**GURZHII Taras,**

Doctor of Law, Professor,

Head of Administrative, Financial and Informational Law Department

Kyiv National University of Trade and Economics

PUBLIC CONSULTATION IN UKRAINE: TOPICAL ISSUES OF LEGAL REGULATION

*Annotation. The article revolves around the genesis and current state of development of public consultations institute in Ukraine. The range of negative factors provoking low efficiency of public consultations is outlined. The priority directions of public consultations’ development are determined. Also is grounded the necessity of taking complex legal and organizational steps, aimed to promote public participation into the policy-making processes.*

*Keywords: state policy, public administration, rule-making process, good governance, public consultation.*

Background. Democratic development in modern Ukraine requires fast implementation of European standards on good governance, which provide direct public participation in lawmaking, public administration and policy processes. With this aim national system of public administration, increasingly use progressive forms of cooperation between government and society, based on the ideas of ​​partnership, transparency and social dialogue. One of these forms are public consultations, focused on ensuring direct participation of citizens in the process of developing regulations, accountability of administration, improving the quality and legitimacy of legislative acts.

The formation of public consultations institute in Ukraine continues nearly a decade. During that time, was made its legal recognition as a part of rule-making process, were defined the principles of its organization, were determined organizational and procedural aspects of its holding. Public consultations gradually rooted in rule-making activity of executive power, spreading its influence at all levels of state administration. Analysis of national practices on public consultations shows the growth of their role in Ukrainian political life, as well as enriching experience of their organizing and holding.

Results. As shown by a number of sociological studies, the functioning of public consultations in Ukraine characterized by insufficient effectiveness. Organization of such consultations is inconsistent and unsystematic. Tentative plans of public consultations (the preparation of which is stipulated by current legislation) are developed by no more than 2/3 of central authorities and local state administrations. Wherein adopted plans often do not provide the activities on discussing the key political and legislative acts, including concepts, strategies, national programs, sectoral and regional plans, etc. Besides, most of adopted plans do not specify the subject of public consultation (in particular, they don’t represent the title of disputable legal act, the scope of its regulation or, at list, the matters its development) [1].

What concerns the organization and conduct of concrete public consultations, there are many problems here as well: - total number of consultations on legislative acts maintained by executive power is extremely low (according to some sources, the number of such consultations does not exceed 10 per year); - organization and holding of public consultations as a rule are carried indirectly (only as public opinion research), instead live discussion involving scientists, practitioners and the general public; - information support of public consultations is very poor (websites of many central and local authorities do not contain detailed information about consultations, most of answers to public requests are formalized and uninformative; - wide reports on consultations and their recommendations published infrequently [2, с. 94-96].

And the main ploblem: the fact of public discussion on a draft of legal act (as well as the existence of clearly defined requirements for its form and content), does not guarantee taking it into account by state authorities. Systematic ignoring of recommendations, developed at public consultations, is usual fact in Ukrainian administrative practice.

According to the results of a poll conducted by the civic initiative “For effective communication authorities and the public” (Committee of Voters of Ukraine, School of Political Analysis and Analytical Center “Policy”), over 40% of non-governmental organizations consider the ignorance of public proposals by executive authorities the main problem of public consultations in Ukraine [2, с. 50].

On the other hand, real influence on authorities’ political activity through by public consultations is weak because of the inertia of domestic public organizations. At present, the main initiators of public consultations are central and local authorities who initiate such consultations because of legislative requirements and not by the reasons of public interest.

Instead, the activity of non-governmental organizations and other social institutions is very low. Also notable part of these institutions focused not on defending the interests, rights and needs of citizens, but on promotion the interests of different political forces, private and corporate interests of financial-industrial groups, public officials and local authorities [3].

Sometimes such organizations artificially integrated into public consultation process, providing a favorable information background for lobbying decisions. Those public organizations, which sincerely defend public interests, do not always have sufficient resources (in particular, expert-analytical) to formulate professional and competent proposals suitable for effective implementation. The logical result of this situation is poor quality of recommendations, formulated by institutions of civil society. And, of course, such state of matters does not contribute to enhancing the role of public consultations in modern political and legal practice.

Insufficient effectiveness of public consultations is due to many negative factors: non-transparent mechanisms of public administration, high level of corruption, weak government support for public initiatives and many others. However, certainly one of the main obstacles on the way to development of public consultations in Ukraine is imperfect legal regulation. Today the main legal act on organization and holding of public consultations is the *Order of consultations with public on formation and implementation of state policy, approved by the Cabinet of Ministers of Ukraine on 3 November 2010 № 996* [4].

At the time, adoption of this document was very important step to involve the wide public into policy-making and administration processes. The Order defined the aims of public consultations, outlined the range of their participants, systematized their organizational forms, regulated the process of their planning and implementation. Being a complex act, it provided not only a systemic regulation of public consultation sphere, but as well created legal basis for building a network of community councils in the executive branch – specialized advisory bodies designed to promote public participation in public policy.

However, with the farther establishment of public consultation in national political and administrative practice, became increasingly apparent numerous flaws of the Order. In particular, its provisions do not cover a number of state bodies that do not belong to the executive branch of power (Parliament of Ukraine, President of Ukraine, National Council of Ukraine on Television and Radio, the Central Election Commission, etc.). Actually, this is not surprising. As the Order was approved by the government, its performance, a priori, can concern only the system of executive power. For the same reason, this Order has only advisory nature for all local majors and councils (see: p. 6 Regulation of Cabinet of Ministers of Ukraine 3.11.2010 № 996). Thus, wide range of issues of cooperation between the public and some state entities stays outside the legislative field.

Unreasonably wide are the limits of administrative discretion in the field of organization of public consultations. However, subjects of executive power in this process play a dominant role. To a large extent the fate of public discussion of concrete legal draft depends on executive authority, which alone decides whether to include it into tentative plan of public consultations. As well he makes the final decision on holding public consultations by civil initiative. In fact, according to the Order, holding of public consultation is mandatory only if it was initiated by at least three institutions of civil society. In other cases, the matter rests entirely on the discretion of the executives.

Among weak points of Order can also be attributed not clear certainty of: - the list of participants of public consultations; - the range of their rights and responsibilities; - organizational forms of consultations; - coordination between state institutions involved in their organization; - mechanism of practical implementation of their results; - approaches to calculating of relevant procedural terms; - the legal consequences of breaking the rules of public consultation.

Furthermore, at the point of view of researchers and practitioners, the Order ignores the specific features of recent socio-political situation in Ukraine. Under conditions of Crimea annexation, the military conflict in the east of state, the rapid growth of internal and external threats to Ukrainian statehood there is an objective need for urgent government decisions on vital issues of national security (especially for emergencies, military status, antiterrorist activities, etc.). The Order does not provide special procedure for adopting such acts. As well, it doest not provide the mechanism (even simplified) of involving the public into the processes of development social, cultural, economic and budgetary decisions of special administrations in the area of ​​anti-terrorist operations.

All of these problems raised the question of adoption principally new legal act, aimed at improving the socio-political role of public consultations, expansion of their practice, increase their transparency and effectiveness. Now this question is the subject of wide public discussion and a number of national and international initiatives, including initiatives “Partnership” Open Government ", adopted on 20 September 2011 at the UN General Assembly [5]. As a part of this initiative Ukraine took the responsibility to develop and adopt the law, aimed to provide comprehensive participation of wide public in forming and implementing of national policy.

In order to implement this commitment Cabinet of Ministers of Ukraine carried out large-scale measures (discussions, examinations, conferences, etc.) on development the draft of new Law on public consultations. The immediate realization of this project was provided by the Ministry of Justice of Ukraine with active assistance of OSCE mission in Ukraine, with the participation of representatives of central and local government, local authorities, non-governmental organizations, research institutions, law universities, independent experts, jurists and general public.

The result of united efforts was the draft Law of Ukraine “On public consultation” (hereinafter – the Draft), which, after much debate and completions, was officially presented for public discussion in July 26, 2016 [6]. Analysis of this Draft reveals significant progress in improving legal supply of organization and holding public consultations. Among its most important novels are the following:

implementation of mechanisms of cooperation between state authorities and wide public at all levels of formation and implementation of national policy (national, regional, sectoral, etc.);

addressing the requirements for mandatory public consultation to all power bodies involved in political process, including the President of Ukraine, Verkhovna Rada of Ukraine, the National Bank of Ukraine, local authorities etc;

putting into the base of public consultations main principles of good governance in accordance to European standards of public administration;

recognition of private legal entities and individuals as participants of public consultations and as the subjects of its initiating (and, according to Art. 26 Constitution of Ukraine, the right to participate in public consultations offered to give not only the citizens of Ukraine, but also foreigners and stateless persons);

definition of some public administrations (including local authorities), not only as consultation organizers, but also as stakeholders able to participate in consultations, organized by other entities, acting “on the side” of the public;

determination the legal status of public consultations’ participants, concretization their rights and obligations;

recognition only direct forms of public consultation (public discussions and web-consultations), removal of all indirect forms of consultation (exploring of public opinion etc.);

specification of legal grounds for public consultations;

improvement of public consultations’ procedures;

introduction of the Stakeholders Information Registry – open electronic database, containing common information about all subjects who declared intention to take part in certain public consultation;

setting mandatory publishing on official websites of the authorities all proposals received from participants of public consultations;

setting the grounds for urgent lawmaking, proceeding without public consultations (in particular, by urgent procedure should be adopted the acts on emergency situations, martial law and antiterrorist measures);

improvement the mechanism of cooperation and coordination between different bodies of power in the field of public consultation;

outlining the legal consequences of offences against public consultations order, providing the responsibility of offenders.

In general the Draft is characterized by clearness of provisions, structural sequence, detailed and complex regulation. And from this point of view its development may be considered as a wide step toward European standards of governance.

But at the same time, the analysis shows that some provisions of the Draft are not so “well developed” as it should. To some extent, they are not enough clear, complete and informative.

In particular, the Draft does not outline the scope of rights given to participants of public consultations (it contains only the list of their obligations). And what concerns these obligations, they apply only to organizational side of consultations (“to promote participation”, “to promote access”, “create organizational conditions” etc.) and do not provide mandatory review of public proposals by authorities. Some information about such obligations can be derived from the Draft provisions, but corresponding requirements formulated non-personal, without being tied to a particular obligations (“recommendations of public consultations are studied and analyzed”, “general information about consultation recommendations is placed into the report” and so on).

The Draft demands to place information relating to public consultation on official websites of authorities. It should be noted that in wide variety of authorities involved into policy-making process, such a mechanism is unlikely to be optimal. After all, to get initial information on certain public consultation, interested persons will have to monitor electronic resources of all state entities. In mind of great number of such entities, and, as well, the lack of monitoring capabilities at disposal of public institutes, not every consultation will get maximum representation.

As it seen, the best way to solve this problem is creation of unified Internet portal, accumulating information on all public consultations planned, organized and holding in Ukraine. Moreover, this step will contribute the creation of Stakeholders Information Registry – open database of all subjects, interested in taking part in public consultation.

The Draft hardly can be recognized perfect in part of certain forms of public consultations, like as *public discussion*. Establishing the grounds for public discussion, the Draft does not recognize them mandatory. To hold or not to hold public discussion – this question is laid upon the discretion of administrative body. Thus eliminates the warranty of discussing key political issues at open public dialogue.

Besides, seems to be not rational the timing of some steps in public discussion procedure. In particular, deadline for publication of discussion protocol (within ten working days after debates) seems too long. However, the period of announcing public discussion and mailing invitations to participants (at least three working days before the discussion) is not always sufficient to solve all organizational tasks related to assignment and accommodation of nonresidents.

Also it’s difficult to recognize successful Draft’s provisions on coordination in the field of public consultation. Developers of the Draft limited by sacramental statement that every power entity should determine a structure or a person responsible for coordination with other entities, taking part in public consultation. However, the specific mechanism (or at least its general “outline”) of such coordination is not offered.

In turn, the provisions on responsibility for violations in public consultation sphere have much “broader” content, than it should follow from their primary essence. In most cases, they regulate not the questions of responsibility for violations, but the procedure of adopting legal acts in case of such violations (including the procedures of delaying the draft or putting changes into adopted normative act).

**Conclusion.** It should be noted, that not all controversial aspects of the Draft were mentioned in this article. Further consideration and discussion require its provisions on public consultations’ principles, on implementation public recommendations, on the framework of administrative discretion in rule-making activity and many others. But given the large number of such aspects, (obviously, it requires broader format of research) we confine mentioned above.

It seems more than enough to state the incomplete process of developing legal framework, necessary for the effective functioning of the institute of public consultation. Successful completion of this process requires further Draft development and, in particular, solving the next points:

- determination of obligation for authorities to account findings and recommendations public consultation;

- clear delineation the scope of future Law on Public consultations and other legislative acts defining rule-making activity in certain areas or branches of social life;

- specification the legal status of all actors involved in the process of organizing and holding public consultations (including corresponding powers of authorities and their responsibilities for practical implementation of public consultations results);

- development of legal framework for creation of a specialized Internet portal, containing detailed information about all public consultations planned, organized and carried out in Ukraine;

- forming General Register of Interested Persons (GRIP), which would provide automatic inclusion of such persons to the list of participants of certain consultations;

- outline the range of normative acts, which drafts require mandatory public discussion;

- optimization the timing of some procedural actions in public consultation process;

- creating an effective mechanism of coordination between all power bodies, involved in the organization and holding of public consultations;

- clear definition of all types and grounds of responsibility for violations in public consultations sphere.

Besides, with further work on the Draft, it is necessary to implement a wide range of normative, organizational, informational and other measures to build in Ukraine an integrated, multi-level system of public participation in state political activities. This can be done only under the targeted policy, based on the principles of planning, comprehensiveness, consistency, participation, transparency, consensus and responsibility. To this end, the implementation of standards and mechanisms of good governance must be declared strategic direction of administrative reform, and the primary field of state ​​activity – reflected in legislation, strategic planning and key political decisions.

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