

Comparative Overview of European Standards and Practices in Regulating Public Participation¹

I. Introduction

The following paper provides a brief overview of European standards and models of public participation in decision-making processes, specifically drafting laws and regulations on governmental level only. It aims to help Macedonians benchmark the legal framework and practices against European models, and identify what elements of those models may be relevant for their context.

The paper relies mainly on standards adopted by the European Union (EU) and the Council of Europe (CoE). It also describes practices of regulation and models of participation from 9 countries throughout Europe. The overview does not analyse the implementation of the adopted documents, rather only what they prescribe for. The countries were selected based on geographical criteria and those with system similar to the Macedonian. Countries with well developed participatory practices (e.g., the United Kingdom) were also considered in order to present different approaches undertaken to advance participation. The overview highlights those models which are potentially applicable, appropriate and transferable considering the local context.

“Many years ago, a large American shoe company sent two sales representatives out to different parts of the Australian outback to see if they could drum up some business among the Aborigines. Some time later, the company received telegrams from both agents. The first said, /No business here . . . natives don't wear shoes.’ The second one said, ‘Great opportunity here . . . natives don't wear shoes!’”²

The possibility of the public to influence drafting of a law that will affect their life is integral to many democracies. Efforts to promote participation in law making processes however meet hurdles. If in some places it does not exist, or if it is sidelined or disrespected it does not mean that it cannot be properly introduced. With sincere effort many countries have been able to create practice of effective public involvement and thus strengthen the potential for the successful implementation of the laws and regulations.

II. Benefits and Challenges of Participatory Law making

Participation in decision-making processes means a possibility for the citizens, civil society organizations (CSOs) and other interested parties to influence the development of policies and laws which affect them. The importance of engaging the public in these processes is increasingly recognized by EU institutions, CoE and national governments. They have identified several benefits of participatory processes. Specifically, participation can help towards:

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- Creating fair policies/laws reflective of real needs enriched with additional experience and expertise;
- Facilitating cross-sector dialogue and reaching consensus;
- Adopting more forward and outward looking solutions;
- Ensuring legitimacy of proposed regulation and compliance;
- Decreases costs, as parties can contribute with own resources;
- Increasing partnership, ownership and responsibility in implementation;
- Strengthening democracy - preventing conflict among different groups and between the public and the government and increasing confidence in public institutions.

III. Values and Principles of Participation

In regulating the procedure for consultation institutions and organizations in Europe have highlighted several principles which guide the process. Some of those include:

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| ▪ Commitment; | ▪ Openness and consideration; |
| ▪ Recognition of rights and responsibilities; | ▪ Objectivity and equal treatment; |
| ▪ Access and clarity of information; | ▪ Resources; |
| ▪ Continuity (ongoing); | ▪ Sufficient time; |
| ▪ Proper structure (coordination); | ▪ Accountability for the process and result; |
| ▪ Publicity; | ▪ Acknowledgement and feedback; |
| ▪ Transparency; | ▪ Evaluation, etc. |

The values that these principles aim to promote have been summarized well by the International Association for Public Participation as *Core Values for Public Participation*:³

1. Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.
2. Public participation includes the promise that the public's contribution will influence the decision.
3. Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers.
4. Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.
5. Public participation seeks input from participants in designing how they participate.
6. Public participation provides participants with the information they need to participate in a meaningful way.
7. Public participation communicates to participants how their input affected the decision.

In addition to flagging the benefits it should be noted that ensuring participatory law making processes has own *challenges* too.

³ IAP2, *Core Values for Public Participation*, 2007 www.iap2.org/associations/4748/files/CoreValues.pdf, last accessed in September 2010

1. Governments may be pressed by deadlines to adopt certain legislation.
2. It may not be clear who to consult or engage; or how to do it.
3. Participatory processes are costly; they require investment in organizing meetings, writing comments, providing feedback.
4. The political context may not be supportive of public involvement.
5. Those who participate may not have enough understanding of the issues at stake.

The standards enshrined in the documents adopted on level of EU and in different countries aim to minimize the effect of those challenges and to pave the way for more effective participatory law making processes. Therefore, when developing the appropriate standards for participation in one country it is important to consider not only the opportunities, but also the challenges that surround it so that appropriate mechanisms are adopted to address and circumvent them.

IV. International Documents

The importance of public participation in policy and law making has been recognized globally. Major intergovernmental organizations have not only produced documents which aim to strengthen citizen participation; but they have also created models to support such participation, and are increasingly involving the public and CSOs in their own decision making processes. Although some of these documents are not legally binding, they lay out standards, principles and best practices which should be considering in initiatives on national level.

International level

Perhaps the first and most notable document internationally is the *Aarhus Convention*⁴ which requires that the parties of the Convention guarantee *rights* of access to information, public participation in decision-making and access to justice in environmental matters. The Convention sets out minimum requirements for public participation in various categories of environmental decision-making, and also envisions the development of compliance mechanism to ensure that the parties implement its provisions.⁵

The United Nations have several mechanisms to include CSOs in their work and consult them on the development of policies. For example, *the UN Non-Governmental Liaison Service (NGLS)*⁶ facilitates information sharing and inclusion of CSOs in deliberations concerning the development of UN policies. In the addition, the World Bank⁷ and OECD⁸ have also undertaken initiatives and produced guidelines to increase participation in decision-making processes.

European Union

⁴ UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters adopted on 25th June 1998

⁵ For more information see: <http://www.unece.org/env/pp/welcome.html>, accessed on September 14, 2010

⁶ <http://www.un-ngls.org>, accessed on September 14, 2010

⁷ World Bank, *A Call for Participatory Decision-Making: Discussion Paper on World Bank-Civil Society Engagement*, 2005

⁸ See for example, OECD, *Citizens as Partners: Information, Consultation and Active Participation in Policy-Making*, 2001

The participatory approach of making policies and laws on level of EU and its member states is enshrined in the *Lisbon Treaty*.⁹ Specifically, article 10 prescribes that: “Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.” Further, article 11 provides that:

1. “The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent.
4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.”¹⁰

Even before this Treaty was adopted, the European Commission (EC) launched action to improve participation in policy and law making process on EU level. In 2001, it developed the *White Paper on European Governance*,¹¹ which, among others, aimed to reinforce the culture of consultation and dialogue on EU level and thus increase the legitimacy of the decisions. The paper highlights five principles of ‘good governance’: openness, participation, accountability, effectiveness and coherence, which not only “underpin democracy and the rule of law in the Member States, but they apply to all levels of government – global, European, national, regional and local.” The principle of participation highlights the importance of inclusion of the public in all stages of the drafting process and explains that participation creates confidence. It also stresses the role of Member States in enforcing participatory approach in relation to EU policies development:

“The quality, relevance and effectiveness of EU policies depend on ensuring wide participation throughout the policy chain – from conception to implementation. Improved participation is likely to create more confidence in the end result and in the Institutions which deliver policies. Participation crucially depends on central governments following an inclusive approach when developing and implementing EU policies.”

The White Paper recommended changes in several directions, and obliged the EC to undertake action to implement them. As one of the results, in 2002 the EC adopted a communication: *Towards a reinforced culture of consultation and dialogue - General principles and minimum*

⁹ Consolidated Version of the Treaty on European Union, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:EN:PDF>, accessed on September 14, 2010

¹⁰ According to article 11(5) the Lisbon Treaty and article 24 of the Treaty on the Functioning of the European Union, the European Parliament and the Council, are to adopt the procedures and conditions required for the citizens' initiative and the minimum number of Member States from which such citizens must come. http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/index_en.htm, accessed on September 14, 2010

¹¹ COM(2001) 428

*standards for consultation of interested parties by the Commission*¹² [hereinafter: EC Principles and Minimum Standards]. They emphasize the importance of providing clear consultation documents, consulting all relevant target groups, leaving sufficient time for participation, publishing results and providing feedback.

In efforts to promote the dialogue with civil society as undertaken by the Lisbon Treaty and following upon the EC Principles and Minimum standards, in 2009 the European Parliament adopted a resolution on the perspectives of *Developing Civil Dialogue under the Treaty of Lisbon*.¹³ The resolution is important in that it reinforces the significance of consultation and calls on EU institutions to adopt binding guidelines concerning the appointment of civil society representatives, methods for organizing consultations and their funding, and calls on them to maintain registers of active CSOs. Further, the resolution calls on EU institutions and Member States to make full use of legal provisions and best practices to “step up dialogue with citizens and CSOs”, and especially in those regions and sectors where it is not fully developed. The resolution also acknowledges that dialogue with citizens at all levels (EU and Member States) requires certain financial resources, and therefore calls on the stakeholders and responsible bodies to ensure that such dialogue is adequately funded.¹⁴

Council of Europe

The issue of participation is also addressed by the CoE in several recommendations.

- *“Governmental and quasi-governmental mechanisms at all levels should ensure the effective participation of NGOs without discrimination in dialogue and consultation on public policy objectives and decisions. Such participation should ensure the free expression of the diversity of people’s opinions as to the functioning of society. This participation and co-operation should be facilitated by ensuring appropriate disclosure or access to official information. NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation.” [CoE, Recommendation CM/Rec (2007) 14]*¹⁵

The Explanatory Memorandum further elaborates this recommendation: *“It is essential that NGOs not only be consulted about matters connected with their objectives but also on proposed changes to the law which have the potential to affect their ability to pursue those objectives. Such consultation is needed not only because such changes could directly affect their interests and the effectiveness of the important contribution that they are able to make to democratic societies but also because their operational experience is likely to give them useful insight into the feasibility of what is being proposed.”*¹⁶

¹² COM(2002) 704. These standards are not legally binding, but aim to provide guidance to EC officials when they conduct consultation. Nevertheless, their implementation and compliance in European Commission Action plan “Simplifying and improving the regulatory environment”, COM(2002) 278 and the reports on “Better Lawmaking”. http://ec.europa.eu/governance/better_regulation/reports_en.htm, accessed on September 14, 2010

¹³ P6_TA(2009)0007, 13 January 2009

¹⁴ For further information see: EurActiv.com, “MEPs Push for ‘Structured Dialogue’ with EU Citizens”, 14 January 2009, <http://www.euractiv.com/en/social/europe/meps-push-structured-dialogue-eu-citizens/article-178503>, accessed on September 14, 2010

¹⁵ Council of Europe, Recommendation CM/Rec (2007) 14 of the Committee of Ministers to member states on the Legal Status of Non-Governmental Organisations in Europe

¹⁶ Explanatory Memorandum to Recommendation CM/Rec (2007) 14 of the Committee of Ministers to member states on the Legal Status of Non-Governmental Organisations in Europe

- *“Member states should ensure that non-governmental organisations defending the human rights of lesbian, gay, bisexual and transgender persons are appropriately consulted on the adoption and implementation of measures that may have an impact on the human rights of these persons.” [CoE, Recommendation CM/Rec(2010)5]¹⁷*

Most recently, the CoE adopted *Code of Good Practice for Civil Participation in the Decision-Making Process* [hereinafter: CoE Code on Participation]¹⁸ which defines the general principles, guidelines, tools and mechanisms for active participation of CSOs in the decision-making processes. Although it is a nonbinding mechanism the Code is drafted with the aim to support the development of participatory decision-making processes on national level. Towards this end, the CoE Committee of Ministers adopted a Declaration which calls on national authorities to consider the Code when developing undertaking initiatives to foster participation in the decision-making processes.¹⁹

V. Principal Issues Concerning Participation in Law Making

The documents adopted on European level and in different countries address wide range of issues relevant for the participation of the public in decision-making processes. The section summarizes general considerations related to participation and specific issues which most commonly arise in the process.

1. What are the different levels of participation?

Participation can be viewed as a continuum of interaction between government and the public which ranges from informing and listening at one end, to implementing jointly agreed solutions at the other; and in between there is dialogue, debate and analysis.²⁰ All stages of the process (preparation, drafting, adoption, implementation, evaluation) should be subject to public participation to ensure better laws. This is also highlighted by the *EC Principles and Minimum Standards*: *“The quality of EU policy depends on ensuring wide participation throughout the policy chain – from conception to implementation”*.

Since there are different stages in of law-making processes the intensity and form of participation will vary depending on the stage of the process. International documents and country specific regulation recognize the following levels of participation: (1) access to information, (2) consultation and (3) active engagement through dialogue and partnership. The following is a summary of how these levels are described in different documents.²¹

(1) Access to information is the first, basic and important right which is underlying the whole process of participation. Whilst it means that the government informs the public about its plans and the types of documents it wants to adopt at the beginning of the process, it also highlights

¹⁷ Council of Europe, Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.

¹⁸ Council of Europe, *Code of Good Practice for Civil Participation in the Decision-Making Process*, adopted by the Conference of INGOs, 2009

¹⁹ Council of Europe, *Declaration by the Committee of Ministers on the Code of Good Practice for Civil Participation in the Decision-Making Process*, 2009

²⁰ Adapted from Bryce-Lambert Forum, *Building Effective Consultations* (1990).

²¹ See for example: CoE, Code on Participation 2009; OECD, *Citizens as Partners*, 2001; also Austria, Croatia, Estonia, Romania.

the right of the public to have access to all information (e.g., drafts, comments and reasoning) throughout the process. The access to information is right regulated in specific laws. While at this level there is no need for intensive interaction between the government and the public, the government should not apply measures which would prevent the public from receiving the information crucial for the process.

Consultation is a form of participation where the government invites the public to provide its opinion, comments, views and feed-back on a specific document. Whilst the issues on which the public is consulted are defined by the government, this process should also allow for the public to express opinion on other issues contained in the draft. Consultation can be organized with a broader group of participants from the public. It is a reactive way of participation – the public becomes involved because the government requests this. However, this is not to say that the public cannot request to be consulted. Indeed, it should act and remind the governmental bodies about the need to be asked to comment on laws which will affect them.

Active involvement (partnership) in law making means collaboration and jointly undertaken responsibilities at all stages of the decision-making process (agenda setting, issue identification, drafting, decision and implementation). It is the highest form of participation; it may be described as a situation where the representatives of the public share a seat at the table with the government representatives. The initiative can come from both the sides. Whilst there should be an agreement about the common goals of the process, those involved from the public should be able to retain their independence, and to advocate and campaign for the solutions which they want to see adopted.

The **CoE Code of Good Practice** also highlights the *dialogue* as an active form of participation. Indeed, dialogue is prerequisite for collaborative relationship. It requires “*a two-way communication built on mutual interests and potentially shared objectives to ensure a regular exchange of views.*” The dialogue is an underlying form of a collaboration which is built around a specific issue of interest and should lead to commonly agreed outcomes.

It is important to recognize these different stages and levels of participation when aiming to regulate participation or to design models. The nature of the different levels and the relationship which arises from them desires consideration of compatible models specific to that level and relationships so to ensure effective participation.

2. Framework for public participation

“To ensure that the essential contributions of CSOs are enshrined in the political decision-making process without discrimination, an enabling environment is required. Conditions of an enabling environment include the rule of law, adherence to fundamental democratic principles, political will, favourable legislation, clear procedures, long-term support and resources for a sustainable civil society and shared spaces for dialogue and cooperation. These conditions allow for a constructive relationship between NGOs and public authorities built on reciprocal trust and mutual understanding for participatory democracy.”²²

Rules and principles concerning public participation in policy and law making processes on government level are spelled out in different types of documents.²³ They emphasize different

²² CoE, *Code on Participation*, 2009

²³ A detailed list of all relevant documents used in this research is provided in the Bibliography section.

values that they aim to promote and accomplish and they all underline the importance of participation in law making.

The ultimate goal of *the Croatian Code of Practice on Consultation with the Interested Public in Procedures of Adopting Laws, Other Regulations and Acts*²⁴ “is to facilitate interaction with citizens and representatives of the interested public in the democratic process, and encourage more active participation by citizens in public life.”²⁵

The *Austrian Standards of Public Participation – Recommendations for Good Practice*²⁶ [hereinafter: Austrian Standards] have been adapted to: “to help administrative staff of the federal government in the concrete conduct of high-quality participation processes. They are a contribution to good governance in Austria”.

The *Romanian Law on Transparent Decision-Making by State Bodies and Local Governments* from 2003 [hereinafter: Romanian Law] aims to “increase the degree of accountability of public administration toward citizens as beneficiaries of the administrative decision; stimulate active participation of citizens in the administrative decision-making process and in the process of drafting normative acts; enhance the degree of accountability of the entire public administration.

Documents which regulate participation differ in terms of whether they are legally binding or not. Also, issues related to participation are not necessarily regulated in one place, they can be found in different documents. However, they should be consistent and documents adopted on national level should not undermine practices which already exist or which create higher standards. Some adopted documents (e.g., the Croatian Code) explicitly refer to this.

Binding or non-binding document

Some countries have included procedures and rules in legally binding documents (laws, regulations), others in documents with no binding measure (codes, standards). Legally binding documents have been adopted in Bosnia and Herzegovina (rules of government) and Romania (stand alone law), while codes and guidelines in Austria, Croatia, Republika Srpska and the United Kingdom.

For example, the *Austrian Standards* contain (1) performance standards for politics and administration to achieve optimal involvement of citizens and interest groups in the decision-making process and (2) quality standards for the participants as a measure which citizens and interest groups can use to assess the quality of the administrative behavior with respect to public participation. The standards of public participation are recommendations for good practice and offer service and practical support in public participation processes. They are grouped as standards related to the (1) preparation, (2) implementation and (3) monitoring and evaluation of the participation process. The standards are defined in a form of a question to help with assessment of the compliance.

Stand alone document or not.

Issues concerning participation can be found in one document specifically dedicated to that issue (e.g., law or code regulating the participatory procedure such as Romania or Croatia). They can also be found as part of different documents which address other issues. For example,

²⁴ November 2009, <http://www.uzuvrh.hr>, accessed on September 14, 2010

²⁵ Section II of the Code.

²⁶ July 2008, <http://www.partizipation.at>, accessed on September 14, 2010

in Bosnia and Herzegovina, Hungary and Slovakia participation issues are included in the laws which concern the process of law drafting; in Finland, Hungary and Slovakia, as part of laws concerning access to information. In the UK and in Hungary, several documents regulate issues concerning participation.

For example, In **Hungary**, the right of participation has been included in the Constitution²⁷ and is elaborated in the Act on Legislation.²⁸ The provisions of Act are very broad and have not been supported by ministerial decrees, which left them unimplementable in practice. Even more, some of its provisions were repealed by the Constitutional Court.²⁹ In the meantime, in 2005, the *Law of Freedom of Electronic Information*³⁰ [hereinafter: Hungarian Law] was adopted which is the most relevant legislation from the access to information and consultation point of view. The law details deadlines, methodology and procedures for publishing such information and commenting on drafts, and the way feedback should be provided.

The legal nature of the document is important as it can ultimately have an effect on how much the provisions can be enforced in practice, and the types of measures that will need to be undertaken to ensure compliance by the responsible state bodies. For example, under the **Romanian Law state** officials may be subject to disciplinary action if they breach provisions of this law. On the other hand the Croatian Code is a guiding document and has no enforcement mechanism. The *UK Code of Practice on Consultation*³¹ [hereinafter: UK Code on Consultation], is also a non-binding document. However, if a government body decides to adopt it then it is expected to comply with its provisions, and interested parties are encouraged to comment on how different bodies have used the criteria in the code in a specific consultation process.

Regardless of which type of document is developed it is very important to adopt measures to ensure its compliance and harmonize implementation in practice. Indeed, as noted above the fact that the provisions of the Act on Legislation in Hungary have not been supported by implementing regulations left them open to various interpretations (which was resolved to some extent with the adoption of the Hungarian Law on Access to Information).³² To address this challenge:

- It is important to *plan the type of resources* (human and financial) which will be needed for implementation. An assessment of the Romanian Law concluded that: “*the failure to*

²⁷ In Hungary, section 36 of the Constitution states that while performing its duties, the government shall cooperate with concerned CSOs. However, it is up to the government to follow up on the form of cooperation. The implementation of this article has been subject to several Constitutional Court decisions. See: Golubovic, D., “*Citizen Participation in Legislative Processes: A Short Excursion through European Best Practices*”, in *Cooperation between the Government and Civil Society in Legislative Processes*, published by the Government of Croatia Office for Collaboration with CSOs, 2008

²⁸ Act no.XI of 1987 on Legislation.

²⁹ The provisions were repealed with pro futuro effect - 31 December 2010. A new act on participation is currently drafted to strengthen the information sharing, consultation and active participation.

³⁰ Act XC of 2005 on Freedom of Electronic Information

³¹ Revised in 2008. The Better Regulation Executive in the Department for Business, Enterprise and Regulatory Reform maintains a list of state bodies that have adopted it. <http://www.bis.gov.uk/files/file47158.pdf>, accessed on September 14, 2010

³² Fridly, J., Pasko, I., “*Civil Organizations in the Legislative Process*”, edited by Judit Fridli and Ildi Pasko, a Publication of the Hungarian Civil Liberties Union, Budapest, April 2000

*assign the required resources has represented a practical difficulty as far as the implementation of the Law on the Transparency on Decision-Making was concerned”.*³³

- Specific *regulations* can be developed to help implement the law or adopted rules. For example, in Bosnia and Herzegovina Ministry of Justice adopted a Rulebook, which contains detailed provisions relating to the implementation of the on Consultation in Legislative Drafting within the Ministry of Justice.³⁴
- *Guidelines or standards*, or even client friendly brochures can be developed to further explain the provisions of the document, increase understanding and also ensure harmonized application by different bodies of the government (e.g., Austria³⁵, Croatia).
- Activities to *raise awareness and build capacity* among the public and state officials can be undertaken (difficulties with implementation of the documents have been associated with the fact that the parties were not familiar with their content or they were not clear how to apply it in their work).

For example, in line with the provisions of the Croatian Code, the Government Office for Cooperation with Association produced draft guidelines, which are currently being discussed with interested parties and CSOs. In the UK, upon adoption of the *Code of Practice on Guidance on Regulation*,³⁶ the Department for Business, Innovation and Skills developed Guidance to the Code to support its implementation among various government agencies.

3. Parties that should be involved in the process

The issues as to who should the government call when they want to organize participatory process is often raised. In general, most of the countries allow for every individual to be able to take part in consultations, while they may limit the participation in specific working groups to selected representatives. The role of CSOs in raising awareness about the process, facilitating participation and reporting on the outcomes is important – their active and responsible role can help increase the quality of the law and the possibility for more successful implementation.

Who to involve?

Participation in law making should be open to the public. Documents of institutions on level of Europe and national governments refer to public as – anybody who will be affected by the specific decision, an interested party. Public means citizens, in their individual capacity, or through their formal and informal organizations. Different law making processes will require involvement of different representatives of the public depending on who is most affected.

- The **Austrian Standards** state that *“The term public encompasses individuals just as much as groups of persons. Groups of persons may form on occasion (citizens’ initiatives, for*

³³ Stan, V., *“The Transparency of Governance and the Participation to the Decision-Making Process - Concept, Legislation, Restrictions In A Democratic Society”*, 2009

³⁴ Bosnia and Herzegovina, Ministry of Justice, *Rulebook for Implementing the Rules on Consultation in the Development of Legal Acts in the Ministry of Justice*, 2008

³⁵ In Austria worksheets on different topics have also been developed including check-lists to facilitate the participatory process. <http://www.partizipation.at>, accessed on September 14, 2010

³⁶ Developed in 2008, revised in 2009. This Code highlights eight rules government agencies should follow when publishing guidance for businesses and CSOs on how to comply with a legal act. <http://www.bis.gov.uk/policies/better-regulation/code-of-practice-on-guidance-on-regulation>, accessed on September 14, 2010

example, form in most cases in connection with a concrete project and have but a very loose internal organizational structure) or with a specific long-term objective and clear organizational structure (= organized public)."

- According to the *Bosnia and Herzegovina, Rules for Consultations in Drafting of Legal Regulations* [hereinafter: BiH Rules for Consultation]³⁷ in case of laws which have significant influence on the public, the institution can consider to involve not only the general public and CSOs, but also domestic and foreign experts, medial government bodies, lawyers, prosecutors, judges.
- The *Croatian Code* applies to interested public, which is defined broadly as: *"citizens, CSOs (informal civic groups or initiatives, associations, foundations, funds, private institutions, trade unions, associations of employers), representatives of the academic community, chambers, public institutions and other legal entities performing a public service or who might be affected by the law, other regulation or act which is being adopted, or who are to be included in its implementation."*
- The *Romanian Law* refers to "interested persons", who can be citizens and legal persons. Legal persons are defined as a "civic organization, trade union, employers association, or other associative group of civic representation."

While access to information should be open the whole public, sometimes consultation or active involvement can be focused on a specific target group.

For example, a Ministry of Labor aims to develop a law concerning people with disabilities. The Ministry can plan a targeted, focused, consultation which individuals and organizations which work on this issue by organizing specific roundtable discussions or focus groups. However, it should also provide an opportunity to others who may have an interest to provide an opinion by, for example, posting the draft concept or draft law on its website and giving timeframe for opinions to be submitted.

In the case of active involvement, the respective government body may decide to limit the participation of certain groups to the drafting process, e.g., as members of a working group. However, the inclusion of such groups should be made based on clear and open criteria. This will ensure credibility of the process, increase legitimacy and respect of the results. For example, the *Croatian Code* outlines that when members of public are invited to take part in working groups the following should be considered: expertise, previous public contributions on the subject matter, qualifications relevant to the matters regulated by the law, or other regulation or established by the act of the state body. In addition, the public should not be denied the opportunity to provide its opinion on the draft legislation prepared the working group; as a good practice the overall rules on consultation should still apply.

Importantly, efforts should be made so that people with certain disabilities or those belonging to particular group (women, youngsters, minorities) are able to take part in the process. This is highlighted by several recommendations on European and country level.

- The *EC Principles and Minimum Standards* provide that EC should ensure adequate coverage of (1) those affected by the policy, (2) those who will be involved in its implementation and (3) bodies that have stated objectives which gives them direct interest in the policy. When determining who should be involved, EC should consider several elements such as: the impact on a policy area, the need for certain knowledge

³⁷ Adopted in 2006.

and expertise, track record in previous consultation, the need to involve non-organized interests, and should aim to maintain a balance between different groups (large or small organizations, those from EU countries and non-EU countries, wider constituencies such as churches, or people with special needs – elderly, minorities, unemployed).

- **Council of Europe Rec(2001)19** discusses specifically steps and measures to encourage categories of citizens who, for various reasons, have greater difficulty in participating, such as women, young people, underprivileged social groups and certain professional groups, foreigners.³⁸
- The **Estonian Good Practices of Involvement**³⁹ [hereinafter: Estonian Good Practices] recommend that in case of draft documents which affect foreign language speaking population, the state body should consider the need and possibilities for the information related to the participator process to be translated in that language.
- The **UK Code on Consultation** recommends that alternative versions of consultation documents are used to reach wider audience, such as young person's version, a Braille and audio version, translated version in relevant languages, etc.

The responsibility of CSOs towards stakeholders

CSOs and their umbrella organizations are often more active at the stages of active participation – specifically by taking part in working groups of different ministries, but also at the level of consultation, when they send comments on behalf of the groups they represent. The responsibility of CSOs towards the groups they represent is important as the constituencies ought to know the issues that are being discussed. In addition, some CSOs represent certain interest which affects wider group of people (e.g., minorities, women) and therefore they can help inform these groups about the legislative proposals and sometimes even facilitate their participation in the process (e.g., by assisting them to develop own comments). CSOs can also help educate the public about the issues at stake and the adopted laws, which can also contribute towards better application of the law. Overall, CSOs can help increase accountability and transparency of the drafting process.

The **EC Principles and Minimum Standards** state that “*interested parties must themselves operate in an environment that is transparent, so that the public is aware of the parties involved in the consultation processes and how they conduct themselves. Openness and accountability are thus important principles for the conduct of organisations when they are seeking to contribute to EU policy development. It must be apparent: which interests they represent and how inclusive that representation is*”.

The Compact on Relations between the Government and the Third Sector in England⁴⁰, outlines specific commitments that CSOs should fulfil. Specifically, CSOs should include their stakeholders (beneficiaries, members, volunteers) when preparing responses to consultations, and should give feedback as to what was communicated to the government and what is the outcome. CSOs should be clear whose views they represent and what were the bases for

³⁸ Council of Europe, Recommendation Rec(2001)19 of the Committee of Ministers to member states on the participation of citizens in local public life, 6 December 2001

³⁹ The document was developed by the representatives of both ministries and NGOs in 2005. It gives recommendations for planning and implementing participatory processes to make sure that all stakeholders could take part in them; <http://www.valitsus.ee/?id=5603>, accessed on September 15, 2010

⁴⁰ Revised in December 2009

development of their comments. They should promote consultations among other organizations and respect the requirements for confidentiality.

The **UK Code on Consultation** provides that “*in order to ensure that responses are analysed correctly, it is important to understand who different bodies represent, and how the response has been pulled together, e.g. whether the views of members of a representative body were sought prior to drafting the response.*”

4. Specific Issues to the Process

Should participation be open for all legislative drafts?

Whilst most of the countries apply the obligations, or principles and standards to all legislative acts, some Bosnia and Herzegovina and Republika Srpska make a distinction based on whether the law will have significant influence on the public or not. Both documents list the areas of regulation which are considered to have such influence (e.g., criminal law, election law, labor laws etc).⁴¹

According to the **BiH Rules for Consultation** there are minimum obligations concerning consultation in case of pre-drafts and refer mainly to the requirement to inform those on their consultation lists about the process and give them 21 days to provide opinion. In case the law will cause a significant influence on the public, then there is a need for a wider and more open distribution of the draft (e.g., via media), involvement of experts, individuals, CSOs in working groups and organizing public meetings.

Types of documents open for participation

In a law drafting process draft laws, regulations and other acts and documents which are related to them should be open to the public. This is a most common rules in European countries discussed in the paper.

The **Croatian Code** applies to draft laws, regulations and other acts (e.g., strategy, resolution, declaration, program) of both parliament and government, the **BiH Rules for Consultation** on draft laws and regulations. The **Hungarian Law** applies to drafts of laws, but also concepts of laws and other preparatory materials related to law drafting processes as well as ministerial decrees. In **Slovakia**⁴² the documents of programmatic, concept and strategic nature and the draft rules of law should be made public. The **Legislative Rules of the Government of the Slovak Republic**⁴³ [hereinafter: Slovak Legislative Rules] apply to both laws and regulations drafted by its bodies.

The **Estonian Good Practices** list the specific documents which should be open for participation:

- Drafts of laws and their amendments;
- Drafts of the regulations and directives of the Government of the Republic;
- Drafts of Ministers' decrees;

⁴¹ See articles 9-14, of the BIH Rules of Consultation and article 6-10 of the Republika Srpska Guidelines.

⁴² Act on Free Access to Information and Amendments of Certain Acts (The Freedom of Information Act), 2000 (as amended in 2006 and 2009)

⁴³ Legislative Rules of the Government of the Slovak Republic, 1997 (last amended 2010)

- Documents, concepts, policies, development plans, and programs that are important to the country's development;
- Drafts of legislation of European Union institutions and other strategic documents (i.e. green and white books);
- Instruction and procedures for rendering public service;
- Conventions and international agreements, as well as the documents that are worked out within their framework, and that influence the society.

What other information is provided?

Various documents stress the importance of providing clear, concise and comprehensive information needed to facilitate the process. Therefore, high consultation standards are not satisfied by mere publishing of a draft document. In addition complementary information should be provided to ensure that the comments which will be submitted are meaningful, and useful; and that the consultation targets the most relevant issues.

- **EC Principles and Minimum Standards:** the documents for consultation should be complemented by summary of the context, scope and objectives of consultation, issue of particular importance or for which input is needed, type of feedback to be provided, details about the overall process, follow up steps, contact details and deadlines, and documents that are related and referenced.
- **Hungarian Law:** when the draft law aims to amend at least one fifth of the provisions of another act, the act to be amended must also be disclosed on the website in a structure which integrates the envisaged amendment.
- **Romanian Law:** announcements about law drafting process, among others, should contain justification or information about the approved need for drafting such law, the complete draft law, the deadline, place, and method as to how to submit proposals, suggestions, and opinions.⁴⁴
- **Slovakia:**⁴⁵ the announcement about the publication of the draft law on the internet has to include information on the title, reference number, internet address where the law can be found, date when the draft was posted, deadline for comments, and email address where comments should be sent and link to other relevant materials.⁴⁶

When to involve?

As a matter of good practice, the public should be able to gain access to the documents at the earliest stage of their development. Only in this way they will be able to familiarize themselves with the issues and prepare themselves to provide useful and credible contribution. This will allow them to consult their constituencies and stakeholders, research the issues, or even agree on jointly developed contributions. While it is understandable that government bodies may not

⁴⁴ However, it is not mandatory to mention the date when the announcement was made. So there is no guidance as to how to calculate the deadline for sending the public comments and this can be misused in practice.

⁴⁵ Slovak Legislative Rules and *Methodological Guideline for the Preparation and Submitting of Documents for Government Deliberations*, issued by the Head of the Office of the Government, 2001

⁴⁶ The announcement must be sent to the bodies which the drafter must consult (listed in article 9 of the Slovak Legislative Rules). The drafter may also decide to send the announcement to other state bodies, bodies of self-government, professional associations, and other institutions.

feel comfortable to release early version of the draft laws, they could nevertheless provide short summaries of issues they plan to address. In addition, by involving CSOs and other interested parties in the actual drafting process, they can also allow for these groups to consult their stakeholders and bring back initial views on some issues. Such approach can save time and decrease potential disagreements in the later stages when wider consultation is conducted.

- **BiH Rules for Consultation:** draft version of laws should be made public, and if possible at any time of the drafting process but before it is finalized for submission.
- **Estonian Good Practices:** consultation and participation should start as early as possible in the preparation of the draft. It can be preceded by informing and consulting on an informal basis in order to inform the parties about the problems related to the field of regulation.
- *Republika Srpska, Public Administration Guidelines on Participation of Public and Consultations in Legislative Drafting* [hereinafter: Republika Srpska Guidelines] the public should be included even at the phase of developing preliminary drafts of the law.
- **Romanian Law:** announcements about the drafting of a law should be made 30 days before submitting the draft for analysis, approval or adoption.
- **Slovakia:**⁴⁷ ministries, other central bodies of state administration and bodies of local state administration shall disclose materials upon their release for inter-ministerial commentary period. So the general public should receive the text the moment other state bodies do, but in any case prior to its submission to the Government.
- **UK Code on Consultation:** *“It is important that consultation takes place when the Government is ready to put sufficient information into the public domain to enable an effective and informed dialogue on the issues being consulted on. But equally, there is no point in consulting when everything is already settled. The consultation exercise should be scheduled as early as possible in the project plan as these factors allow.”* In addition, the Code encourages the Government to undertake informal consultations to obtain initial evidence and gain understanding of issues that will need to be addressed in formal consultation process. Awareness should be raised before the process starts so that interested party can prepare for it.

Timeline for comments or discussions

When planning for a consultation it is important to consider how much time is given to the public to comment on the document. Different tools may require different timeframe, and the timeline will need to correspond to the type of document, the issues raised its length and the issues that are raised available expertise on the issue. For example, if the document raises new issues the public may need more time to familiarize itself with it. The same if the law affects wide range of issues. Although most of the documents described here set a certain timeline, most of them specifically mention the possibility for this timeline to be extended.

- **EC Principles and Minimum Standards:** highlight the importance to balance the need for adequate input and swift decision-making. To this end the process may be extended (e.g., in case CSOs need to consult members, in case of public holidays) depending on the circumstances. They prescribe 8 weeks for reception of responses in case of written consultation, and 20 working days notice for working meetings.

⁴⁷ Act on Free Access to Information and Amendments of Certain Acts (The Freedom of Information Act), 2000 (as amended in 2006 and 2009) and Slovakian Government Legislative Rules.

- **BiH Rules for Consultation:** consultations should be conducted at any stage of the process but prior the submission of the draft to the Council of Ministers. For draft laws which do not have significant influence on the public the deadline for comments is 21 days; for the rest, and in cases when written comments are required, at least 30 days.
- The **Croatian Code** proposes 15 days from the time the draft law has been posted on the web site of the responsible government body.
- **Estonian Good Practices:** consultations generally should last for a minimum of 4 weeks. The length of the consultations must be extended in the case of very voluminous and substantial drafts, or in the case of with state holidays and vacations.
- **Hungary:** a time period of at least 15 days for opinions, comments or proposals from the day the draft was posted on the web site of the state body. In the case of emergency procedure the same timeframe which is indicated for consultation with state bodies should be given to the public.
- **Republika Srpska Guidelines:** preliminary draft of the law is open for consultation for 15 days while the final draft law for 8 days from the day it is posted on the internet.
- **Romanian Law:** In case of written submissions - 10 days should be given for sending comments. Public debates they should be held within 10 days from the date when the location and day have been announced.
- **Slovakia Legislative Rules of the Government:** the period for submitting comments is 15 working days from the day the information about the draft is posted. The drafter of the act may assign a longer time period.
- **UK Code on Consultation:** consultation should last 12 weeks. Longer period should be allowed when consulting during holidays, or when issues are particularly complex.

Acknowledgement and Feedback

Providing feedback to the consulted parties increases trust and strengthens cooperation. It helps guarantee that their opinion is indeed considered, and included in the draft law when appropriate. The feedback does not need to be individualized, especially when there are wide consultation processes. However, a summary of all responses and the action upon them should be provided in a collective report. The feedback and guarantees that the opinion of the parties will be considered are integral part of documents concerning participation.

- The **EC Principles and Minimum Standards** prescribe that all received contributions will be acknowledged (either by sending individual or collective response via email and web site depending on the number of contributions). Concerning feedback, legislative proposals should be accompanied by an explanatory memorandum which will contain information about the consultation process, the results and how those results were considered in relation to the legislative proposal.
- The **BiH Rules for Consultation** prescribe that oral consultations must be recorded. All comments must be considered, and the institution must develop report on the accepted and rejected comments with explanation on why it has accepted/rejected certain comment. The draft law submitted for adoption must be accompanied by a statement which contains: (1) statement that the minimum consultation obligations have been fulfilled, (2) statement whether the law will have significant influence on the public, (3) explanation for selection of the of consultation and the process, (4) statement that the institution has acted upon the received comments and has submitted the report on the

comments. This statement is attached to the law adopted by the Council of Ministers and forwarded to the Government.

These provisions further elaborate the provisions in the **Unified Rules for Drafting Legal Documents in BiH Institutions**⁴⁸ which require that all justifications of draft laws also contain information about the conducted consultation, and specifically list CSOs and international organizations as parties that should be consulted when developing preliminary drafts and draft laws.

- The **Croatian Code** proposes that summarized unified explanation of the rejection of the comments is announced publicly on the web site of the body responsible for drafting or in another appropriate manner.
- **Estonian Good Practices**: a summary answer should be prepared by the initiator of the participation, which should include all submitted comments and an explanation on those that have not been accepted. The summary will be posted on the internet and sent to participants within 30 days from the end of the consultation, and when necessary also transmitted via the mass media.
- **Hungary**: The competent ministry should consider the comments and publish a summary on its website of all comments which have been accepted and the reasons of those which have not been accepted, unless the comments are considered to be ungrounded.⁴⁹
- **Romanian Law**: public authorities must develop an annual report about the law-making process which is made public at the location of the specific authority, through displaying it on the poster board at the department site or through presenting it in a public meeting. The report should contain information about:
 - total number of recommendations received from the public;
 - total number of recommendations included in the drafting of normative acts and in the content of decisions passed;
 - number of participants at public meetings;
 - number of public debates organized to discuss drafts of normative acts;
 - record of trails brought before a court as a result of noncompliance with the law;
 - self-evaluation of the established partnership with citizens and civil associations;
 - number of meetings that were not publicly held and the reasons for restricting access to these meetings.⁵⁰
- **Slovak Legislative Rules**: a meeting with representatives of the public must be organized in case the drafter does accept a comment sent collectively by at least 500 persons (see details below). When submitting the draft law to the Government, the responsible body must also include a statement that the law does not have provisions which are disputed by other state bodies or members in the public. In case it contains disputed provision those must be indicated and reasons for not settling them provided.

⁴⁸ Adopted 2005

⁴⁹ The law does not determine who shall decide whether a comment is ungrounded or not.

⁵⁰ According to the opinion of our local partner, the law lacks check and balances because it does not regulate what will happen if the public authority is not taking into consideration the suggestions and comments of the public. This discourages the public to get involved in the process. Currently, the law is going through an amending process within the Parliament.

- **The UK Code on Consultation:** the Government should provide a summary of who responded to the consultation and a summary of the views expressed to each question. A summary of any other significant comments should also be provided. The summary should be published before or alongside any further action related to the draft; and those who have participated in the process should be informed about it.

Waiver of the rules/standards

While all documents insist on the importance of conducting participatory processes in law drafting, they do list the situations when certain exceptions may be in place. Most commonly, deviations (either a shortened period or no consultation) from the prescribed processes can occur in the case of:

- emergency situation (e.g., BiH, UK);
- exceptional circumstances such as threat from human rights, basic freedoms, security, economic damage, state of emergency etc (e.g., Slovakia);
- obligations related to the EU or international treaties which have or have not been anticipated (e.g., BiH, Croatia, Estonia, Slovakia, UK);
- issues particularly important such as defense, national security, financial, foreign affairs, nature conservation or inheritance protection interests or when there is an outstanding social interest linked to its particularly rapid adoption (e.g., Hungary);
- when law needs to be adopted outside of a legislative agenda, due to an urgent need (e.g., Slovakia)
- when only few amendments are made (e.g., Estonia).

According to the **BiH Rules for Consultation** the institution must provide detailed reasons about the exceptions. The situation which requires exemptions however does not release the institution from the prescribed minimum obligations concerning consultation prescribed in the rules (described above in the text).

Under the **Romanian Law**, in the case of critical situation⁵¹, which requires urgent measures and protection of the public interest, the draft can be submitted according the emergency procedures.

The **Slovak Legislative Rules** provide that even in such cases which require urgent adoption the time period for consultation should be at least 7 days.

UK Code on Consultation allows for shorter consultation period, however the reasons must be clearly stated and the responsible body should consider alternative ways to involve wider audience.

Assessment of the process

Assessment as to how the participatory process was conducted can help improve such processes in the future. Even more, they can help transfer experiences, correct certain obstacles

⁵¹ Local organizations however have reported that this article is a too vague and prone to interpretations, therefore they recommend that this article should list specifically those ‘critical situations’ which allow derogation from the provisions of the law (e.g., natural disaster).

that have appeared and help record creative methods and tools that have been used. Such assessment can also be done in collaboration with those who took part in the process.

The **Austrian Standards** provide for several questions to be considered when the process of participation ends. The aspects they mention include:

- Documenting measures of the policy, the plan, the program or the legal instrument already implemented and those which are still pending.
- Documenting experiences with the public participation process so they can be considered or passed on in future procedures.
- In case of large processes evaluation by evaluation by an independent agency.
- Making the documentation available to those who may benefit in the future.
- Verifying that the objectives of the public participation process have been met.
- Involving the public in the monitoring and the evaluation, e.g. through participation in a monitoring group.

The **Estonian Good Practices** suggest conducted mid-term and final assessment of the process. All parties take part in both assessments with the aim to provide guidance for improvement in future processes. The mid-term assessment aims to assess the way the involvement is conducted, the feedback and to determine the need to undertake supplementary methods of involvement. The summary of the assessment can take many forms (e.g., verbal, written report, brief) but should be sent to all interested parties and include any important decisions that are being made. Final assessment is done in relation to process and results.

- Concerning the process, the following is assessed: the initial assignment; the productivity of the forms and methods of engagement that were used; the motivation of the parties to participate; the efficiency of the administrative work; the efficiency of the feedback; the satisfaction of the target group with the engagement, etc.
- Concerning the result, the following is assessed: correspondence of the results to the initial assignment; whether alternatives were considered; the applicability of the results to the subsequent development of the topic being consulted on; etc.

The **UK Code on Consultation** provides that its criteria should be reproduced in consultation papers alongside the contact details of the consultation coordinator. Those who have participated in the consultation process are invited to submit comments to the coordinator about the extent to which the criteria have been observed and any ways of improving consultation processes. Further, government bodies should monitor the consultation process, and share learning with other bodies.

What if procedure is not followed?

Some documents, mainly those with legally binding nature, prescribe certain measures in case the government officials do not respect the procedures for participation.

- The **BiH Rules for Consultation** prescribe that the Council of Ministers may return the draft law to the institution to comply with the rules on consultation if it has not done so before submitting the law.
- According to the **Romanian Law**, any person may launch complain according to the administrative procedure in case of infringement of rights under the law; the complaint

or appeal are considered under emergency procedure and are exempt from taxes. Public servant may be penalized if s/he “does not allow the access of individuals to the works of the public sessions or prevents the interested parties from getting involved in the elaboration process of public interests regulations, under the conditions of the present law.”⁵²

VI. Models for public involvement

Countries use different tools and methods to support participation at all stages of the drafting and implementation process. The decision on which method to choose can be made based on: the issues that are subject to consultation and the size of the group they target, whether the issue introduces novel solutions, time period available, costs that are allocated for the process, other laws that may be affected with its introduction; level of expertise available (or need for additional expertise and information) etc. These issues should be considered at the beginning of the process to ensure that the most appropriate method is selected, to help explain to the interested audience why that method was chosen and to help guarantee that the desired result will be achieved.

Here is a summary of examples of tools and models which are used in process of law drafting specifically, and which are considered in laws, codes or guidelines:

- *access to information*: creation of on-line central portals (registers), publishing information on the government and its bodies’ web sites, transmitting information in media (TV, newspapers), official gazettes, CSO portals, CSO newspapers, etc.
- *consultation*: publishing call for consultation on on-line central portals (registers) or on the government and its bodies’ web sites, media (TV, newspapers), portals or newspapers of CSOs, public hearings, conferences, roundtable discussions, citizen advisory groups, focus groups, on-line chat events, email lists, written comments, experts panels, public debates etc.
- *active participation*: cross-sector working groups, experts meetings, email lists, on-line chat forums, etc.

Application of one tool should not mean exclusion of another. Governments should adopt different tools which may be needed to solicit wider input and include all groups that may be affected by the law. For example, the EC and several countries have established a web portal to facilitate and coordinate information sharing and consultation. However, they also apply other methods to solicit input (e.g., public hearings, press releases, contact points).

Further, as outlined in the **Estonian Good Practices**, the chosen method of involvement should consider the effect of the draft document on the parties to be involved, the needs, opportunities and other conditions. Below is summary of some models addressed in European documents:

1. Preparation for the process

Several countries provide for certain suggestions or requirements as to what institutional methods to use to ensure successful participation.

Assigning participation coordinators/facilitators

⁵² Art. 14, Law 52/2003 on the Decision-Making Transparency in the Public Administration

Several countries propose the assignment of specific government officials in each government body to coordinate and monitor the consultation process, to ensure compliance and harmonized application of the prescribed law or code (e.g., Austria, BiH, Croatia, Estonia, Republika Srpska, the UK).

- **BiH Rules for Consultation:** each institution must designate a Coordinator for Consultation responsible to coordinate all consultative processes within the institution, and in addition a separate official may be designated for particular consultation process.
- **Estonia:** each ministry appoints officials, whose direct responsibilities include involving the public in decision-making processes. These people supervise the implementation of the Code of Good Practice on Involvement in their respective ministries, and help both government officials and nonprofit organisations in the matters of involvement.⁵³ The names of the contact persons are available on the common web site for consultation. According to the **Best Practices**, the coordinator of the involvement should advise the parties, analyze the process and summarize the results.
- **Republika Srpska Guidelines:** each institution should assign a coordinator for consultation who takes part in the process of drafting laws and is responsible for applying the Guidelines to the process.
- **UK Codes on Consultation:** every government body should assign a consultation coordinator, to advise different officials who run the specific consultation. The coordinator receives information from the parties about the way consultations have been conducted and how the Code was respected in the process, and shares learning within its government body and among government bodies as to how to improve the consultation process.

Developing a list of interested parties

Developing list of individuals and organizations that work in the area of activity of a government body or would be interested to take part in the process is a useful tool to facilitate more effective participation process. Such lists help answer the questions as to 'who to involve' and also can help promote cooperation even beyond the law drafting process. However, the existence of such lists aims to facilitate the process and it should not inhibit the possible participation of other parties which may be affected or have an interest to take part in consultation on a specific law.

- **Estonian Good Practices:** the responsible body should register all interested parties which want to be informed about the preparation of certain document in general. In addition, when determining who to involve in a specific process, aside for the registered parties, the body should consider other possible interest groups to be involved in that particular process. When deciding who else to involve, the responsible body can consider the representativeness of the party and their expertise.
- **BiH Rules for Consultation:** each institution should keep a list of interested organizations and individuals; request to be included in the list should be made in writing.

⁵³ Kubar, U., "Estonian Civil Society Development Concept (EKAK): Framework for Cooperation Between Third and Public Sector", 2008

Developing plans

Developing plans as to how the process should be conducted can help government bodies clarify the objectives of the process in the beginning, and decide on the best method to choose for that process. Even more, it can help them assess the amount of financial resources needed and plan for them in advance.

The **Estonian Good Practices** recommend the preparation of a 'plan for involvement'. The content and format of the plan should correspond to the type and content of the document which will be consulted. The following issues should be addressed: participants in the process, stages of involvement, coordinator of the process, beginning, length, final deadlines, forms, methods of consultation, information channels, interim assessment of the process and final results.

The **Austrian Standards** provide for several questions which need to be considered in the stage of preparation for a participatory process. Those include: objectives and goals of the process, target group, outlining topics and issues which can be changed, and those which cannot (from the legal provisions), determining the scope of influence by the public and informing them how much their comments will be binding, level of involvement (information, consultation, participation), methods to be applied, assigning facilitator to lead the process.

2. Providing information about the process

Good practices require that the public is informed in time about the intended law drafting process. Sending information to the public could help interested parties to prepare in time for the upcoming process, and contribute meaningfully to it. Different tools should be used to ensure that the information is distributed as widely as possible.

- According to the **BiH Rules for Consultation** each institution should post on its web site the list of planned activities in terms of law drafting, send it to those on the consultation list and give to anybody who requests it in writing.
- According to the **Estonian Good Practices** documents and references related to the involvement process should be made public through the electronic information channels, if necessary through alternative channels (libraries, CSOs, local government, information points) and through the mass media.
- According to the **Romanian Law** announcements regarding law drafting process must issued in the respective department, in a location that is accessible for the public; moreover, they must also transmit these announcements to the central or local mass-media channels and to all the people that manifested interest in receiving such information.

3. Using the Internet

Web sites of government bodies

In several European countries, the governmental bodies are asked to post draft laws on their web sites, and some of them detail the way information should be posted.

In **Bosnia and Herzegovina** the Ministry of Justice website has a section dedicated to public consultation with information on the planned drafting processes; details of a contact person for consultation, list of organizations; the relevant rules and guidelines; the internal rule book; and the form for making submissions, and it also aims to contain the draft laws open for consultation.⁵⁴

In the **UK** different departments also contain special sections on their web site dedicated to online consultation processes. In general, the web sites host information about open and closed consultations. Comments can be given by answering questions asked by the department via an online form, or via email or by sending comments by post (depending on the format the department chooses to use). The web site provides short description about the aim of the document open for consultation and its content, the questions which are focus of the consultation, related materials, information on when the process was open, when it will be closed/deadline for submission of comments, reference number, and contact person and also the intended target group for the consultation. The closed consultations also contain links to the responses received during the process.

In **Hungary**, the concepts of laws, draft laws and decrees, the relative proposals and professional arguments and the status of their conciliation shall be posted on the web site of that ministry which is operated by the minister preparing the law. The interested parties may provide their opinion without registration by sending it to e-mail addresses specified in case of each draft law. The law does not specify the scope of opinion nor does the competent ministry raise specific questions therefore the interested parties may touch upon any aspect of the examined draft law and may also upload document in the e-mail. The draft legislation and related documents should be kept on the web site of the ministry for a year following the adoption of the legislation.

Central electronic portals

In addition to posting on individual web sites, some governments host central electronic portal/database which also aims to facilitate information sharing and consultation.

The EC Principles and Minimum Standards provide that open public consultations should be published on the internet of its bodies and also announced in a single access point, and for this purpose it will use the *Your Voice in Europe portal*⁵⁵. The portal is a tool for submitting comments and views on EU policies, discussion on current issues, chat-online with EU leaders. It also facilitates communication with MPs, and other bodies, informs about opinion polls, etc.

In Finland⁵⁶ the **web register and information portal hare.vn.fi** aims to facilitate information sharing and help increase transparency about the work of the government departments. It contains information on all projects and law drafting activities by the Parliament, Government and different government bodies. The online register enables the public to obtain information and to monitor and evaluate the work of state bodies. It contains information the goals of the document which is prepared, the timeline, contact persons, and members of the project or working group. It also contains information on how the how the project advances and of its

⁵⁴ <http://www.mpr.gov.ba/en/str.asp?id=224>, accessed on September 14, 2010

⁵⁵ http://ec.europa.eu/yourvoice/index_en.htm, accessed on September 14, 2010

⁵⁶ <http://www.hare.vn.fi/> accessed on September 14, 2010

publications. Information is sent to the register as soon as the project or law drafting is launched.⁵⁷

The **Direct.Gov web** site in the UK hosts a central consultation web site,⁵⁸ which contains links to direct consultation web sites of the government departments as well as search engine of all open and closed consultations. It provides guidance and tips on how comments should be provided.

In Estonia, the **participation portal Osalusveeb.ee**⁵⁹ was launched by State Chancellery in 2007. It aims to complement other methods of participation and consultation. The portal allows CSOs and individuals to post comments about the ongoing consultation processes, while the ministries can provide the public with their annual work plans, draft laws, background materials as well as post polls. The web site hosts information about success stories of participation, handbook on participation, and contact points at each ministry responsible for involvement of CSOs. It runs a searchable database of current laws and draft laws. Although submission is currently voluntary, this portal is used by all ministries.

The main features of the portal are as follows:⁶⁰

- The portal publishes drafts of laws, amendments and development plans. Drafts are posted at the early stage of their development.
- The portal allows all registered users (registration is unrestricted) to express their opinion and make suggestions on a published draft act within an announced deadline. Individual feedback is not provided, however all comments are analysed by the drafters of the document. All comments, suggestions and ideas are answered with information on how the suggestion is to be treated: incorporated in the paper, acknowledged, left for further incorporation at a later stage (implementation phase, second amendment etc.), or ignored (reason is given for each exclusion). The results are written in a report and published on the site. After the process is closed for consultation the draft is processed for inter-ministerial discussion, and this process can be followed on the e-legislation web site.⁶¹
- The portal facilitates creation of interest groups to support or comment on a specific draft act, policy etc. as a one-off action; interested parties can collect signature for example. They can also launch initiatives, present ideas and submit petitions.

In Hungary, **the on-line Central Electronic Register of Public Information**⁶² hosts information about documents (e.g., laws, publications) developed by different bodies performing public

⁵⁷ The description about hare.vn.fi is drawn from Holkeri, K., *Accompanying Mechanisms for Public Scrutiny and Access to Information: A Case Study from Finland*, presented at Forum on Ensuring Accountability and Transparency in the Public Sector in Brazil, 5-6 December 2001

⁵⁸ http://www.direct.gov.uk/en/Governmentcitizensandrights/UKgovernment/PublicConsultations/DG_170463, accessed on September 14, 2010

⁵⁹ <https://www.osale.ee>, accessed on September 15, 2010

⁶⁰ The description of the webi site is taken from Mandel-Madise, Marie., *Participation Web Site Estonia, Study on Stakeholders' Involvement in the Implementation of the Open Method of Coordination in Social Protection and Social Inclusion*, Carried out by INBAS GmbH and ENGENDER on behalf of the European Commission, Employment, Social Affairs and Equal Opportunities DG, 2009; and also E-Practice.eu <http://www.epractice.eu/cases/osale>, accessed on September 15, 2010

⁶¹ <http://eoigus.just.ee/>, accessed on September 14, 2010

⁶² <http://www.kozadat.hu> accessed on September 14, 2010

duties and data of public interest (e.g., name of the head of the government body). It also provides links to the web sites of bodies performing public duties and informs about ongoing consultation processes. Bodies performing public duties must send a description about the data of public interest and documents that they are developing to this register site as soon as the information is published on their own web sites. The information must be updated regularly (immediately after its change/submission, quarterly, permanently or within 60 days after the decision was made according to the type of data⁶³) and be accurate on both the central electronic list and the web sites of the responsible body. A so-called *Single Public Information Retrieval System* hosted on this register ensures that the documents are categorized and may be searched based on specific criteria which are uniform (e.g., title, subject and the deadline of the commenting). The register and the retrieval system are operated by a non-profit company on behalf of the National Development Ministry.⁶⁴

4. Submitting comments – example of ‘collective comment’

The **Slovak Legislative Rules** in article 9 and 10 regulate in more detail the right of the public to submit comments to a legislative draft. Comment is defined as a proposal to adjust the draft act, submitted and justified within the allocated time for comments. The comment could be:

- Proposal for new wording;
- Recommendation for an adjustment to the wording, such as supplements, change, deletion or rephrasing of the original text.
- A reasoned proposals, which explains the specific reservations regarding the draft text and provides proposal as to how to remedy the opposed shortcomings. In this case the comment has to state clearly in which parts and in what way the draft should be amended.

The initiator of the draft law is not obliged to consider the comment nor evaluate proposals (opinions, ideas, recommendations), which do not meet these three requirements.

The rules provide guidance as to ‘how’ to present the comment. Namely, the comments should be clearly formulated and their legislative benefit should be apparent. They should be divided into ‘general’ and ‘comments on individual provisions’ of the draft. Comments can be submitted in electronic version through the web site of the drafter of the law (where the draft is published), in electronic version at the designated electronic address or in hard copy. Comments can be submitted individually or collectively.

The commentator (whether a government body or member of the public) can mark the comment as of ‘principle comment’ if it believes that the comment is of particular importance. The drafter of the law is required to accommodate to that comment, and if not it will be considered that there is a ‘subject of disagreement’ because of which a ‘settlement procedure’ will need to take place. For a comment of the public to be considered as a ‘principle comment’ it must be supported by 500 signatures of natural or legal persons⁶⁵ and the signatories should have authorised a person to represent it. Such a ‘principle comment’ must then be dealt with by

⁶³ The annex to Act XC of 2005 on Freedom of Electronic Information contains specific list of all documents which should be made public and specifics about when changes must be reported.

⁶⁴ Neumann Nonprofit Ltd. de facto operates the register and the system on behalf of the minister.

⁶⁵ Or 300 signatures in case the document is of non-legislative nature.

the drafter of the law, who must also explain why it was or it was not accepted.⁶⁶ If the comment was not accepted, a 'settlement procedure' needs to take place, which is conducted through organizing a meeting with the authorised representative of the public. If an agreement is not reached during this meeting, the draft law that will be sent to the Government should include the issue of disagreement as well. 'Settlement procedure' may also be conducted even if 500 signatures are not collected, based on decision of the drafter of the law. However, if the conditions for a 'settlement procedure' are fulfilled, and the drafter considers that there are serious reasons not to organize such procedure, it must publish those reasons on the internet.⁶⁷

5. Organizing public meeting and working groups

According to the **Republika Srpska Guidelines** consultations are conducted by forwarding the preliminary law to the interested parties to give objections and suggestions in writing, or by creating cross-sector working group with representatives of all interested parties. Consultations on the law are conducted during the development of the draft law and have to be finalized within 15 days, after which the prepared draft legislation enters into regular drafting procedure. After the draft is finalized interested parties can still comment on it, within 8 days from the day it is posted on the web page of the drafter of the law.

The **Romanian Law** contains specific provisions as to how public meetings on a draft law are organized. Public meeting is meeting organized by a government body to which every person can have access. The meeting must be advertised at least 10 days before it is planned on the web site of the department, displayed in the department offices and also transmitted through the public media. The announcement must include the time, date, venue and agenda. All parties that have submitted written comments to the draft (prior this meeting) must be informed about the meeting. A person responsible for civil society relations within the department is required to distribute the announcement and send special invitations. At the actual meeting, people may participate within the available limit of seats, and the chairperson makes an order of speaking based on the topics of interest. Mass media is also invited. The opinions expressed should be considered as recommendations. The public authorities must write, archive and make public the minutes of the meeting.

6. Organizing consensus conference

Organizing a consensus conference is considered in the Austrian Standards and can be used in cases of (politically or socially) controversial question. A selected group of 10-20 interested parties (lay people) works out the answer to the issue in collaboration with experts, who support their opinion. Those selected familiarize themselves with the issue. A three-day conference is organized during which the experts elaborate all matters related to the subject, while the participants question the experts and discuss the issue in depth. At the end a written report is composed which explains the consensus achieved (points of view, recommendations).

⁶⁶ This can also have a negative effect, e.g., a government official may decide to disregard any comment which does not have 500 signatures even if it is relevant and useful to the process. See: Staroňová, K., Public policy-making in Slovakia, Slovak Governance Institute,

⁶⁷ Mlynarcikova, Viktoria., Public Participation in the Legislative Process in Slovakia, presented at the Citizen Participation in Legislative Process, seminar, Mongolia, 14-17 January 2007

This report is then presented to the decision-makers (politicians). Media and the public can also be present.⁶⁸

CONCLUDING REMARKS

Participatory policy making processes are recognized and practiced internationally. Intergovernmental institutions and European countries have adopted documents to strengthen, guide and help guarantee the participation of the public, CSOs, and various organizations in their decision-making processes. While some of these documents do not have a binding force, they set out clear guidance and framework. If they are considered in the local context they can help in strengthening the legal environment and supporting the practice of participation.

The texts of the adopted documents on EU level, Council of Europe and the described regulations of countries in Europe provide a general framework of standards which can be considered and applied in participatory processes in other countries. The following concluding remarks can be drawn out from these documents.

Rules and principles concerning public participation in policy and law making processes on government level are spelled out in different types of documents. Some are legally binding (e.g., Bosnia and Herzegovina, Romania), others are not (e.g., Austria, Croatia, the UK). Sometimes issues concerning participation can be found in different documents. Documents adopted on national level should not undermine practices which already exist or which create higher standards. Upon adoption of the document (law or code) it's important to undertake follow up steps to ensure effective implementation.

The law drafting process is composed of several stages. The public should be involved in all of them, i.e., from the planning through their implementation.

There are three major level of participation: access to information, consultation and active engagement through dialogue and partnership. They require employment of different tools and methods and are characterized by different intensity in the relationship between the government and the public.

Everybody should be informed and have the possibility to be consulted in the process of law drafting. Additional efforts should be made to include those who will be most affected by the laws. When special working groups are formed, participation may be limited; but the selection of the members of the public or CSOs should be done openly and based on predefined criteria to ensure credibility of the process. Participation should be open to different groups and methods should be chosen which will help facilitate involvement of groups with special needs.

CSOs can play an important role in the process – by facilitating the involvement of the public, representing stakeholders' interests and by informing on the results.

⁶⁸ As explained in: Arbter, K., Handler, M., Purker, E., Tappeiner, G., Trattnigg, R., *The Public Participation Manual – Shaping the Future Together*, 2007. For more information see: <http://www.peopleandparticipation.net/display/Methods/Consensus+Conference>, accessed on September 14, 2010

All laws and implementing regulations should be drafted in a participatory manner. Sometimes there may be conditions which would require certain limitations in the process. However minimum standards should be respected – the public must be informed and have access to the draft, minimum time for consultation should be provided before the draft is sent for adoption in the parliament, and interested parties should be able to take part in the drafting process.

Some documents recommend adoption of clear, concise and comprehensive information to be provided so as to help ensure that interested parties understand the issues better and are able to offer more meaningful contribution. For the same reasons, the public should be able to gain access to the draft documents at the earliest stage of their development.

The timeline allocated for comments or participation in public meetings should be determined on several factors including the type of document, the issues raised, its length, available expertise, the size of the target group it affects. The timeline can be shortened; but it is recommended that the situations when this can occur are clearly prescribed.

Providing feedback to the consulted parties increases trust and strengthens cooperation, and it also ensures that they will be more committed to take part in future processes. While the feedback does not need to be individualized, a consideration of all issues raised should be made when developing collective response. Some countries provide additional guarantees that the opinions will be considered; for example the responsible state body may need to make the collective feedback public, and send it to the Government and/or Parliament as accompanying document to the draft law.

Assessment of the process of participation helps draw recommendations to improve future process and share experiences. Therefore, such assessments should be conducted after the law is adopted.

Different tools and methods can be used to support participation at all stages of the drafting and implementation process. The decision on which method to choose can be made based on different factors, but such decision should be made at the beginning of the process to ensure that the most appropriate method is selected and that it will bring the desired results. Governments should adopt different tools which may be needed to solicit wider input and include all groups that may be affected by the law.

In preparation for the process, some government bodies can assign coordinators who will facilitate the process, develop a list of interested parties to take part in the process, and develop plans for the process.

Different tools should be used to ensure that the information about the launched process is distributed as widely as possible (e.g., web sites, newspapers, TV, CSO portals).

Governmental bodies use their web sites to facilitate the process of consultations. In some countries, central on-line registers have been set up to assist with the coordination of information sharing and consultation, but also to provide tool for the public to meet in one place and comment on various undertakings by the government.

The laws that are enacted affect people. Passing a law is a demanding process. It requires investment from both the government and the interested parties involved, in terms of time, financial resources and energies. Governments may decide not to ask the public for opinion on the draft. In such cases, they may not be able to implement the law properly, people may not be willing to comply with law which they do not understand and have not been consulted about. The government will need to amend the law more often to adjust to the needs or circumstances which were not foreseen, and thus spend additional resources and time. This will decrease trust in its work. Open processes bring government bodies and the interested parties together, resources needed for the process are shared, the proposed laws have increased legitimacy and ownership, and responsibility for the implementation is shared. Ultimately, participatory processes can ensure that the laws meet the real needs of the people and contribute towards further development of the society.

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