

**Participatory Democracy in the European Union? European
Governance and the Inclusion of Civil Society Organisations in
Migration and Environmental Policies**

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Introduction

One of the most significant developments in the political realm of the 20th century is undoubtedly the proliferation of democracy to most corners of the globe. Yet, in the moment of this apparent triumph, history's irony confronts liberal democratic institutions with increasing scepticism about their ability to cope with the political, social and economic challenges of the 21st century. Doubts arise whether the majoritarian form of representative, parliamentary democracy, which is the principal mode of governing in the modern nation state, can sustain the continuation of democracy. A debate has started in recent years, both in the academic and the political realm, about whether additional forms of governance are needed to complement "electoral rights [of citizens] with new kinds of participatory patterns" (Magnette 2003: 151) at local, regional and global level of governance (e.g. Fung 2003; Fung and Wright 2003; Heinelt 2003; Heinelt et al. 2002, and this volume). What this literature tells us, is, that participatory governance has become an integral part of modern 'continuous democracy' and that the 'democracy mix' between representative and participatory elements of democracy can vary in different political systems at different times.

Although this general trend concerns all levels of governance, it cannot surprise that governance systems, which are either unable to acquire the traditional means of a majoritarian democracy or where these means are deemed deficient for creating democratic legitimacy, are particularly dedicated to finding alternative paths to democracy. In international politics, probably the best example of this kind is the European Union (EU). Despite considerable efforts to shape the EU's multi-layered polity according to the model of a western-style representative democracy,

¹ This paper is part of my PhD dissertation and is based on research undertaken in the B5-project "Participation and Legitimation of International Organisations" within the Collaborative Research Center 597 "Transition of the State" at the University of Bremen, Germany. Accordingly, the theoretical and methodological part greatly profits from the projects' colleagues, particularly from Jens Steffek, Patrizia Nanz, Claudia Kissling and Charlotte Dany. See also Friedrich, Dawid (forth.) **Shaped by the Logic of Policy-Making and the 'Volonté politique': Participation of CSOs in the EU's Migration and Environmental Policies**, to be published in Steffek, J., Kissling, C. and Nanz, P. (eds.) (2007) *Civil Society Participation in European and Global Governance: A Cure for the Democratic Deficit?*, Palgrave, Basingstoke.

universal suffrage applies to the European Parliament's (EP) elections since 1979 which enjoys meanwhile significant power,² the debate about a 'democratic deficit' of the EU continues in both academic and political discussions. In recent years, optimism, or fear, to achieve a 'great leap forward' to European democracy via constitutionalisation has seemingly faded and a pragmatic approach to European democracy evolved that focuses on incremental democratising reforms of (new) governance arrangements (i.a. Jachtenfuchs 1997; Schmitter 2000; Schmitter 2002).

Above all, the participation of civil society organisations (CSO)³ in European governance processes and its normative promise to increase democratic legitimacy has gained attention (Armstrong 2002; de Schutter 2002). However, empirical research focuses particularly on the participatory patterns of new modes of governance in social policies (i.a. De la Porte and Nanz 2004; Friedrich 2006). This paper employs the hypothesis that the CSOs' potential function as 'transmission belt' between the citizenry and supra- and international level policy processes" (Nanz and Steffek 2004: 324) would remain normatively fragmentary if solely applied to new modes of governance; instead, it should be extended to European policy-making in general. Only if participation of CSOs becomes a routine for the daily-work of EU officials, both politicians and civil servants, then it can become conducive to democratic governance in the EU. Moreover, the inclusion of Article 47 on 'participatory democracy' in the constitutional treaty seems to be a logical step towards a rights-based approach to participation.

This paper seeks to explore the alleged democratic promise of organised civil society's involvement in European governance. Starting from a theory of deliberative politics, the paper provides a normative-theoretically informed, yet empirical evaluation of the democratic quality of European policy-making processes. I will argue that the democratic quality of governance arrangements depends on the extent to which the democratic ideal of selfgovernment of citizens is fulfilled. Since it is unrealistic to imagine the direct involvement of all citizens in European policy-making, it is argued here instead that CSOs act as a potential "transmission belt" (Nanz

² Philippe Schmitter, in his unmistakable language, says: "The EU has been a rather extreme case of a consociational democracy that weighs intensities more than it counts noses, especially when those intensities are expressed in the form of so-called national interests" (Schmitter 2003: 71).

³ A civil society organisation is defined here as a non-governmental, non-profit organisation which pursues its clearly stated purposes in a non-violent way (see endnote 4 of Nanz and Steffek 2005). On the usage of the term 'civil society' in European institutions see (Smismans 2002).

and Steffek 2004: 324) between the citizenry and political processes, given sufficient inclusion into deliberative policy processes.

Consequently, this paper examines the participatory pattern of two policy areas that are not predominantly subject to new governance modes, namely migration and environmental policy. The area of migration is a very dynamic, rather young policy area at EU-level, where substantial legislation has been put forward in recent years, whereas environmental policies belongs to the most established policy fields in European integration. The policy fields are chosen for reasons of variation in their status in EU integration in time and in legal respect, environment belonging since long to the EU's first supranational pillar, and migration to the intergovernmental third pillar. The indicators of access, transparency and inclusion are examined in their general application to the policy field, whereas responsiveness is assessed by taking a crucial policy process of each area in recent years as examples. In migration, this is the case of the directive on family reunification, and in environment the chemical directive Registration, Evaluation and Accreditation of Chemicals (REACH). The empirical analysis is based on document analysis and sixteen semi-structured interviews with NGO representatives and members of the European Commission, the European Parliament and the Council were conducted in June and July 2005. The analysis of indicator 4 on 'responsiveness' relies on a computer-supported qualitative content-analysis.

This paper is organised as follows: first, I outline the deliberative approach to democracy, which understands deliberation as justification, and discuss the role of organised civil society therein. In a second section, I present my methodological approach, which develops a set of four indicators that shall guide the empirical assessment of the democratic quality of EU governance. These indicators encompass the access of CSOs to the policy-making settings, the transparency of the overall process, the inclusion of all relevant concerns into the process as well as the responsiveness of the process to the concerns raised by the non-state actors. Since the EU – officially – adopts a general approach to participation, the indicators of access, transparency and inclusion are analysed in turn at a general level in section three, before, in the then following two sections on migration and environmental policies, policy area specificities and the responsiveness of concrete policy processes towards CSOs' input are assessed. The concluding section compares the cases and offers some further explanatory comments.

Part I - Analysing the democratic quality of European governance: Theoretical and methodological considerations

The deliberative approach to democratic governance and the role of organised civil society

In what follows, I focus on only one, albeit central, aspect of democracy: the participation of citizens in processes of political decision-making. In that respect, democracy means a political ideal that applies principally to the arrangements for making binding collective decisions. Such arrangements are democratic if they ensure that the authorisation to exercise public power arises from collective decisions by the citizens over whom that power is exercised. Thus, governance arrangements are democratic if they are designed in a way as to guarantee the inclusion of citizens' concerns into policy processes. In a nutshell, deliberative democracy must ensure that citizens' concerns feed into the policy-making process and are taken into account when it comes to a decision on binding rules. The obvious challenge for any form of international governance is the fact that it is hard to imagine how all stakeholders of governance (and this in many cases will mean all citizens) could participate directly in the policy processes.

The deliberative model of democratic governance offers some hopeful proposals to ease the problem of complex polities by arguing that a necessary (yet not sufficient) condition for democracy is to base decision-making processes on the principle of "political justification" (Cohen 1996). Political decisions should be reached through a deliberative process where participants scrutinize heterogeneous values and interests and justify their positions in view of the common good of a given constituency. However, as Cohen and Sabel stress, "deliberation, understood as reasoning about how to best address a practical problem, is not intrinsically democratic." (Cohen and Sabel 2003: 336-367). Viewed from a functional perspective, deliberation is predominantly a means to enhance governance efficiency. Some scholars from a public policy or IR theory background have argued that deliberation is a prerequisite for high levels of efficiency, efficacy and quality in political regulation. Thus, the importance of scientific expertise and consensus-seeking in the epistemic community of experts (Haas 1992; Majone 1999) is highlighted. Such a deliberative policy process is not designed to aggregate

particularistic interests but rather to foster mutual learning, and to eventually transform actors' preferences while converging on a policy choice that is oriented towards the common good. In their study on 'comitology' in the EU, Joerges and Neyer (1997) empirically support these arguments by underscoring the high quality of the supranational bureaucratic procedures in the EU. However, it is far from clear how bureaucratic procedures such as 'comitology' can make sure that citizens' concerns will be given appropriate weight in the process of argumentation that leads to an informed decision on binding rules. Even if we trust experts and scientists to advocate norms that, in their view, serve the common good of a polity and not some particular interest, it still remains their assessment and their view of the good still prevails. What is missing from the committee model is a plausible mechanism that links expert governance with the discourse of ultimate stakeholders.

Therefore, from a normative perspective, deliberation is only democratic if policy processes are "in principle open to appropriate public processes of deliberation by free and equal citizens" (Benhabib 1996: 69). Hence, only with the participation in the policy process of all those affected by the decision is institutionalised, can governance arrangements acquire a democratic quality. Institutional safeguards have to ensure that information is made available to all stakeholders and that their concerns reach the agendas of the European institutions. Therefore, *deliberative procedures* in European governance need to be complemented with *participatory rights* in order to be pushed towards democratisation.

Deliberative theories in the tradition of Jürgen Habermas have paid much attention to the role of civil society. According to Habermas,

Civil society is composed of those more or less spontaneously emergent associations, organizations, and movements that, attuned to how societal problems resonate in the private life spheres, distil and transmit such reactions in amplified form to the public sphere. The core of civil society comprises a network of associations that institutionalizes problem-solving discourses on questions of general interest inside the framework of organized public spheres (Habermas 1996: 367).

Thus, Habermas "shifts some of the burdens for securing democratic outcomes away from the individual virtues of an active citizenry onto the 'anonymous network of communication' in civil

society” (Baynes 2002: 134). The idea is that an organised civil society picks up individual citizens’ concerns, gives voice to them in the wider public sphere (‘weak public’), where the issues are discussed, and carries them further to the ‘strong public’ of the institutionalised political system. This ‘two track model’ offers a solution to the problem of socio-cultural complexity in today’s differentiated and heterogeneous societies: political decision-making in institutions must be open to the general public and yet structured in a way as to be effective. Civil society organisations should be open to all interested citizens and, furthermore, also pick up concerns of disadvantaged people or of ‘voiceless’ but important issues of the common good, such as the environment. However, Habermas’ ‘two-track model’ seems to be ill-equipped to capture the gradual transformation of a contemporary multcentred, heterogeneous polity such as the EU. The proliferation of ‘governance’, i.e. of multiple forms of decision-making bodies within the governing system, poses considerable problems for his differentiation between an informal public on the one hand and the formal institutions that ultimately make the decisions on the other.

The conception employed in this paper departs from this view insofar as it emphasises the role of organised civil society participation *within* governance regimes as an intermediary agent between the political institutions and the wider public. Organised civil society has a high potential to act as a ‘transmission belt’ between specialized discourses within public institutions and the emerging European citizenry. Such a discursive interface operates in two directions: first, CSOs can give voice to citizens’ concerns and channel them into the deliberative process or European governance. Second, they can make the internal decision-making processes of the EU more transparent to the wider public and formulate technical issues in accessible terms (Nanz and Steffek 2004).

Normative theory and empirical research: the methodological approach

Although there exists a body of literature that deals with organised interests in the EU (i.a. Clays et al. 1998; Greenwood 2003), most of it lacks substantial empirical research driven by insights from democratic theory (cf. Smismans 2004). This empirical analysis builds on the previously elaborated model of deliberative democracy, focusing hereby on the inclusion of CSOs in policy-making processes. A policy-making process is judged to be ‘democratic’ according to its

“capacity to bring about free, informed and inclusive deliberation” (Nanz and Steffek 2005). This normatively informed condition for the quality of a policy process can be measured with a parsimonious list of four indicators which captures the key determinants of democratic quality of a policy process. Thus, these four criteria should be both empirically manageable and normatively informative:⁴

- 1) Access to political deliberative processes;
- 2) Transparency and access to information;
- 3) Inclusion of all concerns;
- 4) Responsiveness to stakeholder concerns.

The central element of democracy is the idea of self-government, and I have argued that it requires equal influence of all citizens in the policy-making process. The deliberative model helps to understand that civil society organisations can function as mediators. One requirement for such mediated input of stakeholders’ voices in the policy-making process is institutionalised *access to political deliberative processes* for CSOs. Among others, institutionalised access to meetings, official observatory status and/or regular formalised consultative meetings are indicators of this criterion.

However, access to deliberative processes alone is insufficient if not complemented by *transparency and access to information* for all participants. This is necessary to achieve equal footing for all partaking actors and to render public awareness possible. The fulfilment of this criterion is indicated by institutionalised accessibility to background and policy documents. A core principle of democratic political deliberation is that the arguments of all stakeholders possibly affected by the decision should be included in the process of decision-making. *Inclusion of all concerns* therefore is a key issue for the democratic quality of decision making. Deliberative democracy requires that all arguments or stakes are equally included and considered in the policy-making process. The inclusion of arguments is specifically problematic when certain groups of stakeholders are disadvantaged with regard to their resources and their degree

⁴ This list is explained in more detail in (Nanz and Steffek 2005).

of organisation. Therefore, the democratic quality of deliberative arrangements hinges upon the institutionalised capacity to equally include all arguments into the policy process which are made by the stakeholders. This can be achieved through institutionalised rules of empowerment for marginalized groups of stakeholders. Financial support for setting up a CSO as well as project funding is an important indicator for empowerment.

Access, transparency and *inclusion* alone are, however, not sufficient criteria for deliberation to be called democratic. Deliberation only possesses a democratic quality if the stakeholders' concerns are not only be heard, but also reflected upon during the decision-making process. In order to make the indicator of *responsiveness to stakeholders concerns* clearly traceable, I focussed on observable changes in participants' overtime positions that resonate in adjustments in the outcome of the policy process.

It is evident that these four criteria are neither independent of each other nor mutually exclusive. Moreover, conditional relations hold between them. Without general 'access', a deliberative process would remain elite-driven, not enhancing the process' democratic quality. Only if the analysis shows that a policy process fulfils all four criteria, it can be considered democratic. This proposed criteria-based assessment has two distinct strengths (see also Mathur and Skelcher 2004): first, it is a transparent research approach by making the criteria explicit, thus adding to the reliability of the measure and contributing to the literature on measuring democracy. Second, criteria allow for comparison across units of and across levels of analysis. Comparability is essential for any case study that is conducted as part of a broader research project – as is the case with this study.

Against this background, the two cases of legal migration and chemical policy will be assessed in order to illuminate the pattern of CSO participation in concrete policy processes. The indicator on 'responsiveness' in particular is only researchable by analysing a concrete example and was measured by applying computer supported content analyses of CSOs' influence in both policy processes. It should be stressed that it is not the aim to present and analyse the content of the

directive in an encompassing way⁵ but, instead, to trace if, and how, arguments of CSOs found their way into the draft directive over time. This approach differs to impact assessments, which focus on the outcome, the final legislation. My approach assumes that during the years of deliberations and negotiations, certain topics might well be discussed and temporarily included in a draft proposal, only to become perhaps excluded in a later stage of the process. Thus, in order to account for changes over time, the decision-making processes were split in four periods, taking the different major official publications (white paper, different stages of the legislative proposal, the final directive) as reference documents. Then, I collected all available documents of CSOs that dealt with the directives, resulting in 48 CSO documents in the case of migration and 121 documents in the REACH case. In each case, I identified on the basis of document and literature analysis those topics that were of key importance to the CSOs and developed a coding scheme, accordingly, and analysed the CSO documents vis-à-vis the respective official document of the directive, trying to detect whether themes or even concrete wording of CSOs can be found in the official documents. I used the computer programme *Atlas.ti* in the analytic process in order to achieve systematic and transparent results.

In the following part, I will first examine the EU's participatory regime, before I then briefly present the results of the analysis of the two cases.

Part II – Assessing European policy-making processes

A normative assessment of the EU's participatory regime

'Brussels' and its European quarter is known as an 'insiders' town' where people regularly meet in a 'cocktail circuit' (Lahusen 2004: 57), so that a flow of continuing discussion among public and private actors is established. CSOs are one element of this circuit and one can easily assume that these occasions are valuable for them to give voice to their concerns. However, from the normative stance adopted in this volume, these informal contacts do not enhance the democratic

⁵ In the case of family reunification, with view to human rights, this has been done from a legal perspective in an excellent, detailed way by van der Velde (2003); see also Peers (2003a; 2003b). REACH is too young for detailed analysis. For an early overview about the process see (Pesendorfer 2006).

quality of European policy-making processes as they do not guarantee free and equal participation of all stakeholders. Therefore, the analysis of the indicators needs to be sensitive with regard to the evolution of a formal participatory regime in policy processes.

Access to policy-making processes

This indicator portrays the institutionalised repertoire that the European Union offers CSOs to partake in policy-making processes. Unlike other international organisations, the EU has no general formal accreditation scheme for CSOs that would encompass an explication of their rights of participation. Instead, the European Commission, as the most important interlocutor for CSOs, stipulates that it “wants to maintain a dialogue which is as open as possible”⁶. Rather than a conditionality approach for CSO involvement, the Commission favours a self-regulatory model. However, this lack of explicit *conditions* for access ties with a lack of explicit *rights* for access. Unlike the United Nations⁷, the European Commission favours a decentralised approach and states that its “different services are responsible for their own mechanisms of dialogue and consultation” and rejects “an over-legalistic approach [which] would be incompatible with the need for timely delivery of policy” (Commission 2002: 10).⁸

Nevertheless, there are some provisions that shape the relationship between CSOs and the Commission. First of all, there is the ‘civil dialogue’ initiative of the late 1990s, which was established by the DG Employment & Social Affairs in cooperation with the Platform of European Social NGOs. Later, particularly the Commission’s White Paper on European Governance (European Commission 2001) aimed at enhancing civil society’s importance in the European decision-making processes. Based on my conducted interviews, however, I agree with Pauline Cullen that “[t]he only tangible results from these initiatives were a Commission website with a registration system, and the use of internet portals as cyber or virtual consultations” (Cullen 2005: 6), i.e. the online database CONECCS (‘Consultation, the European Commission and Civil Society’)⁹, and an internet consultation scheme called ‘Interactive Policy-Making’

⁶ See http://europa.eu.int/comm/civil_society/.

⁷ See <http://www.un.org/dpi/ngosection/index.html>.

⁸ The Social Dialogue and the Economic and Social Committee are treaty-based provisions for consultation that are outside the scope of this paper.

⁹ http://europa.eu.int/comm/civil_society/coneccs/index.htm.

(IPM). Although the Commission hopes that it will be used by Commission staff in order to identify an appropriate mix of partners for consultation, its de facto usage is yet in need for detailed research. The interviews did not reveal particular enthusiasm about CONECCS, in fact, ignorance was dominant. It needs to be seen whether this website will remain what it currently is, i.e. a voluntary database for information without any impositions of condition on the CSOs and without improving the de facto consultation procedures (as Cullen suggests), or whether it is an incremental foundation for a system of ‘access leagues’”, as Greenwood and Halpin argue (2005: 5). Up to now, both CONECCS and the IPM are relatively unknown among both CSO representatives and civil servants and there is no structured intra-institutional strategy for disseminating relevant information.¹⁰

The European Parliament (EP) does not either provide for structured contacts with CSOs, but has well-developed informal contacts with CSOs and, as Smismans states, “is seen as very receptive to demands of the NGO sector” (2002: 18). In order to gain access to the EP building, however, CSOs must be registered and are issued four permanent entrance permits per organisation maximum. This rather recent restriction to access, in an attempt to tighten security in the EP, has triggered – as my interviews revealed - broad unease among CSOs and there are discussions going on to improve this scheme. The (European) Council lacks behind in its effort to become more open and accessible for CSOs, both formally and informally. CSOs have no formal consultative status and there is no framework for relations between them and the Council.¹¹¹²

For the time being, however, participation of CSOs has to be characterised as ‘participation by grace and favour’, meaning that the extent of participation hinges largely upon the discretion of functionaries. Therefore, the democratic character of the existing structures for civil society’s *access to deliberative policy-making processes* is, from a normative perspective, relatively limited.

¹⁰ For instance, within the Commission, knowledge dissemination about IPM depends alone on the small IPMunit within DG Internal Market (interviews with IPM personnel).

¹¹ An exception to this rule is the contacts of the Socialplatform. In 2000, the Portuguese Presidency invited the Platform to an informal Social Affairs Council Meeting and provided them with speaking rights (Alhadeff, Wilson, and Forwood 2002). These meetings have been repeated since then until the Presidencies of Italy and Greece stopped this invitation. The British Presidency in 2005 promised, however, to re-establish these meetings.

¹² In a Decision from December 21, 2005, the Council announced to open its meetings for meetings concerning issues under co-decision. However, the European Ombudsman criticises this move as insufficient and urges the Council to open its doors to all meetings where concrete policy measures are discussed (Press Release No. 2, 2006).

Transparency – Access to documentation

Entered into force in December 2001, Regulation 1049/2001 EC lays down the principles and limits to access for documents of the European Parliament, the Commission and the Council of the European Union. This regulation, which followed the inclusion of the transparency article 255 in the Treaty of Amsterdam, obliges the institutions to report annually on the implementation of the reports; comitology, however, is not included. Again, the constitutional treaty would substantially improve transparency, not only in terms of access to documents but also in terms of conducting the work of the institutions as openly as possible. Both EP and Council would be obliged to meet publicly when deliberating and adopting legislations (Bignami 2003). However, in a preliminary analysis after two years of the regulation's existence, the European Citizen Action Service complained that "at the very most, the Institutions fulfilled the minimal requirements" (Ferguson 2003: 1) and that refusal rates for access to documents are actually rising.¹³

The interviews revealed broad satisfaction with the accessibility of documents; especially improvements of internet-access (via the Europa-website) were mentioned. However, the lack of transparency in the Council's working procedures was regularly mentioned; interviewees would welcome if the positions of the individual member states were made visible, i.e. the footnote-papers of the Council working groups could be made accessible as well. Other statements point in the direction that it would be important for effective participation if the procedures were made more transparent. For CSOs, it would be as important as 'access to documents' to get 'access to the agendas' of the European institutions in an early stage so that they could gain time to prepare themselves and to develop positions in cooperation with their national sections. Nevertheless, although CSOs are still not at equal footing with the European institutions, the EU's transparency regime as a whole– "after a long, bitter set of negotiations" (Bignami 2003: 11) – seems to be rather conducive to democratic participation of civil society.

¹³ European Commission: From 19% in 1999 to over 33% in 2002; Council: from 16% in 1999 to almost 29% in 2002 (for documents that were released wholly). See Ferguson 2003: 4.

Inclusion of all voices

The extent to which the EU engages in (financially) supporting CSOs of vulnerable groups and the overall CSO 'landscape' is the levelling board for the indicator of 'inclusion'. In accordance with this volume's normative position, 'inclusion' is crucial for fair and equal participation of *all* stakeholders. Far-reaching consultative rights for an exclusive group of selected organisations would be normatively insufficient. Inclusion is particularly important for concerns of vulnerable or voiceless groups, which cannot afford (or are unable) to set up an office in Brussels or lack the modern telecommunication resources needed to make use of e-Governance. The European Commission provides a rather complicated set of budget lines where NGOs can receive financial support. With some exceptions, funds depend on whether the organisation can meet the requirement of co-financing; the amount of funding and the procedures vary across policy areas. Even the Commission can only estimate that about €1,000 million is allocated per year (European Commission 2000); consequently, in recent years there is a debate about changes in the financing structure, which, however, can become detrimental to smaller NGOs (European Citizen Action Service 2004; Smismans 2002).

In sum, at a general level, one can say that the European Commission makes some efforts to enable civil society activities at European level, but that these efforts lack transparency and favour well-established NGOs with high reputation and expertise, so that, as several interviewees made it clear, the functionary can expect not only 'opinions' and 'unrealistic wishes' but also 'competent' aid and 'technical expertise'. Moreover, budget lines pursue the EU's policy goals and potentially exclude a number of CSOs that follow a different agenda. In the area of human rights, for instance, the current focus on anti-discrimination policy excludes other themes (similarly Cullen 2005). Hence, the existing EU practice to support CSOs does not guarantee broad inclusion, while it is not fundamentally detrimental to the inclusion of stakeholders either.

Participation in the EU's Migration Policy

Migration policy in the European Union

The area of migration is a relatively young policy field and constitutes one of the most dynamic areas of EU integration of recent years. In the early days of European integration, collaboration on migration issues only took place horizontally, between nation-states, i.e. on a purely intergovernmental basis outside the realm of the European institutions. As Guiraudon (2000; 2001; 2003) has convincingly demonstrated, particularly since the early 1980s, the national ministers of the Interior have used the European level to avoid national veto points in order to pursue their security-led agenda of restricting migration; accordingly, their policy-style was secretive rather than open. Since the Single European Act (1987), however, functional spillovers from the internal market programme (concerning free movement of persons) as well as the Schengen regime required closer cooperation. Therefore, a third pillar on matters of police and judicial cooperation was established in the Maastricht Treaty (1992). As the resulting policy-making procedures of “formal intergovernmentalism” (Geddes 2003: 136) proved to be inefficient, the Amsterdam Treaty (1999) endorsed significant procedural changes in the EU's Asylum and Migration Policies' decision-making rules. Most of its provisions were transferred from the intergovernmental pillar III to the supranational pillar, so that now, after a five-year transition period, complementing horizontal cooperation by an increasingly strong vertical dimension of supranational competences has become prominent.¹⁴ After the end of the transitional period on 1 May 2004, and after an additional unanimous decision by the Council to skip unanimity and the consultation procedure in all fields except legal migration by 1 April 2005, qualified majority voting in the Council and co-decision with the EP have recently become the rule (cf. Peers 2004; Peers 2005). The secretive tradition of policy-making is challenged by the more recent changes in procedures and in the primary law, which are now part of a strong supranational frame within an interesting structure of “intensive transgovernmentalism” (Wallace

¹⁴ Cf. art. 67 EC and the Protocol and Declaration on this article (Nice Treaty) which required unanimous voting in the Council, mere consultation with the EP and a shared right to policy initiation between the Commission and the Council (Alegre et al. 2005).

2000: 33) as the persistent policy style. Legal migration, however, remained in the intergovernmental third pillar.

In addition to the procedural developments, there was considerable political support to further European integration in this policy field. In October 1999, the Special European Council on Justice and Home Affairs (in Tampere) gave migration policies considerable political momentum by setting the goal of constructing an 'Area of Freedom, Security and Justice' across the Union. The ambitious 'Tampere programme' formulated a five-year agenda for substantial legislation; it has been replaced recently by the 'The Hague' Programme (in May 2005), which does not seem to have the same political support (and thus dynamic), however. It adds little to the development of legal migration, which "could likely move only forward significantly once the Constitutional Treaty enters into force" (Alegre et al. 2005: 52).¹⁵ A prominent view among observers is that migration policies are dominated by a security agenda, with the repressive 'fortress Europe' looming in the background (cf. Huysmans 2000). However, there are other voices that interpret migration policies "as a potentially progressive source of post-national rights" (Geddes 2003: 26) and who adopt a "citizenship paradigm" (Guiraudon 1998: 11) that includes political and civic rights for migrants at EU-level (see for instance Geddes 2000; Kastoryano 1998; Kastoryano 2003). In fact, if it turned out that migrants' voices – or 'third-country nationals', to use EU parlance – are heard in EU policy-making processes, this would indicate that the EU was moving towards a postnational polity.

The empirical case: the directive on family reunification

The 'Council Directive 2003/86/EC on the right to family reunification for third-country nationals', the 'flagship' directive in legal migration, aims at regulating the main type of legal immigration of third-country nationals in recent years (Boeles 2001: 61). Moreover, as the Commission repeatedly argues in its legislative proposals, uniting families is important for the well-being and eventually integration of third-country nationals (TCNs) already residing lawfully in the EU. This combination of economic considerations and human rights concerns were the driving motives for the European Union to issue a directive on family reunification.

¹⁵ This was also the message of the interviewed CSOs.

The directive was decided on the basis of the new provisions in the Amsterdam Treaty and the aims specified by the Tampere programme. The legal basis of this directive is Article 63 (3), (4) EC Treaty, from which Denmark, the UK and Ireland have opted out. Whereas Denmark has a definite opt-out, the UK and Ireland may decide to join the directive at a later date (van der Velde 2003: 159). The Article 67 EC-Treaty based decision-making procedure, including unanimity voting and mere consultation of the EP, remains the legal basis for legal migration also after the end of the five-year transition period (see 4.1 above). Only two months after Tampere, in December 1999, after having consulted CSOs, the Commission published the first proposal of the family reunification directive (COM(1999) 638 final). However, since there was hardly any progress in the Council, the Commission, in October 2000, presented an amended proposal (COM(2000) 624 final) that took into account the proposed amendments of the EP (Boeles 2001). Nevertheless, the Council negotiations remained thorny and the Laeken Council, December 2001, asked the Commission to again redraft the proposal. This redraft was released in May 2002 (COM(2002) 225 final) (cf. Peers 2002a; Peers 2002b; Peers 2003a), thus ending the deadlock in the Council¹⁶ and enabling the Justice and Home Affairs Council in February 2003 to reach an agreement on the directive.

Finally, in September 2003, the directive was adopted, though under politically problematic circumstances. In agreeing upon the directive already in February, the governments of the fifteen member states did not wait to consult the European Parliament, which, in its report issued in April 2003, included substantial reservations about the directive's provisions. Although the directive should have entered into force in October 2005, its final destiny is still open. In December 2004, the European Parliament took action against the Council at the European Court of Justice (Case C-540/03)¹⁷ to withdraw certain elements particularly concerning children of minor age that allegedly contradict the European Human Rights Convention. This move, which was very much welcomed by several CSOs, suggests severe disagreements among the

¹⁶ Not least due to Germany which had blocked any progress so far because of its pending new immigration law. After it was finally decided, Germany stopped its obstructive attitude in the Council (cf. Interview in the German Permanent Representation, June 2005).

¹⁷ Published in the Official Journal (2004/C 47/35).

participating actors and is a first sign of low responsiveness, particularly of the Council, to CSOs' concerns.¹⁸

Civil society organisations in the EU's migration policy and in family reunification

Given the youth of migration policies at European level, it cannot surprise that there are only few civil society organisations in 'Brussels' that focus solely on migration issues (Migration Policy Group 2002). On the Commission website CONECCS, of currently 34 listed organisations in the field of 'justice and home affairs' (JHA), only 10 are more or less closely related to migration issues (including police unions). The rest are industrial associations such as the Association of European Producers of Steel for Packaging (APEAL) or other non-economic groups interested in other aspects of JHA, for instance the European Humanist Federation (EHF). CSOs are mostly concerned with the subjects of integration and the human rights situation of refugees and asylum-seekers and the awareness of the growing importance of European-level migration policies among national CSOs increases only gradually (ibid.). Nevertheless, there are some organisations that operate quite actively on specific migration issues. Among them are Church-based agencies such as the *Churches' Commission for Migrants in Europe* (CCME) or *Caritas Europa*, the *European Network Against Racism* (ENAR) and the *European Council on Refugees and Exiles* (ECRE) which are prominent and outspoken agents for migration issues, among others. Of some importance for cooperation and coordination of migration NGOs is the UNHCR's initiative for a regular, but loosely organised Migration- and Asylum-NGO group, which established a migration sub-group, which is currently organised by the Migration Policy Group. Additionally, a few other organisations deal with migrants' concerns if their special interests are concerned. The European Union sections of the *International Lesbian and Gay Association* (ILGA) and of *Save the Children* show the diversity of actors active in this field. Finally, expert organisations such as the *Immigration Law Practitioners' Association* (ILPA) or *Statewatch's European Monitoring and Documentation Centre* (SEMDOC) offer expertise, circulate policy proposals and critically comment on the EU's migration policies.

¹⁸ The EP's appeal to the ECJ, however, might be considered as a success of CSOs, many of which called at the EP to take legal action after the adoption of the directive.

It should be noted that migrants themselves are not directly represented at EU-level, although, since the mid-1980s, the EP financially supported migrants associations to further their coordination among themselves and to better integrate them into Europe (Kastoryano 1998: 8f). At the beginning of the 1990s, supported by the European Commission, a European Migrants' Forum was established "with a mandate to deal with the position of third-country nationals within the European Union" (Niessen 2002: 81). The Migrants' Forum was structured alongside the nationality criterion. It fought for political and legal rights of migrants that would be equal to those of European citizens. Due to internal problems as well as managerial and financial irregularities, this Forum lost support by the Commission and eventually ceased to exist. Moreover, the European Migrants' Forum lost its appeal at the Court of First Instance¹⁹ to annul the Commission's decision from July 2001 to terminate the financial support. Currently, there is only loose talk in Brussels for a renewed initiative (Geddes 2000).²⁰ Although it is remarkable that the EU does not use EU-citizenship to exclude non-EU citizens from 'soft' forms of participation, farther reaching expectations that the EU's migration regime might be a source for a postnational polity (e.g. Kastoryano 1998; 2000) can empirically not be supported.

In the case of the directive on family reunification, there have been intensive informal contacts between the CSOs on the one side and the Commission and the EP on the other. If at all, the Council was usually only approached via the member-state level by national CSO members. The unit for legal migration of the then DG Justice and Home Affairs²¹, in contrast, prepared informal discussion papers on some issues of family reunification and used them for an early consultation with CSOs on October 8, 1999 (cf. also Niessen 2001: 422), even before the Tampere European Council presented the 'Tampere Programme'. Indeed, a consultation very early in a policy process is both quite common and quite effective for CSOs, as the analysis of 'responsiveness' will show.

¹⁹ See Case T-217/01, decision (2003/C 146/70) of 9 April 2003.

²⁰ Also e-mail communication with CCME (7 July 2005).

²¹ DG JHA has been renamed into DG Freedom, Security and Justice.

Was the policy process in the case of family reunification responsive to CSOs' input?

For CSOs,²² the following topics on family reunification were of key importance and provided the basis for the analysis' coding scheme:

- the legal status of the sponsor, i.e. the migrant within the EU that wishes to be reunified with her/his family,
- the material conditions the sponsor has to fulfil (e.g. provision of 'sufficient' resources, accommodation, health insurance)
- the family members eligible to migrate (e.g. nucleus family vs. extended family concept),
- legal and socio-economic rights for the family members after migrating (i.a. access to employment, granting of an independent residence status),
- non-discrimination between TCNs and EU citizens,
- the relationship of the directive vis-à-vis existing national law (degree of harmonisation, flexibilisation clauses etc.).

To make the story of a long analysis short: against the background of the lengthy and thorny decision-making process, it comes at no surprise that the intake of CSO concerns was minimal. Even more, the over time analysis showed a gradual exclusion of issues that are important for CSOs. In the beginning, the Commission wanted to achieve an encompassing directive concerning all instances of family reunion, i.e. for TCNs' with long-term residence status, for Geneva convention refugees, for those with subsidiary forms of protection and for EU citizens with non-EU family members. The Commission adopted an encompassing definition of family that did not distinguish between married, unmarried or same-sex partners and granted them socio-economic rights comparable to those of EU citizens. The comments of all CSOs on the early two drafts, particularly on the first one from 1999, were very positive. One can assume that the Commission was receptive during the early consultation before the first proposal. In contrast, the scope of the second amended proposal (2002) was considerably restricted in all these areas. For instance, persons with subsidiary form of protection and EU citizens were excluded from the directive, married and unmarried partners are now treated separately and the accession of the

²² See annex for a list of the CSOs.

latter is not anymore obligatory to the member states. Having seen their stakes disappearing over time, all CSOs are united in their disagreement over the new proposal and the final directive:

“The Coordination can no longer ask associations to support the new proposal as it did for the two previous ones. On the contrary, it expresses its complete disapproval of a step backward and calls on associations and organisations of the civil society to persuade the representatives and governments of their countries to oppose its adoption. With regard to family reunification, it would be better to have no European directive than to have one that endorses violations of the right to family life perpetrated by certain member states.” (coordeurop 2002)

One major ‘success’ of CSO needs to be mentioned, however: Although they were generally satisfied with the second amended proposal, CSOs already anticipated that the proposal would end up with minimum standards. Therefore, they argued for flexibilisation, which would allow member states/give MS discretion to deviate positively from the minimum standards of the proposal, and for a standstill clause. The latter would avoid a race-to-the-bottom by forbidding member states to lower their existing standards. Eventually, after the long and thorny negotiations in the Council that followed the second proposal, the Commission seemed to realised that its aim of real harmonisation was not be achievable and gave up its resistance to include greater flexibility and a standstill clause. However, it included a deadline clause in the second amended proposal of 2002, which would require many flexible clauses to be revisited in two years time after the directive’s coming into force.

Participation in the EU’s Environmental Policy

Environmental policy in the European Union

Today, EU environmental policy “adds up to considerably *more* than the sum of national environmental policies” (Jordan 2005: 2). It represents a complex system of multilevel governance with many opportunities for public and private actors that entails a substantial legislative corpus which “contributes significantly to the view of the Union as a ‘regulatory state’” (Sbragia 1998: 241). Throughout the history of environmental policy integration, impulses

from the global sphere and the role of 'leader' states, such as Denmark, The Netherlands and Germany, pushed environment to become a major policy area in the EU with considerable high regulative standards (Jordan 2005; Sbragia 2000). Similarly to the situation in migration policies, national ministers, often rather marginalised at home, made use of the European level in order to increase their importance (Sbragia 1998). In 1973, stimulated by a UN conference the year before, coordinated European environmental policy started with the European Commission's first Environmental Action Programme. In these early years, environmental policy's reputation as 'low politics' was conducive to its advancement in silence and its role for strengthening political integration (Jordan 2005). It was only with the Single European Act (1987) that environmental policy received a clear legal basis (cf. Hildebrand 2005); moreover, the strategy of issue-linkages between environmental and single market issues (cf. Lenschow 2005), in order to apply qualified majority voting (QMV), further advanced legislation. The treaty reforms of Maastricht (1993) and Amsterdam (1999) expanded QMV to environmental policy and upgraded it to a general principle of the EU. However, in recent years, environmental concerns have become increasingly in the defensive, and new policy initiatives such as the Lisbon Strategy are dominated by economic reasoning.

Nevertheless, environmental policy evolved from a sectoral theme to a horizontal issue where general principles, in particular the principles of sustainability and of precaution, are supposed to be respected across all EU policies. On the one hand, this 'mainstreaming' strengthens the environment's weight. On the other hand, however, these general principles are in danger of conceptual overstretching. As the REACH case clearly exemplifies, despite being part of everybody's rhetoric, political support for instance for the precautionary principle remains at best opaque and undifferentiated. Moreover, environmental policy increasingly lost the secrecy of 'low politics', where policy processes are the primary realm of expertocratic procedures and few actors. Hence, the success-story of environmental policy integration is stalled, and legislation such as REACH will show whether the EU will remain one of the most advanced environmental policy regimes of the world.

The empirical case: the REACH directive

‘No data – no market’, everybody unfamiliar with chemical policy would think that this principle is the uncontested and existing principle of marketing chemicals; however, it is not. The current EU-system, which is based on the implementation of the 'Sixth amendment of Directive 67/548/EEC on the classification, packaging and labelling of dangerous substances' in 1981, introduces obligations to pre-market testing, hazard assessment and notification procedures only for **new** chemicals. Currently, of about 100,000 in European chemical registers listed substance, about 30,000 are of commercial significance. However, only about 2,500 chemicals were introduced on the market **after** 1981, which means that the majority of chemicals have not yet undergone a registration and hazard assessment procedure.²³ Moreover, the existing chemical regime in the EU is rather complex so that the chemical industry has an interest in establishing a comprehensive, harmonised European chemical regime. Chemical policy so far has mainly been motivated by economic, in particular trade concerns and only marginally to environmental or consumer protection (Lenschow 2005: 307). REACH, the planned directive on **R**egulation, **E**valuation and **A**uthorisation of **C**hemicals, is supposed to establish a coherent, integrated regime to European chemicals.

Pushed by Scandinavian countries and The Netherlands (Pesendorfer 2006), the EU Council in Vienna (December 1998) acknowledged the necessity to work on an integrated and coherent approach to the EU’s chemicals policy that adequately reflects the principles of precaution and sustainability. In June 1999, the Environment Council²⁴ in Luxembourg took a step forward by giving a clear mandate to the Commission to take the appropriate measures. Consequently, on February 24/25, 1999, the Commission held a stakeholder brainstorming workshop *On the*

²³ According to the Commission, “existing substances amount to more than 99% of the total volume of all substances on the market, and are not subject to the same testing requirements” (European Commission 2003) as the ‘new’ substances. However, numbers vary in documents, which shows the insufficient available data.

²⁴ During the Italian Presidency (2nd half 2003), and – according to interviews - apparently not debated beforehand by PM Berlusconi, the Competitiveness Council became responsible for REACH instead of the Environmental Council. However, at least Germany and Denmark decided to further sent their Environmental Ministers to Council meetings on REACH. Also within the other European institutions responsibility for REACH was contested. In the Commission, DG Environment was originally responsible and produced the White Paper in 2001, however, meanwhile it shares responsibility with DG Enterprise and Industry. Moreover, after fierce battle in the EP, the Environmental Committee remained the leading committee, however, other committees such as the Competitiveness Committee received the right to bring own amendments into the plenary sessions. For a useful description of the early stages of the REACH-process, see (Pesendorfer 2006).

development of a future chemicals strategy for the European Union in Brussels and published in February 2001 a White Paper on the future of chemical policy (COM(2001) 88final). In this White Paper, the following aims for a chemical regime are expressed:

- Protection of human health and the environment,
- Maintenance and enhancement of the competitiveness of the EU chemical industry,
- Prevent fragmentation of the internal market,
- Increased transparency for both consumers and industry,
- Promotion of non-animal testing,
- Conformity with EU international obligations under the WTO.

All (existing and new) chemicals should be registered, evaluated and an authorisation scheme established for chemicals of very high concern, such as carcinogenic, mutagenic or bioaccumulative substances, which includes the possibility of restriction and substitution of chemicals.

In October 2003, after extensive consultation, encompassing an eight-week online consultation in summer 2003, several conferences and public hearings, and a series of impact assessments, the Commission published its draft proposal (COM(2003) 644final) and passed it to the European Parliament. Two years later, after much procedural tactics and substantial contestation, the EP, under co-decision procedure, agreed on a significantly amended draft version in its first reading in November 2005 (Council 2005). Only a month later, the Council achieved a political agreement on REACH (EP 2005).

Civil society organisations in the EU's environmental policy and in REACH²⁵

Parallel to the growth of European environmental policy in the mid-1980s, environmentally oriented civil society actors became more visible in Brussels. At the NGO-side, the big four, the European Environmental Bureau (EEB), Greenpeace, WWF and Friends of the Earth (FoE) became important actors, whereas on the business-side, organisations such as CEFIC, FECC or

²⁵ In addition to participation in policy processes, in December 2004, the European Commission recognised the European Social Dialogue in chemical policy between EMCEF and ECEG. An emphasis in the agreed Work programme is the European legislation on Chemicals Policy. A joint declaration of the Social Partners ECEG and EMCEF was compiled on REACH, which then was adopted in its 3rd Social Dialogue Plenary session on 15.9.2005. One major aim is information sharing to the new member states.

UNICE have become active already at early stages of European integration. The database CONECCS lists currently 137 organisations in the field of environment, of which are only 12 directly concerned with environmental concerns, the others being predominantly associations of business interests. Today, the environmentally oriented CSOs are very well established and coordinated as 'Green 10'²⁶ at European level. According to the interviews, this coordination works really well and is important to distribute tasks and coordinate action in order to compensate for lack of resources with regard to business interests. For instance, in the REACH process, the environmentalist CSOs often co-authored their position papers and activities, for instance their contribution to the online consultation.

Although in principle the same 'rules of the game' concerning the indicators of 'access' and 'transparency' apply also to environmental policy (see above), developments at global level could stimulate the EU's environmental policy to become a forerunner for a participatory governance regime. In 1998, the Aarhus Convention was agreed by the United Nations Economic Commission for Europe (UNECE) and foresees access to information, public participation in decision making and to justice in environmental matters. On 17 February 2005, the EU ratified a watered-down version of the convention, excluding access to certain types of documents and, above all, denying NGOs access to the European Court of Justice.²⁷

In the REACH process, as table 1 shows, the European institutions and the stakeholders have been very actively engaging in numerous dialogical activities. Moreover, the Commission initiated 'REACH Implementation Projects' (RIPs), and – proposed by CEFIC - launched the Programme 'Strategic Partnerships on REACH Testing' (SPORT) with industry, trade unions, and the member states. Besides these occasions, CSOs such as the ETUC or the EEB

²⁶ See Annex for members of the Green 10. Many of them receive Commission funding to secure their operations.

²⁷ See for relevant legislation under the Aarhus Convention (Council 2003a; Council 2003b) and <http://europa.eu.int/comm/environment/aarhus/>. An early legal analysis of the relation between the Aarhus Convention and the EU provides Rodenhoff (2002).

Table 1: Overview about crucial official participative activities during the REACH process

Date	Type of Activity
1999	The European Commission organised a conference with 150 stakeholders.
2001, April 2	The European Commission organised a second stakeholder conference on the Chemicals White Paper.
2003, May 7 – July 10	Internet Consultation, for which the Commission published a very detailed document as reference document.
2003, October 16	October Stakeholders' briefing organised by the Commission on its impact assessment study.
2005, January 19	Joint Public Hearing on "The new REACH legislation", organised by the EP's Committee on the Environment, Public Health and Food Safety; Committee on Industry, Research and Energy and Committee on Internal Market and Consumer Protection. ²⁸

organised several major conferences for dialogue of all stakeholders and countless smaller receptions, information meetings and other informal contacts took place. Environmental groups sought to gain public visibility with international campaigns such as the WWF's DETOX-Campaign. All in all, although informal contacts between stakeholders and decisionholders was of significance, one can say that the Commission made efforts for rendering the policy formulation process very open. Particularly the internet consultation via the IPM-Platform resulted in more than 6300 contributions and, as the interviews reveal, influenced the first draft legislation – in favour of business concerns. The restrictive questionnaire that focused on

²⁸ The three parliamentary committees could not agree on a common programme for the hearing, so that, in the end, every committee organised its own panel with its own like-minded experts so that real dialogue between the different stakeholders was largely avoided.

technical questions was criticised to favour business actors by avoiding a fundamental debate about the core principles and aims of REACH, such as the precautionary principle.

Despite the Commission’s efforts to create an accessible, transparent and inclusive policy process, REACH shows how a mixture of *formal* but technical consultation exercises and *informal* policy-making practices which results in asymmetric access to policy processes. To establish and maintain close contacts to the European institutions and to provide highly technical advice is resource intensive (personnel, financial, expertise), but non-business CSOs usually suffer from scarce resources. Therefore, these actors tend to focus on their ‘natural allies’ of DG Environment and the Members of the EP’s Environmental Committee. Moreover, it is not least this resource asymmetry among the CSOs, business and non-business, in informal participatory pattern that accounts for different strategies. Whereas business-CSOs try to be involved in policy-making without publicity, non-business concerns actively seek to increase visibility in stimulating public debates. In addition, political salience of the different concerns of various stakeholders is asymmetrically distributed, namely business concerns echo considerably stronger in the policy process than environmental concerns, as the next section will show.

Was the policy process in the case of REACH responsive to CSOs’ input?

REACH affects industry, consumer, worker and the environment. Consequently, the coding scheme for the analysis is based on the following key concerns of the CSOs²⁹, as is visible in their contributions:

Table 2: Principles guiding the analysis

Economic Concerns	<i>Competitiveness</i> (costs involved; bureaucracy; transparency (duty of sharing and publishing data); scope of directive; risk-based approach)
	<i>Innovation</i> (authorisation: substitution of chemicals; loss of substances; R & D)

²⁹ See annex for a list of the CSOs. The Copenhagen Charter of October 2000, issued by major environmental NGOs, has been signed by more than 100 organisations.

	<i>Trade</i> (WTO compatibility; relation domestic producers vs. importers)
Consumer and Worker Concerns	<i>Precautionary Principle</i> (scope of directive; minimising exposure at workplace and at consumption; transparency (labelling of products); hazard-based approach ³⁰ ;
Environmental Concerns	Animal testing
	<i>Precautionary Principle</i> (see above; authorisation regime)
Procedural Issues	<i>Role of Agency</i> (burden of proof; degree of harmonisation; risk- vs. volume-based approach; relation to existing legislation)

Given this paper's limited space, it concentrates only on the major tendencies of the analysis. As table 1 shows, the Commission showed significant willingness to listen to stakeholders' concern and at least the majority of CSOs were rather satisfied with the White Paper; less so business concerns, who did not see a balance between environmentally and economic aspects. However, in the course of the process and the reshuffle of competences in favour of business concerns in the European institutions, the environmental and consumer concerns were increasingly in the defensive and those CSOs seem to have given up on many issues, e.g. the inclusion of lower tonnages for registration or the establishment of a hazard-based approach already in registration and evaluation. Instead, they concentrated on key issues, in particular on a quality criterion in the registration process and, above all, on the authorisation scheme that should, according to them, include the phasing out of chemicals of very high concern and their mandatory substitution. Without this, so the argument, the precautionary principle would not be respected at all and no

³⁰ The industry's risk-based approach implies a tiered approach to registration and risk assessment. This means that there are different stages of assessment intensity according to the risk of the chemical - and not according to the substance's intrinsic hazards or the volume of yearly production (volume-based approach) -. CEFIC argues that this minimises animal testing (it will do so) because it would make tests of not-risky substance superfluous. However, environmental and consumer CSOs consistently asked: how does one know the risks of substances before comprehensive testing? A hazard-based approach would be more appropriate to the precautionary principle.

substantial improvement in relation to existing legislation achieved. Contrary to this, the business CSOs succeeded to avoid a substantial application of the precautionary principle. Instead of a hazard-based approach to registration, a risk-based approach was introduced and substitution only made optional in the authorisation stage.

By analysing the documents in more detail it was striking to see that the discussion became more and more polarised. The same arguments are put forward again and again, and many indications suggest that the actors tend not to listen to each other and, even more, even tend not to listen to the results of impact studies. In particular the environmental NGOs make their claims visible and their approach is based on arguing and reason-giving. However, business stakeholders apply a strategy mix: they engage less openly in discussions but rely much more on their direct access to important official players in the process and trust in their lobbying capabilities. One part of the strategy of the business associations and conservative/liberal MEPs was to prolongate the legislative process - with success. Due to this tactic, it was the newly elected EP which had to deal with REACH, which did not only lead to further delay of one and a half years, but also to watering-down of measures because the new EP is more conservative and business-friendly than the former. Furthermore, business-CSOs profited from the procedural changes which strengthened business concerns both in the Commission and the Council. One can only speculate whether these changes were more important for shaping the directive's content than the business' argumentative input.

Concluding observations

This paper aimed to examine whether the EU's discourse about participation has contributed to the establishment of a participatory regime of European policy-making, i.e. whether EU policy-making makes systematic use of the normative potential of civil society participation. Although both analysed policy areas are *in principle* subject to the same unspecific EU-rules for access and transparency, the analysis of the cases revealed that *in practice* participatory activities vary in due course of the process. In the early stages of both processes, the European Commission tried to act inclusively by inviting stakeholders to discussions on the prospective legislation. However, as soon as the official legislative process between the EU-institutions started, the cases deviate from each other. In (legal) migration policy, where the intergovernmental rules of unanimity prevail,

member states did not show willingness for listening to civil society. To the contrary, as soon as the Council entered the stage, it dominated the process and CSOs efforts to get heard remained peripheral to the process. Although also in REACH the Council's working group on chemicals was central for negotiating the draft legislation, member states were forced by the co-decision procedure not to shut down their doors to voices from stakeholders. In REACH, CSOs had considerably more access points than in migration policy, not least because the members of the EP do not have huge bureaucracies at their disposal and thus need to rely more on external expertise.

In addition to these policy process characteristics, also policy field specific characteristics influence the participation of CSOs. In migration policy, the analysed data give strong reasons to suggest that the securitisation of migration policies increased since 9/11, overshadowing possible needs for economic migration (beyond high-skilled labour) and human rights concerns. Obviously, this development shifts the balance of power even more to the disadvantage of most CSOs' priority issues. Contrary to migration, environmental policy is an established policy area in the EU's supranational pillar and the general political will for integration is rather undisputed. However, the current dominance of economic perspectives in the EU seems to strengthen the dominance of economic voices to the disadvantage of other concerns. The considerably greater divergence among CSOs' concerns in environmental policy is reflected by different strategies of getting access to the policy process. Economic CSOs apply both public and more secretive strategies, whereas human rights, environmental and consumer CSO tend to rely more on argumentative efforts and to strive for publicity.

The results suggest that particularly a relatively restricted number of well-organised CSOs have benefited from the partial opening up of policy processes. One could now easily argue that European policy-making processes make only limited use of CSOs normative potential. However, particularly the area of environmental policy suggests that 'hard law' policy processes have not been totally unaffected by the lively discourse on CSO participation in recent years. Particularly means of e-governance are in use, which somewhat de-territorializes consultation and participation, without, however, the ability to balance disadvantages of 'silent' concerns, such as environmental issues. Online consultations do not substitute efforts to actively support

inclusion of these concerns. Hence, the existing EU practice to support CSOs does not guarantee broad inclusion, while it is not fundamentally detrimental to the inclusion of stakeholders either. In sum, the development of a participatory infrastructure did not keep up with the pace of the discourse. An eventual ratification of the constitutional treaty could substantially accelerate this process. The constitutional treaty's Title VI includes Article I 47 on 'participatory democracy', which would establish a clear connection between civil society participation and democratic governance in the EU, would be a significant step towards a rights-based approach to participation. This article would oblige *all* European institutions, i.e. also the Council, to be transparent and open to consultation, as does the Aarhus Convention whose effect beyond environmental policy remains to be seen. Currently, the participation of CSOs in the EU's policy-making processes is dependent on the issue area's legal basis (the role of the Commission is stronger in first pillar issues than in second or third pillar issues, for instance), the coincidence of CSOs meeting interested civil servants in either the Commission and or in national executives, and the general 'volonté politique' of the member states to integrate the respective policy area and to abandon their tradition of secrecy.

However, doubts can be raised whether a systematic transposition from discursive to practical civil society participation is – in the end of the day – the goal of technocrats in the European Commission and by the executives in the Council and many member states' capitals. Because: what would be the consequence of democratising participation? It would mean greater public visibility and discourse about policy aims and means, it would mean greater awareness and mobilisation of citizens, it would mean a 'politicisation' of EU policy-making, thus making political steering by expertise, technocracy and bureaucrats behind close doors more difficult and European policy-making a truly thorny task, requiring considerable efforts of arguing and persuasion.

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