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Summary

This policy brief is based on research carried out within the NEWGOV project no. 11 on “The Role of Civil Society in Democratising European and Global Governance - CISONANCE”.

This project is concerned with the potential role of civil society in the democratisation of governance beyond the nation state. Its aim is to explore different modes of civil society involvement in institutions of European and global governance and to assess their respective potential for bringing these institutions closer to their stakeholders. The project has compared the role of civil society in the process of policy formation of the EU and the WTO. The focus of this comparison has been on the advantages and shortcomings of various institutional designs for fostering civil society participation. Issue areas studied were health protection and human rights.

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I. Civil society everywhere?

Civil society participation is on the rise in governance beyond the nation-state. From the European Union to the United Nations, from the World Trade Organization to the World Bank, participatory rhetoric abounds. The rhetorical shift from classic intergovernmentalism to participatory governance is accompanied by a proliferation of consultative practices that are supposed to bring more representatives of (organized) civil society into international institutions. Participatory policy making, it seems, is becoming an emergent norm of international governance, as there is a growing expectation that international organizations, once widely shielded from public scrutiny, should open up to interest groups and NGOs.

The trend towards participatory governance is perfectly observable in the European Union. According to recent estimates, in Brussels there are some 15,000 individuals, among them lawyers, corporate lobbyists, public affairs consultants, and NGO activists, who seek to gain access to and influence Community institutions. Moreover, some 2,600 NGOs and interest groups have a permanent office in Brussels. About 750 organizations had registered officially with CONNECS, the European Commission's consultation database that was closed recently.

The underlying expectation, in the EU and elsewhere, is that the participation of civil society will render policy-making beyond the state more legitimate, or even more democratic. Especially for the European Commission, consultative procedures have become a major element in its self-legitimation strategy. The reason for this is obvious: unlike the Parliament, the Commission cannot draw on direct electoral legitimacy, and unlike the Council, it cannot point to a chain of democratic delegation from national parliaments.

The Commission therefore strives to appear to be a competent and impartial manager of common European concerns that takes all relevant societal interests into account. Against this background, consultation of affected parties, or 'stakeholders', in the preparation of legislative proposals, is a vital element of European governance. The 2001 'White Paper on European Governance' and the 2002 'General Principles and Minimum Standards for the Consultation of Interested Parties' testify to the emphasis that the Commission places on public participation and consultation. However, not only the Commission promotes cooperation with non-state actors. The most pronounced emphasis on participation can be found in the so-called 'new modes of governance', such as the Open Method of Coordination.

In this paper, we critically assess this turn to participatory governance. Two arguments are put forward. First, new modes of participatory governance do not necessarily render the policy process more inclusive and hence 'democratic'. Evidence from the exemplary field of occupational health and safety (OH&S) regulation will illustrate that point. Second, enhanced direct participation by stakeholders needs to be balanced with serious efforts to ensure transparency. From an analysis of current debates about interest group access to European policy-making, we conclude that the new Commission register, to become operational in late spring 2008, is likely to be only a minor improvement in this respect.

II. Are new modes of governance more participatory?

Debate about the role of civil society in European governance has particularly emerged in the context of so-called 'new modes of governance', such as the Open Method of Coordination or European agencies. One of the most common arguments about 'new governance' is that it is characterised by heterarchy rather than by hierarchy, creating horizontal modes of governance among a multitude of actors – public and private – involving all relevant stakeholders.

Often implicitly, but sometimes explicitly, this argument is linked with a normative democratic claim that praises the particular participatory features of ‘new governance’ as compared to ‘old governance’, i.e. the traditional ‘Community method’ based on the use of hard law, initiated by the Commission, adopted through legislative procedures, and enforceable in court. Our research has focused on whether such claims are justified. We have used the field of Community OH&S as a case study, since this policy field has been characterised by a clear shift from ‘old’ to ‘new’ governance since the 1990s. Our findings suggest that one should be very cautious in making normative claims regarding the participatory nature of new modes of governance.

Until 1992, Community OH&S policy was mainly characterised by legislative action. New OH&S Directives were adopted at the initiative of the Commission, and upon the final decision of the Council, with an increasing role for the EP as it developed towards its current co-decision prerogatives in this policy area. However, in addition to the input of the EP in the decision-making procedure, the involvement of civil society actors was sought in different ways, in particular through the European Economic and Social Committee, and the Tripartite Advisory Committee for Safety, Hygiene and Health at Work (composed of representatives from the social partners and the national administrations). Our research and interviews illustrate satisfaction of the main policy actors in the way this civil society participation was organised under the old mode of governance.

By 1992, European OH&S policy was characterised by a shift towards new policy instruments. However, rather than strengthening the participation of all stakeholders in policy-making, the shift to these new policy instruments and to persuasive policy-making often appears to primarily address the national administrations and to lead to a certain level of ‘technocratisation’ of OH&S policy-making. In comitology, for instance, civil society actors hardly find a place and do not manage to use the Tripartite Advisory Committee as a structure to influence what is mainly a decision-making mode in which the national administrations dominate. This is even more difficult where very technical standardization issues are at stake; the civil society representation in the Tripartite Advisory Committee, for instance, does not manage to follow the very scientific debate in the Scientific Committee for Occupational Exposure Limits.

Also in the functioning of the European Agency for Health and Safety at Work, created in the mid 1990s, civil society actors do not participate as strongly as the objectives of the agency would suggest. The Agency often does not reach those that are most directly concerned by OH&S, i.e. employers and employees, and it functions mainly around the role of national administrations. Of course, civil society actors like the social partners are not entirely absent from this design. However, whereas the main civil society actors in OH&S – namely the social partners – have been satisfied with their involvement under the Community Method, their participation in the new modes of governance (still) shows important shortcomings.

Our evidence suggests that new modes of governance are indeed more horizontal and heterarchical in nature than the Community method. However, this does not mean automatically that they are more participatory in normative democratic terms. This does not imply that the Community Method should be used to the exclusion of other policy instruments, but it warns us that one should be very reluctant in arguing that ‘new modes of governance’ are characterised by their particular democratic-participatory nature.

III. The problem of transparency

The increasing participation of non-elected stakeholders and interest groups in European policy-making was not greeted with unfettered enthusiasm. It has also spawned fears of hidden influence of private interests on political decisions, and of a further loss in transparency of European policy-making. Therefore, some have argued for tighter regulation of access by organized civil society, and especially lobby groups, to policy-making in the EU. In fact, the Commission itself has stressed repeatedly that “with better involvement comes greater responsibility”.

So far, the regulation and monitoring of non-state actors’ access to European policy-making has been rather weak when compared, for instance, to the situation at the United Nations. The UN has established formal accreditation procedures and provides different kinds of consultative status for non-state actors. In the EU, there is no comparable system of registration or accreditation. Only the European Parliament keeps a public register of lobbyists, mainly for security purposes. Individuals need to register and sign a code of conduct in return for a badge that gives them access to the Parliament buildings. Before every meeting, lobbyist and NGO activists are, in theory, required to tell Parliamentarians who they are representing.

Although it extensively consults with all sorts of interest groups, the European Commission to date has no such register. Until recently, some basic information on organisations consulted regularly by the Commission was accessible via an Internet directory called CONECCS, an acronym for ‘Consultation, the European Commission and Civil Society’. However, registering with this database has never been compulsory and not all active groups were listed there.

At the moment, the European Commission is in the process of setting new rules for lobbyists and NGOs. Key to this development has been the “transparency initiative” launched by Commissioner Siim Kallas in 2005 which, *inter alia*, is aimed at increased transparency of interest representation and lobbying. The plan is to set up a register of interest representatives by late spring 2008. Over the last two years, there has been intense debate in Brussels about whether registration should be voluntary or mandatory, and about what pieces of information should be disclosed.

Among the stakeholder groups concerned, a major gulf has opened between corporate lobbying associations on the one hand and the NGO coalition ‘Alliance for Lobbying Transparency and Ethics Regulation’ (ALTER EU) on the other. Public interest NGOs are pressing for robust and mandatory regulation in order to counter what they consider to be the hidden influence and privileged access of business groups. Many professional consultants, in contrast, have been opposed to tighter regulation and compulsory registration. They are especially worried about financial reporting requirements that might force them to publish information about their clients.

Judging from the latest Commission communication on the transparency initiative, released in 2007, it seems unlikely that the new “register of interest representatives” will break new ground in terms of transparency. In particular, there will not be a mandatory registration scheme, and hence there is an opt-out for those lobbies that seek to keep information about their clients secret. The Commission has explained that there will be positive incentives for groups that choose to register, such as automatic notification on upcoming consultations, but it seems doubtful whether these incentives will be sufficient.

The problem with voluntary registration schemes is obvious: activist NGOs and interest groups that seek public support for their demands are exposing themselves to public scrutiny anyway. If these organisations are listed in a public register the improvement with regard to

transparency is negligible. Much more precious for the critical observer would be the disclosure of information relating to those organizations and consultants that prefer to act invisibly in lobbies and corridors. In this case, the interested public would benefit much more from increased transparency but it is unlikely that these groups will register, unless access to European institutions can be effectively denied if they fail to do so.

IV. Conclusion

Civil society participation is sometimes hailed as a cure to the democratic deficit of European policy-making, in particular in conjunction with new, heterarchical modes of governance. In this paper we have called for caution. First, our comparison between old and new modes of governance in the field of occupational health and safety revealed that there is no guarantee that new modes of governance will be more participatory or inclusive than old modes of governance. Most of the civil society representatives we interviewed did not feel that the transition from old to new modes of governance improved their access to policy-making.

Second, we addressed fears that the rise of private actors may exacerbate, rather than mitigate, the democratic deficit of European policy-making. The main concern is that private interests may prevail, and that lobbying further reduces the public visibility of who is doing what in European governance. We argued that, in order to counter such fears of a ‘privatization’ of European politics, complete transparency is needed. A voluntary register of interest groups, currently under discussion, is very unlikely to create transparency in crucial cases. No matter whether it is under old or new modes of governance, the EU needs a functioning but also transparent system of consultation.

V. Bibliography

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