



**CENTRE OF EXPERTISE FOR GOOD GOVERNANCE**

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**Opinion on the Draft Law “On public consultations”**

**(No.4254)**

The present Opinion was prepared by the Centre of Expertise for Good Governance,  
Department of Democracy and Governance of Directorate General II – Democracy

## 1. Introduction

1. The present opinion was requested by the Chair of the Parliamentary Committee on State Building, Local Self-Government, Regional and Urban Development of Ukraine. It was prepared by the Council of Europe's Centre of Expertise for Good Governance in the framework of the Programme "Enhancing decentralisation and public administration reform in Ukraine" based on contributions from experts Antonella VALMORBIDA and Olena BOIKO.

2. The opinion examines the compliance of the current text with the European Charter of Local Self-Government, the Recommendations of the Committee of Ministers of the Council of Europe, and with the best practice of other European countries. Without making a constitutional analysis, the opinion also points at some of the articles of the Constitution of Ukraine which may need to be examined closer in order to ensure that the final text is in line with it.

3. The following methodology was applied in order to give concrete and precise support to the Parliamentary Committee. The experts:

- a) developed an in-depth understanding of the draft law and the process of its elaboration, including the views of institutions, civil society and other stakeholders, extensive desk research and interviews with key representatives, in order to identify concrete and useful recommendations;
- b) conducted a comparative assessment of the legislation and practices in several Council of Europe members States<sup>1</sup> as sources of references;
- c) extrapolated trends and practices relevant for the present Ukrainian situation, and elaborated recommendations.

4. Through the analysis of the texts and commitments of Ukraine, the process and the content of the law on public consultation, it is understood that the law on public consultation is ambitious and is intended to meet expectations of many stakeholders. To achieve this goal, it needs to respect the following principles:

- to be as clear and as understandable as possible,
- to be implementable and avoid being a "ticking the box" exercise,
- to truly increase potential of stakeholders to engage into decision-making process,
- to focus on practice and to make use of existing good examples,
- to focus on equality of opportunities and on empowering stakeholders, in particular the disadvantaged group,
- to use technology carefully, as one of the means to build citizens' engagement,
- to focus on the key elements of good consultation.

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<sup>1</sup> Countries selected for the comparative assessment: Albania, Armenia, Belgium, Finland, France, Georgia, Germany, Italy, Moldova, the Netherlands, North Macedonia, Norway, Poland, Serbia and Spain.

## 2. European and international legislative commitments and sources

5. The European Charter of Local Self-Government (henceforth “the Charter”) was ratified by Ukraine on 15 July 1997 without declarations or reservations; it entered into force on 1 January 1998. It can therefore be assessed that all obligations of the Charter apply in respect of all levels of Ukrainian sub-national self-government. The Charter<sup>2</sup> and its [Additional Protocol on the right to participate in the affairs of a local authority](#)<sup>3</sup> state in Article 3 the right and the ability of local authorities (...) to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population. This right could be exercised by freely elected councils or by assemblies composed of members. This provision shall in no way affect recourse to assemblies of citizens, referenda or any other form of direct citizen participation where it is permitted by statute. Article 1 of the Additional Protocol states that “The right to participate in the affairs of a local authority denotes the right to seek to determine or to influence the exercise of a local authority's powers and responsibilities.”

Other key European standards, instruments and sources relating to citizens’ participation in public affairs are:

6. [Recommendation CM/Rec\(2018\)4](#)<sup>4</sup> and in its appendix recall that “local public life” regards all matters, services and decisions and in particular the management and administration of the affairs relating to or concerning a local community and that “citizens” are any persons (including, where appropriate, foreign residents) belonging to a local community. It mentions that (...) participatory democracy, which respects and recognises the role of all actors, can contribute to and complement representative and direct democracy, rendering democratic institutions more responsive, hence contributing to inclusive and stable societies and that (...) where “often today, the level of trust citizens have in their elected institutions is declining”. The Recommendation highlights that (*local*) democratic participation policy a) enhances civic-mindedness b) creates awareness of belonging. The local approach though could also pave the way to a more general and national perspective. The recommendation is also calling for a comprehensive approach to participation of citizens, “avoiding overly rigid solutions and allow for experimentation, giving priority to the empowerment of citizens”.

7. As for the way civil/stakeholders’ participation is implemented, tools and instruments can be found in the Code of Good Practice for Civil Participation in the Decision-Making Process, which was embedded in the [CM\(2017\)83-final](#).<sup>5</sup> On ways and important elements relevant for engagement of citizens and public consultation, the Code quotes: known timing of consultation and proper timing for responding, methods and means need to be commensurate with the scope (introducing an interesting reference to the fact that not all the means are for all issues), inclusiveness for all stakeholders, even those in difficulty (introducing the concept of empowerment and equal access, mentioned later).

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<sup>2</sup> <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/122>, Ukraine ratified the Charter in 1997 and it ratified the Additional Protocol in 2014.

<sup>3</sup> <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482a>

<sup>4</sup> <https://rm.coe.int/09000016807954c3>

<sup>5</sup> <https://rm.coe.int/16802eed5c>

On consultation: 1) Consultation allows public authorities to collect the views of individuals, NGOs and civil society at large on a specific policy or topic as a part of an official procedure. 2) Consultation may be carried out through various means and tools, such as meetings, public hearings, focus groups, surveys, questionnaires and digital tools. 3) Public authorities should provide publicly available feedback on the outcome of consultations, particularly information giving reasons for any decisions finally taken. The European Union indicates consultation as: “a formal process by which the Commission collects input and views from stakeholders about its policies”. It is the tool used to broaden interaction with stakeholders mainly in the process of a policy initiative’s preparation or evaluation or in the implementation of an existing intervention.”<sup>6</sup>

8. The Organisation for Economic Co-operation and Development (henceforth “the OECD”) has indicated a useful procedure in public consultations<sup>7</sup> that might be relevant for Ukraine. It establishes uniform and clear obligations for consultation procedures for all regulations at national level, including:

- a notice and comment procedure with minimum standards for the timing, content, process and scope of consultation processes,
- definition of a single, easy searchable, free of charge, consolidated, Internet based database for all federal national laws and regulations,
- definition of a notice-and-comment procedure to replace or supplement the current practice of consulting with selected parties,
- indication of making responses to consultation papers publicly available,
- improvement and expansion of information available to the public about future planned legislation, for example by drawing more on information already available in internal government planning systems.

9. [The 12 Principles of Good Democratic Governance](#),<sup>8</sup> promoted by the Council of Europe’s Centre of Expertise for Good Governance, are enshrined in the Strategy on Innovation and Good Governance at local level, endorsed by a decision of the Committee of Ministers of the Council of Europe in 2008. Participation, openness and transparency are among these 12 principles. The Principle 1, “Participation, Representation, and Fair Conduct of Elections,” provides for involvement of citizens in public life in clearly defined ways, stipulates that everyone can have a voice in decision-making, and that all voices, including those of the less privileged and most vulnerable, should be heard and taken into account in decision-making.

On electronic democracy and participation:

10. Recommendation [CM/Rec \(2009\)1](#) of the Committee of Ministers to member states on electronic democracy (e-democracy):

- a) emphasises importance of maintaining and improving democratic institutions and valorises in the context of the new opportunities and challenges arising from the

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<sup>6</sup> European Union public consultations in the digital age: Enhancing the role of the EESC and civil society organisations; European Economic and Social Committee, 2017; Published by: “Visits and Publications” Unit EESC-2017-110-EN

<sup>7</sup> Better Regulation Practices across the European Union, OECD Publishing, Paris, see reference to the German case.

<sup>8</sup> Available at <https://www.coe.int/en/web/good-governance/12-principles>

information society and its recommendations, such as “to consider and to implement e-democracy as the support and enhancement of democracy, democratic institutions and democratic processes by means of ICT, and linked to the engagement and re-engagement of citizens in democracy”;

- b) widely focuses on importance of trust among institutions and citizens and states that technology is a mean and not an objective per se, solving all issues and problems; “when introducing, implementing and reviewing e-democracy, ensure that it: (...)maintains and enhances citizens’ trust in democracy, democratic institutions and democratic processes” (...) When introducing, reviewing and improving e-democracy, the focus should be on democracy and its stakeholders – not on technology”;
- c) highlights the need to deliver digital education, i.e. “helps to narrow the digital divide by means of an inclusive and non-discriminatory approach and by empowering people through support for education and training, including education and training in e-literacy, and public information measures, and by combining electronic and non- electronic approaches”.<sup>9</sup> It strongly highlights the need of enabling factors.

11. It recalls the complementarity of the electronic approach, i.e. “e-democracy is one of several strategies for supporting democracy, democratic institutions and democratic processes and spreading democratic values. It is additional, complementary to, and interlinked with traditional processes of democracy. Each process has its merits: none is universally applicable.<sup>10</sup> IT should increase quantity and quality of participation.

On the importance of focusing on equal opportunities and efforts to engage people in disadvantaged positions:<sup>11</sup>

12. The Recommendation CM/REC (2018)4

- a) focuses on active support to engaging those who are less capable to participate, by “paying particular attention to citizens who have greater difficulty becoming actively involved or who, de facto, remain on the side lines of local public life”;<sup>12</sup>
- b) in “Steps and Measures” it identifies the need “to improve citizenship education and incorporate into school curricula and training syllabuses the objective of

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<sup>9</sup> “While e-democracy may not be a panacea when it comes to addressing shortcomings in democratic practice, it should help to tackle existing democratic challenges such as declining numbers of participants, social, racial and regional segregation and the formation of splinter groups where no deliberation takes place, and to promote sustainable inclusion.”

<sup>10</sup> 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.

<sup>11</sup> See also [Recommendations CM/Rec\(2012\)2](#) of the Committee of Ministers on the participation of children and young people under age of 18.

<sup>12</sup> It mentions also the balanced participation of women and men in local politics and local public life; it recognises the potential that children and young people represent for the sustainable development of local communities; it recognises and enhances the role played by associations and groups of citizens as key partners in developing and sustaining culture of participation and as a driving force in the practical application of democratic participation; it recognises how culturally diverse and inclusive societies can facilitate the participation of everyone in the public life of their communities.

promoting awareness of the responsibilities that are incumbent on each individual in a democratic society;

- c) as regards foreign residents in particular, encourages their active participation in life of a local community on a non-discriminatory basis, by complying with the provisions contained in the 1992 Convention on the Participation of Foreigners in Public Life at Local Level.

13. The following recommendations are also to be taken into consideration: [CM/Rec\(2011\)14](#) on the participation of persons with disabilities in political and public life and the opportunities (and risks) offered in terms of electronic consultation and the Recommendation [Rec\(2006\)14](#) of the Committee of Ministers on citizenship and participation of young people in public life<sup>13</sup> with indication of focus and means for engaging them also through non formal means.

14. The Council of Europe's opinion CSD/LEX (2019)1 on the draft law "On Amending Certain Legislative Acts of Ukraine on the Forms of Direct Participation of Citizens in the Management of Local Affairs and Statutory Rulemaking"(No. 10158) advised to take into account some important recommendations, for example:

- binding nature of a community charter, which would also include, among other things, the issues of participatory democracy,
- introduction of provisions on "participatory budgeting" ("public budget") and consultation on it as a mechanism that is increasingly being used in Europe and in Ukraine.

15. In addition, it is worth paying attention to the theses of the unofficial note on the participation of children in the new Law of Ukraine "On Local Self-Government in Ukraine", prepared within the framework of the Council of Europe project "Promoting Public Participation in Decision-Making Processes in Ukraine" in 2020. It mentions namely that it is important "to provide an environment that allows the child to exercise the right to be heard."

16. It is advised to make use of the Council of Europe "Civil participation in decision-making" toolkit<sup>14</sup>, prepared to build capacities of public authorities to increase participation at all levels. The toolkit provides an integrated framework that guides local authorities in the design and implementation of context-based strategies to increase a community's civil participation.

17. Moreover, it should be recalled that Ukraine is a signatory to the Open Government Partnership, which set some relevant criteria on a public and transparent, participative and digital administration.

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<sup>13</sup> Available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805b251a](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805b251a)

<sup>14</sup> Available at <http://rm.coe.int/civil-participation-in-decision-making-toolkit-/168075c1a5>

### **3. Comparative assessment: key findings, trends and relevant developments in selected European countries**

18. The Parliamentary Committee requested specific information on the legal provisions and practices in other European countries. Ukraine therefore has an opportunity to develop its own, new, and innovative approach to multi-stakeholder consultation in policymaking, taking into account experiences of other Council of Europe member states.

19. The countries selected for comparative assessment are Albania, Armenia, Belgium, Finland, France, Georgia, Germany, Italy, Moldova, the Netherlands, North Macedonia, Norway, Poland, Serbia and Spain.

20. All member States of the Council of Europe share the same values as for citizens' and multi-stakeholder consultation as a modern way of overcoming lack of trust in public institutions and improving effectiveness of public governance. In many Western European states, the legislative work on participation and consultation of citizens was initiated over 30 years ago, as a result of historical progress and transitions. However, it is clear that good legislation is only the first step, and that its implementation is not always guaranteed. For example, not all national consultations on policies or draft laws truly respect the provision of holding public consultations at least 14 days prior to their discussion or adoption by the respective bodies, which often rightly provokes protests from the civil society.<sup>15</sup>

21. General laws on public consultation exist in most of the selected states, with a different level of systemisation:

- a) Some of them are more principle-based and leave the details of organisation to the various levels of governance (in Finland, Germany, and the Netherlands). Such laws focus on the importance of the participatory approach: for example, in Finland, it is included in the overall law-making process; in Italy, there are Guidelines for Citizens' Participation.
- b) In some laws, land use and broad territorial planning are subject to public consultation: for example, areas for petrol extraction in Norway; dealing with water and flooding in the Netherlands;
- c) Some laws are addressing only certain topics: for example, the environmental issues require consultation with citizens in France<sup>16</sup> and in Belgium, the Puglia region in Italy has identified compulsory consultation for projects with budgets above 50 million Euros;
- d) Other laws are more stringent and provide precise regulations for consultations, such as the current draft law in Ukraine, laws in Albania and Moldova;

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<sup>15</sup> For example, in June 2019, the Government of the Republic of Serbia held a meeting with CSOs aimed to changing the Law on Financial Support for Families with Children. Association "Moms are the Law" which was most critical of the law was not originally invited, but other CSOs that have never dealt with this law have been invited. After this association's post on social networks invitation to participate in meeting was sent just the day before. (Source: <https://monitoringmatrix.net/serbia-report/area-3-sub-areas/standard-3-2-3-csos-representation-in-cross-sector-bodies/>) -

<sup>16</sup> The law of 2 February 1995 or Barnier law strengthened the use of public consultations in specific fields.

- e) There are also legal systems which do not have any participation embedded, they rely more on practice and tradition of participation, and they prove to be quite efficient, for example, in Norway. Other systems are rather vague and consider the “importance” of the argument, as in Poland.

22. It can be concluded that overall, the stricter and more complex the legislation, the less it is used or fully implemented. This is the case of Moldova, which has a law very similar to what is now proposed in Ukraine. When the focus is more on principle and building opportunities of participation through various means, the principle is usually better implemented, as it is the case in Finland, Norway, or Germany. Certainly, the starting point is also the level of democratic experience, of trust and capacity of citizens and authorities to work together. It has to be noted that Germany, lacking a strong regulation on the matter, has been invited to further regulate its process of consultation by the OECD. Interestingly, it is also the global approach of the European Union, with the Lisbon Treaty on the importance of consultations in Article 11: “the European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent”. Protocol No. 2 on the application of the principles of subsidiarity and proportionality annexed to the Treaty strengthens this also by stating that “before proposing legislative acts, the Commission shall consult widely” and publish consultation documents whenever appropriate.<sup>17</sup>

23. In all of the selected case studies, the practice of multi-stakeholder approach and participation in the decision-making is growing. This practice is an efficient way of making the voice of citizens heard, through interest groups, and civil society organisations, such as the Advisory Groups in Belgium, or Working Groups in Serbia, or Scientific Advisory Councils in Georgia. In North Macedonia, the Government can also invite various stakeholders for discussing points on the agenda. Sometimes there is a confusion in terminology: for example in Armenia, consultation and discussion are mixed as the same concepts; some definition issues also need to be addressed in the Ukrainian draft law. Other issues include the potential inequality: for example, *who* is able to participate, not everyone is enabled to participate, as raised recently in North Macedonia. There is also a discriminatory dimension, which is less often perceived in institutional policy-making: in Germany, “high-level commissions” are foreseen to deal with this. Some countries have more institutional and organised structures, such as the National Participation Council in Moldova, which is no longer operational and stopped its activities in 2016. In Poland, the Parliament can organise “public hearings”. In Spain, consultations should take place even prior to the drafting of the laws, which is indeed a stronger approach to stakeholders’ consultation.

24. In all case studies, the level of participation and consultation in decision-making is stronger and more efficiently articulated at local level,<sup>18</sup> through the use of websites, direct consultations, pools and innovative ways of consultation (for example, consultations on “windmills in town” in Amsterdam). They are also more stringent and compulsory, for example in case of local regulations in Finland. In Poland, there is a number of interesting initiatives on

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<sup>17</sup> European Union public consultations in the digital age: Enhancing the role of the EESC and civil society organisations; European Economic and Social Committee, 2017; Published by: “Visits and Publications” Unit EESC-2017-110-EN.

<sup>18</sup> Participative democracy and citizens’ engagement, solving local problems at the local level, in Moldova and Ukraine, Antonella Valmorbidia, published in English and Russian by Susil Edizioni, October 2020, ISDN, 978-88-5550-155-5.



the citizens' budgets at local level. Regions have also developed strong policies on citizens' participation and consultations.

25. Digitalisation and the role of e-consultation for accessing information and interacting with decision-making process are also a general trend. Nevertheless, those instruments have not yet led to real increase in participation. The digitalisation also raises issues of equal access and digital gaps.

26. The focus on public consultation with stringent rules is often put on information and transparency. In those cases, there is a general understanding that laws must be made public, but there are no clear mechanisms for commenting and participating.

27. Several countries, e.g. Moldova, have centralised electronic platforms for public consultations on all legal acts. The centralised platforms need time for testing before being fully operational, and they need to be accompanied by *enabling* citizens and various stakeholders to participate. In some countries, e.g. in France, websites for consultations offer alternatives such as public committees. The referencing of public consultations on the *vie-publique.fr* website in France is compulsory only for open consultations "replacing" consultation of an advisory committee. In other cases of consultations, this referencing is optional. The real functioning of these governmental platforms is often questionable because of the lack of participation or their use, as in Serbia. In the context of the European Union,<sup>19</sup> procedures for consultation online are very frequently used and allow for citizens' engagement. However, results of these consultations are often not as meaningful as expected, demonstrating the limitations of this instrument.

28. Basic rules of citizens' participation are sometimes clearly expressed in rules and legislation, including information, summary and feedback. For example, in France, there is a Code of relationship between the public and the administration,<sup>20</sup> and the organic law No. 2009-403 of 15 April 2009.

29. In most countries, consultations are proposed on the websites of ministries or institutions that are at the origin of the legislation.

30. The liability for not respecting the law on public consultation often occurs when it comes to the need for information and transparency. In some countries the liability of the public institutions is less obvious (e.g. Moldova). At the European Union level, the Article 11 of the Lisbon Treaty requires that the consultation with citizens needs to be applied to the adoption of policies and strategies. The control of the process of consultation is implemented and then endorsed by an Inter service group, which is in charge of verifying whether it is in line with relevant requirements.

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<sup>19</sup> European Union public consultations in the digital age: Enhancing the role of the EESC and civil society organisations; European Economic and Social Committee, 2017; Published by: "Visits and Publications" Unit EESC-2017-110-EN

<sup>20</sup> [Titre III : L'association du public aux décisions prises par l'administration \(Articles L131-1 à L135-2\)](#) du Code des relations entre le public et l'administration

31. Liability on non-consultation and more specifically on non-information is easier to prove. A local and regional case in Spain was identified with also *personal* responsibility for non-implementation of public consultation. Stricter rules are applied at the regional level in Poland. In some cases, as in Albania, despite the facts that all laws should be presented to the public, the requests of citizens for information are not always met.

32. Globally, the public consultation is considered in fact “consultative”, while the decision remains always in the hands of the democratically elected bodies.

33. In terms of *who* needs to be consulted, the general approach is usually “those who are impacted”, which is broader than an active or passive right of vote. It confirms the point that public consultation is open more to citizens/stakeholders, than to those who have the right to vote (which excludes foreigners or temporary residents). In the Andalusian region of Spain, the law mentions citizens above 16 years old, introducing an interesting and quite unique age restriction for public consultation. This approach opens the possibilities to collect feedback from citizens who do not possess passive and/or active electoral rights: for example, the law in Lombardy, Italy, mentions resident citizens, foreigners and stateless persons regularly residing in the territory, concerned by participatory processes; persons who work, study or reside on the territory or who have an interest in the territory itself or in the subject of the participatory process; companies, associations, organisations and other social groups that have their headquarters in the territory affected by participatory processes or that have an interest in the participatory process.

34. A realistic and pragmatic approach to consultation exists in the regions of Spain. In terms of capacity of management of public consultations, Andalusia requires no more than three consultations per year at regional level, and no less than two years apart between the consultations on the same topic. In Valencia, the law provides for involving citizens living abroad and giving compensation for participation costs.

35. In general terms, consultations have a precise timing identified in advance (except for situations like in Germany decided by the Ministry).

36. At the federal level (Belgium) citizens’ participation is expressly considered as problem solving to address conflicts. “Consultation of users is a non-expensive and efficient solution to contribute to identifying issues, assess the necessity for governmental action and define the best way to act.”

37. There is a general agreement that limitations to consultations are linked to emergency (in North Macedonia among others) even though the notion of “emergency” is not always well defined and subject to questioning. There is also the notion of “public interest” to justify limiting the consultations. In some cases (like in Spain at the regional level), another reason for avoiding consultation due to “*non significance*” can be found. “Non significance” is explained as “not having significant impact on economic activity or not imposing relevant obligation on a potentially affected stakeholder or regulating partial aspect of a subject matter.” In some cases in literature, one can find arguments that limitation of consultation can be not only formal (addressed by the provisions of the law) but also substantial, i.e. due

to “impossibility of participation” linked to pragmatic element of ways and means (working hours, facilities, etc.).

38. Direct forms of democracy can also be referendums, petitions, and citizens’ initiatives, as mentioned in the example of Italy.

#### **4. Ukrainian legislative context**

39. The range of legislative regulation of interaction between public authorities in Ukraine and civil society is quite wide. Article 38 of the Constitution of Ukraine determines that citizens have the right to take part in the management of state affairs, in all-Ukrainian and local referenda, freely elect and be elected to bodies of state power and bodies of local self-government. According to Article 69 of the Constitution, the expression of the will of the people is carried out through elections, referenda and other forms of direct democracy.

40. The issue of consultation and interaction with public is regulated by numerous laws of Ukraine, bylaws and acts of auxiliary nature. Thus, on issues of legislative initiative in the Verkhovna Rada of Ukraine, consultations with the public are envisaged as parliamentary hearings and hearings in committees. Communication between authorities and civil society is also envisaged through public associations, consultative and advisory bodies, all-Ukrainian and local referenda, other forms of direct democracy (general meetings, local initiatives, public hearings, electronic petitions, self-organising bodies of population, etc.). Certain forms, for example, consultations on public budget of local self-government, are a popular practice in Ukraine; however, they still do not have legislative consolidation and are regulated in separate legal acts of local self-government bodies. There is no legislative framework for holding local referenda in Ukraine.

41. The concept of “public consultations” is not enshrined in the legislation of Ukraine. However, the concept of “electronic consultations” is defined as “a form of public consultation, which, in particular, provides for the promulgation of draft acts of public authorities or issues requiring resolution in order to receive proposals and comments.” In other cases, different concepts are used: “public hearings”, “public discussions”, “open discussions” and others. The relevance of the legal regulation of public consultations is due to the need to unify their legal support, to create effective mechanisms for such consultations and to increase the effectiveness of “government-citizens” communication for better managerial decision-making. An attempt to introduce such regulation was in the previous draft law (No. 7453 of 27 December 2017 with the same name), already submitted to the Verkhovna Rada of Ukraine and returned for revision.

42. The issue of participatory democracy was also raised in the draft law “On Amending Certain Legislative Acts of Ukraine on the Forms of Direct Participation of Citizens in the Management of Local Affairs and Statutory Rulemaking” (No. 10158 of 15 March 2019), which was withdrawn by the subjects of the legislative initiative.

## **5. Comments and recommendations on the draft law**

### **5.1 Positive elements:**

43. Standardisation: the law describes single rules for implementation of public consultation for the institutions and various actors; formation and implementation of regional and national policies; solutions for issues of local importance, preparation of draft documents, which are programmatic and strategic, acts of laws for the agreements about public and private interests. An important aspect is the potential of unification and consequent harmonisation of the entire list of legislation governing public consultations.

44. Based on principles: the law describes the principles of public consultations. In particular, it focuses on the need of reporting and feedback: Article 14 of the draft stipulates that “based on the results of public consultations, the subject of power prepares a report, which includes information on all events held within the framework of public consultations”. This is a novelty in the organisation of public consultations in Ukraine.

45. Consultation becomes compulsory for public institutions: Article 4 of the draft defines the obligations of public institutions in legal relations related to the conduct of public consultations, which is certainly a positive feature of the draft law. Citizens and stakeholders have therefore legal rights (Article 5) related to public consultations.

46. Indication of disadvantaged groups: Article 3 indicates clearly the disadvantaged groups; however, the law should also indicate that a task of the public authorities should be to enable them to participate.

### **5.2 Challenges and recommendations**

#### ***5.2.1 Comments on the text: issues and solutions***

47. The text presents some repetition in the structure, making its understanding sometimes difficult. It is recommended to revise the structure of the text in order to simplify it and increase clarity.

48. The definition of “public consultation” is not entirely clear. A reference to the Council of Europe’s Code of Good Practice for Civil Participation in the Decision-Making Process could help to clarify it.

49. In respect of the Cabinet of Ministers of Ukraine, it is advisable to update the list of “public authority/subject of power”: it contains “Secretariat of the Cabinet of Ministers of Ukraine”, while there is no indication of the “Cabinet of Ministers of Ukraine”.

50. Certain norms of the draft contradict each other. For example, 1) part 1 of Article 4 - part 1 of Article 16 - final norms regarding amendments to the Law “On the Rules of Procedure

of the Verkhovna Rada of Ukraine” (regarding the mechanism of public consultations in the legislative process); and 2) part 1 of Article 9 - Part 2 of Article 1 (the principle of identifying stakeholders).

51. Part 7 of Article 1 of the draft stipulates that “public consultations are conducted by local governments in accordance with the requirements of this Law, taking into account the specifics determined by the relevant local council.” It is recommended to add the right of local self-government bodies to consult through local government associations (Law of Ukraine “On of Local Government Associations”).

52. Article 1 of the draft contains general instructions on the specifics of holding public consultations, determined by acts of the President of Ukraine, the Rules of Procedure of the Verkhovna Rada of Ukraine, but there are no specific references to the relevant provisions of such acts. It is recommended to indicate relevant provisions of such acts not to leave space for uncertainties or various interpretations.

53. Part 2 of Article 2 of the draft determines that “the provisions of this Law do not apply to the preparation of draft acts in terms of provisions containing information with limited access.” Taking this into account, it is worth defining more precisely in the text the concept of “information with limited access”.

54. Part 2 of Article 1 of the draft stipulates that by interested persons are meant, among other categories, “foreigners and stateless persons who legally reside on the territory of Ukraine”. While this is a progressive and welcome idea, it may contradict Article 38 of the Constitution of Ukraine, which provides that only citizens of Ukraine are vested with the constitutional right to participate in the management of public affairs. Public consultation is one of the forms of implementation of the constitutional right of citizens to participate in the management of public affairs. Nevertheless, it should be treated as an important issue and considered in the context of other broader on-going reforms in Ukraine. Indeed, citizens’ participation and public consultation is a way to engage the population, including those without electoral rights, such as residents and those who are temporarily living in the country. This also represents a European standard implemented in many European countries.

55. Clause 3 of Part 2 of Article 6 of the draft contains obligations to indicate in the consultative document “information about stakeholders and the possible impact on them in the event of an appropriate decision.” However, this status is acquired by a party only after submitting a relevant application. This clause seems to be very demanding in general for the applicant, who needs to elaborate a quite complex explanation. It is recommended to transform it into “relevance for them to be involved in the decision-making process”.

56. The list of forms for holding public consultations in Article 7 of the draft is presented as exclusive (electronic consultations, public discussion, targeted consultations). However, it does not take into account other existing forms of consultation, as well as the right to choose the optimal form of consultation by local governments. This rule narrows the right to participatory democracy. It is recommended to keep the list open adding other forms of consultations mechanisms (with a reference to the Code of Good Practice mentioned above).

57. Article 9 of the draft defines the features of targeted consultations. However, the way about how to form the list of stakeholders still requires further clarification. It is recommended to indicate not the subject of responsibility for drafting the list of stakeholders but rather the criteria for being a stakeholder, again referring to the Code of Good Practice for Civil Participation of the Council of Europe or other references indicated above.

58. Article 10 indicates the procedures for implementing a public discussion. This Article is valid and should be taken as it is. The reference to the Code of Good Practice and the relevant Committee of Ministers recommendation might be appropriate.

59. Article 13 provides that “the interested parties, when submitting proposals, indicate the following information: surname, name, patronymic, contact information (address, means of communication)”. However, the draft law does not provide for the identification of the person concerned when submitting proposals. It is recommended to ensure that the person is clearly identified, and this information is checked, so that the registration is verified, in order to avoid possible manipulation.

60. Article 13 gives indication on comments provided by citizens. The draft law does not provide for a mechanism, criteria, principles of acceptance (non-acceptance) of proposals and comments submitted by interested parties.

61. The final norms of the draft law provide for amendments to a number of laws of Ukraine to unify the legislation; however, this list is not complete and requires significant clarification. It is recommended to synchronise legislation on consultation issues. The Cabinet of Ministers could prepare the necessary amendments of articles and laws within a possible deadline, for example, one year.

## ***5.2.2 Inputs from the comparative assessment***

### ***5.2.2.1 Positive points:***

62. With proposing this draft law Ukraine moves towards greater compliance of its legislative framework with the Council of Europe standards, as well as towards better fulfilling its commitment as an OECD and Open Government Partnership member State. The intention to adopt a law in order to have a clear, general, inclusive and, in part, innovative set of principles and procedures for public consultation is a positive initiative and goes in the right direction. The draft law on public consultation in Ukraine is aligned with the general trends and demands in Europe and in the world. It reiterates and reinforces the direction adopted by the country to enrich democracy with participative approaches, responding to a participative process of elaboration.

63. The law is correctly taking into account technology through the use of an IT platform for consultation, which is the case in most European states, whether in a general way or in a more specific one. E-democracy and e-participation are likely non-reversible processes in modern societies and the draft law on public consultation enshrined definitively Ukraine into this foreword looking process.

64. The draft law is very ambitious and it intends to encompass the most important issues: it provides principles, details and positive elements of public consultation, including all possible stakeholders and all possible acts, without specifying topics and level of legislation. It shows the determination of the political choice to go out of the usual decision-making path and to target maximum results. This draft law is among the most ambitious laws on public consultation examined by the Council of Europe experts.

#### **5.2.2.2 Risks and proposed ways to mitigate them**

65. According to the draft law, all draft legislative acts are subject to the law on “public consultations”. This aspect can represent an issue in terms of management of such vast volume of data, then resulting in lack of effectiveness. A possible solution would be to prioritise some key issues to be addressed for general public consultation (like territorial planning or environmental issues or special use of land) not to “overburden” the system. When covering all acts, a substantial risk may occur linked to sheer numbers, thus posing a risk that this instrument will be quickly abandoned or turned into a formalised procedure. The criteria adopted in Spain can also be considered, namely introducing the “importance of the law/act: i.e. excluding *proposed standards which do not have a significant impact on economic activity or do not impose relevant obligation on potentially affected stakeholders or regulate partial aspect of a subject matter*”. Another option is to leave regional and municipal-level acts at their respective level and not centralise the whole system. At the moment, the understanding is that all draft laws should be present in the centralised system for consultation.

66. There are no indications of the way to fund the platform and in general the team working on it. It is recommended to indicate more clearly who/which departments will be in charge and if possible, indicate the source of the resources available.

67. The definition and methods of public participation are important. They appear in multiple places (redundancy) and yet are not sufficiently detailed. A solution could be to refer directly in the text to the Code of Good Practice and Recommendations of the Council of Europe.

68. The status of “**interested person**” is to be clarified, the elements proposed by the Code of Good Practice could be used.

69. Mandatory use of the electronic centralised platform is problematic:

- a) it is technologically very difficult. It proved to be unrealistic in operational terms. It may soon be neglected because of its complexity and it does not increase participation substantially enough;
- b) possible lack of resource can block the introduction of public consultations. The final provisions stipulate “... the Law comes into force in six months from the date of its publication.” The full implementation of the platform risks to be unrealistic in this timeframe;

- c) it creates inequalities for participants who do not have access to the platforms for various reasons.

It is therefore proposed:

- i. As for the technology, it is suggested to anticipate a period of testing for the platform, which may need to be adapted. The platform should be highly intuitive and very user-friendly in order to avoid possible digital gap in hardware and software but also considering possible digital literacy gaps. Operating platforms of the central executive authorities could be recommended too.
- ii. This technological part of the process is also expensive and should be clearly considered as an element. Clear resource should be made available in a medium and long term.
- iii. To offer alternative ways of doing public consultation, with face-to-face options or other ways and offer the platform as an option (option for an IT platform when other forms are/cannot not be implemented, has been a practice in several countries). The practice of “advisory groups and working groups” at the ministerial level, representing interest groups and civil society actors could also be mentioned as an alternative.
- iv. To stimulate all public institutions to work on enabling factors for citizen and stakeholder engagement by training and educating on civic participation, on equal access to consultations for all people in disadvantaged positions, and on enhancing the digital and IT skills.
- v. To keep the practice of a centralised platform for informing about an act and legislation in order to secure transparency (which is broadly recognised as essential).
- vi. To keep working with regional and local level in order to have their public consultations going on, and with a possible link to the electronic centralised platform.

70. Liability of public actors not implementing the public consultation is mentioned in the law. However, there is no indication about who is going to control whether the process of consultation takes place or not. No monitoring or assessment of public consultations is introduced. There is no indication of sanctions other than non-validity of the law in case of non-implementation.

71. Normally, if the law requires consultation, liability is connected to the consequences of non-implementation. However, the realistic approach would provide for some flexibility. In practical terms, it is clearly possible to verify the transparency of information about the legislative process. It is recommended to indicate a “person, organisation or system” that would ensure supervision of the participatory processes. The proposal of addressing complains to an Ombudsperson could also be a valid option (as at the European Union level). It is recommended to add a part, connected with structures mentioned above, when it comes to monitoring and assessment of the process of public consultation.



72. The law stipulates very stringent conditions, with the risk of constant invalidation of the process. It is suggested that more flexible timing of consultations should be foreseen to make it more realistic.

73. The law indicates specific limitations and uses of consultation. It is advised to stipulate limited consultation during electoral campaigns in order to avoid mixing or hindering these two processes.

74. The law indicates the possibility to suspend implementation in case of certain emergencies. It is recommended to provide for the specifics of public consultations where preparation of legal acts in an urgent or special order takes place (for example, the Rules of Procedure of the Verkhovna Rada of Ukraine allow making decisions on the Ad hoc procedure).

75. It is recommended to take into account the practices already existing and operating in Ukraine, for authorities to consult through public councils (and other subsidiary bodies).

## **6. Conclusion**

76. The present draft law on public consultation represents a good opportunity for boosting and consolidating practices and laws on civil participation existing already in Ukraine. It is an ambitious proposal that also raises big expectations. While some of the aspects are to be completed and adapted in line with European standards and principles, the law has a solid basis and represents a key step towards applying participatory democracy and multi-stakeholder approach to governance.