

Participation and governance in times of social distancing. Learning from others – a possible lesson for the European Union

Bartłomiej Bodziński-Guzik

PhD Candidate, Jagiellonian University, Department of Sociology of Law
ORCID: 0000-0002-4562-9123, e-mail: b.bodzinski-guzik@doctoral.uj.edu.pl

I. Introduction

I.1. The new perspective

Originating from the Chinese province of Wuhan, the disease caused by the new coronavirus COVID-19 spread worldwide in just a couple of months. The World Health Organisation announced that the outbreak could be considered a pandemic on March 12, 2020.¹ The early expectations that some countries would overcome the disease after the first lockdown turned out to be false. The early winners faced the so-called second wave, and the WHO predicts that the virus will stay with us for at least two years.² The unprecedented decisions to enforce strict quarantine, close schools, limit movement, and social contacts were implemented by many European countries, excluding Great Britain and Sweden. The former, however,

¹ WHO, *Coronavirus disease (COVID-19) pandemic*, <https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/novel-coronavirus-2019-ncov>, 2020 [Accessed 8 Aug 2020].

² BBC, *Coronavirus pandemic could be over within two years - WHO head*, August 22, 2020, <https://www.bbc.com/news/world-53870798> [Accessed 3 Sep 2020].

quickly adopted the dominant isolation strategy.³ The limitations aiming at providing security and protect lives also had a dark side. Here it suffices to mention, job losses, limited access to services, and education, especially for those digitally excluded,⁴ and the severe limitation of civil rights, in some cases even leading to the violation of national laws and constitutions.⁵ On the other hand, the pandemic forced an accelerated switch to technology and remote communication for employees, students, and pupils.⁶ While there are certain negative aspects of such a switch, progress always comes at a price. The ultimate goal of a change should be to evaluate whether the positive impact outweighs the negative and, if so, to implement them at the lowest possible cost for those wrongly affected.

1.2 The role of the internet and technology

The numbers show that the *e-revolution* initiated by the COVID-19 is also beginning to affect the sphere of public services, turning the state into an *e-state*, with citizens demanding internet use to settle their official affairs and, for example, the Polish government is accelerating the implementation of such services.⁷ Such an approach can lead to increased use of technology and the internet by citizens and, as a result, familiarisation with such a form of civil activity. The difficult and challenging times of the pandemic have created an opportunity to direct the *e-revolution* to a higher level. This could lead to not only using technology as an everyday tool of communication with offices, submitting applications, saving time, and replacing paper but also to enable deeper citizen engagement and involvement in governance by providing online tools of participation in public administration. In the author's opinion, the best way to do so is to explore and evaluate others' experience in order

³ O Matthews, *Britain Drops Its Go-It-Alone Approach to Coronavirus*, Foreign Policy, <https://foreignpolicy.com/2020/03/17/britain-uk-coronavirus-response-johnson-drops-go-it-alone>, March 17, 2020 [Accessed 8 Aug 2020].

⁴ V. Nash, R. Eynon, *Coronavirus school closures impact 1.3 billion children – and remote learning is increasing inequality*, The Conversation, <https://theconversation.com/coronavirus-school-closures-impact-1-3-billion-children-and-remote-learning-is-increasing-inequality-138656>, May 18, 2020 [Accessed 8 Aug 2020].

⁵ P. Szymaniak, *Zakazy bez żadnego trybu. Konstytucjonaliści: Nie trzeba łamać konstytucji, by działać efektywnie!*, March 26, 2020, Gazeta Prawna, <https://prawo.gazetaprawna.pl/artykuly/1463851,koronawirus-stan-wyjatkowy-kleski-zywiolowej-swobody-obywatelskie-konstytucja.html> [Accessed 8 Aug 2020].

⁶ A. Wilson, *There is no workplace like home*, Raconteur, <https://www.raconteur.net/technology/remote-working-coronavirus>, March 30, 2020 [Accessed 8 Aug 2020].

⁷ J. Balcer, *E-państwo: coraz więcej usług, z których Polacy coraz chętniej korzystają*, SSPAP, <https://samorząd.pap.pl/kategoria/aktualnosci/e-panstwo-coraz-wiecej-uslug-z-ktorych-polacy-coraz-chetniej-korzystaja>, April 29, 2020 [Accessed 8 Aug 2020].

to implement the good and effective practices of others and avoid repeating their mistakes.

This paper aims to provide a brief insight into one of the public participation methods in the United States of America, focusing on the strong and weak aspects of the method, followed by preliminary reflection on the possible use of these assessments in the post-COVID-19 reality in the European Union. Even before the current pandemic, technology had a massive impact on everyday life. More than half of the global population has Internet access, with the figure reaching up to 80% in highly developed countries.⁸ Approaching the stage when being online equals being alive, many countries follow this trend by providing the ability to use their services and fulfil citizens' duties using laptops and mobile phones. Citizenship is turning into e-citizenship. Regardless of the stage and quality of these developments, there is one particular field of state activity that can, at least in this assumption, be influenced the most by these changes. This field is rulemaking or as it should be called when done with the use of technology, e-rulemaking.

To analyze and evaluate the phenomenon, there is no better example than the American Administrative Procedure, with their notice and comment rulemaking procedure and federal regulations.gov platform enabling citizen participation in regulating processes online.

II. Notice and comment procedure

II.1 Legal background

Enacted in 1946, the Administrative Procedure Act (APA) is the core of administrative procedures in the USA. Designed to regulate the decision-making process of administrative agencies as a result of significant political compromise⁹ has provided, as it turned out over time, a powerful tool for public participation. With its *notice and comment* rulemaking procedure, citizens can e-comment on proposed regulations and influence agencies' decisions by supporting them with opinions and data. For a proper understanding of the topic, the legal background of notice and comments should be provided. What does not fit into the scope of the judicial and legislative branch, and excluding the President and their advisors, shall be considered as

⁸ International Telecommunication Union, (2019) *Measuring Digital Development, Facts, and Figures*, <https://www.itu.int/en/ITU-D/Statistics/Documents/facts/FactsFigures2019.pdf> [Accessed 25 May 2020].

⁹ R. Elias, *The Legislative History of the Administrative Procedure Act*, Fordham Environmental Law Review, 2015, vol. 27, no. 2, p. 209.

an executive agency.¹⁰ Some of the agencies, namely the independent ones, are even called the headless fourth branch, as they are meant to be insulated from presidential and, to a lesser extent, congressional control. Defining what an agency is, is not an easy task.¹¹ Although the APA contains a legal definition of an agency (5 U.S.C. § 551(1)) that fits the presented above, due to the number and character of some agencies, some ambiguity is inevitable. Therefore, for the scope of this article, the legal definitions included in the APA will be valid.

II.2 Rulemaking

The main task of agencies is to provide rules in the rulemaking process. The rule is an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency (5 U.S.C. § 551(4)) while the rulemaking is a process for formulating, amending, or repealing a rule (5 U.S.C. § 551(5)). Before the enactment of the APA, regulatory policies in the United States were established mostly by following court-like proceedings. By adjudicating individual cases, agencies created precedents that would guide other entities and individuals in similar cases.¹² It was not an effective method for facing an increased need for the new type of regulations, especially in such fields as security, environment, and technology, where generally applicable standards with precise contours are required.¹³

The APA introduced two main procedural forms of rulemaking. One of them is adjudication, the process of the formulation of an order by an agency (5 U.S.C. § 551(7)). The order is defined as whole or a part of agency's final disposition, whether affirmative, negative, injunctive, or declaratory in form, in a matter other than rulemaking but including licensing (5 U.S.C. § 551(6)). The second one, considered less formal, is *notice and comment* rulemaking, a simple three-step procedure consisting of the Notice of Proposed Rulemaking, a commenting period and the recognition of the comment provided within the concise general statement, usually being a part of a final rule (5 U.S.C. § 553), will be the main subject of this paper and could possibly become an object of interest in the current times.

¹⁰ A. B. Morrison, *Fundamentals of American Law*, New York, 1996, p. 130.

¹¹ J. L. Selin, D. E. Lewis, *Sourcebook of United States executive agencies*, 2018, p. 42.

¹² C. Coglianese, *E-Rulemaking: Information Technology and Regulatory Policy Program. New Directions in Digital Government Research*, Report No. RPP-05, Harvard University, John F. Kennedy School of Government Center for Business and Government, 2004, p. 24.

¹³ T. D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, *Administrative Law Review*, 2000, vol. 52, no 1, p. 163.

There are, however, two things that should be underscored regarding adjudication. Firstly, the clear intention of the legislator to separate those two categories, by providing that order is a disposition in a matter other than rulemaking.¹⁴ As emphasized by M. Stępień,¹⁵ adjudication is related to the cases involving a small number of people and on the facts regarding individual case, rather than policy. It is the chronological orientation of agency action and rulemaking *future effect* orientation that makes the distinction.¹⁶ Secondly, it is a primary agency reaction to the new forms of rulemaking. *Notice and comment*, after the adoption of the APA, was not initially the main rulemaking procedure used by agencies. Accustomed to *quasi-trial* procedures, agencies tend to act as if they needed to use adjudication if they were to regulate at all. This conviction was overturned by the Supreme Court in *United States v. Florida East Coast Railway Co.* in 1973. The Court upheld that the assumption of the engaged Commission, namely that its statutory obligation was to use formal rulemaking, was wrong. The use of the *notice and comment* rulemaking was sufficient in this case and by extension for most agencies. (410 U.S. 224-228 (1973)). The judgment, together with Congress mandating rulemaking in numerous environmental, and health and safety statutes, resulted in a surge of *notice and comment* rulemaking.¹⁷ This development made the future *e-rulemaking* possible.

II.3 E-revolution of the procedure

As previously mentioned, the *notice and comment* procedure consists of three simple steps, giving the citizens the opportunity to become familiar with the content of the proposed regulation and to provide their comments online. E-commenting, however, was not initially an option and it took around 60 years for *notice and comment* to switch to the fully online availability stage. Before the advent of the internet, getting acquainted with the proposed rules required one to visit libraries and read Federal Register in hard copy, then submitting the comments in letter form. A further obstacle was that sometimes the commenting period might have already closed before the Register was delivered. Therefore, it is unsurprising that the average number of comments received was very low and most of them were provided by organized interest groups¹⁸ and that at least in the regulatory arena, there was a striking absence

¹⁴ R. Elias, *op. cit.*, p. 217.

¹⁵ M. Stępień, *Responsywna administracja publiczna*, Toruń 2008, p.137.

¹⁶ R. Elias, *op. cit.*, p. 217.

¹⁷ C. Coglianese, *op. cit.*, p. 27.

¹⁸ C. Coglianese *Citizen Participation in Rulemaking: Past, Present, and Future*, *Duke Law Review*, 2006, vol. 55, p. 943.

of citizen representation.¹⁹ This period shows how much time is needed for evolutionary changes, but should also sensitize us to the risks associated with accelerating certain processes, even under forced circumstances such as the current pandemic.

The situation changed with the development of the internet and the authorities who saw its potential for involving citizens and enhancing public participation in the rulemaking process. The detailed history of implementing particular online tools may not be as important as the fact that until 2008 almost all agencies shared and used two common systems useful for e-regulating and public participation in the process. These were the already mentioned *e-regulations.gov* where all proposals should be published with the possibility of posting comments with *Federal Docket Management System*, an online archiving system, containing all the relevant data and supporting information regarding regulatory issues and granting online access to the Federal Register.²⁰

The portal, however, is still being improved. As per the recent release of the *beta.regulations.gov* on August 8, 2019,²¹ user experience was improved with a better search engine, more clarity, and an up-to-date and responsive design. The commenting procedure was also unified for all agencies as different information was required depending on the agency in the previous version, while the new site only requires two pieces. These are providing the comment itself and the identity of the one commenting, chosen from three available options: individual, organization, or anonymous. It seems that these developments stemmed from the difficulties experienced with using the original site that were raised by both users and scholars.²²

It thus becomes possible to verify whether *e-rulemaking* can fulfil some scholarly expectations of being the next “best thing” in enhancing participation or whether this will fail and citizen involvement will remain the same, as predicted by Coglianese.²³ It is worth confronting those two approaches with facts and figures. The question of the possible advantages and disadvantages of *e-commenting* is one that will help us to evaluate if it can make the procedure of administrative rulemaking one of the greatest inventions of modern government, as stated by Davis,²⁴ or

¹⁹ M. M. Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, *Journal of Public Administration Research and Theory: J-PART*, 1998, vol. 8(2), pp. 245-270.

²⁰ L. Moxley, *E-Rulemaking and Democracy*, *Administrative Law Review*, 2016, vol. 68, no 4, p. 667.

²¹ HelpDesk email communication with author, 2020.

²² C.R. Sunstein, *Democratizing Regulation, Digitally*, *Democracy a journal of Ideas*, 2014, vol. 34, <https://democracyjournal.org/magazine/34/democratizing-regulation-digitally> [Accessed 2 Sep 2018].

²³ C. Coglianese, *Citizen...*, *op. cit.*, p. 959.

²⁴ M. R. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, *San Diego Law Review*,

whether it should be still regarded as akin to Kabuki theatre, a highly stylized process for formally displaying the essence of something which in real life takes place in other venues.²⁵

II.4 Method evaluation

Enthusiasts of rulemaking and *e-commenting* follow the simple mantra that e-commenting will increase participation and allow a vast number of people to share their thoughts.²⁶ The potential to control agencies in terms of their rulemaking procedure is also highlighted by both scholars and citizens. Setting apart the self-fulfilling prophecy aspect of the concept, that giving people the possibility to participate is enough to make them do so, on the formal aspect there is some truth in this approach. There was no opportunity to effectively participate without technological progress, but the online tools will not themselves suffice to make a difference.

Technology instantiates participation as stated by C. Farina,²⁷ one of the biggest enthusiasts of e-regulating and e-participation, while pointing out the fact that the e-revolution in *notice and comment* did not affect the breadth or nature of the participation process. There is clear potential in the method, and it can strengthen the participation process and political control, but it will not happen without the proper approach on the part of both citizens and decisionmakers. The method helps to avoid retroactivity, and this characteristic can play a very important role while implementing new regulations that require the kind of speedy reaction that can only be afforded by technology.

There is also a very important civic aspect of the method. It empowers individuals with the opportunity to comment, influence decisions and, as a result, assure stability and control.²⁸ As a result, *notice and comments* can be a means to promote democratic commitment and civic attitudes, as well as additional technology-based advantages such as grouping comments, interactive presentation of the text of the rule with relevant references, or even the ability to cooperate with citizens on the

2005, vol. 42(1), pp. 315-345 [quoting] C.K. Davis, *Administrative Law Treatise*, 1970, § 6.15 at 283.

²⁵ E. D. Elliott, *Re-inventing rulemaking*, *Duke Law Journal*, 1991, vol. 41, pp. 1490-1496, <https://scholarship.law.duke.edu/dlj/vol41/iss6/4> [Accessed: 20 May 2020].

²⁶ L. Moxley, *op. cit.*, p. 667

²⁷ C. R. Farina, M. Newhart, J. Heidt, *Rulemaking vs. Democracy: Judging and nudging public participation that counts*, *Michigan Journal of Environmental & Administrative Law*, 2012, vol. 2(1), p. 128. <https://scholarship.law.cornell.edu/cei/17/> [Accessed 6 Sep 2018].

²⁸ D. J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, *Oklahoma Law Review*, 2018, vol. 70(3), pp. 601-622, <https://digitalcommons.law.ou.edu/olr/vol70/iss3/2> [Accessed 6 Sep 2018].

simplification of the text.²⁹ If the commenting reaches a satisfactory level, there is a lot to be added to expand the possibilities of the method. However, there are also negative aspects that can ruin the whole performance and make *notice and comment* seem like nothing more than Kabuki theatre. The most important of these is pre-regulation, namely the practice of consulting and drafting final proposed rules with chosen representatives of the society, usually major stakeholders, while limiting access to this process for others. In some cases, there is a justification for such an approach, since it is meant to provide valuable and full regulation proposals on time as requested by *APA* requirements.³⁰ However, the secrecy and misuse of such proceedings simply leads to the destruction of assumptions and goals of *notice and comments*. Another problem which has already been underlined with such types of participation activity is that it can easily turn into an opinion poll and, as Farina³¹ warns, participation should not be a poll. That is why it is important to determine the goal of participation through commenting and what type of it is needed. When it comes to rulemaking, knowledge should be the basis for citizen activity, not (at least not only) their preferences. While these are only some of the positive aspects of the described method, and only the most important drawbacks, some general conditions of the effectiveness of the method can be proposed. The first is that a wide and unlimited possibility of commenting should be provided. Secondly, the clear purpose and moment of commenting needs to be determined and strictly abided by. Thirdly, to ensure a positive user experience, a common, accessible platform including all the relevant data needs to be established, preferably within the existing systems with which citizens are familiar. Fourthly, but perhaps crucially, conditions should be created for the effectiveness of the comment to be ensured. As a broader issue, however, this requires further analysis but it is important to mention here that it should include the desired features of the comment (knowledge-based, preference-based, etc.) and the terms of the legal protection of participants (at least the scope of rules for recognizing or ignoring comments as well their enforcement procedure)³²

As can be clearly discerned, there is a considerable amount of knowledge, both theoretical and empirical, that can be obtained from analysing the American proposition. However, the important question is how to use it to ensure better performance in the current situation.

²⁹ C. Coglianese, *E-Rulemaking...*, *op. cit.*, pp. 14-15.

³⁰ J. Weinberg, *The Right To Be Taken Seriously*, University of Miami Law Review, 2002, vol. 67, pp. 149-216, <http://repository.law.miami.edu/umlr/vol67/iss1/6> [Accessed 6 Sep 2018].

³¹ C.R. Farina, M. Newhart, J. Heidt, *op. cit.*, p. 124.

³² B. Bodziński-Guzik, M.A. Thesis, *Notice and comments jako metoda partycypacji publicznej*, JU Krakow, 2018, p. 91-94.

III. Conclusion

III.1 A lesson for difficult times

The outbreak of the pandemic forced everyone to take a new approach both in everyday issues and activities and regarding major decisions. Parliaments and governments started to hold online sessions, in some cases for the first time in history, citizens in some cases obtained the ability to vote remotely or such a possibility became a subject of debate. An enormous number of activities moved online because this was the only remaining option. While there are certain risks associated with such a rapid *e-revolution*, especially the issue of exclusion, it is becoming clear that a return to an offline character for some of these activities will not be possible. These circumstances have provided us with an excellent opportunity to focus on the question of what should be done to use them in our favour. We should be looking ahead, seeking to use technology not only as a replacement for paper but to improve our citizenship and democratic engagement in creating rules. While there is surely a different approach to the role of agencies and the understanding of rules in common and civil law countries, for now this not the most important distinction. What matters is a reflection on how to use the technology which is now an even more vital part of our lives, not only as humans but also as citizens, to have a greater impact on the policies and regulations that are made and to participate in the decisions taken in a timely and meaningful manner.

In this preliminary paper, the scope of the American method of *notice and comment* was presented. The method has been used for decades and recently its e-platform entered the beta phase. While the solutions should be tailor-made for the countries it worth looking at other countries' experience in *e-regulating* and *e-participation* in order to utilise their experiences and avoid mistakes. Proper analysis and comparison of *notice and comment* with other national regulations would require a separate paper, given the difference of the legal orders and constitutional organisation systems (federal vs unitary). This paper aims for a less extensive but equally important reference – participation in rulemaking within the European Union structure. The following part will be devoted to the possibilities of European citizens to participate in creation of the policies by the European Commission with the proviso that this is only a preliminary approach to the topic and a guide for future, more extensive research.

III.2 Is there a lesson to learn? Current situation in the European Union

It is always worth investigating and learning from others and indeed this is the core of comparative legal analysis. However, it is vital not to overlook our own solutions,

especially given the common tendency to believe that the grass is always greener at the other side of the fence. The choice to focus on the EU and European Commission is far from a random one, and lies in the unique character of the European law and that its influence on the member states has much more in common the regulations subject to *notice and comments*.

According to the Treaty on European Union (TEU), the European Commission has exclusive legislative initiative.³³ There are some important exemptions to this Treaty provision resulting in referring to this prerogative as *quasi* exclusiveness,³⁴ nevertheless they do not directly influence the scope of participation possibilities that will be presented.

The Treaties directly refer to public participation and consultations in Article 11 of TEU, providing that the EU Institutions shall ‘give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action’, ‘maintain an open, transparent and regular dialogue with representative associations and civil society’ and that the Commission ‘shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent’. The obligation to include citizens and allow their participation is therefore included in the primary EU law. While there are many possible ways of fulfilling this obligation, the Commission’s attempts to include stakeholders in the rulemaking process through an online platform (‘Have your say’) will be presented below.

The road to the increased fulfilment of the treaties was not short.³⁵ The first step toward public participation was the adoption of the White Paper on ‘European Governance’ on July 25 2001.³⁶ The goal of the documents was to ‘involve more people and organisations in shaping and delivering EU policy’ and by so increasing ‘EU’s democratic legitimacy and accountability’.³⁷ Along with other activities, it led to the creation of the ‘Action Plan for Better Regulation’.³⁸ The key part of the Better Regulation agenda, which is not about

regulating or deregulating: it is a way of working to ensure that political decisions are prepared in an open and transparent manner, informed by the best available evidence

³³ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1, TEU, Article 17(2).

³⁴ P. Ponzano, C. Hermanin, D. Corona, *The Power of Initiative of the European Commission: A Progressive Erosion?*, Notre Europe 2012, pp. 5-7.

³⁵ See, European Court of Auditors, *Special Report: ‘Have your say!’: Commission’s public consultations engage citizens, but fall short of outreach activities*, Publications office of the EU, 2019.

³⁶ COM (2001) 428 final.

³⁷ European Court of Auditors, *Special Report, op. cit.*, p. 6.

³⁸ *Ibidem*, COM(2001) 726 final and COM(2002) 278 final.

and backed by the comprehensive involvement of citizens and other stakeholders, such as civil society organisations and representative associations³⁹

is stakeholder consultation – ‘a formal process by which the Commission collects information and views from stakeholders about its policies’. Citizens are also included in the notion of stakeholders.⁴⁰ From 2015 to 2017 European Commission upheld the commitment to involve Citizens, creating guidelines and a toolbox for Better Regulation, while in October 2017 the Commission stressed this commitment by implementing ‘Contribute to law-making website’⁴¹ allowing citizens to participate in the policy cycle in terms of both initiation and evaluation⁴² through the ‘Have your say (HYS)’ portal.⁴³

The Commission is also devoted to simplifying EU laws and reducing unnecessary costs, and this is partially realised through the ‘Fit for Future (F4F) Platform’⁴⁴ as a part of Regulatory Fitness and Performance Programme (REFIT). The F4F Platform builds on the experience of the REFIT platform that ended its mandate on October 31 2019.⁴⁵ Currently the stakeholders can share their opinions through dedicated ‘Have your say: simplify!’.⁴⁶ The feedback provided to F4F Platform may be included in recommendations to the Commission and as a part of REFIT, feedback on draft EU laws currently being developed/negotiated by the legislators, EU laws adopted less than two years ago, a planned or on-going consultation with social partners or issues of sole national competence will not be considered.⁴⁷ It is important to underline that these are two separate initiatives with different primary functions. While the ‘Have your say: Simplify!’ is more about overseeing the existing laws and their improvements along with the REFIT agenda, ‘Have your say’ focuses

³⁹ *Ibidem*, p. 7.

⁴⁰ SWD(2017) 350 final: Better Regulation guidelines, p. 69, <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines.pdf> [in:] European Court of Auditors, *Special Report...*, p. 7.

⁴¹ “Contribute to law-making” website: https://ec.europa.eu/info/law/contribute-lawmaking_en [Accessed 20 Feb 2021].

⁴² European Court of Auditors, *Special Report*, *op. cit.*, p. 7.

⁴³ ‘Have your say’ portal: <https://ec.europa.eu/info/law/better-regulation/have-your-say>

⁴⁴ F4F Platform: https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/fit-making-eu-law-simpler-less-costly-and-future-proof/fit-future-platform-f4f_en [Accessed 20 Feb 2021].

⁴⁵ REFIT platform: https://wayback.archive-it.org/12090/20200221163756/https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/fit-making-eu-law-simpler-and-less-costly/fit-platform_en [Accessed 20 Feb 2021].

⁴⁶ ‘Have your say: simplify!’: <https://ec.europa.eu/info/law/better-regulation/have-your-say-simplify>.

⁴⁷ *Ibidem*, sec. ‘How is my feedback used’.

more on current works on laws and policies (new initiatives, reviews/revisions and evaluations). Just a year after implementation of the platform, several improvements were made, like ‘displaying feedback opportunities on a timeline; incorporating all open and closed public consultations; publishing upcoming initiatives; and translating general information relevant for all public consultations into all EU languages.’⁴⁸ The efforts of the commission have not been meaningless, and the OECD Regulatory Policy Outlook report ranked the Commission first in terms of stakeholder engagement among all OECD countries in 2018.⁴⁹ In the following paragraphs, the scope of the Commission’s consulting process will be presented.

The aforementioned OECD ranking was based on the Commission’s principles which were adopted in the Better Regulation Guidelines which govern consultations, namely:

- (1) Participation: Adopt an inclusive approach by consulting as widely as possible;
- (2) Openness and Accountability: Make the consultation process and how it has affected policy making transparent to those involved and to the public;
- (3) Effectiveness: Consult at a time when citizens’ views can still make a difference, respect proportionality and specific restraints;
- (4) Coherence: Ensure consistency of consultation processes across all services as well as evaluation, review and quality control.⁵⁰

It is important to underline the fact that the ranking was based upon declared policies and not their actual performance. The consultation process is presented in the Picture 1:

The first step of the consultation process is the creation of a road map or Inception Impact Assessment (IIA). Since November 2018, all public consultations along with other feedback opportunities can be found on the Have Your Say Portal.⁵¹ Apart from the feedback stages that will be described below, the Portal allows users to search for *in progress* initiatives that are currently being prepared for consultation and to subscribe for notifications about commenting opportunities. This increases transparency and allows stakeholders to be duly informed about upcoming initiatives. Four opportunities are available for providing feedback, following the stages of development:

- 1) roadmap or Inception Impact Assessment;
- 2) public consultations;

⁴⁸ European Court of Auditors, *Special Report*, *op. cit.*, p. 8.

⁴⁹ OECD (2018), OECD Regulatory Policy Outlook 2018, OECD Publishing, Paris, p. 48 [in:] European Court of Auditors, *Special Report*, *op. cit.*, p. 8.

⁵⁰ Better Regulation guidelines 2017, p. 70 (2015, p. 65) [in:] European Court of Auditors, *Special Report*, *op. cit.*, p. 19.

⁵¹ See, https://ec.europa.eu/info/consultations_en [Accessed 20 Feb 2021].

- 3) draft act;
- 4) commission adoption.

Picture 1. The consultation process



Source: ECA, based on the Commission's Better Regulation guidelines.

The roadmaps define a major new law or policy, an evaluation of an existing law or policy, a fitness check of a bundle of related existing laws and/or policies providing information about a problem to be tackled, and objectives to be met along with explanation why the action of the European Union is needed. If the potential impact of the act is likely to be significant, the roadmap is replaced with an Inception Impact Assessment.⁵² IIA is a detailed version of a roadmap, including potential economic, social and environmental effects. At this stage, stakeholders are given a four-week feedback period for providing comments. The comments can be up to 4,000 characters long and contain attachments. Both IIA's and roadmaps are presented in the form of a standardized table.

A roadmap contains three main fields:⁵³

- 1) Context, Problem definition and Subsidiarity Check;

⁵² https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law_en#how-their-scope-is-defined [Accessed 20 Feb 2021].

⁵³ See, e.g. <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12858-Micro-credentials> [Accessed 20 Feb 2021].

- 2) What does the initiative aim to achieve and how;
- 3) Better regulation,

While the more precise IIA covers four aspects:⁵⁴

- 1) Context, Problem definition and Subsidiarity Check;
- 2) Objectives and Policy options;
- 3) Preliminary Assessment of Expected Impacts;
- 4) Evidence Base, Data collection and Better Regulation Instruments.

The public consultation process is the next step and the opportunity to participate is available for 12 weeks. The process available on the portal is quite unique and different from what is considered a common understanding of consultation, since participants are invited to fill in the survey (questionnaire), with some detailed questions. The public is invited to provide their opinions: not in a free manner, but through replying to questions posed. The questionnaire regarding *Combating gender-based violence – protecting victims and punishing offenders* proposal for a directive⁵⁵ exemplary questions are: “In your view, how important is it that your Member State takes measures to prevent violence against women and domestic violence?”, “In your opinion, what measures should be taken, if any, to challenge harmful gender stereotypes to prevent violence against women and domestic violence?”, “To your knowledge, are there specialist support services in your Member State which are accessible to male victims of domestic violence?”.⁵⁶ For each questionnaire, respondents have the opportunity to attach supporting documents. This stage is an interesting example of possibly valuable opinion-poll based participation, exploring the valuable knowledge input rather than devaluing the participation process.⁵⁷

The next step in the consultation process is the draft-act commenting period, which lasts four weeks. At this stage, the commenting aims to provide feedback for finalising the initiative and respondents are welcomed to provide up to 4,000 characters of free text feedback, including attachments, on the draft of the act and its annexes. The final opportunity for commenting is given prior to the adoption of a final act, lasting for four weeks for legislative and four weeks for implementing and delegating acts. The participants are able to provide the same feedback type as

⁵⁴ See, e.g. <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12733-Supporting-broad-and-inclusive-participation-of-mobile-EU-citizens-in-municipal-elections-in-Europe> [Accessed 20 Feb 2021].

⁵⁵ See, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12682-Preventing-and-combatting-gender-based-violence-> [Accessed 20 Feb 2021].

⁵⁶ See, <https://ec.europa.eu/eusurvey/runner/genderbasedviolence?surveylanguage=EN> [Accessed 20 Feb 2021].

⁵⁷ See. II.4 Method evaluation.

for the draft-act, that will be summarised and presented to the European Parliament and Council with the aim of feeding into the legislative debate.

As presented above, stakeholders, European citizens, and institutions have numerous opportunities to provide feedback and participate in the legislation process at various stages along with the possibility of monitoring progress and receiving information about the upcoming stages of the process. The consultation process is summarised in the mandatory Synopsis Report summarising all the consultation activities undertaken and informing citizens as to how their feedback was used. While the possibilities for commenting withing the EU legislation process are significant, there are also some weaknesses raised by the evaluation of the European Court of Auditors. The most important ones include a low awareness of public consultation process,⁵⁸ the professional language used in the surveys⁵⁹ and insufficient feedback for respondents and limited publicity given to results.

There are many common points between *notice and comment* and the Have Your Say Platform commenting possibilities. It seems that in many points the EU did her homework providing vide, citizens friendly and transparent consultations possibilities. There are also some aspects that require improvements. In the author's opinion, both the American and European example of tackling online consultations, online participation, and commenting possibilities are an example of decent citizen engagement requiring constant improvements. They are also a great point of reference for national proceedings towards greater civic engagement.

III.3 Further research

The *notice and comment* method and consultation process within the EU are not the only ones where commenting is used as a form of participation, nor are they the only one that uses technology. Numerous interesting participation activities, both online and offline, are being held around the world, but none of them seems to be so deeply associated with the law-making procedure by its obligatory nature nor has the special and unified for different purposes online platform apart from the presented exemplars. That is why it is important to duly observe those examples and use it as a possible basis for national solutions that would possibly lead to improving democracies if properly and wisely implemented over future decades. What should be done now is to use this *e-revolution* impulse to start something truly revolutionary.

⁵⁸ European Court of Auditors, *Special Report*, *op. cit.*, p. 30.

⁵⁹ *Ibidem*, p. 33.

Abstract

This early research paper focuses on the impact of the pandemic on governance, administration, and participation. With the outbreak of the pandemic, everyday life, as well as citizens' duties, were severely affected. While there are numerous negative aspects of the coronavirus crisis in some fields, a positive change and acceleration are visible. The author highlights the role of new technology on the governing and e-revolution that is happening due to COVID-19. The American rulemaking method known as notice and comment is presented as an example of a successful, broad implementation of online citizen participation as rule-makers. The research paper aims to show the potential of technology and stimulate reflection on the possible improvements of the mechanism in European countries.

Key words: participation, rulemaking, pandemic, notice and comments, technology

Partycypacja i zarządzanie w czasach dystansu społecznego – możliwy wzór dla Unii Europejskiej Streszczenie

Artykuł stanowi prolegomenę do badań na wpływem pandemii na zarządzanie, administrację oraz partycypację obywatelską. Rozprzestrzenianie się choroby oraz próby zapobieżenia temu zjawisku, poważnie zredefiniowały życie codzienne, a także obowiązki i prawa obywateli na różnych polach. Pomimo wielu negatywnych aspektów kryzysu związanego z pandemią, w niektórych dziedzinach, widoczne są pozytywne zmiany a także ich akceleracja. Autor podkreśla rolę nowej technologii w rządzeniu i e-rewolucji, która może mieć miejsce z powodu COVID-19. Amerykańską metodę tworzenia przepisów, znaną jako *notice and comment*, przedstawiono jako przykład udanego, szerokiego wdrożenia udziału obywateli z wykorzystaniem narzędzi online jako uczestników procesu zestawiając ją z działaniami podejmowanymi na szczeblu Unii Europejskiej. Artykuł ma na celu ukazanie potencjału technologii i wsparcie refleksji nad możliwymi ulepszeniami podobnych mechanizmów w ramach struktur państwowych.

Słowa kluczowe: partycypacja, tworzenie regulacji, pandemia, obwieszczenie i komentowanie, technologia