RESEARCH ARTICLE

The Rise of Procedural Legitimacy of the EU Under the Juncker Commission: The Impact of the Better Regulation Agenda

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The aim of this paper is to examine if, and to what extent, the EU's governance system corresponds to the principles and demands of procedural legitimacy. We analyze procedural legitimacy as developed through the work of Lon Fuller and Robert Summers, and we conceptualize and examine legitimacy at the EU level through input, output, and throughput. We use these approaches to analyze the basic rationale and components of the 2015 Better Regulation Agenda of the Juncker Commission, arguing that it has enhanced citizens' involvement in the policy-making process of the EU and has led to increasing participatory practices, by strengthening throughput legitimacy. However, there are still shortcomings in establishing a deliberative mode of public engagement. Throughput seems to have a considerably increased importance in the EU's quest for legitimacy, although there is still room for improvement.

Keywords: procedural legitimacy; Better Regulation Agenda; Throughput; EU; Policy making

Introduction

The Lisbon Treaty has strengthened the democratic credentials of the EU. However, there is always a strong ongoing debate about several shortcomings in the legitimacy of EU policies, especially during crises. In recent years, the EU has undertaken efforts to address these issues in a multitude of ways, the primary of which, we contend, is through increasing so-called 'throughput' legitimacy, originally developed by Vivien Schmidt (2013).

Our aim is to trace how throughput legitimacy, which is founded on the framework of 'procedural legitimacy' developed by Lon Fuller (1940, 1954, 1969a), has been enhanced within the EU, leading to an increasingly deliberative character of EU decision-making processes. Procedural legitimacy has direct connections with the principles and theoretical elements of deliberative democracy, since effective deliberation requires organized procedural preconditions. In turn, both have impacted the development of throughput legitimacy. We draw on the case of the 2015 Better Regulation Agenda of the European Commission (EC) Presidency of Jean-Claude Junker, which aspired to increase participatory and deliberative features in the EU policy cycle with a focus on throughput legitimacy.

The article unfolds as follows. In the next section, we establish the theoretical connection between deliberative democracy and procedural legitimacy, highlighting their foundations and perspectives. We then proceed to examine how the development of the throughput approach to EU legitimacy has been informed by procedural legitimacy and deliberative democracy principles. We use our theoretical analysis to critically assess the basic rationale of the 2015 Better Regulation Agenda for the purpose of examining whether its framework really supports throughput legitimacy, and thus, whether it reinforces deliberative democracy. Our conclusion summarizes our findings while providing prospects for future research.

Deliberative democracy and procedural legitimacy

Deliberative democracy has been subject to extensive academic research, particularly after the late 1980s. It was first proposed as complementary 'to more conventional electoral democracy' and 'as a response to the "aggregative" view of democracy advanced by rational choice theorists', based on a liberal conception of the individual by John Rawls (Rosenberg 2007: 2, 4–6). Although a common all-encompassing definition does not exist (Parkinson 2006: 2–3; an overview can be found in Bächtiger et al. 2018), deliberative democracy's core characteristic is 'the process by which individuals sincerely weigh the merits of competing arguments in discussions together' (Fishkin 2009: 33).

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Fostering legitimacy is a critical and ingrained element of deliberative democracy. As Parkinson argues, 'above all, however, deliberative democracy in its classic formulations is an account of political legitimacy' (2006: 4). After all, 'serious and systematic engagement with stakeholders and citizens can only improve trust in public authorities' (Smulders and Paquet 2018: 82). Decisions are deemed legitimate if, inter alia, all those subjected to them participate in the deliberation process to reach them. Primary importance is placed on the procedures through which these decisions are reached. Scholars recognize various conditions that need to exist for deliberative democracy to work, such as diversity, equality, inclusiveness, openness, etc. (Parkinson 2006: 4; Fishkin 2009: 33–34; Rosenberg 2007: 9).

One of the key scholars on the importance of procedures in a democratic system of governance is the legal philosopher Lon Fuller. Fuller argued that to understand what a legal precept means, you need to understand what it is *for* (Summers 1984: 16–27). The purposiveness of rules has two main functions, a direction-giving and a means-ends correlation function: Rules provide people with guidance and orientation in their lives, and they embody a relationship between means and ends. In his book *The Morality of Law* (1969a: 106), Fuller defined the legal system as 'the enterprise of subjecting human conduct to the guidance and control of general rules.' People expect to be guided by specific rules, operational processes, and entire legal systems, which conjunctively form a *rule of law*. And every rule of law, which integrates 'is' and 'ought,' evokes demands of *justification*, and hence requires support from acceptable principles of legitimacy (Winston 2001: 34).

In the case of the EU, as well as of any modern liberal democratic state, deliberative practices vary in type, often including complicated arrangements with many stakeholders and actors. The combination of rules and processes into a full-blown legal system, together with the moral qualities rules, processes, and systems have, can, and must be studied to raise consciousness on policy makers and ordinary citizens alike. Fuller termed this study and consciousness-raising 'eunomics,' by which he meant the 'theory of good order and workable arrangements' (Fuller 1954: 477). In eunomics (from Greek, meaning 'the science of good legislation'), there is no strict separation between means and ends; rather, it is a practical enterprise addressed to the legal realization of social ends that uses processes as the primary unit of analysis, from which rules and other outcomes derive. Not only do we need appropriate processes in order to be able to realize social ends, but the proper arrangement of our procedural means that abide by moral values helps obtain good substantive results. In that sense, due process underpins the legitimacy of the workings of a legal system (Summers 1984: 74–75).

In eunomics, each type of process contains two central elements: the design of a mechanism, which provides a determinate structure of decision-making, and moral principles appropriate to that design, i.e., a set of moral requirements distinctive to the process (Winston 2001: 42). Since, under the rule of law, legal institutions are the most important social agencies of legitimation, and legal institutions necessarily operate through procedural arrangements, 'legal processes constitute modalities through which particular outcomes – decisions, rules, acts – acquire legitimacy. Legitimation results from conforming to the moral conditions stipulated in a legal process' (Winston 2001: 46). Therefore, each process contains an internal morality, the violation of which by officials reduces the legitimacy both of the process itself and of its output.

According to Fuller, not only should appropriate legal processes be in place, but these processes must involve participation and deliberation of citizens (Fuller 1965: 152). When citizens elect their representatives, but also themselves participate—either directly or via representative civil society organizations—in the law-making processes (e.g., legislative hearings and forums of deliberation), this itself 'injects' legitimacy to the legal system. This is the core argument of Fuller's 'procedural due process':[1] individuals potentially aggrieved or adversely affected by public decisions must be given the possibility to effectively participate in and to be heard in the decision-making process. It is by virtue of participation, and the ensuing capacity for some form of deliberation, that a process gains legitimacy; procedural legitimacy, in turn, lends moral power to the outcome of a process of decision-making, irrespective of whether everyone agrees on that outcome, since there will naturally be different opinions. Overall, fair participation in the decision-making process, as the core element of procedural legitimacy, is a moral and political value of the first order in genuine democracies (Fuller 1968: 60–61; Fuller 1949: 705–07).

It thus becomes apparent that the existence of effective procedures is an important precondition for the participation of stakeholders, and that participation, in turn, is directly connected to the basic tenets of deliberative democracy. The possibility of involved stakeholders' fair participation and deliberation in decision-making processes affecting them—arguably the core of deliberative democracy—is the centerpiece of procedural legitimacy. Stakeholder involvement and participation have an intrinsic value: Whatever the substantive outcome of a process may be, being able to participate in a hearing or to deliberate represents a valued human interaction in which affected persons have, at the very least, the chance of participating in decision-making that vitally concerns them, of becoming aware of the reasoning behind the decision, and of articulating arguments that may prove convincing and, to a lesser or greater extent, even affect the outcome (Tyler 2006: 115–124, 170–178). Therefore, in procedural legitimacy, an emphasis is placed on rules and regulations that are primarily oriented towards deliberation, and not only towards representation. In deliberative democracy, this deliberation (and all of its implementing procedures) is highly important within the broader democratic governance framework.

Legitimacy framework within the EU

The concept of procedural legitimacy, with the emphasis it places on the importance of procedures—including deliberative procedures—for legitimizing policy decisions, can be connected to the throughput approach to EU legitimacy (Schmidt 2013),[2] which, in turn, can be useful to the proponents of deliberative democracy in policymaking procedures within the EU. The throughput approach to EU legitimacy is part of the wider input/output/throughput legitimacy framework, developed primarily to describe legitimacy standards within the context of the so-called 'EU democratic deficit.' Fritz Scharpf developed the original approaches of input and output legitimacy in the EU in the late 1990s. He argued that, according to the input approach, decisions are legitimate 'if and because they reflect the will of the people,' while according to the output approach they are legitimate 'if and because they effectively promote the common welfare of the constituency in question' (Scharpf 1999: 6).

Throughput legitimacy was developed more recently by Vivien Schmidt to describe 'what goes on in between the input and the output' (Schmidt 2013: 14). Throughput legitimacy ensures 'people's trust that the rules are being applied fairly, in the spirit as much as the letter of the law, in ways that are responsive to citizens' input demands while ensuring the best possible policy outputs' (Schmidt 2020: 25 and 31). It also places importance in 'productive deliberative interrelationships among actors in the wide variety of throughput governance processes that make up the coordinative discourse of the policy sphere' (Schmidt 2013: 17).

Input and Output

In the output approach, the main argument is that more 'democratization' of the EU would lead to less efficiency, an element which constitutes, as it is argued, the primary purpose of the EU (Papadopoulou 2017: 70–71; Moravcsik 2008: 340); input legitimacy should be sacrificed to achieve the desired outputs (Bellamy 2010: 3; Majone 2003: 5). In this approach, the EU is viewed as a highly technical organization lacking decision-making capacity in redistributive policies that have high threshold requirements for citizen input, such as taxes or social welfare (Moravcsik 2002: 607–608 and 2008: 333; Bredt 2011: 41). Issues on which the EU has competence over are argued to not be electorally salient (Majone 2010: 157; Hobolt 2012: 90), and, in any case, 'technocratic expertise in technical policies is superior to the knowledge, or willingness of participation of citizens (on account of the high costs involved)' and independent technocratic institutions can prove much 'more impartial and less prone to biases or pressures by powerful national minorities' (thus avoiding the risk of a 'tyranny of the majority'; Moravcsik 2002: 614; Kyriakidis 2016: 214). The approach also includes arguments relating to the (indirect) legitimacy of existing structures within the EU (Moravcsik 2008: 334–336); even under Qualified Majority Voting in the Council of the EU, 'consensus-seeking practices are so effective, that politically salient national interests that are vigorously defended by the respective governments are rarely overruled' (Scharpf 2009: 182).

Proponents of the input approach share a more republican-based perspective to democratic governance, recognizing the value of the output of policies while, at the same time, predominantly emphasizing 'the input of citizens which is necessary to produce the proper outputs' (Eriksen & Fossum 2000: 43; Scharpf 2009: 188). Decision-making based on deliberation and consensus, subject to party and policy competition, is a key element of the democratic system, regardless of the level (national or supranational) at which this system operates (Follesdal & Hix 2006: 549–551). Proponents of the input approach further argue that the EU has developed considerably from its original nature as a mere facilitator, and has now come to affect a wide range of redistributive policies, which, in turn, makes effective citizen input of paramount importance in ensuring the quality of democratic governance (Follesdal & Hix 2006: 543–552; Kyriakidis 2016: 215). Even if the EU is supposed to produce policies that are highly technocratic and beneficial to EU citizens (as proponents of the output approach suggest), it is argued that citizens' preferences are not fixed, and so participation would be required in order to determine them. To this extent, additional input by citizens would ensure that the EU policymaking structure remains legitimate and responsive to citizens' demands (Follesdal & Hix 2006: 545–549; Auberger & Iszkowski 2007: 274). After all, it is argued that independent technocratic institutions are not necessarily or automatically better equipped to produce effective policies compared to majoritarian-based institutions, and are, in fact, more prone to influence by lobbies or interests, or may often simply 'overlook issues that are legitimate worries for ordinary folk' (Bellamy 2006: 737–740; Follesdal & Hix 2006: 546).

Throughput, procedural legitimacy and deliberative democracy within the EU

Neither the input nor the output approaches to EU legitimacy seem to directly address the principles of deliberative democracy in EU policymaking. The output approach is primarily concerned with the production of outputs by the EU, and goes as far as being directly against an increase in any type of participatory processes, since that is argued to create additional impediments to the production of proper outputs. The input approach is more relevant, but is largely concerned with more traditional (representative or even aggregative) forms of democratic participation, or those related to 'horizontal' accountability (e.g., cross-institutional oversight; O'Donnell 1998).

But throughput 'focuses on the quality of the governance processes of the EU,' emphasizing institutions' efficacy, accountability, inclusiveness, transparency, and openness in terms of either their outcomes or their ideational perspective, i.e., their more constructivist aspects (Schmidt 2013: 5–8, and 2016: 1033). The approach includes four basic elements: efficiency of decision-making processes; accountability of actors involved in those processes;

transparency of information; and inclusiveness of civil society to deliberation and consultation (Schmidt 2013: 6–8, 2016: 1038, and 2020: 32). These elements are based on an institutional as well as a constructivist perspective to EU decision-making. The institutional perspective underlines the importance of the principles of efficiency, transparency and accountability, as well as 'the intermediation processes through which citizens organized in interest groups have a direct influence on policy making,' based on pluralist and democracy-associated theoretical approaches (e.g., Robert Dahl; Schmidt 2013: 15). An example is the Commission's post-1990s attempts to include civil society organizations (special interests, activists, etc.) to its policymaking (Schmidt 2013: 15). The constructivist perspective underpins the deliberative aspect of the decision-making processes, highlighting that it can be 'a "counter-steering mechanism" ensuring that citizens' community power is adequately channelled in societal and administrative decision-making, thereby improving accountability' (Schmidt 2013: 17).

These elements are in line with what scholars argue is necessary for a truly democratic deliberative process (Rosenberg 2007: 9). In fact, the very foundations of the theory are related to procedural legitimacy, with Schmidt citing David Easton's political systems theory as a major influence (Schmidt 2020: 31). Easton, viewing political life as a 'system of behavior imbedded in an environment to the influences of which the political system itself is exposed and in turn reacts,' argued that it can eventually be interpreted as 'a complex set of processes through which certain kinds of inputs are converted into the type of outputs we may call... policies, decisions' (Easton 1965: 17).

This view has a direct connection with the work of Fuller and Summers, and with the concepts of 'procedural due process' and 'process values.' As Summers (1997) aptly argues, 'rules are of special importance. […] (They) are the main legal instruments for authoritative embodiment not merely of essential civic policies such as community peace, order and safety, but of all kinds of problem-specific policies' (1173–1174). He further explains:

> a process may also be good insofar as it implements or serves 'process values' such as participatory governance and humaneness. These forms of goodness are attributable to what occurs, or does not occur, in the course of a process. They are thus process-oriented, rather than result-oriented (Summers 1974: 13).

Processes are not mere technicalities; they open a forum of interaction between legal rules and background social practices, with their purposes and expectations (Fuller 1969b). When normative systems are generally accepted as procedurally fair and rational, legitimacy will ensue (Fuller 1954: 464).

As Kenneth Winston puts it, 'Fuller took as the defining characteristic of each form of legal order the manner of people's participation in them' (Winston 2001: 18). The deliberative democracy element that is intrinsic in procedural legitimacy is, thus, another form of the

never-ending quest for the moral and political autonomy of persons. In a democratic polity, citizens are engaged as moral agents only when, and to the extent that, they appreciate the fairness of the legislative and administrative procedures of a legal order, and therefore acknowledge the moral force of the rules these procedures produce as output (Winston 2001: 3). It is this moral sense of *dignity*, born by citizens' capacity to participate in the processes of rulemaking that concern them, which probably is at the source of the specific kind of legitimacy produced by processes as such, i.e., procedural legitimacy (Tyler 2013: 13–14, 93–107; Tyler & Jackson 2014).

Considering all the above, the primary importance placed on procedural legitimacy in the throughput approach to legitimacy within the EU makes it an ideal 'lens' through which to examine whether EU policies—in this case the 2015 Better Regulation Agenda—establish a more deliberative process in the policy cycle of the EU. To achieve this, we use the four main elements of throughput as the guiding principles, focusing, in accordance with both throughput and procedural legitimacy, on procedures: Is the decision-making process efficient? Are actors involved accountable? Is information transparent? Is the deliberative process inclusive? To answer the first question, we conduct an overview of the procedures involved in the 2015 Better Regulation Agenda and how efficient these have been in promoting deliberative practices, such as participation of, and discussion between, different stakeholders. To answer the second question, we examine whether the aforementioned procedures have proper safeguards of accountability of the actors involved in the decision-making process, both during the process and after the policy outcome. In terms of the third question, we analyze whether the aforementioned procedures include provisions and rules related to transparency; this is a core element of deliberative process, without which the various actors and stakeholders cannot obtain the proper information necessary to conduct an effective deliberation. Accordingly, to answer the fourth question, we address the participatory aspect of these procedures, i.e., whether participation of different stakeholders from various societal groups affected by policies are given a voice in the deliberation process.

In the next section we examine the Agenda against each of these questions. The analysis is based on the discussion of the official EU documents on the 2015 Agenda and the relevant scholarship.[3] Our remarks are complemented with the observation of the portal of the Agenda online, its design, and the functions it provides. Thus, the following analysis does not constitute an empirical analysis but one that combines the evaluation of the normative principles in the design of the Agenda with a basic observation of how it actually operates.

The Juncker Commission Better Regulation Agenda and throughput legitimacy
Overview of the 2015 Agenda and its basic principles and procedures
The EU has always been confronted with a debate around an 'existential' democratic deficit. The attempt has been

to address these issues surrounding legitimacy gaps primarily by increasing participatory opportunities in the decision-making procedures, with a major shift being accomplished under the Treaty of Lisbon.

In 2015, the revamped Better Regulation Agenda was launched (European Commission 2015a) with the purpose of providing more participatory governance and of significantly increasing public participation throughout the policymaking procedures within the EU (Garben, 2018: 3–4). The Agenda had begun as 'a rather obscure, legally fuzzy initiative...' by the EC to improve and simplify the regulatory processes, based on the 'Lisbon Strategy' (Alemanno 2015: 344). It was a broad initiative engulfing, inter alia, the Regulatory Fitness and Performance Programme (REFIT) of 2012, aimed at eliminating unnecessary regulatory costs and ensuring that the body of EU legislation remains 'fit for purpose' (European Commission 2012: 3), and the to-be-upgraded Impact Assessment Board. The Agenda corresponded to the 10th priority of the Juncker Commission, 'Democratic change', and reflected a minimalistic perspective: '... focusing on the things that really do need to be done by the EU and making sure they are done well' (European Commission 2015a: 3). The relevant Communication by the Commission underlined the importance of opening policy-making and of 'interact[ing] with those implementing and benefiting from EU legislation' (European Commission 2015a: 3). Its legal foundations can be found in the Treaty of the European Union article 11(3), which provides 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.' Because of both the Treaty article and the Agenda initiative, the EU has been ranked as having 'one of the most advanced regulatory systems in the world' (European Commission 2021: 1).

The Agenda consists of two parallel procedures: the first is entitled 'Consultation and Feedback' and allows for input at several stages of the lawmaking cycle (see the next section). The second is the process of 'Quality', safeguarded by the Regulatory Scrutiny Board (RSB), which exercises a quality assurance role. As part of the Commission's renewed commitment to Better Regulation, the Juncker Commission announced that the Impact Assessment Board would be transformed into the independent RSB to strengthen the existing system of quality control. This reform was an integral part of the Agenda (Papadopoulos 2018: 20–23). Some member states had been advocating for a fully independent RSB, but in the end, a compromise was reached, resulting in the RSB becoming an independent advisory body within the Commission and being staffed partly by EU officers (three members) and partly by independent experts (six members; Radaelli 2021; European Commission 2015b; Alemanno 2015: 350). Compared to the previous Impact Assessment Board, the RSB has augmented functions that include considerable retrospective evaluation and 'fitness checks' of existing EU policies and legislation. Not only has its composition widened with the inclusion of non-Commission experts, but its capacity has also been

strengthened and it can now scrutinize the quality of all impact assessments and issue opinions on the drafts of the impact assessment reports in line with relevant guidelines. The RSB's opinions provide recommendations on how these draft impact assessment reports should be improved by the Commission Directorates-General (DGs) that wrote their first draft.

Considering all the above, the emphasis of the Agenda's operation lies on enhancing feedback mechanisms, and also on ensuring that quality, in terms of evidence-based policymaking and justification, is maintained at all stages. The Agenda provides ex ante and ex post evaluation (Radaelli 2018; Alemanno 2015: 346), and the Secretariat-General of the Commission oversees its operation.

Objectives, structure and function of the Agenda
The Agenda is built around three key pillars: impact assessment ('how policy goals can be achieved in the most efficient way without imposing unnecessary burdens'); evaluate first ('opportunities to simplify and reduce unnecessary costs based on analyses and stakeholder inputs'); and stakeholder engagement ('active engagement of civil society, which invites inputs from stakeholders at all points in the policy cycle'). It becomes clear, therefore, that deliberation has been considerably upgraded from its position within REFIT, by becoming a part of the second and, primarily, of the third pillar of the Agenda (European Commission 2015a: 2).[4]

As already noted, the Agenda covers two parallel procedures, which ensure that all stages of the law-making process are properly monitored and constantly evaluated, and that the opportunity for the public to have its voice heard exists throughout the process. The first parallel procedure is entitled 'Consultation and Feedback' and provides the opportunity for feedback in the form of a free text at any European language, at different stages of the legislative procedure in relation to different legal acts and instances, even at an early stage, when ideas are initiated by the EC (roadmaps). It opens up public participation and participation of stakeholders in law-making procedures via the dedicated portal.

In 'Consultation and Feedback', input involves four stages: i) Roadmaps, Evaluation Roadmaps, and Inception Impact Assessments; ii) Public consultation in the context of all Impact Assessments and Evaluations; iii) Feedback on Commission proposals; and iv) Feedback on Draft Delegated and Implemented Acts. In particular, with regards to the time cycle of the 2015 Agenda, we identify four main instances in which feedback is allowed:

a. At the level of initial ideas (before an initiative is introduced), allowing citizens to propose ideas. Commentaries of the public may consist of a free text of up to 4000 characters.
b. Before the Commission adopts an initiative, with commentaries by the public allowed for a period of 12 weeks. This is the public consultation instrument, through which citizens can express their views and engage in a legislative initiative via a tailored questionnaire.

c. After the adoption of a legislative act and after its submission to the European Parliament and the Council. At this level, the public can comment on the draft adopted act for a period of 8 weeks through a free text of up to 4000 characters.

d. Ex post, i.e., after the initiative is adopted at the level of delegated or implementing acts, when the EC can either amend or supplement a delegated act or set the conditions of its implementation. At this stage, commentaries by the public are allowed as per (c) above.

From the analysis above, it becomes evident that 'feedback' is enabled throughout the policy cycle, and normatively speaking, provides multiple opportunities for participation.

In addition, the 2015 Agenda did not only aim to improve and inform new legislative initiatives. Its ambition was also to screen, review, and improve the existing stock of legislation in order to be more targeted, quantitative and inclusive. This was sought to be achieved through the REFIT platform, and its results are to be embedded in political decision-making. The platform 'represents the most significant effort at connecting – through its multi-stakeholder composition – the highly technocratic Better Regulation, in particular its REFIT program, to the public' (Alemanno 2015: 351).

The Agenda includes a 'Toolbox,' which consists of a number of documents that are structured around different stages of lawmaking (chapters) and provide guidelines, particularly for the DGs that are responsible for each consultation.[5] The documents are also of an informative character for citizens as well, and they contribute to the demand for transparency, as they explain the grounds and procedures on which consultations are built. The toolkit associated with the Agenda is an essential component and a guide map for DGs that wish to begin an initiative. The several 'tools' provide a concise breakdown of the procedures, and they analyze each stage separately (see also Deligiaouri & Suiter 2021).

Examining deliberative democracy and throughput legitimacy criteria in the Agenda

The Agenda, as presented by the Commission, is associated with principles of deliberative democracy and emphasizes the need to increase legitimacy. It aims at increasing effectiveness and efficiency of legislation by simplifying it and by eliminating or reducing unnecessary costs (European Commission 2015a: 10, REFIT). Its three main objectives are 'more frequent stakeholder consultations throughout the policy cycle, more thorough impact assessments, and improved ex-post evaluation' (Schout & Schwieter 2018: 8). Openness and transparency appear in an entire separate subsection of the Agenda (European Commission 2015a: 4–5) where the EC specifically mentions that 'the public and stakeholders rightly expect to be able to influence decision-making [and to] examine the evidence…', and commits 'to engaging with stakeholders and citizens throughout the policy cycle'

(European Commission 2015a: 5). As previously analyzed, the Agenda provides specific and justified procedures allowing for the involvement of everyone interested. It is clear, therefore, that the Agenda addresses, at least at the level of declarations, each one of the throughput approach's elements outlined above (efficiency of decision-making processes; accountability of actors involved in those processes; transparency of information; and inclusiveness of civil society to deliberation and consultation).

The EC's portal 'Have your say' is the Better Regulation Agenda's platform that invites citizens and businesses to share their feedback both on new EU policies and on existing EU laws.[6] In this dedicated platform all legislative initiatives appear and at the top of the page we find the ones that are open to feedback and consultation. The EC analyzes and summarizes the feedback and contributions received, and in some cases, reports are made available so that contributors can see how their feedback contributed to fine-tuning the EC's initiatives. A closer observation, though, reveals that the correspondence of declarations with their implementation is still not sufficient, despite the major advances that were made. More specifically, regarding inclusiveness of civil society to deliberation and consultation, even though it is in principle enhanced by the Agenda, it still suffers from a number of shortcomings. The Agenda relies on a self-selection mode of participants, i.e., anyone can participate in the portal of consultations online and provide feedback. Participants can include ordinary citizens, companies, and any stakeholder interested in contributing an idea/opinion. Thus, the online and (in principle) open access provided by the Agenda may qualify as an inclusive participatory framework only if inclusiveness is interpreted as a 'no one is excluded' concept. The only precondition for participation is that someone needs to have a European Commission Authentication System (ECAS) account or register for a new one. Presumably this term aims to encourage responsible contribution and to avoid chatbots and other actors that could interfere in the procedure. Nevertheless, self-selection may be biased and leaning towards vested interests, thus causing an imbalance and asymmetry, a well-known shortcoming in open consultations.

For reasons of transparency, and to avoid vested parties dominating the discussion, an individual, a representative of a company, or any other stakeholder who wishes to participate, has to register in advance with the 'Transparency Register'.[7] This requirement aims to ensure that the entire decision-making process is transparent and that the public is provided with information on the participants who provide feedback. Therefore, potentially everyone can assess any impact these parties had on the final outcome or on the discussion in general.

Citizens' involvement in the Agenda takes the form of either a public consultation at the stage prior to the Commission adopting an initiative or a feedback mechanism at various stages of the policymaking process, as outlined above. Comments are published on the platform and are visible to anyone, and are, thus, able

to 'trigger' a discussion. To this extent, the potential for some form of deliberative discourse is provided from a normative perspective. However, there is no structure, like nested arguments, that would allow for interaction and deliberative discussion to take place among interlocutors. Public consultations involve a structured questionnaire with some open questions that citizens fill out online and submit to the relevant DG that oversees and manages the specific consultation. At all other stages, feedback is given by posting a comment in any European language.

Public consultations and the questionnaire are only visible to the relevant DG that received the submissions. Thus, while citizens' input at the Agenda can take place during the whole policy cycle and all stages of the procedure, it does not really seem to offer opportunities for constructive dialogue, 'nor is the feature of visibility present at all stages' (Deligiaouri and Suiter 2021: 80). Consequently, the criterion of 'effective participation' and involvement of interested parties is not really fulfilled. The Agenda does not ensure that all interests are represented, and hence, seems to fall short in terms of achieving 'political equality' as interpreted through a proceduralist perspective (Alemanno 2020). The deliberative features are also weak, even though the Agenda has instantiated a considerable effort for engagement in a constructive manner.

When evaluating participation, one should also consider the 'invisible' barriers of a potential lack of infrastructure or internet literacy that may prevent certain categories of citizens from being involved. Biases stemming from a hesitancy to participate due to the complexity of a topic or of the procedures should not be ignored. Streamlining the entire procedure, while simplifying input methods, would be important assets in improving the level and quality of engagement.

Shortcomings are also observed with regard to transparency and accountability. In relation to effectiveness and the potential policy impact, DGs that are responsible for the organization of each consultation also undertake the task of the evaluation of public consultations and feedback. Results of consultations and feedback are presented in the Impact Assessment, which constitutes part of the legislative proposal that the Commission sends to the co-legislators. In many cases, there has been a quantitative analysis of the comments received and the public consultation results, especially when the consultation exhibits a high volume of participation. However, in some cases there has been a more nuanced qualitative analysis provided as an Annex on stakeholders' consultation and is attached at the Impact Assessment.

To date, open consultations remain at the discretion of the Commission to utilize and to take into consideration in the decision-making process. The Commission itself states that 'better regulation tools and procedures are there to support political decision-making, not to substitute it' (European Commission 2019: 4). While this is understandable, we believe there is the need for clear evidence and correlation of decision-making to the Better Regulation principles, especially with regard to input

provided by stakeholders. That would make accountability stronger as the public could see directly on which grounds a decision is made.

With reference to the evaluation of the Agenda, the Report released in 2019 by the OECD (OECD 2019) provided a positive evaluation and ranked the EU higher in comparison to the member states in indicators such as stakeholders' engagement and impact assessments. The 'internal' evaluation and stocktaking exercise in the EU in 2019 (European Commission 2019) has acknowledged a number of positive steps in relation to evidence-based policymaking. The report identifies the Agenda as a shift in the EU institutional culture and as a working mode that aims to be at the heart of decision-making. Nevertheless, it underlines the need for a shared effort among institutions and member states in adopting Better Regulation principles, while stating the Commission's commitment for the improvement and continuous implementation of Better Regulation practices and the overall framework.

Conclusion

This paper utilized the concept of 'procedural legitimacy' to examine whether the EU has indeed made a more deliberative turn to its governance system. Connections were drawn between this wider theoretical concept and deliberative democracy, as both are expressed in the 'throughput legitimacy' approach of the EU democratic deficit. Throughput legitimacy was then used to examine the 2015 Better Regulation Agenda of the European Commission as a case study for the increase of participatory and deliberative practices in the EU.

Procedural legitimacy presupposes effective citizen participation and involvement and opens the road to deliberation since effective deliberation requires organized procedural preconditions. In this way, the concept of procedural legitimacy is inextricably connected to deliberative democracy. We have pronounced this connection throughout this article, demonstrating how it has been manifested within the field of EU studies through the arguments of the throughput approach to EU legitimacy. In other words, procedural legitimacy is the common ground upon which both deliberative democracy more broadly, and the throughput approach to EU legitimacy, build upon, and it constitutes the connection between the former, more general concept, and the latter, more specific (both theoretically and subject-wise) one. Our main theoretical argument was that throughput conceptually draws chiefly from procedural legitimacy and is, in turn, appropriate for the examination of deliberative processes specifically within the EU. To us, it is clear that neither the input nor the output approaches to EU legitimacy seem to directly address the important elements of deliberative democratic theory within the EU: the output approach is primarily concerned with the production of outputs by the EU, whereas the input approach is largely concerned with traditional democratic representation. It is the throughput approach, with its heavy importance placed on procedural legitimacy, that is best suited to examine whether EU policies are of a

more deliberative nature. Throughput can, thus, be useful in examining deliberative democracy and its impact on legitimacy within the EU.

The EU has been under constant pressure due to the well-known accusations of suffering from democratic deficit. To increase its legitimacy, it has introduced a number of initiatives aiming at enhancing citizens' involvement by installing more deliberative elements in its decision-making process, and has adopted an accompanying deliberative discourse. Having outlined the Input/Throughput/Output approaches to EU legitimacy, and having demonstrated the theoretical connection of the throughput legitimacy framework with deliberative democratic theory through the overarching theoretical concept of procedural legitimacy, the paper presented and provided critical remarks on the 2015 European Commission's Better Regulation Agenda in terms of deliberative practices and throughput legitimacy.

In our analysis, the participatory and deliberative democratic element that is intrinsic in procedural legitimacy is another form of the quest for moral and political autonomy and dignity of persons. In a democratic polity, citizens are engaged as moral agents only when, and to the extent that, they appreciate the fairness of the legislative and administrative procedures of a legal order, and therefore acknowledge the moral force of the rules these procedures produce as output. Citizens' capacity to participate in the processes of rulemaking that concern them probably is at the source of the specific kind of legitimacy produced by processes as such, i.e., procedural legitimacy.

The 2015 Better Regulation Agenda of the European Commission was one of the flagship political initiatives to tackle the perceived lack of legitimacy in EU policies, especially regarding its decision-making procedures. The Agenda is part of a broader initiative encompassing, inter alia, REFIT and an upgraded impact assessment process, and serves the purpose of increasing public participation throughout the policymaking procedures within the EU. Our analysis of the two aspects of the Agenda clearly showed that the Commission places emphasis in enhancing feedback mechanisms and in ensuring quality at all stages of policy-making through constant monitoring and evaluation. Overall, the Agenda seems clearly linked to legitimacy and deliberative democracy through a self-conscious effort towards more transparency, accountability and efficiency.

We consider the procedural legitimacy perspective adopted here and transferred within EU studies by means of the throughput approach as an element that can offer valuable contributions to a more democratic and efficient governance. Furthermore, the connection between procedural legitimacy and throughput opens new avenues of cross-disciplinary research, offering thus new perspectives to the classic Input-Output debate.

Notes
[1] 'Procedural due process' is generally defined in constitutional law as 'the right to be heard before being condemned to suffer grievous loss of any kind'

as a result of government action; see *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951).

[2] In relation to the input and output approaches to EU legitimacy, Schmidt (2013) argues that developing a separate approach for throughput legitimacy is important, considering that the processes involved in throughput legitimacy have otherwise '…sometimes been discussed in Output terms, where particular institutional or discursive processes are seen as preconditions for better Output…, and occasionally in input terms, where certain institutional processes or deliberative interactions are preconditions for better input…' (14).

[3] The analysis does not include the Agenda's re-design in 2021, which, in either case, hasn't substantially changed the Agenda's scope and orientation, but has taken stock of its operation and of critical remarks on it. For example, after 2021 there has been a strong shift towards evidence-based policymaking.

[4] For a detailed description of the Agenda and a cost-benefit analysis of its respective elements, see Renda 2016.

[5] The Agenda's toolbox can be accessed at https://ec.europa.eu/info/better-regulation-toolbox_en.

[6] The portal can be accessed at https://ec.europa.eu/info/law/better-regulation/have-your-say_en.

[7] http://ec.europa.eu/transparencyregister/public/homePage.do.

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Competing Interests
The authors have no competing interests to declare.

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