

Nejc Brezovar, PhD
University of Ljubljana – Faculty of Public Administration
Gosarjeva ulica 5
1000 Ljubljana
Email: nejc.brezovar@fu.uni-lj.si

EARLY STAKEHOLDER ENGAGEMENT FOR BETTER REGULATION OF THE NGO SECTOR - POSITIVE EXPERIENCE FROM SLOVENIA

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KEYWORDS

better regulation, stakeholder engagement, NGO, regulatory procedure, public interest

ABSTRACT

The paper presents an empirical analysis of the regulatory procedure of the adopted Non-Governmental Organizations Act in Slovenia. The emphasis is given on the impact of stakeholder involvement in the early stages of the regulatory process (preparation, work-paper and final draft phase). Usage of different measures and tools is evaluated through the process and the end result - the adoption phase. Regulation and other non-binding documents (guidelines and manuals) are critically examined, with an intent to demonstrate the existence of such rules and instructions is not sufficient for a proper stakeholder engagement. A change in political culture is needed, if the regulatory process is to be improved in a way that enables early stakeholder engagement. Raising the awareness (via trainings, seminars and workshops), of both the regulator and stakeholders is necessary if we want to change the predominantly negative attitudes towards stakeholder engagement. The paper helps us identify key stakeholders in early stages of a concrete regulatory procedures, capable of sharing useful information, alternative solutions, expertise and experience, resulting in better regulation.

1. INTRODUCTION

Many countries and organizations strive toward better regulation. To achieve this goal, certain theoretical principles of good governance should be perused (transparency, participation etc.) in concrete regulatory processes, when adopting new or amending already existing legislation. The concept of governance itself is not a new topic for discussion. The definitions vary, and the term itself can be used in several contexts, such as corporate, local, national, international governance with many different characteristics. For our understanding, the definition of governance as “the process of decision-making and the process by which decisions are implemented (or not implemented)”, is sufficient.¹ The process of decision making is understood from its earliest of stages, not only when a certain regulation is being adopted, but also in the process of drafting it. At this stage different decisions are made such as on the general pursued course of our agenda, on choices between different alternatives to find the best possible solutions, which stakeholder to include in the process and when. Stakeholders are usually individuals or different interest groups that have an issue or a stake in the matter that is being regulated. In the process of decision making (such as the legislative procedure) many actors meet (government, civil society, political parties), where their different interests collide and influence the process and the end result. Here good governance principles and characteristics such as following the rule of law, respective to human rights, accountable, participatory, opened and transparent, responsive, consensus oriented, effective and efficient, ethical, competent, innovative, inclusive should be applied. All of the later principles play an important role in the “production” of better regulation - the narrower the gap between these theoretical principals and their usage in concrete regulatory procedures, the better the regulation. Although better regulation covers the whole policy cycle, from planning, all the way to evaluation and revision, for the purpose of this paper the emphasis will be on more transparent legislature with increased stakeholder input through stakeholder engagement and *ex ante* regulatory impact assessment (RIA) in the early phases of developing (draft) legislation. Engagement is referred to different methods of involving the interested public in the regulatory process, through a combined approach of communication, consultation and participation.² What was one a theme for academic debate³, is becoming a reality in policy making. Since the Slovenian Non - governmental Organizations Act (NGO Act),⁴ which is the main focus of the discussion, was adopted in 2018, it is still too early to make quality monitoring and evaluation of its implementation and application results in practice. The paper is based on the hypothesis that (I) when regulating areas of society which enjoy a special independence of state authority, principles of good governance should be applied to an even higher level, especially the principle of stakeholder engagement, which should be applied in the early phases of the regulatory process, to ensure a wide acceptance of proposed regulation and ease its adoption phase.

¹ Yap Kioe Sheng, What is Good Governance, 2009, <https://www.unescap.org/sites/default/files/good-governance.pdf>.

² Alberto Alemanno, Stakeholder Engagement in Regulatory Policy, in OECD Regulatory Policy Outlook 2015, p.10.

³ On the transformation of concepts regarding democracy and public engagement see works such as Klingemann D. and Fuchs D. (ed.), *Citizens and the State* (Oxford University Press 1995), Dryzek J. S., *Deliberative Democracy and beyond: Liberals, Critics, Contestations* (Philosophical Quarterly 54 (215), p. 343-345, 2004), Dorf, M. C. and Sabel, C. F., *A Constitution of Democratic Experimentalism* (Cornell Law Faculty Publications, Paper 120, 1998) or more recent Neblo, Michael A., *Deliberative Democracy Between Theory and Practice*, (Cambridge University Press, 2015).

⁴ Non-Governmental Organizations Act, Official Gazette of the Republic of Slovenia, No. 21/18.

2. TOWARDS A BETTER REGULATION

Efforts towards better regulation are being made on many, if not all levels, e.g. on international level by Organization for Economic Co-operation and Development (OECD) which adopted Recommendation of the Council on Regulatory Policy and Governance⁵, on European level by the European Union (EU) where the European Commission proposed Better regulation guidelines⁶, and even on different state levels e.g. Slovenian National Assembly adopted Resolution on Legislative Regulation (Resolution)⁷, Rules of Procedure of the National Assembly⁸, the Government adopted Rules of procedure of the Government of the Republic of Slovenia⁹ which are in a way crucial for the implementation of the Resolution. An in depth RIA (*ex ante*) analysis should be a part of the process, to allow the regulator to foresee the results new regulation will cause, and therefore help him choose the optimal solutions among possible alternatives in relation to the regulation goals (on one hand independent and on the other transparent functioning of the NGOs in Slovenia). For now, we can only analyse the policy making procedures regarding the preparation of NGO legislation, while the *ex post* implementation evaluation should be carried out in the near future.

2.1 Regulatory Policy Review of Slovenia

In OECD Regulatory Policy Review of Slovenia¹⁰ from October 2017, it was concluded that although stakeholder engagement is required for ministries while developing laws and regulations it is often not implemented in line with requirements. One of the key findings was that “the Slovenian legal and policy framework creates conditions for efficient stakeholder engagement in regulatory policy, especially with regard to developing new regulations and their amendments. However, there is a substantial need to strengthen the enforcement of this framework, which is not often adhered to, to the extent that would enable successful engagement of stakeholders in the process of developing, implementing and reviewing regulations. Although a few ministries do engage with stakeholders early on in the regulation-making process, this is still not systematic and mostly left to their discretion. Most of stakeholder engagement takes place at its final stage.”¹¹ Key recommendations of the OECD, regarding stakeholder engagement, were that Slovenia should strengthen stakeholder engagement via tools such as adding stakeholder engagement training for public employees, updating government policies on stakeholder engagement and setting up monitoring of stakeholder engagement. Regarding new regulation in Slovenia and public consultation OECD states that public consultation is quite strongly focused on the use of ICT tools like the e-Democracy portal¹² where the public can get informed, comment and share its views on the new, (already) drafted regulation. OECD focus was also on

⁵ Available on <https://www.oecd.org/governance/regulatory-policy/49990817.pdf>, March 2012.

⁶ Available on <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines.pdf>, July 2017.

⁷ Official Gazette of the Republic of Slovenia, No. 95/09.

⁸ Official Gazette of the Republic of Slovenia, No. 92/07 – official consolidated text, 105/10, 80/13 and 38/17.

⁹ Official Gazette of the Republic of Slovenia, No. 43/01, 23/02 - corr., 54/03, 103/03, 114/04, 26/06, 21/07, 32/10, 73/10, 95/11, 64/12 and 10/14.

¹⁰ Regulatory Policy Review of Slovenia – Oversight Matter (2017), available on <http://www.oecd.org/slovenia/regulatory-policy-in-slovenia-9789264291690-en.htm>.

¹¹ Regulatory Policy Review of Slovenia p. 6 and 60.

¹² <https://e-uprava.gov.si/drzava-in-druzba/e-demokracija.html>

transparency, as one of the central pillars of effective regulation, which involves a range of actions, among them consultation with stakeholders, where contribution of e-government to improve transparency, consultation and communication is of growing importance.¹³ And although OECD noticed that “there is no government-wide, general policy on stakeholder engagement in drafting, implementing and reviewing regulations”, we cannot completely agree with such a statement since e.g. instructions on the execution of the Rules of procedure of the Government of the Republic of Slovenia were amended in 2016 in a way that obliges the government to carry out consultations with representative municipality associations, when a legislative proposal affects their area of work, jurisdiction or financing. Also in November 2017 similar instructions (No.10) came into force regarding public consultations, stating that when submitting a (draft) proposal to the government, the drafting institution has to summarize and explain the consultation process, as part of the government material. This means the ministries have to explain, whether the draft was published on e-Democracy portal (if not, they have to explain the reasons why not), present a list of involved stakeholders, present which comments were provided, how the communication was carried out (portal public hearings, round tables), which were the prevailing comments and suggestions (especially those that were not taken into account with reasons why not) etc.

2.2 Rules, guidelines and manuals on public consultation

In Slovenia Ministry of Public Administration (MPA) covers wide (mostly horizontal) areas of work, which also include NGOs and better regulation. Regarding the later, the MPA prepared different non-binding strategies and guidelines on public consultation and involvement of key stakeholders in the regulatory process, with the goal of improving legislation. The first key document was the Public Administration Development Strategy 2015-2020¹⁴, adopted by the Government in April 2015. Analysis carried out by MPA, and discusses on Government level, “established that the public is not sufficiently involved in the drafting of regulations, since the participatory political culture in Slovenia has no tradition and is at a level that is too low” and that “violations of the provisions of the Resolution when adopting regulations and policies clearly show reservations, lack of knowledge and failure to accept participation”.¹⁵ One of the goals in preparing better legislation, as a value in public administration, should be to improve cooperation with suitable stakeholders as swiftly as possible. Possible way of addressing the issue is by preparing different guidelines on how to involve the public in the regulatory process. The MPA prepared a Manual for planning and implementation of consultative processes¹⁶ and Guidelines for stakeholder involvement in the

¹³ One of MPA areas of work is also transparency, access to public information and open data. The Access to Public Information Act (Official Gazette of RS, No. 24/2003 with changes and amendments, latest change: Official Gazette of RS, No. 19/15, Decision of Constitutional Court of Slovenia) also states in Article 10 that each body is obliged to transmit to the World Wide Web public information such as proposals for regulations, programs, strategies, and other similar documents relating to the field of work of the body. Yet the clause is oriented on the “already existing proposals” and not on the “draft of the proposals” phase, where the stakeholders should be involved, if we wish to discuss public consultation in the early (draft) phases of the regulatory procedure.

¹⁴ Available on http://www.mju.gov.si/fileadmin/mju.gov.si/pageuploads/JAVNA_UPRAVA/Kakovost/Strategija_razvoja_JU_2015-2020/Strategija_razvoja_ANG_final_web.pdf.

¹⁵ Ibid., p. 90-91.

¹⁶ Available on http://www.mju.gov.si/fileadmin/mju.gov.si/pageuploads/SNO/Prirocnik-vkljucevanje_javnosti.pdf.

preparation of regulations in 2015¹⁷. The manual and guidelines, were prepared as part of a project called Strengthening the capacity to implement the impact assessment of regulations and integrate the public in the preparation and implementation of public policies, in co-operation with a number of different stakeholder groups, including CNVOS (Centre for information service, co-operation and development of NGOs)¹⁸, Chamber of Commerce and Industry of Slovenia, Chamber of Craft of Slovenia, different trade unions. Trainings, seminars and workshops for public officials, (from different ministries) on the planning and implementation of consultative processes, were organized. While the Manual focuses on the organization of the public consultation process (explaining different phases and giving advice on how to achieve better results), the Guidelines provide detail instructions on individual steps of the consultation process (tools on identifying relevant stakeholders, examples of different forms). One of the guidelines findings is, that the need to consult with stakeholders and general public exist already in the phase of drafting regulations – so before a legislative text is actually drafted, as well as at the end of the process. Therefore the obligation to consult with the public, should be understood as consultation throughout the whole regulation-making process – from beginning (planning and drafting), to end (implementing). Although such non-binding documents are useful - giving more concrete guidelines to public officials in charge of concrete regulatory processes - one cannot argue with the comment from the OECD, that the existence of such non-binding documents, on top of several legal documents covering public consultation, can be confusing.¹⁹ In all truth, Manual and Guidelines could be simply combined together, to form a single document, that could at one point be adopted by the Government in a more formal way. The existing problem is the legal nature of such documents. If legislation is binding for everyone, regulation adopted by the government such as Rules of procedure are binding for the government and its ministries, who is bound by a non-binding document such as guidelines or manuals, which were prepared and published at ministry level? The Resolution adopted by the National Assembly is a politically binding document, without formal sanctions (only political), but binding non the less. Manual and Guidelines are information acts, which encompass crucial information on how to properly carry out public consultation in all phases of the regulatory process, published by the MPA. The reason behind this lies in the fact that the MPA is a horizontal ministry, responsible for regulation and development of areas such as better regulation, transparency, access to public information and NGOs, with emphasis on better and more active cooperation and communication between different stakeholders (public administration institutions, public service providers, NGOs, private sector entities, etc.).²⁰ Even the titles of these documents (manual and guidelines), let us know their intent is not to bind or formally instruct state institutions and state officials on how to act, but to offer aid, information on involving the public in the regulatory process they decide to do so. With such non-binding documents and the lack of political participatory tradition, the result cannot be encouraging. A binding set of rules on how to implement public consultation in the early phases of the regulatory process is needed,²¹ combined with an

¹⁷ Available on http://www.mju.gov.si/fileadmin/mju.gov.si/pageuploads/SNO/Smernice-vkljucevanje_2015.pdf.

¹⁸ CNVOS is a national NGO umbrella network, monitoring breaches of the Resolution by different ministries. They even set up a web page, where a counter exists, counting the breaches www.stevac-krsitev.si/.

¹⁹ Regulatory Policy Review of Slovenia,

available on http://www.stopbirokraciji.gov.si/fileadmin/user_upload/mju/templates/pdf/porocilo_OECD.pdf, p. 56.

²⁰ If areas of work are defined by law (State Administration Act Official Gazette of RS, no. 113/05 - official consolidated text, 89/07 - dec. US, 126/07 - ZUP-E, 48/09 , 8/10 - ZUP-G, 8/12 - VRS-F, 21/12 , 47/13 , 12/14 , 90/14 and 51/16), the claim about stakeholder engagement can be found on MPA website http://www.mju.gov.si/en/areas_of_work/.

²¹ Even the Rules of procedure of the Government (and instructions for their execution) which are binding state that the institution (ministry) should invite expert and other public to participate in the preparation of the regulation with a general invite that already includes a draft of the regulation

extensive training of government officials involved in different regulatory processes. But the later will probably not produce desired effects, since these officials will be put under (time) pressure from their (politically appointed) superior officials.²² Such situations become evident in times (e.g. the end of a certain government mandate) when the Government would try and “force” through the National Assembly as much legislation as possible, to complete its legislative agenda. Without binding rules and regulation on public consultation, the government officials are forced to follow direct instructions on how to run the regulatory process given by their superiors. OECD has a strong point when recommending, that Slovenia should consider codification of the different legal and policy documents governing stakeholder engagement, and by doing so make clear, which provisions are obligatory and which ones have only a guidance character.²³ Meanwhile, emphasis should be given to promoting a strong commitment to stakeholder engagement on all levels, to raise awareness of its importance - from politicians to public officials involved in regulatory processes.

The preparation of NGOs Act, as it will be demonstrated in the forthcoming chapters, refutes some of the preliminary findings on existing violations in stakeholder engagement and can therefore serve as an example on how to involve stakeholders in the early phases of drafting legislation.

3. PREPARING DRAFT LEGISLATION – IDENTIFICATION AND EARLY ENGAGEMENT OF STAKEHOLDER FOR BETTER RESULTS?

Stakeholder engagement is a crucial element of regulatory policy and open and inclusive policy making. The objective of regulatory policy should be ensuring that regulations are designed and implemented in the public interest, which can only be achieved with inclusion and (expert) help, from those concerned by regulations – the stakeholders.²⁴ Involvement of stakeholders should be done in all phases of the regulatory process. Engaging stakeholders at an early stage of the legislative process, can offer a constructive discussion, confrontation of different ideas and opinions and cause a sense of “ownership”, that may lead to positive interest and innovative ideas in the process, increasing its credibility, transparency and enabling early identification of possible constraints.²⁵ Slovene regulation lacks accountability on the regulators side, when a regulatory process is not in line with principles governing stakeholder consultation. Political culture is also important, when it comes to the practical use of stakeholder engagement. The

(paragraph 2, Article 9), and that the public has 30 to 60 days to respond to the (web) published draft (paragraph 4, Article 9). Taking into consideration the whole article 9, we can conclude that the public is invited to participate only after the draft regulation has already been prepared (usually at ministry level) and presented, and not in the early drafting phase. Their comments and suggestions therefore address an already drafted document, but can be included before the document is sent to the next phase which is adoption on government level. The preparation of the document as is understood by the rules of procedure therefor present the phase between the drafting of the document and its final proposal to be adopted by the government.

²² As the OECD noticed in its report on Slovenia (p. 6) regulation is often developed and adopted quite rapidly in Slovenia, since the government uses the so-called “urgent procedure” to pass legislation (which should in theory only be used in case of a national emergency/security/defense) more often than a regular or shortened procedure (less demanding changes). Both the regular and the shortened procedure require a more thorough stakeholder engagement process and a more rigorous *ex ante* analysis.

²³ Regulatory Policy Review of Slovenia p. 63.

²⁴ OECD draft on Best Practice Principles on Stakeholder Engagement in Regulatory Policy, available on www.oecd.org/gov/regulatory.../BPPs-for-Public-Consultation.docx.

²⁵ Similar on stakeholder involvement in projects in Tammer, Mark (2019), Early stakeholder involvement in projects, available on https://www.researchgate.net/publication/242548602_Early_stakeholder_involvement_in_projects.

later should be an objective the regulator strives towards, if it desires open, transparent and better regulation. Stakeholder engagement should not be understood as an interference of the normal regulatory procedures, carried out within institution, but as a welcomed complementary activity in policy creation. Usually consultations are carried out after a draft regulation has already been presented. The goal should be for consultations to be carried out at an earlier stage of the regulatory preparation process, which can be beneficial in the long run. There are exceptions - not every regulatory process is similar and not every process demands early involvement – it all depends on the regulatory issue at hand (some involve minor issues, are confidential, demand urgent action, are less complex etc.). It can be difficult deciding at what stage to include stakeholders. For instance, if a need exists to gather information, or if it is expected that the issue at hand will arise much interest in the public, it is better to involve the public at an early stage. This way time can be saved and costs can be cut, since probable problematic issues will surface early in the process, and an attempt to find solutions and balance interests can be made early on, so as to elude confrontations and contradictions in the future, when the process is governed by more formal rules of procedure with possible time limitations. It is also important to target, identify or reach out to possible critical stakeholder in the early phases, to avoid later confrontation, where attitudes can be quite negative, if stakeholders feel they have been left out at the beginning, resulting in less influence in the following phases. One option is to engage with – if existent – stakeholder institutions or bodies, but keeping in mind not to leave anyone on the side, and keeping the process opened to all interested stakeholders. At the early draft phase, different informal tools can be used to collect information from relevant stakeholder such as phone calls, round tables, *ad hoc* informal meetings. At this phase transparency is lacking and should be followed by a more open public consultation, allowing possible interested parties, which were not contacted at the early phase to share their views, comments and possibly different interest on the issue (e.g. different IT tools such as consultation portals).

Non the less engaging with stakeholders should start as early as possible in the process, with the objective of gathering as much vital information as possible. This is especially important when developing new regulations in areas that have not been subjected to existing regulation (e.g. regulating new technologies). Engagement should be promoted in the phase of defining the problem and the objectives for the new regulation. Stakeholders can be consulted even before the draft regulation has been prepared, to help the regulator decide, if it will even move forward with regulating a certain issue. At this phase consultation can help identify the most troublesome issues, and focus on their possible (alternative) solutions to tackle the challenges. The objective of such early involvement, is to uncover additional policy options, that may not have been apparent to policy-makers (lack of information and expertise). For this to work, the prevailing regulatory culture among policy-makers (from politicians to government officials), must be open to this kind of input.²⁶ If they are not, they are (intentionally?) misunderstanding the concept of open government, which also means the government needs to be open to new ideas, demands and needs of the public.²⁷ We can conclude, that engaging with stakeholders should start as early as possible in the regulatory process (at the drafting stage) and strives should be made towards closely integrating stakeholders in the new regulation *ex ante* RIA.²⁸

²⁶ OECD draft on Best Practice Principles on Stakeholder Engagement in Regulatory Policy, p. 26.

²⁷ OECD, *Modernizing Government: The Way Forward*, Paris: OECD, 2005, available on https://read.oecd-ilibrary.org/governance/modernising-government_9789264010505-en#page1.

²⁸ *Ibid.*, p. 36 and 37.

3.1 Stages of early involvement

Different authors divide the regulatory process in different ways, for some, what we will determine as early stage of regulatory cycle, would be divided into policy initiative, agenda setting, policy preparation and design.²⁹ For the aim of this discussion, the early stage of the regulatory process is divided into three sub-phases.³⁰ First is the preparation phase, second is the work-paper phase and third the final draft phase.³¹ This division was done having in mind the regulatory (mostly legislative) process in Slovenia, although with slight adjustments, it could relate to (almost) any regulatory process.

The preparation phase is gathering of information needed to make a quality decision, whether certain issue(s) will be regulated. At this stage, stakeholders can offer vital information on existing needs and problems first hand, since they are the ones effected by the (lack of) regulation, or the ones using the regulation as experts, professionals. They can also help prepare a regulatory process plan, motivating them(selves) to continue their cooperation in the process. At this stage the primary course is being set, which is not easily changed in the following phases. The work-paper phase includes preparing the reasoning and objectives behind the regulatory process, analysing challenges, providing expert data, presenting possible solutions and setting priorities. At this phase the *ex ante* RIA should be carried out. Stakeholders can offer their views on the reasoning, challenges, preferred possible solutions, chosen impacts for analysis etc. The final draft phase includes gathering objectives and best solutions and putting them together, resulting in a formed draft paper - text. This can be done together with stakeholders, which were involved in the first and second stage. Usually, in the early stages, only certain (key) stakeholders are included, and the process lacks transparency, wide inclusion and openness. That is why the draft must be published on consultation portals or other appropriate tools, to allow other stakeholder, which have not been identified in the early stages as “relevant”, to share their views, comments etc.

Not all stakeholders (individuals, experts, groups, organizations, civil society etc.) have the same importance - in different phases, different stakeholders, hold different importance. In early phases (mainly first phase), when deciding, whether new regulation or changes to existing are even necessary, and the need to set primary course exists, the widest possible scope of stakeholders should be included, but at minimum addressees of the regulation, its executors and experts. They are an important source of information and have the potential (if not included early) to oppose and contradict the solutions offered by the regulation in the following phases. In the following phases (work-paper and forming a draft) the group of stakeholders can be narrowed to a certain “key group”. Doing analysis, preparing expert grounds, setting objectives, choosing concrete solutions and drafting regulation should involve mostly experts. When the draft is finished and published, the scope of stakeholders should be broadened, and anyone (from the public) interested in the regulation invited (and included), to share their views on the pursued objectives, consistency of

²⁹ For e.g. look at Alemanno A., Stakeholder Engagement in Regulatory Policy, in OECD Regulatory Policy Outlook 2015, p. 16 and 17.

³⁰ Similar stages can be identified in the Guidelines prepared by the MPA.

³¹ Alemanno A., Stakeholder Engagement in Regulatory Policy, in OECD Regulatory Policy Outlook 2015

solutions and to maybe recognize questionable contents in the draft. The aim is to provide wide public support and legitimacy to the draft proposal.

In the early (three) phases stakeholder engagement resembles an hourglass – wide at top and bottom, and narrow in the middle. Identifying stakeholders should never be focused on “the usual suspects”, the ones already included in the past, the loudest, most critical and annoying ones etc. The search should be open for all stakeholders, which could improve the regulatory process and the end result with their experience or expertise. When identifying key stakeholders, free choice is not always an option. Sometimes the legislature obliges the regulator to inform and include certain stakeholders e.g. municipalities, different associations, trade unions. Some thought should be given to the right approach to different stakeholder. For instance, stakeholders who have low interest in the process, low power and influence and are supportive need only be informed on all the phases and efforts should be directed towards getting them more interested and involved. On the other hand, stakeholders with high interest to participate, which have high power and influence and are contradictory, should be invited to be a part of a work group (a part of their autonomy is choosing their own representatives) leading the process, while arguments should be prepared in defence of suggested solutions and if possible efforts should be made in direction of considering and accepting some of their proposals. Identifying stakeholders and informing about them is crucial in preparing a strategy on how to work together for the best end result.

3.2 NGO impact on regulatory process – how to include private interests of independent organization

Better regulation leads to a more reasonable allocation of resources, and, therefore, in turn, to the development of democracy and the rationalization of public governance, which is especially important when dealing or regulating a sector which enjoys a certain level of independence from state authority. NGOs are often labelled as being part of the so-called third sector.³² The first sector being the state, the second the market, the third seems to refer to a diverse group of actors, from NGO to voluntary. In theory different concepts of NGOs independence were developed. Salamon and Anheier argue that third sector organizations share five common characteristics – they are organized, private, non-profit-distributing, voluntary and self – governing (i.e., equipped to control their own activities)³³, while Ball and Dunn, see common characteristics of NGOs as ones connected to their reason for existence such as being formed voluntarily, independent of government, not for private profit or gain and their principal goal is to improve the circumstances and prospects of disadvantaged people.³⁴ The view of the European commission is that “NGOs are independent, in particular of government and other public authorities and of political parties or commercial organizations”³⁵. Corry claims that “Unlike the state and the market economy, it is something that can scarcely be

³² On different meaning and theories related to the third sector see Corry, Olaf (2010). Defining and theorizing the third sector. In: Taylor, Rupert ed. Third Sector Research. London: Springer, pp. 11–20.

³³ Salamon, L. M., and Anheier, H. K. (1997), The third world’s third sector in comparative perspective, Working papers of The Johns Hopkins Comparative Nonprofit Sector Project, no. 24, The Johns Hopkins Institute for Policy Studies, Baltimore, MD.

³⁴ Ball, C. and L. Dunn, (1995), Nongovernmental Organization: Guidelines for Good Policy and Practice, London: The Commonwealth Foundation.

³⁵ Commission Discussion Paper – The Commission and Non-governmental organizations: Building a Stronger Partnership (2000), p.3, available on https://ec.europa.eu/europeaid/sites/devco/files/working-paper-commission-ngo-partnership-com200011-20000118_en.pdf.

subjected to detailed planning or regulated without it losing some of its third sector qualities such as voluntary participation, value-based motivation, and independence from more institutionalized power structures.”³⁶. Sanyal claims, that institutional linkages with political parties and the government reduces NGOs autonomy. He sees the state and NGOs not only as partners, but also as rivals, a relationship that could be described as “cooperative autonomy”.³⁷ The need for absolute autonomy³⁸ from the state is a thing of the past and is obsolete. To achieve results cooperation between state and NGOs is needed. Even the notion of total or absolute autonomy is misplaced, since two autonomous entities (state and NGOs) cannot be operating in the same territory. Rule of law needs to be respected, and the only entity capable of truly “self-governing” itself is the state, since it has legislative powers, whose authority and government comes from the people. NGOs are therefore not independent of the state, taking into account, “their emergence and functioning is often significantly influenced by the state and the broader state-society relations”³⁹. It is up to the state, the legislator to set the rules for the functioning of NGOs. Only the state can relinquish its own sovereign power in certain areas to a certain degree (e.g. local self-government, university autonomy). But even these institutions which have been granted autonomy only enjoy relative autonomy and not absolute – meaning their autonomy is within the scope granted by the state (legislator).

A balancing of interests, of all involved stakeholders (including state authority), should be one of the main goals of such regulatory process if the goals set in the legislation are to be achieved in real life, as a result of wider public acceptance of adopted rules and procedures. All stakeholders involved should promote the power of argument and not hide behind the argument of power. The latter is especially important for the state authority side (regulator/legislator), which should restrain from using its apparatus to enforce certain solutions, but rather stride towards common goals and interests – public as well as private (for example removal of administrative barriers). One of the goals of stakeholder engagement is to balance - if possible reach a consensus on - opposing interests, which should be done in the early phases to ensure the understanding of regulatory objectives and dealing with the challenges as the regulatory process evolves (step by step). Usually private and public interest in the regulatory process can be imagined as two partly overlapping circles. The overlapping part are the shared public and private interest which can overlap especially in areas such as NGOs, since many of them (although independent) pursue public interest and goals (better health, education).⁴⁰ Then there are different ideas and opposing interest where we can achieve balance. And then there are parts where sometimes consensus is not possible – here the result will be based on the influence, power and skill in the political arena.

³⁶ Corry, O. (2010), Defining and Theorizing the Third Sector, *Third Sector Research*, ed. Rupert Taylor, 11–19. New York: Springer.

³⁷ Sanyal, Bishwapriya (1997), NGOs self-defeating quest for autonomy, *The Annals of the American Academy of Political and Social Science*, Vol. 554, The Role of NGOs: Charity and Empowerment (Nov., 1997), pp. 21-32.

³⁸ Autonomy is derived from the Greek words *autos* (self) and *nomos* (law) and means something that makes its own laws.

³⁹ Bloodgood, E. A., Tremblay-Boire, J., & Prakash, A. (2014). National Styles of NGO Regulation. *Nonprofit and Voluntary Sector Quarterly*, 43(4), p. 719.

⁴⁰ In Slovenia approximately 1/6 of the cca. 27.000 NGOs have an »NGO in the public interest« status. Such status is granted to NGOs whose activities in their field of work exceed the private interests of its members and is considered beneficial to the wider public interest. They are usually granted such status in a specific field of work e.g. health care, culture, social welfare.

4. NGO ACT IN SLOVENIA – DOES AN INCLUSIVE PROCESS OF PREPARING (DRAFT) LEGISLATION LEAD TO SUCCESSFUL ADOPTION?

Although key findings of OECD Regulatory Policy Review of Slovenia show, the existing gap between theoretical principals and their usage in concrete regulatory procedures, does not seem to be narrowing, some exceptions to the rule exist.⁴¹ Such was the case of regulating the NGO sector in Slovenia, which adopted its first Non-governmental Organizations Act (NGOs Act) in March of 2018, after more than a decade of ignoring different initiatives from the NGO sector, of the need for a general regulation, that would set certain minimum standards and criteria that apply to all NGOs. The process clearly shows that the pursuit of certain good governance principles in concrete regulatory processes, especially when regulating a field of society that *inter alia* enjoy a certain independence from state authority, can result in regulation that enjoys a wide public support.

In Slovenia, a country of 2 million people, there are 27.813 registered NGOs⁴². The number rose for about 600 NGOs each year since 2009, when there were 20.417 registered NGOs. At the end of 2014 the Government of the Republic of Slovenia established a permanent advisory body - Council of the Government of the Republic of Slovenia for the promotion of the development of volunteering, volunteer and non-governmental organizations (Council). The Council is composed of 23 members – 11 representatives of ministries and government offices⁴³, 11 representatives of NGOs and 1 (expert) representative of civil society, nominated by universities. The president of the Council is always a representative of NGOs. Among other tasks the Council proposes initiatives on forming and adopting regulation, development documents and measures needed for the performance of public policies, referring to activities and development of voluntarism and NGOs in Slovenia, discusses initiatives, views and opinions of NGOs regarding new regulation and development documents, that influence NGOs and their areas of work. NGOs usually present a group of stakeholders with high interest to participate, are respected in the eyes of the public, have high influence. They are independent, organized, non-profit and can sometimes be seen as “loud” and contradictory. As such it is best to invite them (early on) to be a part of a work group leading the process.

A look at Council meeting records (from 2012)⁴⁴ identifies the priorities of the NGO sector in 2012, one of them being the adoption of a new Act of public interest in NGO sector. MPA (at that time Ministry of Justice and Public Administration) informed the members of the Council of the MPAs intent, to form a working group for the preparation of the Act of public interest in NGOs. After a decade of different initiatives, round tables, meetings and correspondence this was a clear signal - a setting of a primary course towards a new NGOs Act. Later, in 2015, there was talk about

⁴¹ On the existing gap between declared principles and practice in Slovenia see Kovač P., Between theoretical principles and practice in Slovene regulatory impact assessment procedures. *Review of central and east European law*, ISSN 0925-9880, 2017, vol. 42, iss. 2/3, 215-250.

⁴² The number was valid in February 2019. This number consist of 24.104 societies under the Societies Act (Official Gazette of R.S. No. 64/11), 3.456 (private) institutes under the Institutes Act (Official Gazette of RS. No. 12/91, 8/96, 36/00 – ZPDZC in 127/06 – ZJZP) and 253 foundations under the Foundations Act (Official Gazette of RS. No. 70/05, 91/05). On the other hand the number of active NGOs (ones who send yearly reports to AJPES – Slovenian Business Register, <https://www.ajpes.si/>) is lower for about 3 percent. More data on the subject is available on <https://www.cnvos.si/en/>.

⁴³ They are representatives of: Office of the Prime Minister, Ministry of Labor, Family, Social Affairs and Equal Opportunities, Ministry of Public Administration, Ministry of Culture, Ministry of Defense, Ministry of the Environment and Spatial Planning, Ministry of Education, Science and Sport, Ministry of Health, Government Office for Development and European Cohesion Policy, Ministry of Finance and Ministry of Agriculture, Forestry and Food.

⁴⁴ http://www.mju.gov.si/si/delovna_podrocja/nevladne_organizacije/svet_za_nvo/.

forming a working group with the task of preparing a strategy on developing NGO sector. The group was formed, based on the open working group principle, therefore consisting of members representing the Government and members representing NGOs (mixed group). Leading the group would be MPA. At first, there were some ideas in the Council from representatives of ministries, to have a separate working group made out of only ministry representatives, but it was decided at the end that the decision to maybe form a sub-group will be left to the main working group. The group was formed in march 2015. Although members were nominated by the minister of public administration, only four of the nine members represented the ministry, while the other five represented different NGOs. Fourteen working group meeting were held, from April 2015 till January 2016, with an ongoing debate via email correspondence and phone calls. It was decided to start preparing the draft, based on the working draft proposal made by NGOs, under the patronage of CNVOS. Reports of these meetings show, that the working group invited different institutions, to get involved as the process evolved, such as Slovenian Business Register, different ministries and even debated on suggestions sent to them by other NGOs e.g. Institute for Electronic Participation.⁴⁵ The *ex ante* RIA in this phase was done on the basis of analysis of the current state of the NGO sector, different alternative proposals and solutions to problems were discussed etc. Unfortunately, *ex ante* RIA text lacked a more detailed description of expected impacts on parts of society such as economy, welfare, environment. There were only a few statements regarding administrative barriers. Decisions were made that the MPA and CNVOS should work together to prepare the final draft text (articles and their comments). One of the last working group decisions was, that the final draft text of the NGOs Act is agreed upon by all the members of the working group. The working paper phase was inclusive and without extensive tension between participants. In November 2016 the draft was published on e-Democracy portal, and the public debate was open for comments till mid of January 2017, altogether 45 days. Twelve general comments were received from different stakeholders such as municipalities, youth organizations, pensioner organizations, army officers' association, National Council of Disabled people's organizations, Slovenian Business Register. On a Council meeting in December 2016 the final draft of the NGOs Act was presented to the Council. The debate was quite heated at first, since a few NGO representatives stated the draft is not ambitious enough, lacks certain rights and benefits etc. The mixed group used an outline for the draft, prepared by the NGOs themselves (or better their umbrella organization CNVOS) in order to form the final draft text of the NGOs Act. So even though the draft text was agreed upon in the mixed working group, when the doors opened for other stakeholders, tensions surfaced. In NGOs opinion, there were three vital measures missing 1. establishing a so-called “NGO fund”⁴⁶ aimed at financing a supportive environment for the NGOS such as promoting employment, co-financing international projects, supporting innovation, 2. Court fee exemptions for NGOs and 3. The right to initiate a procedure for assessing the constitutionality or legality of regulations or general acts in front of the Constitutional Court of Slovenia.⁴⁷ All three

⁴⁵ Available on http://www.mju.gov.si/si/delovna_podrocja/nevladne_organizacije/zakon_o_nevladnih_organizacijah/.

⁴⁶ Individuals can, under the Personal Income Tax Act, donate (up to) 0,5 percent of their income tax each year to financing different socially beneficial purposes, political parties or unions. About one third of tax payers decide to donate, which means almost two third of this “0,5 percent fund” go back into the budget. The intent of the NGOs was to distribute the remaining two thirds among NGOs. Altogether 0,5 percent present about 11 million euros.

⁴⁷ At the moment this right is reserved – under the Constitutional Court Act (Official Gazette of RS, No. 64/07 and 109/12) - for the National Assembly, third of the deputies, National Council, the Government, Ombudsman, (if it considers that a regulation or general act issued for the exercise of public authority represents inadmissible interference with human rights or fundamental freedoms), Information Commissioner, Bank of Slovenia and the Court of Auditors, Attorney General (for he later four if there is a question of constitutionality or legality concerning the procedures which they are leading), the representative body of local self-government (if it interferes with the constitutional position or constitutional

proposals were disputed by the Ministry of Finance (NGO fund) and Ministry of Justice (court fee exemptions and constitutional court initiative), while the MPA on the other hand prepared an amendment to the Administrative Fees Act⁴⁸ in a way the NGOs (mostly ones working in the public interest) are exempt from paying administrative fees. The later was a compromise for not being able to reach a consensus on NGOs exemptions for court fees. The Council at this point concluded the ministries should try to include the proposals presented by the NGOs into the draft text and present the final version of the draft after the end of public debate. Next Council meeting was held in September. The draft remained unchanged regarding two disputed measures - exemptions for court fees and a possible initiative to start procedures in front of the Constitutional Court. A compromise was made regarding the NGO fund in a way, a special fund would be formed within the MPA budget, which would receive a certain sum of financial funds each year, for supporting NGOs, depending on the acting Government decision. The compromise was (at first) supported by the NGOs as a step forward. The remaining problem, as seen by the NGOs, was that “would receive” would probably be interpreted as “should receive”, as there are no safeguards determining the amount of funds. In October the NGOs Act passed Government procedure, and was sent to the Parliament (National Assembly), which decided to send the proposed act through the legislative procedure via regular legislative procedure. The act itself was amending 19 other laws. This meant the final vote would be in spring of 2018 - just a few months before regular parliamentary elections. The NGOs (although supportive of the NGOs Act)⁴⁹ seized this opportunity to put additional pressure on the Government coalition parties, Parliamentary political parties and Members of Parliament to try and persuade them, to propose an amendment to the proposed NGOs Act, establishing the NGO fund in a way, that would safeguard the amount of funds eligible for promotion and development of the NGO sector. If the amount is determined, or at least determinable by law, the legislators action is needed to change it. It is not up to any active Government decision. The amendment, establishing a special “NGO budget fund” was proposed by Government coalition parties in the National Assembly, and adopted. The amendment stipulates, that a special budget fund for the development of NGOs will be set up for an indefinite period of time and managed by the MPA. The amount of funds will be equal to the amount of personal income tax – up to 0,5 percent - not being donated to possible beneficiaries. During the parliamentary debate, there were some political parties opposing the NGOs Act in general, some hesitations were mentioned regarding the establishment of NGO budget fund etc. But the end result was that out of 74 present members of parliament 58 voter in favour of the NGOs Act, with none opposing. Early involvement of key stakeholders, followed by positive public

rights of local authorities, the representative associations of local communities (where rights are of local communities are threatened) and representative trade unions at the national level for each activity or profession (if workers' rights are at risk). NGOs here are not included. Having in mind the number of NGOs with the status of working in the public interest in the wide areas of work, the fear was, giving them the possibility of such initiatives would overburden (the already overburdened) Constitutional Court.

⁴⁸ Article 24, Administrative Fees Act (Official Gazette of RS, no. 32/16) stipulates that NGOs are exempt from paying administrative fees e.g. for documents and actions regarding the implementation of the purpose for which they are established, for documents and actions regarding the approval status of an organization in the public interest, (for ones which have been granted the status of organizations in the public interest or for which the law stipulates that their activity in the public interest) - for documents and actions in connection with the performance of activities.

⁴⁹ In general, the NGOs supported the proposed NGOs Act since it included some much needed regulatory solutions of the NGO sector which was already agreed upon during the early stages of engagement. The NGOs Act e.g. defines the conditions that an organization must fulfill in order to be considered an NGO, establishes the status of a NGO in the public interest, defines the conditions for acquiring the status of a NGO in the public interest, defines the obligations of NGOs in the public interest, including, inter alia, the reporting obligation to two years (before it was one year and presented an unnecessary administrative burden for NGOs), defines the rights and benefits of NGOs in the public interest, among others, advantages in public tender procedures, establishes a register of non-governmental organizations in the public interest with AJPES, which will be publicly available (the goal is more transparent functioning of the NGO sector), defines subjects of a supportive environment for NGOs (horizontal network, regional junctions, content networks of NGOs), establishes a budgetary fund for the development of NGOs (later was added in the parliamentary debate).

debates and media coverage, were the main reasons leading to a wide (public) support of the proposed legislation, resulting in its unanimous adoption.

4.1 Possible negative consequences of failing to reach consensus

Bottom up open approach bore positive results, since the key stakeholders were involved from the very beginning via working group. A draft text was prepared, some balancing of interest and reaching of consensus was needed in the following stages. In some areas consensus could not be reached in the early phases – like NGO budget fund – but was reached later on, in Parliament. The Government side lost a lot of time and energy, trying to reach a consensus on the NGO budget fund, first horizontally between different ministries and later in relation to the key stakeholders. Mistakes were made during stakeholder consultations. First mistake was not taking the information they received from the NGOs seriously enough – such was the case with the NGO budget fund. Second mistake was not understanding or even underestimating the influence and power of the NGO sector (on society, media, other stakeholders). The third was not understanding the crucial time frame in which the legislation was being adopted – pre-election time. The end result was a “win” for the NGOs, since the legislator followed their proposals regarding NGO budget fund. Looking at the whole process of NGOs participation, criticism can be directed towards the actions of the NGOs as well. Their representatives missed their chance to present their demands in the early phases of preparing the legislation, and later – after a consensus was already reached - succumb to “peer pressure” from other NGOs, by using the argument of power, without any serious intent to negotiate through dialogue. Presenting relevant arguments in the early stages might have swayed the government into considering their proposals. When the proposed NGOs act, supported by NGO representatives in the working group and accepted by the Government, was sent into the parliamentary procedure, it was too late for the government to act – it was no longer leading the procedure, which was now in Parliaments hands. A negative impression was left on the government side, which might influence future NGO engagement and endanger future strives toward cooperation in implementing the adopted legislation.

5. CONCLUSION

Overall stakeholder engagement is not sufficiently integrated into policy or regulatory making processes. For proper integration formal obligation »to integrate«, written in some regulation or a new technical method or innovation, enabling easier stakeholder engagement does not suffice. A shift in the mindset is needed, a change of attitude and political culture. On one side the politicians and officials need to perceive stakeholder engagement as adding value to the regulatory process via new ideas, sharing information and experience, presenting alternative (maybe better) solutions etc., and not perceiving it as a burden, a formal “must have”. On the other hand, the public must try to understand, that what they perceive as best solutions, ideas etc. might not be in line with the wider public interest. It is of the outmost importance that each side is able »to acknowledge and take into account the priorities and realities

of the other». ⁵⁰ For future references it is necessary to provide both sides with training, workshops, sharing of experience from positive (as well as negative) examples in order to alter the now prevailing negative attitude towards stakeholder engagement.

The process of drafting and adopting the NGOs Act in Slovenia, can (even with all of its flaws) serve as a positive example. Mistakes made, can be a welcomed example for future trainings in order to avoid them in other legislative procedures, when questions on how to engage stakeholders arise. Although the engagement of stakeholders was done in the earliest possible stages (preparation and working paper phase), it did not deliver desired effects of harmonizing all of the interests involved. That is rarely the case. The part where the private and public interest collided and compromises were not honoured, was the NGO fund. This approach used in stakeholder engagement could be labelled as bottom-up coproduction approach. The initiative came from the NGO sector, followed by the stakeholders and the regulator working hand in hand throughout the regulatory cycle. The problem occurred between the second and third phase, since the second one was apparently not engaging enough. Maybe the right questions were not asked, causing certain new proposals (or better demands) to appear only after the draft text was finalized. Sometimes new ideas surface in later stages of the regulatory preparation procedure, and cannot be dismissed only on this account. The (positive) end result – unanimous parliament support – was certainly not only a result of early involvement of stakeholders, but of many other factors such as time frame (nearing elections), public support. It would be presumptuous to say the method of early involvement that worked in Slovenia, regarding NGOs, is bound to work elsewhere. There is no single rule on how to engage stakeholders – every situation demands a specific approach and usage of specific measures and tools. It is also the reason, why so many different models and practices exist. They follow very diverse goals and change with the passing of time as new tools and measures evolve. Stakeholder engagement plan should be one of the first thing on the regulators agenda, made in the earliest possible phase. In the early (draft) stages of the regulatory process, stakeholders should be engaged at least through communication and consultation, while participation would also be a welcome tool. There are many pieces in this puzzle. Early engagement of stakeholders, when put in the right place, can offer information to make other pieces easier to place and is therefore, if nothing else a welcomed tool. Presented empirical study of a concrete regulatory process in Slovenia shows the usage of good governance principles, such as (early) public/stakeholder participation, can (combined with other elements) bring positive results in the preparation and adoption of the new legislature.

⁵⁰ Commission Discussion Paper – The Commission and Non-governmental organizations: Building a Stronger Partnership (2000), p. 7, available on https://ec.europa.eu/europeaid/sites/devco/files/working-paper-commission-ngo-partnership-com200011-20000118_en.pdf.

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