Evaluation of Public Consultations and Citizens' participation in 2015 Better Regulation Agenda of the EU and the need for a deliberative e-rulemaking initiative in the EU

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Abstract
This paper connects and disentangles three interrelated concepts: citizens' participation; e-rulemaking (in a deliberative environment) and effective policymaking at the EU level. We critically evaluate public participation under the revamped 2015 'Better Regulation Agenda' by focusing on the public consultations tool; examining it through the lens of deliberative democratic legitimacy; and assessing its potential to be more deliberative following the legitimacy evaluation framework of Schmidt (2013). The paper employs an innovative theoretical approach, which blends deliberative democracy, e-rulemaking with EU studies insights. Furthermore, it introduces a new legitimacy criterion we call 'functional legitimacy' which refers to an overarching principle and evaluative framework that should govern e-rulemaking initiatives from their design through implementation and evaluation. We examine the preconditions for e-rulemaking at the EU level on the principles of transparency, inclusiveness and evidence-based policy making.

Key words: deliberative democracy, e-rulemaking, EU, Better Regulation Agenda, democratic deficit, legitimacy, legislative politics, public consultation

1.Introduction
Over the past decade, especially since the Great Recession, democratic societies have been confronted with a loss of faith in both politics and political institutions. These problems are particularly pressing at the EU level, where a 'democratic and communication deficit' was already a central concern (e.g. Decker, 2002; Zweifel, 2002; Weale, 2005; Follesdal and Hix, 2006). Studies mainly focus on the weak democratic legitimacy of its institutions and decision making and the failure of Brussels to communicate EU issues with the public. The economic crisis further fueled concerns in relation to the democratic credentials of the EU (Kreisi and Grande, 2014; Roth et al, 2013; Laffan, 2016). Austerity measures and, in particular, those imposed by the 'troika' (EU, IMF and ECB) led to concerns around a 'representation deficit' (Bellamy and Kröger, 2013) and have intensified allegations of a 'legitimacy slippage' (Nicolaidis, 2014, p.11) within the EU. While weak public support for the EU was already in evidence (Hix, 2008), the constitutional architecture of economic governance of the EU (Fabbrini, 2016, p.2) during the crisis period exacerbated these tendencies (Bang et al., 2015).

Much criticism of the EU points directly or indirectly at the issue of representation (Kohler-Koch, 2010) and consequently legitimacy in decision-making. In representative democracies, accountability and legitimacy are pursued and secured by relying on an electoral system, which allows people to elect their representatives; they can always 'kick the rascals out' (Curtice and Jowell, 1997; Norris, 2001). However, excessive focus on the electoral moment of democracy may limit legitimacy to a 'momentary', election-centered approach. In vibrant democracies legitimacy should be present throughout the life cycle of a government and there is a normative demand for *continuous legitimization.*

As the EU is not a single state but an association of states the concept of polity, demos, representation and legitimacy are interpreted from a different standpoint, making the projection of the model of representative democracy from the nation state to the European level challenging. Conceptualizations of the European polity refer to the plural sense of demos, which is 'demoi' (Nicolaidis, 2004), and thus any democratic deficit of the 'European demo-icracy' (Nicolaidis, 2013) should be analysed from another perspective.

The EU has acknowledged the strong criticisms of its democratic credentials and has launched a number of participatory frameworks (e.g. Plan D 2005; the 'White paper on a European Communication policy' 2006; the European Citizens Initiative introduced by the Lisbon Treaty in 2009) usually named in literature under the umbrella term of 'Deliberative Citizens Involvement projects' (DCIPs) (Yang, 2012). These 'new modes of governance' adopted by the EU (especially after 2000) attempted to reduce hierarchical models of decision and policymaking while promoting more open and participatory models of governance (Buonanno and Nugent, 2013, pp.132-133). However, they have not managed to challenge institutional structures of power (Tambouris et al., 2012). An evaluation of these initiatives reveals a failure of integration of the outputs to policy making (Aichholzer and Rose, 2019, pp.114) which renders their continuity and success questionable (Smith, 2013).

E-participation has largely followed the logic of e-consultation (Dalakiouridou et al., 2012, p.316) with 'Your Voice' and 'European Citizens Consultation' platforms being the main instruments (Aichholzer and Rose, 2019, p.116). Electronic participation tools have taken a central role under the EU e governance plan 2010-2015 (EC2010). While e-participation initiatives in the EU invested in the involvement of citizens in policy making they present a 'lack of clear implementation policy' (Dalakiouridou et al., 2012, pp.315-316).

In line with the previous initiatives, the revamped 2015 Better Regulation Agenda (henceforth Agenda) further developed this participatory turn in the EU and aimed to increase public participation in the legislative process (Garben and Govaere 2018, p.9); it was also considered a foregrounded commitment to 'reflexive governance' (Scott, 2018,p.20). As law making is the main instrument for deciding and implementing policies, the more democratic, open and transparent law making and policymaking procedures are, the fewer the arguments specifying the weak democratic credentials of the EU. The Agenda is considered an e-rulemaking initiative and thus it can provide vital solutions for democratic shortcomings in the EU, can enrich law making procedures with civic participation and strengthen citizens' knowledge of the EU. The normative stance employed in this paper is that enriched civic participation *following a deliberative e-rulemaking design*, will bolster the legitimacy of the EU.

We will disentangle issues of legitimacy, law making and policy making in the EU by focusing on citizens' participation. The analysis conducted in this paper is predominantly theoretical and will be centered on the public consultations instrument in the revamped Agenda. We utilize Schmidt's (2013) evaluative standard for EU legitimacy while assessing the public consultations tool. The input, throughput and output processes reflect the structure of the public consultations and is frequently employed in deliberative literature when analyzing these initiatives as it provides a concise breakdown of the procedure. For our study the throughput legitimacy inserted by Schmidt which bridges 'input' and 'output' legitimacy (Reuchamps and Suiter, 2016), is essential in analyzing the (non) deliberative character of public consultations. In particular, the institutional throughput (constructive throughput) criterion is critical as it 'requires productive deliberative interrelationships among actors in the wide variety of throughput governance processes' (Schmidt, 2013, p.17).

We engage with an innovative interdisciplinary perspective, which combines deliberative democracy principles, e-rulemaking and EU studies. The implementation of the evaluative framework of Schmidt (2013) and our analysis identifies the need for the introduction of a new evaluative criterion. For our study we rely on a) the relevant e-rulemaking and deliberative literature and studies on the consultations platform of the EU and the Agenda b) official documents and the evaluation of the Agenda released in April 2019 from the EC and c) our own online observation and analysis of the operation and functionality of the Agenda.

In the next part, we will discuss and scrutinize synergies and possible irreconcilabilities between e-deliberation and e-rulemaking. We will then critically assess the current structure on online consultation at the EU under the input, throughput, output framework and we will introduce another criterion which we call, functional legitimacy; we will reach our conclusions by suggesting a deliberative e-rulemaking initiative.

2. E-Rulemaking and E-Deliberation Crossroads, incompatibilities and affordances: lessons learned

Deliberative theory provides the theoretical and empirical framework to address the weaknesses of representative democracy and to reinvigorate diminishing citizens' participation (e.g. Habermas, 1996; Benhabib, 1996; Dryzek, 2000; Bohman, 2000; Gutmann and Thompson, 2009). Despite the plurality of approaches, there are constants: the need for public deliberation and citizen-centered decision making; the preservation of fair and reasonable, justified argumentation and equality among participants. In its essence, then, deliberative democracy is an effort to broaden democratic practices and deepen citizens' engagement involving competent and reflective participation (Ercan and Dryzek, 2015).

In recent years there are a large number of 'experiments' employing a deliberative design either following face-to-face or online procedures. Face-to-face deliberation often occurs in mini-publics (Niemeyer, 2011; Setälä, 2014); in citizens' assemblies which ran with great success in Ireland (Farrell et al, 2018; Suiter et al, 2016); town hall meetings, deliberative polling (Fishkin et al, 2000); among many others. At the EU level, Citizens' Consultations (ECCs), a decentralized initiative, led from member states (with more than 1200 events being held from 2014-2019 across Europe and 280.000 citizens participating) was an initial step towards deliberative engagement although

national variations in implementation do not assist in a coherent evaluation (Butcher and Stratulat, 2019).

In the online domain we find online platforms; online discussion forums; online deliberative polling and blogs enabling discussion between citizens; notably, there is a significant difference in the deliberative quality of general discussion platforms as opposed to platforms designed *per se* as deliberative (Strandberg and Grönlund, 2014). As Davies (2009, p.2) puts it: 'Online deliberation advocates generally rely on the vision of a communication network that is relatively unencumbered for deliberative activity'. However, several factors, drivers and barriers of e-participation (Smith et al., 2011) and e-platforms features, such as anonymity (Kamladge and Nanz, 2017), may contest this assumption. The EU has developed a number of online platforms to engage citizens in dialogue (Dalakiouridou et al., 2012) which has increased participative opportunities but not debates and deliberation among citizens (Aichholzer and Rose, 2020, p.117-118).

It seems that the 2015 Agenda has not shifted priorities towards more deliberative interaction either. Certainly, law making, constitutes a distinct and *demanding* procedure, which presents several difficulties and raises a number of challenges around public participation especially when this participation in enabled online. E-rulemaking defined as 'the application of information technology in law making procedures with the potential to substantially transform the process'[1] refers to different procedures and levels of law making[2] online; it is closely associated with *open governance* and the effort to increase legitimacy in policy making (Deligiaouri, 2013). E-rulemaking does not always coalesce in a deliberative format but when it does it 'may be the only form of online deliberation that regularly ends in some form of actual implementation by the state' (Schlosberg et al., 2008, p.40). When we speak of *deliberative e-rulemaking* (Schlosberg et al., 2008; Muhlberger et al., 2008; Stromer- Galley et al., 2012) the theory of deliberative democracy is expected to inform the design, implementation and the whole operation of the initiative. We define deliberative e-rulemaking as the development of a law making environment online which enables and facilitates public participation according to the principles of deliberative democracy such as openness, fairness and well justified public argumentation, a procedure which in the end is expected to inform the final law and lead to citizens' centered policy making. Deliberation can be *institutionally and democratically constructive* for e-rulemaking as its premises correspond to transparency, increased legitimacy, informed citizenry and the potential to tackle disagreements and inadequacies at a very early stage of policy making, therefore, possibly resolving them earlier in the process.

The literature has identified several points for discussion regarding the normative assumptions and enthusiasm invested in e-rulemaking, deliberative or not while examining the challenges it imposes on traditional rulemaking processes. Most of the studies concerning e-rulemaking derive from the US initiative[3] where e-rulemaking is well established but at a very different context and with a rather different structure

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[1] https://regulatorystudies.columbian.gwu.edu/files/downloads/US%20eRulemaking%20challenges.pdf

[2] Perez et al (2018) for example take a broad view of e-rulemaking which covers both national law, secondary rules and soft law.

[3] https://www.regulations.gov

due to the discrepancies between the US and EU legal architecture; however the insights provided are important when designing an e-rulemaking initiative for the EU. Below we will try to engage and critically develop the main points of concern and contestation by following the input, throughput and output legitimacy scheme adopted to e-rulemaking.

a)Input legitimacy: Representativeness, literacy and power asymmetries in influence capacity

In online domains, self-selection is the usual mode followed for participation and thus maintaining a balance in representation is a difficult, if not impossible task. Ordinary citizens do not have the same incentive as interest groups to participate and without specific design and inclusiveness features, some may hesitate if they believe it is beyond their abilities. Consequently, when designing e-rulemaking initiatives it is important to pay attention to making procedures user friendly and attractive to an ordinary citizen. The 'digital divide' in all its dimensions (Gastil and Black, 2008) remains a concern. In general e-rulemaking initiatives may lead to increased public participation but as insofar as public agencies really value and consider carefully the process and do not address it only as a legal obligation they have to fulfill (Carvalho and Lourenco, 2018, p.45).

Without a strong deliberative design, law making processes and any participation in them can require increased knowledge and strong communicative skills. In an online domain several *asymmetries in power relations* and skills exist which implicitly or explicitly favor some social actors. We expect that highly engaged participants and interest groups will be the ones with an inherent interest in contributing to the procedure (companies, industries, civil society actors) and naturally their capacity in commenting and knowledge level will be higher and more sophisticated. Thus, the probability that they dominate the whole discussion and the agenda of topics is increased.

Notably, a balanced participation can be achieved through random selection or sortition (Luskin and Fishkin, 2003; Warren and Pearse, 2008; Landemore, 2013). Sortition[4] which follows the random selection of citizens to participate can ensure representativeness, a sensitive issue especially for European demos due to the reasons we have already explained. On the other hand, online platforms can go beyond representation and change the dynamics of participation by enlarging further public participation. Such a case however requires a strong participatory culture, which cannot be taken for granted. Therefore, we argue that at least some indicators of representativeness in participation should be present.

b) Throughput legitimacy: Quality and evidence

Throughput parameters affect the substance and the quality of public participation. Most of the e-rulemaking initiatives employ public commenting as a throughput form. Citizens can comment either on each article of the legislative proposal or on the whole document in general. In some e-rulemaking portals[5] citizens can view the comments

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[4] https://www.sortitionfoundation.org/what_is_sortition

[5] e.g. the www.regulations.gov (USA) and opengov.gr (Greece)

of others and respond to them which is a feature that is encouraging a kind of deliberation.

Studies from Regulations.gov, the US e-rulemaking system, report a usually low quantity and quality of comments received (Coglianese, 2006, p.958) which is understood as the level of the sophistication of comments and the original, substantial arguments they articulate (Shulman, 2009, pp.225-226). Farina and Newhart (2013, p.14) distinguish four potential types of participants in e-rulemaking and their likely capabilities in commenting. What accrues from the classification provided is that factors such as 'relevance' and 'direct impact' by the proposed law on participants are not decisive for participation when compared to awareness, understanding, knowledge/expertise and experience in interacting with government officials.

Concerning the actual quality of commenting in laws we need to pay attention to some specific requirements of e-rulemaking. Justification is one of the most crucial elements of e-rulemaking as laws have to be well justified. In laws, there is always an 'Exploratory Memorandum' or a specific section before the actual text of the law where the reasons and aims for adopting a legislative act are described. Justification needs to be provided both regarding the rationale of the law and the means employed to implement it. A faulty or inadequate justification may render the law invalid. Based on the above we expect that a)public commenting which is evidence-based and well justified arguments can be more constructive for e-rulemaking b) evaluation of comments, apart from a quantitative approach, should be based on the merits of the justification they provide; two principles that are responding to deliberative schemes. This approach should not be understood as 'participation elitism' in which only experts' opinion counts neither as a reason for discouraging ordinary 'non experts' citizens to participate; the so called 'missing stakeholders' can contribute 'situated knowledge' (Farina and Newhart, 2013) which derives from their personal experience and their exposure to several circumstances. This kind of 'experimental knowledge' is also helpful for lawmakers; it may be less sophisticated but closer to real world.

Another important parameter is evidence. Citizens can participate when they have a good knowledge of the rationale and the actual text of the legislative proposal about to be adopted. Usually in e-rulemaking initiatives features a 'docket' with relevant documents that citizens can consult in order for their participation to be constructive and meaningful. Documents associated with e-rulemaking have to be comprehensible and accessible to ordinary participants something, which is really challenging due to the inherent complexity and linguistic difficulty of legal texts. Perhaps video evidence in simple language from balanced experts and other forms of enhanced digital information provision in plain language along with deliberation could be the solution.

c) Output legitimacy: effectiveness of the procedure
The output legitimacy addresses the relationship between the 'mini-public' and 'maxi-public' (Suiter and Reuchamps, 2016, p.9) and it is a major concern in e-rulemaking. Citizens must see that their participation counts, that it is considered and taken into account in some fashion. While e-participation platforms have experienced an upsurge the last decade, the use and the integration of their outcome in regulatory processes and policy making remains elusive.

Increased public participation is important but efficiency of such a law making system relies on well-structured and meaningful participation with concrete results.

Plausibility of the outcome, policy and justification are crucial parameters. Evaluation and assessment in e-rulemaking initiatives are an integral part of them and not just another quality indicator.

On the other hand, even advocates of e-rulemaking are usually skeptical and reserved on how, and in which way, citizens can actually contribute and produce an outcome within such a bureaucratic, highly demanding procedure, a hesitance that emanates from both legislators and citizens. Additionally, the traditional organizational culture in legislative bodies is rather wedded to the status quo and hence unfavorable for public participation in law making, thus creating a significant barrier to the whole procedure, arguably difficult to circumvent (Newhart and Brooks, 2017). This dual-faced reservation creates a *void space,* a stalemate on how citizens' involvement can actually take place and how productive and useful their participation can be and thus, efforts to transcribe input to output legitimacy may be undermined. Deliberative democracy, however, has proved that 'ordinary people are capable of high-quality deliberation, especially when deliberative processes are well-arranged' (Dryzek et al., 2019).

In addition to the previous evaluative scheme, relevant studies have identified other factors that affect the implementation and success of e-rulemaking initiatives such as administrative barriers and institutional context.

i) administrative barriers: Rulemaking is an administrative legislative process with substantial administrative burden and complicated procedures. The actual implementation of e-rulemaking initiatives relies heavily on the eagerness and available resources of legislative bodies to engage in a technological sophisticated law making procedure. Since rulemaking is an 'informational and technically intensive process often satiated with partisan interests' (Johnson and Roman, 2015, p.44) a certain skepticism is always present in entrusting law making procedures to an online domain.

Another frequently mentioned concern refers to the management of online comments. E-rulemaking platforms have the ability to reach and engage a geographically dispersed audience and thus the potential to attract a high volume of comments. The system has to be prepared and capable of managing and assessing them in a way that would not undermine equality between participants nor impose concerns of an *eclectic assessment* of comments, meaning favoring some comments over others. In terms of the volume of comments, a high number of comments on a specific provision or article of a draft law can be a valuable indicator for the social animus towards the content of the article.

ii) institutional context: A number of institutional challenges appear to affect the actual implementation and success of e-rulemaking initiatives such as cooperation within and across governmental agencies, organizational inertia, as well as design and accessibility to the system (Coglianese, 2003). Rulemaking and satisfactory citizens' participation are dependent on a number of institutionally context variables such as transparency, quality of institutions, and the level of democratic development in a given country. The latest OECD report (2019) demonstrates that most EU countries have engaged in Better Regulation practices but to a different extent. High income countries with an effective and well-designed rulemaking process tend to score higher with regards to citizens' involvement and are keener on including consultation in law making (Jones and Saltane, 2016). The regulatory framework and the legal order of

each country are critical variables although a careful institutional design can overcome some of these obstacles (Dryzek et al., 2019).

3. Ensuring effectiveness and the need for *functional legitimacy*

E-rulemaking is an institutionally embedded procedure, as it produces a result that speaks to the whole society irrespective of who has participated and hence agencies need to be responsive (Schlosberg at al., 2007, p.10). However, even when a platform provides all the affordances for citizens engagement the overall functionality may still suffer delivering poor results in terms of policy making, as the aforementioned analysis demonstrates. In order to address this lack of effectiveness we introduce another normative criterion that should govern e-rulemaking initiatives and we consider it critical for the viability and sustainability of them. We argue that there is a need to evaluate if the whole procedure followed serves the rationale and purpose of citizens' centered policy making. Under this prism, input, throughput and output legitimacy should be examined by an overall legitimacy criterion we name as *functional legitimacy*. Functional legitimacy is an overarching coherence principle that governs e-rulemaking from its design to its evaluation and it is present in all stages. Practically it is the 'glue' between the three parts of the legitimacy scheme, defines their interrelation and allows them to be more functional. Designers of e-rulemaking initiatives should take into account under which procedures and modes (Elstub and Escobar, 2017) citizens can contribute more constructively and effectively to law making. Functional legitimacy may potentially lead, to the selection of different input, throughput and output modes according to the rationale of each e-rulemaking process, as 'one size does not fit all'. For example, trying to detect public opinion on an important topic may require input legitimacy of the widest possible participation to understand the public feeling; this is an input which might not be that concerned with representation standards. On the other hand, deliberating on a long-term policy e.g. pensions may require the representativeness of interlocutors from different social sectors contributing their experience in order to acquire knowledge for the specifics of each sector. Throughput may be accordingly comments, recommendations or voting on specific articles. Consequently, the output may be a summary report for all opinions expressed with the dominant one highlighted or it may also be the collection of all different views and an adoption of a law or a policy, which tries to accommodate all of them in the best possible way. In any case, there must be an identifiable policy outcome.

Functional legitimacy structures and evaluates the whole procedure from the beginning to the end, asking how each of the three legitimacy criteria were first *designed* and then *implemented* to respond better to the rationale of a specific e-rulemaking procedure. Functional legitimacy aims to secure links and continuity between the stages and components of e-rulemaking initiatives. In order to enshrine effectiveness and transparency, a specific commitment on how citizens' participation will be considered by policy makers should be stated clearly from the beginning.

On the other hand, functional legitimacy should not be understood as a kind of instrumental legitimacy that favors goals over methods nor can it be employed by compromising deliberative principles in order to reach an outcome. The criterion inserts that there is the need for a well thought through strategy of e-rulemaking that will be less abstract and generic and more focused on the actual needs of e-rulemaking.

As e-rulemaking is intense, time consuming and demanding in terms or resources (both human and technical), functional legitimacy ensures the effectiveness of the whole process and enforces regulatory bodies to set and specify in advance the criteria for the success of e-rulemaking procedures rather than relying on an 'opaque' normative discourse which remains at the level of declaration. Consequently, different strategies and participatory modes or even a combination of them can be employed according to the *topic* of deliberation and the way we expect it to *feed* in law making process.

Unless e-rulemaking initiatives embrace this functional legitimacy, thus a rationale of substantial functionality, a double -edged deadlock is likely to appear: a) legislative bodies may rest on a veil of legitimacy by providing platforms of public engagement without expecting any impact of this engagement or providing any commitment in considering citizens' input b) citizens are likely to be disappointed and discouraged steadily if these initiatives are not functioning effectively when they encounter the time they have invested in participating with no final outcome.

At the next section we approach the Agenda by considering the insights and analysis from the previous sections while we apply the input-throughput-output framework and our functional legitimacy criterion.

4.The 2015 'Better Regulation Agenda' and public participation features
Participatory democracy asks for a substantive involvement of citizens in decision making processes. The democratic deficit of the EU is mainly acknowledged as the 'discrepancy between the EU regulatory power and the democratic justification of its organs' (Marxsen, 2015, p.257) and therefore involving public participation in proposed laws would strengthen the EU's democratic credentials, assist towards the actual substantiation of the idea of a European polity and contribute to a participatory political culture. We will first proceed to a short description of the basic components of the Agenda by focusing on the public consultation tool and then we will critically assess its features and affordances specifically for public participation.

a) General remarks, features and structure of the Agenda
In the aftermath of the Great Recession, the revamped 2015 Better Regulation Agenda was a promising scheme to increase the level of citizens' input in law and policy making procedures in the EU[6]. The 2015 Agenda, refined in 2017, was a 'regulatory review exercise' and it manifested J.Cl.Junker's Presidency interpretation of law making in the EU (Garben and Govaere, 2018, pp.3-4) corresponding to the 10th priority of 'Democratic change' of his presidency[7]. The Agenda is legally rooted in the Treaty of the European Union (TEU) article 11 (3), which stipulates that 'The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent'. Admittedly, it has introduced the possibility of a multi-stage involvement of citizens and stakeholders throughout the law making cycle of the EU by ensuring 'that measures are evidence-

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[6] https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en

[7] At the time the paper was revised the new Von Der Leyen Commission has taken office and the Better Regulation Agenda is under the 6th priority 'A new Push for European Democracy' https://ec.europa.eu/info/strategy/priorities-2019-2024/new-push-european-democracy_en

based, well designed and deliver tangible and sustainable benefits for citizens, business and society as a whole' (EC, 2015, p.3).

The Juncker Commission demonstrated a commitment to delivering more in terms of transparency and citizens' involvement in policy making. As law making in the EU is an inter-institutional procedure, commitment from all co-legislators to the new Better Regulation Agenda is considered essential and was set forward with the Interinstitutional Agreement in 2016 (EC, 2016). The Agenda operates under the rules of *proportionality* and *subsidiarity* in the EU and aspires '*not impose policies but prepare them inclusively*' thus, at a theoretical level, it contributes to the openness and democratic accountability of the EU. The Agenda covers two parallel procedures (Annex 1); the first is entitled 'Consultation and Feedback' while, the process of 'Quality'- safeguarded basically by the Regulatory Scrutiny Board- assures the continuous quality and impact assessment of all procedures. *Ex ante* and *ex post* evaluation (Radaelli, 2018) is provided in the Agenda and Impact Assessments constitute an integral part of it. The Secretary General (SG) of the European Commission (EC) and A5 Unit are supervising the operation of the Agenda in cooperation with DGs.

b) Citizens participation: The public consultation tool
Citizens' involvement in the Agenda takes the form of either the *public consultation* or *feedback mechanism*. Feedback in the form of comments takes place at the stage of initial ideas or after the legislative act has been adopted by the EC and comments are published on the platform in the language they are submitted. Public consultation takes place before the EC adopts a legislative act and thus in the context of Roadmaps and Inception Impact Assessments. Participation at this stage takes the form of filling in a tailored questionnaire, which sometimes allows for a free text or uploading of a file (position papers).

The Agenda is associated with a series of documents and tools that aim to make all stages comprehensible and easy to manage from relevant DGs that run the consultations. Stakeholder consultation, (VII Section) which is the focal point of this paper, refers to the Tools #53,54,55,56#. The Consultation process involves three phases: Phase 1 is entitled: Establish the Consultation Strategy, phase 2: Conduct Consultation work and phase 3: Inform policy making. Consultations run at a central website but literally they are decentralized and run from different DGs according to the topic. For participation in the public consultations platform prerequisites and procedures are relatively easy but perhaps not that direct for an ordinary citizen. The requirement is the registration with an EU account (former ECAS account) and then the completion of a structured questionnaire, which has to be submitted electronically. If participation is in the name of or representing a company or any other entity, prior to participation there should be a registration to the 'Transparency Register'[8] as to ensure that the whole decision making is transparent in terms of the interlocutors and the parties that were involved in the consultation.

Stakeholders' input is summarized; results and evaluation of comments is a task basically undertaken from each DG. Results of feedback and consultation are analysed in a Summary report and are incorporated in the Impact Assessment, which is a part

of the legislative proposal, sent to the co-legislators (European Parliament and Council of Ministers) and are briefly outlined in the proposal itself. The analysis is usually descriptive and on a quantitative basis usually based on statistical analysis. Occasionally at the Impact Assessment, an Annex is attached that analyses in a more sophisticated way the comments received.

c) Critical Evaluation of the of the Agenda and the Public Consultations
The Agenda was a good effort to address arguments for the weak legitimacy of the EU. The OECD (2019,p.19) acknowledges that the EU scores higher than member states in implementing better regulation practices. In terms of how citizens understood and addressed this effort, the first evidence comes from the consultation that the EC has run (17 July -23 October 2018) for the evaluation of the Agenda. At the Summary report issued in April 2019, 63% of the respondents were individuals (citizens) (EC 2019b). 53% of them are not at all satisfied with how the Agenda operates in terms of public participation. A paper published by the EC (2019a) the same month, flags consultations and transparency as the areas in which significant process was made while in parallel there is a need for improvements.

Legal and institutional related concerns in the current Agenda are discussed in the literature such as the Interinstitutional Agreement that expands the 'modus operandi' of the Agenda to the European Parliament and the Council of Ministers and it is portrayed by some as an unlawful expansion of the legislative powers of the Commission over the other two legislators and a direct breach of the institutional balance (Alemanno, 2015, p.352); the EC speaks of a 'joint responsibility' and a 'shared effort' that should be undertaken while putting forward the objectives of the Agenda (EC ,2019a). The opening of evaluations to various stakeholders and SMEs, which the Agenda largely presents as tool of enhancing legitimacy, has been addressed with concerns reflected in the question why the Commission should jeopardize its prerogatives by taking advice from all these stakeholders with dubious incentives and interests (Alemanno, 2015, p.34). The 'Better Regulation Watchdog'[9] illustrates a reservation regarding the 'usual suspects' that may dominate consultation process. The bureaucratization of the process, the role of the Secretary General of the EC and the politicization of the Agenda has also been criticized (Van Del Abeele, 2015, p.74).

In relation to the public consultations tool we have identified a number of shortcomings, which we will present according to the three-fold legitimacy framework.

Input legitimacy: In the Agenda stakeholders and citizens' participation is possible and enabled throughout the whole policy cycle, thus theoretically allowing for inclusiveness, reflexivity, and transparency in all instances of law making in the EU. However, in reality the procedure falls short of these expectations.

Participation is attracting specific interlocutors such as lobbies, organisations and interest groups and it can hardly be named a tool for engaging ordinary citizens (Dunlop and Radaelli, 2017; Russack, 2018). Presumably, this asymmetry in participation relies partly on self-selectiveness biases, the complexity of the procedure and high level of knowledge required in order to participate. Studies on the previous

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[9] https://www.betterregwatch.eu. In the aims it is mentioned that: 'we are united in our concern that the European Commission's 'Better Regulation' agenda does not further public interest, but rather aims to weaken or neglect essential regulations protecting workers, consumers, citizens and the environment'

consultation platform [10] demonstrate that some consultations (on taxation, environmental issues etc) gathered significant citizens' interest (Marxsen, 2015, pp.264-265) due to the easiness of filling in a questionnaire and also because there was a good campaign on the specific topics. Despite these exceptions public participation remains weak and demonstrates unclear representativeness (Listorti et al., 2019, p.41). The Agenda is more inclined to provide the ground for an *open, unconstrained participation* rather than a representative and well-balanced participation.

We believe that the self-selection bias should be overcome and the best way to do this is to use random selection in order to ensure a representative sample of ordinary citizens.

Throughput legitimacy: The questionnaires at the public consultation tool are a one way, notably 'invisible' public input. Citizens provide their comments to the Commission having little or no space at all for interaction or free input (IAI, 2017). Hence, citizens' input may cover a long time span in terms of the procedure but it does not expand in terms of constructive dialogue nor is the feature of visibility present in all stages. Clearly, this mode of citizens' consultation is by no means a deliberative one. Comments provided by stakeholders at other stages of law making process are regularly dominated by the 'usual suspects' (Garben, 2018, p.234) and are not illustrative of a genuine public participation procedure. The whole procedure of public consultations also raises the question of whether it actually alleviates or reinforces bias in interest representation (Bunea, 2017). Justification in feedback may appear to sophisticated stakeholders but as there is no interaction there is no constructive dialogue between participants. Multilingualism should not be considered as a barrier to deliberation as the EU has sufficient human resources to address this parameter (Cengiz, 2018, p.589).

In terms of design and informational resources, a number of documents under the title 'Reference documents' provide information on the consultation. Also at the 'Objectives of the consultation' section occasionally, we find links to relevant informative documents.

Output legitimacy: The analysis of the comments or questionnaires provided at the Impact Assessments and the legislative proposals does not really speak to a 'policy evident' decision -making. Sometimes the analysis is merely descriptive and provides a superficial justification as to what extent this input feeds and plays any role in the law making procedure (Maśnicki, 2016). This deficit may be named as a *policy deficit* and it is described as the lack of transcribing citizens' input into policy making which means that output legitimacy is highly contestable. To date there is no concrete obligation for consideration of comments received during consultation and there is no signal for their impact on policy process (Scott, 2018, p.21; Garben, 2018, p.235). The formal report issued in the end does not guarantee the actual impact of consultation on the final legal act adopted and neither specifies the methodology and how accurately this evaluation process was performed (Bunea and Ibenskas, 2017). Thus, for the moment it seems that public consultations remain a 'listening exercise' for the EC (Marxsen, 2015b) and the results are hardly channeled in the policy making process.

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[10]http://ec.europa.eu/yourvoice/ (currently inactive)

In addition, our online observation of the Agenda has identified the difficulty in reaching the place where this analysis of consultations sits in the website. The Summary report is not visible in all consultations and one may have to navigate to the Regulatory Scrutiny Board website or perhaps the Eur-Lex index to become informed about the results of the consultations. Overall, the Agenda is essentially a declaration of principles that are not fully met in practice. Therefore, it fails to deliver substantially to the standards of all three legitimacy criteria and consequently to the functional criterion, unless the purpose of the Agenda is limited to an information providing tool to the EC.

5.Strengthening legitimacy with a deliberative e-rulemaking initiative in the EU
We should admit that the 2015 Agenda has made significant steps towards a more participatory governance model in the EU (see also Garben, 2018, p.225). However, it is evident that a number of reasons both *internal and/*or *external* to the structure of the Agenda have not permitted it to operate in such a way that it could effectively counter the arguments about the EU's democratic deficit and its capacity to produce law and policies that have strong layers of legitimacy. Our study analysed the existing status of public consultations[11] in the Agenda through the lens of the evaluation model of input-throughput-output legitimacy and has recognized shortcomings in all three legitimacy criteria but all to different extents.

We can argue that the inclusiveness aspect of the input legitimacy is theoretically fulfilled as the current online portal allows for open participation. On the other hand, the Agenda certainly does not succeed, and it is not designed to address the representative aspect of input legitimacy; it scores even lower in terms of equality as participation is usually emanating from interested major stakeholders or special interests rather than individuals.

In terms of output legitimacy, we can only identify a very weak correspondence to it with the requirement of publishing the results of the consultations and no concrete policy impact indicators.

The shortcomings in throughput legitimacy, are fundamental and arguably do not permit output legitimacy to be reflective of citizens' needs. The format of questionnaires does not allow any interaction, nor deliberation. Overall, functional legitimacy is not fulfilled as the structure and the choices made in the design of the Agenda are not able to deliver its aims. The link between input-throughput and output legitimacy is very 'anaemic'. This is why functional legitimacy is important; providing only the platform and functionalities without investing on its actual function and effectiveness renders the whole procedure as a superficial and weak in producing results.

We suggest that a deliberative environment in public consultations tool may overcome the current deficiencies of the Agenda. In terms of input much attention should be paid to ensuring that there are sufficient channels for all interests to be expressed and that deliberation is facilitated. When employing a deliberative throughput and considering the EU's supra-national structure we expect to confront over-lapping, sometimes competing commitments, interests and identities and thus deliberation 'must be conflict tolerant' (Crespy, 2014, p.90). We also propose the

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[11] As of April 2019

adoption of functional legitimacy in order to ensure that any effort to revise the Agenda is fit for purpose and is not limited in untested assumptions. A sensitive issue to the whole comitology of law making in the EU is how throughput legitimacy may inform output legitimacy in terms of the legal provisions, lawmaking procedures and the triangle of co-legislators European Commission, European Parliament and Council of Ministers.

Nevertheless, a deliberative e-rulemaking initiative would probably enable the EC to reach its purpose of citizens' participation and evidence-based policy, a wish that currently remains an ideal but fortunately an enduring commitment. It is a necessity for a deliberative e-rulemaking initiative to be informed of all these shortcomings and debates as they were analyzed in the previous sections of this paper. The actual implementation of a deliberative Better Regulation Agenda in the EU would, of course, require more than ideas and normative thinking of political scientists and law scholars. It can certainly be another good opportunity for interdisciplinary research that can be embedded in real world politics and has the potential of being socially beneficial.

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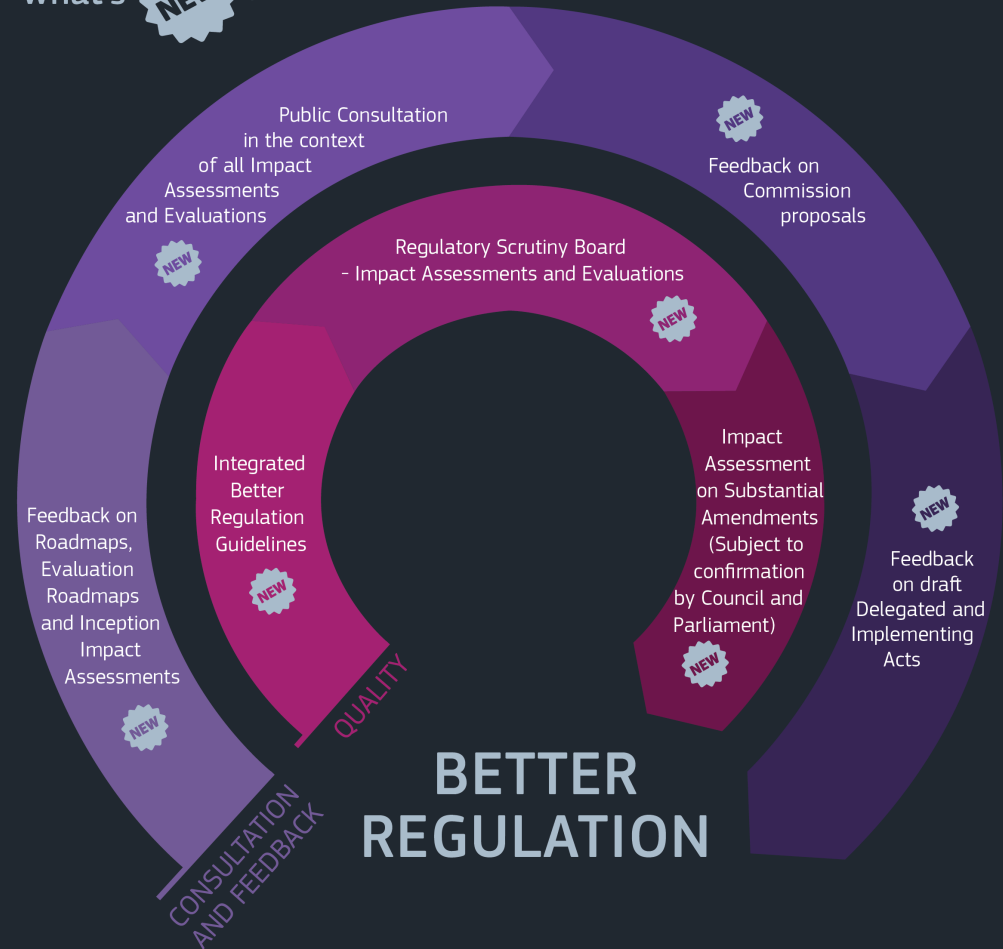
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Annex I The 2015 Better Regulation Agenda (image from the EC)

BETTER REGULATION AGENDA

Enhancing Transparency and Scrutiny for Better EU Law-Making

European Commission

What's NEW ?

Public Consultation
in the context
of all Impact
Assessments
and Evaluations

Feedback on
Commission
proposals

Regulatory Scrutiny Board
– Impact Assessments and Evaluations

Feedback on
Roadmaps,
Evaluation
Roadmaps
and Inception
Impact
Assessments

Integrated
Better
Regulation
Guidelines

Impact
Assessment
on Substantial
Amendments
(Subject to
confirmation
by Council and
Parliament)

Feedback
on draft
Delegated and
Implementing
Acts

QUALITY

CONSULTATION
AND FEEDBACK

BETTER
REGULATION

STAKEHOLDER INPUT

Lighten the Load: An updated interactive tool
for citizens to provide ideas to the Commission

REFIT Platform – A forum for review of existing
legislation by high level experts from social
partners, business and civil society

EXISTING LEGISLATION

REFIT check of existing stock of legislation more
targeted, quantitative, inclusive, embedded in
political decision-making

Strong Monitoring and Evaluation