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Public Consultations in Ukraine: Topical Legal Issues

1. Background

Democratic development in modern Ukraine requires fast implementation of European standards on good governance which provide direct public participation in lawmaking, public administration and policy processes. To this end, the national system of public administration has intensified the use of progressive forms of cooperation between the government and society based on the ideas of partnership, transparency and social dialogue. One of these forms is public consultations, focused on ensuring direct participation of citizens in the process of developing regulations, accountability of administration as well as improving the quality and legitimacy of legislative acts.

The institution of public consultations in Ukraine has been developing for nearly a decade. During that time, it has been legally recognised as a part of the rule-making process, the principles of its organisation has been defined and the organisational and procedural aspects of holding such consultations have been determined. Public consultations have been gradually rooted in the rule-making activities of the executive power, spreading its influence across all levels of state administration. Analysis of national practices concerning public consultations shows the growth of their role in Ukrainian political life, as well as an enriching experience of organising and holding the process.

2. Results

As shown by a number of sociological studies, the functioning of public consultations in Ukraine is characterised by their insufficient effectiveness. Organisation of such consultations is inconsistent and unsystematic. Tentative plans of public consultations (the preparation of which is stipulated by current legislation) are developed by no more than two-thirds of central authorities and local state administrations. At the same time, adopted plans often fail to provide for discussing the key political and legislative acts, in-

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cluding concepts, strategies, national programmes, sectoral and regional plans, etc. Besides, most of adopted plans do not specify the subject of public consultation (in particular, they do not represent the title of a disputable legal act, the scope of its regulation or, at least, matters of its development)².

As regards the organisation and conduct of concrete public consultations, there are many problems here as well: the total number of consultations on legislative acts maintained by the executive power is extremely low (according to some sources, the number of such consultations does not exceed ten per year); organisation and holding of public consultations as a rule are carried indirectly (only as public opinion research) instead live discussions involving scientists, practitioners and the general public; information support of public consultations is very poor (websites of many central and local authorities do not contain detailed information about consultations, most of answers to public requests are formalised and not informative; comprehensive reports on consultations and their recommendations are published infrequently³.

The main problem lies in the fact that the public discussion of draft legal acts (as well as the existence of clearly defined requirements for their form and content) does not guarantee taking it into account by state authorities. It is common in the Ukrainian administrative practice that recommendations developed in public consultations are systematically ignored.

According to the results of a poll conducted by the civic initiative “For effective communication between authorities and the public” (Committee of Voters of Ukraine, School of Political Analysis and Analytical Centre “Policy”), over 40% of non-governmental organisations consider the ignorance of public proposals by executive authorities to be the main problem of public consultations in Ukraine⁴.

On the other hand, real influence on authorities’ political activity through public consultations is weak because of the inertia of domestic civic organisations. At present, the main initiators of public consultations are central and local authorities which initiate such consultations because of legislative requirements and not by because of public interest.

Instead, the activity level of non-governmental organisations and other social institutions is very low. Additionally, a considerable part of these institutions focus not on defending the interests, rights and needs of citizens but on promotion of the interests of different political forces, private and

2 *Analiz praktiki diyalnosti strukturnih pidrozdiliv organiv vikonavchoyi vladi, vidpovidalnih za zvyazki z gromadskistyuu // Ofitsiyinyi sayt Tsentru Adaptatsiyi Derzhavnoyi Sluzhbi do Standartiv Evropeyskogo Soyuzu [elektronniy resurs], <http://www.center.gov.ua> (dostep: 5.06.2017).*

3 *Udoskonalennya konsultatsiy z gromadskistyuu. propozitsiyi gromadskosti ta vladi: Finalniy analitichniy zvit*, ed. D. Kovrizhenko, Kyiv: Vseukrayinska Gromadska Organizatsiya “Komitet Vibortsiv Ukrayini” 2012, p. 94–96.

4 *Ibidem*, p. 50.

corporate interests of financial-industrial groups, public officials and local authorities⁵.

Sometimes, such organizations artificially integrate into the public consultation process providing a favourable information background for lobbying decisions. Civic organisations that sincerely defend public interests do not always have sufficient resources (in particular those expert and analytical) to formulate professional and competent proposals suitable for effective implementation. The logical result of this situation is poor quality of recommendations formulated by institutions of civil society. And, obviously, such a state of affairs does not contribute to enhancing the role of public consultations in modern political and legal practice.

The insufficient effectiveness of public consultations is due to many negative factors: non-transparent mechanisms of public administration, high level of corruption, weak government support for public initiatives and many others. However, certainly one of the main obstacles on the way to the development of public consultations in Ukraine is imperfect legal regulation. Today, the main legal act on the organisation and holding of public consultations is the *Order on consultations with the public on the formation and implementation of the state policy, approved by the Cabinet of Ministers of Ukraine on 3 November 2010 № 996*⁶.

At the time, the adoption of this document marked a very important step towards involving a wide public into policy-making and administration processes. The Order defined the aims of public consultations, outlined the range of their participants, systematised their organisational forms, as well as regulated the process of their planning and implementation. Being a complex act, it provided not only for a systemic regulation of the sphere of public consultation but also created a legal basis for building a network of community councils in the executive branch – specialised advisory bodies designed to promote public participation in public policy.

However, with the further establishment of public consultations in national political and administrative practice numerous flaws of the Order became increasingly apparent. In particular, its provisions do not cover a number of state bodies that do not belong to the executive branch of power (Parliament of Ukraine, President of Ukraine, National Council of Ukraine for Television and Radio, the Central Election Commission, etc.). Actually, this is not surprising. As the Order was approved by the government, its performance, a priori, can concern only the executive power system. For the same reason, this Order is merely advisory for all local majors and councils

5 G. Paliy, *Schodo aktivizatsiyi vzaemodiyi organizatsiy gromadyanskogo suspilstva iz organami derzhavnoyi vladi. Analitichna zapiska*, Sayt Natsionalnogo Institutu Stratezhichnih Doslidzhen http://www.niss.gov.ua/articles/881.#_ftn8 (dostep: 5.06.2017).

6 Poryadok provedennya konsultatsiy z gromadskisty z pitan formuvannya ta realizatsiyi derzhavnoyi politiki, zatverdzeniy postanovoyu Kabinetu Ministriv Ukrayini vid 3.11.2010, Ofitsiyiny Visnik Ukrayini 2010, No. 84, p. 2945.

(see: p. 6 Regulation of Cabinet of Ministers of Ukraine 3 November 2010 № 996). Thus, a wide range of issues of cooperation between the public and some state entities remains outside of the legislative field.

Unreasonably wide are the limits of administrative discretion in the field of organisation of public consultations. However, subjects related to the executive power in this process play a dominant role. The fate of the public debate concerning concrete draft legislation to a large extent depends on the executive authority, which alone decides whether to include it into the tentative plan of public consultations. Likewise, it makes the final decision on holding public consultations on civil initiative. In fact, in accordance with the Order, holding public consultations is mandatory only if they are initiated by at least three institutions of civil society. In other cases, the matter rests entirely in the discretion of the executive.

Other weak points of the Order include lack of certainty as regards: the list of participants of public consultations; the scope of their rights and responsibilities; organisational forms of consultations; coordination between state institutions involved in their organisation; mechanism of practical implementation of their results; approaches to calculation of relevant procedural terms; legal consequences of breaking the rules of public consultations.

Furthermore, from the point of view of researchers and practitioners, the Order ignores the specific features of the recent socio-political situation in Ukraine. Under the conditions of Crimea annexation, the military conflict in the east of the state and the rapid growth of internal and external threats to the Ukrainian statehood, there is an objective need for urgent government decisions on vital issues of national security (in particular emergencies, military status, antiterrorist activities, etc.). The Order does not provide for any special procedure for adopting such acts. Nor does it provide for a mechanism (even simplified) of involving the public into the processes of development social, cultural, economic and budgetary decisions of special administrations in the area of anti-terrorist operations.

All of these problems raised the question of adoption of a principally new legal act aimed at improving the socio-political role of public consultations, expanding their practice and increasing their transparency and effectiveness. Now this question is the subject of wide public discussion and a number of national and international initiatives, including the Open Government Partnership adopted on 20 September 2011 at the UN General Assembly⁷. As part of this initiative, Ukraine took the responsibility to develop and adopt legislation aimed at providing comprehensive participation of a wide public in forming and implementing of national policies.

⁷ *Pro initsiativu «Partnerstvo Vidkritiy Uryad», Sayt Koordinatsiyanoi Radi initsiativi «Partnerstvo Vidkritiy Uryad», <http://ogp.gov.ua/content/%d0%bf%d1%80%d0%be-%d1%96%d0%bd%d1%96%d1%86%d1%96%d0%b0%d1%82%d0%b8%d0%b2%d1%83>*.

In order to implement this commitment, the Cabinet of Ministers carried out large-scale measures (discussions, examinations, conferences, etc.) on the development of a draft of a new Law on public consultations. The direct implementation of this project was a task of the Ministry of Justice with active assistance of the OSCE mission in Ukraine and the participation of representatives of central and local government, local authorities, non-governmental organisations, research institutions, law universities, independent experts, jurists and the general public.

The result of united efforts was the draft Law of Ukraine on public consultation (hereinafter the “Draft”), which, after much debate and amendments, was officially presented for public discussion on 26 July 2016⁸. Analysis of this Draft reveals significant progress in improving the legal framework for the organisation and holding of public consultations. Among its most important novelties are the following:

- implementation of mechanisms of cooperation between state authorities and the wide public at all levels of formation and implementation of national policies (national, regional, sectoral, etc.);
- extending the requirements for mandatory public consultation to all power bodies involved in political process, including the President of Ukraine, *Verkhovna Rada* of Ukraine, the National Bank of Ukraine, local authorities etc;
- making the main principles of good governance the basis of public consultations in accordance with European standards;
- recognition of private legal entities and individuals as participants of public consultations and as their initiators (and, pursuant to Article 26 of the Constitution of Ukraine, the right to participate in public consultations offered to not only the citizens of Ukraine but also foreigners and stateless persons);
- definition of some public administrations (including local authorities), not only as consultation organisers but also as stakeholders able to participate in consultations organised by other entities, acting “on the side” of the public;
- determination of the legal status of public consultations’ participants, concretisation of their rights and obligations;
- recognition of only direct forms of public consultations (public discussions and web-consultations), removal of all indirect forms of consultation (exploration of public opinion etc.);
- specification of legal grounds for public consultations;
- improvement of public consultation procedures;

⁸ 26 July 2016 Повідомлення про оприлюднення проекту Закону України «Про публічні консультації», Sayt MInIsterstva yustitsiyi UkraYini <http://old.min-just.gov.ua/51435>.

- introduction of the Stakeholders Information Registry – an open electronic database, containing common information about all subjects who declared their intention to take part in certain public consultations;
- making it mandatory to publish on official websites of the authorities all proposals received from participants of public consultations;
- setting the grounds for urgent lawmaking, proceeding without public consultations (in particular, acts on emergency situations, martial law and antiterrorist measures should be adopted through urgency procedure);
- improving the mechanism of cooperation and coordination between different bodies of power in the field of public consultations;
- outlining the legal consequences of offences against the public consultation order, providing for the responsibility of offenders.

In general, the Draft is characterised by the clarity of its provisions, structural sequence as well as detailed and comprehensive regulation. From this point of view, its development may be considered as a leap change towards European standards of governance.

At the same time, however, the analysis shows that some provisions of the Draft are not as well drafted as it should. To some extent, they are not clear, complete and informative enough.

In particular, the Draft does not outline the scope of rights given to participants of public consultations (it contains only a list of their obligations). Further, as regards these obligations, they apply only to the organisational side of consultations (to “promote participation”, “promote access”, “create organisational conditions”, etc.) and do not provide for a mandatory review of public proposals by authorities. Some information about such obligations can be derived from the Draft provisions, but corresponding requirements are formulated in a non-personal manner, without being tied to particular obligations (“recommendations of public consultations shall be studied and analysed”, “general information about consultation recommendations shall be included in the report” and so on).

The Draft requires that information relating to public consultations be published on official websites of authorities. It should be noted that in the case of many authorities involved in the policy-making process such a mechanism is unlikely to be optimal. After all, to get initial information on certain public consultations, those interested will have to monitor electronic resources of all state entities. Given a great number of such entities as well as lack of monitoring capabilities of public institutions, not every consultation process will get maximum representation.

As it can be seen, the best way to solve this problem is the creation of a single Internet portal, accumulating information on all public consultations planned, organised and held in Ukraine. Moreover, this step will contribute to the creation of the Stakeholders Information Registry – an open database of all subjects interested in taking part in public consultations.

The Draft can hardly be recognised as perfect as regards certain forms of public consultations, such as *public discussion*. Establishing the grounds for public discussion, the Draft does not recognise it as mandatory. To hold or not to hold a public discussion – this question is left to the discretion of the administrative body, which precludes discussing key political issues in an open public dialogue.

Besides, the timing of some steps in the public discussion procedure does not seem rational. In particular, the deadline for the publication of the discussion report (within ten working days after the debates) seems too long. However, the period of announcing the public debate and mailing invitations to the participants (at least three working days before the discussion) is not always sufficient to perform all organisational tasks related to the registration and accommodation of non-residents.

Also, it is difficult to recognise as successful the Draft's provisions on coordination in the field of public consultations. While the authors of the Draft were limited by the fundamental statement that every unit of power should determine a structure or a person responsible for coordination with other entities taking part in public consultation, a specific mechanism (or at least its general "outline") of such coordination is not offered.

In turn, the provisions on liability for violations in the area of public consultations have much "broader" content than it should follow from their primary version. In most cases, they regulate not the questions of liability for violations but the procedure of adopting legal acts in case of such violations (including the procedures of delaying the draft or putting changes into an adopted normative act).

3. Conclusion

It should be noted that this article does not mention all controversial aspects of the Draft. Further consideration and discussion are required of its provisions on the principles of public consultations, implementation of public recommendations, framework of administrative discretion in the decision-making activity and many others. However, given a large number of such aspects (it obviously requires a broader format of research) we confine ourselves to those mentioned above.

It seems more than enough to state the process of developing legal framework necessary for the effective functioning of the institution of public consultations is incomplete. The successful completion of this process requires further Draft development and, in particular, addressing the following points:

- determination of obligation for authorities to account for findings and recommendations of public consultations;

- clear delineation of the scope of future Law on Public Consultations and other legislative acts defining decision-making activity in certain areas or branches of social life;
- specification of the legal status of all actors involved in the process of organising and holding public consultations (including the respective powers of authorities and their responsibilities for the practical implementation of the outcomes of public consultations);
- development of a legal framework for the creation of a specialised Internet portal containing detailed information about all public consultations planned, organised and carried out in Ukraine;
- setting up a General Register of Interested Persons (GRIP) which would provide automatic inclusion of such persons in the list of participants of certain consultations;
- outline of the range of normative acts whose drafts require mandatory public discussion;
- optimisation of the timing of some procedural actions in the public consultation process;
- creating an effective mechanism of coordination between all authorities involved in the organisation and holding of public consultations;
- a clear definition of all types and grounds of liability for violations in the area of public consultations.

Moreover, as regards further work on the Draft, it is necessary to implement a wide range of normative, organisational, informational and other measures to build in Ukraine an integrated, multi-level system of public participation in state political activities. This can be done only under a targeted policy based on the principles of planning, comprehensiveness, consistency, participation, transparency, consensus, and responsibility. To this end, the implementation of standards and mechanisms of good governance must be declared a strategic direction of the administrative reform, and the primary field of state activity – reflected in legislation, strategic planning and key political decisions.

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Abstract

The article revolves around the genesis and current state of development of the institution of public consultations in Ukraine. It outlines a range of negative factors resulting in the low efficiency of public consultations and determines priority directions in the development of public consultations. Additionally, the article emphasises the necessity of taking complex legal and organisational steps aimed to promote public participation in policy-making processes.

Keywords: state policy, public administration, decision-making process, good governance, public consultations

Konsultacje społeczne na Ukrainie: aktualne zagadnienia prawne

Streszczenie

Artykuł skupia się na genezie i bieżącym stanie rozwoju instytucji konsultacji społecznych na Ukrainie. Wymienia całą serię negatywnych czynników skutkujących niską wydajnością konsultacji społecznych oraz określa priorytetowe kierunki w rozwoju konsultacji publicznych. Dodatkowo w artykule podkreślono konieczność podjęcia złożonych kroków prawnych i organizacyjnych w celu promowania uczestnictwa społeczeństwa w procesach decyzyjnych.

Słowa kluczowe: polityka państwa, administracja publiczna, proces stanowienia przepisów, dobre rządy, konsultacje społeczne