**Title:** The Dilemmas of Pursuing ‘Throughput Legitimacy’ through Participatory Mechanisms

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**Abstract**

Under pressure to open up the 'black box' of governance, technocratic bodies are increasingly seeking to include civil society participation in the policy process. We draw on empirical cases from the European Commission and NHS England to assess the extent to which the participatory mechanisms pursued by these institutions have been successful in eliciting 'throughput legitimacy'. We show that though these mechanisms have taken very different forms—the former a classic instance of 'window dressing' participation, the latter closer to 'best practice' in this field—they nevertheless share a number of ongoing vulnerabilities. We outline the shared organizational, operational and existential dilemmas that technocratic bodies face when eliciting civil society participation, and highlight their reliance on backstage negotiation to sustain stakeholder buy-in. We conclude by highlighting the prospect that the pursuit of throughput legitimacy for technocratic bodies entails inherent limitations and contradictions.

**Keywords**

throughput legitimacy; public administration; participation; democratic governance

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**Bios**

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**Introduction**

Modern public bureaucracies deal with an increasingly broad array of complex and sensitive issues. Their evolution, under these stresses, has primarily prioritised efficient and effective policy outputs over public legitimacy – a shift towards ever-more technocratic governing arrangements (see Schmidt 2013, Scharpf 1999). They exhibit highly complex institutional settings which render the policy process more efficient in delivering these ends. These configurations confound and confuse outsiders, not least the public whose interests these institutions are supposed to serve (see Flinders 2008). Indeed, supranational bodies like the European Commission, and arms-length agencies at the national level, are seen as facing something of a legitimacy crisis (Gould 2004).

So far, though, the debate in relation to technocratic bodies has focused on the tensions between electoral (input) and performance (output) dimensions of legitimacy (Scharpf 1999). Either focus ignores the legitimacy of the actual decision-making process. Recently, scholars started scrutinising the quality of governance or of decision-making processes by focusing on the practices that go on in the ‘black box’ of governance, particularly with respect to the quality of interactions among the actors engaged in these processes (eg. Schmidt 2013; Van Meerkerk *et al.* 2015). Vivien Schmidt (2013: 6) coins the term ‘throughput legitimacy’ to encapsulate these concerns. This means that political or administrative systems need to shore up ‘the quality of the governance processes as established by their efficacy, accountability, transparency, inclusiveness and openness to interest intermediation’. Yet Schmidt’s is not just a normative claim. It also conceptualises a shift in governing processes where, in practice, output-oriented technocratic bodies are opening up the policymaking process to assuage mounting challenges to their *modus operandi*. In particular, there has been a move to embrace participatory[[1]](#endnote-1) mechanisms that actively include civil society actors and citizens as something of a cure-all for deepening concerns about the legitimacy- *qua* throughput-of the governance process.

Much has been written about the challenges associated with pursuing participatory mechanisms in different policy contexts, including at some length in the public administration literature (eg. Barnes *et al*. 2003). The bulk of this work, though, has focused on the micro processes of participation, somewhat divorced from the bigger picture of governance and throughput legitimacy. It has generally paid fleeting attention to the broader institutional context in which participation occurs.[[2]](#endnote-2) The benefits of citizen or civil society participation in policy-making have been widely scrutinised, yet what has been little researched is *how* the quality of participation (as a process) impacts on the quality of governance, and hence on throughput legitimacy.

In this paper we examine the extent to which participatory mechanisms at national and supranational levels can be successful in eliciting throughput legitimacy for such bodies. We present a comparative case study–European Commission and child rights policy and NHS England and health policy–deploying some of Schmidt’s dimensions to measure throughput legitimacy via the *quality of participation* in governance processes in relation to two aspects: a) input into agenda-setting, b) effect on policy outcomes[[3]](#endnote-3). These two yardsticks employed here capture a key dimension of participation: namely the purpose(s) it aims to serve in practice, or put differently, what ‘participation’ – as a process - means to those taking part in it. Both participatory mechanisms examined here were intended to feed into the policy process and, as mechanisms of throughput legitimacy, they shed light on key questions about the *quality of the governance process* of the Commission and NHS England in those two policy sectors. What are the knock-on effects of the initiatives pursued by these technocratic bodies to encourage stakeholder participation in the policymaking process? What consequences have these participatory mechanisms had on eliciting throughput legitimacy? How have actors within technocratic bodies sought to embed and strengthen these mechanisms? *The central argument of this article is that eliciting civil society participation through the policy process risks either undermining the technocratic credentials of administrative bodies or further embedding democratic disaffection, and that mitigating these risks requires intensive stakeholder management behind-the-scenes. The paradox is that ‘opening up’ the black box of technocratic governance may hinge on the creation of ‘closed down’, informal spaces of policymaking.*

This paper spells out this argument over three sections. The first outlines the legitimacy crisis facing technocratic bodies at national and EU levels, and highlights the role of throughput legitimacy in addressing it. The second section presents the comparison between participatory practices in the European Commission’s approach to children’s rights and similar developments in the newly formed NHS England. The third section draws lessons from this comparison. It identifies the common ‘dilemmas’ facing technocratic bodies as they elicit participation in the policymaking process, and highlights the challenges different approaches present to these bodies. In the conclusion, we draw lessons from this comparison to inform ideas about the pursuit of throughput legitimacy more broadly.

**1. Technocratic bodies and democratic legitimacy**

The relationship between bureaucracies, democratic institutions and citizens has been widely researched (Brehm and Gates 1999; Peters 2010), with most scholarship painting an antithetical, yet complementary, relationship between bureaucratic technocracy and democratic participation. The key reason for this is that majoritarian institutions derive their legitimacy from the electoral process, which is generally described as ‘input-oriented’ democracy, non-majoritarian institutions[[4]](#endnote-4) derive their legitimacy from their problem-solving capacity, namely ‘output-oriented’ democracy.

This is a debate that has long played out in relation to EU processes (Scharpf 1999) and their legitimacy credentials. According to Scharpf (1997: 18-21) both input legitimacy, qua citizen voting in EU elections, and output legitimacy, qua effective problem-solving, are important for the EU. However, some have argued that the output dimension of legitimacy, due to the nature of the European polity, should prevail at the EU level. Most famously, Majone (1999) makes the case that the EU can acquire legitimacy via policy-related performance, which constitutes the central objective of its non-majoritarian institutions, such the European Commission. More recently, scholars like Vivien Schmidt (2013) have highlighted the importance of ‘*throughput’ legitimacy* rather than the input-output legitimacy distinction. By focusing on the quality of governance processes, ‘throughput’ legitimacy captures what occurs inside the ‘black box’ of EU governance. Its key dimensions include the efficacy, accountability, transparency, inclusiveness and openness of EU governance to civil society (Schmidt 2013: 4-5). The quality of the process and procedures that underpin the Commission’s role in various policy sectors can elicit or undermine its ‘throughput’ legitimacy. By being more open to processes of engagement with civil society actors, the Commission can acquire throughput legitimacy, which can lead to increased output legitimacy since specific policy processes are seen as preconditions for better output performance (Schmidt 2013:14).

Similar concerns have emerged around the growth of arms-length governance at the national level, with agencies and other delegated bodies proliferating through national governments in Western Europe in the last decades. Their spread is often linked to New Public Management (NPM) ideals and a focus on technocratic efficiency (Dunleavy *et al.* 2006), though a new orthodoxy sees the value as more multifaceted and enduring than this particular public management trend (see Smullen 2010). Regardless, the spread of agencies has seen a growing number of governance issues vested in the control of these technocratic bodies, at arms-length from elected governments (Egeberg and Trondal 2011; Pollitt *et al*. 2004). One effect of this shift, as with the move to EU governance, has been a growing perception of wilful ‘depoliticisation’, and a questioning of their credentials as legitimate aspects of democratic governance (Flinders 2008).

Increasingly, in response to this perception, these bodies have sought out new ways of legitimating their authority. Of particular interest to us has been a broader move to secure better ‘throughput’ legitimacy, especially through participatory initiatives designed to include affected citizens and civil society actors in the process of policy formulation. These participatory mechanisms, akin to our ‘throughput’ focus, emphasise openness and inclusiveness of the *process itself* rather than focusing on the substantive outcome of that process (see Nabatchi 2010). In practice, they tend to represent an attractive ‘quick fix’ by which to establish, and often entirely embody, the goods associated with throughput legitimacy.

How successfully systems (national or supranational) elicit throughput legitimacy remains largely under-researched empirically (Schmidt 2013:5), and so far no comparative research has examined how participatory mechanisms at various levels of government generate throughput legitimacy. We seek to shed such light in our analysis that follows. Ultimately, our analysis aims to show the extent to which the quality of civil society participation in governance processes – gauged here as agenda-setting input and effect on policy outcomes (see below) – can elicit throughput legitimacy. Our analysis attempts to answer the same set of key questions for both cases: How, and to what effect, do these technocratic bodies go about developing ‘throughput’ legitimacy –via participation - for their actions?

**Approach**

Before embarking on this analysis, however, it is important to outline and justify our methodology. Our analysis examines the achievement of throughput legitimacy – via participatory mechanisms – at national and supranational levels, which constitutes the first analysis of this kind in the literature. We conduct a comparative, richly qualitative analysis of cases from either level: on the one hand, a consultative-participatory Forum on the Rights of the Child (hereafter the Forum) operated by the European Commission (Directorate General (DG) Justice); on the other, a participatory innovation (NHS Citizen) in England’s National Health Service. Both cases represent interventions in new administrative terrain, where public legitimacy remains fragile. The Forum came about as DG Justice expanded its remit to encompass issues surrounding children’s rights issues. NHS Citizen was born in the context of controversial health system reform, with the agencification of core functions in a new body, NHS England.

Comparison is fruitful because the two cases sit at opposite ends of the ‘participation’ spectrum with respect to their capacity to enable throughput legitimacy (measured according to our two yardsticks, see below)—the Forum as a least likely case, and the NHS Citizen as a most likely one. There are two key reasons to suppose this. First and most obviously, the supranational setting of the Forum makes it less conducive to successful participation than the national setting of NHS Citizen (Kohler-Koch and Quittkat 2013). In line with the long-standing observation about democracy and scale, proximity is a key enabler of broad democratic engagement in the decision-making process (see Dahl 1994). The context of the Forum is, by its nature, more remote from established democratic institutions, rituals and identities, especially when compared to the iconic status of the NHS in British politics.[[5]](#endnote-5) The second reason is the different trajectory of participation undertaken by these two bodies. The Forum has, from its very inception, been subject to tight top-down control from within DG Justice. NHS Citizen, in contrast, has been contracted out to facilitation specialists employing a bottom-up template of engagement. However, despite these contrasting contexts and trajectories, we will show that both cases nevertheless exhibit the same persistent dilemmas and vulnerabilities. The comparison therefore sheds especially important light on the challenges faced by technocratic bodies seeking to shore up ‘throughput legitimacy’.

To be clear, this comparison was not ‘designed in’ to a single project—each case was pursued separately in the initial stages. However, as these affinities (and divergences) emerged, it became clear that comparison would prove fruitful—something entirely consistent with the interpretive approach to political analysis that underpins our collective research (see Yanow 2014). The empirical data for the Forum was gathered between 2011-2012 as part of an intensive project[[6]](#endnote-6) as well as via informal conversations held subsequently with children’s NGOs during a knowledge exchange programme (from 2013-2015, see also Iusmen and Stalford 2016). The empirical data for the NHS England case draws on a detailed documentary analysis of online resources, including formal documents, archived video footage, and social media outputs (all publicly available at: http://www.nhscitizen.org.uk/). It is also informed by observation drawn from attendance at three public meetings, and by in-depth discussions stemming from those meetings with key members of the NHS Citizen team.[[7]](#endnote-7)

Using this wealth of data from across the cases, our focus is on analysing the commonalities and differences in how these mechanisms pursue throughput legitimacy for the technocratic bodies in question. Drawing on criteria elucidated in Schmidt’s account, we operationalize ‘throughput legitimacy’ as the *quality of participation* in the governance process as measured by: a) input into agenda-setting, b) effect on policy outcomes. The former renders the extent to which stakeholders can shape the agenda of the participatory mechanisms: what topics are discussed and the concrete format of the participation itself. The latter focuses on the effects and consequences of stakeholder participation: namely how successfully the participation of stakeholders in policy debates feeds into the policy process.

**2. European Commission and human rights: the case of children’s rights**

The European Commission’s policy agenda has expanded to include new issues related to human rights. Over the last decade the European Commission has taken decisive action to address the violation of children’s rights inside and outside the Union. By developing plans of action – such as the Communications *Towards an EU Strategy on the Rights of the Child* (2006) and *An EU Agenda for the Rights of the Child* (2011) – the Commission adopted a set of measures aimed at advancing child rights in line with the UN Convention on the Rights of the Child (CRC) principles. Despite having legal mandate to address child rights issues only in those sectors falling within the EU’s jurisdiction, the EU, steered by the Commission’s agenda-setting powers, has adopted a wide range of hard and soft law measures aimed at upholding the protection of child rights at the EU and national levels. The EU has no ‘general competence’ (European Commission 2011) in addressing children’s rights, as the primary responsibility for this area rests with the Member States. Nonetheless, the Union has recently become a key child rights actor (Iusmen and Stalford 2016) taking action aimed at addressing child rights violations or at supporting national efforts to do so.

The Commission’s engagement with child rights issues, however, entails the Union’s involvement with policy matters that usually constitute the remit of national authorities. All EU Member States have signed and ratified the main international instrument upholding the protection of child rights, namely the CRC, and therefore, they have the legal obligation to reform their institutional, legislative and policy structures to reflect the provisions and principles enshrined in the Convention. Nevertheless, the Commission’s actions aimed at protecting children’s rights, and therefore encroaching on issues broadly regarded to constitute national responsibility, have been met with disapproval from the Member States[[8]](#endnote-8). Therefore, the Commission had to engage the key stakeholders, particularly civil society organisations and children’s NGOs, in order to craft a sense of legitimacy for its actions addressing child rights matters. Indeed, usually the engagement of civil society actors in EU policymaking process plays a legitimating role (Smismans 2006) particularly in those policy sectors where the EU has limited legal mandate, such as children’s rights.

Having endorsed the protection of children’s rights as a cross-sectoral issue to be addressed by EU policies, EU institutions adopted a wide range of measures[[9]](#endnote-9) across a range of policy sectors – for instance, health, migration, social inclusion, education to note just a few – in order to address specific child rights violations, such as trafficking, poverty and social exclusion, or discrimination. It was primarily the European Commission that spearheaded the new EU child rights policy (Iusmen 2013). Yet, given that the Member States were unwilling to embrace the Commission’s new role, as a champion for the European children’s rights (Stalford 2012), the Commission had to devise mechanisms that would render its actions in child rights matters more appealing to the key stakeholders, including national governments. One way of achieving this in practice was by developing bespoke participatory mechanisms that would engage civil society actors and NGOs in policy formulation. At the Commission level, this process of stakeholder engagement gained momentum after the Commission’s *White Paper on European Governance* (2001) which paved the way for the development of regular consultations with stakeholders.

*European Forum on the Rights of the Child*

In 2008 the Commission set up a European Forum on the Rights of the Child, which was specifically aimed at involving the key stakeholders[[10]](#endnote-10) in the policy-making process (European Commission 2008: 3). By bringing together the main children’s rights organisations as well as transnational networks, the Forum on the Rights of the Child was intended to play an advisory role to the Commission services on specific child rights policy issues. The Forum was expected to provide a space to exchange knowledge and examples of best practice among stakeholders, which would feed into the policy process (European Commission 2006: 1). Therefore, the Forum was designed, at least on paper, as a consultative, participatory mechanism that would facilitate the policy deliberation and input by civil society actors. The engagement of leading child rights organisations in processes of policy debate and formulation would have also attached ‘throughput’ legitimacy to how the Commission addresses complex and sensitive child rights matters. Therefore, the Child Rights Forum was aimed at establishing a participatory mechanism which could legitimise –via openness to and inclusiveness of civil society actors, according to Schmidt (2013) –the governance process regarding EU child rights matters.

The Forum is convened by DG Justice and its agenda is decided mainly by the policy priorities of this Commission DG [[11]](#endnote-11). The Forum meetings –which run annually - have provided limited opportunities for stakeholder participants to influence the Forum agenda and feed into the policy debates (Grugel and Iusmen 2013). Thus, children’s NGOs have no *input into the agenda-setting* of the Forum. Although the Forum was intended to provide a participatory setting for all key civil society actors, the institutional design of the Forum obstructed the emergence of a genuinely open and inclusive environment whereby civil society actors can feed into the policy process (Grugel and Iusmen 2013).

Over time, the main child rights NGOs have become disengaged and critical of DG Justice’s approach to stakeholder participation in the Forum meetings (Grugel and Iusmen 2013). One of the reasons for this disengagement is the Forum’s lack of concrete initiatives to translate the Forum discussions into policy outcomes. To this end, child rights NGOs and networks consider that their expertise and practical knowledge of child rights issues has no bearing on the policy measures adopted by the Commission (Grugel and Iusmen 2013) due to the disconnect between the outcomes of the Forum meetings and the Commission policy process[[12]](#endnote-12). For instance, some stakeholders stated that for the Forum meetings they ‘just turn up, make presentations, and then go home’[[13]](#endnote-13) every year as there is no follow-up to the Forum meetings. Indeed, as stakeholders put it, the Forum meetings focus on reporting policy –what has been done- rather than on what should be done in the future[[14]](#endnote-14). The lack of policy input into the decision-making process and therefore the absence of concrete *policy outcomes* emerging from the Forum meetings, alienates the civil society actors (Grugel and Iusmen 2013) and thus, diminishes the Forum’s role as a meaningful participatory and inclusive mechanism, which could attach throughput legitimacy to Commission actions. What civil society actors attending the Forum achieve in practice is *participating in the participation* as the Commission has the proof of having involved the key child rights stakeholders in the policy consultation process. This cosmetic mechanism of participation reflects what Arnstein (1969) called as ‘window-dressing’ ritual of participation, whereby participants’ input is limited or has no value whatsoever. Indeed, as Arnstein rightly noted, this ‘window-dressing’ participation provides stakeholders with a sense that they have participated and, at the same time, provides policy-makers with the evidence that they have taken the necessary steps in involving the people, or civil society actors, in the decision process that affects them. In other words, this ‘window-dressing’ or facade participation is deliberately designed and intended to generate the throughput legitimacy of the governance process by having all the right ingredients of a participatory setting, but lacking the essential conditions: namely the ability to shape the agenda and policy outcomes.

The Commission–driven civil society participation via the Forum has had mixed results. While the Forum meetings are attended by a significant number of civil society actors, the format and outcome of stakeholder participation cast doubts on the effectiveness of this institutional mechanism in eliciting throughput legitimacy. Although stakeholder participation in the policy process occurs on paper, in practice, due to its restricted inclusiveness of civil society actors in the decision process, the Forum has not succeeded in generating throughput legitimacy.

**3. NHS England**

The second case focuses on NHS Citizen, a new initiative that has emerged during the formation of NHS England as an arms-lengthy agency devoted to the administration of health services across England. NHS Citizen is an ambitious experiment that is, at the time of writing, only just exiting its initial 18-month ‘design phase’. Compared with the Forum, it is a fledgling project. But the contingency and uncertainty that this entails reveal equally important lessons about the pursuit of participatory mechanisms to feed into, and legitimate, technocratic administration.

As with the Forum case, the key to understanding NHS Citizen lies in its institutional origins, amid the then Coalition Government’s recent controversial reforms to the National Health Service. While public debate has focused on marketisation, a key administrative reform was of the transformation of the NHS into an arms-length agency—NHS England—responsible for administration of health services across England. NHS England was to be overseen by a 17-strong Board of Directors. Though there was some homage to public oversight in the form of a handful of Non-Executive Directors drawn from the community, the board primarily comprises Very Senior Managers. These are actors prized for their administrative capacity. As such, the agency’s initial focus was on output legitimacy. It was to streamline health services, administering a more efficient and cost-effective system of delivery.

However, as the shift to arms-length governance was rolled out, the perceived legitimacy of the process—especially in the context of the controversial policy debate into which it was born—was called into question, most pointedly by influential Non-Executive Directors on the Board.[[15]](#endnote-15) The language of Schmidt’s ‘throughput legitimacy’—‘accountability’, ‘transparency’, ‘inclusion’ and ‘openness to civil society’—permeated the informal discussions and official documents.[[16]](#endnote-16) In practice, these calls for change became concentrated around the notion of a participatory innovation.

In response, the Board committed to pursuing greater participation with citizens and civil society actors. As with the Forum case, this commitment was met with confusion and uncertainty among many of the Board members as well as actors across the broader organization.[[17]](#endnote-17) There were already a number of mechanisms of consumer feedback and public participation in health governance across multiple levels of government. Many questioned (and continue to question) the value of another initiative, particularly in light of NHS England’s technocratic focus. Born of this confusion and contestation was a decision to pilot a provisional scheme now known as NHS Citizen—a participatory innovation charged with canvassing citizen input on health services, developing and making sense of this input, and then reporting it to the Board for action at a public assembly.[[18]](#endnote-18)

Central to the development of the NHS Citizen initiative was a decision to outsource the task to a consortium of organisations in the ‘democratic sector’ (The Democratic Society; Public-I; The Tavistock Institute; and Involve).[[19]](#endnote-19) As such, NHS Citizen has evolved in the context of deep and ongoing co-production between these partner organizations and the NHS England Public Voice team, sparking a collaborative culture of ‘planning in the open’. All paperwork associated with NHS Citizen is published on the website as ‘working documents’. The outputs of participation are publicised in eye-catching and interactive ways. Regular design meetings are open to anyone from the public, and are webcast and archived. There is also an aggressive social media profile, with regular blog posts and tweeting from events and meetings.

As a result, the agenda for discussion remains, for the most part, tentative and subject to revision. Civil society actors can achieve significant *input into agenda-setting*. Anything could emerge from the process and be carried through to the Board for discussion and a formal response. This lends an openness to NHS Citizen which belies the common perception of closed technocratic decision-making within delegated agencies. It enables the performance of the sort of ‘throughput legitimacy’ that was thought to be lacking in the shift to the NHS England model. Adopting this approach has served to disarm some opposition to the establishment of the agency, allowing civil society groups to feel they retain a stake in the process.

Of course, buy-in even following ‘best practice’ participation is not necessarily universal and ongoing, especially in a dynamic, open-ended process. Experience with the myriad other forms of participation across the complexities of the NHS (now and in previous iterations of reform) left many sceptical about the concept.[[20]](#endnote-20) The design phase has also been marked by a reticence to expose the initiative to the scrutiny of powerful vested interests in British health governance. Notably, for instance, medical professionals and the pharmaceutical industry have played peripheral roles in NHS Citizen thus far. Given the established influence such actors have in the health sector, this raises significant doubts for critics about the genuine influence of NHS Citizen on policy formulation.

This hints at more fundamental concerns about a lack of authenticity on the part of powerful managers on the Board of NHS England. Indeed, there is a fear that NHS Citizen may simply be a tokenistic process designed to depoliticise controversial decisions by providing a veneer of participation.[[21]](#endnote-21) Although still early in its evolution, there is an abiding scepticism—informed by those earlier experiences of participation in the NHS—about the *effect on policy outcomes*, outside a few minor or highly specialized areas. This is the type of ‘window-dressing’ described in the Forum case above. The keenest manifestation of this is lingering concern about the vulnerable nature of the enterprise. Funding for the organisations which run NHS Citizen is provided only on temporary, short-term contracts which are subject to regular review. Any progress can be entirely wiped out by the Board of NHS England, who retains the formal authority to dismantle the machinery of NHS Citizen.[[22]](#endnote-22) The hope among the organisers and supporters of NHS Citizen, expressed by a range of actors amid a frank design workshop discussion, is that it achieves a *de facto* robustness in spite of its *de jure* vulnerability. They hope that it has already become too engrained for the Board of NHS England or any other powerful actor to dispose of.

**4. Discussion**

The two empirical cases examined above demonstrate that the participatory mechanisms alone failed to elicit throughput legitimacy, measured according to our criteria. By drawing on our findings regarding the quality of stakeholder participation in decision processes initiated by bureaucracies, we have identified below the paradoxical stances – dilemmas– faced by public bureaucracies when they decide to promote participation in policy processes.

*The organizational dilemma: how to approach divergent imperatives of participation and efficiency?*

The Forum on the Rights of the Child is an initiative intended to involve the main child rights organisations in the EU policymaking process. The Commission employs similar participatory forums in other policy areas, such as social policy or youth policy. However, the Child Rights Forum, whilst designed on paper as a participatory mechanism aimed at informing EU policy, in practice took shape as a top-down administered mechanism, whereby DG Justice controlled both the agenda and the format of the Forum. In theory, the Commission pursued the pattern of civil society engagement by promoting the openness to and inclusion of civil society actors in EU policy debates, however, this process was administered by the Commission in a way that generated the opposite effects: namely, children’s NGOs became disengaged and sceptical regarding the Commission’s new role in the protection of children’s rights (Grugel and Iusmen 2013). The paradox identified here is that the participatory and deliberative mechanisms devised by the Commission in relation to child rights had to conform to a top-down, command-and-control logic - usually employed in public administrations – whereby DG Justice controlled both the agenda and organisation of the Forum, which in practice proved counter-productive, and hence *illegitimate,* due to no stakeholder *input into the agenda-setting* process*.*

Though approached in quite a different way, this same clash was at the heart of the confused and contested response to the initial idea for a participatory mechanism linked to NHS England, as well. The decision to contract out the process design seems to have successfully delineated the initiative from ordinary operations. The effect has been to sustain, for the most part, the organizational imperative on output-related efficiency while allowing the initiative itself to take place on terms more amenable to the organic or bottom-up logic of broad participation. But of course there are disadvantages with this form of distancing, too. Despite sustained efforts towards ‘cultural change’ within NHS England, there is still scepticism about the value of participation across the organization.[[23]](#endnote-23) Ultimately, this same dynamic is what makes the entire NHS Citizen initiative vulnerable, too. The functional separation of the participatory initiative from the core functions of the technocratic body appears to strengthen the authenticity of participation (measured via *input into agenda-setting*). However, this success comes at the expense of the prospects for shaping policymaking.

*The operational dilemma: how to embed participation in the policy process?*

The Forum case shows that the Commission has deliberately advanced the participation of civil society stakeholders in the Forum meetings, but failed to connect this engagement to the actual policy process, hence there was no *input into policymaking*. Indeed, there was a stark disconnect between the NGOs’ input into the Forum debates and the Commission’s policy initiatives[[24]](#endnote-24). The empirical evidence suggests that some Commission services, such as DG Justice, view stakeholders’ input into the policy process according to a zero-sum logic: meaningful and inclusive participation could hamper the Commission’s effectiveness and efficiency in fulfilling its Treaty role[[25]](#endnote-25). This tension has played out in relation to the Forum, where DG Justice decided to pursue a thin and tightly controlled participatory initiative, which would not impact on the output-dimension of the Commission policy process.

By advancing stakeholders’ participation for participation’s sake, the Commission failed to grasp the intrinsic connection between throughput legitimacy and output-legitimacy (Schmidt 2013:9). Indeed, given the expertise and practical know-how of child rights organisations, their inputs into the Forum debates could feed into the policy measures adopted by the Commission, and therefore, could impact positively on output legitimacy by improving the Commission’s capacity to deliver effective *policy outputs* and *outcomes*. However, this link between participation and policy outputs failed to take shape in practice so far.

The NHS Citizen case shows how difficult embedding engagement in practice can be even with firmer elite commitment. The central problem is about the capacity to connect to the pragmatic requirements of NHS England and its daily operations. The design complexities and defiant openness that make NHS Citizen such a pioneering participatory innovation may also be the very features that determine its unsuitability as a valid source of knowledge for policymaking. One significant problem which has emerged from the pilot process, for example, has been the tendency for participants to focus on issues outside the remit of NHS England. Participants want to focus on issues of local service delivery or the broader political debate concerning the related marketisation reforms, yet NHS England has no jurisdiction at either end of the spectrum.[[26]](#endnote-26) The risk is that the outcomes from NHS Citizen are too woolly or tangential to be of use to the Board members and senior NHS England officials charged with responding to and enacting them.

Of course, organisers are acutely aware of this risk and have made painstaking efforts to shape and convey NHS Citizen as a constructive tool for Board members. But the process of packaging or translating the claims raised in public deliberation risks undermining the open and unmediated nature of NHS Citizen—the very thing which makes it appealing to civil society groups in the first place. In fact, early indications suggest that some individuals and groups initially attracted to NHS Citizen have moved away from the initiative as they perceive a lack of capacity to follow through on what emerges from the innovation[[27]](#endnote-27)—a finding consistent with broader work on stakeholder engagement with policy deliberation, too (see Boswell and Corbett 2015).

The broader point is that sustaining public engagement in the face of inevitable disappointment remains a perennial challenge. A recent effort to open up consultation about the direction of NHS Citizen has met with a flurry of criticism from online commentators—actors who have participated at various points of the process but have become disillusioned by what they see as a lack of real action and a growing disconnect between the organisers of NHS Citizen and the actors who participate in it.[[28]](#endnote-28)

*The existential dilemma: whether to elicit participation at all?*

The third dilemma we have identified highlights the ‘existential’ questions faced by public administrations when it comes to broad civil society engagement: how, to what extent, and to what end to engage? This is deemed to be an ‘existential’ dilemma particularly as it challenges the very ‘*reason of being’* of bureaucratic bodies, which, by their very design, are not intended to be participatory structures. More specifically, technocratic bodies need to gauge what shape participation should take and what purpose it will serve. Lacking clear and institutionally agreed answers to the questions above can pave the way to participatory ‘experiments’ conducted by technocratic bodies, as the Forum case above, that generate confusion and scepticism amongst those who take part in them[[29]](#endnote-29). In the case of the Commission, the participation of civil society organisations in the Forum meetings was also intended to elicit the approval of the Member States for the EU’s new initiatives to uphold child rights at the national level. Civil society’s disengagement, however, meant that the Member States were reluctant to support the Commission-driven initiatives to tackle child rights violations[[30]](#endnote-30).

It is too soon to tell whether any such repercussions might occur in the NHS Citizen case. As the NHS Citizen project has grown in scope and complexity, and particularly as it becomes subject to more aggressive publicity in the upcoming ‘implementation phase’, the stakes only get higher. On the one hand, continued (qualified) success will rest on creeping ‘cultural change’ within NHS England, as well as careful, ongoing navigation of obstacles and management of trade-offs among the powerful interests associated with health governance. On the other hand, failure to embed and sustain the NHS Citizen initiative will bring with it fresh and more probing challenges still. Indeed, having raised hopes of consequential and authentic public engagement, only to dash them at the last, NHS England risks inviting significant political scrutiny and interference. Either way, the operational focus on output legitimacy becomes hard to sustain.

**Conclusion**

Are technocratic bodies damned if they do not elicit participation, but damned if they do, too? In this conclusion, we seek to unpack the lessons that this analysis holds for our understanding of how technocratic bodies build and maintain throughput legitimacy, qua inclusiveness and openness to civil society.

The first and most obvious lesson is that *participatory mechanisms are no simple institutional fix to the perceived legitimacy deficits of technocratic bodies*. In fact, we learn from the Forum case, tokenistic engagement undertaken under the premise of a quick fix can provoke deeper cynicism among civil society actors and further reproduce an unflattering, undemocratic image. Certainly, of course, there is reason to think that such a ‘fix’ might be harder to achieve at the EU level. But we see that even in the more conducive case of NHS England—one also uniquely characterised by the best of elite intentions and founded on best practice skills and expertise—grafting participatory mechanisms onto technocratic bodies involves a significant investment in resources and energy, with little hope of final resolution. It also occurs amid the constant threat of dissolution should the political winds change.

The second is that *embarking on a participatory mechanism can be disruptive for technocratic bodies.* It entails an (at least partial) opening up that, by its very nature, challenges the expertise and technical efficiencies which characterise these institutions. On the one hand, from the NHS Citizen case, it is clear that engagement for some actors is predicated on the pursuit of such disruption. They hope that the initiative might develop sufficient clout to challenge the marketisation of the NHS, and in doing so push the agenda out well beyond the scope of NHS England’s remit. On the other hand, the Forum case shows us that even attempts to minimise such disruption by pursuing tight, top-down control of the agenda can backfire. The resultant experience of poorly designed participatory mechanisms prompts greater adversarial scrutiny on the part of civil society actors. Pursuing stakeholder participation, which raises the prospect of improved throughput legitimacy, seems to be disassociated from the output legitimacy typically associated with technocratic bodies like those in our analysis.

The third and most fundamental is that *participatory mechanisms alone seem insufficient in eliciting throughput legitimacy*, and that parallel strategies are needed to augment or strengthen their impact. In particular, mitigating the aforementioned risks requires considerable behind-the-scenes management. This is especially apparent where the Forum has encountered so much scepticism. Indeed, Commission external services have been more successful in engaging informally with civil society actors to address child rights issues in EU external policy (Iusmen 2012). These consultative arrangements provide civil society actors with informal and regular access to Commission officials behind-closed-doors and thus greater input into children’s rights’ policies pursued by Commission external services. This is a significant concession made in the face of ill-will created by the tokenistic Forum. Yet in the NHS England case we see something similar (if lesser in degree), with the deliverers of NHS Citizen engaging in significant back-channel negotiation to keep key stakeholders on board. In fact, from the outset, one partner in the enterprise—the Tavistock Institute—has been almost entirely devoted to behind-the-scenes engagement with NHS managers in a bid to build buy-in from within. Doubtless, the authentic, refreshing ‘openness’ of NHS Citizen has manufactured a greater deal of good-will among stakeholders, and so there is no demand for such a large-scale ‘backstage’ operation as we see in the Forum case. But the balance may change over time as actors engaged in NHS Citizen become disillusioned with its outcomes (or, more pertinently, lack of outcomes). Indeed, organizers shared off-the-record stories about having to liaise privately with key civil society groups to keep them engaged with the process. As such, the dilemmas associated with pursuing throughput legitimacy seem to generate a more fundamental paradox. Despite the contrasting trajectories of the mechanisms in our cases, the continued existence of both comes to rely on more informal practices of behind-the-scenes negotiation, in the Commission case to effectively replace the tokenistic Forum, in the NHS England case to more subtly augment the work of NHS Citizen. Either way, though, our analysis suggests that ‘opening up’ the black box of technocratic governance might actually hinge on instantiating new processes and *practices of ‘closing down’*.

Our account has thus added nuanced understanding of the challenges, trade-offs and contradictions associated with pursuing throughput legitimacy in practice—an intriguing conclusion that further in-depth case research might parse out in two ways. First, it can further tease out the relationship between governance level and participation. In particular, there is an opportunity to explore whether participation in governance processes at sub-national level could indeed be more effective in generating throughput legitimacy for administrative bodies. Second, future research in this area may consider whether, indeed, the typology of the policy sector – whether the focus is on politically sensitive areas, as in our analysis, or sectors less salient to the general public – can shape the effectiveness of participatory mechanisms in shaping the quality of governance processes, and hence throughput legitimacy. Such work is vital in building a fuller picture of participation in governance processes and the broader issue of legitimacy.

**Notes**

1. We employ the terms ‘participatory’ and ‘participation’ here in line with Schmidt’s (2013) account of democratic governance ‘with’ the people. As a distinct addition to Abraham Lincoln’s famous dictum about democracy as being by, of, and for the people—understood respectively as voting in elections or referenda, citizen representation and governing effectiveness—governing ‘with’ the people in this sense entails an effort to actively consult with stakeholders in the policy process. Schmidt’s primary normative concern-like ours-is with the inclusion of marginal or poorly resourced civil society actors who have historically been peripheral to governance processes. [↑](#endnote-ref-1)
2. There are important exceptions, of course, including the theoretical connections made by Nabatchi (2010). [↑](#endnote-ref-2)
3. These yardsticks were developed by the authors to measure Schmidt’s dimensions of throughput legitimacy as ‘inclusiveness and openness to civil society’. [↑](#endnote-ref-3)
4. These are defined as ‘those governmental entities that (a) possess and exercise some grant of specialised public authority, separate from that of other institutions, but (b) are neither directly elected by the people, nor directly managed by elected officials’ (Thatcher and Sweet 2002: 2). [↑](#endnote-ref-4)
5. Work on political participation consistently shows that citizens are more likely to be actively engaged in issues closer to their daily lives or central to their sense of identity (see Lowndes et al. 2006), while EU initiatives have traditionally struggled to foster any genuine sense of a European public sphere (e.g. De Clerck-Sachsse 2012). [↑](#endnote-ref-5)
6. The empirical case focusing on the European Commission draws on several rounds of qualitative interviews (35) with Commission officials and children’s rights NGOs as part of the ESRC post-doctoral fellowship PTA-026–27-2846 ‘The EU Human Rights Regime: Policy Feedback and Children’s Rights’ (2011–2012). [↑](#endnote-ref-6)
7. However—given the tenuous nature of the initiative at this stage—none of the interviews or private discussions were ‘on-the-record’, and so only comments made in the explicitly public fora of the NHS Citizen events will be referred to in the analysis. [↑](#endnote-ref-7)
8. Author’s interview with Commission officials, Brussels, July 2011. [↑](#endnote-ref-8)
9. For a full list of EU *acquis* and policy documents on children’s rights check <http://ec.europa.eu/justice/fundamental-rights/files/acquis_rights_of_child.pdf> [↑](#endnote-ref-9)
10. According to the Forum’s ‘Terms of Reference’(2008), it was supposed to achieve two objectives: ‘advise and assist the Commission and other European institutions, in particular as regards mainstreaming of children's rights in EU legislation, policies, and programmes; exchange information and good practice between stakeholders […]’ (European Commission 2008:3). [↑](#endnote-ref-10)
11. Author’s interview with child rights organizations and networks, Brussels, July, September 2011. [↑](#endnote-ref-11)
12. Author’s informal conversations with child rights networks, Brussels, February 2014. [↑](#endnote-ref-12)
13. Author’s interview with child rights networks, Brussels, July 2011. [↑](#endnote-ref-13)
14. Author’s informal conversations with child rights networks, Brussels, February 2014. [↑](#endnote-ref-14)
15. Discussion in NHS Citizen Design Workshop in Bristol, September 2014. [↑](#endnote-ref-15)
16. See items 3 and 4 in the minutes of the NHS Board Meeting in London, 28 February 2013. [↑](#endnote-ref-16)
17. Discussion in NHS Research Forum in London, January 2015. [↑](#endnote-ref-17)
18. Note that despite the branding, lay citizens have tended to represent a small minority of those most active in the initiative. It is technically open to all-comers, but it has been largely those with an affiliation to a relevant civil society group in the health sector who have been aware of the opportunity and had the skills and knowledge to make use of it. [↑](#endnote-ref-18)
19. These are organisations staffed by professionals who specialise in facilitating democratic innovation, working with institutions to bring together, engage and develop citizen and civil society perspectives. [↑](#endnote-ref-19)
20. See, for example, this set of reflections published on the blogsite of one of the collaborating organizations: <http://www.demsoc.org/265/>. [↑](#endnote-ref-20)
21. Discussion in NHS Citizen Research Workshop in London, April 2015. [↑](#endnote-ref-21)
22. Discussion in NHS Citizen Design Workshop in Bristol, September 2014. [↑](#endnote-ref-22)
23. Discussion in NHS Design Meeting in Bristol, July 2014. [↑](#endnote-ref-23)
24. Author’s interview with child rights organisations, Brussels, July 2011. [↑](#endnote-ref-24)
25. Author’s interview with child rights networks, Brussels, July 2011. [↑](#endnote-ref-25)
26. Discussion in NHS Citizen Design Workshop in Bristol, September 2014. [↑](#endnote-ref-26)
27. Discussion in NHS Citizen Research Workshop in London, January 2015. [↑](#endnote-ref-27)
28. See the responses in the following webpage in response to the question ‘NHS Citizen: What it is and what it could be’: https://gather.nhscitizen.org.uk/topics/nhs-citizen-learning-eventprogramme-2016/forum/topic/nhs-citizen-what-it-is-and-what-it-could-be/. [↑](#endnote-ref-28)
29. Author’s interview with children’s NGOs, Brussels, September 2011. [↑](#endnote-ref-29)
30. Author’s interview with children’s NGOs, Brussels, July, September 2011.

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