

Evaluation of the Confederation's consultation and hearing practice

Summary of the Report by the Parliamentary Control of the Administration for the National Council Control Committee

of 9 June 2011

Summary

Consultation procedures are accorded a great deal of significance in Switzerland and have a long tradition. However, it was only in 2005 that they were regulated in law. The new Consultation Procedure Act (CPA) was intended to tighten the application of the procedure and to improve its quality. At the same time, a distinction was introduced between consultations, which would be initiated for important projects put forward by the Federal Council or by Parliament, and hearings, which could be initiated for projects of lesser importance by departments, offices and decision-making committees themselves. Whereas consultations have to satisfy various requirements stipulated in the CPA and the concomitant ordinance, the hearing procedure is less clearly regulated.

After participants in hearings and consultations in the last few years have repeatedly complained about excessively short time limits, a lack of transparency regarding the selection of invited addressees and regarding the evaluation and weighting of comments, the Control Committees of the Federal Assembly instructed the Parliamentary Control of the Administration (PCA) to conduct an evaluation. The competent subcommittee FDJP/FC of the Control Committee of the National Council decided on 30 June 2010 that the PCA should focus its investigations on the Federal Administration's practice with regard to hearings.

Results: an overview

The evaluation revealed that both the Federal Administration and addressees regard hearings and consultations as sensible and useful tools for the purpose of involving non-administrative circles in the Confederation's opinion-forming and decision-making processes and of examining the factual correctness, enforceability and acceptance of the Confederation's intentions.

However, it also became clear that statutory requirements were occasionally flouted, particularly in respect of the decision as to whether a project should be the object of a consultation or of a hearing. In addition, the newly introduced distinction between hearings and consultations is problematic because many addressees do not understand it, which in turn results in false expectations. Participants' expectations are not fulfilled by hearings, in particular, which means that it is no longer guaranteed that the aims of the procedure – participation, an improvement in the draft project, and acceptance – are actually attained.

An unclear notion of «hearing»

According to the CPA, the decision as to whether a consultation or a hearing should be initiated for a given project is essentially governed by two criteria: the level of the legal norm, and the scale of the importance of the project. The evaluation revealed that decisions are often solely based on the criterion of the legal norm level, whereas the criterion of the importance of the project is not taken into account, or the scale of its importance is not sufficiently clarified. In some cases, however, the criteria were quite simply disregarded, and a hearing was conducted although a consultation would clearly have been required.

Added to this, the newly introduced distinction between hearings and consultations generally appears to be of little expedience since it strikes numerous addressees as neither clear nor relevant. Instead, addressees are mindful of the extent to which a project affects them and then participate in or abstain from the procedure irrespective of whether it is called a consultation or a hearing. Furthermore, the term «hearing» causes confusion since it is associated with a verbal procedure at an early stage of legislation rather than with a (usually written) procedure pursuant to the Consultation Procedure Act.¹ However, since addressees regard the distinction between the two procedures with indifference or are not sufficiently aware of its nature, they are also unaware of the fact that the different procedures are subject to different provisions and that in the case of hearings, there are no provisions with regard to time limits and the selection of addressees. Many examples of «unsatisfactory consultations» to which interviewees referred in the evaluation proved to have been hearings which had been conducted correctly in accordance with the relevant statutory provisions.

Short time limits considered the main difficulty

It was emphasised in all the interviews with addressees of hearings and consultations that a well-founded and if necessary internally consolidated comment could only be prepared if this was permitted by the conditions governing the procedures in general and the time limits in particular. This is not guaranteed by the frequently short time limits for hearings. If, however, the Administration does not receive carefully drafted comments, the project in question cannot be checked for factual correctness, enforceability and acceptance either. Thus the goals of the hearing procedure are not attained. Excessively short time limits for which no easily comprehensible reasons are provided often arouse addressees' suspicions that a «token procedure» is being conducted, which compromises its credibility.

Inadequate communication of hearing results

One weak point in the way hearings are conducted, which at the same time distinguishes them from the way consultations are carried out, lies in the communication of the utilisation of the comments. In consultations, a report, required by law, is published which summarises the comments in a neutral way ; as a rule, this report is accompanied by a media release about the findings of the consultation, and the lessons learnt from the procedure are also summarised in a message to the Federal Assembly. In hearings, however, no information is provided

¹ This statement is only valid in the German and French-speaking areas, as in Italian, two different notions are used: «audizioni» for oral proceedings in the early stages of the legislative process and «indagine conoscitiva» for hearings according to the CPA.

about what suggestions have been accepted and for what reasons and how the original project has been adapted. The report containing the non-judgemental summary of the comments, which as a rule is not even sent to the parties who participated in a hearing, fails to satisfy the addressees' need for transparent information about the utilisation of their comments.

Decision-making competence in the offices – the weak position of the Federal Chancellery as the coordinator of the procedure

All in all, it has become apparent that the respective offices have a great deal of decision-making leeway with regard to the planning and execution of hearings. In some of the cases under review, however, this discretion was not used lawfully or expediently, and yet the Federal Chancellery failed to intervene. One of the reasons for this is the fact that the Federal Chancellery has no authority over the offices that conduct these procedures and is therefore unable to enforce their correct execution and their coordination. The Federal Chancellery also maintains that it can only allocate limited resources to the supervision of consultation and hearing procedures and therefore tends to focus on the politically more significant consultations.

Inadequate legal provisions

The evaluation has revealed that the CPA must be considered to be problematic with regard to the criteria for the decision as to whether a hearing or a consultation should be conducted. It has also become apparent that the small number of provisions in the CPA and the concomitant ordinance which are also applicable to hearings are not always applied in practice. In addition, addressees often complain in cases where the legislator (deliberately) granted administration offices a certain latitude – and as the evaluation has shown, this discretion is indeed not always used appropriately.

Finally it must be noted that the legal basis that was newly established in 2005 has not attained and is incapable of attaining the objective of tightening the application of the consultation procedure. The reason for this, in particular, is the fact that Art. 3 CPA imperatively requires a consultation for many, precisely defined types of projects. This means that in such cases it is not possible to refrain from conducting a consultation even if a proposal might not be controversial at all or if all the stakeholders were involved in its drafting and consequently the purpose of the procedure stipulated in Art. 2 CPA has already been fulfilled.

The full report is available in German and French, and the Italian version should be ready around February 2012: <http://www.parlament.ch> > Organe und Mitglieder > Kommissionen > Parlamentarische Verwaltungskontrolle