In this, we do not shy away from self-criticism. Scholarly curiosity may have driven us to be too forward in light of initial silence, a rashness for which we have presented our excuses. Yet the main reason for the obstacles faced when trying to establish a closer working relationship with the DGs may have been a pending investigation of the EU Ombudsman going on simultaneously to our survey. It appears that at least some of the DGs were not entitled to interfere with the pending official response. However, this reluctance has frustrated the offered chance to self-portrait the DG's true efforts and achievements. That makes our study somewhat vulnerable to criticism, though the empirical data gathered stands on its own. On the other hand, the CSOs and RAs demonstrated an encouraging degree of collaboration so that we received a finely nuanced impression, which for that matter was completed by significant and serious statements of DG officers as individuals, presumably coming predominantly from the dialogue frontier DG's Agri and Trade, which we cannot precisely know due to the strict anonymity of our survey.

The length of our survey also apparently kept some potential contributors from participating. We nonetheless felt this to be necessary as to escape an overly superficial account. We needed to include subtle questions in order to get a chance of reading in-between the lines and to cross-relate and double-check the validity of responses when putting them into cross-referring light. We have decided in favour of quality instead of just quantity. Preliminarily imposed open questions have been an extra-source of fully associatively given hopes and criticisms, which we brought into "speaking out" when cross-referencing them with the closed questions.

Further, we balance that all sources, except for the legal ones, are rather opaque, pluripotent, multi-evaluable and finally, that the responses of our survey can be biased by professional style and social desirability. Our recommendations reflect this by reflecting on but not simply applying the survey's data. For a condensed picture of the survey's findings, we invite the reader to browse through the special part and the "cartography mapping" in the Annex. Thus we come immediately to our conclusions and recommendations.

4. Give Participatory Democracy a Real Chance

This recommendations are addressed to all the institutions. On the background of our proclaimed premises and the overall evaluation of our findings, we felt obliged to address a dense *modus operandi*, but we are convinced that without an overarching holistic concept any reform must further on reproduce shortfalls and fail the legitimacy leverage purpose as is the desideration of the Lisbon Treaty.

i. Sensitise for the New Mind-setting by the Treaties

We sense that the practices are still based on an outmoded pre-Lisbon mind-set. We recommend rearranging the dialogue(s) along the philosophy of Committee of Regions's Multi Level Governance (MLG) Charter, as are in short: *togetherness, partnership, awareness of interdependence, multi-actorship (...) transparency, sharing best practices (...), open and inclusive policy-making process, promoting participation and partnership involving relevant public and private stakeholders (...), including through appropriate digital tools (...)*. Employing collaborative democracy and thus Europeanwide multiplication diversifies the dialogue away from Brussels. Civil dialogue issues are a civic task and the citizens are in their 500 million "out there" and are rather Brussels averse, face it and take it as a motive to keenly reach-out to them.

We balance the dialogue(s) "unfinished" character and great legitimising potential, which unfortunately has not yet been brought to its full potential.

ii. Accept the Constitutional Obligation and Take the Responsibility Pro-actively

Respect the spirit of the Treaties and the mission statement of the EU Commission's President, corroborate the dialogue culture and do it pro-actively. Copy the ambitious way of DG Agri and use this as a role model.

Bring across the overdue horizontal civil dialogue. This one has even more legitimacy potential than any other of the participatory instruments under Article 11. Welcome the EESC's efforts to initiate this process.

iii. Experiment, Endeavour in Order to Bring Participatory Democracy to its Full Legitimising Potential

This requires a redirection of the focus from practical considerations to legitimacy leverage desideration. DG Trade, the second best role model, should become encouraged to keep on going with its criticized way and not to follow suggestions to become more earthed.

In case this "holy legitimacy goal" would not become consented, it could be rethought to put participatory democracy on the delete list for a next convention.

iv. Complete the Fragmentary Composition by Wide Opening of the Eligibility - Even to Single Citizens - And Let a Broader Partnership Principle Break Through

A shift of paradigms towards rigid openness and enhanced transparency, ideally self-controlled by the dialogue stakeholders themselves, is the prerequisite of any improvement. Consider a two-chamber model to get the diverse interests into a clearer competition, end-up any "closed shop" possibility and prevent establishing a new "political" oligarchy. Make societal "seismographs" welcome dialogue partners.

v. Resolve the Confusion on the Nature of Dialogue - Consultation, Expertise, Communication

Make the dialogue a real dialogue, interactive, of two-way nature, empower it to political bargaining and protect it against out-watering by intermingling diverse categories, which downgrades the dialogue's constitutional dignity.

vi. Design a Serious Conflict of Interest Policy

Any interest, in the dialogue is acceptable if it is honest and disclosed in full transparency. But rules should be provided - as has the ombudsman rightly stressed - to detect any conflicts of interest. Oblige to self-uncover interests and make them competing, also by the suggested two-chamber model; on a competitive "market" the competitors themselves will be the best regulators.

vii. Clarify the Nature of a Core Dialogue Regime to be developed

The Commission's Communication "*Towards a reinforced culture of consultation*" of 2002 denies expressively an over-legalistic approach and favours "culture". We share the underlying assumption that governance, as we have promoted afore, with its wider inclusion of political actors is a model that can potentially leverage better and more consensual policy-making than the traditional government model. Neither should courts substitute political processes. This position is widely backed by the responses of our survey. Nevertheless, it seems to be indicated under the rule of law principle to make procedures predictable and resilient, which is apparently the background of the Ombudsman's legitimate suggestion. Despite the aforementioned leeway for designing the appropriate way of implementation - whether by hard law or soft law or ethic code or similar – we are in doubt whether a legal regime could really be opted-out in the long run. Article 41 of the Charter of Fundamental Rights of the European Union (FRC) indicates that remedial claims cannot be suppressed. We recommend to carry-out a particular legal analyses on what the bandwidth of a possible legal framework could be. However, whichever regime is opted for, it should contain binding standards on admissibility, eligibility and a selection regime stating who and why is entitled to be dialogue partner, this even despite our recommendation to open the dialogue to the widest possible range of participants.

viii. Install a Reviewing and Monitoring Scheme

We recommend therefore that this task is best carried out in cooperation with and as far as possible along self-evaluation and this should be done on the publicly accessible eTool.

ix. Strengthen the Role of the Dialogue - Turn Partners into Supporters and Public Multipliers

Allow in turn for the admission to partnership your partners to become intermediaries. Use their qualified knowledge for translating and interpreting the DG's political necessities to the public. And make them representatives of the public, but make sure that they are really mandated and - as intermediaries are supposed to do by nature - assure that they are not acting on their own segmentary interest.

x. Install an Online "Eleven-Two-Tool" - Save Time and Money and Gain Broad Compliance

Firstly, without delving too deeply into technical and organisational details, we would like to recall the benefits of such a tool: Enabling a European wide participation of dialogue partners on the MS levels and sublevels horizontally as well as vertically. Literally every willing party could make up its mind on any proposed dialogue issues.

Secondly, and in line with the Ombudsman desideration, such a tool could serve for a more perfect

openness. If and when any participant is obliged by rules and "motivated" by social stimulus and under silent group wise internal "supervision" to make herself or himself vitreous, this would be a next step towards a more perfect transparency.

Thirdly, such a tool could enable a more permanent process which surpasses even the criterion of regularity and makes any definition by law or courts obsolete, as to what "regular" could imply.

Fourthly, the DGs can require that any proposal should be addressed to the DG preliminarily filtered by internal co-creation and co-decision making until rather clear positions crystallise. This would enable the DG to see which reasoning and majorities support a proposal – in other words, to whom it is relevant and why.

Fifthly, such a collaborative or cooperative democracy tool discharges the DG's to be at stake during the elementary political will-building phase and the finalisation process can therefore be kept fairly short. Once, when the dialogue partners are trained to deal with e-collaborative democracy, the face-to-face meetings can be reduced to a short finalisation procedure. This would impact a significant cost saving effect.

If and when the "unfinished" dialogue(s) are fully realized, we predict a great future and we forecast a significant legitimacy leverage function. We ascertain that the assumptions of the Lisbon Treaty were right.

Taken all our recommendations together we are convinced that these could comply with the President of the EU Commission's inaugural call: ... *bringing the European citizens closer to Europe*.

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*"Last chance Commission", either
we succeed in bringing the European
citizens closer to Europe - or we will fail*
Jean Claude Juncker¹

*Any bridge needs firm pillars at both ends
and two directions in which to go*
Anne-Marie Sigmund²

*Governments – together with socio-economic
and civil society actors – at all levels
have to seize opportunities together*
Luc Van den Brande³

I. Fundamentals and Considerations

I. 1 Objectives and Grounds for the Study

To make the concept of this study lucid requires an intense reflection of its objectives. The foremost reason for this study is to clarify:

- Firstly, "existing structures" and "what exists". This refers to a mapping of the reality of the civil dialogue (CD) under participatory democracy (PD) principles, whether and if so, to what extend these are carried-out (or not carried-out) by the institutions and under which regime.
- Secondly, the task and mandate to analyse the "patterns" requires a very far reaching evaluation of manifold factors as what the rationales are about and whether there is an awareness and a mutual sense of responsibility for overarching aims.
- Thirdly, "recurring elements" can't refer to anything else but to the normative equipment, and how it is dealt with. This covers balancing the legal orders for installing and holding civil dialogues and thus, conclusively and coercingly investigates on the facts behind the opaque perception of the apparent gap that "exists" between participation law in the books and these laws in action.
- Fourthly, in order to "fill the present knowledge gap" intrinsically, knowledge must firstly be generated which inevitably includes investigations on all things that in total help build knowledge and

¹ Inaugural speech, European Parliament, November 2014

² Living Europe, Foreword, 2006

³ Van den Brande Report, Consolidating a European Culture of Multilevel Governance and Partnership, 2014

- finally, for the mandate to come up with a "conclusion" and "recommendations" requires making a proposal on how best to overcome this gap. In the light this task, one must inevitably focus on "what exists" and on "patterns", which implies that there is also to be dealt with even rather silent and psychological, political, economic interest factors as impacts and biases as well as restraints, which is a crucial part of "what exist".

"What Exists": What Is - What Ought to Be- What Appears to Be

To map and to analyse "what exists", is our contracted task. We could contend ourselves not exclusively but primarily to report on the corpus of norms - laws, codes, regulations, recommendations and case law. For lawyers this appears to be the dominant reality⁴, their reality. But this is only superficial. The law itself tells us just what ought to be⁵. To close the gap between what ought to be and what is, which is our solemn goal anyway, challenges to go far beyond the surface, the backstage and the considerations, which altogether make "what is". Why are we going so far into legal sociology and legal philosophy here? This is in order to explain why we won't come nearer to "what really is" if we contend ourselves with the normative level and why we are going after the entire cosmos of the dialogues, because that is what makes "what exists".

As the Union needs not just another document in the style of "wash me but don't get me wet", we'll speak-out very clearly and we will not hesitate to refer to "perceptions" even though this could become discredited as a non-empirical approach. As we know from only one study with serious foundation by in-depth interviews of high-ranking officers of the "apparatus", we will with all respect and fairness refer to this intensely as we go on and only then additionally report on our own impressions that could be received over many years. Of course, it is promptly to be confessed right here that such notions could become rightly blamed as partial and being not more than the subjective observation of a spectator being biased from his double role as analyst and also having acted in favour of PD.

Despite a large number of documents in favour of participatory democracy, there is an evident widespread distrust in the function of participatory democracy and of the civil dialogue(s) and a certain reluctance to implement it proactively. Moreover, there is also some confusion about the definition, role and function of participatory democracy and civil dialogue. This causes also lurking doubts around implementation. There are, of course, good arguments for acting dilatorily. Even though we have libraries full of scientific interpretations, we are still missing any resilient doctrine on *how* to close the aforementioned gap. And the fundamental reasons, *why*, basically, the gap should be closed are still hovering in the Cloud of Unknown as the respondents to our survey further prove.

⁴ *Gravers*, den juristskapte virkeligheten, 1982

⁵ *Hume*, A Treatise of Human Nature, 1739, II,1.1

Keeping up with "Constitutionalism": Committed to the Rule of Law

Two eagerly debated problems, one, whether participation can really contribute to make the Union more democratic and, two, whether the use of participatory democracy and of the civil dialogues can and will definitely provide legitimacy, neither can nor at all must be resolved by us, because the case is in fact already closed, *Roma locuta causa finita*.

The *Treaty of Lisbon*⁶ stands in its preamble determined, when stating one of its "holy" desideration as: *enhancing the democratic legitimacy of the Union*. This is a proclamation. This is also an authentic motive. It is immediately followed by a next Lisbon democracy manifesto on the political priority setting: *Title II. Principles of Democracy*.

This second proclamation of "Principles", which logically covers also participatory democracy, again, constitutes the entire underlying concept of participatory democracy of the *Treaty on European Union*⁷ (TEU) as enshrined in Art 11, in our particular case Art 11(1) and Art 11 (2).

Here is the right moment to come *ad fontes* and to prominently recall the text of these two dialogues:

Art 11(1): *The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make publicly known and exchange their views in all areas of Union action.*

Art 11(2): *The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.*

Core texts, by nature, usually say much on the motives, but lesser on the extent or on the functioning in reality. Yet the *Treaty on the Functioning of the Union*⁸ (TFEU) does so. Art 15 (1) goes one significant step further by conclusively ordering a positive and pro-active mind-setting in the entire Union's apparatus: *In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.*

⁶ OJ 2007/C 306/01

⁷ OJ 2012/C 326/01

⁸ OJ 2012/C 326/01

Whatever "openly" means, one thing is for sure when taking this *holy shrine* of three Treaties into account: we have and we face a solemn, lucid, "para-constitutional"⁹ commitment that both intentions, ought to be realized by the foreseen instruments: democratizing the Union and consequently a leverage of legitimacy. That is reason enough to take the *officium nobile* to adopt this commitment as our premises. Premise one: Participatory democracy is a legal term and is only and exclusively addressed to the instruments and their meaning as exhaustively worded in Art 11 TEU. Premise two: Civil dialogue in the context of participatory democracy is another legal term and strictly reserved to the paragraphs 1 and 2 of Art 11. Consultation as ordered under Art 11 (3) TEU or the citizens initiative under Art 11(4) are clearly instruments of participatory democracy but not at all to be subsumed as civil dialogue(s). For reasons of clarity and not to thin away the Lisbon pledge: whatever other efforts are taken to attract and to engage the European citizenry are welcome voluntary engagements but are neither mandatory participatory democracy nor civil dialogue. Convincingly, the dialogue under Art 17 (3) TFEU, is as well a dialogue by legal wording but not participatory democracy in its genuine popular sense. when Archbishops and Archimandrites meet with the Presidents of the Commission and the EU Parliament and in separate meetings the Grand Masters and Secretary Generals of secular(ist) organizations. For the sake of completeness of the use of the term "dialogue": The same applies to the *political dialogue* under Art 27 TEU and to the *social dialogue* under Arts 151ss TFEU. As a result: the combination of participatory democracy and civil dialogue refers solely to Arts 11 (1) and (2).

Despite hesitant standpoints in EU law commentaries on whether there is a strict implementation obligation of the civil dialogue(s) - we'll come back to that in more depth¹⁰ - it appears as unacceptable to implicitly treat the primary laws like a provisional wishful thinking at anyone's interpretation disposal - even when the Treaties' wordings sometimes offer space for interpretation. In such cases the interpretation of *more or less* or of *so or otherwise* is indeed up to the legitimate actors, but not the decision of *whether or not*. Implementation omission is neither a legal nothing nor just a peccadillo: So, finally it would be up to the Courts to render a binding interpretation. If an institution should be blamed for misperception or infringement we have procedures at stake to take action against that under Art 263 TFEU. There are competent guardians "claimants" for taking action. The order of participatory democracy in the Treaties is not, as sometimes subliminally alleged, an erroneously added or an injudicious narrative from just some visionary. It does not stem from souled essayists of the Convention era and of other Pied Pipers, it is the Member States who are giving the orders. Every single one of the Member States is supposed to have read this document carefully and only then agree conclusively on every sentence of this text. Unanimously. Therefore we can talk about potentially twenty-

⁹ as the approach of right these lines here is a functional one it appears to be at least not counter indicative to refer to the primary EU law in terms of a "constitution", especially when we summarise that 99% of the core text of the Constitution Treaty - except for the above mentioned exclusions of deleting "principles" - were published without any significant changes. Of course, a formalist or dogmatist, presumably also a citizen of the UK, would heartily protest against this sloppy provocation, but we are committed to going on with our functional approach

¹⁰ See chapter legal scholarship in Annex 4.

eight entitled controllers of the proclivities or disfavours of the institutions and rightly take the Treaties as canon.

Showing loyalty, if not empathy, to one's own "constitution" is nothing that needs be justified. Therefore, we appreciate the new German approach of "Verfassungspatriotismus", *constitution patriotism*, which means that the cohesion of the Union can be guaranteed by a strong belief in the integrative power of its constitution. We do not appreciate that this is sometimes put somewhat patronisingly in a slightly pejorative or smiling light. Indeed, the highflying Lisbon desideration are volatile, maybe juridifying meta-narratives would also be a heritage from the Constitutional Convention's enthusiasm. But what should be wrong with that in a declared "political Union"? There are (albeit long) times for reasoning, philosophising and, well, also for pettifoggery, but then there are also times when political and societal activity are necessary - and such times, we guess, are dawning.

The Ombudsman's (OM) View

This gives leeway for a too subjective evaluation from now on becoming limited. Since January, 27th, 2015 we have a first in-depth analysis with follow-up recommendations which are outstanding and of highest competence: it is the Ombudsman preliminarily who makes the case in intellectual honesty - until the Commission either agrees or overrules. These recommendations must be recalled right here in their entirety because of showing all "risk-zones" and offering solid grounds for the author as well as for the *lector benevole*. Nothing could better prove the objectives and grounds of this study.

Just one comment must be added right here to clarify some commingling: it is highly problematic - and we'll come back to this in our reflections - to treat consultation and dialogue equally¹¹ and, then logically, to analogise the rules. This collides with the concept of the Union Treaty. Unfortunately, the Ombudsman follows in this respect the observance of the EU Commission, which has not adjusted the Consultation rules to the Lisbon state. This again refers to our observation that the apparatus, presumably rather unconsciously, still lives with usage of pre-Lisbon patterns. Note: Consultation under paragraph 3, Art 11 TEU is also participatory democracy, but is of another nature than the dialogues under paragraphs 1 and 2 Art 11. Whereas the dialogues are clearly construed as an exchange, bargaining and political process, near to the social dialogue, consultation is - despite the practices of hearings and consulting meetings - by concept in principle a one way instrument. There lies strong proof on this different concept by the fact, that the order of dialogues is addressed to all of the institutions whereas the Consultation Procedure exclusively addresses the EU Commission. This makes sense as the initiation of a law making process is exclusively the competence of the Commission and so far it

¹¹ see Fn 1 of the Ombudsman's Letter to the President, citation next Fn: *The Commission may, nevertheless, choose to apply the measures it adopts in response to this own-initiative inquiry also to such groups.*

has become its very own of form of collecting objective reasons whereas the political next step, the political one, allows to respect political aspects, as is the "sovereign" not bound to objective reasons - or in other words, democracy has its very own objectives and rationales. The sovereign "we, the people..." is indeed sovereign. The EU Parliament and the Council have increasingly documented this "truth" in recent times. The apparent similarity, that the EU Commission gives reasons in both cases, cannot be understood as sameness. So, even this is not inevitable, the rules can turn out as quite different, respecting the diverse nature of these twofold instruments. If the Union Treaty would have seen these two elements as the one and the same, it would have expressed this as such, but as it did not, we can rightly assume that the idea was to open pluralistic channels for providing the institutions an overview on the bandwidth of perceptions - on equal footing.

A Landmark: OM Inquiry¹² and Position¹³ in Brief

After having received feedback from public consultation that the Ombudsman had carried out, she presented her conclusions as follows:

The main problems identified by stakeholders are (i) the inconsistent categorisation of organisations that are members of expert groups, (ii) the perceived continued dominance of corporate interests in a high number of expert groups, (iii) a lack of data on the expert groups register, and (iv) the appointment of individuals who are closely affiliated with a specific stakeholder group as experts in their personal capacity, linked to the absence of an effective conflict of interest policy.

This raises concerns on whether it is (i) currently not possible adequately and consistently to review the composition of specific expert groups because of deficiencies in the framework governing such groups, as well as in the expert groups register, (ii) that there is no consistent labelling/categorisation of organisations appointed to expert groups and that the vague category 'association' appears to be frequently used as a fall-back category. (iii) What is more, the Commission has so far not developed any general criteria for delimiting different groups of stakeholders. In particular, there are no criteria for the broader categorization of which groups of stakeholders are deemed to represent economic and non-economic interests respectively.

The Ombudsman noted, furthermore, that the European Parliament adopted, on 22 October 2014, a resolution on the general budget of the European Union for the financial year 2015, which envisaged holding "some appropriations in reserve until the Commission modifies the rules on expert groups and ensures their full implementation within all DGs". The draft amendment tabled by a group of MEPs,

¹² OI/6/2014/NF

¹³ Letter of the European Ombudsman to the President of the European Commission Jean Claude Juncker, 27 Jan 2015; <http://www.ombudsman.europa.eu/de/cases/correspondence.faces/en/58861/html.bookmark>; accessed 21 Feb 2015

on which the resolution was based, pointed to what was perceived as a continued failure to ensure a balanced composition and transparency of expert groups. In light of the contributions received, the concerns put forward by the European Parliament in the context of the budget procedure, as well as my own preliminary views as outlined above, I have decided to focus my own-initiative inquiry exclusively on systemic issues which negatively impact on the balanced composition of expert groups and the transparency of the groups' work.

As positive developments underpinning the Ombudsman's suggestions for improvements, she evaluated that *since December 2013, DG AGRI's civil dialogue groups, a specific type of Commission expert group, have been governed by a new framework. I consider that this legal framework, the implementation of which is subject to review in the context of own-initiative inquiry OI/7/2014/NF, presents clear advantages over the horizontal rules governing Commission expert groups*¹⁴.

Under restraint¹⁵ of a supervening detailed evaluation, which we shall refer to the DG AGRI model as the benchmark-setting role model. With these statements the Ombudsman came to its own conclusions and recommendations which were to be reflected by the Commission and stated particular suggestions.

A. The (legal) nature of the horizontal rules and achieving a balanced composition:

The Commission should adopt a decision laying down the framework for expert groups. This Commission decision should require the following.

- 1. A balanced representation of all relevant interests in each expert group.*
- 2. An individual definition of 'balance' to be set out for each individual expert group.*
- 3. A provision containing general criteria for the delimitation of economic and non-economic interests.*

B. Calls for applications:

- 1. Publish a call for applications for every expert group.*
- 2. Create a single portal for calls for applications to expert groups.*
- 3. Introduce a standard minimum deadline of 6 weeks for all calls for applications.*

C. Link to the Transparency Register:

¹⁴ see FN 2, Letter of the Ombudsman to the President of the EU Commission; The horizontal rules governing Commission expert groups are set out in the following Commission Communication: Framework for Commission Expert Groups: Horizontal Rules and Public Register, 10.11.2010 (C(2010) 7649 final, SEC(2010) 1360).

¹⁵ see FN 5, Letter of the Ombudsman to the President of the EU Commission

1. Use the Transparency Register's categorisation to categorise members in Commission expert groups.
2. Require registration in the Transparency Register for appointment to expert groups.
3. Systematically check whether registrants sign up to the right section of the Transparency Register.
4. Link each member of an expert group to his/her/its profile in the Transparency Register.
5. See heading D. below for individuals who are not self-employed and who are appointed to expert groups as individual experts in their personal capacity.

D. Conflict of interest policy for individual experts appointed in their personal capacity:

The Commission should revise its conflict of interest policy and take the following measures.

1. Carefully assess individuals' backgrounds with a view to detecting any actual, potential or apparent conflicts of interest.
2. Ensure that no individual with any actual, potential or apparent conflict of interest will be appointed to an expert group in his/her personal capacity.
3. Consider, in a situation of conflict of interest, the possibility to appoint an individual as a representative of a common interest shared by stakeholders or to appoint his/her organisation of affiliation to the expert group.
4. Publish a sufficiently detailed CV of each expert appointed in his/her personal capacity on the expert groups register.
5. Publish a declaration of interests of each expert appointed in his/her personal capacity on the expert groups register.

(...)

On the basis of the above, the Commission should consider (i) adopting a decision in 2015 laying down the general framework for expert groups and (ii) reviewing the composition of expert groups which are active or on hold, once this decision has been adopted.

The EU Commission's reaction and response times were set out for April, 15th, 2015. Further debates and a replica are obvious. Supposedly the Commission will not fully disavow its own not so badly founded position: The EU Commission speaks in its already pre-Lisbon self-imposed *Communication on Rules and Standards*¹⁶ clearly about a *Reinforced culture of consultation* not deriving from any kind of legislative implementation. Secondly, the EU Commission has ordered itself to be reluctant of letting things go too far, in order to and based on the rational of efficiency. Setting the rules for Consultation, what again raises valid doubts, such as whether these can be analogously used for the CD, but in actual practice - the EU Commission has already in the *General Rules and Minimum Stand-*

¹⁶ COM (2002) 704 final

ards¹⁷ explicitly stated: *A situation must be avoided in which a Commission proposal could be challenged in the Court on the grounds of alleged lack of consultation of interested parties. Such an over-legalistic approach would be incompatible with the need for timely delivery of policy, and with expectations of the citizens that the European institutions should deliver on substance rather than concentrating on procedures.* Note: Efficiency is an "overwhelming" argument and to substitute law by culture, in the name of lesser regulations, is another highly "convincing" scenery.

However, we will see an impressive discourse, presumably lasting for a while. Although the Ombudsman has carried out a profound consultation, we do hope to be able to contribute to the discourse with our approach and with additional empirical enforcement.

Keeping the constitutional tracks anyway

By strongly basing ourselves on the overarching constitutional goals and promises, and severely committing to not be consumed by open-ended debates nor by non-constitutional level demurs, be they scientific ones or such based on *Realpolitik*, we are determined to think about realisation of implementation steps. Still, we are always reconnecting to the normative basement.

This may appear as reference to a positivist method, but we are less pretentious and rather believe that it is based on a "fundamentalist" pragmatism. Only this strict normative approach augurs realistic and factual implementation of the "constitutional" desires and orders, in case the responsible politicians should honestly still consider that, which, of course, can be doubted. The *zeitgeist*, *spirit of the age* of efficiency appears to have surpassed the ranking of democracy. We keep on going on the democracy primacy premise's trails anyway. Should the Union not take action and wait until there is an overall, scientific, administrative, executive and political consensus once on how PD and CD work best, it will wait until *calendas Graecas*.

Deeply respecting scholarship, but committed not surrendering to

The scientists of very diverse disciplines cultivate a debate on a very sophisticated intellectual level, regarding our subject. They are going so far to challenge the existence of a civil society or diagnosing a couple of civil societies and scrutinising, whether there is just one Europe or maybe several Europes and which of these Europes can be matched with which type of participatory democracy adequate civil society¹⁸. This approach is problematic. Is there need to rethink Europe from scratch? Intellectually, this is an amazing, formidable, impressive, awe-inspiring and highly complex and ambitious de-

¹⁷ *ibid*, 6, 10

¹⁸ see *Kohler-Koch*, The Three Worlds of Civil Society - What role for civil society for what kind of Europe?, in: *Policy and Society* 28 (2009), 48

bate. While reaching out for ever more certainty or even training for uncertainty there is less eagerness to intermingle in down-to-earth questions like whether and how a DG should reach-out for a sectoral citizen-driven domino-like multilevel-multiactor-multiplier legitimacy leveraging participation scheme. Of course, this down-to-earth challenge challenges us even more to respect the diverse doctrines. For example, it is true, civil society is an ever changing, and, well, sometimes lobbyists in disguise, oscillating, vibrating, ambiguous and finally not strict definable something. But it would be overdone to negate its presence. If there are multiple faces and functions and weights, then they are to be put to adequate multiple use, but not to not be used at all. *Beate Kohler-Koch*¹⁹ has proposed a "table" of options, functions and perspectives, that is more than appropriate to serve as a preliminary guideline for designing a multiple architecture. Dealing with where, how and how far civil society can be placed in multiple functionalities and responsibilities, it can support the effects as envisaged by the Treaties. *Gautier Busschaert*²⁰, meanwhile, takes one fairly radical step further and adopts as a premise that the EU has turned to participatory democracy because representative democracy may be reaching its limits. So, what now? Can PD and CD be seen as bridge-builder or is this merely a *magical*²¹ oxymoron? Law is flexible and by modern nature always under construction, so there is no obstacle to optimising this architecture permanently once a more lucid and consented doctrine should arise. Politology and sociology provide the scholarly ammunition to morally justify the Commission's resistance; we'll come back to that overtone.

... but rather disentangling the complexity

Assuming it will take time until a serious call for "disentangling the debate" becomes a reality our plead to the institutions is not to merely await this reality. Instead, we advise trust in the assumptions of the Treaties and to enhance PD and CD. No doubt, a proactive progress could be seen as the Treaties' desideration payment in advance which maybe pay off. But the engagement and inouts of an ever more one-sided invited citizenry is no less a payment in advance, which in case of becoming irrelevant - this is the "valuta" - would also be seen as a loss. But is there any other option? Bluntly spoken the Treaties order the Union to exercise on the fields of trial and error. Consequently, legal-political backers serving as "investment advisers", who inevitably can only free-draw themselves from any guarantee for success and being exonerated from liability, could be blamed for mere mercenaries.

We could easily, by intellectually fiddling-around, move over to all those scepticisms and pessimisms and other -isms around the profoundly imposed question, whether the EU could become democratised

¹⁹ *ibid*, 53

²⁰ Participatory Democracy in the European Union : a Civil Perspective, PhD Thesis University of Leicester - School of Law, 2013

²¹ *Busschaert*, 125: The Civil Dialogue : a Magic Cure for the Democratic Ailments of the Community Method?

from below²², meaning from the man-on-the-street and from civil society. With our own background it is tempting to scholarly combine all these methodologies for finding a methodology to get things analysed correctly and to join all those various adept assumptions on democratising democracy. But we withstand this temptation. As we mentioned before, we made a commitment to share assumptions though preferably those stated in the Treaties. Because in our norm related approach their dignity is of the highest obtainable ranking.

So, let us frankly and boldly begin by balancing the widest panorama of the political, philosophical, scientific and normative order and then come to fact findings and to behavioural imprint challenges and finally to results and recommendations.

Referring to the Key Actors: EU Commission and the European Economic and Social Committee

As early as 2001, the European Commission, based on its own pre-evaluations explicitly referred to the *European Economic and Social Committee's* (EESC) "*Sigmund-Report* (I) : *The role and contribution of civil society organisations in the building of Europe*"²³ and to the EESC's "*Sigmund Report* (II) : *The Commission discussion paper "The Commission and non-governmental organisations - Building a stronger partnership"*"²⁴. Those documents made civil society and participatory democracy a pillar of the Unions' architecture of democracy. From these days on, the EESC additionally adopted to its genuine functions²⁵ a leading role and a factual function as guardian of the issue of participatory democracy²⁶.

It was then titled the "*European Governance - A White Paper*"²⁷, and announced a fundamental involvement of civil society in the political will building process. Only one year later, this outline was already surpassed by a new policy approach and another high-ranking mission statement. This was the Communication of the Commission "*Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*"²⁸. This next milestone of open governance reinforced the Union's ambition to obtain European intermediaries on board of the EU Commission, all in favour of an enhanced democratisation of the Union's executive entity, which was previously scolded for being undemocratic for quite some time. Some years later and as publicly confessed in reaction to the fatal "non" and "nee" in France and Netherlands to the Constitution Treaty, came a Communication to the Commission, an "*Action Plan*

²² so recently again *Liebert et al* (Eds), *Democratising the EU from Below?*, 2013

²³ Rapporteur *Sigmund*; adopted September, 22, 1999; CES 851/1999 D/GW

²⁴ Rapporteur *Sigmund*; adopted July, 11, 2000; CES 811/2000 FR/ET

²⁵ OJ 287/ 2001; COM(2001) 421 fin

²⁶ see *Brombo*, *Le Formazioni economico-sociali e l'Unione Europea*, in: *Theory of Law and State* 1/2 (2003), 293ff; Conference University of Venice Ca' Foscari, 25 September 2013, Venice...

²⁷ COM (2001) 428 final

²⁸ COM (2002) 704 final

to *Improve Communicating Europe by the Commission*²⁹". The document stated in all openness that the aforementioned rejections had led to the conviction, *that the dialogue with the European citizen has become a Commission priority*.³⁰ The new communication approach was based on three main principles, namely, (i) listening, (ii) communicating and (iii) *connecting with citizens by "going local": good communication must meet the local needs of citizens*³¹. A *Green Paper on Transparency*³² then spoke of the issue on how to safeguard and to keep "clean" the civil society from disdainful hidden lobbyism, and how to disclose particular interests and a follow-up Communication from the Commission *"European Transparency Initiative"*³³ what was appointed. Finally, the new *Treaty on European Union*³⁴ in the amended version of the *Treaty of Lisbon*³⁵ built the capstone and signalled that the Union appreciates the participation of the European citizenry and of civil society as a core strategy to "citizenise" the Union and to "Europeanise" the citizenry. As the Union Treaty remained fairly imprecise as to what its "constitutional" orders in particular meant concerning the factual implementation, it was again the EESC who pushed for rules that made the invitation to the citizens and the civil society organisations viable, this time by the *"Sigmund Report (III) - The implementation of the Lisbon Treaty : participatory democracy and the European citizens' initiative (Art 11)"*³⁶. So it was again and again the EESC urging for a more proactive participatory policy of the EU institutions, as finally documented by the complex *"Jahier Report"*³⁷.

Even when we come back to this issue in more depth, it is worthwhile to acknowledge here that this invaluable tradition is still in continuity. It was the EESC's Liaison Group that recently drafted a new *Road Map for the implementation of Arts 11 (1) and 11(2) of the Treaty on European Union. Towards better civil dialogue and involvement of citizens for better policy making*, then adopted by a NGO Forum, hosted by the Latvian presidency³⁸. The EESC appears to be **the** "Brussels" motor of PD and CD. A next generation represented by EESC Member *Andris Gobins* has taken not only responsibility but obviously also stakeholder activity to push CSO's towards organised action.

Participatory Democracy Becoming a Self-runner

²⁹ SEC (2005) 985 final

³⁰ *ibid*, introductory remarks

³¹ *ibid*, summary of the motives

³² COM (2006) 194 final

³³ SEC (2007) 360

³⁴ Fn 2

³⁵ Fn 1

³⁶ Rapporteur Anne-Marie Sigmund; CESE 465/2010

³⁷ see CESE 766/2012; 3 October 2012 : *Principles, procedures and action for the implementation of Arts 11(1) and 11(2) of the Lisbon Treaty*

³⁸ Riga, 2/3 March 2015.

The path from Amsterdam over Nice to Laeken reflected the urgent need for political success with its solemn confirmation³⁹ to make the Union *more democratic*, resulting in a strong debate between protagonists and antagonists of the direct democracy community on the nature of PD⁴⁰. Even then there was talk of a European Referendum, which appears to be welcome, just look at proponents like *Tony Blair, Angela Merkel, Wolfgang Schäuble* - and *Jean-Claude Juncker* - but has nothing to do with PD.

One preliminary note right here. Participatory democracy is neither direct democracy nor a revival of the co-decision concept in any way. Let us part with illusions: the primary goal of representative democracy is pompously stated in Art 10 (1) TEU. PD is a just accessory and complementary element of dignity and may be a stepping stone towards direct democracy, which is clearly underrepresented in the Treaties, but is of another nature and should not be subsumed under "direct". Even when the ECI comes close, it is just and only agenda setting for further reactions. PD, in particular in form of CD or CP is not one of the binary instruments which usually end with a yes or no. PD and CD are typical prerequisites for *good governance*, as it is a process to find cooperatively and collaboratively solutions, horizontally first, vertically afterwards. Right this is the concept follow up of Art 11, first comes the internal dialogue amongst the citizens, para 1, then evolve their findings to political bargaining, para 2, afterwards the results of that process step become aired back to the public for backing or enrichment or even denial, para 3. PD is based on the *inclusion principle* and has taken the step from pure deliberation towards an outcome-related co-design. See instead of all others the doyenne of this new branche, *Beth Noveck*⁴¹. We will also come back to this important bifurcation.

The Committee of the Regions- A New Player Boarding, Decentralising Participatory Democracy

If the institutions would really understand the joint chances and options of a collaborative spirit, it would definitely induce a change of the mindset. By the way, even when not (over)burdened by the same far reaching responsibility as indeed is the Commission, the Committee of the Regions has a better understanding of the challenges for an urgent change of political culture, in order to reach the citizens, when adopting and solemnly promoting its *Multilevel Governance Charter* in 2014.

In addition, initially there was no need of prevenient collective shift of mindset. It is, like so often in

³⁹ see *Laeken Declaration*, 15 th December 2001

⁴⁰ Also we have for political and communication and simplifications reasons used the categorisation direct democracy, see *Auer / Flauss, Le Référendum Européen* (Bruylant 1997); *Feld / Kirchgassner*, The Role of Direct Democracy in the European Union, in: *Blankart / Mueller* (Eds), *A Constitution for the European Union*, 2004); *Pernice*, Référendum sur la Constitution pour l'Europe: Conditions, Risques et Implications' in: *Kaddous / Auer* (Eds), *Les Principes Fondamentaux de la Constitution Européenne*, 2006) and: *Direct Democracy and the European Union... Is that a Threat or a Promise?* (2008) 45 CML Rev 929.

³⁵ See *Kohler-Koch*, Does Participatory Governance Hold its Promises? in: *Kohler-Koch / Larat* (Eds), *Efficient and Democratic Governance in the European Union*, 2008; *Smismans*, *European Civil Society: Shaped by Discourses and Institutional Interests*, 9 ELJ (2003) 482, 493;

⁴¹ *Wikigovernment*, 2009; *Smarter Citizens, Smarter States*, 2015

history, enough that one key actor acts committedly - which is a statement clearly addressed to the President of the EU Commission. This MLG concept and recent Charter concept was exclusively developed and improved by *Luc van den Brande*, who was President of the COR at the time of the PD hype. As was, which is reflected in all of the relevant literature, one of the driving forces of PD since the days of her mandate in the Constitution Convention and then several times as Rapporteur *Anne-Marie Sigmund*, who at that time was President of the EESC. All of the afore named put their proposals and documents on right that spirit, as is expressed in the MLG Charter:

togetherness, partnership, awareness of interdependence, multi-actorship, efficiency, subsidiarity, transparency, sharing best practices (...) developing a transparent, open and inclusive policy-making process, promoting participation and partnership involving relevant public and private stakeholders (...), including through appropriate digital tools (...) respecting subsidiarity and proportionality in policy making and ensuring maximum fundamental rights protection at all levels of governance. Strengthen institutional capacity building and invest in policy learning amongst all levels of governance or to create networks between our political bodies and administration.

This is the empathy, that *Jeremy Rifkin*⁴² urges and proclaims a characteristic of advanced and mature societies.

Critical Scholarly Voices and Rumours

An unprecedented breakthrough of a European Civil Society participation invitation⁴³ came next, almost tuning into an hype in the 2000s. *Beate Kohler-Koch*⁴⁴ may be right when being suspicious that we are now the heirs of post-hype times. But can we, on the other hand, really pronounce participatory democracy in the EU as such as finally *de-mystified*, as recently done so by *Beate Kohler-Koch / Christine Quitkat* in their book title⁴⁵? We agree that there are obviously disadvantages on both sides of the "table". But haven't we seen only half-hearted implementations and camouflages? Isn't it a bit daring to air such an apodictic verdict regarding such a complex issue with no past but maybe a great future? And, above all: is it really legitimate to disavow the "masters of the Treaties", who have signed on to this constitutional concept this early and this fully?

⁴² Empathic Civilisation, 2009

⁴³ cf. *Smismans*, European Civil Society. Shaped by Discourses and Institutional Interests, in: *European law Journal*, 9 (4), 2003, 482 ff

⁴⁴ Fn 18

⁴⁵ Die Entzauberung partizipativer Demokratie. Zur Rolle der Zivilgesellschaft bei der Demokratisierung von EU-Governance (2011).

At the backs of our minds, we do share those warnings⁴⁶ addressed to the Union's decision makers not to neglect either the citizens' political desires or the implied constitutional call, because, otherwise, the final political costs would be out of proportion. The main desire of the authors of the (draft) *Constitution Treaty* was to Europeanize the Europeans⁴⁷ and, as already stated above, the subsequent Treaty also aimed at enhancing the Union's *democratic legitimacy*.⁴⁸ There is no doubt at all that, originally, the *principle of participatory democracy* – as resoundingly trumpeted by the EU Constitution Treaty⁴⁹ – was seen as the most appropriate means for enhancing this legitimacy, introducing a mechanism in favour of the citizens along the idea of *consociationalism*⁵⁰ and encouraging *societal peace building*.⁵¹ Still, there is broad agreement that the citizens must be attracted⁵² and affected⁵³ by Unions' issues. But is there still a consensus that Art 11 (2) TEU is the appropriate vehicle to include the people structurally?

However, key scholarship shows that there is no consensus on whether participation is a boon or bane⁵⁴ and whether it generates legitimacy⁵⁵. However, the breakthrough was achieved and there was a *participatory turn*.⁵⁶ At least as law in the books would have it. But there is another narrative on air on the reality of open governance, open participation and open dialogues, which appears to be not so unlikely. Since the economic crisis the democratisation and in this context the participation desire became overruled by the executive primacy. The Brussels backstage rumour became richer with another murmur as salvation for dawdling: In times of monetary transfers to Greece and potential imminent threats to pay for several other risk candidates as symbolised by acronyms such as SSCT and SFT the people themselves could not care less for democracy. Right or wrong?

⁴⁶ Cf *Craig*, The Lisbon Treaty. Law, Politics and Treaty Reform, 2011, 77ff; *Piris*, The Lisbon Treaty. A Legal and Political Analysis, 2010, in particular 135ff; see also *Tiemann/ Treib / Wimmel*, Die EU und ihre Bürger, 2011

⁴⁷ See only *Chryssochoou*, Civic Competence and Identity in the European Polity, in: *Bellamy et al* (Eds.), Making European Citizens. Civic Inclusion in a Transnational Context, 2006, 219ff.

⁴⁸ See also *Lenaerts/ Cambien*, The Democratic Legitimacy of the EU after the Treaty of Lisbon, in: *Wouters et al* (Eds.), European Constitutionalisation beyond Lisbon, 2009

⁴⁹ Heading of its Art I-47

⁵⁰ Cf, still for the post-Lisbon era, *Warntjen*, Designing Democratic Institutions: Legitimacy and the Reform of Council of the European Union in the Lisbon Treaty, in: *Dosenrode* (Ed.), The European Union after Lisbon. Polity, Politics, Policy, 2012, 111ff.

⁵¹ See *van Leeuwen*, Partners in Peace. Discourses and Practices of Civil-Society Peacebuilding, 2009

⁵² Cf *Castiglione*, We the Citizens? Representation and Participation in EU Constitutional Politics, in: *Bellamy et al* (eds.), Making European Citizens, 75ff.

⁵³ Cf *Hilson*, EU Citizenship and the Principle of Affectedness, in: *Bellamy et al* (Eds.), Making European Citizens, 56ff.

⁵⁴ *Pateman*, *Participation and Democratic Theory*, 1970; *CB Macpherson*, *The Life and Times of Liberal Democracy* (OUP 1977; *Barber*, *Strong Democracy: Participatory Politics for a New Age*, 1984); *JD Wolfe*, 'A Defense of Participatory Democracy' (1985) 47 *The Review of Politics* 370; *Craig*, *Public Law and Democracy in the United Kingdom and the United States of America*, 1990) chaps 10-11; *Sintomer*, *La Démocratie Participative*, 2009, 5

⁵⁵ *Kohler-Koch / Rittberger* (Eds.), *Debating the Democratic Legitimacy of the European Union*, 2007, 255.

⁵⁶ *Busschaert*, 19

Accordingly to this paradigm shift of the "Brussels" insider-rumour - we shall explain quite soon what its dignity means – in sum and by possibly exaggerating simple words, that participatory democracy in the EU is not much more than a nice ornament, a cover-up. It is a *fig leave* for pseudo-collaboration between the institutions and a greater handful of professional civil servants and kind of another portal for legally officialised lobbyism, alimoned by Brussels, being far away from any kind of dialogue with the (not-) represented real European citizenry: The Brussels civil society corps what *Busschaert* calls the *Brussels bubble*⁵⁷ is a rather professional elitist body, proposed segmental experts not far away from lobbyists⁵⁸ to be embedded in the Brussels apparatus.⁵⁹ Far away from being "civil" in terms of being "cives"-connected to local or regional CSO roots⁶⁰, they are hardly delegates in the sense of a democratically entitled EU constituency. This means that whatever these partners bargain is not born by and in the name of a structured EU citizenry and therefore fails the *ratio legis* why the Lisbon Treaty has introduced a "constitutionalised" participatory democracy. Again, right or wrong?

Right, when carefully reading the doyen of participatory democracy doctrine, *Beate Kohler-Koch*⁶¹, and also when reading between the lines. We are inclined to start our study from this critical point of view and to better assume the work hypothesis for strategic reasons. However, this would be better answered when having finished the study, because sum-up-perceptions are not a trustworthy source.

Wrong, if we listen to the rumour mill. It is indeed important to refer to those opaque sources in the beginning, because there are some severe indicators that also "rumour" is rather a kind of a balance than a pure chimaera or wool-gathering, f. ex. when the EU Commission's President *Jean-Claude Juncker* states a concern like that one in our header on top. This comes not from nothing, when coming from the most "Brussels" stamped mandarine since the days of *Walter Hallstein* or maybe *Jacques Delors*. To call upon his own commission to go with all its energy for the citizens is not a subordinate clause but a lump-sum-expression of insight that the citizens are not at all embedded in the Union which includes conclusive awareness that also the Civil Dialogue can and could not attract the Europeans yet. *Emily O'Reilly*, the EU Ombudsman, opened right within her very first months of surveil-

⁵⁷ 131

⁵⁸ *Justin Greenwood*, Interest Representation in the European Union, 2007, 215; *Quitkat / Kotzian*, Lobbying via Consultation - Territorial and Functional Interests in the Commission's Consultation Regime, in *Journal of European Integration* (2011) 33, 401ff

⁵⁹ see *Kohler-Koch / Finke*, The Institutional Shaping of EU Society Relations : A Contribution to Democracy via Participation, in: *Journal of Civil Society* (2007) 3, 401ff; see also *Boussaget / Dehousse*, L'Europe des Profanes : L'Experience des Conférences Citoyennes, in: *Costa / Magnette* (Eds.), Une Europe des Élités? Réflexions sur la Fracture Démocratique de l'Union Européenne, 2007;

⁶⁰ cf. *Lundberg / Sedelius*, National Linkages and Ambiguous EU approaches among European civil society organisations, in: *Journal of Contemporary Research*, 10 / 3 (2014), 321 ff

⁶¹ *Kohler-Koch / Quitkat* (Eds.), Demystification of Participation, 2013; see also *Hüller / Kohler Koch*, Assessing the Democratic Value of Civil Society and EU Democracy Engagement in the European Union, in: *Kohler-Koch / De Bièvre / Maloney* (Hrsg.): Opening EU-Governance to Civil Society, 2008, 167 and *Kohler Koch*, Civil Society and Democracy : "Astroturf" Representation? in: *JEPP* (2010), 17, 100 and *Kohler-Koch*, How to Put Matters Right? Assessing the Role of Civil Society in EU Accountability, in: *West European Politics* (2010) 33, 1117

lance a "strategic own-initiative" to investigate on the participatory democracy's practice on the failing of the overarching goals of the European Citizens Initiative (ECI)⁶² and on the admittance-procedures for the admissibility of representatives⁶³ to the Civil Dialogue (CD)⁶⁴. So, rumour per se must not be wrong, if the murmur is that one amongst insiders, then suddenly rumour becomes an invaluable source and part of evidence. Talking in terms of overarching goals such as citizens' trust and confidence even hearsay, in particular that of the tabloids could well become a serious factor of impacting legitimacy positively as well as pejoratively, and we must therefore keep an eye on it.

Why this sidestep right at the beginning? Reason number one: Because scholarship often does little more than compiling all available bits of information into a new kaleidoscopic picture or kaleidoscopic pictures. And after years of masses of analyses on CD and PD, we still face a favoured resume like "*ambiguity still surrounds the concept*"⁶⁵. So, these pictures of course always have the same handful of basic elements but with the slightest turn of the kaleidoscope shows different patterns and these can mostly not be harmonised because the sampling belongs to diverse premises; those – sometimes more and sometimes less self-reflected – rules is debated worldwide by the civil society debate⁶⁶, often in a very open style⁶⁷ but rarely with such empirical proof as recently found in a study of a group of labour unions, *The Fire Power*⁶⁸, although in the context of expert groups, which are rarely part of civil society. Though vividly denied, even scholars have their own premises and that also does not allow scientific sources not be exempt from critical reviewing in regard to these premises; premises, whereas, appertain to either aporia or rhetoric – as, by the way, does rumour. Reason number two for not strictly rejecting report as a source: A "good" rumour has a rational background and the scientific community ammunitions the apparatus with a variegated arsenal of arguments⁶⁹, one will always fit – if and when one is needed at all. Because the very recent doctrines on political communication and political psychology⁷⁰ teach us unisono that politics is all about people's perception and not assertions, neither those from official documents and releases nor those from political and legal scholarship. The chal-

⁶² <http://www.ombudsman.europa.eu/de/cases/correspondence.faces/en/53106/html.bookmark>

⁶³ *I consider that the Ombudsman's proactive intervention through launching the present own-initiative inquiry at this stage appears to be in the interest of all the parties involved and will in all likelihood strengthen citizens' trust in the outcome of the selection....*

⁶⁴ <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54297/html.bookmark>; addressed to DG AGRI

⁶⁵ *Laine*, Debating Civil Society : Contested Conceptualizations and Development Trajectories, in: *International Journal of Not-for-Profit Law*, 16, Sept 2014/59,

⁶⁶ *Cohen / Arato*, Civil Society and Political Theory, 1994, 425ff, *Ehrenberg*, Civil Society, 1999, 235; *Salamon / Sokolowski / List*, Global Civil Society, 2003; *Evers / Laville* (Eds), The Third Sector, 2004; *Heinrich*, Assessing and Strengthening Civil Society Worldwide, 2003; *Barber*, How to make Civil Society and Democracy Strong, in: *Giddens* (Ed.), The Global Third Way Debate, 2001 and foremost *Habermas*, Between Facts and Norms: Contribution to a Discourse of Law and Democracy, 1996, 366ff,

⁶⁷ So f. ex. *van Schendelen*, Machiavelli in Brussels : The Art of Lobbying the EU, 2007; *Persson*, Participatory Governance in the EU : Enhancing or Endangering Democracy and Efficiency, 2011

⁶⁸ *Haar / Hoedamann*, Corporate Europe Observatory, 2014

⁶⁹ see *De Schutter*, Europe in Search of its Civil Society, *European Law Journal* (2002) b, 198, 202ff or *Smismans*, The Constitutional Labelling of "the Democratic Life of the EU" , in: *Dobson / Follesdal* (Eds), Political Theory and the European Constitution, 2004, 19ff

⁷⁰ *Brader*, Campaigning for the Hearts and the Minds, 2006; *Westen*, Political Brain, 2007; *Lakoff*, The Political Mind, 2008

lenge posed by a slightly but ever decreasing standing and acceptance of the EU⁷¹ has to do with the perception of "Brussels" very own rational, let us say attitudes. For that matter - and this is also a crucial back-stage hard fact for this study – it is their right to feel and sense. In our Western democracies citizens are not obliged to give reasons for their opinions and senses. Citizens are also not obliged to reasoning as judges are, they simply vote by yes or no. In other words: citizens are entitled to address an emotional yes or no to the Union. So, what we have stated, when reflecting on the desire of the Preamble of the Lisbon Treaty, which concerns itself with enhancing legitimacy and to this end has introduced participation rights: we must not forget for a single moment that this Lisbon consideration is the core parameter for this study and its intrinsic objective. Everything revolves around one key question: is participatory democracy and are the dialogues in particular of such outreach, notoriety, essence, quality and nature that would allow Europeans to be more trusting and thus accept the Union as being their Union? Or in other words, do the dialogues impact the European citizenry to leverage the Union more legitimacy, be it input-legitimacy or output-legitimacy, yes or no? For this reason we have introduced with *Jean-Claude Juncker's* highly wise and deeply concerned famous quote: *bringing the citizens closer to Europe - or we will fail!* This challenge must also be addressed in regard to the CD. Actually, this is the core function of the CD - *bringing the citizens closer to Europe (Juncker)*. All other functions, as delivering expertise, safeguarding communication or enhancing efficiency, are highly welcome and optimising them is indicated but even these synergising optimisations have to, in the long run, support the core function of enhancing EU legitimacy.

Legitimacy from "Below"?

Scepticism is a common feature of scholarly literature⁷². Therefore our permanent crucial levelling for the probability and functionality of the PD and CD is: if and under which circumstances could they be a serious legitimacy leverage? What to do in order for European citizenry to take positive notice of the CD with the end goal of legitimacy⁷³ increase?

Here we are: we have a proactive proUnion premise and we intend to refute the rumours' destructive message. For this reason we have primarily invited the real actors and also urged them to not just indignantly refuse and launch a counter-narrative, but to show up honestly and openly with all facts that

⁷¹ EU Commission : Eurobarometer from 2010 up to 2014

⁷² See recently Liebert, U et al. (Eds), *Democratising the EU from Below? Citizenship, Civil Society and Public Sphere*, 2013

⁷³ *Sudbery*, Bridging the Legitimacy Gap in the EU : Can Civil Society Help to Bring the Union Closer to its Citizens? in *Collegium* 26, 75, 93ff; *Saurugger*, The Professionalisation of Interest Representation : a Legitimacy Problem for Civil Society in the EU?, in: *Smismans* (Ed.), *Civil Society and Legitimate European Governance* (2006); *Warleigh*, Making Citizens from the Market= NGO's and the Representation of Interest, in: *Eallamy / Castiglione / Shaw* (Eds.), *Making European Citizens : Civil Inclusion in a Transnational Context*, 2006, 128ff; *Jordan / Maloney*, *Democracy and Interest Groups : Enhancing Participation?* 2007, 191 fff; *van Deth*, The "Good European Citizen" : Congruence and Consequences of Different Point of View, in: *European Political Science*, 175, 183ff ;

could be adequate and appropriate to rebut the rumours' core content and to find a way for attracting the Europeans by participatory democracy. We understood this authentic sourcing as most appropriate way of creating accuracy and certainty.

Solid Grounds for Making the Case in Sight?

More trustworthy external indicators than simply hearsay and rumour are available, indeed, but even they are laying low. To intensify the lecturers' attention to the "fundamentals", a short preview on an example that we shall later focus on more intensely: The most recent survey on CD/PD, the "*Evaluation of DG TRADE's Civil Society Dialogue*"⁷⁴, delivers an unprecedented amount of notes on how to make the dialogue more "efficient" - particularly for the DG Trade. In respect to our intrinsic fundamental requests it contends itself with call backs and re-questions further follow-up investigations. So, even when making a short reference to Art 11 and an even shorter one to the Lisbon Treaty, the case-making and real constitutional core desideration has not been on the "radar". Unfortunately, there is no reference to the constitutional "dignity" of the participatory democracy and civil dialogue. Even though an outstanding study per se, it is perfectly done for operational reasons but not for strategic reasons. Its overall "evaluation" is done in a business-consultant feasibility study style. Note: CD is not a "business"; hopefully not. The EU institutions / Commission are not an enterprise; hopefully not. And Civil Society is neither a customer nor a client; hopefully not. Concerning the corporate culture and corporate goals, it is recommended that DG Trade finds a self-commitment, to which end "its" dialogue should become dedicated, whether it should be rather a knowledge tank or an appeasement trust or something else. *Coffey-Deloitte*, is the "constitution" making the desideration and **not** DG Trade. It is the Lisbon Treaty setting the overarching goal for the dialogues under Art 11 TEU, and not some efficiency, efficacy and effectivity doctrines; this would be the wrong premise. CD is literally (!) about "principles of democracy"(sic)⁷⁵ and about the fundamental purpose, namely, to enhance legitimacy, which then again intrinsically means *to bring the Europeans closer to **their** union* (Juncker). It is the *Coffey* criticism that DG Trade should replace its vague political considerations by strong (business) "objectives" that must be criticised. Rightly so, DG Trade is on the right political way.

As long as we have no in-depth studies based on in-depth interviews and real honest, true and authentic self-evaluations that must also be mutually and unanimously consented by the real actors **and** the citizens and as long as we have no such consensuses (which therefore rightly so can be the only source of and for further interpretations) we are no nearer to the "truth". Actually, there is, as is usual in democracies, only one "final" proof: the sovereigns, meaning electorates vote. In our case, when

⁷⁴ *Coffey International Development together with Deloitte*, Final Report of July, 2bth 2014, Luxembourg 2014

⁷⁵ Lisbon Treaty, Headline of Art 8

Brussel's efforts of citizens inclusion would have led to a significant increase of legitimacy, which is measured in the valuta of enhanced acceptance. We must continue with puzzle-like method until we can come asymptotically to a likely objective consented solid common (or dissented) conviction; that is why we use - despite deeply respecting the existing sources of knowledge and awareness - an empirical design and let the involved speak out clearly, without guiding them except for contesting the constitutional dimension and awareness of the "fundamentals". Because one fact is clear and that is also one of our core objectives: due to the crucial importance of a successful CD there is a serious need to identify the real actors and the factors for success - or mishaps, strictly evaluating in the light of legitimacy leverage and not in the light of secondary issues like efficiency or costs.

In order to start with a reference to authentic fact finding, we must mention an attempt to sit almost all considered CD "relatives" around one table. The *Austrian Institute for European Law and Policy*⁷⁶ organised and carried out a series of initial joint workshops in Brussels throughout 2012, which was later published in the conference report "Open Dialogue"⁷⁷. Invited were representatives from nearly every sector that generally some form of a connection with CD, foremost the CD driving force EESC and of course, all CD relevant "institutions", but also including authorities like the European Ombudsman or the Committee of the Regions, COR. Even dialogue-averse entities were invited, as the Commission des Évêques de la Communauté Européenne, COMECE, the European Bishops Conference and many others that are not genuine CD-actors but stakeholders nevertheless.

1. Mandate Description and Scope

i. The Mandate - Ascertaining the Status Quo

The contracted mandate of this study is quite extensive and capacious: *This study shall make a clear picture of the CD situation in order to identify **what exists**, by underlining the patterns and recurring elements. It shall thus fill the present gap in knowledge in the EU Commission/ DG's which lack a coherent and comprehensive view of what has so far been put in place. The study is supposed to provide a more complete overall assessment of the results achieved, the tangible impact on the legislative process, the intervening unexpected developments, the problems encountered, the shortcomings and incongruities noted, while lastly identifying the elements required to ensure a more appropriate and wider participation. The study should also assess the actual effectiveness and scope of the current system of structured cooperation with civil society, and consider ways of making it more effective. It should also consider good practices that could be put forward and how to develop them further. As far as possible, the study will further assess how and to what extent this considerable body of work is*

⁷⁶ www.legalpolicy.eu. This research institute is born by an association built by the Austrian Federal Chancellery, the Austrian Federal Ministry for Science, Research and Economy, the University of Graz, the University of Salzburg, the State of Styria. It is tri-located in Salzburg, Edmundsburg, Vienna, Hofburg and Graz, Resowi-Center.

⁷⁷ published in Pichler / Balthasar (Eds), Open Dialogue, 2012

known and perceived outside the circles concerned, and how it contributes to broadening democratic participation and increasing support for the European project and thus to the shaping of a European public space.

The core means of the empirical fundament of this study is a standardized questionnaire which is to be completed with required information and complimentary comments by the interrogated DGs and, as far as possible and accessible, CSO's and RA's in cooperation with DG's. The study will be carried-out in a spirit of intellectual honesty and primarily with the end to enrich the institutions with reflective awareness and knowledge, all in order to support the *Lisbon Treaty's*⁷⁸ consideration of increasing EU's legitimacy.

ii. The Limits in Law and Democratic Potential

First, there was an imminent intrinsic limit for the outcomes of this study and this is a subjective one, i.e. the appearance of the actors. As a prominent book title "*De-Mystification of Participatory Democracy*"⁷⁹ signals, there exists a factual reality that calls for caution. Potential factual hurdles and hindrances can be caused by the professional strategic habits of the "players" by showing up with diplomatic answers, which can be biased by subjective impressions. Mutually diverse perceptions of the reality of the CD can raise challenges and uncertainties for an appropriate interpretation. These "risks" are highly substantial, as authentically documented in our aforementioned "Open Dialogue"; diverse positions can sometimes not be brought to a common lowest denominator without conclusively deforming the reality. The crucial precondition is that the only entities that could assure solid and valid empirical evidence are prominently the EU Commission respectively, as well as the Directorate Generals and the CSO's & RA's that are participating in the CD. Also CSO's that were not admitted due to illegibility, could also be a valuable information source of the "truth", but how to come to a representative selection? All depends on the intellectual honesty and open-mindedness and cooperation of all of the actors. This study could therefore never be better than the input information it is initially given.

Another limit of this study is an objective one, namely the selection of the dialoguing institutions. By concepts of the Union Treaty PD, in general and CDs in special belong to any of the institutions, except for the ECI under Art 11 (4) TEU and the CP under Art 11 (3) TEU, which are solely addressed to the EU Commission. Despite this wide responsibility, it is the EU Commission that runs the CD despite whatever kind of dialogue the other institutions carry-out, we cannot honestly talk of a "civil dialogue" as is designed under Art 11 (1) and (2) TEU. Nevertheless, we did contact some institutions

⁷⁸ Preamble: "*desiring (...) to enhancing the .. democratic legitimacy...*"

⁷⁹ *Kohler-Koch / Quirkat (Eds)* , subtitle: EU Governance and Civil Society, 2013; see Fn ...

in addition to the key player, the EU Commission. Committedly we did not invite to the recently referred workshops the European Court of Justice, the European Council nor the Court of Auditors - and this approach will be continued in this study. Independently from the hard fact that in none of these parts of the institutions is there CD, we do not raise the question as to why this is so or how to change it. We refrain from doing so for good reasons: Honestly, who would see citizens or civil society's participation as of any use for the highly professional objectivising task of the Court of Auditors and Central Bank⁸⁰ as there is no space for democratic or participatory co-ordination. Furthermore, who would think in all seriousness of favouring the Prime Ministers of the MS in the European Council with assistance of civil society organisations? The consensus finding process in the European Council is nearly a mission impossible as it is set-up now; participatory democracy could not ease that mission. Finally, who would seriously favour a civil society "consultancy" for making the European Highest Court more just by way of lay assistance?⁸¹ One could of course find arguments for application of lay advice and participation structures even in these cases and circumstances. However, the smallest sense of proportion should allow for the realization that this is not much more than an intellectual game of fiddling-around. Since gamification is not currently on our agenda, we skipped over this segment of the institutions, without giving further long winding explanations.

Sources for analyses in general and in particular for the design of the questionnaire and for better understanding the analysis of the legal and procedural regimes are manifold, but one premise appears to be evident - *It's all about Politics*.

iii. Introductory Explanations on "What Exists"

Our core instrument to track the perceived reality of PD and CD in action will be an in-depth Questionnaire. To match the right issues and topics requires an all-round access. There are manifold sources and factors that make the overall-reality, "what exists" consist of many "what exists". There are

- law related foundations and implementations in front of all other bases. But law per se does not create reality, there are several impacts and biases that make "the reality" in the end, as to
- very different points of view, which indeed exist
- very different and highly volitive expectations, which also truly rule and are in so far "what exists"

⁸⁰ see *Mendes*, CMLR 2011, 1869, questioning whether a "restrictive or corrective interpretation" should apply even to "are- as such as the common foreign and security policy or the budgetary policy of the Union."

⁸¹ so already *Lopez*, The Lisbon Treaty's provisions on democratic principles: a legal framework for participatory democracy, *European Public Law* 2010, 123ff, 132, wondered "how the Court of Justice, that exercises its jurisdiction in accordance to the principles of independence and impartiality, should consider the arguments provided by civil society".

- perceptions as they influence the implementation of the constitutional orders more than one would suppose, because, as mentioned, there is much constitutional leeway for interpretation of how to implement
- systemic barriers and hindrances as limits by administrative "circumstances", which also exist
- subjective attitudes and habits which rule PD and CD as a matter of fact
- this means that it is necessary to focus on
- *legal documents* primarily, but as well on
- *genesis* - which we'll do then - as some imprints can be found, which stem from the pre-Lisbon era and which unconsciously impact the habits. One should keep in mind that key players in the apparatus, primarily civil servants but some politicians as well - originate from pre-Lisbon times and do their jobs following inherent routines. Routines, or *red tape*, are mostly deeply internalised and somehow resistant against political turns. In German there is a saying that best illustrates this point: *I have seen so many ministers come and go ...*
- *environment* - HCD and VCD are not lone standing instruments, as there is an overall constitutional architecture. This indicates an overview on the other instruments of PD and how they should be handled, because it is highly unlikely that mainstream attitudes should change from one particular instrument to another.
- *authentic overall evaluations* - as the announced Brussels' workshops, *Open Dialogue*, results delivered by the CD stakeholders
- *studies* - as aforementioned, analysing the CD in DG Trade, which we present and evaluate in chapter of its own, because of its benchmark setting for several questions in our questionnaire
- *overall report on a "Joint Seminar on Civil Dialogue under Art 11(2) TEU"* - as held amongst high-ranking representatives of DG's, which offers an overview on the - consented - reality of VCD and therefore justifies a particular chapter
- *literature in general* - which mirrors all the heterogeneity and uncertainties around the PD and CD, its function, its promises, deriving in particular from
- *political sciences and sociology* - which courageously incline to open Pandora's box but can not rule as a genie when out of the bottle, and therefore we use this source as integral seismograph but do not dedicate to it a separate chapter, as well as from
- *legal scholarship* – which is usually solid ground for explaining the factual limits, also tending to believe in their own "lawyers' self-created reality", *den juristskapte verkligheten*⁸², which in our case is not so, as this body is somewhat divided. Because of the lack of concrete judicature they tend to make presumptions. But these are worth to be presented in a particular chapter, because they analyse and focus on the normative essentials for future potential regulation or judicature.

⁸² so the legal-sociological - bit sardonic - valuation of *Gravers*

All these points taken altogether build the fundament of the investigation as well of the final evaluation. In addition to specific references, key legal sources are incorporated in our Mapping (Annex).

2. The PreLisbon Roots of the Current Legal Regime

The CD had a *praeter legem* embryonic life for decades before the Union Treaty and this was then called the *structured civil dialogue* (SCD)⁸³. It was born by usage and was installed by political acumen than by a formal obligation. The Union Treaties since Amsterdam recommended⁸⁴ that the institutions may make use of this communication and pacification strategy. So, this invitation by a vague "may" was followed by some entities of the institutions but the major part of them did not much care for that. In other words: when seen as opportunity to deal or at all to bargain with civil interest groups they did, but never sensing this instrument as obligatory. It was an ornament, and rightly so. In societies based on the *Rechtsstaatlichkeitsprinzip and legality principle*, somewhat synonymously but not truly identical to the aka *rule of law*, a "may" is no more than a *may* and lack of clear commanding implementation regulation caused a perception of a voluntary something.

Then came the "*Convention on the Future of the EU*". And then, too, came the project of the "*Constitution Treaty*"⁸⁵, with its strong political commitment⁸⁶ to attract the Europeans for the Union by giving them participation rights and deliberative (semi-) direct democratic instruments. It served as a landmark in terms of political history, a benchmark for the protagonists of collaborative democracy and an unseen challenge for the apparatus. As a result, the (then defeated) "*Treaty Establishing a Constitution for Europe*" trumpeted a "Principle of Participatory Democracy" (Art I 47). After the Constitution Treaty, the (semi-) direct democracy hype turned out to be a bit less "hot". The Brussels' and Union's former *communis opinio* on favouring (semi-) direct democracy, in other words participatory democracy appears to have dissipated along with the disappearance of the high-flying idea of a Constitution.

⁸³ See instead of lots of secondary literature the *Sigmund-Report*, adopted September, 22, 1999; CES 851/1999 D/GW. This is the authentic source, since *Sigmund*, EESC president 2005 - 2007, was "on deck" long time before and then member of the "Convention of the Future of the EU" and, as another contemporary witness, Malosse, the incumbent president of the EESC, recently stated, "*Sigmund is the 'mother of Art 11 TEU*" (online statement Dec 11th, 2014; see www.eesc.europa.eu/myeurope) As is true, that every victory has many fathers, it is indicated to add, that also *Lamassoure / Mayer / Häfner* et al, most of them coming from the IRI - Initiative&Referendum Institut - have been pushy and savvy "lobbyists" of the constitutionalisation of participatory democracy.

⁸⁴ see above

⁸⁵ This "*Treaty establishing a Constitution for Europe*" (TCE); Official Journal EU: 16st December 2004, Vo. 47 C 310, was the product of a joint assembly, so called Constitutional Convention. This Treaty was already ratified by a majority of EU Members States when a French and a Dutch referendum brought this process to a halt in 2006

⁸⁶ see for the short history of this Art I 47, in particular I 47 (4) *Pichler*, *Revolt of the Stars*, 3ss and *Pichler*, *The European Citizens' Initiative*, 12ss in: *Pichler* (Ed.), *We Change Europe. The European Citizen Initiative - Art 11 (4) TEUnv*, 2008

Nevertheless, the participation arts in the Lisbon-architecture and in Union Treaty's Art 11 are substantially the same provisions with perfectly identical wording as those former ornate formal "Principles". Thus, from a legal-sociological perspective, we suggest to suppose that there is still the "silent" concept of a principle of participatory democracy in the actual version of the Union Treaty as well, though not expressively called by this name. The Lisbon architecture has wisely organised the Civil Dialogue under Art 11 TEU into two dialogues: One which is supposed to be carried out, so to say, on equal footing between *citizens* and citizens and their own *representative associations*. Let us assume, this is the pre-dialogue for any further dialogue, the issues and mission finding assembly, could maybe become the future recruiting arena for the future delegates to the next to present dialogue: The other form of dialogue is the one between *representative associations and civil society* and the institutions. The former is called Horizontal Civil Dialogue and the latter Vertical Civil Dialogue. How come? More research was necessary to find out the origin and the originator of this fateful semantic dichotomy only to establish that it was solely *Anne-Marie Sigmund* who authoritatively invented this terminology in her report. As a tutor of the citizens one owes the effort to make an objection. To call the Art 11(1) TEU dialogue, citizens to citizens, "horizontal" makes sense. However, calling (or framing as) the dialogue between civil society and the institutions "vertical" cannot be accepted, as this is a *contradictio in adjecto*: Either we speak of a dialogue, meaning intrinsically a communication in mutual respect and without any bias of a hierarchy. Or we talk of an asymmetric relation. In that case could the qualification as "vertical" be truly adequate? Better not to talk of dialogue and for that matter, there is neither the categorisation of the Union Treaty nor is there any indication that the Union Treaty could have understood this in such a way.

Beyond terminological philosophies we need to look for the reality of implementation. One might expect that a sense of personal responsibility for the constitutional fate of this Union is a driving factor in favour of the constitution's ideal. Let us conclude with our refrain: However, the Lisbon Treaty ordered the amending Union Treaty in very clear words to enshrine "*Title II: Provisions on Democratic Principles*"⁸⁷. Let us try to find out later what principles are worth and first focus on the environment of these two orders of having an apparently obligatory dialogue; we'll also come back to the nature and legal status of the dialogues.

⁸⁷ covering Art 8, which is now Art 9 TEU; Art 8 A, which is now Art 10 TEU and Art 8 B, which is now our main focus, Art 11 TEU

3. The Collateral Environment - the Wider Perspective on Participatory Democracy⁸⁸

An overview - for a more detailed evaluation see the annexed Mapping

<p>Art 10.3 TEU / Art 15 TFEU</p> <p>“Citizen-Centered Democracy”</p> <p>Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizens</p>	<p>Art 11.1 TEU</p> <p>“Horizontal Civil Dialogue”</p> <p>The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action</p>	<p>Art 11.2 TEU / Art 16 TFEU</p> <p>“Vertical Civil Dialogue”</p> <p>The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society</p>
<p>Art 11.3 TEU</p> <p>“Consultation Procedure”</p> <p>The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Unions actions are coherent and transparent</p>	<p>Art 11.4 TEU</p> <p>“European Citizens’ Initiative”</p> <p>(...) one million (...) of (7) Member States may take the initiative of inviting the EC, within the framework of its powers, to submit (...) where citizens consider ...to implement Treaties</p>	<p>Art 17.3 TFEU</p> <p>“Dialogue of Values”</p> <p>Recognising their identity and ... contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations</p>
<p>Art 24 TFEU / Art 44 CFR</p> <p>“Petition Right”</p> <p>Every citizen shall have the right to petition the European Parliament ...</p>	<p>Art 24 TFEU / Art 43 CFR</p> <p>“Right to apply to Ombudsman”</p> <p>Every citizen shall have the right to apply/refer to the Ombudsman ...</p>	

⁸⁸ see here and in general in the next parts *Pichler*, Legal Political-Sociological Reflections on the Participatory Democracy “Principle” in the European Union Treaty, in: *Ketscher* et al., *Velferd og rettferd*. FS Kjønstad, 2013, 463

II. Essentials for the Study and for the Questionnaire

In the case of both horizontal and vertical civil dialogue, a re-appraisal of the first years of implementation will reveal not only the different perceptions of these two instruments but also whether they passed from the realm of legal and political theory into legal reality.

It has already been suggested to not overdo conclusions on reality for the time being, especially on new or renewed chapters. The "professional Brussels" backstage rumour argues that most of what appears to be new is not, and that which is really new, like the European Citizens' Initiative under Art 11(4) TEU is nothing which will call in a new era. We agree. Brussels' rumour continues that deliberation is oxymoron and refers rightly so to the disunity on the nature of deliberation in *action* in literature.⁸⁹ with the average citizens' body⁹⁰ no being truly and honestly eager to develop a lively participation for the sake of democratising the EU except when having an interest.⁹¹ From this perspective, this democratisation is a welcome argument for another sort of lobbyism that does not prove its own democratic legitimisation. If there is deliberation, then it is far away from *Habermas* credo of being coercion-free. Thus the common perception of stakeholders and professionals is that the Constitution and its Art 11 do not make any significant difference compared to the present reality. Again: Right or wrong?

1. Taking into Account the Implementer's Chemistry and Climate

A politologist, policy adviser and one of the most outstanding "nation brand" experts, *Simon Anholt*⁹² stated as keynote speaker invited by and in the European Parliament in 2011: "*The problem with the politicians and the civil servants as a breed is this: They deal every day with incredibly serious matters (...) but they make the fatal error of believing, that because their job is so serious they also have to be boring (...) because it's the boring policies that fail to grasp imagination, fail to communicate themselves and consequently fail to do any good (...) You then have to use hard power rather than soft power to make them work. So, imagination in policy making is critical. For the European Union to*

⁸⁹ See f. ex. *Curtin*, 'Civil Society' and the European Union, 1999, 202ff or *Cohen and Sabel*, Directly-Deliberative Polyarchy, in: *ELJ* (193,97) 313; *Nieuwenburg*, Democratic Life in Europolis, in *Kinneging* (Ed), *Rethinking Europe's Constitution*, 2007, 165; *Saurugger*, Interest Groups and Democracy in the European Union, 173ff

⁹⁰ see only contributions in *Smismans* (Ed), *Civil Society and Legitimate European Governance*, 2006 or *Kohler-Koch*, *The Three Worlds of European Civil Society*, 50ff

⁹¹ see *Saurugger*, Interest Groups and Democracy in the European Union' in: *Beyers et al* (eds), *Interest Group Politics in Europe: Lessons from EU Studies and Comparative Politics*, 2010; *Justin Greenwood*, Interest Representation in the European Union, 2011; *Hendriks*, Integrated Deliberation: Reconciling Civil Society's Dual Role in Deliberative Democracy, in: *Political Studies*, 54, 486ff, *Eder*, *The Making of a European Civil Society: "Imagined", "Practised" and "Staged"* (2009) in *Policy and Society*, 28, 23ff ;

⁹² link <https://www.youtube.com/watch?v=baxr9Ie0zqg>

becoming imaginative in its policy making would require structural change, but (...) governments deliberately exclude imagination. They encourage their employees that they should leave their hearts and their heads, the only organs that make us a special species in the refrigerators at home when they coming to work."⁹³

This professional evaluation should be kept in mind when reflecting on the climate that rules as well as the reality of conceptualisation of the dialogue.

i. The Need for Imagination

The Union faces a body of executives who are top professionals. Occasional emotional derailings like *Lady Ashton's "I love Europe"*, and the new President of the EU Commission *Jean-Claude Juncker's* initially cited statement none withstanding. Maybe they are supposed to be on the opposite end of the type of spectrum which *Jeremy Rifkin* challenges in his *Empathic Civilisation*⁹⁴. On the one hand it is a very distinguished body of highly educated and highly experienced civil servants, but on the other hand, it is a corps that feels content in showing a certain distance (including each of the double-meanings) to its own object. Although "professionals" are generally used to being in that mood namely being professionally "biased", this attitude appears to be problematic in any context of political issues. But, of course, we could as easily defend this professional habit. The tremendous success of the EU appears as the result of a rather silent, sometimes stormy, although most of the times rather boring but highly persistent and tenacious administrative, step-by-step, straight-on, labouring along and muddling through procedure. Enthusiasm - in "their" professional view - is not the coherent principle of the EU which explains why the apparatus thinks people better keep out of "their" business. Once again: Right or wrong?

Wrong. This should be the spontaneous answer of everybody who sides with the intrinsic "Rifkin mood" of *empathic science*⁹⁵ or of an *empathic civilisation*⁹⁶ or with *Anholts'* analyses from a rather result-related perspective. Not only that, but also for a legal historian who knows that times are always changing it appears as indicated to come to a "wrong": sometimes for bad reasons and with a bitter end, yes, but only sometimes. Thus we also try to view these participative hopes as being in transition at the time from the direct democracy approach to the *Noveck approach*, i.e. collaborative, cooperative democracy approach⁹⁷, mostly, and in accordance with the laws of evolution, in transition toward improvement. But such an "empathic" view on evaluation could also be blamed as just another result of another professional deviance, in our case here, that of a legal historian who predicts that nearly every idea that was in line with evolution had to break through sooner or later. Furthermore,

⁹³ *ibid* 29: 39 - 30:52

⁹⁴ 2009

⁹⁵ *Rifkin*, *Empathic Civilisation: An Address before the British Royal Society of Arts*, March 15th 2010 , Chapter III www.coe.int/t/dg4/.../cwe/EmpathicCIV_EN.pdf

⁹⁶ *Rifkin*, *The Empathic Civilisation*, 2009

⁹⁷ see recently *Noveck*, *Smarter Citizens, Smarter States*, 2015; also *Beth Noveck*, *Wikigovernment* 2009 and more often

self-determination, which in terms of politics is what participation means in its overarching nature - is an evolutionary and *humana conditio* self-runner. However, we have to confess here that *Wittgenstein* would not agree on predicting the future solely on historical experience.

ii. Where Best to Start with an Evaluation and a Disclosure?

As announced, it is best to skip over an in-depth reflection on the Consultation Procedure under Art 11(3) TEU, which is a typical one-way instrument without any nature of a dialogue. Let us begin with the European Citizens' Initiative, which can be viewed as having the nature of a dialogue, and then to come to our core task, the Civil Dialogues. Since the first instrument is momentarily under intense public debate as the role model of participatory democracy, it seems to pay-off to refer intensively to the fairly well-known, well-documented and long-winding public "battles", for they best show the patterns on how to deal with Participatory Democracy when being urged from bottom-up.

Having come into force and into action on April 1st of this year 2012, the public's focus is, therefore, on this first transnational "tangible" tool. Often seen as direct democratic tool, it in actual fact is not. The latter ones are still under silent but serious construction at the moment and hopefully this study can contribute to enhance and enrich the new philosophy and follow-up architecture of, at least, the VCD.

Referring to a broad emanation⁹⁸ we conclude: This instrument did not really work out in increasing legitimacy, because of - to put it short and sweetly - lack of passion on the EU Commission's side and slightly averse habits due to neglecting the potential win-win option and not realising the potential of a new communication channel.

2. The Horizontal Civil Dialogue at First and Final Glance

i. Communication's a one-way nature

By reasons of vague feelings that the Union should carry-out dialogues in general, we can see numerous endeavours to invite citizens and civil society organisations to make up their minds - here and there: *Open Days*, as annually carried-out by the Committee of the Regions; *Citizens Day* (*Civil Society Days*; *ECI Days*) as organised by the Economic and Social Committee, the *Citizens Agora*, and other great efforts as offered by the European Parliament, are all highly welcome means of inclining the European citizenry to improve positive empathy for their Union. Already the title and the question

⁹⁸ *Pichler*, Legal Political-Sociological Reflections on the Participatory Democracy "Principle" in the European Union Treaty, in: *Ketscher et al.*, Velferd og rettferd. FS Kjønsstad, 2013, 463ff

mark behind the highly sceptic book "*Europäische Öffentlichkeit durch Öffentlichkeitsarbeit*"⁹⁹? (*A European Public Sphere by Public Marketing?*) summarises and signalises the entire result: communicating, marketing or even branding attempts - see again the harsh EU related evaluation of the foremost prominent European branding expert, *Simon Anholt*¹⁰⁰ - are standard, self-evident, necessary and welcome activities, of course, but not an appropriate means to empower EU citizens.

Despite the temptation to analyse these citizen related events in more depth, we commit ourselves to refrain from such an act: The Union Treaty has implemented a very specific connotation as to what a dialogue in the constitutional interpretation is about - and all that does not fit into this legally denoted pattern, even dialogue in a very unspecific meaning. Yet it is not a dialogue under the constitution's authentic interpretation. Therefore we refuse to entrap ourselves with subsidiary measurements and skip over those activities in order to not dilute the serious content of the dialogues as are ordered by Art 11(1) and (2) Union Treaty.

ii. *The PD Orphan - Lack of Trust in Citizen's Benevolence*

The HCD under Art 11 (1) TEU, is just another orphan, if not alien. Let us explain these harsh comparisons. We have no indication yet that there has been any attempt to install or to motivate or to support this instrument - except for the newly started project of the EESC, "*My Europe....Tomorrow*", which could rightly be seen as a surrogate fulfilment of the Art 11 (1) TEU promises, but introduced by the not-ordered entity, since the EESC is not qualified as an "institution". Therefore we incline to see the EESC in the function of surrogate motherhood. We'll come back to this idea shortly.

Why is there so absolutely no engagement from the constitutional addressees?

Honestly spoken, in respect to the intellectual "game", the argumentation was quite surprisingly creative and challenging, as it was not that easy to leverage the bastion of hard core professionalism: First, we imposed the argument that an order by the TEU is intrinsically to be followed by whoever could be competent. Rejection: constitutions sometimes ornate themselves with programmes and solemn proclamations, suggesting objectives rather than binding law. Replica: This could have been an applicable exception when earlier in the Treaties there was talk about a "may". Now that we face a clear command by a rigid "shall" there is no longer space for sophisticated interpretation. Triplica: Well then, but without any implementation clause even the "shall" indication is just part of a classic *lex imperfecta*. Proof was offered in the ECI Art 11(4) TEU, where just eight (8!) lines above the Art 11(1) TEU, the legislator imposed an enforcement clause for the Commission. But he omitted an analogy just a couple of lines before in 11 (2) TEU. Should this be explained as an act of oblivion? This would

⁹⁹ so the book-title of *Brüggemann*, 2008

¹⁰⁰ <https://www.youtube.com/watch?v=baxr9Ie0zqg>

be a dishonourable misreading of the constitution. The only appropriate reading could be, that this lack is without any doubt an indicator that there was simply no political consensus for either an enhanced enforcement or an implementation at all. Quadruplica: An order like Art 11(1) TEU's "by appropriate means" clause indicates a parameter for implementation which even with use of pettifoggery can never be interpreted as "by no means", finally led to surrender regarding the existence of a fundamental obligation. But there was no end of claim and action: The argumentation now changed to the case of the insoluble opaque competence situation as to who'd be primarily in charge of the constitutional command. The amendatory argument was that if one would ever be able to construe any "privilege" for any one of the institutions, then the Commission would be last one in line. This even more so with regard to the particular cases behind the motives of and for the HCD: Because implementing a new policy is a very political issue and the Commission instead, is a non-political, executive body. So either the Parliament or the Council would have charge or indeed, the European Council, if the dialogue scheme were to be subject to a shift of paradigm.

iii. *The EESC's "My Europe ... Tomorrow!" Project*

Henri Malosse, the attendant President of the EESC, has announced a next "curtain up" and introduced his favourite project "*My Europe ... Tomorrow!*" that tries to get along with a youth centred HCD, primarily online-based and therefore put on a citizens-participation software¹⁰¹.

Things turned out very promisingly even though there is a significant investment to be done on the entire structure, and in particular to the overdue "launching" and "marketing". A serious doubt was addressed to the topic of "ownership" and whether such a portal should be run by an official EU entity or whether outsourcing would be more favourable.

We do know nothing on whether the EU institutions are pleased with this pioneer landmark in CD's yet stillborn history, but we have at least seen no objections so far.

Allow me to adding that it was once again the *Austrian Institute for European Law and Policy*, together with the University of Graz¹⁰², which took a leading role in the contesting, improvement and further development of this portal. Numerous suggestions were addressed in regards to the following adaptation "needs":

¹⁰¹ <http://eesc.europe.eu/myeurope>

¹⁰² Joint Seminar, EESC-AIELP-UNI Graz, Prof. Johannes W. Pichler, Youth and Working Life. The "*My Europe ... tomorrow!*", University of Graz, 10/11 Dec 2014

i. a mission statement and a statement on the "customer use" that indicates whether and if, how far the ideas, suggestions, concerns, recommendations coming from bottom up are of any relevance for "Brussels'" policies

ii. a forecast what the investment will be on

iii. strategic proclamation on operational cooperation between citizens and EESC: "participants, the EESC is your embassy"; members - either of the EESC or of the EU Parliament - should "adopt" an issue from bottom up and act as a "communicator" between a tool group and "Brussels'" operational inputs for bringing alive a civil dialogue and on generating critical mass; regular report on the achievements of the myeuropetomorrow-tool

iv. incentives to be set out, because one way or the other it must pay off: moral incentives f. ex. group-wise delegated heads of "senators"; awarding the best idea and/ or best issue based consultancy to the EESC; one head per issue internally delegated to be invited to the EESC "Citizens Day" - entitled to give a statement; maybe installing an internal EESC contact point "Citizens Desk"; qualitative open innovation - crowd sourcing

v. the EESC win situation was carefully analysed: in addition to the inner-legitimate dignity by delegation to the EESC its members can generate a citizens driven direct "legitimacy" which is a very rare case; new "issues" and crowd sourcing coming from bottom up could enrich the EESC expertise and reports; the EESC could argue to be the only one entity in Brussels that generates a knowledge base and awareness base sourced by the "wisdom of the crowd".

vi. Balance: There is a certain readiness and willingness of young citizens to cooperate with the official "Brussels". But, it seems to become a long way still from "earning" trust and confidence. People want to see what "Brussels" comes up with in return for their participatory efforts.

For further in-depth innovative ambitions of the and within the EESC towards a significant overall improvement of a "Citizens Participation Tool" for carrying-out a pan-Europeanwide HCD there are to be noted some strict and severe recommendations, but this we'll do when coming to our own suggestions of a "Vertical-Dialogue-Online-Tool" in the Conclusion and Recommendation Part in the very end.

3. The Vertical Civil Dialogue - The Constitutional Promise and its Perceived Reality

In order to attract attention to the complex figure-based empirical part there should first be a rather sensitising chapter, kind of an interim preliminary result. Four overall pictures may offer a coherent outlook on the wider panorama right at the beginning. Note, the "inter-relational" aspect is much more

crucial than widely recognized. Rationales are rationales, but psychology is a hard factor. This statement is well documented in politological literature as well.

Only one of these "snapshots" do we offer here, because it is necessary to pre-talk about possible misunderstandings of what the dialogue should be about. Three others are to be presented as a bundle in the Annex, as they could be perceived as too predefining the focus and the lectors' benevolence. Hypocritical views of serious insiders, of high-ranking EU civil servants, of politicians and of DG's top executives, dedicated in semi-public conferences and in closed seminars, are very detailed and far reaching. The third separate complex, coming from legal scholarship appears to be too segmentary to enrich the general ductus, but we refer to some positions in the appropriate passages.

i. *The Coffey-Deloitte VCD Screening Model¹⁰³ - A Solitaire Benchmark Despite Serious Misconceptions*

As stressed in the introduction, the *Coffey survey* is one of the most recent and most prominent landmark studies on the VCD. Therefore we shall welcome and use it, as it allows us to have a benchmark instrument in order to continue on solid empirical data grounds. However, as also noted, there are some severe reluctances to restrict ourselves to this questionnaire design, due to a too limited and apparently (by contracting) self-imposed *Coffey* scope. This is acceptable in regard to the microscopic investigation, but to come to systemic recommendations without having a macroscopic and teleological ambition must be criticized. This in particular even more so, as the study refers to the fundamental legal documents on the sense and aims of the CD but not making those to the central parameter, and instead going along its own research and questioning design that is rather influenced by the typical canon of business consultancies' market surveys and feasibility studies.

ii. *Setting Democracy Values at Market Price*

To measure the "quality" of the civil dialogue nearly exclusively along criteria of the "*effectiveness of the current implementation procedures*", of the "*efficiency of its organisations, use of resources, and monitoring mechanisms*", to "*make recommendations with a view to improving and renewing the approach and process*" and to "*present (...) conclusions regarding the CSD's performance...*"¹⁰⁴ seems to cause a too narrow minded approach.

iii. *Identifying the Wrong Rule Maker*

Consequently to the limited scope, the study must have come so prominently to fundamentally wrong recommendations, when it recommends that: "*DG Trade needs to define what it wants to achieve with*

¹⁰³ *Coffey International Development together with Deloitte*, Final Report of July, 2bth 2014, Luxembourg 2014

¹⁰⁴ *ibid* 6s

the Civil Society Dialogue."¹⁰⁵ This crucial definition and causa prima is, as shown, already given by the Lisbon Treaty, namely: "*Desiring*"(!) enhancing "... *democratic legitimacy of the Union*". The question should have been: Did DG Trade succeed in using its CD to make Europeans aware of its efforts in favour of the European citizenry? Have the people noticed that DG Trade has invited them to become a welcome partner to it? If DG Trade had not followed this regime before, it could well have, as attested, the most improved VCD in terms of comparison with the practices of other DG's, but could still have failed the solemn overarching goal anyway.

It makes less sense, when the study so soundly states, that the CSD (meaning in our case VCD) "*fulfils its mandate as described in the Lisbon Treaty*"¹⁰⁶, but *current aspirations/goals do not match the reality*", when not explaining how the study reads the Lisbon Treaty's mandate. Nor is there an in-depth interpretation what the "current aspirations" as seen in the Lisbon light are about or why these "do not match the reality". The path to the recommendation remains cryptic, nr 2, that "*DG Trade needs to reset aspirations for CSD in-line with its (!) strategic intent*".¹⁰⁷ This is *venire contra factum proprium*, when first ignoring the fact that the Treaties push a state philosophical core value, namely "*principles of democracy*" but then ordering the contractor to reset the given objective along "*its own intent*". Except for the recommendations to use the CSD as a means to create visibility of EU trade and to see the civil dialogue as a means to generate inputs to policy¹⁰⁸ the study misses the greater political overview.

The teleological purposes and motives of the civil dialogue cannot in fact be found in either Arts 11 (1) and (2) TEU or in the cited Art 8b (1) and (2) Lisbon Treaty. They merely tell us what the final order is. Only the Preamble of the Treaty of Lisbon speaks out, *desiringly*, about the motives and intentions and that is where we prominently find the democratic legitimacy motive.

iv. *Legitimacy - A Business Case?*

Nevertheless, let us summarise the efforts and balance the achievements, as is the study a very good parameter for secondary level issues - in particular for clarifying what the factual and pragmatic ruling "objectives" on a lower level are for now. These obviously aren't clear either. Nor does it become clear whether one should actually talk about "objectives", or what they basically are about, when Coffey recommends¹⁰⁹, that "*DG Trade needs to set clear and specific objectives from the CSD process and CSD meetings*" and continues that these "objectives"(?) should be in-line with being "specif-

¹⁰⁵ *ibid* 8

¹⁰⁶ annotation off records: when referring to "Art 11(1&2)" it is also wrong to refer to the Lisbon Treaty. Art 11 refers to the Union Treaty, n.v., as amended by the Lisbon Treaty; the Lisbon Treaty itself ends with Art 7. The cit content finds in Art 8b para 1 and para 2 of the amending to the Treaty on Union (...)

¹⁰⁷ *ibid* 7

¹⁰⁸ *ibid* 9

¹⁰⁹ Recommendation nr.3, 8

ic, measurable, accurate, realistic and time-bound (SMART)¹¹⁰. This cannot be deducted from the EU primary law level. There is nothing in the Lisbon Treaty, except the reference to efficiency but apparently in a higher-ranking context use, and nothing in Art 11(2) Union Treaty referring to f. ex. accuracy or measurability; the only objectivising requirements are being *open, transparent and regular* - none of these three criteria matches either directly or indirectly with the SMART "objective". Of course, the *Coffey* recommendations are indeed recommendable, when focusing on pragmatic solutions of how to carry-out the daily CD activities. Such pragmatic operational state-of-the-Art management maxims simply have no roots in the overarching goal. Democracy in general, and so also PD in particular, are about goals and can be costly - otherwise we could even make parliaments subject to business consultants' cost-benefit-analyses which could take time and can (maybe should) be non-specific but rather a philosophising generalist method. In short, democracy must not be SMART.

More to the crucial point of how the CD could become relevant for the perception of the Unions citizen-near behaviour, comes the study in its conclusions¹¹¹, when it reflects, whether DG Trade's CSD matches with the good governance principle. Then *Coffey* arrives at the paradox evaluation that DG Trade tries with its CSD to realise goals but having no objectives. And now it comes to *Coffey's* "oath of premises manifestation" as a genuine business consultancy with rare feeling about politics, political communication and also having no clue as to what the Constitutional Convention and the Lisbon spirit was about: "*Goals are broad general intentions that cannot be validated. Objectives are narrow and precise*"¹¹². Of course goals and intentions can be validated, but not with the chosen levelling methods and one must also courageously raise the bar. What else are voters doing if not validating? This is the ultimate validation of the realisation of political intentions and no one else would be more competent for this kind of validation than the final "owner", in our case the silent but real European sovereign. It is too early to congratulate DG Trade to this "mistake" for affording "luxury" goals, but if it eventually turns out that this is true then we'd rather recommend not to follow the pure economic *Coffey* SMART recommendations but to keep on with its criticised political, "objectives-free" goal-related way.

v. *Working towards the Ultimate Goal: Democracy*

However, the Union's CD is predominantly about goals, values and ways to be gone and not primarily about managerial and operational aspects. The Union can be regarded since the days of Amsterdam as a political Union and no longer as just the *European Economic Community (EEC)*, merely a single market. Remember the well-known statement of *Jacques Delors*, "*you cannot fall in love with the single market*". Sometimes *Coffey-Deloitte* scrapes past this *pars pro toto*, when reasoning, whether "*the*

¹¹⁰ *ibid* 9

¹¹¹ *ibid* 11ff

¹¹² *ibid*

*CSD in DG Trade plays a role in raising public awareness on trade issues and policies*¹¹³. This should have been the core topic of the investigation! Could the CD of the competent DG Trade communicate pan-European wide that the Union's trade is based on a stipulated fundamental premise¹¹⁴ under Art 206 TFEU to contribute, *in the common interest, to the harmonious development of world trade*? Has this message reached the Europeans in their masses, yes or no? That is the parameter of a functioning CD. Then comes, rather half-heartedly, the real important reflections, unfortunately coming to the detrimental end that *"DG does not take proactive steps to increase participation"*¹¹⁵, and that the CSD is *"not a very effective process to allow CSO's to present their ideas"*¹¹⁶, thereby indicating that this Lisbon core mandate, which *Coffey* had first explicitly attested as fulfilled and which was now revoked and in turn explicitly ascertained that it has not been fulfilled. If truly so - which one of the both actually? - then the recommendations should have come to the consequence to advise DG Trade to rearrange its CD from scratch. One could have expected from such a massive study to find bold out-of-the-box solutions, instead of suggesting internal organisational ameliorations and ruminations on the "state-of-play"¹¹⁷(sic!). Curiously, the right appropriate approach to one of the Lisbon Treaty's likely considerations though sometimes shines through, when somewhat rhetorically asking sub point 1.2.12, whether the communication of DG Trade is *"disseminated by the CSO's to their constituencies"*¹¹⁸ and if the CD attendees are the representatives or delegates of *"a wider group of interest / organisations, a type of multiplier"*¹¹⁹.

vi. *The Dialogue is either Legitimacy leveraging – Or else Superfluous*

That is the crucial as well as detrimental point, whether the CD is competing for leverage of legitimacy - or not. The constituencies out there between Finisterre and Przemysl, between Catania and Haparanda are the very ones who can only provide the Union with legitimacy, but not at all the "Brussels" corps, even when politologists eagerly debate on input and output legitimacy. This solemn goal to run for the citizens' inclusion is better expressed in Art 11(1) TEU, when speaking of the "citizen" as the true bearer of the citizen: citizen CD and lesser in Art 11(2) TEU, which refers rather to intermediaries. But what are intermediaries good for, if not being the brokers to the "customers", as they were the stakeholders of the CD organisations/associations: citizens?

What we could gratefully learn from *Coffey-Deloitte* and promptly reuse in the following sections is the following: There is a DG with a benchmark setting VCD, but things just happen, apparently. Ob-

¹¹³ *ibid* 3

¹¹⁴ *Coffey-Deloitte* refer to the old EC Treaty, Art 131; this is now Art 206 in the TFEU, Functioning Treaty. This notion is in so far of importance as it shows that *Coffey-Deloitte* appear to be influenced by the economic categories.

¹¹⁵ *ibid*, 13

¹¹⁶ *ibid*, 14

¹¹⁷ *ibid*, 13

¹¹⁸ *ibid*, 15

¹¹⁹ *ibid*

viously they happen much better than the study attests. This is due to the fact, that the premises for the screening design do not align with the overarching desires and the evaluator, making it impossible to see the forest for the trees. There was no hierarchy for questioning according to Lisbon goals, but there was orientation on self-imposed feasibility criteria. So, maybe the DG Trade is the right role model for a renewal of the CD in general, we shall see. We compared apparent role models, including DG Agri.

III. The Questionnaire and the Design of the Questionnaire - Methodology

1. The Overall Design - Primarily Referring to the Open Questions

i. Methodological Alignment

We have committedly not taken a design that only focuses on headlines. By our previous knowledge¹²⁰, particularly on substantive surveys on the subtle relation of people and the law, obedience to law and other intrinsic and psychological clues, *Rechtsakzeptanz*¹²¹, we repeatedly camouflaged some questions into indirect indicators which when combined with others, give a rather true picture when compared with direct confrontation questions.

But predominantly we must answer with a No to the self-imposed provocation, whether we went after secondary issues. We decided to let the audience find out whether this questionnaire could impact their own task or be seen as irrelevant. This could also prove to be a valuable outcome of this study for either of the participating sides. Another "No" refers to another underlying approach of the Questionnaire, namely, to attribute respect to the possible highly diverse perceptions, which is within the intrinsic nature of democracy, as we have stated above.

It could be supposed that a DG might see things differently as the "other side of the table" could, but even within "the other sides" different perceptions are likely. It is most likely that there could be very diverse or at all controversial desideration on the hidden "values" which however were not revealed:

ii. Highly Homogenous Desiderations and Considerations

Hardly coincidentally all respondents came to a similar opinion, when invited to express vague considerations:

¹²⁰ Pichler in: Pichler / Balthasar (Eds.), Open Dialogue, 2012 and Pichler / Balthasar, Open Dialogue with Citizens, in: BEPA Monthly, 64, 2013, 6

¹²¹ Pichler / Giese, Rechtsakzeptanz, 1994 and Pichler (Ed), Rechtsakzeptanz und Handlungsorientierung, 1998

79. Do you consider any other "underlying principles" like:

O: dialogue to be ruled by welfare deliberation

O: dialogue to be kept free from lobbying

O: civil society and representative associations to be representative into any respect

O: civil society and representative associations to be democratically legitimised by a "constituency"

O: civil society and representative associations to match eligibility criteria

Other (please specify)

iii. *Hidden Agenda by Open Questioning - And the Worthwhile Outcomes*

We felt obliged to open a wide array of options, which indeed can annoy and exhaust the respondent. Only by combining very diverse and at a first glance not coherent set of answers are we able to paint a picture that is not just black-and-white but lively and - as is usual in all politics - mirroring the rainbow of pluralistic worlds. We went so far that, if a respondent should have a particular vision in mind, s/he could express it by observing carefully the offered options. Not that we would claim to open the entire treasure chest. But providing this data set the scientific community and the stakeholders open an unseen chance to enforce the public debate with a bunch of interpretations transcending and maybe also falsifying our own.

That is the real reason why we made a follow up of open and closed questions. Respondent should not be able switch back when recognising that the answers to the more philosophical open files could have been perhaps been better given in the light of the detailed, structured and guiding closed part. We intended to stimulate very open expression of views, not limited to any mind-set and not restricted to the solution that is provided by the Treaties. So we put the open questions without giving any hidden incentive:

11. What do you think is the aim of the civil dialogue (as provided for by Art 11 TEU)? ...

12. What do you think is the nature of the so-called horizontal civil dialogue?...

13. What do you think is the nature of the so-called vertical civil dialogue? ...

14. What is the advantage of participatory democracy? What is added value?...

15. Where do you think this idea of a civil dialogue comes from?...

16. Could the civil dialogue produce negative effects? If so, please elaborate.

iv. *Tracing Multiple Considerations*

As for the content, we should be aware that several considerations need to be made in order to determine what the right threshold should be. The Lisbon Treaty's preamble solemnly states that its intention is to "enhance the democratic legitimacy of the Union"¹²² and further refers in chapter II to "Principles of Democracy" which again have led to the provisions of Art 11 TEU, in our particular case to Art 11(2), which orders the VCD, which is at least accepted by the DG's. But it isn't just the DG's addressees, that is why we have asked other institutions as well whether they have an engagement under Art 11 (2). This again raises another question: is the apparent affiliation with "Brussels" the only and appropriate one. Could it be that there is a consideration that the VCD is to be offered and implemented throughout the Union, what is so often stressed in literature? Or at all, is the localisation still necessary? Couldn't the dialogue become "virtualised", at least in addition to the face to face dialogues? What is the opinion about that? This led to the following investigation:

48. *What is currently the most important venue for civil dialogue(s)?*

O: Brussels

O: Cyberspace

O: Conferences throughout Europe

O: Areas especially concerned by policies

v. *Tracking a Legitimacy Providing Model*

The fact that this VCD part foresees no specific method and means of implementation opens the chance for the institutions to develop their very own ways of instrumentalisation. But, which model is to be seen as appropriate to a best practice of transforming the overarching goal of "enhancing the democratic legitimacy of the Union", which is seriously doubted by literature as we repeatedly have documented? And how is the climate of "transforming" perceived? These are crucial questions for any implementation and we therefore continued our "open" approach, only for the purpose of comparability did we put limited options, nevertheless, the bandwidth is open between the two binary ends:

Open Questions - Reality, Chemistry, Effectiveness

17. *How do you perceive the reality of the civil dialogue in action in your own area of expertise?*

O: Satisfactory

O: disappointing?

18. *How is the "chemistry and climate" of your particular civil dialogue?*

O: good

O: sufficient

O: bad

19. *Do you think civil dialogue is effective? If so, why?*

20. *How effective do you perceive your particular civil dialogue to be?*

¹²² Preamble Treaty of Lisbon

O: very O: somewhat O: not at all

21. *What issues could be improved to achieve greater effectiveness?*

Just to show how we turned the apparently duplicating question into a kind of pre-formulated "corset" we shall document this methodology right here by inserting the corresponding closed question:

47. General Performance - Particular Performance (closed question)

Your evaluation / perception of the overall performance of the civil dialogue

O: 1 very good O: 2 O: 3 O: 4 O: 5 poor

Your evaluation of the performance of "your" particular civil dialogues

O: 1 very good O: 2 O: 3 O: 4 O: 5 poor

A candid surveyor must openly confess that these answers could easily become misused by pushing-through personal discretion and personal arbitrariness. As already outlined in the "overall" chapters, we face a very disparate scientific landscape and a rather reluctant public "Brussels" sector on improving an own driving implementation doctrine. So, there is ample space for suggestions as well as for further debates, or even for a green-paper-consultation, but some rather obvious "landmarks" are to be stated anyway, which refer to the aims and the nature of PD and VCD. Whether the respondents sense a binding or a voluntary nature was investigated by the following questions:

Open Questions – Obligations

22. Are you aware of any legal obligation why the civil dialogue must be conducted?

23. If so, where does the obligation stem from? ...

24. Do you believe that an obligation other than legal exists in light of the EU's democratic legitimacy?

Open Questions - Regulatory Regime

25. What kind of regulatory regime currently regulates civil dialogue in your area of work / expertise

26. Please describe the exact legal basis for the regime currently in place in your area of work/expertise

27. Please describe legal recourses currently available to actual as well as aspiring participants of civil dialogues in your area of work/expertise

vi. *Disentangling Mazy Commingle*

Exemplifying the challenging complexity we refer to some contents. It is evident that the term "dialogue" is used in manifold contexts and often rather vaguely¹²³. There is also confusion in the use of terms such as "experts" or "consultative groups" as is the case within the chapter of dialogue. Note that dialogue is not consultation even though dialogue partners may sometimes also give advice, but DGs themselves cause confusion when referring to CSOs as consultants¹²⁴. Whereas the institutions could use several channels to incur expertise, the CD is a unique instrument in obtaining more than just expertise. It can also inform on political headwind (or tailwind), add direct legitimacy by inclusion, give a bargaining chance in order to figure out the mainstream and clarify the political standpoint of minor partners and so on. But are dialogue partners "consultants"? Often there is confusion between what consultation is meant as under Art 11(3) TEU and dialogue under Art 11(2). That is why we have designed one question on how the parties involved see this and whether - in turn – they also see consultation as another form of dialogue:

88. *Would you consider consultations as provided by Art 11.3 TEU as:*

O: a strong form of dialogue

O: a weak form of dialogue

O: no dialogue at all

When talking about civil dialogue there is usually an unrequested pre-understanding that this is just about VCD. In order to reassure or to falsify, rather unlikely, this presumption we have integrated a slight reminder to the HCD in the open questions segment and among the closed questions placed a specifying set:

53. *Do you see the horizontal civil dialogue in action?*

O: yes

O: no

If yes, where and in which form?

54. *It is up to whom to enable dialogue?*

O: the institutions (legally obliged to initiate this horizontal civil dialogue)

O: citizens (invited to voluntarily constitute a dialogue on equal footing)

O: the institutions, but not in a driving role

O: the institutions (legally obliged to support this dialogue if proposed from bottom-up)

O: ...

55. *What could be the intended benefits / results of the horizontal civil dialogue?*

¹²³ see Pichler / Balthasar, Open Dialogue, 296

¹²⁴ see Busschaert, 134

O: making citizens feel respected by the EU
O: provoking an interEuropean EU-related platform for bottom-up proposals
O: making civil organisations feel like a potential "player"
O: stimulating a European wide onset of a "citizenship", "demos" or similar
O: constituting a real civil society "power"

56. *Do you think the dialogue should be:*

O: kept free of any regulatory regime
O: ruled by an ethic code, code of conduct or of any "recommendation" of a similar nature
O: subject to a regulation
O: offering just a pre-organised dialogue model for further self-improvement
O: ...

vii. *Constitutional Awareness*

Not that we would expect a very different picture from what we have described above in the more general reflections, but in respect to the EESC's long lasting and newly again documented¹²⁵ engagement on the HCD, it seems to indicate to recheck empirically the awareness around Art 11(1) dialogue. And we are curious on the reaction of the respondents when having confronted them with the text of the Union Treaty:

57. *After reflecting upon the wording of original text on the horizontal civil dialogue, Art 11(1): The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make publicly known and exchange their views in all areas of Union action... would you maintain your above-stated evaluation?*

O: yes *O: no*
If no: what do you see differently now ...

Since, as described before, opposite to foreseen provisions for the Consultation Procedure (Art 11(3) TEU) and the European Citizens Initiative (Art 11(4) TEU) the Union Treaty provides no specific criteria and addresses no responsibility hierarchy for the introduction and the run of CD. We can only take into account all the various official documents on PD and CD, as described in the beginning, and summarise as given. Does this converge with the perceptions? This was the last set of open questions:

Open Questions - Particular Perceptions

¹²⁵ NGO Forum 2015, Riga 2./3. March 2015

28. *What do you spontaneously associate with the nature of civil society organisations in relation to civil dialogue? ...*
29. *Moving on to the requirements of the civil dialogue as being open, regular and transparent, how would you define "dialogue"?...*
30. *Which criteria differentiate "dialogue" from "consultations"? ...*
31. *What do you connote with the requirement "open"? ...*
32. *What do you connote with the requirement "transparent"? ...*
33. *What do you connote with the requirement "regular"? ...*

Final Open Questions

34. *What do you think about specific qualifying criteria for admissibility? ...*
35. *Which criteria would you favour? ...*
36. *Which criteria would you reject? ...*
37. *What are your perceptions of regulatory regimes, are they legal or otherwise binding? ...*
38. *Is there anything else that you would like to address concerning civil dialogue and participatory democracy? ...*

Any of the institutions would supposedly welcome any narrowing-down suggestion on capable options for a best practice model of a VCD that claims to be oriented along the inviting and appellative Lisbon desideration.

2. The Political Design and its Methodology - Closed Questions

At a first glance, the VCD models which are in use show quite similar patterns and differences appear not to make a real difference. At a second glance it is becoming obvious, that the differences are more than just about aesthetics. DG AGRI seems to be in "pole-position" with its Regulation¹²⁶ model, but as already annotated, this again has raised observation by the EU ombudsman. DG Trade appears to have the second most advanced model.

i. Adopting a Green Paper Stylus

To build one's own rationales it seems to be recommendable to self-impose a screening-raster with questions along a mode and style that a green paper would impose, instead of making an immediate snap judgement. This narrowing-down challenge is reflected in the repetition of questions which at first had been addressed as open question and are now, in this second part, reissued as closed ques-

¹²⁶ see mapping

tions. We started again with overarching issues, this time by submitting a certain catalogue of options, of which every single one corresponds with observations found in literature¹²⁷. Even those have indeed a very wide spectrum, yet done on a scale that is still comparable and measurable:

41. *Do you perceive a dialogue as (drop-down)*

- O: an ad hoc way of explaining policies* *O: an ad hoc way of communicating policies*
- O: an institutionalised way of explaining policies*
- O: an institutionalised way of communicating policies*
- O: a process not directed at reaching specific decisions*
- O: a process to improve specific decisions - decision shaping*
- O: a process that creates the perception of participation by civil society*

42. *Which are the objectives of civil dialogue and participatory democracy? Why should they be taken into consideration? (drop-down)*

- O: enhancing EU legitimacy* *O: democratising the EU*
- O: creating a European public sphere as a precondition for a European demos*
- O: installing a kind of a co-decision-making procedure including civil society*
- O: opening of a valve for channelling concerns*
- O: communicating the EU's politics regarding the public*
- O: communicating public concerns regarding EU authorities*
- O: a source of illusions and imaginations*

43. *If you have opted for channelling concerns, does this*

- O: make the citizens more satisfied with the EU*
- O: become a source of even more worries*
- O: cause even more worries if the EU does not react properly*
- O: ...*

ii. *Overall Aspects*

Even when there are evident, though not expressively addressed, notions to PD that this could become a silent "co-decision" side door for people's legislation, this approach must be rigorously rejected. Outstanding EU players, like *Chancellor Angela Merkel* and *Minister Wolfgang Schäuble*, at that time in true alliance with, meanwhile, President *Jean-Claude Juncker*, have publicly reasoned on the pub-

¹²⁷ see *Craig*, *Democracy and Rule-Making within the EC. An Empirical and Normative Assessment*, in: *European Journal of Law* (1997), 105, 124ff

lic direct election of a President of the Union.¹²⁸ They also sided with a European referendum instrument, foreshadowing some hot issues of the agenda of a next convention. This is partly aligned with the recommendations of the Future of Europe Group of the eleven ministers for foreign affairs of 2012¹²⁹. However, as for the Treaties, there is not a shadow of an idea to interpret participation as of being of any binding follow-up. Revising once again the reaction of the Commission to the two "successful" ECI's, the first statements and the reorganisation and transferring of the ECI unit, f. ex., of Comm *Frans Timmermans*, we can predict that the attendant Commission is paying rather little attention to PD instruments. As said, this "last call commission" is seemingly interpreting to appropriate the citizens "closer to the Union" by showing up with crisis-management and therefore going after the economy, which, of course, per se is highly indicated and maybe pays-off more at the moment. But this should not justify neglecting the democracy issue, which remains as a silent but underlying long-term consideration of the citizens anyway. So we also investigated issue of how the respondents perceive the very nature of the VCD and how it is seen in the light of advantages and disadvantages and, furthermore within this frame-setting, whether it is assumed as generating real benefits:

58. *What do you think is the nature of the vertical civil dialogue?*

O: a co-decision procedure of civil society

O: a channel for segmentary issues from bottom-up

O: a one-way communication tool from Directorates Generals to civil society organisations and representative associations

O: a mutual communication tool

O: a one-way communication tool from civil society organisations and representative associations to Directorates Generals

O: ...

59. *What are the benefits of the vertical civil dialogue?*

O: utilise expertise of civil society and representative associations

O: providing a platform for mutual understanding and co-counselling

O: providing a platform for co-designing solution

O: providing a platform for appeasement and pacifying

O: providing a platform for political bargaining and political back-up

O: providing a legitimate lobbying channel

O: constitutionalising a pre-existent practice of lobbying

O: using civil society and representative associations as sounding post to their constituencies

¹²⁸ without making specifically clear whether it was talk about the EU Council president under Art 15 (5) TEU or the Commission's president under Art 16 (7) TEU or, most likely, at all a new overall president as being under debate for a next Treaty amendment

¹²⁹ Final Report, 17. September 2012; see in *Pichler / Balthasar* (Eds.), *The Future of Europe*, 2013

60. Does such vertical dialogue also encompass:

- O: national fora of civil dialogue* *O: regional fora of civil dialogue*
O: national and regional fora of civil dialogue *O: neither national nor regional*

61. Should such vertical dialogue also encompass:

- O: national fora of civil dialogue* *O: regional fora of civil dialogue*
O: national and regional fora of civil dialogue *O: neither national nor regional*

iii. *Presumed Benefit as Stimulus for the Use of Dialogue*

The use of democracy and democratic instrument always stands in provocative context to the outcomes and how those are perceived. Whoever will potentially suffer from the results seemingly blocks democracy's actuation and activation. We can turn this conclusion around and propose that the side that feels better would rather incline to favour the instrument, which the loser would self-evidently counteract, block or suspend its use. No doubt that either side could feel the most benefitted yet either side could also feel the exact opposite. However, it pays-off to track the perceptions and so we did:

44. If you sense benefits, what are more specific benefits of civil dialogue?

- O: to utilise the European-wide citizens "collective wisdom"*
O: to utilise the expertise of civil society and representative associations
O: to have a platform for appeasement and pacifying
O: to open a legitimate lobbying channel
O: to constitutionalise the pre-existent practice of lobbying
O: to use civil society and representative associations as sounding post to their constituencies

45. Who do you consider to benefit most from civil dialogue?

- O: the EU and the institutions* *O: the European citizens directly*
O: the European citizens through intermediaries
O: civil society and representative associations in their own interest
O: none of them *O: my suggestion*

46. If you sense negative effects, who stands to lose?

- O: the EU and the institutions* *O: the European citizens*
O: national parliaments and/or governments
O: civil society and representative associations
O: none of them *O: other...*

iv. *Methodological Implications*

Although, as for a political nature we can at least reflect upon how "indicative" the contributions of civil society could be taken. We can therefore assess in which cases, under which circumstances and under which sorts of legal provisions could or even should there be an impact on proposals of a DG. Is in such situations of qualified "recommendations" a regulatory self-obligation of DG's thinkable?

Could the VCD work as a formal bargaining policy instrument maybe be seen analogously to the Social Dialogue or analogous to the Right of collective bargaining and action as addressed to the labour markets under Art 28 FRC? If so, what does that imply for particular requirements in regard to expertise or representativity for a significant constituency or standing for a promising future idea?

v. *Tracing Perception on Assumed Winners and Losers*

Should the VCD rather be seen as market place for exchanging views and ideas, in other words, can it serve as a pure political communication channel? Not that this would not also be a highly valuable source for the Lisbon considerations, but it raises questions to whether and how a working environment could be designed that would satisfy oldies and attract newbies as well. In other words, which kind of civil society would apply for a membership in this reading of participation, when communication per se means back and forth interaction, which again imposes serious hard work to act as an intermediary and interpreter from inside Brussels to out there even into the most distant corners of the Union, right there where the icy headwinds blow fast. It is much easier to interfere from within Brussels, but this approach has not shown any evidence of any increasing of legitimacy. So we are inclined to put a series of questions on how the perception is about the origin and the originator of the VCD, including suggestions on the source of implementation:

49. *In your opinion, where can the concept of the civil dialogue as such be traced back to?*

O: bottom-up, EU citizens

O: civil society and representative associations

O: top down, EU institutions

O: Union Treaties

O: social sciences

O: political science in particular

O: legal scholarship

50. *The Lisbon Treaty commits to enhancing the democratic legitimacy of the EU.*

Do you think that participatory democracy is a means for reaching that overarching goal?

O: Yes

O: No

O: Don't know

51. *Do you think civil dialogue is a means for reaching that overarching goal?*

O: Yes

O: No

O: Don't know

52. *Which of these sources primarily shapes your understanding of civil dialogue*

O: EU primary law

O: EU secondary law

O: Internal manuals/traditions which exist in my entity

O: Traditions in my state of origin

O: Scholarly literature

O: Mass media

O: Understanding the general need for good/better public relations

vi. *Dialogue Admittance a One-way Privilege or Source of Associated Duties?*

Is there a political design that allows all of the three approaches to be tied together?

Apparently yes: what about a model that sets new standards and imposes an obligation on CS and RA in return for having the sectorial or segmental "ear" of Brussels by serving as communicator of this specific sector or segment throughout the entire Union? This would humble the achievements of Brussels as a communicator, which for that matter is perceived as marketing tool and thus make the Union "tangible". As long the CSO's participation was connoted with, and addressed to, an economic community, things had been rather linear. With the turn of the EC toward a political union and with the turn from government to governance, the scope of the CD turned out to be much more complex¹³⁰. This turn appears as the moment of a subtle change of the apparatus' mind-set.

Without further longwinded explanations, let us describe the compelling primary criteria for the design of our Questionnaire in regard to specific issues. In order to figure out the perceptions of either a supposed political predominance or of a fair balance, one has to clarify how the CD's partners mutually see their own standing, role and functions. Furthermore, one has to investigate which agent is seen as benefitting from whom and, lastly, and who is - mutually - supposed to be the "winner" given that the Union / DG's could be seen as a regulatory political system or rather a system of participatory governance or even a polity with a social constituency in the making¹³¹. This issue is not easily put into question in such a way that does not unnecessarily alert mistrust nor implant wishful thinking either. Therefore we imposed a broad series of open questions that through subtle cross reference can give an evidence based answer.

3. The Legal Design of VCD and Methodological Implications - Closed Questions

i. *Overall Aspects*

¹³⁰ see *Majone*, Regulatory Legitimacy, in: *Majone and Baake* (eds), *Regulating Europe*, 1996ff ; *Craig*, Democracy and Rule-Making, 120ff; *Bignami*, The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology, in: *Harvard International Law Review* (1990), 40, 451; C Joerges, "Good Governance" through Comitology? in: *Joerges and Vos* (Eds), *EU Committees: Social Regulation, Law and Politics*, 1999, 337; critical *Harlow*, Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot, *European Law Journal* (1997) 11; *Bignami*, Three Generations of Participation Rights before the European Commission, in: (2004) *Law and Contemporary Problems* (2004) 68, 82ff

Evidently, it makes a detrimental difference if the VCD is construed as a voluntary or an obligatory scheme. Adopting tight legal frameworks and their design is an indicator for any substrate as to how far it can go, how permanently it is supposed to work and lastly how the roles are defined is essential for the empowering and entitlement to act humbly or persistently. Without any ability to offer prophecies we can make a hypothesis that the VCD's sustainability is crucially bound to be put on a horizontal legal basis with maybe asymmetric exercise options for the special conditions in different use in diverse need of DG's, but on a legal or quasi-legal core fundament anyway.

ii. *Dialogue a Matter of Law or of Culture?*

Nevertheless, we have to keep two things in mind. Firstly, the EU Commission speaks in its self-imposed *Communication on Rules and Standards*¹³² clearly from a *Reinforced culture of consultation* and not from any kind of legislative implementation. Secondly, the EU Commission has ordered itself reluctance to let things go too far, based on the rational of efficiency. Setting the rules for Consultation, which rightly so raises doubts as to whether these can be analogously used for the CD, or is actual practice - the EU Commission has already in the *General Rules and Minimum Standards*¹³³ explicitly stated: *A situation must be avoided in which a Commission proposal could be challenged in the Court on the grounds of alleged lack of consultation of interested parties. Such an over-legalistic approach would be incompatible with the need for timely delivery of policy, and with expectations of the citizens that the European institutions should deliver on substance rather than concentrating on procedures.* Felicitously argued, but what about this understandable dogma - because Courts are not surrogate legislators¹³⁴ and otherwise politics could be haphazardly put to a halt, when seen in the light of Art 41 FRC, *The Right to Good Administration*, in particular Paragraph 2 (3) and synchronic Art 296 TFEU, which both stress the obligation to give reasons for any administrative and Art 15 (1) TFEU remains an open question¹³⁵. However, the Court is reluctant to canonise the participation rights anyway¹³⁶. Yet, however, there are several other barriers to face under Art 263 FTEU as to which actions against which acts private claimants are entitled. Some conclusions on the Courts "chemistry" towards - non-admitted - participatory ambition can perhaps be drawn quite soon from

¹³² COM (2002) 704 final

¹³³ *ibid.*, 6, 10

¹³⁴ *Alemanno*, The Better Regulation Initiative at the Judicial Gate, *European Law Journal*, Vol. 15, Issue 3, 382 (392ff), *Busschaerts*, 142, enforces: *the consultation standards and principles may produce legal effects arising from the duty for the Commission to abide by the rules it has set for itself, disregard of which could amount to breach of an essential procedural requirement likely to entail annulment of the act finally adopted in cases where no consultation or no IA has been conducted* and refers to *W Voermans and Y Schuurmans*, *Better Regulation by Appeal*, in: *EPL* (2011) 17, 507

¹³⁶ *Craig / De Búrca*, *EU Law: Text, Cases, and Materials*, 2011, 5th, 521. See Case T-521/93 *Atlanta AG and others v Council and Commission* [1996] ECR II-1707, para 71; Case C-104/97 P *Atlanta AG and Others v Commission and Council* [1999] ECR I-6983, para 38; Case C-258/02 P *Bactria Industriehygiene-Service Verwaltungs GmbH v Commission* [2003] ECR I-15105, para 43. For a critical appraisal of that position, see *J Mendes*, *Participation in EU Rule-Making: a Rights-Based Approach*, 2011, chap 5.

analogy from the still pending cases in regard to claims of initiators of Citizens Initiatives under Art 11(4) TEU. It is true that Courts must definitely not leer at public opinion, but should still not ignore a democratic majority's convictions and value preferences in the long run. This notion is shared by prominent judges as well¹³⁷. Art 263 TFEU is dozing in respect to participation, but is still there. Legal practice and prevailing opinion are transient. This is apparently the background of the afore-cited own-initiative of the European Ombudsman¹³⁸ to investigate on DG Agri's regime and admissibility rules. We'll see the final report. This could change the climate.

However, we felt obliged to put this question on the agenda in order to trace for perception. To let opt and to opt for either one can be seen as an expression of a mind-setting and preference, and openly confessed, we are rather curious of the DG's response.

62. *Do you sense any legal obligation that vertical civil dialogue must be conducted?*

O: yes

O: no

In either case, please elaborate on the why

63. *What do you consider that a "regime" of the vertical civil dialogue should be?*

O: kept free of any regulatory regime

O: a mission statement

O: ruled by an code of ethics, code of conduct or by another "recommendation" of similar nature

O: designed by an internal regulation of concerned DG's, institutions

O: a one-fits-all overall framework regulation binding any of the concerned vertical civil dialogue entities

O: Other (please specify)

64. *Is your vertical civil dialogue "belegalised" by a regulatory regime?*

O: yes

O: no

65. *If yes, are you satisfied with this regulatory regime?*

O: yes

O: no

if no, why not

iii. *Methodological Implications*

We openly search for the perceptions of existing as well as considered variations of policy responses, whether and how far the expectations are directed to a non-binding dialogue scheme or to a "belegalized" scheme. In both cases, the bandwidth of perceptions could be very wide. Therefore we have al-

¹³⁷ see almost all contributions, in *Pichler* (Ed.), *Rechtsakzeptanz und Handlungsorientierung*, 1998

¹³⁸ <http://www.ombudsman.europa.eu/de/cases/correspondence.faces/en/53106/html.bookmark>

ready, part by including open questions, opened the doors to allow back-in-mind thoughts to be aired, which maybe could lead to the result, that the answer could be: policy makers, free us from this dialogue.

66. *What do you consider necessary "hard core contents" of a "regulatory regime" to be?*

O: setting an election period

O: defining procedures

O: regulating admissibility

O: imposing efficiency control

O: setting budgetary limits

Other (please specify)

Again, in the part of the open questions we invite the respondent to come up with very own and creative connotations, desires, considerations, leaving him or her committedly alone and thereby strictly not guiding her or him into any Social-Desirability-Response-Set. Whereas the part of closed questions confronts the respondents with a rather pre-formulated catalogue of possible answering options which are derived from the diverse positions in literature. Thus we suggested only such well-known positions.

4. The VCD Parameters Concerning the Addressees "Civil Society" and "Representative Associations"

i. Civil Society and Representative Association

As stressed before, Civil Society is ascribed and sometimes rightly so criticized in scholarly literature as being an unspecific, oxymoron term covering whatever one wishes. In actual fact it is not a term that is appropriate to base legal consequences, follow-ups and concrete entitlements on, but that is what has happened. It is worth adding that the NGO's only appear as a part of the CS. NGO as code is usually seen as having an underlying assertion of a "moral" orientation. This is just a myth, please see the literature we have often referred to for further validation. A first glance on Group III of the Transparency Register shows a heterogeneous panorama that allows no such "moral" qualification at all. It would be fairly exciting to trace after the genesis of the enculturation of those terms and how the CS's nature and role is seen in relation to the CD. However, we traced the actor's connotations anyway:

72. *What do you think is the role of civil society and representative associations in relation to vertical civil dialogue?*

O: only decorative *O: including contributions from bottom-up*

O: as an "audience" for top down announcement

O: serving as a multiplier capable of reaching citizens

O: as supportive experts

O: as a political partner to institutions leveraging EU proposals

O: playing a leading role / driving force / agenda setting

O: as the "silent" masters of the dialogue who rule the Directorate Generals and institutions

Other (please specify)

73. *What is your opinion concerning the scope of the vertical civil dialogue? Should civil society partners of the institutions be entitled:*

O: to set an own-initiative political agenda regardless to the proposed content

O: to render an opinion to all of the proposals within an institution

O: to render an opinion only to submitted proposals

O: to chair the meeting Other (please specify)

74. *What do you consider the limits of the vertical civil dialogue to be? Should an institution:*

O: be entitled to fully ignore proposals / opinions coming from the partners

O: be obliged to respond to proposals / opinions coming from the partners

O: be entitled to reject but to give reasons for the rejection

Other (please specify)

ii. *Representative Associations AND Civil Society... Pleonasm or Distinction?*

Presumably artificial creations are riding the wave of post-modernism, and thereby are semantically and philosophically in line with the style to define by lowest common denominator what something is definitely not. Any organisation which is not directly involved by any governmental task could be called for an NGO - even my own institute, the Austrian Institute for European Law and Policy, which is run by a non- profit association under private law, but being created/funded by ministries of the Republic of Austria, the State of Styria and allegedly autonomous universities, which again are factually one hundred percent financed by the Republic. All what needs to be done is to find a legal form and entity that works as kind of legal fire-wall between any kind of governmental nature and the NGOs. Other examples show the fragility of dubiousness of such strict differentiations. There are in Group III Transparency Register lots of umbrella organisations under civil law and with a not-for-profit profile of the European industries, be they agricultural, from the banking sector and so on. Is that what is meant by the daily semantically use when talking of an NGO? But it is out of our scope to track down the historical-political semantics. It has only been indicated in order to clarify the relevance of their use in action.

Therefore we submitted closed questions that set limited options, however the panorama is still open from one to the opposite end of the scale.

39. *Do you perceive representative associations as civil society?*

O: a different name for O: part of

O: different from O: ...

40. *Do you perceive lobbying groups as representative associations?*

O: a different name for O: a form of

O: different from O: ...

This methodology of finding out how the involved categorise themselves, says of course nothing on how they define civil society. This was the idea not to let them run into a definitory minefield. The only positioning we allow is after the respondents having given the preliminary answers when confronting them with the original text of Art 11(2) TEU then to rethink their choice in the light of the text:

84. *Having read the original text on the vertical civil dialogue, Art 11(2) TEU: The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society; would you maintain your above stated answers?*

O: yes

O: no

If no: what do you see differently now ...

85. *Art 11(2) TEU enumerates dialogue partners as representative associations and civil society. Do you sense this as*

O: committedly creating two bodies vis-a-vis the institutions

O: if yes, does this imply procedural organisational consequences, i.e.: should they "vote" per curia

O: just pleonastic, descriptive use of terms

87. *Should you sense any significant difference between representative associations and civil society as cause for further reactions, please describe that difference and the appropriate follow-up.*

iii. *Civil Society - Definitinal Intricacy and Underlying Suppositions?*

However, the afore mentioned core document for eligibility to CD, "*Towards a reinforced culture of communication and dialogue - Communication of the Commission*"¹³⁹, addressing general principles and minimum standards for consultation of interested parties by the Commission, openly faces the same perplexity. Curious, the Commission, which is part of legislation and ought to show-up with legislative powers, just balances and confesses openly that *there is no commonly accepted -let alone legal - definition*¹⁴⁰. It further describes that CS is a shorthand to refer to a range of organisations. Remarkably it begins to enumerate examples with *labour-market players, trade unions, employers organisations*. Having put the so called social partners in front of all CSO's the enumeration continues: *... organisations representing social and economic players, which are not social partners (consumer organisations), then NGO's, which bring people together in a common cause, such as environmental*

¹³⁹ COM (2002) 704 final

¹⁴⁰ *ibid* 6

organisations or human rights organisations, charitable organisations, educational and training organisations; CBO's (community-based organisations) (...) youth organisations, family organisations and all organisations which citizens participate in local and municipal life; religious communities.

Keeping in mind this exemplifying catalogue, and knowing that there is a different view from the "religious communities" side¹⁴¹, which apparently fits the Treaties' structure in separating the dialogue on values under Art 17(3) TFEU ostensibly from Art 11 TEU. Thus we have raised the question on the perception of whether religious organisations are and if, to which extent, seen as civil society and so far entitled also to participate in the VCD or not:

86. Reflecting upon Art 17 TFEU 3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.

Would you think that religious or philosophical (non-religious) organisations should be:

O: eligible

O: not eligible

So, actually, whenever people organise themselves around an apparently not illegal purpose and goal, we can rightly call such an organisation for CSO or "association". How come? The Commission simply and without any comment or any regulatory ambition refers to the *EESC Sigmund Report II*?¹⁴². Only when referring to the White Paper for Governance can we find a kind of behavioural "moral" connotation: "*Civil society plays an important role in giving voice to the concerns of the citizens and delivering services that meet people's needs. [...] Civil society increasingly sees Europe as offering a good platform to change policy orientations and society. [...] It is a real chance to get citizens more actively involved in achieving the Union's objectives and to offer them a structured channel for feedback, criticism and protest.*"

iv. Are Political Parties Civil Society?

Wondering why there is not a single reference to the possibility of participation of political parties or sub-entities of those, we put this case on the respondents agenda. Of course one could argue that the function of political parties are exhaustively defined under Art 10 (4) TEU. But aren't double functions in respect to the respective task quite usual in the Union? Do we have strict incompatibility rules? As there are proposals that political parties see themselves as bodies of civil society we decided to impose this rather rarely aired question to the respondents:

¹⁴¹ COMECE represented by Secretary General *Michael Kuhn*, see in: *Pichler / Balthasar*, Open Dialogue, 167

¹⁴² OJ C 329, 17 (1999), 30

83. *Do you think that entities that are close to / subunits of political parties / movements should be:*

O: eligible

O: not eligible

The Commission evidently makes no approach to categorise the participation in specific kinds of dialogues into any respect. When revising these clusters we can see the same picture at the end: the TR creates six groups but keeps on going with a just descriptive method without making any "moralising" difference. To sum up, there is seemingly no political will to confine the CD to any content-wise specification which in turn signals that the CD is open into any respect and without any preference for any priority of certain values. The description of the category NGO discloses that this group is supposed to be rather bound to the welfare principle, whereas most of the others can represent whichever interest. Moreover, there is no indication that interest groups ought to switch to welfare perspectives when entering a civil dialogue.

v. *One Body or Two?*

Next observation is that the Union Treaty does no longer speak of civil society "organisations". It speaks in Paragraph 2, Art 11, only of *civil society and representative associations*. Is it now one category or two? The "and" indicates logically that there should be two. But what makes the difference? Whereas Art 11 (1) foresees that citizens are entitled to participate in the horizontal dialogue, which semantically even includes single citizens, the following paragraph does not refer to the criteria of being organised when participating in the VCD, it only talks of civil society being an admissibility requirement. Or does "association" instead of the former "organisation" equally refer to civil society and representative? That is why we have designed a series of questions addressing this issue, in order to find out whether we can garner an explanation of the practical use.

vi. *Single Citizens Eligible?*

Art 11 (2) clearly sets a shift of paradigm. For the first time, the notion of "civil society" was added to the (then) Art 257 (2) TEC by the Treaty of Nice, stating that the Economic and Social Committee¹⁴³ "shall consist of representatives of the various economic and social components of *organised civil society*, and in particular representatives of producers, farmers, carriers, workers, dealers, craftsmen, professional occupations, consumers and the general interest." When we compare, however, this version with the current Art 300 (2) TFEU ("The Economic and Social Committee shall consist of representatives of organisations of employers, of the employed, and of other parties *rep-*

143 Of course, this Committee dating back to the original version of the Treaties, in a way, the dialogue with civil society is as old as that (as pointed out Luca Jahier, in: *Pichler / Balthasar*, 132).

representative of civil society, notably in socio-economic, civic, professional and cultural areas”), we again find remarkable developments:

- the attribute “organized” was dropped, which allows to conclude that the notion “civil society” now also comprises non-organised people¹⁴⁴
- “civil society” is no longer restricted to “various economic and social components”, as specified in (the non-exhaustive list of) Art 257 (2) TEC, but open to “civic” and “cultural areas”.¹⁴⁵

These developments already indicate a large material and personal scope of “civil society” within the meaning of Art 11 (2) TEU. The latter assumption is further backed by Art 15 TFEU which now not only confers, in its third paragraph (as it did already, though only with regard to the European Parliament, the Council and the Commission, Art 255 TEC; cf. now also Art 42 EUCFR), “a right of access to documents of the Union’s institutions, bodies, offices and agencies” to “*any citizen of the Union*” (and, moreover, to *every person* established in a Member State), but explicitly intends, according to its first paragraph, “to promote”, by granting (inter alia) this right, “good governance and ensure the participation of civil society”.

Confusingly, the apparently helpful and formerly stereotypically used narrowing down qualifications of “structured” and “organisations” as prefix and suffix around civil society have disappeared on their way into the Union Treaty. Consulting the documents of the Constitutional Convention does not garner a satisfying explanation; neither does the search for a concrete significance of the newcomer term “representative associations”. It could be that this is just an un-reflected alliterative use, but this appears to be unlikely when reaching such a prominent place in a constitution. It could well also be that the idea in the back minds of the authors was to get off with a system of “structured”, which could imply that this could be seen as a cryptographic camouflage for a closed community of “haves” that keeps out the “have-nots”, which per se again could throw a correspondent light on the criterion of “open”. However, we decided to let the respondents make the case, who are really involved and could therefore deliver a more authentic reading from their daily business and give insight to how they interpret the omission of imposing a connotation of “structured”:

78. Whereas there was talk during the pre-Lisbon era about a “structured dialogue”, the actual Union Treaty has deleted / omitted this criterion. Do you consider this:

144 This interpretation (cf. already Mendes, CMLR 2011, 1852) avoids, furthermore, any discrepancy between Art 11 (1) TEU favouring “citizens and representative associations” and the second paragraph, speaking of “representative associations and civil society”, and, perhaps, also the notion “concerned” used in the third paragraph; cf. that Daniela Fraið as well as Pierre-Arnaud Perrouy/Julie Pernet (all in this volume) focussed not so much on numbers of members of civil society organisations, but on people concerned with a specific issue.

145 This enlargement is, of course, due to the enlargement of competences of the Union which is no longer only focussed on the single market (a point stressed in particular by Kathrin Hatzinger, but also by Daniela Fraið, both in Pichler / Balthasar, Open Dialogue, 129; 87

O: an incidental slip

O: as an elimination of any measure that could potentially constrain the dialogue

O: to mean nothing in particular

O : ...

Nevertheless, when designing the Questionnaire we felt bound to propose possible "structures" in the offered options' categorisations, such as NGO, because these correspond with the typology of the Transparency Register, which intrinsically is law-reality-making. It would make no sense at all to introduce new synthetic categorisations, which would only confuse the respondents. To be honest, we have no others at hand either, so we are also muddling-through with the old and fairly senseless ones.

vii. *Representative*

Apparently much more consistent, even though also extendible in any respect¹⁴⁶ and being also a general term as repeatedly shown afore, and also a great issue in literature, is the admissibility or eligibility criteria "representative". But it at least makes us think about resilient criteria as representative either in a quantitative numeric sense or as representative in a qualitative sense. Finally, representativity raises the question on how to represent grassroots movements and the question on the role of self-proclaimed single intermediaries to represent the unrepresented, silent citizens, which may fit for some social CSOs. The answer to what makes a CSO a CSO often lies in volitive categorisations by law and politics¹⁴⁷.

viii. *Representativity as an Admissibility Criterion*

The EESC "participation" reports have dealt with this qualifying criteria ever since. From these reports as well as from literature in general, we can draw no overall conclusions and no iterable concepts, only one certain result : that representative in the context of PD has a different underlying drive than the use in the concept of *representative democracy* under Art 10 (1) and (4) TEU. PD is by no means a full-fledged alternative to representative democracy, which is also clearly addressed by the

¹⁴⁶ See *H Johansson*, Whom Do They Represent? Mixed Modes of Representation in EU-Based CSOs' in *S Kröger and D Friedrich* (eds.), *The Challenge of Democratic Representation in the European Union*, 2012, 90; *M Rodekamp*, Representing their Members? Civil Society Organizations and the EU's External Dimension, in: *S Kröger and D Friedrich*, see also *A Fung*, Associations and Democracy: Between Theories, Hopes, and Realities *Annual Review of Sociology* (2003) 29, 515ff and in general *Jürgen Habermas*, *The Theory of Communicative Action /Vol.2, Lifeworld and System: A Critique of Functionalist Reason*, 1987, chap 8.

¹⁴⁷ see *Busschaert*, 60: With variations as to the family to which they belong,81 welfare states confer CSOs legal recognition through appropriate statutes, fund, through tax-exemption and grants, their activities, shield their conduct from the rigour of competitive markets and commission social services from them. These measures share a common purpose: nurturing a civic space between state and market where citizens may become masters of their own destiny.

Union Treaty, when stressing in Art 11 (1) "*The functioning of the Union shall be founded on representative democracy*". Therefore the term representative in context of PD can be alleviated from the burden of counting every vote as equal and quality, density, significance or evidence can outweigh quantity. This reading is not a just voluntary one, it can also be derived from the authentic and specifically addressed for the use in CD interpretation of the European Parliament, what civil society's issues could be about which in turn makes the issue to the core element and, further, makes any issuing a civil society representative. Speaking in the name of an issue conclusively means to speak for a greater group of concerned people as no problem regarding an idea is a singular problem, not amongst a citizenry of half a billion people : "*...presence in public life, expressing the interests, ideologies (...) based on ethical, cultural, political, scientific, religious or philanthropic considerations.*"¹⁴⁸ Thus - only by the definition of having a consideration - can any citizen in general participate under the title civil society and this without having to organise themselves within an association¹⁴⁹. Of course, in particular this would cause numerous procedural worries, so the Commission is forced to bundle and channelize in order to handle the implicit challenges. But first comes the challenge and only then the appropriate and, foremost, doable solution.

82. In regards to "qualifying elements", do you think that it should be one of the following?

O: representative for a significant constituency

O: representative in the sense of a Union-wide network

O: representative in respect to expertise

O: representative in regards to an idea that is seen of potential for the future

O: qualified by the "quality/significance" of the represented issue or value

Other (please specify)

Up until now it has been up to the respondents to come up with empirical affirmation or disconfirmation. The questions we have designed do not stringently drive into any direction, but are open and stimulating for instigating creative models.

5. The VCD Criteria "Open, Transparent and Regular"

The Union Treaty addresses three requirements to CD. These have raised a lot of reflections in literature. Open to whom? Carried-out openly to the public? Adverse to admissibility or eligibility restraints? Furthermore, does the apparently conscious omission - we cannot insinuate that a Treaty wasn't revised carefully enough - of setting any constraints when speaking solely of civil society, no

¹⁴⁸ OJ 2010, C 46 E/23, recital F

¹⁴⁹ see the concerns by *Britta Breser*, Ein Stimmrecht aber keine Stimme. Zur Beteiligung des unorganisierten Bürgers an EU Governanceprozessen, Master Thesis, University of Krems, 2015

"structured" and "no organisation" any longer, that even single citizens with a typical "civil" concern - and maybe a significant grassroots movement behind her or him - is to be seen as (part of) CS? One could propose that, and some have done so already. Notwithstanding the organisational worries, what about a citizen's democratic legitimization? But if we take this as the crucial bifurcation, then all other applicants must be screened on their democratic background. This again would indicate further procedures over procedures.

i. *An Empty Canonical Trinity?*

Nevertheless, we are not entitled to make such a case and therefore have decided to ask for the opinion of the parties involved.

What do the particular requirements of the civil dialogue in being open, transparent and regular mean to you?

75. *Open*

O: to be kept free of any barriers, like detailed structures, organisational biases and similar

O: open to any potential applicant

O: open in regard to the procedure itself, i.e. to be carried-out in open sessions

O: open in regard to the outcomes, that therefore must be strictly communicated to the public

O: just another catchy word *Other (please specify)*

76. *Transparent*

O: transparent in regard to the admissibility criteria

O: transparent in regard to the power / influence of the "players"

O: transparent in regard to the processes, rather a synonym to "open"

O: just another catchy word *Other (please specify)*

77. *Regular*

O: to be held along a regulatory regime *O: to be held at certain terms*

O: to be held permanently *O: just another catchy word* *O: ...*

6. Factual Challenges to the VCD - Procedural Aspects, Effectiveness and Relevance

i. Procedural Aspects

As mentioned in the introductory part – as opposed to Art 11 (4), Art 11 (1) and 11 (2) are both not determined for a particular model of implementation. So there is obviously ample space for the institutions on deciding how best to implement, to carry-out, to inner-organise and even where to allocate. This makes the experiences, opinions and perceptions of the parties involved even more valuable for further design.

67. Considering the potential need for selecting dialogue partners, is participation in the civil dialogue held or joined by your entity:

- O: completely open to anyone* *O: open upon registration*
O: regulated on an ad hoc basis without reasons given
O: regulated on an ad hoc basis with reasons given
O: regulated following a standardised procedure without legal recourse
O: regulated following a standardised procedure with legal recourse
Other (please specify)

68. Based on your experiences, should participation in the civil dialogue held or joined by your entity be:

- O: completely open* *O: open upon registration*
O: regulated on an ad hoc basis without reasons given
O: regulated on an ad hoc basis with reasons given
O: regulated following a standardised procedure without legal recourse
O: regulated following a standardised procedure with legal recourse
Other (please specify)

69. What do you consider as necessary accompanying measures?

- O: monitoring mechanism* *O: evaluation scheme*
O: permanent feed-back instrument

70. If you are part of vertical civil dialogue, are any of the above mentioned schemes in action?

- O: monitoring mechanism* *O: evaluation scheme*
O: permanent feed-back instrument

ii. *Dialogue - Intrinsic Value or merely a Tool?*

We contested this consideration through a question on the assumptions on effectiveness and relevance of VCD:

71. *Effectiveness and relevance*

How effective is your particular vertical civil dialogue?

O: very *O:* *O: somewhat* *O:* *O: not at all*

How relevant do you sense your particular vertical civil dialogue to be?

O: very *O:* *O: somewhat* *O:* *O: not at all*

iii. *Open to Whom and Why?*

We addressed this investigation in the eligibility criteria.

Eligibility Requirements

80. *In regards to deciding on eligibility / admissibility, do you think that:*

O: this decision should be fully up to the institutions

O: this decision should be up to the institutions but due reasons have to be given

O: this decision should be up to the institutions but remedial actions are to be foreseen

O: this decision should be up to the institutions but is to be done according to narrow legal criteria

O: this decision should be subject to co-decision-making by a joint body comprised of the institutions and the dialogue partners

Other (please specify)

81. *In regards to general eligibility / admissibility, do you think that:*

O: participation in the transparency register should be required

O: with the number of admitted parties limited, there should be a rotation prior to the period end

O: every applicant should show up with a specifically qualifying element, like being "representative"

O: stakeholders of any kind corresponding to the "drive" of a specific dialogue are eligible anyway

Other (please specify)

IV. Key Results of the Survey

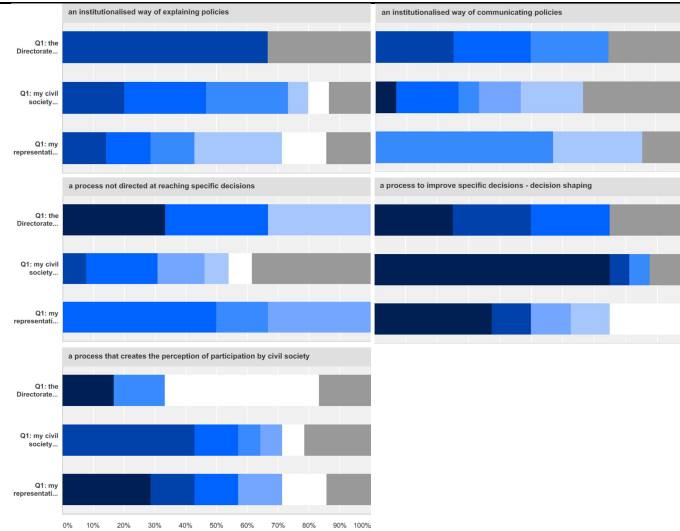
The differentiation of the respondents is based on the options for self-identification provided for in the survey. For a comprehensive mapping, including key legal materials, see Annex I.

CATE-GORY	Open Questions	Closed Questions
"Re-gime"		
I. General Objectives	<p>Q 14 Where do you think this idea of a civil dialogue comes from?</p> <p>DGs: treaty provisions / Art. 11 TUE / The EU civil dialogue was inspired by national practices. The white paper on governance developed a comprehensive approach / Need for accountability and better ownership of policy / collecting feedback</p> <p>CSOs: Ancient Greece / Athens? / culture and history and democracy / The democratic charters of the EU / democracy / It comes from the people's interest to be involved in the welfare of their communities and on their need/expectation for social harmony /In order to make policy which caters to the needs of the population, one needs to know what the population thinks / Need to enhance citizen's participation in EU decision making process / from different organizations / pushed forward by CSOs and EESC / NGOs involvement / from the practices of local development methods /</p> <p>RAs: Ancient Athens democracy / CD is a tool to implement the principles of a democratic society: openness, participation responsibility efficiency and consistency / collecting feedback</p>	<p>Q42 Which are the objectives of civil dialogue and participatory democracy? Why should they be taken into consideration?</p> <p>Legend: 1 (dark blue), 2 (blue), 3 (light blue), 4 (very light blue), 5 (lightest blue), 6 (light green), 7 (medium green), 8 (light grey), N/A (dark grey)</p>
1. Civil Dialogue in General	<p>What is the advantage of participatory democracy? What is added value? (15)</p> <p>DG: Better governance / larger range of ensuring broader support and improving quality of policy / transparency</p>	<p>Q41 Do you perceive a dialogue as</p> <p>Legend: 1 (dark blue), 2 (blue), 3 (light blue), 4 (very light blue), 5 (lightest blue), 6 (light green), 7 (medium green), N/A (dark grey)</p>

/more expertise/ stronger engagement / enhanced legitimacy / Legitimises action / empowerment/ Participatory democracy helps overcoming the shortcomings of representative democracy by combining it with elements of direct democracy / democracy is valuable by itself

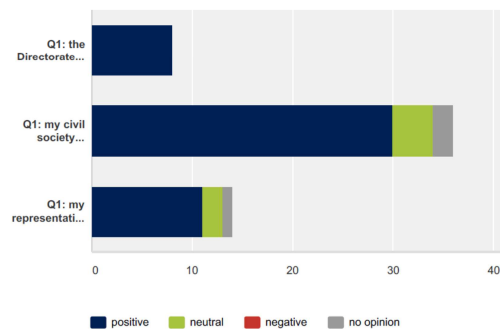
CSOs: Reducing the costs of some investments / share views, knowledge and best practice, resulting in better policies / Broader knowledge base, broader acceptance by the public / policy examined from many perspectives, kinds of expertise, including experiential. early warning of negative effects / Potentially, all stakeholders get a chance to express their opinion, enriching the debate / expertise by stakeholders can feed in to the policy process / It serves as a reality check for EC institutions -who are far away from the daily reality / bringing deeper knowledge and balanced decision / good policies are achieved when all the stakeholders contribute/ Citizens are satisfied with the choices made by the governance / understanding what Brussels is up to / getting real life feedback / empowerment, understanding, dignity, greater transparency and accountability of policies / better adequacy with the interest of the population/ enhance the legitimacy of EU policies / civic engagement / Any decision, initiative, law, action is backed up by the community, the communities evolve based on citizen direct involvement / It is a basic condition of democracy to involve the participation of civil society groups. Without it there is no effective democracy / It serves as a reality check for EC institutions -who are far away from the daily reality

RA: Added value is only present if the dialogue involves submitted comments, ideas and a follow up as to how these can/are taken forward / Mostly better preparation and understanding of legislation / more support for legislation / Allows everyone to share their views, get involved in policy making in some way / Citizens are satisfied with the choices made by the governance / Participatory democracy is part of the ES model of society. Participation is a civic right and subsidiarity - a pillar of democracy / democracy is valuable by



Q10 Do you perceive civil dialogue and participatory democracy as...?

Answered: 55 Skipped: 26



itself / that citizens can make their voice heard not only as voters but also outside of elections on topics that matter to them

Could the civil dialogue produce negative effects?

DGs: (mostly no)/ expectations might be high / Lack of openness of different actors to different views creates negative dynamic

CSOs: No. Citizens are perfectly able to understand and comprehend what is at stake only good for **vested interests** who have time to participate / if it is hijacked in some way/ If professional lobbyist actors are getting too much space, it harms the true nature of the democratic process / If **unbalanced in representation**, it could provide biased inputs / power imbalances can be increased , if not active in engaging the most disadvantage , excluded & least organised citizens /not the dialogue itself, but there is always a risk that a minority dominates the (passive) majority / someone can complain that it **takes time**, or spoils the final effect. But this is a judgement of one side only. / Waste of organisational capacities, contribution to *unnecessarily complex and overly bureaucratic procedures* / Lengthy and protracted decision making / *being a waste of time* and taxpayers money / dissatisfaction / by some it might be perceived (as) undemocratic

RAs: Citizens are perfectly able to understand and comprehend what is at stake. / not everyone has **equal chances** to participate as actively in any aspect of the dialogue / could slow things down if too cumbersome / if a party/lobby wants to rule the dialogue yes / If participants are selected by a lack of transparency, have no jurisdiction if only listen and not take a direct part/ by some it might be perceived undemocratic/ **Time consuming** and lack of action

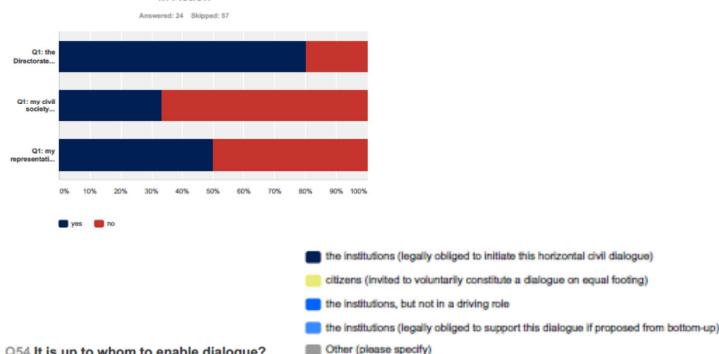
2. Art 11
para 1

DGs: Dialogue between the civil society **organisations** themselves

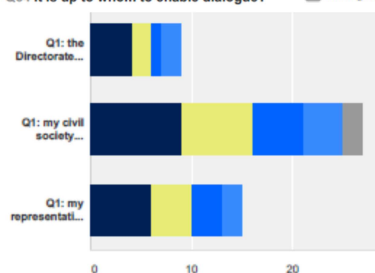
CSOs: citizens having **dialogue** with each other on their views of policies/ **dialogue** between several civilians/ between **associative structures** on the same level/consultation Exchange and alignment of CSO positions and input/ going beyond the sectoral and institutional approaches/ cross sector collaboration / Sectoral or specific targeted/ **take attention to the problems for the officials / democracy (plus 3 variations of don't know)**

ROs: Dialogue between European civil society **organizations** for the development of future European policies / organizations involved in the process discuss among themselves / Mainly exchange amongst stakeholders / **citizens** having dialogue with each other on their views of policies/ **between the EU and citizens**

Q53 Do you see the horizontal civil dialogue in Action



Q54 It is up to whom to enable dialogue?



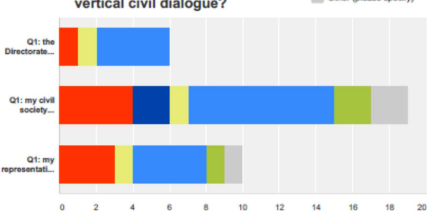
3. Art 11
para 2

DGs: Dialogue between *executive and legislative authorities* on one hand and *representative associations and civil society* on the other hand / consultation / between the *institutions* and *representative associations and civil society organisations*

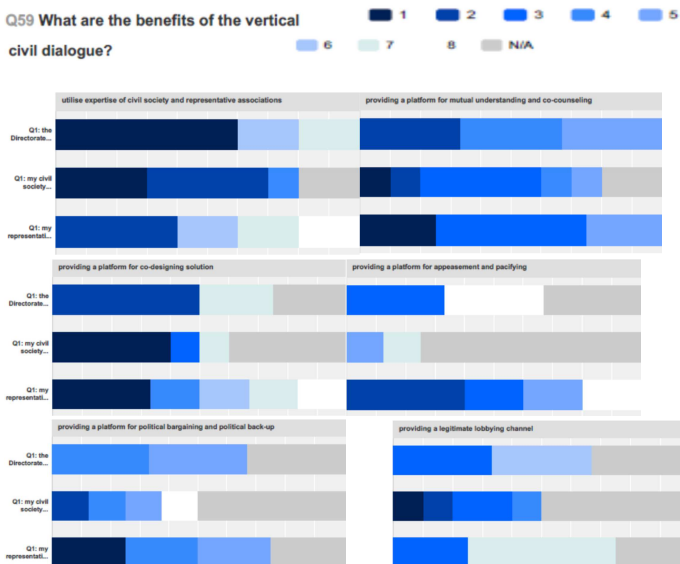
CSOs: Citizens having **dialogue** with the *institutions* on their views of policies / dialogue from and to *policy makers* / between civil society organisations and EU authorities / Bottom-up dialogue crossing all levels of the society from citizen, grassroot org, to civil society, umbrella structures and public bodies / improving links between local, regional, national and European level / Ancient Greece/ consultation / To know what's going on at the population

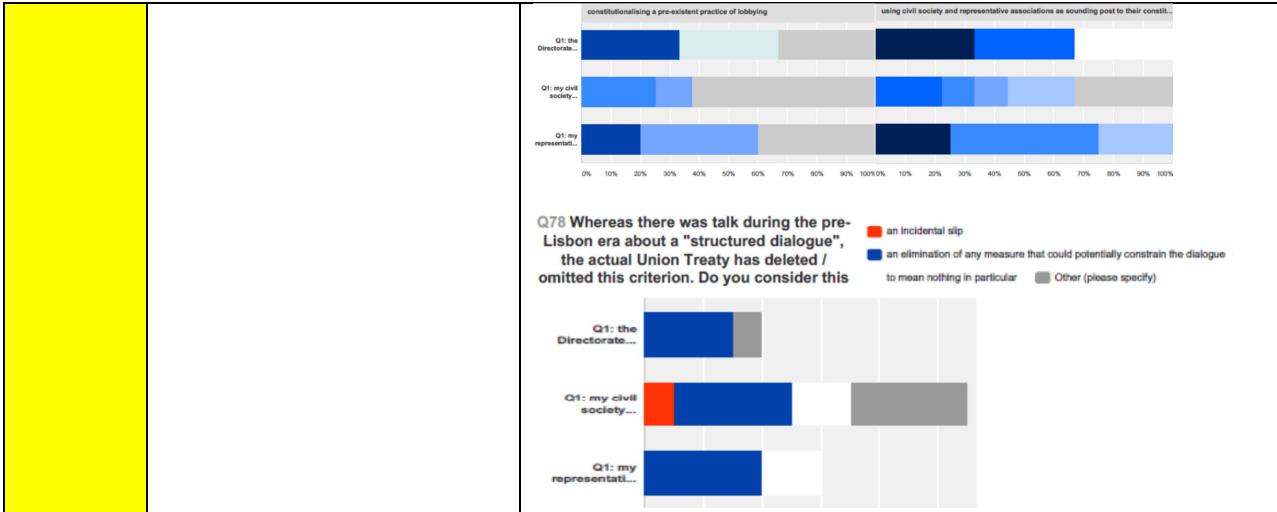
RAs: Citizens having **dialogue** with the institutions on their views of policies / *Structured and regular* dialogue between the **organizations** and the EU / Exchange between stakeholders and the EC / **between citizens**

Q58 What do you think is the nature of the vertical civil dialogue?

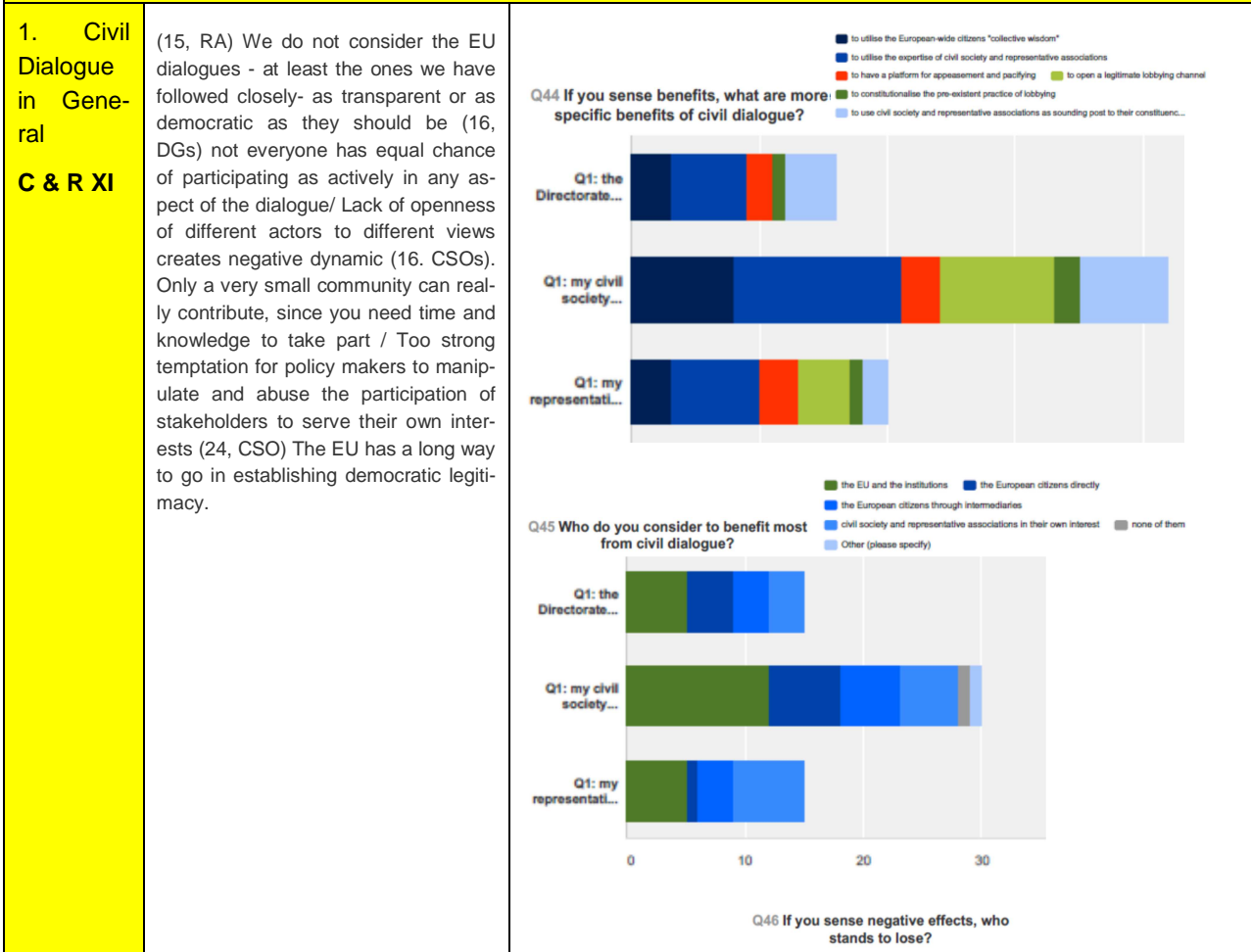


Q59 What are the benefits of the vertical civil dialogue?





II. Objectives Met (C & R VII)



2. Art 11 para 1	(compare answers in I.2.)	<p>Q53 Do you see the horizontal civil dialogue in Action yes no</p>
3. Art 11 para 2	(compare answers in I.3.)	<p>Q71 Effectiveness and relevance very (no label) somewhat (no label) not at all</p>
4. <i>Per- formance in Meet- ing the Objec- tives</i> C & R XII	<p>How do you perceive the reality of the civil dialogue in action in your own area of expertise? Do you think civil dialogue is effective? If so, why? (17, 19)</p> <p>DGs: (17) Range from “good and useful” to disappointing (19) Yes. On partners' side: it enhances ownership. On the side of the authorities: increased coherence, more targeted action / yes, it brings COM closer to citizens and stakeholders / forum would be better than survey and live meeting even better / Effective, stimulates debate, has helped deliver greater transparency in both directions, informs us of wider politics of trade DG AGRI changed its system to make the dialogue more effective. The initial feedback is good</p> <p>CSOs: (17) We have been calling for structured dialogue within Education & Training without success / satisfactory in the process of local development, disappointing in higher level of territory / satisfactory- it is exciting to participate in building a new type of democ-</p>	<p>Q47 General Performance Very good (no label) (no label) (no label) Poor</p> <p>Q18 Chemistry Answered: 48 Skipped: 41</p> <p>Q20 Effectiveness Answered: 41 Skipped: 40</p>

	<p>racy (otherwise range as above)</p> <p>(19) No. The agenda of the dialogue is very limited and set by only one side of the dialogue / A civil dialogue is not effective. There is a lack in practice, especially resources to adequately perform a dialogue in a short time. / Not at our European level / it is good in getting some information, we do not really dialogue a lot though/ No, there are to less people who knows about it. We need better information. / I think it is not substantive enough / yes, but not enough of it; civil dialogue means bunch of work, and COM tries to avoid / partly effective due to conflicts of interests/ It is effective. Helps to better manage the communities and puts pressure on decedents. / at Brussels level yes (It does provide an opportunity for civil society groups to make their voices heard with the Commission and Parliament./ yes, promotes more informed & democratic decision making / No, there are too few people who know about it. We need better information /</p> <p>The questions aren't right: dialogue works with the people we work with directly but not with the hierarchy.</p> <p>RAs: (17) wide range, mostly satisfactory</p> <p>(19) No. The agenda of the dialogue is very limited and set by only one side of the dialogue / Not effective, as there is a lack of transparency and non-equal treatment among the DG and organisations / Depends on type of people involved, needs to be broad and involve new people. / Yes, if just seen as an exchange platform / Yes, because efficiency is one of the principles of management of civil dialogue. / yes, it can influence decision making /</p> <p>It does highlight The Commissions important work areas</p>																																																													
III. Specific Tasks																																																														
1. Civil Dialogue in General	<p>19b, 20b</p> <p>Dialogue:</p> <p>DGs: A structured and meaningful mutual exchange/two way flow; engagement to listen/engagement in discourse (conversation) intended to enhance understanding and reach amicable agreement/ interactive/ need two way exchange</p>	<p>Q41 Do you perceive a dialogue as</p> <p>■ 1 ■ 2 ■ 3 ■ 4 ■ 5 ■ 6 ■ 7 ■ N/A</p> <table><thead><tr><th></th><th colspan="7">an ad hoc way of explaining policies</th><th colspan="7">an ad hoc way of communicating policies</th></tr></thead><tbody><tr><td>Q1: the Directorate...</td><td colspan="7"></td><td colspan="7"></td></tr><tr><td>Q1: my civil society...</td><td colspan="7"></td><td colspan="7"></td></tr><tr><td>Q1: my representative...</td><td colspan="7"></td><td colspan="7"></td></tr></tbody></table>		an ad hoc way of explaining policies							an ad hoc way of communicating policies							Q1: the Directorate...															Q1: my civil society...															Q1: my representative...														
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	<p>CSOs: Two sides hearing each other and replying to each other's arguments / a two way street /listening and talking on both sides / dialogue is limited by the economic interests and has a non-visible part / procedure to getting constructive solutions/ exchanging views and knowledge / A fruitful exchange of information, experiences, opinions / mutual, intensive, efficient / democratic listening to each other and make action plans Civil dialogue is the way to get information and reflect</p> <p>RAs: a two-way process / conversation / Two sides hearing each other and replying to each other's arguments/ Despite the original meaning of the greek word dialogos, it can be a discussion to find a consensus among more than two parties / interactive/ interaction with stakeholders and decision makers to influence a decision / The dialogue is more based on the Commission lecture instead of a real discussion</p>	<p>an institutionalised way of explaining policies</p> <p>an institutionalised way of communicating policies</p> <p>a process not directed at reaching specific decisions</p> <p>a process to improve specific decisions - decision shaping</p> <p>a process that creates the perception of participation by civil society</p>
2. Art 11 para 1	(compare answers in I.2.)	
3. Art 11 para 2	(compare answers in I.3.)	<p>only decorative including contributions from bottom-up as an "audience" for top down announcement serving as a multiplier capable of reaching citizens as supportive experts as a political partner to institutions leveraging EU proposals playing a leading role / driving force / agenda setting as the "silent" masters of the dialogue who rule the Directorate Generales and L... Other (please specify)</p> <p>Q72 What do you think is the role of civil society and representative associations in relation to vertical civil dialogue?</p> <p>Q1: the Directorate...</p> <p>Q1: my civil society...</p> <p>Q1: my representati...</p>
IV. Aims	<p>DGs: Give citizens and representative associations the opportunity to make known and publicly exchange their views (cf. art. 11 TUE) / to make known their views in all areas related to CAP/ engagement, transparency</p> <p>CSOs: To let citizens be heard / involve stakeholders / give stakeholders opportunity to express views; contribute to open and transparent policy</p>	<p>Q49 In your opinion, where can the concept of the civil dialogue as such be traced back to?</p> <p>bottom-up, EU citizens civil society and representative associations</p> <p>Q1: the Directorate...</p> <p>Q1: my civil society...</p> <p>Q1: my representati...</p>

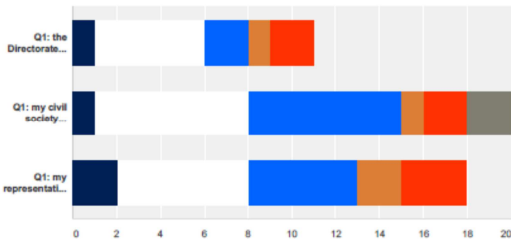
	<p>making process / Provide a platform for qualified participation to CSOs into EU policies / to show transparency and participation / Enable the democratic participation in policy making of those concerned / Enhance democratic participation of civil society / Exchange of information and expert advice to the DG / To establish democratic influence, transparency/ To make sure the voice and interest of EU Citizens are taken into account/ understand our diversity, increase public engagement in Europe, and take account of different voices in decision making</p> <p>(output oriented): more understanding, better regulations / Improving governance and leading policy in better adequacy/ the quality of legislation / the individuals' quality of life and make the communities sustainable/ find a better solution / Good governance for the people / Make use of experts and grassroots knowledge/ balanced policy making / structured support by NGOs</p> <p>RAs: let citizens be heard/ to make the voice of citizens through organized civil society heard / Give citizens/orgs the opportunity to share their opinions on EU related issues/work / To express our opinion. Active participation for better state of agriculture in Europe / opportunity to make known and publicly exchange their views in all areas of Union action</p> <p>(output oriented): improvement of the quality of legislation / Sustaining the EC in the elaboration of an adequate legislation, improving its understanding amongst stakeholders and its implementation.</p>	<p>Q50 The Lisbon Treaty commits to enhancing the democratic legitimacy of the EU. Do you think that participatory democracy is a means for reaching that overarching Goal?</p> <p>Yes No Don't know</p>
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V. The Criteria of 11 para 2 (C & R XV)		
<p>1. Open</p> <p>C & R XII</p>	<p>DGs: not restricted to certain categories or lobbies / Based on clearly defined rules, without unjustified barriers / fully transparent / An open dialogue is one which is open to all interested parties to hear and participate in / Open to not-for-profit organisations in EU Transparency Register</p> <p>CSOs: for all to be part of it/ open to every contribution / A wide range of stakeholders have access to the dialogue. / access to everybody on the</p>	<p>Q75 Open</p> <p>to be kept free of any barriers, like detailed structures, organisational biases and simil... open to any potential applicant open in regard to the procedure itself, i.e. to be carried out in open sessions open in regard to the outcomes, that therefore must be strictly communicated to the public just another catchy word Other (please specify)</p>

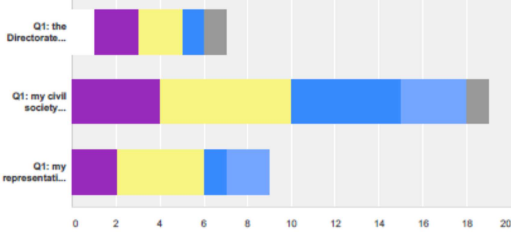
	<p>documents, allowing all NGOs to participate, but not having many people per one interest group / open to non-economic interests / both 'sides' can put items on the agenda... / democratic listening to each other / The wide public can see it freely and media can easily dig deeper / administrative "impossibility" / Prior disclosure of relevant information about what is at stake</p> <p>ROs: no restriction / accessible / open to all interested organizations / Broad access / The wide public can see it freely and media can easily dig deeper.</p>																									
2. Transparent	<p>(32) DGs: Publicly available information, unambiguous rules/ openness / public /Open meetings, records published, potentially web streamed</p> <p>CSOs: Information about agendas, meetings, decision making milestones / the fact that each partner of the dialogue is clearly displayed. Dissemination of the results and the arguments of the decision. / Accessibility of agendas, minutes and list of participants / clear goals, actions and procedure and dissemination of information / all documents are available. It is clear in advance and afterwards, how the dialogue affects the decision making and how other factors influence it / minutes should be available to the public / On the record so that those with contrary views can have an opportunity to challenge information exchanged / clear reporting / no hidden agenda, willingness to be open about the issues and interests / this concerns especially the invitation policy / completely open to everybody / lack of responsiveness /</p> <p>RAs: It is clear in advance and afterwards, how the dialogue affects the decision making and how other factors influence it / open to public scrutiny / truth / Equal access to participation and documents / Open, non-prejudiced, neutral, objective, respectful to all parties / that it is visible for all those interested / public</p>	<p>Q76 Transparent</p> <table><caption>Data for Q76 Transparent</caption><thead><tr><th>Category</th><th>transparent in regard to the admissibility criteria</th><th>transparent in regard to the power / influence of the "Players"</th><th>transparent in regard to the processes, rather a synonym to "open"</th><th>just another catchy word</th><th>Other (please specify)</th></tr></thead><tbody><tr><td>Q1: the Directorate...</td><td>5</td><td>2</td><td>0</td><td>0</td><td>3</td></tr><tr><td>Q1: my civil society...</td><td>10</td><td>10</td><td>5</td><td>0</td><td>5</td></tr><tr><td>Q1: my representati...</td><td>5</td><td>5</td><td>2</td><td>2</td><td>6</td></tr></tbody></table>	Category	transparent in regard to the admissibility criteria	transparent in regard to the power / influence of the "Players"	transparent in regard to the processes, rather a synonym to "open"	just another catchy word	Other (please specify)	Q1: the Directorate...	5	2	0	0	3	Q1: my civil society...	10	10	5	0	5	Q1: my representati...	5	5	2	2	6
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Q1: my civil society...	10	10	5	0	5																					
Q1: my representati...	5	5	2	2	6																					
3. Regular	<p>(33) DGs: Recurring at fixed, uniform, or normal intervals / at sufficient close intervals as to be beneficial for all par-</p>	<p>Q77 Regular</p>																								

	<p>ties involved periodic, as necessary – 2-3 times per year and more if necessary by modern IT tools /several times each year / We try to ensure monthly contacts</p> <p>CSOs: As regular as decisions are made and agendas are set. / Before, during and after the process / regular meetings are held / a fact/ organised, planned / action/procedure that is common, repeatable, based on a periodicity / more often than once / every X weeks/months / continuous / meaning not only a one off occasion but several times when new input is needed / Recurrent, constant over time / defined by rules / regular depends on context , should involve dialogue at all points of assessment or policy change Can be anything from monthly to bian-nual / at least twice a year and before changes in key policies no big regulatory work should be done without liaising with the civil society / lack of vision and good will</p> <p>RAs: As regular as decisions are made and agendas are set / frequent / normal, standard, permanent, stable / that it happens regularly At least twice a year / several times each year</p>	
<p>VI. Considerations (Wish List" - General)</p>	<p>What issues could be improved to achieve greater effectiveness? (21 in part)</p> <p>DGs: Extension of the culture and practice of civil dialogue in all EU Member States./ more periodic dialogue; not only CDG per se; openness and frank approach/ forum would be better than survey and live meeting even better</p> <p>CSOs: agenda sent well in advance; input on agenda possible; targeted discussion on specific issues; follow-up / agenda set by us. / Structured dialogue instead of one huge meeting per year / a more institutionalized involvement of CSOs / More media work, more forums / less meetings, less people in meetings, more technical discussions, more concrete questions of commission what they want from us / Careful selection of the leaders. More</p>	

	<p>information for the electorate. / The assistance of independent scientific experts / More effort and money on our side / no way to learn political skills since unions collapsed / more involvement of the parliament members</p> <p>RAs: Dialogue should be way more extensive, inclusive and the agenda set by us./ Proper dialogue with feedback - instead of university style lecturing on the part of the Commission /</p> <p>Wishes expressed in response to other questions:</p> <p>16: RA: Should not be used by EC to refrain organising proper consultation processes, impact studies and evaluations of (possible) EU legislation</p>													
VII. "Legal Nature"														
1. Hard Law	<p>Are you aware of any legal obligation why the civil dialogue must be conducted? If so, where does the obligation stem from? (22 and 23)</p> <p>DGs: EU Treaty / Art 11(2) of the TEU / Art. 11 TUE as well as obligations stemming from sector-specific secondary legislation / it stems from participatory democracy as a fundamental democratic principle of the EU</p> <p>CSOs: Treaty of Lisbon stresses the need for dialogue with various groups / Art. 11 / in the treaty of Lisbon / not specifically / Art 11(1) and 11(2) of the Treaty on European Union / Art 11 TEU, Art 41-44 EU Charter, Regulation on Access to Documents / From the constitution(s) / From the constitution(s) / Constitutional Treaty</p> <p>ROs: Treaty of Lisbon / Yes, art. 11 TEU / Art 11 / Art 11(1) and 11(2) of the Treaty on European Union / Lisbon Treaty, human rights treaties / Treaty agreements signed by the EU</p>	<p>Q62 Do you sense any legal obligation that vertical civil dialogue must be conducted? ■ yes ■ no</p> <table border="1"> <caption>Data for Q62 Chart</caption> <thead> <tr> <th>Group</th> <th>Yes (Blue)</th> <th>No (Red)</th> </tr> </thead> <tbody> <tr> <td>Q1: the Directorate...</td> <td>3.5</td> <td>1.5</td> </tr> <tr> <td>Q1: my civil society...</td> <td>6.0</td> <td>4.0</td> </tr> <tr> <td>Q1: my representat...</td> <td>4.0</td> <td>1.0</td> </tr> </tbody> </table>	Group	Yes (Blue)	No (Red)	Q1: the Directorate...	3.5	1.5	Q1: my civil society...	6.0	4.0	Q1: my representat...	4.0	1.0
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Q1: my representat...	4.0	1.0												
2. Soft Law Nature	<p>(24, CSOs)Best practices in EU states are the additional incentives to effective civil dialogue / EP Report on the perspectives for developing civil dialogue under the Treaty of Lisbon</p>													
3. Non-legal Obligation /	<p>Do you believe that an obligation other than legal exists in light of the EU's democratic legitimacy? (24)</p>													

<div>Code of Ethics</div>	<div><p>DGs: (several times yes)/ EU democratic process and tradition / the CDGs are an asset in ensuring that people are active in shaping their society</p><p>CSOs: (several times yes, less frequently no)/ for sure, Europe lost the link to its citizens / A moral obligation exists indeed /yes, a moral and popular obligation / yes, ethical and duty to citizens / yes a democratic one towards the citizens and who represents them / Yes, democracy is based on listening to the population - it is the most basic principle / a moral obligation for transparency and legitimacy / All the big words about democracy, transparency and rights must have just a shred of reality in order not to be completely ridiculous / I don't think so</p><p>RAs: ("yes" twice) / A moral obligation exists indeed. As EU has competence in many topics / I hope so!</p></div>																													
<div>4. Regulatory Regime (Beyond Art 11 TEU)</div>	<div><p>What kind of regulatory regime currently regulates civil dialogue in your area of work/expertise? Please describe the exact legal basis for the regime currently in place in your area of work/expertise (25 and 26)</p><p>DGs: EU secondary legislation / Commission decision of 16 December 2013 / Art. 5 of Regulation 1304/2013 ; Commission Decision setting up the ESI Funds structured dialogue group of experts C(2014) 4175 / setting up a framework for civil dialogue in matters covered by the common agricultural policy and repealing Decision 2004/391/EC / COM decision (AGRI) / The rules of procedure complement the operation rules of the civil dialogue group as set up in the Decision 2013/767/EC / CONSTITUTION AND INTERNATIONAL LAW</p><p>CSOs: decision of commission / DG decisions / 23 April 2004 Decision of the Commission / Rules of procedures defined by the DG and agreed on by participants to the dialogue / values and communication system (methodically and democratically) / as part of various EU programmes. out of habit / The Law of Associations and Foundations no. 26/2000 /The Law of Associations and Foundations, the Civil Code and the Fiscal Code / (variations of none)</p></div>	<div><p>Q66 What do you consider necessary "hard core contents" of a "regulatory regime" to be?</p><div><div>■ setting an election period</div><div>■ defining procedures</div><div>■ regulating admissibility</div><div>■ imposing efficiency control</div><div>■ setting budgetary limits</div><div>■ Other (please specify)</div></div><table><caption>Data for Q66: Necessary "hard core contents" of a "regulatory regime"</caption><thead><tr><th>Group</th><th>setting an election period</th><th>defining procedures</th><th>regulating admissibility</th><th>imposing efficiency control</th><th>setting budgetary limits</th><th>Other (please specify)</th></tr></thead><tbody><tr><td>Q1: the Directorate...</td><td>1</td><td>0</td><td>2</td><td>1</td><td>1</td><td>0</td></tr><tr><td>Q1: my civil society...</td><td>1</td><td>0</td><td>12</td><td>1</td><td>2</td><td>2</td></tr><tr><td>Q1: my representati...</td><td>2</td><td>0</td><td>10</td><td>2</td><td>3</td><td>0</td></tr></tbody></table></div>	Group	setting an election period	defining procedures	regulating admissibility	imposing efficiency control	setting budgetary limits	Other (please specify)	Q1: the Directorate...	1	0	2	1	1	0	Q1: my civil society...	1	0	12	1	2	2	Q1: my representati...	2	0	10	2	3	0
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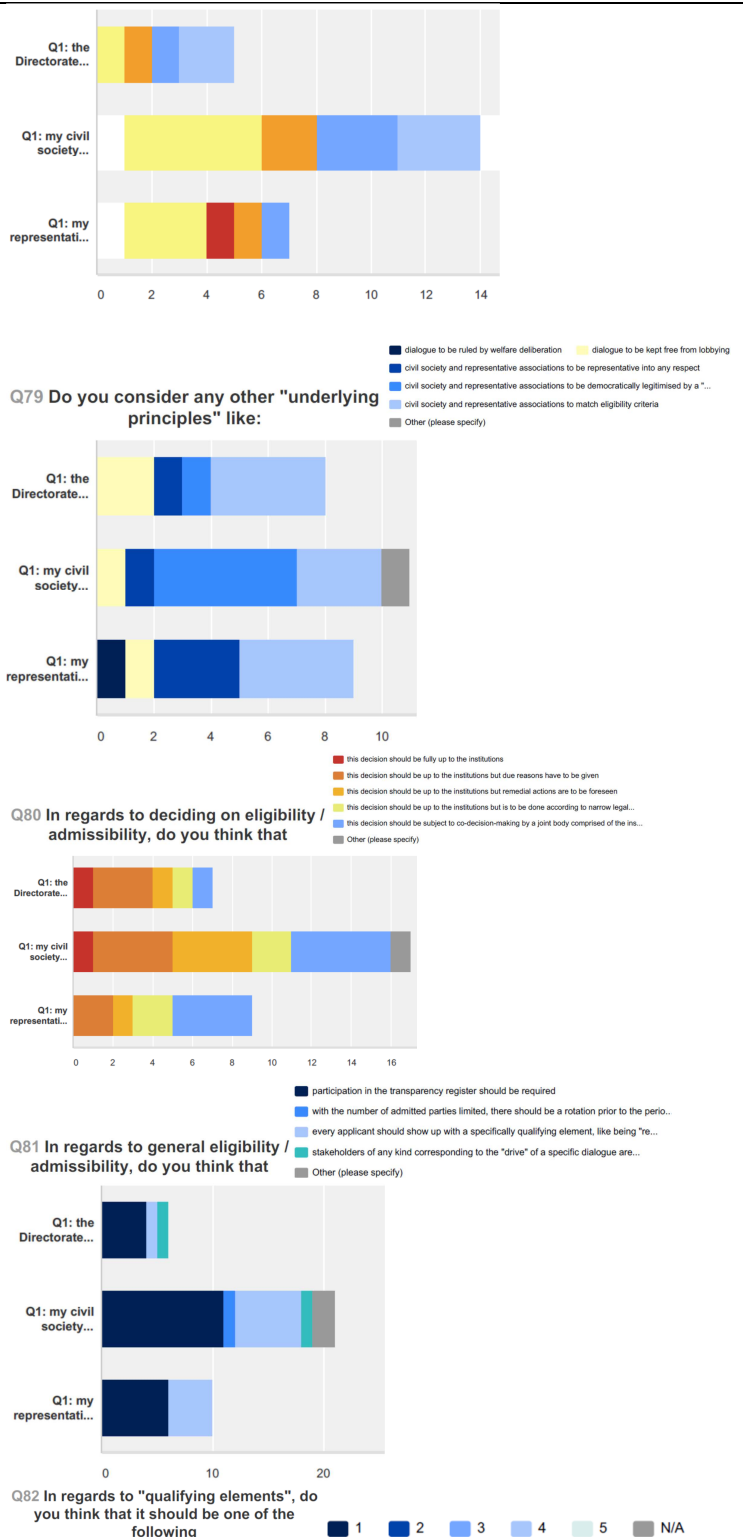
	<p>RAs: DG decisions / National legislation, which is mostly not implemented / lack of dialogue regime /(variations of no/none)</p>																													
5. Remedy	<p>Please describe legal recourses currently available to actual as well as aspiring participants of civil dialogues in your area of work/expertise (27)</p> <p>DGs: the standard ones for the advisory groups of the Commission / don't know /NA</p> <p>CSOs: only the TEU is a resource, apart from that we stand very weak / outsourced externally / Mediator / focus groups, public hearings, referendum, promotion of citizen initiatives, consultation process on law drafts / (variations of don't know)</p> <p>RAs: only the TEU is a resource, apart from that we stand very weak / (variations of don't know)</p>																													
VIII. Performance of the Regulatory Regime		<p>Q64 Is your vertical civil dialogue "belegalised" by a regulatory Regime?</p> <p>■ Yes ■ No</p> <table border="1"><caption>Data for Q64: Is your vertical civil dialogue "belegalised" by a regulatory Regime?</caption><thead><tr><th>Category</th><th>Yes (%)</th><th>No (%)</th></tr></thead><tbody><tr><td>Q1: the Directorate...</td><td>40</td><td>60</td></tr><tr><td>Q1: my civil society...</td><td>30</td><td>70</td></tr><tr><td>Q1: my representat...</td><td>40</td><td>60</td></tr></tbody></table> <p>Q65 If yes, are you satisfied with this regulatory regime?</p> <p>■ yes ■ no ■ if no, why not</p> <table border="1"><caption>Data for Q65: If yes, are you satisfied with this regulatory regime?</caption><thead><tr><th>Category</th><th>yes</th><th>no</th><th>if no, why not</th></tr></thead><tbody><tr><td>Q1: the Directorate...</td><td>3</td><td>0</td><td>7</td></tr><tr><td>Q1: my civil society...</td><td>1</td><td>3</td><td>6</td></tr><tr><td>Q1: my representat...</td><td>2</td><td>2</td><td>6</td></tr></tbody></table>	Category	Yes (%)	No (%)	Q1: the Directorate...	40	60	Q1: my civil society...	30	70	Q1: my representat...	40	60	Category	yes	no	if no, why not	Q1: the Directorate...	3	0	7	Q1: my civil society...	1	3	6	Q1: my representat...	2	2	6
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Q1: my representat...	2	2	6																											
2. Considerations on the Legal Nature/Regulator Regime („wish-list“)		<p>kept free of any regulatory regime ■ a mission statement</p> <p>■ ruled by an code of ethics, code of conduct or by another "recommendation" of al...</p> <p>■ designed by an internal regulation of concerned DG's, institutions</p> <p>■ a one-fits-all overall framework regulation binding any of the concerned vertical civil d</p> <p>■ Other (please specify)</p> <p>Q63 What do you consider that a "regime" of the vertical civil dialogue should be?</p>																												

		
IX. Selection (C & R IX.)		
<p>1.</p> <p>Notifica- tion and Criteria for Partic- ipation</p> <p>C & R XIII</p>	<p>Q 34 What do you think about specific qualifying criteria for admissibility?</p> <p>DGs: They allow better structuring of the dialogue, ensure representation and avoid discrimination / necessary to have in order to have a well-functioning dialogue / ok but it is a bit artificial that religious org cannot register as such but only through a representative / spelt out in decision</p> <p>CSOs: Needed, to prevent fragmentation and wild growth / necessary / Important / qualifying criteria enhance the applicants to achieve a minimum level of expectations. They are useful / In principle good / in principle this is fine as long as the threshold is not too high / the formal criteria are not as important as the actual conditions under which civil society has to operate - usually lack of resources / not respected</p> <p>RAs: Needed, to prevent fragmentation and wild growth / Cannot properly be assessed for representatives / It would be good to call qualified experts to dialogues, if a professional issue is concerned</p> <p>Q 35 Which criteria would you reject?</p> <p>DGs: Any criteria that impinge on a fundamental right / any that aims to exclude a category of EU citizens / inconsistent treatment/categorisation of organizations appointed /</p> <p>CSOs: financial, age, focus on national organisations / NGOs including public authorities in their membership / registered association, focus of the</p>	

	<p>NGO relevant to the dialogue</p> <p>RAs: Small budget / financial, age, focus on national organisations / Non relevant to our profession or to an issue parties, authorities / any that aims to exclude a category of EU citizens</p> <p>Q 36 Which criteria would you favour?</p> <p>DGs: Criteria related to representativeness and relevant expertise, provided they are objectively verifiable / representativeness / the ones published in the call for applications by DG AGRI</p> <p>CSOs: Democratic structure of organisation, a certain representativeness and public interest / representativeness, internal democracy and meta-dialogue / democratic listening to each other / proof of working on European level / balance between economic and non-economic interests</p> <p>RAs: representativity / Close contact with people in the area / Evidence of the subject's good knowledge, authorised participation to executive committees</p>													
2. Responsibility and Criteria for Selecting Members		<p>Q86 Reflecting upon Art 17 TFEU 3 Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations would you think that religious or philosophical (non-religious) organisations should be</p> <p>■ eligible ■ not eligible</p> <table border="1"> <thead> <tr> <th>Question</th> <th>eligible (%)</th> <th>not eligible (%)</th> </tr> </thead> <tbody> <tr> <td>Q1: the Directorate...</td> <td>100</td> <td>0</td> </tr> <tr> <td>Q1: my civil society...</td> <td>50</td> <td>50</td> </tr> <tr> <td>Q1: my representati...</td> <td>85</td> <td>15</td> </tr> </tbody> </table>	Question	eligible (%)	not eligible (%)	Q1: the Directorate...	100	0	Q1: my civil society...	50	50	Q1: my representati...	85	15
Question	eligible (%)	not eligible (%)												
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Q1: my representati...	85	15												
4. Considerations on the Selection	<p>(Partial overlap with 1.)</p> <p>Taken from: What issues could be improved to achieve greater effectiveness? (21)</p> <p>DGs: ensuring a balanced representation of interests CSOs: / Better balancing the interests between economic and non-economic interests / Bal-</p>	<p>Q67 Considering the potential need for selecting dialogue partners, is participation in the civil dialogue held or joined by your entity</p> <p>■ completely open to anyone ■ open upon registration ■ regulated on an ad hoc basis without reasons given ■ regulated on an ad hoc basis with reasons given ■ regulated following a standardised procedure without legal recourse ■ regulated following a standardised procedure with legal recourse Other (please specify)</p>												

anced representation of all interests. / Dialogue should be way more extensive, inclusive // reaching & involving disadvantaged & uneducated. RA: Neutral and objective approach by the DGs towards all representative organisations / Must involve practitioners and real farmers. / that not only employers and employees organizations are involved in employment issues but also other NGOs, like family/women organizations / increasing the input through online options

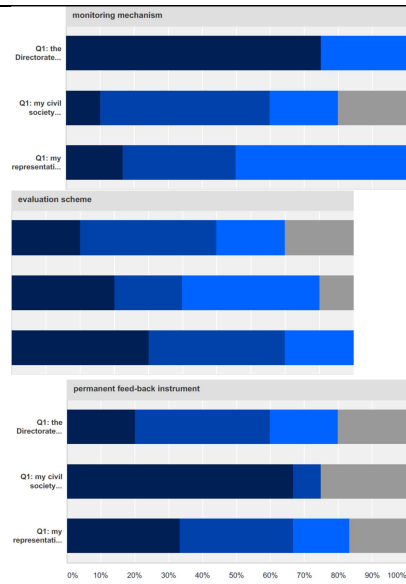
Taken from 16: DGs: the CDGs should have balanced composition so to avoid the overrepresentation of certain interests for example economic in the dialogue



XI. (X.) Dialogue Procedure		
1. Structuring of Participants - General		<p>Q85 Article 11(2) TEU enumerates dialogue partners as representative associations and civil society. Do you sense this as</p> <ul style="list-style-type: none"> committedly creating two bodies vis-a-vis the institutions if yes, does this imply procedural organisational consequences, i.e.: should they "vo..." just pleonastic, descriptive use of terms <p>Q78 Whereas there was talk during the pre-Lisbon era about a "structured dialogue", the actual Union Treaty has deleted / omitted this criterion. Do you consider this</p> <ul style="list-style-type: none"> an incidental slip an elimination of any measure that could potentially constrain the dialogue to mean nothing in particular Other (please specify)
XII. Venues for Civil Dialogue		<p>Q48 What is currently the most important venue for civil dialogue(s)?</p> <ul style="list-style-type: none"> 1 2 3 4 N/A

		<p>Conferences throughout Europe</p> <p>Areas especially concerned by policies</p> <p>Q1: the Directorate...</p> <p>Q1: my civil society...</p> <p>Q1: my representati...</p> <p>0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%</p>
XIII. Conflict of Interest Policy		
1. Check- ing on Possible Conflicts, Conse- quences	<p>Answer on Q 34 What do you think about specific qualifying criteria for admissibility? (CSO): regulations of <i>industrial lobbying</i> (RAs): Journalists should be allowed to attend</p> <p>Answer on Q 35 Which criteria would you reject? (CSOs) criteria based on personal CVs and not on organisations</p>	
2. Impact of Vertical Dialogue		<p>Q74 What do you consider the limits of the vertical civil dialogue to be? Should an Institution</p> <p>be entitled to fully ignore proposals / opinions coming from the partners</p> <p>be obliged to respond to proposals / opinions coming from the partners</p> <p>be entitled to reject but to give reasons for the rejection</p> <p>Q1: the Directorate...</p> <p>Q1: my civil society...</p> <p>Q1: my representati...</p> <p>0 2 4 6 8 10 12 14</p>
XIV. Re- view		
1. Review in Place		<p>Q70 If you are part of vertical civil dialogue, are any of the above mentioned schemes in action</p> <p>monitoring mechanism</p> <p>evaluation scheme</p> <p>permanent feed-back instrument</p> <p>Q1: the Directorate...</p> <p>Q1: my civil society...</p> <p>Q1: my representati...</p>
2. Con- sidera- tions on Possible Review		<p>Q69 What do you consider as necessary accompanying measures?</p> <p>1 2 3 N/A</p>

Mecha- nisms



V. Conclusions and Recommendations: The Unfinished Dialogues

1. Premises First - General Objectives

i. Adapting to the New Mind-set by the Treaties and a Constitutional Responsibility

From the Lisbon Treaty's Preamble to the Union Treaty and the Functioning Treaty, the Treaties gave clear orders: They made clear mission statements on the desideration of increasing legitimacy, thus in a way officially ordering the "spirit" of implementation. The leeway for the handling does not translate into an option for not-implementing or a half-hearted manner of implementation. Despite the reminiscence of the ruling principle of representative democracy under Art 10 (1) TEU, the Treaties since Lisbon have not parted with the pre-Lisbon era mind-set and clearly signal new approaches of open-mindedness, whereby respecting the European citizens' political will. As empathically expressed in the multilevel governance Charter of the Committee of the Regions: *"Togetherness, partnership, awareness of interdependence, multi-actorship (...) transparency, sharing best practices (...) transparent, open and inclusive policy-making process, promoting participation and partnership involving relevant public and private stakeholders (...), including through appropriate digital tools (...) to create networks between our political bodies and administration.* Worth noting is the fact that all these tendencies and considerations are in line with *Luc Van den Brande's* MLG philosophy concept and as well with *Beth Noveck's* Wikigovernment doctrine, which we have referred to and which we favour.

Throughout the entire study we keep this intrinsic beacon of interactive aims and legitimacy goals in mind, because we cannot find a single reason otherwise for the appointed task of giving recommended mapping when we disagree on the core premise. CD aims intrinsically for mutual understanding by exchanging good arguments or, best case, in finding a broad mental consensus on pendent EU legislation. In other words, Art 11 does not at all introduce a further kind of silent co-determination track through the backdoor and actually does not really side with the idea of direct democracy, even if the European Citizens Initiative under Paragraph 4 of Art 11 is interpreted quite often as such. Art 11 intends to empower and enable partners in an enriched and enhanced mutual political communication. It surpasses the deliberation idea in the Habermasian sense and takes one step further to set up the most modern philosophy of outcome-related cooperative and collaborative democracy.

With a decisively positivist premise we have - without any restraint - respected the premises and underlying assumptions of the Treaties and made them the core parameter of our evaluation methodology. It is the right of a "Constitution" to claim ontological priority. Neither would it have been up to authors of a study on "what exists" nor is it up to the bodies operating under the rule of law to ignore the legislators' desideration and conclusively to insinuate that the Treaties were just driven by the chimera of the Constitutional Conventions enthusiasm. A significant part of scholarship seems to believe so, thereby reinforcing the implementers' reluctant attitudes and behaviours.

What about the *desideration* of the Lisbon Treaty, what about the clear commandments of Arts 11(1) and (2) of the Union Treaty? An equal majority throughout our diverse respondents categories - some referring to the Treaties explicitly as the superstructure - do not sense a legal obligation for implementation in general and obviously keep the fact that the VCD exists for a voluntary gesture of the EU Commission, as was appropriate for pre-Lisbon times. But years after Lisbon? Well, this lack of awareness and rule of (mis-)perception is maybe tolerable for all those who are not directly bound by the solemn orders, but is the same acceptable for EU authorities? Hardly. Are they entitled to interpret simple texts into sophisticated complexity and from there conclusively sophisticate it to factual insignificance, as is at least the result in case of the HCD? President and Commission, here is a matter to be rethought.

Neither the relevant scholarship nor our survey data reflect any clear consensus when referring to the dialogue as it is designed now. However, the survey data on considerations demonstrates a near unanimous consensus that participatory democracy can provide legitimacy in general. So far, Civil Dialogues are considered to be a means for creating a European public and bringing the Union and/or the EU Commission closer to the concerns of the people it serves. Assuming an inviting policy and changed attitudes to more pro-active and real collaborative use of PD, legitimacy leverage could be assumed and in that case it would be indicated to go further with inclusion, especially when a constitutional call upon the institutions conclusively orders to put on an open-minded spirit. It is the law.

ii. Internalise the EU Commission's President's Mission Statement - Corroborating in a Proactive Manner in the Dialogue Culture

The President of the EU Commission seems to be in his right, when calling his team for a "last call Commission." The - to us disrespectfully so called - EU project is not invincible and we see signals of it being at risk to be re-surpassed by a nation state revival.

A possible solution for this concern was nearly unanimously expressed by respondents by attesting legitimacy leverage power of the dialogue(s) in general, whereas criticisms predominantly arose when tracking the daily practice. But this underlines that something must be done to close the gap between sensed theory and experienced practice. Facing the empirical fact of an ongoing downturn of acceptance of the EU, the constantly stressed "communication" as an overall medicine must have clearly failed *in semine* - so it makes no sense to just be more and "better communicators". Doing Union is key. Doing means engaging, cooperating, sharing, being into, associating with and partaking. Aligning with the President's statement stressing "citizens" and the principle of openness and the admissibility of CS, without any restraint as to "organisation", indicates allowing to see single citizens as eligible, which causes no greater problems when participating online, which again makes leverage of legitimacy more likely, therefore single citizens should be considered as valuable dialogue partners.

Could the actual dialogue principle achieve that? Our findings attest a clear "No". So, has participation failed in general? Another clear "No". Our findings evidence that this "what exists" is not seen as real participation. We can draw the following result: Participation has not been contested to its full potential yet. Only then, when after many attempts and significant efforts, a broad, European wide and, on any of the Union's levels installed PD scheme had shown a legitimacy increase, could one propose to delete it from a next Treaty. Amongst others, Art 11 (1) offers one of the means which was not contested. Its strength is to be a constitutional track which should allow the average citizens to openly join the dialogue.

The often legitimately stressed argument to incur "expertise" via 11 (2) for the EU Commission is more than fragile: first of all, the dialogue partners are rather "political" representatives and not experts per se, secondly, to obtain expertise the Commission could use rather less complex and more objective ways; thirdly, it is not the case that the EU Commission couldn't generate its own expertise internally, either by its own body of officers or by buying expertise or through Art 11 (3), the consultation procedure.

2. Horizontal Civil Dialogue

i. An Orphan in Need of Surrogate Activity?

We state that the horizontal civil dialogue in the underlying reading of Art 11 paragraph 1 TEU does not exist. Alternative "offers" - which came in form of a friendly and cooperative contribution and for which we are grateful - even in best conviction unfortunately do not match and thin away the Lisbon pledge: "dialogue" is a precise used legal term and strictly reserved to the paragraphs 1 and 2 of Art 11. Communication or Consultation (Art 11 (3) TEU) or the ECI (Art 11(4) TEU) are clearly instruments of participatory democracy but not to be subsumed as civil dialogue(s). As a result : the combination of participatory democracy and civil dialogue refers to Arts 11 (1) and (2) TEU solely, intermingling them with other proEuropean activities or communication is not in alignment with the constitutional profile.

Nevertheless some argue not to act too scholarly and purist. , and that summing up all the Union's communication with the citizens and all the diverse and also disparate discourses on Union and sub-Union levels, makes in total the Art 11(1) dialogue. Whether this is motivated by benevolence or compliance we don't know We strongly disagree to this truly dangerous excuse, which could turn out as a perpetual absolution for further omission. Not only is paragraph 1 - not coincidentally the antecedent of, but written in the same logic, as paragraph 2 - and nobody is in doubt that paragraph 2 refers to a very particular institute or instrument. Furthermore, para 1 says that the institutions "*shall ... give...opportunity*", which semantically means a one-sided and rather altruistic action, as does the additional order, namely to do that by "*appropriate means*". To let the citizens debate - what could the Union do that would finally become interpreted as a favour that is "given"? So, we keep stating that this horizontal civil dialogue is overdue. This again - as an order of the Treaties which is not followed

- can be seen as an *infringement of the Treaties*. At least the EU Commission's position is within reasonable rationales to be a rather executive body, whereas to install a pan-Europeanwide citizens dialogue scheme is of typical political nature and therefore either the Parliament or the Council or the European Council, could be, if anyone, the ones primarily obliged.

Is this an appropriate way of arriving at a *new culture of dialogue*, as the EU Commission has promised in its Communication of 2002? We incline to abnegate. Starting a fairly new relation with a claim has never turned out as being particularly benefitting. How to resolve such a deadlock? Such an answer is not ours to give. We can only remind the reader that we have acknowledged that there is a "constitutional" commandment to be followed.

ii. Support Surrogate Motherhood from Bottom-up or from the Side "by Appropriate Means"

Self-development from bottom up, coming from the citizenry, could be one option. This could by the way, well urge support *by appropriate means*. It would thus be possible to equip and enable people all over the Union to join in this dialogue, if there were an incubator that - what could be deemed as less than "appropriate means" - provides the necessary basic tool. The modern IC technology opens unlimited options for participation, as f. ex. Facebook demonstrates. Unfortunately, it is just not the offered technology that ensures participation. But apparently neither is the civil society advanced and on a framing-level organised enough to serve as a crystallising power to motivate citizens to join in EU politics in their masses. Bringing them in and keeping them on board is the real challenge and this again requires a participation "pay-off", noticeably, tangibly, and one way or another, far away from monetary benefits. This, again, would urge the institutions to be present "on the other end of the line", but opposite to the vertical style, this time in a rather horizontal manner, being on equal footing, proposing their own position, not coercingly unanimous and not buckling up, but corresponding to the brought-up issues anyway, say dialoguing.

Therefore we appreciate the efforts of the EESC to promote citizens' participation by installing its very own portal-project "My Europe...tomorrow". Although the EESC is not formally an institution of the EU and furthermore is not addressed by the Union Treaty, it has set a clear signal and acted by substitution. Will the institutions appreciate this brave-hearted "surrogate motherhood" the same way we do?

3. On the Vertical Civil Dialogue

A certain reluctance of DG's to engage our survey can be understood. It could be that we have joined the arena at the most unfavourable moment, namely when the EU Commission was faced with a challenge by the Ombudsman's highly investigative addressed invitation from end of January 2015 to show up with a fundamental response to sensed grievances in the attendant dialogue regime. It is true, the statement of the EU Commission, scheduled by end of April 2015, will truly be of a case making nature for a long time. The kaleidoscope will take a next turn - as we have substantively reflected on.

i. Consensus on the Dialogue's Necessity - Dissensus on the Status Quo

Pre-note: As already mentioned, throughout all of the diverse groups there was an overwhelming majority opting for being convinced that CD could provide legitimacy to the EU. A significant and highly surprising collective statement! Despite the possible interpretation that was involved, their role could be seen with an overdone optimism, this (nearby) unanimity of the actors should make the scholars rethink whether their doubtful theories are still valid. This conclusive "promise" should allow the Commissioners to put on an enhanced and enlarged use as well as an innovated use of CD and inviting the asserting CS and RA's to communicate this to the public, because it is not this selected "handful" of dialoguers that could leverage the legitimacy, this *consilium nobile* is clearly up to the public. But they could well act as witnesses and multipliers.

Our internal suppositions, based on the apparently too intensively analysed literature, that we will face a highly heterogeneous picture on the necessity of the dialogue, did in actual fact not turn out as such. The DG's, CS's and RA's respondents showed great homogeneity in favour of the dialogue in general. Prominent allegations from CS, less stressed by the body of RAs, were an imbalance of the respective powers among their own "curia", opaque admission practices, top-down agenda setting only, and information without the willingness to deal with the issues. So, then the consensus was over and out. This, of course, might have to do with the fact that some respondents represented organisations which were not eligible. One potential respondent called us to voice his concerns: he suspected this study to adulate the EU Commission or the EESC. What makes one also wonder is the fact that the questionnaire respondents from DG's documented fairly great compliance, whereas DG representatives in the described BEPA seminar in contrary complained and aired scepticism. Group dynamics under protection of Chatham House Rules?

ii. Possible Role Models

With our findings and in full accordance to the Ombudsman's evaluation, we can report that there is a preliminary best practice, namely the one established by DG AGRI. DG AGRI has voluntarily improved a regulation in 2014, which puts most of the crucial questions in a clear legal framework and respects the underlying requirements of the Rule of Law principle. Maybe this regulatory willingness of DG AGRI was the reaction to the annoying experience incurred by the famous so called olive-oil-dispenser-case, which was right on its orbital way to surpass the dubious fame of the European-wide "Cucumber Regulation" which was finally stopped by the AGRI Commissioner in the last second. Nevertheless, the foreseen admissibility procedure is still not truly satisfying, as a severe observation of the Ombudsman and a formal intervention is likely to be started within the next weeks from now (stated on 27 March 2015). We can't predict in a scientifically vindicable approach that the existing possibility of quasi-monopolist hegemony erases, but it seems likely. Two of the core actors, which in actual fact are just one according to the Ombudsman's pre-screening, held by 70% of the obtainable "seats", and the significantly greater and pluralist rest of all the others agriculturally connoted interests - let alone new ones, like the new movement of permaculture or seed saving which claim to revolu-

tionise the entire sector - have to contend themselves with the remaining 30%. This example manifests another ultimate fundamental as well as detrimental flaw of the entire dialogue scheme, which was peripherally detected within our open questions but, stunningly, not explicitly qualified the importance which we attributed it to.

In a rather amply evaluation we incline to state that the next to best practice is that of DG Trade. Not that we have any further information on DG Trade, but on the basis of the intensely analysed *Coffey-Deloitte* study on the Civil Dialogue in DG Trade, we can draw our indirect conclusions that there are self-binding procedures of openness and transparency at stake that make the outcomes slightly predictable and traceable for the parties involved. We'd rather recommend DG Trade to see just the weaknesses as ascertained by the *Coffey* study rather than its strengths.

iii. Complete the Fragmentary Composition - Where are the Considerations of Average Citizens?

Sectoral representation may not always represent the European's real and daily expectations and concerns. Curiously, this chapter was rarely matched, but it was garnered through the open questions, which entailed free space for out-of-the-box suggestions. Due to the inner-organisational department structure of the EU Commission with regards to the dialogues, its participants from outside are simply redubbing and mirroring the DG's genuine functional sectoral competence. The vast majority of the European citizenry, despite having expectations along their manifold daily boundary, points to the Union's planning and measurements, are clearly not represented. It has always been the internal thematic coherence that makes organisations and associations eligible. The average citizen is in theory represented by the DG which also defends her or his interest against any other DG. We are not entitled to make this case, but we can here refer back to the olive-oil-dispenser case. When did the citizens come into the closed game? The oil-disperser story was brought to the attention of the public via mass media. This ensued a thunderstorm - in the professional language titled "shitstorm" - across the Union. Where were the end-users, the consumers of agricultural products in this preparatory dialogue process? Actually, why are they not entitled to join the dialogue? It is they, the Europeans, that represent the most appropriate obtainable "expertise". Why is the Union patiently waiting until the "eaters and drinkers" finally protest? Why not openly invite those "eaters and drinkers" as they are the final controllers anyway? This time the protest was against a waste of resources - and of their money in the direct run, because who else, if not the "eaters and drinkers" in restaurant would pay the party, generously sponsored by an unfortunate alliance of Brussels and the olive oil industries? Next time it may be protests against the bandwidth of EU tolerance of chemicals in groceries, runs against the fishing-quotas which are bargained amongst the producers exclusively, maybe even assisted by their ministries in the Council and maybe by some EP's of the involved states - and so on and so on. What do all these and endless other cases have in common? Upsetting and creating/reinforcing resentments of citizens only and exclusively harm the Union.

iv. Let a Broader Partnership Principle Break Through

Why not finally draw the conclusion and, according to the wide orders of the Lisbon concept, invite the citizens to enrich the dialogues? One could, for once, show that the Union is siding with the citizens, which could save them from the widespread rumour of being an exclusive bastion and henchmen of industries and additionally strongly support the DGs when being confronted with too "harmonized" interest policy from the side of the economic sector. This must have been the hidden agenda of the Lisbon concept, to widely open the participation doors for enhanced, enriched and enlarged participation of non-organised citizens as well, which found its expression in the omission of the former qualifying and narrowing-down criteria of "structured" and "organisations".

Moreover, by way of its criteria of open, transparent and regular the dialogue aims to offer a channel for fair bargaining, disclosing interest (as far as it is an honest interest), addressing considerations, generating rationality and receiving feedback from bottom up so that we can rightly talk of a concluding partnership principle. This per se on the other hand promises a consensus democracy principle. Not so bad an augmentation channel, we guess.

v. Reflecting on the New Wide Opening of the Dialogue(s)

Beyond the aforementioned concrete lack, our respondents have rather un-specifically worried about an opaque admittance praxis, as did the Ombudsman, but she located the reasons and mechanisms distinctly: first come first serve; who is already in can hardly be replaced and some quasi-monopolists are non-callable. New values or issues are excluded by the simple static argument of having no "seats" left. We'll see how the Ombudsman's interrogation will turn out.

This consideration of a radical opening appears to be clearly addressed in detail when Arts 11(1) and (2) have omitted to continue with categorising and qualifying attributions, like former "structured" and "organised" as intrinsic characteristics for the admissibility to the dialogue. We don't overlook the consequences of leaving the traditional well-rehearsed mechanisms: the complexity of the DG's handling of civil dialogue will no doubt become far more complex and require additional resources. Nevertheless, there is a strong prospective improvement also in favour of the DG's, which can base their further concepts on the pre-arrangements of countervailing powers, which first must find to a democratic consensus internally. Civil Society therefore should be seen in this new light as a generic term, for this deliberative, vigilant part of society that gathers around an issue of "civil" concern, be it another interest, possibly in contrast with established interests, be it a value, a proposal of future perspective or similar affection of union wide connotation and relevance - which can be represented by outstanding or seismographic single citizens as well. Therefore we do not share the underlying and sometimes explicit assumption in the new Road Map on Art 11 (1) and (2), that single citizens are just rather exceptionally admissible to the HCD, nor on Art 11 (2) that single citizens are strictly ineligible to VCD. This conviction is, however, not in line with the clear text of 11 (1) and maybe neither with that of 11 (2).

vi. Quality Rather than Quantity

This just mentioned premise opens the dialogue to a new and wider range of participants, open even to single citizens representing one of these denoted directions. The number of the constituencies could be replaced by the quality of the substrate as a key criterion. This could for that matter equalise predominant oldies and provide a fresh competitive wind thereby energizing the dialogues. The evident mass problem implicated can be resolved by reorganising the dialogue mode and by putting the dialoguing primarily on an online preparation model, which we'll come back to more in-depth at the end of our conclusions.

vii. A Two-chamber Model?

One certainty is obvious: CS and RA's must doubtlessly have different backgrounds, perceptions and substrates. Throughout the entire survey there is significant and clear homogeneous difference in the responses between those of CS and of RA's. On the sole basis of our empirics we cannot offer a valid answer, we can only express an impression, based on the style of responding: RA's appear more committed, more to the stark point, in short: more professional and efficacy driven. This and the following extrapolation can rightly become queried, but we must take this risk: RA's appear to be rather economic related - which for that matter are, of course, also clearly invited by the Treaties to be part of the VCD.

So, whereas legitimate economic interests appear to be rather covered by the concept of RA's, which refer to segmentary and limited objectives, Civil Society is undefined and unlimited. By the way, the implicit and conclusive popular assumption according to which CS is rather representing the welfare principle is not supported by the results of our investigation. Even CSO do not strictly opt for the choice that VCD could be of a rather altruistic or welfare nature. Insiders know better... This again could correspond with our respondents own opinions: conclusively in contradiction to their own shown inhomogeneity by curia, they ascertained this distinction in RA's and CS overwhelmingly as a stylistic matter, not indicating a substantive content matter.

Therefore, despite the fact that our supposed option, whether the differentiation between RA's and CS could be about creating two bodies of different interest and concept, was not strongly opted, we raise the question anyway: whether there aren't two dialogue bodies meant under Art 11(2) in analogy to Art 17 (3) TFEU which organises the dialogue between one body of religious and one of philosophical organisations. Also the Social Dialogue under Art 152 TFEU showing some similarities to 11 (2) but some disparities as well, leverages an indication in such a direction. This reading could be used by the DG's to establish an internal pre-competition and pre-harmonisation amongst the diverse positions in order to figure out, in a democratic internal process, where and on which topics majorities agglomerate. This reading could, of course also be misused by the DG's along the motto of *divide et impera*. Yet we resist the temptation to overprotect the "players" as they cannot be reduced by nature to blue-eyed freshmen.

viii. Co-designing a Reform Model

However, the dialogue in action is perceived as suboptimal and improvable. It's to be recommended therefore that the EU Commission carries-out an open consultation, publicly as usual, under Art 11 (3) TEU, primarily addressed to admissible organisations plus starting a particular all to non-organised citizens, and inviting them to a hearing, using open method to trace after constructive suggestions and solutions on how to best optimise the dialogue. We are convinced that this will result in a highly collaborative co-design of a new and enriched "culture" of dialogue.

If, by some reason, *inter alia* by the reading that the impulse action is not up to the institutions, which we do not share, the EU Commission should not take up this recommendation, it could be the EESC taking the responsibility as could everybody else along this interpretation of the EU Commission. If the institutions factually or implicitly deny their competence to set action, then also the justification by qualification as implementation by substitution is actually not necessary. In that case it would be logic that whomever - also the EESC - sets an activity, could require to get support "by appropriate means" from which ever institutions. At least this order of Art 11 (1) TEU should be beyond any doubt. Given that any application must be either accepted or rejected by an answer under Art 41 (4) FRC and that reasons must be given under para 2 lit c of same Art, making it an "act", Art 263 TFEU comes into play. Only a vanishing minority regarded these criteria as empty words. This, in turn does not indicate a homogeneous majority of the compliants. Whereas this time nearly none of the usual divides between DG's respondents and the others were seen, the diverse groups fall apart internally and linearly within their groups concerning the differentiation of the functions of the criteria.

viii. Resolving the Confusion on the Nature of Dialogue - Consultation, Expertise, Communication

Remarkably, even the involved parties have no distinct position when confronted with this open question (Q13), as to that they themselves are doing. This fundamentally changes only when directly facing the two options (Q31), what "dialogue could be about and what about 'consultation'". Then, nearly homogenously, came the appropriate connotation that dialogue means an interactive political exchange whereas consultation is unilateral and neither requires an answer nor any reaction on how it impacts the DG's final commitments. It is little wonder that this uncertainty in identifying the nature of the dialogue is mirrored in the adequate perception in key scholarship, which again leads to severe doubts as to what this dialogue is about and what it could accomplish. If any kind of communication to the DG is seen as dialogue, then the dialogue itself cannot ever fulfil its considered function of co-operative and collaborative democracy, which in its intrinsic sense is meant by participatory democracy. [Many internal educational efforts are ahead, if the institutions would bring the dialogue to its full intended potential. Moreover, that DG's are challenged to take the risk - which indeed could result in backlash of over-emancipation and undue self-esteem that could boost the complexity of policy making ever more. To keep the participants small in number and manageable makes them neither partners nor allies. Empowering civil society to act as real partners, in turn obliges a responsibility for the CS and RA's to present themselves as shared policy makers to their own constituencies, audiences and to

the general public. This could reinforce the perception of the Union as being open to the citizenry and thereby stimulate the legitimacy leverage.

ix. Designing a Serious Conflict of Interest Policy - A Case of Transparency in Action

The ombudsman has rightly stressed an overdue policy concerning evident conflicts of interest. We incline to share the OM's perception of an insufficiently identified overrepresentation of economic interests. The complexity of delineation what interest could be about - basically every consideration - and which one of these refers to partial economic interests and which to general economic interests does not negate this. Even typical altruistically welfare related concerns have more or less economic impacts. And, for that matter, the legal construction of an RA or CSO as non-profit organisations says only something about the front-entity itself. This is shown (Annex) by the fact that the RA of the European banks is in itself a Not-for-Profit. So, this categorisation says absolutely nothing about the interests that could be represented. This - inter alia - seems to be the background of a relative neutrality of CSO's when being asked on their perception of the fact of dealing with economic substrates in CD. As said, the RA's are supposed to be nearer to particular economic interest than the CSO's but they do not feel conflicted by representing economic interests, nor do the respondents of DG's, which they are obviously trained to face.

Our finding show surprisingly little ambition to distinguish too rigidly between economic and non-economic interest reflecting some of the views documented in scholarly literature. Nonetheless, it appears as an *officium nobile* to at least reconsider introducing a clarifying categorisation as afore recommended. The predominant literature conclusively agrees - as do we - with the OM's proposal to oblige the participancy to self-disclose their entanglements and involvements with factual "powers" to the widest extent. Those who have nothing to conceal must not stand against an "inviting" disclosure clause. But we do not see the EU Commission, as it is the other "partner" of the dialogue, in the role of the chief detective and controller, which could cause a rumour to act capriciously and to be a judge in its own case. Taking the way of "self-evaluation" the control scheme could become internalized into the participancy, which in the medium run will truly detect any one-sided partisanship and thus factually take over the self-purification responsibility. This is a typical requirement of transparency of access and admissibility that could be in care and cure of self-governance, though we hesitate to go too far in tracking possible hard "legal" structures (which of course we would quickly have at hand). As we have stated introductorily and within our premises, we are aligned with the philosophy of the Multilevel-Governance Charter of contesting new approaches of co-designing new policies and since Art 11 (2) TEU keeps away from any detailed regulatory orders we also feel aligned with the overarching spirit of freedom of choice of the implementary means. The VCD is in our reading clearly a "level"; we should not read the MLG levels exclusively as territorial ones.

We therefore share also the OM's direction to make every single participant's self-evaluation accessible and transparent to the public, which is the best form of control in democracies. We are going even further, as we do not suggest having a particular transparency register and website only within every

DG. We suggest - see our last recommendation at the very end - a single and highly advanced VCD portal which displays all dialogues and all other influencing channels to the EU Commission, which also makes transversal linkages transparent.

x. The Eligibility of Religious and Philosophical and Party-political Organisations

Astonishingly, our respondents - nearly unanimously - have no objections against a double representation of political parties' organisations, which are already represented in the EU Parliament, and religious and non-religious organisations, which have their very own dialogue under Art 17 (3) TFEU, also within the dialogue scheme. They obviously regard them not as competitors but rather as supporters. In that case, there is nothing to be recommended from our side, because we plea in general for the widest interpretation of "open". The only question is, whether the recommended call scheme should address a particular invitation to these sectors or let them find out for themselves their best interest. Churches so far, with some exemptions, have shown no interest to be covered by the qualification of being also a Civil Society. Well, they have their exclusive channel under Art 17 (3) TFEU. What about political parties? We shall see.

xi. Legal frameworks vs. Arbitrariness vs. Culture

Without any doubt a constitutional obligation to implement the dialogue orders exists, see above. Opposite to the ECI order under Art 11 (4) TEU, which refers to a regulation under Art 24 (1) TFEU, paragraphs (1) and (2) do not prescribe a particular legal instrument of implementation, which can hardly be interpreted as an act of oblivion. Nevertheless, we intentionally share the underlying "message" of the OM that it would be in line with the rule of law principle, to take the approach of adopting tight legal frameworks and make the procedural impacts more predictable. But we must face that we cannot find any strict indication for this model. This is especially crucial when keeping in mind that the EU Commission in the 2002 Communication *"Towards a reinforced culture of consultation and dialogue"*, firstly, loudly and soundly envisages the category of "culture" and not that of "law" or of a similar strict self-binding quality. Secondly, there is an explicit remonstration, which proves that the Commission had already envisioned the "hard law" model back in 2002 yet committedly taken this from the agenda: *Second, a situation must be avoided in which a Commission proposal could be challenged in the Court on the grounds of alleged lack of consultation of interested parties. Such an over-legalistic approach would be incompatible with the need for timely delivery of policy, and with the expectations of the citizens that the European Institutions should deliver on substance rather than concentrating on procedures.*

The EU Commission was welcoming participation long before it got constitutionalised and committed not to risk an over-juridification of the dialogue. This in particular, again, would also be averse to the idea of governance, which was the context of the "Communication" of 2002 as a logical follow up step to the White Paper on Governance of 2001. Furthermore, to embed PD in the legal, juridical and, rather sooner than later, in the courts arena, could quickly pervert the dialogue into an instrument that

would be more subdued to the rule of law principle in the preserved hegemony of the judiciary body than to the democracy principle, which again must inevitably lead to the worries that courts substitute and supersede democratically expressed self-determination of the sovereign. This would benefit the "culture" of dialogue. We are conflicted on this point. This "culture" issue existed prior to Lisbon and the Lisbon Treaty has clearly set higher standards of PD and constitutionalised it under Art 11. However, it is exactly this Art 11 (2), which even under a progressive reading does not order any "legal" prescription. However the EU Commission reacts to the OM's suggestions of "legally binding" means, maybe copying the DG AGRI model as a general role model for all of the DG's, if it accepts the suggestions voluntarily. Then are measurements of prevention of derailing to be recommended.

Which other legal means of making the procedures clear and resilient are at hands? Again, Art 263 TFEU comes to mind. If so, it would make no significant difference whether the hard law or soft law model is chosen. Ethic codes, as the one used in DG Trade, could be the scapegoat. But are they of that nature of making the procedures as clear, resilient, predictable and sustainable as we have newly challenged?

xii. A Particular Finding Process is to be Recommended as is a Commission-wide Basic Regime Model

Facing a serious matter of legal analysis of political follow-up reflection, a broad consultation process should take place, including instrumentalising all channels of incurring advice would be recommendable. This process could cover at once the further general follow-up effects on the secondary procedural consequences. One nucleus core role model for maybe further adaption along the diverse profiles, functions and responsibilities of DG's must be found in order to match the principles of proportionality, objectivity, coherence and in that rare case that one of effectivity.

xiii. Standardise an Admissibility, Eligibility and Selection Regime

Perpetualising the present "powers" with just slight optical and not bothering pluralisation, full self-recruiting along a blanket form, total opening to any applicant, restricted accessibility along the capacity of the largest available meeting room in a DG (which is not a completely fallacious and tenuous example, not at all), "licensing" by typecast qualification criteria - all these disparate patterns can be found in different sources.

As this model undoubtedly refers to the criteria of being open and transparent, there is - again aligning with the OM's reminder, a highly overdue a viable and just access model. The DG AGRI is also in regard to this consideration a benchmark-setting, with one restriction: As also the OM has identified it as a matter of another own-initiative, there is low attention paid to an inner-balanced equilibrium. This example also shows that with simple front-office diversification the scheme can be tricked (if it keeps its eyes "wide-shut"). Therefore we plead for a remodelling from scratch into this respect and along an out-of-the box prototype of admissibility procedure that again should be designed as a core model for the use of all of the DG's. We therefore follow recommendations from our respondents, while also taking into account the Coffey-Deloitte study, enrich it with suggestions of the OM and round it up with ideas coming from literature:

First, an open call system must be installed, as prescribed by the OM. We have disclosed our premise to favour the collaborative democracy approach of the *Luc Van den Brande* MLG philosophy concept and of the doctrine of *Beth Noveck's* wikigovernment. It is to be co-designed by the potential applicants but under supervision of and at the final promulgation by the EU Commission, allowing participatory democracy to work in favour of training co-design before the concrete diverse interest come into scenery - self-evidently being open for amendments in case of turbulences. Based on these self-co-committed grounds the DG's calls have to be open to any applicant who must only proof on concern, involvement or self-proposed mission or any other realistic clue which matches with any of the tasks of a particular DG. All of those applicants are to be invited to a concourse - whose results are to be pre-evaluated amongst the applicants themselves but are subject matter of a final decision of the DG, which in that case must give reasons. Under the above mentioned cauteles of which kind of denomination of a principal and general EU Commission regime model is opted for, this reasoning could eventually end up in an action under Art 263 TFEU, which, as said, the EU Commission has declared as undesirable. So, watch out for a model that is lest endangered to open the watergates to the judiciary surrogate democratic political decision-making.

xiv. Enhance the Positive Perception of the Performance

In another surprising unanimity, the respondents came to the conclusion that the dialogue is perceived as highly satisfying and leveraging its intended result - but only when questioning in open questions and addressed to the overall performance. Wishful thinking, it would appear. This homogeneity throughout the different sides falls apart immediately when rechecking by closed questions with submitted options and when asking for the particular experience with the concrete dialogue in one's own segment. Whereas the "chemistry barometer" also fell slightly within the group of DG's representatives, it fell significantly amongst the group of RA's but ran down into the dumps among the CSO group. We have no solid explanation why it is split up in such a manner, but this statistic suggests that the CSO segment appears to be often overruled and feels as the lesser benefitted group and the foremost loser. If this presumption holds true, this would again clearly refer to the OM's assumption of the "healing" effect of a better balanced representation scheme and, for that matter, seems to support our "two-chamber" model. Despite some harmonies and accordance between the RA's and CSO, there is a significant gap when inner-relational competition is touched. This is the common red thread throughout our findings. It seems better not to put them into a Procrustes king-size-bed but to make their diverse pursuit transparent - which indeed also refers to the transparency criterion - and to let them find out their preconsensus and only then letting them confront the DG's with their political compromise. Only then can we come to a clearer picture of the perception of the performance and to the legitimacy question.

xv. Consider Reviewing and Monitoring

Therefore, and also to objectivise the performance indicator, we have consecutively invited our respondents to speak-out on a back-up scheme and in such case the response was overwhelmingly affirmative. There is an obvious lack of such a scheme and in that particular case we can only recom-

mend to adopt and adapt the recommendations to DG Trade by the Coffey-Deloitte study. Given that the data warehouse is commonly but distinctly filled in terms of groups, the lacks and gaps would appear as self-reporting and the adjustment tasks could be carried-out gradually and smoothly. Monitoring and reviewing systems are easily available in prefabricated versions. It is rather the maintenance and the regular run that causes costly inputs - and worries. We recommend therefore to carry-out this task in cooperation with and as far as possible along self-evaluation and this again on the publicly accessible eTool as will be explained in the next but one paragraph.

xvi. Enrich the Role of the entire Dialogue- Of the Partners, of the Contents, of the Potential

Finally a recommendation that goes beyond our own explicit empirical findings, and is based on a synopsis of the responses: We have apparently rather stubbornly and obstinately stressed the VCD as a *two-way model*. Empowering the RA's and CS as real partners on a true two-way-scheme utilises the dialogue partners to act as the Union's postilions and makes them reliable in carrying out the communication dissemination process to their clientele. That is what Art 11(2) means to us, as well: building a bridge between the isolated executive bodies and the European citizenry, a channel for communicating interactively with citizen considerations from Haparanda all the way to Gozo, mediated by new informal but benefitting intermediaries as are welcomed by the Multilevel Governance Charter.

The next enrichment chance that vertical dialogue offers for an executive entity like the Commission, is to *build up a standing argumentative cordon sanitaire* that enforces the position vis-a-vis the Parliament. If the dialogue were broadly and correctly carried out, once and for all, the Commission could save itself from serious allegations: living in a citizen-free space in professional seclusion and not having a clue as to what the people out there truly think and require. For example, if, as is one of our findings, a silent or even unaware consensus prevails with, f. ex., DG Agri or DG Trade or DG Industry that the real, genuine and core stakeholders are the representatives of the producers side, be it farmers, retailers or the industries, then we have lost the nature of a "civil" dialogue. The genuine and final partner for DG on agricultural affairs are the 500 million Europeans, as well as the 500 millions of buyers and consumers involved. Position the Commission therefore as clearly siding with the citizens. Contact the 500 million Europeans and don't be not satisfied with just a comfortable handful of association representatives.

Side with quality and side with new horizons. However the Commission designing the applicants' approbation model, should not take the comfy way of merely re-installing the existing family of old-established members. Furthermore, the Commission should not primarily focus on the numeric dimension. Better to put it on the quality, even if it is hard to define quality in a concrete interpretation. Political acumen indicates going after a representation of the political spectrums in the widest scope. DG's should be political, and should act politically, not closing any door, inviting anyone, whomever, as long as he or she represents a serious political movement. This is not a recommendation to entertain block-up representatives, but looks for those aspirants who have creative intelligent ideas, providing they have a pro-European touch. The Commission

should look for diversity of the represented interests. Only in this way can it counter-direct and disqualify power concentrations and lobbying.

Final enrichment: *design a European wide win-win model*, diversified and installed throughout the entire Union. Make sure to get the dialogue away from the in-house Brussels model to reach to the farthest peripheries of the Union, making it a real multilevel and thus *a networked governance instrument* that step-wise is winding up, level by level, until ultimately landing on the "green table" of Brussels.

xvii. Install an Online "Eleven-Two-Tool" - Save Time and Money and Gain Broad Compliance

Finally, we substantiate the often stressed recommendation to put the entire dialogue on a time-adequate "eDialogue" tool, which we shall call *Eleven-Two-Tool*. We save the lector from technical and organisational details, which are challenging but adoptable. Core tools are available, even within the Unions bodies: There is the aforementioned EESC tool *"My Europe...Tomorrow"* that could be adopted, there is also the genuine co-creation *Futurium* tool, *A Foresight Platform for Evidence-Based and Participatory Policy Making* available in the EU Commission, and which is now hosted by DG Digit, which with some adaptations could quite quickly and easily be found on the "runway".

Imagine the benefits:

Firstly, this tool could enable a European wide participation of dialogue partners on the MS levels and sublevels, as was considered of our respondents, horizontally as well as vertically. Literally every willing party could make up its mind on any proposed dialogue issues. The language problem could become resolved by installing integrated and transversally interlinked sub-platforms along the dialogue design as suggested by the DGs for every particular dialogue. So, this would match with the inclusion principle and match with *Juncker's* call for getting the European citizens to participate.

Secondly, and in-line with the Ombudsman desideration, such a tool could serve for a more perfect openness. If and when any participant is obliged by rules and "motivated" by social stimulus and under silent group-wise internal "supervision" to make herself or himself vitreous, this would be a next step towards a more perfect transparency.

Thirdly, such a tool could enable a more permanent process which surpasses even the criterion of regularity and makes any definition by law or courts obsolete, as to what "regular" could imply.

Four, the DGs can require that any proposal, even their own, coming from bottom-up, should be addressed to the DG: Filter by internal co-creation and co-decision until rather clear positions crystallise and enable the DG to see with which reasoning and in which majorities a proposal is supported. This again is in line with the Commission's ever since stated consideration of the function of the dialogue to be a means for better decision-making and for that matter, supports the non-constitutionalised but often stressed factual demand of efficiency. Even the also often stressed topic of rotation is nearly obsolete when anyone and any organisation is part of the process of dialoguing. Then the rotation challenge can be reduced to the final face-to-face phase, when decision is to be made who is lastly admissible to sit on the "green table". What is more, this model complies with the idea of a far reaching

subsidiarity in form of self-administration, self-governance and governance, as is considered by the *White Paper on European Governance*.

Five, such a collaborative or cooperative democracy tool discharges the DGs to be at stake during the elementary political will-building phase and the finalisation process can be kept fairly short. When the dialogue partners have been trained to deal with e-collaborative democracy, the face-to-face meetings can be reduced to a short conclusion procedure, which enables to invite just the speakers of diverse groups who could not come to an internal consensus and this would impact a significant cost saving effect as well.

This *Eleven-Two-Tool*, created and organised along the just mentioned intrinsic principles, is to be addressed exclusively to the VCD. It not become out-watered by overburdening with more than the genuine 11(2) function. It should be a single Commission-wide instrument, comprehensive and feasible, and, as said, open to all who are willing and able to participate in VCD, be it single citizens, representative associations or civil society / organisations. This platform must be designed and structured synchronically to the inner-organisation of the Commission. By reasons of "marketing" and in order to visually refer to the democratic nature, we recommend to visualise the surface as a kind of a parliament. For that matter, the overall surface allows the EU Commission as well as the public to have an overview on what is going on in total. On the other hand, it allows all participants in the dialogue to quickly perceive what is happening in particular, who is in charge of what, which facilitates are there to find the right stakeholders and it would also enhance collaboration and co-design.

A clone of the *Eleven-Two* tool - but strictly not interlinked nor entangled - could easily offer an "extra open area" that is dedicated to the general horizontal use of all European vigilant citizens who want to participate horizontally. This could become the long overdue *Eleven-One* tool. This general tool is also dedicated to empower and enable every European, single persons as well as associations, whether formally eligible for the VCD or not, to suggest issues that are not (yet) on the agenda of the Commission / DG. In turn, this non-specific area can be used by the institutions for crowd sourcing and making use of crowd wisdom.

xviii. A Final Remark

As we were by contract obliged to submit our study at an appointed date (10 May 2015), we could - unfortunately - not evaluate or refer to the EU Commission's truly benchmark-setting response to the Ombudsman's considerations. We suppose that this will be the ultimate clarification of the EU Commissions perception what the VCD should be about.

However, we suppose that propositions, which potentially could ameliorate and enrich the dialogue scheme, could become a matter of further mutual benefitting use. It has the potential to realise the Lisbon desideration of increasing legitimacy. Thus it can finally comply with the Commission's President's mission statement: ... *bringing the European citizens closer to Europe*.



European Economic and Social Committee

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