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## **Democracy, Participation and Consultation. An empirical analysis of EU open consultation processes**

The implementation of the Communication from the European Commission “Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission”

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Following the 2001 White Paper on Governance, the European Commission set general principles and minimum standards to consult the public, focusing on written consultation processes and on-line questionnaires (COM704/2002). Since then, over 500 open consultations have been carried out, unevenly distributed among DGs and attracting a variable number of responses. This paper aims at discussing the role of written and on-line consultations in the context of the wider EU policy-making process and at assessing the conditions under which DGs of the European Commission decide to launch a consultation targeting the general public. Further the paper presents some evidence on levels of public participation. A database of open consultation processes has been created, collecting information on the distribution of consultations among DGs, the range of topics, the distribution over time, the number of respondents, etc.

The paper is structured as follows. The first paragraph presents an overview of the better lawmaking package and the related better regulation agenda and in this context outlines the relevance of processes of open consultations. The second paragraph describes general principles and minimum standards for carrying out open consultations as discussed and adopted by the Commission in 2002 and provides some information on the on-going discussion among institutional and social actors on procedures for consultation processes. In the third paragraph empirical results on the implementation of COM 704/2002 are presented. The final paragraph presents some concluding remarks.

## **The Better Lawmaking package**

The draft Constitutional Treaty and the Lisbon treaty mention consultations and dialogue with interested parties and civil society to ensure coherence and transparency in EU actions<sup>1</sup>. The reform Treaty do not add much to already existing practices of involvement of civil society organisations in EU policy processes (Greenwood, 2007). Procedures for public consultation have been formalised in 2002 with the definition of general principles and minimum standards for consulting EU citizens and organised citizens (COM 704/2002). Communication 704/2002 is a follow-up of the White Paper on Governance and together with the Better Regulation Action Plan and the communication on impact assessment forms the Better Lawmaking package<sup>2</sup>. The package represents the response of the European Commission to the need for improving the quality of legislation and policy-making

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<sup>1</sup> Article 11 of the Lisbon Treaty states: 1. 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. 2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society. 3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

<sup>2</sup> More precisely, the Better Lawmaking package consists of four Communications from the European Commissions, all proposed on June 5<sup>th</sup> 2002: - 'European Governance: Better Lawmaking' COM(2002) 275 final; 'Communication on Impact Assessment' COM(2002) 276 final; 'Consultation Document: Towards a reinforced culture of consultation and dialogue – Proposal for general principles and minimum standards for consultation of interested parties by the Commission' COM(2002) 277 final; 'Simplifying and improving the regulatory environment', known as the Better Regulation Action Plan, COM(2002) 278 final

recognised by the European Council in Lisbon<sup>3</sup> and then widely discussed in subsequent years. In this sense the Better Lawmaking package is part of the debate on the transformation of European governance and takes on board a number of recommendations on simplification and participation that have been presented in the report of the high-level consultative group chaired by Mr Mandelkern. Proposals for reforming EU governance are based on the idea that ‘improving the quality of regulation is a public good in itself, enhancing the credibility of the governance process and contributing to the welfare of citizens’ and that ‘we can govern ourselves better ... without changing the Treaty, without necessarily waiting for the successful outcome of a new intergovernmental conference’ (COM(2002) 275 p. 2). Accordingly, the Better Regulation Action Plan (then revised and renamed Better Regulation Agenda) focuses on transparency, simplification and rationalisation to improve lawmaking in the EU in the context of existing legal provisions. For instance, for what of interest of public consultations, the Commission stresses that consultation with interested groups is part of its duties according to the protocol 7 annexed to the Amsterdam Treaty states ‘the Commission should ... consult widely before proposing legislation and, wherever appropriate, publish consultation documents’.

The Better Regulation Action Plan analyses the role and responsibilities of EU institutions and member states in the legislative cycle and puts forward a number of measures to be adopted by the EP, the Council and Member states in the discussion and application of legislation and defines – with some contradictions - the role of civil society in policy processes. To its part the Commission ‘is committed to be more transparent in the way it exercises its right of initiative and take greater account of diversities. In particular, the Commission shows how it sets out clearly the reasons why it takes a particular initiative, and how it set out to ensure that the substance of its legislative proposals are restricted to the bare essentials’ (COM(2002) 275 p. 3). All information has to be made available to the public and transparency is deemed essential to achieve both effectiveness and efficiency and to promote accountability. The simplification of the ‘EU regulatory environment’ implies full consideration of non-legislative measures<sup>4</sup> to put into practice EU policies as well as the systematic withdrawal of obsolete legislative proposals<sup>5</sup>.

On the whole the Better lawmaking package puts a strong emphasis on rational, evidence-based policy-making. For instance the inter-institutional agreement on better lawmaking signed in 2003 states that the impact of amendments introduced by the EP and the Council to proposed legislation have to be assessed (Radaelli 2007). In this context the main role of civil society is to provide valuable inputs to the policy process, channelling relevant information to EU institutions. Accordingly, public participation is mainly understood in instrumental terms. Such predominantly instrumental orientation to participation emerges in the specific procedural link between public consultations and impact assessment exercises: public consultations have to be carried out primarily

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<sup>3</sup> See Conclusions of the European Council summit at Lisbon (23-24 March 2000) and following summits in Stockholm, Laeken and Barcelona.

<sup>4</sup> The range of legislative and non-legislative options includes: regulation, directive, recommendation, co-regulation, self-regulation, voluntary sectoral agreement, open coordination method, financial assistance, information campaign (COM(2002) 278 final, p. 7)

<sup>5</sup> The ‘Second Strategic Review of Better Regulation’ (COM(2008) 32 final), highlights that in the period 2005- 2008 the Commission identified around 100 proposals to be withdrawn because of no current relevance or because ‘amendments introduced by the EP and/or the Council denature the proposal’ (COM(2002) 278, p. 9)

on those proposals that are subject of extended impact assessment, i.e. those proposals that ‘will result in substantial economic, environmental and/or social impact on a specific sector ‘ and ‘represent a major policy reform’ in a sector (COM704/2002 p. 15).

Impact assessment is a constitutive tool of the better regulation package: ‘for one thing, it will guide and justify the choice of the right instruments at the appropriate level of intensity of European action. For another, it will provide the legislator with more accurate and better structured information on the positive and negative impacts, having regard to economic, social and environmental aspects.’ (COM(2002) 275 p. 3-4). In this sense public consultations constitute an important stage of impact assessment exercises allowing the EU Commission to gather relevant information on socio-economic conditions and ‘should in addition allow a discussion of wider considerations such as ethical and political issues’ (COM276/2002 p. 7). Lowering the threshold for participation in EU policy processes and extended consultations with a wide range of stakeholders, civil society organisations as well as individual citizens became a strategic choice of central importance, that allows an adequate assessment of likely impacts of policy proposals and helps avoiding policy failures and the risk of asymmetric information. For the Commission to be effective in delivering policy solutions, the ad hoc consultations with experts and dialogue with Brussels-based organisations might be no longer enough and broad consultations with the public must be institutionalised and embedded in procedures for policy formulation. The definition of common standards for public consultations are thus part of this institutional design aiming at ‘simplifying and improving the regulatory environment in Europe’ (COM(2008) 32 final, p. 2), and the next paragraph describes with more details the general principles and minimum standards for getting EU citizens involved.

### **General Principles and Minimum Standards for public consultations**

The COM704/2002 is itself the result of a process of consultation: a first draft proposal was made in June 2002 (COM(2002) 277 final) and then discussed, revised and adopted in its final version in December 2002.

In this paragraph I will describe the EU Commission approach to consultation and discuss this process of definition of principles and standards, highlighting how interested parties commented and criticised the initial proposal.

As defined by the Commission, consultations are ‘those processes through which the Commission wishes to trigger input from outside interested parties for the shaping of policy prior to a decision by the Commission’ (COM(2002) 704 p. 15-16). Over time the Commission developed different consultation instruments, involving experts, stakeholders and more recently the general public in policy processes in almost all sectors. The overall goal of COM(2002) 277 and then COM(2002) 704 is to make consultation systematic, to improve transparency in EU-civil society relations as well as to enhance the scope for consultations. In commenting on the White Paper on Governance civil society organisations complained that ‘the consultation procedures are too numerous and too dispersed; they seem to depend on the goodwill of people who are here today but may be gone tomorrow and they often bear the stamp of clientelism’. The definition of principles and standards is thus a move in order ‘to systematise and rationalise the wide range of consultation practices and procedures, and to guarantee the feasibility and effectiveness of the operation; to

ensure the transparency of consultation from the point of view of the bodies or persons consulted and from the legislator's point of view; and to demonstrate accountability vis-à-vis the bodies or players consulted, by making public, as far as possible, the results of the consultation and the lessons that have been learned' (COM(2002) 275 p. 3).

The list of general principles recalls those already delineated in the White Paper on Governance, and includes principles of participation, here meaning inclusiveness, openness and accountability, mainly understood in terms of full access to information and transparency, effectiveness, which implies that consultations must start at early stage of policy process to shape policy options effectively. Finally, the principle of coherence implies a consistent approach to consultation to be adopted by each DG, thus overcoming the fragmentation of existing practices.

General principles and minimum standards institutionalise consultation with the general public, but do not affect other forms of consultation and informal contacts with interest representatives<sup>6</sup>. In particular the Commission made clear that the strengthening of consultation procedures open to the general public does not affect existing procedures for obtaining opinions from the Economic and Social Committee and the Committee of Regions as well as should not impact on the role played by social partners in accordance with articles 138 and 139 of EC Treaty and on the 'comitology' procedure.

Procedures for consulting experts, stakeholders and the general public thus co-exist, are embedded in routines and practices and it would be interesting to shed light on the interaction among different 'consultation regimes' and to assess to what extent a common approach to consultation is developing among DGs (Kohler-Koch 2007; Quittkat and Finke, 2008). As the Mandelkern report observed 'in some respects it could be desirable to have a fixed well-established consultation procedure that has to be followed independently of the subject concerned. On the other hand, it is an advantage to have the possibility to choose consultation methods that are suitable for the specific act involved' (Mandelkern Report, p. 28). For what of interest here, the point to be made is that open consultations are but one option and that crucial decisions over the format, the timing, the kind of issues to which consultation takes place are firmly in the hand of the Commission, that decides on a case-by-case basis whether and how to proceed with the collection of input from outside parties.

Further it is important to note that the overriding principle of proportionality implies that efforts in consulting the public must be proportionate to the expected impact of the policy decision. In other words, consultations do not take place on all Commission proposals but rather on a selection of them. In particular consultations with the general public are to be expected for Green and White Papers and for 'major policy initiatives' for which – as observed above – an extended impact assessment is required<sup>7</sup>.

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<sup>6</sup> In May 2008 The Commission adopted a Code of Conduct for Interest Representatives that will regulate lobbying activities.

<sup>7</sup> More recently the Commission refined its approach to impact assessment, suggesting that it would be more useful to focus resources on initiatives where more value is added, 'meaning that impact assessment requirements for initiatives with limited or only general impacts will be scaled down or waived' (COM(2008) 32 final p. 6).

The list of general principles is then ‘translated’ in a number of more practical requirements, that require to publish all relevant information on the consultation on a single access point, to establish a minimum consultation period and the obligation to report on results of the exercise, to provide the public with an appropriate feedback on how results have been taken into consideration in the explanatory memoranda accompanying legislative proposals and impact assessment reports.

The Commission makes a distinction between open and focused consultation procedures. Focused consultations are ‘formal consultation fora officially established by the Commission, or other structured consultation groupings, as well as ad hoc consultation exercises (e.g. hearings) with invited representatives of the relevant sectoral interest and of the public concerned (COM277/2002 p. 8)’. Such focused seminars, workshops etc can either be permanent or temporary, formally or informally constituted (Gornitzka and Sverdrup, 2008). All fora for experts and stakeholders are listed in the ‘Register of expert groups’, set up by the President Barroso in 2004 with the specific aim of enhancing transparency in the working of DGs. Minimum standards require 20 working days notice for meetings in Brussels. As we will see in more details in the next paragraphs, at the time of writing the total number of active fora is 908<sup>8</sup>.

Open consultations are online surveys and written consultation processes addressing all interested parties and the general public. When the Commission launches an online survey it proposes a standard questionnaire; questions are generally closed and respondents are required to tick relevant boxes<sup>9</sup>. In the case of written consultation processes DGs publish a consultation document and present a list of open questions to be answered<sup>10</sup>. Contributors are free to express their views and to motivate their preferences as well as to advance alternative options and to present new evidence. Written consultation processes are clearly more demanding than on-line surveys, and it is not a surprise that - as we will see in the next paragraph - respondent rates to written consultations and online questionnaires are significantly different. Open consultations - both online questionnaire and written consultation processes - are published on the ‘Your-Voice-in-Europe’ web portal and a minimum of 8 weeks is allowed to interest parties to submit their contributions<sup>11</sup>. In the period January 2003 – December 2008 the Commission proposed a total of 540 open consultations, 4/5 in the form of written consultations, 1/5 in the form of online surveys.

An important point to be made is that no invitation is needed and no specific skills are required

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<sup>8</sup> The number refers to fora activated by 21 DGs dealing with policies and external relations plus the Secretariat General. Over time the total number of fora varies: Broscheid and Coen counted 1165 fora in 2006, Gornitzka and Sverdrup 1126 in 2008.

<sup>9</sup> Online surveys are carried out through the Interactive Policy-Making. IPM was set up in 2001 and is a user-friendly platform for online questionnaires. ‘IPM is one of the tools that will help the Commission, as a modern administration, respond more quickly and accurately to the demands of citizens, consumers and business’ (COM704/2002 p. 7).

<sup>10</sup> For instance the consultation document for the ‘Health Check of the CAP’ (COM(2007) 722) asked stakeholders and the general public to answer the following – rather broad - questions: how to make the Single Payment Scheme more effective, efficient and simple? How to render market support instruments ... still relevant in a more and more globalised world and an EU of twenty-seven? How to master new challenges, from climate change to growth in biofuels and water management and ongoing ones such as biodiversity by adapting to the new risks and opportunities?

<sup>11</sup> The Commission originally proposed a minimum period of 6 weeks, but has been criticised by contributors to the consultation on consultation, who observed that they need more time to consult their membership. The minimum period has thus been extended to 8 weeks, that in the view of the Commission 8 weeks represent ‘a reasonable balance between the need for adequate input and the need for swift decision-making’ (COM 2002/704 p. 12).

to take part in a open consultation; there is no need to travel to Brussels and in principle contributions can be written in any language. As Kohler-Koch argued, the definition of standards for consulting the general public can be seen in the context of a general trend aiming at lowering the threshold for participation in EU policy processes (Kohler-Koch, 2007), involving more actors from different background. Regional, local and minority views are explicitly mentioned as important inputs that will allow the Commission to make sense of diversity across Member states<sup>12</sup>. It is of note that the Communication establishes that there are no requirements in terms of representativeness of participating organisations. In particular the eligibility criteria proposed by the ESC for civil dialogue – that give priority to groups organised at the Community level - do not apply to public consultation processes launched by the Commission that are thus intended to reach out to ‘every individual citizen, enterprise or association’ across Europe. Contributors to the consultation on consultation do not unanimously welcomed the idea to develop direct contacts with the public: ‘consultation of representative business organisation should have absolute preference over direct questioning of entrepreneurs: it is a central role of associations to represent their members and business expect this from the organisations they are member of’ (Eurochambers). Overall a substantial proportion of contributions from civil society to the discussion on public consultations reflects an understanding of participation and participatory democracy that is based on a structured, regular dialogue between EU institutions and organised civil society representing public interests (Kohler-Koch, 2007). Consultations open to the general public fit only partially this model of EU-civil society relations. Open consultations can be seen as an attempt of the Commission to address EU citizens directly and for this reason have been criticised (see below)<sup>13</sup>.

Finally it must be noted that ‘neither the general principles nor the minimum standards are legally binding’ (COM(2002) 277 p. 9). Contributors to the consultation on consultation heavily criticised this point, suggesting that ‘the absence of an obligation on the part of the departments within the Commission to follow common procedures for public notice and comment on proposed policy initiatives undermines the credibility of the Commission’s stated commitment to ensuring consistency’ (EU Committee).

In rejecting civil society’s demand, the Commission observed that a first reason for avoiding a legally-binding consultation practice refers to the need for drawing a clear distinction between formal consultations processes as established in the Treaty and open consultation processes that are intended to supplement existing procedures and to support the EU Commission in the formulation of policy proposals. Further, the Commission expressed the view that a legally-binding set of consultation rules will potentially undermine its capacity to act timely and to deliver effective policy solutions. In other words, as already noted above, the Commission has full control of consultation processes and in the exercise of its right of initiative the Commission can decide not to apply minimum standards – for instance can decide to shorten the consultation period – and more fundamentally can decide whether to go or not to go for an open consultation.

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<sup>12</sup> A similar point is made in the Communication on the use of expertise, where DGs are recommended to “cast their net as widely as possible in seeking appropriate expertise” (COM(2002) 713:11).

<sup>13</sup> See also reaction to the 2006 White Paper on Communication, that can also be interpreted as an attempt to address individuals with no intermediation.

## **Research Results**

The Communication 704/2002 has been adopted in December 2002 and general principles of transparency and publicity have been applied as early as January 2003. Reliable data on open consultations are thus said to be available from 2003 onwards. It should be noted that the portal Your Voice in Europe reports all on-going and recently closed consultations only. Therefore information from this single access point to consultation exercises have been substantially supplemented by information from DG websites. This raises the question whether all relevant web pages have been maintained over the years or pieces of information on past consultation exercises have been lost. Since the total number of records in the database matches the number of officially reported consultations<sup>14</sup>, it seems safe to affirm that the database covers the ‘universe’ of open consultations promoted by the European Commission from January 2003 to December 2008.

At the time of writing the database includes for all open consultations data on the DG who promoted the consultation, the format of the consultation (written or online survey), the type of document on which the consultation is based, the main goal of consultation, the policy area, the start and the end dates of the consultation exercise, the total number of respondents to each consultation<sup>15</sup>. In addition information on DG size (in terms of policy units and staff), budget, on number of impact assessment carried out and the number of fora for experts and stakeholders have been added (see below for details).

Using a selection of this data, in the following paragraphs I will address 3 main questions.

First I will try to place open consultations in the context of the wider EU policy process and to assess to what extent consultation and dialogue are embedded in the daily policy-making process of the European Commission and to which proposals open consultations take place.

Second I will assess variations among DGs in the format of consultation, trying to assess under which conditions DGs decide to gather information from experts in focused fora or from all interested parties in open consultation processes.

Third I will analyse variations across policy areas etc in the number of replies received from the public in response to open consultation processes.

### **The role of open consultations in EU policy processes: to which proposals do consultations take place?**

The total number of open consultation processes launched by the European Commission in the period 2003- 2008 is 540. Is 540 a big or a small number? In an attempt to make sense of numbers I tried to look at practices for formal public consultation at national level. The overall picture is

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14 A brief report on consultation processes is presented in the annual ‘Better Lawmaking Report’ that provides info on the application of subsidiarity and proportionality in EU initiatives.

15 This is an on-going process. The collection of data proved quite time-consuming. The complete database will include data on the geographical distribution of respondents, the type of respondent (national/EU/international institution, business group, NGOs, individual citizen).

mixed. Written consultation processes are almost ignored in Italy<sup>16</sup>, only seldom utilised in France<sup>17</sup> and precisely regulated and extensively utilised in the UK<sup>18</sup>. The UK government is not currently recording comprehensive data on public consultations; last available data suggest that in 2002 the UK government promoted some 620 consultations exercises and the general view is that in recent years the use of formal written consultation is on the rise<sup>19</sup>.

At the EU level, as Table 1 below shows, in five years time the number of open consultations tripled, ranging from 42 in 2003 up to 139 in 2008. In the same period the legislative and non-legislative activity of the Commission remained substantially stable. This trend suggests that public consultations processes are gaining some relevance in the context of EU policy-making.

At the same time a similar tendency can be observed for focused forms of consultation. Gornitzka and Sverdrup report that the number of expert groups is constantly increasing from 500 in 1970 to more than 1200 in 2007 (Gornitzka and Sverdrup, 2008 p. 733). It is worth noting that since 2000 the number of fora for experts and stakeholders increased by 40% (Gornitzka and Sverdrup, 2008 p. 733), and therefore the total growth in the number of fora can be explained only partially by the extension of EU competences over the year.

In other words it seems safe to affirm that the general public is consulted on a higher proportion of EU Commission proposals and that the increase reflects a general trend towards more openness and participation in EU policy processes.

*Table 1: Number of Legislative Proposals (Directive, Regulations, Decisions plus Recommendations), Green Papers, White Papers, Reports, Non-legislative Communications, Impact Assessments and of Open consultation processes issued by the Commission by year (2003-2008)*

	Legislative Proposals <sup>a</sup>	Green Papers <sup>b</sup>	White Papers <sup>b</sup>	Reports <sup>c</sup>	Non-legislative comm. <sup>c</sup>	Number of Impact Assessments <sup>d</sup>	Number of Open Consultation Processes <sup>e</sup>
2003	491	5	1	73	142	21	42
2004	526	7	2	110	159	31	72
2005	411	13	2	92	187	74	55
2006	482	11	2	106	217	67	120
2007	465	10	3	126 <sup>b</sup>	232	98	115
2008	384 <sup>b</sup>	9	1	123 <sup>b</sup>	-	109	136
Total	2759	55	11	381	937	400	540

Sources:

<sup>a</sup> General report on the activities of the European Union (See: <http://europa.eu/generalreport/en/rgset.htm>)

<sup>b</sup> Pre-lex (See: <http://ec.europa.eu/prelex/apcnet.cfm?CL=en>)

<sup>c</sup> European Commission Better Lawmaking Annual Report

<sup>d</sup> See: [http://ec.europa.eu/governance/impact/practice\\_en.htm](http://ec.europa.eu/governance/impact/practice_en.htm)

<sup>e</sup> Own elaboration from DG websites and Your Voice in Europe

16 I could find only two Italian examples, both promoted by the Prodi government in 2006.

17 In France the most important public consultations are carried out by the "Commission Nationale de débat publique" See <http://www.debatpublic.fr/>

18 The UK government adopted a non-binding Code of Practice for Consultation in 2000 and revised it three times since. The last version has been made public in July 2008.

19 Interview at Better Regulation – UK government January 2009.

As already noted above Communication 704/2002 established that ‘in terms of consultation, Green Papers are by their very nature initiatives to which the general principles and minimum standards apply’ (COM(2002) 704 p. 15). Indeed open consultation exercises have been carried out on almost all 55 Green Papers issued in the period 2003-2008. In addition public consultations have to be carried out on ‘major policy initiatives’, i.e. those that are subject to ‘extended impact assessment’. In turn the communication on Impact Assessment (COM(2002) 276 final) affirms that ‘major policy initiatives’ are ‘those presented by the Commission in its Annual Policy Strategy or its work programme’. For example the Commission Legislative and Work programme for 2007 lists 60 initiatives to be prioritized. Among its priorities, the Commission planned to review legislation on industrial emissions, with the aim of recasting six existing Directives into a single legislative act. The procedure for impact assessment included the launch of a consultation open to the general public on the ground that the revision of existing directives was expected to have a significant impact on the sector. Accordingly, in June 2007 DG Environment published an online survey ‘Review of the IPPC Directive and existing legislation on industrial emissions’ to collect views from the general public and received around 450 replies. A summary of consultation results has then been reported in the Impact Assessment report ([http://ec.europa.eu/environment/air/pollutants/stationary/ippc/pdf/recast/ia\\_en.pdf](http://ec.europa.eu/environment/air/pollutants/stationary/ippc/pdf/recast/ia_en.pdf) ). Eventually on 21 December 2007 the Commission adopted a ‘Proposal for a Directive on industrial emissions’ that is now under discussion.

At first sight then, the expected contribution of open forms of consultation to EU policy-making is reasonably clear and predictable: to collect information from interested parties all over Europe in the policy formulation stage and contribute to assess the likely impact of alternative policy options.

This is not always the case. A closer look to the list of Impact Assessments carried out by each DG and the list of open consultation processes reveals that there is not a strong correspondence between the two. The correlation between number of consultations and number of impact assessments performed by each DG is  $r = .61$ . This means that impact assessments are carried out without necessarily consulting the general public and that open consultations are not necessarily instrumental to impact assessments.

I would argue that the correlation largely reflects the intensity of activity of the DG (the more issues a DG has to deal with, the more impact assessments, the more open consultations) rather than a strict procedural link between the two policy instruments.

A preliminary analysis suggests that when available alternative policy options have not been adequately/fully clarified open consultations are not planned. Similarly when the issue at stake is very specific the general public is not involved in consultations.

It is of note that comments to draft proposal for general principles and minimum standards of consultation processes highlighted the issue, pointing out that the European Commission did not make clear the criteria concerning the choice of proposals on which consultation will take place and asked for more clarity. A number of contributors observed that the definition of ‘major policy proposal’ is somehow ambiguous, as it might either refer to proposals listed in the EU Commission Annual Policy Strategy or to proposals subject to extended impact assessment or to proposal

affecting a large number of social/economic interests. Further it has been observed that the Commission does not pay attention to public discussion on proposals that fall outside the definition of ‘major policy initiatives’, thus making the instrumental approach to participation of civil society to consultations even more evident. For instance ECAS observed that the Commission should recognise that ‘it needs to consult from time to time on general issues – as it did indeed and rather well in preparing the White Paper on EU Governance’ (ECAS, 2002 ). This preliminary analysis suggests that DGs consult on a selection of ‘major policy initiatives’ plus a selection of other initiatives, though the criteria for making this selection are not entirely transparent. In this context it must be also noted that the Commission does not provide interested parties with the opportunity to ask for a public consultation to be carried out. To sum up, there is evidence that formal public consultations are gaining relevance in EU policy-making, that efforts have been made to make procedures transparent and foreseeable and that the Commission retains a considerable discretionary power when it ‘gives the opportunity’ to publicly exchange views on policy. In particular it is not entirely clear how the choice between focused and open consultations has to be made. The next paragraph tries to address this specific aspect of EU consultation policy.

### **Strategic consultation: the choice between open and focused consultations**

Once a DG has decided to consult outside parties on a specific initiative, still has to decide the format of consultation. As noted above, DGs have different options to choose from when performing a consultation and indeed are required to adapt a mix of consultation tools according to contingent situation: ‘it is apparent that open and more focused consultation procedures are not necessarily mutually exclusive. Depending on the policy issue concerned, they are both often part of a mix of consultation procedures aimed at getting the best possible input from interested parties’ (COM(2002) 277, p. 9).

In other words, DGs decide on a case-by-case basis the specific consultation strategy to be adopted, and can choose among a number of available methods, namely expert fora, stakeholders meetings, written consultation processes, online surveys. Here I will consider the basic distinction between open and focused forms of consultation and will try to assess a) whether DGs use open and focused consultation procedures strategically and b) under which conditions DGs go for a open consultation.

Table below shows the distribution of open and focused consultations by DG. It results a clear predominance of focused consultations over open ones. The mean of open consultation is 24.8, the mean of focused consultation is 41.2 and the difference is statistically significant (t-test,  $p=0.000$ ).

In other words evidence is that DGs are significantly more likely to prefer expert fora to open consultations.

Table 2: Number of Open and Focused Consultation Processes by DGs

DGs	Number of Open Consultations	Number of Focused Consultation
AGRI	11	66
COMP	63	7
DEV	8	21
EAC	8	54
ECFIN	0	9
ECHO	0	0
EMPL	9	45
ENL	0	2
ENTR	41	100
ENV	78	71
FISH	9	28
INFSO	51	29
JLS	26	40
MARKT	77	35
REGIO	8	51
RELEX	2	6
RTD	12	72
SANCO	63	73
SG	6	4
TAXUD	23	114
TRADE	8	8
TREN	37	73
total	540	908

More importantly, it might be noted that the correlation between the number of open and focused consultations is rather weak ( $r = .33$ ). This result suggests that DGs can not be distinguished on the basis of their general propensity to consultation; a high number of expert fora is not associated to frequent open consultations. For example DG Competition launched over 60 open consultation processes and is running 7 expert fora, while the opposite holds for DG Research (12 open consultations and around 70 expert fora).

It makes sense then to assess whether the choice between focused and open forms of consultation can be explained. The following analysis builds on the research undertaken by Broscheid and Coen (2007) who assessed the conditions under which the Commission establishes fora for interest representation. In what follows I will first present a replication of the Broscheid and Coen analysis

then I will apply the model to the case of open consultations and compare statistical results.

In their model Broscheid and Coen consider that the number of expert fora is a function of the number of interest groups active in a policy field and a function of the informational needs of the DG. More specifically Broscheid and Coen base their analysis on two main hypothesis:

Hp1: ‘The probability of observing Commission consultation fora for societal interests increases with the number of groups in a policy domain’ (Broscheid and Coen , 2007 p. 357)

Hp2: ‘The Commission is more likely to establish fora in policy domain in which technical information is required to make good policy. In policy domains that are less technical and that affect large number of societal actors, Commission fora are less likely’ (Broscheid and Coen , 2007 p. 358).

To test their hp, Broscheid and Coen put together a database including for 21 DGs: the number of interest fora (fora), the number of interest groups that are active in each policy domain, as resulted in 2006 from the Connecs database (groups); a distinction between distributive and regulatory policy domains, assuming that distributive sectors are less technical than regulatory ones (and therefore according to the hypothesis will require less fora).

In addition they included two control variables in the model: the number of personnel for each DG (pers), suggesting that the larger the DG (in terms of personnel), the more likely to have fora for interest representation organised by the DG (see also Gornitzka and Sverdrup 2008); the policy domain age (age) making reference to the year in which the Commission portfolio was first established (see Broscheid and Coen, 2007 table p. 362). The hp is that the older the policy domain, the more fora.

To perform my analysis I first replicated the Broscheid/Coen model using updated data from the Register of Expert Groups and from Dg websites<sup>20</sup>. The resulting statistical model is summarised below<sup>21</sup>:

Table 3: Bootstrapped OLS regression of number of focused consultations

	b	SE	Confidence Intervals (95%)	
Constant	-6.89	16.86	-39.96	26.16
Groups	.38	.09	.19	.56
Personnel	.023	.016	-.009	.06
Age	-8.2	13.55	-34.7	18.37
Distributive	19.3	14.0	-8.08	46.79

N=22

Adj R2: 0.34

The updated model (happily) closely reproduces the original one performed in 2006 by Broscheid and Coen. Main substantive results are:

20 Broscheid and Coen present data on 21 DGs. In addition my own database includes information on the Secretariat General.

21 Broscheid and Coen assume that the dependent variable ‘fora’ is approximately continuous and therefore utilise OLS regression bootstrapping error estimates and confidence intervals. Due to the small N, t-test are not appropriate and are not presented in the models.

- the number of interest groups active in a policy field is related to the number of expert/stakeholder fora created in the field. More specifically Broscheid and Coen affirm that every three groups, one additional forum is created.
- contrary to authors' expectations, distributive policy sectors have more fora than regulatory ones.
- other variables (age of policy sector and staff) are not significant.

I can now apply the same model to my own database reporting the number of open consultation processes launched by each DG. The dependent variable is then the number of open consultations organised by each DG; the set of independent variables consists, as in the preceding analysis, of the number of interest groups, the number of DG staff, the policy domain age, the distinction between distributive and regulatory sectors.

Table 4: Bootstrapped OLS regression of open consultations

	b	SE	Confidence Intervals (95%)	
Constant	-7.16	16792	-39.94	25.62
Groups	.14	.044	.053	.22
Personnel	-.001	.016	-.31	1.58
Age	11.09	8.88	-6.31	28.50
Distributive	-14.72	8.32	-31.13	1.58

N=22  
Adj R2: 0.54

Main results are:

- the number of groups active in a policy field do not affect significantly the number of open consultation launched by Commission DGs
- regulatory policy sectors have more open consultation processes than distributive ones
- other variables are not significant. In particular DG size, expressed in terms of personnel, has a negligible impact in determining the number of open consultation processes by the DG.

Statistical results are interesting insofar as suggest a strategic use of forms of consultations. Focused consultations (expert and stakeholder fora) are more likely to be set up in reaction to lobbying overload: the more groups in a policy domain, the more DGs will try to control their environment by granting privileged access to selected organisations, and then the more fora will be created<sup>22</sup> (Broscheid and Coen, 2007).

In the case of open consultation processes the number of organisations active in a policy sector is not relevant in determining the number of open consultations launched by each DG. Compared to focused consultations, open consultations are more likely to be proposed by DGs operating in policy fields less crowded with interest groups, controlling for DG size. A tentative explanation is that already existing formal and informal practices of consultation exhaust the capacity of a DG to

22 For a critique of this conclusion, see Gornitzka and Sverdrup, who observed that expert fora do not necessarily include interest representatives and stakeholders. Data on the composition of expert fora are thus needed to refine this analysis.

process information from outside parties and thus lower the capacity to launch open consultations. ‘Consultation fatigue’ - often lamented by civil society organisations - can well be experienced by EU officials as well. It is of note for instance that DG Employment and Social Affairs, traditionally among the most committed DG to building strong relationships with civil society launched very few open consultation processes. As noted in the first paragraph, processes of consultations open to the general public can not affect well-established formal procedures involving social partners, as foreseen by art. 138 and 139 EC, but rather have to be added to them. This might also suggest some resistance on the part of ‘insiders’ to the broadening of consultation to the national and local associations and ‘every individual citizen, enterprise or association’ in Europe. Consultations in areas like labour law might prove controversial, as the following excerpt suggests:

‘For some social partners, primarily trade unions, the consultation should have taken a form of formal consultation of the EU social partners on the basis of Article 138 EC. They perceived the conduct of an open consultation on labour law by means of a Green Paper as a down-grading of the Social Dialogue and of their pivotal role as representatives of employers and workers. The EP and the EESC also expressed reservations about the Commission’s recourse to a public consultation. However, a large majority of the Member States and Social NGOs positively welcomed the openness of the consultative process’ (COM(2007) 627 final, p. 4)

Fora for interest representatives are more likely to be set up in distributive policy sectors, while open consultations are more likely in regulatory policy fields. This might indeed suggest that DGs have different informational needs and that they need to collect evidence as widely as possible to assess the likely impact of regulations in different territorial contexts. In this sense the result confirms the predominant instrumental orientation to public participation<sup>23</sup>. Finally DG size does not seem to affect the capacity for open consultations. It has been observed that DGs are chronically understaffed and that they heavily rely on outside parties for essential information (Greenwood, 2003). It might be hypothesised then that the smaller the DG, the more intense its consultation activity. At the same time, it should be noted that extensive consultations require substantial administrative capacity (Gornitzka and Sverdrup, 2008). My results however suggests that the number of officials does not really matter in the case of written and online consultations: it seems that even relatively small DGs can potentially deal with a substantial number of public consultations and therefore develop contacts with the public at large.

In the following paragraph I will present some data on the level of participation to open consultation, in order to assess whether –and if so to what extent - the public is interested in developing such direct contacts with the EU Commission.

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<sup>23</sup> However I’m not totally convinced that the distinction between distributive and regulatory policy can measure a distinction between the kind of informational needs of the Commission. In particular it is difficult to assume that regulatory areas are more technical, of low political salience and affecting a smaller number of societal interests, as Brosheid and Coen suggest. Indeed the authors express some reservations as well.

## **Participation in open consultations: variations in the number of respondents**

A crucial aspect of open consultations refers to the willingness of civil society and citizens to send their contributions to the Commission.

In the next step of the project the database on open consultation processes will be enriched with detailed information on participants, collecting data on type of respondents and their geographical provenience. A survey of participants to one or more consultation processes is also planned. On the whole the research should allow to evaluate the potential of open consultations to attract respondents from local and national organisations thus overcoming the remoteness of the EU as well as to test hp on the multi-level character of the EU polity.

In this first phase available data refers to the total number of respondents to each consultation.

It is important to distinguish data on respondents to written consultation processes and to online surveys. According to available data written consultation processes attracted an average of 104 respondents, online surveys an average of 1029. Calculations on respondents to online surveys excludes three exercises that attracted a huge unexpected number of participants and in statistical terms are outliers. It might of interest to list them explicitly as in my view they shed some light on the potential for mobilisation of EU civil society. The three consultations all refer to animal welfare. A survey on seal products promoted by DG Environment in 2008 attracted 73.153 individual citizens<sup>24</sup>. Second comes the 2005 consultation promoted by DG Sanco on the welfare of farmed animals that recorded 44.491 replies<sup>25</sup> and then the consultation in 2006 on the protection of animals used for experimental and other scientific purposes that had 42655 feedback.

Finally it is worth mentioning the consultation on ‘The Future of the Most Deprived Persons Food Distribution Programme’ promoted by DG Agri which attracted over 12.000 individual citizens, of whom more than 9.000 are from Italy, showing the specific capacity for mobilisation of Italians on food issues. A few other consultations (like the one on REACH system, the one on anti-discrimination) attracted the attention of over 5000 EU citizens and/or organised citizens.

However the ‘typical’ consultation attracts far less respondents. In particular in the case of written consultation processes the median is 67.5.

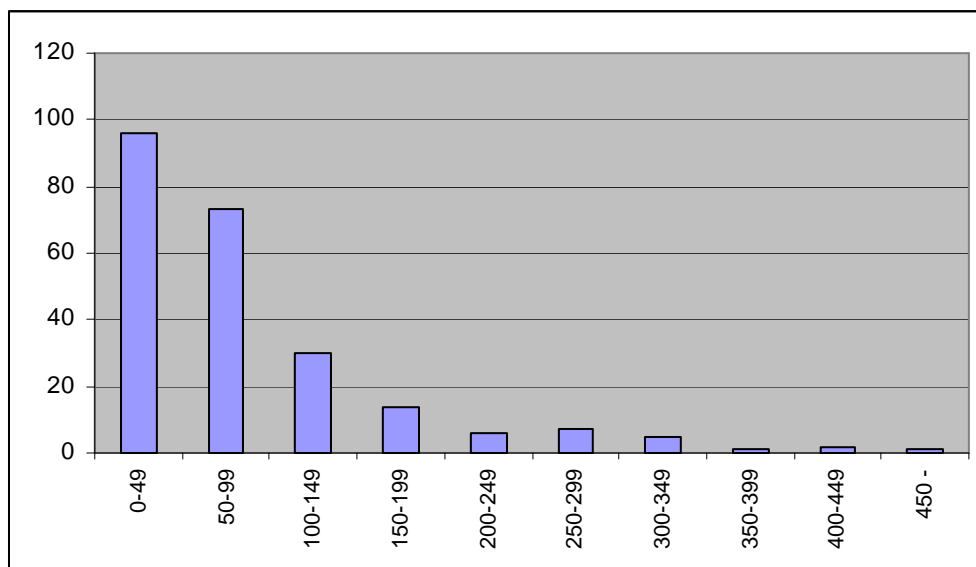
The graph below shows the distribution of written consultation processes by number of participants.

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<sup>24</sup> See: [http://ec.europa.eu/environment/biodiversity/animal\\_welfare/seals/pdf/seals\\_ia.pdf](http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/seals_ia.pdf)

<sup>25</sup> See: [http://ec.europa.eu/food/animal/welfare/sum\\_response\\_stats\\_en.pdf](http://ec.europa.eu/food/animal/welfare/sum_response_stats_en.pdf)

Graph 1: Distribution of written consultation processes by number of participants



It is interesting to note that there are seasonal variations in the number of respondents<sup>26</sup>. Both the number of consultations launched and the level of public participation drop in summer and in December/January, as it might be expected. Over the years public participation tend to decrease for online surveys and to increase for written consultations, as shown in table below. The good performance in 2003 is influenced by the REACH consultation while the result for 2005 can be explained with the success of consultations on climate change and, curiously, on the ‘European definition of veal’ that mobilised farmers’ interests.

Table 5: Respondents by years (mean)

Year	Written Consultations	Online Surveys	Mean by year
2003	53,9	3446,5	643,9
2004	65,8	1291,5	445,2
2005	94,7	2025,8	407,9
2006	133,3	314,4	154,3
2007	115,7	793,7	242,3
2008	102,0	624,7	210,5
Mean	104,3	1129,1	296,2

There are significant difference among DGs in terms of the number of respondents they attract.

<sup>26</sup> I would like to thank Albert Weale for suggesting me to explore the relationship between seasons and respondents rates.

For instance DG Environment performed more than 70 consultations and received on average 840 replies, while DG Competition is running a large number of consultations for a quite restricted public: the average respondent rate is 57.

A basic (theoretical) function of civil society is to socialise EU citizens to policy and to mobilise them around policy issues. Accordingly it would be logical to hypothesise that the more interest groups in a policy sector, the more respondents open consultation will attract. This hypothesis would require a strong correlation between the number of organisations that express interest in a policy area and respondent rates. The correlation coefficient between the number of interest groups and the number of respondents is very weak ( $r = .09$  significant at .01 level, two-tailed). This would suggest that it's not the number of interest groups as such, but rather their capacity for mobilisation of their membership that matters. Unfortunately this relation is difficult to assess. However it will be interesting to explore whether there is a relation between the type of actors present in a policy field (distinguishing between professional organisations, NGOs, trade unions, companies, etc) and the number of respondents to consultations. Alternatively it might be of interest to assess whether the salience of a specific issue determines the level of public participation.

## **Conclusion**

In this paper I presented some preliminary data on the implementation of the Communication 704/2002 on public consultations. The Commission has great expectations on consultation procedures: 'by fulfilling its duty to consult, the Commission ensures that its proposals are technically viable, practically workable and based on a bottom-up approach' (COM 704/2002). In this light, the transparency of consultation regimes seems of central importance. It seems safe to affirm that the European Commission is working effectively in making information on its activities available, as proved by the fact that I've been able to create a database collecting data over a period of five years from all DG websites.

Open consultations are but one option available to DGs when it comes to gather input from outside parties. Focused seminars and workshops including a limited number of selected experts and stakeholders have long been the most common form of consultation and even a cursory analysis of EU news and events reveals that they are clearly daily life for policy-makers in Brussels. As noted, the Commission can decide which kind of format fits its informational needs at best and adopt a mix of consultation strategies. This seems to confirm the instrumental use of public consultations and the predominant focus on the output side of legitimacy: participation of civil society and interested parties is primarily expected to contribute to the efficiency of policy-making and to better regulation. This strategic use of public consultations tends to marginalise the potential for input legitimacy of the involvement of the general public, though the tension between input and output legitimacy has not been resolved. There is evidence that – at least in rhetoric terms consultations are also expected to foster participation and to contribute to participatory democracy. From this point of view, the choice between consultation formats is of central importance. Online surveys provide very little room for public discussion: even if the questionnaire allows free-text answers, it remains a 'ticking exercise' aiming at collecting information about public preferences over a pre-defined set of policy options. Written consultations instead can be seen as a form of

asynchronous deliberation. For instance Fishkin and Luskin (2000) argue that when broadly defined as ‘the serious consideration of arguments and counter-arguments for and against policy alternatives’, even synchronous or asynchronous online exchanges and written digests of the full range of arguments should be taken into account as deliberative tools<sup>27</sup>. The two forms of public consultation then refer to very different forms of public reasoning (Weale, 2007) and can represent different ways to embed forms of public participation in policy processes.

At the same time it should be observed that the level of public participation tend to be quite low and this might undermine the prospects for an open, participatory system of governance. In this context it is important to assess the outcomes of open consultation exercises, that is, who participates, how information are processed and to what extent consultation results are used in subsequent stages of the policy cycle. Such aspects will be addressed in the next stages of this project.

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<sup>27</sup> The main point here is that it is misleading to equate ‘deliberation’ with ‘discussion in assemblies’ (Cohen and Sabel 1997), which is but one of the potential institutional devices that can be implemented according to deliberative principles.

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