

Working Paper Series

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**LEGISLATIVE DRAFTING AND ONLINE  
CONSULTATION: A CONTRIBUTE TO LAW-  
MAKING FOR BETTER REGULATION?**

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# ABSTRACT

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*This paper deals with online consultation (also known as e-consultation or consultation by ICT) as a legislative drafting technique. As we all know, for some time at international level (see OECD's Papers on Better Regulation) consultations of the recipients of legal acts carried out within the regulatory cycle have been considered fundamental for a better regulation. Specific theoretical models and just as many IT programs have been retrieved from the literature on the matter and then studied in order to enhance consultations in the field of regulatory impact assessment activities. This paper deals mainly with the consultations by ICT. It intends to be an overall assessment of the state-of-the-art diffusion and regulation of the above-mentioned consultations. It also aims to establish whether and in which way the ICTs have improved the consultative activity and above all whether, perhaps, its diffusion has really improved the quality of law. Or whether, on the contrary, as has often happened in e-government practices, ICT alone cannot work magics in putting right all the shortcomings by way of excessively enthusiastic users in charge of implementing it.*

Keywords: Online Consultation; Legal Drafting; Regulatory Impact Assessment.

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## **1. INTRODUCTION**

The e-consultation consists of an activity of consultation of the subjects of a legal act conducted through the ICTs by the public entity that has the right to adopt said act.

While dealing with internal consultation conducted within the regulatory cycle - and more specifically dealing with law impact assessment activities, it should be remembered that in theory these activities are part of the e-participation processes, which are occasionally regulated and practiced in many countries. From a legal point of view, the common matrix consists, in any case, of those institutions of direct democracy which are integrated into representative democratic systems.

Furthermore, it should be noted that e-consultation is an activity that risks being confused with lobbying, especially in some legal systems such as that of the EU where it has been practiced for some time. Aware of this, for example, the European Commission on the one hand continues to pursue the goal of better regulation (see COM (2017) 675), on the other hand it has tried to keep the consultations of lobbyists, now registered in a Transparency Register, separated from those of other stakeholders and, more broadly, the public.

The e-consultation models within the regulatory cycle have been studied for a long time and have been adopted by the legal systems of several countries, especially by those of young democracies. In all cases, the propulsive leverage of ICT is a common trait, as evidenced by the numerous researches in the field of legislative drafting by ICT aimed to design and develop platforms and tools for the standardization of consultative procedures. Paradoxically, it is quite surprising that today's greater diffusion of standardized online platforms for consultative processes has not ended up producing unwished-for side effects. If, in other words, thanks to ICT and the easy and open access to all types of legal text now extended to a wider range of consulted subjects, some lawmaking processes have not ended up clogged up and slowed down, as it may have been feared, which is what can be observed in the presence of complex acts and whenever institutions lack professionalism and invest insufficiently in such activities. In this case, there is no substantial improvement in the quality of regulation.

## **2. E-PARTECIPATION AND E-CONSULTATION**

The participation of people in the political life of their communities in defining the rules governing those communities, both in the representative and in the direct form, has been perhaps boosted by ICT's and even more so by some Internet applications. I say 'perhaps', because - once

put to the test - there is little evidence of it. What is certain is that the Internet alone enables even the less experienced users to exchange data and information considerably and to communicate as fast and efficiently as never before. These activities are also essential in a political action involving as protagonists - in a virtuous circle - both the electorate and its representatives.

The more effective and more extensive diffusion of data and information on public sources over the last few years has certainly contributed to revitalizing the ever-dormant participatory yearnings present in society, foreshadowing new opportunities for relations and exchange. To such an extent that public information and communication, in principle all striving for transparency in administrative action and social control over public action, thanks to the use of new tools, have also proved decisive in triggering off public debates on major issues. In the course of these public debates, administrations and administrators have interacted on equal terms, in an unprecedented collaboration which is, in future, likely to affect the very idea of public administration.

Hence the attention for the institute of popular consultation, already known and experienced in our legal system; an institution present in the Constitutional Charters of representative democracies and aptly aimed at fostering representation. In the wake of ITCs, the Internet is likely to give impulse to popular consultation (OECD 2001).

Within these renewed online communications between public authorities and civil society, those relating to law-making stand out, and in particular the methods used by the authorities to acquire - through direct consultation - opinions and observations on legislative draft acts or on political documents about matters of significant social interest. An advisory activity with an inclusive purpose, aimed at allowing the direct participation of citizens in the process of lawmaking, which is formally up to the institutions of representative democracies and in the constitutional principles mandating grassroots participation.

It is now through observing a special feature of contemporary political participation, which consists of contributing to law-making through well-defined and standardized methods of consultation, that we can understand whether or not the direct participation of communities in the lawmaking processes has helped to improve the effectiveness of act enforcement.

According to the European Commission "better regulation is underpinned by the active engagement of civil society, which invites inputs from stakeholders at all points in the policy with a range of feedback tools and consultation activities" (COM (2015) 215, Better regulation for better results - An EU agenda), the legal framework of reference is broad and consolidated in many countries, including Italy. However, in many territories there is certainly no effective and extensive implementation of many existing regulations.

### 3. E-CONSULTATION: MANY JURIDICAL MODELS

The public electronic consultation is not dissimilar in its purpose from some of the consultative institutes already known by our legal systems, through which public entities can or must acquire opinions and observations stemming from the communities that inhabit the territories affected by their political decisions. One example is the consultative referendum applied by certain jurisdictions, and whose results are not legally binding but can only have an effect at political level.

The online consultation is one of the institutions of the so-called "democratic participation tout court or popular", which consists in practices of direct intervention of citizens in the decision-making activities of public institutions.

Citizens, individually or collectively, voice their arguments through specific public procedures (so-called "deliberative process"). They are entitled to take part in the decision-making process by the same institutions that regulate the methods, timing and effects of this process.

The public electronic consultation is therefore an advisory activity conducted by a public entity through its own institutional website in order to directly acquire opinions and observations on the part of citizens on issues relevant to the life of the community. It is therefore a public activity carried out in pursuit of a public interest; it does not strip the decision-maker of responsibility, who has the ultimate prerogative of the final decision. However, thanks to the wealth of information acquired through consultation, the final decision tends to come close to the best possible choice.

However, there is a plurality of e-consultation models, depending on whether web-based consultation is open to stakeholders' input: *a*) on policy documents (plans, programs, texts, non-formalized regulatory proposals, etc.); or *b*) on drafting of deeds already formalized.

We can distinguish between a consultative activity carried out by the public on the web as a "legislative drafting technique" in the strict sense (intended to improve the substantial quality of the legal act); and an advisory activity carried out by the same subjects always via the web, which is instead a method of sharing public policies, as in the very well-known and long-established case of the French public debate.

The differences are not trivial, because the procedure in the second case is certainly more complex, involving more institutional subjects, not just the proposing decision-maker.

The practice of recent years has highlighted a number of gaps in the system, which however have been partially plugged by regulations with similar content, even if the exceptions observed in different States give us a much diverse picture, as shown in the "OECD pilot database on stakeholders engagement practices" (in [www.oecd.org](http://www.oecd.org)).

In recent decades, owing to the development and diffusion of ICT also in the public sector, and to the evolution, also *ex lege*, of digital sections in the public administrative bodies, a number of institutions have undergone changes in order to improve the quality of regulation: the traditional form of consultation has become e-consultation.

There has been an evolution, partly structural, in the wake of the diffusion and perfection of ICT, which facilitate the acquisition of data and opinions expressed by the recipients of the aforementioned regulation, already envisaged back in 2013 by the OECD (OECD (2013), Transparency through consultation and communication): “Transparency is one of the central pillars of effective regulation, supporting accountability, sustaining confidence in the legal environment, making regulation more secure and accessible, less influence by special interests, and therefore more open to competition, trade and investment. It involves a range of actions including standardised procedures for making and changing regulations, consultation with stakeholders, effective communication and publication of regulations and plain language drafting, codification, control on administrative discretion, and effective appeal processes... The contribution of e-Government to improve transparency, consultation and communication is of growing importance.”

The engagement of the stakeholders in the procedures for the formation of legal acts can take place at different times of the regulatory cycle, before, during or after the approval of regulations. According to OECD, there are different stages of intervention: Early Stage in the Development of Regulations (before draft), Later Stage in the Development of Regulations (during draft), Ex Post-Evaluation of Regulations, Implementation (including transparency/accessibility).

Quite obviously, the first of the above points highlights the need for a better definition of the regulatory intervention and the expected effects resulting from it; the second and the third point concern the effects produced after a certain time by an act already adopted.

The guiding principles of this type of activity are shared at international level: transparency, clarity and completeness of the information provided; speed and compliance with the timing of the regulatory process; congruence of the proposed observations with the object of the future regulation. The subjects consulted are both public and private recipients of the intervention, single or associated.

These are no longer experimental methods, as long-term e-consultation practices are recorded. Reportedly, the European Commission has, for example, used online consultations as a better regulation tool since at least 2002 (COM (2002) 704, Towards a reinforced culture of consultation and dialogue). The portal of the EU Commission dedicated to public consultations ([http://ec.europa.eu/yourvoice/consultations/index\\_en.htm](http://ec.europa.eu/yourvoice/consultations/index_en.htm)) has been active for some time. But in



recent years, the focus has also shifted towards the development of special tools and platforms, increasingly specialized, which facilitate the procurement of information, and the collection and processing of data, as well as the processing of the results of the consultative process. .

The first EU programmes on better regulation by ICT (funded by ISA programme) have favoured, with good results, the design and implementation of specialized tools for legislative drafting, such as Legit, which aims to make the process of drafting new legislation more efficient, and LEOS, that is, the Open Source Software created within the Legit action as a result of the analysis of best practices and reusable solutions for drafting new legislation. LEOS-Pilotis was launched in 2017 across the Commission services and Council of the European Union. It selects LEOS for internal use (see <https://joinup.ec.europa.eu/>).

In recent years, however, as evidence of the centrality assigned to consultation processes, the focus has shifted to e-participation support tools and especially to e-consultation. Let's consider for example, LOD and e-Participation, a pilot project promoted by the European Parliament and developed by the Publications Office of the EU that aims to create a Web platform enabling citizens to participate actively in the European law-making process. The system is based on Semantic Web technologies, particularly on a modular knowledge organization system capable of describing, from a semantic point of view, users' activities. In particular, the conceptual models developed represent users' comments and their feedback on the bill awaiting ratification, as well as the amendments the users can provide in the 24 official languages of the EU. Conceptual modelling is accomplished through an RDF(S)/OWL-based approach for all the information objects (documents, comments, amendments, statistics) with the aim of making them available as Linked Open Data (LOD).

#### **4. AN OVERVIEW OF E-CONSULTATION IN ITALY**

In many continental countries, as mentioned above, the consultation has long entered the impact assessment pathways. Even in Italy the first rules are quite old. The e-participation appears in a general state law in 2005 (Code of digital public administration, legislative decree 82/2005, article 9), even if only as a general principle and without specific reference to lawmaking; while the consultation in lawmaking had already entered in 1999 into a law of the State that regulates the legislative simplification (law 50/1999), without however referring to the use of ICT.

However, it was necessary to wait until 2016 to put together the two profiles, i.e. consultation in lawmaking for a better regulation and the use of ICT's, with an update of the law 82/2005 complementing the principle of e-participation with a reference to e-consultation as a technique

that improves regulation (the improvement of the quality of legislation "also through the use, where required by law and within the resources available under current legislation, of forms of prior consultation by electronic means on the layouts to be adopted ", Article 9).

Therefore, back in 2016, the Italian legal system began regulating, with primary source, two distinct and complementary profiles: a) the e-consultation of the addressees of the act to be adopted, as "legislative technique" in the strict sense, aimed at improving the substantial quality (2016) ; b) the online consultation of all stakeholders as a method of sharing public policies (2005).

And above all, internal consultation with the regulatory cycle became an exclusive e-consultation.

However, we should remember that the process of enhancing the consultation as a technique of legislative drafting has a long history. Already in 1979, in a well-known report about the main problems of the Italian public administration, promoted by the Ministry of Public Administration of the time, Massimo Severo Giannini, pointed out, among the ills of public administrations, to the obscurity of the normative sources. In Giannini's words they were difficult to implement for two main reasons. First, the absence of impact assessment and legislative drafting methods and techniques, and then, already at that time, the inadequate use of ICT's, even though the law 50/1999 required the development of the impact assessment of law, including consultations for certain types of acts.

More specific rules on consultations in the impact assessment of law procedure were approved only in 2008 (Prime Ministerial Decree 2008), including, even for governmental legislative acts, the sanction **for** impropriety in cases of failure to conduct consultations on the legislative draft. Despite the rules, consultations were only exceptionally carried out.

Despite it being mandatory, this rule was completely disregarded over the years (Chamber of Deputies - XVII leg., Doc. LXXXIII n. 2, Relazione sullo stato di attuazione dell'analisi d'impatto della regolamentazione - anno 2013), presented to Parliament by the Undersecretary to the Presidency of the Council on 14<sup>th</sup> August 2014). This rule included the consultation between the mandatory cognitive activities prior to the issuance of the proposal for a legislative act of the Government, of which the same administration competent to the regulatory initiative should give an account in progress, also through its own institutional website. The Authorities are regularly consulted (Chamber of Deputies cit.; Raiola 2012). See, for example, the case of the Bank of Italy, which pursuant to art. 23 of law 262/2005 is required to submit for consultation proposals for new regulatory acts or general content or amendments to pre-existing documents. In the circular 20 July 2010, n. 277, implementing this provision, which regulates the impact analysis of the regulation, in fact, the consultation (multichannel) of the interested parties appears among the

methods of investigation of the prior assessment. Another case worth mentioning is that of Consob (National Commission for Companies and Stock Exchange), which regularly uses the advisory practice to improve the quality of its acts, publishing in full - and not as a summary document, as it is more common practice elsewhere - all the observations gathered during the consultation. However, we should keep in mind that these administrations, dealing with highly specialized subjects, usually consult the proposals for new acts or the revision of pre-existing acts and mainly attract subjects with equally specialized skills. For example, by observing the four public consultations conducted by Consob in 2014 (one jointly with Banca Italia), we notice a recurring element: most of the advanced proposals come from professional associations (Abi, Assofinance, Assogestioni, Adiconsum etc.) Or from free professions, with an objective prevalence of groups able to attract the Authorities on their side.

The former general regulation of 2008 applicable to the public administrations of the State has been only in 2017 replaced with a new regulation (Prime Ministerial Decree 169/2017), which, at least formally, seems to have extended the scope of consultation in lawmaking, to which it dedicates a general discipline (Chapter IV), previously missing. Another novelty is the general obligation to carry out consultations in all cases of preventive and subsequent impact assessment, except in cases of necessity and urgency; and the distinction between open consultations (to anyone) and restricted consultations (to the addressees of the act). Open and restricted consultations are alternatives at the discretion of the administrations and are always and only performed by ICT's.

The new regulation of 2017, in my opinion, however, lacks a decisive point, that is, the one concerning the effects of the results of the e-consultations carried out. In fact, the new regulation expressly establishes that on the contributions provided by the consulted the administration has no obligation to reply, nor these contributions are a constraint for the legislative investigation. Finally, among the acts of the State, the Directive of the Presidency of the Ministry of Ministers of 31<sup>st</sup> May 2017 entitled "Guidelines on public consultation in Italy", is a secondary act containing, all in all, only "indications and advice" ("It recommends public administrations to promote greater citizen participation in public decisions and to commit themselves to considering the public consultation, also carried out through electronic modalities, as an essential phase in decision-making processes.").

I will now briefly mention the regional laws, which have shown greater conviction in moving towards e-participation. In fact, in addition to the forms of popular consultation already known by the Statutes (for example referendums, consultative), some Regions, such as Tuscany and Umbria, have approved specific laws on participation, introducing *new and different legal institution just the e-consultation* (Regional Laws of Tuscany 46/2013 and 69/2017; Regional law of Emilia-

Romagna 3/2010; Regional law of Umbria 14/2010). These are pilot rules that have certainly promoted participatory processes in Italy in the form of public debate and in that of lawmaking consultancy through the definition of stable and predefined models with a specific law.

## **5. CONCLUSION**

Until recently, the consultations activated by the public administrations on their websites were largely considered to be just opinion polls. Worse still, they were sometimes mixed with similar consultative initiatives promoted on a personal or collective basis by individuals or groups active in political life, for example legitimate instances of freedom of expression and communication. This latter category was not conditioned - as the former was - by the “onus and honour” of playing a public role and nor bound to the pursuit of public interest. This is an onus and an honour that e-consultations inside the lawmaking also assign to individuals who then enter fully into the process of public decision-making. This involves, as mentioned above, supporting public regulation and helping integrate the stock of information that will lead to the adoption of a legislative act binding for the community. This is a contribution that today, thanks to ICT's, can be offered to everybody and much more easily than in the past.

Quite obviously, within a legislative framework that at least sets the limits to the scope of public consultations, especially those "on topic". Public consultations, in the absence of precise guidelines, risk overstepping the areas of competence of the subjects that activate them, the time constraints for consultation, the legal effectiveness and the validity of results over time. Besides, public consultations risk misusing the characteristics of specific ICT platforms and preventing them from being reused. These are norms that, as we have seen, in the European Union, in Italy and in several other States (see again the OECD database already mentioned) are coming into existence and therefore allow full exploitation of the potential of ICT's for democratic purposes, as an instrument that paves the way for political participation and removing even the few operators of the ICT's market a space entirely dedicated to democratic growth.

Finally, however, I must also add a note of realism, or scepticism, specifically with regard to ICTs and the many applications developed so far. In fact, I believe that the platforms and tools for consultative processes within the regulatory cycle (although this may apply in general for all the ICT applications developed for legislative drafting) cannot by themselves be determined for the purposes of regulation. These are precious tools that can certainly facilitate access to consultative proceedings (if there were no European Commission platforms, which of us would ever participate in a consultation opened by the Commission itself?). However, in some cases they

may risk involving further decision-making processes, for example in the case of complex acts and in cases of institutions lacking human and instrumental resources to be allocated to this activity; or they can be excuses for public decision-makers trying, by opening e-consultations, at least formally, to either compensate for a deficit of democracy or for detachment from their communities. This is likely to be perceived as evidence of the inability of ICT's alone to produce democratic growth effects, or in the specific case, to curb the vices of bad regulation.

In my opinion, ICT's could be useful: *a)* to influence the stock of sources considerably, through a reorganization and simplification activity aimed, for example, at codification (French model); *b)* to share data between different public entities, avoiding the dispersion of information functional to the regulatory processes (particularly in the activity of the preventive or subsequent impact assessment of law); *c)* specifically on e-consultation, to increase consultative practices as long as they are differentiated (distinguishing for types of act and for material areas of regulation) and enhancing the results through a more incisive regulation of the effects.

They could, in short, be an excellent support for the public decision-maker who knows and wants to treasure it, but in itself only the crucial problems that still characterize the regulation cycle are not conclusive. If this were the case, all problems of bad legislation would have long been resolved.

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