

REPORT

E-Consultation Mechanisms in Legislative and Regulatory Decision-Making

Introduction: COVID-19 and electronic participation

The COVID-19 epidemic has necessitated a shift to remote operations across society, from workplaces to schools to holiday celebrations. Government operations have not been exempt from this imperative. According to the Inter-Parliamentary Union,¹ 61 of 108 parliaments profiled have shifted in whole or in part to remote operations due to the pandemic.² This shift comes as governments have engaged in active policy-making in response to the epidemic, in many cases adopting measures with significant effects on the daily lives of citizens and notable impacts on freedoms of expression, assembly, association, movement, and other fundamental rights.³ There is a pressing need, recognized by some governments, for citizen input into these policy-making processes. Affected individuals, civil society organizations (CSOs), experts, and service providers can play a key role in identifying needs and policy priorities; developing, reviewing, and refining proposed measures; and overseeing and participating in policy implementation. The shift to remote operations necessitated by COVID, however, can restrict opportunities for in-person public participation in policy development and implementation. The COVID-19 epidemic, then, only underlines the importance of governments establishing effective modalities for remote public participation in policy-making processes, including e-participation mechanisms.

As defined by the United Nations, “e-participation” refers to “the process of engaging citizens through ICTs [information and communication technologies] in policy, decision-making, and service design and delivery so as to make it participatory, inclusive, and deliberative.”⁴ Since the early 1990s, governments have increasingly

¹ The Inter-Parliamentary Union is a “global organization of national parliaments” with 179 Member Parliaments and 13 Associate Members. Inter-Parliamentary Union, “About Us,” <https://www.ipu.org/about-us>.

² Inter-Parliamentary Union, “Country compilation of parliamentary responses to the pandemic,” <https://www.ipu.org/country-compilation-parliamentary-responses-pandemic>. We have considered that parliaments have “shifted in whole or in part to remote operations” where plenary meetings, committee meetings, or voting on measures by members of parliament has taken place by remote means.

³ See International Center for Not-for-Profit Law (ICNL) and European Center for Not-for-Profit Law (ECNL), “COVID-19 Civic Freedom Tracker,” <https://www.icnl.org/covid19tracker/>.

⁴ David LeBlanc, *E-participation: a quick overview of recent trends*, UN Department of Economic and Social Affairs (DESA) Working Paper No. 163 (January 2020): 4, https://www.un.org/esa/desa/papers/2020/wp163_2020.pdf.

prioritized the development of e-participation mechanisms designed to provide information to citizens about government activities (monitoring); permit citizens to establish policy priorities (agenda-setting); and include citizens in decision-making (input).⁵ In this paper, we will focus on the input function of e-participation mechanisms, and in particular on e-consultation systems providing individuals and organizations with opportunities to participate in national legislative and regulatory policy-making. We will set out applicable international and regional standards governing participation and e-participation, and examine prominent examples of e-consultation systems established by national legislative and regulatory authorities. We will then close with recommendations for how national authorities can more effectively integrate e-consultation modalities into their policy-making processes.

Norms regarding (e-)participation and (e-)consultations

The right to public participation is generally protected under international and regional human rights treaties. Regional instruments such as the Aarhus Convention⁶ and the Escazu Agreement⁷ set out specific requirements that authorities must follow with respect to public participation in environmental decision-making, with a special emphasis on public consultation. Though these treaties and instruments set out general requirements applying to public participation and consultation, they do not specifically address e-participation or e-consultation.

The United Nations and the Council of Europe have also issued or approved standards for public participation. The UN guidelines issued by the Office of the High Commissioner on Human Rights,⁸ and guidelines for civil participation in decision making issued or endorsed by the Council of Europe,⁹ elaborate upon the specific practices that authorities should follow in conducting public consultations on proposed policies or decisions. The UN guidelines, notably, stress that the same

⁵ Ralf Lindner & Georg Aichholzer, "E-Democracy: Conceptual Foundations and Recent Trends," in *European E-Democracy in Practice*, eds. Leonhard Hennen et al. (Springer 2020): 23, <https://springer.com/gp/book/9783030271831>. For a survey of e-participation mechanisms implemented around the world, see United Nations, Department of Economic and Social Affairs, *2020 United Nations E-Government Survey*, <https://www.un.org/development/desa/publications/publication/2020-united-nations-e-government-survey>.

⁶ The Aarhus Convention, also known as the "UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters," establishes rights of the public with regard to the environment. European Commission, "The Aarhus Convention," <https://ec.europa.eu/environment/aarhus/>.

⁷ The Escazu Agreement, also known as the "Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean," aims to guarantee rights contributing to the right to live in a healthy environment and to sustainable development. United Nations Treaty Collection, *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, <https://treaties.un.org/doc/Treaties/2018/03/20180312%2003-04%20PM/CTC-XXVII-18.pdf>.

⁸ OHCHR, Guidelines for States on the effective implementation of the right to participate in public affairs (2018): 3, https://www.ohchr.org/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs_web.pdf.

⁹ See Conference of INGOs of the Council of Europe, *Code of Good Practice for Civil Participation in the Decision-Making Process (Revised)* (2019), <https://rm.coe.int/revised-code-of-good-practice-for-civil-participation-in-the-decision-1680980cb1>; Council of Europe, *Declaration by the Committee of Ministers on the Code of Good Practice for Civil Participation in the Decision-Making Process* (21 October 2009), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802eeddf>

requirements apply to consultations conducted online or offline. The Council of Europe has also issued a recommendation on e-democracy,¹⁰ which stresses that e-democracy procedures should comply with general human rights principles.

Based on these sources of international law and standards, and as elaborated upon further below, we can identify nine key principles and requirements specifically relevant to the design of e-consultation mechanisms: (1) the public should have the opportunity to participate in the development of rules, policies, laws, and decisions affecting them; (2) public participation in decision-making through ICTs should follow the same principles governing offline participation; (3) the public should have the opportunity to participate in decision-making early; (4) authorities should provide the public with information about the procedures for public participation; (5) authorities should provide the public with information sufficient to permit effective participation in decision-making; (6) public participation procedures should include reasonable time-frames; (7) decisions should take due account of inputs from public participation; (8) authorities should inform the public of decisions taken and how inputs from consultations were taken into account in the decisions taken; and (9) remedies should be available when public participation requirements are not satisfied.

INTERNATIONAL AND REGIONAL TREATIES

The International Covenant on Civil and Political Rights (ICCPR) – a global treaty with 113 States parties,¹¹ and one of the three components of the “International Bill of Human Rights”¹² – enshrines the right to public participation in Article 25:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

¹⁰ Council of Europe, *Recommendation CM/Rec(2009)1 of the Committee of Ministers to member states on electronic democracy (e-democracy)* (18 February 2009), https://www.coe.int/t/dgap/goodgovernance/Activities/Key-Texts/Recommendations/Recommendation_CM_Rec2009_1_en_PDF.pdf.

¹¹ United Nations Treaty Collection, “International Covenant on Civil and Political Rights,” https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND.

¹² United Nations, “The Foundation of International Human Rights Law,” <https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html>.

- (c) To have access, on general terms of equality, to public service in his country.¹³

Regional human rights instruments protect the right of public participation, as well. The American Convention on Human Rights (ACHR) provides for the right of public participation in language similar to that in ICCPR Art. 25.¹⁴ The African Charter on Human and Peoples' Rights (ACHPR) provides that "[e]very citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."¹⁵ The European Convention on Human Rights (ECHR) addresses the right of public participation in more limited fashion, setting out the "right to free elections" in its Protocol No. 1.¹⁶

Other international treaties also enshrine a right of public participation. The Treaty on European Union (TEU) provides at Art. 10(3): "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." Art. 11 elaborates:

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....¹⁷

As we will explore further below, the European Union has vindicated these rights in part through e-participation mechanisms, including e-consultation systems.

Other international agreements specifically address public participation with respect to environmental matters. The Aarhus Convention, with 47 parties in Europe and

¹³ UN Office of the High Commissioner on Human Rights ("OHCHR"), "International Covenant on Civil and Political Rights," <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. ICCPR Art. 2(1) provides: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

¹⁴ Organization of American States, "American Convention on Human Rights," Art. 23, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

¹⁵ African Commission on Human and Peoples' Rights, "African Charter on Human and Peoples' Rights," Art. 13(1), <https://www.achpr.org/legalinstruments/detail?id=49>.

¹⁶ Council of Europe, *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11*, 20.III.1952: Art. 3, <https://www.refworld.org/docid/3ae6b38317.html>. See also OHCHR, "Equal participation in political and public affairs," <https://www.ohchr.org/EN/Issues/Pages/EqualParticipation.aspx>.

¹⁷ EUR-Lex, "Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union," 2012/C 326/01: Arts. 10(3), 11, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT>.

Central Asia,¹⁸ establishes a right to public participation in environmental decision-making. Of note, the Aarhus Convention requires, with respect to permitting decisions with environmental effects and the preparation of plans and programs relating to the environment, that authorities provide for public participation as follows:

The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

...

Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.¹⁹

With respect to permitting decisions with environmental effects, the Aarhus Convention additionally states:

Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.²⁰

With respect to the development of normative instruments affecting the environment, the Aarhus Convention establishes more relaxed requirements:

Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.

To this end, the following steps should be taken:

- (a) Time-frames sufficient for effective participation should be fixed;

¹⁸ UN Economic Commission for Europe (UNECE), "Map of Parties," <https://www.unece.org/env/pp/aarhus/map.html>.

¹⁹ Aarhus Convention, Art. 6(3), (4), (8); Art. 7.

²⁰ Aarhus Convention, Art. 6(9).

- (b) Draft rules should be published or otherwise made publicly available; and
- (c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

The result of the public participation shall be taken into account as far as possible.²¹

The Escazu Agreement – which has yet to enter into force, but currently has nine States parties and 24 signatories in Latin America and the Caribbean²² – likewise mandates public participation in environmental decision-making processes, while similarly applying different standards to permitting processes and other forms of environmental decision-making:

2. Each Party shall guarantee mechanisms for the participation of the public in decision-making processes, revisions, re-examinations or updates with respect to projects and activities, and in other processes for granting environmental permits that have or may have a significant impact on the environment, including when they may affect health.

3. Each Party shall promote the participation of the public in decision-making processes, revisions, re-examinations or updates other than those referred to in paragraph 2 of the present article with respect to environmental matters of public interest, such as land-use planning, policies, strategies, plans, programmes, rules and regulations, which have or may have a significant impact on the environment.²³

The Escazu Agreement sets out the following requirements for public participation:

Each Party shall adopt measures to ensure that the public can participate in the decision-making process from the early stages, so that due consideration can be given to the observations of the public, thus contributing to the process. ...

The public participation procedure will provide for reasonable timeframes that allow sufficient time to inform the public and for its effective participation.

²¹ Aarhus Convention, Art. 8.

²² United Nations Treaty Collection, "Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean," https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-18&chapter=27&clang=en.

²³ Escazu Agreement, Art. 7(2)-(3).

...

The public's right to participate in environmental decision-making processes shall include the opportunity to present observations through appropriate means available, according to the circumstances of the process. Before adopting the decision, the relevant public authority shall give due consideration to the outcome of the participation process.

Each Party shall ensure that, once a decision has been made, the public is informed in a timely manner thereof and of the grounds and reasons underlying the decision, including how the observations of the public have been taken into consideration. The decision and its basis shall be made public and be accessible.²⁴

Both the Escazu Agreement (generally) and the Aarhus Convention (with respect to environmental permitting decisions) establish requirements for providing the public with information regarding opportunities for public participation. These instruments mandate that authorities should inform the public of: the nature of the decision under consideration; the authority responsible for making the decision; the procedure envisaged for public participation; and the authorities from which additional information may be obtained.²⁵ The Escazu Agreement also provides generally, and the Aarhus Convention with respect to the preparation of plans and programs relating to the environment, that authorities should provide the public with "necessary information" in order to inform its participation.²⁶

INTERNATIONAL AND REGIONAL STANDARDS

In 1996, the UN Human Rights Committee issued General Comment No. 25, providing authoritative but limited guidance on the rights set out in ICCPR Article 25.²⁷ Then, in 2018, the UN Office of the High Commissioner on Human Rights ("OHCHR") presented the UN Human Rights Council with *Guidelines for States on the effective implementation of the right to participate in public affairs* ("OHCHR Guidelines").²⁸

²⁴ Escazu Agreement, Art. 7(4)-(5), (7)-(8).

²⁵ Escazu Agreement, Art. 7(6); Aarhus Convention, Art. 6(2).

²⁶ Escazu Agreement, Art. 7(4); Aarhus Convention, Art. 7.

²⁷ General Comment No. 25 primarily addresses the rights to vote and have access to public service provided for in ICCPR Art. 25(b)-(c), but the General Comment also notes specifically that citizens may "participate directly in public affairs," inter alia, "by taking part ... in bodies established to represent citizens in consultation with government," and "by exerting influence through public debate and dialogue with their representatives." OHCHR, *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote)*, CCPR/C/21/Rev.1/Add.7 (12 July 1996): ¶¶ 6, 8, <https://www.refworld.org/docid/453883fc22.html>.

²⁸ OHCHR, *Guidelines for States on the effective implementation of the right to participate in public affairs* (2018): 3, https://www.ohchr.org/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs_web.pdf. The UN Human Rights Council "took note with interest of the guidelines and presented them as a set of orientations for States and other relevant stakeholders." *Id.*

The OHCHR Guidelines, developed through an involved process of consultation and stakeholder input, elaborate upon the effective implementation of the rights set forth in ICCPR Art. 25.²⁹ The OHCHR Guidelines address citizen participation in policy-making with a focus on including the public in decision-making.

As a general matter, the OHCHR Guidelines provide:

Laws, policies and institutional arrangements should ensure the equal participation of individuals and groups in the design, implementation and evaluation of any law, regulation, policy, programme or strategy affecting them. Effective remedies should be available if this right is violated.³⁰

The OHCHR Guidelines then further explain:

Information regarding the decision-making process should contain clear, realistic and practical goals in order to manage the expectations of those participating. Information about the process should include, as a minimum, the following elements: [listing a variety of information, including the type or nature of the decision under consideration, timelines for participation, and the public authority responsible for making the decision].

Rights holders should be able to access adequate, accessible and necessary information as soon as it is known, to allow them to prepare to participate effectively, in accordance with the principle of maximum disclosure.

Relevant information should be proactively disseminated by making it available in a manner appropriate to local conditions and taking account of the special needs of individuals and groups that are marginalized or discriminated against. This should include: ... Disseminating information in clear, usable, accessible, age-appropriate and culturally appropriate formats, and in local languages, including indigenous and minority languages. This may entail publications in Braille, easy-to-read and plain language formats ...

Rights holders should be able to participate in the decision-making process from an early stage, when all options are still open. ...

²⁹ OHCHR Guidelines, ¶¶ 4-6.

³⁰ OHCHR Guidelines, ¶ 19(c).

Any revised, new or updated draft versions of documents relating to the decision(s) should be made public as soon as they are available.

Sufficient time for rights holders to prepare and make their contributions during decision-making processes should be provided.³¹

The OHCHR Guidelines devote particular attention to information regarding the outcome of participatory decision-making processes that authorities must provide:

The outcome of the participation process should be disseminated in a timely, comprehensive and transparent manner, through appropriate offline and online means. In addition, the following should be provided:

- (a) Information regarding the grounds and reasons underlying the decisions;
- (b) Feedback on how the contributions of rights holders have been taken into account or used, what was incorporated, what was left out and the reasons why. For example, a report can be published, together with the decision(s) made, which may include the nature and number of inputs received and provide evidence of how participation was taken into account. This requires that adequate time be allocated between the end of the participatory process and the taking of the final decision.
- (c) Information on available procedures to allow rights holders to take appropriate administrative and judicial actions with regard to access to review mechanisms.³²

And the OHCHR Guidelines stress that the same principles apply to e-participation contributions and mechanisms as their offline counterparts, stating that “[t]he weight given to contributions received through online platforms should be equal to that given to comments received offline,”³³ and that “participation through the use of ICTs should follow the same principles of offline participation.”³⁴

The OHCHR Guidelines complement previous sets of standards recognized or issued by the Council of Europe regarding civil participation and electronic democracy.

³¹ OHCHR Guidelines, ¶¶ 67-72.

³² OHCHR Guidelines, ¶ 79.

³³ OHCHR Guidelines, ¶ 76.

³⁴ OHCHR Guidelines, ¶ 87.

The Conference of INGOs of the Council of Europe adopted in 2009, and further revised in 2019, a *Code of Good Practice for Civil Participation in the Decision-Making Process* (“INGO Code”),³⁵ which was recognized by the Committee of Ministers of the Council of Europe as “as a reference document for the Council of Europe, and as a basis for the empowerment of citizens to be involved in conducting public affairs in European countries.”³⁶ The INGO Code, as revised, identifies four levels of participation – information, consultation, dialogue, and partnership – and seven different steps of the political decision-making process: inputs, agenda setting, drafting of policy, decision-making, implementation of policy, monitoring and reformulation of policy.³⁷ Each step of this process offers opportunities for consultation, which the INGO Code defines as “a form of initiative where the public authorities may ask NGOs for their opinion on a specific policy topic or development.”³⁸ With respect to the drafting of policy, in particular, the Code identifies the following responsibilities on the part of public authorities:

- **Information sharing:** Provision of timely and comprehensive information on current consultation processes
- **Procedures:** Develop and adhere to minimum consultation standards, such as clear objectives, rules for participation, timelines, contacts etc. Organise open consultation meetings, including invitation to all potential stakeholders
- **Resource provision:** Provide adequate timelines and means for consultation to ensure participation of different levels of civil society
- **Responsiveness:** Ensure active involvement of relevant public authority representatives; listen, react and give feedback to consultation responses³⁹

The revised INGO Code also addresses e-participation in some depth, noting:

E-participation is an essential part of E-democracy. As such it must follow all the principles of a good democratic decision-making process with the added aspect of using E-tools. E-tools offer great potential for improving democratic practice and participation of an organised civil

³⁵ Conference of INGOs of the Council of Europe, *Code of Good Practice for Civil Participation in the Decision-Making Process (Revised)* (2019), <https://rm.coe.int/revised-code-of-good-practice-for-civil-participation-in-the-decision-1680980cb1>.

³⁶ Council of Europe, *Declaration by the Committee of Ministers on the Code of Good Practice for Civil Participation in the Decision-Making Process* (21 October 2009), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802eeddf>.

³⁷ INGO Code, 9, 11.

³⁸ INGO Code, 10.

³⁹ INGO Code, 13.

society.... To achieve this positive result the tools used must be tailored to enhance inclusiveness, transparency and make participation easier. They must avoid creating new barriers. But these tools are also vulnerable to misuse and manipulation. Therefore, measures must be taken to minimize these risks with full respect to the demands of data-protection and the right to privacy. ... Most commonly used tools in many countries today are central electronic portals. To fully benefit from their potential, e-tools should be integrated by all participants in decision-making, including authorities at all levels and organised civil society.⁴⁰

In 2009, the Council of Europe issued *Recommendation CM/Rec(2009)1 of the Committee of Ministers to member states on electronic democracy (e-democracy)* (“CoE Recommendation”).⁴¹ The CoE Recommendation stresses that e-democracy, which it defines as “the support and enhancement of democracy, democratic institutions and democratic processes by means of ICT,”⁴² must “fully compl[y] with obligations and commitments in respect of human rights and fundamental freedoms, and the principles governing the domestic organisation of democratic government.”⁴³

The CoE Recommendation also specifically addresses e-consultation:

E-consultation is a way of collecting the opinions of designated persons or the public at large on a specific policy issue without necessarily obliging the decision maker to act in accordance with the outcome.

There are various forms of e-consultation, formal and informal, public-authority-regulated and unregulated. E-consultation can invite and collect various opinions whilst providing an inclusive space for deliberation or for simply following the debate; it allows decisions to be directly or indirectly influenced.⁴⁴

The Recommendation stresses that “to create trust in e-petitions and e-consultations, parliament or another public authority should give adequate consideration to the opinions voiced and provide reasoned feedback to petitioners concerning decisions.”⁴⁵

⁴⁰ INGO Code, 17.

⁴¹ Council of Europe, *Recommendation CM/Rec(2009)1 of the Committee of Ministers to member states on electronic democracy (e-democracy)* (18 February 2009), https://www.coe.int/t/dgap/goodgovernance/Activities/Key-Texts/Recommendations/Recommendation_CM_Rec2009_1_en_PDF.pdf.

⁴² CoE Recommendation, P.1.

⁴³ CoE Recommendation, para. 6.

⁴⁴ CoE Recommendation, P.43.

⁴⁵ CoE Recommendation, G.50.

Finally, in 2017, the Council of Europe issued *Guidelines for civil participation in political decision making* (“CoE Guidelines”),⁴⁶ aiming to “strengthen and facilitate participation by individuals, NGOs and civil society at large in political decision making.”⁴⁷ The CoE Guidelines set out “fundamentals of civil participation in political decision making,” including that:

Civil participation should seek to provide, collect and channel views of individuals, directly or via NGOs and/or representatives of civil society, providing a substantive exchange of information and opinions which inform the decision-making process so that public needs are met.

Civil participation should be guaranteed by appropriate, structured and transparent means including, where necessary, legal or regulatory measures which could include provisions for handling requests for recourse or redress in the event of non-compliance....

...

Adequate information should be provided in a timely manner allowing for substantive input while decisions are still reversible.

...

Public authorities should provide up-to-date, comprehensive information about the decision-making process and procedures for participation.

...

The timeline allocated should provide, other than in exceptional and well-defined circumstances, sufficient opportunity to properly prepare and submit constructive contributions....⁴⁸

The CoE Guidelines also specifically provide that “authorities should provide publicly available feedback on the outcome of consultations, particularly information giving reasons for any decisions finally taken.”⁴⁹

SUMMARY OF NORMS REGARDING (E-)PARTICIPATION AND (E-)CONSULTATIONS

Based on the international agreements and standards described above, we can identify nine key principles specifically relevant to e-consultation mechanisms. It bears

⁴⁶ Council of Europe, *Guidelines for civil participation in political decision making* (27 September 2017), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016807509dd.

⁴⁷ COE Guidelines, ¶ 1.

⁴⁸ CoE Guidelines, ¶¶ 5-6, 9, 11, 16.

⁴⁹ CoE Guidelines, ¶ 24.

emphasizing that this list is not meant to set forth an exhaustive set of requirements applicable to e-consultation mechanisms, but rather to highlight key principles specifically relevant to e-consultation.⁵⁰ To vindicate the right of public participation through e-consultations and ensure effective public input in decision-making:

- (1) The public should have the opportunity to participate in the development of rules, policies, laws, and decisions affecting them,⁵¹ including by providing comments concerning proposed rules, policies, laws, and decisions;⁵²
- (2) Public participation in decision-making through ICTs should follow the same principles governing offline participation,⁵³ and inputs provided by the public in decision-making through ICTs should be given the same weight as inputs provided through offline means;⁵⁴
- (3) The public should have the opportunity to participate in decision-making early, when options are still open and effective participation can take place;⁵⁵
- (4) Authorities should provide the public with information about the procedure for public participation,⁵⁶ including the decision under consideration, the authority responsible for making the decision, and the procedure and timelines envisaged for participation;⁵⁷
- (5) Authorities should provide the public with information sufficient to permit effective participation in decision-making,⁵⁸ including the text of any draft documents related to the decision to be taken,⁵⁹ and this information should be provided in clear, usable, accessible, and culturally appropriate formats;⁶⁰
- (6) Public participation procedures should include reasonable time-frames allowing information to be provided to the public and the public to prepare and participate effectively in decision-making;⁶¹
- (7) Authorities should ensure that decisions take due account of inputs from public participation;⁶²

⁵⁰ In particular, we have omitted from this list and from our discussion critically important requirements, generally applicable to participation and e-participation mechanisms, concerning data security, privacy, inclusiveness, and accessibility to minority and vulnerable populations. See, e.g., INGO Code, 17; OHCHR Guidelines, ¶¶ 56-62, 87-94.

⁵¹ ICCPR Art. 25(a); ACHR Art. 23; ACHPR Art. 13(1); TEU Art. 11(3); Aarhus Convention Arts. 6-8; Escazu Agreement Art. 7; OHCHR Guidelines, ¶ 19(c); CoE Recommendation, P.27; CoE Guidelines ¶ 5.

⁵² Aarhus Convention Art. 8; Escazu Agreement Art. 7(7).

⁵³ OHCHR Guidelines, ¶ 87; CoE Recommendation, para. 6; INGO Code, 17.

⁵⁴ OHCHR Guidelines, ¶ 76.

⁵⁵ Aarhus Convention Arts. 6(4), 7, 8; Escazu Agreement Art. 7(4); OHCHR Guidelines, ¶ 70; CoE Guidelines ¶ 9.

⁵⁶ INGO Code, 11; CoE Guidelines ¶ 11.

⁵⁷ Escazu Agreement, Art. 7(6); Aarhus Convention, Art. 6(2); OHCHR Guidelines, ¶ 67.

⁵⁸ Escazu Agreement, Art. 7(4); Aarhus Convention, Art. 7; OHCHR Guidelines, ¶ 68; CoE Guidelines, ¶ 9.

⁵⁹ Aarhus Convention Art. 8; OHCHR Guidelines, ¶ 71.

⁶⁰ OHCHR Guidelines, ¶ 69.

⁶¹ Aarhus Convention Arts. 6(3), 7, 8; Escazu Agreement Art. 7(5); OHCHR Guidelines, ¶ 72; INGO Code, 13; CoE Guidelines, ¶ 16.

⁶² Aarhus Convention Arts. 6(8), 7, 8; Escazu Agreement Art. 7(7); CoE Recommendation, G.50.

- (8) Authorities should inform the public of decisions taken and the basis therefor,⁶³ and address how inputs from public participation have been taken into account in the decisions taken;⁶⁴ and
- (9) Authorities should make available effective remedies when requirements for public participation in decision-making are not satisfied.⁶⁵

E-Consultation in practice: examples and analysis

Robust e-consultation procedures have been implemented by national legislative or regulatory authorities in an array of countries. We now turn to a description and analysis of how e-consultation procedures with respect to legislative or regulatory decision-making have been implemented in seven leading jurisdictions: Scotland, the United States, the European Union, the Netherlands, Estonia, Slovakia, and Croatia.

PARLIAMENTARY E-CONSULTATIONS IN SCOTLAND

The Public Bill Procedures of the Scottish Parliament establish a presumption, if not a requirement, that draft Bills be subject to public consultation. The Scottish Government and Parliament maintain websites through which citizens can participate in and review the outcomes of consultations relating to draft bills, government strategies and frameworks, and inquiries under committee consideration.

The Public Bill Procedures establish weak consultation requirements with respect to Government Bills, or bills “introduced by a member of the Scottish Government.”⁶⁶ Such bills must be introduced with memoranda setting out “the consultation, if any, which was undertaken on [the policy objectives of the bill] and the ways of meeting them or on the details of the Bill and a summary of the outcome of that consultation.”⁶⁷

Consultation requirements applicable to Members’ Bills – or “a Public Bill, other than a Committee Bill, which is introduced by a member [of Parliament] who is not a member of the Scottish Government”⁶⁸ – are more stringent. Before introducing such a bill, a member must deposit with the Clerk of Parliament a proposal accompanied by “a consultation document prepared as the basis for a public consultation on the policy objectives of the draft proposal,” or “a written statement of reasons why, in the member’s opinion, a case for the proposed Bill has already been established by reference to specified published material and that consultation on the draft proposal is therefore unnecessary.” Consultation, where it takes place, must “begin on the day on

⁶³ Aarhus Convention Art. 6(9); Escazu Agreement Art. 7(8); OHCHR Guidelines, ¶ 79(a); CoE Guidelines, ¶ 24.

⁶⁴ Escazu Agreement Art. 7(8); OHCHR Guidelines, ¶ 79(b); INGO Code, 13; CoE Recommendation, G.50; CoE Guidelines, ¶ 24.

⁶⁵ OHCHR Guidelines, ¶ 19(c); CoE Guidelines, ¶ 6.

⁶⁶ The Scottish Parliament, “Standing Orders of the Scottish Parliament > Chapter 9: Public Bill Procedures” (“Scotland Public Bill Procedures”), Rule 9.2(1), <https://www.parliament.scot/parliamentarybusiness/26514.aspx>.

⁶⁷ Scotland Public Bill Procedures, Rule 9.3(3).

⁶⁸ Scotland Public Bill Procedures, Rule 9.14(1).

which the draft proposal is published in the Business Bulletin (or a specified date no more than two weeks later) and... last for a specified period of not less than 12 weeks,” with the posting specifying “the dates on which the consultation period begins and ends, and information about where copies of the consultation document may be obtained.” If consultation is not carried out, the parliamentary committee within whose remit the proposal falls may decide that it is not satisfied with the statement of reasons that consultation is unnecessary; the proposal then fails unless the member lodges the requisite consulting document with the Clerk within two months.⁶⁹

The final proposal for the member's bill must then be accompanied by either “a summary of the consultation responses (including any conclusions the member draws from those responses), together with copies of all those responses,” or “the statement of reasons lodged with the draft proposal (or a revised version of that statement).”⁷⁰ The final proposal is published in the Business Bulletin for a defined period, “together with information about where the summary of consultation responses or (as the case may be) the statement of reasons may be obtained.”⁷¹ The lead committee within whose remit the proposal falls may recommend that Parliament not take up the bill if it considers that “the consultation on the draft proposal, or the published material referred to in the statement of reasons, does not demonstrate a reasonable case for the policy objectives of the proposal or does not demonstrate that legislation is necessary to achieve those policy objectives.”⁷²

Notwithstanding these apparently differing formal requirements for Government Bills and Members’ Bills, it appears that the norm is for all proposed legislation to be subject to consultation before introduction in Parliament.⁷³ These consultations are conducted in part through websites presenting ongoing and closed consultations.

The Scottish Government maintains a website through which users can search for and take part in consultations – not only with respect to proposed laws and regulations,⁷⁴ but regarding government strategies and frameworks, as well.⁷⁵ Separate webpages for

⁶⁹ Scotland Public Bill Procedures, Rule 9.14(7).

⁷⁰ Scotland Public Bill Procedures, Rule 9.14(9).

⁷¹ Scotland Public Bill Procedures, Rule 9.14(10).

⁷² Scotland Public Bill Procedures, Rule 9.14(18).

⁷³ The Scottish Parliament, “Stages of a bill,” <https://www.parliament.scot/visitandlearn/Education/18641.aspx> (“In order to share the power to influence policy, arrangements have been made to allow Parliament and interested individuals and groups to be consulted about proposed legislation before it becomes a bill. This pre-legislative consultation is designed to be open and participatory, allowing access to the decision-making process. This system prevents the government from being selective about which pressure groups have an opportunity to be consulted before policy is devised. The outcome of the consultation process must be attached to draft bills (as a memorandum) and so the views of pressure groups and any opposition to the proposals are open and public at an early stage.”).

⁷⁴ For an example, see, e.g., Scottish Government, Consultation Hub, “Consultation to amend the Civil Contingencies Act 2004 to include Integration Joint Boards,” <https://consult.gov.scot/health-and-social-care-integration/consultation-to-amend-the-civil-contingencies-act/>.

⁷⁵ For an example of such a consultation, see, e.g., Scottish Government, “Digital ethics: a framework for trust,” <https://consult.gov.scot/digital-directorate/digital-ethics/>.

each ongoing consultation include a consultation paper with information on the issue for decision. Users may provide input by filling out an electronic questionnaire with open and multiple-choice questions, developed by the responsible Government agencies. Respondents must identify themselves but may opt for their response not to be published, or to be published anonymously. Separate webpages for closed consultations include the text of responses, as well as – in some cases, though apparently not all – an analysis of the responses received and a brief description of action taken with respect to the proposal as a result of these responses.

The Scottish Parliament similarly maintains a website listing all proposed members' bills.⁷⁶ Separate webpages corresponding to each bill present information on the consultations taking place or completed with respect to each bill, including the dates on which consultations close and a consultation document setting forth information on the bill and advising as to how input into the consultations may be submitted (through an online questionnaire, or e-mail or hard copy submissions).⁷⁷ The Business Bulletin, in which a summary of consultation responses received with respect to members' bills should be published, is also available on Parliament's website.⁷⁸

Though Committee bills, or bills introduced by the Convenor of a Parliamentary Committee, do not appear to be formally subject to consultation requirements under the Scottish Parliament's Public Bill Procedures, the Parliament maintains yet a third website soliciting views on inquiries and bills under consideration by committees.⁷⁹ While a separate webpage for each topic under consultation provides the opportunity to submit views (via an electronic questionnaire) and access the text of responses received, the webpages do not appear to include a summary of these views or an explanation of how these views have been incorporated into any decision taken.

E-RULEMAKING IN THE UNITED STATES

As Newhart and Brooks explain, in the United States, it has long been true that rulemaking, or “the process by which federal agencies make new environmental, consumer protection, financial and other regulations,” has “included substantial participation rights for stakeholders and members of the general public.”⁸⁰ By stages, the U.S. federal government has made this process fully accessible online.

Newhart and Brooks generally describe the U.S. rulemaking process as follows:

⁷⁶ The Scottish Parliament, “Current Proposals for Members' Bills,” <https://www.parliament.scot/parliamentarybusiness/Bills/12419.aspx>.

⁷⁷ See, e.g., The Scottish Parliament, “Proposed Scottish Employment Injuries Advisory Council Bill,” <https://www.parliament.scot/parliamentarybusiness/Bills/116429.aspx>.

⁷⁸ The Scottish Parliament, “Business Bulletin – Legislation,” <https://bb.parliament.scot/Legislation>.

⁷⁹ The Scottish Parliament, “Scottish Parliament Calls for Views,” <https://yourviews.parliament.scot/>.

⁸⁰ Mary J. Newhart & Joshua D. Brooks, *Barriers to Participatory eRulemaking Platform Adoption: Lessons Learned from RegulationRoom* (2017): 2, <https://scholarship.law.cornell.edu/ceri/19/>.

In the typical rulemaking, the federal Administrative Procedure Act requires that the originating agency give the public notice of what it is proposing and why. The agency must then allow time, typically 60-90 days for important rules, during which any interested individual or entity may comment on the proposal. By law, the agency must consider every comment. If it decides to adopt its proposed regulation, it must demonstrate this consideration in a written statement that responds to relevant questions, criticisms, arguments, and suggestions. The public record of the rulemaking – including all submitted comments – is used by the courts in settling any challenge that may be brought against the rule.⁸¹

The E-Government Act of 2002 required agencies to “enhance public participation in Government by electronic means” and specifically mandated that agencies create electronic docketing systems for the conduct of rule-making:

(c) SUBMISSIONS BY ELECTRONIC MEANS.—To the extent practicable, agencies shall accept submissions under section 553(c) of title 5, United States Code, by electronic means.

(d) ELECTRONIC DOCKETING.—

(1) IN GENERAL.—To the extent practicable, as determined by the agency in consultation with the Director, agencies shall ensure that a publicly accessible Federal Government website contains electronic dockets for rulemakings under section 553 of title 5, United States Code.

(2) INFORMATION AVAILABLE.—Agency electronic dockets shall make publicly available online to the extent practicable, as determined by the agency in consultation with the Director—

(A) all submissions under section 553(c) of title 5, United States Code; and

(B) other materials that by agency rule or practice are included in the rulemaking docket under section 553(c) of title 5, United States Code, whether or not submitted electronically.⁸²

Then, in 2011, Executive Order 13563 provided:

⁸¹ Newhart & Brooks, 4 (internal citations omitted).

⁸² Public Law 107-347, *E-Government Act of 2002* (Dec. 17, 2002): Sec. 206, <https://www.congress.gov/107/plaws/publ347/PLAW-107publ347.pdf>.

... To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days. To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on [regulations.gov](https://www.regulations.gov), including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.⁸³

As Newhart and Brooks explain, the result of the federal e-rulemaking initiative was to launch “a government-wide web portal, [Regulations.gov](https://www.regulations.gov), to facilitate electronic filing of public comments on proposed regulations,” while “[t]he allied Federal Docket Management System (FDMS) provided agencies the ability to keep rulemaking materials in digital form in e-dockets that could be accessed by the public.”⁸⁴

[Regulations.gov](https://www.regulations.gov) indeed provides a user-friendly interface for identifying and commenting on proposed regulations. For each draft regulation, a webpage presents the text and rationale for the proposed rule, supporting documents, the agency contact and contact information, comments already submitted, the deadline for submitting comments, and the opportunity to submit comments through an easy webform.⁸⁵ Final rules to be adopted are then published in the Federal Register and made available online, together with a summary of comments received, instructions for accessing the full text of the comments, and the regulating agency’s responses thereto.⁸⁶

However, Newhart and Brooks note that “[t]he initial hope that moving the public comment process online would increase meaningful citizen participation has not come to pass.”⁸⁷ As they explain, “[t]raditional rulemaking processes favor sophisticated and experienced stakeholders,” such as “industry, trade associations and national advocacy groups.”⁸⁸ While rulemaking agencies may comply with e-

⁸³ Executive Order 13563 -- *Improving Regulation and Regulatory Review* (Jan. 18, 2011): Sec. 2(b), <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.

⁸⁴ Newhart & Brooks, 6 (internal citations omitted).

⁸⁵ See, e.g., [Regulations.gov](https://www.regulations.gov/docket?D=NOAA-NMFS-2020-0113), “2021-2022 Specifications for the Golden Tilefish Fishery and Emergency Action,” <https://www.regulations.gov/docket?D=NOAA-NMFS-2020-0113>.

⁸⁶ See, e.g., National Oceanic and Atmospheric Administration, *Atlantic Highly Migratory Species; 2021 Atlantic Shark Commercial Fishing Year*, <https://public-inspection.federalregister.gov/2020-26341.pdf>.

⁸⁷ Newhart & Brooks, 8 (internal citation omitted).

⁸⁸ Newhart & Brooks, 13 (internal citation omitted).

rulemaking directives, they generally have little incentive to “encourage and facilitate broader public engagement in the rulemaking process.”⁸⁹

E-CONSULTATIONS ON EUROPEAN COMMISSION INITIATIVES

The European Commission has provided opportunities for citizens to participate electronically in European Union policy-making processes since the early 2000s.

In 2001, the Commission launched the “Your Voice in Europe” (YViEU) web portal. As Rose et al. explain, YViEU served as “the European Commission’s ‘single access point’ to a variety of consultations and feedback opportunities for citizens and various stakeholders,” with the goal of incorporating “views of citizens and stakeholders throughout the policy cycle.”⁹⁰ As of January 2017, YViEU had hosted over 880 consultations.⁹¹ More recently, the Commission’s e-consultations have been migrated to the “Have your say” portal, which provides citizens and businesses with the opportunity to “share their views on new EU policies and existing laws.”⁹²

In 2017, the Commission issued “Better regulation guidelines”⁹³ which “set out the mandatory requirements and obligations for each step in the policy cycle.”⁹⁴ These include guidelines on stakeholder consultations⁹⁵ that the Commission has implemented through the YViEU and “Have your say” portals.

The “Guidelines on Stakeholder Consultation” provide, in relevant part, as follows:

- “Stakeholders should always be consulted when preparing a Commission legislative or policy initiative or when performing an evaluation or fitness check and on Communications which launch a consultation exercise or Green Papers.” In particular, the Guidelines mandate “open, internet-based public consultations” for 12 weeks⁹⁶ regarding initiatives supported by impact

⁸⁹ Newhart & Brooks, 14 (internal citation omitted).

⁹⁰ Gloria Rose, Ira van Keulen, and Georg Aichholzer, “Formal Agenda-Setting (European Level),” in *European E-Democracy in Practice*, eds. Leonhard Hennen et al. (Springer 2020): 222.

⁹¹ Rose et al., “Formal Agenda-Setting (European Level),” 222.

⁹² European Commission, “Have your say,” <https://ec.europa.eu/info/law/better-regulation/have-your-say>.

⁹³ European Monitoring Centre for Drugs and Drug Addiction, “Better Regulation Guidelines (European Commission),” <https://www.emcdda.europa.eu/document-library/better-regulation-guidelines-european-commission-en>.

⁹⁴ European Commission, *Better regulation in the Commission* (2017): 3, <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-better-regulation-commission.pdf>.

⁹⁵ European Commission, “Better regulation: guidelines and toolbox,” <https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox-en>.

⁹⁶ European Commission, *Better Regulation Guidelines* (7 July 2017): 70-71, <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines.pdf>. Internet-based public consultations are not required for, e.g., legislative proposals adopted by the College, and draft implementing and delegated acts, though stakeholders must be able to provide feedback on these instruments. *Id.* at 71. The Guidelines specify the minimum scope of consultations regarding initiatives accompanied by impact assessments, evaluations, and fitness checks. For example, with respect to initiatives accompanied by impact assessments, the “key issues which must be addressed” include “[t]he problem to be tackled,” “[t]he issue of subsidiarity and the EU dimension to the problem,” “[t]he available policy options,” and “[t]he impacts of the policy options.” *Id.* at 75.

assessments, evaluations, fitness checks, Commission Communications “with the explicit purpose of launching a consultation process,” and Green Papers.⁹⁷

- “Contributions to a consultation must be published,” and “[w]ritten contributions should be made public on the dedicated consultation webpage,” with the option of anonymized publication.⁹⁸ The Guidelines further state that it is “good practice to prepare and publish on the consultation website a short factual summary on the key issues raised in each of the separate stakeholder consultations foreseen in the consultation strategy.”⁹⁹
- “Once consultation work is completed, the input received for each consultation needs to be thoroughly analysed.”¹⁰⁰ The Guidelines state that “[t]he contributions received through the various consultations carried out in the context of the consultation strategy feed into the further work related to the policy initiative,” but note that “[i]t is up to the lead Directorate-General to provide information on the outcome of the overall consultation work, the conclusions that may result and any other related issues.”¹⁰¹
- “A report outlining the overall results of the consultation work and providing feedback to stakeholders (synopsis report) must be published on the consultation website.”¹⁰² As the Guidelines further state: “Adequate feedback should be provided to stakeholders. It is critical for those participating in stakeholder consultations to know how, and to what extent, their input has been taken into account and to understand why certain suggestions could not be taken up in the policy formulation.”¹⁰³

The last two points merit further discussion. As Rose et al. note, “there is no legal obligation to use consultation contributions.”¹⁰⁴ Writing on YViEU before the issuance of the Guidelines, Badouard summarized: “The organizations and the citizens express themselves, but the [Directorate-General] at the origin of the consultation reserves

⁹⁷ “Impact assessment,” “fitness check,” and “Green paper” are terms of art in the context of European Commission policy-making activities. “Impact assessments collect evidence (including results from evaluations) to assess if future legislative or non-legislative EU action is justified and how such action can best be designed to achieve desired policy objectives,” while “[a] fitness check is a comprehensive evaluation of a policy area that usually addresses how several related legislative acts have contributed (or otherwise) to the attainment of policy objectives.” European Commission, *Better Regulation Guidelines*, 8. “Green Papers are documents published by the European Commission to stimulate discussion on given topics at European level. They invite the relevant parties (bodies or individuals) to participate in a consultation process and debate on the basis of the proposals they put forward. Green Papers may give rise to legislative developments that are then outlined in White Papers.” EUR-Lex, “Glossary of summaries: GREEN PAPER,” https://eur-lex.europa.eu/summary/glossary/green_paper.html.

⁹⁸ European Commission, *Better Regulation Guidelines*, 83.

⁹⁹ European Commission, *Better Regulation Guidelines*, 83.

¹⁰⁰ European Commission, *Better Regulation Guidelines*, 84.

¹⁰¹ European Commission, *Better Regulation Guidelines*, 86.

¹⁰² European Commission, *Better Regulation Guidelines*, 67.

¹⁰³ European Commission, *Better Regulation Guidelines*, 86.

¹⁰⁴ Rose et al., “Formal Agenda-Setting (European Level),” 226.

itself the right to consider whether a contribution is relevant or not.”¹⁰⁵ This continues to be true under the Guidelines. Furthermore, though the Guidelines require that a synopsis report be prepared and published online, Rose et al. observe that “[m]any of these [synopsis] reports are not yet available,” though Commission officials have suggested that the reports “are going to start gradually appearing on the website.”¹⁰⁶

Summarizing the experience with respect to YViEU, Rose et al. conclude:

Your Voice in Europe can boast several successes, such as the fact that various interest groups are represented in the online consultations. Access to EU-level consultation processes has also been increased for individual actors. All in all, participation through the web portal can be considered high and diverse with many different interests being represented. ... EC experts reported a high quality of consultation contributions. ... Transparency, however, remains a big issue concerning the methodology chosen for consultation evaluation and a lack of feedback to the participants concerning their inputs.¹⁰⁷

A quick review of the “Have your say” website indicates that it is a user-friendly interface providing information on the status of initiatives, opportunities to participate in consultations, and feedback received. Reports summarizing how feedback from consultations was considered in policy-making do not appear commonly available, though. On this point, the “Have your say” website simply states: “The Commission analyses and sums up the feedback and contributions received. Reports become available under some initiatives.”¹⁰⁸

E-CONSULTATION ON DRAFT LAWS IN THE NETHERLANDS

Since 2011, the Dutch government has conducted online consultations as part of the national legislative process.¹⁰⁹ Online consultation are now conducted through the web platform Internetconsultatie.nl, which provides the public – private individuals as well as businesses and CSOs – the opportunity to provide input on draft laws, regulations, and policies at a preparatory stage of the legislative process, before the Council of State assesses the legislative proposal and parliamentary debate occurs.¹¹⁰

Dutch ministries are expected to conduct consultations through Internetconsultatie.nl on concepts of laws, general administrative orders, and ministerial regulations, and

¹⁰⁵ Romain Badouard, “Pathways and Obstacles to eParticipation at the European level,” *Journal of eDemocracy & Open Government* 2(2) (2010): 108, <https://iedem.org/index.php/iedem/article/view/30>.

¹⁰⁶ Rose et al., “Formal Agenda-Setting (European Level),” 226.

¹⁰⁷ Rose et al., “Formal Agenda-Setting (European Level),” 226.

¹⁰⁸ European Commission, “Have your say,” <https://ec.europa.eu/info/law/better-regulation/have-your-say>.

¹⁰⁹ Koen van Aaken, “Digital Democracy in Belgium and the Netherlands. A Socio-Legal Analysis of Citizenlab.be and Consultatie.nl” (2017): 21, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2932962.

¹¹⁰ Iris Korthagen, Gloria Rose, Georg Aichholzer, and Ira van Keulen, “Formal Agenda-Setting (National and Local Level),” in *European E-Democracy in Practice*, eds. Leonhard Hennen et al. (Springer 2020): 200-01.

can also submit policy proposals for public consultation through the portal.¹¹¹ The Dutch House of Representatives can also submit initiative proposals for consultation through the portal, though this happens more rarely. Korthagen et al. report that as of October 2018, 1036 online consultations had been completed, but that the House of Representatives had only used [Internetconsultatie.nl](http://internetconsultatie.nl) to consult the public ten times.¹¹²

Consultation documents must include the bill or concept regulation, a report concerning the proposal developed under the Dutch integrated impact assessment framework, and any available effect assessments,¹¹³ and may include links to other relevant documents, such as policy documents, parliamentary documents, or media articles.¹¹⁴ Consultations should generally be open for at least four weeks, subject to adjustment upon proper justification.¹¹⁵ The ministry initiating the consultation may either pose structured questions seeking input or invite general reactions to the proposal,¹¹⁶ including submission of relevant documents.¹¹⁷ Commenters are required to provide their names and email addresses, and responses are published on the website with commenters' names and places of residence unless the commenter objects, in which case a response will not be published but will still be considered.¹¹⁸

While departments are required to post a report to the website after the close of the consultation period outlining the results of the consultation and how these results were incorporated into the draft proposal,¹¹⁹ less guidance is provided to departments about how to process this input. [Internetconsultatie.nl](http://internetconsultatie.nl) merely states that “[a]fter the consultation period, all responses will be reviewed and the bill will be amended if necessary.”¹²⁰ Korthagen et al. note that applicable requirements on how to process these responses “could be further improved,” with a “systematic procedure” needed to govern the analysis and interpretation of input received through consultations.¹²¹

Korthagen et al. and van Aaken observe that [Internetconsultatie.nl](http://internetconsultatie.nl) is viewed positively by both government officials and the public, as having increased transparency and participation in the legislative process.¹²² However, van Aaken notes

¹¹¹ Government of the Netherlands, “Internet consultation on new laws and regulations,” <https://www.rijksoverheid.nl/onderwerpen/wetgeving/internetconsultatie-nieuwe-wet--en-regelgeving>.

¹¹² Korthagen et al., “Formal Agenda-Setting (National and Local Level),” 200.

¹¹³ van Aaken, “Digital Democracy in Belgium and the Netherlands,” 21.

¹¹⁴ Korthagen et al., “Formal Agenda-Setting (National and Local Level),” 200.

¹¹⁵ Government of the Netherlands, Ministry of Security and Justice, *Cabinet position on internet consultation legislation* (17 June 2011), <https://www.rijksoverheid.nl/onderwerpen/wetgeving/documenten/kamerstukken/2011/06/17/tk-5698502-kabinetsstandpunt-internetconsultatie-wetgeving>.

¹¹⁶ Overheid.nl, “Frequently Asked Questions,” <https://internetconsultatie.nl/veelgestelde vragen>.

¹¹⁷ Korthagen et al., “Formal Agenda-Setting (National and Local Level),” 200.

¹¹⁸ Overheid.nl, “Frequently Asked Questions,” <https://internetconsultatie.nl/veelgestelde vragen>.

¹¹⁹ Overheid.nl, “Frequently Asked Questions,” <https://internetconsultatie.nl/veelgestelde vragen>; van Aaken, “Digital Democracy in Belgium and the Netherlands,” 21.

¹²⁰ Overheid.nl, “Frequently Asked Questions,” <https://internetconsultatie.nl/veelgestelde vragen>.

¹²¹ Korthagen et al., “Formal Agenda-Setting (National and Local Level),” 204.

¹²² Korthagen et al., “Formal Agenda-Setting (National and Local Level),” 204; van Aaken, “Digital Democracy in Belgium and the Netherlands,” 24.

that “the mandatory feedback on internet consultation is often incomplete, overly concise and sometimes missing altogether,” notwithstanding official requirements.¹²³ As a result, Korthagen et al. suggest that “[o]n the side of the participants, they feel that they do not have that much insight into what has been done with their input.”¹²⁴ And in many instances proposals are viewed as “almost finalized” before submission for consultations, so that there is little scope to take into account the input from these consultations in revising the draft proposals.¹²⁵

PUBLIC E-CONSULTATIONS ON LEGISLATIVE DRAFTS IN ESTONIA

Since 2007, the Estonian government has maintained a website, Osale.ee, which provides a platform for public e-consultations on legislative drafts. In 2011, Osale.ee was joined by another system, the Electronic Coordination System for Draft Legislation (EIS), a platform for managing inter-institutional governmental coordination that was also integrated with Osale.ee. Through these platforms, the Estonian government has implemented the “Good Public Engagement Code of Practice,” a set of key principles for public participation in policy-making developed by the Government Office of Estonia beginning in 2004.¹²⁶

The Code of Practice mandates “public engagement,” or “informing and consulting with interest groups and the public in the decision-making process,” when “preparing a legal act to be adopted or a decision to be made at the level of the [Parliament], the Government of the Republic and the ministers. The Good Public Engagement Code of Practice also applies to forming Government positions on European Union issues.”¹²⁷ According to the Code of Practice, “[a] public consultation must in any event be carried out in two stages of proceedings: when applying for a Mandate for developing a draft and when the draft has already been developed.”¹²⁸ The relevant government authority provides the public with information about the consultation to be conducted, including the rationale for the draft decision, issues on which public input is sought, the manner and deadline of providing feedback, and the further course of decision-making with respect to the draft decision.¹²⁹ Public consultations ordinarily last for four weeks, which may be shortened or extended as appropriate.¹³⁰

¹²³ van Aaken, “Digital Democracy in Belgium and the Netherlands,” 24.

¹²⁴ Korthagen et al., “Formal Agenda-Setting (National and Local Level),” 204.

¹²⁵ Korthagen et al., “Formal Agenda-Setting (National and Local Level),” 204; van Aaken, “Digital Democracy in Belgium and the Netherlands,” 24.

¹²⁶ Maarja Toots, “Why E-participation systems fail: The case of Estonia’s Osale.ee,” *Government Information Quarterly* 36 (2019): 551-52, <https://doi.org/10.1016/j.giq.2019.02.002>.

¹²⁷ Republic of Estonia, Government Office, *Good Practice of Engagement* (last updated 21 April 2017): §§ 1.2, 1.4, <https://www.riigikantselei.ee/en/good-practice-engagement>.

¹²⁸ Republic of Estonia, Government Office, *Good Practice of Engagement*, § 4.1.

¹²⁹ Republic of Estonia, Government Office, *Good Practice of Engagement*, § 4.5.

¹³⁰ Republic of Estonia, Government Office, *Good Practice of Engagement*, § 4.6.

The Code of Practice mandates that those participating in consultations “must be provided with adequate feedback within a reasonable period of time, generally within 30 days of the end of consultation.”¹³¹ Furthermore, the Code provides:

6.2. Decision-makers must be notified of the results of consultation with interest groups. A government authority prepares a summary about the consultation results. The summary sets out interest groups who were invited to participate in the consultation, presents the proposals and comments made, explains consideration of the proposals or comments and provides a justification if they were not adopted by the government authority preparing the decision.

6.3. The summary is annexed to the decision being deliberated and is forwarded to all interest groups along with the feedback specified in clause 6.1. If the analysis of feedback requires, as an exception, more time than 30 days, interest groups are forwarded information about a new deadline. The summary is published in the [Electronic Coordination System for Draft Legislation] next to the draft being processed and also made available after the end of the proceeding.

Importantly, the conduct of consultations is subject to assessment:

At the end of public consultation of important drafts a government authority analyses the conduct of engagement, including attainment of the goal, relevance of the used methods, participation of interest groups in consultation, efficiency of providing feedback and satisfaction of interest groups with the engagement. For the purpose the government authority also asks for an assessment about the conduct from interest groups engaged.¹³²

As noted, Estonia has implemented dual online systems to satisfy these requirements. As the Estonian government explained in its response to a 2016 survey conducted by the Organisation for Economic Co-operation and Development (OECD):

The Electronic Coordination System for Draft Legislation (EIS) tracks the development of all Estonian and EU draft legal acts, and makes available RIAs [regulatory impact assessments] and documents of legislative intent (describing the problem to be addressed, analysing policy options and determining initial likely impacts).

...

¹³¹ Republic of Estonia, Government Office, *Good Practice of Engagement*, § 6.1.

¹³² Republic of Estonia, Government Office, *Good Practice of Engagement*, § 7.1.

EIS allows any member of the general public to follow the development of a draft legal act, search for documents in the system, and give their opinion on the documents open for public consultation. ...¹³³

EIS is complemented by a second system, Osale.ee:

The website www.osale.ee/ is an interactive website of all ongoing consultations where every member of the public can submit comments on legislative proposals or other policy documents prepared by the Government and review comments made by others. It also allows the public to submit ideas and suggestions for new legislation or amendments to existing legislation on any policy matter, which are forwarded to the responsible ministry for consideration.

EIS and www.osale.ee/ are linked, i.e. EIS takes into consideration opinions submitted via www.osale.ee/ and provides a direct link to them. While all documents of legislative intent legal and drafts are available on EIS, it is at the discretion of the relevant ministry sponsoring a regulation to decide whether the document will also be available on [osale.ee](http://www.osale.ee/) for public consultation.¹³⁴

Given the sophistication and comprehensiveness of the EIS and [osale.ee](http://www.osale.ee/) systems, it is perhaps surprising that commentators have characterized [Osale.ee](http://www.osale.ee/) as a “failure”:

Based on usage statistics, interviews and the 2015 assessment, [Osale](http://www.osale.ee/) failed to achieve the expected use and qualitative results, being evaluated negatively by all stakeholder groups. Since organized interest groups have preferred alternative channels for accessing policy-makers, the main supporters of [Osale](http://www.osale.ee/) have been some 5–10 individual citizens. Low user take-up has been a subject of consistent criticism throughout the history of [Osale](http://www.osale.ee/) and is an important failure dimension because it has also undermined the system's ability to achieve its stated objectives of increasing the quality and legitimacy of decision-making processes.¹³⁵

¹³³ OECD, *Pilot database on stakeholder engagement practices in regulatory policy* (2016), “Online tools for engaging with stakeholders (Estonia),” <https://www.oecd.org/gov/regulatory-policy/EST-Online-Tools.pdf>.

¹³⁴ OECD, “Online tools for engaging with stakeholders (Estonia).” The Code of Good Practice clarifies the latter point, concerning the “discretion of the relevant ministry sponsoring a regulation to decide whether the document will also be available on [osale.ee](http://www.osale.ee/) for public consultation”: “Consultation channels must be selected taking into account the possibilities of the public and interest groups to access the documents sent for consultation. If consultation presumes participation of the wider public, information is published in [EIS] and, through that, in [[osale.ee](http://www.osale.ee/)] and, as appropriate, through other channels.” Republic of Estonia, Government Office, *Good Practice of Engagement*, § 5.

¹³⁵ Maarja Toots, “Why E-participation systems fail: The case of Estonia’s [Osale.ee](http://www.osale.ee/),” 553 (internal citations omitted).

E-CONSULTATIONS ON LEGISLATIVE AND REGULATORY PROPOSALS IN SLOVAKIA

Slovakia has implemented a comprehensive system for e-consultations on laws and regulations, known as Slov-Lex, with “systematic use of electronic public consultations through the government portal accessible to all members of the public.”¹³⁶ As the OECD summarizes the operation of this system:

Public consultations are required for every legislative proposal submitted to the Slovak government. All legislative drafts and their accompanying impact assessments are automatically published on the government portal www.slov-lex.sk at the same time as they enter the inter-ministerial comment procedure. The portal provides a single access point to comment on legislative proposals and non-legislative drafts (e.g. concept notes, green or white papers). ...

Both public authorities as well as members of the general public can provide comments on the legislative drafts and the accompanying material. All comments submitted are visible on the website. The deadline for comments is usually 15 working days. The general public can also access all final legislation through the government portal. Written comments can be submitted by members of the general public either as individual comments or as “collective comments”, to which individuals or organisations can signal their support. Whenever a comment receives support from 500 individuals or organisations, ministries are obliged to provide written feedback on the comment, either taking the comment into consideration for the legislative proposal or explaining why the comment has not been taken into account. The feedback provided is then part of the dossier submitted to the government for discussion.

Virtually all legislative proposals are adjusted following the consultation process. The number of comments received varies significantly for different legislative proposals. Accompanying impact assessments to the legislative proposal are also updated on the basis of comments received. Following the consultation process, a summary of comments received together with the reasoning for their consideration or non-consideration is published on the portal for all consultations.¹³⁷

¹³⁶ OECD, *Regulatory Policy in the Slovak Republic: Towards Future-Proof Regulation* (2020): Ch. 4, <https://www.oecd-ilibrary.org/sites/52bc3c91-en/index.html?itemId=/content/component/52bc3c91-en>.

¹³⁷ OECD, *Better Regulation Practices across the European Union* (19 Mar 2019): Ch. 2, https://www.oecd-ilibrary.org/governance/better-regulation-practices-across-the-european-union_9789264311732-en.

A few points regarding Slovakia’s e-consultation system warrant elaboration. Slovakia conducts early-stage consultations, before a preferred approach been identified, with respect to selected legislative proposals chosen by the Ministry of Economy; information on the draft is forwarded to a list of businesses and associations which have expressed interest in being informed on ongoing consultations. These entities can then engage with the responsible ministry in the process of drafting the relevant regulation or legislation. This does present a risk, as the OECD notes, that “the whole spectrum of interests will not be represented in those consultations, as larger companies or business associations might be better resourced and motivated to actively engage in discussions with the administration.”¹³⁸

Late-stage consultations are open to the public on all legislative drafts, whether of primary laws or secondary regulations. Under the *Legislative Rules of the Government*, as noted above, such drafts must be published with accompanying documents on the government electronic portal Slov-Lex at the same time as they enter the inter-ministerial comment procedure. Though the comment period is usually 15 working days, under the *Legislative Rules* this period may be shortened in exceptional cases to seven days. In practice, the time for submitting comments appears to be subject to abbreviation in about 20% of consultations.

The “collective comment” feature of the Slov-Lex system, requiring government feedback for comments receiving a certain threshold of public support, seems a notable innovation. Where the responsible ministry chooses not to accept a “collective public comment,” it is required to organize a “dispute meeting” with representatives of those who submitted the comment in order to find an acceptable compromise.

There are some mechanisms to review and ensure adherence to consultation requirements, with the RIA Commission of the Ministry of Economy overseeing compliance of the legislation-making process with these requirements. Generally speaking, the Commission assesses “whether consultations have been carried out and sometimes also whether the comments have been taken into account but not the completeness of consultations or representativeness of the consulted subjects.”¹³⁹

Notwithstanding recent efforts to improve the usability of the Slov-Lex portal, the OECD notes its “relatively low take up among external stakeholders, especially individuals, due to the limited knowledge of the possibility to take part in the legislative process through the portal and its suboptimal user-friendliness.”¹⁴⁰ A recent review for the European Commission similarly concludes that notwithstanding

¹³⁸ OECD, *Regulatory Policy in the Slovak Republic: Towards Future-Proof Regulation* (2020): Ch. 4.

¹³⁹ OECD, *Regulatory Policy in the Slovak Republic: Towards Future-Proof Regulation* (2020): Ch. 4.

¹⁴⁰ OECD, *Regulatory Policy in the Slovak Republic: Towards Future-Proof Regulation* (2020): Ch. 4.

“the existence of comprehensive legislation requiring government to consult on all policies with stakeholders,” there is “limited real involvement of all social actors.”¹⁴¹

E-CONSULTATIONS ON LEGAL AND REGULATORY PROPOSALS IN CROATIA

Since 2015, Croatia has employed a web-based platform, e-Savjetovanja, to conduct public consultations on both primary laws and secondary regulation, thereby affording opportunities for stakeholder engagement that place Croatia among the leading countries within the OECD.¹⁴² The e-Savjetovanja platform implements requirements under the Act on the Right of Access to Information (as amended in 2013), which provides with respect to consultations as follows:

- (1) State administration bodies, other state bodies, local and regional self-government units and legal persons with public authority are required to conduct public consultations prior to the adoption of acts and subordinate legislation, and in the adoption of general acts or other strategic or planning documents where these affect the interests of citizens and legal persons.
- (2) The state administration bodies, via the central state website for public consultations, and other state authorities, local and regional self-government units and legal persons with public authority, via their websites or via the central state website for public consultation, release the draft of the regulation, general act or other document, with a substantiation of the reasons and objectives to be achieved through adoption of the regulation, act or other document, and inviting the public to submit their proposals and opinions.
- (3) The public authority bodies from paragraph 1 of this Article are obliged to conduct public consultations as a rule, for a duration of 30 days, except in cases when such consultations are conducted pursuant to regulations governing the procedure of assessment of the effect of regulations.
- (4) Upon the expiry of the deadline for the submission of opinions and proposals, the public authority body is obliged to draft and publish on the central state website for public consultations or its website, a report on the public consultation, which contains

¹⁴¹ Juraj Nemej, European Commission, *Public administration characteristics and performance in EU28: Slovakia* (Apr. 2018): 905, <https://op.europa.eu/en/publication-detail/-/publication/a7c9b4c2-960f-11e8-8bc1-01aa75ed71a1/language-en>.

¹⁴² OECD, *Regulatory Policy in Croatia: Implementation is Key* (18 June 2019): Ch. 4, https://www.oecd-ilibrary.org/governance/regulatory-policy-in-croatia_b1c44413-en.

the received proposals and comments, and responses thereto, with the reasons for rejection of individual proposals and comments. The report on the public consultation must be submitted by the body responsible for its drafting to the body that adopts or issues the regulation, general act or document.¹⁴³

Other official documents setting out guidance on the conduct of public consultations with respect to proposed legislation in Croatia include the nonbinding 2009 Code of Practice on Consultation with the Interested Public in Procedures of Adopting Laws, Other Regulations and Acts,¹⁴⁴ and the Rules of Procedure of the Government of the Republic of Croatia, which *inter alia* require “central state administration bodies to submit adequate reports on conducted consultation together with draft laws, other regulations and acts upon referring them to the Government procedure.”¹⁴⁵

The e-Savjetovanja platform appears to be user-friendly and transparent, with an emphasis placed on effective conduct of e-consultations. As the OECD describes:

The portal presents a unique single access point to all open public consultations of all laws, other regulations and acts carried out by public administration bodies.^[146] It was developed in co-operation with civil society organisations as well as the private sector. The system is continuously updated based on the input of all users. Civil servants are trained in using the portal and providing expert support in conducting consultations.

The portal has a simple and user-friendly interface and is searchable by the topic, institution responsible for the draft, date of issue or specific text. Anyone may submit comments after a simple registration on the portal.^[147] All submitted comments are then visible to other users and users can “like” other users’ comments. The portal also enables to group similar comments.

¹⁴³ Republic of Croatia, *Act on the Right of Access to Information*, Art. 11.

http://europam.eu/data/mechanisms/FOI/FOI%20Laws/Croatia/Croatia_FOI%20Act_2013_amended%202015.pdf.

¹⁴⁴ Government of the Republic of Croatia, *Code of Practice on Consultation with the Interested Public in Procedures of Adopting Laws, Other Regulations and Acts* (2009).

<https://udruga.gov.hr/UserDocsImages/userfiles/file/code%20of%20practice%20on%20consultation-croatia.pdf>.

¹⁴⁵ Government of the Republic of Croatia, Office for Cooperation with NGOs, “Croatian Government Amends its Rules of Procedure to Facilitate More Efficient Implementation of the Code of Practice on Consultation with the Interes[t]ed Public,” <http://int.uzuvrh.hr/vijestEN.aspx?pageID=2&newsID=2136>.

¹⁴⁶ “For major draft primary laws, RIA [regulatory impact assessment] statements are also made available for comments.” OECD, *Better Regulation Practices across the European Union* (19 Mar 2019): Ch. 2.

¹⁴⁷ Users may either post general comments regarding a draft or “post comments on individual clauses.” OECD, *Better Regulation Practices across the European Union* (19 Mar 2019): Ch. 2.

The responsible public administration authority is obliged to respond to all submitted comments individually. The form of response is not prescribed, so, in theory, it can only present a simple ‘duly noted’ statement. The reactions are visible to all users of the portal.¹⁴⁸

The volume of consultations carried out through e-Savjetovanja is robust, with a total of 1,033 consultations carried out in 2018 and 1,031 consultations conducted in 2019.¹⁴⁹ In 2019, 19,543 comments were received, with 3,039 fully accepted; 1,236 partially accepted; 5,983 rejected; 5,047 duly noted; and 4,328 unanswered.¹⁵⁰

The Croatian government has also implemented multiple accountability mechanisms to ensure that consultations are carried out in accordance with legal requirements. The Information Commissioner, an independent official selected by Parliament, is responsible for overseeing the public consultation process and ensuring that consultations take place, that the minimum consultation period is observed, and that reports on the consultation process are produced and published on e-Savjetovanja. Members of the public may complain to the Commissioner where consultations are not carried out in accordance with the law, whereupon the Commissioner may issue a warrant mandating or extending consultations.¹⁵¹ The Government Office for Cooperation with NGOs is also responsible for preparing annual reports on the implementation of the Code of Practice on Consultation, which includes a review of consultations carried out through the e-Savjetovanja platform; it is from these reports that the statistics above on consultations have been taken. Perhaps most notably, Croatian courts have enforced consultation requirements with respect to specific legislation. As Montero and Taxell noted in 2015, “recent decisions of the Croatian Constitutional Court have declared the non-constitutionality of some laws and regulations on the ground that they had not been developed following a democratic procedure, including providing opportunities for inputs from the public.”¹⁵²

Croatian authorities have continued to endeavor to improve compliance with consultation requirements and promote use of the e-Savjetovanja system. In the 2018-2020 National Action Plan developed by Croatia under the Open Government

¹⁴⁸ OECD, *Regulatory Policy in Croatia: Implementation is Key* (18 June 2019): Ch. 4.

¹⁴⁹ e-Savjetovanja, “Report on the implementation of consultations with the interested public in the procedures for the adoption of laws, other regulations and acts in 2019” (30 Nov. 2020), <https://savjetovanja.gov.hr/vijesti/izvjesce-o-provedbi-savjetovanja-sa-zainteresira-nom-javnosc-u-postupcima-donosnja-zakona-drugih-propisa-i-akata-u-2019/1217>.

¹⁵⁰ Government of the Republic of Croatia, Office of Legislation, *Report on the implementation of consultations with the interested public in procedures for passing laws, other regulations and acts in 2019* (2020): 19, <https://savjetovanja.gov.hr/UserDocImages//dokumenti//Izvie%C5%A1%C4%87e%20o%20savjetovanjima%202019.pdf>.

¹⁵¹ OECD, *Regulatory Policy in Croatia: Implementation is Key* (18 June 2019): Ch. 4.

¹⁵² Aránzazu Guillán Montero and Nils Taxell, *Open government reforms: The challenge of making public consultations meaningful in Croatia* (Dec. 2015): 23, <https://www.u4.no/publications/open-government-reforms-the-challenge-of-making-public-consultations-meaningful-in-croatia.pdf>.

Partnership, for example, the government committed to several activities aimed at strengthening the e-consultation system, including “upgrading the online consultation system (Milestone 12.1), educating officials and civil servants on its use (12.2), conducting a public promotion campaign (12.3), and publishing information on working groups for drafting the proposed legislation (12.4).”¹⁵³

ANALYSIS OF EXAMPLES WITH RESPECT TO INTERNATIONAL STANDARDS

The seven examples of e-consultations described above – with respect to proposed legislation in the Scottish parliament; rule-making in the United States; European Commission initiatives; and legislative and regulatory proposals in the Netherlands, Estonia, Slovakia, and Croatia – provide instances in which robust mechanisms have been implemented to secure public input on policy proposals via electronic means. We summarize the operation of these mechanisms on the following page.

Each of these mechanisms gives the public the opportunity to provide observations and comments regarding a wide range of draft policies and decisions; makes available adequate information about the procedure for public participation; and makes available sufficient and in many cases detailed information about the proposals under consideration. In most cases, these mechanisms provide adequate time-frames for the public to furnish input (with the possible exception of the Slov-Lex system in Slovakia, which typically provides only a 15-day comment period). At least formally, these mechanisms also appear to treat online inputs on an equal basis with offline inputs. By and large, these mechanisms thus satisfy the first, second, fourth, fifth, and sixth requirements for e-consultations enumerated in Section II.c above.

¹⁵³ Ivona Mendeš Levak, Open Government Partnership, *Independent Reporting Mechanism (IRM): Republic of Croatia Design Report 2018-2020* (2020): 52, https://www.opengovpartnership.org/wp-content/uploads/2019/12/Croatia_Design_Report_2018-2020_EN.pdf.

TABLE 1. SUMMARY OF E-CONSULTATION MECHANISMS

<i>Country</i>	<i>e-Consultation Platform</i>	<i>Covered Instruments</i>	<i>Consultation Period</i>	<i>Official Feedback on Consultation Inputs</i>
Scotland	consult.gov.scot, yourviews.parliament.scot	Government Bills and Members' Bills (under Public Bill Procedures); Committee Bills and inquiries, government strategies and frameworks (informally)	12 weeks (for Members' Bills under Public Bill Procedures)	Summary of consultation responses and conclusions drawn (for Members' Bills under Public Bill Procedures); analysis of responses received and description of action in response (for Government proposals in some cases)
United States	Regulations.gov	Proposed rules	60-90 days	Statement responding to relevant questions, criticisms, arguments, and suggestions
European Union	Your Voice in Europe, Have Your Say	Initiatives supported by impact assessments, evaluations, fitness checks, communications launching consultations, and Green Papers	12 weeks	Synopsis report outlining overall results of the consultation and providing feedback to stakeholders
The Netherlands	Internetconsultatie.nl	Concepts of laws, general administrative orders, ministerial regulations; optionally, policy proposals from ministries and parliamentary initiatives	4 weeks	Report outlining results of the consultation and how results incorporated into the draft proposal
Estonia	Osale.ee, Electronic Coordination System for Draft Legislation (EIS)	Legal act to be adopted or a decision to be made at the level of the Parliament, the Government of the Republic and the ministers; Government positions on European Union issues	4 weeks	Summary setting out interest groups who were invited to participate in the consultation, the proposals and comments made, consideration taken of the proposals or comments, and justification if they were not adopted by the government authority preparing the decision
Slovakia	Slov-Lex	All legislative proposals (primary laws and secondary regulations)	15 days	For comments receiving support from 500 individuals or organisations, must provide written feedback on the comment, either taking the comment into consideration for explaining why the comment has not been taken into account
Croatia	e-Savjetovanja	Acts and subordinate legislation, and general acts or other strategic or planning documents affecting the interests of persons	30 days	A report on the public consultation, which contains the received proposals and comments, and responses thereto, with the reasons for rejection of individual proposals and comments

However, even leading jurisdictions appear to have encountered challenges in satisfying the third, seventh, and eighth requirements listed in Section II.c. In the Netherlands, draft proposals are often submitted for e-consultations after they have been all but finalized within the government, so that effective public participation cannot really take place. Though authorities in the European Commission and the Netherlands are formally required to inform the public of how inputs from public participation have been taken into account, this requirement appears to be complied with only irregularly. Only in the United States does there appear to be an enforceable requirement that inputs from consultations be taken into account in decision-making.

One key feature supporting the effectiveness of e-consultation systems appears to be the presence of accountability mechanisms to ensure adequate implementation. In the U.S. and Croatia, for example, courts have provided effective remedies, including invalidation of legal instruments, where participation requirements were not followed. Empowering citizens to pursue such remedies may promote effective implementation to a greater extent than deputizing officials to police adherence to consultation requirements, as has been done in Slovakia.

Even where authorities have set up legal frameworks and e-consultation systems that afford genuine opportunities to participate in the development of legislation, this will not guarantee by itself that citizens avail themselves of these opportunities, as the U.S., Estonian, and Slovakian examples demonstrate. Continued effort is required to make systems user-friendly and accessible; to train officials on how to manage consultations; and to promote these systems among the general public.

Conclusion

E-consultation mechanisms can provide an effective means of vindicating citizens' right to participate in the development of rules, policies, laws, and decisions affecting them. However, it is not enough to merely set up a website furnishing information on policy proposals and participation procedures and providing reasonable time-frames for the public to submit input. Authorities must also take seriously the requirement to consider public input in decision-making, and to inform the public of how inputs from offline or online consultations have been incorporated into the decisions taken. Establishing a judicial remedy where these requirements are not observed can assist in ensuring their practical implementation. And promoting the actual use of these systems by the public requires continued outreach and systems refinement – efforts that may be forthcoming only where there is a genuine interest on the part of authorities to facilitate effective participation in decision-making by citizens.