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Civil Society Organizations and Administrative Law

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CIVIL SOCIETY ORGANIZATIONS AND ADMINISTRATIVE LAW

*Roberto Caranta**

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I. INTRODUCTION

This paper endeavors to give a systematic account of the role of civil society organizations ("CSOs") in administrative governance. In most jurisdictions, "civil society" is not a legal term of art. It does exist, however,

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and it does raise legal questions.¹ The different kinds of roles played by CSOs in both policy formulation and policy delivery will be examined, as well as the legal questions raised by the involvement of CSOs in governance.

It is admitted that some of these roles—including roles implicating the right of access to information or participation in administrative proceedings—are not exclusively roles played by CSOs, in that individuals and businesses might be involved as well. The involvement of our organizations, however, gives rise to specific questions, including questions of legitimacy and accountability, and this is especially true when participation in decision-making procedures is concerned. Governance itself is not a term of legal art, and it is frequently used by social scientists willing to break free from the perceived formalism of legal thinking and analysis.²

What, then, is the role of law in this area? This paper strives to set out how the problems linked with involvement of the civil society in policy formulation and delivery can be systematically reconstructed and understood. Solutions to those problems will be then sought—if deduced is thought to be a too strong word—from their systematic understanding. Instances of actual legislation or case law are helpful in illustrating a problem and its possible solutions, and they will often be referred to herein.

Finally, this paper has been drafted from a European—and, more specifically, an E.U.—perspective. Materials and ideas from other jurisdictions, and most notably the U.S., will however be referred to from time to time, in order to provide a contrast.

II. THE EUROPEAN CONTINENTAL ADMINISTRATIVE STATE: A (TOO) SHORT HISTORY

The institutional model that followed the French Revolution is bipolar to the extremes: on the one hand, you have the citizens, on the other hand, the State. True, in principle, the people have become the new sovereign after the monarchy was disposed of. However, the “people” is a theoretical construct going beyond the sum of the citizens taken as

¹ See generally Kenneth Anderson, ‘Accountability’ as ‘Legitimacy’: *Global Governance, Global Civil Society and the United Nations*, 36 BROOK J. INT’L L. 841, 865 (2011) (providing a useful discussion and references to the idea of “civil society”).

² It has been argued that:

[T]he basic idea [referred to when talking of “governance”] is that government, identified with the traditional hierarchical state form, has given way to a world of diffused authority in which the boundaries between public law and private law are blurred. Governance seems to refer to the regulatory capacity of the whole gamut of organisations in the public sphere, including governments at all levels, private firms, and associations.

Michael Keating, *Europe’s Changing Political Landscape: Territorial Restructuring and New Forms of Government*, in CONVERGENCE AND DIVERGENCE IN EUROPEAN PUBLIC LAW 3, 13 (Paul Beaumont et al. eds., Hart 2002).

individuals. It is often translated in a mystical entity: the Nation. It is the Nation to be vested with sovereign powers. Under Article 3 of the 1789 *Déclaration des droits de l'Homme et du Citoyen*, which, by the way, is still part of the French national compact, “*Le principe de toute souveraineté réside essentiellement dans la Nation. Nul corps, nul individu ne peut exercer d'autorité qui n'en émane expressément.*”

As already remarked, the “Nation” is more an idea than an actual occurrence. It must be translated in institutions which are actually exercising sovereign powers, such as an *assemblée nationale* (a one-chamber Parliament). These institutions are in turn different emanations—in legal jargon, different organs—of another theoretical construct: the “State.” Differently from the Nation, the State is articulated in institutions which actually are given a number of powers over the society at large and its members.

The citizens could be seen as evaporating from abstraction (the Nation) to abstraction (the State), the latter, however, being capable of materializing itself through its different organs. In the end, the citizens vote; beyond this, they are not usually involved directly in government choices, unless these choices affect their rights and freedoms. In the latter case, the citizen is not seen as the holder of a part of sovereignty. He or she is rather at the receiving end of the choices made by the State in the name of the people or the Nation.

Indeed the State is also the only representative of those interests which are thought to be general in a given society. More than this, it is the State, through its (possibly democratically representative) organs, that is charged with selecting those interests which are deemed to be general. General interests are selected through legislation, which provides a measure of security for individuals, in that the statutes define the limits and conditions of authoritative powers.³

Once an interest is thus selected, the State is supposed to tend to its satisfaction. For instance, when the provision of a service to the general public is in the general interest, the State is to make sure that the service is provided according to what is now termed the universal service principle.

Because these interests are general, supposed to be common to the entire Nation, they override individual interests. The French have this wonderful opposition between *intérêt général* and *intérêt particulier*, which immediately conveys the feeling that the latter must be less relevant than the former. The whole is always more relevant than its parts. That is why “citizen” is more used in constitutional law than in administrative law. In administrative law, the more anodyne “individual” is often used, and closer to the French idea of *particulier*. The *particulier* must therefore be ready to

³ See Matthias Ruffert, *The Transformation of Administrative Law as a Transnational Methodological Project*, in *THE TRANSFORMATION OF ADMINISTRATIVE LAW IN EUROPE 3*, 10 (Matthias Ruffert ed., 2007).

see his or her rights and freedoms encroached upon and at times forfeited in the general interest.

It goes without saying that the general interest is also intended to override the interest of firms or corporations (undertakings, in the language of the E.U.), which in the end are the emanation of some individuals' freedom (the freedom to undertake an economic activity through a corporate structure).

The *motore immobile* being legislation, public servants tend to be individuals with legal training. Quite to the point, Max Weber characterized this administration as legal-rational.⁴ As it has been remarked, "In essence, Weber identified administrative, or bureaucratic government, as a rational-legal regime in which groups of full-time, salaried officials, chosen on the basis of their credentials and placed within hierarchical organizations, conduct official business according to established rules, within a defined jurisdiction, and for defined instrumental purposes."⁵

A special knowledge therefore sets the bureaucrats apart from the rest of society and is the reason for their special powers.⁶ This of course creates the perfect environment for a very top-down, hierarchical and often centralized approach to governance and administration. The relationship between the State and the citizen is not only bipolar, it is very much vertical. Maurice Hauriou in France centered his description of administrative law on the idea of *puissance publique* (public power) and on derogations to the law as between private individuals, which were the result of the overriding powers of the administration. Similarly, in Germany, Otto Mayer stressed the

⁴ See, e.g., Jens-Peter Schneider, *The Public-Private Law Divide in Germany*, in THE TRANSFORMATION OF ADMINISTRATIVE LAW IN EUROPE 85, 89 (Matthias Ruffert ed., 2007).

⁵ Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 99 (2003).

⁶ See Fabio Rugge, *Administrative Traditions in Western Europe*, in HANDBOOK OF PUBLIC ADMINISTRATION 177, 178 (B. Guy Peters & Jon Pierre eds., Sage 2003).

During the eighteenth century, as the state became increasingly de-personalized and the scope of its action came to coincide, at least ideally, with the common welfare, the crown's servants were gradually replaced by the state's servants, whose personal dependence on the sovereign was coupled with—although rarely replaced by—an institutional relation to the state. Real administrative apparatuses developed and their activities and proper functioning became the subject of a large number of writings, soon to amalgamate into a body of knowledge defined as the administrative science(s). Notwithstanding all this restructuring, the "kingly administrations" were not superseded until the beginning of the nineteenth century. Up to this time, monarchs largely retained their powers in shaping states' administrative structures, in controlling their action, in appointing their personnel.

Id.; see also Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 AM. J. COMP. L. 859, 863 (2011).

rechtlichen Ungleichheit (legal disparity) between State and subject.⁷ The fact that the word “subject” was used instead of “citizen” is by itself of obvious significance.⁸

True, in France, Hauriou had a formidable opponent in Léon Duguit, who with the theory of the *service public* meant to cast administrative action as an instrument for caring after the needs of the people, rather than an exercise of authority.⁹ What could be considered a legal theory of the welfare State, however, failed to command following in most European countries, where the top-down character of administrative law was much exalted.¹⁰

In Continental Europe, these vertical relations came to be crystallized by the idea of the unilateral bidding administrative decision. This concept, which remains somewhat alien to English administrative law, was and is central on the other side of the Channel. Referring to Germany, it has been remarked that:

[L]ike legislation and jurisdiction, administration, too, had its own decision-making functions and the *Verwaltungsakt* was vested with the task of declaring the law in concrete, individual case Running along the same line of reasoning, French and Italian legal doctrine has identified those particular administrative decision-making functions through which *imperium* was exercised (*décisions administratives, provvedimenti amministrativi*), thereby limiting rights and liberties. This expressed the supremacy of the administration *vis-à-vis* private citizens, in the sense that the former declares what the law is for the latter, instead of being placed under the same legal rules.¹¹

As it has been exactly remarked, “The administrative act was theoretically important because it represented the moment at which the law

⁷ See Bernardo Giorgio Mattarella, *Il rapporto autorità-libertà e il diritto amministrativo europeo*, in RIVISTA TRIMESTRALE DIRITTO PUBBLICO 909, 910 (2006) (referencing the Italian experience); Bernardo Sordi, *Il principio di legalità nel diritto amministrativo che cambia. La prospettiva storica*, in DIRITTO AMMINISTRATIVO: RIVISTA TRIMESTRALE 1, 15 (2008).

⁸ See Jos C.N. Raadschelders, *Administrative History*, in HANDBOOK OF PUBLIC ADMINISTRATION 161, 164 (B. Guy Peters & Jon Pierre eds., Sage 2003).

⁹ Etienne Picard, *The Public-Private Divide in French Law Through the History and Destiny of French Administrative Law*, in THE PUBLIC-PRIVATE DIVIDE: POTENTIAL FOR TRANSFORMATION? 17, 53 (Matthias Ruffert ed., BIICL 2009).

¹⁰ See also Bignami, *supra* note 6, at 864; Roberto Caranta, *The Fall from Fundamentalism in Italian Administrative Law*, in THE PUBLIC-PRIVATE DIVIDE: POTENTIAL FOR TRANSFORMATION? 99, 99 (Matthias Ruffert ed., BIICL 2009) (concerning Italy in particular).

¹¹ Giacinto Della Cananea, *Beyond the State: The Europeanization and Globalization of Procedural Administrative Law*, in EUROPEAN PUBLIC LAW 562, 566 (2003).

took effect in the individual case and the work of civil servants acquired significance for the legal system.”¹²

We come almost full circle: from the people to the Nation, from the Nation to the State and its organs, from the State organs to the bureaucracy, that is some people governing the people. As has been remarked, “Both administrative systems and administrative law developed in the specific context of the nation-state.”¹³

On the European Continent this model replaced—and in revolutionary era France, it was much determined to do away with¹⁴—a very different world, one which was very much articulated, where many different kinds of institutions claimed particles of sovereignty and often took over the provision of services (especially social services).¹⁵ French State ideology held a wide swath, as it deeply influenced most of continental Europe over the nineteenth and first half of the twentieth century and beyond. Even socialist States could be seen as—not peculiarly benevolent—developments of the potential omnipotence of the State.¹⁶

The pattern change was, however, less marked in common law jurisdictions and possibly in some of the Scandinavian countries. U.S. administrative law in particular has followed an original path, which is not easy to plot exactly.¹⁷ Quite briefly and not considering the active role played by the political parties in the administration,¹⁸ one could say that, federal to the bones, the U.S. administration has never had nor claimed a *tradition régalienne* the like of that of centralist France (the English has “kingly,” but the French is here much more evocative),¹⁹ and anyway there have always

¹² Bignami, *supra* note 6, at 867.

¹³ Sabino Cassese, *The Rise of the Administrative State in Europe*, in RIVISTA TRIMESTRALE DIRITTO PUBBLICO 981 (2010).

¹⁴ “Il n’y a plus ni noblesse, ni pairie, ni distinctions héréditaires, ni distinctions d’ordre, ni régime féodal, ni justice patrimoniales, ni aucun des titres, dénominations et prérogatives qui en dérivèrent, ni aucun ordre de chevalerie, ni aucune des corporations ou décorations pour lesquelles on exigeait des preuves de noblesse, ou qui supposaient des distinctions de naissance, ni aucune autre supériorité que celle des fonctionnaires publics dans l’exercice de leur fonctions. Il n’y plus ni vénalité ni hérédité d’aucun office public. Il n’y plus pour aucune partie de la Nation, ni pour aucun individu, aucun privilège, ni exception au droit commun de tous les Français. Il n’y a plus ni jurandes, ni corporations de professions, art et métiers. La loi ne reconnaît plus ni vœux religieux, ni aucun autre engagement qui serait contraire au droit naturel ou à la Constitution.”

¹⁵ See PAULO GROSSI, L’ORDINE GIURIDICO MEDIEVALE 75 (Laterza 1995).

¹⁶ O.S. Ioffe, *Administrative Law in the Soviet Legal System: Concluding Remarks*, in SOVIET ADMINISTRATIVE LAW: THEORY AND POLICY 499, 506 (George Ginsburg ed., Nijhoff 1989) (stressing the relevance of administrative law in the Soviet State).

¹⁷ Bignami, *supra* note 6, at 863 (stressing the analogies between the French and United States experiences).

¹⁸ See Larry S. Luton, *Administrative State and Society: A Case Study of the United States of America*, in HANDBOOK OF PUBLIC ADMINISTRATION 172 (B. Guy Peters and Jon Pierre eds., Sage 2003).

¹⁹ The French-like model was appropriate for fairly authoritarian systems, too. See Mattarella, *supra* note 7, at 910.

been powerful forces opposing the concentration of administrative power.²⁰ The model for U.S. administrative law has traditionally been the businessman much more than the lawyer.²¹ Legality and authority were always less a concern than in Continental Europe; when, thanks to the intense judicialization of U.S. administrative action, the law crept back to the center of the stage, the aim became to protect individuals and everyone else concerned by administrative actions through due procedures.²²

The U.S. administrative law tradition has obviously held a large influence on the administrative reform having taken place in Europe since the late 1970s. These reforms have made a big dent in, even if they have not disposed of, the French model of the administrative State. In brief:

The main reasons for promoting administrative reform were the rediscovery, affirmation, and diffusion of markets and consumer advocacy. The user is no longer an *administré*, but a customer who has to be satisfied. Thanks to the free market philosophy, administrative reforms have changed from being policies involving the public sector internally to interventions aimed at improving the efficiency and effectiveness of services for citizens.²³

In this framework of reforms centered on the citizen rather than on the State, it is no surprise that the U.S. anticipated a development “towards increased

²⁰ See A. Roberts, *Harris’ Mirage: The Positive Service State*, in PUBLIC ADMINISTRATIVE REVIEW 70 (2010) (referencing a specific historical figure).

²¹ See Luton, *supra* note 18, at 172. The 1883 civil service reform strived to avoid the feeling of the coming back of a “gentlemanly government”: The Civil Service Commission pointedly described the examinations that were required for civil service positions as practical in nature and pitched at a modest intellectual level, not aimed at establishing a college-trained aristocracy. In adopting a civil service system, the United States was participating in an international trend towards a merit system; but in the United States such a system was a direct challenge to patronage and rotation. The patronage system had lost favor because of its participation in the general decline in morality found throughout American society. Still, to succeed, the merit system had to offer more than a return to morality—it had to offer new values that could counter patronage’s claims to democracy and responsiveness. *Merit’s new values were derived from business*—economy, efficiency, and the ability to deal with the increasingly complex affairs of an industrial and urban society. Suspicion against professionals, something unthinkable in most of Europe, still pops up in the U.S. literature. See, e.g., Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 IND. J. GLOBAL LEGAL STUD. 370 (2001).

²² *Id.* at 369 (describing a U.S. administration previously bound by the “the citizens to whom administrators owe legally correct substantive and procedural action”).

²³ Cassese, *supra* note 13, at 1004; see also B. Guy Peters & Jon Pierre, *Introduction: The Role of Public Administration in Governing*, in HANDBOOK OF PUBLIC ADMINISTRATION 1, 3 (B. Guy Peters & Jon Pierre eds., Sage 2003) (“With some exaggeration it could be argued that while previously that legitimacy was derived from the public and legal nature of the public administration, legitimacy is currently to an increasing extent contingent on the bureaucracy’s ability to deliver customer-attuned services swiftly and accurately.”).

transparency and participation in government decision making as a means of achieving a more perfect pluralist society.”²⁴

In the past decades, the progressive democratization of western societies, the growing influence of the U.S. (also due to the collapse of the socialist regimes), the financial crisis of the State and its theorization, the development of sociological governance theories, all have contributed to change dramatically theories of administrative law²⁵ and to stress the role of civil society in filling the gaps between the State and the individuals.²⁶ In particular, through governance theories “everyone, or at least potentially everyone, is also seen as a participant in the collective decision-making process.”²⁷ According to a brilliant theoretical model, administrative law is today best described as a system of accountability networks, administration and civil society being two of the knots in these networks.²⁸

The evolution of European—and not only European—administrative law has meant profound changes both to its bases and in the ways at which decisions are arrived. The change has blurred the boundary between the citizen and the State, with civil society often assuming a pivotal role between the two.

Traditionally, collective decisions had to pass through national Parliaments: the legislature enacted statutes establishing administrative goals, assigning tasks and setting forth procedures. The administrative machinery was then summoned to implement them. The legitimacy of administrative bodies resulted from their implementation of laws. Legality thus also meant legitimacy. This is now only partially true. Direct social pressures on the administrative machinery have become stronger and stronger. The machinery of government has opened up to these pressures. For example, we can examine the emergence of participatory rights. Administrative authorities no longer make their decisions in solitude. They inform the addressees of their prospective decisions. They discuss their draft decisions with them. Only at the end of such procedures, do they take their decision. Legitimacy through the Parliament

²⁴ Shapiro, *supra* note 21, at 376; *id.* at 372 (providing a critical reference to this development of a pluralist democracy).

²⁵ See Bignami, *supra* note 6, at 860 (reflecting the dramatic change of administrative law theories).

²⁶ See Fabio Rugge, *Administrative Traditions in Western Europe*, in HANDBOOK OF PUBLIC ADMINISTRATION 113, 123 (B. Guy Peters & Jon Pierre eds., Sage 2003) (describing the relevance of democratization); Keating, *supra* note 2, at 10 (outlining the general trends reshaping governance discourse in Europe).

²⁷ Shapiro, *supra* note 21, at 369.

²⁸ Bignami, *supra* note 6, at 872.

is not enough. There is another type of legitimacy, “*Legitimation durch Verfahren*.”²⁹

So much so that “the very distinction between governmental and nongovernmental has become blurred, since the real decision-making process now continually involves, and combines, public and private actors.”³⁰ Seen from a different angle, “[b]lending State and society means that public administrators must become more adept at bargaining and governing through instruments such as contracts, rather than depending upon direct authority to achieve the ends of government.”³¹ Public administration is no longer the oracle of the “general interest”; it is a mediator of conflicts, a facilitator of debate, a midwife of consensus.³²

Of course, CSOs, more than individuals, are keen to take part in decision-making processes, advocacy being one of their *raison d'être*. Knowledge and passion, the usual tickets for participation,³³ inevitably become more compelling once they are vested in an organization specifically established to more effectively pursue them.³⁴ In this context, the E.U. faces specific problems. Representative democratic institutions are slowly asserting themselves, but there is the feeling that accrued civil society participation will strengthen the legitimacy of the whole E.U. construction.³⁵

III. AN ELUSIVE DEFINITION

It would clearly be preferable to provide an intensional or coactive definition of “civil society.” However, there are a number of definitions used in different contexts and disciplines. At times, civil society is opposed to the State; its organizations are then called non-governmental organizations (“NGOs”). Other times, it is the space between the State and the market; in

²⁹ Cassese, *supra* note 13, at 1006; *see also* F. WERNER, *LEGITIMATION DURCH VERFAHREN* (Suhrkamp 2001).

³⁰ Shapiro, *supra* note 21, at 370.

³¹ Peters & Pierre, *supra* note 23, at 4.

³² *See* Daniela Obradovic & Jose M. Alonso Vizcaino, *Good governance requirements concerning the participation of interest groups in EU consultations*, 43 COMMON MKT. L. REV. 1049, 1050 (2006) (referring to the E.U. Commission as a “policy entrepreneur, collecting views and recommending policies for action”); *see also id.* at 1053 (referring to the idea that public institutions “arbitrate between competing claims”); Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 987 (2008) (describing the U.S. experience of regulated negotiations); Shapiro, *supra* note 21, at 372.

³³ *See id.* at 374.

³⁴ This is certainly the case in the E.U. *See* Luis Bouza García, *Can segmented public foster a general public sphere in the EU? An example from the consultation practices of the European Commission*, 9 OBSERVATORIO J. 169, 171 (2009) (“[C]itizens’ individual participation in the European public space is not strong and . . . it is organized groups which play a main role.”).

³⁵ Olivier De Schutter, *Europe in Search of its Civil Society*, 8 EUR. L.J. 198, 198 (2002).

this case, the not-for-profit label is often preferred. At times individual citizens are considered to be part of the civil society; other times a meta-individual organization is required.³⁶

As already remarked, the paradigmatic model of the nation State was very much bipolar. As is often the case, the paradigm implied a drastic simplification of actual social relations while simultaneously forcing it upon reality to conform it to the abstract pattern. The progressive democratization of the nation State along with other changes already mentioned has seen the growth in relevance of actors different from both the State and the individual citizens (or families, but in the nineteenth century and for most of the twentieth century, the difference had limited relevance). The paradigm has become untenable, and to find the place of civil society in administrative law has become a necessity.

This area between the State and the individual citizens is where this paper intends to dwell, with an additional qualification. The organizations considered here will be those pursuing—or purportedly pursuing—general interests as opposed to commercial or profit oriented interests. The latter are a well know fixture of law and do not present specific problems in administrative law. Indeed, in administrative law, corporations or companies are treated the same as individual citizens, enjoying participatory rights when their individual interest is at stake. Having said so, a caveat is needed. Once we abandon the idea that the general interest is what is considered as such through the legislative process, many organizations (and even individuals) will lay claims as bearers of some general interest. This is the case with trade unions and may also be the case with industry associations, both often portraying themselves as standard bearers of societal and economic development. The role of such associations will be considered here, as well. Although their members might be corporations or companies, they do not directly pursue profit-oriented interests. As is the case with, for instance, trade unions or environmental associations, they pursue the interests of their associates claiming a parcel of the general interest.³⁷

In sum, the focus here will be on those a) organizations which b) are not public, in the sense that they are not part of the State or treated as an articulation of it, and this c) independently from their being c1) motivated by some high (or less so) ideals, or c2) rather business- or professionally-oriented, or simply c3) not for profit; d) natural and legal persons pursuing their individual interests will instead fall out of the scope of the research. More or less, the idea is to consider the space between the State and individuals (including firms therein). Organization will be an important

³⁶ See also *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*, at 6, COM (2002) 704 final (Nov. 12, 2002); see *infra* note 38 and accompanying text (discussing the approach engrained in Communications from the Commission).

³⁷ See De Schutter, *supra* note 35, at 204 (detailing a different structure of civil society participation).

element, but the pursuit of a meta-individual interest would be required as well.³⁸

It should be noted that we are not thus trying to give a definition of “civil society” suitable for every circumstance. And again, the above does not mean that some of the questions raised when considering the role of civil society are completely different from those raised in the relationships and exchanges between the State and individuals (here, covering both citizens and corporations or companies, and natural and legal persons). Only when there is an organization is it easier for it to lay a claim as the bearer of a particle of the general interest, and maybe of sovereignty. This is why, it is believed, civil society either poses specific questions or gives a special twist to questions which normally are raised in administrative law.

IV. WHAT DO CSOS DO?

Basically, CSOs may be involved in both policy formulation and policy delivery. The distinction is obviously a logical one. One thing is the decision to build a school, it is another thing to have it built and classes started. In practice, there may often be a certain continuum. For instance, an administrative decision implementing a regulation may be both policy formulation and delivery, depending on the amount of discretion left to the decision-maker and on whether, and to what extent, the decision will have the force of a precedent.

Of more relevance here is, therefore, the distinction between, on the one hand, the adoption of legally bindings measures (including both regulatory measures and individual decisions), and, on the other hand, the actual provision of material services (even if it has to be admitted that in some jurisdictions the latter too might be read as implying the adoption of legally binding measures; for example, the decision to admit a patient to benefit from the National Health Service). The relevant services will be offerings to the general public or, and more often, to a section thereof or to individuals.

Basically, as it is shown, the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, better known as the Aarhus Convention,³⁹

³⁸ See *supra* note 36 and accompanying text (describing the more inclusive approach taken by the Commission in that it also covers economic operators not generally considered to be “third sector” or NGOs). This might make sense since the Communication is concerned with all possible participants to consultations organized by the Commission, and obviously large companies and corporations can here play a role; moreover, everyone, including individuals, may take part in these consultations, so that for the Commission civil society is short for anything which is neither E.U. institutions or member States. The focus is obviously narrower here.

³⁹ See *generally* UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, <http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention.html>; see ÁINE RYALL, EFFECTIVE JUDICIAL PROTECTION AND THE ENVIRONMENT

involving CSOs in decision-making processes entails a combination of three rights, namely access to information, participatory rights during the procedure, and access to justice.⁴⁰

Right of access to information is obviously relevant not just as a precondition to meaningful participation, but as an enabler for CSOs operating as monitors of the activities of public institutions. However, the right of access hardly poses specific questions concerning the role of CSOs. Right of access is again relevant when we think to the monitoring role of CSOs; CSOs have an important place in the transparency and accountability mechanisms of governance in that, unlike individual citizens, they have the time and resources to oversee and investigate public and private activities and to blow the whistle on wrongdoings, which in administrative law parlance would be considered cases of maladministration.⁴¹ It has, however, to be remarked that the possible role of CSOs with reference to policy monitoring is not in the end different from the role of, for instance, media. Unsurprisingly, some of the most relevant cases on right to access decided by the European courts of what is now the E.U. were brought by a news outlet and by an environmental organization, respectively.⁴²

Access to justice and the remedies available are a discreet theme by themselves and will not be discussed in much detail here.⁴³ In fact, as E.U. law stands today, private litigants including CSOs will not normally (and unless they show that their position is directly concerned) be granted standing in the E.U. courts to challenge E.U. provisions adopted without their participation or without taking into account due account their participatory contribution.⁴⁴ As will be seen, the situation is different under the Aarhus Convention.⁴⁵

The main focus here is on participation in decision-making procedures and what is relevant is that bundle of rules which in different jurisdiction go under the label of fair hearing, due process or something

IMPACT ASSESSMENT DIRECTIVE IN IRELAND 49 (Hart 2009); B. Dalle, *Instruments of a Universal Toolbook or Gadgets of Domestic Administration? The Aarhus Convention and Global Governance*, in RIVISTA TRIMESTRALE DIRITTO PUBBLICO 34 (2008).

⁴⁰ A similar assessment would be granted on the basis of the U.S. Administrative Procedure Act. See Rubin, *supra* note 5, at 100.

⁴¹ See KENNETH CLINTON WHEARE, MALADMINISTRATION AND ITS REMEDIES 6 (Stevens & Sons 1973).

⁴² Case T-194/94, Carvel & Guardian Newspapers v. Council, 1995 E.C.R. II-2765 (noting that Carvel was a journalist working with U.K. newspaper *The Guardian*); Case T-264/04, WWF UK v. Comm'n, 2007 E.C.R. II-911.

⁴³ See, e.g., Case C-115/09, BUND, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen GmbH & Co KG, 2011 E.C.R. I-; Case C-240/09, Lesoochránárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky, 2011 E.C.R. I-; Case C-263/08, DLV, 2009 E.C.R. I-9967.

⁴⁴ Case C-263/02 P, Comm'n v. Jégo-Quéré, 2002 E.C.R. I-3425.

⁴⁵ See also Ryall, *supra* note 39, at 59.

similar.⁴⁶ Participation may come under many different guises.⁴⁷ Participation of the potential addressee in decisions infringing on his or her property or another legal entitlement is different from participation as consultation of the stakeholders,⁴⁸ which in turn is deeply different from taking part in the decision-making process and being able to negotiate its outcome.⁴⁹ Defense, consultation, and negotiation leading to co-regulation or co-decision⁵⁰ are three very different kinds of participation, indeed.⁵¹

Coming to policy delivery, CSOs may be involved in many different ways, namely either being the ones that actually provide the services or simply monitoring how the services are provided by the public sector. The latter is obviously relevant, and CSOs are coupled here with the media in raising the awareness of the general public regarding possible cases of maladministration. From the point of view of administrative law, this form of involvement does not, however, raise specific problems going beyond the general questions of right of access to information and right of access to courts. The focus, therefore, will be on CSOs delivering services to the general public or, and more often, to a section thereof, or to individuals.

V. PROCEDURAL AND PARTICIPATORY ISSUES

A. Participation in Proceedings for the Adoption of Legally Individual Binding Measures (and Judicial Protection Against the Same Measures)

In a number of common law jurisdictions, the right to take part in administrative proceedings—normally proceedings for the adoption of individual decisions—developed from the principle of fair hearing. As such,

⁴⁶ See Sérvulo Correia, *Administrative Due or Fair Process: Different Paths in the Evolutionary Formation of a Global Principle and of a Global Right*, in VALUES IN GLOBAL ADMINISTRATIVE LAW 313 (G. Antony et al. eds., Hart 2011) (providing a comparative assessment of different traditions).

⁴⁷ See also Francesca Bignami, *Three Generations of Participation Rights in European Administrative Proceedings*, 68 LAW & CONTEMP. PROBS. 61, 61 (2005) (referencing specifically the evolution of E.U. law).

⁴⁸ L. Azoulai, *Le principe de bonne administration*, in DROIT ADMINISTRATIF EUROPÉEN 493, 502 (J.M. Auby & J. Dutheil de La Rochère eds., Bruylant 2007).

⁴⁹ See e.g., Cristoph Möllers, *European Governance: Meaning and Value of a Concept*, 43 COMMON MKT L. REV. 313, 321 (2006) (providing that participation is at times equated with consultation, but it is not necessarily so, because the latter kind of participation could be considered “strong” participation, quite close to self- or direct government).

⁵⁰ See Paul Verbruggen, *Does Co-Regulation Strengthen EU Legitimacy?*, 15 EUR. L.J. 425, 425 (2009) (“In general terms, co-regulation can be described as a regulation method that includes the participation of both private and public actors in the regulation of specific interests and objectives. As such, co-regulation brings together private and public actors in the different stages of the regulation process.”).

⁵¹ See L. Betten, *The Democratic Deficit of Participatory Democracy in Community Social Policy*, 23 EUR. L. REV. 20, 29 (1998) (describing the difference between consultation and negotiation).

its primary beneficiary was the person who could be affected by the decision under consideration (*participation as defense*).

In the E.U., participation as defense is safeguarded to a fairly high degree, as can be evinced from *Kadi*, a case in which the Court of Justice referred to the constitutional role of the judiciary to demonstrate the necessity to submit to judicial review anti-terrorism measures (including the freezing of funds) taken in pursuance of a resolution by the United Nations Security Council.⁵² The measure taken was then quashed because of a blatant breach of the right to fair hearing; the Court of Justice did not need to put in practice its indications as to the proper standard of review.⁵³

Kadi has been followed a number of times. In the *Melli Bank* case (concerning the freezing of funds belonging to a bank established in the United Kingdom and controlled by an Iranian credit institution involved in that country's nuclear program),⁵⁴ the then court of first instance held that the courts "must also ensure that the right to a fair hearing is observed and that the requirement of a statement of reasons is satisfied and also, where applicable, that the overriding considerations relied on exceptionally by the Council in disregarding those rights are well founded."⁵⁵

These days, participation as defense is generally granted in the E.U.,⁵⁶ in part because it is referred to in the provision of Article 41 of the Charter of Fundamental Rights, now having the same standing as the Treaties.⁵⁷ According to the Court of Justice:

[O]bservance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question That principle requires that the addressees of

⁵² Joined Cases C-402/05 P & C-415/05 P, *Kadi and Al Barakaat Int. Found. v. Council*, 2008 E.C.R. I-3649; see also F. Fabbrini, *Silent enim leges inter arma? La Corte Suprema degli Stati Uniti e la Corte di Giustizia europea nella lotta al terrorismo*, RIVISTA TRIMESTRALE DIRITTO PUBBLICO 533, 591 (2009) (analyzing the parallel developments of U.S. and E.U. case law on anti-terrorism).

⁵³ See Giacinto della Cananea, *Global Security and Procedural Due Process of Law between the United Nations and the European Union*, 15 COLUM. J. EUR. L. 511, 516 (2009) ("[T]he situation of *Kadi* was a reminder of Kafka's nightmare of a process in which the individual ignores the charges and is deprived of ordinary process rights.").

⁵⁴ Joined Cases T-246/08 & T-332/08, *Melli Bank v. Council*, 2009 E.C.R. II-2629.

⁵⁵ *Id.*

⁵⁶ See Roberto Caranta, *Evolving Patterns and Change in the EU Governance and their Consequences on Judicial Protection*, in TRADITION AND CHANGE IN EUROPEAN ADMINISTRATIVE LAW 15 (Roberto Caranta & Anna Gerbrandy eds., Europa Law Publishing 2011).

⁵⁷ See generally JILL WAKEFIELD, *THE RIGHT TO GOOD ADMINISTRATION* (Wolters Kluwer Law & Business 2007).

decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views.⁵⁸

More than that, participation as defense is considered one of the pillars of global administrative law; participation is the body of basic rules which are followed by supranational and transnational institutions, such as the panel of the World Trade Organization (“WTO”).⁵⁹

Participation as defense may however pose some special challenges to CSOs. Fair hearing and similar notions were developed for the defense of freedom and property. They are part and parcel of the mechanism of the legal individualist thinking developing from the Age of Reason. Individualism is not referred to here with the same meaning ascribed to it in current law and economic analysis.⁶⁰ We refer instead to the nineteenth century idea that rights are bestowed to and enjoyed by individuals—natural and legal persons, i.e. men, women, and companies, or corporations—rather than by communities, such as families, trade and craftsmen guilds, religious orders, and chapters of the Church or churches as was the case during the Middle Age. It is well known that, in the past, even animals were at times considered as holders of rights (mainly defense rights in criminal cases).⁶¹

The focus on individuals only having individual rights was compatible with the idea that the State was the entity responsible for looking after supra-individual interests deserving to be considered general interests, and obviously contributed to reinforce the bipolar character of the modern nation States.

CSOs may well have individual rights corresponding to this meaning, such as property or free speech. The reason for the existence of such organizations is, however, normally advocacy on behalf of someone else or something else. Trade unions fight for the interest of workers; workers may be syndicated, but at times they are not; if the latter is the case, it is difficult to maintain that trade unions have a mandate or are agents acting on behalf of the workers. Lack of mandate is even more evident in the

⁵⁸ Case C-32/95 P, *Comm’n v. Lisrestal*, 1996 E.C.R. I-5373; *see also* Case T-228/02 *Organization des Modjahedines du peuple d’Iran v. Council*, 2006 E.C.R. II-4665.

⁵⁹ *See* Sabino Cassese, *Global Administrative Law: An Introduction*, 37 *J. INT’L L. & POL.* 663, 663 (2005); D. Gartner, *Beyond the Monopoly of States*, 32 *U. PASADINA J. INT’L L.* 595, 617 (2010); Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 *EUR. J. INT’L L.* 187 (2006); della Cananea, *supra* note 53, at 516 (specifically addressing the area of global sanctioning measures).

⁶⁰ Robert Ahdieh, *Beyond Individualism in Law and Economics*, 91 *B.U. L. REV.* 43 (2011) (capturing how in that context, individualism is quite a hot topic).

⁶¹ *See, e.g.,* Katie Sykes, *Human Drama, Animal Trials: What the Medieval Animal Trials Can Teach Us About Justice for Animals*, in 17 *ANIMAL L. REV.* 273 (2011) (referring to due process). Today the problem of animal rights has come back, taking quite a different twist. *See also* GARY FRANCIONE & ROBERT GARNER, *THE ANIMAL RIGHTS DEBATE: ABOLITION OR REGULATION?* (Columbia University Press 2010).

case of CSOs working to promote democracy, human rights, welfare of indigenous tribes, animals, the environment, or cultural heritage.⁶² In the latter instances, not only is there no mandate, but there cannot be any, as no natural or legal person can claim individual rights with reference to cultural heritage.

The problem is well-illustrated by the *Trianel* case, decided by the Court of Justice (now of the E.U.).⁶³ *Trianel Kohlekraftwerk Lünen GmbH & Co. KG* sought permission to construct and operate a coal-fired power station in Lünen in Germany. Within eight kilometers of the project site, there are five areas designated as special areas of conservation within the meaning of Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora, as amended by Directive 2006/105/EC (“the Habitats Directive”). The partial permission granted to *Trianel* was challenged by the *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV* (the *Nordrhein-Westfalen* branch of Friends of the Earth, Germany; “Friends of the Earth”) because of the lack of an environmental impact assessment. The German court seized with the action considered that, on the basis of domestic law, environmental protection organizations are not entitled to rely on infringement of the law for the protection of water and nature or on the precautionary principle.

Under German law, the right of action accorded to non-governmental organizations is comparable with that provided for under the general rules of administrative procedural law governing actions for annulment and, in particular, under §§ 42(2) and 113(1) of the Administrative Court Rules (*Verwaltungsgerichtsordnung*, - *VwGO*), which provide that an action challenging an administrative measure will be admissible only if the administrative measure affects the claimant’s rights, that is to say, his individual public law rights. The decisive criterion for establishing whether a provision of national law protects individual rights is the extent to which that provision adequately specifies and delimits the interest or right protected, envisages the way in which the right might be regarded as impaired, and determines the class of persons protected. According to the court, the rules against pollution primarily concern the general public and not the protection of individual rights.⁶⁴

As we will see, the German court, in turn, seized the Court of Justice doubting whether the domestic approach is consistent with the obligations flowing from the Aarhus Convention. The situation as described by the national court is, however, illustrative of the challenges faced by CSOs when trying to make their voices heard in jurisdictions that still adhere to the individualistic approach to legal entitlements.

⁶² See Anderson, *supra* note 1, at 844.

⁶³ Case C-115/09, *BUND, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen GmbH & Co KG*, 2011 E.C.R. I-.

⁶⁴ See *id.*

In considering the position of CSOs, it must be stressed that individual administrative decision-making procedures—or adjudication, to use a term more current in the U.S.—are quite often polycentric, in that a number of individual and supra-individual (including general) interests may be involved beyond, and in addition to, the general interest represented by the decision-maker and the individual interest that might be directly affected by the decision under consideration.⁶⁵ For instance, the decision to allow the building and operation of a factory may involve conflicting environmental and economic development interests, the interests of the entrepreneur asking for the permission to build, those of the owners of land and houses in the proximity (which according to the case, could either benefit from the development or see their property lose value), and those of local dwellers seeking to protect their health from potential emissions resulting from the industrial activities under consideration.

The fact that administrative disputes are often polycentric obviously makes adjudication more complex when compared with civil disputes normally opposing just two parties. To this, it is to be added that interests involved in administrative disputes might have, and often do have, a different relevance and importance. Without necessarily buying into the tyranny of the general interest, it is beyond discussion that the general interest is expected to override private interest(s) in a number of occasions. That is why taking or expropriation is well-known in different jurisdictions. Administrative disputes are therefore not only often polycentric; they tend to be asymmetric.⁶⁶

The polycentric and asymmetric nature of administrative disputes does not by itself impact the operation of participation as defense. It however stresses the limit of the individualist approach to the law, as some of the interests recalled are not individual interests and the State alone could hardly be supposed to show the same determination in pursuing with the same vigor all the often-conflicting general interests involved. In the instance given above, when economic development and the protection of the environment are at the loggerheads, the State will have to choose one interest over the other, and in so doing the latter risks being defenseless.

This is particularly true given that an additional factor of complexity in administrative disputes is that, in many jurisdictions, the decision-maker is vested with wide discretion. This means that the tipping point where one interest prevails over the other is not fully defined by the law, as is the case

⁶⁵ See Lon L. Fuller, *Adjudication and the Rule of Law*, 54 PROC. AM. SOC'Y INT'L L. 1, 1–8 (1960) (introducing the term “polycentric dispute” in administrative sciences).

⁶⁶ The idea of asymmetric disputes is well known to international law and refers to issues dividing a rich and a developing State. See, e.g., Klint Alexander, *Rethinking Retaliation in WTO Dispute Settlement System: Leveling the Playing Field For Developing Countries in Asymmetric Disputes*, in THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES (Kern Alexander & Mads Andenas eds., Leiden 2008) 483, 483. In administrative law, the idea is different, and turns around on the relevance of different interests.

in civil disputes. On the contrary, to a large extent, it is left to the public authority to decide which interest is to prevail on the specific circumstance of every situation. Often enough in European administrative law, the decision-maker is not just a referee between conflicting interests. The decision-maker is also a player in the polycentric dispute at hand, in so far as it is representing one among the possibly numerous relevant general interests.

Individualism needs to be set aside in administrative law to allow CSOs to take the defense of general interests against the State itself. In some European countries, individualism has made the life of CSOs—and especially of public interest organizations—quite difficult. As already recalled, in Germany, CSOs are routinely denied standing to challenge administrative decisions, and in the past this was also the case in Italy.⁶⁷

To provide a remedy to this situation, in 1998, the United Nations Economic Commission for Europe (“UNECE”) has adopted a Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, better known as the Aarhus Convention. Both the Member States of the E.U. and the E.U. itself have acceded to the Convention, which means that, under given conditions we cannot analyze in detail here,⁶⁸ the Convention is now binding on the Member States as a matter of E.U. (rather than of international) law.⁶⁹ Briefly said, this in turn means that the Aarhus Convention overrides national rules, and national courts are expected to set rules aside to give consequence to the overriding direct effect of E.U. law (something that is said to be an effect of the *primauté* (primacy) of E.U. law over national law). As a consequence of this *primauté*, in *Trianel*, the Court of Justice held that the German rules at issue had to be set aside because they basically deprive environmental protection organizations of the possibility of verifying compliance with environmental rules which, for the most part, address the public interest and not merely the protection of the interests of individuals as such; stated otherwise, standing “cannot depend on conditions which only other physical or legal persons can fulfill, such as the condition of being a more or less close neighbor of an installation or of suffering in one way or another the effects of the installation’s operation.”⁷⁰

The approach in *Trianel* was followed (with some differences due to the technicalities of the direct effect doctrine which do not concern us here) in the so-called *Brown Bear* case.⁷¹ Lesoochranárske zoskupenie VLK

⁶⁷ Cass., Sez. Un., 8 maggio 1978, n. 2207, in Foro it., 1978, I, 1090.

⁶⁸ See Ryall, *supra* note 39, at 52.

⁶⁹ Case C-240/09, Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky, 2011 E.C.R. I-.

⁷⁰ Case C-115/09, BUND, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen GmbH & Co KG, 2011 E.C.R. I-.

⁷¹ Case C-240/09, Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky, 2011 E.C.R. I-.

(“zoskupenie”), an association established in accordance with Slovak law whose objective is the protection of the environment, had challenged the decision by the Ministry of the Environment of the Slovak Republic to refuse the association’s request to be a “party” to the administrative proceedings relating to the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas, or the use of chemical substances in such areas. The Court of Justice held that it was the responsibility of the national courts to interpret domestic legislation so as to enable an environmental protection organization to challenge before a court decisions taken following administrative proceedings liable to be contrary to E.U. environmental law.⁷²

To do away with restrictive national takes on the involvement of civil society organizations in policy and decision making procedures liable to affect the environment, the Aarhus Convention provides a generous definition of those involved in the procedures just mentioned. Under Article 2(4), “The ‘public’ means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups.” True, national legislation is referred to here, as is the case in Article 2(5), “‘The public concerned’ means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.”⁷³

However, while it is to be conceded that the Aarhus Convention is often worded in ways that might appear to be designed to minimize changes in domestic law, the case law by the Court of Justice has given the Convention and the E.U. provisions adopted to give force to the Convention a functional interpretation aimed at strengthening the protection of the environment and thus enhancing the standing of NGOs.⁷⁴ To this end, the Court of Justice has referred to the E.U. provision implementing Article 9(2) of the Convention, according to which, “[w]hat constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention.”⁷⁵

As it is clear from its title, the Aarhus Convention also provides for participation rights. Articles 6 to 8 concern respectively participation a) in decision-making procedures for specific activities (which could be broadly

⁷² *Id.*

⁷³ See Ryall, *supra* note 39, at 55.

⁷⁴ See, e.g., Case C-115/09, BUND, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen GmbH & Co KG, 2011 E.C.R. I-; see also Case C-263/08, DLV, 2009 E.C.R. I-9967.

⁷⁵ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art. 9, June 25, 1998.

translated into adjudication), b) in procedures for the adoption of plans, programs and policies relating to the environment, and finally c) in procedures for the preparation of executive regulations and “generally applicable legally binding normative instruments.”

Article 6, which is of immediate concern here, provides that the public concerned—as defined under Article 2(5) analyzed above—must be given certain information “early in an environmental decision-making procedure, and in an adequate, timely and effective manner.” This information covers both the proposed activity and the nature of possible decisions (or the draft decision and details as to the procedure which will be followed), including opportunities for the public to participate. Participants have right of access to the relevant information and may submit, in writing or, as appropriate, at a public hearing or inquiry, any comments, information, analyses or opinions they consider relevant; the outcome of the public participation must be taken into account in the decision which translates in a duty to give reasons.

The Aarhus Convention proves the case arguing that environmental law is very much a hotbed for legal innovation, and this is particularly true as the involvement of CSOs in decision-making procedures is concerned. It remains to be seen how these developments can become general trends in administrative law.

What has been discussed so far is very much participation as defense. The fact that the public administration has been transforming into a mediator of conflicts, a facilitator of debate, a midwife of consensus, while diminishing the asymmetry in administrative law, both increases the need for participation and has affected the nature of participation (including the rise of cases of *participation as co-decision*). As the next paragraph will show better, if the State takes up the role of umpire, all relevant interests must sit at the negotiating table, because those interests not represented will either be ignored or trampled upon.

B. Participation in Proceedings for the Adoption of Legally Binding Non-individual Measures

Numerous general or supra-individual interests, other than a large number of individual interests, are normally involved in rule-making or similar procedures (as in the case of the adoption of planning instruments). By the sheer number of people affected, these procedures affect vast interests. Even if both CSOs participation in adjudicatory procedures and individual participation in rule-making procedures cannot be ruled out as a matter of principle, rule-making or similar procedures have naturally become the elective ground for the participation of CSOs.

Participation rules concerning the adoption of measures having general or wide-ranging effects are, however, often less developed than the

rules on fair hearing in individual decision-making proceedings.⁷⁶ To take again the Aarhus Convention as an example, Article 7 provides that in the adoption of plans and programs relating to the environment, early public participation must be allowed; early participation meaning “when all options are open and effective public participation can take place.” Moreover, the results of participation must be taken into account by the decision-maker. Article 7 is however much more stringent as to the information which shall be provided to the general public. In addition, concerning the preparation of policies, Article 7 is content with prodding the signatories to endeavor to provide opportunities for public participation.

Article 8 on rule-making is somewhat more stringent, providing for a basic notice and comment approach open to the public, which should be given the opportunity to comment, directly or through representative consultative bodies. The latter might well be read as an oblique reference to participation as consultation. In rule-making proceedings, as well, we can see both instances of participation as defense (in the case of CSOs, this could be translated as *participation as advocacy or consultation*) and participation as co-decision (or rather as *co-regulation*). In both cases, but with an obviously accrued relevance in the latter, the most relevant legal questions pertain to the definition of who—and more specifically, which—CSOs must be invited to take part in the proceedings so that the outcome might be considered as a legitimate one.

In the E.U., the problem surfaced in the context of the European social dialogue, a regulatory procedure introduced after the Maastricht Treaty and focusing on social policies.⁷⁷ In essence, the social partners are involved in negotiating the content of rules on working conditions.⁷⁸ Briefly said, the Commission promotes the dialogue between European industry and workers *organizations* in view of the possible conclusion of agreements between the two sides of industrial relations.⁷⁹ Agreements may be given general binding force by the Council. Otherwise, they are implemented by the *organizations* themselves.⁸⁰ A big question in this framework is how far the *organizations* concerned may be said to be “representative” of the workers. In the context of social dialogue, the Commission employs “representativeness” criteria which—as it will be seen—have withstood judicial scrutiny in the only case brought to the attention of the E.U. courts.⁸¹

⁷⁶ See Herwig C.H. Hofmann, *Negotiated and non-negotiated administrative rule-making: The example of EC competition policy*, 43 COMMON MKT. L. REV. 153, 157 (2006) (providing a relevant discussion of some relevant E.U. rule-making procedure).

⁷⁷ See Betten, *supra* note 51, at 29; Verbruggen, *supra* note 50, at 433; PAUL CRAIG, *EU ADMINISTRATIVE LAW* 235 (Oxford University Press 2006).

⁷⁸ Catherine Barnard, *The Social Partners and the Governance Agenda*, 8 EUR. PUB. L. 80, 87 (2002).

⁷⁹ *Id.* at 88. The Commission acts as a “facilitator.” *Id.*

⁸⁰ This is a general issue regarding NGOs. See De Schutter, *supra* note 35, at 208.

⁸¹ Case T-135/96, *UEAPME v. Council*, 1998 E.C.R. II-2335.

UEAPME, an association of small and medium business (or “SMEs”), had challenged Directive 96/34/EC on parental leave, adopted by the Council following social dialogue between various representative organizations, which lead to a framework agreement between three horizontal organizations, not including UEAPME. UEAPME claimed it should have been associated with the negotiations since it represents the specific interests of SMEs.

The court of first instance remarked that UEAPME was consulted by the Commission in the first phase of the procedure, the problem being whether all organizations consulted have to be part of the negotiation leading to an agreement that is to be given binding force by the Council.⁸² On the basis of the provisions then ruling social dialogue, the court held that it was not up to the Commission but to the social organizations themselves to choose which social partners had to be involved in the negotiation.⁸³ Stated another way, no organization could claim a right to be involved.⁸⁴

This approach could be easily criticized as exclusive and possibly discriminatory. According to the court, however, before submitting an agreement to the Council the Commission is under a duty to assess whether the parties to the agreement are representative of the social partners.⁸⁵ In turn, the Council is under a duty to check whether this assessment has been duly performed.⁸⁶ On the substance of the case,⁸⁷ the court held that both the Commission and Council had checked whether the social partners having signed the agreement were sufficiently representative,⁸⁸ and were also correct in holding that the constituency represented by UEAPME was anyway represented by some of the other more representative organizations having signed the agreement concerned.⁸⁹

In the end, those who need to be represented at the negotiating table are those whose rights and interests are at stake, not necessarily all the CSOs that make their business by representing employers, workers or other categories. Generally speaking, the approach deserves to be commended, since it introduces a measure of competition among CSOs whose claims at representativeness cannot just be taken at face value.⁹⁰ Otherwise stated,

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Case T-135/96, UEAPME v. Council, 1998 E.C.R. II-2335.

⁸⁷ Inevitably, the all reasoning was framed in legal terms (standing, admissibility, etc.). This is described as “convoluted” reasoning. J. Scott & D.M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the ERU*, 8 EUR. L.J. 1, 13 (2002) (framing the analysis in governance discourse). It is, however, hard to see how (and why) a court could or should reason in non-legal terms.

⁸⁸ Case T-135/96, UEAPME v Council, 1998 E.C.R. II-2335.

⁸⁹ *Id.*; Anne Meuwese et al., *Towards a European Administrative Procedure Act*, 2 REV. EUR. ADMIN. L. 1, 15 (2009).

⁹⁰ See also De Schutter, *supra* note 35, at 210.

since participation, as it will be seen below, entails costs for all involved, it might make sense to look for representativeness thresholds, (provided of course they are reasonable and do not fight the rationale for participation).⁹¹

The latter proviso was at the heart of another case arising from the Aarhus Convention.⁹² The Municipality of Stockholm had concluded a contract with an electric company for works which entailed tampering with groundwater. The works were approved by Environmental Chamber of the District Court of Stockholm. Djurgården-Lilla Värtans Miljöskyddsförening (DLV), a local environmental association challenged the decision.

A number of questions were referred to the Court of Justice, including whether small, locally-established environmental protection associations might have a right to participate in the decision-making procedures with respect to projects with the potential to significantly affect the environment in the area where the association is active, but not have a right of appeal. According to the Swedish legislation then in force, only an association with at least 2,000 members could bring an appeal against a decision adopted in environmental matters.

The Court of Justice held that, while it is true that E.U. law implementing the Aarhus Convention leaves to national legislatures the task of determining the conditions that may be required in order for a non-governmental organization that promotes environmental protection to have a right of appeal under the conditions set out above, those national rules must both ensure “wide access to justice” and render effective the provisions of the applicable directive on judicial remedies.⁹³

According to the court, a national law might well require that such an association has as its object the protection of nature and the environment.⁹⁴ Moreover, “it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active.” However, the number of members required cannot be fixed by national law at such a level to run counter to the objective of allowing wide access to the courts, taking into account that some projects affect the environment on a local scale only.⁹⁵ The case of the Swedish Government was of course not

⁹¹ It is true that the number of members any organization might have is often a crude way to assess the relevance of any CSO; at the same time, the effectiveness assessment of the way CSOs operate is not easy, as shown by a massive literature which cannot be analysed here. *See generally* HELMUT ANHEIER ET AL., THE FUTURE OF PARTICIPATORY CIVIL SOCIETY ASSESSMENTS: A CONCEPTUAL ANALYSIS (United Nations Development Programme 2011), available at http://www.undp.org/content/dam/undp/documents/partners/civil_society/publications/tools_and_resource_sheets/CS%20Assessments_Conceptual%20Analysis.pdf. The role of CSOs in monitoring the performance of others, such as public institutions or private companies, is still another question.

⁹² Case C-263/08, DLV, 2009 E.C.R. I-9967.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

helped by the fact that only two associations actually have the required number of members. The Court also ruled that the requirements of E.U. law could not be met by compelling local associations to contact one of those two associations and ask them to bring an appeal, since such a system would give rise to a filtering of appeals contrary to the spirit of the law.⁹⁶ This case shows that, at times, the question is not only making sure that those who participate are sufficiently representative; what is sought is the widest participation possible.

The question of legitimacy might indeed be avoided with reference to participation as advocacy or consultation by allowing everyone to express their view. This is the approach followed in the E.U. concerning the Commission's legislative proposals. It is to be recalled that under E.U. law as it stands now, the Commission has an almost exclusive competence for submitting proposals for future legislation. The 2001 White Paper on European Governance already stressed the importance of having the civil society more involved in policy design, but also more responsible, meaning to have the relevant organizations following the principles of good governance, which include accountability and openness.⁹⁷

To implement this pledge, in 2002, the Commission adopted a Communication *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*.⁹⁸ The Communication lays down a number of general principles that should govern its relations with interested parties and a set of minimum standards for the Commission's consultation processes. It addresses the specific role of CSOs in stressing that, though the target groups of consultations may vary according to the circumstances and all relevant interests in society should have an opportunity to express their views, CSOs play an important role as facilitators of a broad policy dialogue.⁹⁹

The minimum standards for consultations laid down in the 2002 Communication give detailed indications as to the relevant considerations to be taken into account, including the need for specific experience, expertise or technical knowledge,¹⁰⁰ the track record of participants in previous consultations, the need for a proper balance, where relevant, between the representatives of social and economic bodies, large and small organizations or companies, and wider constituencies (e.g. churches and religious

⁹⁶ *Id.*

⁹⁷ *European Governance*, at 14, COM (2001) 428 final. A precedent characterized by the involvement of the civil society on a scale unheard before was the drafting of the Charter of Fundamental Rights. See De Schutter, *supra* note 35, at 207.

⁹⁸ *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*, *supra* note 36.

⁹⁹ *Id.* at 5.

¹⁰⁰ See De Schutter, *supra* note 35, at 207.

communities) and specific target groups (e.g. women, the elderly, the unemployed, or ethnic minorities).¹⁰¹

In practice, a draft proposal is published online, often along with a number of working documents of the services of the Commissions, including impact assessment of regulation analysis;¹⁰² public consultations are then opened on the “Your voice in Europe” website, which has taken the place of CONECCS (*Consultation, the European Commission and Civil Society*).¹⁰³

This intentionally all-inclusive approach has been, so far, quite successful in terms of reactions from different sectors of the civil society, widely intended, including CSOs.¹⁰⁴ For instance, consultations for the proposal for a Directive on public procurement and the proposal for a Directive on procurement by entities operating in the water, energy, transport and postal sectors drew more than 600 respondents.¹⁰⁵ It is to be added that this inclusive approach is combined with more structured participation institutes, including advisory bodies and hearings, and the need for selection criteria resurfaces here.¹⁰⁶ In practice, the Commission “proceeds to open consultation with the general civil society as a preliminary approach, but it then moves to much narrower discussion with stakeholders’ organizations experts.”¹⁰⁷ Moreover, the above does not necessarily apply to all of the different measures that make up a multifarious portfolio of more or less hard or soft regulatory measures, which can be adopted by the E.U. Commission (including guidelines and so on).¹⁰⁸ Finally, as it will be stressed again later in this paper, the principles and standards referred to here are rather of a soft

¹⁰¹ *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, supra* note 36, at 19.

¹⁰² See Meuwese, *supra* note 89, at 10. The authors, however, appear to lament the very basic nature of the information often provided. *Id.*

¹⁰³ See YOUR VOICE IN EUROPE, http://ec.europa.eu/yourvoice/index_en.htm (last visited Feb. 15, 2013).

¹⁰⁴ *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, supra* note 36, at 11 (expressly ruling out the option of restricting participation to representative European Organizations); see also *id.* at 16 (referring to an “inclusive approach”); De Schutter, *supra* note 35, at 209 (providing proposals for selecting CSOs).

¹⁰⁵ *Proposal for a Directive of the European Parliament and of the Council on Public Procurement and the Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal sectors*, SEC (2011) 1585 final (Dec. 20, 2011); *Public consultations, THE EU SINGLE MARKET*, http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/consultations/index_en.htm (providing an analysis of the participatory contributions).

¹⁰⁶ *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, supra* note 36, at 11; see also Meuwese, *supra* note 89, at 19.

¹⁰⁷ Bouza García, *supra* note 34, at 176.

¹⁰⁸ See *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, supra* note 36, at 10; Hofmann, *supra* note 76, at 170.

law nature. As the law stands up to now, concerned parties, including CSOs, do not have standing to challenge either the procedure followed or the rules approved.¹⁰⁹

An “everyone welcome,” fully inclusive approach is obviously the more difficult to sustain the more impact participation is having. Consultations may often be opened to everyone, but this approach just cannot work in the case of participation as co-decision. In the latter case, in or out choices are to be made.¹¹⁰

C. “Ossification” of Administrative Procedures and Legitimacy through Procedure

Beside this, the potential problems linked to participation—and not necessarily only the participation of CSOs, even if this is our focus here—are inevitably accrued the more rights are given to participants and the more duties to take into account participatory contributions are imposed on the decision-maker. Or, to word this differently, the magnitude of the problems depends on how these rights and duties are construed. The risk, in particular according to some current thinking expressed in the American legal literature, is that of the “ossification” of procedures.

Basically, as already recalled, involving CSOs in decision-making processes entails a combination of three rights, namely access to information, participatory rights during the procedure, and access to justice. By itself, right of access to information can hardly lead to ossification of procedure, and this is particularly true with the development of internet technologies and the process of shifting information from paper to electronic files. Access to justice can obviously contribute to ossification since it is the sharpest tool available to challenge the final outcome of the procedure, including rising procedural issues.¹¹¹ It has been remarked that the “adversarial atmosphere often contributes to the expense and delay associated with regulatory proceedings, as parties try to position themselves for the expected litigation.”¹¹²

What is however is to be stressed again is that, generally speaking, in the present state of E.U. law, private litigants, including CSOs, will not normally be granted standing to challenge the E.U. legislative provisions adopted without their participation or without taking into due account their participatory contribution, unless they show that their position is directly

¹⁰⁹ Case C-263/02 P, *Comm’n v. Jégo-Quéré*, 2002 E.C.R. I-3425; Meuwese, *supra* note 89, at 13 (discussing more recent cases).

¹¹⁰ De Schutter, *supra* note 35, at 211.

¹¹¹ See Case C-115/09, *BUND, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen GmbH & Co KG*, 2011 E.C.R. I-; Case C-240/09, *Lesoochránárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, 2011 E.C.R. I-; Case C-263/08, *DLV*, 2009 E.C.R. I-9967.

¹¹² Lubbers, *supra* note 32, at 991.

concerned.¹¹³ Again, the focus here is on participation in decision-making procedures and what is relevant is that bundle of rules which in different jurisdictions go under the label of fair hearing, due process or the like.¹¹⁴

The right to a fair hearing has a centuries old and noble place in the common law. It is often recalled that in 1723, the Court of King's Bench issued mandamus to the University of Cambridge requiring the restoration to one Dr. Bentley of the degrees of Bachelor of Arts and Bachelor and Doctor of Divinity. Dr. Bentley had been deprived of his degree by the University because of some outstanding debts without being granted a hearing. On passing judgment for Dr. Bentley, Justice Fortescue famously said:

The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defense.¹¹⁵

This is obviously participation as defense and the word itself is repeated twice in few lines. As such, fair hearing was transplanted from the law of civil and criminal procedure to what we would call administrative law. The fair hearing principle contamination from court procedures to administrative ones was obviously helped by the fact that *pace Montesquieu* procedures and functions were no much set apart.¹¹⁶

Participation as defense has been termed as “first generation participation.”¹¹⁷ In the E.U., the right to a hearing initially emerged “in the 1970s in competition (antitrust) proceedings and was later extended to anti-dumping and customs proceedings.”¹¹⁸ As already recalled discussing the *Kadi* case, this is a right taken seriously in the E.U.¹¹⁹

Myth aside, the principle of fair hearing has kept a marked judicial characterization, and as such, it was extended to rule-making procedures by the United States Administrative Procedure Act (“APA”) of 1946. Indeed, adjudication, which is the term usually used for what in Europe would be considered proceedings for the adoption of individual measure, is a generic enough term that can be used to designate a judicial process.¹²⁰

¹¹³ Case C-263/02 P, *Comm'n v. Jégo-Quéré*, 2002 E.C.R. I-3425.

¹¹⁴ See *Sérvulo Correia*, *supra* note 42, at 313 (providing a comparative assessment of different traditions).

¹¹⁵ *R. v. Chancellor of the Univ. of Cambridge*, (1723) 93 Eng. Rep. 698, 704; see also *R. v. Sussex Justices, ex parte McCarthy*, (1923) Eng. Rep. 233.

¹¹⁶ Rubin, *supra* note 5, at 107; Bignami, *supra* note 6, at 892.

¹¹⁷ Bignami, *supra* note 47, at 61 (classifying participatory rights in successive generations).

¹¹⁸ See *id.* at 62.

¹¹⁹ See *Joined Cases C-402/05 P & C-415/05, P Kadi & Al Barakaat Int'l Found.*, 2008 E.C.R. I-3649.

¹²⁰ Rubin, *supra* note 5, at 109.

This has not been without criticism. It has been written that the APA was already out of date when enacted because of the “advent of the administrative State,” which would have demanded “a transition from a system of rules elaborated and implemented by the judiciary to a system of rules elaborated and implemented by administrative agencies.”¹²¹ Of course, one could very well consider the APA as a reaction to the New Deal legislation and an attempt, quite successful by the way, to reaffirm the specific U.S. administrative law tradition.¹²² In any case, not everyone is so critical, and some scholars in Europe view the APA as a possible model for a codification of E.U. administrative law.¹²³

As is well known, formal and informal (“notice and comment”) rule-making are distinguished in the APA. The former is very seldom used because it is considered simply too cumbersome; however, the case law has ultimately “judicialized” notice and comment procedures, too.¹²⁴ This has been achieved by taking a hard look at both whether the information provided is sufficient and closely scrutinizing the logical and factual basis of the rule adopted.¹²⁵

For the reasons given above, while process-like rights are quintessential to participation as defense in individual decision-making procedures, they might easily go beyond the mark, particularly in both the cases of rule-making procedures and/or participation as consultation (true cases of participation as co-decision are in principle different, since, once beyond the question as to the existence of a right to participate, the substantive issue of the agreement being reached or not absorbs all procedural issues). The U.S. experience shows that participants—including CSOs—may easily hijack rule making proceedings when consultations are “judicialized” to a high degree.¹²⁶

In the U.S., a way out of ossification was in the past sought in negotiated regulation, which is in many ways similar to the E.U. social

¹²¹ Rubin, *supra* note 5, at 96. The author further contends that the APA: [I]mposes a number of procedural requirements on the way in which administrative agencies may act, these requirements are derived from pre-administrative modes of governance, namely rulemaking by the legislature and adjudication by judiciary. Even more basically, they are derived from an essentially judicial concept of governance in which laws are discovered rather than invented and policy making is always incremental.

Id. at 2.

¹²² Meuwese, *supra* note 89, at 7 (providing further remarks and referencing the role of the American Bar Association).

¹²³ See, e.g., *id.* at 3.

¹²⁴ Anna Gerbrandy, *Models of Judicial Review: The search for instances of the dialogue-model of judicial review in the USA*, in *TRADITION AND CHANGE IN EUROPEAN ADMINISTRATIVE LAW 15* (Roberto Caranta & Anna Gerbrandy eds., Europa Law Publishing 2011); Meuwese, *supra* note 89, at 23.

¹²⁵ Meuwese, *supra* note 89, at 25.

¹²⁶ Lubbers, *supra* note 32, at 991.

dialogue discussed above.¹²⁷ Basically, the competent agency calls on all concerned parties to meet and negotiate a proposed rule. A neutral mediator or facilitator chairs the meetings, which do not abide to the strict adversarial rule now imposed on formal adjudication.¹²⁸ The agency operates somewhat on the sidelines; its contacts with the parties are informal and unstructured.¹²⁹ However, regulated negotiation has been used less and less, one reason being the significant time and costs involved.¹³⁰ For an outsider, the impression is that the U.S. is still trying to find ways to tackle the problems linked to civil society involvement in decision-making procedures.

So far, the E.U. has expressly refused to follow the U.S. example. The 2001 White Paper on European Governance recognized only to a limited extent the legal relevance of participation and civil dialogue.¹³¹ The Commission was afraid of strengthening participation too much—as it sees it—along the U.S. model, “[c]reating a culture of consultation cannot be achieved by legal rules which would create excessive rigidity and risk slowing the adoption of particular policies. It should rather be underpinned by a code of conduct that sets minimum standards.”¹³² Indeed, in the White Paper “[w]e find little evidence of a shift towards greater involvement of non-governmental actors in governing.”¹³³

Accordingly, the already referred to Communication, *Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission*, does not lay down legally binding rules (and a communication is not the legal instrument apt to this end).¹³⁴ As already recalled, the idea here is that interest groups fulfilling a number of good governance criteria—namely representativeness, accountability, and transparency—have the right to be

¹²⁷ See Hofmann, *supra* note 76, at 165 (explaining that instances of negotiated rule-making can also occur with the Commission on one side and the Member States on the other).

¹²⁸ See Lubbers, *supra* note 32, at 987. The U.S. adversarial culture, however, is ultimately contaminating these kinds of procedures. *Id.* at 991.

¹²⁹ *Id.* at 990.

¹³⁰ *Id.* at 996.

¹³¹ *European Governance*, COM (2001) 428 final.

¹³² See Meuwese, *supra* note 89, at 3; see also Herwig C.H. Hofmann, *Seven Challenges for EU Administrative Law*, 2 *REV. EUR. & ADMIN. L.* 37, 50 (2009); Kenneth A. Armstrong, *Rediscovering Civil Society: The European Union and the White Paper on Governance*, 8 *EUR. L.J.* 102, 112 (2002) (discussing the merits of the hard versus soft approach to participation).

¹³³ See Colin Scott, *Governing Without Law or Governing Without Government? New-ish Governance and the Legitimacy of the EU*, 15 *EUR. L.J.* 160, 170 (2009); see De Schutter, *supra* note 35, at 201 (writing of “generous, but exceedingly vague, recommendations”); see also Armstrong, *supra* note 132, at 116; Simona Rodriguez, *Law-making and policy formulation: il ruolo della società civile nell’Unione europea*, in *RIVISTA TRIMESTRALE DIRITTO PUBBLICO* 125, 136 (2010) (referring to the Italian experience);

¹³⁴ *European Governance*, COM (2002) 704 final; see Silvére Lefevre, *Interpretative communications and the implementation of Community law at national level*, 29 *EUR. L. REV.* 808, 808 (2004) (providing communications in E.U. law).

consulted.¹³⁵ Given the difference between participation as consultation and participation as negotiation, the preference clearly lies with the former,¹³⁶ so much so that participants do not have a right to receive individual feedback from the Commission.¹³⁷

What in the end is the most glaring difference between the U.S. and the E.U. is that under E.U. law, only participation as defense and participation as co-decision in the area of social dialogue gives rise to justiciable rights. Participation as consultation does not.¹³⁸ It has been argued, however, that Article 11 of the Treaty on the European Union, in so far as it *inter alia* calls for open, transparent and regular dialogue with representative associations and civil society, might provide for an evolution in the sense of the legalization of participatory rights.¹³⁹

Ossification not being, so far, a relevant risk or foe in Europe, civil society participation has been often discussed as a way to strengthen what is perceived the fledging legitimacy of E.U. institutions.¹⁴⁰ The possible role of CSOs in governance has, however, had its fair share of critics, who lament the feared demise of traditional representative institutions and criticize the perceived lack of legitimacy and accountability of these organizations.¹⁴¹ These concerns may have some merits, even if it is to be remarked that the legitimacy of representative democracy is too often taken for granted.¹⁴²

Manifestly, more must be done to shed light on CSOs in the way of imposing transparency rules, like the mandatory disclose of funding sources. The minimum standards for consultations laid down in the 2002 Communication already referred to provide a number of relevant indicia.¹⁴³ However, what is needed is a transparent arena where CSOs vie to represent

¹³⁵ See Obradovic & Vizcaino, *supra* note 32, at 1049; Nieves Pérez-Solórzano Borrágán & Stijn Smismans, *Representativeness: A Tool to Structure Interest Intermediation in the European Union?*, 50 J. COMMON MKT STUD. 403, 403 (2012) (discussing the specific topic of representation); De Schutter, *supra* note 35, at 209.

¹³⁶ See Betten, *supra* note 51, at 29 (exploring the difference between consultation and negotiation).

¹³⁷ See Obradovic & Vizcaino, *supra* note 32, at 1060.

¹³⁸ See Meuwese, *supra* note 89, at 3.

¹³⁹ Joana Mendes, *Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU*, 48 COMMON MKT. L. REV. 1849, 1849 (2011).

¹⁴⁰ See Scott, *supra* note 133, at 160; Verbruggen, *supra* note 50, at 432; Bouza García, *supra* note 34, at 169; Scott & Trubek, *supra* note 87, at 1; Colin Scott, *The Governance of the European Union: The Potential for Multi-Level Control*, 8 (2002) *EUR. L.J.* 59, 59 (2002); De Schutter, *supra* note 35, at 198.

¹⁴¹ See, e.g., Shapiro, *supra* note 21, at 372; Sabino Cassese, *La partecipazione dei privati alle decisioni pubbliche. Saggio di diritto comparato*, in *RIVISTA TRIMESTRALE DIRITTO PUBBLICO* 15 (2007).

¹⁴² See Roberto Caranta, *Democracy, Legitimacy and Accountability – is there a Common European Theoretical Framework?*, in *LEGITIMACY IN EUROPEAN ADMINISTRATIVE LAW: REFORM AND RECONSTRUCTION* 175 (Matthias Ruffert ed., Europa Law Publishing 2011).

¹⁴³ *European Governance*, at 19, COM (2002) 704 final.

and influence, a sort of competitive market for CSOs where information about their doings is widely available.¹⁴⁴

D. Participation and Lobbying

At least a passing reference is then due to lobbying. In an ideal world, lobbying should take place through participatory procedures articulated according to the transparency principle. CSOs and other actors involved in participation as consultation and participation as co-decision are actually pressing their concern through the procedures. Participation could thus be seen as “lobbying civilized.”¹⁴⁵

However, in many jurisdictions, actors involved in advocacy and pressure groups operate outside the procedures, trying to influence the decision-makers, be they bureaucrats or elected officials, including members of parliament. Lobbying constantly and easily risks favoring special interests if not degenerating into outright corruption.

The E.U. has taken some steps to try and make sure that this is not the case. As already recalled, the 2002 Communication, *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*, lists openness and accountability among the leading principles for consultations. The idea is that the “interested parties must themselves operate in an environment that is transparent, so that the public is aware of the parties involved in the consultation processes and how they conduct themselves.” Therefore, information must be provided and published on the website for consultation as to which interest the CSOs represent and as to how inclusive that representation is. If the information is not provided, submissions will be considered as individual contributions.¹⁴⁶

However, the worst abuses in influence peddling take place outside formalized consultation procedures. A few years after the 2002 Communication, the Commission published a Green Paper titled *European Transparency Initiative*, which tries to address these problems.¹⁴⁷ Building on the 2002 general principles and minimum standard, the Green Paper

¹⁴⁴ De Schutter, *supra* note 35, at 209 (explaining the necessity of transparency to strengthen the representativeness of CSOs); Bignami, *supra* note 47, at 68 (providing an account of the development of the transparency principle in the E.U.). *But see* Harlow, *supra* note 59, at 199 (providing an example of how transparency is not well received by academics).

¹⁴⁵ *See* De Schutter, *supra* note 35, at 217; Bouza García, *supra* note 34, at 174 (providing a way for participation and lobbying to be distinguished).

¹⁴⁶ *European Governance*, at 17, COM (2002) 704 final.

¹⁴⁷ *European Transparency Initiative*, COM (2006) 194 final; *see also* David Coen, *Lobbying in the European Union*, CONSTITUTIONAL AFFAIRS (2007), http://www.eurosfairer.prd.fr/7pc/doc/1211469722_lobbying_eu.pdf.

stressed the need to improve the openness and transparency of the operation of E.U. institutions.¹⁴⁸

Following the consultations of the Green Paper, the E.U. Commission published a new Communication Follow-up to the Green Paper, “European Transparency Initiative,” which set up the Register of Interest Representatives.¹⁴⁹ The Commission has favored a voluntary and incentive-based approach, meaning that there is no obligation to register, but the Commission will combine the Register with a standard template for Internet consultations, and those participating in a consultation are systematically invited to register. Those registered have to provide information on the interests they represent, their mission, and how they are funded.¹⁵⁰ A new Code of Conduct for the relations with interest representatives was also approved; respect for this Code is a condition for both registration and permanence of the registration. Basically, interest representatives are expected to apply the principles of openness, transparency, honesty and integrity, while Members of the Commission and staff are bound by strict rules ensuring their impartiality.¹⁵¹

Finally, last year the E.U. Commission and the E.U. Parliament signed an inter-institutional agreement on the establishment of a transparency register for organizations and self-employed individuals engaged in E.U. policy-making and policy implementation, which basically establishes a Register and a Code of Conduct common for lobbying with the two institutions.¹⁵² Breach of the Code may entail among other measures the exclusion of the delinquent organization or individual from the Register and the interdiction of access to the European Parliament.¹⁵³ It is, however, evident that while lobbying can be directed through the participatory procedures managed by the Commission, the political nature of the

¹⁴⁸ *European Transparency Initiative*, at 2, COM (2006) 194 final (“The Commission believes that high standards of transparency are part of the legitimacy of any modern administration. The European public is entitled to expect efficient, accountable and service-minded public institutions and that the power and resources entrusted to political and public bodies are handled with care and never abused for personal gain.”).

¹⁴⁹ *Follow-up to the Green Paper ‘European Transparency Initiative,’* COM (2007) 127 final.

¹⁵⁰ See also *European Transparency Initiative: A framework for relations with interest representatives (Register and Code of Conduct)*, COM (2008) 323 final, available at http://europa.eu/transparency-register/index_en.htm; *European Transparency Initiative: the Register of Interest Representative, one year after* COM (2009) 612 final.

¹⁵¹ *European Transparency Initiative: A framework for relations with interest representatives (Register and Code of Conduct)*, at 6, COM (2008) 323 final.

¹⁵² *Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation*, 191 OFFICIAL J. 29 (2011), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:191:0029:01:EN:HTML>.

¹⁵³ *Id.* at art. 18.

Parliament makes domesticating lobbies more difficult.¹⁵⁴ While the Council and the Member States, which through the same Council play a very relevant role in E.U. lawmaking, have yet to associate themselves with the European Transparency initiative, CSOs make an important portion of registered interest representatives.¹⁵⁵

The E.U., as was already plain upon a reading of the Green Paper on *European Transparency Initiative*, has benefited from the U.S. experience of regulating lobbies.¹⁵⁶ The U.S. experience, which additionally is characterized by money-thirsty politicians to an extent without comparison in Europe, in turn bears witness to the difficulties in effectively addressing the problems of the preferential access the lobbies try to obtain.¹⁵⁷ The problem obviously is that “Federal and state legislation (even local government regulation) can dramatically affect the profitability of any business.”¹⁵⁸ What can be conclusively said here is that open and transparent participatory procedure may be a cure for the worst aspects of lobbying, which itself thrives in democratically representative environments.¹⁵⁹

E. Global CSOs

The increased role of CSOs is also a result of globalization.¹⁶⁰ “The influence, reach, presence, and power of . . . international NGOs have grown fantastically in the past two decades.”¹⁶¹ The inability of both traditional international organizations and of States to effectively address important global problems such as the protection of the environment, climate change, or the safeguarding of human rights,¹⁶² has created a vacuum that CSOs try

¹⁵⁴ See *Insight: Euro MPs exposed in ‘cash-for-laws’ scandal*, THE SUNDAY TIMES, Mar. 20, 2011, <http://www.thesundaytimes.co.uk/sto/news/insight/article582604.ece>.

¹⁵⁵ See *European Transparency Initiative: the Register of Interest Representative, one year after* COM (2009) 612 final; Israel De Jesús Butler, *Non-Governmental Organisation Participation in the EU Law-Making Process: The Example of Social Non-Governmental Organisations at the Commission, Parliament and Council*, 14 EUR. L.J. 558 (2008) (providing an insight on how CSOs penetrate policy making in the E.U.).

¹⁵⁶ *European Transparency Initiative*, COM (2006) 194 final.

¹⁵⁷ Anita S. Krishnakumar, *Towards A Madisonian “Interest-Group” Approach To Lobbying Regulation*, 58 ALA. L. REV. 513 (2007); see also Heidi Reamer Anderson, *Allocating influence*, 3 UTAH L. REV. 683, 705 (2009).

¹⁵⁸ T. Hearne & A. Blunt, *Federal Lobbying Regulation*, 3 BLOOMBERG CORP. L.J. 65 (2008). The authors are more sympathetic to lobbying than academic writers, *et pour cause*.

¹⁵⁹ Public choice theory has shed light on the role of lobbies and special interests, which is unduly ignored by much of constitutional law thinking. See Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CALIF. L. REV. 83 (1989).

¹⁶⁰ L. David Brown et al., *Globalization, NGOs and Multi-Sectoral Relations*, 1, 2 (2000), available at <http://ssrn.com/abstract=253110> or <http://dx.doi.org/10.2139/ssrn.253110>.

¹⁶¹ Anderson, *supra* note 1, at 842.

¹⁶² Gartner, *supra* note 59, at 596.

to fill.¹⁶³ At the same time, new technologies have contributed greatly to enabling and empowering advocacy at the global level.¹⁶⁴

Involvement of CSOs has also been sought as a way to strengthen the legitimacy of the international organizations and their activities; the well-known instance of the World Bank shows that the involvement of CSOs can lower the risk of poor performance, thus enhancing the effectiveness of financial assistance.¹⁶⁵ On this stage, too, the role of CSOs has been criticized as lacking legitimacy.¹⁶⁶ The criticism of opacity and elitism when leveled at global CSOs may have merits, but it bites less strongly when one considers the traditional lack of transparency in diplomatic negotiations.¹⁶⁷

VI. THE DELIVERY OF SERVICES TO THE GENERAL PUBLIC OR SECTIONS THEREOF AND INDIVIDUALS

Managerial reforms in administrative law acting in unison with the participatory drive that was analyzed in the previous sections of this work have conspired to enhance the role of both the market and the civil society in providing services to the general public, or sections thereof, on behalf of the State.¹⁶⁸

Having recourse to the E.U. legal jargon, these services may be services of general interest (“SGI”), and more specifically services of general economic interest (“SGEI”), if the competent authority so decided.¹⁶⁹ The

¹⁶³ It is submitted that linking the increased role of CSOs on the international stage is a consequence of the shift from government to governance. See Shapiro, *supra* note 21, at 374.

¹⁶⁴ David Brown, *supra* note 160, at 2; see Donald J. Kochan, *The Blogosphere and the New Pamphleteers*, 11 NEXUS L.J. 101 (2006).

¹⁶⁵ See Gartner, *supra* note 59, at 611, 626.

¹⁶⁶ Compare Anderson, *supra* note 1, at 846, with Gartner, *supra* note 59, at 599. See Harlow, *supra* note 59, at 198.

¹⁶⁷ See Shapiro, *supra* note 21, at 375 (doubting the possibility to transplant transparency and participation at the global stage).

¹⁶⁸ See Gavin Drewry, *Law and Administration*, in HANDBOOK OF PUBLIC ADMINISTRATION 258 (B. Guy Peters & J. Pierre eds., Sage 2003) (“In countries that have undergone variants of the New Public Management reform, patterns of judicial review (and other mechanisms of accountability) have reflected a continuing struggle to keep abreast of the changing machinery of state functions and services, and to establish a workable line of demarcation between public law *per se* and private law (including the law of contract and the law of tort) as it applies in the context of public functions and state power.”).

¹⁶⁹ See generally J. Vaquero Cruz, *Beyond Competition: Services of General Interest and European Community Law*, in EU LAW AND THE WELFARE STATE. IN SEARCH OF SOLIDARITY 170 (Gráinne de Búrca ed., Oxford University Press 2005); M. Lombard, *L’impact du droit communautaire sur les services publics*, in DROIT ADMINISTRATIF EUROPÉEN 969 (J.-M. Auby et J. Dutheil de la Rochère dirr., Bruylant 2007); D. Ritleng, *L’influence du droit communautaire sur les catégories organiques du droit administratif*, in DROIT ADMINISTRATIF EUROPÉEN 866 (J.-M. Auby et J. Dutheil de la Rochère dirr., Bruylant 2007); J. Ziller, *Les droits administratifs nationaux: caractéristiques générales*, in DROIT ADMINISTRATIF EUROPÉEN 546 (J.-M. Auby et J. Dutheil de la Rochère dirr., Bruylant 2007).

provision of SGEI has been externalized more often than not,¹⁷⁰ and CSOs may be involved in the delivery of these services.¹⁷¹ In line with a tradition of limited or self-government in the U.S., the private, not-for-profit sector is also delivering services.¹⁷²

The role of CSOs is of course not necessarily limited to the provision of SGEI. They may actually provide services that the State or another competent authority has not deemed in the general interest and to whose provision it does not commit taxpayers' money, though such services may be sought after.

CSOs may provide services either on a charitable base, using the money of donors, or—and this is quite often the case when the service has been classed as SGI, implying a duty for the competent public administration to make sure that the service is provided (normally) according to the principle of the universal service—thanks to financial contributions from the same administration.

The two cases raise different legal questions, even if at times the two situations are not well-distinguished, as when some public authority—as is often the case in the E.U. and in some of its Member States—is willing to distribute public money to strengthen civil society quite independently from the provision of any specific service.¹⁷³

A. Charitable Actions

From the point of view of administrative law, charitable actions by CSOs do not pose major problems. No taxpayer money is involved, and coordinating the services provided by the public administration with the services provided by these organizations simply makes sense. The main question is whether, as is the case with investors and consumers, law has a role in imposing transparency rules to the benefit of contributors. This question is particularly pertinent, and again the analogy with investors is appropriate, when considering small donors.¹⁷⁴

¹⁷⁰ See generally Catherine Donnelly, *The Response of English Public Law to Private Actors in Public Governance*, in *THE PUBLIC-PRIVATE DIVIDE: POTENTIAL FOR TRANSFORMATION?* 169 (Matthias Ruffert ed., BIICL 2009); *Le esternalizzazioni*, (C. Mignone et al. eds., Bonomia University Press, 2007).

¹⁷¹ See Brown, *supra* note 160, at 14; Bignami, *supra* note 6, at 889 (explaining how in some jurisdictions, corporate traditions have CSOs, such as trade unions, institutionally involved in the management of public sector organizations).

¹⁷² Luton, *supra* note 18, at 174.

¹⁷³ See Christine Mahoney & Michael Beckstrand, *Following the Money: European Union Funding of Civil Society Organizations*, 49 *J. COMMON MKT. STUD.* 1339 (2011).

¹⁷⁴ This aspect is somewhat linked to the idea of “internal” accountability. See Anderson, *supra* note 1, at 842. But in so far as donors do not have associate status in the relevant CSO, it falls rather somewhere between “internal” and “external” accountability.

The same kind of rules might, of course, benefit major philanthropists. The later, however, normally have the financial clout to either create and essentially directly manage their own CSO (just think of the Gates Foundation) or to use civil law—including corporate governance rules—to take part in the management (or at least to be fully informed of the choices made by the CSO) and— more importantly—of the results achieved. Philanthropic venture capital is becoming a term of art, even if its actual legal configuration still needs to be investigated.¹⁷⁵

B. Providing Services for Consideration

Each legal system possesses its own solutions as to how public goods are provided. The way they are performed depends on how, in one particular system, the distribution of functions between public institutions and private entities taking part in the management of public duties is legally arranged: this is about the delineation of those public duties which must be directly performed by public institutions and those which may be partly assumed by private entities; about the type of contracts through which part of public tasks can be entrusted to private entities; about the recognition of something like a ‘third sector’, acting between public authorities and the market, and so on. What can also vary is the means by which the performance of public goods is monitored, assessed, and whether there are legal remedies available to those dissatisfied with the quality of the provision.¹⁷⁶

In the E.U., the Court of Justice has many times stressed that it is the responsibility of Member States to decide whether to use their own resources and personnel to deliver SGEI or to outsource delivery to the market.¹⁷⁷

¹⁷⁵ See ROB JOHN, VENTURE PHILANTHROPY: THE EVOLUTION OF HIGH ENGAGEMENT PHILANTHROPY IN EUROPE, (Alex Nicholls & Rowena Young eds., Oxford University 2006), available at www.sbs.ox.ac.uk/skoll/research/Short+papers/Venture+Philanthropy+in+Europe.htm.

¹⁷⁶ J-B Auby, *Public Goods and Global Administrative Law*, in VALUES IN GLOBAL ADMINISTRATIVE LAW 239, 241 (Gordon Antony et al. eds., Hart 2011) (also referring to STEPHEN OSBORNE, THE THIRD SECTOR IN EUROPE: PROSPECTS AND CHALLENGES (Routledge 2008)).

¹⁷⁷ See, e.g., Case C-26/03, Stadt Halle, 2005 E.C.R. I-1, at ¶48 (“A public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments.”); see also ALBERT SÁNCHEZ GRAELLS, PUBLIC PROCUREMENT AND EU COMPETITION RULES, 27, 232 (Hart 2011); Fotini Avarkioti, *The Application of EU Public Procurement Rules to “In-house” Arrangements*, 16 PUB. PROCUREMENT L. REV. 22 (2007).

With that said, the outsourcing trend has obviously affected the provision of services of general interest in Europe as much as in the rest of the world. More and more, the market and the third sector are called in to provide services of general interest *in lieu* and on behalf of the State and its articulations. Basically, this can be arranged in two ways. The simplest is the result of a combination of an accreditation system with fixed amount payments. The other is through public procurement procedures, possibly including “set aside” mechanisms. Theoretically, it is of course possible to think of a third possibility: direct contracting between the public authority responsible for the service provision and a contractor. This approach is however neither transparent nor generally speaking efficient, and therefore its legality is simply ruled out in the E.U. and in other jurisdictions.¹⁷⁸

The combination of an accreditation system with fixed amount payments is, for instance, used in Italy in the framework of the NHS. Diagnostic services can be provided by both the NHS itself through its structures, such as hospitals and so on, or through accredited private providers, which in theory can be managed by both for-profit firms and CSOs. It is fair to say that, in the main, this market space is mostly occupied by commercial firms—CSOs apparently not being interested or good enough at competing in this market. As a consequence, it does not strain reality too greatly to assume that CSOs stand a chance in outsourcing services based on public procurement only when there is some form of set aside.

The U.S. is paradise for set aside.¹⁷⁹ This includes small businesses, women owned small businesses, service disabled veterans, and many others.¹⁸⁰ In the E.U., the situation is more complex. The non-discrimination principle is paramount in public procurement.¹⁸¹ There is, however, the problem of the old *Sodemare* case, in which the Court of Justice held that:

[A] Member State may, in the exercise of the powers it retains to organize its social security system, consider that a social welfare system of the kind at issue in this case necessarily implies, with a view to attaining its objectives,

¹⁷⁸ See, e.g., Case C-119/06, *Comm’n v. Italy*, 2008 E.C.R. I-168, ¶34; see Adrian Brown, *Application of the Directives to Contracts to Non-for-profit Organizations and Transparency under the EC Treaty: A Note on Case C-119/06 Commission v Italy*, 17 PUB. PROCUREMENT L. REV. NA96 (2008).

¹⁷⁹ The U.K. ended up aborting a similar evolution. Martin Trybus, *Sustainability and Value for Money: Social and Environmental Consideration in United Kingdom Public Procurement Law*, in THE LAW OF GREEN AND SOCIAL PROCUREMENTS IN EUROPE 262 (Roberto Caranta & Martin Trybus eds., DJØF 2010); Roberto Caranta & Sara Richetto, *Sustainable Procurements in Italy: Of Light and Some Shadows*, in THE LAW OF GREEN AND SOCIAL PROCUREMENTS 147 (2010) (Italy).

¹⁸⁰ See generally OFFICE OF GOVERNMENT CONTRACTING, www.sba.gov/about-offices-content/1/2986.

¹⁸¹ See, e.g., Case C-21/88, *Du Pont De Nemours*, 1990 E.C.R. I-889; see Sue Arrowsmith, *The Legality of ‘Secondary’ Procurement Policies under the Treaty of Rome and the Works Directive*, 1 (1992) PUB. PROCUREMENT L. REV. 408, 410 (1992).

that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit-making.¹⁸²

The Commission's communication on "Implementing the Community Lisbon programme: Social services of general interest in the European Union" points to the application of the general public procurement rules and principles: "In such cases, the public body delegating a social mission of general interest to an external organization must, at the very least, respect the principles of transparency, equal treatment and proportionality. Moreover, in certain cases, the public contracts directives impose more specific obligations."¹⁸³ Moreover, an exception is spelled out in Art. 19 of Directive 2004/18/EC, under which "Member States may reserve the right to participate in public contract award procedures to sheltered workshops . . . where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions."¹⁸⁴ Basically, under E.U. law, there are some limited possibilities to set aside contracts for certain kinds of economic operators (E.U. jargon for the partners of contracting authorities), which as far as social services are considered, could also be CSOs.

Setting aside, however, cannot be equated with a direct award. Competition is restricted to those economic operators belonging to the targeted categories, including in some cases CSOs, but competition is still present within the category. Award procedure will have to follow the usual rules basically centered on the principles of equal treatment and transparency.¹⁸⁵

E.U. public procurement law is currently under reconsideration. The 2011 Green Paper "on the modernisation of EU public procurement policy"

¹⁸² Case C-70/95, *Sodemare*, 1997 E.C.R. I-3395, at ¶32; *see also relativa a la aplicaci3n a los servicios de inter3s econ3mico general y, en particular, a los servicios sociales de inter3s general, de las normas de la Uni3n Europea en materia de ayudas estatales, de contratos p3blicos y de Mercado Interior*, at 4.2.10, SEC (2010) 1545 def (July 12, 2010).

¹⁸³ *Mettre en 3uvre le programme communautaire de Lisbonne Les services sociaux d'int3r3t g3n3ral dans l'Union europ3enne*, at 2.2.1, COM (2006) 177 final (Apr. 26, 2006).

¹⁸⁴ *See also* Council Directive 2004/17/EC, art. 27, 2004 (L 134/1); CHRISTOPHER MCCRUDDEN, *BUYING SOCIAL JUSTICE: EQUALITY, GOVERNMENT PROCUREMENT & LEGAL CHANGE* 4, 56 (Oxford University Press 2007) (outlining the history of sheltered workshops); Roberto Caranta, *Sustainable Public Procurement in the EU*, in *THE LAW OF GREEN AND SOCIAL PROCUREMENTS IN EUROPE* 38 (Roberto Caranta & Martin Trybus eds., DJØF 2010); Joel Arnould, *Secondary Policies in Public Procurement: The Innovations of the New Directives*, 13 *PUB. PROCUREMENT L. REV.* 187, 193 (2004).

¹⁸⁵ *See* Roberto Caranta, *The Borders of EU Public Procurement Law*, in *OUTSIDE THE EU PROCUREMENT DIRECTIVE – INSIDE THE TREATY?* 25 (Dacian Dragos & Roberto Caranta eds., DJØF 2012).

quotes from the Staff working document already referred to.¹⁸⁶ It also addresses a question to potential respondents on whether the Directives should allow the possibility of reserving contracts involving social services to NGOs or whether there should be other privileges for such organisations in the context of the award of social services contracts.¹⁸⁷

The proposal for new procurement directives tabled late last year provides for both watering down the criteria for qualification of sheltered workshops and for special rules for the procurement of social services. According to Recital 11 of the proposal, services to the person, such as certain social, health, and educational services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for these services, with a higher threshold of EUR 500.000. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the selection of service providers in the way they consider most appropriate. The proposed rules take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers. Member States and public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

It is remarkable that both the procurement and the accreditation options are allowed, but no provision is made for set aside for civil society organisations. However, as already recalled, the possibility to reserve contracts is widened beyond sheltered workshops for the disabled.¹⁸⁸

Of lately, outsourcing and civil society involvement have taken a new and maybe surprising twist. An interesting case is provided by the UK Localism Act 2011. The Act implements some aspects of the “Big Society” doctrine expounded by David Cameron, the present prime Minister. Part 5 of the Act deals with “community empowerment.” Section 81 allows any

¹⁸⁶ *On the modernisation of EU public procurement policy Towards a more efficient European Procurement Market*, at ¶4.4, COM (2011) 15 final (Jan. 27, 2011).

¹⁸⁷ *Id.* at Question 97, ¶1.2.

¹⁸⁸ See proposed new Article 17 (“Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers or provide for such contracts to be performed in the context of sheltered employment programmes, provided that more than 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.”). In any case, a call for competition is required.

relevant body, including voluntary or community bodies, bodies of persons or a trust established for charitable purposes only, and parish councils to express their interest in providing or assisting in providing a service of general interest on behalf of the local authority. Section 81(7) defines a “voluntary body” as a body, other than a public or local authority, the activities of which are not carried on for profit, while Section 81(8) provides that the fact that a body’s activities generate a surplus does not prevent it from being a voluntary body so long as that surplus is used for the purposes of those activities or invested in the community. Under Section 83(8), the relevant authority in deciding about an expression of interest must consider whether acceptance of the expression of interest would promote or improve the social, economic, or environmental well-being of the authority’s area.

The need for transparency is attended to in the same Section 83. If the authority accepts the expression of interest it must carry out a procurement exercise relating to the provision on behalf of the authority of the relevant service to which the expression of interest relates (public procurement or concession for services); the procurement procedure followed must be appropriate, having regard to the value and nature of the contract that may be awarded. Since, at present, service concessions are only marginally ruled under E.U. and U.K. law (and the same applies to below the threshold service procurement contracts), Section 83 further details the rules to be followed, including minimum periods for submitting tenders and publication of details of the specifications.¹⁸⁹ Moreover, under Section 83(9), the authority must consider how it might promote or improve the social, economic, or environmental well-being of the authority’s area.

One might easily dismiss the Localism Act as a new ruse to rein in public expenses and roll further back the borders of the State, introducing new forms of privatization.¹⁹⁰ Indeed, the first sections of the Act regulate referenda relating to council tax increases and other fiscal matters reminiscent of Margaret Thatcher policy to rein in spend-happy (or so perceived) local labor councils.¹⁹¹ As we have seen, however, the greater involvement of the civil society in delivering public policy is not something new, nor necessarily something very right-wing and conservative.

Already in 2001, against a quite different ideological background—one marked by a traditionally important involvement of both the Church and lay organizations in the provision of social services—the new Article 118 of

¹⁸⁹ See Roberto Caranta, *The Borders of EU Public Procurement Law*, in *OUTSIDE THE EU PROCUREMENT DIRECTIVE – INSIDE THE TREATY?* 25 (Dacian Dragos & Roberto Caranta eds., DJØF 2012).

¹⁹⁰ See Jay Kennedy, *Eric Pickles’ Localism Bill contains a Trojan Horse*, *THE GUARDIAN* (Feb. 11, 2011), available at <http://www.guardian.co.uk/voluntary-sector-network/2011/feb/11/localism-bill-tojan-horse> (referring to the Bill later voted into the Localism Act).

¹⁹¹ See Eoin Carolan, *Legitimising Disaggregated Governance: Accountability, Experimentalism and Democracy in the Big Society*, *PUB. L.* (2012) (forthcoming).

the Italian Constitution introduced the idea of horizontal subsidiarity, that is, the preferential involvement of CSOs in the provision of those services.¹⁹²

At present, Italian law is however somewhat less firm than the Localism Act 2011, in holding that civil society involvement must take place through open and competitive procurement procedures.¹⁹³

VII. CONCLUSION

“Theories of administration and administrative law have changed dramatically in recent times.”¹⁹⁴

One element of the evolution toward a new paradigm is indeed the new relevance of civil society and its organizations. CSOs today play important roles in both policy design and policy delivery.¹⁹⁵ While in some quarters CSOs are seen as upholding the legitimacy of representative institutions¹⁹⁶—albeit weakly democratic—others lament the lack of legitimacy of the CSOs themselves.¹⁹⁷

The most sensible way out of this conundrum seems to be enhancing transparency in—and competition among—the CSOs, rather than killing or maiming participation.¹⁹⁸ Strengthening participation beyond consultations¹⁹⁹ implies the necessity to devise mechanisms to select which CSOs are to participate because an “everyone welcome” approach would make decision-making procedures too cumbersome.²⁰⁰

In this respect, the E.U. is hindered by the traditions of corporatism. In Europe, generally, few large organizations are given privileged access to regulatory and administrative proceedings, apart from self-regulating powers. The U.S. adversarial—or pluralist—approach, instead, sees many different CSOs competing for relevance and influence.²⁰¹

The pluralist approach is obviously preferable, in that it makes the capture of the CSOs more difficult when compared with cozy corporatist arrangements. The point is how the competition can be rendered open and fair. Transparency is obviously of paramount importance here, and one relevant element in this respect is reputation. As it has been remarked, “Since

¹⁹² See generally Tania Groppi, *Italy. The Subsidiarity Principle*, 4 INT’L J. CONST. L. 131 (2006); A. POGGI, LE AUTONOMIE FUNZIONALI TRA SUSSIDIARIETÀ VERTICALE E SUSSIDIARIETÀ ORIZZONTALE (Giuffrè 2001).

¹⁹³ See Caranta & Richetto, *supra* note 179.

¹⁹⁴ Bignami, *supra* note 6, at 860.

¹⁹⁵ See *id.* at 905 (explaining that the role of CSOs, previously obscured by the dominant paradigm of expert administration, has been brought to the light).

¹⁹⁶ De Schutter, *supra* note 35, at 198; Bouza García, *supra* note 34, at 169; Caranta, *supra* note 56, at 15.

¹⁹⁷ Shapiro, *supra* note 21, at 372; Casesse, *supra* note 141, at 15.

¹⁹⁸ De Schutter, *supra* note 35, at 209 (explaining the relevance of transparency).

¹⁹⁹ See Mendes, *supra* note at 139, at 1849.

²⁰⁰ De Schutter, *supra* note 35, at 209.

²⁰¹ Bignami, *supra* note 6, at 885.

NGOs are particularly vulnerable to threats to their reputations—and because they are otherwise fairly weak actors who rely on their credibility for influence—reputational concerns can be a powerful accountability mechanism.”²⁰²

Moreover, “strictly corporatist models pose significant challenges at the international level, in terms of how such organizations would be selected and the risk that rigidities could evolve that would exclude emerging stakeholders.”²⁰³ What plays at the international level will play at regional or State level, as well, and here again the reference to competitive market concepts (think new entrants, but also incumbents) is manifest.²⁰⁴

As CSOs contribute to the transparency of governance mechanisms, the question of their own transparency is unavoidable. In particular, “fiduciary institutions of a nonprofit nature . . . owe obligations of public trust.”²⁰⁵ The role of law here is to provide rules which force or at least encourage CSOs to disclose data concerning, for instance, membership, sources of funding, ways funds are spent, and results achieved.²⁰⁶ In a way, a sort of CSO market regulatory framework is necessary for the accountability of CSOs both to their members and to the public at large affected by their contribution to policy formation.²⁰⁷

Finally, when, as is the case with the E.U., CSOs are at times seen as sources of expertise, rather than “general,” “political,” or “democratic,” legitimacy, fair and open competitive selection mechanism are needed, and the model here can be the principles and rules of public procurement discussed above.²⁰⁸

²⁰² Gartner, *supra* note 59, at 603.

²⁰³ *Id.* at 633; *see also id.* at 637.

²⁰⁴ *See id.* at 637 (writing about the risk that “early participants will become entrenched in their roles and prevent the involvement of new groups”).

²⁰⁵ Anderson, *supra* note 1, at 842.

²⁰⁶ *See* Helmut Anheier et al., *The Future of Participatory Civil Society Assessments: A Conceptual Analysis* (2011), available at http://www.undp.org/content/dam/undp/documents/partners/civil_society/publications/tools_and_resource_sheets/CS%20Assessments_Conceptual%20Analysis.pdf. This document was recently drafted for the U.N. Development Programme.

²⁰⁷ Anderson, *supra* note 1, at 842.

²⁰⁸ *See* Roberto Caranta, *Transparence et concurrence*, in *DROIT COMPARÉ DES CONTRATS PUBLICS. COMPARATIVE LAW ON PUBLIC CONTRACTS* 145 (Rozen Noguellou & Ulrich Stelkens eds., Bruylant 2010) (providing the relevance of the way transparency and competition rhyme in public procurement).