

Parliamentary involvement in the field of soft law

**Summary of the report by the Parliamentary Control of the
Administration for the Foreign Affairs Committees of the National
Council and of the Council of States**

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Summary

The way in which Parliament is involved in the field of soft law is only partially appropriate. The rights of the Parliament in this regard are well-developed in international comparison, but are open to interpretation, and the respective ordinance essentially restricts participation. The practice in the Federal Administration is inconsistent, but efforts are underway to harmonise the approach. The responsibilities of the parliamentary committees are not clearly defined.

With the approval of the Federal Assembly control committees (CCs), in the summer of 2020 the Foreign Affairs Committees (FACs) commissioned the Parliamentary Control of the Administration (PCA) to conduct an evaluation of parliamentary involvement in the field of soft law.

At its meeting on 10 November 2020, the FACs' responsible sub-committee – 'Parliamentary involvement in the field of soft law' – decided that the evaluation should look at the Federal Administration's practice of informing and consulting Parliament on soft law projects and compare Switzerland's statutory framework with that of other countries.

The PCA commissioned an external legal opinion which was to focus on Switzerland's statutory framework and make an international legal comparison based on country reports prepared by the Swiss Institute of Comparative Law (SICL) on behalf of the PCA. The PCA reviewed Swiss practice on the basis of five case studies of soft law projects, conducting document analyses and interviews in order to assess parliamentary involvement. The PCA also conducted interviews with representatives of all departments and the secretariats of the parliamentary committees, and analysed the existing guidelines. The main findings of the study are presented below.

The Swiss parliament's participation rights, which are extensive in international comparison, reflect the distribution of competences in foreign policy (Section 3.1)

The Federal Constitution states that the Federal Council is responsible for foreign relations, subject to the right of participation of the Federal Assembly. The Federal Assembly and the Federal Council are therefore jointly responsible for foreign policy. This gives the Swiss parliament a strong and unique position by international standards; it has greater participation rights than parliaments in most other countries (Section 3.1).

Federal act leaves scope for interpretation, while the ordinance provision is inadequate (Sections 3.2 and 3.3)

The Federal Act on the Federal Assembly (Parliament Act, ParlA) is appropriate in so far as it defines the instruments and procedures of parliamentary involvement; however, it leaves scope for interpretation (Section 3.2). Meanwhile, the article of the ordinance that specifies the matters on which parliament must be consulted is inadequate in several respects. Firstly, the matters are specified in an ordinance rather than in the federal act, and by the Federal Council and not by Parliament. Secondly, the article is imprecisely worded and restricts the scope of the law, not legally, but in practice (Section 3.3).

Soft law concerns the Federal Administration offices to varying degrees and their practices are inconsistent and not generally systematic (Section 4.1)

The PCA has drawn up a list of soft law projects dealt with by the Federal Administration, which shows that all departments are involved in soft law, albeit to varying degrees. The most closely concerned are the administrative units of the Federal Department of Foreign Affairs (FDFA), the State Secretariat for International Financial Matters (SIF) and the State Secretariat for Economic Affairs (SECO). The evaluation further shows that there is neither a systematic nor a uniform approach to deciding whether Parliament must be consulted and informed on a particular project. Some administrative units first clarify whether they are dealing with a soft law project before assessing whether it is material enough for Parliament to be involved, while others focus first on whether it is material before establishing in detail whether soft law is concerned (Section 4.1). The first approach is inappropriate, as parliamentary participation is not limited to soft law. Nevertheless, the type of foreign policy activity involved must be established in order to determine whether the project is material enough to warrant the involvement of Parliament (Section 3.2).

As the soft law processes pose difficulties, guidelines are currently being prepared and these will provide a welcome tool (Sections 4.2 and 4.3)

Soft law projects and the ways of approaching them take many different forms and are constantly evolving. In respect of this, the definition of soft law in the Federal Council's report and the associated explanations are helpful in practice, but they are not clear or precise enough to clearly identify soft law (Section 4.2). As soft law processes are inconsistently applied, the FDFA has proactively set up a soft law working group to raise awareness of the issue among the departments and to produce a soft law guide. This guide is a welcome practical aid, but the current version does not cover the entire scope of parliamentary participation (Section 4.3).

The responsibilities of the parliamentary committees in participation are not clearly defined (Sections 3.4 and 5.2)

The FACs, although not explicitly mentioned in ParIA, are the "committees responsible for foreign policy" which are the main players in foreign policy participation (Section 3.4). An analysis of how things operate in practice shows that the administrative units do not always know which parliamentary committee to involve. The Federal Administration also regularly informs and consults committees other than the FACs, even when not specifically asked to do so. In some cases, being required to inform or consult the FACs is only of limited value. Moreover, the FACs do not systematically pass on pertinent information to the other committees responsible owing to the large volume of information and to regulations on access to documents (Section 5.2).

Information and consultation processes complement each other, but cannot always be used in an effective way (Sections 5.1 and 5.3)

In principle, information as one-way communication and consultation as two-way communication between the government and Parliament are complementary processes. However, the PCA's analyses show that it is not clear to some departments which procedure is to be applied and when. The Federal Administration uses various

lists to inform the parliamentary committees about important foreign policy events. The committees can thus regularly obtain an overview of events, even though the content and form of these lists are not optimum. As far as consultation is concerned, it should be noted that the documents provided do not always substantiate the Federal Council's position sufficiently to allow the committees to make a well-founded statement (Section 5.1). The law also provides for early involvement of Parliament, but it is difficult for the Federal Administration to find the right time to involve it for a number of reasons, including the constantly changing nature of soft law, the schedules of the parliamentary committees, and those of the international organisations and multilateral bodies. Since the debates on the UN migration pact, the Federal Administration has endeavoured to hold consultations at a time when the soft law instrument in question can still be shaped (Section 5.3).

The full report is available in French, German and Italian (www.parliament.ch).