

UACES 39th Annual Conference

Angers, 3-5 September 2009

Conference papers are works-in-progress - they should not be cited without the author's permission. The views and opinions expressed in this paper are those of the author(s).

www.uaces.org

**Procedural or substantive legitimacy? How to reconcile deliberative quality and
interest representation**

Wilhelm Lehmann

Policy Department *Citizens' Rights and Constitutional Affairs*
European Parliament*

- *Preliminary version - please do not quote !*
- *Comments are welcome -*

Abstract

Both the European Commission and the European Parliament have recently made renewed efforts to bring their consultation mechanisms and their treatment of special interest groups more in line with the rapid evolution of professional lobbying at the European level. This paper focuses on some of their theoretical foundations. It delineates conditions for deliberative communication and their utility for a normative assessment of the Parliament's political strategy to bolster its legitimacy. Based on an internal inquiry with a small sample of MEPs and officials it proposes a tentative categorisation of lobbying tactics and the risks and benefits attached to them. Types of transparency-enhancing measures proposed by Parliament and the intentions they represent are scrutinised for the extent to which they can contribute to more efficient policy-making and for their usefulness as confidence-building instruments to increase legitimacy with citizens.

* This paper can under no circumstances be deemed to represent an official position of the European Parliament.

A utopian vision, once it is translated into political idiom,
 becomes mendacious or self-contradictory;
 it provides new names for old injustice or
 hides the contradictions under *ad hoc* invented labels.

Leszek Kolakowski 1982

Introduction

The constitutional significance of interest groups dates back to the US founding fathers' reflections on how to balance the influence of "factions" with good government achieving equitable results for all citizens. Joshua Cohen, who appears to have first given the term "deliberative democracy" currency in its modern signification, seems to have found it in a 1985 article by an American constitutional lawyer (Cass Sunstein, "Interest Groups in American Public Law"; see Schaefer 2008, 1). Sunstein's starting point is the contention that the political influence of factions, which he equates with interest groups, is a source of widespread, fundamental dissatisfaction. There is hence a long-standing junction of the concepts of deliberative democracy and the activities of interest representation. Furthermore, since interest representatives address themselves usually to the major institutions of representative democracy, those institutions stay at the centre of both normative and empirical analysis, despite the often anti-parliamentary impetus of modern proponents of deliberative methods.

At first sight behaviour associated with the activities of lobbyists appears to be the opposite of open and equitable deliberation upon issues concerning the common good. All their communicative acts are governed by the overarching interest to obtain a specific information, decision or non-decision from the interlocutor. One may even be tempted to say that the ultimate aim justifies most means for the interest representative. However, there have quite recently been a few efforts to utilize interest representation as a heuristic tool and empirical basis to explore in more detail, in the European Union framework, some of the weaknesses and contradictions of what has come to be called the deliberative democracy movement (see notably Naurin 2007 and Tanasescu 2009).

While the theory of deliberative democracy is widely focused on the nation state there have been some seminal papers on supranational deliberation in the Habermasian tradition. Habermas himself has taken great interest in the EU's constitutional evolution (Habermas 2008). The EU may in some respects be a better object of examination for the verification of deliberative theorizing because of its necessarily cooperative and non-hierarchical style of governance. The extension of the competencies of the European Parliament and the inclusion of hundreds of advisory and executive committees in the European political process may be interpreted as reacting to the fact that a non-coercive form of governance will only have a chance of being effective if the addressees of the rules have a say in the formulation of those selfsame rules. To be sure, the EP and the committee system formally have very different tasks. Both, however, are similar, in that they "aim to include the affected parties in the process of rule-making, enabling inclusive discourses, and providing incentives to abstain from using extra-legal means of political action". (Neyer 2006, 788).

According to Neyer, the crucial question for a **normative** deliberative approach is to analyse the mechanisms and to identify the conditions under which a public discourse materializes that comes close to the assumptions of the 'ideal speech situation' in Habermas' sense (Neyer 2006, 781). From a **functional** perspective, deliberation is defined by its positive effects for

realizing efficient, effective and legitimate governance in the EU. It is seen by deliberative theory as a crucial element of supranational governance which carries the burden of holding the EU together “despite the great diversity of interests and its lack of both a coercive central enforcement authority and a functional equivalent to a national ideology or religion.” (Neyer 2006, 786)

This optimistic view has been challenged and qualified in recent years as a result of some empirical studies on EU decision-making. Naurin (2007) questions common claims about the civilising effect of publicity and transparency. Pollack and Shaffer have studied comitology and Council debates on GMOs and arrive at a similar conclusion: “ [...] our analysis lends further support to the view that transparency and politicization *decrease* the prospect for deliberation in transnational bodies, which appears to function most effectively in closed, *in camera* settings.” (Pollack and Shaffer 2008, 161).

This paper aims to demonstrate that some much-vaunted instruments of assuring legitimate policy-making, such as transparency or public deliberation are fraught with almost intractable dilemmas and based on misconceptions of the origins and objectives of liberal democracy and political representation. It takes interest representation as a case study for analysing these contradictions and for proposing some steps towards a clearer view of how legitimate governance can be improved in the EU framework.

Accountability and transparency: the modern regulatory state and its discontents

Schumpeter reminded voters in 1942 that they "must understand that, once they elected an individual, political action is his business not theirs. This means that they must refrain from instructing him what he is to do." (quoted in Manin et al. 1999, 13). Such a sceptical view of representative democracy would hardly carry the day in our time of direct or participative democracy, often proclaimed by parliamentarians and political leaders themselves. Scholars of representative government, however, continue to defend a sober approach towards public participation and complete transparency. Democratic accountability is perhaps better captured by seeing it as an approach to mediating the strains of political membership than by seeing it as a “narrow and robustly instrumentally rational set of devices for minimizing (let alone eliminating) the vertical dimension of the risks of collective political life.” (Dunn 1999, 332)

The standard account of political representation is still somewhat undertheorized and full of contradictions. Notably, it is inherently restrained to serve the analytical needs of a theoretical framework where the nation state is the sole reference point. (Pollak et al. 2009, 26). According to Pollak et al. there are five major fallacies in many models of representation:

- Representation was invented to make democracy work in large scale political communities
- The absent is the people which acts via the representative body
- Representation is a direct social relationship between representative and represented
- Representatives have to be elected
- Good representation is equal to responsiveness

Over the past decades a change of the powers and ambitions of public actors has nevertheless occurred in most European countries. Government was transformed from a carrier of

sovereign powers to a service provider in an increasing number of domains. A trend towards deregulation and lean government changed the public sector (Moran 2003). This concerned not only the distribution of tasks between the private and public sectors but also the objectives and instruments of governmental activities. These reforms may also have reduced the steering capacity of the public sector, and in particular have reduced the capacity that political officials have enjoyed in the past for exercising control over the policies of their governments (Peters 2008, 3).

Regulation of economic policies, particularly in network industries such as telecommunications, energy or transport became an important research subject of political science. Recent work in this field has concentrated on describing intermediate "third way" strategies between old style interventionist, state-oriented policy-making and liberal approaches to minimise the use of public resources for the implementation of common societal interest. Wishing to avoid a purely negative description of the objectives and the utility of state action a recent paradigm develops the concept of the "responsibility-sharing ensuring state" which assures the respect of public interests, e.g. in social policy or infrastructure, but does not carry out these activities by itself (Schuppert 2006).

The core of the ensuring state is a new definition of its instruments and the relationship between non-governmental and state actors. According to traditional legal norms there is a hierarchical relationship between public and private acts, the state being exempt from competition and directly responsible for the implementation and surveillance of most of its activities. Recent theories stress that governance and regulation today are based on a network of public and private actors and negotiated contractual relationships. This new division of tasks may reduce the state's dependability as the last instance of many legal or political decisions (for instance in cases of market failure) and make it more difficult to acknowledge its responsibility to provide all citizens with a given set of social or economic goods. The duty of government, both at the national and the European level, remains to respect general interests but it acts less frequently through legislation to implement them. Consequently, governments and their administrations cease to have the monopoly for assuring the common weal.

The new sharing of tasks and responsibilities entails new challenges for businesses and public authorities alike. It becomes essential to negotiate favourable terms for entering into contractual relationships. The public side of these negotiations is increasingly inspired by business practices such as outsourcing or focussing on core competences. Consultants specialising in the public sector often recommend solutions such as public-private partnerships for management problems at all levels of public administration. In any modern democracy, seeing the issue of accountability principally as one of rulers to ruled is almost certain to mislead, since the main oppressive hazard to any particular group in such circumstances is likely to be a transposed horizontal hazard, emanating from other groups of citizens, not a hazard inherent in vertical subjection itself. (Dunn 1999, 333)

New governance approaches still have to integrate into their theoretical framework the need for a state or supranational entity which safeguards the general interest, corrects failures in the non-governmental implementation of political, social or economic responsibilities and functions as an insurance against inequitable definitions of public priorities. Government cannot depend on arbitrary choices of private actors or their varying strength of implementation. There are risks that the insight into the necessity of certain regulations is sacrificed to achieve compromises with strong organised interest. Careful fine-tuning of

private interest representation and intermediation, particularly in directly elected institutions, represents a substantial correction factor. Only if social groups have roughly equal chances to shape governance an "open society of public interest interpreters" (Schuppert) can be created without running the risk to return to a modern version of corporatism.

A brief look to the American federal experience shows that similar discontents surface in the debate. Schaefer stated recently that, among other limitations, congressmen have to rely on the staff to instruct them on how to vote and use an increasing portion of their time and resources to promote their re-election through the disbursement of pork and "constituency service". Despite these imperfections of the present-day Congress, he continues, a system of nationwide plebiscitary government would likely be far worse (Schaefer 2008, 5). While the rationale for Fishkin-style town hall procedures is to combat citizen apathy and a feeling of powerlessness, it suggests (like similar proposals made by Cohen and Rawls) a failure to take the need for substantive deliberation, and the advantage of a representative process over direct democracy for that purpose, seriously (Schaefer 2008, 17).

Instead, for a long time the tax treatment of participating in the US democratic process favoured business entities over non-profit groups. Economically self-interested groups were invited to participate vigorously in the legislative process through the use of tax-advantaged contributions. Groups seeking disinterested solutions that would have advanced the common good were either forbidden from participating at all, or were forced to do so with tax-disadvantaged funds. The net result was a legislative process that looked very much like the public choice model, but only because the US tax system had taken the public interest component out of the game. (Neuborne 1994, 4).

The standard response to such discontents is to increase public scrutiny and transparency of decision-making. Political theory is of course aware of the fact that governments can to some extent escape from public scrutiny and public control. To what extent is difficult to say: "as conceptual discussions of representation indicate, even the yardsticks are difficult to establish, not to speak of their realization." (Manin et al. 1999, 23). But even the best of regimes of freedom of information would always be open to manipulation and largely depending on a certain hypocrisy. The principal-agent model entailed in the relation of democratic representation is a peculiar one, insofar as it is the agents who decide what principals will know about their actions. Why, then, would politicians, subject to the electoral sanction, make it easier for voters to learn about their conduct?

One answer to this question may be that under some conditions voters will be disposed to invest politicians with more-extensive powers or resources when citizens are more certain that they will be able to learn what the incumbents did with these powers. In turn, politicians may "prefer to have greater resources and be subject to more-extensive scrutiny than have less power." (Manin et al. 1999, 17). In any case, the development and deepening of practices of public exposure - of putting politically consequential conduct tendentially under the floodlights - must be essential to any coherent project of "rendering even the most democratically generated of rule effectively accountable" (Dunn 1999, 340).

To come back to the EU context, transparency seems to have become an all-pervading principle in the major institutions, despite the sceptical scholarship mentioned in the introduction. The European Ombudsman proclaimed recently: "Processes of decision-making should be understandable and open. The decisions themselves should also be reasoned and based on information that, to the maximum extent possible, is publicly available". Similar

ideas are enshrined in Articles 41 and 42 of the EU Charter of Fundamental Rights which deal with the right to good administration and the right of access the documents (see Sasu 2009, 3).

Thus, even if – according to the theory of representative democracy – political elections give governments a broad authorization to rule, this authorization should not extend to informing citizens. Information must not depend on what governments want us to know. Some scholars contend that we need "accountability agencies," independent of other branches of government (Manin et al. 1999, 24). At the same time, we should keep in mind that many represented have no particular stance on most issues, and that the “duty of the representative is to do what *is* best for them, not what they latently want.” (Pitkin 1967, 163) Finally, there is a permanent risk that “civil society” (of which interest representation is an often neglected part) remains a euphemistic label for a rather elitist participation and consultation practice, limited to those citizens and groups who benefit from enough intellectual and financial resources to influence EU politics and policies. (Höreth 2001, 15).

Interest representation in the EU: a tool to study deliberation ?

As we have seen, disagreements persist in the literature as to the precise contours of deliberation (see also Tanasescu 2009, 16). At the EU level great emphasis is placed on input legitimacy via provision of information and much of lobbying is still based on the logic of regulatory delegation (Majone 2001). How far is this applicable to the European Parliament and to attempts to influence its decision-making? Interest representation, particularly at the European level, has long been seen by functionalists as instrumental for the increase of the supranational institutions' autonomy. At the same time, European governance is characterised by much less spending power and hierarchical implementation instruments than national governments, hence providing a case study of "governance with less government".

Given that the multi-level structure of EU governance has mostly been more open and malleable to outside interests than close-knit and hierarchical national administrations, has the European level of governance benefited from a relative weakening of national state structures through deregulation? Or is it more easily captured by powerful trans-European associations which possibly have the support of some national governments in the Council?

Naurin asked – and partially answered - the interesting question whether it is possible that “opaque 'backstage' areas of politics may in fact, under some circumstances, be more civil in the deliberative sense - more characterised by arguing with reference to public interests and ideals and less affected by self-interested bargaining and pressure politics - than the public 'front stage'?” (Naurin 2007, 7). His conclusion is that “the hard currency of private lobbying meetings in Brussels [...] is not naked power, but dressed.” (149). He continues “if political actors are induced to 'talk the talk' at the forum, the chances increase that they will eventually also 'walk the walk'.” (149), hence corroborating in a certain way Elster’s proposition about the civilising effect of hypocrisy.

To clarify whether interest representation can serve as an instrument to clarify the appropriateness of deliberative approaches for the EP, a short look on scholarly work on decision-making in the Council of Ministers is an interesting complement. Lewis observes here that “the durable set of informally institutionalized norms and standards of what is and is not acceptable, adjudicated within a discursive environment where the pursuit of

'communicative consensus' leads to collectively legitimated outcomes, also matter. Social influence counts as well as formal voting power in the Council, and here we need to take into account intangible elements of the Council's culture. [...] the deeply engrained (global, unwritten) preference for consensually made decisions is an important part of this institutional environment." (Lewis 2008, 181). He concludes that "EU scholars who study the Council should probably trumpet more loudly to international relations theorists that here is perhaps the premier international institutional laboratory where the logics of action have become complexly entwined, with important implications for what the 'Westphalian' conception of sovereignty now means (at least in Europe)." (182)

On Elster's hypocrisy argument (see next section) Lewis arrived at the conclusion that "when the language of 'Europe' is pushed too far in the name of national interest, this can result in a range of group opprobrium from laughter to anger and bargaining breakdowns." (168) This indicates that any serious future research on deliberation in real-world politics will be incomplete without some initial steps towards clarifying the issue of the truthfulness of communicative action.

Industry lobbyists are in many respects the complete opposite to the ideal of a deliberative actor. In fact, lobbyists do not deliberate at all, in the sense of engaging in dialogue with openness for being convinced by the arguments of others (Naurin 2007, 148). If it happens that they are eventually hit by what Naurin calls a "cognitive dissonance mechanism", or if the "force of reason" in some other way manages to transform their preferences during the process, that could be seen as a positive consequence of their hypocrisy in the sense mentioned above. It does not, however, make them deliberating actors.

Private interests have an a priori preference for the absence of regulation because, according to a classic definition, the essential characteristic of regulation is the limitation of the exercise of property rights. Hence one of the positions most often taken by lobbyists is a preference for auto-regulation of a given economic sector. Auto-regulation comes in various guises such as codes of conduct, reporting obligations or autonomous, self-binding rule-setting without public interference. However, this general principle is subject to many exceptions which are usually a function of the competitive situation within or across sectors, countries or policies. If for instance lenient or absent regulation leads to the predominance of large economic operators in a particular market, small firms may be tempted to plead for activist legislation. If the laissez-faire attitude of a national or the European legislator brings about competitive advantages for certain companies or countries, other actors will probably fight for legislation establishing a level playing field. Non-business interests often depend exclusively on governmental activism to promote their political agenda in fields such as environmental protection or social legislation.

The admittedly simplifying principle of a preference for no regulation can be differentiated if we take into consideration that hard law and soft law are parts of a continuum lying partly in the daylight, partly in the penumbra of law. Specialists of soft law and governance have no difficulty of defining particular loci on this continuum, such as "soft acts with a law-plus function" (Peters and Pagotto 2006, 2). However, the soft law literature also encompasses some worrying indications that deliberative methods, particularly in well-hidden governance networks, can be equivalent to a depoliticisation of the issues under debate. It is of course an open question whether such depoliticisation can be a positive factor, as Pollack and Shaffer seem to indicate in their analysis of the GMO debate in the Council (Pollack and Shaffer 2008).

At the European level, supranational governance allows for discussion over the legitimacy of the regime itself; hence, deliberative democracy seems suited for the EU to the extent that the nature of the polity itself is still being debated and should remain subject to continuous disagreement and reframing. As a possible political philosophy for the EU, deliberative democracy would be an alternative to both functionalist theories that stress the importance of output legitimacy and to culturalist approaches that argue for a European demos (common identity, transnational sense of solidarity) as a basis for EU legitimacy. Also, it would provide an autonomous basis for EU legitimacy, in its own right, that does not depend on the legitimacy derived from the Member States (Tanasescu 2009, 28).

The precepts of deliberative democracy: how do they fit into parliamentary debate?

As mentioned in the introduction, democracy, on the deliberative view, is a “framework of social and institutional conditions that facilitates free discussion among equal citizens - by providing favourable conditions for participation, association, and expression - and ties the authorization to exercise public power (and the exercise itself) to such discussions - by establishing a framework ensuring the responsiveness and accountability of political power to it through regular competitive elections, conditions of publicity, legislative oversight, and so on.” (Cohen 1997, 67). Persons participating in deliberations “are amenable to changing their judgments, preferences, and views during the course of their interactions, which involve persuasion rather than coercion, manipulation, or deception.” (Dryzek 2000).

In European governance, “deliberative approaches have become a promising alternative to more established approaches. The strength of deliberative approaches is that they provide normative guidance to integration studies, open up a new research agenda for the analysis of interaction and offer innovative interpretations for understanding the institutional design and the policy process of the EU.” (Neyer 2006, 789). Finally, Cohen supposes that the practice of participating in common deliberation will reduce the likelihood of people’s concealing their real interests under the guise of the public good. He also anticipates that the “commitment to deliberative justification” will “shape the content” of people’s “preferences and convictions.” (Cohen 1989).

Deliberative democracy theorists are highly influenced by Habermas’ model of the ideal speech situation. Thus, their focus is cognitive, oriented on language and the force of the better argument – a bias that has often prevented them from seeing how “what is considered ‘the better’, of even only an appropriate or legitimate argument highly depends upon context.” (Hajer and Versteeg 2008, 11). Elster has famously spoken about a “civilising force of hypocrisy” which “on the average ... yield[s] more equitable outcomes” (Elster 1995, 251). Of course this theory of publicity’s civilising effect “assumes that [genuinely non-self-interested] actors have managed to set the standard for the rest.” (Naurin 2007, 17).

The idealistic view of democratic decision-making has been accompanied - as we have seen in the previous section – by a growing current of anti-parliament sentiment. For instance, Andersen et al. observe: “Although parliamentary institutions are the core of Western political systems, they are undergoing systematic erosion. Modern governance is increasingly divided into semiautonomous, specialised segments or sectors; that is, it is multipolar with the interpenetration of state agencies and agents of civil society.” (Andersen and Burns 1999,

227). However, the specific pragmatic and symbolic functions of representative institutions have evolved to solve the very same problems modern deliberative approaches encounter today.¹ Moreover, because the deliberation of all those subject to a decision or regime is impossible, deliberative democratic practices cannot deliver legitimate outcomes as the theory defines them. (Parkinson 2003, 181).

Deliberative processes like citizens' juries, deliberative polls and consensus conferences have not arisen pure from deliberative theory or popular imagination. They are embedded in a liberal, not necessarily a deliberative system, and are fundamentally affected by the assumptions, motivations, discourses and power structures of that system. Whereas the theoretical literature all too often sketches a dichotomy between on the one hand interest based, highly political, bargaining oriented governance and on the other hand idealistic deliberation for the public good [...], case studies show that in practice there is no such thing as a clear demarcation line between the two types of governance. Nor are the traditional classical-modernist institutions, such as parliaments, and the governance networks 'in between' as clearly separated as the literature tends to suggest when writing about the shift from government to governance (Hajer and Versteeg 2008).

Another aspect neglected by deliberative theorists is that people often define themselves in opposition to others and use perspectives that are not "other-regarding", or at least not when it comes to those whom they do not regard as "one of them". Politics is often highly adversarial. Citizens have interests and beliefs and are often willing to fight for them rather than assessing the needs of the other. (Chappell 2008, 23). On the other hand, each institution develops an informal code of conduct which is capable of steering the behaviour of its members. Rule-guided behaviour differs from instrumentally rational behaviour in that actors try to "do the right thing" rather than maximizing or optimizing their given preferences (cf. Risse 2000, 4).

In a practical perspective, the question arises which institutional conditions constitute the best environment for such rule-guided behaviour. Risse contends that arguing processes are more likely to occur both in negotiating settings and in the public sphere,

- the more actors are uncertain about their interests and even identities;
- the less actors know about the situation in which they find themselves and about the underlying "rules of the game" ("common knowledge"); and
- the more apparently irreconcilable differences prevent them from reaching an optimal rather than a merely satisfactory solution for a widely perceived problem. ("problem solving"). (Risse 2000, 33)

Other scholars arrive at different conclusions: "The positive role of uncertainty can be limited, and may in some instances cut against deliberation." (Pollack and Shaffer 2008, 161). Complex decision-making arrangements can stimulate legitimate deliberative decision-making if they systematically separate the two tasks to be fulfilled in a deliberation, namely the "definition of the broader lines of governance and their specification in concrete situations." (Gehring and Kerler 2008, 1019).

In any event, a viable model of modern democracy needs to incorporate not only deliberation but also representation, voting and interest group politics. It needs to represent the fact that in

¹ Cf. Majone: „Les codes de procédure parlementaire, électorale, administrative et juridique actuels sont le fruit de siècles d'expérience pendant lesquels les hommes ont dû affronter le problème concret de la délibération publique.[...] Leur importance est telle que l'histoire du gouvernement démocratique peut être assimilée à celle des diverses procédures élaborées pour institutionnaliser et réglementer la délibération publique. (Majone 1994, 596)

politics citizens compete for scarce resources and are trying to solve seemingly intractable moral dilemmas (Chappell 2008, 27). Thus at different times, different decision-making mechanisms will become necessary. We cannot solve the problem of democratic politics by applying deliberation to all problems, in all places, at all times. The best method of democratic problem-solving and decision-making will probably be contingent on many factors that determine how we can best make a decision.

Increasingly, analysts of deliberative decision-making in the EU have attempted to articulate and operationalize clear **scope** conditions for deliberation, and most of these analysts include three conditions of a common life world, complexity and uncertainty, and ongoing discussions in an informal institutional setting. By contrast, Pollack and Shaffer find some disagreement in the literature about the significance of other factors, including openness, transparency and politicization: while some scholars argue that it is the public nature of deliberative democracy that requires actors to limit their appeals to naked self-interest, others posit that individual participants are more likely to leave aside preconceptions and fixed interests, and join in the collective search for truth, in closed, *in-camera* settings where compromise will not be second-guessed by governmental leaders or public opinion 'back home'. (Pollack and Shaffer 2008, 148). If the comitology committees satisfy deliberative principles then open doors can certainly not be a necessary condition for making actors adhere to what Naurin calls “the norms of the forum” (Naurin 2007, 30; Elster 1986).

Still, we should not forget that parliaments provide the media with stories that can be relatively easily portrayed and made attractive for potential audiences: classical-modernist politics is characterized by a wealth of ceremonies, emotional debates, the personal dramas and charismatic legitimacy of celebrity politicians, or of decision making moments that come to symbolize an entirely policy process. Network governance thrives on quiet negotiation. And if some enlightened spirit tries to connect that round table to the mediatised politics, all that network governance can offer is a meeting room filled with rational administrators, some stakeholders, expert reports and a pile of minutes and draft agreements. (Hajer and Versteeg 2008, 10).

Finally, as institutionalists remind us, each institution has a strong propensity to defend its prerogatives and powers. For instance, in its resolution on the Commission’s White Paper on European Governance, the Parliament underlined that “consultation of interested parties [...] can only ever supplement and can never replace the procedures and decisions of legislative bodies which possess democratic legitimacy; only the Council and the Parliament, as co-legislators, can take responsible decisions in the context of legislative procedures.” (paragraph 11 (b)).² The European Parliament has hence “resisted allowing the Commission to develop its own strong vision of consultation in a discursive struggle over the sources of legitimacy. (Tanasescu 2009, 85).

² OJ C 153E of 27 June 2002, p. 314

The European Parliament experience of interest representation: some empirical observations

Background

Many scholars have tended to view legislatures primarily as "rubber stamps" where policies made elsewhere are debated in an adversarial and rhetorical way between the parties involved (Bächtiger and Steenbergen 2004, 23). While it is fair to say that this describes a substantial part of parliamentary debates, under specific institutional and contextual conditions, open, respectful and consensus-oriented deliberation is possible in legislatures. Parliaments both literally and physically represent the demos, even if it is in an imperfect and by citizens (often rightly) criticized way. Hajer and Versteeg ask how we would be able to understand 'democracy' when we could not engage in experiential practices like a ritual as voting or the passing of a bill (Hajer and Versteeg 2008, 8). What would be made of parliamentary democracy if we could not experience it or enter our parliamentary buildings, the site where important decisions are made.

Any parliament – and perhaps even more a transnational parliament – is by its nature a deliberative institution, albeit a very hierarchical one. Although the degree of publicness is very divergent among parliamentary chambers around the world, particularly as concerns committee work, parliaments are meant to involve the public in policy decisions and their intellectual preparation. In the case of the European Parliament some specific aspects apply. The EP has for a long time identified its major institutional self-interest in extending its policy-making powers. Its main role in the institutional equilibrium was seen as becoming a more and more effective legislator. However, with the increasing extension of EU powers into politically sensitive fields the second traditional role of any parliament, being an ideological arena for debating political alternatives, acquired greater salience. MEPs themselves saw their role increasingly in explaining and defending policy options in the European and national public.

It could be argued that the EP is particularly well placed to be a deliberative arena because – compared to most other chambers - it is much less constrained by the obligation to defend at all cost the governmental majority. One could compare it more to a parliament in a presidential constitutional system than to one in a classic parliamentary system. According to Bächtiger and Steenbergen chambers in presidential systems offer better conditions for truly deliberative discourse (Bächtiger and Steenbergen 2004, 21). From this perspective it could be argued that the highest level of parliamentary deliberation should be found in consensus (presidential) systems with strong veto players, e.g., when a non-public debate occurs in the second chamber concerning a non-polarized issue. While some of these criteria apply to the EP, others do certainly not. For instance, in most of its meetings (with some important exceptions) the EP is much more transparent than the large majority of national chambers.

Moreover, the opaque procedures of the Council of Ministers give Parliament more opportunity to present itself as the focus of EU policy debates than many national parliaments. A further component is the special structure of interest representation at the European institutions (Coen and Richardson 2009). In the functionalist tradition interest representatives are often seen as one of the most influential civil society groups furthering the establishment of a transnational European policy-making structure. Hence their approach to defend the interests of their industries or clients *vis-à-vis* the EU institutions should be analysed not only with a view to publicity and transparency but also with regard to the modes of representation.

n this paper, the question is raised whether lobbying can be seen as a contribution to deliberative policy-making in the European Parliament.

An important feature of EP politics is the role of national parties. They are, on the one hand, the primary principals of the MEPs as they control the selection of candidates in the national elections for the EP, the party group affiliation within the EP and the nomination for key parliamentary offices in plenary/committees (cf. Sasu 2009). However, once the representatives of a national party join a party group within the EP, they become subjected to the leadership of the respective transnational party group, which controls the allocation of committee positions, financial resources, rapporteurships, speaking time and policy agenda and which, as their new principal, may employ whips to ensure that the elected MEPs conform to the party group line in the decision-making process. The reason why the leaderships of the national parties decide that their MEPs assemble in transnational party groups within the EP instead of in national delegations is that they expect their policy preferences on most issues on the EP agenda to be closer to parties with the same ideology from different Member-States than to parties with a different ideology from the same Member-State. The organization of the MEPs along transnational party lines rather than national lines suggests that the main dimension of conflict in the EP is along the left-right divide. Consequently, political parties remain the most effective institutional means for linking people and decision makers. (Leonard 1997, 9).

Interest representation takes place where decisions are made. Up to the entry into force of the Single European Act (SEA) on 1 July 1987 the Commission and the Council were therefore the preferred counter parts of non-governmental interest groups, while the European Parliament was often viewed as a "phantom Parliament" (Shanks and Lambert 1962). After the institutional position of the EP had been upgraded with the introduction of new legislative procedures - the co-operation and the co-decision procedures - pressure groups much intensified their action with the EP as a new channel of influence. In the early stages, less organised interest groups tried to form alliances with the EP on issues that most concerned the general public. Apparently the main strategy of these groups consisted in lobbying the Commission and the Council as the final targets via the Parliament. This had a considerable impact on the institutional balance and its internal dynamics: the Commission and the EP are no longer permanent allies representing the European interest but are increasingly becoming rivals competing for legitimacy (see below). Relations between the EP and "weaker" civic interest groups had the characteristics of what some EU scholars call 'advocacy coalitions'.

There is agreement among MEPs and EP civil servants that lobbying has increased significantly over the past decade. Some empirical research confirms this anecdotal evidence although hard quantitative data are hard to obtain given the informality and confidentiality of many contacts (Greenwood 2002). What can clearly be demonstrated is the development of new instruments and the professionalisation of European lobbying. It will remain a challenge for this type of research to develop reliable indicators that encompass new phenomena such as lobbying work carried out by MEPs' assistants or temporary staff placed in committee secretariats. Generally speaking, lobbying the European Parliament has most increased in those policies where codecision applies (for instance, in Single Market legislation, consumer protection, environmental policy, European networks and transport, research, and European citizenship).

From a Parliament standpoint the policy area is by far the most important variable that influences both its own institutional demands on consulting input and the level of lobbying

activity it is confronted with. As a democratically elected institution it is particularly sensitive to issues which suddenly receive focussed public attention. Examples such as the services directive or the passenger data agreement with the United States show that press coverage, sometimes combined with legal proceedings covered by the specialised media, is a determining factor both for the supply and the demand side of the opinion market.

The type of policy under consideration is often the key determinant of influence, as it shapes the political arena within which policy is debated, as well as the institutional rules of the game, and determines the actors who mobilize to mould legislation. In his classic typology Lowi identifies four policy types (quoted in Burns 2005, 486):

- constituent (procedural policies that set the rules of the game);
- regulatory (policies that constrain or encourage certain activities);
- distributive (policies that allocate resources to social groups); and
- redistributive (taking resources from one group and allocating them to another), and argues that for each of these types there exist different policy arenas and power structures

In a more recent attempt at categorizing the principal policy types and their characteristics with regard to interest representation I arrived at the following typology, which partially extends Lowi's system (Lehmann 2009, 54/55):

- policies presenting little salience for the majority of organized interests because there is no regulatory content but having high symbolic or institutional value for Parliament and/or member state governments (e.g. regulation on the financing of political parties at the European level; statute of MEPs)
- policies which are of great interest only for a limited number of addressees of sector-specific regulation and where no significant institutional interest of the Parliament is involved or where Parliament has little powers (e.g. reform of the sugar market).
- policies providing immediate financial incentives for selected organizations or socio-economic actors because they distribute new EU funds or redirect existing funding programmes; mostly rather little interest outside Brussels except for those immediately affected (e.g. rural development, with little Parliament influence, or research framework programme, with codecision)
- few but very powerful interests and specialized media are concerned and Parliament pursues an institutional agenda of its own (e.g. financial services directives, related to comitology issues)
- policies which are of great interest and easy to understand not only for several important industries but also for powerful action groups, particular Member States and/or wide parts of the general public and the media (e.g. services directive or roaming charges regulation).
- EU decisions carrying few short-term economic incentives but affecting either deep-seated national traditions or wide-spread public concerns (e.g. embryonic research, patentability of biotech inventions, exchange and storage of passenger data in the United States)

Overall, the literature suggests that, in the regulatory field, particularly given the EP's capacity to inflict costs on industrial actors, the Parliament will attract widespread lobbying and lobbyists will seek to present their arguments in ways designed to appeal to the Parliament. Consequently, in the field of regulatory policy pluralist patterns of interest representation will be the norm. However, in the field of distributive policy, even where the

EP has the potential to exercise influence under co-decision because cost–benefit configurations are more likely to impose concentrated costs on net contributors within the Council, the EP’s scope for influence is limited. Additionally, albeit unsurprisingly, lobbying activity at the European level in such cases is likely to be more muted as most lobbying is targeted at the national level. (Burns 2005, 502)

It has been estimated that there are about 70.000 individual contacts per year between the Members of the European Parliament and interest groups (Mazey and Richardson 2001). The EP comes into the focus of special interests as soon as the rapporteur of the competent committee starts to prepare his or her report, and the discussion commences within the committee and the political groups. The rapporteur and the committee chair are the main gatekeepers in forming the opinion of the EP. Personal acquaintance, nationality, or political affiliation that might influence the accessibility and openness of parliamentarians rank comparatively low in importance to lobbyists. Assistants, the secretariats of the political groups or the EP’s research services are also considered less significant by lobbyists. They give preference to staff close to the rapporteur and the secretary of the Committee. Lobbyists and MEPs agree that it is most efficient to meet a Member in person. The average MEP still receives most of the requests for help and support by letter or e-mail but surprise visits in the office are also part of the game.

The internal EP inquiry

In preparation of a recent parliamentary report on lobbying, which reacted to the Commission's European Transparency Initiative, a questionnaire was sent out to all MEPs and to a selection of about 100 officials involved in policy-making (e.g., committee secretariats and policy departments). The intention of this project was to establish a baseline for further studies on the type and volume of lobbying going on in the EP and to gain some first insights in Members’ perceptions of the legitimacy of lobbyists’ activities. While the responses received do not yet allow a qualitative interpretation of the modes of interest representation they shed some light on the recent evolution of lobbying activities. 80 MEPS and 31 officials replied to the questionnaire. In addition, 12 follow-up interviews were organised with particularly exposed MEPs and officials. The questionnaire was very brief in order to maximise the return rate.

On average MEPs are contacted 36 times a week. The predominant method of communication is e-mail with 54% of all contacts, followed by appointments with 19%, telephone with 18% and informal conversations with 9%. According to the MEPs about 37% of the legislative amendments in their committee are drawn up by outside interest representatives.

On average, the questions received the following scores:

- has the quality of lobbying improved since you came to the EP: 2,2
 - has the intensity of lobbying increased since you came to the EP: 1,8
 - do lobbyists focus on the EP because of parliament's increasing legislative powers: 1,7
 - do lobbyists focus on the EP because of parliament's frequent coverage in the media 3,4
- (1 = "yes, absolutely" to 5 = "No, not at all")*

For cross-checking information given by special interests the main sources for the MEPs are the permanent EP staff (51 out of 80 contact them), the Internet (49) and other interest

representatives (48). Only 29 MEPs contact the Commission, 27 think tanks and 14 the library.

50 MEP's think the most effective lobbying is done by industry associations, followed by campaign or action groups (30) and companies and public actors (25 each). 21 MEP's think professional consultants do effective lobbying.

The results for officials of the General Secretariat indicate that on average an official is contacted by special interests three times a week. The predominant method of communication with them is e-mail (41%) and phone calls (40%), followed by informal conversations (11%) and appointments (8%).

On average, the questions received the following scores:

- has the quality of lobbying improved since you came to the EP: 1,8
- has the intensity of lobbying increased since you came to the EP: 1,4
- do lobbyists focus on the EP because of parliament's increasing legislative powers: 1,6
- do lobbyists focus on the EP because of parliament's frequent coverage in the media 2,8

(from 1 = Yes, I absolutely agree to 5 = No, not at all)

For cross-checking information given by special interests the main sources for the administrators or advisors are the Commission and the internet. 25 out of 31 prefer to contact them directly. 13 contact other interest representatives and 12 contact other permanent EP staff (think tanks 11, library 7). Besides 6 administrators also contacted national representations.

18 officials think the most effective lobbying is done by public actors, followed by industry associations (14) and campaign or action groups (13). Only five administrators think companies or professional consultants do the most effective lobbying.

These preliminary data confirm wide-spread estimations that both the quantity and the quality of lobbying the EP have substantially increased over the past decade. However, there are some surprising statements about the relative quality of different categories of lobbying input which indicate that the most "professional" interest groups (at least those that are usually qualified as being the most professional) are not necessarily those that most impress MEPs.

From the interviews some remarks related to the issues raised in this paper stand out:

One MEP observed that the quality of lobbying varies according to the issue or policy. Massive lobbying campaigns use a combination of different approaches. E.g., the chemical industry lobbying on REACH mobilized professional lobbyists, people from hundreds of companies, or embassies such as those of the USA, Australia and some developing countries. Another MEP reported that according to his personal experience the so-called "civil-society" (in a sense not comprising lobbyists) is much better organized than industry associations. Companies are generally focused on single problems. Another MEP contributed that "professional consultants simply earn money making a lot of fuss with little impact". Too often the same amendment is introduced by several MEPs having been lobbied in the same way.

Some supplementary observations:

- “I find lobbying positive and helpful, and should oppose curbs on lobbyists.”
- “I have a preference for transparent fora with different interests, like the EPFSF, Kangaroo Group, intergroups, etc.”
- “Usually the person that deals with interest groups is my assistant. As a rule I do not meet with lobbyists.”
- “Input from lobbyists can be positively useful in identifying problem areas in time for rectification.”
- “Lobbying in [my committee] is very different from other committees. Although much money is involved, it is mainly NGOs and development actors lobbying instead of major business representations. However, due to the recent changes in the development scene with new powerful donors (e.g., the Gates Foundation), we start to see professional consultants attending committee meetings (usually representing major pharmaceutical companies). Nevertheless, the nature of the committee is different and hence lobbying is different.”
- “Some lobbying activities are useful in order to assist us in deepening specific issues, others are too aggressive, and in some ways they try to replace the MEPs in their own work.”

Some of the officials interviewed also offered personal impressions although in general they were more guarded in their statements than MEPs.

- “The Commission is by far the most effective lobbyist in my field.”
- “The quality of lobbying depends on the case - industry associations and NGOs do normally well; individual companies to a much lesser extent. Some member states lobby hard on their MEPs of their nationality, often with considerable success.”
- “Future questionnaires should better differentiate between different categories of lobbyists. For instance, national governments are very active towards their national MEPs, and often effective.
- “Industry associations have often a lot of staff to provide complete amendments whereas NGO's cannot provide that, but can be very effective on specific issues or provide practical or specific information.”
- “One of the first instances of massive lobbying I recall was the tobacco advertising directive. At the conciliation stage³ MEPs received phone calls from interests even during the conciliation committee meeting, which is *in camera*.”
- “The room for manoeuvre for a member of the conciliation committee is quite determined by the outcome of the second reading.”

Some of these contributions underline a hypothesis which can often be found in the EU lobbying literature: a considerable fraction of MEPs are not ready to accept industry rationales at face value. This obliges trade associations and other business groups to find a wider range of policy goods to offer, a phenomenon that figures prominently in Daniel Naurin's study of how lobbying is affected by more or less (or absent) publicity and transparency (Naurin 2007). It is simply not sufficient to advertise positive effects for some European industries if a clear majority of MEPs is to be convinced. Public goods such as a cleaner environment or higher employment need to be included in the political equation.

³ See Lehmann 2009 for a detailed account of the codecision procedure.

The Stubb report and resolution

In view of these responses and after a workshop with international experts on lobbying, as well as some high-profile lobbyists, the responsible rapporteur, Alexander Stubb, drafted a report on the “Development of the framework for the activities of interest representatives (lobbyists) in the European institutions”.⁴ The explanatory statement of the report sets out by clarifying that “transparency of political institutions is a prerequisite for legitimacy. It should be easy to scrutinize how decisions are made, what are the influences behind them and finally how resources, i.e. taxpayer’s money are allocated. Therefore rules for lobbying are ultimately a question of legitimacy.” The statement then proceeds to a short assessment of the Commission’s European Transparency Initiative ETI, dealing in particular with the question of the proposal to create a register of lobbyists common to all three political EU institutions (Commission, Parliament and Council). It recognises that the Parliament has long been the only institution to require all persons representing outside interests to register with their name and affiliation if they want to have access to the Parliament’s premises.

As to the definition of what constitutes a lobbyist, a difficult issue in previous EP resolutions on the subject,⁵ the rapporteur accepted the Commission’s rather general formula, seemingly inspired by the Parliament’s pragmatic approach, that “activities carried out with the objective of influencing the policy formulation and decision-making process of the European institutions” are to be considered lobbying. The report notes that the Commission’s definition is compatible with Parliament’s rules of procedure (rule 9(4) provides that “persons who wish to enter Parliament’s premises frequently with a view to supplying information to Members within the framework of their parliamentary mandate in their own interest or those of third parties” fall under the code of conduct for interest groups.

Stubb encountered some resistance from other political groups with his very wide definition of lobbyists, including even churches or regional administrations. He specifically refused to accept any difference in treatment between businesses and not-for-profit entities, except for placing them in separate categories of the register. In the resolution adopted by the Parliament on 8 May 2008, some exceptions to the rapporteur’s liberal line are enumerated: lawyers if they provide legal assistance, regions and municipalities of the Member States, political parties at national and European level, and bodies which have legal status under the treaties (paragraph 10). However, Stubb made considerable efforts to require certain categories of interest groups to provide obligatorily specific financial information on their own or their clients’ activities, which were taken on board by the plenary at least in a perspective for future revisions of the rules⁶ (paragraph 21).

⁴ T6-0197/2008. The presentation in the plenary was made by MEP Ingo Frierich because Stubb was called back to Finland to become Minister of foreign affairs.

⁵ Even the term “lobbyist” was then resented by a considerable percentage of MEPs who thought that such persons did not exist or at least not interfere with their parliamentary activities.

⁶ Paragraph 21 stipulates that

- the turnover of professional consultancies and law firms attributable to lobbying, as well as the relative weight of their major clients,
- an estimate of the costs associated with direct lobbying incurred by in-house lobbyists, and
- the overall budget and breakdown of the main sources of funding of NGOs and think-tanks

should be provided. Moreover, paragraph 22 stresses that the requirement of financial disclosure must apply equally to all registered interest representatives.

Further proposals concerned the so-called “legislative footprint”, a complete list to be drawn up by any EP rapporteur on all persons or groups having contacted him or her during the work on a legislative dossier. After an extended debate in the committee and the plenary this was reduced to an optional possibility because many Members thought that it might give disingenuous incentives to the Brussels lobbying scene.

The final EP resolution maintains or even strengthens Parliament’s stance expressed in the governance resolution by reiterating that “Parliament must decide entirely independently to what extent it will take account of opinions originating from civil society” (paragraph 4).

Both future research and the political monitoring required by the EP resolution should certainly address the question of whether closer cooperation between the Parliament and the Council enhances or reduces the risk of the legislative authority to be captured by special interests. The “early agreement” procedure that allows informal meetings between Council delegates (usually from COREPER I) and EP representatives to take place at earlier stages, even at first reading, has greatly increased the efficiency of codecision and the power of the EP while – at the same time – decreasing the standards of democratic accountability (see Sasu 2009, 64).

Another aspect to be scrutinized in more detail is the differentiation of lobbying categories. If the US Internal Revenue Code distinguishes four types of players seeking to participate in the processes of democratic lawmaking (see Neuborne 1994, 5), i.e.

- profit-making business entities,
- non-charitable, non-profit entities,
- charitable entities with broad public support, and
- private charities,

then it seems at least questionable to renounce to any distinction based on the purpose and aims of an organisation or legal entity in the European context.

Conclusion: towards a concept of substantive legitimacy

Over 70 percent of Americans think
that congressmen vote to please major contributors,
not as they themselves think best for their country.
Ronald Dworkin 2007

We have set out with the observation that representative democracy is under attack. The rise of deliberative theory (and practice) can be interpreted as an attempt to cure some of those discontents. We have also seen that many of the solutions suggested by a new industry of deliberative activism⁷ bring about their own shortcomings. At least for the time being, and despite wide-spread scepticism of the parliamentary system it is hard to imagine a structure of public policy without well defined mechanisms of representation. Deliberation is certainly not only a philosophical and utopian affair. Under certain contextual conditions, it has a chance in the real world of politics, too, as Bächtiger and Steenbergen have demonstrated on the basis of their extensive empirical analysis of the debates of six parliaments. On the other hand, they

⁷ For example, see <http://www.deliberative-democracy.net>.

remind us that “the large majority of parliamentary debates (even if there were individual actors who followed deliberative standards) are not really deliberative.” (24)

More specifically, concerning the EU, its problem-solving capacity is increasingly at stake since it does not have the power to perform important federal policy tasks such as macroeconomic stabilization and redistribution. At the same time, it increasingly inhibits member states from maintaining such functions. (Börzel 2003). This evolution is one of the underlying factors for a certain disenchantment of many EU citizens and national politicians with supranational governance. Since an extension of the powers of the European Parliament is often suggested as a remedy our analysis of the questions raised by interest representation in the EP and its interpretation from a deliberative point of view can provide scholars as well as policy-makers with some fresh insights on how to improve the legitimacy of European governance.

Based on his analysis of lobbying activities both in Brussels and Stockholm, Daniel Naurin recommends: “In order for the EU to attain functional mechanisms of accountability, however, transparency reforms must be complemented by reforms focusing on the ability of the electorate to impose real sanctions on policy-makers. Increasing transparency with the purpose of civilising elite behaviour - strengthening the democratic legitimacy equation from the 'output' side in Scharpf's words - should not be used as an excuse for not starting to look seriously at the accountability mechanisms on the input side. If the EU, on the other hand, should choose to go for government by the people, not just for the people - for instance by strengthening the political accountability of the European Commission, or political parties starting to compete on European issues in the national and the European Parliament elections, thereby allowing citizens to both mandate and sanction those in power - then transparency will have a more important role to play.” (Naurin 2007, 152).

The debates preparing Parliament's resolution of 2008, as well as some of its final provisions, have demonstrated that procedural legitimacy is simply not enough. It is contended that there will in future be stronger pressure to provide specific (financial, legal, personal) evidence to be better informed about how MEPs (as other MPs worldwide) arrive at their convictions and voting behaviour. In order to establish the guiding principles of obtaining such evidence (which will surely be opposed with reference to the rights of personal data protection or the protection of confidential business information more research will be required.⁸ An important purpose of such research will have to be to develop a realistic assessment of the importance of deliberative approaches in political life.

Pluralistic democratic systems are supposed to give to all economic and social actors the chance not only to represent their private interests but also to express their views on how to balance interests in the shared public space between government, civil society and private individuals making choices about how they want to live. The idea of a state less inclined to claim supreme authority and extended to the multi-level governance system of the European Union is part of an evolution towards public authorities which negotiate contractual relationships more than they enact binding legislation. Transparency and fair access to decision-making institutions will continue to be highly important in such a system. One crucial issue has been and will be how to compensate for different levels of organisational

⁸ Robert Mack, CEO of the public affairs consultancy Burson Marsteller, is reported to have said that „the European Transparency Initiative is not about ethical lobbying. It is about disclosure of information. These are two separate things.”

proficiency among interest groups in order to include all relevant positions into the framework of negotiations and to arrive at balanced political priorities.

For a long time, European governance was quite isolated from public pressure, leading to an increased importance of more confidential exertion of political influence, such as lobbying. However indirectly, the European Parliament has succeeded in introducing or provoking some elements of popular democracy in the European political arena, such as demonstrations of unions or citizens' action groups. Recent examples include demonstrations in Strasbourg protesting against some liberalising elements of the ports and the services directives as well as movements against the dilution of the REACH directive on chemicals. While such events are still much more exceptional than at the national level, they clearly show the impact of a directly elected and majoritarian institution not only on the rules of legislative decision-making but also on the logic of influence.

The fine-tuning of interest representation in the European Parliament can also be seen as a contribution to the establishment of new public behavioural norms, as we have seen in the third section. European institutions would be in a much weaker position in dealing with national administrations if they had not their comprehensive knowledge of local situations and technical details. To an important extent they derive this legitimacy from non-state partners. On the other hand there is always a risk of instrumentalisation for private agendas. Two-level games to exploit political differences between the national and the European level must be watched, too.

For the three institutions involved in co-decision, the main threat to the principles of transparency and openness that all of them genuinely embrace is represented by the informal tripartite negotiations (“trialogues”) and the lower-level bargaining. Both types of informal contacts between the European institutions emerged after repeated interactions and had an important impact on institutional outcomes. As a matter of fact, they seem to have increased the efficiency of the legislative process, as the decisions adopted by the three institutions are not made in “one-shot games” but in a package, so that actors do not always make decisions according to their policy preferences, but according to the salience rankings of those decisions. Such “vote trading” (“log-rolling”) is possible only when all actors know each other’s policy preferences and salience rankings, which is unlikely in as large a body as the EP plenary, but quite likely in the EP committees, Council working groups and COREPER or in Commission’s advisory groups, where various studies detected the existence of a culture of socialization and cooperation. (Sasu 2009, 67)

Close attention to the way in which governance networks operate in today’s mediatised environment is a crucial element of any future analysis of how deliberative governance might work. (cf. Hajer and Versteeg 2008, 30). In European policy-making, it seems that corporatist theory - and especially those theorists who emphasise the deliberative character of corporatist arrangements - come closest to the empirical findings concerning the behaviour of interest groups, such as investigated by Daniel Naurin (Naurin 2007, 148). This necessitates, as Bächtiger and Steenbergen have recognised, that not only the “talk culture” aspect of parliamentary proceedings need to be analysed but also the relation between interest representation of a certain type and specific policy outcomes. A final, though enormously challenging research agenda concerns the construction of dimensions of truthfulness in deliberative exchanges. Even if we accept Elster’s “civilisation through hypocrisy” hypothesis any observation of communicative action in interest representation without at least a first step towards this test will leave us with incomplete knowledge of what is going on.

The “empirical turn” of deliberative theory needs operationalisations of the theoretical constructs it seeks to investigate. Following again Naurin, “we cannot use the two volumes of Habermas’ Theory of Communicative Action (or any other favourite theoretical work) as our empirical yardsticks. For comparative research in particular the operationalisations must be fairly narrow, and will therefore always be easy to criticise for not capturing all aspects of deliberation. However, we must accept that we usually cannot observe ‘the whole phenomena’ at a time, but must rely on different indicators” (Naurin 2007a).

References

- Anderson S. and Burns T. (1999): The European Union and the Erosion of Parliamentary Democracy: A study of Post-parliamentary Governance. In S. S. Andersen & K. A. Eliassen (eds.), *The European Union: How Democratic is It?*, pp. 227-251. London.
- Armstrong, Kenneth; Begg, Iain; Zeitlin, Jonathan (2008): JCMS Symposium: EU governance after Lisbon. *Journal of Common Market Studies*, 46, 2, 413–450.
- Bächtiger, André. (2007): The study of deliberation in real world politics: the deliberative dimensions of legislatures and sketches of a future research agenda. Contribution to the symposium *Empirical Approaches to Deliberative Politics*, Florence.
- Bächtiger, André, Steenbergen, Marco R. (2004): The real world of deliberation: a comparative study of its favorable conditions in legislature. Herausgegeben von EUI. Florence. (SPS Working Paper, 17).
- Börzel 2003 Börzel, T.A. (2003): What can federalism teach us about the European Union? Paper presented for the conference "Governing together in the New Europe", Cambridge.
- Budge, Ian (2000): Deliberative democracy versus direct democracy - plus political parties! Saward, Michael (ed.): *Democratic Innovation: Deliberation, Representation and Association*. London.: Routledge, 195–209.
- Burns, Charlotte (2005): Who pays? Who gains? How do costs and benefits shape the policy influence of the European Parliament? *Journal of Common Market Studies*, 43, 3, 485–505.
- Coen, David, Richardson, Jeremy. J. (eds.) (2009): *Lobbying the European Union. Institutions, actors, and issues*. Oxford, New York: Oxford University Press, 39–69.
- Chappell, Zsuzsanna (2008): Deliberation and representation: disputing the deliberative model of democracy. Paper presented at the *Annual APSA Meeting*, 28-31 August, Boston.
- Cohen, Joshua (1989): Deliberation and democratic legitimacy. In: Hamlin, Alan; Pettit, Philip (Hg.): *The Good Polity: Normative Analysis of the State*: Basil Blackwell, 17–34.
- Cohen, Joshua (1997): Deliberation and democratic legitimacy. In: Bohman, J.; Rehg, W. (Hg.): *Deliberative democracy. Essays on reason and politics*. Cambridge MA: MIT Press, 67.
- Dryzek, J. (2000): *Deliberative democracy and beyond. Liberals, critics, contestations*. Oxford: Oxford University Press.
- Dunn, John (1999): Situating democratic political accountability. In: Przeworski, Adam; Stokes, Susan C.; Manin, Bernard (eds.): *Democracy, accountability, and representation*. , Cambridge New York: Cambridge University Press, 329–344.
- Elster, Jon (1986): The market and the forum. Three varieties of political theory. In: Elster, Jon; Hylland, A. (eds.): *Foundations of social choice theory*. Cambridge: Cambridge University Press.
- Elster, Jon (1995): Strategic uses of argument; In: Arrow, Kenneth et al (Hg.): *Barriers to conflict resolution*. New York: Norton, 236–257.
- Eriksen, Erik O. (2005): From reflexive integration to deliberative supranationalism? In: Eriksen, Erik O. (Hg.): *Making the European Polity. Reflexive Integration in the EU* London: Routledge.

- Eriksen, Erik O. (2006): Deliberation and the problem of democratic legitimacy. ARENA Working Paper nr 8.
- Galston, Miriam (1993): Lobbying and the public interest: rethinking the Internal Revenue Code's treatment of legislative activities. *Texas Law Review*, 71, 1269.
- Gehring, Thomas; Kerler, Michael (2008): Institutional stimulation of deliberative decision-making: division of labour, deliberative legitimacy and technical regulation in the European Single Market. *Journal of Common Market Studies*, 46, 5, 1001–1023.
- Greenwood, J. (2002): EU public affairs and the White Paper on Governance; *Journal of Public Affairs* 1, 423-435.
- Habermas, Jürgen (1998): Between facts and norms. Contributions to a theory of law and democracy. Cambridge MA: MIT Press.
- Habermas, Jürgen (2008): Ach, Europa. Frankfurt am Main: Suhrkamp.
- Hajer, Maarten; Versteeg, Wytske (2008): The limits to deliberative governance. Paper presented at the *Annual APSA Meeting*, Boston.
- Höreth, M. (2001): The European Commission's White Paper on Governance: A 'Tool-Kit' for closing the legitimacy gap of EU policymaking? Rheinische Friedrich Wilhelms-Universität Bonn; Zentrum für Europäische Integrationsforschung. (Discussion Paper, C 94).
- Joerges, Christian (2001): Deliberative Supranationalism - a defence. *European Integration Online Papers* 5(8).
- Joerges, Christian; Neyer, Jürgen (1997): From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology. *European Law Journal* 3(3), 273–299.
- Lehmann, Wilhelm (2007): Soft law or no law ? The European Parliament's new role in the management of organized interests. Paper presented at the *10th EUSA Meeting*, Montreal.
- Lehmann, Wilhelm (2009): The European Parliament. In: Coen, David, Richardson, Jeremy J. (eds.): *Lobbying the European Union. Institutions, actors, and issues*. Oxford, New York: Oxford University Press, pp. 39–69.
- Leonard, Mark (1997): *Politics without frontiers: the role of political parties in Europe's future*. London: Demos.
- Lewis, Jeffrey (2008): Strategic bargaining, norms and deliberation. In: Naurin, Daniel; Wallace, Helen (eds.): *Unveiling the Council of the European Union. Games Governments Play in Brussels*. Basingstoke: Palgrave MacMillan (Palgrave Studies in European Union), 165–186.
- Majone, Giandomenico (1994): Décisions publiques et délibération. *Revue française de science politique*, 44(4), 579–598.
- Majone, Giandomenico (2001): The common sense of European integration; Two logics of delegation: agency and fiduciary relations in EU governance. *European Union Politics*, 2 (1), 103–122.
- Manin, Bernard, Przeworski, Adam, Stokes, Susan C. (1999): Introduction. In Przeworski, Adam, Stokes Susan C., Manin Bernard (eds.), *Democracy, accountability, and representation*. Cambridge University Press, Cambridge New York, pp. 1-26.
- Mansbridge, J. (1992): A deliberative theory of interest representation. In: Petracca, M. (Hg.): *The politics of interest*: Westview Press.

- Moran, M., (2003): *The British Regulatory State: high modernism and hyper-innovation*; Oxford: Oxford University Press.
- Naurin, Daniel (2007): *Deliberation behind closed doors. Transparency and lobbying in the European Union*. Colchester: ECPR Press.
- Naurin, Daniel (2007a): Why give reason? Measuring arguing and bargaining in survey research; *Swiss Political Science Review*. 13 (4), 559–575.
- Neuborne, Bruce (1994): Madison's nightmare: the tax-driven exclusion of disinterested voices from the legislative process. New York University Law School (Working Paper).
- Neyer, Jürgen (2006): The deliberative turn in integration theory. *Journal of European Public Policy*, 13, 5, 779–791.
- Parkinson, J. (2003): Legitimacy problems in deliberative democracy. *Political Studies*, 51, 180–196.
- Peters, B. Guy (2008): The two futures of governing - decentering and recentering processes in governing; *Working Paper Politikwissenschaft* 114; Wien: Institut für höhere Studien, January 2008.
- Peters, A., Pagotto, I. (2006): Soft law as a new mode of governance: a legal perspective, NEWGOV Working Paper 04/D11; Basel.
- Pitkin, Hanna F. (1967): *The concept of representation*. University of California Press, Berkeley CA.
- Pollack, Mark A.; Shaffer, Gregory C. (2008): Risk regulation, GMOs and the limits of deliberation. Naurin, Daniel; Wallace, Helen (eds.): *Unveiling the Council of the European Union. Games Governments Play in Brussels*. Basingstoke, Hampshire: Palgrave MacMillan (Palgrave Studies in European Union), 144–164.
- Pollak, Johannes; Bátorá, Jozef; Mokre, Monika; Sigalas, Emmanuel; Slominski, Peter (2009): On political representation: myths and challenges. RECON Online Working Paper, 03.
- Przeworski, Adam, Stokes Susan C., Manin Bernard (eds.) (1999). *Democracy, accountability, and representation*. Cambridge New York: Cambridge University Press.
- Radulova, E. (2007): The OMC: an opaque method of consideration or deliberative governance in action? *European Integration*, 29, 3, 363–380.
- Richardson, Jeremy (2000): Government, interest groups and policy change. *Political Studies*, 48, 1006–1025.
- Risse, Thomas (2000): Let's argue! Communicative action in world politics. *International Organization*, 54, 1, 1–39.
- Sasu, Ionut (2009): *The Road from Maastricht to Amsterdam and Beyond. An Assessment of Transparency in Co-decision*; Institute for European Studies, VUB Brussels.
- Schaefer, David L. (2008): Deliberative democracy: the transformation of a political concept. Paper presented at the *Annual APSA Meeting*, 28-31 August 2008, Boston.
- Schuppert, G. F. (2006): The changing role of the state reflected in the growing importance of non-state actors; in G. F. Schuppert (ed.), *Global Governance and the Role of Non-State Actors*; Baden-Baden: Nomos.
- Tanasescu, Irina (2009): *The European Commission and interest groups. Towards a*

deliberative interpretation of stakeholder involvement in EU policy-making. Brussels: VUB Press.

Warleigh, Alex; Fairbrass, Jenny (eds.) (2002): *Influence and interests in the European Union: the new politics of persuasion and advocacy*. London: Taylor & Francis.