Participation in European agencies: Keeping promises in institutional practice

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This chapter elaborates the evaluative framework that grounds the examination of participation in European agencies, delineates and classifies the participatory structures of agencies, and explains the analytical approach guiding this research. It lays, in particular, the foundations for the subsequent empirical chapters.

In this research, participation is defined as a formalised interaction between European agencies and interested parties, characterised by access and the quality of deliberation, which is aimed at fulfilling one or more of the central promises. The central promises of participation refer to different claims put forward in the underlying sources about the functions and fundamental values that participation of interested parties might accomplish. These central promises, which will be outlined in the first section, constitute the evaluative framework against which participation in European agencies will be assessed. By examining the rules and practices of agencies through empirical research, this study will analyse the extent to which the promises of participation have been fulfilled.

Depending on the scope and the nature of tasks that interested parties are given access to, it is possible to distinguish between various forms of participation. The functional delimitation of different forms of participation existing in agencies, provided in the second section, draws attention to the need to shift the focus of promises to different participatory structures in place. Specifically, it is argued that different forms and forums of participation may have been established in order to promote their specific sets of promises. Moreover, to show how ubiquitous participation actually is, this section is completed by an overview of the different forms of participation embedded in European agencies.

The ensuing inquiry into participation requires a comprehensive analytical framework. The third section explains two components of analysis derived from the core meaning of participation: access to participation and the quality of deliberation. The interaction between interested parties and agencies is not static, but a dynamic and versatile. Thus, the assessment of participation in European agencies needs to go beyond the conditions of access and take into account the influence of participation (i.e. the difference that participation makes in the end in terms of the promises).

The concluding section explains the approach to studying participation in European agencies adopted, which will be applied throughout the empirical chapters. It pieces together, in particular, all the above elements and elaborates the particularities of the de jure and the de facto inquiry into participation.
2.1 Central Promises of Participation: Points of Departure

The central reasons for establishing European agencies is the perceived need to increase the effectiveness of, and confidence in, policy-making in specific fields or sectors. While agencies remain solely responsible for increasing the effectiveness of the European executive by carrying out technical, scientific or managerial tasks, a number of agencies have created opportunities for interested parties to become involved in different aspects of their operation, such as managerial and rulemaking functions. The existence of participation in European agencies prompts several questions: Why should one care? Why is participation in European agencies relevant? What purpose does it intend to accomplish? In this work, the relevance of the involvement of interested parties relates to the idea that participation fulfills different promises: (i) promotes more informed agency outcomes, (ii) ensures inclusiveness and responsiveness of agency operation, (iii) furthers compliance and implementation, and (iv) enhances transparency and enables monitoring of agency activities and builds trust. These central promises of participation, which constitute the evaluative framework of this study, are based on the claims about the functions of interested parties’ participation (i.e. what participation may accomplish) made in several different sources, such as agencies’ founding regulations and internal policy documents, legal and political science literature, and “good governance” documents, and as supported by the empirical evidence (i.e. interviews with the respondents from the agencies). The scope of the promises is delimited to reflect the legal and political reality of European agencies. This book focuses on the range of “intended”, agency specific functions of participation as they follow from the underlying sources (in particular agency documents) listed above.

The confines of the central promises of participation are seldom as precise as the analytical conception - based on the claims advanced in the sources – suggests. In other words, while it is possible to distinguish between various promises according to the functions underlying interested parties’ participation, at least analytically, in reality these promises often overlap and it is not always easy to isolate one from another. It is expected that different forms of interested parties’ participation in European agencies will promote manifold promises of participation simultaneously, while one of the promises might be more pronounced than another. This will be established in more detail, however, in the empirical part of this research where the promises of the distinctive forms of participation will be identified based on rules and practices in place. In the meantime, the pages which follow will introduce and delimit the central promises of participation.

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1 See Chapter 1, Section 1.1.2.
2 For two reasons, the present scope of the central promises of participation intentionally avoids discussing the involvement of interested parties from a participatory democracy perspective. First, there is nothing in the agencies’ acts (founding regulations or agencies’ decisions) which would (immediately) suggest an underlying democratic value of the participation of interested parties in European agencies. On this basis, we cannot perceive the building of participatory democracy as one of the central promises of participation. Second, in the author’s view, interested parties, affected parties and stakeholders (e.g. the industry) participating in agencies’ activities do not constitute a “demos” and can thus not be understood to substitute the interests of the civil society in general.
4 See Chapters 4-7.
A) More Informed Agency Outcomes

Interested parties may possess relevant factual knowledge and experience which can contribute to more informed outcomes of agencies. This is relevant, especially if one considers that the central reasons for the creation of European agencies, and the transfer of a set of administrative powers to them, include, on the one hand, limited resources of EU decision-makers (in particular the Commission) and, on the other hand, the need to increase the effectiveness of the European executive and ensure technical excellence. Some agencies, the EASA and the EBA for example, have far reaching administrative tasks; they engage in regulatory activities which encompass the drafting of eventually binding implementing rules adopted by the Commission and regulation by soft law. In this respect one respondent from the EASA Safety Standards Consultative Committee explained,

One of the problems in civil aviation is that the rules that are defined by the EASA and by the Commission are very detailed. If the rule is factually wrong, there is a major issue: you can easily ground a lot of airplanes in Europe. To develop detailed technical regulation, one needs to understand the reality and for that you need practical insights. Those are limited in the agency and the Commission, therefore you need [interested parties] to bring that in.6

This view about the relevance of the involvement of interested parties is not isolated. Although the agencies are expected to possess the relevant expertise and a deep understanding of the issues that they deal with, it is unlikely that they will have complete factual information as to all the issues of regulation. In addition, it may prove difficult for agencies to keep up with the fast-paced and highly scientific and technical developments in the fields in which they operate. As a consequence, the very reason for the establishment of agencies, namely an effective executive, risks being “hampered by the concurrence of rapidly growing expectations and limited public resources.”7 The participation of interested parties is claimed to increase “the range of the resources and information”,8 which adds to “those already available within the [agencies] themselves through their internal scientific bodies.”9 Interaction with interested parties, thus, is perceived as “highly valued” because those interested are “expected to give stakeholders’ view, to command specific knowledge, [and] to stimulate deliberation by questioning the established wisdom.”10 Arguably, this ensures that the agency operation is “technically viable, practically workable and based on bottom-up approach”,11 which, in turn, enhances the overall quality of

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5 The term is used in a broad sense to include both implementing and delegated acts.
6 Interview with a member of the Safety Standards Consultative Committee of the European Aviation Safety Agency.
agency outcomes (e.g. rulemaking, managerial decisions, or internal policies).

In other words, “this improves the correctness and quality” of agency outcomes, which are “checked against the views of those who have knowledge” about the “factual situation” to be decided upon. In this respect, the participation of interested parties may be understood as instrumental “to the collection of knowledge that is necessary to a sound and informed exercise of administrative action”, which, in consequence, may contribute to the overall effectiveness of agency operation.

B) Inclusiveness and Responsiveness of Agency Operation

Inclusiveness in the participation of interested parties may help agencies mediate between competing or conflicting interests, claims and needs, it stabilises interactions among the regulators and the regulatees and, thus, contributes to the development of longer term solutions. With regard to “organic participation” (i.e. participation of interested parties in the internal structure of the agencies) it has been observed that the concurrent engagement of “different constituencies in a multilateral context, as opposed to one-to-one meetings, is likely to enhance the quality of dialogue by virtue of direct confrontation among potentially divergent positions, [...] although recourse to [interested parties’ involvement] does not, of course, shift the governance of [an agency] into a pure collaborative model.”

A respondent from the EBA Banking Stakeholder Group provided the following illustration,

Every now and then the EBA comes up with a regulation that is not particularly favourable to the banking industry. There are files, which would have a negative impact on the industry, let’s say, more than one requested for the purpose of this type of regulation. And you see the burden of such regulation for a bank. But in the end, the burden is not for the bank itself, it is for the customers of the bank – someone has to pay for it. In what way? In higher fees for the products or longer waiting times for products being delivered, or more hassle because the customers need to provide more information to the bank. You need to take an overall view, trying to consider the interests of all parties included, and not just focus on the industry. You need to take an inclusive and balanced view which in the end will benefit the economy as a whole.

Similar observations were made in respect to public consultations. It has been argued that consultations are “potentially capable of stabilising [the] dynamics” between agencies and

18 Interview with a member of the Banking Stakeholder Group of the European Banking Authority.
participants, as well as decreasing inequalities in the power of interests.\textsuperscript{20} In the words of Chiti: “Indeed, it binds regulators and regulatees to the respect of an argumentative method according to which each party is called to provide the reasons for its own position, the various arguments are to be crossed and discussed in the perspective of identifying possible inconsistencies, and the adopted solution is to be rationally justifiable on the basis of the arguments provided.”\textsuperscript{21}

The benefits of inclusiveness are also exemplified in the context of US agencies. Inclusiveness of a variety of interested parties “enables the parties to rank their concerns and to make trades to maximize their respective interests. In a traditional proceeding [such that does not secure interested parties’ participation] an agency may be unable to anticipate the intensity with which the respective parties may view the various provisions of a proposed rule. The agency may focus on an aspect of a rule that is critical to one party, but not of particular interest to other parties. [...] The agency simply would have to guess how to reconcile such an issue because it would not know how to rank the parties’ concerns.”\textsuperscript{22}

Responsiveness of agency operation is another aspect of the same phenomenon (i.e. a different angle to the same promise of participation). An inclusive intervention of interested parties and their prospective influence on agency operation arguably allows agency outcomes to be “more in tune with the social and economic needs of the regulated sector.”\textsuperscript{23} As explained by an EASA official,

\begin{quote}
We want to learn about interested parties’ concerns and respond to them. We want to reach out to them and let them express their concerns, because they may indicate that certain agency developments are not positive for their business or are not sufficiently attentive to their needs.\textsuperscript{24}
\end{quote}

One should be aware, however, of the risks that an inclusive and overly responsive approach to the participation of interested parties might pose. On the one hand, the participation of interested parties may compromise the rationales for the creation of agencies. Agencies set up to regulate a particular sector may end up being dominated – held “captive” – by the very sectors they are meant to regulate. Therefore, the agencies should reject the “propensity to regulatory intrusion, which may jeopardise the ties between [agencies] and regulatees within the relevant policy sector.”\textsuperscript{25} In particular, they should refrain from being too attentive to certain interests while excluding other, competing ones.\textsuperscript{26} Thus, the crucial issue is to strike an appropriate balance between avoiding agency capture and simultaneously ensuring participation of the various interested parties. On the other hand, there are limits to how far responsiveness and the balancing of interested parties’

\begin{itemize}
\item \textsuperscript{21} E. Chiti (2013), p. 107.
\item \textsuperscript{23} J. Mendes (2009), p. 259.
\item \textsuperscript{24} Interview with an official from the European Aviation Safety Agency.
\item \textsuperscript{25} E. Chiti (2013), p. 107.
\item \textsuperscript{26} Chiti especially warns about the “shadows” of institutionalised interested parties’ participation, which should be carefully assessed. He argues that “there are obvious risks of unequal access of different groups of [interested parties], starting with the basic opposition between non-governmental organizations and sectors of industry.” See, E. Chiti (2009), ‘An Important Part of the EU’s Institutional Machinery: Features, Problems and Perspectives of European Agencies’, Common Market Law Review, 46(5), 1395-1442, p. 1402.
\end{itemize}
positions and views should be attempted. Participation “should yield realistic commitments from all of those involved [i.e. interested parties and agencies]. A rule that satisfies everyone in principal but cannot be implemented is of little use.” 27 In sum, while it is beneficial that agencies attend to the views and concerns of interested parties and stabilise the interactions among them, it is at the same time of the utmost importance that they preserve their independence and their purported technical excellence by committing to produce effective, objective and viable outcomes.

C) Compliance and Implementation

It is argued that interested parties’ attitudes, beliefs and understanding of the working environment and sectors in which the agencies operate may have a profound effect on the success and acceptance of agency outcomes. As observed by an interested parties’ respondent from the EASA,

If you listen to interested parties, you get the best possible solutions. If the agency says “we do not need anybody, our lawyers will set the rules”, you know one thing, there is going to be a war. It does not work, not at all. Do you think that the EASA would succeed with their rulemaking about the interior of aircraft, like the shape of chairs, which actually happens, without a prior consideration of those who will need to implement this? You would not believe that, would you? It is a natural process of ensuring compliance. 28

Indeed, it can be argued that the participation of interested parties is capable of promoting effectiveness of agency rulemaking “because it can help to overcome problems of implementation by considering motives and by fostering the willingness of policy addressees to comply.” 29 As further explained by one interested parties’ respondent from the EBA,

The agency interacts with interested parties because they want to consider the following: “Well, this is what we developed behind our desks, but if this would now be the new regulation, how will that work? Let’s test it, let’s test it with people who know what the impact will be, how it will need to be implemented, how people will react and how their behaviour will change.” 30

Although the technical expertise accumulated in European agencies can serve as a rational foundation for agencies’ operation, in many cases the ways in which an agency’s decision is perceived by those affected (e.g. if they consider it a good, suitable decision) will influence the “likelihood of spontaneous compliance” 31 with the decision and its effective implementation. In other words, “agency actions no longer gain acceptance from the presumed expertise of its staff.” 32

28 Interview with an interested parties’ respondent from the European Aviation Safety Agency.
30 Interview with an interested parties’ respondent from the European Banking Authority.
32 “Indeed, because complex scientific and technical issues are involved in many rulemakings, rarely will a member of the agency’s staff be a recognized authority in the subject matter.” Quotation by P. J. Harter (1982), p. 17.
It is no longer viewed as legitimate simply because it fills in the gaps left [by the Commission], [...]. To the extent that [agency] rulemaking has political legitimacy, it derives from the right of [interested parties] to present facts and arguments to an agency under procedures designed to ensure the rationality of the agency’s decision.”33 Hence, the participation of interested parties is capable of reducing the “heteronomous nature” of agencies’ outcomes, which makes their implementation all the more effective.34

From the implementation perspective, the involvement of interested parties in agencies’ operation is of further relevance because of the “early warning”35 that it brings to participants. As explained tellingly by one interested parties’ respondent from the EASA,

If a new piece of equipment is needed, for example a new radar system, due to the regulatory changes in the field of air traffic management, you need to know what kind of equipment will be required and when it is mandatory to have it on board. And you need to know early because you still need to develop the equipment: the equipment needs to be ready and approved by the agency at least two years before we can implement it in the production and you need additional two years to develop it. [...] So we need to know what is coming, therefore our involvement in the EASA rulemaking and the planning for the future is extremely important. If the required radar is not on the airplane as it should be according to the rule, that airplane is not flying. In the end we need 100% compliance, otherwise all airplanes are grounded.36

Participation not only concerns the willingness of interested parties to comply with agencies’ decisions as demonstrated in the first case; it is instrumental for fostering implementation because it raises awareness of what agencies plan. If interested parties are aware of agencies’ planned outcomes before they are finalised, they will know what to expect and prepare for implementation in a more effective way. Technical developments and adaptations are clearly time-consuming, not only in the civil aviation, but also in other fields in which agencies operate, such as financial supervision or medicines safety.

D) Transparency, Monitoring and Building of Trust

Transparency is treated as the understanding interested parties have of agencies’ activities through participation, which may include access to relevant information, deliberation of such information and a certain degree of feedback (i.e. reasoning) on the part of agencies.37 Thus, whenever transparency is considered as one of the central promises of participation, it goes beyond the detached observation of the activities of agencies and includes the right of access to agencies’

35 The expression used by various respondents from the European Aviation Safety Agency.
36 Interview with a member of the Safety Standards Consultative Committee of the European Aviation Safety Agency.
37 See also, J. Mendes (2011a), p. 293.
That transparency, monitoring and trust may be promoted through the participation of interested parties is evident in the case of some agencies; for example, the EFSA, the EMA, the EASA and the EBA. We have seen in the previous chapter that one of the core rationales for the establishment of the EFSA was to restore the credibility of European regulation in the food sector. As stated in the EFSA founding regulation,

“Food safety and the protection of consumer interests [are] of increasing concern to the general public, non-governmental organisations, professional associations, international trading partners and trade organisations. It is necessary to ensure that consumer confidence and the confidence of trading partners is secured through open and transparent development of food law.”

According to the EFSA, the participation of interested parties is “apparent and inherent to the concept of transparency” and is meant to ensure that the agency is “seen, and perceived, as a glass house.”

The case of EFSA is not isolated. For example, in the words of an EASA official,

The EASA is largely funded by stakeholders since they are paying the agency through fees and charges for different approvals and certifications. If we allow them to participate in certain aspects of the agency’s work, they will be able to verify and monitor the extent to which the agency is fulfilling its financial commitments and is performing sound financial management.

38 In the words of Curtin and Mendes: “Transparency is defined as being able to observe administrative decision-making processes [e.g. by access to documents, the actual availability of documents, or even information in a more general sense that reveals the thinking behind a decision or the way in which a decision is made] whereas participation refers to the opportunity to participate in these decision-making processes.” See, D. Curtin and J. Mendes (2011), ‘Transparence et participation: des principes démocratiques pour l’administration de l’Union Européenne’, Revue Française d’Administration Publique, No. 137-138, 101-121, (‘Transparency and Participation: A Vista of Democratic Principles for EU Administration’, p. 3, English version on file with author).

39 As claimed by Shapiro, there is a relation between participation and transparency, since “full transparency can only be achieved through dialogue as a form of participation.” This argument shows the link between participation and transparency, but it is also disputable since participation as an enhanced form of transparency will depend on how open participation actually is. See, M. Shapiro (1992), ‘The Giving Reasons Requirement’, The University of Chicago Legal Forum, 179, 179-220, p. 205; See also, P. Craig (2012), EU Administrative Law, Oxford: Oxford University Press, p. 296.


41 Para. 22 of the Preamble to Regulation (EC) No 178/2002, as subsequently amended.


43 Interview with an official from the European Aviation Safety Agency.
One can assume that participation in this sense almost has an element of accountability. However, taken at face value, it is arguable whether such “monitoring” can be interpreted as promoting the accountability of agencies towards interested parties.\(^{44}\) Even though in certain cases interested parties may ask questions and receive a response from agencies, the consequences agencies face are almost non-existent.\(^{45}\) However, the possibility of monitoring of agencies’ operation that may arise from the participation of interested parties is intrinsically related to the building of trust and the avoidance of public dissatisfaction. Trust relations are based on three premises: (i) trust that agencies do what they say they will do, (ii) predictability and knowledge about the actions and intentions of agencies, and (iii) trust on the basis of a belief that it is in the interest of agencies to attend to the interests of participants in the relevant matter.\(^{46}\)

The promises of transparency, monitoring and trust do not come without risks. One is the above-mentioned risk of capture: agencies may be influenced or controlled by the interests they are supposed to regulate. Another risk is that the participation of interested parties creates a “false feeling” of transparency and confidence in the agencies’ operation for those situated outside the formalised participatory structures. As observed by one interested parties’ respondent from the EBA,

> The formal participatory procedures [whatever form they may take] give the impression to the general public that the agency is concerned with their issues, for example consumer issues, because they involve participants who are to represent such interests. They may perceive that the agency is doing something in the field of consumer protection even if it might not do anything at all.\(^{47}\)

In sum, the participation of interested parties while capable of enhancing transparency, monitoring and building trust, requires mechanisms that promote these promises to be put in motion. In order to ensure that interested parties understand and monitor the work of agencies, and to perceive it trustworthy (or not), there should be a reasonable possibility to access pertinent information, debate different “bubbling” issues and receive a reasoned response from agencies.

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\(^{44}\) Claims have been made that participation is a powerful vehicle for (national) agencies’ accountability towards stakeholders and the public. See, E. Hüptes, M. Quintyn and M. W. Taylor (2005), p. 1600; In the context of the EU institutions, it has been argued that interested parties will have “a positive impact on the functioning of accountability when they can put pressure on EU institutions to explain and justify their conduct, enable the relevant forum to pose the pertinent questions and to pass an enlightened judgement, and make sure that the actor faces consequences.” See, B. Kohler-Koch (2010), p. 1121.

\(^{45}\) Bovens determines accountability as “a relationship between an actor and a forum, in which the actor has the obligation to explain and justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.” See, M. Bovens (2007), ‘Analysing and Assessing Public Accountability: A Conceptual Framework’, European Law Journal, 13(4), 447-468, p. 450.


\(^{47}\) Interview with an interested parties’ respondent from the European Banking Authority.
2.2 Forms and Forums of the Participation of Interested Parties in European Agencies

The forms of participation are understood as diverse ways in which interested parties can access agencies’ activities. It is submitted that specific participatory arrangements (i.e. participatory structures and forums falling within a particular form of participation) have been put in place to accomplish different promises of participation. Indeed, interested parties may participate in different aspects (e.g. managerial or rulemaking) of agencies’ operation: their involvement is characterised by different responsibilities and, depending on the type of involvement, participation may convey distinctive promises. In essence, it may be argued that there is a functional distinction between different forms of participation. Given the research purpose, this points to the need to shift the focus of promises, including their relevance and their effective fulfilment, to the various forms of participation. On the whole, taking into account the (functional) specificities of each form of participation will help determine whether and how agencies have lived up to the central promises of participation.

The present classification of the forms of participation reflects the diversity of the formalised participatory structures as enshrined in agencies’ founding regulations, as well as their internal policy documents (e.g. agencies’ decisions). Based on the setting in which participation in European agencies occurs and the type of mandates and tasks that interested parties are entrusted with (i.e. the aspect of agency operation that interested parties are given access to), it is possible to identify the following forms of participation. First, considering the setting, it is possible to distinguish between two overarching categories of participation, namely participation within the internal administrative structure of agencies (i.e. internal or organic participation) and external participation. Second, on the basis of the nature of the mandates and tasks, it is further possible to differentiate between four main forms of the participation of interested parties, of which three are internal and one is external (see Table 2.1 below). The internal forms of participation may comprise the following: (i) participation in the strategic management of agencies, (ii) participation by way of advisory groups and working parties which collaborate with agencies in general matters, and (iii) participation in the quasi-regulatory tasks of agencies. Moreover, external participation, which presupposes participation of interested parties that are external to the agencies’ administrative structure, takes the form of public consultations. For the reason of clarity, I will first delineate these four forms of the participation of interested parties and, then, based on a review of agencies’ constituent and internal acts provide concrete examples of different participatory structures belonging to different categories.

(i) Managerial Participation: Some agencies provide opportunities for interested parties to participate in the managerial tasks of agencies, either directly as members of the management boards or indirectly via advisory bodies which assist the management boards. Management

48 The term “form of participation” is used broadly to describe any participatory arrangement falling within a specific category of participation, while the terms “participatory structures” and “participatory forums” are used to refer to participatory groups belonging to a particular form of participation.
boards are the main steering bodies of agencies, concerned with effective day-to-day operation of agencies. As such, they are entrusted with a wide variety of managerial responsibilities, which usually include a supervisory role with regard to agencies’ budget, approval of annual work programmes and reports, determination of strategic plans, adoption of internal policy documents, and the appointment and dismissal of executive directors. The composition of the management boards differs among agencies, but generally they comprise representatives of Member States as well as, depending on the agency, representatives from the European Commission, the European Parliament and interested parties (e.g. representatives of societal interests or sectors concerned with agency operation). Where interested parties are granted access to the management boards of agencies (either directly or indirectly) they will be involved in part of, or sometimes the whole spectrum of, the above-mentioned tasks. Thus, the functions of managerial participation first and foremost pertain to the discharge of the management board tasks as political guardians of agencies. Furthermore, as interested parties may possess specific knowledge of the societal or sector specific concerns, this form of participation could be perceived as a vehicle for increasing the range of information that will be available to the management boards when making decisions (i.e. more informed managerial outcomes). In addition, such participation may be seen as means to ensure inclusiveness and enhance responsiveness, thus making agencies’ managerial decisions (e.g. work programmes, strategic plans and policy documents) more aligned to the needs of those concerned. It is argued, however, that the manner and the degree to which one or more promises of managerial participation are conducted will depend on whether interested parties participate in the management boards directly as full members with voting rights or as members without voting rights, or indirectly through an advisory body to the management board. In other words, it is understood that the direct (i.e. as full voting members) and indirect (i.e. as observers or via an advisory board) variations of managerial participation may entail different responsibilities for interested parties and thus comprise a different set of functions.

(ii) Participation in General Matters is a form of participation which cannot be reduced to a specific decision-making procedure (e.g. managerial or quasi-rulemaking). It entails the creation of permanent groups of interested parties in the internal structure of agencies, which provide recommendations and feedback on various horizontal issues of their interest. In particular, the tasks of such participatory groups, which can take the form of advisory groups, working parties or platforms comprising stakeholder organisations (e.g. NGOs, consumer groups, and industry), can include the provision of advice on the effectiveness of agency operation with regard to interested parties’ concerns, exchange of information and knowledge, and communication of risks, which may indirectly affect the shaping of agencies’ activities.49 The promises of participation in general matters might vary in relation to the specific functions that agencies advance; they may range from furthering regular exchange of information between agencies and participatory groups and among the members of such groups, to increasing confidence and trust in agencies’ operation and promoting transparency.

49 In a way, this form of participation can be understood as a means of networking with interested parties; however, it should not be confused with other concepts and rationales of networks, in particular those connoting the idea that agencies should interact with other key players, such as national and international authorities, and EU bodies. For an overview see, P. Craig (2012), pp. 166-169. See also, E. Chiti (2000), ‘The Emergence of a Community Administration: The Case of European Agencies’, Common Market Law Review, 37(2), 309-343, pp. 317-328; E. Chiti (2004), ‘Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies’, European Law Journal, 10(4), 402-438, pp. 425-428; J. Mendes (2011a), pp. 105-106.
(iii) **Quasi-Regulatory Participation** is a form of internal participation which pertains to a particular rulemaking procedure of agencies, which may encompass either the drafting of eventually binding implementing rules adopted by the Commission or regulation by soft law. This distinguishing feature, based on the nature of tasks (i.e. the type of interaction), helps us delineate between this form of participation and the general form. Specifically, quasi-regulatory participation entails the establishment of consultative stakeholder groups, which are involved in the rulemaking tasks of agencies. Such groups will usually consist of a representative variety of participants from the various sectors affected by agency rulemaking. As such, consultative stakeholder groups may participate and provide their input at different stages of agencies’ rulemaking, ranging from its conception (e.g. initial determination and preliminary regulatory impact assessment) to its finalisation as a (draft) rule. The promises of this form of participation are understood to be threefold. First, consultation of stakeholder groups may increase the range of relevant information that will be available to agencies in the course of rulemaking. It is submitted that with their varied backgrounds and experience the members of such groups may contribute to more informed agencies’ regulatory outcomes. Second, the membership of such groups will normally consist of those who will eventually need to apply the rules once they are adopted. Having the opportunity to participate in rulemaking and thus comprehending its relevance may be relevant for fostering compliance and implementation. Finally, involving a spectrum of affected interests may be seen as promoting inclusiveness and attending to the needs of the regulated sectors. In all three senses, quasi-regulatory participation of consultative stakeholder groups can be understood as instrumental for the effectiveness of agencies’ rulemaking.

(iv) **Public Consultations:** Finally, certain agencies view the duty of external public consultations as an essential procedural step in their rulemaking activities. This form of participation is another manifestation of quasi-regulatory participation; however, it follows a different logic from the internal one in the sense that it provides an opportunity for those situated outside the agency structure – either the public in general or interested parties – to be involved in the exercise of agencies’ rulemaking tasks and contribute to the process by virtue of their input. Compared to internal quasi-regulatory participation, public consultations are expected to be relatively open to participants and less selective. Given their openness, it is expected that public consultations are intended to fulfil a whole spectrum of promises: advance more informed agencies’ rules (but perhaps in a less technical sense than internal quasi-regulatory participation, given the broader audience), ensure inclusiveness and responsiveness, promote compliance and implementation, and enhance transparency of agencies’ rulemaking.

The table below provides an overview of the different forms of participation of interested parties that exist in European agencies.
Table 2.1 Forms of Interested Parties’ Participation in European Agencies

<table>
<thead>
<tr>
<th>MANAGERIAL PARTICIPATION</th>
<th>PARTICIPATION IN GENERAL MATTERS</th>
<th>QUASI-REGULATORY PARTICIPATION</th>
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<tbody>
<tr>
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<td>Advisory Boards Assisting Management Boards</td>
<td>Advisory Groups / Working Parties / Platforms</td>
</tr>
<tr>
<td>AGENCIES</td>
<td>EASA</td>
<td>ACER, EASO, EFSA, EMA, ENISA, FRA</td>
</tr>
</tbody>
</table>

* V oting rights in the management board (VR).

In the light of the classification of the participatory structures presented above and based on agencies’ acts, we will provide in the following section concrete examples of different forms of participation and substantiate how present participation in European agencies actually is.

**A) Managerial Participation**

The founding regulations of eight agencies\(^{50}\) anticipate the involvement of representatives of interested parties in their management boards. In five cases agencies’ founding acts envisage participation of representatives of interested parties as full members of the management boards.\(^{51}\) For example, the management boards of the CEDEFOP, the EU-OSHA and the EUROFOUND include, in addition to government representatives, representatives of the employers’ and employees’ organisations from each Member State as voting members.\(^{52}\) In all three cases, the amendments to founding regulations stress the importance of this tripartite governance (i.e. representatives of governments, employers’ and employees’ organisations) for the successful operation of these agencies. In particular, such tripartite representation ensures that “all major stakeholders are involved” and that “account is taken of the diversity of interests and approaches” which characterise social or vocational training issues.\(^{53}\) Another instance where representatives of interested parties participate as full members of the management board is the case of the EMA. The EMA management board includes four civil society representatives, namely two representatives of patients’ and consumers’ organisations, and one representative of each doctors’

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\(^{50}\) CEDEFOP, ECHA, EFSA, EMA, EMSA, EU-OSHA, ERA and EUROFOUND.

\(^{51}\) CEDEFOP, EFSA, EMA, EU-OSHA and EUROFOUND.

\(^{52}\) Respectively, Art. 4(2) of Council Regulation No 337/75, as subsequently amended; Art. 8(1) of Council Regulation No 2062/94, as subsequently amended; Art. 6(1) of Council Regulation No 1365/75, as subsequently amended.

and veterinarians’ organisation.\textsuperscript{54} Furthermore, the founding regulation of the EFSA envisages that four management board members need to have a background in organisations representing consumers and other interests in the food chain.\textsuperscript{55} In addition, the management boards of three other agencies include representatives of interested parties without, however, a right to vote. For example, the management board of the EMSA encompasses “four professionals from the sectors most concerned [...] without the right to vote”\textsuperscript{56} while the ECHA management board includes “three individuals from interested parties without voting rights.”\textsuperscript{57} Finally, the management board of the ERA comprises, among other members, six representatives, without the right to vote, representing railway undertakings, infrastructure managers, railway industry, workers unions, passengers and freight customers.\textsuperscript{58} In all agencies, except for CEDEFOP, EU-OSHA and EUROFOUND, the interested parties participating in the management boards need to possess a certain level of expertise in management and experience in the remit of agencies’ operation.\textsuperscript{59}

The case of the EASA presents a unique example of the participation of interested parties in the strategic management of agencies. The EASA’s founding regulation envisages the creation of an advisory board entirely composed of interested parties, which the agency’s management board needs to consult prior to making decisions, for example with regard to work programme or budget.\textsuperscript{60} Moreover, the advisory board is entitled to appoint four of its members, representing, as broadly as possible, the different views represented therein, to participate as observers in the EASA management board.\textsuperscript{61}

\textbf{B) Participation in General Matters}

The founding regulations of three agencies explicitly foresee the establishment of permanent groups, entirely consisting of interested parties, who assist the agencies in general matters.\textsuperscript{62} For example, the founding regulation of the EASO establishes the basis for the creation of a consultative forum, open to all interested organisations.\textsuperscript{63} As such, the EASO Consultative Forum constitutes a mechanism for the exchange of information and pooling of knowledge between the EASO and civil society.\textsuperscript{64} Another example is the establishment of the Permanent Stakeholders’ Group under the auspices of the ENISA.\textsuperscript{65} This group consists of experts representing the relevant stakeholders, such as the information and communication technologies industry and consumer groups, and it is aimed at advising the agency’s executive director on strategic decisions, drawing

\textsuperscript{54} Art. 65(1) of Regulation (EC) No 726/2004, as subsequently amended.
\textsuperscript{55} Art. 25(1) of Regulation (EC) No 178/2002, as subsequently amended.
\textsuperscript{56} Art. 11(1) of Regulation (EC) No 1406/2002, as subsequently amended.
\textsuperscript{57} Art. 79(1) of Regulation (EC) No 1907/2006, as subsequently amended.
\textsuperscript{58} Art. 26(1) of Regulation (EC) No 881/2004, as subsequently amended.
\textsuperscript{59} Respectively, Art. 65(2) of Regulation No 726/2004, as subsequently amended; Art. 25(1) of Regulation (EC) No 178/2002, as subsequently amended; Art. 11(1) of Regulation (EC) No 1406/2002, as subsequently amended; Art. 79(2) of Regulation (EC) No 1907/2006, as subsequently amended; Art. 26(1) of Regulation (EC) No 881/2004, as subsequently amended.
\textsuperscript{60} Art. 33(4) of Regulation (EC) No 216/2008, as subsequently amended.
\textsuperscript{61} Ibid. Art. 34(3).
\textsuperscript{62} EASO, ENISA and FRA.
\textsuperscript{63} Art. 51 of Regulation (EU) No 439/2010.
\textsuperscript{64} Ibid. Art. 51(2).
\textsuperscript{65} Art. 12 of Regulation (EU) No 526/2013.
up a proposal of the ENISA work programme and ensuring communication with stakeholders on all issues related to the work programme. Moreover, the founding regulation of the FRA envisages the establishment of the Fundamental Rights Platform that, inter alia, comprises non-governmental organisations dealing with human rights, trade unions and employers’ organisations, relevant social and professional organisations, religious, philosophical and non-confessional organisations, and universities. This Fundamental Rights Platform constitutes a mechanism for the exchange of information and pooling of knowledge and ensures close cooperation between the agency and relevant stakeholders.

Two other agencies – the EFSA and the EMA – have created permanent participatory groups on their own motion. For instance, following a decision of the management board, the EFSA created the Stakeholder Consultative Platform, composed of EU-wide stakeholder organisations operating in the food chain and active within the EFSA’s mandate, covering in particular food and feed safety, nutrition, and animal and plant health. The tasks of the Platform include offering advice to the EFSA’s executive director with respect to the annual work plan, providing the agency with feedback on the effectiveness of its policies in responding to stakeholders’ concerns, alerting the EFSA of key issues of stakeholders’ concern, and advising on risk assessment methodologies, including the topics for consultation and the best way to organise such consultations. By way of comparison, the EMA has set up the Patients’ and Consumers’ Working Party, as well as the Health Professionals’ Working Party, which are entirely composed of representatives from patients’ and consumers’ organisations and healthcare professionals’ organisations respectively. These two working parties provide recommendations to the EMA and its scientific committees on all matters of interests to their respective members.

C) Quasi-Regulatory Participation

The founding regulations of three agencies – the European supervisory authorities (ESAs), which include the EBA, the EIOPA, and the ESMA - foresee the establishment of consultative stakeholder groups which may participate in agencies’ quasi-regulatory tasks. The EBA Banking Stakeholder Group, the EIOPA Insurance and Reinsurance Stakeholder Group and Occupational Pensions Stakeholder Group, and the ESMA Securities and Markets Stakeholder Group, all exclusively composed of interested parties, were established in order to facilitate consultations with stakeholders (e.g. financial industry, consumers, users, SMEs and academia) in areas that fall

66 Ibid.
68 Ibid. Art. 10(2).
70 Ibid.
within their remit. In particular, such stakeholder groups are consulted with regard to agencies’
 quasi-regulatory tasks (concerning draft technical standards, guidelines and recommendations). In
 addition, the EASA has set up the Safety Standards Consultative Committee on its own initiative,
 as part of its rulemaking process. The EASA consultative group, composed of representatives
 of organisations immediately affected by the agency’s operation, such as manufacturer industry,
 aviation operators, aerodromes, and aviation personnel, assists the EASA in its rulemaking
 activities (e.g. development and issuing of opinions, acceptable means of compliance, certification
 specifications, and guidance material).

D) Public Consultations

The founding regulations of nine agencies envisage external consultations with interested
 parties or the public at large. For example, in carrying out its tasks, the ACER needs to consult
 extensively and at an early stage with market participants, transmission system operators,
 consumers, end-users and competition authorities where relevant, in an open and transparent
 manner. The BEREC, before adopting opinions, regulatory best practice or reports, consults
 interested parties and gives them the opportunity to comment within a reasonable period.
 Moreover, when developing opinions, certification specifications and guidance material, the EASA
 needs to foster wide consultations with interested parties. The European supervisory authorities
 (EBA, EIOPA, and ESMA) have all been mandated to conduct open public consultations on draft
 regulatory technical standards, draft implementing technical standards, and guidelines and
 recommendations. Another example is the ECHA, which arranges consultations with interested
 parties (“third parties”) on a number of occasions. The EFSA founding regulation stipulates that
 there shall be open and transparent public consultations during the preparation, evaluation and
 revision of food law, and that the EFSA needs to develop effective contacts with consumer and
 producer representaties, processors and any other interested parties. In the case of the ERA,
 consultations are conducted with the social partners, as well as with organisations representing

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73 Respectively, Art. 37 of Regulation (EU) No 1093/2010, as subsequently amended; Art. 37 of Regulation (EU) No 1094/2010, as
 subsequently amended; and Art. 37 of Regulation (EU) No 1095/2010, as subsequently amended.
74 Ibid.
 Concerning the Procedure to be Applied by the Agency for the Issuing of Opinions, Certification Specifications and Guidance
76 Ibid.
77 ACER, BEREC, EASA, EBA, ECHA, EFSA, EIOPA, ERA, and ESMA.
78 Art. 10(1) of Regulation (EC) No 713/2009.
79 Art. 17 of Regulation (EC) No 1211/2009; Such consultations are managed by the BEREC Office.
80 Art. 52(1)(c) of Regulation (EC) No 216/2008, as subsequently amended.
81 Respectively, Art. 10(1) of Regulation (EU) No 1093/2010, as subsequently amended; Art. 10(1) of Regulation (EU) No 1094/2010,
 as subsequently amended; and Art. 10(1) of Regulation (EU) No 1095/2010, as subsequently amended.
82 Respectively, Art. 15(1) of Regulation (EU) No 1093/2010, as subsequently amended; Art. 15(1) of Regulation (EU) No 1094/2010,
 as subsequently amended; and Art. 15(1) of Regulation (EU) No 1095/2010, as subsequently amended.
83 Respectively, Art. 16(2) of Regulation (EU) No 1093/2010, as subsequently amended; Art. 16(2) of Regulation (EU) No 1094/2010,
 as subsequently amended; and Art. 16(2) of Regulation (EU) No 1095/2010, as subsequently amended.
84 See for example, Arts. 40(2), 45(4), 58(4), and 69(6) of Regulation (EC) No 1907/2006.
85 Arts. 9 and 42 of Regulation (EC) No 178/2002, as subsequently amended.
rail freight customers and passengers, in order to discuss draft recommendations and proposals before they are submitted to the Commission. The EMA is another agency which makes frequent use of consultations; however, in this instance, the duties of consultations with relevant interested parties are embedded in the procedure for drafting a guideline, adopted by the agency, and not in the EMA founding regulation.

2.3 The Components of Analysis:
Access to Participation and the Quality of Deliberation

The present study is concerned not only with the potential promises of different forms of participation, but primarily with their actual fulfilment, which will be determined by examining agencies’ rules and practices through empirical research. To identify and ascertain the accomplishment of the promises of participation, a systemic and comprehensive framework for analysis is required.

In this work participation refers to a formalised interaction between European agencies and interested parties, distinguished by two defining elements - access and the quality of deliberation, which is intended to accomplish one or more of the central promises outlined above. This core meaning of participation entails two central components of analysis, each capturing a different aspect of participation. First, the actual promises of participation and their delivery depend on the conditions of access, which is a static component. Second, the fulfilment of the promises of participation is determined by the overall quality of deliberation (i.e. the influence of participation), which is a dynamic component. In particular, the first component of analysis – access to participation – will allow us to establish who exactly participates in agencies, where they participate, subject to what conditions, and what promises such participation is intended to fulfil. While the question of access is an essential first step of investigation, it is not sufficiently comprehensive in and of itself. Indeed, participation is not a static concept, but a dynamic and flexible one. Thus, it is important not only to investigate who is included, and where and why a party is given the opportunity of access, but also what happens once interested parties are granted access. That is why a second component of analysis – the quality of deliberation - demonstrating the influence of participation (i.e. the difference that it makes in the end in terms of the promises) is needed. A combination of these two components of analysis enables a thorough investigation of the extent and the manner in which European agencies have lived up to the central promises with regard to different forms of internal and external participation (i.e. managerial, general, quasi-regulatory and public consultations) and participatory structures belonging to these categories.

In light of the above, I will now develop the analytical framework that will be applied in the empirical part of this research.

86 Arts. 4 and 5 of Regulation (EC) No 881/2004, as subsequently amended.
88 See also, Chapter 1, Section 1.3.
2.3.1 Component 1: Access to Participation

Access is defined as an opportunity for interested parties to become part of a participatory structure and become involved in the exercise of (a part of) agencies’ tasks. As such, access to participation is guided by rules – enshrined either in the agencies’ founding regulations or in agencies’ policy documents – which determine “who can get into the system”\(^{89}\) and become a member of a participatory forum, specify the selection and appointment criteria and outline the promises that the participation of interested parties is intended to fulfil.

There are two crucial aspects of access to *internal* participation that need to be considered: (i) the creation of participatory forums and the mandates and tasks they are entrusted with, and (ii) the composition of participatory forums, the selection and appointment of members, and the “representativeness” of their interests. First, the rules and practices governing the creation of participatory forums outline the participatory forums’ responsibilities (for example, the provision of advice with regard to general matters concerning interested parties or the provision of comments on regulatory matters) and on this basis it will be possible to identify the (intended) promises of participation on a case-by-case basis. The rules and practices guiding the second aspect of access, will allow us to ascertain whether all interested parties that matter for the fulfilment of the identified promises of participation are actually provided with an opportunity to participate. For instance, the promise of inclusiveness will always be contingent on how open participation is.

*Figure 2.1 Access to Different Forms of Participation*

While no single model can be prescribed for the selection of members of the diverse internal participatory forums, there are certain minimum requirements that should be applicable in any selection procedure in order to perceive such participation capable of furthering the promises of participation. First, the selection procedure needs to start with an open and transparent call

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\(^{89}\) P. Craig (2012), p. 288.
for the expression of interest to become a member of a participatory forum, which should be accessible to all eligible interests. In other words, this is the first step towards determining whether all eligible interests are actually given an opportunity to apply for a membership in the participatory forums, be selected, and contribute to the fulfilment of the identified promises of participation. Ideally, a call for the expression of interest should include a clear list of criteria (e.g. basic characteristics of interested parties, their mission, possible affiliation or representation of a background organisation, necessary knowledge or experience) that the potential candidates for membership should meet in order to be included into participatory forums. All these considerations are important, as any shortcomings in the selection procedure may negatively affect the fulfilment of the promises of participation.

Moreover, in any selection procedure there will be an appointing authority (e.g. the agency, the Commission or the Council) which is in charge of determining the membership and representativeness of the interests involved in a participatory forum and, in turn, its ability to fulfil the promises of participation. The consideration of the appointing authority is particularly important when assessing the responsibility for promoting or impeding the delivery of the promises of participation. For example, if the promises of participation cannot be carried out due to a malfunction in the selection procedure, the question arises whether the responsibility can be attributed to the agency or the Commission or the Council. In other words, the question is: has an agency failed to fulfil to the promises of participation because of its own fault, or did it not fulfil the promises because it was someone else’s responsibility?

Furthermore, the selection of participants needs to respect the prescribed time-frames in order to ensure that all spots in the participatory forums are filled at all times and that the forum can perform its tasks; any untimely delays in the selection procedure can lead to situations where certain eligible interests might not be represented or may be under-represented in a given participatory forum such that it may hinder the fulfilment of the promises of participation. Finally, at the end of the selection procedure, the appointing authority needs to publish the list of the selected participants (i.e. membership lists) to ensure transparency towards a broader public of who the members of the participatory forums are and what interests they represent.

In the case of external public consultations, the situation is admittedly different. Nevertheless, in order to ensure adequate awareness-raising publicity and promote the fulfilment of the promises of consultation, any open consultation should begin with the publication of a draft document, to which the agency invites comments, in a concise way at a “single access point” (e.g. on the internet).

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90 Eligible interests will depend on the nature of tasks carried out by a participatory forum and the promises that a particular form of participation is intended to fulfil.

91 In 2002, the Commission proposed minimum standards for consultation with interested parties, which, inter alia, stipulate that “for addressing the broader public, a single access point will be established where interested parties should find information and relevant documentation.” See, European Commission (2002b), p. 20; Similarly, the Research Network on EU Administrative Law (ReNEUAL) proposed in its model rules on EU administrative procedure, that draft acts and the explanatory memorandums “shall be published on a central EU website for consultations” and need to be “accompanied by an open invitation to any person to electronically submit comments in any of the official languages of the Union”. See, Research Network on EU Administrative Law (2014), ‘ReNEUAL Model Rules on EU Administrative Procedure. Book II – Administrative Rulemaking’, <http://www.reneual.eu/publications/ReNEUAL%20Model%20Rules%202014/Book%20II%20-%20Administrative%20Rulemaking_individualized_final%202014_09_03.pdf>, p. 43.
(ReNEUAL), “[t]he details of such publication need to be designed with a view of ensuring input into [rulemaking] which reflects the various opinions and interests held within pluralistic societies. No specific group should be able to influence [rulemaking] unilaterally due to privileged possibilities of access to the regulators [i.e. European agencies].” 92 In other words, in order to secure the fulfilment of the promises of consultation, agencies should establish a transparent place for the publication of consultation documents, where all eligible interested parties can access them impartially.

In terms of access to different participatory forums, the appointment of the participants inevitably prompts the question of whether such forums are sufficiently representative of the sectoral interests they are supposed to represent. Thus, the inquiry into the actual representativeness of the participatory forums needs to be assessed in conjunction with the identified promises of participation. Representativeness of interests is important, on the one hand, since participation should allow the audiences that matter to voice their opinion, which is important for the delivery of a given promise; on the other hand, it is important in order to satisfy broader interests not immediately involved in the participatory forums. The composition of the participatory forums is often limited to a certain number of participants, in order to ensure their operability and create conditions for balanced deliberations, which furthers the fulfilment of the promises of participation. Hence, the participatory forums need to be carefully designed with a view to ensuring that the range of dispersed interests is not diminished and, at the same time, allowing effective operation of such forums.

2.3.2 Component 2: Quality of Deliberation

The quality of deliberation refers to the influence of participation (i.e. the difference that it makes in the end in terms of the promises of participation). Thus, the quality of deliberation is taken here in a particular perspective: its relevance for carrying forward the promises of participation.

It is argued that the participation effort, and the subsequent fulfilment of the promises, depends on the overall quality of deliberation which relates to three interlinked and mutually enforcing facets of participation: (i) information, (ii) commenting, and (iii) recognition. In particular, it is believed that these three facets of participation both separately and in conjunction determine the quality of deliberation, which is the driving force for the successful fulfilment of the promises of participation. The agencies are in charge of providing information on the basis of which the participants may shape their views, raise concerns and submit comments. Thus, inadequate and untimely provision of information may prove frustrating for the participants and likely inhibits the quality of deliberation and the subsequent delivery of the promises of participation. Motivated and committed participants who dispose of the information relevant for the performance of their tasks will contribute most to the quality of deliberation and the subsequent fulfilment of the promises of participation. Moreover, sufficient time to discuss the topics on the participatory

forums’ agenda, and the engagement and interaction among the members, targeted at presenting their views (commenting) are equally understood to promote the overall quality of deliberation: the level of interested parties’ input will have a profound effect on the delivery of the promises of participation. On the basis of the input received, agencies determine its influence (i.e. the difference in terms of the promises of participation), which needs to be reflected in the agencies’ feedback or in another form of recognition.

Figure 2.2 The Quality of Deliberation and Fulfilment of the Promises of Participation

On the whole, this shows that the quality of deliberation can only be as meaningful as each of the individual facets of participation, as the level and the strength of one facet will undoubtedly affect the quality and effectiveness of all the subsequent ones. We have seen that there are a number of gateways through which interested parties may access a wide variety of agencies’ activities in order to accomplish different promises of participation. Analysing different forms of participation through the lens of the quality of deliberation will allow us to assess in our empirical part of the research whether and how the assumed promises of participation are concretised or not. Let us now look more closely at the three facets of participation and their relevance for (assessing) the fulfilment of the promises of participation.

A) Information

Access to relevant information and agencies’ documents is a *conditio sine qua non* for the effective execution of the mandates and tasks of the participatory forums and the fulfilment of any of the central promises of participation. Imagine enhancing transparency or building trust into agency operation, this would be impossible without the provision of information to interested parties. Or contributing to more informed agency outcomes, which is an “action-reaction exercise”: without the initial information there would be no basis for the receipt of comments. And ensuring responsiveness – responsiveness of what? If the participants receive no information about the issues that might concern them, they will not be able to express their needs or concerns.

As such, access to information establishes an essential guarantee for the overall quality of deliberation, as it motivates the quality of the participatory forums’ operation, their ability to prepare and shape their views, deliberate and comment, and formulate their input, which together furthers the delivery of the promises of participation. In other words, interested parties (i.e. members of the participatory forums) should be given the opportunity to access and examine all documents which are relevant for the fulfilment of a given promise of participation. This understanding of the relevance of access to information for the promises of participation is
analogous to the right of access to a file associated with the rights of the defence in administrative adjudication.\textsuperscript{93} The right to access the file is settled case-law in EU competition matters,\textsuperscript{94} and is enshrined in Article 41 of the Charter of Fundamental Rights of European Union. In the words of Craig, access to a file “facilitates understanding of the evidentiary basis on which the decision is to be made or has been made, and of the reasoning underlying it, thereby placing the individual in a better position to be able to proffer counter-arguments when exercising the right to be heard, or challenging the decision by way of judicial review.”\textsuperscript{95}

With regard to the overall quality of deliberation and the subsequent fulfilment of the promises of participation in European agencies, this would mean that access to information promotes the interested parties’ understanding of the part of agencies’ activities which they are given access to. Hence, agencies need to equip the participatory forums with all relevant information in order to ensure their proper operation and to promote the fulfilment of the particular promises of participation.\textsuperscript{96} In other words, without a concerted effort to ensure adequate and timely information, the designated interested parties can be significantly disadvantaged in their ability to effectively conduct their role and the promises of participation may not be delivered.\textsuperscript{97}

\textbf{B) Commenting}

The organisational aspect of \textit{debating and commenting} of the participatory forums is equally important. At this stage, the interested parties discuss and respond to the information received. In spite of the particular characteristics of the participatory forums belonging to different categories of participation (i.e. forms of participation), and their presumably distinctive promises, there is one indispensable element of debate/commenting for assessing the overall quality of deliberation: the participants’ role and/or engagement. Specifically, the level and the quality of discussions/commenting conducted in the participatory forums depend on how different interests are


\textsuperscript{95} P. Craig (2012), p. 326.

\textsuperscript{96} In the case of the participatory forums operating within the internal structure of the agencies, access to information would include distribution of relevant documents and information pertaining to the mandate of such forums. In the same vein, external public consultations commence with the publication of the consultation document, preferably at the “single access point”. See for example, European Commission (2002b), pp. 19-20; B. Bugarič (2004), p. 513.

\textsuperscript{97} For example, the Commission minimum standards for consultations provide that there should be “a clear content of the consultation process.” The information in publicity and consultation documents should, \textit{inter alia}, include “a summary of the context, scope and objectives of consultation, including a description of specific issues open for discussion or questions with particular importance”, as well as “contact details and deadlines” for consultations. See, European Commission (2002b), p. 19; Comparably, the Research Network on EU Administrative Law (ReNEUAL) defines the quality of a consultation document, stating that “the draft act and the explanatory memorandum” published for consultation need to “contain information about the adoption procedure including a deadline for submissions which cannot be shorter than twelve weeks after publication” and “in an annex contain studies, data and other supporting material used for the drafting of the act including the impact assessment.” See, Research Network on EU Administrative Law (2014), p. 43.
represented and whether and to what extent they may come forward in discussions. After all, the participants are expected to voice their interests, provide their views, experience and knowledge and further the participatory groups’ mission, whether it is managerial responsibilities, general matters or quasi-regulatory tasks. In other words, corresponding with their interests or concerns, interested parties should actively contribute to the work undertaken by the participatory forums and provide input which supports the quality of deliberation and promotes the fulfilment of the promises of participation. This element of debate will allow us to assess the manner and extent to which different interests are actually represented in the participatory groups.

In the cases where the participatory groups need to present a common position towards the agency, there is a further relevant feature of debate, namely the participatory forums’ decision-making arrangements and the way in which they present their views to the agency. This aspect of debate is relevant as it determines the degree to which different interests are actually represented or reflected in the output of the participatory forums.

The effectiveness of debating and commenting and the overall performance of the participatory forums might also be contingent upon another aspect of debate: participation needs to allow sufficient time to properly address specific issues. This element is particularly important in the case of public consultations, which should allow an adequate time-frame for the preparation and submission of comments. Insufficient time allocated to participation can be detrimental to the level of debate and commenting, and can raise serious doubts about the overall quality of deliberation and the subsequent delivery of the promises of participation. This can, in addition, lead to situations where the participatory forums risk overlooking certain important matters. Therefore, to further the fulfilment of the promises of participation, the time dedicated to the participation of interested parties should strike a reasonable balance between the need for inclusiveness and adequate input and the organisational appropriateness of agencies’ operation.

C) Recognition

The third facet of participation that facilitates the overall quality of deliberation concerns the recognition of the participatory forums’ input and the practical effects of the involvement of interested parties. It concerns, in particular, agencies’ feedback or an acknowledgement of the input provided, which facilitates the fulfilment of the promises of participation. The provision of feedback entails agencies’ commitment to considering the views provided by interested parties and responding to them. Thus, at an abstract level, the provision of feedback, or the acknowledgement of input, is crucial for the overall quality of deliberation as it demonstrates the extent to which participants have been successful (or not) in advancing the promises of participation. After all, the establishment of participatory structures in an agency with a view to advancing the promises of participation “would mean little if the agency did not listen seriously

to those comments received”¹⁰⁰ without certain response to interested parties’ input (including acceptance or rejection), the credibility of the participation effort as a whole may be lost. The demand for the participation of interested parties in European agencies could “be met merely by allowing the interested groups to speak. The agency need not really listen. If, however, the agency is required to respond to each thing the groups say, then the agency must at least listen enough to make a response.”¹⁰¹

The scope of the promise of participation that is claimed to exist determines the type of a response that is appropriate and, thus, potentially acceptable or persuasive.¹⁰² Depending on the participatory group’s mission and the promise of participation, the agencies’ acknowledgement of the contribution of interested parties can take a variety of weaker and stronger forms, ranging from publication of the participatory forums’ minutes or formulated opinions on the agencies’ websites, agencies’ annual reports on the interaction with interested parties, and provision of individual or collective, written or oral feedback to the participants.¹⁰³ For the fulfilment of the promises of participation, in particular, more informed outcomes, responsiveness and implementation, it is important that the agencies are particularly attentive to the concerns of interested parties and to “well made and convincing arguments”, and adequately respond to them.¹⁰⁴ In this way, agencies clearly demonstrate that they take the input of interested parties into consideration and accept or reject it “on the basis of substantive argument.”¹⁰⁵ From the participants’ perspective, the response should preferably include “the reasons for the rejection or acceptance of each of their specific claims.”¹⁰⁶ In this sense, the agencies’ feedback or acknowledgement of the input of interested parties is a manifestation of the effectiveness and fulfilment of the envisaged promises of participation.

¹⁰¹ Ibid, p. 205.
¹⁰³ As stipulated by the Research Network on EU Administrative Law (ReNEUAL) in regard to public consultations, the provision of feedback “balances the need to ensure that the comments received are duly taken into account and the flexibility that ought to be given to the deciding authority [i.e. an agency] in assessing those comments in the light of the legal mandate it needs to pursue. The public should be able to see which points have been taken into account in the final [rulemaking] proposal. Not all comments will be pertinent and justify a reaction.” See, Research Network on EU Administrative Law (2014), pp. 62-63.
¹⁰⁵ Ibid, p. 514.
¹⁰⁶ M. Shapiro (2002), p. 188.
2.4 Investigating Participation in European Agencies: A Comprehensive Approach

The above sections have sketched the theoretical framework for the empirical investigation of the participation of interested parties in European agencies. The central promises of participation (as claimed in the “sources”), in particular, constitute an evaluative framework against which participation in European agencies will be assessed both *de facto* and *de jure* in the light of empirical evidence (i.e. interview data). Several questions are relevant in order to establish the extent and the manner in which participation in European agencies has lived up to its central promises. What form does participation take? Why is a particular form of participation relevant, what promises does it intend to accomplish? How are the intended promises fulfilled, if at all?

Based on the nature of the mandates and tasks (i.e. the aspect of agencies’ operation) that interested parties are formally given access to, different forms of participation were identified: *managerial participation*, *participation in general matters*, *quasi-regulatory participation* and *public consultations*. Considering that different forms of participation may assume distinctive functional roles, it is necessary to shift the focus of promises to each species of involvement. To investigate and assess the particularities of the diverse participatory arrangements in European agencies, each form of participation will be addressed in a separate chapter.

This chapter has outlined two central components of analysis: (i) access to participation, and (ii) the overall quality of deliberation. The actual promises of participation and their effective fulfilment do not depend only on the opportunity of interested parties to become involved in a certain aspect of agency operation, but also on the influence of participation (i.e. the difference that it makes in the end in terms of promises). Thus, in order to assess whether and in what manner participation in European agencies has fulfilled its central promises, each participatory structure needs to be considered on the basis of these components.

In terms of access to participation, there are several aspects to be taken into account. On the one hand, it is necessary to establish the intended promises (i.e. the functional role) of each participatory structure. On the other hand, it is important to determine whether everyone (i.e. the spectrum of interests) that matters for the fulfilment of the identified promises of participation is actually involved. In the case of certain participatory arrangements, the intended promises of participation will be specified immediately (i.e. self-evident) in the relevant legal and policy documents (i.e. agencies’ founding regulations and agencies’ decisions). For example, a certain document may clearly stipulate that a particular form of participation is expected to accomplish the promise of more informed outcomes or increase transparency. In other cases, however, the primary promises might not be directly invoked or could be implicit. This means that in such instances the provisions guiding the creation of the participatory forums, their mandates and tasks need to be examined and interpreted in order to establish the intended meaning of participation. On the whole, the determination of the purpose of different forms of participation (i.e. the intended promises) constitutes an essential step in the present investigation.
The identification of the relevance of different participatory structures (i.e. their envisaged promises), while fundamental, primarily demonstrates how their particular mandates and tasks correspond with the evaluative framework based on the central promises of participation. However, the fulfilment of the promises of participation does not depend only on the formal conditions of access, but also on *de facto* practices i.e. the effective application of the rules. To ascertain whether the promises are indeed fulfilled, several important formal and practical elements of access, including the composition of the participatory forums (i.e. the identification of interests that are formally granted access), the selection and appointment of members, and their actual representativeness of the eligible sectoral interests (i.e. those interests that are considered to be relevant for the fulfilment of primary promises), need to be considered. In order to examine the strengths and the weaknesses of interested parties’ access to participation in relation to the intended promises, the rules will be evaluated by reference to the empirical evidence. Any structural or practical shortcomings of agencies’ arrangements regarding access to participation - such as insufficient representativeness or delays in the appointment of the members of the participatory forums - could be problematic in terms of accomplishing the (intended) promises.

The right to access a participatory forum cannot, however, be understood as “meaningful participation” in the sense that such a right alone fulfils the promises of participation. The participation of interested parties is also characterised by the overall quality of deliberation (i.e. the actual influence of participation). As demonstrated above, the quality of deliberation depends on three interrelated and interdependent facets of participation: *access to information, commenting* and *recognition of input*. All these facets of participation are important regardless of the form that participation takes. However, it is assumed that depending on what is expected from each form of participation differences may exist; for instance, with respect to the type of information provided, the deadlines, the nature of commenting, and recognition. In fact, there are no uniform rules as to the quality of deliberation or each of the facets of participation that apply to the various participatory forums across the population of agencies; particular arrangements have been set up in the agencies’ founding regulations, agencies’ internal acts, or developed as a matter of established practices. The consideration of the formal arrangements, however, displays only the *potential* influence of participation. Juxtaposing rules and empirical evidence allows us to assess the *actual* difference that participation can make in the end. It is expected that such arrangements are put in place to further the fulfilment of the *intended promises* of each form of participation. It is necessary to examine whether and to what extent this is indeed the case. When examining the quality of deliberation of the various participatory forums belonging to different categories of participation (i.e. managerial, general and quasi-regulatory), several aspects deserve closer investigation.

First, it is important to consider the “rules of the game” pertaining to the type and the timing (i.e. deadlines) of *information* provided to the participatory forums. Interested parties are given access to a wide variety of agencies’ tasks and are entrusted with particular responsibilities; thus, the type of information needs to correspond with the particular nature of tasks that the respective forums are to conduct. In particular, the formal arrangements and established practices guiding the relevant content, the timing and the presentation of information are expected to vary from one case to the next depending on the intended promises of participation. Therefore, it is necessary to focus on such arrangements and assess whether they are adequate in relation to the envisaged
promises of a particular form of participation. The question also arises whether the arrangements regarding the provision of information are *de facto* respected. For this task, we will need to rely on the empirical evidence available (i.e. interview data). Only then it can be ascertained whether the identified promises of participation are indeed fulfilled. On the one hand, we need to examine whether the members of the diverse participatory forums receive information in a timely and adequate manner. This issue is highly important, given that the provision of information animates the overall quality of deliberation and the subsequent fulfilment of the promises of participation. Any flaws in the submission of information may have negative consequences for the participants’ capability to effectively accomplish their role and, subsequently, on the fulfilment of promises. On the other hand, it is necessary to look behind the scenes to see how the submission of information translates into the ability of participants to prepare for the execution of the responsibilities they are entrusted. What we also need to keep in mind is that the members of the participatory forums are supposed to represent or voice the interests concerned with agency operation. This means that the participants might need to consult with their background organisations in order to prepare and consolidate their views.\(^\text{107}\)

In other words, agencies need to give the participants “enough room” to sufficiently prepare their input. To a great extent, these two aspects are intertwined, but still relevant in their own right. The first aspect considers agencies’ performance with respect to provision of information, whereas the second aspect shows the participants’ behavioural standards and working practices and the extent to which they can contribute to the fulfilment of the promises of participation.

Second, while the opportunity to obtain information is a prerequisite for the overall quality of deliberation, it is not a sufficient factor to assert whether the intended promises of participation are concretised or not. One needs to press further and examine the participants’ role and engagement in the course of *debating and commenting*. The interaction between participatory forums and agencies will generally occur either immediately in the participatory groups’ meetings or via written/electronic communication. In terms of the debate, it is expected that the participants will primarily aim at advancing and protecting their own particular interests. Therefore, the degree to which the participants engage in the debate and voice their interests should correlate with the substance of the topic on the participatory forum’s agenda. In other words, it is assumed that the participants’ involvement in the debate is more active when the issues pertaining to their individual interests are on the table. This cannot be seen as problematic *per se* in terms of interest representation and the overall quality of deliberation. However, if inadequate debate occurs due to untimely provision of information or its complexity, affecting the ability of participants to prepare for meetings, or due to inadequate knowledge to contribute to discussions, this could be seen as potentially disadvantageous with regard to accomplishing the promises of participation. Problems would also arise, if the participants’ inactivity would lead to situations that would allow certain interests to prevail over other competing interests in the debate. Thus, it is important to pinpoint the possible problematic aspects and good practices of participation in debates and assess how that reflects on the fulfilment of the promises of participation. Moreover, in cases where participatory forums need to present a common position to the agency, it is necessary to explore whether the decision-making arrangements secure the reflection of different, possibly

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107 Admittedly, this may not always be the case, especially in cases where the participatory groups’ members need to participate in their individual capacity and not as representatives of their immediate background organisation. See also Chapter 1, Section 1.4.
conflicting views in the outcomes. In particular, it is important to identify possible deficits which could affect the furthering of the promises of participation, especially inclusiveness (i.e. balancing of different interests). In certain instances, e.g. public consultations, the time dedicated to commenting/debate might be crucial for adequately addressing specific issues and expressing participants’ interests and concerns. The mere possibility to participate might not adequately guarantee that the promises will be fulfilled; interested parties must also have an actual chance to “influence” an agency by virtue of their input. Therefore, it is necessary to ascertain whether the time-frames for participation are adequate in relation to the intended promises.

Finally, in order to pass a final judgement on whether the intended promises of each form of participation are actually fulfilled, one also needs to consider the participatory forums’ contributions and the agencies’ recognition thereof. In particular, it is important to assess whether, structurally, the participatory forums’ outcomes correspond with the intended promises of participation, and establish in what manner and to what degree agencies respond to them. Depending on the form of participation, the outcomes of participation may be manifested through a variety of weaker and stronger forms (e.g. written opinions and reports or immediate presentations and exchange of views with the agencies’ officials in the participatory groups’ meetings). The contributions of the participatory forums might not be legally binding on the agencies (and in most cases they are not). However, the more informal character or the participatory groups’ input should in no way mean that agencies can just ignore it, especially if the participation of interested parties is intended to fulfil the promises of better and more informed agencies’ outcomes, ensure responsiveness of the agencies’ activities (e.g. managerial, general or quasi-rulemaking), further implementation and compliance, and enhance transparency. Indeed, without certain recognition (including acceptance or rejection) of the participatory forums’ contributions, the credibility of the participation effort as a whole may be lost and the promises of participation might not be fulfilled. For example, if participation serves the purpose of increasing the pool of relevant factual information available to agencies, then it is expected that agencies should respond to the input provided by the participatory forums and thus let the participants know in what way their contribution was useful (or not) and how, if at all, it will be utilised.

On the whole, these facets of participation, both separately and collectively, determine the overall quality of deliberation and, arguably, a successful fulfilment of the promises of different forms of participation. In other words, it is assumed that the quality of deliberation can only be as significant as each of these facets of participation, as the level and the quality of one facet will clearly affect the strength and effectiveness of the subsequent ones. Thus, in order to determine the extent and the manner in which the promises of participation are indeed fulfilled, it is of utmost relevance to establish how the arrangements concerning the provision of information, commenting and recognition have transformed into working practices of the two groups of actors, namely the agencies and the participatory forums.

Such comprehensive research endeavours will be capable of generating explicit explanations of the relevance of participation in European agencies. Based on the theoretical insights and the approach to studying participation explained in this chapter, the next stages of the research will be evaluative. It is necessary to “pull back the curtains” and have a closer look behind the scenes of participation. But before embarking on the empirical analysis proper, the underlying methodological choices need to be explained. This is the subject matter of the following chapter.