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E-Government and E-Democracy:
Overcoming Legitimacy Deficits in a Digital Europe

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by
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ABSTRACT

Many political initiatives of the European Union are focussing the development and application of new information and communication technologies (ICT) with regard to the single market and, in particular, to administrative processes at the Union level and among the Member States. While considerable progress has been made insofar, and the notion of e-government plays some role in this context, the discussion on the key constitutional issue of the democratic legitimacy of the European Union seems to remain rather untouched and insulated from the world of the internet. Yet, ICT and, in particular, the internet and e-democracy seem to offer considerable opportunities for enhancing transparency, citizens' information and participation in the decision-making processes and control of the policies led at Union level. With the theoretical distinction, borrowed from

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Vivian A. Schmid, of input-, output- and throughput legitimacy it seems to be possible not only to depict the tools of e-government and e-democracy as bridges of the gap between the citizens and their political institutions in the EU, but also to explore the potentials for further development with a view to overcoming the legitimacy deficits in the "digital Europe".

INTRODUCTION

In May 2015 the European Commission has published a communication on the "Digital Single Market Strategy for Europe",[1] an agenda aiming at boosting growth and competitiveness of our industries. But the strategy is not about business only. It also includes the public sector and the society:

> "A digital economy can also make society more inclusive. Citizens and businesses are not currently getting the full benefits from digital services (from e-government, e-health, e-energy to e-transport) that should be available seamlessly across the EU".[2]

Chapter 4.3.2. of the strategy deals with e-government and so describes what is meant. It states that online public services need to be promoted to "modernise public administration, achieve cross-border interoperability and facilitate easy interaction with citizens". On this line, online public services are considered "crucial to increasing cost-efficiency and quality of the services provided to citizens and companies". The communication proposes to introduce the "Once Only"-principle ensuring that "public administrations reuse information about citizens or companies that is already in their possession without asking again".[3]

One of the existing services are the websites of the European institutions giving broadly insight and explanation to their activities, the policies of the Union, the legislation and the case-law of the ECJ. In diverse policy fields, EU legislation already provides for electronic communication in order to facilitate making use of the freedom to provide services and the freedom of establishment,[4] free trade as well as the regime on public procurement.[5] And the proposed general regulation on data protection[6] and other legislative initiatives like the Network and Information Security (NIS) Directive, as part of the European Cybersecurity Strategy,[7] tend to ensure trust in the internet and online-services, so that people do not hesitate to use the new technology for their benefit.

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[1] European Commission, A Digital Single Market Strategy for Europe, Communication of 6 May 2015, COM(2015) 192 final.

[2] Ibid., para. 4 (p. 14).

[3] Ibid., para. 4.3.2 (p. 16).

[4] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006 L 376, p. 36–68, recitals 46, 52-54, 96, 112 and Articles 7 (3), 8, 21 (1), 22 (1), 22 (2) (c) and (3) (d), 28 (6), 34 (1), 36. 37(2)

[5] See Directive 2014/24/EU and Directive 2014/25/EU.

[6] European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final, and for the amendments of the European Parliament see: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0212+0+DOC+XML+V0//EN.

[7] European Commission, Network and Information Security (NIS), available at (last access 18/5/2015): http://ec.europa.eu/digital-agenda/en/news/network-and-information-security-nis-directive. Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Cybersecurity Stragegy of the European Union: An Open, Safe and Secure Cyberspace, JOIN(2013 1 final. For an overview on the proposed measures see European Commission, EU Cybersecurity plan to protect open internet and online freedom and opportunity – Cyber Security strategy and Proposal for a Directive, available (last acces 16.5.2015) at: http://ec.europa.eu/digital-agenda/en/news/eu-cybersecurity-plan-protect-open-internet-and-online-freedom-and-opportunity-cyber-security.

With the "Malmö-Declaration" of 2009[8] and the "eGovernment Action Plan 2011-2015", decided in 2010,[9] important initiatives have been taken by the EU on e-governance. The e-SENS (*Electronic Simple European Networked Services*) project, co-financed by the EU, was started in 2013 with a view to consolidate, improve, and extend technical solutions to foster electronic interaction with public administrations across the EU. A key issue is interoperability of the national ICT-solutions, so far concentrated on

- making it easier for companies to set up business electronically
- enabling electronic procurement procedures for businesses
- creating seamless access to EU legal systems
- making it easier to use healthcare services abroad in cases of emergency[10]

Not much has been proposed so far, however, and there is no systematic agenda, with regard to e-democracy.[11] Yet, similarly to e-government, that is considered to allow better delivery of government services to the people, the internet could be used as a possible tool to allow better delivery of citizen's will to the government and, thus, as a tool for improving democratic ownership and direct participation in government (e-democracy) in the EU. Its potential for strengthening the relationship between the citizens and their political institutions and leaders, be it at local, at regional, at national or at the European level has yet to be explored. At the EU level, in particular, it is important for the geographical and political remoteness of the institutions from the citizen and the complexity and sometimes obscurity of the decision-making processes. Therefore, the specific tools offered by the internet, both, by e-government and e-democracy could be instruments for overcoming legitimacy deficits in the EU.

Surprisingly, the internet and the use of digital technologies are not mentioned in any of the proposals and discussion papers regarding democratic legitimacy in the reform discussion of the EU. Yet, what I have described, at the ECLN-Conference of 2012 in New York, as the "principle of open democracy", one of the basic characteristics of the European Union,[12] seems to be open for development through e-government and e-democracy as two instruments to be used for enhancing the legitimacy of the European system of governance, a system that is based upon the citizens who are, ultimately, the authors as well as the

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[8] Ministerial Declaration on eGovernment approved unaninously in Malmö, Sweden, on 18 November 2009, available at (last access 19/5/2015): https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/ministerial-declaration-on-egovernment-malmo.pdf.

[9] See European Commission, The European eGovernment Action Plan 2011-2015. Harnessing ICT to promote smart, sustainable & innovative Government, COM(2010) 743 final, of 14.12.2010, available at (last access 19 May 2015): http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0743:FIN:EN:PDF.

[10] See the website of the project e-SENS (*Electronic Simple European Networked Services*): http://www.esens.eu/home/.

[11] As there are plenty ideas about, and attempts for conceptualizing e-democracy, at this stage it may suffice to say that it means application of ICT with a view of empowering the citizen as a participant in the political process. For what it could imply ultimately, see Majid Behruzi, Democracy as the political empowerment of the citizen. Direct-Deliberative e-Democracy (Lexington Books, Lanham et al. 2006), p. 1-3, and with an emphasis the close relationship of the idea to e-government, ibid., p. 100-104. For a general study on e-democracy see already: OECD, Promise and Problems of E-Democracy: Challenges of Online Citizen Engagement, available at: http://www.oecd.org/gov/public-innovation/35176328.pdf (last access 29 Nov. 2015). More sceptical: Graham Smith, Democratic Innovations. Designing Institutions for Citizen Participation (Cambridge University Press 2009), p. 142-161: „The promise of e-democracy has yet to be fulfilled" (ibid., p 160). More optimistically for the potentiels of e-democracy: Julie Freeman and Sharna Quirke, Understanding E-Democracy. Government-Led Initiatives for Democratic Reform, 5 JeDEM (2013), p. 141-154, available at: http://www.jedem.org/index.php/jedem/article/view/221 (last access 29 Dec. 2015). See also: Eduardo Magrani, Democracia Conectada - A Internet como Ferramenta de Engajamento Político-Democrático (FGV Dereito Rio 2014).

[12] See Ingolf Pernice, The EU – A Citizens' Joint Venture. Multilevel Constitutionalism and Open Democracy in Europe, in: José M. Magone (ed.), Routledge Handbook of European Politics, 2015, p. 184 (192-195).

subjects of the Union's public authority.[13] Or, to put it as a question: Has a digital Europe the potential to be more democratic – democracy being understood as a form of government ensuring a highest degree of self-determination for the subjects of public authority[14]? Can we increase the democratic legitimacy of the EU through developing instruments that belong to what we could understand as e-government and e-democracy?

First of all it seems to be necessary to explain what is meant with e-democracy, in particular, with regard to the European Union. One could think of the citizens' initiative provided for in Article 11 § 4 TEU, at first sight. If it is true that the regulation on the citizen's initiative[15] provides for an electronic collection of signatures, this does not in itself, however, turn the citizens' initiative into a tool of e-democracy. I resist giving a definition of e-democracy from the outset. The UK Parliament's Office of Science and Technology has explained in 2009 some aspects of e-democracy and its possible developments in future, and referred to websites like the streaming of all Parliament proceedings (parliamentlive.tv), electronic communication of citizens with their elected representatives (writetothem.com), online-consultations (forums.parliament) and e-petitions to the Prime Minister (petitions.number10.gov). Also blogging and social networks are mentioned.[16] These examples shed some light on what e-democracy is about. E-democracy, though, is not a settled term, but a program of creativity, inviting for the development of innovative uses of the internet with a view to facilitate, promote and enhance inclusion and active participation of the citizen in the political processes at all levels.

E-government[17] and e-democracy are distinct aspects of the same thing; they relate to different applications of the internet, while with regard to the relationship between the citizen and the public authorities they go hand in hand. If well understood and implemented, both terms describe instruments for tightening this relationship, giving it real life and so enhancing the legitimacy of the European Union and its policies. Let me refer, in this context, to Article 1 (2) TEU: It reads as follows:

> "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen".

The principles referred to in this fundamental provision of the Treaty, and, in

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[13] For more details of this concept on the basis of „multilevel constitutionalism" see ibid., p. 186. The theoretical foundations with the sovereignty of the citizen at the centre of the concept are developed in Ingolf Pernice, Europäisches und nationales Verfassungsrecht, Bericht, in: 60 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, (De Gruyter, Berlin 2001), p. 148, 160-3, 165-8: sovereignty today means self-determination of the individual as a matter of human dignity. Similarly focussing the individual: Behruzi (note 11), p. 3, taks about „the sovereign powers of the individual citizen" and distinguishes between „the macro principle of the political sovereignty of the individual" and „the micro principle of the ‚social autonomy' of the individual", see also ibid. p. 13-7: „Democracy as the Political Sovereignty and Social Autonomy of the Citizen".

[14] In this sense, with a reference to the German Constitutional Court and others Gertrude Lübbe-Wolff, Europäisches und nationales Verfassungsrecht, 3. Bericht, in: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 60 (De Gruyter, Berlin 2001), p. 246, at 252.

[15] Regulation 211/2011 on the citizens' initiative, OJ 2011 L 65/1; see in particular the Commission Implementing Regulation 1179/2011 laying down technical specifications for online collection system pursuant to Regulation (EU) No 211/2011 of 17 November 2011 of the European Parliament and of the Council on the citizens' initiative, OJ 2011 L 301/3.

[16] Parliamentary Office of Science and Technology, postnote 2009 no. 321, E-Democracy, available (16.5.2015) at: http://www.parliament.uk/documents/post/postpn321.pdf.

[17] For the concept and its legal implications in Germany see the comprehensive study of Martin Eifert, Electronic Government. Das Recht der elektronischen Verwaltung (Nomos, Baden-Baden 2006), with a short outlook also to the European dimension (ibid., p. 425-50).

particular, openness of the decision-making processes, closeness and proximity to the citizen, can greatly benefit from the internet. In order to explore the potential of the internet for serving the principles of openness and proximity, the key words related to internet and legitimisation in the European Union, to be dealt with hereafter are:

- e-government: better delivery of public services to the citizen,

- open government, or better access to information and transparency

- participatory democracy and better inclusion of the citizen

- the European digital public sphere and political accountability

These four aspects seem to be essential for the citizens of the Member States taking ownership of the European Union and for strengthening legitimacy of the Union and its policies. Legitimacy is understood in a broader democratic sense as a general acceptance by those concerned of – or the identification of the citizens with – the constitutional setting, its procedures and the decisions (outcome) so produced as their own method of self-government, whether or not each individual likes each particular decision taken by the competent authorities regarding his or her case, views or interests. Borrowing from the terms developed by *Fritz Scharpf* and expanded by *Vivian A. Schmidt*, legitimacy means *output* legitimacy with regard to the acceptance of the decisions taken, to be effective and useful (government *for* the people). It is based upon *input* legitimacy in respect of the will of the people having found an expression in the policies decided by the competent institutions following the procedures applicable in each case (governance *by* the people). And it is conditioned by *throughput* legitimacy focussing the internal processes and practices of EU governance and, in particular, the interest mediation *with* the people. Thus, throughput legitimacy regards, as *Schmidt* puts it, "the quality of the governance process, not just the effectiveness of the outcomes or the participation and representation of the citizenry".[18]

These conceptual distinctions do not present sharply separable categories easily applicable to the diverse forms of citizens' information, participation and obedience in a political system. The concrete methods of how the relationship between citizens and their political institutions are shaped and functioning rather overlap and are mutually supportive. Nevertheless, it seems to be worthwhile asking to what extent some relevant aspects of e-government can be related and possibly contribute to *output* legitimacy by ensuring better delivery of public services to the citizen (infra I.), while diverse aspects of e-democracy should rather be discussed as regarding either *input* legitimacy, as far as the election and control of decision-makers are concerned (infra II.) or *throughput* legitimation of Union policies with a view to the internal decision-making processes, the inclusion of, and the interest mediation *with* the people on each particular issue (infra III.).

I. E-GOVERNMENT: BETTER DELIVERY OF PUBLIC SERVICES TO THE CITIZEN AS A CASE OF OUTPUT-LEGITIMACY

If e-government is about better delivery of public services to the citizen, it can be dealt with as a question of *output* legitimacy both, at the national and the Eu-

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[18] Vivian A Schmidt, Democracy in Europe, in: José M. Magone (ed.), Routledge Handbook of European Politics, 2015, p. 280 (282).

ropean level. As Brussels is remote for most of the citizens of the Union living geographically far away from the European institutions, whatever services the EU is offering or delivering to the citizen, it is thanks to the internet that for many it can happen timely and effectively. Assessing the attempts to promote e-government within the EU must be based upon the understanding that, given the primary responsibility of the Member States for the administrative implementation of Union law, only part of the output of EU action is directly provided by European services. Most of it will be provided by national, regional or local administrations. It is fundamental, thus, to understand e-government as a shared responsibility of the public authorities at all levels. Member States have the responsibility to ensure that their internal administrations establish and offer adequate electronic services. European e-government would not be effective in the absence of the technical preconditions, the interoperability of the systems and close cooperation throughout the Union.

1. EU-STRATEGIES FOR E-GOVERNMENT

E-government is progressively gaining ground within the Member States, such as through the German E-Government Act of 2013,[19] but also at the EU level. With the "Malmö-Declaration", the competent Ministers of all the Member States agreed upon their "Joint Vision an Policy Priorities for 2015" as follows:

> „We aspire to a vision whereby European governments are recognised for being open, flexible and collaborative in their relations with citizens and businesses. They use eGovernment to increase their efficiency and effectiveness and to constantly improve public services in a way that caters for users' different needs and maximises public value, thus supporting the transition of Europe to a leading knowledge-based economy".[20]

It is on the basis of this Declaration that the Commission has adopted an "eGovernment Action Plan 2011-2015",[21] where it defines four political priorities for e-government as follows:

• Empower citizens and businesses
• Reinforce mobility in the Single Market
• Enable efficiency and effectiveness
• Create the necessary key enablers and pre-conditions to make things happen

An update for the strategy is promised for 2016.[22] But already much earlier EU

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[19] Available at (last access 19 May 2015): http://www.gesetze-im-internet.de/englisch_egovg/englisch_egovg.html. See for France the "Feuille de Route du Gouvernement sur le numérique" (last access 14 August 2015): http://www.eurocloud.fr/doc/feuille-route-gouvernement-numerique-fevrier-2013.pdf, and the internet platform http://www.service-public.fr/ (last access 14 August 2015); As an overview for the other Member States see the factsheets published by the European Commission presenting inter alia the E-Government strategy and legal framework for each of the 28 Member States and six further countries (last access 14 August 2015): https://joinup.ec.europa.eu/community/nifo/og_page/egovernment-factsheets.

[20] Ministerial Declaration on eGovernment approved unaninously in Malmö, Sweden, on 18 November 2009, available at (last access 19/5/2015): https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/ministerial-declaration-on-egovernment-malmo.pdf.

[21] See European Commission, The European eGovernment Action Plan 2011-2015. Harnessing ICT to promote smart, sustainable & innovative Government, COM(2010) 743 final, of 14.12.2010, available at (last access 19 May 2015): http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0743:FIN:EN:PDF.

[22] See European Commission, European eGovernment Action Plan 2011-2015, available at (last access 19 May 2015): http://ec.europa.eu/digital-agenda/en/european-egovernment-action-plan-2011-2015. Here the Commission states: „Our goal is to optimise the conditions for the development of cross-border eGovernment services provided to citizens and businesses regardless of their country of origin. This includes the development of an environment which promotes interoperability of systems and key enablers such as eSignatures and eIdentification."

action presents important examples for the implementation of these goals.[23]

2. E-GOVERNMENT BY LEGISLATION: THE SERVICES-DIRECTIVE

A leading example is the Directive 2006/123 on Services in the Internal Market.[24] Also the Commission's Quick guide for the application of EU directives deserves to be mentioned, where the Commission explains what the Directive on services is about, so to facilitate setting up businesses and providing services across borders within the EU.[25] In order to simplify the free establishment of businesses, the Directive also provides for "points of single contact" in each of the Member States, accessible through the internet. Article 8 of the Directive, in particular, regards "Procedures by electronic means" and states:

> 1. Member States shall ensure that all procedures and formalities relating to access to a service activity and to the exercise thereof may be easily completed, at a distance and by electronic means, through the relevant point of single contact and with the relevant competent authorities.
>
> 2. Paragraph 1 shall not apply to the inspection of premises on which the service is provided or of equipment used by the provider or to physical examination of the capability or of the personal integrity of the provider or of his responsible staff.
>
> 3. The Commission shall, in accordance with the procedure referred to in Article 40(2), adopt detailed rules for the implementation of paragraph 1 of this Article with a view to facilitating the interoperability of information systems and use of procedures by electronic means between Member States, taking into account common standards developed at Community level.

Here, the internet is used to allow citizens an easier use of the freedoms granted in the Treaties by ensuring that the Member States take the appropriate measures. In this vein recital 52 of the Directive explains:

> „The setting up, in the reasonably near future, of electronic means of completing procedures and formalities will be vital for administrative simplification in the field of service activities, for the benefit of providers, recipients and competent authorities...“

The Directive also compels the Member States to assist the market operators in taking full advantage of their freedoms in practice: Article 21 § 1 subpara. 2 of the Directive states:

> „Where appropriate, advice from the competent authorities shall include a simple step-by-step guide. Information and assistance shall be provided in a clear and unambiguous manner, shall be easily accessible at a distance, including by electronic means, and shall be kept up to date.“

Providers of services shall, under Article 22 of the Directive, be compelled to make available to the recipients of their services their name, legal status and form, geographic address etc. „by electronic means“, so to be easily informed. Cooperation among the Member States and mutual information are other forms how the Directive strives to efficiency of the system. Recital no. 112 states:

> „Cooperation between Member States requires a well-functioning electronic in-

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[23] For an overview see the fact sheet on „eGovernment in the European Union", regularly updated, available at: https://joinup.ec.europa.eu/sites/default/files/ckeditor_files/files/eGovEuropeanUnionMay2015.pdf (last access 17 August 2015).

[24] Directive 2006/123 on services in the internal market, JO 2006 L 376/36, see also supra note 4.

[25] European Commission, Quick guide, available at (last access 19 May 2015): http://ec.europa.eu/internal_market/eugo/index_en.htm.

formation system in order to allow competent authorities easily to identify their relevant interlocutors in other Member States and to communicate in an efficient way."

Accordingly Article 28 § 6 requires an information exchange between Member States "by electronic means", and Article 34 § 1 of the Directive provides that:

> „The Commission, in cooperation with Member States, shall establish an electronic system for the exchange of information between Member States, taking into account existing information systems."

The Directive shows how the EU strives to make e-government benefit the individuals and so to make the internal market effective. The Commission now envisages to go a step further and provide for common rules on the points of single contact with a view to create a "single digital gateway for Europe".[26] For making this possible and to ensure more generally the availability of high-speed broadband Internet and access to Europe-wide digital service infrastructures the Commission has proposed already in 2013 the establishment of the „Connecting Europe Facility", which is a part of the Europe Infrastructure Package providing for funding to facilitate „an efficient flow of private and public investments to stimulate the deployment and modernisation of broadband networks".[27]

3. ENCOURAGEMENT: TAKING THE CITIZEN SERIOUSLY

Another more general primarily online-tool for helping citizens and businesses solve their problems together with European institutions regarding the benefits of the internal market is SOLVIT: The website promises "Solutions to problems with your EU rights".[28] As the „Internal Market Scoreboard" of the Commission explains in the 2013 report, „there is a SOLVIT centre in each Member State, established as a part of the national administration. To resolve problems, SOLVIT centres cooperate directly with each other via an online database".[29] As the internal market is for the citizen, assistance to the citizen for finding her way through the provisions governing the internal market is of great importance.

Other measures of the EU contribute to establishing the rather technical conditions for a broader use and application of e-government. One example are the eSignature Directive 1999/93,[30] and Regulation 910/2014 on electronic identification and trust services for electronic transactions in the internal market, establishing rules for trustworthy authentification and electronic signatures applicable to all participating trans-border transactions and procedures in the area of e-government.[31] With these instruments being applied throughout the EU, also the 2014 public procurement reform package foreseeing a transition to full e-procurement by October 2018[32] has a better chance to come into effect.

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[26] Digital Single Market Strategy, para 4.3.2. See already the call for a „Conference on Points of Single Contact: working towards a single digital gateway for Europe, 17.12.2014, available at (last access 19/5/2015): http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=7998&lang=en&title=Conference-on-Points-of-Single-Contact%3A-working-towards-a-single-digital-gateway-for-Europe.

[27] European Commission, Connecting Europe Facility, available at (last access 19/5/2015): http://ec.europa.eu/digital-agenda/en/connecting-europe-facility#Article.

[28] European Commission, SOLVIT, available at (last access 19/5/2915): http://ec.europa.eu/solvit/.

[29] European Commission, Single Market Scoreboard, SOLVIT reporting period 01/2013 – 12/2013.

[30] Directive 1999/93 on a Community framework for electronic signature. JO 2000 L 13/12, amended by Regulation 1137/2008 of 22 October 2008.

[31] Regulation 910/2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

[32] See European Commission, A Digital Single Market Strategy for Europe, Communication of 6 May 2015, COM(2015) 192 final, para. 4.3.2., with references to Directive 2014/24 on public procurement and repealing Directive 2004/18/EC,

While none of these measures does expressly refer to democracy or legitimacy of the Union, the nevertheless serve the citizens' interest in providing for efficient and participative public services, taking the individual seriously as an active partner in a dialogue with the authorities. Accordingly, the eGovernment Action Plan of 2010 gives special emphasis to „user empowerment" as follows:

> „Empowerment means increasing the capacity of citizens, businesses and other organisations to be pro-active in society through the use of new technological tools. Public services can gain in efficiency and users in satisfaction by meeting the expectations of users better and being designed around their needs and in collaboration with them whenever possible. Empowerment also means that governments should provide easy access to public information, improve transparency and allow effective involvement of citizens and businesses in the policy-making process".[33]

More concretely, the Commission states, that „increasing effective eGovernment means that services are designed around users' needs and provide flexible and personalised ways of interacting and performing transactions with public administrations".[34] It adds:

> „Social networking and collaborative tools (e.g. Web 2.0 technologies) enable users to play an active role in the design and production of public services. Though still small, there are a growing number of services targeted at the needs of citizens, often developed by civil society organisations which are based on the effective collaboration between the private and the public sector".[35]

Other issues addressed in the action plan regard transparency[36] and, more broadly, the involvement of citizens and businesses in policy-making processes.

> The envisaged actions will improve the ability of people to have their voice heard and make suggestions for policy actions in the Member States and the European Union as a whole. These actions will build on projects on eParticipation already launched under the Competitiveness and Innovation Framework Programme (CIP), e.g. by using e-Petitioning ICT tools to support 'citizens initiatives', or on new calls for proposals to be opened under the seventh EU Framework Programme (FP7)".[37]

All these statements show a new approach regarding the status of the citizen in the Union. It is not treated just as a subject of the crown or of another authority, but citizens are recognised as active partners in the system. Nor is the individual confronted with the state as a black box. Through e-government she or he is taken seriously as a relevant actor and a constituent part of a comprehensive system of governance including Member States' and the European Unions' administrations. The result is a better output, more efficiency and easier acceptance of public authorities' action and, thus, it is beneficial to the legitimacy of the Union and its policies.

OJ 2014 L 94/65, and Directive 2015/25 on procurement by entities operation in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

[33] eGovernment action plan (note 22), para. 2.1.

[34] Ibid., para. 2.1.1.

[35] Ibid. pra. 2.1.2.

[36] Ibid. para. 2.1.4.

[37] Ibid., para. 2.1.5.

II. E-DEMOCRACY: ENHANCING CITIZEN'S TAKE IN FRAMING EU POLITICS AS A CASE OF INPUT-LEGITIMACY

Input legitimacy is usually contemplated with regard to the elections of the legislative and executive powers in a political community. It is the way the people's representatives are chosen and mandated for implementing their political programs and acting in the public interest. To be meaningful for democratic legitimay, elections must be based upon some transparency of the political institutions and decision-making processes. Democratic elections presuppose people taking responsibility and ownership and conditions for a free discourse in a public sphere. E-voting, however, is not yet practiced at EU level, and only little experience with e-voting has been gained in Estonia.[38]

While elections can be understood as the principal instrument available for ensuring *input* legitimacy, also referendums, citizens' initiatives, petitions and even polls can be associated with *input* legitimacy.[39] In contrast to e-voting, e-petitions are already common practice around the Union, and some first steps towards direct democracy through the European citizens' initiative (Article 11 § 4 TEU) with the internet as an enabling tool have been taken at EU level.

There are doubts, however, about the concept of *input* legitimacy to be applicable at EU level for the conditions for it are not given here (infra 1). As this discussion does not take into account the internet, it may be asked whether the internet offers solutions to the problem (infra 2.). The experience of the Constitutional Convention having made public its texts and proceedings on a special website seems to be a first step towards a more inclusive political process (infra 3.).

1. QUESTIONING INPUT-LEGITIMACY IN THE EU

Not few authors contest that *input* legitimacy plays a relevant role in the EU: One of the arguments we can find is, that there is no government that the people could vote in and out.[40] Powerful Member States with the greatest bargaining power had "an undemocratic advantage in the closed-door negotiating sessions of the Council". Others observe a "thinness of the communicative processes that articulate citizen ideas and concerns in the European public sphere"; and a "lack of a common European language, of real European media or of a European public opinion" is made responsible for a "fragmentation of discourse": Political actors are found rather to speak to their national publics in national languages.[41]

Is there a "European public sphere"?[42] What are the conditions for the evolution

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[38] See the fact sheet on Estonia (March 2015): „eGovernment in Estonia", available at: https://joinup.ec.europa.eu/sites/default/files/ckeditor_files/files/eGov%20in%20Estonia%20-%20January%202015%20-%20v_17_Final.pdf (last access 17 August 2015), indication that at the general elections in 2015 already 176 491 voters having cast their vote electronically. For a short comment see: Johannes Merkert, Wahl in Estland: Ein Fünftel gibt Stimme per I-Voting ab, in: Heise online 27 February 2015, available at http://www.heise.de/newsticker/meldung/Wahl-in-Estland-Ein-Fuenftel-gibt-Stimme-per-I-Voting-ab-2561003.html (last access 17 August 2015).

[39] See Rudolf Hrbek, Die Europäische Bürgerinitiative: Möglichkeiten und Grenzen eines neuen Elements im EU-Entscheidungssystems, integration 1/2012, p. 35, at p. 44; The Netherlands Scientific Council for Government Policy (WRR), Rediscovering Europe in the Netherlands, Amsterdam University Press, Amsterdam 2007, p. 111.

[40] See Schmidt, (note 18), p. 285; see also Joseph H.H. Weiler, To be a European Citizen – Eros and Civilization, Working Paper Series in European Studies, Special Edition, Spring 1998, p. 8 and 40: „the basic condition of Representative Democracy is, indeed, that at election time the citizens ‚...can throw the scoundrels out' -- that is replace the Government".

[41] Ibid., p. 285-286, with references to Grimm, Habermas, Weiler.

[42] Based upon a broad concept of „public sphere", though without reference to the internet, see Peter Häberle, Gibt es eine Europäische Öffentlichkeit? (Walter de Gruyter, Berlin, 2000), and id., Europäische Verfassungslehre (7th ed.

of a European public sphere and what could be the role of the internet insofar? In respect to what other conditions of democratic legitimacy is the internet about to make a difference?

2. WHAT DOES THE INTERNET OFFER?

The internet enables people, businesses and public authorities to borderless information, communication, interaction and networking. Notwithstanding increased risks and challenges with regard to privacy and security, and in spite of still unsolved problems related to the limited access to the internet, net neutrality or what is called the digital divide, the potentials of the internet as a tool for facilitating political processes, participation and control at all levels of the Union's political system are considerable. The empowerment of the citizen brought about by the internet is due to its capacity to enhance transparency (a.), to enable the evolution of a European public sphere (b.), to facilitate elections, political dialogue and accountability (c.) as well as citizen's participation in the political decision-making processes (d.).

a. Transparency

There is no political accountability and no effective democratic control without transparency and access to information, transparency is a basic condition for democracy.[43] Through websites and interactive tools for all institutions, parties and political leaders the internet allows for more transparency of the political processes: Since the Treaty of Lisbon, negotiating sessions of the Council are public, at least when it deliberates and votes on a draft legislative act (Article 16 § 8 TEU), they can be observed by real-time streams.[44] Debates of the European Parliament can be followed through the internet, thanks to a public stream on the website of the European Parliament.[45] A website of the Commission also gives access to an overview on the diverse steps and the actual status of the legislative process for each legislative proposal (pre-lex),[46] allowing the public to react, where deemed appropriate, directly through the diverse channels offered by the internet.

These are but a few examples for transparency of European politics that would not be possible to the extent we could find without ICT. Other modes of transparency clearly exist, thanks to the internet, such like wellknown leaks from public – and secret – services. This rises the question of "leaks and legitimacy", i.e. whether new possibilities the internet offers for spreading leaks to the public adds to the legitimacy of political decision-making,[47] shall be left open here. At least, easier possibilities insofar may produce a chilling effect upon public – and also private – authorities regarding the proper exercise of their powers. Trust and

Nomos, Baden-Baden 2011), p. 168-184, with an emphasis on cultural aspects and a with partially positive answer, but criticising a lack of transparency of the decision-making in Brussels (see also ibid., p. 182, 214-6, 500-2).

[43] See Lübbe-Wolff (note 14), p. 276-78. For a theoretical and practical account see Christoph Sobotta, Transparenz in den Rechtsetzungverfahren der Europäischen Union. Stand und Perspektiven des Gemeinschaftsrechts unter besonderer Berücksichtigung des Grundrechtes auf Zugang zu Informationen (2001), p. 36-49, 87—277.

[44] See the Website of the European Council: Live streaming, videos and photos, available at (last visit 12 August 2015): http://www.consilium.europa.eu/en/press/audiovisual/.

[45] See European Parliament EUROParlTV, available at (last visit 12 August 2015): http://europarltv.europa.eu/en/about-europarltv/about-us.aspx.

[46] European Commission, EuR-Lex Access to European Union law, Search in legislative procedures, available at (last access 17.5.2015): http://eur-lex.europa.eu/collection/legislative-procedures.html?locale=en.

[47] I owe this question to Jeanette Hofmann. Not much has been written on this question.

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transparency, thus, are closely linked together. Already the mere existence of the internet and its applications, like instruments for the free access to information in general, could so exert a positive impact on the behaviour of authorities.[48]

b. An evolving European public sphere

Where issues of greater political importance are dealt with at the European level, a European public sphere evolves with even a European public opinion in certain cases already now. Let me name but a few examples, such as the reform of the Treaties prepared by the Constitutional Convention following the principles of the Laeken-Declaration of 2001[49] and the current debate on the financial crisis, Greece and the stabilization of the Euro. More recently, the refugees from Irak and Syria have reached the headlines of the media Europe-wide, as an issue that cannot be resolved by individual Member States but need a European solution.

Legislative proposals like the Directive on Services or, more recently, the new Directive of 2013 on Audiovisual Media Services (AVMSD)[50] have met broad attention in the European public, and the present debate on the Commission's proposal of a general regulation on data protection[51] shows how much European policies are on the headlines of the public attention throughout Europe. Other examples are the rejection of the ACTA as a consequence of a Europe-wide internet campaign[52] or the present discussion on TTIP and investor-state dispute settlement arrangements at large.[53] The discussion on TTIP has driven the Commission at least to make public the draft of a parallel agreement with Canada, to inform how the relevant provisions look like,[54] and to develop a transparency strategy for the TTIP negotiations.[55] Online information and documentation, with the possibility for feed backs offered to the general public are a first step to encourage an informed discussion of the common issues across the European Union and beyond.

Among the new instruments stimulating the development of a European public

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[48] In this vein, access to environmental information for the public was considered as an effective tool for ensuring better implementation of European environmental law within the Member States, see Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ 2003 L 41, p. 26. See also piller one of the Aarhus-Convention, for an overview see the Commission's website http://ec.europa.eu/environment/aarhus/legislation.htm. More general: Ingolf Pernice, Verfassungs- und europarechtliche Aspekte der Transparenz staatlichen Handelns, 2. IFG-Tagung Berlin am 6./7. September 2012, in: Alexander Dix et al. (eds.) Informationsfreiheit und Informationsrecht. Jahrbuch 2013 (2014), p. 17-34.

[49] See Annex I to the Annexes to the Presidency conclusions - Laeken, 14 and 15 December 2001 (SN 300/1/01 REV 1), stipulating in the last paragraphs: „In order for the debate to be broadly based and involve all citizens, a Forum will be opened for organisations representing civil society (the social partners, the business world, non-governmental organisations, academia, etc.)". See also Press release 18 February 2003, IP/03/244, http://europa.eu/rapid/press-release_IP-03-244_de.htm (last access 13 August 2015), and infra II.3.

[50] See: European Commission, Online Public consultation on Directive 2010/13/EU on Audiovisual Media Services (AVMSD), http://ec.europa.eu/digital-agenda/en/news/public-consultation-directive-201013eu-audiovisual-media-services-avmsd-media-framework-21st (last access 13 August 2015).

[51] European Commission, Online consultation on the legal framework for the fundamental right to protection of personal data, http://ec.europa.eu/justice/newsroom/data-protection/opinion/090709_en.htm (last access 13 August 2015).

[52] See e.g.: https://secure.avaaz.org/en/stop_acta/ (last access 13 August 2015).

[53] European Commission. Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179 (last access 12 August 2015); specialized forums have emerged for critical assessment of current issues like: *VoteWatch Europe*, http://www.votewatch.eu (last access 13 August 2015); *attac,* http://www.attac.de/startseite/ (last access 13 August 2015); a promising discussion platform has been developed by academics: *publixphere,* https://publixphere.net/i/publixphere-de/instance/publixphere-de (last access 13 August 2015); see also *Dublin European Institute* Blog, http://europedebate.ie/about-3/ (last access 13 August 2015).

[54] See the Commission's website on CETA, inviting the public for comments: http://ec.europa.eu/trade/policy/in-focus/ceta/. For TTIP see: http://ec.europa.eu/trade/policy/in-focus/ttip/index_en.htm.

[55] See the Commission's website: http://ec.europa.eu/trade/policy/in-focus/ttip/index_en.htm.

sphere public video streams of the debates in the European Parliament,[56] of public lectures and discussions like our "Humboldt-Reden zu Europa",[57]

Like in multilingual federal states, language problems do not bar the constitution of a public sphere. Automatic translation, progressively available as a particular application of the ICT may facilitate, in future, the emergence of a European public sphere across borders. Already now, blogging activities and discussion platforms and social networks in the internet substitute, at least in part, traditional media and allow easy borderless public communication among the interested people. If there is a lack of direct accountability of the political leaders in the Commission or in the Council level to the European Parliament or the national parliaments respectively these diverse instruments based upon the internet have a fair chance to develop towards forums where politics are hold accountable to the civil society and the citizens directly as insinuated by Article 10 § 2 subpara. 2 TEU.

c. E-voting, political dialogue and accountability

General elections and referendums have not yet been a field where the internet was successfully applied, and it is questionable if e-voting is a desirable alternative at all to the existing procedures where people are personally gathering at the voting offices, discuss and give their voice to the person or party of their choice.[58] As soon as risks for manipulated counting and secrecy of the votes are technically eliminated and problems of security and data protection are solved,[59] however, both ways of voting may be of interest in particular for those who have no easy access to the voting offices.[60] So far the internet offers at least plenty of opportunities for the individual to be informed and make herself familiar with the political programs, the personality of the candidates and the political situation relevant for the election. It also allows for easy access to information on the past of the candidates and positions of the parties, their ambitions and policies in the precedent periods and, thus, enhances transparency as a basis for more rational choices.

E-democracy includes a continuing conversation of the representatives and their electorate or constituency. Personal websites of the political actors, social networks, blogs, even e-mail and twitter allow for more intensive communication, in particular where a direct personal contact is made difficult by the EU system of national lists and the absence of defined constituencies.

d. Participation: "speaking with your government"

"Speaking with your government" means getting involved, and this is greatly facilitated with the internet: Article 11 § 1 and § 2 TEU expressly state that "the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society". And Article 2 of Protocol (2) to the

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[56] Supra, notes 44 and 45.

[57] See for some examples (Barroso, Renzi, Voßkuhle et al.): https://www.youtube.com/results?search_query=Humboldt-Reden+zu+Europa (last visit 28 November 2015).

[58] For the Estonian experience see supra, note 38.

[59] For some criteria see the interdisziplinary study of Katharina Bräunlich/Rüdiger Grimm/Philipp Richter/Alexander Roßnagel, Sichere Internetwahlen. Ein rechtswissenschaftlich-informatorisches Modell (Nomos, Baden-Baden 2013).

[60] See already Ulrich Karpen, E-Voting as an Instrument of E-Democracy, in: Spyridon Flogiatis, Ulrich Karpen and Alfonso Masucci (eds.), E-Government and E-Democracy. E-Gouvernement et E-Démocratie (Esperia Publications, London 2006), p. 149-169, pleading for „pilot experiments" with non-political elections as a first step.

Treaty of Lisbon, on the application of the principles of subsidiarity and proportionality, compels the Commission to "consult widely" before proposing legislative acts. This "discursive participation" in the framing of political decisions plays an increasing role where patterns of representative democracy suffer from the complexity of European politics and an increasing lack of democratic transmission of the political will through classical elections.[61] Both is simplified and accelerated by the internet, so that active participation of individuals, stakeholders and experts in the decision-making processes can more easily take place for the benefit of an appropriate and satisfying outcome. Accordingly, the Commission's official website "Your voice in Europe" gives direct online access to all open consultations and offers the relevant consultation document.[62] It gives also access to the contributions made by stakeholders and individual citizens under this procedure,[63] inviting to a feed back, so as for the consultation opened from 26.3.2015 to 30.6.2015 on "Towards a new European Neighbourhood Policy".[64]

As a matter of fact, citizen's participation in EU matters is not significant yet, and the question may be raised whether the institutions, parties and political actors would be prepared – technically and with regard to mind, manpower and time – to respond adequately if citizens really made use of the instruments made available to them.[65] ICT solutions, however, may be found also for the screening of comments, suggestions and critiques, and the use of the new opportunities may develop over time depending on the increasing digital competence of people, need and willingness of participating and to make a difference. They are already in place for online-participation of interested people in conferences and fora, such as the Internet Governance Forum (IGF) where open discourses are organised regarding issues of proper regulation for the internet.[66]

3. AN OPEN CONSTITUTIONAL PROCESS: THE EXAMPLE OF THE CONSTITUTIONAL CONVENTION

An important example for an early application of the internet in a constitutional process was the establishment in 2001 of the "futurum"-website established by the Constitutional Convention for preparing the reform of the Treaties.[67] Not only all documents relevant for the work of the Convention were available there,

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[61] For more details see Lübbe-Wolff (note 14), p. 280-285.

[62] Website available at (last access 12 August 2015): http://ec.europa.eu/yourvoice/consultations/index_en.htm.

[63] European Commission, Your voice in Europe, Closed consultations, available at (last access 12 August 2015): http://ec.europa.eu/yourvoice/consultations/2015/index_en.htm.

[64] European Commission: Consultation „Towards a new European Neighbourhood Policy", available at (last access 12 August 2015): http://ec.europa.eu/enlargement/neighbourhood/consultation/index_en.htm.

[65] See the critical comments of Christiane Schulzki-Haddouti, EU-Kommission gewährt Informationszugang nach Gutsherrenart, in: Heise online of 17 August 2015, at: http://m.heise.de/newsticker/meldung/EU-Kommission-gewaehrt-Informationszugang-nach-Gutsherrenart-2781506.html (last access 28.Nov. 2015).

[66] See the website of the IGF: http://www.intgovforum.org/cms/ (last access 28 Nov. 2015); see also Ingolf Pernice, Global Constitutionalism and The Internet. Taking people Seriously, in: Rainer Hofmann (ed.), The Pasts and Futures of Law beyond the State (Campus, Frankfurt 2015), forthcoming (also as HIIG Discussion Paper Series No. 2015-01), around footnotes 62-69.

[67] For a critical account on the so established "Forum" see: Malte Bayer, Der Konvent zur Zukunft Europas. Deliberativ-demokratische Verfassunggebung für die Europäische Union – Zugleich ein Beitrag zum Begriff der Verfassunggebung (2007), in particular pp. 405-412. The „futurum"-website is closed, but the archive is available at (last access 12 August 2015): http://european-convention.europa.eu/EN/bienvenue/bienvenue2352.html?lang=EN. For the inauguration of the website see: http://europa.eu/rapid/press-release_IP-01-328_en.htm. For comments see: Jesse Scott, *The culture of constitution-making? "Listening" at the Convention on the Future of Europe*, 3 German Law Journal (2002), *available at* (last access 12 August 2015): http://www.germanlawjournal.com/index.php?pageID=11&artID=193. Annika Frisch, Das Potential deliberativer Demokratietheorie für die Konzeptualisierung von Demokratie in der Europäischen Union, ZPol, 2007/3, p. 711, 724-728, available at (last access 2 August 2015): http://www.zpol.nomos.de/fileadmin/zpol/doc/Aufsatz_ZPol_07_03.pdf.

but the Convention also invited the public at large to comment and contribute with written proposals. Even if the process may not have triggered the expected participation and in spite of other deficiencies of this attempt to organise an inclusive Europe-wide discourse based upon the internet, this first experience of an open, transparent and participative process, including all the lessons learned, should be used by any future Convention as a model for upcoming negotiations of amendments to the Treaties under Article 48 TEU.

III. Throughput Legitimacy in a digital Europe

If the effectiveness of the outcomes is a matter of *output* legitimacy, and representation or the participation of the citizenry regards *input* legitimacy, *throughput* legitimacy, as mentioned above is about the quality of governance processes and regards the internal decision-making processes, the inclusion of, and the interest mediation *with* the people. E-government and e-democracy in a number of issues favour the effectiveness of the outcomes and also the representation and participation of the citizenry in political or administrative processes, some overlapping cannot be denied. Even more so, it is possible to say that e-government and e-democracy as described, encompass devices that enhance the inclusion of, and the interest mediation *with* the people in many cases and, thus, adds to *throughput* legitimacy.

Throughput legitimacy covers, according to *Vivian A. Schmidt* "everything that transpires between the input and the output, encompassing issues of accountability, transparency, inclusiveness and openness", while, in contrast, "throughput via corruption, incompetence or exclusion could be disastrous".[68] Throughput in some sense regards the conditions under which the will of the people makes his way thought the institutions to effective action without being distorted. It comes close to, and even may be regarded as a kind of input-legitimacy. But it focuses more on how input gets effective. At stake is the trust of the people in their institutions and, therefore, the proper functioning of the political system.

Regarding the multilevel system of the EU this trust, as fundamental for its legitimacy as it is, encounters threats from the complexity and opaqueness of the processes and the multiplicity of actors at the national and European level participating in the decision-making. This multiplicity is not a problem in itself, but it frustrates attempts to ensure democratic control and, ultimately, political accountability. Here is the question of where and how the internet can offer a remedy to existing deficiencies so to enhance *throughput legitimacy*. Any solution has to keep in mind that the EU system of governance, established by the Treaties, encompasses the citizens, the Member States – and their respective local and regional communities – as well as the institutions of the European Union.

1. Transparency of decision-making processes

Openness and transparency of the processes of decision-making, as already mentioned, seem to be a first path the internet offers to the interested public for better understanding and control. The provisions, mentioned above, for an electronic access to information and files, for transparency of the decision-making processes at specific websites, for the public streaming of political debates, for openness of the institutions to engage into a dialogue with the citizens and for

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[68] Schmidt (note 18), p. 286.

the consultation with the interested public are a way to reduce the complexity. In particular, interactive websites of the institutions explaining the objectives, giving account of participating actors and their respective input and influence and stating at what stage the decision-making process actually is, but also giving interested citizens and the civil society an meaningful opportunity to make their voice heard, thus, are a first step towards more *throughput* legitimacy.

To go a step further this line, there should be a direct access, via electronic links, to the relevant files of the Commission, to the documents and work of the European Parliament, including protocols and archives of streams of the debates in committees and of the plenary, but also to any relevant documents related to the meetings of the Council and the positions of the Member States. Openness and transparency, insofar, cannot be limited to legislative processes; this kind of openness is particularly important with regard to the European Council, that is defining the "general political directions and priorities" in accordance with Article 15 § 1 TEU. How can "the open method of cooperation",[69] where decisions are taken at the highest political level, with the greatest impact upon the Member States and their internal policies and, in particular, on economic and financial policies be confidential? Can we accept that these decisions are taken beyond closed doors excluding any parliamentary and public control? Even if these questions are regarded as "matters concerning the European Union", to use the terms of the German Basic Law (Article 23 § 2 and 3) that provides for consultation of the parliament before the government makes up its position to be defended at the Councils or European Council, how can a parliament control what the chancellor or prime minister really said during the deliberations of the institution, as long as they are private? There are certainly matters that need to be kept confidential, but on the other hand there seems to be great potential for more transparency. This transparency can be provided through the internet and so help building trust in and legitimacy of the Union and its policies.

2. NETWORKS FOR ADMINISTRATIVE AND JUDICIAL COOPERATION

Another example where the internet already plays an important role, and where openness for the public could add to transparency and, thus, enhance trust and legitimacy, are the diverse networks of administrative and judicial cooperation established among the Member States with the Commission being more or less involved. To name but a few:

- the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) which has been created for ensuring a better and harmonised implementation of European environmental directives throughout the Union;[70]

- the European Competition Network (ECN) that creates an effective mechanism to counter companies which engage in cross-border practices restricting competition through mutual information and cooperation of the competent national authorities.[71]

- the Body of European Regulators for Electronic Communications (BE-

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[69] Even if the conclusions or decisions taken within this framework are not legally binding, they are most relevant for the policy orientation of the Union, see for details: Beate Braams, Koordinierung als Kompetenzkategorie (Mohr & Siebeck, Tübingen 2013), p. 9-76, 215-6, with proposals for enhancing transparency (ibid., p.244-246)..

[70] http://impel.eu/.

[71] http://ec.europa.eu/competition/ecn/index_en.html.

REC) established by Regulation (EC) No 1211/2009 with a view to contribute to the development and better functioning of the internal market for electronic communications networks and services.[72]

Smooth cooperation within these networks and information of the public upon their existence, structure, tasks and actual policies are facilitated by the internet. Developing their openness for interactive communication with the civil society, interested citizens and academy could allow the decisions taken at the EU level to be considered part of self-rule of the citizens in a transparent system of European governance. As European regulatory networks generally seem to play an increasing role in the formulation, deliberation, and implementation of EU policies,[73] it is important to explore more in depth possible applications of the internet with a view to ensure more transparency also in this field.

3. PUBLIC DISCOURSE ON SUBSIDIARITY AS A CASE OF *THROUGHPUT* LEGITIMACY

Last not least mention should be made of the attempts of ensuring subsidiarity within the EU according to Article 5 TEU and the application of the early warning system under Article 8 of the Subsidiarity Protocol (no. 2) to the Treaty of Lisbon. While this system, at first sight, looks like an instrument of defence of the Member States and their regions against excessive action at the European level, it also triggers parliamentary and public debate within the Member States on the Commissions' legislative proposals, rises public awareness of the political questions involved and so allows to avoid surprises to the citizens potentially affected by the measure. It is part of what the Commission presents, on its website, as the attempt to ensure "better regulation", where it also invites the public to participate in making EU legislation more effective and less burdensome.[74] What is still missing, however, is transparency of the work of the institutions at the national level. As national parliaments play a crucial role in controlling and legitimising European legislation (Article 10 § 2 subpara. 2 TEU and Protocol 1 on the Role of national parliaments in the European Union), greater transparency of their debates, hearings and positions on particular legislative proposals of the Commission made public through the internet would considerably contribute to trust and legitimacy also of the Union's policies.

CONCLUSIONS

If Article 1 § 2 TEU requires that within the EU decisions are taken as closely as possible to the citizen, this is not only a matter for strict observance of the principle of subsidiarity. It may also be considered with regard to the openness and transparency of the diverse decision-making processes of the Union, at all levels. Input, throughput and output are legitimising factors of the EU when the citizens are taken seriously and understand themselves as the owners of the Union. The internet and, thus, methods of e-government as well as e-democracy, seem to offer considerable opportunities for inclusion of the citizens and civil society

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[72] http://berec.europa.eu/eng/about_berec/what_is_berec/.

[73] See the study of Michael Blauberger and Berthold Rittberger, 'Conceptualizing and Theorizing EU Regulatory Networks', Regulation & Governance, DOI:10.1111/rego.12064.

[74] European Commission, Better Regulation, http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm: „The Commission would like to hear your views on how to make EU laws more effective and efficient via an online contact form. Your suggestions will be examined by the Commission and may be used to identify actions for simplification and burden reduction within the REFIT programme.The Commission publishes relevant contributions and feedback."

through tools offering easier information, transparency and participation.

If the statement of Kai von Lewinski made in 2005, that "full e-democracy" means "changing the operating System of the State,[75] these changes have already begun, both at national level in the Member States, but many developments at the EU level can be taken as steps striving to make the best of ICT for the Union's operating system. It is time, nevertheless, to elaborate a systemic perspective of the diverse initiatives and innovations and reflect further, in particular, on a proactive use of digital technologies for better bridging the gap between the citizen and the public authorities in the European Union, as a contribution to the debates on a more democratic future of the European Union. This is what the present paper aims to initiate.

This attempt does not ignore the manifold problems to be solved at a technical, legal and political level in order to allow the internet developing its full potential for the benefit of democratic legitimacy. As recent experience shows, there are at least three fundamental conditions for the internet to provide such beneficial opportunities.

- First, there is a need for a functioning internet and a proper system of internet governance. This is a global challenge and invites us considering new forms of international or global ruling.

- Second, easy and effective internet-access for everybody is necessary; it must be based upon the principle of net neutrality and allow all citizens effectively to take stake on-line in European governance and politics.

- Third, provision must be made for a safe and trustworthy internet through effective regulation and technical provisions for data protection as well as for cyber security at a global level.

After the Snowdon revelations and other recent discovery of mass surveillance and spying activities by intelligence services, re-building trust in the internet[76] is crucial, and establishing a trust-building constitutional framework for global regulation[77] may be decisive for all progress towards overcoming legitimacy deficits of the European Union and beyond.

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[75] See Kai von Lewinski, Downstream of Information and Upstream of Signals: E-Democracy in Germany beyond E-Voting, in: in: Spyridon Flogiatis, Ulrich Karpen and Alfonso Masucci (eds.), E-Government and E-Democracy. E-Gouvernement et E-Démocratie (Esperia Publications, London 2006), p. 205, 217-8.

[76] For an attempt to set trust and distrust in a new balance, with regard to internet governance, see: Jeanette Hofmann, Constellations of Trust and Distrust in Internet Governance, in: Report of the Expert Group 'Risks of Eroding Trust - Foresight on the Medium-Term Implications for European Research and Innovation Policies (TRUSTFORESIGHT)', European Commission, Brussels, available at http://ssrn.com/abstract=2608414 (last access 17 August 2015).

[77] See Ingolf Pernice, Global Constitutionalism and The Internet. Taking people Seriously, in: Rainer Hofmann (ed.), The Pasts and Futures of Law beyond the State", Reihe des Frankfurter Exzellenzclusters im Campus-Verlag Frankfurt am Main, 2015 i.E., also available as HIIG Discussion Paper Series No. 2015-01 at SSRN: http://ssrn.com/abstract=2576697 or http://dx.doi.org/10.2139/ssrn.2576697.