

Modernising the Public Administration

# Regulatory Consultation in the Palestinian Authority

A PRACTITIONERS' GUIDE  
FOR ENGAGING STAKEHOLDERS  
IN DEMOCRATIC DELIBERATION



### Summary

This Practitioners' Guide, prepared by the OECD on the basis of a survey in the Palestinian Authority, provides guidance to Palestinian policy makers and public officials facing choices about the most appropriate form of consultation: when and how to consult, who to involve and how to overcome barriers for a successful deliberative process.

- Regulatory consultation supports an open government that adheres to the right of people to know. It has the potential to reduce the vacuum created by the absence of a functioning legislature.
- Many challenges for Palestinian officials result from the lack of clarification of the scope and purpose of consultation at the outset of the process. A code of practice can serve as a reference document and help to enhance confidence in the consultation process.
- Regulatory consultation requires specific skills and tools. Staff training needs to go hand in hand with the use of a flexible and multichannel approach that combines a range of consultation tools.

### Impact

- Improved co-ordination between internal stakeholders for critical review on existing consultation by providing **data and analyses** on consultation in the rule-making process.
- Increased **awareness** among external and internal stakeholders on consultation mechanism in the rule-making process.
- Issued **guidance** for a **code of practice** to engage stakeholders meaningfully in regulatory consultation.
- Increased action for change by providing **recommendations** to reach out to stakeholders and overcome barriers to successfully involve the public in democratic deliberation.

### Relevance

The Guide has direct relevance for the implementation of the following national and sectoral policies of the PA:

- Ministry of Planning, **Palestinian Reform and Development Plan 2008-10**;
- The **Justice and Rule of Law National Strategy 2011-13**;
- PA, First year programme of the 13th Government of the Palestinian Authority: **"Ending the Occupation, Establishing the State"**, 2009;
- PA, Second year programme of the 13th Government of the Palestinian Authority: **"Homestretch to Freedom"**, 2010.
- **Palestinian Reform and Development Plan**, 2008-10;
- Council of Ministers Decision No. 01/86/12/M.W/S.F/ of 2008 ratification of the **government's legislative plan** of 2009.



## *Foreword*

This Practitioners' Guide on public consultation in the rule-making process is part of the first phase of the MENA-OECD Initiative to Support the Palestinian Authority (PA). The Guide assesses the regulatory consultation process in the PA, and presents good practices examples from OECD countries and practical guidelines.

The Guide is based on a survey conducted in May 2010 and the workshop on "Regulatory Policy Tools and Institutions in Practice" organised in Ramallah in July 2010. The survey and workshop were addressed to all Palestinian officials in charge of legal drafting and regulatory policy. The guide provides guidance to public officials of the Palestinian Authority responsible for regulatory policy and facing choices about the most appropriate form of consultation; it addresses when and how to use public consultation, who to involve and how to overcome barriers for a successful consultation process.

**Acknowledgements.** This Guide is based on a survey, interviews and workshop carried out by the OECD Secretariat in May and July 2010 in the West Bank. (The interviewees are listed below.) The OECD Secretariat owes special thanks to Palestinian public officials, academic institutions and NGOs for sharing information and giving critical advice.

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This report was produced by the Directorate for Public Governance and Territorial Development, under the responsibility of Rolf Alter, in the Regulatory Policy Division, headed by Josef Konvitz. Under the direct supervision of Carlos Conde, this Guide was written by Miriam Allam and Hania Bouacid. The Guide benefitted from extensive comments by Christiane Arndt, Alessandro Bellantoni, Gregory Bounds, Marco Daglio, Martin Forst, Engin Kucet, Helge Schröder, Daniel Trnka, and Caroline Varley. Jennifer Stein was responsible for final editing and layout of the text.

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## *Introduction*

This practitioners' guide is written for decision makers, politicians, policy makers and public officials of the Palestinian Authority (PA). The guide identifies choices to be made in planning and managing regulatory consultation by addressing the major challenges faced by the PA. It provides guidance to *decision makers* and *politicians* responsible for regulatory policy who want to understand how a constructive dialogue among stakeholders can contribute to informed and better decision making. It provides guidance to *policy makers* and *public officials* facing choices about the most appropriate form of consultation, when and how to use public consultation, who to involve and how to overcome barriers for a successful consultation process. The guide is based on a survey and workshop organised in 2010 and addressed to all Palestinian officials in charge of legal drafting and regulatory policy.

Public consultation can help to improve both the quality of regulation and governments' responsiveness to citizens and businesses. At the technical level, the use of consultation mechanisms – and the introduction of the Regulatory Impact Analysis in particular – is pivotal for collecting empirical information, measuring expectations, assessing costs and benefits and identifying alternative policy options (see Annex). At the policy level, stakeholder involvement enables a transparent policy-making process and increases the level of social acceptance of decisions and, therefore, compliance. The *1995 OECD Recommendations of the Council on Improving the Quality of Government Regulation* refers to consultation as an integral part of regulatory quality.<sup>1</sup> The important contribution of regulatory consultation was also highlighted repeatedly at the first OECD International Regulatory Policy Conference, held on 28-29 October 2010.

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1. Question 9 of the OECD Reference Checklist: Have all interested parties had the opportunity to present their views? OECD (1995).

Public consultation supports an open government that readily shares information with citizens. However, public consultation is a demanding process that requires a change in both the organisational structure and the administrative culture towards a participatory governance system. It requires political will and needs additional human and financial resources over time.

Indeed, the survey on regulatory consultation in the Palestinian Authority (see Chapter 2) confirms a general hesitation among policy and decision makers about the use of public consultation, which can be observed worldwide. The reasons for this are manifold: they may want to avoid over-complication of an already sophisticated law-drafting process. In addition, it is often argued that the public may not have the capacity to develop a coherent system of knowledge on the regulation in question because the issue at stake may simply be too complex or too time consuming. Moreover, there is a danger that vested interests will hijack the dialogue, and there is a high risk that the information presented is biased towards a certain option that serves powerful interest groups.

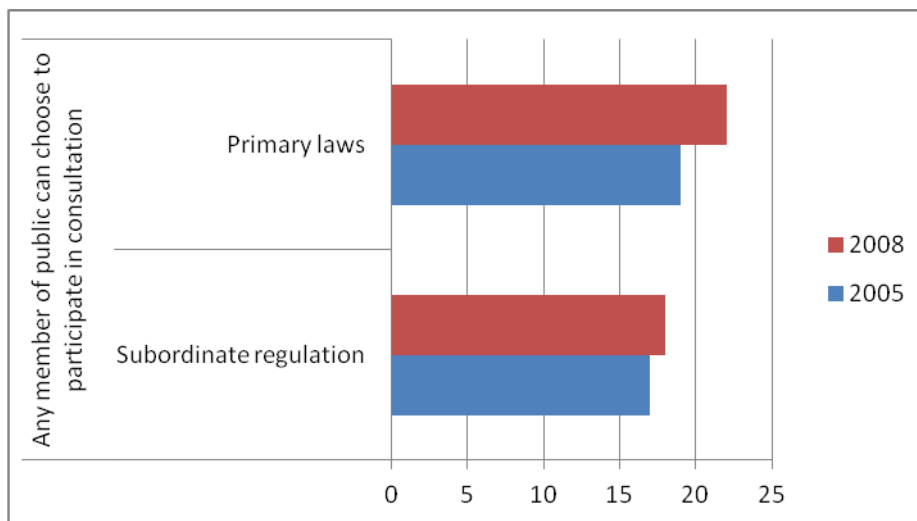
On the other side of the spectrum, the public may also be reluctant towards the use of public consultation. For example, citizens might mistrust public officials' sincerity in engaging the public. Widespread quotes include: "We cannot influence the decision anyway". "The decision is already taken and they invite us only to legitimise their action ('tick-box consultations')". "The consultation always starts too late to really have an impact". "It remains unclear what they do with our feedback – this shows that they really do not want to shed light into the black box of how the government works". Certainly, both the concerns of officials and the reluctance of the public bear the risk of frustration, apathy and even potential conflicts during the public consultation process.

Critics therefore say that public consultation in rule making causes a great deal of political and organisational pain with little gain. Undeniably, every consultation requires resources. However, stakeholder involvement is a corollary of the increasing complexity of public policy, and the costs of consultation should be seen as an investment in better policy. Certainly, public consultation cannot and should not replace governments. A voice does not make a decision, which is the purview of elected governments. Ultimately, governments have to assume responsibility for their actions, decisions and policy. Consultation does, however, change the quality and quantity of the information available to governments. Public consultation therefore supports better evidence-based decision making.

In short, in a democratic society, public consultation enables policy makers to learn about the complexities of measures under consideration, and use the knowledge from the public to design better regulation. Tackling complex policy challenges requires the concerted efforts of all actors in society. Governments can benefit from wider public input by creating a political space for stakeholders to participate in democratic deliberation. If properly managed and created under conditions which motivate actors, public engagement and an open, transparent rule-making process can promote public confidence in government and increase the legal security for businesses and citizens. It therefore strengthens the rule of law, the basis for democracy and welfare.

As is the case in the PA, governments around the world have increasingly engaged the public in consultations during the law drafting process. Indeed, as Figure 1 shows, the majority of OECD countries engage in public consultation when developing laws – with a growing and continuous trend to consult external stakeholders for both primary laws and subordinate regulations (see Glossary for a definition of primary laws and subordinate regulation).

**Figure 1. Openness of the consultation process in OECD countries, 2005 and 2008**



Notes: Data for 2005 and 2008 are presented for the 30 OECD member countries and the European Union.

Source: OECD Regulatory Management Systems' Indicators Survey 2005 and 2008, [www.oecd.org/regreform/indicators](http://www.oecd.org/regreform/indicators).

The question therefore arises: why are more and more countries using consultation in their efforts to provide better policies? Box 1 summarises the key benefits expected from consultation.

### Box 1. Benefits of consultation

- **Transparency and access to information:** Public consultation can increase the transparency of the rule-making process because stakeholders have access to the process itself, as well as to timely and relevant information about the proposed legislation. Consultation therefore contributes to equal access to information.
- **Added value:** The public is a rich source of instant and updated information. It is the driver of innovation, and public consultation enables policy makers to make use of the public's precious experience and knowledge.
- **Alienation and connectivity:** Public engagement in rule making can raise support for regulations, as citizens feel connected to the policy-making process. Disenchantment with politics bears the risk of declining support for reform, and for undermining public confidence and trust in national political institutions.
- **Increased compliance:** Engaging the public and striving for consensus can help to increase the social acceptance of regulations. It can contribute to greater compliance and, therefore, reduce enforcement costs.
- **Regulatory literacy:** Stakeholders will learn about the complexities of setting regulations, finding compromises and trade-offs. Open government illustrates to the public the constraints and limitations faced by authorities. Public consultation therefore promotes public education on rule making, and provides stakeholders with a chance to increase their regulatory literacy.
- **Anticipating the impact:** Public consultation is necessary to anticipate the likely impact of the regulation on stakeholders, contemplate unintended consequences and consider alternatives to the proposed regulatory option.
- **Managing conflict:** Public consultation provides a mechanism to manage conflicts at an early stage. Engaging the public in rule making is one tool for mediating among various interests in society and increasing awareness of compromises.
- **Pursued public interest:** Quality regulations are based on public interest. Yet, public interest is not static – but a dynamic concept that needs to be continuously defined. Naturally, the definition and pursuit of public interest can only take place through a dialogue with the public.

- **Legitimacy:** Public consultation is essential for comprehensive and responsive policy making that meets the needs of citizens. Greater public engagement has the potential to create a source of legitimacy and proof of successful governance.
- **Credibility:** Public consultation can help to re-establish public trust and government credibility by means of creating new and better ways to communicate with citizens.
- **Confidence:** Involving the public in rule making requires *per se* an accessible legal system. Public consultation can promote public confidence in the legal security of a country because it opens avenues for stakeholders to obtain information and express their concerns.
- **Social cohesion:** Public consultation provides a platform to bring diverse people together and bind them for review and debate on core issues of community life. It can therefore contribute to greater social cohesion.

As in OECD countries, the Palestinian Authority is increasingly engaging stakeholders in the rule-making process. However, confronted with one of most complex legal system in the world, strong historical legacies and low public confidence in the judiciary (Palestinian Authority 2010), one of the major issues for Palestinian politicians and public officials is the difficulty in obtaining balanced guidance on stakeholder involvement in the management of regulation.

The practitioners' guide is therefore structured to discuss the current situation in the Palestinian Authority in terms of law-drafting capacities (1) and consultation mechanisms in the law-drafting process (2). The Guide then develops options for addressing the most pressing questions: what to achieve (3), who to consult (4), how to consult (5), and when to consult (6). The guide concludes with a checklist for regulatory consultation.

## *Chapter 1*

### **The law drafting process in the Palestinian Authority<sup>1</sup>**

The law drafting process and regulatory consultation in the PA can only be understood in the context of its exceptional international and domestic political context. Since the establishment of the PA in 1994 and the subsequent coming into operation of its legislature, the Palestine Legislative Council (PLC), there have been significant changes in the structure of its executive. These developments have led to the creation of a series of bodies related to the drafting process, which have somewhat overlapping functions and changing relationships over time. A number of important constitutional developments since the establishment of the PA affect the legislative process generally, and legislative drafting in particular. These include: Laws 4 and 5 of 1995; the elections, initially in 1996, of a President of the Authority and of its legislature; and the Basic Law (adopted by the Legislative Council in 1997, eventually promulgated by the President in 2002, and subsequently amended in 2003 and 2005), which provides an interim constitution for the PA. As will be discussed below, Article 43 of the Basic Law plays a central role in the current law-drafting process. This is because the President rules by decree under Article 43 in the absence of a functioning legislature (state of emergency).

Public consultation in rule making in the PA takes place against the backdrop of an extremely complicated legal environment. The law is a blend of regulations issued under several political regimes, dating as far back as the Ottoman Empire. Indeed, the complex history is reflected in the legal environment of the Palestinian Authority. As in Jordan, the law is a blend of Islamic customary law, *Urf*, and the principles of Islamic *Shari'a* (the main source of legislation), the stock of legislation applied or enacted under the Ottoman Empire (1516-1917), British Mandate Law (1917-1948), Jordanian legislation applied to the West Bank and Egyptian legislation applied to the Gaza Strip (1948-1967). There have also been subsequent Israeli

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1. This section draws on the 2010 MENA-OECD Governance Programme publication *Progress in Public Management in the Middle East and North Africa*, OECD, Paris.



amendments to previous legislation applicable in areas which were introduced by military orders, and, of course, legislation enacted by the Palestinian Authority since 1994. This legacy creates a significant challenge when drafting new legislation. The “fragmentation of the Palestinian laws” and low public confidence in the judiciary poses strong challenges for implementing and enforcing laws (Palestinian Authority, 2008). In addition, the political split between Gaza and the West Bank with the different legal traditions (see above) has far-reaching implications for the legislative process and impedes consolidation efforts for the Palestinian legal system.

The PA’s law-drafting procedures are rooted in the Basic Law, which provides that both the Palestine Legislative Council and the government may initiate primary legislation. Within government, represented by the Council of Ministers, general administrative responsibility is vested in the Secretariat General of the Council and its chief officer, the Secretary General of the Council. This includes developing policies to implement the Council’s general policy and decisions. By statute, it is the ministries and other competent authorities which are empowered to prepare legislative proposals. The drafting ministry then refers its proposal or draft law to the Secretariat General of the Council of Ministers, who considers it and its consistency with existing legislation. The proposal is then submitted by the Secretary General to the Council of Ministers for approval. Within this general structure, the Council of Ministers has established a Unit of Coordination with the Legislative Council, which monitors proposed legislation and may establish a ministerial committee to consider a draft prior to its approval by the Council of Ministers. The Council of Ministers also established, in 2007, a Higher National Committee on the *Legislative Plan* to develop a systemic plan for the preparation of government legislation – a distinctive project that has yet to find its counterpart in most OECD and MENA countries. The membership of the Higher National Committee on the Legislative Plan includes one or more representatives of civil society organisations and the private sector (OECD 2010a). To address the current challenges in the PA, the Higher National Committee has established criteria for prioritising categories of proposed government legislation:

- i)* Prioritise legislation required to implement international obligations or the government’s plans for reform, or to address matters of concern which are not presently legally regulated;
- ii)* Amend older legislation in preference to more recent legislation, and particularly where the older legislation no longer meets current needs, or is not consistent with the applicable law in the West Bank and the Gaza Strip;

- iii) Emphasise legislation which is cost effective and, in particular, does not require additional enforcement bodies to be created; and
- iv) Prioritise the amendment of subordinate legislation over primary legislation, given the capacity of government to enact subordinate legislation more easily.

Primary authority for law drafting lies with the Bureau of Legal Counsel and Legislation (*Diwan al-Fatwa wa' Tashri'*), established in 1995 by presidential decree. One of the bureau's functions is to prepare a formal draft of proposed and draft legislation referred to it from the ministries, without altering legislative substance or purpose. In its drafting, the bureau considers the compliance of the proposed legislation with the Basic Law and its consistency with existing legislation. It has at least 11 staff, of varying seniority, involved in drafting. The bureau is administratively and financially regulated by the Ministry of Justice, while maintaining a degree of independence. It also has technical responsibility for supervising legal advisers within ministries, who are charged at the same time with evaluating and reporting on draft legislation submitted to ministries by the bureau. Once legislative proposals are drafted by the bureau and considered further by the promoting ministry, they are sent to the Secretary General of the Council of Ministers to be checked for consistency with existing legislation. The Council of Ministers first refers it for consideration to a ministerial committee consisting of a number of relevant ministers and the head of the bureau, under the chairmanship of the Minister of Justice. If this committee approves the draft, it is returned to the full Council of Ministers, which may accept or reject it, or ask for it to be amended. If the Council asks for amendments, it is returned to the bureau to draft the amendment in appropriate form. Following the first elections to the Council in 1996, the Palestine Legislative Council established a legal department responsible for drafting proposed legislation and draft legislation emanating from committees and individual members of the Council. The draft legislation is then sent by the legal department to the Legal Committee of the Council.

Regulatory policy in the PA can only be understood in the context of its exceptional political context. The current political situation further impedes legal reform: law making in the PA takes place under a state of emergency in the absence of a functioning legislature. Since the 2006 election and the political division between Fatah and Hamas, the Palestinian Legislative Council (the Legislature) has not been able to govern. Because of the absence of a quorum (over 40 parliamentarians are held in Israeli jails), legislation is enacted under exceptional circumstances (state of emergency). The President can rule by decree during emergencies, based on Article 43 of the Palestinian Basic Law (see Figure 2). The Palestinian Legislative

Council (PLC) must approve all decrees issued under the state of emergency during its first meeting. Certainly, in the absence of a functioning legislature, regulatory consultation is gaining ever more importance. However, as scholars argue, regulatory consultation has been hindered through the usage of Article 43 as “many pieces of legislation [have been issued], mostly uninformed, unjustifiable, and in certain cases unconstitutional and in contradiction to basic human rights” (Birzeit University, Institute of Law 2010).

Figure 2 illustrates the law-drafting process under Article 43 of the Basic Law. After reviews and hearings in the Council of Ministers and – and, in some cases, in the National Committee for Legislative Plan and Specialised Committees – the President issues the proposed legislation.

**Figure 2. Law drafting process in the Palestinian Authority under Article 43**



Source: OECD Secretariat.

Within the administrative arrangements for law drafting, there is no formal provision for systematic consultation outside government on proposed legislation – regulatory consultation in the PA takes place on an *ad hoc* basis, as discussed in the following section.

## Chapter 2

### Public Consultation in Law Drafting in the Palestinian Authority<sup>1</sup>

Regulatory consultation is becoming part of the legal drafting process in the Palestinian Authority. With the adoption of the Legislative Plan for 2008-2012, there is a growing trend to engage the public in developing laws on a more systemic basis.<sup>2</sup> When public consultation does occur, it takes place at a stage when there is scope to influence the outcome. However, there is no formal public consultation process in drafting laws in the PA. Public consultation takes place informally and on an *ad hoc* basis. The Government's Legislative Plan 2008-2012 states that public consultations are necessary to assess needs and set priorities for legislative policy; however, consultation is not mandatory and the legislative plan does not refer to a process for consultation based on official rules.

Interviewees described the consultation process within government under the state of emergency as follows: upon request, the Government creates a Special Committee for each legislative proposal (see Figure 2). These Committees are in charge of reviewing the draft law and policy paper on its objectives (the so-called policy memorandum). Consultation with stakeholders outside the government takes place through *hearings and workshops in the specialised committees* (see Figure 2). Some ministries also directly consult civil society and the private sector.

Stakeholders are notified by the relevant ministry about the consultations to be held by the specialised committees. In fact, the workshops or hearings are generally “invitation only”. Other tools for consultation, *e.g.* submitting comments via a website or advisory bodies, do not exist. Certainly, as stressed by the *Diwan al-Fatwa wa 'Tashri'*, the Bureau of Legal Counsel and Legislation, the public may always submit comments in writing to the relevant institutions and in particular to the *Diwan*. Feedback on comments received from stakeholders can be given orally or in writing, but is not mandatory. There is also no “tracking table” to trace back how comments are taken into account and how stakeholder involvement may have impacted the final draft law.

As for the duration of the consultation exercise, responses to the survey vary. According to the Council of Ministers, consultations should normally last for four weeks; however, most respondents refer to consultation as a lengthy and burdensome process with no clear timeframe.

Interviewees pointed to the need for a code of practice on consultation as a reference document to control the quality of the consultation process. There is also widespread discussion on the need to establish a central oversight body which could make a critical contribution to improving regulatory quality and the rule of law (Institute of Law 2010). It could also perform one or more of the following core functions: i) *oversight of the rule-making process*; ii) *assisting rule makers in their evidence-based analysis*; iii) *challenging the quality of regulatory proposals*, and iv) *advocating for quality regulation/ better regulation* (OECD 2011). Interviewees stated that supporting a more systematic and co-ordinated approach to introducing evidence-based decision-making tools such as *Regulatory Impact Analysis* (RIA) across ministries could be an important function of the oversight body. In fact, while public consultation is becoming part of the legal drafting process in the PA, it is *not* part of a comprehensive RIA process – but organised on an *ad hoc* basis. This also means that consultation in the PA is detached from other cost-benefit analysis and the identification of alternative options to proposed regulations (see Annex).

According to the interviewees, a list of laws to be prepared or modified is not published. With the exception of the Ministry of Economy, draft laws are not made available to the public; however, they are distributed to agencies and all ministries. Laws are officially published in the “Official Gazette” once the law is enacted. They are made available for free to the general public by the Institute of Law at Birzeit University through the electronic legal database “Al-Muqtafi” (see Box 2).

#### Box 2. The legal database Al-Muqtafi

Al-Muqtafi (Palestinian Legal and Judicial System) is the first legal data bank in the Palestinian Authority, and a pioneering legal database in the MENA region and beyond. Al-Muqtafi contains all legislation since the Ottoman period and is continuously updated and upgraded. Users are able to consult consolidated versions of legislation enacted since the establishment of the Palestinian Authority and all legislation enacted over the past 150 years, including the status and relations among the pieces of legislation (currently about 13 000 laws), full text of all laws *in force* (about 5 000 measures) and full text of regional and international legal documents relating to Palestinians (including UN documents). The Court Judgements Database has recently been added to the database. It contains 23 000 judicial judgements issued by Palestinian high courts since 1994. According to recent statistics more than 6 500 users from the Palestinian Authority are consulting the databases on a regular basis.

Legal database available at: <http://muqtafi.birzeit.edu>.

The collected survey findings can be summarised using the following analytical framework:<sup>3</sup>

#### Summary of the survey findings using the framework of the UK code of practice

1. **Capacity to consult:** Consultation is a demanding process that needs direction. PA officials are exposed to public consultation mechanisms, but need training and guidance on systematic and effective use of public consultation in drafting laws.
2. **Clarity of scope and impact:** Consultation processes should be comprehensible, and the scope and influence of stakeholder involvement should be clear. Consultation documents are not open to the public in the PA, stakeholders are not aware of their scope of influence and there are no clear guidelines or codes of practice on consultation.
3. **Accessibility of consultation exercises:** Consultation should be accessible and targeted toward stakeholders. In the PA, stakeholders can participate in the consultation process upon invitation only, and there is no systemic stakeholder involvement or stakeholder analysis.
4. **Communication:** Consultation depends on effective communication with the public and raising awareness about the issues at stake. In the PA, laws are published in the official Gazette once they are enacted. However, relying on the Gazette as the sole means to communicate with the public is not enough. Draft regulations are usually not made available to the public, nor is there a government website where all consultations can be found. ICT tools are not used in the consultation process. The legal database Al-Muqtafi, however, has improved access to laws and regulations.
5. **Burden of consultation:** Consultation fatigue can lead to a low buy-in to the process. The burden of consultation should therefore be kept to a minimum. There are widespread complaints about the additional administrative burdens of consultation in the PA.
6. **When to consult:** Formal consultation should take place at a stage when stakeholders can help to develop better solutions and impact policy outcomes. Informal consultation in the PA takes place at a stage when there is scope to influence the outcome.
7. **Duration of the consultation exercise:** A timetable for minimum and maximum duration of consultation should be set at the outset of the process. There is no clear timeframe for the duration of the consultation in the PA. In some cases, the public consultation process turned out to be too lengthy.
8. **Responsiveness of consultation exercises:** Consultation needs a built-in process to analyse and make use of stakeholders' input. Feedback to participants is provided orally or in writing but is not mandatory in the PA. There is also no mechanism to establish how consultation has influenced the final outcome.

This practitioners' guide follows the logic of the above analytical framework and provides guidance to address the identified barriers for effective regulatory consultations: Issues of capacity to consult and clarification of scope and impact are dealt with in Chapter 3 (what to achieve?), aspects of accessibility and communication fall under the subject of Chapter 4 (who to consult), ways of communicating better with the stakeholders and reducing the burden of consultation are further elaborated in Chapter 5 (how to consult) and finally, the stages, duration and responsiveness of the consultation exercise are discussed in Chapter 6 (when to consult).

## Notes

1. The following section summarises the key findings of the OECD survey on public consultation in the Palestinian Authority. Ministries and key institutions were asked to reply to a detailed questionnaire and provide information on the consultation process in drafting laws and regulations. A mission of the OECD Secretariat to support the collection of the survey answers was organised on 9-11 May 2010.
2. As suggested by interviewees, donor consideration for programmes that include elements of participatory governance may have supported this trend.
3. The analytical framework is based on the Code of Practice on Consultation of the United Kingdom (see OECD, 2010b).

## *Chapter 3*

### **What Do You Want to Achieve? Plan, Purpose and Scope of Consultation**

Effective regulatory consultation can improve regulatory certainty and compliance. However, managing consultation requires specific skills for facilitating the process in terms of preparing, structuring and evaluating the quality of the consultation. Palestinian officials are exposed to public consultation but need training and guidance on systematic and effective ways to meaningfully involve stakeholders. All interviewees agreed that what is most needed is a consistent approach towards public consultation that can be applied across departments and agencies in the PA.

Managing consultations requires a high level of political commitment and a framework for promoting the process. If regulatory consultation across departments is to enhance consistency and maintain high standards, it must be given a degree of authority. A way of achieving this is to make a formal cabinet decision that regulatory consultation should be followed in drafting legislation.

A consistent approach which is used across government departments helps to develop a common language and a process that is widely understood. By extension, a consistent approach enhances confidence in the consultation process. A cabinet decision should therefore be supported by a Code of Practice (CoP) and consultation plan that can be used to verify if the consultation process adheres to high quality standards and if affected parties have been properly consulted. The CoP and consultation plan therefore build a mechanism of checks-and-balances into the consultation process that makes it difficult for vested interests to capture the dialogue or for regulators to manipulate consultations in favour of their own interests. Whereas the CoP is usually based on broad criteria, the consultation plan provides more detailed guidance.



The consultation plan lays out the “rules of engagement” in order to ensure that all participating parties are aware of their role in the consultation process. They need to be informed at the outset about the process and scope of involvement. Poorly designed consultation processes can do significant harm, as they jeopardise future attempts to engage stakeholders in policy deliberation. A consultation plan should therefore clearly lay out:

- the methods of consultation and required resources;
- who gets involved (scale of engagement);
- the timeframe, different stages and proceedings of the consultation process;
- who takes what decisions in the rule-making and consultation process;
- what will happen to the comments made by affected parties, and;
- how much influence the consulted parties have on the result.

The *OECD Guiding Principles for Open and Inclusive Policy Making* may serve as reference point for developing a CoP and consultation plan. These principles are designed to help governments strengthen open and inclusive policy making, and they will be discussed in detail throughout the guide. The principles were developed and promoted by the OECD in 2001 in the “Guiding principles for successful implementation, consultation and active participation of citizens in policy making” and the European Commission launched several activities and initiatives<sup>1</sup> to translate the principles into practice.

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1. For example “Your Voice in Europe”- a single online access point for all consultations, or The Active Citizenship Programme.

### Box 3. Guiding Principles for open and inclusive policy making

1. **Commitment:** Leadership and strong commitment to open and inclusive policy making is needed at all levels – politicians, senior managers and public officials.
2. **Rights:** Citizens’ rights to information, consultation and public participation in policy making and service delivery must be firmly grounded in law or policy. Government obligations to respond to citizens must be clearly stated. Independent oversight arrangements are essential to enforcing these rights.
3. **Clarity:** Objectives for, and limits to, information, consultation and public participation should be well defined from the outset. The roles and responsibilities of all parties must be clear. Government information should be complete, objective, reliable, relevant, easy to find and understand.
4. **Time:** Public engagement should be undertaken as early in the policy process as possible to allow a greater range of solutions and to raise the chances of successful implementation. Adequate time must be available for consultation and participation to be effective.
5. **Inclusion:** All citizens should have equal opportunities and multiple channels to access information, be consulted and participate. Every reasonable effort should be made to engage with as wide a variety of people as possible.
6. **Resources:** Adequate financial, human and technical resources are needed for effective public information, consultation and participation. Government officials must have access to appropriate skills, guidance and training as well as an organisational culture that supports both traditional and online tools.
7. **Co-ordination:** Initiatives to inform, consult and engage civil society should be co-ordinated within and across levels of government to ensure policy coherence, avoid duplication and reduce the risk of “consultation fatigue.” Co-ordination efforts should not stifle initiative and innovation but should leverage the power of knowledge networks and communities of practice within and beyond government.
8. **Accountability:** Governments have an obligation to inform participants how they use inputs received through public consultation and participation. Measures to ensure that the policy-making process is open, transparent and amenable to external scrutiny can help increase accountability of, and trust in, government.
9. **Evaluation:** Governments need to evaluate their own performance. To do so effectively will require efforts to build the demand, capacity, culture and tools for evaluating public participation.
10. **Active citizenship:** Societies benefit from dynamic civil society, and governments can facilitate access to information, encourage participation, raise awareness, strengthen citizens’ civic education and skills, as well as to support capacity-building among civil society organisations. Governments need to explore new roles to effectively support autonomous problem-solving by citizens, CSOs and businesses.

OECD (2009).

### Consultation plan – Capacity to consult

#### ➤ **Be consistent**

- A consistent approach permits better co-ordination of consultation initiatives across departments and policy areas. It supports the monitoring of quality control with checks-and-balances to prevent specific interests from “capturing” a ministry.
- A clear and comprehensive consultation plan facilitates the consultative process and maximises the impact of stakeholder involvement.
- A **Code of Practice** can serve as a reference document and help to enhance confidence in the consultation process.

#### ➤ **Be supported by**

- High political commitment.
- Cabinet decision.
- Staff training.

Successful public consultation depends on managing expectations of the affected and involved parties. *Many challenges facing public officials in the PA arise from an unclear scope and purpose of a consultation* at the outset of the process. There are different forms of consultation, and officials must ask “*how much stakeholder involvement is needed*” and “*what is needed from stakeholders*”? to determine which form should be applied.

## Purpose and scope of regulatory consultation

The purpose for consulting the public can vary and include:

- Providing information to affected parties about a proposed regulation.
- Obtaining the views of the public on the regulation at stake.
- Identifying potential conflict lines.
- Obtaining additional information.
- Verifying consistency and acceptance of the proposed regulation.
- Engaging the public in the formulation of a regulation, its objective and policy.

Depending on the purpose, the scope of public consultation can vary. In short, there are three types of interaction with interested members of the public:

### Box 4. Types of consultation

- *Notification* (“*passive consultation*”) is the communication of information on regulatory decisions to the public. It is a one-way process of communication in which the public plays a passive consumer role of government information. Notification does not in itself constitute consultation, but can be a first step, as it communicates information to the public. In this view, prior notification allows stakeholders the time to prepare themselves for upcoming consultations.

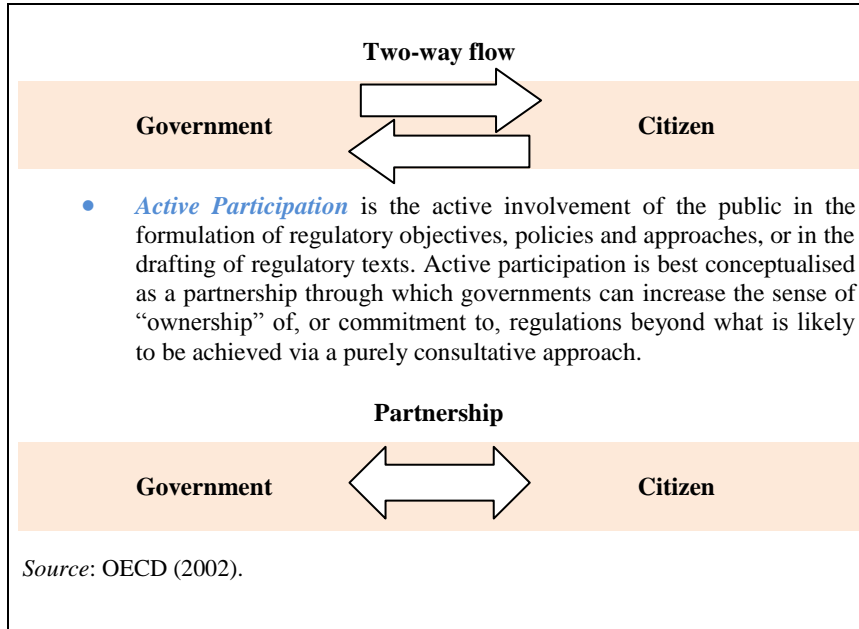
#### One-way process

Government



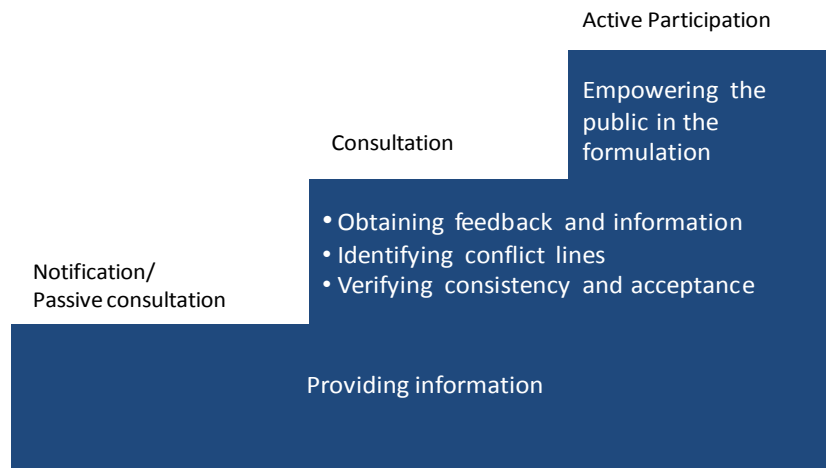
Citizen

- *Consultation* aims at actively seeking the opinions of interested parties and affected groups. It is a two-way flow of information, which may occur at any stage of regulatory development, from problem identification to evaluation of existing regulation. It may be a one-stage process or, as is increasingly the case, a continuing dialogue.



In practice, these three forms of interaction are often mingled in public consultation plans, complementing and overlapping each other. For example, as Figure 2 shows, active participation obviously builds on elements of notification and consultation.

**Figure 2. Purpose and scope of consultations**



Source: OECD Secretariat, figure adapted from ÖGUT (2007).

Certainly, purpose and scope define the scale of consultation. Deliberative activities can range from online consultation with several thousand responses to expert panels which involve only a dozen participants (see Chapter 5 on How to Consult).

#### Clarity of scope and impact

➤ **Be clear**

- Clarify the purpose of consultation at the outset of the process: why is consultation needed, *e.g.* for providing or collecting information? What do you hope to achieve by holding the consultation?
- Clarify the impact of stakeholder involvement and manage expectations: how much influence do the consulted parties have on the results? How much can the comments and views influence policy making?

The next chapter will discuss who to involve in consultation.



## Chapter 4

### Who Will You Involve in Public Consultation?

Access to consultation in the PA is restricted to a limited number of affected parties. In fact, stakeholders can participate upon invitation only and there is no systemic stakeholder involvement or stakeholder analysis. If the invitation is solely at the discretion of regulators, severe problems of inclusiveness may occur – calling the principle of representativeness of the consultation into question and posing problems of integrity.

Consultation should be open to all stakeholders, and participation should be voluntary. A systematic stakeholder analysis helps to identify interested and affected parties that should be included in consultation.

The question of who you will involve depends on the scope of the proposed regulatory changes. However, in general, ministries and agencies should consult widely in order to ensure that the consultation represents and captures the views of the affected parties. Depending on the methods used for consultation (see Chapter 5), stakeholders either have to self-react to or be directly notified about the proposed regulation. The first is the case if the draft regulation is published on a website for comments, the latter if key stakeholders are directly informed about the consultation process.

Regardless of the methods chosen, ministries and agencies should try to reach out to stakeholders, where appropriate. However, stakeholders evidently vary in regard to their status, level of organisation, representation and capacities to participate meaningfully in the consultation process. Powerful interest groups may put their interests first, above public interest. It is therefore important to bring in a variety of stakeholders, including civil society groups and NGOs, to balance the power of well-organised and specialised interest groups. For the public administration, this means that a systemic stakeholder analysis should precede the consultation process. The stakeholder analysis should include the identification of relevant



stakeholders *and* the objectives that they pursue. Certainly, the analysis requires resources, and must be updated on a regular basis. However, a well-run database of potential stakeholders on a given subject matter increases the chance that not only the best-resourced or most vocal, but also the most affected and valuable, stakeholders participate in a consultation. In addition, the process of defining stakeholders supports a thorough reflection on the real issues at stake.

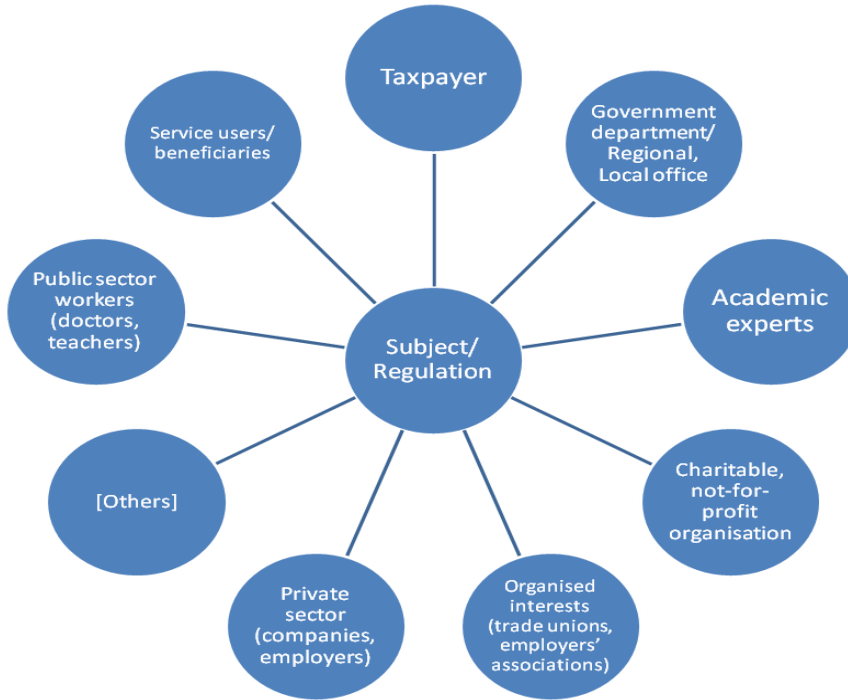
**A rigorous approach to identifying stakeholders will help you:**

- Consider the policy and regulation from all angles.
- Prioritise who you need to meet during your consultation.
- Identify whose views you need to research.
- Suggest members for a possible focus group and expert panel (see Chapter 5).
- Identify potential risks to compliance with and enforcement of the regulation.

**Interested and affected parties include:**

- Potential critics of the regulation.
- Intended beneficiaries of the regulation, for example service users and consumers.
- Academic experts on the subject.
- Potential allies who want to see change.
- Intermediaries, such as consumer and citizen representatives, trade associations, professional organisations.
- Organisations outside the public sector, for example, contractors, NGOs, businesses.

Figure 3 provides a mind-map to identify a range of affected parties for a given regulation.

**Figure 3. Mapping stakeholders**

*Source:* OECD Secretariat, graph adapted from NAO (2001).

After identifying potential stakeholders, the use of a matrix can help to plot the level of importance against the influence of the stakeholders. The matrix helps to define the stake, resources and objectives of the affected groups:

**Matrix. Importance and influence of stakeholders**

Influence of stakeholder	Importance of Stakeholder		
		Little importance or Unknown	Important
	Influential	C	A
Not really influential or Unknown	D	B	

*Source:* Department for International Development (1993).

Stakeholders in Box A have a high degree of influence and are the most important for the success of the drafting and implementation of the regulation. In practice, this means that law drafters and the implementing agency will need to create and maintain good relations with stakeholders in Box A. They are essential for creating a winning coalition that supports the regulation in question. Possible stakeholders in Box A are politicians and powerful business associations.

Stakeholders in Box B are of high importance, but have little or low influence. They are key stakeholders because the effectiveness and efficiency of the regulation in question depends on the compliance of these stakeholders. In practice, this means that law drafters and the implementing agency will have to take special initiatives to protect the interests of the stakeholders in Box B and lower any barriers to their involvement in the public consultation process (See section ‘How can barriers be lowered?’). Possible stakeholders of Box B are young or retired people, or traditionally marginalised groups.

Stakeholders in Box C have high influence but are not necessarily important for the law drafting procedure itself or the implementation. However, given their influence, stakeholders in Box C can cause problems during the drafting and implementation stages. In practice, this means that they have to be carefully monitored and kept satisfied to ensure that they do not generate potential risks. Possible stakeholders in Box C are financial administrators who can exercise power over the purse and funding.

Stakeholders in Box D have low influence and are of low importance for the public consultation and implementation process in drafting regulations. In practice, this means that these stakeholders need some monitoring but they are of lesser priority and do not necessarily have to be directly consulted. Possible stakeholders of Box D are indirectly affected parties.

**Accessibility of consultation exercises**

- **Be inclusive**
  - Consultation should be open to all and participation voluntary. Ensure that not only the best-resourced or most vocal stakeholders are included, but that a variety of stakeholders are brought in.
- **Be specific**
  - Identify the objectives and resources of the stakeholders: their use of media, location and pursued interests.
  - Use the matrix to rank and plot stakeholders against the different criteria.
- **Be open-minded**
  - Revisit the stakeholder analysis throughout the public consultation process.
  - Be willing to talk.
  - Try to meet as many interested groups/individuals/experts as possible.
- **BUT**
  - Be aware: Stakeholder analysis needs to be updated on a regular basis and therefore requires additional resources over time.

### Problems you may encounter and how to tackle them

Stakeholder analysis helps to identify affected parties. However, interviewees in the PA underlined that the real challenge is involving affected parties who are *willing but unable* to participate because they face problems such as cultural or language barriers, low capacity to get engaged, geographical distance, disability or socio-economic problems (stakeholders in Box B of the Matrix). The geographical discontinuity in the PA adds another layer to the difficulties of stakeholder participation.

You might also encounter stakeholders who are *able but unwilling* to participate in the consultation process because of low interest in politics, time constraints, and mistrust of government and political institutions to make good use of their input.

The aim is therefore to lower the barriers preventing the willing but unable people from participating and increase the attractiveness to participate for the able but unwilling people.

### How can barriers be lowered?

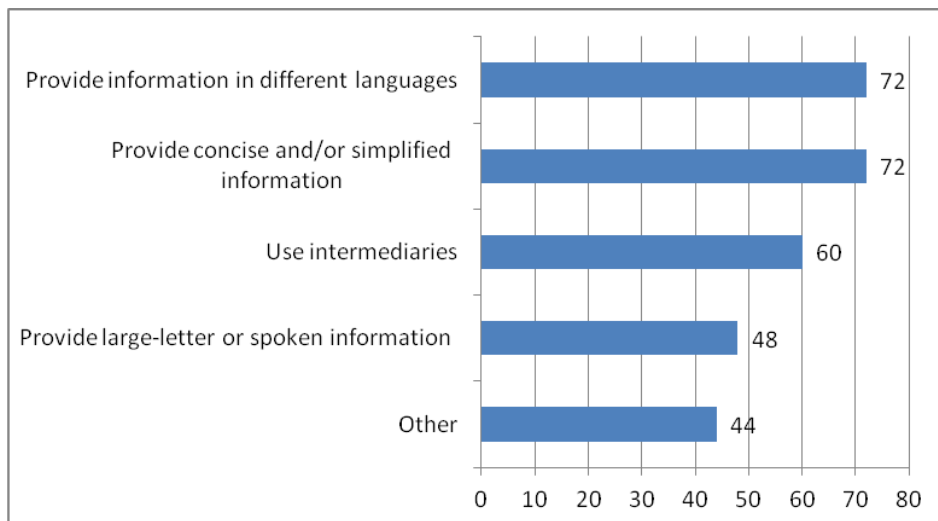
Measures to encourage the willing but unable to participate in public consultation can be grouped into three types:

1. Content: providing concise and/or simplified information, also in additional languages if required.
2. Format: providing large-letter or spoken information.
3. Channel: using intermediaries to reach target groups.

As Figure 4 shows, 72% of OECD countries have tried to overcome the barriers by providing information in other languages and in a concise and simplified way. Over 60% turned to intermediaries, such as community groups, to reach out to the wider target group.

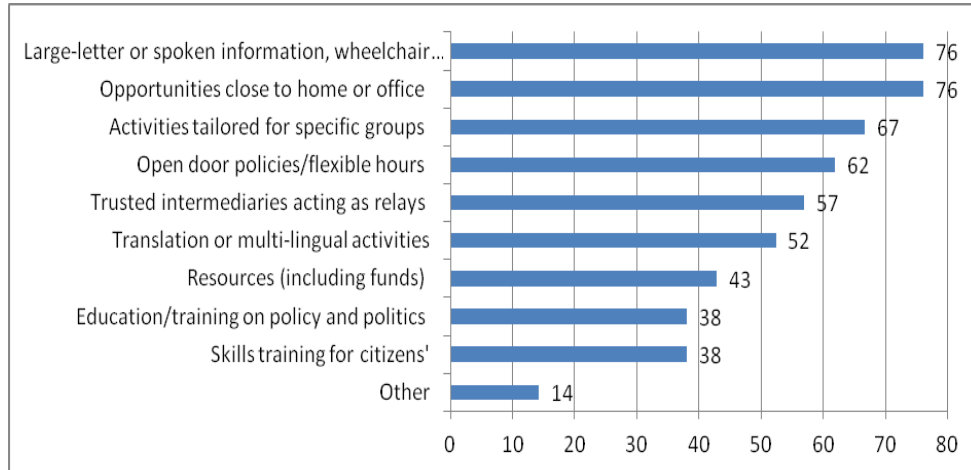
**Figure 4. Measures to lower barriers to governmental information**

(% respondents, n = 25 countries)

*Source:* OECD (2009b).

In a large-scale survey of OECD governments and non-governmental organisations, further activities to lower barriers to participation were cited as important or very important. Figure 5 shows that over three-quarters of respondents mentioned efforts to overcome physical barriers by providing consultation opportunities close to home or office, ensuring wheelchair access, and using large-letter and/or spoken information. Indeed, in the PA, consultations in larger cities such as Ramallah are potentially easier to organise than in other more isolated geographic areas like the Jordan valley or Hebron area. However, depending on the issue at stake and the geographical distribution of the affected parties, it might be worth considering consultation opportunities closer to the location of the stakeholders concerned.

**Figure 5. Measures to lower barriers for consultation and participation**  
(% respondents, n = 25 countries)



Source: OECD (2009b).

### Application 1. Lowering barriers to public participation in the European Union

The European Commission has been asked to launch a series of measures to lower barriers to public participation and raise the interest of concerned parties in taking part in consultations. First of all, it was stressed that the consultations should not be pre-empting their outcomes to avoid a 'tick-boxing' exercise. The Commission was also asked to prolong the period for consultation, and to adopt a more proactive approach to increase stakeholders' involvement and their interest in participation. It was agreed that the Commission should seriously explore various communication channels and address representative organisations directly – *i.e.* the European Business Test Panel, European Enterprise Network, the social partners (as defined in the Lisbon treaty) – as well as considering the expertise of the Economic and Social Committee and the Committee of the Regions. Moreover, the stakeholders expressed their willingness to advertise the consultations in specialist magazines and regional/local press, and on TV broadcasts. In addition, the Commission should consider organising consultations that address only the real challenges encountered by citizens or businesses (and small and medium-sized enterprises in particular). Focusing on regulation where there is a genuine need to listen to stakeholders would not only enhance participation and contribution of stakeholders in the regulatory process, but would ensure compliance with their expectations and needs.

Source: European Commission, 2010.

### How can stakeholders' capacities be built?

As discussed in Chapter 3, building capacity to engage meaningfully in consultation should focus on training activities and consultancy support to equip officials with deliberative techniques. The techniques should be based on principles of engagement best described in a Code of Practice.

However, building capacity in external stakeholders is equally important. Low participation rates in public consultation correlate with low capacities to get involved. For example, citizens may feel that they do not have the required knowledge, skills or confidence to contribute effectively to the consultation. Building democratic deliberation is a complex process, and successful consultation does depend on the capacity of stakeholders to both engage *and* mobilise technical expertise on the topic in question.

Many stakeholders might be discouraged to take part in consultation because they perceive the political process as too complex, with little chance to make a real difference to policy outcomes. Any initiative to encourage and empower citizens should therefore start with making the political process more accessible and user friendly. This may include programmes to help citizens gain skills and knowledge required for active civil engagement, or activities to strengthen the dialogue between government and citizens. Initiatives may also target specific hard-to-reach citizen groups, such as activities that aim to give young people a voice and involve them in deliberate democratic processes. The UK, for example, has launched an online forum ([www.headsup.org.uk](http://www.headsup.org.uk)) for young people to discuss political issues and learn about parliamentary democracy; it includes several initiatives at the local community level, for example the project Take Part ([www.takepart.org](http://www.takepart.org)) and Fix-My-Street ([www.fixmystreet.com](http://www.fixmystreet.com)). Given that local communities are “closer to the citizens” they naturally play an important role in taking up measures to empower stakeholders.

Creating legal awareness and technical expertise are also part of capacity building for stakeholders. In the PA, draft laws are generally not made available to the public, and enacted laws are solely published in the official Gazette. However, more efforts need to be undertaken to reach out to and create legal awareness among stakeholders. Publishing laws to a broader audience, making use of the media, and creating education programmes for both external and internal stakeholders to raise legal awareness are all examples of potential measures to further empower stakeholders.



### How can appeal be increased?

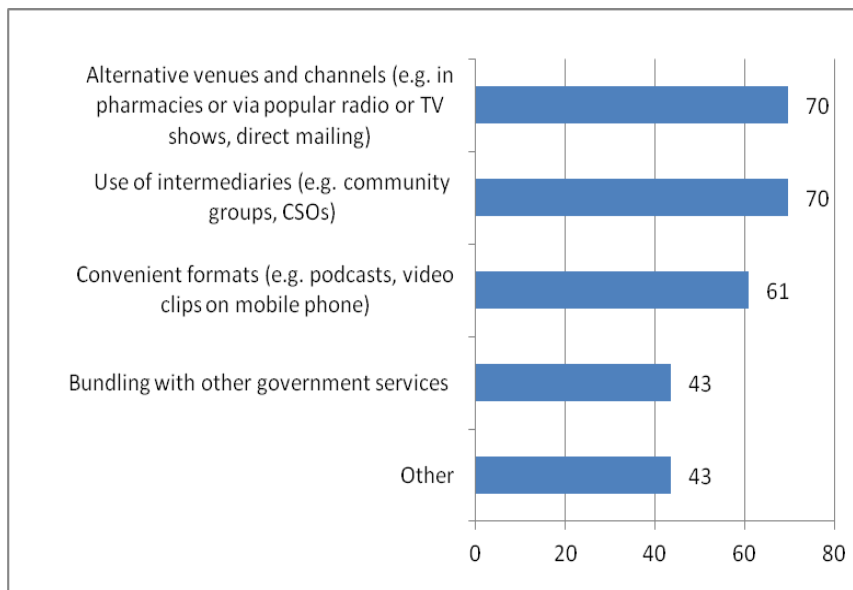
There are two types of measures to increase the participation of “able but unwilling” affected parties:

1. Measures to increase the uptake of government information.
2. Measures to increase the appeal of consultation and participation.

Many countries have experimented with a broad variety of instruments to provide the “able but unwilling” stakeholders with more government information. Figure 6 summarises the main methods applied in OECD countries.

**Figure 6. Measures to increase uptake of government information**

(% respondents, n = 25 countries)



Source: OECD (2009b).

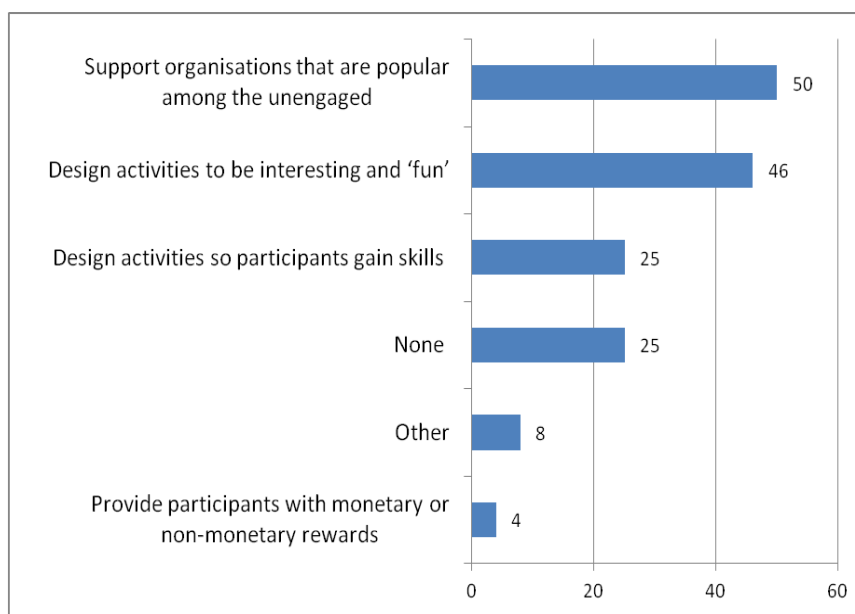
As with lowering barriers for consultation, over two-thirds of OECD governments make use of intermediaries in disseminating information and increasing interest in getting involved in the consultation process. In addition, most respondents use new multi-media formats, *e.g.*, podcasts and video clips on mobile phones (61%), or alternative venues or channels such as providing information in pharmacies or via radio, TV shows and direct

mailing (70%). Information should be made available at an early stage in the drafting process, and information technology may support effective dissemination. As will be discussed in Chapter 5, the use of media other than the Official Gazette is of utmost importance to reach out to stakeholders, and should be further explored by the PA. The OECD Survey on E-Government (OECD, 2011) concludes that PA is not fully exploiting the potential for using ICT in the public administration due to an existing digital divide. Any initiative to increase e-consultation in rule making should therefore go hand in hand with projects that aim to increase Internet penetration and training for users take-up of the new tools.

The second type of measures – using intermediaries in disseminating information – are recognised as one of the most effective ways to engage the “able but unwilling”: 50% of survey respondents consider the support of organisations that are popular among the unengaged as most useful (see Figure 7).

**Figure 7: Measures to increase the appeal of consultation and participation initiatives**

(% respondents, n = 25 countries)



Source: OECD (2009b).

Only 4% of respondents support increasing appeal by providing monetary or non-monetary rewards to participants. On the other hand, almost half of the respondents (46%) believe that appeal can be increased by designing activities to be interesting and “fun”. In this regard, innovative approaches to involve youth have gained traction in recent years (see Application 2).

#### **Application 2. Youth in the Law Hall (*Ragazzi in Aula*)**

Since 1997, the Italian Chamber of Deputies has organised the “Youth in the Law Hall” (*Ragazzi in Aula*) project, which allows students to actively participate in the process of law drafting and development. *Ragazzi in Aula* has given hundreds of students the opportunity to meet, exchange ideas and interact with each other on project topics – and also to work on real law drafting projects that have later been implemented. The purpose of this project was to involve students in the process of the law development by spending a day in the role of Council members. The project is addressed to Piedmont high-level schools, and since 1997 more than 200 schools and 2 000 students aged 14 to 18 years have participated in over 500 law projects. The initiative has gained relevance since 2005, as all law projects are now submitted to the regional Council members with consequent opportunity to become a true regional law ([www.consiglioregionale.piemonte.it](http://www.consiglioregionale.piemonte.it)).

The project won the United Nations Public Service Awards in 2010, in the category “Fostering participation in public policy-making decisions through innovative mechanisms”.

### Accessibility and communication

- Where important stakeholders are known to be harder to reach or are less able to participate, some flexibility might be required in the extension of time limits, more intensive information provision to reach out to specific stakeholders, or the provision of specifically tailored opportunities for dialogue.
- Information should be made available at an early stage, with the support of information technologies. Regulators should work harder to communicate with the public, with less-organised groups and with the media by packaging information into understandable formats, using plain language and clarifying the issues at stake.
- In order to attract stakeholders, regulators need to explain in plain language why the regulation is needed, what problems and policy objectives are to be addressed: use simple language and avoid jargon. Keep the document short, and make it available in different formats.
- Explore other media formats, *e.g.*, the internet; however, make sure that any initiative to increase e-consultation in rule making goes hand in hand with projects that aim to increase internet penetration and training for user take-up of the new tools.
- Making the political process accessible and user-friendly is one side of the coin. The other side is to build capacities in stakeholders for active civil engagement. Initiatives may include programmes to gain skills and knowledge, creating legal awareness and technical expertise, or activities to target specific citizen groups that are hard to reach.

Having discussed methods to identify potential stakeholders and lower barriers to civil engagement, the following chapter will present the process of how to consult.



## Chapter 5

### How to consult?

Managing public consultation requires specific skills and tools. Lack of time and resources are often blamed for poor public consultation. However, the wrong choice of tools and methods to consult the public can also lead to poor public consultation. Ineffective consultation not only wastes time and money, but jeopardises future attempts to meaningfully engage the public. Public hearings and workshops are the primary consultation tools used in the PA.

The use of a flexible and multi-channel approach that combines a range of consultation tools improves communication and helps to reach stakeholders. Building monitoring into the consultation process supports quality control and leads to improvements for future attempts to engage stakeholders in rule making.

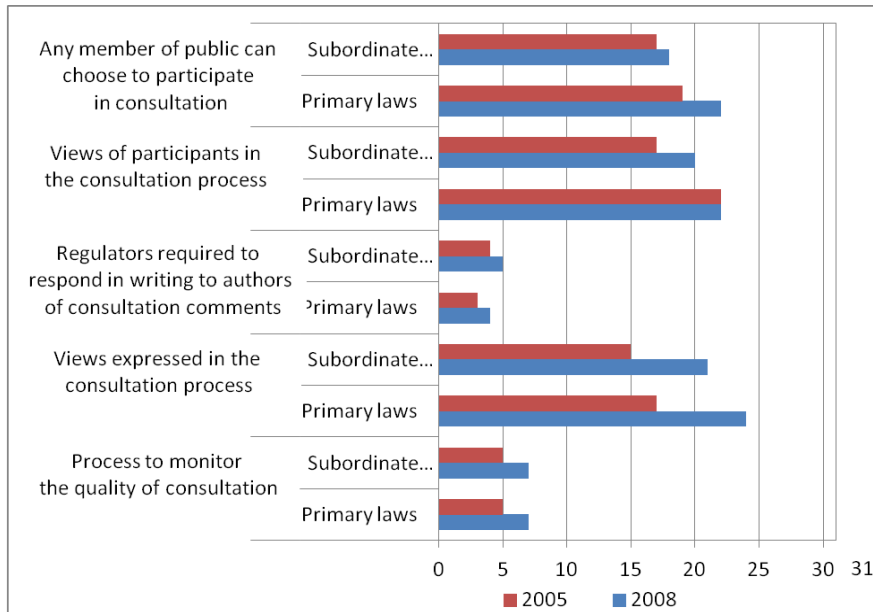
“How to consult” is probably be the most complex question. There are no one-size-fits-all solutions, and the right choice for a particular regulatory consultation process depends on a range of factors that are idiosyncratic in nature, *i.e.*, they vary across time and space. This chapter therefore first discusses the most common tools for regulatory consultation; how they are applied, how they have been adjusted to new circumstances (e-consultation) and used together over time (combining different tools). The rise and applicability of e-consultation – which is gaining importance at an unprecedented pace – is presented in detail, including a discussion on how to overcome barriers associated with the use of e-consultation tools. The chapter concludes by providing guidance on a built-in mechanism to ensure responsiveness and monitoring of the regulatory consultation process.

#### Tools for regulatory consultation

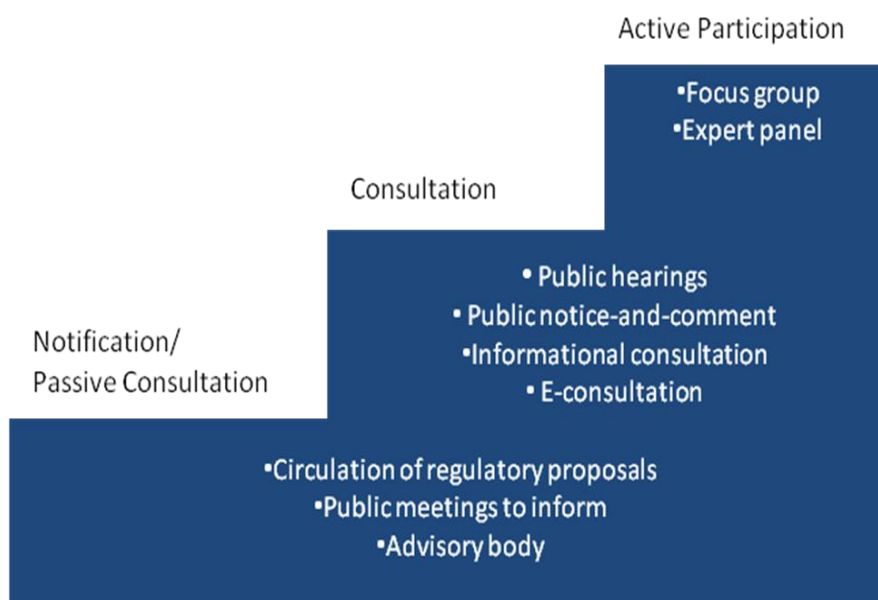
The choice of tools is related to the consultation process itself, which can differ widely across countries with respect to timing, availability of guidelines and the degree of openness of the process (see Figure 8 and 9). For example, in countries using regulatory impact analysis, consultation is

part of the impact assessment exercise and the views expressed in the consultation are included in the cost-benefit analysis as well as in the discussion of alternative options (see Annex).

**Figure 8. Openness of the consultation, 2005 and 2008**



A wide range of evolving consultative tools and methods give voice to the public will (see Figures 10 and 11). The guide discusses the eight most common tools that can be used for regulatory consultation, depending on who is to be consulted, how formal the process is, the communication means used, and the scope of the consultation (See Figure 10). For example, in open consultation where any member of the public can choose to participate, the use of focus groups or expert panels might be inappropriate or need to be complemented with other consultation tools such as public hearings or e-consultation. Certainly, the instruments are often mingled in public consultation plans, complementing and overlapping each other. For example, advisory bodies are often used for both notification (“passive consultation”) and consultation. In fact, to reach out to stakeholders, a flexible approach that combines a range of consultation tools is most effective.

**Figure 9. Scope and tools of public consultation**

Source: OECD Secretariat. Graph adapted from ÖGUT (2007).

### 1. Informal consultation

Informal consultation<sup>1</sup> includes all forms of discretionary, *ad hoc*, and unstandardised contacts between regulators and interest groups. It takes many forms, from phone calls to letters to informal meetings, and occurs at all stages of the regulatory process. The key purpose is to collect information from interested parties. Informal consultation is carried out in virtually all OECD countries (see Figures 10 and 11), but its acceptability varies tremendously. Informal approaches can be less cumbersome and more flexible than more standardised forms of consultation; hence, they can have important advantages in terms of speed and the participation of a wider range of interests.



### **Application 3. Informal consultation**

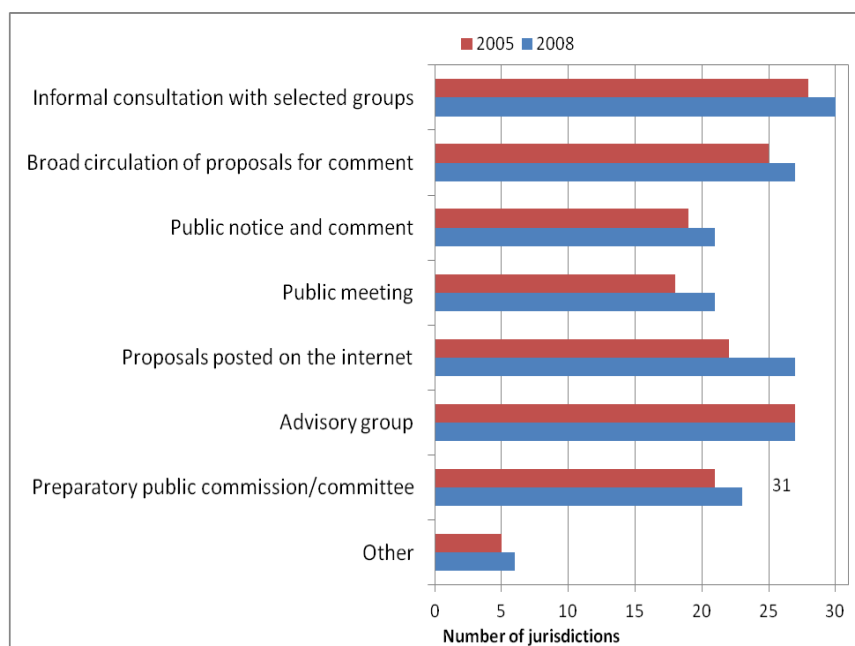
In the United Kingdom, regulatory bodies have traditionally had close and informal contacts with major interests, particularly businesses, and informal consultation is seen as a norm of the regulatory process, prior to formal consultation in line with the code of practice on written consultation. In France, informal consultations occur very frequently during the preparation of reforms; they help the regulatory authority to grasp the specific problems at issue. Thus, the government may undertake bi-lateral consultation with representatives of the parties concerned when drawing up the draft regulation. In Japan informal consultation is crucial in shaping consensus around the final product. In Canada, the government has encouraged regulators to consult informally prior to formal consultation. By contrast, informal consultation is viewed more suspiciously in the United States as a violation of norms and equal access, and in many cases it is a violation of the administrative procedure act requiring equal access for all interested parties.

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

### ***2. Circulation of regulatory proposals for public comment***

Circulation of regulatory proposals for public comment is among the most widely used forms of consultation (see Figures 10 and 11). It is a relatively inexpensive way to solicit views from the public, and it is likely to induce affected parties to provide information. This procedure differs from informal consultation in that the circulation process is generally more systematic, structured, and routine – and may have some basis in law, policy statements or instructions. It can be used at all stages of the regulatory process, but is usually used to present concrete regulatory proposals for consultation. Responses are usually in written form, but regulators may also accept oral statements, and may supplement those by inviting interested groups to hearings. The negative side of this procedure is the discretion of the regulator in deciding who will be included in the consultation. Important groups will not usually be neglected, as this is likely to create difficulties for the regulatory proposal when it reaches the cabinet or parliament.

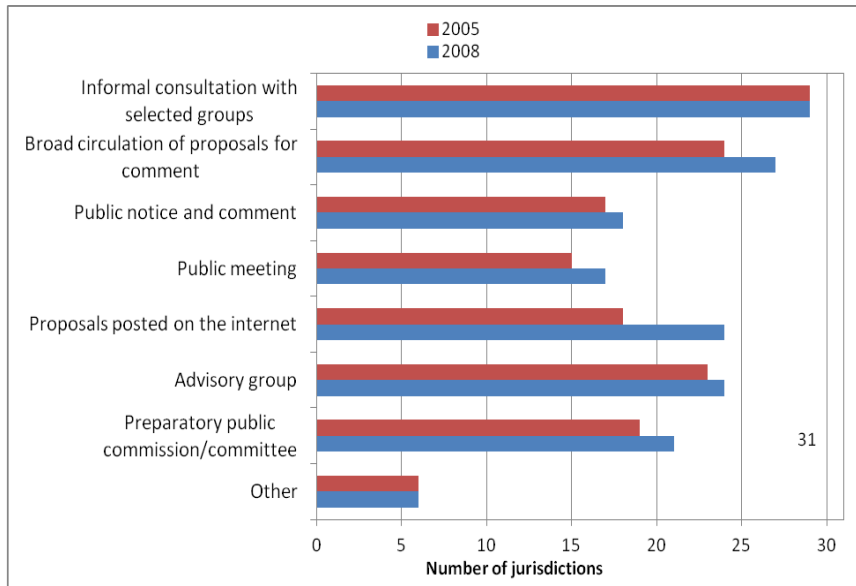
**Figure 10. Tools of public consultation routinely used at the central government level:  
Primary laws, 2005 and 2008**



Notes: Data for 2005 and 2008 are presented for the 30 OECD member countries and the European Union.

Source: OECD Regulatory Management Systems' Indicators Survey 2005 and 2008. [www.oecd.org/regreform/indicators](http://www.oecd.org/regreform/indicators).

**Figure 11. Tools of public consultation routinely used at the central government level: Subordinate regulations, 2005 and 2008**



Notes: Data for 2005 and 2008 are presented for the 30 OECD member countries and the European Union.

Source: OECD Regulatory Management Systems' Indicators Survey 2005 and 2008. [www.oecd.org/regreform/indicators](http://www.oecd.org/regreform/indicators).

### 3. Public notice-and-comment

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

#### Application 4. Notice-and-comment in OECD countries

Notice-and-comment has a long history in some OECD countries. It was first adopted for lower-level regulations in the United States in 1946. The practice was subsequently adopted in Canada in 1986 (called “pre-publication”), and in Portugal in 1991. By 1998, 19 OECD countries were using public notice-and-comment in at least some situations. Japan adopted notice-and-comment requirements for all new regulatory proposals (and revisions to existing rules) in April 1999. In other countries such as Hungary, the process is proceeding on an *ad hoc* basis, with individual ministries deciding their own policies.

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

Public notice-and-comment is used both for primary and secondary laws. In many countries, it is regarded as particularly important in respect to secondary laws because it provides some scrutiny to regulatory processes inside ministries, which are not subject to the open law-making processes applying to legislation debated in parliaments.

#### 4. Public hearings

Public hearings are public meetings on particular regulatory proposals at which interested parties and groups can comment in person. Regulatory policy makers may also ask interest groups to submit written information and data at these meetings. A hearing is seldom an independent procedure; rather, it usually supplements other consultation procedures.

### Application 5. Public hearings

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

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

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

### 5. Advisory bodies

Use of advisory bodies is one of the most widespread approaches to public consultation among OECD countries. Some 27 countries use advisory bodies in some form during the regulatory process (see Figure 10 and 11). Advisory bodies are involved at all stages of the regulatory process, but are most commonly used quite early in the process in order to assist in defining positions and options.

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

There are two main types of advisory bodies: first, interest groups that negotiate processes aiming to reach consensus; and second, technical advisory groups formed by experts, aiming to find information for regulators. The interest groups tend to have a permanent mandate, while the technical bodies are often *ad hoc* groups that work on concrete issues. Advisory bodies are particularly valuable if technical advice or help on complex and controversial policy issues is needed. Problems may arise when selecting membership, handling internal dynamics, and ensuring resource commitments.

#### Application 6. Consultative bodies in France

Irrespective of what these bodies are called (board, council, commission, committee), their aim is to provide political or administrative authorities with instructive information, and involve all interested parties in the decision-making process (this can include members of parliament and, very frequently, highly qualified prominent persons). Some of these bodies are fairly general in purpose, as in the case of the Economic, Social and Environmental Council (CESE), whose existence is enshrined in the constitution, its duties specified in organic laws, and membership includes representatives of civil society and individuals from all walks of social and economic life. Most other consultative bodies belong to specialised fields of interest within a single sector such as the environment, transport or agriculture. The government may also form *ad hoc* consultative commissions when preparing draft documents for a particular reform, for the purpose of bringing together categories of citizens who represent different interests which are not always represented in the official consultative bodies.

*Source:* OECD 2010c.

### **Box 5. Trends: Rationalisation of advisory bodies**

In recent years, some governments have started to rationalise advisory boards by carefully considering their value and effectiveness. This was the case in France, where the government decided to close those advisory bodies which served little purpose, and required any new bodies to demonstrate they satisfy a real need, thereby curbing their continued expansion. The rationale was that this method of consultation can provide a way of engaging with different interests and reaching a shared perspective, but it may also very significantly delay final decision making, especially when the topic is narrow one and meetings are somewhat few and far between. This situation has been aggravated by the marked increase in consultative bodies set up since the 1980s. In many cases, the tasks of these new bodies could have been performed by others already in existence. In the Netherlands, the need for rapid improvement of public consultation as an integral part of effective regulatory management was realised through: 1) a drastic reduction of advisory boards, and 2) removal of the legal requirement for the government to consult advisory bodies. Due to these reforms, ministries started turning on their own initiative to other, more flexible and open consultation approaches, including notice-and-comment. These developments were organised in order to boost transparency and ensure that effective and timely consultation is part of the development of government policies, and, in particular, to the impact assessment process for new regulations.

*Source:* OECD 2010c.

### **7. Focus groups**

A focus group is a collection of people selected because of their relevance to the regulation. They are engaged by a facilitator in a series of discussions allowing them to give insights, share ideas and make observations on a topic of concern in the regulation. Focus groups have gained importance in recent years for collecting qualitative information and providing feedback. The disadvantages of focus groups are that the selected members and number of participants may not be large enough to be a representative sample of the affected parties, and that the facilitator of the discussion may influence the respondents' answers.

### 8. *Expert panels*

There is no formal definition of an expert panel. The aim of a panel is to provide advice and comments at various stages to evaluate the effectiveness of the regulation. An expert panel is most useful where the examination needs to consider the views of many different types of stakeholders. It may also be used to obtain detailed specialist knowledge or professional advice on complex regulations (such as those addressing health issues) where required. Expert panels should not be used as steering groups or project management tools. One of the major risks is that the panel may be biased in its opinion, with individuals bringing their own agendas. Also, a lack of agreement among panel members could present problems; finally, it is essential that all members of the panel buy into the process.

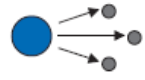

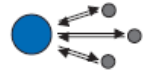



### 9. *E-Consultation*

Information and communication technologies (ICT) have opened up new communication channels allowing the public at large to be engaged in democratic processes. Electronic consultation is defined as the use of ICT for the institutionalised submission of comments, observations, proposals and amendments by citizens, experts, interest groups and non-governmental organisations on a subject or proposal for a regulation. E-Consultation provides an opportunity to reach out to a broader audience. If properly applied, e-consultation and the use of ICT can reduce the burdens of consultation and encourage further participation.

Indeed, e-consultation is gaining importance as the face of the web is rapidly changing. Thanks to web 2.0 technologies, more and more users can make their voices heard through applications such as Wikipedia, YouTube, Flickr, Twitter and Facebook. The new, user-friendly online tools allow users to readily create, edit, link and share web-based content. However, the use of these platforms within the public administration is not yet widespread. This shift from web 1.0 to web 2.0 has important implications for e-consultation; in fact, web 2.0 is also known as *participative web*. Figure 12 summarises how these participative web tools can contribute to public consultations:



**Figure 12. From participation 1.0 to participation 2.0**

	Participation 1.0 model	Tools	Participation 2.0 model	Tools
<b>Information</b>		<ul style="list-style-type: none"> <li>• E-mail alerts</li> <li>• Websites</li> </ul>		<ul style="list-style-type: none"> <li>• RSS feeds</li> <li>• Tag clouds</li> <li>• Podcasts</li> <li>• Webcasts</li> </ul>
<b>Consultation</b>		<ul style="list-style-type: none"> <li>• Online forms</li> <li>• Online consultation</li> </ul>		<ul style="list-style-type: none"> <li>• Blogs</li> <li>• Online polls</li> <li>• Online surveys</li> </ul>
<b>Participation</b>		<ul style="list-style-type: none"> <li>• Discussion forums</li> <li>• Shared online workspaces</li> </ul>		<ul style="list-style-type: none"> <li>• E-petitions</li> <li>• Mash-ups</li> <li>• Wikis</li> <li>• Tagging</li> <li>• Virtual worlds</li> </ul>

Source: OECD (2009).

While e-tools such as email alerts and informational websites were used under web 1.0, governments are now relying more and more on RSS feeds, tag clouds, podcasts and webcasts as means to disseminate information. Likewise, while consultation tools under web 1.0 were limited to online forums, web 2.0 allows for greater participation with the extensive use of online polls and surveys. To foster active participation, the model 2.0 can even go further by creating virtual worlds with shared workspaces where governments can be on the receiving end of e-petitions. Certainly, web 1.0 may be more appropriate in countries with a strong digital divide, as web 2.0 can require very sophisticated computer skills. Where access to the Internet is not widespread, Web 2.0 may pose limits in reaching out to stakeholders.

In some countries, open consultation over the Internet has occurred on an *ad hoc* basis. It may involve posting preliminary draft texts online, as well as “virtual forums” on reform topics. The Internet can be also used to publish laws, offering free access to citizens (see Application 7).

### Application 7. E-consultation procedures

In the USA, the Administrative Procedure Act of 1946 requires that agencies put proposed regulations through a notice-and-comment process open to all members of the affected public (see page 51). Before agencies can issue a final regulation, they must respond to the public comments, make sure that the final regulation is a logical out-growth of the proposal and the public record, and is not arbitrary or capricious. The public record is used by the courts in settling any challenge to the regulations brought by the affected public. Online regulatory information is currently difficult to access and navigate, in part because several websites publish portions of that information at different stages in the rule-making process. To promote transparency and to help aggregate information, OIRA (Office of Information and Regulatory Affairs) issued a memorandum directing agencies to use the Regulation Identifier Number (RIN) on all relevant documents throughout the entire “life cycle” of a rule (see Figure 13). The US expects that this requirement will help members of the public to find regulatory information at each stage of the process and will promote informed participation. The goal is to provide more convenient, public-centered ways of obtaining input on regulatory proposals.

The Office of Management and Budget is considering the use of Web 2.0 technologies (the eRulemaking Programme and Regulations.gov) to facilitate the public comment process. Greece has developed a website for electronic deliberation ([www.opengov.gr](http://www.opengov.gr)). All draft laws are posted in a blog-like format, and the public can submit comments article-by-article. Several MENA countries are also publishing draft laws via the internet. The Syrian Arab Republic has recently launched the website [www.youropinion.gov.sy/](http://www.youropinion.gov.sy/). All draft laws are published on this website and the public is invited to submit comments during a one-month period after the posting. Also, the Kuwaiti national assembly website publishes all draft laws ([www.kna.kw/ct/tenders\\_suggestion.asp](http://www.kna.kw/ct/tenders_suggestion.asp)). The public can follow the work of different commissions online. In Bahrain consultation over the Internet enables citizens to access all bylaws. The website answers frequently asked questions, and publishes Parliaments’ reports and activities ([www.nuwab.gov.bh/ServicesCenter/Requests/Request.aspx](http://www.nuwab.gov.bh/ServicesCenter/Requests/Request.aspx)). Also, this portal allows members of the public to give their opinions on the services provided by the website.

In France, consultation over the Internet occurs on the initiative of individual ministries, which are responsible for content, the practicalities of transmission and, where applicable, the publication of a summary of results. Internet discussion forums have addressed wide-ranging reform proposals, rather than specific texts. They generally supplement consultation with established boards or commissions. In 2008 a dedicated portal for assessing ongoing and archived forums (including a summary of all contributions) was set up to make it easier to access these forums. Furthermore, all ongoing or planned public debates can be followed on the *Vie-publique.fr* website, which includes provisions for mapping activities throughout France in its entirety. This is a recent facility which has yet to prove its worth.

*Source:* Hunt, A. (2008), “ERulemaking: Promoting Transparency and Participation in the U.S.”, paper presented at the OECD, October. OECD (2010), *Better Regulation in Europe: France*, OECD, Paris.

### Application 8. The Enterprise Europe Network in the EU

The European Union has established several e-consultation mechanisms for new legislation. For example, through the Enterprise Europe Network<sup>2</sup>, the Commission operates two mechanisms to test the impact of EU legislation and programmes. They have been used to consult SMEs when developing new EU legislation or programmes that have a direct impact on their operations. These two mechanisms are organised:

- *In advance* via SME Panels to consult SMEs about forthcoming EU legislation and policies. The Enterprise Europe Network partners will select SME participants, run the SME Panels and provide the Commission with findings. The findings will be taken into consideration when preparing new legislative or policy proposals. To ensure that the needs of SMEs are continuously taken into account in EU law making, the SME panels will be operated in liaison with the SME Envoy.
- *Retrospectively* via the SME feedback mechanism. This mechanism allows the Enterprise Europe Network partners to collect views and feedback from SMEs on a broad range of EU policy initiatives, actions, legislation or programmes related to the internal market. The policy areas where feedback will be requested include the environment, sustainability, employment and social affairs, innovation support, taxation and customs and, in more general terms, better regulation and simplification.

Source: [http://ec.europa.eu/enterprise/policies/sme/small-business-act/listening-to-smes/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sme/small-business-act/listening-to-smes/index_en.htm)

### Box 6. Combining different types of consultation tools

Using one consultation method alone may not be sufficient to reach out to stakeholders. A combination of a range of methods and a flexible approach helps to maximise the effectiveness of consultation. For example, a multi-channel approach can combine focus groups, institutional advisory boards, meetings organised in the regions and open consultation over the Internet, as illustrated in the following example.

#### The “Grenelle” forums in France

As an example, the *Grenelle* Environment Forum brought together the central government and representatives of civil society in order to draw up a road map for ecology, and sustainable development and planning, leading to the bill on environmental programming. The aim was to establish an action plan of 15-20 concrete and quantifiable measures that would meet with the broadest possible agreement among participants.

The *Grenelle* Environment Forum combined several forms of consultation, joint action and appeals for contributions, as part of a co-ordinated process:

- The first phase, from mid-July to the end of September 2007, was dedicated to dialogue and the preparation of proposals within six working groups consisting of 40 members drawn from five “colleges”: the central government, local authorities, NGOs, employers and wage earners. They were given the task of identifying concerns and devising operational proposals to respond to them. These proposals were recorded in a set of reports.
- The second stage of the *Grenelle Forum*, from the end of September to mid-October 2007, was devoted to consultation with the public on the action proposals from the working groups, via different channels:
  - The government took stock of the opinions of various advisory boards, institutions or bodies, including Parliament: 31 councils and committees were consulted, and Parliament debated the proposals on 3 October in the National Assembly and on 4 October in the Senate.
  - Regional meetings were organised from 5-22 October 2007. Any citizen could take part by applying to the prefecture of the Department concerned. The government selected 17 towns (or cities) to host the meetings. These gatherings were often preceded by workshops chaired by prominent local people, which allowed first discussions of the proposals and presented conclusions of the national working groups. These regional meetings were attended by almost 17 000 participants in all, including elected representatives; people representing the economic, social and voluntary sectors; and ordinary citizens.

–Finally, participation over the Internet was proposed: citizens were able to go online to comment on and suggest amendments to the proposals of the working groups on a website forum, from 28 September to 14 October. This method of online consultation was an unqualified success, with 72 000 visits and over 11 000 contributions published in 17 days.

- The third stage, on 24-26 October, resulted in negotiations and decisions. Within four panel discussions involving the five colleges, 268 commitments were identified.
- In the fourth stage (December 2007), 33 operational assignments were initiated to obtain proposals for action enabling the conclusions of the *Grenelle* Forum to be implemented.

The results of these assignments fed into the bill for environmental programming, which was passed by Parliament in June 2009. The act known as the *loi Grenelle 1*, was followed by *Grenelle 2*. The two bills arising from *Grenelle* were the subject of an economic, social and environmental impact assessment, and were publicised on the Internet as soon as they were submitted to Parliament.

Source: OECD (2010c).

### Problems you may encounter and how to tackle them

As illustrated in detail in the OECD e-government study, *Modernising the Public Administration: The Case of E-Government in the Palestinian Authority*, while ICT tools can increase the efficiency of consultation, that technology is an enabler – not the solution – and the quantity of online tools and information does not equal quality. Participative web tools are a means to an end, and not an end in themselves. It should also be noted that the effectiveness of online consultation depends on the Internet user rate. For example, in the PA, only 18% of the population has regular access to the Internet and information sharing between the public administration and stakeholders remains weak (for a fuller development of this point, see OECD 2011). The OECD e-government study on the PA concludes:

A digital divide in the population is preventing citizens from fully exploiting all the possibilities offered by ICT within the Palestinian public administration. The Ministry of Telecommunication and Information Technology is working on infrastructure projects (*i.e.* the introduction of WiMAX) to increase Internet penetration. These kinds of projects, if associated with training and financial support to buy computers, could quickly bridge the digital gap and considerably increase users' take-up of existing services (OECD, 2011, p. 13).

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However, while ICT tools have opened up new channels of communication, they also pose new challenges to governments:

- ICT tools are constantly evolving, and citizens as consumers are using ICT in different ways. This poses the question of how government should interact with citizens in e-consultation; *e.g.* via personalised online interfaces, SMS updates, instant messaging?
- Active participation through e-consultation under the web 2.0 model requires that governments constantly analyse and review information received, as this is the case with blogs or Facebook.
- Data protection, privacy and security issues are salient in e-consultation and create significant limits and challenges to governments; *e.g.*, should citizens' personal data be stored on servers located abroad?
- Given the rapid change in the use of ICT, governments using e-consultation have to invest in staff development on ICT matters.
- Easy access to consultation through the Internet can also mean large-scale consultation that brings thousands of comments that have to be reviewed.<sup>3</sup> While the consultation is online, the analysis of the submissions is still offline. A Semantic Web, which includes information on the laws (and drafts) and allows discussion groups to be created, could be a potential solution to manage the online consultation processes. It would also help to structure and unify the collected data. However, as the Semantic Web is still in its early development, specific applications remain premature at best.

In order to guarantee a successful use of e-consultation and overcome potential problems, the OECD has formulated the following guidelines (see Box 7).

**Box 7. OECD guiding principles for online consultation**

1. Start planning early.
2. Demonstrate commitment.
3. Guarantee personal data protection.
4. Tailor your approach to fit your target group.
5. Integrate online consultation with traditional methods.
6. Test and adapt your tools.
7. Promote your online consultation.
8. Analyse the results.
9. Provide feedback.
10. Evaluate the consultation process and its impacts.

OECD (2003).

**Responsiveness and monitoring**

Independent from the consultation tools chosen, a built-in mechanism is required to ensure that the comments received from stakeholders are analysed and appropriately used. Equally, a review of monitoring and evaluation to independently oversee the quality of the consultation helps to avoid “tick-box” consultation.

Governments need to appropriately use and respond to comments received. In the PA feedback is provided in writing or orally, but is not mandatory. Providing good quality feedback to stakeholders following consultation helps to improve the consultation and encourages participation in future events. Government feedback is also important to avoid “consultation fatigue”. If stakeholders perceive their input as being valuable, they will be more likely to engage in consultation again. Governments should also make use of the comments and, wherever appropriate, show how the responses to the consultation have affected the final outcome. If

stakeholders see the impact of their involvement, consultation can provide a powerful tool to strengthen trust in policy making and enhance government-citizen relations. In Denmark, for example, some ministries publish detailed information on consultation on their websites, and provide feedback to stakeholders. Certainly, if the comments received by stakeholders are made available to the public, the protection of confidential information and personal data needs to be guaranteed. A tracking document that reports if, when and how the comments are taken into account is useful.

Monitoring allows governments to “close the loop” of consultation, and shows how to secure change most effectively for the planning, implementation and monitoring of future regulatory consultation. To this end, the evaluation should include an analysis of the:

- extent to which consultations affected the final proposal.
- government’s feedback to stakeholders (was feedback given and if so, what was the quality?).
- response rate (how many stakeholders have been reached?).
- effectiveness of the consultation tools to reach out to stakeholders (have the tools been appropriate?).
- transparency of the process and accessibility of the consultation (*e.g.*, was there an equal opportunity to take part, was the process easily understood by stakeholders?).
- timeframe of the consultation (was the time table respected?).
- cost-effectiveness of the consultation (how much time and resources have been spent; did the costs exceed the initial expectations?).

Monitoring and evaluation should become an integral part of the consultation process to establish a quality control mechanism, adapt the consultation plan if needed and refine the process for future consultation.



### Communication and responsiveness of consultation exercise

#### ➤ Be sure to

- Use a flexible and multi-channel approach that combines a range of consultation tools, including formal and informal approaches.
- Select the tools most suitable for the specific stakeholder. Assess the advantages/disadvantages of each consultation tool and ensure that the selected tool is appropriate for the size of the consulted group and the scope of consultation. Tools should be selected to fit the needs of the different stakeholders and used in a way that targets the stakeholders in terms of presentation, language and style: which method would best reach out to the stakeholders? Who will most likely respond to a particular method and for whom might this method not be appropriate? If the method is inappropriate for a certain group of stakeholders, what alternative methods could be applied to engage them? Can you use intermediaries to reach out to the stakeholders?
- Reach out to stakeholders. Nothing is gained if the tools are well chosen and adapted, but if information never gets through to the stakeholders. Attention to delivery is important (OECD, 2001).

#### ➤ Be prepared to

- Develop new approaches to better use ICT: Implement specific actions to increase access to the Internet and reduce the digital divide through *ad hoc* training programmes and infrastructure projects (see also OECD E-Government Study on the Palestinian Authority, 2011). If properly applied, ICT tools can reduce the burdens of consultation.
- Establish a monitoring and evaluation mechanism to control the quality of the consultation process.
- Use the input: If governments do not make use of the input received, then the consultation is of no use for strengthening trust in policy making and enhancing government-citizen relations (OECD, 2001). If stakeholders do not see the meaning of their involvement, it will be harder to engage them in future consultations. Establish a mechanism ensuring that public comments are adequately taken into account.
- Ensure the protection of confidential information and personal data received during consultation.
- Develop a tracking document that reports when/how the comments are taken into account. When issuing the final regulation, policy makers should indicate whether or not they agree with comments received by the public.

In the following chapter, the closing question of when to consult will be discussed.

## Notes

1. The sections Informal Consultation, Circulation of regulatory proposals for public comment, Public notice-and-comment, Public hearings and Advisory bodies and part of E-consultation are taken from OECD (2002).
2. The Enterprise Europe Network brings together business support organisations from across 47 countries. They are connected through powerful databases.
3. This occurred in the UK in 2010, when Deputy Prime Minister Nick Clegg, announced the “Freedom Bill” project through Parliament, with the objective of “sweeping away meddlesome legislation and freeing up individuals and business from overbearing rules.” Three months later, more than 46 000 people left their comments on the e-consultation website for the Freedom Bill, posing strong managerial problems for the public administration.



## Chapter 6

### When to consult?

In the PA, informal public consultation takes place at a stage when stakeholders can influence policy outcomes. However, there is no clear timeframe for consultation, and in some cases it turned out to be a lengthy and less-productive process. This also contributed to the widespread impression that public consultation is an additional administrative burden with little impact and meaning.

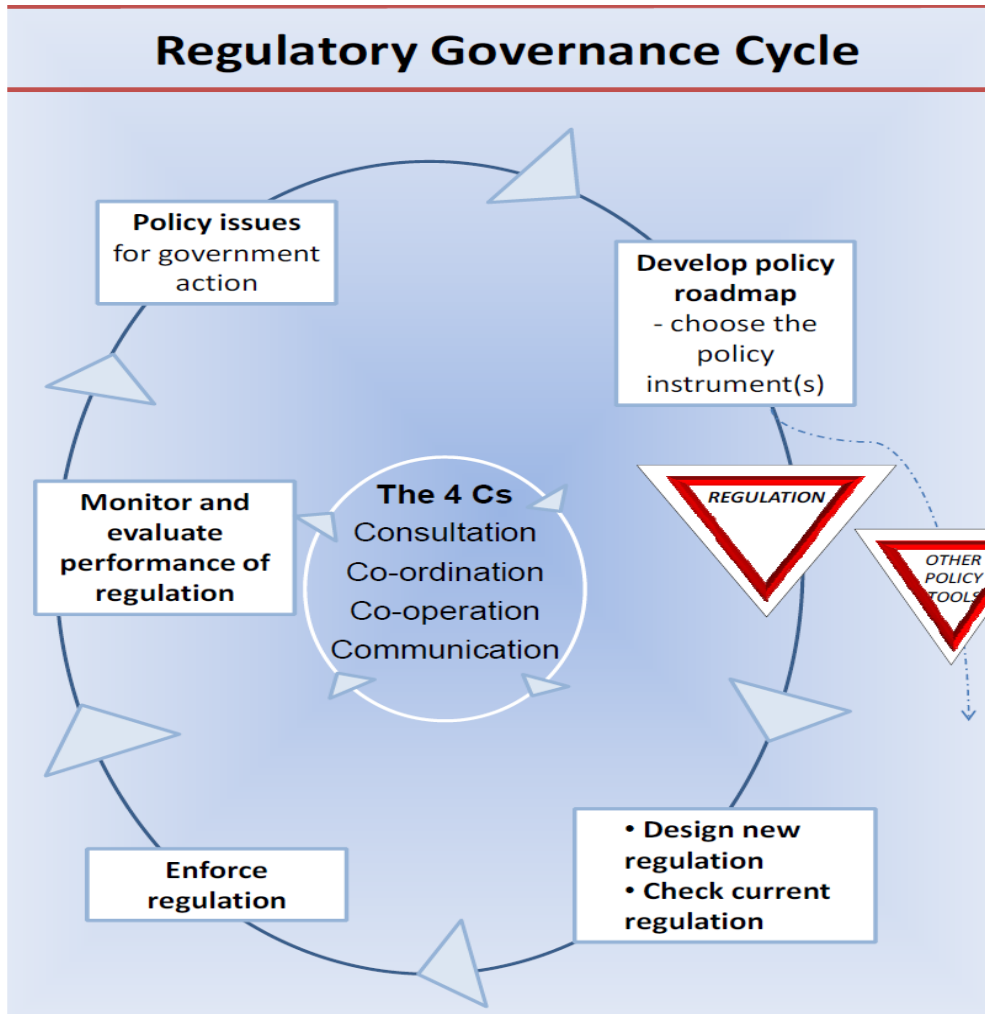
A clear timeframe and consistent guidelines for the different stages of consultation, and use of input to the consultation, are essential for increased impact of stakeholder involvement.

In addition, public consultation in the PA is limited to the law-drafting process; however, it can take place at different stages and is not limited to the preparation phase.

If public consultation is to have an impact, it needs to be initiated at an early stage in the decision-making process when there is still scope to influence the outcome. However, consultation should not start too early, as concrete law proposals are required to receive quality comments. Finding the right balance requires careful planning and guidance on consultation at various stages of the rule-making process. As for the duration of the consultation exercise, stakeholders should be given enough time of notification to submit their comments and/or participate in expert panels or public hearings. The consulting agency should set a clear timeframe with realistic deadlines at the outset of the consultation process.

There is a tendency in OECD countries to involve the public not only in the planning (*ex ante*) but also in the implementation (interim) and monitoring (*ex post*) stages. For example, from 1998 to 2008 the number of OECD countries with a mechanism in place by which the public can make recommendations to modify specific regulations increased from 17 to 29 (*OECD, 2009, Indicators of Regulatory Management System*). The monitoring and evaluation of the relevance of the regulation is an important element to assess whether the regulation is meeting value-for-money criteria, *i.e.* whether the regulation is effective in an economic and efficient manner. Figure 13 illustrates the policy cycle and the stages of consultation.

Figure 13. Policy cycle and stages of consultation



Source: OECD (2010d).

Table 1 summarises the different stages in the policy cycle, their purpose, and possible tools and methods to be used in the respective consultation stage.

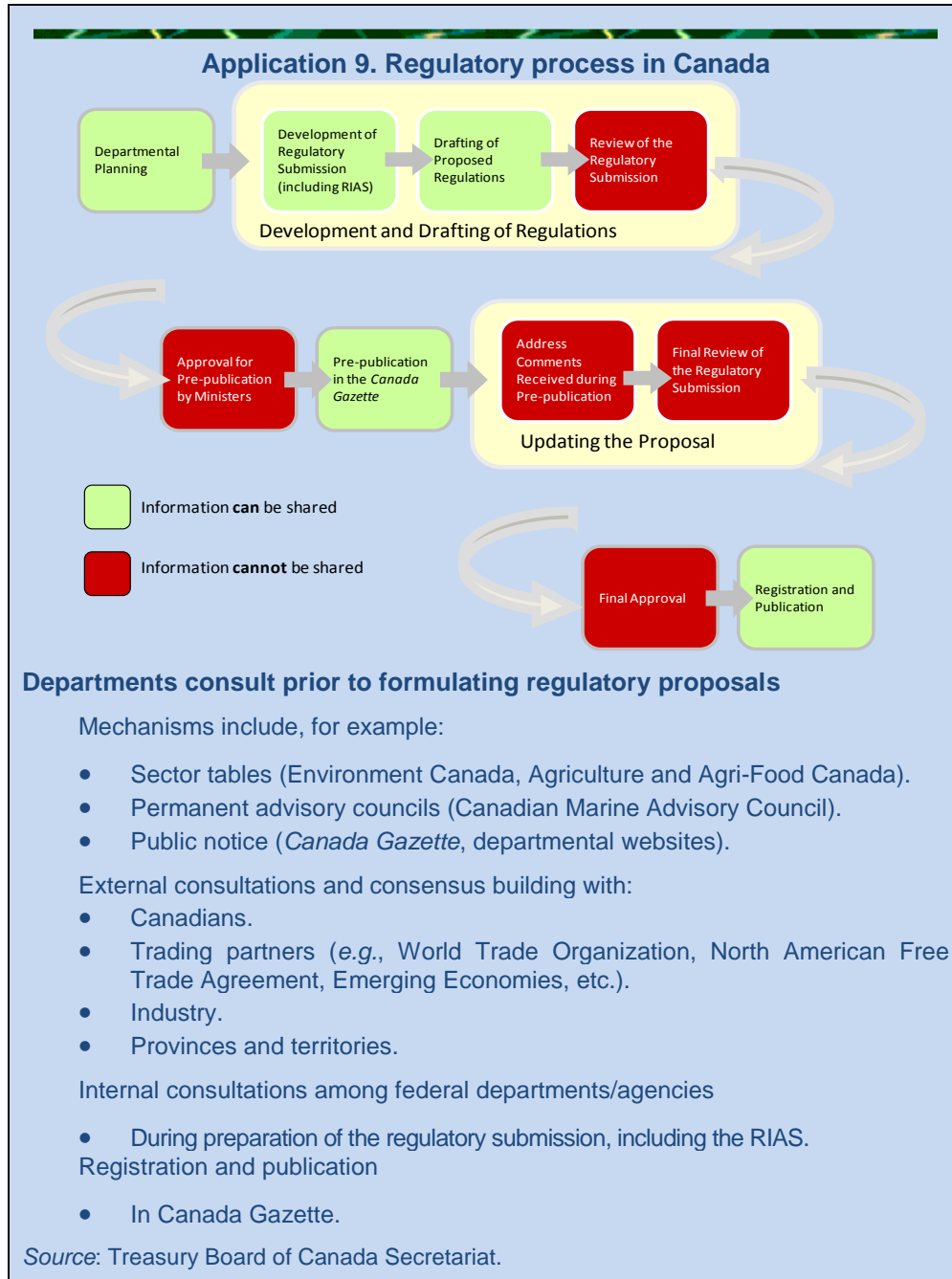
**Table 1. Purposes and tools of public consultation in different stages of the policy cycle**

Stage in the policy cycle	Purpose of consultation	Possible tools and methods
Formulation: Law-drafting	Obtain the views of the public, identify potential conflict lines, gather additional information, verify consistency and acceptance of the proposed regulation, provide information to the affected parties about the proposed regulation (see page 29).	Useful tools and methods include those that support communication with the public, discussion, development and expression of opinions from citizens and interest groups: public hearings, informal consultation, circulation of regulatory proposals for public comment, public notice-and-comment, Advisory Board, e-consultation, focus groups.
Implementation and delivery: Law-endorsement	Formulate guidelines and delivery plans.	Public consultation is limited at this stage, as the regulation is in its implementation phase. Focus groups and expert panels and be used to refine the regulation.
Assessment: Law-review	Review and evaluate the efficiency, effectiveness and cost-effectiveness of the regulation.	Public consultation is pivotal to verify the efficiency and effectiveness of the regulation. Tools and methods include surveys, opinion polls, e-consultation, advisory board, expert panel, focus groups.

*Source:* OECD Secretariat, Table adapted from the Ministry of Public Administration, Republic of Slovenia (2008).

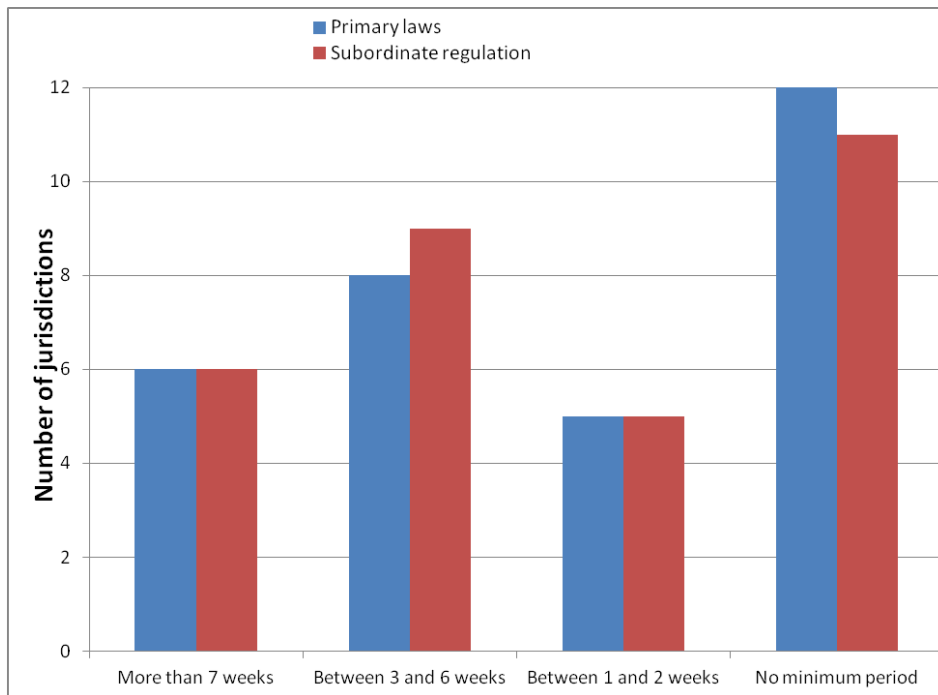
Public consultation during the life cycle of a regulation can help to maximise its intended impact. However, in order to guarantee a successful implementation of the regulation, there might be stages during the life cycle, where public consultation should be limited.

Application 9 illustrates the policy cycle at different stages of consultation in Canada, during which information can and cannot be shared with the public.



Another important aspect is the duration of the public consultation. Practices differ widely across countries. In the PA, consultations should normally last for four weeks; however, most interviewees referred to consultation as a lengthy process with no clear timeframe. According to Figure 14, most jurisdictions in OECD countries also do not have a minimum period for consultation, neither for primary laws nor for subordinate regulation. When timing is specified, most countries give 3 to 6 weeks for consultation, while others allow more time (in the UK, for example, the consultation period must be at least 12 weeks); the remainder give between 1 and 2 weeks. The fact that some countries have no specific minimum period may simply reflect the lack of a formal policy, rather than the absence of well-institutionalised practices.

**Figure 14. Minimum period for consultation: Comments by the public (in OECD countries), 2008**



Source: OECD (2009a).



The deadlines for receiving comments need to be realistic, to allow enough time for stakeholders to look into the subject of the regulation and formulate their comments. The number of consultation sessions needs to be determined at the outset of the process if public hearings, or expert and focus group meetings, are chosen as consultation tools. However, stakeholders should not be over-burdened with excessive documentation or frequent requests for comments. This can lead to consultation fatigue and may hamper the quality of the process.

The maximum is as important as the minimum period for consultation. When determining the time span of the consultation cycle, it is important to consider how much time is needed to analyse the comments and report back to the stakeholders. Certainly, the amount of comments received depends on the scope of consultation. In large-scale deliberation, the analysis of comments received may take longer than in consultation processes that involved only a selected group of experts.

#### When to consult and duration of the consultation process:

##### ➤ Be sure to

- Set clear timelines for the consultation process. Assess whether the deadlines are realistic.
- Initiate consultations early in the decision-making process to allow stakeholders enough time to look into the subject of the regulation at stake and receive feedback. However, make sure not to overburden stakeholders with excessive documentation or frequent requests for comment. Overburdening can lead to “consultation fatigue”.
- While consultations need to be initiated early in the decision-making process, avoid premature submission of a draft regulation to stakeholders. Launched too early, consultation can lead to unsatisfactory results.
- Determine how many consultation sessions are required. Respond to comments received (see Chapter 5).
- Determine how much time you need to analyse the comments, and report back to stakeholders.

## Conclusion: Recommendations and Proposed Actions

Regulatory consultation is becoming an integral part of the legislative drafting process in the PA. This practitioners' guide addresses key questions of why, who, how and when to consult stakeholders more effectively. The guide is based on an analysis of regulatory consultation in the PA. Palestinian officials are exposed to public consultation, but need training and guidance to systematically and effectively involve stakeholders in a meaningful manner.

Many challenges facing public officials in the PA arise from an unclear scope and purpose of the consultation at the outset of the process. The guide therefore recommends starting with a consultation plan that helps to conceptualise a consistent approach and permits better co-ordination of consultation initiatives across departments and policy areas. In this regard, a *code of practice* can serve as a reference document and help to enhance confidence in the consultation process. A consistent approach may also build in a quality control mechanism with checks-and-balances to counteract the capture of a ministry by special interests.

At the outset of the consultation process, *clarification of the scope and impact* of the consultation is required. Participating parties need to be informed about the timeframe, different stages and proceedings of the consultation process, who takes what decisions in the rule-making and consultation processes, what will happen to the comments made by affected parties, and how much influence the consulted parties have on the result.

Consultation should be *open to all* and participation voluntary. A *stakeholder analysis* can assist in identifying stakeholders, their objectives and resources, location and pursued interests. During the consultation phase, public officials should try to meet and reach out to as many stakeholders as possible. Where important stakeholders are known to be harder to reach or are less able to participate, some flexibility might be required towards the *extension of time limits, more intensive efforts to provide information* to specific stakeholders, or creating specifically tailored opportunities for dialogue.

*Information should be made available at an early stage, with the support of information technologies. Regulators should communicate with the public, with less-organised groups and with the media by packaging information into understandable formats, using plain language and clarifying the issues at stake.*

*A clear timeframe and consistent guidelines for the different stages of consultation and use of comments are essential to increase the impact of stakeholder involvement. Stakeholders should receive a response to their comments, and a mechanism to ensure that public comments are adequately taken into account should be established. If governments do not make use of the input received, the consultation is of no use for strengthening trust in policy making and enhancing government-citizen relations.*

Regulatory consultation requires specific skills and tools. *Staff training* needs to go hand in hand with the use of a flexible *and multi-channel approach that combines a range of consultation tools*, including formal and informal approaches. Appropriate tools are selected on the basis of the scope and form of consultation, and with a focus on the different stakeholders' needs. Nothing is gained if the tools are well chosen and adapted, but if the information never gets through to the stakeholders. Attention to delivery is as important as the choice of tools and consultation options.

If regulatory governance is to deliver on its promises, the *evaluation of progress and outcomes of the consultation process* needs to be assured. The consultation exercise has to be constantly revisited, and viewed from a "citizen's perspective" to involve stakeholders meaningfully in democratic deliberation.

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## Checklist

### 1. What do you want to achieve: Plan, purpose and scope of consultation

#### *Is there a consultation plan in place?*

When designing a consistent consultation plan, does it address the following questions?

- What are the methods of consultation?
- What resources are required?
- Who gets involved (scale of engagement)?
- What is the timeframe, different stages and proceedings of the consultation process?
- Who takes what decisions in the rule-making and consultation processes?
- What will happen to the comments made by affected parties?
- How much influence do the consulted parties have on the result?

#### *Has the purpose of consultation been clarified?*

When clarifying the purpose, have the following questions been addressed?

Why is consultation needed:

- Providing information?
- Obtaining feedback?

- Discussing alternatives?
- Identifying conflict lines?
- Verifying consistency and acceptance?
- Empowering the public in policy formulation?

***Has the scope of consultation been clarified?***

When clarifying the scope, have the following questions been addressed?

- How much influence do the consulted parties have on the results?
- Is the scope related to:
  - » Notification (passive consultation)?
  - » Consultation?
  - » Active participation?
- To what extent can the comments and views influence policy making?

**2. Who will you involve in regulatory consultation?**

***Are the stakeholders for consultation identified?***

***Have the objectives and resources of the stakeholders, their media use, location and pursued interests been identified?***

***When using previous stakeholder analysis, has the analysis been updated on a regular basis?***

When identifying the affected parties, have the following questions been addressed?

- Has the regulation been considered from all angles?
- Have the views of the potential stakeholders been researched?
- Have potential critics of the regulation been included?
- Have intended beneficiaries of the regulation been included?

- 
- Have potential allies who want to see change been included?
  - Have intermediaries been included?
  - Are NGOs to be consulted?
  - Are academic experts to be consulted?

***Have regulators tried to reach out to stakeholders, including groups that are less organised?***

When reaching out to stakeholders, have the following questions been addressed:

- Has the information be packaged into understandable formats, using plain language (no jargon) and clarifying the issues at stake?
- Have other media formats (*e.g.*, e-consultation) been considered to reach out to stakeholders?
- If e-consultation has been launched, has user take-up been increased by initiatives to build stakeholders' capacities to use the new ICT tools?
- Have other initiatives to increase skills and knowledge, and create legal awareness and technical expertise, to build stakeholder capacities been launched?
- Has information been available to stakeholders at an early stage of the consultation process?

### **3. How to consult?**

***Has a flexible and multi-channel approach that combines a range of consultation tools been used?***

When deciding on the most appropriate combination of consultation tools, have the following questions been addressed?

- Have regulators asked which method would best reach out to stakeholders?
- Have the advantages and disadvantages of each consultation tool been assessed?
- If a method is inappropriate for a certain group of stakeholders, what alternative methods could be applied to engage them?
- Can intermediaries be used to reach out to stakeholders?
- Has the use of e-consultation tools be considered?

- If e-consultation tools are used, has user take-up been increased by initiatives to building stakeholders' capacities to use the new ICT tools?

***Is there a monitoring mechanism in place to evaluate the quality of the consultation process and outcomes of the consultation?***

When developing a monitoring mechanism, have the following questions been addressed:

- Does the monitoring process include a tracking document that reports when/how stakeholders' comments are taken into account?
- Is there a mechanism in place that makes sure to adequately use the input received?
- Is feedback provided to the stakeholders?
- When issuing the final regulation, have policy makers indicated whether or not they agree with the comments received?
- Is the protection of confidential information and personal data received from stakeholders during consultation guaranteed?
- How many stakeholders have been reached?
- Have the tools and methods to reach out to stakeholders been appropriate?
- Was there an equal opportunity for all stakeholders to take part, and was the process easily understood by stakeholders?
- Was the time-table respected?
- How much time and resources have been spent; did the costs exceed the initial expectations?

#### 4. When to consult?

##### ***Have clear timelines for the consultation process been set?***

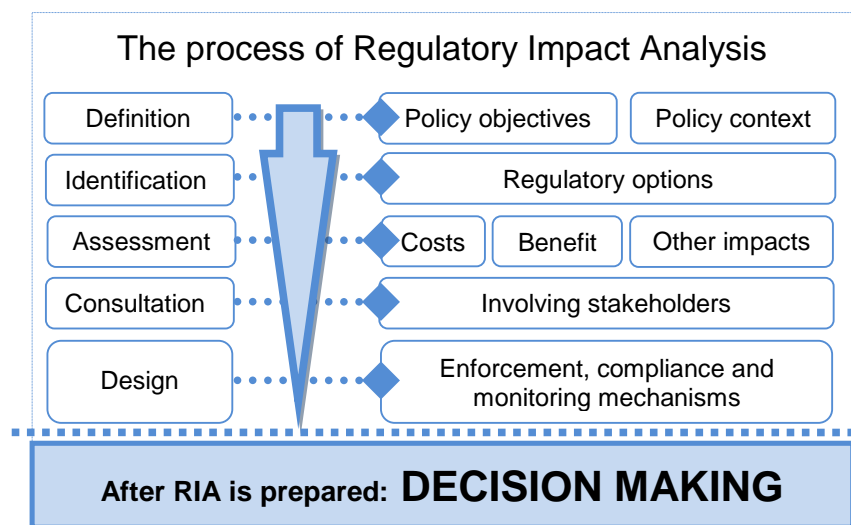
When setting the timelines, have the following questions been addressed?

- Are the set deadlines realistic?
- Is the consultation process initiated early (but not too early) in the decision-making process to allow stakeholders enough time to look into the subject?
- Is there enough time to analyse and provide feedback to the comments received?
- If hearings or meetings are organised, have the number of sessions been determined?





## Annex



Source: OECD (2008).



## *Glossary*

### **Advisory groups**

Selected experts and/or interested parties (*e.g.*, social partners, environmental groups) are brought together to form a consultative body, either on an *ad hoc* or a standing basis.

### **Better regulation/regulatory policy**

Generically, this is an explicit, dynamic and consistent “whole-of-government” policy to promote continuous improvements in the quality of rule-making. Better regulation is largely interchangeable with the term regulatory policy.

In the OECD context, the *OECD’s Guiding Principles for Regulatory Quality and Performance* encourage countries to adopt at the highest political level broad programmes of regulatory reform that establish principles of “good regulation”.

In the EU context, the *Lisbon Strategy* for growth and jobs, which was renewed in 2005, includes *National Reform Programmes* to be carried out by member states, an important part of which addresses the need for better regulation. Specifically, the term is associated with the *EU Commission’s 2006 Strategic Review of Better Regulation and related working documents*.

See also regulatory reform.

### **Compliance**

Acting in accordance with enacted regulation. To achieve its intended objective, a regulation must not only be implemented, but those to whom it is addressed (business, citizens, etc.) must comply with it.

See also implementation, enforcement, Table of Eleven.

<b>Enactment</b>	The act of making regulations.
<b>Enforcement</b>	<p>Monitoring compliance with the law, including sanctioning non-compliance by national and supranational institutions.</p> <p>See also compliance, implementation, Table of Eleven.</p>
<b>Evaluation</b>	<p>A distinction needs to be made between <i>ex post</i> evaluation and <i>ex ante</i> evaluation.</p> <p><i>Ex post</i> evaluation is the assessment of existing regulatory policies, tools and processes in terms of their effectiveness and/or efficiency in delivering better regulation. It can be applied to specific tools and processes such as administrative simplification or impact assessment, or to a regulation, body of regulations, or institutions.</p> <p><i>Ex ante</i> evaluation refers to the evaluation of a proposed regulation before it is made, including the use of tools such as <i>regulatory impact assessment</i>.</p> <p>A third form of (<i>ex post</i>) evaluation is the assessment of regulatory policies, tools and processes in terms of whether they help to improve economic performance, such as more efficient product or labour markets.</p>
<b>Good practices</b>	A set of standards for achieving regulatory quality.
<b>Implementation</b>	<p>The enactment and application of regulations.</p> <p>In the EU context, it specifically means the process of incorporating any EC regulation (that is Decisions, Regulations, and Directives) into the national legal framework and ensuring its application.</p> <p>See also incorporation, transposition enforcement, compliance, Table of Eleven.</p>

**OECD 2005 Guiding Principles for Regulatory Quality and Performance**

These Principles set out core principles of effective regulatory management:

- Adopt at the political level broad programmes of regulatory reform that establish clear objectives and frameworks for implementation.
- Assess impacts and review regulations systematically to ensure that they meet their intended objectives efficiently and effectively in a changing and complex economic and social environment.
- Ensure that regulations, regulatory institutions charged with implementation, and regulatory processes are transparent and non-discriminatory.
- Review and strengthen, where necessary, the scope, effectiveness and enforcement of competition policy.
- Design economic regulations in all sectors to stimulate competition and efficiency, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests.
- Eliminate unnecessary regulatory barriers to trade and investment through continued liberalisation, and enhance the consideration and better integration of market openness throughout the regulatory process, thus strengthening economic efficiency and competitiveness.
- Identify important linkages with other policy objectives and develop policies to achieve those objectives in ways that support reform.

**Primary legislation**

Regulations enacted by the legislature (parliament or congress). At the European level, the treaties constitute the EU's "primary legislation".

See also secondary regulation.

<b>Public consultation</b>	Structured public engagement which involves seeking, receiving, analysing and responding to feedback from stakeholders among the public. Public consultation gives citizens and business the opportunity to make an active input in regulatory decisions.
<b>Public governance</b>	Optimising the management of government institutional capacities and public decision making. Establishment and strengthening of administrative structures that are effective, efficient, transparent and accountable to citizens.
<b>Public Notice and Comment</b>	Notice of the intention to regulate is published, and comments are sought from all interested parties before the regulation is approved.
<b>Regulation</b>	In the context of this project, regulation covers any instrument by which governments set requirements on enterprises and citizens. It therefore includes all laws (primary and secondary), formal and informal orders, subordinate regulations, administrative formalities and rules issued by non-governmental or self-regulatory bodies to whom governments have delegated <i>regulatory powers</i> . <i>Secondary or Subordinate regulations</i> may be mandated in the primary laws, or established directly by lower levels of government (state, region, <i>e.g.</i> ).
<b>Regulatory alternatives</b>	Policy instruments other than “ <i>command and control</i> ” <i>regulation</i> used to obtain policy goals. They include instruments such as performance-based regulation; process regulation; waiver or variance provisions; delegated, self and co-regulation; contractual arrangements; voluntary commitments; tradable permits; taxes and subsidies; insurance schemes; information campaigns.  See also delegated or self regulation, performance-based regulation.

<b>Regulatory authorities</b>	Public authorities responsible for enacting and enforcing regulations. This responsibility generally flows from provisions in the constitution and/or primary legislation.
<b>Regulatory Impact Assessment (RIA)</b>	A structured framework and systematic process to identify and quantify economic, social and environmental impacts likely to flow from adoption of a proposed regulation or a non-regulatory policy option under consideration. The process may be based on benefit/cost analysis, cost-effectiveness analysis, business impact analysis, <i>e.g.</i>
<b>Regulatory powers</b>	Powers to enact and enforce regulations.
<b>Regulatory quality</b>	Optimising the performance, cost-effectiveness, or legal quality of regulation and administrative formalities.
<b>Regulatory reform</b>	<p>Changes in the capacity of institutions and systems for regulatory management that improve <i>regulatory quality</i>; that is, enhance the performance, cost-effectiveness, or legal quality of regulation and formalities.</p> <p>The term is also associated with measures targeted at a specific sector with a view to improving economic performance.</p>
<b>Risk Assessment</b>	The task of identifying and exploring – preferably in quantified terms – the types, intensities and likelihood of the (normally undesired) consequences related to a risk. Risk assessment comprises hazard identification and estimation, exposure and vulnerability assessment and risk estimation.



**Risk Management**

Regulation is a fundamental tool for managing the risks present in society and the economy (societal risks such as environmental or health risks, as well as market-related risks). Regulation can aim to reduce the incidence of hazardous events or their severity. Some OECD countries have started to explore the ways in which regulatory policies can better reflect the need to assess and manage risks, and to put institutional structures, guidelines and procedures in place for this.

**Secondary regulation**

Secondary regulation can be enacted by a body authorised to do so by primary legislation (legislation enacted by the legislature). It may also be known as subordinate regulation.

Note that many secondary regulations can be disallowed by the legislature, if it so decides.

See also primary legislation.

**Table of Eleven**

Developed by the Netherlands for the purpose of promoting compliance. It involves an *ex ante* compliance assessment. Eleven aspects of a proposed regulation are considered. The eleven aspects may be categorised as follows:

Spontaneous compliance: knowledge of the regulation, costs of compliance/benefits of non-compliance, degree of business and popular acceptance of the regulation, loyalty and natural obedience of the regulated form, extent of informal monitoring.

Monitoring: probability of report through informal channels, probability of inspection, probability of detection, probability of inspection.

Sanctions: risk of sanctions, severity of sanctions.

**Transparency**

Transparency is a central pillar of effective regulation, sustaining confidence in the legal environment, making regulations more secure and accessible, less influenced by special interests, and therefore more open to competition, trade and investment. It involves a range of actions including standardised processes for making and changing regulations, consultation with stakeholders, effective communication of regulations and plain-language drafting, publication and codification to make them accessible, controls on administrative discretion, and effective implementation and appeals processes.

**Voluntary commitments**

Commitments by firms to reach certain targets or behave in certain ways not mandated by legislation. May be agreed to in exchange for certain other government benefits (*e.g.*, reduced frequency of regulatory inspections).

*Source:* OECD (2010c).



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Modernising the Public Administration

# Regulatory Consultation in the Palestinian Authority

## A PRACTITIONERS' GUIDE FOR ENGAGING STAKEHOLDERS IN DEMOCRATIC DELIBERATION

Regulatory consultation can help to improve both the quality of regulation and governments' responsiveness to citizens and businesses. At the technical level, the use of consultation – and the introduction of the Regulatory Impact Analysis in particular – is pivotal for collecting empirical information, measuring expectations, assessing costs and benefits and identifying alternative policy options. At the policy level, stakeholder involvement enables a transparent policy-making process and can increase the level of social acceptance of decisions and, therefore, compliance.

This Practitioners' Guide, prepared by the OECD on the basis of a survey, assesses the regulatory consultation process of the Palestinian Authority, presents good practices examples from OECD countries and provides guidance to Palestinian policy-makers and public officials facing choices about the most appropriate form of consultation in rule-making, when and how to consult, who to involve and how to overcome barriers for a successful deliberative process.