Special Issue
EU Citizenship: Twenty Years On

Communicating with the European Composite Administration

By Jane Reichel[*]

A. Introduction

One of the reasons for introducing a "Union" citizenship in the 1993 Maastricht Treaty was to provide a direct channel between the citizens of the Member States and the EU. In contrast to many other international organizations, the role of the individual has been central to the European project since its inception. In its famous 1962 judgment given in *Van Gend en Loos*,[1] the Court of Justice of the European Union (CJEU) underscored the importance of the "vigilance of individuals concerned" seeking to protect their European rights in the new legal order through judicial control.[2] The right to directly vote on the representatives of the European Parliament had already been introduced in the 1970s. The citizens of the Member States were thus equipped with two classic forms of political participation even prior to the introduction of Union citizenship: law making and the legal adjudication of individual cases. Nonetheless, whether these channels are sufficient to guarantee the citizens effective democratic means to influence legislation and exercise control of EU institutions in the rather complex multilevel legal system of the EU has been continuously debated.

During the twenty years since Union citizenship was introduced in 1993, the constitutional setting of the Union and its relations to the Member States have evolved. The subject of this paper is the developing administrative cooperation between administrative organs within the EU and its Member States. The implementation of EU law at the national level has changed from being mainly an issue for the Member States to decide, to becoming an issue of shared responsibility for the EU and the Member States. In most sectors of EU law, national authorities work closely together as well as with EU organs, not only at the implementation stage, but also to a certain extent at the policy-making and rule-making stages. This intense cooperation has provided many new sector-specific arenas for participation and communication. The objective here is to analyze from a legal perspective

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[1] Van Gend en Loos v. Nederlandse Administratis der Belastingen, CJEU Case C-26/62, 1963 E.C.R. 1.

[2] *Id.* at para. 13.

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the current channels for communication—direct and indirect—between the Union citizen and the European composite administration. The point of departure is that democracy presupposes the possibility for citizens to participate and communicate in one way or another with the decision-making organs of the polity at hand. The values of communication have been recognized by the Member States when drafting the legal foundation of the EU. Article 10.3 of the Treaty of the European Union (TEU) states that every citizen shall have the right to participate in the democratic life of the Union and that decisions shall be taken as openly and as closely as possible to the citizen.[3]

The analysis here begins with the democratic foundations of the EU, as laid down in the Treaties. One of the novelties of the Lisbon Treaty is the list of democratic sources given for the EU introduced in Articles 9–12 TEU. The subject of European democracy is identified in Article 9 TEU as the Union Citizen: The Union shall in all its activities observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies.[4] This Article goes on to define the Union citizen, the nationals of the Member States. Importantly, this Article also reaffirms the derived status and complementary nature of Union citizenship. Citizenship of the Union is in addition to, and does not replace, national citizenship.[5] The democratic basis for the EU is laid down in TEU Articles 10–12. The classic form of democracy, representative democracy through directly elected parliaments, is declared in Article 10 TEU to be the foundation of the democratic functioning of the Union.[6] This form of democracy is further complemented by a participatory form of democracy as given in Article 11 TEU. Lastly, the national parliaments reappear in Article 12 TEU, given a specific role in the political life of the EU beyond their function in the representative democracy of Article 10 TEU.

The two classic mechanisms for Union citizens to communicate with the EU, parliamentary elections and judicial control, are here analyzed in light of the more innovative form of democracy as set out in Article 11 TEU: participatory democracy. The presentation is structured as follows. A brief introduction to the European composite administration is given in Section B. The representative form of democracy and the role of national parliaments are discussed in Section C. Section D. focuses on the rights of the Union citizen to engage in administrative and judicial proceedings in individual cases in order to protect their rights. These rights are codified in Articles 41 and 47 of the EU Charter of Fundamental Rights (hereinafter the Charter), corresponding to Article 19 TEU. The

[3] *See* Consolidated Version of the Treaty on European Union, Oct. 26, 2012, 2012 O.J. (C 326) art.10.3 [hereinafter TEU].

[4] *See* TEU art. 9.

[5] *See* TEU art. 9; Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) art. 20.1 [hereinafter TFEU].

[6] *See* TEU art. 10.

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participatory forms of democracy introduced in the Lisbon Treaty, where the institutions of the EU are to engage in open dialogues with the citizens and their representative organizations, are analyzed in Section E. The question put forward here is whether the current legal framework merely provides an *ad hoc* approach, diluting any possibility of effective democratic or judicial control over the administration, or whether it enables a flexible and pragmatic form of control via Union citizen participation in the multi-faceted legal and political reality of the EU. Conclusions and final thoughts are given in Section F.

B. The Development of a Composite European Administration

The starting point for implementing EU law within the Member States generally has been that this is a matter for Member States to resolve independent of the EU.[7] Traditionally, EU law has mainly been implemented by national authorities, creating a situation where the EU decides and the Member States implement.[8] The legal basis for this is found in the Treaties, Article 5.2 TEU and the principle of the conferral of powers, stating that the EU can only take action in areas where the Member States have transferred competence to the EU.[9] This Article is to be read in conjunction with Article 6g TFEU, introduced in the Lisbon Treaty, stating that EU competence in the field of administrative cooperation is limited to carrying out actions to support, coordinate or supplement the actions of the Member States.[10] Articles 4.3 TEU and 291 TFEU stress that Member States shall take all measures of national law necessary to implement legally binding Union acts, and that the European Commission (Commission) may adopt implementing legislation only in cases where uniform conditions for implementation are necessary.[11] From this it seems to follow that the main responsibility for the implementation of EU law at the national level rests securely with the Member States and their respective constitutional orders.

Though, the implementation of EU law has not been left to the Member States to take care of separately from the EU. Article 197.1 TFEU, where EU competence under Article 6g TFEU is specified, also maintains that the effective implementation of EU law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.[12] It is up to Member States to implement EU law, but it is a

[7] The principle of the institutional autonomy of the Member States was introduced in International Fruit Company v. Produktschap voor groenten en fruit, CJEU Case 51-54/71, 1971 E.C.R 1107, para. 4. The principle of procedural autonomy was established in Rewe-Zentralfinanz v. Landwirtschaftskammer für das Saarland, CJEU Case 33/76, 1976 E.C.R. 1989, para. 5.

[8] *See* HERWIG C.H. HOFMANN ET AL., ADMINISTRATIVE LAW AND POLICY OF THE EUROPEAN UNION 259 (2011).

[9] *See* TEU art. 5.2.

[10] *See* TFEU art. 6g.

[11] *See* TEU art. 4.3; TFEU art. 291.

[12] *See* TFEU art. 197.1.

matter of common interest that—and not seldom how—this is done. Considering the issue from a more practical perspective, the implementation of EU law is usually divided into three parts: Direct, indirect or shared administration. EU institutions themselves thus provide direct administration, particularly the Commission. Indirect administration is when implementation is taken care of by the Member States, while the shared administration is carried out by the Member States in cooperation with EU institutions and agencies.[13] Even though the competence of the EU to regulate the internal administrative functions of the Member States is very limited, there has long been an acceptance that the EU may introduce minimum rules of functions and procedures on the basis of substantive EU law, for example, with respect to the internal market, agriculture, and so forth.[14] One example is that within EU food policy, the EU has adopted a regulation with common rules for monitoring the implementation of EU food regulations.[15] Nowadays, EU law is mainly implemented through various forms of shared administration with national administrative organs working closely with EU institutions and agencies.[16]

Another relevant factor is that the EU's own administration has grown significantly through the establishment of over thirty independent European agencies. The EU authorities have different characteristics, but the majority, the "regulatory" agencies, have the overall task of promoting the implementation of EU law in different ways.[17] The regulatory agencies may provide technical or scientific advice to the Commission and the Member States, be responsible for operational activities, or create networks between administrations.

The growing cooperation between the European and national administrative bodies in various forms has come to be regarded as an administrative organization in itself, referred to as an integral or composite administration.[18] The different functions and competences of the organs involved vary from one area to another, but it is not unusual for the

[13] *See id*.; Carol Harlow, *Three Phases in the Evolution of EU Administrative Law*, *in* THE EVOLUTION OF EU LAW 443 (Paul Craig & Grainne de Búrca eds., 2011).

[14] *See* Francois Lafrage, *Administrative Cooperation Between Member States and Implementation of EU Law*, 16 EUROPEAN PUBLIC 597–616 (2010).

[15] *See* Regulation 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, 2004 O.J. (L 191).

[16] *See* Eduardo Chiti, *The Relationship Between National Administrative Law and European Administrative Law in Administrative Procedures*, *in* WHAT'S NEW IN EUROPEAN ADMINISTRATIVE LAW 7 (EUI Working Paper Law No. 10, 2005).

[17] *See Communication from the Commission to the European Parliament and the Council: European Agencies – The Way Forward*, COM (2008) 135 final (Mar. 11, 2008).

[18] *See* Eberhard Schmidt-Aßmann, *Introduction: European Composite Administration and the Role of European Administrative Law*, *in* THE EUROPEAN COMPOSITE ADMINISTRATION (Oswald Jansen & Bettina Schöndorf-Haubold eds., 2011).

administrative organs to be represented in all cycles of the legislative process, from policy-making, to rulemaking and implementation.[19] The role of national officials in comitology procedures has long been important.[20] In such matters, the development of the role of administration within the composite administration follows a general trend in the Western world. As pointed out by Corkin, bureaucratic law-making is found everywhere and is here to stay.[21] The participation of private organizations and undertakings has also been prevalent in the EU.[22]

Another specific feature of the composite administration relevant here is the variety of tools available to the administration. In some policy areas, administrative organs act within composite administrative procedures, whereas national and European administrative organs take part in one and the same procedure for enacting decisions.[23] This is seen in the administrative procedures allowing genetically modified organisms (GMO) to be released into the environment,[24] permitting medical products to be released on the market,[25] enacting technical standards,[26] and within regulations on telecommunications.[27] In the

[19] *See* Morten Egeberg, Guenther F Schaefer & Jan Trondal, *EU Committee Governance Between Intergovernmental and Union Administration, in* MULTILEVEL UNION ADMINISTRATION: THE TRANSFORMATION OF EXECUTIVE POLITICS IN EUROPE 66 (Morten Egeberg ed., 2006); Herwig C.H. Hofmann & Alexander Türk, *The Development of Integrated Administration in the EU and its Consequences*, 13 EUR. L. J. 253–71 (2007); Mauro Zamboni, *Globalization and Law-Making: Time to Shift a Legal Theory's Paradigm*, 1 LEGISPRUDENCE 125, 142 (2007).

[20] *See generally* CARL FREDRIK BERGSTRÖM, COMITOLOGY: DELEGATION OF POWERS IN THE EUROPEAN UNION AND THE COMMITTEE SYSTEM (2005).

[21] *See* Joseph Corkin, *Constitutionalism in 3D: Mapping and Legitimating Our Lawmaking Underworld*, 19 EUR. L. J. 636, 642 (2013).

[22] *See id*. at 648; JOANNA MENDES, PARTICIPATION IN EUROPEAN UNION RULEMAKING: A RIGHTS-BASED APPROACH 120 (2011); MARIA WIBERG, THE SERVICES DIRECTIVE – LAW OR SIMPLY POLICY 235 (2013); *infra* section D.

[23] *See* HOFMANN ET AL., *supra note 8*, at 406.

[24] *See* Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the Deliberate Release into the Environment of Genetically Modified Organisms, 2001 O.J. (L 106); Regulation 1829/2003 of the European Parliament and the Council of 22 September 2003 on Genetically Modified Food and Feed, 2003 O.J. (L 268).

[25] *See* Regulation 726/2004 of the European Parliament and of the Council of 31 March 2004 Laying Down Community Procedures for the Authorization and Supervision of Medicinal Products for Human and Veterinary Use and Establishing a European Medicines Agency, 2004 O.J. (L 136).

[26] *See* Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 Laying Down a Procedure for the Provision of Information in the Field of Technical Standards and Regulations, 1998 O.J. (L 204).

[27] *See* Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive), 2002 O.J. (L 108). In a proposal from the Commission, the composite elements are suggested to be strengthened to be able to grant a single EU authorization to provide electronic communications across the Union. Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC,

proposal for a new Data Protection Regulation, the national data protection authorities—who are to be independent[28]—are provided with a specific "consistency mechanism" to be applied in matters having a cross-border element, or otherwise having an EU-wide impact.[29] In such cases, the European Data Protection Board and the Commission will also be involved in the handling of the matter, according to a specific scheme laid down in the regulation.[30] Yet another area with close cooperation between national and EU authorities is the area of social security. EU secondary law provides for procedures to coordinate social security benefits in the Member States, including conflict resolution mechanisms.[31]

In other areas where EU competence is more limited, the national authorities cooperate mainly by non-binding legal tools, also known as soft law. For example, in the area of research and innovation, the EU has only the competence to take complementary and coordinated actions *vis-à-vis* national policies.[32] Despite this, the EU has been described as a supranational organization in the international field of research.[33] This can be explained by the available programs for research grants, organizational regimes, and soft law mechanisms that the EU can utilize within the European research area. In the 2020 strategy, the EU has defined several steps to achieve a sustainable economy and growth in Europe, among them research and innovation.[34] The EU has introduced several agencies, programs, and instruments to facilitate research. One of them is the European Strategy Forum on Research Infrastructures (EFRSI), a Commission instrument to support a coherent and strategic policy for research infrastructures in Europe.[35] The ESFRI identifies and describes the scientific needs for research infrastructures within the EU through

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2002/21/EC, and 2002/22/EC and Regulations (EC) No. 1211/2009 and (EU) No. 531/2012, COM (2013) 627 final (Sept. 11, 2013).

[28] *See* TFEU art. 16; Charter of Fundamental Rights of the European Union, Dec. 14, 2007, 2007 O.J. (C 303) art. 8.

[29] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), arts. 57–62, COM (2012) 11 final (Jan. 25, 2012).

[30] *See id*. arts. 58–59.

[31] *See* Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, art. 76, 2004 O.J. (L 314); Regulation 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, art. 5, 2009 O.J. (L 284); Henrik A. Wenander, *A Network of Social Security Bodies – European Administrative Coordination Under Regulation No. 883/2004*, 6 REALAW 39, 67 (2013).

[32] *See* TFEU arts. 4.3, para. 3.

[33] *See* MATTHIAS RUFFERT & SEBASTIAN STEINECKE, THE GLOBAL ADMINISTRATIVE LAW OF SCIENCE 65 (2011).

[34] *See* Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth, COM (2010) 2020 final (Mar. 3, 2010).

[35] *See* European Commission, *Research & Innovation* (May 26, 2014), http://ec.europa.eu/research/infrastructures/index_en.cfm?pg=esfri.

roadmaps.[36] Within the ESFRI, the national competent authorities in the research area are represented and the needs identified at the EU level will also influence the priorities made at the national level. For example, in the Swedish equivalent to the ESFRI road map, the Research Council guide to infrastructures 2012, it is stated that the ESFRI road map has been used as an important basis.[37] The national research grants are subsequently distributed in line with the road map, so that research identified as valuable at the European level is supported by the national research institution.[38]

An important difference between this composite European administration and national administration is that the composite administration is not organized under one coherent political structure. Neither the EU nor the Member States can by themselves steer or control the European composite administration as a whole. Instead, the composite administration is part of all twenty-nine constitutional orders at the same time—the EU and the twenty-eight Member States.[39] A specific feature of the composite administration is its fragmented structure; the organization and relationships between its constituent bodies vary from one policy area to another. As seen, this heterogeneous administrative model, with its indistinct boundaries between the European and national bodies, as well as between the private and the public, may in itself open the doors for the use of alternative regulatory methods, using soft governance tools rather than distinct legal rules. One of the main driving forces behind the development of a composite administration is its ability to resolve common European problems that are out of reach for the individual entities, the EU and the Member States.[40] By coordinating European and national policies and infrastructures, a more efficient outcome of policies may be attained. On the other hand, the ability to steer and control the heterogeneous administration may prove more difficult, as it is not directed by one coherent policymaker. The development has thus led to an intermingling of the mandates and responsibilities of the EU and its Member States. With this further follows a risk of fragmentation, because different policy areas develop rather independently of each other.

[36] Three roadmaps have been published to date: The European Roadmap for Research Infrastructures 2006 and two updated versions in 2008 and 2010. They are published on the Commission's webpage, http://ec.europa.eu/research/infrastructures/index_en.cfm?pg=esfri.

[37] *See* VETENSKAPSRÅDETS GUIDE TILL INFRASTRUKTUREN 3 (2012).

[38] *See* Jane Reichel, *BBMRI-ERIC – An Analysis of a Multi-Level Institutional Tool for the EU and Beyond*, *in* ADMINISTRATIVE LAW BEYOND THE STATE - NORDIC PERSPECTIVES 92 (Anna-Sara Lind & Jane Reichel eds., 2013).

[39] *See* JANE REICHEL, ANSVARSTUTKRÄVANDE – SVENSK FÖRVALTNING I EU 213 (2010).

[40] *See* Hofmann & Türk, *supra* note 19, at 262.

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C. The Representative Democratic Model and the Role of Parliaments

Article 10 TEU and representative democracy are the first of the three sources of democratic legitimacy listed in the EU Treaty, and can be labeled as the main source of democracy in the EU. This Article structures the representation of Union citizens into two channels, direct representation via the European Parliament[41] and indirect representation via the members of the European Council and the Council, where Union citizens are represented by their Heads of State or Government and by their governments, respectively.[42] These organs are further said to be democratically accountable either to their national Parliaments, or to their citizens. The national parliaments thus represent the citizens and hold the executive accountable for their doings within and beyond the state. This form of democracy constitutes the traditional form of democracy and of cooperation of sovereign nations beyond the state; the sovereign people is represented by a parliament, who in turn appoint a government—or, as the case may be, also elect a president—who represents the sovereign people in international affairs.[43]

With globalization in general and Europeanization in particular, more and more of the public power of each state is exercised beyond its borders. The question of representing the sovereign people beyond the nation state has been widely discussed in the legal literature and elsewhere for some time now.[44] Here, two aspects are highlighted. First, with the development towards a composite European administration as described in the previous section, national parliaments will encounter difficulties in holding their own executive branches accountable. Instead of the classic international law situation, where the state is represented by its government in international affairs, the Member States can today to a large extent be described as perforated, as opposed to unified, in their relations to the world outside their borders. It has become increasingly problematic for national parliaments to follow the public power of the nation state when crossing borders and intermingling with public powers emanating from other states. The parliaments can thus experience major difficulties when attempting a comprehensive view of all the influences reaching the national legal order, in order to hold the responsible actors accountable for actions, or lack of actions.

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[41] *See* TEU art. 10.2 para 1.

[42] *See* TEU art. 10.2 para 2.

[43] For a discussion on these issues, see DEIRDRE CURTIN, EXECUTIVE POWER OF THE EUROPEAN UNION: LAW, PRACTICES, AND THE LIVING CONSTITUTION (2009) and Leonard F.M. Besselink, *Shifts in Governance: National Parliaments and Their Governments' Involvement in European Union Decision-Making, in* NATIONAL PARLIAMENTS AND THE EUROPEAN UNION: THE CONSTITUTIONAL CHALLENGE FOR THE OIREACHTAS AND OTHER MEMBER STATES LEGISLATURES 30 (Gavin Barrett ed., 2008).

[44] *See*, *e.g.*, Neil MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1 (1993); Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, 6 INT'L. J. OF CONST. L. 373–96 (2008); THE WORLDS OF EUROPEAN CONSTITUTIONALISM (Gráinne de Búrca & Joseph H.H. Weiler eds., 2012).

Second, no parliament exists with the mandate to hold the composite administration as a whole accountable. As set out above, the composite administration is part of twenty-nine constitutional orders simultaneously, the EU and the twenty-eight Member States, and thus is to be held accountable by twenty-nine parliaments simultaneously. As mentioned, Article 10 TEU states that Member States are represented in the European Council and the Council and that these organs are themselves democratically accountable either to their national Parliaments or to their citizens. One could read this as a call to the national parliaments to collaborate in order to hold the European Council or the Council as a whole accountable in an effective way, perhaps even in collaboration with the other directly elected organ of the Union, the European Parliament. However, this interpretation has very little to do with the reality of cooperation between parliaments within the Union. Already in the preamble to the 1997 Protocol on the National Parliaments, scrutiny by individual national parliaments of their own governments in relation to the activities of the Union was deemed a matter for the particular constitutional organization and practice of each Member State, thus an issue with which the EU could or should not interfere.[45] As pointed out by Harlow, there is a marked difference between how national courts interact with the Court of Justice in comparison to how national parliaments interact with each other and with the European Parliament: "The remarkable measure of trust and co-operation which generally exists between national courts and the ECJ provides a sharp contrast to the general negative parliamentary relationships." [46]

There has been some development in the cooperation since the 1997 protocol and since Harlow made this statement in 2002. With the Lisbon Treaty, the position of the parliaments in the EU has been strengthened in several ways. The powers of the European Parliament in the legislative and budgetary procedures have been extended, as well as the Parliament's role in international affairs.[47] More importantly here, the Parliament's control of the implementation powers of the Commission in comitology procedures has been strengthened.[48] However, the mechanisms for the European Parliament to check the exercise of power by the Commission are not very strong. The current constitutional theory on which the EU builds, the Community method, does not provide for any real parliamentary control.[49] However, the European Parliament has clearly advanced their

[45] *See* Protocol on the Role of the National Parliaments in the European Union, Oct. 26, 2012, 2012 O.J. (C 326).

[46] CAROL HARLOW, ACCOUNTABILITY IN THE EUROPEAN UNION, THE COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 157 (2002).

[47] *See* Juan Mayoral, *Democratic Improvements in the European Union Under the Lisbon Treaty: Institutional Changes Regarding Democratic Government in the EU*, EUROPEAN UNION DEMOCRACY OBSERVATORY (EUDO) (Feb. 2011), http://www.eui.eu/Projects/EUDO-Institutions/Documents/EUDOreport922011.pdf.

[48] *See id.*; TFEU arts. 290–91.

[49] *See* John Temple Lang, *Checks and Balances in the European Union: The Institutional Structure and the Community Method*, 12 EUR. PUB. L. 127 (2006).

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position regarding the appointment of the President of Commission, by claiming that the candidate of the winners of the election to the Parliament in May 2014 should be appointed.[50] This constitutes quite extensive reading of Article 17.7 TEU, which merely states that the European Council shall take into account the election to the European Parliament in the process.[51] At the time of the writing of this article, July 2014, the outcome of this process is still not settled. The national parliaments have also been given a stronger role beyond holding the national representatives accountable as set out in Article 10 TEU.[52] The national parliaments are given in Article 12 TEU an independent role also as bearers of democratic legitimacy within the EU, by involvement in the EU decision-making procedures outside the traditional passive role of national parliaments' international affairs.[53] This Article lists six different ways by which the national parliaments "contribute actively to the good functioning of the Union," including the task of "seeing to it that the principle of subsidiarity is respected," which can be deemed as the most inventive and novel form.[54] This mechanism allows the national parliaments to participate in the EU

[50] *See*, Debating Europe, *Who Are the Presidential Candidates?*, http://www.debatingeurope.eu/focus/presidential-candidates/#.U7QXU02KC70 (last visited July 15, 2014).

[51] *See* TEU art. 17.7.

[52] *See* TEU art. 10.

[53] *See* TEU art. 12.

[54] *Id.* at para. B. The other five are:

> (a) Through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union; . . .
>
> (c) By taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty;
>
> (d) By taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;
>
> (e) By being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;
>
> (f) By taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.

legislative process at an early stage, and to cast a negative vote in cases where the national parliament finds the proposed legislative act to contravene the principle of subsidiarity. If a sufficient number of parliaments cast negative votes, the Commission can be given either a yellow or an orange card.[55] Even though this is not a question of a veto from the national parliaments, the Commission is to find it difficult to proceed with a high number of national parliaments against a proposal. To date, two yellow cards have been given by national parliaments, one in 2012 concerning a proposal on the rights of posted workers[56] and one in 2013 regarding the introduction of a European Public Prosecutor Office (EPPO).[57] In the first case, the Commission retracted its proposal,[58] whereas in the second case the Commission withheld its proposal and the legislative procedure is currently ongoing.[59]

Even with the strengthened positions of the parliaments of the EU after Lisbon, it does not seem possible for either the European parliament or the national parliaments to control the composite administration single-handedly. The existing mechanisms for cooperation available, for example COSAC,[60] have not yet developed into an arena for pooling parliamentary power control over the common work of the national and European authorities. To date, the effect on parliamentary control over the European composite administration remains weak. However, as discussed further in Section E, these strengthened powers and new forms of collaboration for the parliaments of the EU can very well turn out to be progressive tools enabling an efficient parliamentary control in the EU.

D. Administrative and Judicial Procedures in Individual Cases

The role of the courts within the EU legal order has been important from the start. The combination of the doctrines of "direct effect" and "primacy," as well as the preliminary ruling mechanism under Article 267 TFEU, have created a direct channel between the

[55] *See* Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality, March 30, 2010, 2010 O.J. (C 83/206); Marco Goldoni, *The Early Warning System and the Monti II Regulation: A Political Interpretation*, EUR. CONST. L. REV., 90–108 (2014).

[56] *See* Goldoni, *supra* note 55, at 97.

[57] *See National MPs Protest EU Public Prosecutor Idea*, EU OBSERVER (Nov. 1, 2013), http://euobserver.com/justice/121959.

[58] *See* Withdrawal of Obsolete Commission Proposals, Apr. 16, 2013, 2013 O.J. (C 109) 7.

[59] *See* Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office, COM (2013) 534 final (Jul. 17, 2013).

[60] *See* Morten Knudsen & Yves Carl, *COSAC: Its Role to Date and Its Potential in the Future*, *in* NATIONAL PARLIAMENTS AND THE EUROPEAN UNION: THE CONSTITUTIONAL CHALLENGE FOR THE OIREACHTAS AND OTHER MEMBER STATES LEGISLATURES (Gaven Barrett ed., 2008).

national courts and the CJEU, entirely disconnected from the political levels in both the EU and the Member States.[61] The emphasis on judicial control in the interpretation of the rule of law in the jurisprudence of the CJEU is quite apparent. In the famous cases *Les Verts,* the Court gave the European Parliament standing to act as defendant before the Court based on an understanding of the rule of law, stating that neither the Member States of the EU nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.[62] In connection with acts of the administration, the possibility of judicial control has also been deemed of fundamental importance, both in regards to individual decisions[63] and in regards to the rule-making capacity of the administration.[64]

The rights of Union citizens to engage in lawful and legitimate procedures before the administration as well as before the courts are laid down in Articles 41 and 47 of the Charter respectively. According to the case law of the CJEU, there is further a strong connection between the right to good administration in Article 41 and the right to an effective and a fair trial remedy in Article 47,[65] also noted in the semi-official explanations relating to the Charter.[66]

There are several explanations for the strong position of judicial control in the EU constitutional order. Craig has underlined the fact that even though the concept of rule of law has diverse meaning within the Member States, the idea that the administration should be procedurally and substantively accountable before the courts has nonetheless been central.[67] This core idea has had special force in Union law. Further, it may be readily accepted that it is the effective mechanisms provided for in the Treaty, in the preliminary

[61] *See* TORBJÖRN ANDERSSON, RÄTTSSKYDDSPRINCIPEN: EG-RÄTT OCH NATIONELL SANKTIONS- OCH PROCESSRÄTT UR ETT SVENSKT CIVILPROCESSUELLT PERSPEKTIV 276 (1997); Anthony Arnull, *The Rule of Law in the European Union*, *in* ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION 242 (Anthony Arnull & Daniel Wincott eds., 2002).

[62] *See* Les Verts v. European Parliament, CJEU Case C-294/83, 1986 E.C.R. I-1339, para. 23; Parliament v. Council (Chernobyl), CJEU Case C-70/88, 1990 E.C.R. I-2041. It may be remarked that even though the CJEU in these two cases strengthened the role of the European Parliament, the cases should be seen as evidence of the importance of judicial control in the EU constitutional system. The European Parliaments procedural rights were merely lifted to the level of the other EU institutions.

[63] At the EU level, see TU München v. Hauptzollamt München-Mitte, CJEU Case C-269/90, 1991 E.C.R. I-5469, and at the national level, see UNECTEF v. Heylens, CJEU Case C-222/86, 1987 E.C.R. 4097.

[64] *See* Pfizer Animal Health v. Council, CJEU Case T-13/99, 2002 E.C.R. II-3305, paras. 199–201 (regarding a consultation of a scientific committee in law-making); Germany v. the Commission, CJEU Case C-263/95, 1998 E.C.R. I-441, para. 31 (regarding comitology procedures).

[65] *See UNECTEF*, CJEU Case 222/86 at paras. 14–16.

[66] Explanations Relating to the Charter of Fundamental Rights, Dec. 14, 2007, 2007 O.J. (C 303/02) art 41.

[67] *See* PAUL CRAIG, EU ADMINISTRATIVE LAW 270 (2006).

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ruling system, together with the case law of the CJEU with its dynamic doctrine of direct effect and supremacy, and the weight laid upon ensuring the loyal cooperation of the national courts, that has enabled the EU to escape the implementation trap of traditional international law.[68] But, as the mechanisms for implementing EU law become more elaborated, involving actors from several Member States and the EU, as well as private parties, the limits of judicial control have also become apparent. Article 267 TFEU allows a comprehensive control of more than one legal order at the time, but only as long as the procedure involves actors from one Member State and the EU.

Even though neither the CJEU nor the national courts have any competence to review acts emanating from legal orders other than their own, the CJEU has in its case law developed mechanisms to allow for an integrated review. Accordingly, if a decision taken at the European level will have legal effects at the national level, the EU-decision can be reviewed by way of a preliminary ruling. This was the situation in the well-known *TU München* case, where a decision from the Commission not to allow an exemption from import duties in accordance with the Common Customs Tariff was reviewed—and declared invalid—within a preliminary ruling.[69] The opposite situation may also occur, where a national authority enacts a decision, or even a non-binding measure such as an opinion, that has effects within a decision-making procedure at the EU level. In the *Borelli* case the CJEU held that it is an obligation for the Member States to ensure that the measure can be reviewed by a national court, even if the domestic rules of procedure do not provide for this in an equivalent national case.[70]

Even if *TU München/Borelli* does allow for an effective judicial control in bilateral composite procedures, there may still be a number of situations that remain difficult for courts and litigants to approach. First, when authorities in different spheres cooperate closely, the delineation of public powers involved may be difficult to trace. Even though the CJEU in *Borelli* held that Member States could be under the obligation to provide judicial scrutiny also for non-binding measures, this has not always been upheld at the Union level. Non-binding measures at one level giving rise to legally enforceable measures at a national level, may render the allocation of responsibilities unclear. The situation can be illustrated by the *Tillack* case, where a German journalist, Hans-Martin Tillack, had published articles in the *Stern* magazine on alleged irregularities regarding the activities of OLAF, the EU anti-fraud organ, connected to the van Buitenen affair.[71] Based on the

[68] *See* CAROL HARLOW, ACCOUNTABILITY IN THE EUROPEAN UNION 147 (2002); SIONAIDH DOUGLAS-SCOTT, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 225 (2002).

[69] *See* TU München v. Hauptzollamt München-Mitte, CJEU Case C-269/90, 1991 E.C.R. I-5469.

[70] *See* Borelli v. Comm'n, CJEU Case C-97/91, 1992 E.C.R. I-6313, para. 13.

[71] *See* Tillack v. Comm'n, 2006, CJEU Case T-193/04, E.C.R. II-3995.

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suspicion that Tillack had bribed officials at OLAF, OLAF initiated an investigation into the matter, and contacted judicial authorities in Belgium and Germany under the regulation concerning investigations conducted by OLAF,[72] handing over information. On the basis of this information, the Belgian police carried out a search at the applicant's home and office and seized or sealed professional documents and personal belongings. The suspicions were also included in a press release from OLAF.[73] Tillack first lodged a complaint with the EU ombudsman, who found that OLAF, by making allegations of bribery without a factual basis that was both sufficient and available for public scrutiny, had gone beyond that which was proportionate to the purpose pursued by its action, and that this constituted an instance of maladministration.[74] Tillack then turned to the General Court, seeking annulment of the act by which OLAF forwarded information to the German and Belgian judicial authorities and a claim for compensation for the alleged damages.[75] However, the Tribunal found that the measures undertaken by OLAF, to ask assistance of national judicial authorities, did not produce any legal effects:

> That duty implies that, when OLAF forwards them information pursuant to Article 10(2) of Regulation No 1073/1999, the national judicial authorities have to examine that information carefully and draw the appropriate consequences from it in order to comply with Community law, if necessary by initiating legal proceedings if they consider such action justified. Such a duty of careful examination does not, however, require an interpretation of that provision to the effect that the forwarded information in dispute has binding effect, in the sense that the national authorities are obliged to take specific measures, since such an interpretation would alter the division of tasks and responsibilities as prescribed for the implementation of Regulation No 1073/1999.[76]

[72] *See* Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 Concerning Investigations Conducted by the European Anti-Fraud Office (OLAF), May 31, 1999, 1999 O.J. (L 136/1).

[73] As recorded in *Tillack*, CJEU Case T-193/04 at para. 19.

[74] *See* Decision of the European Ombudsman on Complaint 1840/2002/GG Against the European Anti-Fraud Office, Nov. 20, 2003 (European Ombudsman), http://www.ombudsman.europa.eu/en/cases/decision.faces/en/1810/html.bookmark.

[75] *See Tillack*, CJEU Case T-193/04 at para. 43.

[76] *Id.* at para. 72.

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Neither did the Tribunal find any grounds for liability, because a sufficiently serious breach of Union law could not be attributable to OLAF.[77] From the perspective of Tillack, it is quite obvious that the real conflict was between him and OLAF, and the involvement of the national judicial authorities was secondary. References to the national judicial systems would therefore not quite answer Tillack's request for judicial scrutiny of the actions undertaken in the conflict.

In *Tillack*, the issue was mainly allocating the legal responsibility for actions undertaken by clearly identified European and national authorities working together. Even if *Tillack* is a bit out of the ordinary, the situation as such is not all that unusual. There are plenty of examples in the case law of the CJEU where individuals have sought redress at the incorrect court system. The most common situation seems to be that an individual turns to its national court regarding measures undertaken by the EU institutions, and the national court may not always identify the problem.[78] On other occasions, it may be altogether more difficult to trace who has done what in a procedure. Hofmann points to the situation where information is registered in database systems, where it might be nearly impossible for the individual to choose the proper defendant and competent forum for proceedings.[79] Some Union acts thus contain special provisions affording individuals an extended right to turn to any partner in the database system in order to have his or her data corrected or removed, namely the CIS, the EU customs information system, and the EURODAC, a database of fingerprints of applicants for asylum and illegal immigrants found within the EU.[80] The Data Protection Directive does not go as far, even though the proposed Regulation contains provisions to circumscribe difficulties arising from over-lapping competences between several national data protection authorizes.[81] The current Directive specifically obliges the supervisory authorities to cooperate with each other,[82] and as seen

[77] *See Id.* at para. 135.

[78] *See, e.g.*, Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini, CJEU Case C-119/05, 2007 E.C.R. I-6199; P Mediocurso v. Comm'n, CJEU Case C-462/98, 2000 E.C.R. I-7183.

[79] *See* Jens Hofmann, *Legal Protection and Liability in the European Composite Administration*, *in* THE EUROPEAN COMPOSITE ADMINISTRATION 451 (Oswald Jansen & Bettina Schöndorf-Haubold eds., 2011).

[80] *See id.*; Council Regulation (EC) No 515/97 of 13 March 1997 on Mutual Assistance Between the Administrative Authorities of the Member States and Cooperation Between the Latter and the Commission to Ensure the Correct Application of the Law on Customs and Agricultural Matters, Mar. 22, 1997, 1997 O.J. (L 082) art. 36; Council Regulation 2725/2000 of 11 December 2000 Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention, Dec. 11, 2000, 2000 O.J. (L 316) art. 18.

[81] *See* Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), arts. 55–56, 74, COM (2012) 11 final, (Jan. 25, 2012); Jane Reichel & Anna-Sara Lind, *Regulating Data Protection in the EU*, *in* PERSPECTIVE ON PRIVACY 30 (Dieter Dörr & Russell L. Weaver eds., 2014).

[82] *See* Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, Nov. 21 1995, 1995 O.J. (L 281) arts. 28.6–.7.

above, the proposed Regulation provides for a new mechanism for the authorities to receive guidance from the Commission in cross-border matters through the consistency mechanism. Further, according to Article 76 of the proposal, a national court that has reasonable grounds to believe that parallel proceedings are being conducted in another Member State, is to contact the court in the other Member State to confirm the existence of such parallel proceedings. If so, the court may suspend the proceedings.[83]

Lastly, a further problematic area for individual proceedings within the European composite administration can be highlighted. Through the principles of mutual recognition and of home state control, national authorities in many cases have to rely on decisions from authorities in other Member States as the basis for their own assessment.[84] Many internal market directives require Member States to provide contact points to enable communications between national authorities,[85] but still there is no mechanism to enable an authority or court in one Member State to receive an authoritative statement of the legality of a decision from a competent court, equivalent to the preliminary ruling mechanism available for national courts to refer questions to the CJEU. The complex and fragmented administrative landscape may prove to be too difficult for many individuals to navigate.

E. Participatory Democracy

As set out above, Article 11 TEU introduces a participatory form of democracy as one of the foundations of the EU constitutional order. This Article begins by stating that "the institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action."[86] In the following paragraphs, the Article sets forth three requirements.[87] The first

[83] *See* Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), COM (2012) 11 final, (Jan. 25, 2012).

[84] *See* Henrik Wenander, *Recognition of Foreign Administrative Decisions: Balancing International Cooperation, National Self-Determination, and Individual Rights*, 71 ZAÖRV 755 (2011).

[85] Horizontal free movement acts regularly contain organizational frameworks, such as contact points, etc. *See, e.g.,* Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States, Apr. 30, 2004, 2004 O.J. (L 158/77); Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on Services in the Internal Market, Dec. 27, 2006, 2006 O.J. (L 376/36); Regulation (EC) No 764/2008 of the European Parliament and the Council of 9 July 2008 Laying Down Procedures Related to the Application of Certain National Technical Rules to Products Lawfully Marketed in Another Member State, Aug. 13, 2008, 2008 O.J. (L 218/21); Directive 2005/36 EC of the European Parliament and the Council of 7 September 2005 on the recognition of professional qualifications, Sept. 30, 2005, 2005 O.J. (L 255/22)..

[86] TEU art. 11.1.

[87] *See* TEU art. 11.2–4.

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is that the EU institutions shall maintain an open, transparent and regular dialogue with the representatives, associations and civil society. Secondly, the Commission is to carry out broad consultations with the parties concerned. Lastly, no less than one million citizens from a significant number of Member States may take the initiative of inviting the Commission, within the frameworks of its powers, to submit any proposal on matters where citizens consider that a legal act of the Union is required.

Except for the last mechanism, the citizens' initiative, the other forms of participation by citizens and their organizations are no newcomers to the history of European law-making. As Mendes explains, the concept of policy-making underpinned by participation was well developed in the European Coal and Steel Community already in 1951[88] and was also present in the EEC Treaty from 1957.[89] Thus, the Economic and Social Committee, ECOSOC, functioned as an advisory board for social interests of the Union already from the start. Other organs were introduced later, such as the Committee of Regions with the Maastricht Treaty 1993.[90] The independent agencies of the EU also include different forms of interest representation within their constitutive set-up, such as advisory boards and working groups connected to the agencies.[91] The social partners of the EU, representing enterprise and labor, are also involved in EU-decision-making, first introduced with the Protocol on Social Policy as part of the Maastricht Treaty, and then later included in the Treaty itself by the Amsterdam Treaty.[92] A further example of the EU openness to non-state actors is the development of rule-making within the Internal Market, and especially concerning the adoption of technical standards. According to the New Approach launched in the 1980s, technical standards are developed in form of voluntary rules by private entities and according to procedures laid down in a Council resolution.[93]

These longstanding customs of participation were further developed in the 2001 Commission White Paper on Governance, where the Commission underscored the general importance of involving the civil society, stakeholders and business in the EU legislative processes.[94] These ideas have been further developed in later documents. The Commission

[88] *See* MENDES, *supra* note 22, at 80 (referring among others to Article 5 of the ECSC Treaty, which states that the competences of the Community were to be carried out by the institutions with a minimum of administrative machinery and in close cooperation with the parties concerned).

[89] *See* MENDES, *supra* note 22, at 81.

[90] *See* MENDES, *supra* note 22, at 88, 90.

[91] *See* MENDES, *supra* note 22, at 104.

[92] *See* TFEU arts. 151–61; CRAIG, *supra* note 67, at 235.

[93] *See* Council Resolution 85/C 136/01 of 7 May 1985 on a New Approach to Technical Harmonization and Standards, June 4, 1985, 1985 O.J. (C 136); Corkin, *supra* note 21, at 650; MENDES, *supra* note 22, at 120.

[94] *Commission White Paper on Governance*, at 14, COM (2001) 428 final (July 25, 2001). *See also* Communication from the Commission Towards a Reinforced Culture of Consultation and Dialogue - General Principles and

declares in the 2011 Internal Market Act its intention to strengthen the governance of the Single Market, among other things by involving private actors in a Single Market Forum: "Forum will periodically gather together market participants, e.g. businesses, social partners, non-governmental organizations and those representing citizens, public authorities at various levels of government and parliaments. It will examine the state of the single market (in particular the transposition and application of directives) and will exchange best practice."[95]

Another type of involvement of private parties in the EU legislative procedures widely used is lobbying. The main difference between lobbying and the democratically-based participation seems to be who initiates the contact; at least this is the dividing line for the voluntary registry for lobbyists that the Commission and the European Parliament has enacted, the transparency register, where lobbyists are expected to register.[96] If a private organization, either business or NGO, contacts an EU institution with the objective of directly or indirectly influencing the formulation or implementation of policy or decision-making processes of the institutions, it is thus labelled lobbying. If the contact is initiated by the institution, it is a democratically-based form of participation.

With Article 11 TEU, mechanisms where EU institutions contact private parties to invite them to participate have gained a status of a democratic underpinning of the EU. Mendes, however, points to the obscure language of the Article, where the first three paragraphs seem to be a bit unclear as to whom the participatory procedures are addressed.[97] Article 11 TEU refers to citizens, representative organizations, civil society and parties concerned in what seems to be a random manner. The forms of communication are further referred to as "opportunity to make known and publicly exchange ideas" in paragraph 1, "open, transparent and regular dialogue" in paragraph 2 and "broad consultations" in paragraph

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Minimum Standards for Consultation of Interested Parties by the Commission COM (2002) 704 final (Dec. 11, 2002).

[95] Commission Communication on Single Market Act: Twelve Levers to Boost Growth and Strengthen Confidence "Working Together to Create New Growth," at 20, COM (2011) 206 final. *See also* Commission Communication on the Single Market Act II: Together for New Growth, at 5, COM (2012) 573 final; MARIA WIBERG, SERVICES DIRECTIVE – LAW OR SIMPLY POLICY? 295 (2013).

[96] Agreement Between the European Parliament and the European Commission on the Establishment of a Transparency Register for Organisation and Self-employed Individuals engaged in EU Policy-making and Policy Implementation, arts. 8–10, 2010/2291 (ACI) final (June 23, 2011), http://www.europarl.europa.eu/oeil/popups/summary.do?id=1346318&t=f&l=en. According to Article 10, organizations involved in three activities are excluded from the expectations to register: activities concerning the provision of legal and other professional advice, activities of the social partners as participants in the social dialogue, and activities in response to direct and individual requests from EU institutions or Members of the European Parliament.

[97] *See* Joanna Mendes, *Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU*, 48 CMLREV 1849, 1852 (2011).

3.[98] Lastly, the only institution that is specifically mentioned to have an obligation to carry out consultations in paragraph 3 is the Commission.[99] The question is thus: If Member States when drafting the Treaty had a clear view on what kind of participation Article 11 TEU sought to protect. It may also be reiterated that the Treaties have included other forms of communication with specific interest groups in other parts, such as the above-mentioned social partners as well as Article 17 TFEU, which provides for specific grounds for maintaining an open, transparent, and regular dialogue with churches and religious associations or communities in the Member States. Whatever the case may be, the introduction of participatory forms of democracy as a part of the democratic foundation of the EU is today a fact and may in itself foster further constitutionalization of this specific form of communication between Union citizens and the EU. This is discussed further in section E, but before that, some words should be said on the fourth paragraph of Article 11, the citizens' initiative and the specific meaning that may be attributed to this procedure.

As pointed out above, the only new element in Article 11 TEU is the citizens' initiative. According to this Article and to the applicable secondary legislation,[100] no less than one million citizens, representing at least one-quarter of the Member States, with a minimum number of signatures from each of the states involved, can invoke such an initiative.[101] From the time of the registration of the initiative, its organizers must collect the necessary signatures within twelve months.[102] After this, the Member States must within three months verify the statements of support submitted on the basis of appropriate checks, in accordance with national law and practice.[103] Once the initiative is validated, the Commission has three months to examine the initiative and decide how to act upon it.[104] The organizers will also have the opportunity to present their initiative at a public hearing organized at the European Parliament.[105] According to a press release from the

[98] TEU arts. 11.1–.3.

[99] *See* Mendes, *supra* note 97, at 1852.

[100] *See* Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the Citizens' Initiative, Mar. 11, 2011, 2011 O.J. (L 65/1); Commission Implementing Regulation (EU) No 1179/2011 of 17 November 2011 Laying Down Technical Specifications for Online Collection Systems Pursuant to Regulation (EU) No 211/2011 of the European Parliament and of the Council on the Citizens' Initiative, Nov. 18 2011, 2011 O.J. (L 301/3).

[101] *See* Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the Citizens' Initiative, Mar. 11, 2011, Annex, 2011 O.J. (L 65/1)

[102] *See id.* art. 5.5.

[103] *See id.* art. 8.2.

[104] *See id.* art. 9.1(c).

[105] *See id.* art. 11.

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Commission, the organizers of the first eight initiatives ran out of time to collect statements of support by 1 November 2013.[106] Three groups claimed to have reached the target of one million signatures.[107] In the Spring 2014, the two firsts initiatives were answered by the Commission.[108]

F. Communicating with a European Composite Administration—Is It at All Possible?

Directly elected parliaments are commonly perceived as the basic democratic form of communication between a people and decision-makers. The parliament, in the form of the legislature, is bestowed democratic legitimation which the government, its administration, and the courts can rely on when enforcing the enacted legislation. But, if this is considered the ultimate form of democracy, there is an inherent problem in envisaging democratic procedures beyond the nation state. Here, citizens are traditionally represented by members of the government, merely indirectly accountable to the citizens. When the administration also starts acting beyond the state, the possibilities for the parliament to effectively hold accountable the executive powers will become difficult, if not to say illusory. Problems related to representative democracy *vis-à-vis* administration are thus mainly related to the processes of globalization, or more specifically in our case, the Europeanization. In regards to the European composite administration, development is complemented by a processes of bureaucratization, where non-elected officials are allocated more and more responsibilities that previously belonged to the elected legislature, or at least, a more intensely controlled government. The processes of privatization are also relevant in this context.[109] These processes have thus given room for a multitude of actors to engage in European policy-making, regulatory, or administrative procedures, representing either a state, in the form of officials from public agencies at national, regional or local levels, or their own interests, in the form of private actors, businesses, or NGOs. Even when private actors represent themselves, they do not act within a vacuum, but are part of the civil society in their respective states, or perhaps international representatives of national actors. Representing the state and the interest of the citizens and the civil society in each state is no longer the sole responsibility of the government. As Teubner points out, national societies were hardly homogenous before globalization and it has always been a question for constitutional law whether and how the constitution should also govern non-state actors.[110] The question is how to organize the

[106] *See* Press Release, Brussels European Commission, Time's Up for Supporters of the First European Citizens' Initiatives – What Happens Next? (Oct. 31, 2013), europa.eu/rapid/press-release_IP-13-1012_en.pdf.

[107] *See id.*

[108] Water and Sanitation Are a Human Right! Water Is a Public Good, Not a Commodity!, COM (2014) 177 final (Mar. 24, 2014); One of Us, COM (2014) 355 final (May 28, 2014).

[109] *See* Corkin, *supra* note 21 (analyzing these three processes).

[110] *See* GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION 5 (2012).

representation of different societal spheres acting beyond the nation state and how the national parliaments, as representatives of the people, can organize communications between the multitude of actors representing the state and itself, and thereby also the people.

As democratic representation in the EU has been weak, attention has turned to the other traditional form for Union citizens to communicate with state entities, via judicial control. Private enforcement and judicial control have played an important role in the development of the EU legal order and it now seems to be commonly accepted that national courts in many Member States have gained power with the EU, as well as with globalization in general.[111] Still, even the effective mechanism of the preliminary ruling system cannot connect all angles of the European composite administration, even if the CJEU has come a long way in developing solutions for bilateral composite administrative procedures involving EU institutions and one Member State at a time.[112] The EU-legislature has also tried to develop mechanisms, such as in the proposed Data Protection Regulation. However, providing for a complete system of judicial control, covering the entire composite administration, would probably entail a significant waiver of sovereignty on the part of the Member States.

The question thus is how can the participatory democratic model contribute? Is it possible to overcome the geographical and legal boundaries that both the parliaments and the courts encounter by engaging in open, inclusive, and informal dialogues over borders? One obvious advantage for citizens in communicating with a parliament or a court is that these organs have been vested with true powers to hold the executive accountable for its actions, or non-actions as the case may be. To a large extent, communication via a participatory democratic mechanism lacks this quality. Instead, it may be posited that too much reliance on participatory models of decision-making renders traditional forms of accountability more difficult.[113] One inherent difficulty with open and participatory decision-making procedures from an accountability point of view is the allocating of powers to the potentially multiple actors involved. If there is not one identifiable entity that may ultimately take decisions on behalf of others, the possibilities of holding decision-

[111] *See* Arbetsdomstolen [AD] [Labor Court] 2009-12-02 Case no. A 268/04 (Swed.), http://www.arbetsdomstolen.se/upload/pdf/2009/89-09.pdf.

[111] *See, e.g.,* David Edward, *National Courts—the Powerhouse of Community Law*, 5 CAMBRIDGE Y.B. OF EUR. LEGAL STUD. 1 (2002); Lech Garlicki, *Cooperation of Courts: The Role of Supranational Jurisdictions in Europe*, 6 INT'L J. OF CONST. L. 509 (2008); XAVIER GROUSSOT ET AL., REPORT NO. 3, EMPOWERING NATIONAL COURTS IN EU LAW (2009).

[112] *See, e.g.*, TU München v. Hauptzollamt München-Mitte, CJEU Case C-269/90, 1991 E.C.R. I-5469; Borelli v. Comm'n, CJEU Case C-97/91, 1992 E.C.R. I-6313.

[113] *See* Jane Reichel & Agnes Eklund, *Representing the Public in Environmental Matters—NGOs and the Aarhus Convention*, *in* FUNDAMENTAL RIGHTS IN EUROPE: ONE MATTER FOR TWO COURTS (Sonia Morano-Foadi & Lucy Vickers eds., forthcoming 2014).

makers accountable for regulatory choices decrease. When public authority is exercised beyond the state and outside of the classic international legal procedures of unanimity, there is a risk that the powers from each and every one of the actors involved first are intermingled and then scattered and dispersed beyond recognition. The citizens, interested parties, and stakeholders may very well change their minds about the outcome of the composite procedures if things do not turn out the way expected. But how can citizens, parties, and stakeholders communicate their wishes for changes of power when the public authority is exercised in deliberate and participatory procedures beyond the state? One tempting way to circumvent these difficulties might be to adopt a more flexible definition of that which constitutes accountability. Accountability could thus be perceived of as an umbrella concept, also including other specific concepts such as transparency, justice, democracy, efficiency, accessibility, responsibility, and integrity.[114] A broad interpretation of the concept can imply that the requirement of specific ex-post procedures for accountability is excessive because the decision-making processes themselves guarantee that the interests of the people have been taken into account.[115] But this is hardly a convincing path to take. As Harlow has elegantly formulated the issue in relation to global regulatory regimes, "[d]ecision-makers all too easily insulate themselves from accountability. Democracy is fragile." [116] She continues:

> Sceptics of legal globalization are in the main more concerned with structures than with principles. In the modern nation-state, power is 'billeted' and powers are 'bounded'; in global space, power is diffused to networks of private and public actors, escaping the painfully established controls of democratic government and public law. [117]

The introduction of mechanisms of participation and deliberation at the international level, or in our case within the European composite administration, accordingly cannot in itself and automatically be expected to render the regimes legitimate from an accountability perspective. Something more is needed. What could be helpful is whether these different forms of communication could be connected in some form. By focusing on participation and the possibilities of citizens to engage in a constructive dialogue regarding the

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[114] *See* Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. L.J. 447, 449 (2007); Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics,* 99 AM. POL. SCI. REV. 29, 35 (2005).

[115] For a critical analysis of these arguments, see CAROL HARLOW, ACCOUNTABILITY IN THE EUROPEAN UNION 185 (2002) and Bovens, *supra* note 114, at 453.

[116] Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187, 212 (2006).

[117] *Id.*

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European composite administrative regimes, the conditions for other accountability mechanisms available at the national or regional levels could be enhanced. According to Article 12 TEU, the national parliaments contribute to the well-functioning of the Union by being informed by the institutions of the Union, by taking part in evaluation mechanisms and Treaty revisions, by being notified of applications for accessions to the Union, and last but not least, by taking part in the inter-parliamentary cooperation within COSAC.

These mechanisms can be seen as a specific form of participatory democracy for the parliament where the national parliaments constitute a privileged form of representative organization. On one hand, unlike the other representative organizations of Union citizens, the national parliaments are geographically-bound and can only represent a predetermined group, their own Union citizens, those who are nationals of their Member State. On the other hand, national parliaments have a democratic legitimacy that other representative organizations lack. Thus, it seems appropriate to give the parliaments a privileged forum of dialogue with each other and the EU institutions. Not surprisingly, the Swedish parliament has been strongly opposed to any interpretation of its role even approaching the one suggested here. The Committee on the Constitution of the Swedish parliament has repeatedly maintained that it is the task of the Swedish government to represent the state in international affairs and that the Swedish constitution does not provide for any procedures allowing the parliament to communicate directly with EU institutions, here mainly the Commission.[118] Obviously, an interpretation of the national parliament as being something less than the ultimate representative of its sovereign people could be interpreted as a step backwards, entailing a further loss of sovereign rights. Then again, the present form of representative democracy as foreseen in Article 10 TEU does not seem to be effective with too many parliaments controlling one and the same entity in a rather uncoordinated manner. Further, through the sometimes extensive lobbying activities before the EU institutions, many organizations already today chose to direct themselves to the EU legislator instead of their national parliament.[119] The parliaments of Europe deserve a better role and should have a greater importance.

As referred to above, the introduction of a participatory form of democracy may in itself foster further constitutionalization of these procedures for communications between Union citizens, their associations and interest groups and the EU institutions. These mechanisms in fact entail the only form of communication that may easily transcend national borders, and which is not bound by specific time limits and a narrow division of competence between different institutions in the Member States and the EU. The future role of Article 11 TEU and participatory democracy in the EU could first and foremost be foreseen to be complementary. The channel of communication would thus function as an

[118] *See, e.g.*, Konstitutionsutskottet utlåtande 2012/13:KU15 [parliamentary committee report] (Swed.).

[119] *See* JÖRGEN HETTNE & JANE REICHEL, REPORT NO. 4, ATT GÖRA RÄTT OCH I TID – BEHÖVS NYA METODER FÖR ATT GENOMFÖRA EU-RÄTT I SVERIGE? (2012).

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addition to other traditional forms of communication, with a special emphasis on the function of translator as to discussions out of earshot of the parliaments. Courts have had this function for a long time, as a channel for citizens and individuals to display to the elected parliaments those consequences that their legislation has had on individuals in specific cases. The informal and elastic ways of communicating via Article 11 procedures may prove to be a very relevant translating mechanism for Union citizens affected by EU legislative and administrative actions, or lack thereof. In this way the vague networks of actors in diffuse procedures beyond the national constitutional arenas could become more visible to other constitutional organs within the EU and its Member States.

In the future, the participatory form of democracy could possibly also achieve an independent function within the EU democracy. Article 11 TEU may have the potential to develop into a specific channel for Union citizens over time to communicate with the EU institutions. Mindus and Goldoni have posited that the citizens' initiative introduced by the Treaty of Lisbon was framed specifically for giving voice to cross-national political concerns on the basis of a political conception of the EU citizenship.[120] The Commission often functions as a spider in the web of the European composite administration and is thereby a relevant actor for Union citizens to communicate with regarding European administrative issues. Interpreted this way, the mechanisms of Article 11 TEU could be the starting point for a new relationship for Union citizens, with direct communication via the channels provided for by the institutions themselves, leaving the national parliaments outside the conversation. Lobbyist have since long found their way to Brussels. Tomorrow, Union citizens may also follow this path. After all, this was the intention when introducing Union citizenship twenty years ago: To create a direct channel between the EU and its citizens. If and when this occurs, the democratic basis of the European composite administration and the EU as a whole may need to be again revised.

[120] *See* Patricia Mindus & Marco Goldoni, *Between Democracy and Nationality: Citizenship Policies in the Lisbon Ruling*, 18 EUR. PUB. L. 351, 370 (2012).

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