



CENTRE FOR LAW AND DEMOCRACY

Comments on the Council of Europe's Draft Guidelines on Civil Participation in Political Decision-Making¹

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These Comments were prepared by the Centre for Law and Democracy (CLD) – a human rights NGO based in Halifax, Canada, that works internationally to promote foundational rights for democracy – as a contribution to the development by the Council of Europe of Guidelines on Civil Participation in Political Decision-Making. They are a response to a call for input by the European Committee on Democracy and Governance and the Conference of International Non-Governmental Organisations, who are organising a public consultation on the draft Guidelines prior to their being sent to the Committee of Ministers of the Council of Europe for adoption.

Public consultation is a vital underpinning of robust participatory democracy and we welcome this initiative as a much-needed step towards developing broadly applicable European standards regarding the conduct of effective consultations. We hope that these Comments help the Council of Europe to prepare and adopt strong and ambitious Guidelines.

The Comments are broken into two parts. The first is a set of General Comments which identify areas where we believe that more attention or some adjustments

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need to be introduced generally into the draft Guidelines. The second is a set of more Specific Comments on the actual proposed Guidelines.

General Comments

1. The range of decision-making processes

One of the challenges in developing standards for participation in decision-making by public authorities is that the range of types of political decisions is enormous, and that the appropriate level and intensity of consultation varies correspondingly. An initial problem with the draft Guidelines is that they fail to define clearly their scope in terms of the types of decision-making process they cover. Indeed, even the language is not consistent and they sometimes refer to “political decision-making” while in other places the reference is simply to “decision-making”.

The one place where some attempt at definition is made is in the definition of “civil participation” in Guideline 3. However, this is a somewhat roundabout approach, since technically it defines participation and not decision-making. Furthermore, if this were to be treated as a definition of decision-making, it would be significantly overbroad. It covers not only policy and legal processes, and decisions which affect the public generally, but also strategies – at least some of which should not be the subject of public consultations – and arguably even decisions – which formally includes both administrative and legal decisions – which affect only one person or a small subset of the whole public – of which again many should not be the subject of consultation.

More generally, the vast range of types of consultation needs, flowing from different types of decision-making process, makes it very difficult to move beyond generalisations when it comes to standards for consultations. In several cases, noted below under Specific Comments, the Guidelines impose standards which are appropriate for more intensive consultation situations, but which are not realistic for every consultation. In some cases, for example in Guideline 34, this problem is dealt with by introducing a conditional term – in that case, “should consider” – before the standard (i.e. rather than making it mandatory), which weakens the Guidelines. The best solution for this is not immediately obvious, but one option would be to set out minimum standards for consultations regarding all decision-making processes, and then a more stringent set of standards for more intensive consultative processes, which might even be defined. Another option would be to set out a range of options, where appropriate, making it clear that these are not optional but that the precise set of options that would be required depend on the situation.

Recommendations:

- The Guidelines should include a clear definition of their scope in terms of the types of decision-making processes they cover.
- Consideration should be given to the best approach for dealing with the fact that different decision-making processes require different levels and intensities of consultation, beyond simply relying on conditional terms.

2. The need to provide more specific options

One of the most useful benefits of a document such as the proposed Guidelines is to provide specific options to be considered for different types of consultation needs. Perhaps in part due to the issue raised in the first point, the draft Guidelines do not go as far in this regard as they might. There are certainly general references to different types of formats for consultations, such as in Guideline 29, but far more detail could usefully be provided.

This need for greater precision and specificity extends to other aspects of consultation as well. For example, the section on Partnership and co-decision could elaborate on when partnership and/or co-decision-making processes are needed or particularly desirable. Guideline 24 refers to the need to receive “timely and accurate information” about decision-making processes but it fails to elaborate on the specific information needs for consultative processes, such as advance notice of the time and agenda of any public meeting, as well as access to any background documents relating to the issue being discussed at the meeting.

Recommendation:

- More specific detail on different specific consultation modalities and options, as well as on other issues relating to consultations, should be provided in the Guidelines.

3. Too much of a focus on legal and regulatory

In much of the document, there is a focus on legal and regulatory tools as the means for providing the formal framework for consultative opportunities. For example, Guideline 13 refers to the need for an “appropriate legal or regulatory framework” for participation, ignoring the potential role of policy in this respect. It is true that, as noted above, the definition of “civil participation”, which effectively serves as the definition of decision-making processes covered by the Guidelines, refers to policy, law, regulation and various other processes undertaken by public bodies. But this is about the scope of the Guidelines and not the way the framework for consultation should be established.

While the role of law in setting very general frameworks for consultation is important and regulations can help elaborate on the legal requirements, the overwhelmingly dominant tool for formalising regulatory opportunities in practice is various types of policy instruments. Indeed, for many public authorities, which is the type of entity addressed by many of the specific guidelines, policy instruments are the only tools at their disposal for establishing clear and binding consultation frameworks. And, in practice, these more flexible instruments are far better suited to the specific context of consultations, noting that the need for flexibility is explicitly recognised in Guideline 29. As a result, in most cases, references to legal and regulatory tools should also incorporate a reference to policy tools.

Recommendation:

- The text of the draft Guideline should be reviewed and consideration should be given to adding in references to policy in most cases where there are presently only references to legal and regulatory tools.

4. Too much of a focus on organised groups

Although Guideline 2 calls for the right to participate to be guaranteed for everyone, including “individuals, the general public, NGOs and civil society”, in fact the major focus of the Guidelines is on NGOs and civil society. Indeed, even the definition of “civil participation” refers only to NGOs and civil society. NGOs are certainly extremely important stakeholders, whose collective opinions often reflect a broad range of public sentiments on a particular issue. However, outreach to NGOs is not a substitute for broader public outreach and consultation efforts.

Recommendations:

- The definition of “civil participation” should be expanded to include individual members of the public as well as NGOs.
- The consultation needs of individual members of the public – for example as to outreach and particular forms of consultation – should be more fully integrated into the Guidelines.

5. The right to information

We welcome the inclusion of a section on “Access to Information” in the draft Guidelines and agree with its characterisation as “an indispensable precondition for genuine civil participation”. However, this section focuses exclusively on the need for public authorities to disseminate appropriate information about consultation and decision-making processes, what may be termed a ‘push’ approach to information, ignoring the fundamental importance of a ‘pull’ or request driven approach to information. In addition to receiving the information public authorities

proactively disseminate, people should have the right to decide for themselves what information they need to engage in a particular consultation process. For this, States need to adopt comprehensive and effective right to information laws. It is worth noting that a couple of the Member States of the Council of Europe have not even adopted right to information laws, while many have weak or outdated laws.²

Recommendations:

- The Guidelines call on States to recognise and pass laws giving effect to the right to information.
- The section on “Access to Information” should be renamed “Right to Information”, in keeping with international recognition of this as a human right.

6. More attention for offline consultation tools

Guideline 18 states: “Public authorities should make good use of the new information and communication technologies, infographics and social media to facilitate civil participation”. We agree with this idea and recognise the fundamental importance of digital consultation opportunities. At the same time, these should not be over relied upon to the detriment of offline tools. Although global Internet access rates continue to grow every year, in many countries access to digital communication tools remains concentrated among the wealthy, urban and educated. As a result, it is important to balance digital consultation efforts with offline mechanisms, in order to ensure that nobody is left behind.

Recommendation:

- The Guidelines should place more emphasis on offline consultation tools and mechanisms.

7. Reaching out to marginalised or disadvantaged groups

Beyond the question of access to digital communication tools, outreach to marginalised or disadvantaged groups may be particularly challenging for a variety of reasons, potentially including the need to overcome historic distrust and the difficulty of penetrating insular communities. At the same time, fostering participation among marginalised or disadvantaged groups is particularly important both to ensure that consultation processes accurately reflect wider public opinion and to help to address the causes of disempowerment.

Recommendation:

² See www.rti-rating.org/country-data/.

- The Guidelines should call on public authorities to make significant efforts to ensure that marginalised and disadvantaged groups are not left out during consultation processes.

8. Rationalisation

In a few places, the draft Guidelines would benefit from being organised in a more logical and rational fashion. For example, the second bullet in Guideline 5 lumps together openness, respect and responsibility, all very different ideas, while the third bullet refers to accountability and transparency, again very different ideas (but transparency would seem to fit closely with openness from the preceding bullet). Guideline 40 refers to the completely separate ideas of: a) adopting the Guidelines; and b) taking the necessary measures to implement them. Guideline 42 refers to the dual ideas of fostering better understanding and of harmonising implementation, while Guideline 43 again refers to the need for awareness-raising.

Recommendation:

- The Guidelines should be reviewed with a view to ensuring that similar concepts are brought together while different concepts are addressed separately.

Specific Comments

Guideline 2: This Guideline sets out the scope of the right to participate in terms of who should benefit from the right. It is appropriately broad, but consideration should be given to whether or not to recognise the difference, recognised under international law in at least some cases, between the participatory rights of citizens and non-citizens.

Guideline 4: The last part of this Guideline refers to the dual ideas of dialogue and cooperation. While of course the latter is often very important in terms of implementing public decisions, it goes beyond the formal scope of the Guidelines and is not otherwise addressed in the rest of the Guidelines. It is therefore recommended that this reference be removed.

Guideline 5: There are a few problems with this Guideline. The references to openness and transparency in bullets 2 and 3 should be brought together, while the idea of accountability in bullet 3 should be treated separately. The reference to 'respect' in bullet 2 needs to be refined. There is no need for civil society actors to respect public authorities, at least in the social sense of that word, for consultations to work. Rather, what is needed is for everyone to show respect for appropriate

participatory processes (such as letting others have their say and using appropriate language). The reference to ‘responsibility’ in this bullet is also problematical because it is not defined and could be interpreted by some actors in far too broad a fashion. In bullet 4, in addition to respecting the independence of NGOs, their freedom should also be respected. Bullet 5 conflates the two very different ideas of providing feedback on participatory contributions (which could involve saying that all contributions had been rejected) and ensuring that contributions have actually been taken properly into account (which will, in turn, help ensure that participation has a real impact on decision-making). Both are important and it would be useful to separate them out more clearly.

Guideline 7: This Guideline calls on NGOs to fully respect “principles of accountability and transparency”. This could be misunderstood to suggest that NGOs are under the same obligations in this area as public actors, which is not correct. Formally, NGOs are simply required to respect the legal rules governing their operations and a qualification along these lines could be added. At a minimum, the phrase should be qualified by reference to the idea of the relevant principles in these areas that apply to NGOs.

Guideline 9: This Guideline protects the right of NGOs to “undertake research, education and advocacy on issues of public interest”. The latter qualification should be removed since NGOs have a right to conduct these activities regardless of whether or not the target is considered to be a matter of public interest. For example, some NGOs exist to promote the interests of their members, which is perfectly legitimate although it cannot normally be described as a matter of public interest.

Guideline 10: This Guideline refers to the role of civil society in acting as “oversight bodies of public affairs”. To the extent that civil society does this, it is on an informal basis, and this reference might be misunderstood. Consideration should be given to replacing this reference with a reference to the monitoring and reporting roles of civil society.

Guideline 12: This Guideline suggests that civil participation ensures “that real public needs are met” but this is not necessarily the case. Consideration should be given to replacing the word “ensuring” with something along the lines of promoting or increasing the chances of public needs being met.

Guideline 13: The idea of policy tools as contributing to the framework for participation should be recognised here. In addition, the focus of the second sentence is on limitations and restrictions, which is appropriate, but some language

should be added to make it clear that the main focus of the framework should be on creating positive opportunities to participate.

Guideline 14: This Guideline refers to various forms of civil participation. Consideration should be given to adding in more detailed options or possibilities here to provide guidance on this important matter.

Guideline 24: As with the previous comment, consideration should be given to elaborating in this Guideline on the specific types of information that should be provided to support consultation and participation.

Guideline 25: This Guideline calls for the establishment of websites to provide information about opportunities for “online consultation, feedback and petitions”. There is no reason to limit the information provided via websites to online participatory opportunities (i.e. information about all participatory opportunities should be provided on these websites).

Guideline 27: This Guideline suggests that consultation “sets the basis for evidence-based policy formulation, implementation and monitoring”. This is not actually true and evidence based processes can operate perfectly well without consultation. It is recommended that the wording be changed to reflect the idea that consultation can support evidence-based processes.

Guideline 28: This is an example of a standard which should be mandatory for more important decision-making processes but where conditional language (“are encouraged”) is used. This issue was discussed under General Comments. Consideration should be given to making it clear that this is mandatory for major decisions and should be implemented as far as possible for more minor decision-making processes.

Guideline 31: This is another guideline where a reference to policy should be added to the references to legal and regulatory tools. In addition, the reference to “each draft of the document” should be replaced by a more generic reference, for example to “each stage of the process”, because there may be phases which do not involve documents, such as ideation phases at the very front end of a policy development process.

Guideline 32: This is an example of a standard which is overstated (sort of the opposite of the problem identified above in relation to Guideline 28). While expedited processes are not generally appropriate, situations often arise where decisions need to be made on a relatively expedited basis, for example in the context

of dynamic international negotiations, and where expedited consultations are the best option.

Guideline 33: The definition of dialogue as a “long-lasting” process in this Guideline is limiting because not all dialogues need to take place over a long time.

Guideline 34: This is another guideline, like Guideline 28, where conditional language (“should consider”) is used but where this should be mandatory for more important, ongoing decision-making processes.

Guideline 36: This Guideline suggests that where partnership or co-decision systems are used, they should apply to all phases of the relevant decision-making process (“agenda-setting, drafting, decision, implementation, monitoring and reformulation phases”). In fact these systems might legitimately be applied only to a sub-set of the different phases. The word “and” in the quote above should be replaced with “and/or”.

Guideline 38: In addition to “clear processes and transparent criteria for representation of NGOs and other interested parties” in co-creation bodies, these processes should also be fair and democratic in nature (i.e. that this should be substantively, as well as procedurally, appropriate).

Guideline 39: This is another example of a guideline where a reference to policy should be added to the references to legal and regulatory tools.

Guideline 40: The reference to having Member States adopt the Guidelines should be kept separate from the second part of this Guideline, which starts to look at implementation measures.

Guideline 41: In addition to the conditions listed in this Guideline for regulating the participation of NGOs in political activities, any such regulations should be required to be substantively justifiable as restrictions on the rights which might be engaged, such as freedom of association, freedom of expression and the right to participate.

Guideline 42: This Guideline contains two very different ideas, namely promoting understanding and harmonising implementation of the Guidelines and consideration should be given to separating them. On the other hand, Guideline 43 also focuses on understanding (awareness raising) and so should be joined with Guideline 42.

Guideline 44: This Guideline refers to coordinating bodies but it is the first time that term is used in the Guidelines. It would be useful to clarify whether and under

what circumstances the Guidelines suggest that coordinating bodies should be put in place.

Guideline 46: This Guideline calls for certain resources to be provided “so that participants can be engaged in a meaningful manner”. A first point is that the reference should be made more precise so that it is clear that it refers only to engagement in civic participation. Second, consideration should be given to adding a reference here to the need for such resources to be provided in a manner that does not undermine the independence of participants.