

UNION INTERPARLEMENTAIRE



INTER-PARLIAMENTARY UNION

Association of Secretaries General of Parliaments

COMMUNICATION

from

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on

“Taking account of interest groups when preparing legislation: the consultation procedure”

**Dhaka Session
April 2017**

Legislative work in all parliaments shares certain common features. The procedure generally begins with the submission of a draft originating either from the government or parliament. The draft is then examined in committee meetings, before being debated in plenary meetings, where it is subjected to modifications. At the end of the process, the final text is adopted and enacted. In certain cases, the text may still be subject to a popular vote.

Although the legislative process has been the subject of numerous legal and political analyses, these rarely focus on the procedure for dealing with legislative bills in the pre-legislative phase. Yet experience shows that the quality and thus the legitimacy of a law depends as much on the conditions under which it was drafted as on its content.

In this area, Switzerland has a special system known as the “consultation procedure”. This procedure involves certain authorities and different interest groups in the process of preparing legislative texts before they are submitted to parliament.

The consultation procedure is enshrined in the Federal Constitution¹. It is also set out in its own specific act of parliament² and in an implementing ordinance³.

The consultation procedure is mandatory in the following cases:

- a. modifications to the Constitution;
- b. draft legislation establishing legal rules;
- c. international treaties subject to a mandatory or optional referendum⁴, or which affect essential cantonal interests;
- d. ordinances and other bills of major political, financial, economic, ecological, social or cultural significance;
- e. ordinances and other bills which significantly affect individual cantons or all the cantons;
- f. ordinances and other bills that are implemented to a significant extent outside the Federal Administration.

The consultation procedure has various objectives:

- a. to assess whether the draft legislation meets a need and enjoys support from those concerned;
- b. to verify the content of a bill and ensure that it is complete and materially accurate;

¹ See the legal provisions in the annex.

² Federal Act on the Consultation Procedure of 18.3.2005.

³ Ordinance on the Consultation Procedure of 17.8.2005.

⁴ A referendum is mandatory for treaties providing for accession to organisations for collective security or to supranational communities (Art. 140 para. 1, let. b of the Federal Constitution of 18.4.1999). It is optional for international treaties that (a) are of unlimited duration and may not be terminated, (b) provide for accession to an international organisation, or (c) contain important legislative provisions or whose implementation requires the enactment of federal legislation (Art. 141 para. 1 let. d Federal Constitution).

- c. to assess the impact of a bill and verify that it can be applied;
- d. to inform citizens of new legislation in good time and encourage public debate.

Consultations are both participative and informative. They are used to gather information on the merits of a legislative bill, and its quality, feasibility and acceptability to those that it concerns. They also help to increase the transparency of state activities.

Any person or organisation, regardless of nationality or domicile, can take part in the consultation process and express an opinion, even if they have not been invited to participate.

Certain authorities and interest groups are always consulted:

- a. the cantons, which, under the Swiss federalist system, are responsible for implementing a large number of federal acts;
- b. the political parties represented in parliament;
- c. interested parties operating at national level (associations of communes or cities, business associations, other interest groups concerned by the bill in question).

The procedure for consultation is not left to the discretion of the authorities drafting the legislative bills. It is governed by strict rules; these rules are the same, irrespective of whether the bills originate from the government or from parliament.

In principle, the consultation procedure is mandatory. However, it is possible to dispense with consultation if a bill relates primarily to the organisation or procedures of federal authorities or to the allocation of responsibilities among federal authorities. Consultation is also unnecessary if the positions of the interest groups are already known. This is the case, for example, if the issue has already been the subject of a consultation procedure. A decision to dispense with the consultation procedure cannot be based on considerations of a political nature or of expediency; it must be justified on objective grounds.

The consultation procedure is initiated by the Government when it is responsible for the bill in question. It is ordered by the relevant parliamentary committee for bills originating from parliament.

Consultation on a draft is the subject of an official publication providing details of the consultation period and the office responsible. The consultation documents are made available on paper or online. They comprise the draft text and an explanatory statement presenting the arguments in support of the amendments or the new legislative provisions envisaged. The documents also include an information sheet and a list of recipients; a questionnaire is sometimes also attached. All the documents normally have to be issued in Switzerland's three official languages: German, French and Italian. If the matter is urgent, e.g. in the case of an international treaty or because the draft is only of regional interest, the documentation need not be issued in all three languages.

The consultation procedure is an exclusively written process. Parties participate by submitting their opinions, either on paper or on an electronic medium. It is

planned to gradually make the consultation procedure an entirely online process. Until 2016, it was also possible to conduct consultations, in certain cases, in the form of a conference. This option was abandoned in 2016 because it was proven to limit the number of participants who could take part in the consultation.

The consultation period lasts for at least three months. It is extended appropriately to take account of any public holidays. If the bill cannot be delayed, the period may be reduced by way of exception. In such cases, participants in the consultation procedure must be given reasons justifying the urgency.

At the end of the consultation period, the office responsible produces a report reviewing the results and evaluating the opinions expressed. This report is sent to the political authority responsible (the government or parliamentary committee) so that it can decide on the content and final version of the bill. The bill is then revised and submitted to parliament. The consultation report is always published, generally on the internet.

Occasionally, draft legislation is abandoned after the consultation procedure. This happens if the opinions expressed indicate that there is another way of achieving the intended goal or that the text has not gained sufficient support to be adopted by parliament (to say nothing of surviving a possible referendum). Consultation thus helps to test the acceptability of a bill before any decision is taken.

Each year, 80 to 120 consultation procedures are organised. A list of planned, ongoing and concluded consultations, with their related documents, is available on the internet⁵ and is regularly updated.

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The Confederation has been conducting consultation procedures for more than half a century; it has gained a wealth of experience in this field, and the value of the procedure has not been called into question.

At first sight, the procedure might appear overly complex and likely to slow down the decision-making process. But when we consider it more closely, we see that the consultation procedure is very effective; it expedites and improves the quality of the work of parliament by ensuring that no bills are submitted that are incomplete, unenforceable or even irrelevant⁶.

The consultation procedure also allows common ground and potential disagreements to be identified at an early stage and to be taken into account appropriately in the bill submitted to parliament.

Seen from this perspective, the consultation procedure anticipates and neutralises opposition. It reduces uncertainty in the decision-making process and increases the chances of draft legislation by giving it a preliminary basis. The consultation procedure and the popular referendum are two related stages in the legislative process: taking account of the opinions of influential interest groups during the consultations neutralises their desire to oppose the legislation if a referendum is held.

⁵ Link: <https://www.admin.ch/gov/fr/accueil/droit-federal/procedures-consultation.html>

⁶ It is worth recalling the words of Montesquieu: "As useless laws debilitate such as are necessary, so those that may be easily eluded weaken the legislation." (The Spirit of Laws, Book XXIX, Chapter 16).

The consultation procedure also shows that the drafting laws is not solely a parliamentary procedure. Legislative work is a complex mechanism involving various authorities and players in a form of “cooperation between powers”. This method of involving the largest number of participants in the legislative process is in keeping with the nature of politics in Switzerland, where confrontation and power relationships frequently make way for joint solutions in the general interest.

In Switzerland, therefore adoption of a law is not a matter solely for parliament. It is a joint effort in which negotiation and cooperation are the driving forces.

Legal provisions

Swiss Federal Constitution of 18 April 1999

Art. 147 Consultation procedure

The Cantons, the political parties and interested groups shall be invited to express their views when preparing important legislation or other projects of substantial impact as well as in relation to significant international treaties.

**Federal
on the Consultation Procedure
(Consultation Procedure Act, CPA)**

Act

of 18 March 2005 (Status as of 1 April 2016)

*The Federal Assembly of the Swiss Confederation,
based on Article 147 of the Federal Constitution,
and having considered the Federal Council Dispatch of 21 January 2004,
decrees:*

Art. 1 Scope of application

1 This Act regulates the main aspects of the consultation procedure.

2 It applies to consultation procedures that are initiated by the Federal Council, a department, the Federal Chancellery or a parliamentary committee.

Art. 2 Purpose of the consultation procedure

1 The consultation procedure has the aim of allowing the cantons, political parties and interested groups to participate in the shaping of opinion and the decision-making process of the Confederation.

2 It is intended to provide information on material accuracy, feasibility of implementation and public acceptance of a federal project.

Art. 3 Subject matter of the consultation procedure

1 A consultation procedure takes place when drafting:

- a. amendments to the Constitution;
- b. draft legislation in terms of Article 164 paragraph 1 of the Federal Constitution;
- c. international law agreements that are subject to a referendum in terms of Articles 140 paragraph 1 letter b and 141 paragraph 1 letter d number 3 of the Federal Constitution or which affect essential cantonal interests;
- d. ordinances and other projects of major political, financial, economic, ecological, social or cultural significance;
- e. ordinances and other projects that do not fall within letter d but which significantly affect individual cantons or all the cantons or are implemented to a significant extent outside the Federal Administration.

2 A consultation procedure may also be carried out in projects that do not meet any of the requirements in paragraph 1.

Art. 3a Dispensing with a consultation procedure

¹ A consultation procedure may be dispensed with if:

- a. the project relates primarily to the organisation or procedures of federal authorities or to the allocation of responsibilities among federal authorities; or
- b. no new findings are expected because the positions of the interested groups are known, in particular because a consultation procedure on the subject matter of the project has already been carried out.

² Well-founded justification must be provided for a decision to dispense with a consultation procedure.

Art. 4 Participation

¹ Anyone and any organisation may participate in a consultation procedure and submit an opinion.

² The following are invited to submit an opinion:

- a. the cantonal governments;
- b. the political parties represented in the Federal Assembly;
- c. the national umbrella organisations for the communes, cities and mountain regions;
- d. the national umbrella organisations for the economic sector;
- e. the extra-parliamentary committees and any further interest groups relevant to the individual case.

³ The Federal Chancellery maintains a list of parties consulted in terms of paragraph ² letters a–d.

Art. 5 Initiation

¹ Consultation procedures on projects from the Federal Administration are initiated:

- a. by the Federal Council in the case of projects under Article 3 paragraph 1;
- b. by the responsible department or by the Federal Chancellery in the case of projects under Article 3 paragraph 2;
- c. by the responsible unit of the central or decentralised Federal Administration if it is authorised to enact legislation.

² Consultation procedures on projects from the Federal Assembly are initiated by the responsible parliamentary committee.

³ The Federal Chancellery coordinates the consultation procedures. It gives public notice of any consultation procedure that has been initiated, providing details of the consultation period and the office where the consultation documents may be obtained.

Art. 6 Procedure

¹ The authority responsible for initiating the consultation procedure makes the required preparations, carries the procedure out, compiles the results and evaluates the same. Where the Federal Council initiates a consultation procedure, the relevant department carries out the tasks required.

² Parliamentary committees may call on the assistance of offices and agencies of the Federal Administration for the preparation of the consultation procedure and the compilation of the results thereof.

Art. 7 Form and duration

¹ The consultation documents are made available in paper or electronic form. The Federal Council may provide that consultation procedures be carried out exclusively online provided the necessary technical requirements are met.

² The authority responsible for carrying out the consultation procedures may also invite interested groups to meetings. Minutes must be taken of these meetings.

³ The duration of the consultation period is at least three months. This period may be extended appropriately to take account of public holidays as well as the content and size of the proposal. The minimum period is extended for consultation procedures:

- a. that include the period from 15 July to 15 August: by three weeks;
- b. that include the Christmas and New Year period: by two weeks;

c. that include Easter: by one week.

4 If the project may not be delayed, the period may by way of exception be reduced. Well-founded justification for the urgency must be given to the parties consulted.

Art. 8 Procedure for opinions

1 The opinions are acknowledged, considered and evaluated.

2 The results of the consultation procedure are summarised in a report.

Art. 9 Transparency

1 The following are made available to the public:

- a. the consultation documents;
- b. on expiry of the consultation period, the opinions and the minutes of consultation procedure conferences;
- c. after acknowledgement by the initiating authority, the summary of the results of the consultation procedure. (Art. 8 para. 2).

2 Opinions are made publicly available by permitting their inspection, providing copies or by publishing them in electronic form, and they may for this purpose be subjected to technical processing.

3 The Freedom of Information Act of 17 December 2004 does not apply.

Art. 10

Art. 11 Implementing provisions

The Federal Council regulates the details in an ordinance, including in particular:

- a. the planning and the coordination of individual consultation procedures;
- b. the content of the consultation documents, their preparation and release;
- c. the conduct of the consultation procedure in electronic form;
- d. the procedure for dealing with the opinions submitted, and in particular their evaluation, technical processing, publication and archiving.

Art. 12 Amendment of current legislation

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Art. 13 Referendum and commencement

1 This Act is subject to an optional referendum.

2 The Federal Council determines the date on which this Act comes into force.

Commencement date: 1 September 2005