



Third ACELG Annual Conference on

Postnational Democracy Beyond Representation in the EU

22 November 2013

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[Amsterdam Centre for European Law and Governance](#)

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Background

The Lisbon Treaty initiated a new debate on the democratic nature of the Union. It did so by explicitly including a title on “provisions on democratic principles”, where it included both representative democracy and participatory democracy as complementary sources of democracy in the EU.

The changed legal situation crucially begs new questions. What normative consequences should follow from this double democratic foundation? Which are its institutional and legal implications? What are the opportunities that follow from Article 11 of the Treaty on European Union (TEU) specifically? How does this way of conceiving ‘postnational’ democracy play out?

The goal of this conference is to take stock of the institutional and legal developments that followed the entering into force of Article 11 TEU. This Article established participatory democracy as an explicit source of democratic legitimacy complementary to representative democracy. We propose to discuss the **conceptual links**, the complementarities and tensions between representative democracy and participatory democracy, as they result from how they are explicitly enshrined in the Treaty. Furthermore, we will analyse **the institutional implications** of Article 11 TEU, by focusing on non-representative institutions. Article 11 TEU enshrined, among other provisions, a general obligation of the institutions to “give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of the Union”. How have the duties stemming from Article 11 TEU been carried out so far by the European Council, the Court, the Court of Auditors and the European Central Bank? What have they meant for the mechanisms that the Commission had put in place to ensure the principle of participation that it included in its White Paper on Governance of 2001? Have the EU institutions drawn new inspiration from Article 11 TEU or simply used it to support (and possibly re-label) old practices? Finally, we will discuss **the legal implications** of Article 11 TEU, focusing on the ensuing normative consequences for non-representative decision-making procedures, i.e. those where the involvement of the Parliament is weaker. In what way does Article 11 TEU indicate the need to reform these decision-making procedures and at which level?

Programme

- 9.30 – 9.50 Arrival and Registration
- 9.50 – 10.00 ***Introduction***
- 10.00 – 11.30 ***Session 1 - Representation and participation: tensions and complementarities in the EU***
Chair: Deirdre Curtin, University of Amsterdam, ACELG
- Colliding visions of representation and participation**
Beate Kohler-Koch, MZES University of Mannheim
- Beyond representation: On the tension between epistocracy and democracy**
Erik Eriksen, University of Oslo, ARENA
- Discussants: Leonard Besselink, University of Amsterdam, ACELG
Sandra Kröger, Hanse-Wissenschaftskolleg /
University of Exeter
- 11.30 – 11.50 Coffee break
- 11.50 – 13.15 ***Session 2 - Institutional implications: the European Council, the Council and the European Central Bank***
Chair: Jonathan Zeitlin, University of Amsterdam
- European Democracy and its critique revisited: The crisis of representation, the crisis *and* representation**
Kenneth Armstrong, Cambridge University
- ECB, the citizens and the parliaments: The impact of Lisbon and the crisis**
Chiara Zilioli, Deputy General Counsel of the ECB
- Discussants: Bruno de Witte; University of Maastricht, EUI
René Smits, University of Amsterdam, ACELG
- 13.15 – 14.15 Lunch
- 14.15 – 15.45 ***Session 3 - Legal Implications: non-representative rulemaking procedures***
Chair: Madalina Busuioc, London School of Economics
- Means to control the Commission's rule-making powers: A matter of legislative choice**
Jürgen Bast, Justus Liebig University Giessen
- Non-representative rule-making procedures: A servan of two masters**
Carol Harlow, London School of Economics
- Discussants: Ian Harden, Secretary General European Ombudsman
Paul Craig, University of Oxford
- 15.45 – 16.15 Coffee break
- 16.15 – 17.15 ***General Discussion and Conclusions***

All participants are cordially invited to a reception after the conference



Abstracts

Colliding visions of representation and participation

Beate Kohler-Koch, MZES University of Mannheim

The European Union is founded on the principle of representative democracy. But, obviously, the Constitutional Convention just like many scholars considered the representative functions of the European Parliament and the Council to be insufficient to ensure democratic European governance. Thus, participatory democracy has been institutionalized and is expected to complement democratic representation. Both in theory and in reality there is no democratic representation without participation but participation can very well be used in a way that runs counter to democratic representation. This assertion will be supported by theoretical arguments and empirical analysis.

Beyond representation: On the tension between epistocracy and democracy

Erik Eriksen, University of Oslo, ARENA

In modern democracies, the necessity of basing decision-making on expertise leads to delegation and the proliferation of depoliticized bodies (DBs). They are 'non-majoritarian institutions' with some grant of specialized authority, neither directly elected nor directly managed by elected officials. Are we beyond representation and what about the problem of epistocracy? When the boundaries of science and politics are blurred, when a broader set of premises for decision-making is called for, when rational answers are not in sight, representation is needed.

Representing 'National' Interests in Uncertain Times – The Council and European Council

Kenneth Armstrong, Cambridge University

At a certain point in integration studies it appeared useful to distinguish between the 'day-to-day' of EU policymaking and the more episodic moments under which 'step-changes' in European integration might occur. The latter was associated with intergovernmental decision-making instigated and orchestrated by the European Council while the former had closer connections with the quotidian institutional interactions of the European Commission, Council and European Parliament. Different patterns of political representation are associated with these modes and moments of integration. Yet it is clear that in more recent times, the roles of the European Council and Council have changed, not least in the context of the economic crisis. Indeed, the European Council has assumed a more continuous role in directing key aspects of EU governance. These changes do not simply concern the institutional vehicle for the representation of national interests but concern the nature of the interests themselves. The paper argues that these developments in EU governance are not well captured by the Lisbon Treaty's formal allocation of institutional responsibilities for the representation of interests and the principles of democracy associated with them.

ECB, the citizens and the parliaments: The impact of Lisbon and the crisis

Chiara Zilioli, Deputy General Counsel of the ECB

The distinction between input and output legitimacy provides useful insights into the topic of the conference. While Article 11 TEU is motivated by the desire to create new forms of input legitimacy, the ECB's legal and institutional set-up is mainly centred on the notion of output legitimacy. The ECB is legitimised primarily by delivering on its mandate which is clearly defined in the Treaties. It is an independent technocratic institution in charge of a policy field which has been elevated to the supranational level but also removed from the influence of politics. At the same time, this does not prevent the ECB from seeking sources of input legitimacy. Article 11 allows the institutions to use "appropriate means" relative to their specificities: the ECB, for example, is prohibited from seeking or taking instructions and is requested to maintain a higher level of confidentiality on its deliberations than political



institutions. Within these constraints and the framework of EU's representative democracy, the ECB relies to a large extent on parliaments to enter into an indirect, two-way dialogue with EU citizens: by exchanging with the elected representatives of the European people(s), the ECB is able to communicate its messages to citizens but also to listen to their views. As a European institution, the ECB is accountable at the European level and has thus regular public exchanges with the European Parliament. Recently, the ECB has also enhanced its efforts to reach out to national parliaments who are closest to EU citizens. Beyond this regular dialogue with parliaments, the ECB is engaged in an array of contacts with representative associations and civil society (such as with social partners at the Macroeconomic Dialogue or with relevant stakeholder groups, academia and think tanks). During the crisis, the ECB has also stepped up its communication activities with a view to reaching out to citizens in all euro area countries. Through such direct and indirect channels, citizens have the opportunity to make known and publicly exchange their views: these constitute "appropriate means", in line with Article 11(1) and (2) of the TEU.

Non-representative rule-making: Law, Output and Input Values

Carol Harlow, London School of Economics

This contribution focuses on the meaning of Art. 11 TEU for non-representative rule-making. The common practice in representative democracies is to treat non-representative rule-making as 'delegated' by the legislator. Typically, non-representative rule-making in democracies is justified with reference to a set of 'output values', which are related to the governmental function of rule-making and centre on efficiency and effectiveness.

In contrast, the effect of TEU Article 11 is to introduce a set of 'input values', applicable generally across the functions of EU governance, which include participation and dialogue (Art 11(1)); openness, transparency and dialogue (Art 11(2)). There is also reference to consultation. Taken seriously, Article 11 contains a potential clash of output and input values. However, with the exception of the Citizen's Initiative installed by Art 11(4), the Article does not mandate legislation. It mandates the institutions to take action 'by appropriate means', which need not necessarily be legal. Its legal force is therefore doubtful.

This raises three main questions, with which this presentation will try to deal:

- How far does existing non-representative rulemaking reflect (i) output and (ii) input values?
- How far does 'law' contain inherent values that could be used to implement Article 11?
- How far is non-law (soft law) an 'appropriate means' to implement Article 11 values?

Means to control the Commission's rule-making powers: A matter of legislative choice

Jürgen Bast, Justus Liebig-University Giessen

This contribution focuses on the legal framework, laid down in Articles 290 and 291 TFEU, for controlling rule-making by the Commission. The presentation argues in favor of a substantial overlap in the potential scope of delegated and implementing acts. In cases where a particular power to be conferred on the Commission would satisfy the requirements of both categories of acts, it is incumbent on the Union legislature to choose the respective control regime it deems appropriate. Moreover, Articles 290 and 291 TFEU leave ample room for designing further means to enable political contestation of value-judgments taken in the guise of administrative decision-making and thus to satisfy the aspirations of Article 11 TEU.

Speakers, Discussants & Chairs

Kenneth A. Armstrong was elected to the Professorship of European law, University of Cambridge in 2013. Previously he was Professor of European Union law at Queen Mary, University of London. He researches and writes on issues on EU social and economic governance. His monograph, *Governing Social Inclusion: Europeanization through Policy Coordination* (Oxford UP, 2010) won the 2011 University Association for Contemporary European Studies book prize. His current research analyses the legal response to the economic crisis in Europe. He has served on the editorial boards of *Public Law* and the *European Law Journal* and has held visiting positions at the Institute for Advanced Studies in the Humanities, University of Edinburgh, the European University Institute and at the Jean Monnet Center, New York School of Law. He tweets (@ProfKAArmstrong).

Jürgen Bast is Professor of Public Law at Justus-Liebig University Giessen. Before his appointment on 1 October 2013, he was Professor of Public International and European Law at Radboud University Nijmegen and a guest professor at several universities in Germany. His research in European Public Law focusses on the institutional law of the EU and the future of economic governance and the welfare state in Europe. His fields of interest include European Administrative Law and international, European and German migration law and policy.

Madalina Busuioac is a Fellow in Risk and Regulation at the Centre for Analysis of Risk and Regulation (CARR), London School of Economics. Prior to joining CARR, she was Assistant Professor at the Amsterdam Centre for European Law and Governance. Her research focuses primarily on questions of accountability, independence, expertise and legitimacy brought on by, and related to, the rise of non-majoritarian agencies in Europe, with a particular emphasis on the EU agency phenomenon. She has published both in public administration and law and is the author of numerous international book contributions as well as articles in journals including the *Journal of European Public Policy*, *Regulation and Governance*,

European Law Journal and *Public Administration*.

Leonard F.M. Besselink is currently Professor of Constitutional Law at the University of Amsterdam. He studied at the University of Leiden (Netherlands), Johns Hopkins School of Advanced International Studies (Bologna Center). He holds a doctorate in social and political sciences of the European University Institute, Florence, Italy. He is a member of the Royal Dutch Society of Sciences and Humanities.

Paul Craig is Professor of English Law at St John's College, Oxford. He undertakes teaching and research in EU law, Constitutional law, Administrative law and Comparative Public law. He has published in all these areas and is also one of the UK Representatives on the Venice Commission on Law and Democracy.

Deirdre Curtin is Professor of European Law and Founding Director of the Amsterdam Centre for European Law and Governance at the University of Amsterdam. She is research leader of several innovative research projects embracing both law and political science, including *Open Government in the European Union*, *Compound Constitution(s) in Europe* and *The Architecture of Postnational Rulemaking*. Deirdre Curtin authored and co-authored a number of scientific monographs, including *Executive Power of the European Union* (Oxford University Press 2009) and *The Real World of EU Accountability: What deficit?* (Oxford University Press 2010 with Paul 't Hart and Mark Bovens).

Erik Oddvar Eriksen is Professor in Political Science and Director of ARENA – Centre for European Studies, University of Oslo, Norway. His main research fields are political theory, public policy and European integration. His interest in legitimate rule has led to publications on democracy in the EU, governance and leadership, functions and limits of the state, deliberative democracy, trust, regional politics, security politics and the welfare state. Recent publications include *The Unfinished Democratization of Europe* (Oxford University Press, 2009); *Rethinking Democracy and the European*

Union (Routledge, with J.E. Fossum (eds), 2012); *The Normativity of the European Union* (London/New York: Palgrave Macmillan, forthcoming 2013); in German: *Die Imperativen der Europäischen Integration* (Freiburg/Munich: Verlag Karl Alber, forthcoming 2014).

Ian Harden is Secretary-General of the Ombudsman's Office. After graduating in law at Churchill College, Cambridge, he joined the Law Faculty at the University of Sheffield, where he was a lecturer from 1976 to 1990, a senior lecturer from 1990 to 1993, a reader from 1993 to 1995, and became professor of public law in 1995. He joined the European Ombudsman's Office as a Principal Legal Adviser in 1996, becoming Head of Secretariat from 1997 to 1999, then Head of the Legal Department from 2000. He was appointed Secretary-General of the Ombudsman's Office on 1 August 2006.

Carol Harlow is Emeritus Professor of Law at the London School of Economics. She is Queens Counsel (honoris causa) (1996); Fellow of the British Academy (1999); Fellow of the London School of Economics (2005) and Emeritus Member of Society of Legal Scholars (2005). Carol Harlow sits on the International Advisory Board of the *Review of Constitutional Studies* and serves on the Editorial Boards of the *European Law Journal* and *Modern Law Review*. In her research she focuses on the liability of the state, on English administrative law, EU administrative law and accountability in the European Union. Among recent publications are: (with Richard Rawlings) *Law and Administration*, 3rd edition, 2009; "Three Phases in the Evolution of EU Administrative Law" in Craig and de Búrca (eds) *The Evolution of EU Law* 2nd edn, 2011; 'The Concepts and Methods of Reasoning of the New Public Law – A New Legislation?' (2011) *European Review of Public Law* 1-50; (with Richard Rawlings) "National administrative procedures in a European Perspective: Pathways to a slow convergence?" (2010) *Italian Review of Public Law* 215-258. She is currently working on a book on EU administrative procedures.

Beate Kohler-Koch, Professor emeritus, University of Mannheim, is project director at the Mannheim Centre for European Social Research (MZES). In recent years she initiated and coordinated several large

national and international research programmes on European governance, democratic legitimacy and civil society. She is author and editor of numerous publications including: *De-Mystification of Participatory Democracy. EU Governance and Civil Society* (Oxford University Press 2013; with C. Quittkat); *European Multi-Level Governance. Contrasting Images in National Research* (Edward Elgar 2009; with F. Larat); *Changing Images of Civil Society: From Protest to Governance* (Routledge 2008; with B. Jobert); *Debating the Democratic Legitimacy of the European Union* (Rowman & Littlefield 2007; with B. Rittberger).

Sandra Kröger is a lecturer at the politics department of the University of Exeter. She holds degrees in social sciences (Humboldt University Berlin, Paris VIII) and Interdisciplinary France studies (University Freiburg) and obtained her PhD at the University of Göttingen. From 2008-2011, she was lecturer at the Jean Monnet Center for European Studies (CEuS) at the University of Bremen, and from 2011-2013 a Marie Curie Fellow in Exeter. Her current research interests are the ways civil society organizations construct and organize political representation across the different levels of governance as well as national parliaments in EU policy-making and democratic representation in the EU more broadly. Recent publications include: Bellamy, R. and Kröger, S. (eds.) (2013) *Representation and Democracy in the EU: Does one come at the expense of the other?* Special issue with the *Journal of European Integration* 35 (5); Kröger, S. (2013) Creating a European demos? The representativeness of European umbrella organizations. *Journal of European Integration* 35(5): 583-600; Kröger, S. and Friedrich, D. (2013), Democratic representation in the EU: Two kinds of subjectivity. *Journal of European Public Policy* 20(2): 171-189; Kröger, S. and Friedrich, D. (eds.) (2012), *Representation in the European Union: Coping with present challenges to democracy?* Palgrave Macmillan: Houndmills; Kröger, Sandra (ed.) (2009), What we have learnt: Advances, pitfalls and remaining questions in OMC research. *European Integration Online Papers*, Special issue 1, Vol. 13.

René Smits is Professor of the law of the Economic and Monetary Union at the University of Amsterdam (Jean Monnet Chair) and a Visiting Professorial Fellow at



Queen Mary, University of London. He has practised law for the past 30 years, first at the Netherlands central bank as General Counsel and, then, at the Netherlands competition authority *NMa*, where he was head of the legal department. He is currently strategic legal counsel and Compliance Officer at the Authority for Consumers & Markets (ACM), the successor to *NMa*. René Smits has a broad command of European Union law issues in the following areas: internal market, banking regulation, the euro and Economic and Monetary Union, and competition law, and is an authority on the European Central Bank. Professor Smits is a regular speaker on legal subjects and has written extensively on legal issues concerning EMU and financial sector and payments supervision.

Bruno de Witte is Professor of European Union Law at Maastricht University (The Netherlands), and co-director of the Maastricht Centre for European Law. Part-time Professor at the Robert Schuman Centre of the European University Institute, Florence. Previously, from 2000 to 2010, professor of European Union Law at the European University Institute, Florence.

Jonathan Zeitlin is Professor of Public Policy and Governance, Distinguished Faculty Professor, and Jean Monnet Chair in European and Transnational Governance in the Political Science Department at the University of Amsterdam (UvA). He is also the Scientific Director of the newly established Amsterdam Centre for Contemporary European Studies (ACCESS EUROPE), a joint venture between the UvA and the Vrije Universiteit (VU). Before joining the UvA in January 2010, Zeitlin taught for 18 years at the University of Wisconsin-Madison, where he directed the European Union Center of Excellence and the Center for World Affairs and the Global Economy (WAGE). He holds a PhD from the University of Warwick (1981), an MA

from the University of Cambridge (1983), and a BA from Harvard College (1977).

Professor Zeitlin's current research focuses on new forms of "experimentalist" governance within and beyond the European Union. For the past dozen years, he has studied the coordination of EU social, economic, and employment policies, and has frequently served as a speaker, advisor, and evaluator for EU institutions. Recent publications include: *Experimentalist Governance in the European Union: Towards a New Architecture*, Oxford University Press (2010); "Experimentalist Governance", in David Levi-Faur (ed.), *The Oxford Handbook of Governance*, Oxford University Press (2012); and "Experimentalism in the EU: Common Ground and Persistent Differences", *Regulation and Governance* 6:3 (2012). A full CV and list of publications is available online at <http://www.uva.nl/profiel/j.h.zeitlin>

Chiara Zilioli (LL.M., Ph.D.) has worked all her career long for the European integration project, in particular for the monetary union. She holds an LL.M. from Harvard Law School and a Ph.D. from the European University Institute. From the Legal Service of the EU Council, where she started in 1989, she moved to the European Monetary Institute in 1995 and to the ECB in 1998 where she was appointed, first, Head of Division and then Deputy Director General of Legal Services (Deputy General Counsel) of the ECB. Dr. Zilioli has published three books and several articles, mainly on the position of the ECB within the EU institutional framework and on the functions of the ECB. Since several years she is Lecturer at the Institute for Law and Finance of the J-W Goethe Universität, Frankfurt and at the Collegio Europeo di Parma, Italy; in 2012 she has given a course at the Academy of European Law of the European University Institute. She is a member of the Italian Bar, is married and has four children.

Practical information

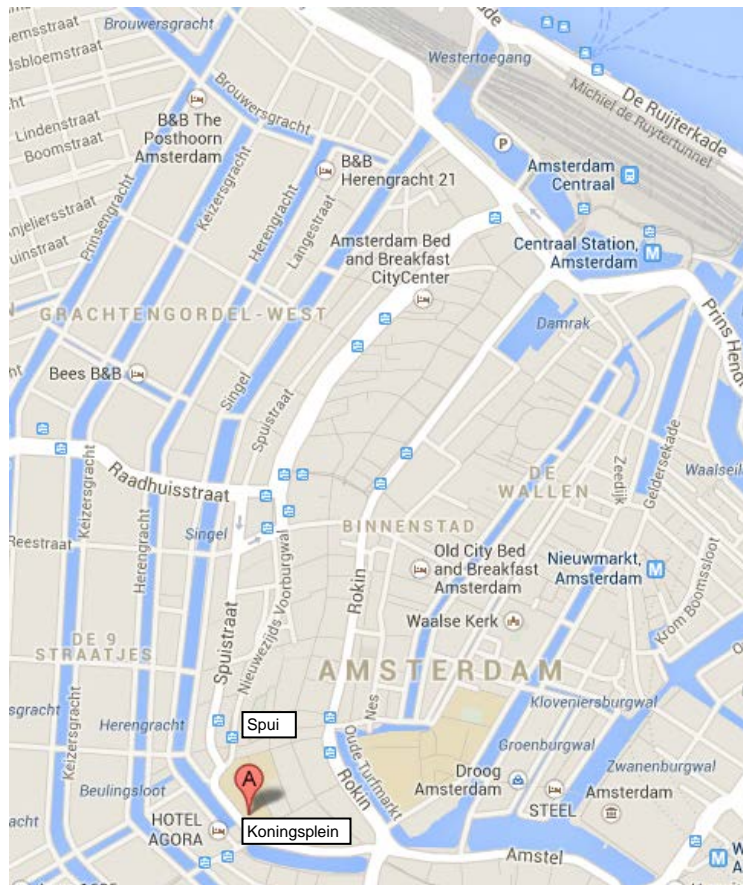
Registration

Participation is free of charge. For organizational reasons, all participants are required to [register online](#).

Venue

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Singel 425
1012 WP Amsterdam

Directions within Amsterdam



By public transport

From Central Station take tram 1, 2 or 5 and embark either at stop Spui or at stop Koningsplein. From there it is a short walk to the conference venue (A on the map).

By car

It is very difficult to find a parking space near the University Library. Closest parkings are:

Parking Bijenkorf
Beursplein 15
1012 JW Amsterdam

Parking Stopera
Valkenburgerstraat 238 -
1011 ND Amsterdam

Public transport

- **Arrival at Schiphol Airport**

From Schiphol airport, trains leave every few minutes to Amsterdam Central Station. The journey takes about 20 minutes. Tickets are sold in the airport's central hall, either at vending machines or at the counter of the NS (Dutch Railways) at EUR 3.90. Plan your trip at www.ns.nl.

- **Public transport within Amsterdam**

Disposable chipcards valid for 1 hour (EUR 2.70), 24 hours (EUR 7.50) or 48 hours (EUR 12.00) after check-in are sold at the GVB Tickets & Info office in front of Central Station or at



ticket machines in the metro stations. The 1-hour card can also be bought on board of trams and busses (not in the Metro).

Accommodation

Participants are requested to organize their own accommodation in Amsterdam. Hotels near de conference venue include among others

[Hotel Le Coin](#) ***

[NH Hotel Doelen](#) ****

[Radisson SAS](#) ****

[The Albus](#) ****

Contact information

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