



Background Document on Public Consultation

This paper was prepared by Delia Rodrigo, Administrator, and Pedro Andrés Amo, Consultant, Regulatory Policy Division, Public Governance and Territorial Development Directorate. For further information please contact: delia.rodrigo@oecd.org and pedro.andresamo@oecd.org

1. PUBLIC CONSULTATION: CORE ELEMENTS

What is Public Consultation?

1. Public consultation is one of the key regulatory tools employed to improve transparency, efficiency and effectiveness of regulation besides other tools such as Regulatory Impact Analysis (RIA), regulatory alternatives and improved accountability arrangements. There are three related forms of interaction with interested members of the public. In practice, these three forms of interaction are often mingled with public consultation programmes, complementing and overlapping each other:

- **Notification.** It involves the communication of information on regulatory decisions to the public, and it is a key building block of the rule of law. It is a one-way process of communication in which the public plays a passive consumer role of government information. Notification does not, itself, constitute consultation, but can be a first step. In this view, prior notification allows stakeholders the time to prepare themselves for upcoming consultations.
- **Consultation.** It involves actively seeking the opinions of interested and affected groups. It is a two-way flow of information, which may occur at any stage of regulatory development, from problem identification to evaluation of existing regulation. It may be a one-stage process or, as it is increasingly the case, a continuing dialogue. Consultation is increasingly concerned with the objective of gathering information to facilitate the drafting of higher quality regulation.
- **Participation.** It is the active involvement of interest groups in the formulation of regulatory objectives, policies and approaches, or in the drafting of regulatory texts. Participation is usually meant to facilitate implementation and improve compliance, consensus, and political support. Governments are likely to offer stakeholders a role in regulatory development, implementation and/or enforcement in circumstances in which they wish to increase the sense of “ownership” of, or commitment to, the regulations beyond what is likely to be achieved via a purely consultative approach.

Why is public consultation important?

2. As the *OECD-APEC Integrated Checklist on Regulatory Reform* highlights regulations should be developed in an open and transparent fashion, with appropriate and well publicized procedures for effective and timely inputs from interested national and foreign parties, such as affected business, trade unions, wider interest groups such as consumer or environmental organisations, or other levels of government. Consultation improves the quality of rules and programmes and also improves compliance and reduces enforcement costs for both governments and citizens subject to rules.

3. Public consultation increases the information available to governments on which policy decisions can be based. The use of other policy tools, particularly RIA, and the weighing of alternative policy tools, has meant that consultation has been increasingly needed for collecting empirical information for analytical purposes, measuring expectations and identifying non-evident policy alternatives when taking a policy decision.

4. Regulation and its reforms affect all the participants in civil society, and therefore, in order to better assess the impacts and minimise costs, all the parts involved should be able to participate somehow in the regulatory processes. That is where public consultation has become one of the best tools to improve quality in regulation.

5. Consultation increases the level of transparency and it may help to improve regulatory quality by:

- Bringing into the discussion the expertise, perspectives, and ideas for alternative actions of those directly affected;
- Helping regulators to balance opposing interests;
- Identifying unintended effects and practical problems. Using pre-notification it is possible to foresee more easily the consequences of some planned policies, becoming one of the most productive ways to identify administrative burdens;
- Providing a quality check on the administration's assessment of costs and benefits;
- Identifying interactions between regulations from various parts of government;

6. Consultation processes can also enhance voluntary compliance for two reasons: first because changes are announced in a timely manner and there is time to adjust to changes, and second because the sense of legitimacy and shared ownership that gives consultation motivate affected parties to comply.

7. Consultation can also have some impact if it is used for amending legislation. Changing legislation using public consultation is more difficult and time-consuming than when amending less formal government policy documents.

2. TOOLS USED FOR PUBLIC CONSULTATION

8. Basically there are five instruments or different ways to perform public consultation, depending on who is to be consulted, how formal the process is, and the communication means used.

Informal consultation

9. Informal consultation includes all forms of discretionary, ad hoc, and unstandardised contacts between regulators and interest groups. It takes many forms, from phone-calls to letters to informal meetings, and occurs at all stages of the regulatory process. The key purpose is to collect information from interested parties. Informal consultation is carried out in virtually all OECD countries, but its acceptability varies tremendously. This approach can be less cumbersome and more flexible than more standardised forms of consultation; hence, they can have important advantages in terms of speed and the participation of a wider range of interests.

Box 1. Informal consultation.

In the **United Kingdom**, regulatory bodies have traditionally had close and informal contacts with major interests, particularly businesses, and informal consultation is seen as a norm of the regulatory process, prior to formal consultation in line with the code of practice on written consultation. The same tradition of informal contacts exists in **France**. In **Japan**, informal consultation is crucial in shaping consensus around the final product. In **Canada**, the government has encouraged regulators to consult informally prior to formal consultation. By contrast, informal consultation is viewed more suspiciously in the **United States** as a violation of norms of openness and equal access, and in many cases it is a violation of the administrative procedure act requiring equal access for all interested parties.

10. The disadvantage of informal procedures is their limited transparency and accountability. Access by interest groups to informal consultations is entirely at the regulator's discretion. Informal consultation resembles "lobbying", but in informal consultation it is the regulatory agency that plays the active role in establishing the contact. The line between these two activities, however, is potentially difficult to draw.

Circulation of regulatory proposals for public comment

11. This form of public consultation is a relatively inexpensive way to solicit views from the public and it is likely to induce affected parties to provide information. Furthermore, it is fairly flexible in terms of the timing, scope and form of responses. That is why it is among the most widely used form of consultation.

12. This procedure differs from informal consultation in that the circulation process is generally more systematic, structured, and routine, and may have some basis in law, policy statements or instructions. It can be used at all stages of the regulatory process – but is usually used to present concrete regulatory proposals for consultation. Responses are usually in written form, but regulators may also accept oral statements, and may supplement those by inviting interested groups to hearings.

13. Regulators generally retain much discretion over access and process but, in practice, important proposals are circulated widely and systematically. Countries have begun to explore the possibilities for improving access and timeliness of consultation that are provided by information technology. The Internet is increasingly being used for this purpose.

14. The negative side of this procedure is again the discretion of the regulator deciding who will be included in the consultation. Important groups will not usually be neglected, as this is likely to create difficulties for the regulatory proposal when it reaches the cabinet or parliament. However, less organised groups are in weaker positions in this respect.

Public notice-and-comment

15. Public notice-and-comment is more open and inclusive than the circulation-for-comment process, and it is usually more structured and formal. The public notice element means all interested parties have the opportunity to become aware of the regulatory proposal and are thus able to comment. There is usually a standard set of background information, including a draft of the regulatory proposal, discussion of policy objectives and the problem being addressed and, often an impact assessment of the proposal and, perhaps, of alternative solutions. This information – and particularly the RIA elements – can greatly increase the ability of the general public to participate effectively in the process, although most countries find that participation remains at a quite low level for all but a few controversial proposals.

Box 2. Notice-and-comment in the OECD countries

Notice-and-comment has a long history in some OECD countries, and its use has become much more widespread in recent years. It was first adopted for lower-level regulations in the **United States** in 1946. The practice was subsequently adopted in **Canada** in 1986 – called "pre-publication" – and in **Portugal** in 1991. By 1998, 19 OECD countries were using public notice-and-comment at least in some situations. **Japan** adopted notice-and-comment requirements for all new regulatory proposals (and revisions to existing rules) in April 1999. In other countries such as

Hungary, the process is proceeding on an ad hoc basis, with individual Ministries deciding their own policies.

Procedures vary widely. In the **United States** and **Portugal**, the procedure is prescribed by law and judicially reviewed, while **Canada** has adopted the procedure through a policy directive that has no legal force. The **United States** model is the most procedurally rigid: comments are registered in a formal record of the rule-making and regulators are not permitted to rely on factual information which is not contained in this public record. United States' policymakers may accept or reject comments at their discretion, but those who ignore major comments risk having the regulation overturned in court. In **Denmark**, by contrast, notice-and-comment arrangements are also widely used in the preparation of "substantially important" lower level rules, but there is no standardised, formal, and systematic set of requirements.

However, many countries have found that levels of participation have in practice been low. This can be particularly so when the mechanism is first introduced, because familiarity is lacking. Established groups may prefer to keep their special relations with government officials than to participate in more open processes. Participation is also dependent on the ease of response and the expected results of participation, including the effectiveness of the notice process, the amount of time allowed for comment, the quality and nature of the information provided to interested parties and the attitudes and responsiveness of regulators in their interactions with participants in the comment process.

16. Public notice-and-comment is used both for laws and lower level rules. In many countries, it is regarded as particularly important in respect to lower level rules because it provides some scrutiny to regulatory processes inside ministries which do not benefit from the open law-making processes applying to legislation debated in parliaments.

Box 3. Best practices for notice-and-comment in the United States

The 1946 Administrative Procedure Act (APA) established a legal right for citizens to participate in rule-making activities of the federal government, based on the principle of open access to all. It sets out the basic rule-making process to be followed by all agencies of the United States' government. The path from proposed to final rule affords ample opportunity for participation by affected parties. At a minimum, the APA requires that in issuing a substantive rule (as distinguished from a procedural rule or statement of policy), an agency must:

i) Publish a notice of proposed rule-making in the Federal Register. This notice must set forth the text or the substance of the proposed rule, the legal authority for the rule-making proceeding, and applicable times and places for public participation. Published proposals also routinely include information on appropriate contacts within regulatory agencies.

ii) Provide all interested persons – nationals and non-nationals alike – an opportunity to participate in the rule-making by providing written data, views, or arguments on a proposed rule. This public comment process serves a number of purposes, including giving interested persons an opportunity to provide the agency with information that will enhance the agency's knowledge of the subject matter of the rule-making. The public comment process also provides interested persons with the opportunity to challenge the factual assumptions on which the agency is proceeding, and to show in what respect such assumptions may be in error.

iii) Publish a notice of final rule-making at least thirty days before the effective date of the rule. This notice must include a statement of the basis and purpose of the rule and respond to all substantive comments received. Exceptions to the thirty-day rule are provided for in the APA if the rule makes an exemption or relieves a restriction, or if the agency concerned makes and publishes a finding that an earlier effective date is required "for good cause". In general, however, exceptions to the APA are limited and must be justified.

The American system of notice-and-comment has resulted in an extremely open and accessible regulatory process at the federal level that is consistent with international good practices for transparency. The theory of this process is that it is open to all citizens, rather than being based on representative groups. This distinguishes the method from those used in more corporatist models of consultation, and also from informal methods that leave regulators considerable discretion regarding whom to consult. Its effect is to increase the quality and legitimacy of policy by ensuring that special interests do not have undue influence.

Public hearings

17. A hearing is a public meeting on a particular regulatory proposal at which interested parties and groups can comment in person. Regulatory policymakers may also ask interest groups to submit written information and data at the meeting. A hearing is seldom an independent procedure; rather, it usually supplements other consultation procedures. According to preliminary results from the most recent OECD survey on regulatory quality indicators, 13 OECD countries used public meetings as a form of consultation by 2005, but there were significant differences in their use vis-à-vis procedures and other aspects of the consultation process.

Box 4. Public hearings.

In the **United States** a hearing is attached to the notice-and-comment procedure as needed. Hearings tend to be formal in character, with limited opportunity for dialogue or debate among participants. Experimentation with “online” hearings has begun. In **Germany**, a regulatory agency circulating a proposal for comment may arrange a hearing instead of inviting written comments, or may do both. In **Finland**, where hearings are a relatively new approach, a hearing is usually arranged instead of, or combined with, the invitation of written comments. In **Canada**, hearings are a formal part of the development of all primary regulatory law – conducted by committees in Parliament. Regulatory departments also often hold public consultation meetings, particularly on major regulatory or secondary legislation proposals.

18. Hearings are usually discretionary and ad hoc unless connected to other consultation processes (for example, notice-and-comment). They are, in principle, open to the general public, but effective access depends on how widely invitations are circulated, the location and timing of the hearing, and the size of the room. Public meetings provide face-to-face contact in which dialogue can take place between regulators and wide range of affected parties and between interest groups themselves.

19. A key disadvantage is that they are likely to be a single event, which might be inaccessible to some interest groups, and thus require more co-ordination and planning to ensure sufficient access. In addition, the simultaneous presence of many groups and individuals with widely differing views can render a discussion of particularly complex or emotional issues impossible, limiting the ability of this strategy to generate empirical information.

Advisory bodies

20. Besides informal consultation and circulation-for-comment, the use of advisory bodies is the most widespread approach to public consultation among the OECD countries. Some 21 countries use advisory bodies in some form during the regulatory process. Advisory bodies are involved at all stages of the regulatory process, but are most commonly used quite early in the process in order to assist in defining positions and options.

21. Depending on their status, authority, and position in the decision process, they can give participating parties great influence on final decisions, or they can be one of many information sources. Regulatory development – drafting and reviewing proposals, or evaluating existing regulations – is rarely the only, or even the primary, task of advisory bodies. Some permanent bodies, for instance, may have broad mandates related to policy planning in areas such as social welfare or health care. There are many different types of advisory bodies under many titles – councils, committees, commissions, and working parties. Their common features are that they have a defined mandate or task within the regulatory process (either providing expertise or seeking consensus) and that they include members from outside the government administration.

Box 5. Examples of advisory bodies

Their relationships to regulatory bodies can vary from reacting to a regulator's proposals (such as the **Netherlands'** Social and Economic Council, or **Germany's** expert advisory commissions) to acting as a rule-making body, in which advice is only one of several regulatory functions (such as the **United Kingdoms'** Health and Safety Commission). Advisory bodies may themselves carry out extensive consultation processes involving hearings or other methods. For example, in **Germany**, the mandate of the Deregulation Commission stated that it "may hear experts from research institutions, the business community and associations, and administration if it deems this necessary". In **Mexico**, businesses and other interested parties now participate in an advisory committee to the Federal Regulatory Improvement Council (COFEMER), through a dozen or more ad hoc consultation groups organised to review existing formalities and new regulations. **Korea**, too, has greatly expanded its use of consultative committees in recent years. This has coincided with a massive rise in the number of non-governmental organisations (NGOs), and hence the diversity of views to be incorporated into policy decisions. Committees are generally used as means of improving regulatory quality by assuring the flow of expert advice and information to regulators, but are also important in increasing the perceived legitimacy of laws.

22. There two main different kinds of advisory bodies: first, the bodies seeking consensus are interest groups where they negotiate processes, and secondly, technical advisory groups are formed by experts and their aim is to find information for regulators. The first kind tends to have a permanent mandate while the technical bodies are often *ad hoc* groups to work in concrete issues.

Box 6. The shift in the Netherlands to more transparent consultation

A core principle in the Dutch process is that of "separation of advice and consultation", which reflects the twin purposes of consultation in obtaining both expertise and consent. There are two formal and distinct consultation structures. The "advisory" function is served by a wide range of ad hoc advisory bodies, created by individual laws.

Membership is based solely on expertise, although in practice direct interests are also represented. "Consultation" is served through a network of advisory bodies created under the Industrial Organisation Act of 1950. Here, the tripartite principle is the underlying factor determining representation. The chief consultative body under the Act is the Social and Economic Council (SER), composed of 15 members representing employers' interests, 15 representing employees and 15 independent experts appointed by the Crown on the advice of the government.

These bodies were historically used within the corporatist system to introduce checks and balances into decisions, to increase the social legitimacy of legislation, and to improve the level of "voluntary" compliance, including a smooth and rapid implementation of new legislation, once agreed. In recent years, however, these structures have been criticised as unsuited to contemporary realities. They are regarded as dampening policy responsiveness, limiting the role of Parliament by locking in "consensus" solutions at an early stage, and as promoting excessive regulatory complexity by trying to balance inconsistent objectives. In addition, the separation of "advice and consultation" has been compromised in practice, while the corporatist and cartel-like structures established under the Industrial Organisation Act are increasingly seen as inconsistent with EU competition principles.

The Dutch Government responded to the criticisms with major reforms. The number of advisory boards was drastically reduced over a number of years, from 491 in 1976 to 161 in 1991 and 108 in 1993. The remainder were abolished in 1997 and replaced with a single advisory body for each Ministry. This reform aims to more clearly separate advice and consultation, and to refocus these bodies on major policy issues rather than details. The ministries are concerned that too many consultative groups have been re-established following the abolition, but they believe that the change has, nonetheless, improved the situation.

3. GOOD PRACTICES FOR PUBLIC CONSULTATION IN OECD COUNTRIES

23. In OECD member countries, after identifying important areas of low quality regulation, the first attempts to improve laws and regulations were focused on advocating specific regulatory reforms and scrapping burdensome regulations. Increasingly, however, it was recognised that *ad hoc* approaches to reform were insufficient. Thus, the reform agenda began to broaden to include the adoption of a range of explicit overarching policies, disciplines and tools (OECD: 2002).

24. According to preliminary results from the most recent OECD survey on regulatory quality indicators, 27 Member countries had implemented public consultation with affected parties from a government wide perspective. This represents three more countries than in 2000. Consultation is the most common regulatory tool used among OECD countries.

25. Some of the challenges related to consultation procedures that OECD countries face refer to data collection and transparency in communicating the views of consulted parties. Data collection is inherently expensive, and to make it really effective, the quality of the information and its collection must be efficiently and carefully managed and addressed. A process to monitor the quality of the consultation process should be institutionalised; however, only 5 countries had done so by 2005, according to preliminary results from the most recent OECD survey on regulatory quality indicators. Some other aspects which should be improved in OECD countries are a deficient publication of participants' views and inclusion of consultation results in RIA.

26. Some governments realised that they could share tasks with other parties directly affected by regulation. In many OECD countries, the public has been taking on new roles in the development, implementation, and revision of regulations. Changes in the nature of civil society and the relationships between government and population have been pushing governments toward more extensive use of consultation. Better educated and informed citizens are demanding more information from governments, and thus, creating pressure for more open consultative mechanisms, with better information and more effective opportunities for participation and dialogue. At the same time, advances in information technology are enhancing governments' abilities to meet these demands, as well as the abilities of civil society groups to organise to pursue and promote their goals.

Box 7. Initiatives in Queensland to improve consultations and information dissemination on regulations.

"Queensland Regulations: Have Your Say" is a regulatory communications system that acts as early warning device for impending regulatory activity by the Government. It has been introduced to assist business and the community to become involved early in the consultation process by clear public disclosure of the Government's regulatory intentions. The system is an interactive Web-based system which enables Government agencies to place information about regulatory proposals on the Department of State Development's Web site (www.sd.qld.gov.au/qldregulations). It also enables interested parties to respond through the system direct to an agency's proposal.

In addition, a one-stop-shop referral service, the Business Referral Service, has been implemented to provide business with access to detailed information and advice on government regulations, particularly compliance matters. The Business Referral Service enables business owners and operators, with complex compliance queries, direct access to relevant experts within Government. The service is incorporated in the Department's Smart Licence suite of services.

27. In order to include all interested parties, consultation procedures should not be complex and costly. Consultation should reduce the risk of capture by well financed groups of interest or with a deep legislative

knowledge. Therefore, regulators could increase the use of plain, accessible language as well as offering RIA to help explain the effects of regulation to all the affected parties.

28. Consultation systems should be designed according to each country's context, legitimised by the inclusion of all groups of interest and by transparent procedures, while fighting to improve information quality and spreading the use of the new information technologies. Regulators should ask themselves: '*Have all interested parties had the opportunity to present their views?*'. Regulations should be developed in an open and transparent fashion, with appropriate procedures for effective and timely input from interested parties such as affected businesses and trade unions, other interest groups, or other levels of government (OECD: 2002).

29. To ensure that consultation improves all regulation, these processes should be used for primary legislation as well as for other lower levels of regulation. Flexibility is important to cope with varying circumstances. In some cases even tailored opportunities for dialogue must be established for further interactions with stakeholders that are harder to reach or less able to participate.