POLICY BRIEF

TICKING THE BOX ON PUBLIC CONSULTATIONS - ENABLERS, REPERCUSSIONS, SOLUTIONS?

WeBER 2.0
Western Balkan Civil Society Empowerment for a Reformed Public Administration

DECEMBER 2021

This Project is financed by the European Union

Authors: Megi Reçi and Diori Angjeli

EXECUTIVE SUMMARY

A transparent approach to consultation processes, inclusive of civil society and open to the public, is essential to ensure the integrity, quality, and legitimacy of decision-making. The effectiveness and genuineness of such processes are integrally bound to the transparency provided by the institutions in charge of the decision-making.

To enable public scrutiny, access to public consultation processes must be ensured by the government, from the initial phases of law-making and policy-making, before the draft documents reach the Parliament. The Council of Ministers (hereinafter "the CoM") is a key actor in such processes since it submits an average of 80–85% of all the draft laws that are reviewed by the Parliament every year[1]. Therefore, this policy brief will address public consultation processes at the central government level with the aim to expose factors that enable their circumvention. It argues that to conduct successful and meaningful public consultations processes, the shortcomings in the legal framework and institutional practice that enable the circumvention, need to be addressed. Lastly, it provides policy recommendations that aim to eliminate the identified legal gaps and improve proactive transparency.

BACKGROUND

In Albania, despite having consultation mechanisms in place, civic engagement has diminished since 2016[2] whilst participation in public consultations as one of the main tools for civic engagement remains at unsatisfactory levels. Citizens' reasons behind low participation are disbelief, believing there are no consultation mechanisms in place, lack of information, etc.[3] Whilst from the perspective of civil society, lack of trust that the input provided will be taken into consideration, lack of notification, and selective participation are amongst the prevailing reasons[4].

According to the EU Commission, consultations in Albania often are artificial exercises, while independent studies indicate that the main features of the public consultation processes are inconsistency[5], lack of transparency, non-inclusiveness, and culture of ticking the box.[6] Such practices are amongst the factors that negatively affect public trust and civic engagement in the country. Amongst the several discouraging factors, this policy brief will focus on the legal gaps and non-transparent practices of public consultations and will examine their impact in circumventing public consultations.

The legal gaps and vague provisions can be misinterpreted to circumvent public consultations processes or enable the process to be artificial and effectless.

WHAT ENABLES THE CIRCUMVENTION OF PUBLIC CONSULTATION PROCESSES?

The right to public consultation at the central government level in Albania is regulated by the Law on Notification and Public Consultation, as well as other bylaws and regulatory acts. Despite being generally in line with European standards, the six-year experience of practicing the law has shown deficiencies. Hereinafter, the shortcomings in the legal framework combined with non-transparent institutional practices enabling the circumvention of public consultation processes at the central government level will be identified and analysed.

Law no. 146/2014 on Notification and Public Consultation

The law no. 146/2014 on Notification and Public Consultation applies to draft laws, drafts of national and local strategic documents, and policies of high public interest, while the decisions of the CoM are not explicitly included in the scope of this law. The law provides a broad list of exceptions to its scope, such as for matters of national security, international, bilateral, and multilateral relations, administrative individual acts, administrative normative acts, normative acts with the power of law approved by the CoM, civil emergencies, and other matters prescribed by other laws. Nevertheless, it does not provide a list of cases for which the holding of public consultations is obligatory. This gap enables the circumvention of the consultation process for matters that could be inadequately interpreted as being of low public interest and fails to provide accountability on how high public interest is measured in each case. Another gap identified in the law concerns the fact that it does not determine the cases when preliminary consultations (before the drafting of the document) must be held, establishing that they are held in special cases and when deemed necessary, leaving the decision upon the discretion of the public institution and allowing for subjectivity.

The publication of draft laws and policies in the electronic register for notifications and public consultations is mandatory. However, the use of other (more friendly and accessible) methods of consultation, such as public meetings and hearings, communication via electronic means, etc., is at the discretion of the public institution itself, therefore optional. The law prescribes that such other forms of notification shall be used when deemed necessary by the public institution, without defining how the necessity is evaluated and without considering e.g., other important indicators such as the target audience. Furthermore, the holding of public meetings is to be decided by the institution, based on its judgment on the importance of the document and the high public interest that it could potentially generate. Such broad concepts can be misinterpreted at the cost of citizens' access to public consultations.

Ineffective complaint mechanisms discourage civil society and the public at large to use such means when a violation of public consultation processes takes place.

To ensure accountability, institutions are required to provide feedback to the recommendations and comments received during the public consultation process, however, the law does not provide a deadline within which this feedback should be provided. The follow-up to public consultations through the means of providing feedback on received input from CSOs is very important in displaying consideration for these actors' role in the public consultation process. However, CSOs are often not provided feedback on their recommendations and comments[7] and only a small portion of CSOs consider institutions to accept their input, following the consultations[8]. The lack of deadlines and clarity of obligations can be amongst the causes for delay or absence of feedback.

The law establishes that the responsible minister overseeing the public consultation law is the minister covering the areas of technology and information, without further defining the role of this institution. Nevertheless, the decision of the CoM regulating the functioning of the electronic register for notifications and public consultations assigns this minister with the responsibility of leading the process of creation, functioning, administration, and monitoring of the electronic register for notifications and public consultations. The Minister for Innovation and Public Administration was responsible up to 2017 when due to a government restructuring this ministry was dissolved. Currently, the institution overseeing and sustaining the public consultation processes at the central government level is the Prime Minister's Office. Such changes and the relevant roles assigned to each implementing institution are not reflected in the legal framework. The latter should be updated to ensure consistent monitoring and reporting on public consultation processes at all levels of government.

The law establishes the obligation of public institutions to draft and publish annual reports on transparency in the decision-making process. The data required to be published are of a statistical nature, therefore they do not provide a complete overview of the institutional accountability in decision-making, e.g. the report provides the number of recommendations and comments received, accepted, and rejected, but it is not required to provide the reasoning behind the rejection; it provides the number of documents approved by the institution in the given year, but it is not required to provide the number of documents consulted, the number of documents not consulted, and the reasoning behind the lack of consultation of the latter. For these reports to ensure full accountability, they should be ameliorated and contain more qualitative information. In addition to the need to ameliorate the content of these reports, their consistent publication is also

important to ensure transparency. It is noticed that such reports are absent in the vast majority of transparency programs of the institutions, while most institutions have published them only in the electronic register. Their publication in the electronic register for public consultations is the bare minimum, and not sufficient, as it is often much easier and accessible to find such information in the websites of the given institutions, rather than searching throughout the electronic register, the use of which by the public, yet remains limited.[9] Proactive and consistent transparency makes a legal obligation for the given institutions deriving from the law on the right to information and is of crucial importance to increase the accessibility of the public in the consultation process. Concerns regarding the quality and consistency of reporting and monitoring on such processes were identified during 2019-2020 by the National PAR Monitor Albania as well, indicating an ongoing problem in this regard.

The competencies of the Commissioner for the Right to Information and Data Protection (hereinafter "the Commissioner") with regards to addressing complaints about violations on public consultations are limited. Unlike "homologue" laws (Law no. 119/2014 On the Right to Information and Law no. 9887/2008 For the Protection of Personal Data) under the supervision of the same Commissioner, the law on public consultation does not provide the Commissioner with the authority to issue administrative sanctions (fines) to the person or institution responsible for the violation. The Commissioner has no mandate to launch an administrative investigation with its own initiative (ex officio) without being set in motion via a request. The mandate of the Commissioner is also limited in time, allowing action only after the approval of the act subject to appeal. Furthermore, the law does not provide the right to file a lawsuit for violations of public consultation. Even though the Constitution and the Code of Administrative Procedures can be referred to when claiming this right before the court, its explicit regulation in the law would enable the clarification of procedural steps and deadlines, particularly in the cases when there is no decision taken from the Commissioner on the given case.[10] Such gaps discourage accountability seeking as witnessed by the insignificant number of complaints filed over the years.

The order of the Secretary General of the Council of Ministers no. 3/2021 "On the approval of the guidelines for public consultations processes"

A recent attempt to better regulate the public consultation process at the central government level was made through the approval of guidelines for public consultation processes via an order of the Secretary General of the CoM approved in January 2021 (hereinafter "the order"). The order addresses all phases of public consultation processes, the monitoring and reporting obligations of the implementing institutions, and provides guidelines and templates to be used during the planning, implementation, and reporting on public consultations. Nevertheless, this document is of a soft law nature and its mandatory power over the ministries is questionable, since the Secretary General of the CoM, does not have the authority to issue orders according to the Law no. 9000/2003 For the organisation and the functioning of the Council of Ministers. It would be feasible for the provisions of this order to be incorporated in the legal framework, to complete some of the gaps identified above, and to ensure a legally binding force over the ministries, other institutions under the subordination of the PM office as well as local government units, which despite not being in the focus of this policy brief, are amongst the institutions obliged to implement the law on public consultations. Lastly, to ensure its recognition and implementation, it is important for the guidelines provided in the order to be publicly accessible and the implementing institutions should receive training with regards to their implementation.

The functions and duties of the institutions overseeing and implementing public consultations processes should be clearly defined in the legal framework to ensure consistent monitoring and reporting.

The decision of the Council of Ministers no. 828/2015 "On the approval of the rules for the creation and administration of the electronic register for notifications and public consultations"

The Decision of the Council of Ministers No. 828/2015 enlists the documents that are to be published in the electronic register such as project documents under consultation, notifications for public consultations, institutional annual plans for the decision-making processes, information about the process of public consultations, the receiving of comments and recommendations, etc., but does not require the publication in the electronic register of the reasoning on the rejection of comments and recommendations received. Such information is of interest to the actors that have provided feedback, but also to the public at large, and shows consideration and accountability from the side of the institutions.

The decision of the Council of Ministers no. 584/2003 "On the approval of Rules of Procedures of the Council of Ministers"

The Rules of Procedures of the CoM establish that project documents of special importance under review for approval by the CoM can be discussed with representatives of NGOs and other stakeholders, without clearly defining how the importance of the documents should be evaluated. Such vague provisions can be misinterpreted to circumvent the consultation process.

Furthermore, the Rules of Procedure establish that the explanatory note attached to the project documents subject to consultation-should contain information on the process of notification and consultation. Nevertheless, they do not define which project documents under the review of the CoM must be subjected to consultations, and neither do they require explanatory notes attached to project

documents that did not undergo public consultation to contain information on the reasoning behind why public consultation was deemed unnecessary. The Rules of Procedure do not provide any measures that can be taken when a project document is submitted without the explanatory information on public consultation processes, unlike for the cases when the explanatory note lacks the table of compliance with EU acquis, for which the Rules of Procedure require for the document to be returned to the proposing institution to complete the document. The Rules of Procedure go even further in the cases when the aim of the draft document is the harmonisation with EU legislation, establishing that the CoM does not review any project documents without priorly taking the opinion of the Minister responsible for the EU integration process. Differently, for cases when consultations are evaded, there are no such measures prescribed for preventing the document from being approved by the CoM, consequently failing to provide accountability when consultations are unduly evaded.

Regarding the draft documents aiming at the harmonisation with EU legislation, the Rules of Procedure consider it optional to provide information (in the explanatory note attached to the draft document) about the inclusion of civil society in the process of consultation, despite the crucial role civil society organisations should play in such processes, according to the government's own policy.[11] Furthermore, the Rules of Procedure establish that the description of the steps taken for the drafting of the project document (part of the explanatory note attached to the draft document), may include information on the external local or international expertise received if recommended by donors when deemed necessary. Such vague provisions fail to guarantee full transparency on the inclusion of civil society in consultations of draft documents aiming at the harmonisation with EU legislation.

CONCLUSIONS AND RECOMMENDATIONS

The legal framework should be reviewed to address the gaps that allow the circumvention of public consultation processes.

The legal gaps and vague or broad provisions must be addressed as they can be misinterpreted to circumvent public consultations processes or enable the process to be artificial and effectless. The scope of the law on notification and public consultation should be extended to include decisions of the Council of Ministers and provide clear provisions determining when public consultations are obligatory; the requirement for objective reasoning on why certain documents are not consulted; the cases when preliminary consultations must be held; the deadline for the provision of feedback to comments and recommendations; the criteria for the selection of the most appropriate consultation method on a case by case basis. Furthermore, the provisions of the order of the Secretary General of the CoM may be incorporated in the legal framework to address some of the gaps and ensure their legally binding force at all levels of government.

The functions and duties of the institutions overseeing and implementing public consultations processes should be clearly defined to ensure consistent reporting and monitoring.

The lack of clearly defined obligations of institutions can affect their monitoring and reporting on the implementation of public consultations, harming institutional accountability, and limiting the opportunities for public scrutiny and reflection on areas for improvement. The law and the relevant bylaws should be reviewed and updated with regards to clearly defining the institutions assigned with monitoring and reporting on public consultations, their functions, and duties. Furthermore, to ameliorate these processes, the requirements in the law regarding the content of annual reports of transparency in decision-making should be reviewed to include qualitative data regarding the consultation processes. Lastly, the annual plans, reports, and all the required categories of information concerning public consultation processes should be updated and published accordingly in the institutions' transparency programs, as required by the order no.187/2020 of the Commissioner for the Right to Information and Data Protection, as well as in the electronic register for public consultations.

Effective complaint mechanisms should be guaranteed to provide accountability on violations regarding public consultation processes.

Ineffective complaint mechanisms discourage civil society and the public at large to use such means when a violation of public consultation processes takes place. The law should be reviewed to strengthen the authority of the Commissioner for the Right to Information and Data Protection. To ensure accountability for violations regarding public consultation processes, in addition to recommendations, the Commissioner should be given the authority to issue administrative sanctions; to initiate ex officio administrative investigations, and not only after the approval of the act subject to appeal. Lastly, the law should explicitly provide the right to file a lawsuit on violations of the right to public consultation, establishing the procedural steps and deadlines.

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This document has been produced with the financial support of the European Union, and the support of the Hanns Seidel Stiftung, Tirana's office. Its contents are the sole responsibility of its authors and do not necessarily reflect the views of the European Union and the Hanns Seidel Stiftung.

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