Participation in European agencies: Keeping promises in institutional practice
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Citation for published version (APA):

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Participation and European agencies have become two major and highly researched topics of European governance. However, they have never been comprehensively analysed together despite the fact that participation has become a pervasive feature of agencies and the way in which they conduct their work.\(^1\) Indeed, it has been shown that in many cases the establishment of participatory structures and procedures including interested parties is anticipated in the agencies’ founding regulations and that some agencies have established participatory structures and procedures even in the absence of legal provisions. Precisely due to the fact that participation has become so present in European agencies, it has been assumed that agencies could offer sites of learning in support of efforts to institutionalise the influence of interested parties across EU administration.\(^2\)

The core purpose of this study was to empirically research the meaning and purpose (i.e. the promises) of pursuing the participation of interested parties in the work of European agencies. Thus, the central question this research attempted to answer is: “Have European agencies lived up to the central promises of participation and, if so, in what manner?”

Accordingly, I have delimited the concept of participation by reference to promises of participation in a manner that respects the legal and political reality of agencies. In this book participation is defined as a formalised interaction - characterised by access and the quality of deliberation - between European agencies and non-institutional actors (i.e. “interested parties”), which is envisaged either in the agencies’ founding regulations or created by agencies’ internal acts with a view to fulfilling one or more of the central promises of participation. In light of this core understanding, the aim was to analyse and assess the function and the added value of participation in European agencies. In particular, it is argued that participation might be relevant because it can accomplish one of the following promises: (i) ensure better and more informed agency outcomes, (ii) promote inclusiveness and responsiveness in agency operation, (iii) advance compliance and implementation, and (iv) enhance transparency and monitoring of agency activities and build trust. Such central promises of participation, which constitute the evaluative framework of this work, are deduced from the claims enshrined in the underlying “sources” (i.e. agencies’ acts, policy documents, good governance documents, academic literature and empirical evidence) about the fundamental functions of the participation of interested parties.\(^3\)

This research has empirically analysed and evaluated different forms of participation and participatory structures existing in European agencies, namely (i) managerial participation, (ii) internal participation in general matters, (iii) internal quasi-regulatory participation, and (iv) external participation by means of public consultations.\(^4\) To assess the manner and the extent to which different forms of participation have lived up to the central promises, I have applied two components of analysis, which were derived from the central meaning of participation, i.e. access to participation, and the quality of deliberation, comprised of three separate, mutually reinforcing facets of participation: information, commenting and recognition.\(^5\)

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\(^1\) See Chapter 1, Section 1.3.
\(^3\) See Chapter 2, Section 2.1.
\(^4\) See Chapter 2, Section 2.2.
\(^5\) See Chapter 2, Section 2.3.
To be sure, the participation of interested parties may not be suitable or needed in the case of all European agencies. As observed in Chapter 1, participation might be entirely omitted in cases where there is no immediate link between the reasons for the establishment of an agency and the “advantages” of participation (i.e. the promises that it may fulfil). Presumably, whenever agencies carry out tasks of intergovernmental nature (e.g. Europol, Eurojust and EDA), the risks of participation, such as the risk of capture, could override the benefits. After all, the mandate of such agencies concerns cooperation in delicate matters relating to Member States’ sovereignty (e.g. defence and law enforcement). However, it may be argued that in cases where the core rationales guiding the creation of agencies are the increased effectiveness of the EU executive and the credibility of its operation, participation is relevant due to the promises it may accomplish. Thus, participation, whatever form it may take, should always be such as to promote agencies’ rationales and not to impede them. This is the precondition for ensuring the successful operation of the agencies, as well as the first step towards ensuring that the promises of participation live up to their full potential. It is further understood that various forms of participation are relevant to cover different situations (i.e. managerial matters, horizontal issues concerning interested parties and rulemaking) in which participation might be beneficial. Thus, the forms of participation existing in a given agency will always vary in accordance with the agencies’ needs and their overall mission. Namely, every form of participation is underpinned by a particular purpose and its intrinsic value for an agency (i.e. the promises it may fulfil). And only such participatory structures that can actually carry forward the intended promises of participation can be considered valuable for both agencies and interested parties. Otherwise, it may be understood that participation is merely “window dressing” and an end in itself, which is clearly not favourable to either European agencies or the participants (i.e. interested parties). Indeed, “meaningless” participation (one that does not accomplish the envisaged promises) would quickly become a burden for an agency, and for interested parties it may create a false promise that they are contributing towards a certain agency’s task substantially, when in fact they are not. In other words, participation is thus only justifiable - at least from the agencies’ perspective - and suitable if it has a real chance of fulfilling a certain promise.

In this research I have opted to utilise a qualitative research method based on case studies with a view to gaining an understanding of how participation in European agencies actually works. I have applied a diverse case selection technique, which aimed at achieving maximum variance among the dimensions relevant for this study (i.e. different forms of participation existing in European agencies), and carefully selected a representative sample of agencies (i.e. the EBA, the EASA, the EFSA and the EBA) to cover different forms of participation and participatory structures. This case selection was oriented towards presenting in-depth (i.e. the specificities of each form of participation), as well as more general (i.e. across different forms) insights into whether and how participation in European agencies has lived up to its central promises. With this purpose in mind, in each of the empirical chapters I have described and examined different

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6 See Chapter 1, Section 1.1.2.
7 Clearly, this is a very specific, instrumental way of approaching participation. For other approaches to researching participation in European governance see Chapter 1, Section 1.2.
8 See Chapter 3, Sections 3.1. and 3.2.
9 Chapters 4, 5, 6 and 7.
forms of participation existing in the sample agencies and, based on two components of analysis – access to participation and the quality of deliberation, assessed the extent to which the promises of participation have actually been fulfilled. In the following section, I will present an overview of the main findings pertaining to different forms of participation and their promises, in an attempt to provide an understanding of the phenomenon across a broader population of cases (i.e. the agencies that were not directly included in the research).

8.1. DIFFERENT FORMS OF PARTICIPATION AND THEIR PROMISES ACROSS EUROPEAN AGENCIES

The empirical chapters showed the broadness and complexity of the participatory arrangements in European agencies and also confirmed the common occurrence of interested parties’ participation. In this regard, it was observed that several different forms of participation (i.e. diverse ways in which interested parties can access agencies’ activities) exist side-by-side, and are perceived as relevant and valuable (by European agencies and by the participants) in their own right due to the different promises they are intended to accomplish. Building on the legal and empirical examination of the participatory arrangements and their promises, which was conducted with regard to the four agencies under scrutiny, the following pages will provide more general insights into different forms of participation – managerial, general, quasi-regulatory, and external public consultations - across European agencies.

8.1.1 Managerial Participation

Managerial participation, as a form of internal participation, entails the involvement of interested parties in the agencies’ main steering bodies – their management boards. On the basis of the research conducted, it can be claimed that this is one of the most diverse forms of participation. It is understood that, depending on the rationale for agencies’ creation (i.e. the need for credibility and/or effectiveness of European administration) different variations of managerial participation might be needed to promote such rationales, and at the same time, preserve agency independence and avoid risk of capture. Accordingly, the intensity of interested parties’ involvement in the managerial tasks of the agencies is assumed to vary along with an agency’s mission.

In this book, I have investigated two “variations” of the involvement of interested parties in the managerial tasks of the agencies. First, interested parties may be admitted to agencies’ management boards as full members with voting rights, as in the case of the EMA. Second, interested parties may participate in the strategic management of the agencies indirectly, by means of an advisory body that assists the management board, and as observers of the management board,
as in the case of the EASA. Generally, the promises that this form of participation is expected to fulfil pertain to the smooth and effective functioning of the management boards as political guardians of the agencies. The inquiry into agencies’ legal provisions and practices revealed that this form of participation contributes to more informed agency managerial outcomes, allows for a certain degree of inclusiveness and responsiveness, enhances transparency and enables monitoring of agencies’ operation (e.g. planning and budget matters).

The first and rather significant observation that can be made on the basis of the empirical examination of managerial participation pertains to the composition of the EFSA management board. Contrary to expectations, and also to views suggested in the academic literature,\(^\text{11}\) the involvement of the four individuals who have their background in organisations representing the interests concerned in the EFSA management board does not fall within the scope of “interested parties’ participation” in the sense of this research.\(^\text{12}\) The empirical data shows that such individuals participate in the management board individually and independently on the basis of their competence and experience (e.g. regarding risk assessment or management) and do not act as representatives of interests, sectors or organisations affected by the EFSA operation. Thus, it is understood that the composition of the EFSA management board is not oriented towards promoting interested parties’ involvement \textit{sensu stricto} and thus cannot be considered a form of participation within the meaning of this book.

On the whole, the image of the participation of interested parties in the strategic management of the agencies is a diverse one. The study of the two variations of managerial participation (i.e. direct and indirect involvement of interested parties) through the conditions of access and the overall quality of deliberation evidenced the potentials and limitations of distinctive designs in relation to the accomplishment of the anticipated promises.

The main advantage of the first variation of managerial participation, i.e. involving interested parties into agencies’ management boards directly, as voting members, is that they have the access to the whole range of managerial tasks and their role will, patently, be no different to that of any other member of the management board (e.g. that of Member States’ representatives). In particular, the interview data reveals that such members are primarily concerned with the discharge of the management board’s mission “like any other member” and voice the societal interests when applicable (e.g. in the matters that might considerably affect such interests or in order to promote further relations – develop new policies or procedures - with those concerned).

In terms of access, it is expected that, as in the case of the EMA, this variation of managerial participation will always be more exclusive (e.g. subject to detailed appointment criteria, selection in the hands of EU institutions, etc.) and subject to a strict conflict of interest policy. While such measures are understood to be necessary in order to reduce any risk of capture, they also present one of the biggest limitations for interested parties’ access and can affect the fulfilment of the


\(^\text{12}\) See Chapter 1, Section 1.4.
promises anticipated (e.g. such participation could be less inclusive). Namely, in such instances, interested parties will likely participate in their personal capacity and their chance of obtaining support from their background organisations might be considerably restricted. Thus, especially in the cases where “representatives” of societal interests would comprise a relatively small number within the management board (as in the EMA), it is practically impossible to expect that they will be entirely knowledgeable about the specificities of the broader societal interests. This means that the information provided by interested parties to management boards will probably always be of a more general nature. Aside from such limitations, which are inherited from the general design of direct managerial participation, the empirical evidence has not revealed any significant practical flaws pertaining to the fulfilment of primary promises (i.e. more informed managerial outcomes, inclusiveness and responsiveness). Granted, in the case of the EMA, there was one recorded occurrence of a delay in the appointment procedure carried out by the EU institutions, which exemplified the negative consequences for the discharge of the management boards’ tasks (e.g. problems with decision-making) and for the participation of interested parties (i.e. the accomplishment of the envisaged promises). Whereas this was a once-off occurrence, it was nevertheless considered to have affected the credibility and reputation of the EMA (i.e. how the agency is perceived by interested parties more broadly). As such, it should be heeded as a cautionary tale about the negative effects that faulty practices could have on the fulfilment of the promises of participation.

The main strength of the second variation of managerial participation, i.e. the inclusion of interested parties in managerial tasks via an advisory board which assists the management board, is its relative openness to various, possibly conflicting interests (e.g. industry vs. unions). Given that interested parties are not immediately involved in managerial decision-making (they only have an “advisory” role and will not be able to immediately influence the management boards’ outcomes), it is assumed that conditions of access will be considerably less restrictive. As evidenced with respect to the EASA Advisory Board, interested parties participate as representatives of their background organisations, and in their advisory role, are not subject to conflict of interest policies. Nevertheless, it appears, formally at least, that in such instances interested parties could still have a fair chance of expressing their (background organisation’s) concerns to the management board and observe the board’s performance. On the one hand, this can increase the range of information available to the board when making decisions. On the other hand, this may enhance transparency and enable monitoring over agencies’ managerial operation. Having said that, in the case of the EASA we could observe that the manner in which the Advisory Board is composed inevitably prompts the question of how effective such a diverse group of interested parties can be in practice. The empirical data demonstrated that the diversity of interests represented in the EASA Advisory Board could lead to situations where a unanimous position towards the management board will not be possible, which, in turn, might diminish the overall effectiveness of the group (“divide et impera”). In particular, divisions in the advisory body could possibly give the agency more leeway in relation to “acknowledging” the participants’ input.

13 Admittedly, there are considerable differences between management boards of the EMA, which admits a relatively small number of interested parties within the overall composition of the board, and the Cedefop, the EU-OSHA and the EUROFOUND, which have tripartite governance and where social partners (representatives of employers’ and employees’ organisations) represent two thirds of the board members.
Furthermore, the second variation of managerial participation also displayed certain practical flaws in respect of the overall quality of deliberation. In the case of the EASA Advisory Board it became apparent that the success of (managerial) participation is highly dependent on the agency’s commitment with regard to the provision of information (and its commitment to the participatory group as such). Untimely submission of documents affects the overall quality of deliberation (interested parties’ preparation, the quality of debates and their opportunity to influence the agency by virtue of their input) and negatively impacts the fulfilment of any of the identified promises of participation. While such flaws could, to a certain extent, be interpreted as an agency’s disregard of this form of participation, this deficiency could easily be mended through a change in practice (i.e. respect of the self-imposed rules regarding timely provision of information).

Overall, it is incredibly difficult to conclude which of the studied variations of managerial participation is more suitable for the fulfilment of the promises (i.e. more informed managerial outcomes, inclusiveness, responsiveness, and transparency/monitoring). As noted, each of the two designs has its virtues and flaws, and one or the other option might not be appropriate for all agencies. Therefore, when arguing in favour of either direct (as full voting members) or indirect (via an advisory body or as observers) participation of interested parties in the management boards, one should first consider the underlying rationale of an agency (i.e. credible commitment or effectiveness of European administration) and the interests that an agency is supposed to regulate, and be aware of all the perils that such involvement might bring (e.g. risk of capture and possible impact on agencies’ independence). Such factors are expected to influence the structural design of managerial participation and the promises that it will fulfil (i.e. the range of information that will be available to the agencies, the level of inclusiveness and responsiveness to interested parties’ concerns, as well as the degree of transparency and monitoring that will be allowed). In the case of direct managerial participation, “restrictions”, such as strict conflict of interest policies, participation in a personal capacity, exclusion of economic interests and selectiveness might be needed to reduce any of the noted risks. After all, management boards carry out political oversight over agencies’ activities. This, however, does not necessarily amount to claiming that indirect, and possibly less restricted, managerial participation is a better option. Indeed, the empirical investigation made clear that this too has its systemic and practical shortcomings in terms of accomplishing the anticipated promises: indirect participation will always be advisory in nature (contrary to direct participation where members have a vote) and the interested parties’ opportunity to influence an agency by virtue of their input will be inherently limited.

8.1.2 Participation in General Matters

The involvement of interested parties in the internal structure of the agencies may also take the form of participation in general matters. The particularity of this approach to participation is that it cannot be pinned-down to a specific decision-making procedure of an agency. As such, it entails the establishment of permanent participatory groups, exclusively or predominantly composed of interested parties, which provide general assistance to the agencies with regard to stakeholder
concerns and can thus indirectly influence the shaping of agencies’ operation. Concretely, the
tasks of such advisory groups and working parties may encompass the provision of advice with
regard to interested parties’ concerns and communication of information and knowledge to the
agencies. In a broad sense, this form of participation could even be characterised as a means of
agencies’ networking with interested parties.\footnote{See Chapter 2, Section 2.2.}

There are currently five European agencies with this form of participation. Besides the two
sample agencies – the EMA and the EFSA – which have created such participatory arrangements
on their own motion, the founding regulations of three other agencies, namely the EASO, the
ENISA and the FRA, foresee the creation of permanent groups of interested parties, which advise
the agencies in general matters.\footnote{As explained in Chapter 2, the EASO established the EASO Consultative Forum, the ENISA created the Permanent Stakeholders’ Group and the FRA set up the Fundamental Rights Platform.} Generally, the empirical inquiry into participation in general
matters conducted in regard to the EMA Patients’ and Consumers’ Working Party and the EFSA
Stakeholder Consultative Platform, demonstrates a considerable degree of openness to various
interests – societal and/or economic – which are affected by the agencies’ remit of operation.

Judging upon the information obtained through the empirical investigation,\footnote{See Chapter 5.} this form of
participation is first and foremost expected to ensure inclusiveness of the various interests
potentially affected by agency operations, and to promote regular exchange of information between
the agencies and interested parties, as well as among the interests included. Such interaction
with interested parties is also anticipated to enhance transparency and promote understanding of
agencies’ activities, and thus help build confidence in the agencies’ sensitive fields of operation
(e.g. public health or fundamental rights). In all these senses, participation in general matters can
be understood to further agencies’ credibility and secure the effectiveness of their performance
with regard to interested parties’ concerns.

An analysis of agencies’ rules and practices showed that this type of participation is subject to
detailed selection and appointment criteria (i.e. eligibility criteria), which were put in place to
ensure the representativeness and inclusiveness of different interests affected by the work of the
agencies. The inquiry into the quality of deliberation, nonetheless, displayed a certain degree
of informality. In the cases of the two studied agencies (i.e. the EFSA and the EMA), there
are no formal deadlines regarding the provision of information to the participatory forums, and
the exchange of views and recognition of contributions usually takes place immediately in the
groups’ meetings. Nevertheless, it can be claimed that, generally, participation in general matters
operates rather well in practice. Possibly, this could be due precisely to its more informal and
non-binding nature.

On the whole, while an examination of the formal provisions and practices in place indicates that
participation in general matters is a fully-fledged participatory arrangement, problematic aspects
in terms of the expected promises have nonetheless become apparent in the light of empirical
evidence. As evidenced, the most striking limitation of this form of participation is the possible
lack of financial resources of the participating organisations, especially those representing societal interests (e.g. patients, consumers or users). The cases of the EMA Patients’ and Consumers’ Working Party and the EFSA Stakeholder Consultative Platform are illustrative of how finances may have serious repercussions on the participation of interested parties (both in terms of access and the overall quality of deliberation), and subsequently on the actual representativeness of the members of such participatory groups. It is reasonable to believe that such disadvantages on the part of the societal organisations (and the fulfilment of the intended promises) are not restricted to the researched cases of the EFSA and the EMA, but could equally occur with regard to any other agency with this form of participation. Certainly, the involvement of interested parties is always voluntary and the related costs are a responsibility of each participating organisation (agencies’ remunerations covering the costs of travelling for financially less advantageous participants are rather an exception). Nevertheless, the great risk of asymmetries in financial resources is that, contrary to the envisaged purposes, certain interests (larger umbrella organisations or economic interests) could create a more influential role for themselves within a participatory group. In this connection it can be argued that the fulfilment of the envisaged promises of this form of participation, especially inclusiveness (i.e. balancing of different, possibly conflicting interests) could be considerably hampered.

Arguably, little can be done to rectify this rather inherent shortcoming of participation in general matters. One solution would be that the agencies would cover the expenses of participation. However, as observed in regard to the EMA and the EFSA, this would very likely negatively affect the primary quality of having such participatory groups. Namely, being paid by an agency could be understood as working for an agency, and consequently the voicing of interests could become a secondary concern. In addition, this would also considerably interfere with the expected promises of general participation, especially the building of trust into agencies’ activities. All in all, this is a case in point for the limits of participation that can hardly be addressed by either a change of practices or improvements in design.

8.1.3 Quasi-Regulatory Participation

Another form of participation examined was the quasi-regulatory participation by means of consultative stakeholder groups. The specificity of this type of participation is its connection to agencies’ rulemaking activities, which might entail the drafting of eventually binding implementing rules adopted by the Commission or regulation by soft law. Consultative stakeholder groups may be involved at different stages of agencies’ rulemaking, stretching from conception to finalisation of a (draft) rule. Therefore, we can speak about two “modalities” of quasi-regulatory participation: on the one hand, consultative stakeholder groups can be involved at the earliest stage of rulemaking, before a rule is drafted (e.g. in regard to regulatory impact assessment); on the other hand, they can be consulted in regard to already drafted rules.

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17 See Chapter 6.
18 A generic term which encompasses both implementing and delegated acts.
There are currently four agencies with this form of participation. Besides the EASA, which created this type of opportunity for the involvement of interested parties on its own motion, the founding regulations of the three European Supervisory Authorities (ESAs), comprising the EBA, the EIOPA and the ESMA, foresee the creation of participatory forums which are consulted with regard to agencies’ rulemaking (i.e. drafting of regulatory and implementing technical standards). Generally, the participatory arrangements of the ESAs are very similar; hence, on the basis of the empirical inquiry into a consultative stakeholder group of one of the ESAs, i.e. the EBA Banking Stakeholder Group, it is possible to draw comparisons and provide explanations of this type of participation that would very likely apply also in the cases of the EIOPA and ESMA.

A joint analysis of the studied agencies’ rules and existing practices indicates that internal quasi-regulatory participation is generally intended to accomplish the following promises. First, given that consultative stakeholder groups will include a representative variety of interested parties with diverse experiences, this form of participation could contribute to more informed agencies’ rulemaking (e.g. either at the planning or final stage of rulemaking). Second, this form of participation is anticipated to promote inclusiveness (i.e. balancing) of various, possibly conflicting interests and ensure a certain degree of responsiveness of agencies’ rulemaking to the interests included. Third, the involvement of interested parties before the agencies’ (draft) rules are adopted may be interpreted as means of promoting the likelihood of spontaneous compliance and fostering implementation. Namely, interested parties that participate in the consultative groups will normally have to apply such rules once they are adopted and their comprehension of the relevance of the developed rules might enhance their eventual acceptance. Finally, considering that consultative groups will have access to agencies’ (draft) documents, this form of participation might also increase transparency and monitoring of agencies’ rulemaking and, in turn, help build trust in these processes. Presumably, however, quasi-regulatory participation first and foremost contributes to the effectiveness and efficiency of agencies’ rulemaking, while transparency, monitoring and trust may occur as a “side effect” or a “spill-over effect” of other promises of participation specified above.

On the whole, given the range of the intended purposes, it can be claimed that this is a promising form of participation; however, as evidenced in the cases of the EASA and the EBA, there are stark contrasts between agencies in the design of internal quasi-regulatory participation, which may influence the performance of the participatory groups belonging to this category. In particular, the empirical evidence revealed that there are two cardinal elements of design that might affect access to participation and the overall quality of deliberation, and, subsequently, the fulfilment of the envisaged promises of this form of participation: (i) the role assigned to the members (i.e. representation of background organisations vs. individual capacity), and (ii) the overall vision (initial planning) for quasi-regulatory participation.

In relation to the first element, the empirical investigation revealed a string of practical problems in cases where interested parties participate in the consultative stakeholder groups in their personal capacity (as in the case of ESAs) rather than as immediate representatives of their background organisations (as in the case of the EASA). Illustrative of this is the situation in the EBA where it was reported that members of the Banking Stakeholder Group have difficulties in coping with the position assigned to them. On the one hand, they are expected to “represent”
stakeholder interests (e.g. broader interests of the banking sector or consumers). However, on the other hand, they are appointed in their personal capacity and should generally not affiliate with their background organisations. In other words, such participation could be described as a mix of interest representation and expertise.\textsuperscript{19} Arguably, such an approach is grounded in the need to secure professional secrecy and confidentiality in the course of drafting agencies’ rules. However, as the empirical data attests, due to the highly technical and complex remit of the agencies’ rulemaking, this is a very difficult balance to strike, and the participants might not always be sufficiently knowledgeable and experienced to carry out their task. In such cases, there will be a serious risk that the members of consultative groups would need to rely on their background organisations in order to provide “meaningful” input. Contrary to what is formally envisaged, this could lead to an unclear and possibly biased representation of such organisations at the expense of a more impartial representation of the “broader” stakeholder interests. Besides, this could also have significant repercussions on the overall performance of such groups (i.e. the quality of deliberation). As shown, the individual knowledge and expertise of members of consultative groups might fall short of what is envisaged for their proper operation. This can result in situations where the discussions and “decision-making” in a participatory forum could be monopolised by a smaller group of more knowledgeable members, while the rest of the group would simply submit to the input of the more dominant participants. Thus, it is assumed that the benefits of being a member of a participatory group might be considerably diminished for some participants. At the very least, this raises concerns regarding the extent to which different, possibly conflicting interests (e.g. industry vs. consumers) could be represented in the outcomes of the group. Compared to situations where interested parties act as representatives of their background organisations, this situation displays a spectrum of failings regarding the primary promises, especially the promise of more informed outcomes, inclusiveness and responsiveness, as well as transparency and building of trust. Admittedly, these deficiencies are inherent to the formal design of the ESAs and cannot be mended by a change (improvement) of agency practices. In the light of the problems observed, a possible solution would be a change of the design of such groups, which, instead of maintaining participation in an individual capacity, would enable an equal and transparent representation of the members’ background organisation. As a consequence, this could increase the effectiveness of consultative stakeholder groups and also their credibility. But most importantly, it would significantly improve the chance that the promises of participation are indeed accomplished (i.e. more informed rulemaking, inclusiveness, responsiveness and transparency).

Second, it emerges from this investigation that the lack of an overall vision (initial planning) for quasi-regulatory participation is a realistic concern. In particular, it can be argued that where internal quasi-regulatory participation and public consultations occur at exactly the same time and with regard to the same consultation documents, as in the case of the ESAs, this will lead to a duplication of participatory effort. Whereas the rationale of consultative groups in the ESAs is to facilitate consultations with interested parties, consultation of interested parties at two instances (internal and external) concurrently appears to make limited practical sense. In any case, this can cause a series of concerns both in terms of access and the overall quality of deliberation. For example, the inclusion of a limited number of interested parties in consultative

\textsuperscript{19} See also Chapter 1, Section 1.4.
groups can raise questions of privileged treatment and inequality when compared to the general public, which can participate in the external consultations. Next, the “internal” participants will possibly have access to confidential information, which could make their standing (their influence) in consultations stronger. This situation is aggravated because, as seen, the members of the consultative groups may not be entirely capable of participating in their personal capacity and will need to rely on their background organisations for support. Thus, the organisations that will have “their people” as members in the consultative group might be in a better position to bring their message across than those that participate only in public consultations. In addition, this can all lead to false expectations about the value of internal quasi-regulatory participation (e.g. that it will fulfil certain promises for the benefit of those not immediately included), even more so because the results of such participation will be extremely difficult to assess (e.g. through reports on consultations prepared by the agency). On this account, it can be argued that there are clear benefits in allowing interested parties’ input at two separate levels of agencies’ rulemaking: at the planning stage (i.e. consultation of stakeholder groups in regard to rulemaking plans and/ or impact assessment) and when finalising a (draft) rule (i.e. public consultations at the final stage of agencies’ rulemaking). Particularly, the “complementary” approach (quasi-regulatory participation and public consultations at different stages of rulemaking) in the case of the EASA could serve as a source of inspiration. It is believed that, in terms of the promises of participation - especially regarding the range of relevant information available to agencies in the course of rulemaking (from conception to finalisation of a rule), promotion of implementation and spontaneous compliance - such combined arrangements are more clear, effective and coherent.

In addition to the systemic issues specified above, the empirical research of quasi-regulatory participation also revealed some practical deficiencies pertaining to the overall quality of deliberation. One such deficiency is the untimely provision of information to the consultative stakeholder group (as shown in the case of the EASA), which may subsequently affect the preparation of the group as a whole. While this practical problem can clearly negatively affect the fulfilment of the anticipated promises of internal quasi-regulatory participation, it could, however, be easily resolved through the agencies’ respect of the formal (self-imposed) rules.

All in all, the actual outcomes of the quasi-regulatory participation (i.e. the fulfilment of the intended promises) depend greatly on the soundness and credibility of the participatory structures in place. For now, it is understood that in the case of the ESAs this form of participation has not lived up to its full potential mainly because of the limitations inherent to its formal design. Specifically, this implies the need to reconsider the overall approach to quasi-regulatory participation in the ESAs, which would need to be reflected in the agencies’ founding regulations. Admittedly, the formal set up of the EASA consultative stakeholder group is more suitable in terms of accomplishing the promises of participation, however, at the de facto level, it is not entirely flawless. In particular, practical deficiencies may severely aggravate the fulfilment of the intended promises of this form of participation.
8.1.4 Public Consultations

Analysis of the agencies’ founding regulations and their internal policy documents shows that participation in European agencies can also take the form of public consultations. Depending on the agency, external consultations may be conducted with regard to agencies’ soft law measures (e.g. guidelines) and/or drafts of eventually biding implementing rules adopted by the European Commission. Generally, it is expected that this form of participation is pursued with the intention of fulfilling the whole spectrum of central promises. First, consultations with interested parties that are situated outside the agencies’ structure can secure relevant information and insights that would otherwise not be available to agencies in the course of their rulemaking. Second, given that public consultations are (formally) relatively open, it can be argued that this form of participation might fulfill the promise of inclusiveness (i.e. balancing of different, possibly conflicting interests) and ensure a certain level of responsiveness of the agencies’ regulatory activities towards those interested. Third, considering that the agencies consult those who will need to apply the agencies’ “rules” (i.e. soft law measures or eventually binding rules adopted by the Commission)20 it is believed that consultations may further implementation and voluntary compliance. Finally, since the consultation documents will normally be published on agencies websites, where they will be visible to the public, consultations can also be perceived as enhancing transparency of agencies’ rulemaking activities. As a consequence, this can also generate trust and confidence in the agencies’ operation as a whole.

The first observation that can be made about this form of participation is that external consultations in the course of agencies’ rulemaking ultimately leading to the adoption of binding implementing rules (e.g. the EASA opinions addressed to the Commission and the ESAs draft technical standards), and with regard to soft law measures, generally correspond with the Commission’s approach to public consultations. An analysis of the formal rules and practices shows that agencies’ consultation arrangements are de facto subject to similar principles and standards as Commission consultations.21 The comparability of approaches to consultation with interested parties is important, especially if we consider that the Commission does not intend to consult on draft delegated and implementing acts when “extensive consultation” has already taken place during the preparation of the act at the agency level.22

Nevertheless, deficiencies (e.g. regarding actual openness) have nonetheless become evident, when agencies’ consultation arrangements were assessed in the light of the empirical evidence.23

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20 Even though agency soft law measures are not legally binding, they are nonetheless considered “strong recommendations” with a quasi-binding character.

21 As explained in Chapter 7, the Commission’s general principles for consultations comprise the following: (i) participation, (ii) openness and accountability, (iii) effectiveness, and (iv) coherence. The minimum standards for consultation by the Commission entail: (i) clear content of the consultation process, (ii) consultation target groups, (iii) publication, (iv) time limits for participation, and (v) acknowledgement and feedback. See, European Commission (2002b), ‘Communication from the Commission. Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission’, COM (2002) 704 final, pp. 15-22.


23 See Chapter 7.
It is believed that flaws could potentially occur across the European agencies with this form of participation and might negatively affect the fulfilment of the envisaged promises of consultations.

What stands out in terms of access to agencies’ consultations is that the opportunity of interested parties to engage in this form of participation is de facto limited because the consultation documents are provided only in English. While it can be argued that this use of language generally corresponds with the agencies’ founding regulations, as well as with Regulation 1/58, which shapes the linguistic regime of the EU, this practice can nevertheless have unfavourable effects on the accomplishment of the foreseen promises of consultations. In particular, it is understood that the language barriers reduce the potential pool of participants, which means that, in practice, “public consultations” are not as open as one may assume, and are restricted to those parties who have a good comprehension of the English language. First and foremost, this is problematic in terms of the equality of access to agencies’ consultations (especially individuals vs. umbrella organisations, which have more resources) and in turn, might also diminish the representativeness of different interests included (e.g. industry vs. civil society). Moreover, regarding the promises of participation it can be argued that because the audience will be de facto limited (i.e. consultations open only to those with adequate English knowledge), the information provided by interested parties in the course of consultations might not be as exhaustive as it could be if consultation documents were translated into more languages. This shortcoming in consultation practices may, moreover, impinge on the inclusiveness of, and responsiveness to, different interests. It is also clear that language barriers hinder transparency of agencies’ operation. Ultimately, the inequalities with respect to access are also believed to affect the fulfilment of the promise of implementation and enhanced spontaneous compliance.

Generally, there are two possibilities through which these shortcomings of public consultations (seen as an instance of maladministration by the European Ombudsman), may be mended.24 First, as proposed by the Research Network on EU Administrative Law (ReNEUAL) in their Model Rules on EU Administrative Procedure (Book II on Administrative Rulemaking), consultation documents could be published in the working languages of an EU authority (i.e. an agency).25 However, this is arguably not a viable solution for improving access to agencies’ consultations, considering that most European agencies (i.e. beyond the sample) conduct their business in English only. Another remedy could be that agencies would publish translations of the summaries of their consultation documents (either voluntarily or on demand) and thus ensure that the various interested parties are generally acquainted with the substance and can at least recognise how the new rules will affect them. On this basis they could decide whether or not to engage in the commenting and to invest their (financial) resources accordingly. This, however, would only be possible to the extent that it does not disturb the time-frames within which the agencies need to carry out their mission (e.g. obligations to the EU institutions).


Another limitation that became apparent after the empirical inquiry into access and the quality of deliberation of agencies’ consultations is the complexity of issues (e.g. financial supervision, aviation safety, medicines and food safety) that are subject to public consultations. With regard to access, it can be claimed that even where formal rules suggest that agencies aim at an inclusive approach to consultations, in practice, the audience is restricted to those parties who are knowledgeable and experienced enough to comment on such complex documents. In its very nature the agencies’ rulemaking is complex, however this effectively means that agencies’ consultations will actually be noticeably less accessible to an “average citizen” or to the “public at large”. Perhaps the agencies’ consultations were never intended to go beyond the more “relevant” interests, however to make their operation accessible to broader audiences and to promote a general understanding, transparency, and subsequently to gain trust in their rather far-reaching quasi-regulatory engagement, European agencies could, to the extent possible, publish technically simplified versions of their consultation documents. It may be argued that this would also guarantee a wider range of comments (admittedly more general), foster inclusiveness and promote responsiveness beyond the “more relevant interests”. But above all, this would ensure a level playing field in terms of opportunities of access and thus promote the credibility of agencies’ rulemaking and likely also its effectiveness.

Additionally, in terms of the quality of deliberation, it is apparent that larger, umbrella organisations, which have more experience and also more resources, will generally be in a better position to provide their comments in the course of the consultation process. Due to the above-mentioned complexity of issues, particularly if paired with rather short consultation deadlines, formulation of comments may prove too burdensome for individuals or smaller associations, which might turn them away from participating. This again illustrates de facto constraints regarding the fulfilment of the promises of consultation, in particular inclusiveness and the potential range of the views submitted, especially because the views provided by those who can afford to participate might not be sufficiently representative of the larger array of interests (e.g. “weaker interests”). Similarly as observed in terms of access, a possible improvement of the consultation practices would be if the agencies with this form of participation could publish (when applicable) simplified versions of their consultation documents, thus possibly attracting a broader spectrum of participants. In turn, this would enhance the inclusiveness of agencies’ consultations and likely also their responsiveness to “weaker interests”. In my opinion, the other solution, namely the prolongation of the consultation timelines would be less feasible and possibly also not very effective, given that agencies often need to conduct their work within the externally prescribed deadlines.

All in all, the examination of agencies’ consultation arrangements as a whole showed the relative strength of this form of participation, namely its general set up and a considerable degree of proceduralization (e.g. publication of consultation documents at a “single access point”, adequate time-frames, and proper feedback provided by the agencies). Considering the deficits outlined above, it can be argued that the improvements can be made not with a further formalisation of public consultations but rather with the consolidation of the existing practices. In particular, the remedies with regard to access to consultations and the quality of deliberation proposed above could considerably strengthen the opportunity of access for individual interested parties and “weaker” organisations, promote the fulfilment of the intended promises of consultation and, above all, advance the agencies’ credibility and possibly also their effectiveness.
8.2 Theoretical Implications for Researching Participation

After discussing the various forms of participation and their promises across European agencies, it is also important to provide the more general implications of the present study, and the approach adopted, for studying participation in European governance and beyond. First, in this work, participation is defined as a formalised interaction between European agencies and non-institutional actors (i.e. interested parties or public) which is grounded either in the agencies’ founding regulations or their internal acts and is intended to fulfil one or more promises in line with the agencies’ particular needs. Such a definition, which understands participation as a permanent and ongoing relationship between two actors is particularly valuable for identifying and analysing a wide range of participatory arrangements that may be accomplishing different purposes (e.g. the promises of participation as defended in this work or other). Moreover, by considering participation not only in terms of access but also with regard to the overall quality of deliberation, comprising three interrelated and mutually enforcing facets of participation – information, commenting and recognition, allows one to empirically research a variety of participatory structures and assess the eventual influence of participation and the actual difference that it will make in the end. This means that participation is no longer seen and perceived as a static or rigid occurrence, but rather as a dynamic and versatile one. Also, employing a broad perception of interested parties, which encompasses different groups of non-institutional actors, such as affected parties, stakeholders, interest or civil society organisations and interest representatives, is very important for the sake of avoiding reductionist understandings of the audiences of the various participatory arrangements. It is believed that in accordance with a given form of participation, the mandate of a participatory forum of participation and the intended promises, the target audience may vary. That is why it might be worthwhile not to presuppose the audience beforehand (e.g. the involvement of societal or economic interests), but rather to identify it and assess its “relevance” (e.g. inclusiveness, representativeness) in line with the (intended) promises of participation. In other words, it is necessary to first identify the intended promises of participation and then establish whether everyone that matters for the fulfilment of the primary promises is in fact included.

Second, the central question addressed in this dissertation concerns the extent and the manner in which European agencies have lived up to the central promises of participation. In this research, the evaluative framework based on the claimed functions of participation (i.e. the central promises - comprising better and more informed outcomes, inclusiveness and responsiveness, compliance and implementation, and transparency, monitoring and trust) was applied to the real world of how agencies operate in law and practice. However, this framework of analysis could easily be adapted to research seeking to assess the meaning of participation elsewhere in European governance, for example with respect to participatory structures existing in the realm of the European Commission. As seen in Chapter 1, there is a body of theoretical and empirical research on participation in

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26 For comparison see other approaches to researching participation in European governance introduced in Chapter 1, Section 1.2. Such approaches comprise inquiry into participation as a principle of good governance, investigation into democratic quality of participation, and a rights-based approach to participation in European administrative law.
European governance, with the majority of these studies primarily focusing on, and criticising the (lack of) democratic quality of participation. Participation, however, might not be intended to have an a priori democratising function (e.g. to ensure participatory democracy, deliberative democracy or increase democratic legitimacy), as confirmed in the case of European agencies, or could adopt a spectrum of other meanings besides and beyond the democratic rationale. The present research transcends the focus on the (lack of) democratic potential of participation and demonstrates that the function of participation may be (far more) complex and diverse. This study has opened the black box of participation in European agencies and showed that participation can adopt manifold interconnected purposes, or certain functions of participation may emerge as a “side effect” of the intended promises. In line with this, it may be argued that it is important to define the scope of the promises of participation while keeping an eye to the complex reality of the participatory regime that a researcher places under her or his lens if one intends to assess participation empirically and beyond the legal rights of access. Otherwise, a certain function of participation (that is studied) could remain nothing more than ideological desiderata, a promise that was never intended in the first place and would, therefore, never be fulfilled.

Third, this study confirmed that it is necessary to shift the focus of the promises of participation to different forms of participation, as not all participatory arrangements are intended to fulfil the same promises. In other words, different forms of participation (such as managerial, general and quasi-regulatory) may be characterised by distinctive mandates and tasks and different groups of interested parties (i.e. audiences) and might, therefore, carry forward different promises. While most of the participatory arrangements are, in one way or another, intended to fulfil the promise of better and more informed outcomes (e.g. managerial or rulemaking), the rest of the promises of participation may vary in accordance with their underlying rationale. If for example, a participatory forum is involved in rulemaking activities (leading to the adoption of soft law measures or eventually binding rules), it is likely that the promises of this (internal or external) quasi-regulatory form of participation will include enhancing responsiveness of regulatory decisions and promoting implementation and furthering compliance with regulatory decisions once they are adopted. Or whenever participation is more general and cannot be pinned down to a particular decision-making procedure (i.e. participation in general matters), it is expected that the intended promises will entail enhancing transparency of a given forum’s (e.g. an agency) operation, allow monitoring of its activities and help build trust. In my opinion, this is certainly an interesting insight for participation theory.

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Finally, this study shows how rich and complex participation in European agencies actually is. In particular, it shows that in many cases agencies have developed and framed participatory arrangements that go further than those envisaged in their founding regulations, not only in terms of access, but also with respect to the quality of deliberation. Thus, in order to fully appreciate participation in European agencies, I believe that it is important to press beyond the legal provisions of access contained in the agencies’ founding regulations and also consider how participation is formed in the agencies’ internal acts. The voluntary establishment of participatory structures is valuable for agencies due to the different promises it may fulfil and it may be seen as pivotal as a means of increasing agencies’ effectiveness and credibility in the areas in which they operate. Furthermore, and in a related manner, this work demonstrated the relevance of evaluating the rules and practices of participation against the empirical evidence (i.e. interview data). On the one hand, it pointed out good practices of participation which emerged beyond the formal rules (e.g. in regard to participation in general matters). On the other hand, it identified the (de facto) weak points of the participatory arrangements, both in terms of access and the quality of deliberation, and identified the deficiencies (e.g. timely provision of information) that can potentially affect the fulfilment of the promises of participation. All in all, this points to the relevance of utilising a holistic approach to researching participation: namely one which combines legal and political science methods to unveil both de jure and de facto functioning of (various) participatory structures.

8.3 Lessons Learned

Following the discussion of the potentials and flaws of different forms of participation through the lens of promises, including suggestions for improvement, and more theoretical implications of this research, one last question demands attention. What are the lessons learned from this study for participation in European agencies and beyond?

Considering the extensive range of participatory arrangements existing in European agencies, it can indeed be claimed that they are breeding grounds for “state of the art” participatory practices. The various internal (i.e. organic) and external forms of participation cover different aspects of agencies’ operation – managerial, general and quasi-regulatory, include distinctive audiences (entrusted with different tasks and responsibilities), and are intended to fulfil diverse promises of participation. Each form of participation is unique and has its own specificities both in terms of access and with regard to the quality of deliberation. To this extent, it can be suggested that precisely due to this pluralistic nature and inherent diversity of participation no single participatory model, i.e. one that would apply across the different forms of participation, could be advocated. Nevertheless, in my view a viable alternative to a common approach is the consolidation of the existing participatory arrangements based on certain minimum standards applying to access to participation, and to the quality of deliberation.

28 See below.
The internal (organic) and the external participatory mechanisms are admittedly different. As shown in this research (Chapter 7), at its current level of elaboration, the agencies’ external participatory arrangements (i.e. public consultations in regard to agencies’ rulemaking), de facto, already largely “follow” the Commission approach on consultations with interested parties. Thus, with a view to ensuring consolidation of agencies’ external participation, a framework for consultations akin to that of the European Commission could easily be envisaged. Indeed, some minor adaptations, such as consultation time limits, might be needed in order to meet the agencies’ reality (to the extent that agencies’ need to work within the externally prescribed deadlines). However, other Commission’s minimum standards, such as clear content of the consultation process, inclusion of the “relevant” parties, publication at the “single access point”, and provision of acknowledgement and feedback, could very much be fitted to the realm of agencies’ consultations.

Beyond this, from this research it also emerges that participation in European agencies provides a considerable source of inspiration for establishing a set of minimum standards that could be applicable with regard to any internal (organic) participatory arrangement. What is more, such minimum standards could be utilised not only with regard to participation in European agencies, but also across the wider spectrum of EU administration. The scope of minimum standards for organic participation could be as follows.

(i) To begin with, for participation to succeed, the first precondition is that there is a clear vision and mission (i.e. planning and goals) for a participatory arrangement and a statement of the promises to be achieved (i.e. the claimed function of participation). This means that a participatory arrangement (whatever form it may take) needs to be clearly outlined from the outset with the aim to accomplishing a given purpose. Only well-organised and clearly defined participatory arrangements will have the potential to achieve high levels of effectiveness and credibility.

(ii) In terms of access to participation, when determining the target audience and the composition of a given participatory forum (i.e. a concrete participatory arrangement), it should be ensured that all interested parties that matter for the fulfilment of the envisaged promises of participation are given an opportunity to become a member. While target groups of interested parties may vary along the anticipated mandates and tasks of a particular participatory forum, for participation to be equitable, the membership in a participatory forum should follow certain predefined and transparent eligibility and appointment criteria (e.g. basic characteristics of interested parties, their mission, representativeness and possible affiliation with the background organisation, and necessary knowledge and experience). Also, the composition of a given participatory forum might need to be limited to a certain maximum number of participants (for example 40), in order to secure its operability and to create conditions for balanced deliberation. In such instances, appropriate steps should be taken to guarantee that the composition of a participatory forum faithfully reflects the interests to be represented. In particular, it is strongly recommended that the membership of the participatory forums is reviewed on a regular basis (e.g. every 3 years) in order to take into account any changes of representativeness (mend any deficiencies) and ensure an adequate coverage of the eligible interests at all times.
Furthermore, the procedure for appointing a member of a participatory forum should always start with an open and transparent call for the expression of interests, which should be accessible to all eligible interests at a “single access point”. In order to ensure that a participatory forum is complete and can effectively perform its tasks (i.e. carry forward the anticipated promises), the selection procedure needs to follow the prescribed timelines and any untimely delays in appointment should be avoided. To ensure transparency to the wider audience, the outcome of the selection procedure (i.e. the list of selected participants and the interests that they represent) should be published on the internet.

(iii) With the aim of ensuring the overall quality of deliberation (i.e. the difference that participation makes in the end with respect to the intended promises) of organic participation, further minimum standards should apply. First of all, in line with the intended promises of participation, the members of the participatory forms should have access to timely and adequate information. The members of the participatory forums should be provided with an opportunity to examine all (official) documents which pertain to their role and be given sufficient time (at least one week) to adequately prepare their position on the matter at stake. Second, participation needs to allow sufficient time to adequately address all topics on the participatory forums’ agenda. Particularly, the time dedicated to interested parties’ input should strike an appropriate balance between, on the one hand, the need for proper representation and inclusiveness (i.e. balancing of the various, possibly conflicting interests), and on the other hand, the organisational appropriateness of a participatory group’s operation. Moreover, if a participatory forum needs to present a common position (e.g. an opinion or advice) towards the “principal institution” (e.g. an agency), the decision-making arrangements should be such as to allow the highest level of common understanding within the group. Finally, the participatory groups’ input should be properly acknowledged. The type of the intended promise of participation would necessarily determine the type of the feedback that would be considered appropriate and persuasive. In line with the envisaged promises of participation, the acknowledgement of the interested parties’ input may take a spectrum of weaker and stronger forms, such as written or oral feedback to the participants, publication of the participatory forums’ opinions on the internet and yearly reports on the collaboration with interested parties. The latter would also ensure a considerable level of transparency towards the wider pool of interested parties (e.g. public at large), not immediately involved in a particular participatory forum.

The present research has examined participation in European agencies through the lens of the promises that participation is claimed to accomplish. Whereas the participatory arrangements in European agencies display certain shortcomings of formal design and de facto limitations that might negatively affect the fulfilment of the intended promises, the potential of this “groundwork” for the involvement of interested parties cannot be denied. From our findings, we conclude that there is a realistic possibility that participation in European agencies lives up to its full potential. To mend the deficiencies, this work has proposed recommendations and solutions for improvement. On the whole, the fact that European agencies, created over a period of 30 years and wielding quite diverse powers, do provide incredibly rich and unique insights into the roles of participation should not be overlooked. As shown, such insights provide a solid basis for consolidation of the various internal and external participatory arrangements, not only at the level of European agencies, but also across the wider spectrum of EU administration.