BUNDESKANZLERAMT ÖSTERREICH

INSTITUTE FOR STATE ORGANISATION
AND ADMINISTRATIVE REFORM

DIALOGUE WITH CIVIL SOCIETY: THE WAY FORWARD

SEMINAR BEPA/AIELP ON

"DIALOGUE UNDER ARTICLE 11 (2) TEU: ENGAGING WITH CIVIL SOCIETY"

Alexander Balthasar*

I. Preliminary Remark

What we just heard from my friend *Johannes W. Pichler* is the empathetic view of a political scientist. May I now add a more sober view of a lawyer based in a governmental structure – you will realize, however, that the results we reach and the conclusions we draw are quite similar.

II. The Original Background

Pursuant to Article 11 (2) TEU, "the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society". This small sentence has left ample room for interpretation, both with regard to the meaning of specific terms, as with regard to its efficacy.

What is more, we have the impression that the fact that this provision forms now part of the "democratic principles" [1] – and not of the subsequent Title III ("Provisions on

---

* Dr. iur. Alexander Balthasar is Head of the Institute for State Organisation and Administrative Reform in the Austrian Federal Chancellery and further member of the Austrian Institute for European Law and Policy (AIELP).

[1] See also, in the same Title, the prelude in Article 10 (3) TEU: „Every citizen shall have the **right to participate** in the democratic life of the Union. Decisions shall be taken *as openly and as closely as possible to the citizen*."
The Draft Treaty establishing a Constitution for Europe, however, had still more emphazised this connotation when attributing to the predecessor of what is now Article 10 TEU the **heading** "the principle of representative democracy" and to Article I-47, the predecessor of current Article 11 TEU, that one of "the principle of **participatory democracy**".

the Institutions") – has **veiled a bit the original purpose** of the "dialogue" and its original initiator.

When we go back to the "White Paper on European **Governance**" 2001[2] of the then **Commission** of the European Communities, we see that "better involvement" of citizens was, there, not an end in itself, but rather an **instrument for** securing nothing less than the **future of European integration** in its entirety.[3]

The main principles underpinning this White Paper were: "*Openness, Participation, Accountability, Effectiveness and Coherence*"[4] – and we find these principles – which seem to be more relevant for the **proper functioning of the institutions** than for democratic life as such – still in the **text** as well as in the **context** of Article 11 (2) TEU, the provision here at issue. It is very likely, however, that these references to "good governance" tend to be overlooked now from *both sides* and that it is exactly this fact why, from the *democratic* perspective, we read now, with regard to Article 11 TEU, of the "disenchantment of participatory democracy"[5], whereas, we face, from the *institutional* perspective, some hesitation (to put it politely).

We, personally, do **neither** share the disappointed judgement of "**disenchantment**", **nor** would we like to advice **hesitation**. But, before giving our view as to how the "dialogue" should be developed in the future, we invite you to have again a look on the wording as well as on the context of the provision:

III. The Provision

A. The Actors

1. The Institutions

When first dealing with the partners of the dialogue, it is a bit striking that this second paragraph of Article 11 TEU, as well as its paragraph 1, addresses "*the* institutions" *in general*, not only the Commission – as does paragraph 3 – or, although only indirectly, the legislator (i.e. the Council and the European Parliament, via the Commission[6]), as does paragraph 4.

Taken literally, i.e. read in conjunction with Article 13 (1) TEU, this provision includes, therefore, not only the European Council – which, given its competence to "provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof" (Article 15 [1] TEU), is still fairly easy

[2] Of 25 July 2001, COM(2001) 428 final.
[3] The „Final Report of the Future of Europe Group of the Foreign Ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal and Spain" of 17 September 2012 shows that the issue has not in the least lost its relevance today.
[4] White Paper, 10.
[5] *Kohler-Koch*/*Quittkat*, Die Entzauberung partizipativer Demokratie. Zur Rolle der Zivilgesellschaft bei der Demokratisierung von EU-Governance (2011).
[6] Cf Article 289 (1) TFEU.

to understand – but also the Court of the European Union, the European Central Bank and the Court of Auditors; on the other hand, at least at first sight not only the two advisory bodies (the Economic and Social Committee/EESC and the Committee of the Regions/CoR) are excluded[7], but also the European Ombudsman.[8]

What we may infer already at this stage of interpretation is, in our view:

- the **overwhelming importance** which is attached *in principle* by the Treaty (and its "masters") to the maintenance of such a dialogue, not allowing exclusion a priori of any "institution", notwithstanding their considerable differences as to structure and remit;
- the **outstanding role** attributed by Article 11 TEU to the **Commission** which is not only addressed, as one "institution" among others, in general, but singled out in the subsequent paragraph 3 as well as in paragraph 4.

If we presume that also "broad *consultations*" (paragraph 3) as well as a *Citizens' Initiative* submitted to an institution (paragraph 4) constitute *specific forms of "dialogue"* – which are, however, *not* to be maintained *by all institutions* – we see that this "dialogue" which is so overarching and all-encompassing on the principal level, *can,* when it comes to implementation, *not be a uniform one*:
Right to the contrary, **tailor-made solutions** with regard to structure and remit of each "institution" have to be found, with **specific regard to the** core and plurifold role of the **Commission**.

Also when performing these roles, however, also and in particular the Commission "*shall", pursuant to Article 13 (4) TEU,* be assisted" by the two Committees (so that, at second glance, also these "advisory" bodies come back into the picture, and not only on a purely discretional basis).

2. "Civil Society"

Whereas Article 13 (1) TEU tells us what "institutions" are, we lack a likewise precise legal definition with regard to the term "civil society"; what is more, Article 11 TEU employs, in addition to "civil society", a variety of terms in order to describe the partners of the "institutions": "citizens" (paragraphs 1 and 4), "representative associations" (paragraphs 1 and 2), "parties concerned" (paragraph 3). But we may infer from the expression "with representative associations *and* civil society" used in paragraph 2 itself that "civil society" is *more than "representative associations"* – in extremis, therefore, indeed **every single citizen**.[9]

[7] Article 13 TEU makes a clear distinction between the "institutions" and the two Committees which shall "assist" and "advise" the European Parliament, the Council and the Commission.
[8] The legal basis of the Ombudsman being, however, Article 228 TFEU, forming part of the section "The European Parliament", we endorse an interpretation which includes the European Ombudsman in the term "European Parliament" within the meaning of Article 13 (1) TEU.
[9] This view is not only avoiding any inconsistency in Article 11 TEU, but also backed by Article 15 TFEU where, "in order to … ensure participation of *civil society*" (paragraph 1) "*any citizen*" (paragraph 3) is entitled to the "right of access to documents" there at issue. Cf also the development of what is

Pursuant to Article 300 (2) TFEU, the EESC "shall consist of representatives of organisations of employers, of the employed, and of other parties representative of civil society, notably in socioeconomic, civic, professional and cultural areas." This provision seems to be crucial in two respects:

- on the one hand we see also here that "*civil society" is much more than the social partners*[10], but covers also "civic … and cultural areas"
- on the other hand this composition of the **EESC** underlines the **assisting role** of this body also and in particular under Article 11 (2) TEU, insofar as the dialogue maintained by the EP, the Council or the Commission is concerned.

B. The Legal Framework

The auxiliary verb "shall" used in Article 11 (2) TEU makes it perfectly clear that it is a **legal obligation**, not just a vague political goal which was enshrined here. But: not a single element of Article 11 TEU has been repeated in the Titel V ("Citizens' Rights") of the EU Charter for Fundamental Rights. This finding raises severe concern as to the legal character of these provisions with regard to citizens, the more so, because the Charter does not only contain "rights" which are directly applicable but also "principles" which need prior implementation by secondary legislation.[11]

In addition, *only* paragraph 4 of Article 11 TEU *is* to be implemented by a regulation.[12]

Does, therefore, the status of at least the first three paragraphs of Article 11 TEU rank even *below the* (not directly applicable) *"principles" of the Charter*? And, even more vexing: is there any **legal basis for – fully binding – implementing legislation** with regard to these paragraphs, in particular for Article 11 (2) TEU here at issue?

In our view, the *second* question could be answered in the *affirmative*: there are *rules of procedure* (see, for the Commission: Article 249 [1] TFEU) which seem to be the right place to ensure as well enough flexibility (see lit A/1, supra) and binding force.[13]

As to the first question, however, it is very likely that the only legal remedy available against even persistent delay would be the action under Article 265 (1) TFEU – which means that it is **not "civil society"** but only and exclusively "**the Member States**

---

now Article 300 (2) TFEU: Originally, Article 257 (2) TEC (in the version of the Treaty of Nice) only spoke of "organized civil society".

[10] Cf Article 155 TFEU, the original starting point of the „horizontal dialogue" (Article 11 [1] TEU).

[11] See Article 52 (5) of the Charter.

[12] Article 11 (4) TEU in conjunction with Article 24 (1) TFEU.

[13] As to the principal feasibility of this approach cf Article 15 (3) (3) TFEU. While being perfectly true that there is an explicit obligation to "elaborate … specific provisions" in the respective rules of procedure which is lacking in Article 11 (1)-(3) TEU I do not think that this difference is a sufficient basis for an argumentum e contrario.

and the other institutions"[14] which are competent to enforce the obligation under Article 11 (2) TEU. This is, of course, more than nothing, but – if we take the perspective of citizens – nevertheless a bit paternalistic; this finding is, however, fully in line with the **institutional background** of Article 11TEU pointed out above.

C. The core features of the Obligation

The main characteristics of the obligation enshrined in Article 11 (2) TEU are:

- It is "the institutions" – not "civil society" – which "shall maintain" the dialogue. This "maintenance" implies an **obligation for the respective institution to provide** not only the necessary legal basis (see lit B, supra) but also the purely **factual preconditions**, such as premises, invitation management, etc. for the dialogue *between* the institution concerned *and* its civil society partners.[15]
- On the other hand, however, even when accepting that "consultations" under paragraph 3 are a specific form of the "dialogue" under paragraph 2 (see lit A/1, supra) it follows from the **coexistence** of the two paragraphs – both of which address themselves to the Commission – that the meaning of the term *"dialogue" cannot be confined to* that of (even "broad") "*consultations*". In our view, "dialogue" entails more emphasis on an **equal footing of the partners as to the setting of the agenda**, a more **active role of "civil society"** to submit its own ideas even if the respective institution did not yet call for them.

The "dialogue" at issue shall be "open, transparent and regular"; these three attributes seem to mean:

- "regularity" requires a minimum of continuity: so it will not be enough for an institution like the Commission just to assemble selected participants once during the five years' term of office; rather, there must at least be offered the opportunity to reach substantive results in at least some topics chosen for discussion.
- "openness" could reflect the elements of "pluralism" and "tolerance" prevailing, pursuant to Article 2 TEU, in our "society" and, therefore, relate more to the **content** or the **method** of the "dialogue", whereas
- "transparency" is the attribute securing that the **general public is informed** of what was discussed among the participants.[16]

[14] Most probably the Court of Justice itself excluded.
[15] In contrast, the obligation enshrined in the preceding paragraph 1 covers the dialogue *among* civil society.
[16] It is true, however that Article 15 (1) TFEU uses the terms „open" and „transparent rather promiscue in the sense which is here attributed to "transparent".

D. The Purpose

Curiously enough Article 11 (2) TEU does **not** in the least **indicate the purpose** of the "dialogue", whereas the following paragraph 3 clearly states that it is "in order to ensure that the **Union's actions** are **coherent** and **transparent**" that "broad consultations" have to be carried out.
Given that these "consultations" can be considered as a subset of the general "dialogue" (see lit A/1), we may conclude that "transparency" and "coherence" serve also as goals to be achieved by Article 11 (2) TEU.

1. Transparency

"Transparency" being the very opposite and safeguard against "arcana imperii", the "**dialogue**" under Article 11 (2) TEU would, from that perspective and vis-à-vis the Commission intensify, if not duplicate the **rights to inquiry and interpellation** conferred, by Articles 226 and 230 (2) TFEU respectively, to the EP, and, therefore, **strengthen** the Commission's **accountability**.

Of course it is true that "accountability" is a tool to secure democratic legitimacy, as is stated in Article 10 (2) (2) TEU with regard to national governments. But observing the principle of "accountability" helps also to prevent maladministration and corruption. And indeed **Article 15 (1) TFEU** reflects this ambiguity when motivating the principle of "openness" enshrined here not only by the purpose of ensuring "the **participation of civil society**", but (and in *first* line!) by that of promoting "**good governance".**

2. Coherence

That understanding is further backed by the fact that participation of citizens under Article 11 (3) TEU is motivated explicitly also by the aim to enhance "coherence".

In this respect, we have to consider that this is not the only provision where this aim is mentioned, and to which fields of policy the term "coherence" is to be applied:

a) Overall Consistency

The very same Treaty of Lisbon by which Article 11 TEU was adopted also mentioned in Article 13 (1) TEU, at the very beginning of the "Provisions on the institutions"[17], the goal to "ensure the consistency, effectiveness and continuity of" the Union's "policies and actions." In particular the Council configuration for **General Affairs** was strengthened and explicitly called to "**ensure consistency** in the work of

[17] Cf also the reiteration of this goal in Article 7 TFEU.

the different Council configurations" (Article 16 [6] [2] TEU).[18] "Consistency", however, means "coherence" (as show the German as well as the French version where in Article 11 [3] as well as in Article 16 [6] [2] TEU the same term – "Kohärenz"/"coherence" – appears.

Obviously aiming at more consistency is a very legitimate aim in particular for institutions where a **high degree of specialization** (division of labour) – between the different Council configurations as well as between different DGs of the Commission – takes place.

So I hold that, in the opinion of the drafters of the 'Treaty, apparently also the **"dialogue"** under Article 11 (2) TEU was considered as an appropriate means **to reach more consistency**/coherence **in the daily work of the institutions,** by adding **fora of a more general remit** where a **synopsis** of different perspectives may be achieved.

b) Foreign Policy and its effects on Internal Policies

"Coherence"/"consistency" is also to be achieved in the field of **foreign policy**. Within the Council, this specific segment has been conferred to the configuration "Foreign Affairs" (Article 16 [6] [3] TEU). But also the **Commission** plays now a prominent role in this field, at least via the "**High Representative** of the Union for Foreign Affairs and Security Policy", who chairs not only the Foreign Affairs Council (Article 18 [3] TEU), but is also one of the Vice-Presidents of the Commission (Article 18 [4] TEU).

In this respect, also Article 21 (3) TEU should be taken into account; pursuant to this provision,

"The Union shall ensure **consistency between** the different areas of its **external action and** between these and its **other policies**. The Council and the **Commission**, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, **shall ensure** that consistency and shall cooperate to that effect."

Even when inclined by tradition to accept that foreign policy, as such, is, by a variety of reasons, less apt to be conducted in an "open and transparent" manner; the explicit link established in Article 21 (3) TEU between "external action" and internal "policies" in order to reach "consistency" makes it extremely **difficult to exclude** a priori even the Union's foreign policy **from the scope of the "dialogue"** under Article 11 (2) TEU – if, of course, we uphold the premiss that also this dialogue was created to ensure consistency of the Union's actions in general and, therefore, also in the field of external policy, in particular, when this **external policy** is to be conducted **interdependently with** the related fields of **internal policies**.

[18] Still the "Future of Europe Report" 2012, 2, however, proposes to empower the "General Affairs Council … to fully assume the coordinating role foreseen for it in the Treaty".

c) Enhanced Cooperation and Coherence

Article 20 TEU provides now a Treaty basis for "enhanced cooperation" among some – at least nine – Member States, but **only**

- with the "aim to **further the objectives of the Union**, protect its interests and reinforce its integration process", and, therefore,
- with the (twofold) perspective of **inclusion** of additional Member States[19] and
- "as a **last resort**".

These limitations show clearly enough the ambiguity of the instrument of "enhanced cooperation" with regard to the Union:

- On the one hand, "integration" and, therefore, "coherence", is "**reinforced**" **among the partners** of this cooperation.
- On the other hand, however, exactly this cooperation not among all, but only among some partners is very likely to **widen the gap** between these partners and all other Member States not joining the cooperation.

From that perspective *all institutions* pondering whether such a decision on enhanced cooperation should be taken or not have to **balance very carefully** the advantages **for the whole Union** of 28 Members, as it stands from next month onwards) against the disadvantages. Within this concert the Commission plays a very prominent role, because its proposal is mandatory (Article 329 [1] TFEU).

In my view, a meaningful "dialogue" under Article 11 (2) TEU could help also and in particular the Commission to assess the factual situation properly – and thus to **avoid the Union to be distorted.**

It is exactly this consideration where we realize the most interesting **subliminal relation** between the "**participatory**" dialogue under Article 11 (2) TEU and the principles of "**national identity**", "**sincere cooperation**"[20], "**subsidiarity**" and "**proportionality**" enshrined in Article 4 (2), (3), and Article 5 (3), (4) TEU respectively.

[19] According to Article 20 (1) (2) TEU, every Member State may, "at any time", join the "enhanced cooperation" fully; in addition, paragraph 3 allows "all Members of the Council" to "participate" in the "deliberations" of the cooperating partners.

[20] This principle has to be applied in **both directions**, thus not only serving as a legal basis for the primacy of Union law, but also as a brake against a pace of integration overcharging a considerable number of Member States.

IV. The Context

A. The Preamble to the Treaty of Lisbon

What I have aimed to draw from the text of the provision at issue has, however, been revealed, quite frankly, already by the preamble to the Treaty of Lisbon; there we learn that the "view" of this Treaty was

"**enhancing the efficiency** and democratic legitimacy of the Union and to **improving the coherence** of its action."

Albeit "enhancing the … democratic legitimacy of the Union" is mentioned, this aim is, evidently, not the only one, **not even the most prominent one**; what is more, we may in fact doubt, at least at first sight, where the substantive **link** is between

- "enhancing the efficiency" and "improving the coherence" of the Union's action on the one hand and
- "enhancing the … democratic legitimacy of the Union" on the other hand.

B. The Commitment to Deliberation[21]

In sharp contrast to the constitutions of Member States, **Article 296 (2) TFEU** stipulates that all kinds of legal acts – i.e. not only administrative decisions and court judgements, but also acts of legislation (in particular regulations, directives and decisions of general nature) – "**shall state reasons** on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties".

Consequently, the "institutions which have adopted the act in question must **be able to show** before the Court that in adopting the act they actually exercised their discretion, which presupposes the **taking into consideration of all the relevant factors** and circumstances of the situation the act was intended to regulate."[22]

Apparently, *Thomas Hobbes*' sentence

"authoritas[23], not veritas, facit legem"[24]

[21] See for the content of this section in more detail *Balthasar*, a) Electronic Decision-Making in the Field of Law with special regard tot he European Union, CeDEM 11 (Proceedings of the International Conference for E-Democracy and Open Government) (2011), 335ff, b) (Wissenschaft von) Recht und Information – "an der Wurzel eins"?, Geist et al, Festschrift Schweighofer (2011), 41ff.
[22] CJ Judgment of 8 July 2010, C-343/09 (*Afton*), point 34.
[23] Instead of "authoritas", we read often "auctoritas" which is in fact a proper Latin term, but, unfortunately, means right the opposite, cf the claim of Augustus of having surpassed his fellow citizens not in formal power ("potestas"), but only in his ability to convince ("auctoritas") ("praestiti omnibus auctoritate, potestatis autem nihil habui amplius quam qui fuerunt mihi quoque in magistrate collegae").

does not fit for legal acts of the Union, rather the opposite:

"**veritas**, not authoritas **facit legem**"

is true. This "reversal" of *Hobbes'* sentence, however, is deeply rooted already in ancient *Greek* rational tradition[25] (where didn't even exist a notion for a mere action of will in the sense of Latin "voluntas"). And nowadays this "reversal" is, according to *Habermas*, a characteristic feature of **public rule** where **public deliberation** of private individuals claims to find, by absence of force, **the truth and the right**".[26]

Also the German Constitutional Court has, in its famous Lisbon Judgement and with explicit reference to Article 11 (2) TEU, labeled Union's **democracy** as a "**deliberative**" one.[27]

To achieve a meaningful "deliberation", however, is **not an easy task** in the current Union, given the sheer size of the citizenry (of about 500 million inhabitants), the general complexity of the legal framework and the substantive complexity inherent in the various fields of law, against the manifold factual background throughout the different regions as well as cultural or social "milieus" (which is, perhaps, a less obliging term for "classes").

When thinking for a means to relieve this burden incumbent on the institutions, also and in particular the "**dialogue**" under Article 11 (2) TEU may come into play, as a **collective effort of approaching the complexity of reality**.

C. The difference between "dialogue" and formal representation

When assessing the **added value** of this "dialogue" against the "background" of Article 10 (1) TEU's stipulation that

"the functioning of the Union shall be founded on representative democracy"

we see quite easily that there is **no use of duplicating structures of Parliament** elected by democratic vote. Rather the "deliberative" character of the "dialogue" requires that at the end of the day **all sensible arguments** have been put on the

---

[24] A Latin predecessor is the likewise famous line of Juvenal (Saturae VI, 223): Hoc volo, sic iubeo. **Sit pro ratione voluntas**". This insight was applied in French legal practice, when it was enough for French monarchs taking a decision to state: "**Car tel est mon plaisir**".

[25] Without any doubt it is not exclusively, but above all and in particular this ancient Greek tradition which has been invoked as the source of the values (within the meaning of Article 2 TEU) in the **second recital to the preamble of the** current version of the **TEU**.

[26] Strukturwandel der Öffentlichkeit (1990), 152f. Evidently the underlying presumption is that in the long run there will be a **progress of rationality**. This optimism in human evolution was firmly expressed i.e. by *Pierce* who is frequently referred to by *Habermas*.

[27] Judgement of 30 June 2009, 2 BvE 2/08 et al (BVerGE 123, 267), point 272. Cf also *Bredt*, Prospects and Limits of Democratic Governance in the EU, ELJ 2011, 35ff, 43, referring to *Joerges* and *Craig*.

table in order to enable the institutions to draw the correct conclusions from this **complete set of premises.**[28]

It might, however, be that this need to have a meaningful "dialogue" with "civil society" is felt nowadays more than in the past when European Parliament was not yet such a powerful player as it is nowadays; or, to put it differently:
As long as European Parliament could only influence the Union's legislation by virtue of the argument it was there where the proper deliberation took place, whereas nowadays also European Parliament has shifted considerably from the side of "veritas" to that one of "authoritas"/"potestas".

Seen from that perspective, the "dialogue" under Article 11 (2) TEU is not only an innovative instrument, but, at the same time, an attempt to **preserve the most characteristic and precious peculiarity** of the Union, that feature which marks the main difference between the Member *States* and the Union: a Union which is, in its ultimate consequence, **not a State based on the will of a sovereign**, but – as the ECJ put it 25 years ago – exclusively

"a community based on the **rule of law**".[29]

In my view, this dictum remains to be true and is a common asset also from the Member State's perspective.

V. Conclusions

When we come now to the conclusions to be drawn, I would like to suggest three:

- **Inclusion** of as many kinds of citizens as possible, by going "beyond Brussels" as already suggested at other occasions.[30] With regard to the Commission this means making use of their representations and the more than thirty agencies based in the Member States in order to get in touch with different sectors of the Union's citizenry.
- **Exclusivity** as to the issues dealt with on the level of Union-wide legislation: only if the **principles of subsidiarity and proportionality**, closely linked and interdependent with the respect to different national identities enshrined in Article 4 (2) TEU, are taken seriously, the institutions in general and the Commission in particular will neither overcharge the limits of their own resources nor those of their civilian counterparts.
- **Coherence/Consistency/Synopsis:** what is really needed also within the Commission (and, in principle, also within the European Parliament), is an **institutionalized counterpart to the General Affairs Council's role** as

[28] This finding is perfectly consistent with the result of textual interpretation achieved in section II/A/2, supra that in extremis it is **every single citizen who counts** (by virtue of the outstanding quality of the argument put forward by him).
[29] Cit CJ Judgment of 23 April 1986, Case 294/83 (Les Verts), referred to by the official Explanations to Article 47 EUCFR.
[30] Cf in particular *Pichler/Balthasar*, "Open Dialogue" with Citizens, BEPA Monthly Brief April 2013, 7.

envisaged (but, unfortunately, not yet fully implemented) by Article 16 (6) (2) TEU.

Only then the Union's **institutions**, **supported by best arguments of Europe's civil society**, will perform sustainably their indispensable task to establish the necessary framework and give the overall guidance which is needed for the perseverance of the unity of the European Union.