



## SIGMA

### Support for Improvement in Governance and Management

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### Workshop on “Consultation Practices within the Process of Public Policies - Challenges and Opportunities”

## Consultation – a Key Tool for Better Regulation in Europe and Romania

### *Consultation Generally*

Consultation may be defined as a structured public engagement which involves seeking, receiving, analysing and responding to feedback from stakeholders. It involves defining the purpose and subject of the consultation (policy initiative, regulatory change, legislative proposal).

In most countries, consultation is mainly conducted on primary legislation and very rarely on secondary legislation. It also involves drawing up a consultation methodology, including criteria for identifying stakeholders.

The potential for consultation is a function of the strength of civil society and of the procedures used, so principles laid down for consultation need to take into account particular domestic cultural and societal factors, as well as the national institutional set up.

Some countries have adopted guidelines on consultation, thereby providing the necessary political support for the consultation process within the Government system. An example of this may be found in the European Commission<sup>2</sup> and in some Member States<sup>3</sup>. The guidelines should be flexible and take into account different levels of organisation by stakeholders.

A general time limit for consultations on draft laws should be set and compliance with the set of principles should be reviewed at the centre of government. The consultation process should be linked closely with the regulatory impact assessment process.

### *Elements and typology of consultation*

The necessary elements seem to be the following:

- Proper choice of stakeholders to ensure a broad and useful input,

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<sup>2</sup> [ec.europa.eu/enterprise](http://ec.europa.eu/enterprise), see also 'General Principles and Minimum Standards for Consultation of Interested Parties' on 11 December 2002 (COM(2002)704 final).

<sup>3</sup> See for example paper delivered at this seminar by Audrey O’Byrne, formerly policy analysis, Department of Prime Minister in Ireland and author of Guidelines on consultation in Ireland and at the time of writing senior advisor, OECD.

- A minimum time for external consultation needs to be introduced,
- Systems to ensure that the recommendations for selections and the minimum time have been complied with,
- Understanding of the role of participants.

Three main types of consultation with the public can be identified:

- Consultation with established bodies, e.g., tripartite committees.
- Consultation with ad hoc advisory groups.
- Public notice published on the internet and submitted to public comment, which may facilitate on-going consultations.

Other forms of consultation take place also, e.g., consultation within government and consultation across government between ministries and agencies.

### ***Why Consult?***

The use of public consultation has different implications for the improvement of the regulatory framework. Firstly, if it is undertaken in a timely and effective manner, consultation captures the collective intelligence of a society. It is increasingly being used to collect empirical information for analytical purposes, especially as a precondition for the move towards more analytically-based models of decision-making processes (*e.g.*, the use of impact assessments to evaluate the impact of regulations).<sup>4</sup>

Consultation is a cost-effective source of data, as well as a source of information on issues such as the acceptability of various policies, which can be essential in determining practicability and designing compliance and enforcement strategies. A consultation process is a valuable tool to improve the legitimacy and credibility of government actions. This data and information may also, in some countries, be used when carrying out regulatory impact assessments.

Secondly, consultation mechanisms are also being increasingly characterised by greater openness and accessibility, particularly for smaller, less organised interests. This reflects a move away from corporatist modes of governance towards more pluralistic approaches. Consultation is inherent in transparent and effective governance.

Consultation is a partnership process that can improve the quality of legislation by involving expertise in civil society. This does not, of course, seek to minimise the challenge of developing the necessary expertise in civil society to participate in consultation exercises. Time and time again, in my work in Eastern and South Eastern Europe, I met with the story from civil society that government does not listen. From government, the view is that civil society does not know how to participate in consultation exercises and that civil society uses consultation only as a means of promoting its own interests.

### ***Consultation in the EU***

The Commission has a long tradition of consulting interested parties on its policy and regulatory proposals. In order to improve its consultation processes, the Commission adopted a set of '*General Principles and Minimum Standards for Consultation of Interested Parties*'. The EU highly values consultation with interested parties and the collection and use of expertise which are both an integral part of the process.

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<sup>4</sup> GOV/SIGMA(2007)6 57.

These principles and standards provide a framework for consulting civil society and stakeholders, which ensures transparency and access to consultation, feedback to contributors and a minimum reply time of 8 weeks. This action is linked to the impact assessment procedure and will, as a first step, apply to those initiatives subject to impact assessments. Nevertheless, the Commission's services are encouraged to apply those rules to any other consultations that they intend to launch. All consultations of special interest for businesses and professional organisations are accessible through DG Enterprise and Industry's dedicated web page *Enterprise and Industry DG in Dialogue*. DG Enterprise and Industry's consultations are also accessible through *Your Voice in Europe*, the Commission's single access point for all its public consultations.

### ***Consultation in New EU (NMS) Member States***

The picture in new EU Member States is very mixed. Many have formal legal arrangements in place to underpin consultation. Some, notably Slovenia and Latvia, are engaged in training exercises to develop consultation. In many NMS, recent legislation required that draft regulations be published on an official website so that each citizen may comment on the draft.

### ***Legal Basis***

In most NMS, consultation forms part of the policy of regulation making rules as a compulsory requirement. In **Lithuania**, it might be noted that, although public consultations are discretionary, some important laws such as the Law on Public Administration and the Law on Local Self-Government provide for compulsory consultation.

All NMS have established different methods of conducting consultations. However, consultation procedures are not standardised in any NMS and even vary from one ministry to another. In addition, the type of consultation very often depends on the issue and its complexity, as well as on the body or people consulted. These variations may undermine the credibility of consultation exercises. The only factor in common is that none has a coherent written policy.

In **Latvia** and **Slovenia**, where there is little experience of consultation by Non-Government Organizations (NGOs), policies are being developed to train representatives from NGOs in consultation methodologies.

In countries where civil society is more developed (**Cyprus, Estonia, and Malta**), consultation processes are conducted at various stages of the regulation making process on the basis of an agreed practice and are rooted in a social dialogue and consensus tradition. However, this does not exclude some form of guidelines or established procedures.

In **Cyprus** and **Malta**, consultation exercises are not compulsory and there are no agreed procedures to carry them out. However, some more established consultation procedures have been adopted. The *Code of Practice on Consultation* of the Malta Environment and Planning Authority, for example, describes the policy-making process and provides for guidelines on why and how consultation should be conducted. In addition, for secondary legislation, the checklist requires that consultation take place.

However, other than **Cyprus** and **Malta**, many of the countries assessed by SIGMA<sup>5</sup> did not have a tradition of consultation. Many officials we spoke to during the assessments of the regulatory management capacities of the NMS expressed the view that consultation was a burdensome process

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<sup>5</sup> See [www.sigmaweb.org](http://www.sigmaweb.org) Sigma Paper No. 42.

and that civil society had not the capacity to be responsive to consultation procedures, though these officials fell short of taking the position that the administration knows what is best for the citizen.

In **Hungary**, by virtue of section 19 of the Act on the Protection of Personal Data and Open Access to Public Information, the state, local-government or other public organisations defined by law is required to publish electronically or by other means, all relevant data related to their activities. The ministries post the texts of draft legislation on the public bulletin boards of the so-called 'Green Spider Network', based on the concept of open legislation. According to the Act on the Freedom of Electronic Information, draft laws are published on the internet, together with a submission deadline for comments.

In **Latvia**, all proposals of importance are put on the website of the State Chancellery before their consideration at the weekly meeting of the State Secretaries.

In **Poland**, following *the Act on Lobbying*, all government policies and initiatives should be communicated to the public (especially, via internet sites of ministries) and that Act affirms the right of everyone to comment on legislative proposals. In addition, certified professional lobbyists communicate their comments on a given draft and can access the draft in the Bulletin for Public information. However, much of the material on accessibility of legislation is included in the Law on Access to Public Information.

Some consultation practices are worth mentioning: In **Estonia**, the 'Web Talk along' initiative is an innovative way of involving citizens in the formulation of policy and the drafting of legislation. In **Latvia**, a Memorandum of Understanding was drawn up in 2005 between the Government and NGOs and handbooks have been published for NGOs and training of officials in consultation techniques. In addition, a representative of NGOs may attend the State Secretaries meetings and the Cabinet of Minister's meetings as an observer and may suggest proposals.

### ***Consultation with Established Bodies and Stakeholders***

The consultation with business and civil society representatives in NMS is often conducted through regular meetings of a committee comprising representatives from social organisations and NGOs, as in **Cyprus, Hungary, Lithuania and Poland**, or following more ad hoc initiatives, or a combination of the two, as in the **Slovak Republic**. In any case, from the point of view of the consulting party, it is not always easy to identify the relevant organisations or the persons in organisations who are the most appropriate to consult with.

In **Cyprus**, depending on the issue and on the existing legislation, the examination of the proposal by a committee such as, for example, the Labour Advisory Board or the Joint Staff Committee may be required. The Joint Staff Committee is consulted on all issues concerned with terms and conditions of civil servants and comprises interested parties from the private sector as well as from the civil service.

In the **Czech Republic**, the Legislative Rules enable a form of public consultation to take place. However, the authority responsible for the preparation of the law has discretion as to whether and how, it will consult with bodies such as NGOs. In the case of labour, the Tripartite Council (Government, Unions and Employers) must be consulted. In addition, following the recent amendment to the Legislative Rule of Government, the Economic Chamber has become an official participant in the inter-ministerial comment procedure and can send its comments to the relevant ministry. Furthermore, the adoption of the Methodology of Public Consultations by the Government is expected in 2007.

In **Hungary**, there are several government institutions designed to ensure stakeholder involvement, e.g., the employment consent mechanism, with the involvement of employers' and employees' representation. A typical consultation body is the National Environmental Council, which meets once a week and has a secretariat run by the Ministry of the Environment.

In **Lithuania**, a Tripartite Council (Government, Business interests and trade unions) was established in 1995 to deal with social, economic and labour issues. In **Poland**, depending on the issue regulated, the government seeks the opinion of established bodies, including:

- The Joint Committee of the Central Government and Territorial Government, in each case if the draft concerns operations of the territorial government.
- The Tripartite Committee for Social and Economic Affairs composed of representatives of employees, employers and central government.
- The Copyright Committee.
- Sectoral regulators.

In the **Slovak Republic**, many ministries have advisory bodies which are consulted on major new proposals. The Minister of the Economy established a Business Environment Board, comprising representatives of the Slovak Chamber of Industry and other business associations. Bills and policy proposals relating to economic and social issues are discussed within the framework of the Council of Social and Economic Agreement.

In the **Slovak Republic**, according to the Law on Free Access to Information, all pieces of legislation, including guidelines and draft proposals for legal regulations, are made available on government websites.

In addition, in many cases, an ad hoc advisory committee or a working group of civil servants and experts is established. Extensive consultation with non-governmental institutions (e.g., the Association of Slovak Towns and Municipalities, the Union of Agricultural Cooperatives of Slovakia) is also organised.

### ***NMS: Lessons on Taking Results of Consultation into Account***

Whatever the consultation procedure may be, it remains formal unless a systematic policy to assess the comments provided by the public, and take into account the relevant ones, is applied.

In **Estonia**, the Government estimates that about 5% of the amendments proposed within the framework of the 'Web Talk along' process are accepted.

**Latvia** has developed several procedures to ensure that the opinion of civil society is reflected in its regulations. The first stage is the publication or announcement of the draft. After publication comments made are collected and, if necessary, meetings are held to review the comments; a summary of all ministry proposals, including arguments for accepting or rejecting each proposal, is prepared and accompanies the draft document when it is returned to the meeting of the State Secretaries for approval.

In addition, an NGO with an interest in issues to be discussed at the Cabinet of Ministers' meeting can apply to the Director of the State Chancellery to attend the Cabinet of Ministers' meeting. In exceptional circumstances, the NGO may be given the opportunity, at the discretion of the Prime Minister, to make a statement at the meeting. A representative of NGOs attending a State

Secretaries' meeting may submit views to State Secretaries and reasons must be given if they are not taken into account.

In **Poland**, according to the Rules of Procedure of the Council of Ministers and the Standing Orders of the Sejm, the results of public consultations conducted for a specific regulation must be set out in the corresponding RIA. In addition, a number of ministries have set up internal procedures to handle public comments. For example, comments made by the public on a regulation drafted by the legal department of the Ministry of Justice are sent to the Codification Committee for civil law or the Codification Committee for criminal law, which decides whether the remarks are justified and need to be inserted into the draft.

In the **Slovak Republic**, where 500 or more people comment on a proposal their views must be considered. If the proposal is not accepted by the government, it must give reasons to the citizens who presented the proposals. It may sometimes be difficult to combine all the comments made by the public and various stakeholders in a consultation process. Submissions to the process may be contradictory.

In **Slovenia**, a pilot project was carried out on the e-archiving law using the *eSodelovanje* portal: 86% of the participants stated they would participate again via the portal and 75% of all comments received were incorporated in the final version of the draft law. Assessing the relevance and whether the comments are representative of a wide range of views is not easy for any country, nor is it easy to avoid the risk of consultation fatigue.

## **Conclusions**

Consultation with the public in relation to proposals for new policies and laws is now an accepted and expected feature of the democratic process. As we will see from the other presentations, countries are beginning to develop guidelines for consultation in the same way as that which has been developed for the European Commission. Countries which have not had a long tradition of public consultation exercises face the additional challenge of having to educate officials and citizens about the benefits and opportunities provided by public consultation exercises.

There is no empirical evidence, but there is growing anecdotal evidence to support the assertion that public consultation adds to the quality of policy making and leads to better regulation. All OECD countries engage in public consultation exercises and those exercises are now an accepted feature of the effective functioning of a transparent and accountable government.

As we will see from the presentations that follow, there is a great diversity of approaches to public consultation exercises and no single country has the monopoly of wisdom on what works best or why but the knowledge is growing. The OECD will shortly produce a substantial report on consultation in its Member States and we will watch with interest how the newer EU countries will develop and build their own consultation methodologies appropriate for their own distinctive cultures and societies.