

SMART REGULATION LAW-MAKING AND PARTICIPATORY DEMOCRACY: CONSULTATION IN THE EUROPEAN UNION*

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Abstract

A regulatory policy based on smart regulation takes the view that legislation and regulations serve the economy and, therefore, laws must aim to create conditions capable of boosting national economies and economic growth, as laid down by the OECD and the European Union itself. Such a regulatory policy is informed by a set of principles which includes transparency, cooperation, accountability, efficiency, effectiveness, participation and openness, and is applicable to both regulatory institutions and regulations. This regulatory approach takes the view that regulations are of better quality when they have been influenced by citizens, and smart regulation results in participatory democracy. Citizens collaborate with the government in the law-making process at an early stage and throughout the life of a legislative act by means of periodic consultations. This paper focuses on consultation as the principal mechanism for participatory democracy in the context of smart regulation law-making in the European Union.

Key words: smart regulation; participatory democracy; consultation; citizens' initiative.

LEGISLACIÓ INTEL·LIGENT I DEMOCRÀCIA PARTICIPATIVA: EL MECANISME DE LES CONSULTES A LA UNIÓ EUROPEA**Resum**

Una política regulatòria basada en la idea de legislació intel·ligent implica que la producció de normes ha d'estar condicionada per objectius econòmics i, per tant, les lleis han d'afavorir les condicions que facin possible la millora de l'economia i potenciar el creixement econòmic, tal com propugna l'OCDE i la mateixa Unió Europea. Aquesta tendència regulatòria està informada per una sèrie de principis, tals com transparència, cooperació, efectivitat, eficiència, participació i obertura. Des del punt de vista dels seus postulats, les normes són "de més qualitat" quan han estat elaborades amb la participació dels ciutadans. Per tant, la democràcia participativa és un dels postulats en els quals s'assenta l'anomenada legislació intel·ligent, que busca la col·laboració dels ciutadans i dels interessats en el procediment legislatiu, no només als primers estadis del procés, sinó també al llarg de tota la vigència de la norma. L'esmentada participació s'articula sobretot a través del mecanisme de les consultes. Aquest article analitza el règim jurídic de les consultes en el context dels procediments per produir normes comunitàries de segona generació.

Paraules clau: legislació intel·ligent; democràcia participativa; consultes; iniciativa ciutadana.

* This paper is partially based on the research conducted at Harvard University during the time I spent as a scholarship recipient in Harvard Kennedy School. The scholarship was awarded to me by the Real Colegio Complutense at Harvard.

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Article received: 03.07.2019. Blind review: 30.07.2019 and 19.08.2019. Final version accepted: 26.08.2019.

Recommended citation: García García, María Jesús. (2019). Smart regulation law-making and participatory democracy: consultation in the European Union. *Revista Catalana de Dret Públic*, 59, 85-96. <https://doi.org/10.2436/rcdp.i59.2019.3337>

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1 Reasons to introduce innovations in government based on participatory democracy

The reasons for introducing innovations in government based on participatory democracy are closely related to attempts to enhance democratic requirements and to face the challenges currently faced by representative democracy. Our starting point focuses on the interaction between government and citizens and on how the quality of democracy could be improved by implementing more effective mechanisms to strengthen the legitimacy of public authorities and by encouraging citizens to take an active role in decision-making and law-making. In this way, democratic systems of government can benefit from citizen participation and citizen engagement in public affairs. Innovations in government fostered by the use of new technologies are capable of reshaping the foundations of representative democracy by bringing participatory democracy to the highest levels of government.¹ Several arguments inform this approach:

- Representative democracy is currently in crisis. Politically disaffected citizens feel that their representatives are not always making the most effective decisions and that they are failing to meet citizens' expectations. This triggers a crisis of legitimacy. Trust in government has been eroded as a consequence of growing inequality, which has been exacerbated by the economic crisis. Politicians believe that participatory democracy could reduce rising disaffection towards politicians.
- Representative democracy is undergoing a process of adaptation and faces new challenges that demand the involvement of new actors. New government systems are attempting to ensure more effective deliberation and democratic legitimacy, which make it necessary to involve public as well as private actors. Increasing forms of democratic participation strengthen the legitimacy of public authorities and imply that public powers are willing to take citizens' opinions into account and to deliver legislation that brings politicians closer to meeting citizen expectations. In this way, government decisions are supported and public powers indirectly legitimised by citizens.
- Democracy needs to meet new requirements of transparency, accountability, legitimacy and efficiency. Citizens judge public powers and governments on the impact of their actions. Increasing forms of public participation influence new forms of legitimacy in public governance.
- Innovation in government is needed. Technologies are accelerating at an exponential rate, yet most government organisational structures and processes remain linear. We are 21st century citizens operating under 18th century government structures and procedures. New technologies bring citizens closer to the decision-making process by giving them the opportunity to take a more active role in the process. It is therefore necessary to explore the use of innovation in governance in order to implement new systems of citizen participation which aim to raise democracy to the highest level of quality and commitment towards citizens.

In short, democratic systems of government can benefit from citizen participation and citizen engagement in public affairs. The above-mentioned ideas apply to all levels of government and all kinds of public activity, but especially to law-making, where democratic participation in decision-making should be a requirement.

Up to now, citizens have been entitled to participate in law-making through the right to be heard and through the right to be informed by public notice of legislative proposals. Participatory democracy goes one step further by giving citizens new rights of participation in law-making:

- the right to take part in the law-making process from an early stage and throughout the lifecycle of a law;
- the right to take part in the law-making process by means of proposals submitted and addressed to public bodies, which impose obligations on public authorities.

¹ Prieditis, 2002: 104.

2 Smart regulation and participatory democracy

2.1 Definition of smart regulation

Smart regulation has its basis in economics. The term originated in the context of the EU² and international organisations such as the OECD.³

A regulatory policy based on the concept of smart regulation takes the view that legislation and regulations serve the economy and, therefore, laws must aim to create conditions that will boost national economies and economic growth.⁴ Legislation must contribute to business competitiveness and economic growth by developing quality regulation and adopting sound legislation that serves economic purposes. From such a perspective, smart regulation is intended to create conditions that foster competition, according to the assumption that markets and economic growth deliver sustainable prosperity for all.⁵

The goal is to adopt and maintain high quality legislation, which is the best legislation for economic purposes, at the same time as creating a regulatory environment favourable to a thriving economy. By high quality legislation, we mean well-informed, efficient and effective legislation fit for economic purposes. The quality of legislation is evaluated in economic terms, that is, how well a piece of legislation is capable of meeting economic requirements.

The aim of a regulatory policy based on these assumptions is to adopt well-informed, effective legislation when necessary, but only when necessary.⁶

Such a regulatory policy is informed by a set of principles which include transparency, cooperation, accountability, efficiency, effectiveness, participation and openness, and apply to both regulatory institutions and regulations. Smart regulation results in participatory democracy and takes the view that regulations are of better quality when they have been influenced by citizens. In order to produce well-informed and efficient legislation, smart regulation therefore makes use of mechanisms of participatory democracy, under the assumption that input provided by citizens and interested parties contributes to the adoption of better regulations, from an economic perspective.

The above-mentioned ideas have had an important impact on the legal systems of some European countries, where provision for the principles and mechanisms that underpin this concept has already been made. Spain, for example, recently amended its legislation to introduce these ideas, as in the case of the Common Administrative Procedure Act.

² The most significant documents to consider in this regard are the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, entitled *Better regulation for better results - an EU agenda*, COM (2015) 215 final; the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, (COM/2010/0543 final), on Smart Regulation in the European Union; and the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, entitled *Completing the Better Regulation Agenda: Better solutions for better results*.

³ Of particular significance are the OECD's guiding principles for regulatory quality and performance, and the Recommendation of the OECD Council on regulatory policy and governance, issued in 2012.

⁴ The concept of smart regulation emerges in the context of the EU, taking into account the importance of regulation in the development of the single market. Incomplete, ineffective, and underperforming regulatory measures have a negative impact on markets. EU regulations contribute to business competitiveness by underpinning the single market, eliminating costly fragmentation of the internal market brought about by differing national regulations. At the same time, given that we depend on business, and small and medium-sized enterprises in particular, to get us back on the path to sustainable growth, we must limit their burdens to the strictly necessary, allowing them to work and compete effectively.

⁵ Baldwin, 2005: 498.

⁶ Smart regulation is not about more or less EU legislation, nor is it about deregulation. It is about delivering better rules for better results. This applies to both new legislation and the existing body of law.

2.2 Objectives of smart regulation

Smart regulation serves economic purposes because it sets out to create the conditions that make it easier for companies and businesses to thrive in a favourable regulatory environment. In other words, smart regulation sets out to create a regulatory environment in which companies can succeed.⁷

Along with economic objectives, smart regulation also applies the principles of open governance⁸ by incorporating citizen participation and participatory democracy. In doing so, public powers aim to gather data, evidence and information to help them to adopt well-informed and evidence-based decisions, which should be more effective. However, citizen participation is not a goal in itself, rather it is a tool and a consequence of the implementation of smart regulation principles.⁹

These objectives are set out in the Interinstitutional Agreement between the European Parliament, the Council of the EU and the European Commission on better law-making,¹⁰ according to which the objectives of smart regulation are as follows:

- Produce effective and efficient legislation for economic purposes.
- Reduce administrative burdens for citizens and especially for companies. If the legislative framework is too complicated, too burdensome or too bureaucratic, the risk is that smaller business will simply not be able to follow it.
- Simplify and make legislation clearer and easier for citizens. EU legislation should be comprehensible and clear for citizens, allowing them to understand their rights and obligations.
- Avoid overregulation.
- Adopt legislation that allows for economic growth.
- Ensure open and transparent decision-making and law-making.
- Ensure that citizens and stakeholders can contribute throughout the law-making process.
- Ensure that regulations are consistent with other regulations and policies.

To this end, EU directives must be transposed in a clear, correct and timely manner and EU regulations must be properly implemented and enforced in all Member States. This brings about legal certainty, allowing citizens and companies to benefit from the opportunities of the single market.

2.3 The foundations of smart regulation

Smart legislation must fulfil three requirements:

- Smart regulation objectives must be considered throughout the life of the law.

⁷ The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled *Better regulation for better results - an EU agenda*, COM (2015) 215 final, points out that: “Applying the principles of better regulation will ensure that measures are evidence-based, well designed and deliver tangible and sustainable benefits for citizens, business and society as a whole. This applies both to new and the large body of existing EU legislation. This legislation is essential for sustainable development, for the single market that drives our economy and for unlocking the investments needed to support jobs and growth”.

⁸ The White Paper on European Governance, COM (2001) 428 final, stresses the importance of consultation and dialogue in the EU.

⁹ Xanthaki, 2013: 75.

¹⁰ According to this agreement, all three institutions are committed to ensuring that:

- legislation is as efficient and effective as possible;
- legislation is as simple and clear as possible;
- the European body of law avoids overregulation and administrative burdens for citizens, administrations and businesses, especially small and medium-sized enterprises, and that legislation is designed with a view to facilitating its transposition and practical application;
- legislation strengthens the competitiveness and sustainability of the EU.

- Smart regulation is about existing legislation as well as new legislation. This means that smart regulation not only addresses the current legislative process, but also assesses and evaluates the existing body of law to ensure that this has not become outdated, obsolete or too burdensome.
- Citizen participation. Smart regulation fosters the contribution of citizens and interested parties throughout the law-making process and beyond, once the legislation has come into force.

2.3.1 Smart regulation objectives must remain constant throughout the life of the law

This implies that the quality of legislation must be managed throughout the whole process, including adoption, implementation, enforcement, evaluation and revision of a piece of legislation. To this end, smart regulation makes use of ex ante and ex post evaluations in order to assess new and existing legislation against the principles of efficiency and effectiveness.

Two mechanisms exist to monitor and assess whether a piece of legislation meets the required standard and continues to do so after its adoption:

- Impact assessments,¹¹ during the developmental stage of a piece of legislation. These analyse the potential economic, social or environmental impacts of a proposal and quantify benefits and costs where possible.¹²
- Ex post evaluation of existing legislation. Assessment and evaluation should continue throughout the life of a law to ensure that the legislation remains fit for purpose and delivers the results intended by law-makers. Regulations must be periodically reviewed. By means of ex post evaluations, public powers ensure that a piece of legislation has not become obsolete, outdated or burdensome while in force. Ex post evaluations assess the efficiency and effectiveness of a piece of legislation, which is subsequently amended, reviewed, codified or repealed as necessary.¹³ This also allows public powers to recast legislation. All this contributes to legal certainty, which is essential for economic reasons.¹⁴

2.3.2 Smart regulation is concerned with the existing body of legislation as well as new legislation

Smart regulation considers that regulatory policy should be concerned, not only with the quality of new regulation, but also with improving existing legislation. Evaluating the functioning, effectiveness and efficiency of existing legislation is therefore of great importance. In this regard, the Commission must codify, recast and consolidate existing legal texts. It will also continue to reduce the volume of legislation by repealing obsolete provisions. Recasting legislation ensures that laws remain clear and well-structured after having been amended. Over time, legislation may also become out of date, and political, social or economic changes may mean that a law is no longer useful, relevant or up to standard. Repealing outdated legislation

¹¹ Renda, 2006: 35.

¹² According to the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission of 13 April 2016 on Better Law-Making, “impact assessments are a tool to help the three Institutions reach well-informed decisions and are not a substitute for political decisions within the democratic decision-making process. Impact assessments must not lead to undue delays in the law-making process or prejudice the co-legislators’ capacity to propose amendments.

Impact assessments should cover the existence, scale and consequences of a problem and the question of whether or not Union action is needed. They should map out alternative solutions and, where possible, potential short and long-term costs and benefits, assessing the economic, environmental and social impacts in an integrated and balanced way, and using both qualitative and quantitative analyses. The principles of subsidiarity and proportionality should be fully respected, as should fundamental rights. Impact assessments should also address, wherever possible, the ‘cost of non-Europe’ and the impact on competitiveness and the administrative burdens of available possible options, having particular regard to SMEs (‘Think Small First’), digital aspects and territorial impact. Impact assessments should be based on accurate, objective and complete information and should be proportionate as regards in their scope and focus”.

¹³ Ex post evaluations can be used to evaluate the efficiency and effectiveness of a piece of legislation in order to amend, review, codify or repeal it. Ex post evaluations of legislation are an integral part of smart regulation. Evaluating the effectiveness and efficiency of EU legislation will improve the quality of policy-making and help to identify new opportunities to simplify legislation and reduce administrative burdens.

¹⁴ To this end, the European Union created REFIT, a platform through which evaluations and fitness checks are open to public participation by means of a ‘lighten the load’ feedback form.

that no longer serves its purpose, or is excessively burdensome, ensures the effectiveness of the EU body of law.

2.3.3 *Smart regulation involves citizen participation*

Smart legislation believes that citizen participation must be included in the law-making process and ex post evaluations of the existing body of law, and that public powers are more likely to deliver high quality legislation if those affected by the law are able to express their views during both the law-making process and the assessment of existing legislation. A regulatory policy based on smart regulation principles embraces the notion that those affected by a specific piece of legislation are best placed to understand its impact and can provide public powers with the evidence and information necessary to improve it. Every stage of the process is open to participation, from the moment a public body outlines a proposal, through the adoption of a piece of legislation to its subsequent evaluation. This means that citizens are involved throughout the life of the law, from the moment public powers set out to outline a piece of legislation to the moment the same piece of legislation is repealed. Public consultation would be involved in the impact assessment as well as in the ex post evaluation once a law has come into force.

All of this helps to put into practice the provisions of the Lisbon Treaty on participatory democracy.¹⁵ Although smart regulation does not aim to allow the public to participate directly in law-making and decision-making processes, it can be said that participatory democracy in law-making stems from smart regulation. In other words, this kind of regulation triggers participatory democracy and therefore is also about citizen engagement and citizen involvement in law-making.

2.4 Mechanisms for participatory democracy in smart regulation law-making

As we said before, smart regulation makes use of mechanisms for participatory democracy in order to develop and adopt well-informed legislation that meets economic requirements.

Two mechanisms must be considered:

- Consultation, which will be analysed in a separate section below.
- The citizens' initiative right, as set out in article 11 of the Treaty on European Union¹⁶ and Regulation (EU) 788/2019 of the European Parliament and of the Council of 17 April on the European citizens' initiative.¹⁷

The citizens' right to initiative is a mechanism of participatory democracy which allows citizens to address the Commission to suggest the adoption of specific legislation which is within the scope of its jurisdiction, with a view to influencing EU policy-making and law-making.¹⁸ A citizens' initiative is possible in any field in which the Commission has the power to propose legislation, such as agriculture, transport, public health and the environment.

The right to initiative and the right to participate in public consultations do not result in citizens having the right to enact or repeal legislation by themselves. Initiative and public consultation are not therefore institutions of direct democracy, but institutions of participatory democracy, as citizens are not empowered to decide for themselves whether a piece of legislation must be passed or repealed. These mechanisms do not involve decision-making by the public, but rather are intended to allow citizens to collaborate in the decision-making process by expressing their views on public matters. However, by no means are citizens allowed to exercise public power by themselves.

¹⁵ Cuesta López, 2010: 125.

¹⁶ Mendes, 2011: 1849-1878.

¹⁷ Espaliú Berdud, 2016: 181-202.

¹⁸ Karatzia, 2017.

3 Consultation as a mechanism for participatory democracy in law-making

3.1 Definition and types of consultation

Through public consultation, citizens can express their views and priorities in relation to a public matter, thus providing public powers with valuable information for either new initiatives or for the evaluation of existing policies and laws. Consultation is essential for well-informed decision-making and for improving the quality of law-making. European Union institutions use the consultation process to collect data and evidence for impact assessments¹⁹ and evaluations, thus enhancing the principle of transparency.

Throughout the law-making process, the Parliament, the Council and the Commission commit to conducting consultations intended for both stakeholders and the public. Based on the openness of the consultation process, there are two different types of consultation:

- Public consultations. These are open consultations, in which all interested parties are invited to submit their comments on a legislative proposal.
- Restrictive consultations. This type of consultation is addressed only to stakeholders and affected parties. This is the case with formal consultation conducted by means of structured bodies. In these cases, contributors have to be selected under specific criteria, e.g. representativeness. In this regard, there is a lack of specific criteria for deciding which particular interest groups should be consulted. The general rule is that the Commission should consult as widely as possible.²⁰

3.2 Consultation throughout the life of the legislation

3.2.1 Consultation overview

As already stated, smart regulation objectives must remain constant throughout the life of a law, and consultation processes must therefore be carried out at different stages of the life of the law.

Thus, consultations are conducted in the pre-legislative stage by the Commission, before the adoption of a legislative proposal. At this stage, the Commission uses the consultation process to collect data and evidence, as consultation in the preparation of legislative acts plays an important role in the quality of law-making. This involves consultation on:

- inception impact assessments, in which the Commission outlines new ideas for policies and legislation or evaluations of existing policies;
- aspects of impact assessments, in which the Commission analyses the possible economic, social and environmental impacts of a proposal. Impact assessments analyse the problem which is expected to be addressed by European legislation, assess whether or not European legislation is needed, map out alternative solutions, and assess the economic, environmental and social impacts. Impact assessments should also quantify benefits and costs where possible. Consultations provide the Commission with better data and information for decision-making.

However, consultations are also conducted in relation to existing legislation. In this regard, consultations are part of ex post evaluations, which the Commission uses to consider whether a piece of legislation continues to serve the purpose for which it was intended. Legislation already in force must be evaluated periodically against the principles of efficiency, effectiveness, relevance and coherence, to ensure that the EU body of law continues to meet the required standard. The Commission aims to amend, codify, recast and consolidate legal texts to simplify and make legislation clearer and more up to date. In addition, the repealing of obsolete provisions contributes to achieving the goals of smart regulation by reducing the volume of legislation. Public consultation and stakeholder consultation are likely to provide accurate information about how a piece of existing legislation is being implemented or applied. Repeals, recasts, simplifications and withdrawals all

¹⁹ Radaelli, 2005: 925.

²⁰ According to Protocol No. 7 on the application of the principles of subsidiarity and proportionality, annexed to the Amsterdam Treaty, the Commission should consult widely before proposing legislation.

benefit from consultation. In this regard, recasting is an effective legislative technique for the modification of existing legislation. In cases in which recasting is not appropriate, official codification is also an effective technique, bringing together a legislative act and all its amendments in a single new act.

Consultations are not only carried out by the European Commission. The European Parliament and Council also have a shared responsibility in the adoption of smart regulation.²¹ By means of the Interinstitutional Agreement between the European Parliament, the Council of the EU and the European Commission on Better Law-Making,²² all three institutions agree to collaborate on the improvement of European Union legislation. This means that the two legislative institutions, the EU Parliament and Council, are committed to conducting consultation processes as part of new impact assessments where a legislative proposal has undergone substantial changes as a consequence of the legislative process. However, as we shall see, these requirements are not always fulfilled by the three institutions.

3.2.2 The consultation process

To be effective, consultation must start as early as possible. Interested parties and the general public should be involved in the development and design of a legislative act at the very beginning, that is, at a stage when their contributions can still have an impact on the formulation of a specific policy or law.

Stakeholders and the general public will be able to express their views throughout the life of a piece of legislation.²³ As a consequence, roadmaps and inception impact assessments will give stakeholders the chance to provide feedback and information on a new initiative from the outset. Twelve-week public consultations will also be conducted when preparing new proposals or evaluating the effectiveness of existing legislation. After the adoption of a proposal, stakeholders and citizens will be invited to submit their comments within eight weeks. The Commission will collect these views and present them to the European Parliament and the Council.

Subsequently, once a piece of legislation has come into force, the consultation process will continue by means of periodic ex post evaluations. Consultation will also form part of the assessment of existing legislation.

3.3 Consultation target groups

From the point of view of democratic participation, consultation is addressed to different parties. Depending on the issue, consultation provides opportunities for input from civil society²⁴ organisations, individual citizens, academics, technical experts and interested parties in third countries.²⁵

Aside from government and public administration, civil society organisations are the main structures of society, which is why it is so important that they are involved in the consultation process.²⁶ The specific role of such organisations is closely related to the fundamental right of association, which brings people with similar interests together. Civil society organisations are consulted in a formal way, which means that there

21 The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, (COM/2010/0543 final), on Smart Regulation in the European Union, is the primary document to take into account in this regard.

22 Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission of 13 April 2016 on Better Law-Making.

23 According to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, entitled *Better regulation for better results - an EU agenda*, COM (2015) 215 final: "First, stakeholders will be able to express their views over the entire lifecycle of a policy. 'Roadmaps' and 'inception impact assessments' will give stakeholders the chance to provide feedback and prompt them for relevant information, right from the very start of work on a new initiative. There will also be twelve-week public consultations when preparing new proposals and when we evaluate and carry out 'fitness checks' of existing legislation. After the Commission has adopted a proposal, national parliaments have the opportunity to provide reasoned opinions on subsidiarity. In addition, the Commission will invite citizens or stakeholders to provide feedback within eight weeks: to feed these views into the legislative debate, the Commission will collect them and present them to the European Parliament and the Council".

24 Bouza Garcia, 2015.

25 Representatives of regional and local authorities can also be part of the consultation process. However, we are talking about a democratic participation approach, which excludes public authorities.

26 In this regard, see the Commission's discussion paper "The commission and non-governmental organisations: building a stronger partnership", COM (2000) 11 final.

are structured mechanisms for consultation. The problem lies in deciding which organisations to consult. Specific eligibility criteria are required to select the target group before the launch of a consultation process. Worthy of mention in this regard is the interinstitutional agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, of 16 April 2014.²⁷ This transparency register provides EU institutions with information about any citizens or private entities, or formal or informal groups, associations or networks which engage in activities intended to influence European policies and decision-making.

Consultation is also possible through institutionalised advisory bodies, such as the Economic and Social Committee. These advisory bodies do not exclude direct contact between the Commission and interest groups, and play an important role in the consultation process. Where a formal or structured consultation body exists, the Commission must take steps to ensure that its composition reflects the specific area of interest. If this is not the case, the Commission should extend the consultation to make sure that all interests are taken into account.

Regardless of the way in which consultation is conducted, these processes must be carried out by involving all the significant parties affected by the legislation, as well as potential interested parties, at the earliest possible stage of developing new legislation. Consultation is thus addressed to those directly affected by a piece of legislation, be they citizens or stakeholders. The aim is to ensure that all relevant parties are properly consulted, both at the design stage of new legislation and once legislation has been implemented.

Nor is this incompatible with open consultations, which are conducted simultaneously to ensure that no interested or affected party is excluded. The Commission is committed to an inclusive approach, which means consulting as widely as possible. Thus, consultation processes must involve not only those affected directly by a piece of legislation, but also the general public. This is closely related to the principle of open governance. In practice, it means that every individual citizen or association will be able to provide the Commission with their respective contributions. Both are permitted to submit comments on legislative proposals, albeit at different stages of the process.

However, though the consultation is addressed to different parties and interest groups, it is the stakeholders that are likely to have a greater impact on the law-making process and ex post evaluation, leaving individual citizens in a weaker position. Stakeholders and interest groups have their own consultation mechanisms and are in better position to influence the law-making process and the subsequent evaluation of existing legislation, meaning that laws are likely to be influenced by economic interests.

3.4 Legal acts subject to consultation

Legislative acts, including statutory and secondary legislation, are subject to consultation processes. Non-legislative acts are also subject to consultation, due to their importance in the implementation and enforcement of legislative acts. This includes delegated and implementing acts. Worthy of mention in this regard is the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission of 13 April 2016 on Better Law-Making,²⁸ the annex of which sets out a Common Understanding between the European Parliament, the Council and the Commission on delegated acts.

3.5 Conclusions: effects and limits of consultations

Consultations are an essential part of the law-making process. They contribute to the making of well-informed and evidence-based legislation and to the improvement of the quality of law-making. By means of public consultations, external contributors can express views and provide legislative powers with valuable information for new initiatives and for the evaluation of existing legislation.

²⁷ There is also a proposal for an Interinstitutional Agreement on a mandatory Transparency Register, COM (2016), 627 final, to amend the above-mentioned Interinstitutional Agreement.

²⁸ The three institutions underline the important role played by delegated and implementing acts in Union law. Used in an efficient, transparent manner and in justified cases, they are an integral tool for better law-making, contributing to simple, up-to-date legislation and its efficient, swift implementation. It is within the competence of the legislator to decide whether and to what extent to use delegated or implementing acts, within the limits of the Treaties.

However, consultations are subject to certain limitations. Their scope is restricted, for though they play an important role in the pre-legislative stage, when the European Commission is outlining and developing new legislative proposals, these proposals are likely to change during the legislative process. The two legislative institutions (European Parliament and European Council) are likely to introduce amendments to these proposals, yet consultations on impact assessments during the legislative process are a rare practice. Producing smart regulations should mean that all three European institutions cooperate in order to ensure the best EU legislation. For this reason, according to the Interinstitutional Agreement, these institutions agree to cooperate and collaborate in the delivery of smart regulation. Under the agreement, the Council and the European Parliament undertake to carry out impact assessments during the legislative process whenever they make an amendment that alters the initial Commission proposal. In such cases, they undertake to reassess the social, economic and environmental impacts of the draft legislative act before any final decision is taken, which means conducting a new consultation process as part of the impact assessment. However, this is not what happens in practice.

Another problem is the lack of a legally binding instrument that regulates consultation. There is a set of minimum standards and general principles that lay down a framework for consultation, but no legal framework.²⁹ The Commission is not legally bound by any legal consultation procedure. Communications from the Commission are not legislative acts, but political acts, which propose a set of recommendations on consultations. The Commission has laid down a number of general principles that should govern its relations with interested parties, and a set of minimum standards for the Commission's consultation processes, yet these are not binding in any way. These general principles and minimum standards take the form of a Commission communication (which is a policy document) rather than adopting a legally binding instrument. The Commission has always been opposed to legally binding acts in this regard, lest a legislative act be challenged in court on the grounds of lack of consultation of interested parties. The result is a set of guidelines that govern the Commission's administrative practice, yet neither the general principles nor the minimum standards are legally binding. It is also worthy of note that consultations are not sufficient in and of themselves. Certain aspects of the consultation process must be guaranteed to ensure that European institutions make the most of input provided by both stakeholders and the public.³⁰ Procedural rules should state how contributions should be analysed in order to determine to what extent these views can be accommodated in the legislative proposal. Acknowledgement and feedback should include how the consultation process is conducted and how the results will be taken into account in the legislative proposal.

Finally, several questions arise from this approach to European Union legislation. If public powers take the view that the law-making process and the existing body of legislation must serve economic purposes, should we assume that economic interests coincide with the common good? Is economic growth a matter of public interest? To what extent are economic interests compatible with the public interest? Is there a conflict of interests? Do economic interests conflict with public interests? Are they mutually exclusive? All these currently unresolved questions will have to be answered in the long-term, having evaluated the true impact of the smart regulation approach on the law-making process and the public interest.

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²⁹ Communication from the Commission *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM (2002) 704 final*. This is a political document, whose provisions are not legally binding on EU institutions.

³⁰ In this regard, it is necessary to determine how to improve the quality of consultation documents and the availability of forward planning of public consultations; how to make the best use of consultation channels familiar to stakeholders within the Member States to disseminate Commission consultations and encourage replies; how to use the consultation process more effectively to collect data and evidence for impact assessments and evaluations; and how to design a bidirectional process through which the inputs collected from citizens can be analysed by the Commission. Consultations should not be a unidirectional process.

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