



**EXPERT COUNCIL ON NGO LAW  
CONF/EXP(2021)2**

25 February 2021

**EXPERT COUNCIL ON NGO LAW**

**EUROPEAN PRACTICES RELATED TO PARTICIPATION OF NGOs  
IN POLICY DEVELOPMENT**

**Review prepared by Dragan Golubović on behalf of the Expert Council  
on NGO Law of the Conference of INGOs of the Council of Europe**

*The opinions expressed in this work are the responsibility of the author(s) and do not necessarily reflect the official policy of the Council of Europe.*

## **INDEX**

Introduction	Paras 1-9
I. Clarification of concept, pertinent instruments and terminology	Paras 10-14
II. The underlying role and benefits of civil/NGOs participation in policy development	Paras 15-20
III. Principles facilitating participation of NGOs in policy development	Paras 21-43
IV. Application of the principles facilitating participation of NGOs	Paras 44-72
Conclusion	Paras 73-80

## Introduction

1. This review examines practices related to participation of non-governmental organisations (NGOs) in policy development in the member States of the Council of Europe (CoE). It is conducted against the background of standards and principles set out in the binding and soft instruments of the CoE underpinning and facilitating this participation.
2. Generally, NGOs play a twofold role in policy development. On the one hand, an NGO is a suitable *institutional tool of choice* which facilitates public participation in policy development. Various forms of NGOs allow individuals and non-state actors (e.g. private companies, universities) to better organize themselves and advocate for their rights and legitimate interests more effectively. On the other hand, NGOs are deemed a legitimate *stakeholder* in policy development. The fact that NGOs, in addition to individuals, enjoy a number of human rights pertinent to participation facilitates their role in this process. This particularly pertains to freedom of expression—including the right to advocacy and petition<sup>1</sup>—as well as access to information of public interest<sup>2</sup> and freedom of public assembly and association.<sup>3</sup> Recommendation CM/Rec (2007)14 on the legal status of non-governmental organisations in Europe (*Recommendation CM/Rec (2007)14*) states in this respect that: “NGOs should enjoy the right to freedom of expression and all other universally and regionally guaranteed rights and freedoms applicable to them” (*Recommendation*, par. 5.).<sup>4</sup>
3. The critical role of NGOs in policy development has been widely acknowledged by the CoE and its member States. Thus, it was declared at the Third Summit of the Heads and State and Government of the Council of Europe member States that “effective democracy and good governance at all levels...are essential...and can only be achieved through the active involvement of citizens and civil society...”.<sup>5</sup>
4. Similarly, it is noted in the Preamble of the *Recommendation CM/Rec (2007)14* that NGOs make essential contribution to the “development and realisation of democracy

---

<sup>1</sup> Article 10 of the European Convention on Human Rights. See *Dichand and others v. Austria*, App. No. 29271/95, Judgement of 26 February 2002, § 38.

<sup>2</sup> See also Article 2.1. of the *Convention on Access to Official Documents* (CETS No. 205).

<sup>3</sup> Article 11 of the European Convention on Human Rights.

<sup>4</sup> See also Article 25, par. 1 (a) of the United Nations *International Covenant on Civil And Political Rights* (ICCPR) which provides that „every citizen shall have the right and the opportunity to take part in the conduct of “public affairs”, directly or through freely chosen representatives, <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>.

General Comments on Article 25 of the ICCPR note that the conduct of “public affairs”, referred to in paragraph (a), is a broad concept which also covers the “formulation and implementation of policy at international, national, regional and local levels” (par. 5.). UN Human Rights Committee (HRC), *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote)*, *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, <https://www.refworld.org/docid/453883fc22.html>

<sup>5</sup> Third Summit, Warsaw, 17 May, 2005, <https://www.coe.int/en/web/cdcj/non-governmental-organisations-ngos->

and human rights, in particular through the promotion of public awareness, participation in public life and securing the transparency and accountability of public authorities..”, and that “contributions of NGOs are made through an extremely diverse body of activities which can range from acting as a vehicle for communication between different segments of society and public authorities, through the advocacy of changes in law and public policy...”.

5. The Code of Good Practice for Civil Participation in the Decision-Making Process adopted by the CoE Conference of International NGOs in 2009 (*Code of Good Practice*) further underscores the role of NGOs in policy development, noting that governments at all levels, from local and regional to national, as well as international institutions, can draw on the “relevant experience and competence of NGOs to assist in policy development and implementation. NGOs enjoy a unique trust from their members and society to voice concerns, to represent their interests and to gain involvement in causes, thereby providing crucial input into policy development”.<sup>6</sup>
6. The foregoing is also reflected in the Resolution 2226(2018) of the CoE Parliamentary Assembly: *New Restriction on NGOs Activities in Council of Europe member State*, which calls on member States to “fully respect the freedom of association and consult civil society on the relevant draft laws”.<sup>7</sup>
7. The review is prepared against the background of the perceived trend of NGOs having difficulties engaging in public consultation and with participation process in general.<sup>8</sup> In addition, the lack of proper consultation is often noted in the opinions of the CoE bodies as a contributing factor to the problematic national legislations impacting on NGOs.<sup>9</sup>
8. Section I of the review sets out to clarify the concept of NGOs participation, and in particular how it differs from political activities and lobbying, as well as elaborate on the key terminology. Section II discusses the underlying role and benefits of NGOs

---

<sup>6</sup> Code of Good Practice (CONF/PLE(2009)CODE1), p.5.

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802eed5c>

<sup>7</sup> <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24943&lang=en>

<sup>8</sup> See The European Agency for Fundamental Rights (FRA), *Civic Space–Experiences of Organisations in 2019*, second annual civil society consultation. The report on consultation notes that many NGOs-respondent to the survey, “participated in public consultations during 2019, but the majority had difficulties accessing such consultations and with the participation process”, pp. 1, 5-7, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-civic-space-organisation-experiences\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-civic-space-organisation-experiences_en.pdf).

Civil Society Europe, *Civil Society in Europe: 2017 Report* notes that lack of “adequate participation of civil society and access to policy-making”, hampers freedom of association in Europe (p. 16). [https://civilsocietyeurope.eu/wp-content/uploads/2019/06/civic-space-in-europe-report-2017\\_web.pdf](https://civilsocietyeurope.eu/wp-content/uploads/2019/06/civic-space-in-europe-report-2017_web.pdf).

<sup>9</sup> See, for example, OSCE-ODIHR/Venice Commission, *Joint Opinion on the Provisions of the so-called “Stop Soros” draft Legislative Package which directly affect NGOs* (in particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration), adopted by the Venice Commission at its 115th Plenary Session, CDL-AD(2018)013-e, par. 9. Expert Council on NGO Law: *Opinion on the Compatibility of Amendments to the Turkish Law on Associations with European Standards*, CONF/EXP (2020)2, April 2020, paras. 10.-13; *Opinion on the Romanian Draft Law 140/2017 on Associations and Foundations*, CONF/EXP (2017)3, 11 December 2017, par. 5; *Opinion on the Hungarian Draft Act on the Transparency of Organisations Supported from Abroad*, CONF/EXP (2017)1, 24 April, 2017, par. 8.

participation in policy development and its role in strengthening participatory democracy. Section III elaborates on key principles underpinning and facilitating participation of NGOs in policy development. Section IV discusses specific issues related to the application of those principles and provides examples as to how they have been incorporated in pertinent regulation and practice of the CoE member States.

9. While the review is concerned with participation of NGOs, the standards and principles discussed herein largely apply to all civil stakeholders in policy development, and therefore do not suggest that NGOs should have a privileged position in this process (par. 17.).

## I. Clarification of concept, pertinent instruments and terminology

10. Participation of NGOs is an inherent part of the broader concept of *citizen/civil participation*—that is, participation of individuals and civil society at large (non-state actors)<sup>10</sup> at different stages of policy development. This concept is also embedded in the guiding principles underpinning a *European Public Administration Space* as they pertain to policy drafting, implementation and monitoring.<sup>11</sup> Citizen/civil participation is thus to be seen as distinct from both *political activities*, which entail direct engagement with political parties<sup>12</sup> and *lobbying* in relation to business interests.<sup>13</sup>
11. The general principles governing participation of NGOs in policy development is chiefly set out in the Committee of Ministers’ Guidelines for civil participation in political decision making (*Guidelines for civil participation*)<sup>14</sup> and the *Code of good practice*.
12. Specific standards related to participation of NGOs in policy development are also to be found in the *European Convention on Human Rights* and its additional protocols; the Council of Europe Convention on Access to Official Documents; the European Charter of Local-Self-Government and the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority; Recommendation CM/Rec (2007)14; Recommendation Rec(2003)3 of the Committee of

---

<sup>10</sup> See Committee of Ministers, *Guidelines for civil participation in political decision making* (CM(2017)83-final) which defines *civil society at large* so as to include a host of organised or less organised groups, including “professional and grassroots organisations, universities and research centres, religious and non-denominational organisations and human rights defenders” (Chapter, II, par. 2.d.).  
[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016807509dd](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016807509dd)

<sup>11</sup> See SIGMA (Support for Improvement in Governance and Management), *The Principles of Public Administration*, OECD/EU, 2017, <http://www.sigmaweb.org/publications/Principles-of-Public-Administration-2017-edition-ENG.pdf>. The notion: *European Administrative Space* was set out by SIGMA in 1999. It entails several components, such as reliability, predictability, accountability and transparency, as well as technical and managerial competence, organisational capacity, financial sustainability and *citizen participation*. See OECD, *European Principles for Public Administration*, SIGMA Papers, No. 27, <https://doi.org/10.1787/5kml60zwd7h-en>

<sup>12</sup> See Chapter I. par. 1, *Recommendation CM/Rec (2007)14* which specifically excludes *political parties* from the notion of “non-governmental organisations”.

<sup>13</sup> *Guidelines for civil participation*, Chapter II, 2.a.

<sup>14</sup> *Supra*, footnote 10.

Ministers to member states on balanced participation of women and men in political and public decision making (*Recommendation Rec(2003)3*); and the OSCE/ODIHR and Venice Commission Joint Guidelines on Freedom of Association (*Joint Guidelines*). In addition, references are also made to pertinent United Nations' (UN) instruments to which CoE member States are signatories.

13. The term *non-governmental organisations* in this review is that found in Recommendation CM/Rec (2007)14, namely, voluntary self-governing bodies or organisations established to pursue the essentially non-profit-making objectives of their founders or members.<sup>15</sup> They can include voluntary informal groups, non-profit organisations, associations, foundations, charities or geographic or interest-based community and advocacy groups, as well as other membership and non-membership groups and organisations.
14. The term *policy development*—sometimes referred to as *decision-making* and *political decision-making*—is understood to refer to the “development, adoption, implementation, evaluation and reformulation of a policy document, a strategy, a law or a regulation at national, regional or local level..”<sup>16</sup>

## II. The underlying role and benefits of civil/NGOs participation in policy development

15. Civil participation in policy development, including participation of NGOs, is a key element of participatory democracy in Europe. Thus, it is noted in the Preamble to the *European Charter of Local Self-Government* that “the right of citizens to participate in the conduct of public affairs is one of the democratic principles that are shared by all member States of the Council of Europe”.
16. It is noteworthy, however, that the underlying role of participatory democracy is not to supplant representative democracy, which is based on the separation of power, multi-party system and free elections, but rather to contribute to its better functioning.
17. This is clearly recognised in the Preamble to the Guidelines for civil participation which provides that participatory democracy is “based on the right to seek to determine or to influence the exercise of a public authority’s powers and responsibilities, contributes to representative and direct democracy”, and that the right to civil participation in policy development should be afforded to “*individuals, non-governmental organisations (NGOs) and civil society at large*”.<sup>17</sup> However, “responsibility and accountability for taking decisions ultimately rests with the *public authority* that has the *democratic legitimacy* to do so” (emphasis ours).

---

<sup>15</sup> Recommendation CM/Rec (2007)14, Chapter I. (Basic Principles), paras 1-3. See also Guidelines for civil participation in political decision making (*Guidelines for civil participation*), Chapter II, par. 2. item c.

<sup>16</sup> *Guidelines for civil participation*, Chapter II, par. 2. item b.

<sup>17</sup> See also Chapter IV, par. 5 of the *Guidelines for civil participation* which provides that: “civil participation should seek to provide, collect and channel views of individuals, directly or via NGOs and/or representatives of civil society, providing a substantive exchange of information and opinions which inform the decision-making process so that public needs are met”.

18. Similarly, it is noted in the *Resolution 326(2011)* of the Congress of Local and Regional Authorities of the CoE that:
3. Representative democracy is the key mechanism whereby citizens can directly influence decision-making processes through universal suffrage. Participatory democracy is complementary to this process, serving as a tool to enable local and regional representatives to effectively carry out the role to which they are elected.<sup>18</sup>
19. Given the foregoing, in the process of policy development, participatory democracy contributes to representative democracy in several important ways:
- providing an opportunity and creates conditions necessary for individuals, NGOs and civil society at large to engage in political life regularly—and not only during elections;<sup>19</sup>
  - creating a framework for those stakeholders to advocate for their rights and legitimate interests and thus contributes to the development of a vibrant democratic society;<sup>20</sup>
  - rendering the work of public authorities more transparent and closer to their constituencies;
  - contributing to the quality of adopted public policy and its smooth, cost-effective implementation;<sup>21</sup> and
  - facilitating a watchdog role of NGOs in policy implementation.<sup>22</sup>
20. While the ensuing benefits of participatory democracy, including participation of NGOs in policy development, are widely recognised (paras. 3-6) there are several perceived

---

<sup>18</sup> Congress of Local and Regional Authorities of the CoE, *Resolution 326 (2011)*, Citizen participation at local and regional level in Europe, <https://rm.coe.int/1680718895>. See also the *Treaty of the European Union* (Official Journal of the EU (C306-10), December 12, 2007) which provides that the Union is based on *representative* and *participatory* democracy (Chapter II: Democratic Principles, Article 10 and 11).

<sup>19</sup> Forbrig, J., "Citizen Participation and Local Democracy in Europe", *Learning for Local Democracy: A Study of Local Citizen Participation in Europe*, Central and Eastern European Citizens Network, in partnership with the Combined European Bureau for Social Development, 2011, p. 5 and further, <http://www.ceecn.net/storage/2011/CALLDE/complete%20study.pdf>

<sup>20</sup> Legitimate is deemed any interest which in democracy is not explicitly prohibited by law. See Bollinger T, "The Tolerant Society", Oxford University Press, Oxford, 1988. Mendel, T., "Restricting Freedom of Expression: Standards and Principles" (background paper for the meeting hosted by the UN Special Rapporteur on Freedom of Opinion and Expression), Centre for Law and Democracy, <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>

<sup>21</sup> I.e. if all stakeholders were given an opportunity to participate in the process, their rights and legitimate interests will presumably be duly protected and the costs of implementation of such a policy will presumably be reduced, as stakeholders will be less inclined to resort to judiciary and other remedies to obstruct policy implementation A study referenced in the manual published by the Organization for Security and Co-operation in Europe (OSCE), suggests that citizens are more inclined to embrace public policy if they have an opportunity to participate in the process of its shaping, even if their proposals are not favourably met. See OSCE, *Public Hearing Manuals: Committee Consultation with the Public*, p. 6. [http://www.oscebih.org/documents/osce\\_bih\\_doc\\_2010122016042890eng.pdf](http://www.oscebih.org/documents/osce_bih_doc_2010122016042890eng.pdf).

<sup>22</sup> Golubović, D., "An Enabling Framework for Citizen Participation in Public Policy: An Outline of Some of the Major Issues Involved", *International Journal of Not-for-Profit Law*, vol. 12, no. 4 (November 2010), pp. 38-39, [http://www.icnl.org/research/journal/vol12iss4/ijnl\\_vol12iss4.pdf](http://www.icnl.org/research/journal/vol12iss4/ijnl_vol12iss4.pdf)



policy risks associated with civil/NGOs participation in policy development, however. Chief among them include the lack of understanding of the role of consultation with NGOs and public at large, the time-consuming and costly process of consultation, the lack of necessary resources required for consultation, and the disproportional influence of various lobbying groups on policy-makers.<sup>23</sup> However, these risks can be addressed or mitigated by the development of a sound legal and institutional framework facilitating consultation as well as the corresponding capacity building measures targeting both public authorities and NGOs.<sup>24</sup>

### III. Principles facilitating participation of NGOs in policy development

21. There are several principles which are recognised to underpin and facilitate participation of NGOs in policy development, which are aptly summarised in the *Guidelines for civil participation* and the *Code of Good Practice*, respectively. As discussed below, those principles are reflective of the fact that the right to participation is derived from a number of specific rights and freedoms that are protected by the pertinent international instruments and afforded to individuals as well as NGOs (par. 2.), as well as the fact that human rights generally need to be observed in the process of civic participation.

#### *Open and inclusive participation*

22. The principle of openness underscores the significance of NGOs and other stakeholders having timely and unhindered access to *pertinent information* at all stages of policy development; this is key precondition for an informed dialogue between NGOs, government and other stakeholders. As stated in the *Code of Good Practice*: “NGOs collect and channel views of their members, user groups and concerned citizens. This input provides crucial value to the political decision-making process, enhancing the quality, understanding and longer term applicability of the policy initiative. A precondition for this principle is that the processes for participation are open and accessible, based on agreed parameters for participation” (*Code*, p. 6).<sup>25</sup>

---

<sup>23</sup> Irvin, R.A. and Stansbury, J., "Citizen Participation in Decision-Making: Is It Worth the Effort?", *Public Administration Review*, Vol. 64, No. 1, 2004, pp. 56, 58. Dahl, R.A., "A Democratic Dilemma: System Effectiveness versus Citizen Participation", *Political Science Quarterly*, Vol. 109, No. 1. 1994, pp. 23-34; Berman, E.M., "Dealing with Cynical Citizens", *Public Administration Review*, Vol. 57, No. 2, 1997, pp. 105-112; Day, D., "Citizen Participation in the Planning Process: An Essentially Contested Concept", *Journal of Planning Literature*, Vol. 11, No. 3, 1997, pp. 421-434.

<sup>24</sup> *Guidelines for civil participation*, par. 3, item b; *Code*, paras. 1. and 6. See also Civil Society Europe, *Civil Society in Europe: 2017 Report*, which notes that the lack of capacity on the side of NGOs to “carry out effective advocacy and influence the policy-making” is one of key factors impacting adversely on participation of NGOs in policy development (p. 20).

<sup>25</sup> See also: Article 2.2.II., item b of the *Code of Good Practice; Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority* which provides that measures for the exercise of the right to participate shall *inter alia* include: “procedures for access, in accordance with the Party’s constitutional order and international legal obligations, to official documents held by local authorities” (Art. 2., Par. 1, item b.); *Joint Guidelines on Freedom of Association* which provides that “associations shall have the freedom to seek, receive and use financial, material and human resources, whether domestic, foreign or international, for the pursuit of their activities (par. 30); SIGMA, *The Principles of Public Administration* which includes the requirement for “inclusive, evidence-based policy and legislative

23. The foregoing consideration is reflective of *Recommendation* CM/Rec 2007(14), which provides that participation and co-operation in policy development should be facilitated by ensuring “appropriate disclosure or access to official information” (*Recommendation*, par. 76.).
24. The *Guidelines for civil participation* further provides that at all stages of policy development the necessary *information* should be presented in clear and easily understandable language and in an appropriate and accessible format, without undue administrative obstacles and, in principle, free of charge, in accordance with open data principles (*Guidelines*, par. 21.). In addition, “public authorities should provide the widest possible access, both offline and online, to key documents and information without restrictions on analysis and re-use of such information” (*Guidelines*, par. 22.). It would also be important that the public authorities ensure *timely* disclosure and access to pertinent information, including the planned time-line, forms and tools of public consultations.<sup>26</sup>
25. The foregoing observations need to be viewed against the background of the ECtHR case law related to access to information of ‘public interest’—that is, the information which “relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community”.<sup>27</sup> Because of its overreaching consequences for the well-being of citizens and the life of communities, there is little doubt that information related to policy development do meet the ‘public interest’ test and thus enjoys protection of Article 10 of the ECHR.<sup>28</sup>

---

development which enables the achievement of intended policy objectives” (p. 29); Civil Society Europe, *Civil Society in Europe: 2017 Report* which notes that “increasing difficulty in accessing information of public interest” hampers freedom of association in Europe (pp. 20, 16).

<sup>26</sup> SIGMA, *The Principles of Public Administration*, Principle 11.2.: “The process and timing of public consultations provide sufficient opportunity to all key stakeholders and affected groups to review and comment...”, and Principle 11.3.: “Public consultation mechanisms and procedures include prior notification to those likely to be affected by the policy changes and other stakeholders (e.g. NGOs, the private sector and advisory bodies), and these procedures are consistently followed in the consultation process”, p. 34. European Commission, *Better Regulation Guidelines*, Staff Working Document, Brussels, 7 July 2017, SWD (2017) 350, pp. 7-8.

<sup>27</sup> *Magyar Helsinki Bizottság v. Hungary* [GC], Application no. 18030/11, judgment of 8 November 2016 § 161-162.

<sup>28</sup> As a general rule, the ECtHR has held that a member State has *positive obligation* to ensure access to information it holds, insofar as it is deemed instrumental for the individual’s exercise of his or her right to freedom of expression as set out in Article 10 of the ECHR, in particular as regards the “freedom to receive and impart information”, and where its denial constitutes an interference with that freedom. See *Magyar Helsinki Bizottság v. Hungary*, § 156. The Court considers whether and to what extent the denial of access to information constitutes an interference with an applicant’s freedom of expression in the light of particular circumstances, having regard the following cumulative criteria: 1) the purpose of the information request; 2) the nature of the information sought; 3) the role of the applicant; and 4) the availability of the information. See *Magyar Helsinki Bizottság v. Hungary*, §157. See also ECtHR, *Guide on European Convention on Human Rights*, pp. 70-73, First edition, 31 March 2020, Strasbourg, [https://www.echr.coe.int/Documents/Guide\\_Art\\_10\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf) The issue of NGOs—including informal

26. The significance of access to pertinent *information* in policy development with respect to environmental matters is specifically addressed in the 1998 UN *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (Aarhus Convention/Convention). Thus, the Preamble to the Convention recalls that: “improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns”.<sup>29</sup>
27. The Convention sets out specific rules governing the duty of public authorities regarding a request for ‘environmental information’ furnished by NGOs and other interested parties, including the deadline by which the information requested should be provided as well as the legitimate grounds for refusal of a request for information.<sup>30</sup>

---

groups—having the right to access information of public interest has been specifically addressed in the *Steel and Morris v. the United Kingdom*, Application no. 68416/01, judgment of 15 February 2005, § 87. In addition, with respect to the access to information of public interest, the case law has put NGOs and civil society at large—including academic researchers and authors of literature on matters of public concern—on par with the press (*Başkaya and Okçuoğlu v. Turkey* [GC], Applications nos. 23536/94 and 24408/94, judgment of 8 July 1999, § 61-67; *Chauvy and Others v. France*, Application no. 64915/01, judgment of 29 June 2004, §68; *Lindon, Otchakovsky-Laurens and July v. France* [GC], Applications nos. 21279/02 and 36448/02, judgment of 22 October 2007, § 48; *Társaság a Szabadságjogokért v. Hungary* Application no. 68416/01, judgment of 15 February 2005, § 27, 87; *Chauvy and Others v. France*, Application no. 64915/01, judgment of 29 June 2004, §68; *Lindon, Otchakovsky-Laurens and July v. France* [GC], Applications nos. 21279/02 and 36448/02, judgment of 22 October 2007, § 48.

<sup>29</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-13&chapter=27](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27)

<sup>30</sup> Article 2 of the Aarhus Convention provides that the environmental information “shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it”. The legitimate grounds for refusal of a request for information are set out in Article 3 of the Convention and include: the public authority to which the request is addressed does not hold the environmental information requested; (b) the request is manifestly unreasonable or formulated in too general a manner; or (c) the request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure. The request for environmental information may also be refused if the disclosure would adversely affect: (a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law; (b) international relations, national defence or public security; (c) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature; (d) the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed; (e) intellectual property rights; (f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law; (g) the interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or (h) the environment to which the information relates, such as the breeding sites of rare species. The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment (Convention, Art. 4.).

28. Furthermore, open and inclusive participation entails respect for *human rights* other than the right to access to public information. This requires that all interested parties are given an opportunity to participate at various stages of policy development, as appropriate, and that no one is *unduly discriminated* in this process.<sup>31</sup> It is noted in the *Guidelines for civil participation* that non-discrimination and inclusiveness requires that all voices, including “those of the less privileged and most vulnerable, can be heard and taken into account”, and that there is “gender equality and equal participation of all groups including those with particular interests and needs, such as young people, the elderly, people with disabilities or minorities” (*Guidelines*, par. 4., item f. and g., par. 7.).<sup>32</sup>
29. Similarly, *Recommendation CM/Rec (2007)14* provides that governmental and quasi-governmental mechanisms at all levels should ensure the effective participation of NGOs *without discrimination* in dialogue and consultation on public policy objectives and decisions (*Recommendation*, par. 76).<sup>33</sup>
30. The right of *persons with disabilities* to participate in policy development is specifically addressed in the 2010 U.N. *Convention on the Rights of Persons with Disabilities* (CRDP).<sup>34</sup> The CRDP calls on State Parties to ensure “that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives...” (Art. 29, a)).
31. The CRDP further calls on State Parties “to promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including: i. Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties; ii. Forming and

---

<sup>31</sup> See Article 1.5.1., *Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority*: “Any formalities, conditions or restrictions to the exercise of the right to participate in the affairs of a local authority shall be prescribed by law and be compatible with the party’s international legal obligations”.

<sup>32</sup> See SIGMA, *The Principles of Public Administration*, Principle 11.1.: “...There is a proactive approach to empowering citizens, particularly women, in decision making”, p. 34.

<sup>33</sup> See also Article 1.3 of the *Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority*, and the 2006 United Nation *Convention on the Rights of Persons with Disabilities and Option Protocol*. The Convention calls on State Parties to ensure that persons with disabilities have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them, and to closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations (Preamble, item o; Art. 4. Par. 3.), <https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>.

<sup>34</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html#Fulltext>. See also UN Special Rapporteur on the Rights of Persons with Disabilities, *Participation of Persons with Disabilities*, A/HRC/31/62, pp. 9-19. [http://www.embracingdiversity.net/files/report/1498559318\\_report-participationfor-web.pdf](http://www.embracingdiversity.net/files/report/1498559318_report-participationfor-web.pdf) OSCE/ODIHR, *Guidelines on Promoting the Political Participation of Persons with Disabilities*, Warsaw, 2019, pp. 87-88. <https://www.osce.org/files/f/documents/b/6/414344.pdf>

joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels” (Art. 29 b)).

32. *Recommendation* Rec(2003)3 envisages a number of legislative, administrative, supporting and monitoring measures which are primarily geared at encouraging member States to achieve a more balanced *gender participation* in political parties and public decision-making bodies. However, it also envisages a number of measures which impact on NGOs as stakeholders in policy development.
33. These include measures to: support, by all appropriate measures, to programmes aimed at stimulating a gender balance in political life and public decision-making initiated by women’s organisations and all organisations working for gender equality (par.18.); incorporate into school curricula education and training activities aimed at sensitising young people about gender equality and preparing them for democratic citizenship (par. 23.); promote participation of young people, especially young women, in associations to enable them to acquire experience, knowledge and capacities which are transferable to the field of institutional, and especially political, participation (par. 24.); encourage youth organisations to ensure a balanced participation of women and men in their decision-making structures (par. 25.); and encourage enterprises and associations to ensure balanced representation of women and men in their decision-making bodies, in particular those subsidised for providing public services or implementing public policies (*Recommendation*, par. 29.).<sup>35</sup>

### ***Trust***

34. Policy development requires honest interaction between the stakeholders. Although NGOs and public authorities have different roles to play in this process (paras. 15-19.), they can accomplish the shared goals only if there is mutual trust developed between the parties as well as respect as to their respective positions on the policy issues at stake (*Code of good practice*, p. 7, *Guidelines for civil participation*, par. 4., items a. and c.). Responsiveness, with all stakeholders providing informed and timely feedback on issues at stake, contributes to the building of mutual trust (*Guidelines*, par. 4. item e.).

### ***Accountability and transparency***

35. Participation in policy development requires accountability from both NGOs and public authorities as well as transparency at all stages of policy development (*Code of Good Practice*, p. 7, *Guidelines for civil participation*, par. 4., items d. and h.). The letter entails clear declaration by NGOs as to whose interests they represent in the process. This is deemed particularly important, given the perceived trend of government’s NGOs

---

<sup>35</sup> See also *Recommendation* No. R (98) 14 of the Committee of Ministers to Member States on Gender Mainstreaming, 7 October, 1998, with further references, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804ec94a>

(GONGOs)<sup>36</sup> occupying civil space and striving to present themselves as having legitimate and independent voice in a public discussion.<sup>37</sup>

### ***Independence***

36. NGOs must be recognised as free and independent bodies in the process of policy development in respect to their goals, decisions and activities. They have the right to act independently and advocate positions different from the authorities with whom they may otherwise cooperate (*Code of Good Practice*, p. 7, *Guidelines for civil participation*, par. 4., item b.). This is consistent with the basic principles underpinning the legal status of NGOs which are set out in the *Recommendation CM/Rec 2007(14)*, and which provides *inter alia* that “NGOs should not be subject to direction by public authorities”, but rather “should be free to pursue their objectives, provided that both the objectives and the means are consistent with the requirement of a democratic society” (*Recommendation*, paras. 6, 11.).

### ***Participation at early and key stages of policy development and its implementation***

37. As a rule, NGOs should be consulted at all stages of policy development, recognising that “consultation may be carried out through various means and tools, such as meetings, public hearings, focus groups, surveys, questionnaires and digital tools”, depending on a particular stage of the process (*Guidelines for civil participation*, par. 23.).<sup>38</sup> Regardless of the scope of participation (information, consultation, dialogue and active involvement)<sup>39</sup> and the tools and the methods used, consultation with NGOs should commence at a time of policy planning i.e. when *policy agenda* is being formulated, thereby facilitating a government’s decision on policy priorities. On the other hand, participation of NGOs at early stages of policy development minimises the risk of ill-conceived solutions which would be more difficult to remedy at later stages of the process. Thus, as a rule, NGOs should have an opportunity to provide feedback to a government’s proposal of an annual legislative plan, as well as to be consulted during the preparation of *ex-ante* impact assessment—in addition to being consulted on a draft policy proposal (*Guidelines*, par. 10).<sup>40</sup>
38. Encouraging participation of NGOs in the working groups commissioned with preparation of a policy proposal would also be consistent with the requirement for consultation at early stages of policy development (*Code of Good Practice*, Chapter

---

<sup>36</sup> Those NGOs that are established, affiliated with or effectively controlled by a government.

<sup>37</sup> <https://osce.usmission.gov/mind-gongos-government-organized-ngos-troll-europes-largest-human-rights-conference/>; <https://europeanwesternbalkans.com/2019/10/16/gongos-a-serious-obstacle-to-public-debate-on-eu-integration-in-serbia>

<sup>38</sup> See also Article 2.2.II.item a. of the *Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority*.

<sup>39</sup> *Guidelines for civil participation*, paras. 19.-29.

<sup>40</sup> See also SIGMA *Principles of Public Administration*, Principle 11: “Policies and legislation are designed in an *inclusive* manner that enables the *active participation* of society and allows for co-ordination of different perspectives within the government” (emphasis ours), pp. 34-35. European Commission, *Better Regulation Guidelines*, pp. 14-18.

III.iii. 2.). It would also require that the public authorities adopt “transparent criteria and processes for the representation of individuals, NGOs and civil society at large” in the working groups (*Guidelines for civil participation*, par. 28.).

39. NGOs also have an important watchdog role to play in the process of policy implementation, and therefore it is incumbent on member States to refrain from any measures which would impede or prevent NGOs from performing that role.<sup>41</sup>

### ***Proportionality***

40. In order to ensure effective participation of NGOs, it is also deemed critical that the overall efforts and resources invested by public authorities are *proportional* to the objective(s) consultations seek to accomplish as well as the nature of the outstanding issues at stake. It is noted in the *Guidelines for civil participation* that “public authorities should seek to avoid unduly burdening individuals, NGOs and civil society in the process of consultations”, and that the scope and method of consultations “should be commensurate with the issue at stake.” (*Guidelines*, paras. 12. and 17.).<sup>42</sup>

### ***Enabling environment for NGOs***

41. In addition to the foregoing principles, the development of an enabling legal and institutional environment of NGOs and its fair and consistent implementation is also deemed essential, in order for NGOs to play an effective role in policy development.<sup>43</sup> As stated in the *Code of good practice*:

To ensure that the essential contributions of NGOs are enshrined in the political decision-making process without discrimination, an enabling environment is required. Conditions of an enabling environment include the rule of law, adherence to fundamental democratic principles, political will, favourable legislation, clear procedures, long-term support and resources for a sustainable civil society and shared spaces for dialogue and cooperation. These conditions allow for a constructive relationship between NGOs and public authorities built on reciprocal trust and mutual understanding for *participatory democracy*.<sup>44</sup>

42. The foregoing statement is echoed in the *Recommendation CM/Rec (2018)11* of the Committee of Ministers to member States *on the need to strengthen the protection and promotion of civil society space in Europe*. The Recommendation calls on the member

---

<sup>41</sup> Parliamentary Assembly of the Council of Europe, *New Restrictions on NGOs Activities in Council of Europe member States*, Doc. 14570 07, June 2018, [https://www.ecoi.net/en/file/local/1434971/1226\\_1528869578\\_document.pdf](https://www.ecoi.net/en/file/local/1434971/1226_1528869578_document.pdf)

<sup>42</sup> See also COMMUNICATION FROM THE COMMISSION, *The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking* {COM (2018) 490} {COM (2018) 491}, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52018DC0703>. European Commission, *Better Regulation Guidelines*, Chapter I.

<sup>43</sup> *Guidelines on Civil Participation*, par. 3. item b.). The minimum standards with regard to the legal framework for NGOs which the member States should adhere to are set out in *Recommendation CM/Rec 2007(14)*.

<sup>44</sup> *Code of Good Practice*, Chapter III.iii.

States to ensure an enabling legal framework for NGOs, consistent with international law and standards, as well as to ensure that:

Legislation, in particular on freedom of association, peaceful assembly and expression, is drafted and applied in conformity with international human rights law and standards and, where appropriate, seek advice from the Commissioner for Human Rights, the Venice Commission and the Expert Council on NGO Law of the Conference of International Non-Governmental Organisations and other bodies of the Council of Europe.<sup>45</sup>

43. Similarly, the *Joint Guidelines on Freedom of Association* provides that “legislation that affects the exercise of the right to freedom of association should be drafted with the purpose of facilitating the establishment of associations and enabling them to pursue their objectives. It should also be drafted with sufficient clarity and precision so as to enable the legislation’s correct application by the relevant implementing authorities” (*Joint Guidelines*, par. 20.).

#### IV. Application of the principles facilitating participation of NGOs

44. This section deals with specific issues related to the application of principles elaborated in Chapter III. It discusses examples as to how those principles have been incorporated in the pertinent regulation and practice of the member States, with a view of assessing the merit of various national policy approaches governing participation of NGOs. For ease of reading, issues at stake are discussed in the main text whereas country specific examples are referenced in the footnotes.

##### *Open and inclusive participation*

45. *Openness*. Open and transparent access to information pertinent to policy development is transposed in a national legislation through a requirement that a public authority provide “enough information to ensure that those consulted understand the issues and can give informed responses”.<sup>46</sup> It might also require a *pro-active approach* of a public authority in reaching out to the stakeholders directly and furnishing pertinent information to them. This would particularly be the case with respect to consultation on complex issues involving a significant number of stakeholders.<sup>47</sup>

---

<sup>45</sup> Recommendation, I. item a. and b.

<sup>46</sup>United Kingdom (U.K.), *Consultation Principles* (2018) (C.) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/691383/Consultation\\_Principles\\_1.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles_1.pdf)

In Italy ministries are required to publish twice a year a 6-month legislative programme, highlighting planned RIAs and consultations. The programmes are to be posted on the central government website and the website of individual ministries. See OECD, *Better Regulation: Italy*.

<https://www.oecd.org/gov/regulatory-policy/better-regulation-in-europe-italy.htm>.

<sup>47</sup> The U.K. *Consultation Principles* (2018) provides that the government should ensure that all target groups are “aware of the consultation and can access it” (F.). See also the 2017 *Rules on Consultation in Legislative Drafting of the Council of Ministers of the Bosnia and Herzegovina* (BiH *Rules on Consultation*) which provides that the Government’s draft strategic plan (mid-term programme and strategic documents) as well as a draft law and a normative act which is subject to consultation is disseminated electronically to interested



46. The foregoing efforts can be facilitated by introducing a government's online platform (eGovernment) as a focal point for dissemination of information pertinent to consultation. A comparative study on participation, which included twenty-one member States<sup>48</sup>, revealed that most of the countries surveyed have already developed such a platform.<sup>49</sup>
47. In addition, it would be important that open access to pertinent information is ensured at the *outset* and *throughout* all stages of policy development. This would allow for NGOs' voice to be heard not only during a drafting process, but also in process of setting policy priorities. Furthermore, it would be necessary to ensure *timely* access to information pertinent to policy development. This pertains in equal measure to consultation on a draft annual legislative plan<sup>50</sup> as well as consultation on a draft law, a regulation, a strategy and other policy document. The latter entails timely access not only to a draft document and its explanatory note, but also to pertinent supporting documents, including the plan of a public debate, the report on *ex-ante* regulatory impact assessment (RIA), the prior versions of a draft and the comments received on a draft during the process of horizontal and vertical consultations (par. 60.).<sup>51</sup>

---

parties registered on the web platform *eConsultations*, in addition to being posted on the responsible public authority's website (Art. 7. Par. 1, item c.). Once a draft is furnished in the system, the design of the platform allows for its automatic dissemination to e-mail addresses of the registered users (<https://ekonsultacije.gov.ba>).

<sup>48</sup> United Kingdom, France, Ireland, Germany, Finland, Poland, Czech Republic, Hungary, Estonia, Latvia, Lithuania, Romania, Bulgaria, Belgium (Flanders), Croatia, Slovenia, Macedonia, Serbia, Bosnia and Herzegovina, Montenegro, and Moldova.

<sup>49</sup> Centre for Cooperation, Service, Cooperation and Development of NGOs (CNVOS), *Public Participation in Decision Making Process: International Analyses of the Legal Framework with a Collection of Good Practices* (2014), Ljubljana, p. 59, [http://balkancsd.net/old/images/PUBLIC\\_PARTICIPATION\\_IN\\_DECISION\\_MAKING\\_PROCESS\\_comparative\\_analysis\\_December\\_2014\\_CNVOS.pdf](http://balkancsd.net/old/images/PUBLIC_PARTICIPATION_IN_DECISION_MAKING_PROCESS_comparative_analysis_December_2014_CNVOS.pdf).

<sup>50</sup> See BiH *Rules on Consultation* which provides that a draft annual *plan on normative activities* shall be posted on the web site of a responsible public authority at least 15 days before consultation on the draft annual plan is scheduled to commence (Art. 6(4), in connection with Art. 7(2)).

<sup>51</sup> See the 2003 *Romanian Law no. 52/2003 on Decisional Transparency in Public Administration*, as amended in 2013 (*Law no. 52/2003*) which provides that the responsible public authority shall announce consultation on a draft "normative act" (an act issued or adopted by a public authority, with general applicability) no later than 30 days before it is scheduled to be submitted to the government for consideration (Art. 3.a.), and shall post on its web site the draft and necessary supporting documents, including the explanatory note, the result of *ex-ante* analyses, and the details of the consultation plan/public debate, including public meetings as well as rules governing providing comments in writing (Art. 7(2)). The information on a public meeting shall be displayed at the public authority's headquarter, posted on its website and forwarded to the media at least 3 days before the meeting (Art. 8(1) b). Within 10 calendar days after the conclusion of public debate, a final draft of the normative act, along with the supporting documents, including the prior versions of the draft, the minutes of the public debate, the written comments to the draft received, and the report on public debate, shall be posted on the website and made available at the headquarter of the responsible public authority (Art. 7(10) d). The U.K. *Consultation Principles* (2018) provides that: "consultations should be published on gov.uk." (H.). The *Finnish Act on the Openness of Government Activities* (1999) provides that, as a general rule, government documents, including preparatory work on draft regulations, should be made available to the public as soon as they are fit for comments. Recommendations on ministries for effective consultation are set out on the government's *kansanvalta* website and include the publication of individual comments and their comprehensive summary, including those which were not

48. However, the *quality* of the published documents and information provided also matters. Thus, a draft policy document should be written in plain and concise language and the same principle should apply to the supporting documents to the extent possible, in order for NGOs to be able to comprehend fully issues at stake and provide informed feedback.<sup>52</sup>
49. *Inclusiveness*. As a rule, an inclusive participation in policy development entails that consultation should be open to all interested parties, including NGOs, civil society at large, businesses and individuals that have interest to participate in consultation.<sup>53</sup> In addition, *international NGOs* as well as *multilateral organisations* should also be recognised as legitimate stakeholders in this process.<sup>54</sup> However, the principle of inclusiveness does not necessarily entail that consultation should be open to all interested parties at all stages of policy development. Such all-encompassing approach might give rise to the issue of *proportionality* and might not be reflective of the nature of the outstanding issues at stake, as well as the underlying goals consultation at a particular stage of policy development purports to serve (paras. 68.-72.).
50. *Non-discrimination*. A non-discrimination requirement mirrors the requirement for inclusiveness and entails the commitment of a public authority to “consider how to tailor consultation to the needs and preferences of particular groups, such as older people, younger people or people with disabilities that may not respond to traditional consultation methods”.<sup>55</sup> This may require specific policy measures, such as providing financial and capacity building support to associations of persons with disabilities and

---

incorporated in a draft, as well as the rationale for not including those comments in a draft. See OECD, *Better Regulation in Europe: Finland*, (2010), p. 74.

<https://www.oecd.org/gov/regulatory-policy/45054477.pdf>.

<sup>52</sup> See U.K. *Consultation Principles* (2018): “Use plain English and avoid acronyms. Be clear what questions you are asking and limit the number of questions to those that are necessary. Make them easy to understand and easy to answer. Avoid lengthy documents when possible and consider merging those on related topics” (A.).

<sup>53</sup> See the *Serbian Law on the Planning System* (2018), which sets out that “interested parties” in policy development consultation are deemed legal and natural persons that have interest to participate in the process (Art. 2, Par. 1, item 15.). In *Finland*, it is an established practice that ministries must ensure that they obtain or hear opinions regarding a draft law on “a large scale”. Target groups likely to be affected by a proposed law must be given a chance to express their views, and “lack of time must not be a pretext for neglecting this procedure”. OECD, *Better Regulation in Europe: Finland*, p. 74.

<sup>54</sup> See the *BiH Rules on Consultation* (2017) which, in addition to providing a broad definition of “interested public”, specifically recognise *international organisations* as a stakeholder in consultation (Article 2, Par. 1, item a). The *Serbian Regulation on Good Practices in Consultation in the Drafting of Laws and Other Legislative Acts* (2019) provides that the process of consultation should put on equal footing all recognised groups and individuals having differing approaches as to how the issues at stake should be resolved in a legislation (Art. 2, par. 3).

<sup>55</sup> UK *Consultation Principles* (2018), (F.). See also the *Serbian Guideline on Participation of NGOs in Working Groups Commissioned with Preparation of Draft Normative Acts and Policy Documents* (2020) which provides that the competent public authority may appoint an NGO representative in a working group, observing the principles of *equality*, *non-discrimination* and *gender balance*. The Guideline makes specific references to the *Recommendation 2003(3)* of the Committee of Ministers to member states *on balanced participation of women and men in political and public decision-making* (Chapter II. items 8) and 9)).

other groups that may not be able to respond to traditional consultation methods, as well obliging public authorities to ensure access for persons with disabilities to public premises, including those in which public meetings are held.<sup>56</sup>

51. In some instances, a non-discrimination requirement may also entail a public authority's commitment to the protection of *personal data* of stakeholders that are otherwise deemed *stigmatised* or *vulnerable*, should they seek such protection. This issue may particularly arise with respect to consultation on a draft law or a regulation whose subject matter is controversial or polarising (e.g. legal recognition of a union between LGBT persons, child adoption by such a union, etc.), and should be considered against the established practice of the results of consultation being accessible to public (par. 54.). In such instances, participation in consultation might incur private risks (e.g. stigmatisation by a family or community, threats to physical security) as well as professional risks (e.g. termination of an employment contract, discrimination at work place). The practice of using a government's online platform as a central tool for consultation and its appropriate design—so that it ensures personal data protection, should a registered user wish so—can mitigate those risks.<sup>57</sup>

### ***Trust***

52. The practice of signing a framework agreement<sup>58</sup> or a memorandum on collaboration,<sup>59</sup> setting out general principles of collaboration between a government and NGOs as well as their respective commitments towards public policy development, may facilitate the process of building trust between the two parties.
53. In addition, building trust entails that NGOs are provided not only access to pertinent information, but are also given sufficient time to provide comments on issues at stake—and that a public authority is obliged to provide feedback on comments received. A

---

<sup>56</sup> Some countries chose to address the issue of equality, including the equality of persons with disabilities, in a comprehensive fashion. See, for example, the *UK 2010 Equality Act* which envisages an array of policy measures geared at facilitating the life and social inclusion of persons with disabilities, which also impact positively on their ability to participate in policy development.

<sup>57</sup> For example, the BiH Council of Ministers' platform *e-Consultations*—recognising that participation is a right, rather than a duty—allows an interested party who seeks to register on the platform, to freely choose his or her user name and does not require a disclosure of any personal data for participation in consultation.

<sup>58</sup> See the *Agreement on Collaboration between the Council of Ministers of Bosnia and Herzegovina and Non-Governmental Organisations* (2017 – *BiH Agreement on Collaboration*) which provides that “by virtue of signing or adhering to the signed Agreement, a non-governmental organization, or an umbrella organization, demonstrates its commitment to collaborate with the Council of Ministers on issues within the jurisdiction of the Council of Ministers, as defined by the Constitution and law of Bosnia and Herzegovina” (Art. 2(2). This particularly pertains to the joint commitment of the two parties to collaboration in building prosperous, open and democratic society in BiH and advancing a full membership of BiH in the European Union (Art. 4). The Agreement recognises different however complementary role of representative and participatory democracy in building a just, open, pluralistic and democratic society (Art. 5(2), based on the common principles of collaboration, including openness, equality and sound policy arguments (Art. 5(3)).

<sup>59</sup> Thus, a *Memorandum on Collaboration* (2009) signed between the *Montenegrin* Ministry of European Integration and NGOs states that the two parties will collaborate towards advancing the common goal of the European Union membership, based on the principles of partnership, transparency, responsibility, mutual exchange of information and independence of NGOs, <http://cedem.me/activities/52-memorandum-o-saradnji>

comparative study on participation in Europe published in 2014 revealed that the minimum deadline for NGOs to provide comments on a draft law and a regulation ranges between ten days<sup>60</sup> and eight weeks.<sup>61</sup> The study also revealed that providing feedback by a public authority on the comments received on a draft law and a regulation is common in most of the countries surveyed, whether due to the legal requirement<sup>62</sup> or the established practice/guidelines.<sup>63</sup>

54. There might also be instances in which a public authority should pursue a pro-active approach in communicating to the target groups and other interested parties the underlying reasons for their comments not being accepted in the final draft. This would be particularly justified with respect to a draft law and a regulation addressing complex, controversial and polarising issues.<sup>64</sup>
55. It would also be important for building trust that a report on a public debate, summarising key feedback received in consultation and the rationale of a government's final position on outstanding issues, is timely posted on a government's central portal and a web site of the responsible public authority, in addition to individual comments received.<sup>65</sup>
56. The practice of preparing an *annual report on consultation*, with specific recommendations for the line ministries and other public authorities as to how to improve the consultation process, and giving NGOs an opportunity to provide feedback on a draft report, may also contribute to the building of trust between the two parties.<sup>66</sup> The same pertains to the practice of including NGOs in a government-sponsored capacity building programmes.<sup>67</sup>

### ***Accountability and transparency***

57. Participation in policy development entails accountability from both NGOs and public authorities as well as transparency at all stages of policy development. As for the former, this would require an explicit or tacit agreement between NGOs and government as regards their respective responsibilities and commitment in the process of policy development. On the side of the government, that commitment may entail developing an

---

<sup>60</sup> E.g. Romania.

<sup>61</sup> E.g. Finland.

<sup>62</sup> E.g. France, Czech Republic, Croatia, Slovenia, Macedonia, Montenegro, Serbia.

<sup>63</sup> E.g. England, Ireland, Finland, Estonia. CNVOS, *Public Participation in Decision Making Process: International Analyses of the Legal Framework with a Collection of Good Practices*, p. 59.

<sup>64</sup> OECD (2018), *Better Regulation in Europe: Finland*, p. 74.

<sup>65</sup> U.K. *Consultation Principles* (2018) provides as follows: "publish responses within 12 weeks of the consultation or provide an explanation why this is not possible. Where consultation concerns a statutory instrument publish responses before or at the same time as the instrument is laid, except in very exceptional circumstances (and even then publish responses as soon as possible)" (J.).

<sup>66</sup> A joint programme of capacity building related to consultation, prepared by the Government of Montenegro and the Center for Development of NGOs (CRNVO) at [https://epale.ec.europa.eu/sites/default/files/finalbrosura\\_nvo\\_2-1.pdf](https://epale.ec.europa.eu/sites/default/files/finalbrosura_nvo_2-1.pdf)

<sup>67</sup> BiH Ministry of Justice at <http://www.mpr.gov.ba/aktuelnosti/vijesti/default.aspx?id=5983&langTag=bs-BA>. The Montenegrin Office for Collaboration with NGOs at [www.gov.me](http://www.gov.me)

enabling framework for NGOs and public participation in policy development, ensuring its consistent implementation through capacity building efforts, and strengthening institutional mechanisms of collaboration with NGOs. A commitment on the side of NGOs may entail strengthening their capacity to participate in the process of evidence-based policy development, supporting a government in efforts to develop an enabling framework for NGOs and public participation, and managing public and other funds received in a responsible and transparent fashion.<sup>68</sup>

58. On the other hand, the requirement for transparency entails that NGOs commit to timely informing “public and the decision makers as to whose interests they represent” in the process of policy development.<sup>69</sup>

### *Independence*

59. The principle of independence of NGOs in policy development stems from the very nature of NGOs (par. 13.) and is reflective of the primary obligation of a member State with respect to Article 11 of the ECHR—that is, a duty not to interfere with freedom of association.<sup>70</sup>
60. The fact that the rules governing consultation with NGOs and other non-state actors are distinct from the rules governing *horizontal* consultation—which the responsible public authority conducts with designated line ministries and other state agencies, and *vertical* consultation—which the responsible public authority conducts with provincial and municipal authorities, is also reflective of the independence of NGOs, whose role in consultation is recognised to be different from the one entrusted to public authorities.<sup>71</sup>

---

<sup>68</sup> See the BiH *Agreement on Collaboration* (2017) which spells out specific responsibilities of the government and NGOs in policy development. The Agreement commits the Government to continue its activities on the creation of an enabling environment for civil society development in BiH; to further strengthen the institutional mechanisms for collaboration with NGOs; to ensure an ongoing capacity building efforts; to establish an advisory body on issues pertinent to collaboration with NGOs; to prepare a strategy for the development of an enabling environment for civil society; to continue its activities geared at developing a transparent system of public financing of programmes and projects of NGOs, which will contribute to efficient development and implementation of public policies within the jurisdiction of the government; to involve NGOs in the process of European integrations, and in particular to collaborate with NGOs in the promotion of the significance and role of European integrations; and to continue activities on strengthening collaboration with NGOs in the process of programming and utilization of the European Union pre-accession financial assistance (Art. 6.). On the other hand, the Agreement commits signatory NGOs to continue activities geared at strengthening their capacity to participate in the process of policy development, thus contributing to their quality and successful implementation; to collaborate with the Government in further development of institutional mechanisms and instruments of collaboration; to manage public and other funds received in transparent fashion and shall develop self-regulatory mechanisms which encourage transparent use of those funds; to support the Government in meeting the conditions set out for a full membership in the EU and bringing the European integrations closer to citizens; and to promote the interests of BiH in the process of European integrations (Art. 7.)

<sup>69</sup> The BiH *Agreement on Collaboration* (2017), Art 7(2).

<sup>70</sup> *Ramazanov and Others v. Azerbaijan*, Application no. 44363/02, judgment of 1 February 2007.

<sup>71</sup> In *Serbia*, for example, separate rules governing public, horizontal and vertical consultations, respectively, are set out in the Law on State Administration (2005, as amended), the Law on the Planning System (2018), The Law on the Local Self-Government (2007 as amended), the Government’s Rule Book (2006, as amended), and the Regulation on the Methodology of the Management of Public Policies (2019).

### *Participation at early and key stages of policy development and its implementation*

61. The requirement for early participation in policy development mirrors the requirement for *disclosure* and *access* to information pertinent to policy development. Firstly, NGOs should have an opportunity to engage in consultation on a government's draft plan of legislative activities and other policy initiatives, thereby ensuring open and inclusive process of setting *policy priorities*.<sup>72</sup>
62. In addition, NGOs should be consulted during the preparation of *ex-ante* RIA, in particular if they are deemed a stakeholder (target group) i.e. if it is expected that rights and legal interests of NGOs will be directly or indirectly impacted by a new policy or a policy change; consultation at this stage of policy development facilitates mapping out possible policy options at hand.<sup>73</sup>
63. Introducing innovative methods of consultation with NGOs and other stakeholders at early stages of policy development at the state and local level, such are *participatory budgeting*,<sup>74</sup> *policy labs*<sup>75</sup> and *co-design*<sup>76</sup> can also contribute to solving complex social problems—and is recognised as an emerging practice in consultation.

---

<sup>72</sup> See the BiH *Rules on Consultation* (2017) which obliges institutions to conduct consultations with “interested public” (NGOs and other non-state actors) in the process of preparation of a draft proposal of annual legislative activities. The purpose of these consultations is threefold: 1) to facilitate a decision on setting legislative priorities; 2) to test different approaches in the development of laws and other regulations; and 3) to facilitate determination as to whether some of the policy goals are better suited to be accomplished by other, non-legislative policy tools (Art. 6 (1) (2), in connection with Art. 2(1), item a). In *Finland*, the government's web site (otakantaa.fi - “Have your say”) allows public authorities to engage in consultation with NGOs and other stakeholders on issues related to mapping out the needs and ideas for new policies. Stakeholder engagement is possible through comments and facilitated by tools like polls and chats (<https://www.oecd.org/gov/regulatory-policy/FIN-Website-Early-Stage-Consultations.pdf>). Similarly, in *Austria*, an interactive crowdsourcing platform was launched in 2018 to provide the public with an opportunity to express their views on planned government reforms, before it proceeds with specific legislative activities (<https://www.oecd.org/gov/regulatory-policy/austria-country-note-regulatory-policy-2018.pdf>).

<sup>73</sup> OECD (2020), *Regulatory Impact Assessment*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris, p. 11. <https://doi.org/10.1787/7a9638cb-en>. Examples include Czech Republic, Slovenia (<https://www.oecd.org/gov/regulatory-policy>), Bosnia and Herzegovina, Serbia and Croatia.

<sup>74</sup> Participatory budgeting is a practice of including citizens and NGOs in the decision making process at the local level (cities, municipalities). In some cases, it implies a whole administrative structure feeding on grassroots democracy, which defines budget priorities for the local neighbourhood or district (e.g. Cologne, Berlin in Germany). In other cases the city allocates part of the budget to projects which are decided by the citizens: the citizens and NGOs can suggest projects, and then they can vote in their favourite ones (e.g. Lisbon Participatory Budget), <https://www.eukn.eu/policy-labs/policy-lab-for-cy-public-participation-in-the-development-process/participatory-budgeting/>.

<sup>75</sup> E.g. Austria, Denmark, Finland, France, Greece, Ireland, the Netherlands, Italy, Poland, Portugal, Spain. Policy Labs are dedicated teams, structures, or entities focused on designing public policy through innovative methods that involve all stakeholders in the design process. Practitioners describe these efforts as design or evidence-based approaches, which places the end users at the center of each stage of the policy-making process. After policy proposals are formulated, they are tested and validated through various forms of experimentation. In addition to co-creating and re-imagining policies and public programs, Policy Labs also undertake a wide range of activities such as preparing prospective studies, organizing creativity workshops, or instilling a sense of empowerment in civil servants through training and other learning activities. The majority of Policy Labs are in and of themselves experimental initiatives undertaken by members of a public

64. Participation of NGOs representatives in a *working group* commissioned with preparation of a draft law, a regulation, a strategy and other policy document would also be consistent with the requirement for participation at early stages of policy development; this might be particularly justified with respect to laws and strategic documents whose preparation mandates full *ex-ante* RIA.<sup>77</sup> Difficulties may arise however in ensuring the necessary flexibility<sup>78</sup> of the rules governing NGOs participation in a working group, insofar as those rule fall short of providing a level filed for participation of *all civil stakeholders*, rather than NGOs only.<sup>79</sup> The OECD country report on Finland highlights challenges if the principle of level filed is not fully observed.<sup>80</sup>

---

administration, frequently with the support of external designers and experts in public innovation. Each Policy Lab is unique in terms of the organization, structure, objectives, and programs. See The European Commission Joint Research Center (2016) *Public Policy Labs in European Union Member States*, <https://publications.jrc.ec.europa.eu/repository/bitstream/JRC102665/final%20report%20w%20identifiers.pdf>

<sup>76</sup> Co-design as a method of consultation is based on premise that traditional chain of public policy design - ideate, design, implement - based on an informed (top-down) vision is no longer effective in promoting, launching and facilitating the introduction of innovation by public policy instruments. It is a tool for creatively engaging citizens and stakeholders, including NGOs, to find solutions to complex problems. It is being used to generate more “innovative ideas, ensure policies and services match the needs of their users, achieve economic efficiencies by improving responsiveness, foster cooperation and trust between different groups, meaningfully engage the ‘hard to reach’, achieve buy-in and support for change, and build social capital”, <https://www.ippublicpolicy.org/file/paper/593a68ec5be3c.pdf>.

<sup>77</sup> See the *Serbian* Guideline on Participation of NGOs in Working Groups Commissioned with Preparation of Draft Normative Acts and Policy Documents (2020) which provides that the competent public authority may appoint an NGO representative in a working group pursuant to the principle of proportionality – and that NGO participation would particularly be justified with respect laws and strategic documents which would require full *ex-ante* RIA (Chapter II, items 5) and 6)). The OECD Report on *Finland* notes that “for a major legislative project, the Council of State or individual ministries may set up an ad hoc committee at the start of the process, chaired by the government. This brings together a wide range of interests- civil servants, external stakeholders (business, consumer and other interests), experts and political decision-makers for the duration of the drafting process. The composition of committees is at the government’s discretion”. OECD, *Better Regulation: Finland*, p. 75.

<sup>78</sup> I.e. a government should have some margin of discretion in deliberation as to whether it needs outside members in a particular working group and what kind of expertise or representation it seeks from outside members, in particular given the other stages of policy development in which consultation with target groups and public is mandated by law or the established practice. This deliberation may depend on a number of factors, including internal human resources, the nature of policy issues involved (simple, complex, controversial) and their overall significance for public.

<sup>79</sup> See the *Montenegrin* Regulation on the Appointment of NGO Representatives in Working Groups Commissioned by Public Authorities and the Conduct of Public Debate in the Preparation of Laws and Strategies (2018) which sets out onerous criteria for participation of a NGO representative in a working group, including the permanent residence requirement, and obliges the competent public authority to appoint in a working group commissioned with preparation of a draft law and a strategy an NGO representative whose public candidacy is supported by most votes of qualified NGOs. The competent public authority shall have a discretion to decide on a NGO representative only in case of split voting i.e. if two or more suggested candidate have received equal number of votes (Arts. 3-9). The mandatory NGO participation requirement in a working group, however, does not pertain to the other civil stakeholders (individual experts, consumers, universities, etc.).

<sup>80</sup> The OECD report on *Finland* states that “consultation continues to favour organised groups. The participative system, based on a strong network of relationships between ministries and key stakeholders, works very effectively at one level, delivering agreement on policies and protecting policies from unravelling

65. Furthermore, it is either an established practice<sup>81</sup> or a legal requirement for NGOs to be consulted on a draft law and a regulation.<sup>82</sup> The practice of publishing a consultation plan outlining the outstanding issues—which in the view of the competent public authority particularly merit further consideration—can contribute to keeping consultation focused and improving the quality of the feedback received.<sup>83</sup> It is also deemed the best practice for strategic and other policy documents to be subject to mandatory consultation, given their overreaching influence on social development.<sup>84</sup>
66. It is considered the best practice for a parliament to also have an opportunity to consult with NGOs—and for NGOs to raise their concerns—with respect to a draft law which is tabled with a parliament; these consultations usually take place in the form of *public hearing*. However, consultation at this late stage is likely to have limited impact on the outcome of the consultation process. This requires NGOs to be strategic in public hearings and focus on addressing the most pressing issues at stake.<sup>85</sup>
67. NGOs should also be consulted in the process of *implementation* of policy documents (laws, strategies, regulatory plans) as well as their evaluation, thereby providing the valuable feedback about the overall impact of their implementation and facilitating a public authority’s determination as to whether further policy intervention is warranted (revisions in policy instruments, additional capacity building programmes, etc).<sup>86</sup>

---

when adopted and implemented. But it may be blocking efforts at a more inclusive approach to rule making. By the time a draft law comes out of the process there is less scope for outsiders to influence outcomes. The system as a whole may be losing valuable inputs and the innovative views and ideas which outsiders can bring to policy making”. The report further notes that “less organised or influential groups such as taxpayers, consumers, the unemployed, and environmental interests can lack access to policy-making processes”, and that membership in a working group (‘committee membership’) is determined by the minister, and that there is a risk that “this mechanism will operate in a way that benefits organised interests and regular or favoured interlocutors of government, at the expense of less organised interests”. OECD, *Better Regulation: Finland*, pp. 72-73.

<sup>81</sup> E.g. France (<https://www.oecd.org/gov/regulatory-policy/france-country-note-regulatory-policy-2018.pdf>).

<sup>82</sup> E.g. Austria, Belgium, Czech Republic, Denmark, Finland, Estonia, Germany, Ireland, the Netherlands. In Greece consultation is mandatory only with respect to laws (<https://www.oecd.org/governance/oecd-regulatory-policy-outlook-2018-9789264303072-en.htm#:~:text=Laws%20and%20regulations%20govern%20the,important%20tools%20of%20public%20policy.&text=Finally%2C%20it%20identifies%20areas%20where,innovative%20approaches%20to%20better%20regulation>).

<sup>83</sup> See Art. 7(2), *BiH Rules on Consultation* (2017).

<sup>84</sup> It is a good practice as regards policy documents in the *Netherlands* (<https://www.oecd.org/gov/regulatory-policy/netherlands-country-note-regulatory-policy-2018.pdf>) and a legal requirement in *Serbia* (Law on the Planning System (2018)) and *Montenegro* (Regulation on the Appointment of NGO Representatives in Working Groups Commissioned by Public Authorities and the Conduct of Public Debate in the Preparation of Laws and Strategies (2018)).

<sup>85</sup> OSCE, *Public Hearing Manuals: Committee Consultation with the Public*,

<sup>86</sup> For example, the Danish Business Forum for Better Regulation monitors the implementation of national regulation impacting on business, <https://www.oecd.org/gov/regulatory-policy/denmark-country-note-regulatory-policy-2018.pdf>



## ***Proportionality***

68. There are several guiding and inter-twined rules underpinning the application of principle of proportionality in the member States. Firstly, consultation should not be conducted for the sake of it, but rather should support specific policy goals.<sup>87</sup>
69. In addition, consultation should not be conducted about issues that are settled, but rather about the outstanding and contentious issues.<sup>88</sup>
70. Furthermore, while the guiding principle is that the consultation process should be open, same stages of policy development might warrant *targeted consultation* i.e. consultation with key stakeholders (target groups) only, rather than with all interested parties (i.e. those that have professional or other interest to participate in consultation). This might be particularly the case with respect to the preparation of *ex-ante* RIA.<sup>89</sup>
71. However, conducting open consultation on a *draft report* on *ex-ante* RIA would not necessarily be inconsistent with the principle of proportionality, in particular if a draft law or a strategic document requires preparation of full RIA.<sup>90</sup>
72. Moreover, the scope, the length, and the methods of consultation should correspond to the nature of issues at stake and the underlying role of consultation at a particular stage of policy development,<sup>91</sup> as well as the particular features of stakeholders participating in consultation.<sup>92</sup>

## **Conclusion**

73. Participation of NGOs is a common feature of policy development in the member States, although the *scope* and *methods* of participation as well as *stages* of policy development which are open to consultation may vary to some degree. The review identifies several

---

<sup>87</sup> U.K. *Consultation Principles* (2018), (B.).

<sup>88</sup> Ibid.

<sup>89</sup> Ibid. (F).

<sup>90</sup> In some countries (e.g. Serbia), it is obligatory to conduct consultation on a draft report on *ex ante* impact assessment. .

<sup>91</sup> Thus, the purpose of consultations on a draft *annual legislative plan* is to receive feedback from NGOs and other interested parties, usually in the form of comments in writing, about *policy priorities*. It is a common practice for those consultations to be open to all interested parties and to be facilitated by the use of the online platforms and other online tools. On the other hand, the purpose of consultations in the preparation of the *ex-ante* RIA is to gather additional *information* and *test* various policy approaches in addressing issues at hand. These consultations particularly target *stakeholders* i.e. those that are likely to be impacted, directly or indirectly, by a new policy or a policy change, and are mostly conducted through focus groups, semi-structured interviews, panels, and round tables. The purpose of the consultations on a draft law, a regulation and a strategy is to seek inputs from the *public at large* in order to improve the *quality* of a draft document. At minimum, they include seeking feedback in writing which can be provided on a government's central online platform and e-mail address of the competent public authority, but may also include public debates, round tables, etc.

<sup>92</sup> U.K. *Consultation Principles* (2018) (E.) (F.)

*key requirements*, in order for the NGOs expertise and experience to be fully utilised in the *process* of public policy development.

74. *Firstly*, there is a need to take on a *holistic approach* with regard to NGOs participation. This requirement entails that participation is planned at the *very outset* of policy development i.e. at the stages of setting *policy agenda* and *ex-ante* RIA preparation, respectively. There are clear benefits of such an approach, including facilitating the process of identifying the policy priorities as well as the policy options to address those priorities, and strengthening the stakeholders' ownership over the entire policy cycle.
75. *Secondly*, the process of consultation needs to be *open* so that all pertinent information is readily and timely made available by public authorities from the very outset of the process of policy development. This requirement facilitates *informed* and *evidence-based dialogue* on issues at stake between NGOs, public authorities and other stakeholders.
76. *Thirdly*, in order to fully unlock the civic potential, participation in policy development needs to be *inclusive* i.e. open to all interested parties: NGOs, civil society at large, businesses and individuals. However, the principle of inclusiveness does not necessarily entail that consultation should be open to all interested parties at all stages of policy development. Such all-encompassing approach might give rise to the issue of *proportionality* and might not be reflective of the nature of the outstanding issues at stake as well as the underlying goals consultation at a particular stage of policy development purports to serve.
77. *Fourthly*, the requirement for inclusiveness mirrors the requirement for *non-discrimination*. In this respect, public authorities would need to consider how to tailor consultation to the needs and preferences of particular groups, such as older people, younger people or people with disabilities that may not be able respond to traditional consultation methods. *Representative NGOs* are likely to play a key role in ensuring that the voice of those groups is heard in policy development.
78. The review also suggests that a government's *central online platform* (eGovernment) has emerged as a focal point of consultation with NGOs and other stakeholders. This development has the potential of significantly reducing the costs of consultation while improving the overall quality of the process. The emerging practice of establishing a system of *quality control* of consultation (stakeholders' engagement) is also thought to contribute to the overall quality and consistency of consultation.<sup>93</sup>
79. In addition, some member States have also made progress in introducing innovative digital tools (policy chat platforms, interactive crowdsourcing platforms), in order to encourage policy dialogue and participation at early stages of policy development. These tools are particularly deemed useful in order to encourage young population and youth

---

<sup>93</sup> Some member States (e.g. BiH, Italy, Latvia, Luxemburg, Slovakia) already have such a system in place, <https://www.oecd.org/governance/oecd-regulatory-policy-outlook>

organisations to engage in consultation, given their familiarities with new communication technologies.

80. It should be noted however that without the clear and unequivocal *commitment* of a government towards democracy, human rights and the rule of law no legal framework for consultation and innovative practices could unlock the full potential of participation of NGOs in policy development.