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Contribution of the Council of Europe

Introduction

Access to legislation in force is a recognised major element of the Rule of Law. Moreover, the interest groups and other representatives of civil society as well as the citizens in general should have the possibility to learn about and express their opinion on draft legislation in preparation. As the Parliamentary Assembly of the Council of Europe acknowledged in its Resolution 800 (1983) on the principles of democracy¹, there should be public engagement and consultation also beyond the elections.

For this reason, the legislative process should not be confined exclusively to the bounds of State bodies but allow for broad public consultation. A precondition for such consultation is, of course, the transparency of the legislative process.

1. Reasons for and benefits of legislative transparency

1.1. Stronger legitimisation and better acceptance of legislation

The first reason for aspiring to greater transparency in the legislative process is the need to give stronger legitimisation to legislation. By allowing the expression of different opinions, legislation can gain in legitimisation as the awareness of being part of the discussion will raise consciousness among its addressees about the need to respect the new legislation. Legislation will be more easily accepted and, consequently, its implementation will be more effective.

In this regard, the Council of Europe Recommendation Rec(2002)2 on Access to official documents underlines that "*public authorities should commit themselves to conducting an active communication policy, with the aim of making available to the public any information which is deemed useful in a transparent democratic society*".

Principle XI of the Recommendation lays down, in particular, that "*a public authority should, at its own initiative and where appropriate, take the necessary measures to make public information which it holds when the provision of such information is in the interest of promoting the transparency of public administration and efficiency within administrations or will encourage informed participation by the public in matters of public interest*".

¹ These and other Council of Europe instruments cited in this Note are available on the Council of Europe Internet portal www.coe.int.

1.2. Better quality legislation

Transparency of the legislative process is also necessary because of the concern about the quality of legislation. Owing to the great diversification of the social and economic processes, the corresponding legislative framework is rapidly gaining in complexity. As a result, the legal drafter and legislator are being faced with increasingly higher risks of error in the design of legal norms.

Transparency and consultation of other external, interested parties in the legislative process is a way for remedying this problem as it enables accumulation of information and ideas from various sources. The involvement of external interest groups with specific knowledge and experience in the relevant field can supply the legal drafters and legislators with crucial information that may otherwise not be available. Consultation is of particular value for the evaluation of the effects of legislation, determining its prospective real impact and possible undesired side effects.

2. Application of new information technology to promote legislative transparency

The Internet has become, without a doubt, the most widely used means for the dissemination of legal information. Much better access to law can now be provided through Internet than is possible with the traditional print media. Putting legal information on-line allows for wide-ranging possibilities of access to law. Thus, electronic legal databases available on the Internet provide access to consolidated texts of legislation, use of search engines and other technological means facilitating retrieval of legal texts according to the specifications and needs of the users.

The introduction of new information technology leads the European States to re-define their policies on access to law, for example, introducing in some cases authentic Internet publications of their official journals of legislation. The Council of Europe has been following and promoting the application of new information technology in this area, encouraging member States to develop electronic dissemination of legal information. In particular, Recommendation Rec(2001)3 on the delivery of court and other legal services to the citizen through the use of new technologies invited member States to provide the text of the law both as enacted and as consolidated in electronic form readily available to the public, stipulating that simple text access to the law database should be free of charge for the individual.

New information technology also contributes to increasing the transparency of the legislative process. It is changing the working methods of the public administration, inducing state bodies to share more information with external parties and the public in general. The use of information technology in policy-making has given rise to the e-Democracy concept, covering a wide range of interaction between the State authorities and the citizens. In this regard, the recent Recommendation Rec(2004)15 on electronic governance ("e-governance") encourages using new information technology, in particular in order to:

- strengthen the participation, initiative and engagement of citizens in national, regional and local public life;
- improve the transparency of the democratic decision-making process and the accountability of democratic institutions.

3. Legal co-operation activities promoting legislative transparency

The Council of Europe involvement, through its legal co-operation and assistance programme, with the preparation of certain draft legislation in its member States frequently has the positive, additional effect of facilitating a more open discussion of the draft legislation in question. These legal co-operation activities often take place in the framework of expert groups and seminars that also involve, for example, NGOs thus facilitating public consultation on draft legislation.

In addition, the Council of Europe is running a specific legal co-operation project on “Law making”² dealing with different aspects of law drafting technique and legislative procedures. The target group of the project’s activities is both law-drafters – civil servants working directly on the preparation of draft legislation – and public officials responsible for planning of the legislative policy. The project relies on the standards developed within the Council of Europe and other international organisations as well as on the comparative national experience and best practices of other member States. The project’s activities include expert studies, awareness-raising seminars as well as counselling of the national authorities in the preparation of certain draft legislation dealing with the organisation of the legislative process and access to law.

One of the main focuses of the “Law making” project is transparency of the legislative process where the project’s activities promote broader public consultation to achieve better quality and effectiveness of legislation, which is especially important for the countries undergoing important political, legal and economic transformations. These activities have shown that in many cases the information provided to the civil society and the consultation of external parties in the legislative process are insufficient. The Council of Europe therefore encourages the authorities and the legal community of the countries concerned to strive for more transparency considering the publication of draft legislation and public consultation on it as inherent parts of the legislative process. Moreover, the authorities are encouraged to carry out a careful analysis of the comments submitted in response to consultation invitations and to make known the results of this analysis.

An important aspect discussed in the framework of these activities relating to the transparency of the legislative process is, of course, the application of new information technology. The public administrations of the European countries are rapidly embracing new information technology, including in the field of legislation. Information technology is used extensively in the dissemination of legislation and also in the process of creating law. As mentioned above, Internet publication has the widest reach and therefore has a great potential for promoting legislative transparency.

² For more information, please consult the “Law-making” site on the Council of Europe Internet portal at www.coe.int/lawmaking.