

Making Better Regulation: How Efficient is Consultation?

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Abstract

Formal consultation when designing new rules and regulations is a commonly used method to ensure regulatory quality. The foundation for this method of involvement is that it allows transparent and open transfer of knowledge from for instance organised interests to government bodies, and that it enables an easier filtering of expert advice from political idiosyncrasies among consultation partners. It is, however, an open question as to whether consultation is in fact efficient in doing so. To investigate that questions, this paper examines the Danish formal consultation system. The study examines response rates and concludes that the Danish consultation system is highly – and perhaps increasingly so – prioritised both in the administration and among consultation partners. However, previous studies have shown that the system has little practical effect on legislation. These two – response rates and amenability – are then coupled to discuss the system's efficiency. The system's inefficiency – it demands a lot of energy and priority but has little effect – stress that the main function of the system cannot be said to be its contribution to regulatory quality. Instead, it serves other aims – aims that are not reflected in the system's design and use. This causes a mismatch between expectations and practice and calls for renewed discussion – both theoretical and practical – on the role of formal consultation systems.

Introduction

Designing new rules to fit the modern and thoroughly regulated society is a difficult task. Complex interactions and interdependencies between new and old rules in a multi-layered regulatory environment must be anticipated, consequences and economic and societal implications need to be analysed and weighed against each other, political desirability must be established, and the best foundations for implementation created. In short: the political and regulatory process needs to be informed to be successful. Ensuring such an informed foundation for policy is a way to strengthen (output) legitimacy, and a common mean to that end is formal consultation. However, it is an open question if the way formal consultation is handled does in fact support this mechanism's potential as a source of output legitimacy. By coupling insights from previous studies of amenability with a new study of response rates in the Danish consultation system, this paper examines the efficiency of formal consultation and discusses the role of formal consultation in modern rulemaking.

The paper begins with an explanation of its theoretical basis. This includes explicating the main argument that is often made in support of formal consultation systems – that it supports regulatory quality and thus output legitimacy – leading to this study's research question: Is the Danish system of formal consultation an efficient tool to ensure regulatory quality? The paper continues by explaining why the Danish case is both peculiar and interesting to dig into when trying to understand the boundaries of and conditions for formal consultation to act as such a source of regulatory quality. I will then clarify the methods used to examine the amount of work put into the Danish consultation system. This, subsequently, leads to a section in which I present the results of

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that endeavour, analysing how policy actors prioritise their contribution to the Danish consultation system. Finally, I shall discuss these results relative to the results in Pedersen (2018b), which show that only a very small portion of the comments in the consultation letters have any effect. The complete picture is of an institution that is highly and perhaps increasingly, prioritised but has little effect – in other words: an inefficient tool relative to its explicit aim of ensuring regulatory quality. This leads me to ask questions regarding both the present setup of consultation in Denmark and on formalised consultation as such.

The Theoretical Foundations for Formal Consultation

In general, consultation is a method to include external actors such as organised interests in the policy-making process. These organised interests can serve as providers of crucial, and often necessary expert advice to government bodies and political decision-makers (Bouwen 2002; Köhler 2019) with consultation is a widely used method to harvest that necessary information and knowledge from these external actors (Lundberg & Hysing 2016; Rasmussen 2015).

Consultation systems are methods to ensure the effectiveness and efficiency of policies by supporting regulatory quality – or legislative efficacy to use a parallel concept. This can be defined as “the capacity of (...) laws to achieve the regulatory aims that they are designed to address” (Xanthiki 2018: 32). As Rasmussen (2015: 272) state: “Consultation is expected to have several positive benefits. The expertise gathered may help improve the quality of public policy.” By that token, systems of consultation are also potential sources of output legitimacy (Majone 1998; Pedersen 2018: 43; Pedersen, Christensen & Ravn 2016; Scharpf 1999), and this is often presented as the main reason for having such mechanisms of consultation at all.

It is, however, not the only reason. Formal consultation also supports the input-side of the legitimacy equation: Consultation gives societal interests an opportunity to be heard and thus ensures that new rules are based on a broad and open dialogue, which goes beyond discussions in parliament (Pedersen 2020). This could – in theory – ensure acceptance of policies that would not otherwise be accepted.

To sum up, if “[I]obbying is the backbone of representative democracy” (Köhler 2019: 143), formal consultation is an integrated part of the democratic nerve system in numerous ways.

The system relies on advice from external partners such as interest organisations, and information from such interests is never unbiased. This raises the question of when the organised interests are acting “truthfully”, as Köhler (2019) dubs it. Beyond being experts, special interests are special interests – including when participating in formal consultations. On that basis, the involvement of such organisations in political decision-making – including in consultation systems – has attracted enormous attention from academia, with the role of these external actors having been scrutinised by researchers at least since the 1930s (e.g. Herring 1933; Schattschneider 1935). In recent times the literature has proliferated beyond measuring, covering a range from general theory-building on the role of organised interests in modern democracies (e.g. Bouwen 2002; Greenwood 2007), to measurements and discussions of influence

(e.g. Bernhagen & Bräuniger 2005; Binderkrantz et al. 2014, Dür 2008; Klüver 2009; Lowery 2013), to more specific investigations of consultation systems (e.g. Lundberg & Hysing 2016; Rasmussen 2015) – with the literature mentioned here only a minimum selection of this vast range of academic scholarship.

However, despite the scope of the academic interest in organised interests and despite scholars generally being fully aware of the potential positive role organised interests can play by adding to regulatory quality (Köhler 2019: 10), researchers in this broad tradition tend to concentrate on questions related to input and “who-gains-what” rather than questions of output (Pedersen 2016). Thus, few investigate and evaluate the functioning of the many systems of involvement (Pedersen 2018b: 45) and ask if – for example – a given system of consultation is in fact capable of delivering the acclaimed sound foundations for effective and efficient policies, or if that same system of consultation – to be polemical – is a time-consuming, bureaucratic exercise that only adds little to the quality of the rules and regulations put under consultatory scrutiny? To be fair, criticism of consultations systems is found in the literature (see, for instance, the ones mentioned by Lundberg & Hysing 2016: 1, 4) but it is arguably far from being a main theme in the scholarship on both organised interests and consultation systems. Yet, asking questions about the functioning of better regulation institutions – such as formal consultation schemes – seems imperative if the main argument for installing such institutions is their possibility to enhance regulatory quality.

And this goes especially for formalised systems of consultation, as the line of thought sketched – that the input from consultation partners potentially can be an important contributor to effective and efficient policies and thereby potentially an important contributor to output legitimacy – is even more explicit here. The governing idea behind formalised consultation schemes is that they allow expert knowledge to wander directly from regulatees (and their representatives) to regulators in a structured and transparent manner. And because of the formalised nature of the system, it is easier for regulators to ask the questions they need answers for, and it is also easier for them to make the distinction between appreciated expert advice on the one hand and comments of lesser relevance on the other. Theoretically, a formalised consultation scheme could therefore reduce the danger of “untruthful” information or at least be a framework for identifying and handling such dubious information. Thereby, a formalised system of consultation should be a good assistant in the on-going quest for quality – or efficacy cf. Xanthiki (2018) – of the product that comes out at the end of the regulatory machine.

To fulfil that role, however, consultation needs to be both effective and efficient. For the system to be effective, consultations must have some sort of effect on legislation, and, logically, this demands a certain degree of amenability in the system. For the system to be efficient, consultations must have an effect *relative* to the amount of energy put into the system. In other words: If a system shows a low degree of amenability – if it is ineffective – but at the same time is a highly prioritised and energy-consuming mechanism, it is also inefficient. And if we assert that policy actors act rational at least to some degree, such a situation would spur the theoretical expectation that consultation partners gradually would minimise their efforts and prioritise other channels of influence – channels that

might be more obscure, less focused on regulatory quality and more focused on special interest idiosyncrasies. The questions of effectiveness and efficiency of a consultation mechanism thus become relevant when discussing both input and output legitimacy. On that background and adding to a previous study on effectiveness (Pedersen 2018b), this paper investigates the intriguing question of efficiency: How much energy is in fact put into consultation?

Consultation in Denmark: A Case for Learning?

Consultation comes in numerous forms and shapes and some kind of consultation system or institution is part of the policy system in many if not most Western countries (OECD 2002; Radaelli & de Francesco 2007); it has become “the rule rather than the exception in liberal democracies” (Rasmussen 2015: 272).

The Danish consultation system is a late-stage system. This means that consultations are conducted when the preparations of a bill have come to the point where the administration can present a draft of the legal text. Consultation partners are then invited to comment on the specificities of that legal text and its background. As a late-stage system, the design of the Danish system clearly stresses that the main (but not exclusive) idea behind the model is regulatory quality (or legislative efficacy to use another term) – not political alignment, policy development or the like.

Of course, this system does not preclude early-stage involvement of actors. However, the use of formal involvement at earlier stages in the form of for instance preparatory committees seems to have diminished over time (Pedersen & Christensen 2013), and Denmark has experienced a ‘decline of corporatism’ (Christiansen & Rommetvedt 1999; Rommetvedt et al. 2013).

On that background, the Danish consultation system is an open system; it is not a consultation of experts and corporative partners alone. Instead, both selected organisations, other government authorities, and the public is openly invited to comment on draft bills. Thus, the Danish consultation system is open and includes both formal invitations to established consultation partners and open invitations to the public (and other organisations). This makes the Danish model of consultation a mixture of OECD has dubbed ‘Circulation of regulatory proposals for public comment’ and ‘Public notice-and-comment’ (OECD 2002: 153-154). This is a special system, different from, for instance, the EU consultation system, but it is more typical in a Scandinavian context. Lessons from Denmark can therefore be interesting in a Scandinavian context. Moreover, several other traits of the Danish system underline that the Danish consultation system is an interesting case to study in further detail.

First, when it comes to consultations of primary laws (but not secondary ditto), both invitations to consultation partners, consultation letters from organised interests and consultation reports summarising the administration’s reaction to the comments from the consultation partners are publicly available. Both qualitatively (the openness of the system) and quantitatively (the amount of data available) speaking, the Danish system offers very good and available data, making it a good place to study the functioning of consultation systems.

Second, the Danish consultation procedure is not mandatory unlike, say, its Swedish counterpart where a very similar system exists (Lundberg & Hysing 2016). But consultation is widely used both when it comes to laws and lower-level rules. Regarding primary legislation, formal consultation is conducted in the preparatory phases of at least 85-95 percent of all laws – and the remaining 5-15 percent include cases such as the state budget and laws granting citizenship where consultations by default are not conducted (Pedersen 2020) and where public consultation in the traditional sense would probably be meaningless. All in all, the central administration in Denmark conducts systematic consultation in all but a few situations despite no legal obligation to do so. The use of the system thus reflects an explicit choice from policy actors. This makes the Danish system a good case for studying any changes in the priority the involved actors give to the system.

Third, the traits described above indicate that it is an institution holding a central position in the rule preparing process of the central administration in Denmark. And this claim is further supported by the fact that the comments from the consultation partners are used both in the parliamentary deliberation (Pedersen 2018a) actively – although mostly by the opposition parties – and in the broader public debate. This would – in theory – situate the Danish consultation system at the level of ‘placation’ in Arnstein’s (1969) classical typology. On that background we should expect both broad invitation to and similar broad participation in consultations: it is an open and prioritised channel of knowledge transfer and influence, making it both available and relevant to policy actors – both insiders and outsiders. This situation echoes the international picture, where consultation is often a prioritised strategy for organised interests (Lundberg & Hysing: 4). On basis of being such a highly prioritised element of the rule drafting process, we should also expect a high degree of amenability in the system. Surprisingly, this has been shown not to be the case (Pedersen 2018b) and it has also been shown that amenability in the Danish system is highly unequally dispensed across different ministries (Binderkrantz et al. 2014; Pedersen 2018b). Investigating how and why this is the case, the Danish case could allow for better informed theory building and learning both when it comes to the role of consultation systems and when it comes to understanding lobbying strategies and behaviour. This, again, makes the Danish case an interesting subject to study in detail.

The situation, then, is an expectation of high priority and broad participation on the one hand and a low degree of effect of consultations on the other hand. In other words: an expectation of a rather low degree of efficiency. Of course, this is not a very optimistic prophecy and following this, we should – if assuming the involved actors behave rationally to some degree – expect a gradual decline in participation in consultation over time. Despite organised interests might have several reasons for participating in formalised consultation (Lundberg & Hysing 2016), this expectation is at odds with international experiences. Due to the data available, this situation can and will be investigated below.

There are, of course, limits to the study, two of which need to be mentioned. First, the study is a study of documents. It does not investigate the reasons that the involved actors themselves give to participate: How do they themselves define the rationality behind their participation in formal consultation? Such an

investigation of motives could be a fruitful addition to this study of actual behaviour as it could explain some of the tendencies revealed in this study. Second, this is a study of the situation in one country. The conclusions cannot be directly applied to the situation in other countries with other systems of consultation. However, the lessons from Denmark can be used to inform both theory-building and to inform studies of the systems elsewhere.

Method: How to Examine Efficiency in Consultation?

Data on consultations in Denmark is easily available but widely dispersed and unstructured. Invitations to consultation is found on one website – www.hoeringsportalen.dk – but this site does not display results from consultations. Therefore, this site only allows us to mine lists of the organisations invited to a given consultation but not a list of the organisations that actually responded to the invitation. Instead, we must turn to the website of the Danish parliament – Folketinget – at www.ft.dk. But surfing this site makes it clear, that the Danish parliament has no systematic record of consultations. This illustrates the informal and non-mandatory nature of the Danish consultation system.

To construct an overview of the consultations conducted, we must turn to the consultation reports from the ministries. These reports follow a bill when it wanders from the administrative level to political deliberation – this to inform the members of parliament of who-said-what and of the administration's response to these consultation comments. These reports can be found on Folketinget's website. In short, the consultation reports sum up the consultations both in form and in content, and they nearly always include a list or the number of responses to that specific consultation. Scraping these numbers from the consultation reports indicate the amount of energy put into that consultation. In a few cases where the report did not include a list or number of responses to consultations, I had to count the number of consultation letters published directly on the site of the bill in question instead.

Automatic data scraping from Folketinget's website would of course be preferable here, but in this specific case such a technical solution is not possible for at least two reasons: First, results in the consultation reports are presented in an unstructured way. The format and structure of these reports – the prime data source of this paper – vary both over time and across different government bodies. Sometimes the reports even vary within the same government body leading this author to conclude that the structure of the reports often depend on the specific and individual government official writing the specific and individual report. This conclusion is supported by the fact that invitations to consultations also take numerous forms (Pedersen & Høgh 2016). Second, the reports are not systematically presented on parliament's website. They have different names and are presented differently on the site.

All this points to the need of a manual data collection, and the data of this paper thus consists of a manually constructed oversight of bills presented to parliament in the period from October 2014 to January 2020. As a parliamentary session in Denmark runs from October one year to September the following, the period covered in the dataset corresponds to the parliamentary sessions 2014-15

(1), 2014-15 (2), 2015-16, 2016-2017, 2017-18, 2018-19 (1), 2018-19 (2) and the first 100 bills presented in the session of 2019-2020 – numbers in brackets indicate that a general election was held during that parliamentary session. This gave a total of 1.299 bills. From this data, I removed bills that did not include any consultation reports, and that resulted in a dataset consisting of 1.142 bills in total, covering all policy fields during a period of more than 5 years and across different colours of government.

In each of these cases, certain characteristics were identified and noted: the parliamentary session and the bill's number and title to identification of single cases; ministerial area and parliamentary committee to identify differences in consultation practices across policy fields; and the number consultation letters in every case. Of course, some of these consultation letters represent “null-responses”, in which a given consultation partner simply states it has no comments to the draft bill in question. For the purpose of this specific analysis, these “null-responses” have been treated as normal cases for two reasons. First, I wish to investigate the priority given to consultation and a “null-response” still reflect that the organisation writing that “null-response” prioritise writing such an answer despite it being completely superfluous. Second, I wish to examine the energy put into the system, and a “null-response” still reflect that the organisation has read, analysed, and taken a stand relative to the bill under scrutiny.

With this dataset, we can answer several relevant questions. First, we can establish how often consultation is initiated and even possibly identify tendencies over time. This would lead to possible conclusions regarding the administration's priority of the system. After all, it is a non-mandatory system, so a rising tendency in the number of bills put under consultatory scrutiny, is an indicator of an administration that chooses to send an increasing number of bills through the system. Second, we can look at the average number of consultation responses. If we identify a rising (or falling) average number of consultation letters over time, this allows us to draw conclusions regarding the consultations partners' priority of the system. Third, we can take a closer look on the dispersion of consultation letters across different policy fields and time: are there any patterns regarding the policy fields that attract most attention from consultation letters? And are these patterns changing over time?

All these answers can be held up against established knowledge on amenability and effectiveness of the system. To do so, I rely on Pedersen (2018b) and the method and results spelled out in that article. Comparing the results from that previous study of effectiveness with the present results regarding priority will give us a foundation to discuss the efficiency of the Danish consultation system: How does the amount of energy put into consultation – the weight and priority given to the system – relate to the actual effects of consultation? And what can this tell us on the role of the consultation system in the regulatory and legislative process?

Results

How often is consultation conducted then? Nearly all the time, the analysis shows: 88 percent of all bills debated in the Danish parliament are followed by

consultation reports. However, that number is an average spanning across the entire period. We could get a better feeling of the priority given to consultation if we zoom in on “normal” sessions of parliament, i.e. when not disturbed by a general election. Due to the timing of some elections relative to the beginning of a new parliamentary session in October, certain parliamentary sessions have very low “consultation rates”. The session of 2018-19 (2), for instance, has a consultation rate as low as 33 percent as the general election fell during the summer and two-thirds of the bills presented from the time of the election to the time of the new parliamentary session beginning in October, were those related to the state budget – bills that by default are not submitted to public consultation.

If we focus on the “normal” sessions of 2015-16, 2016-17, 2017-18 and 2019-20, we get a picture of a consultation system that is getting stronger: consultation rates are rising – ever more bills are submitted to public scrutiny before parliamentarians get their say. Table 1 illustrates.

Table 1. Bills with consultation relative to total number of bills in “normal” sessions of parliament

Session of parliament	Number of bills with consultation	Total number of bills	Bills with consultation as part of total number of bills
2015-16	182	205	88,8 %
2016-17	212	238	89,1 %
2017-18	235	259	90,7 %
2019-20 (by 30 January)	93	100	93,0 %

This might be a move on the margins; after all the difference between a consultation rate of 89 per cent and one of 93 per cent does not seem that big – and the 93 per cent are based on a sample. Yet, given that consultation is not mandatory to the Danish central administration, this development illustrates two points. First, that the system has a high degree of salience across all parts of the central administration; second, that the priority given to consultation might in fact be slightly rising. This conclusion is also supported by the fact that consultation deadlines over time have been increasing (Pedersen 2020), showing that the bureaucracy chooses to make it even easier for consultation partners to participate. Related to our question on the efficiency, these are important insights, as they reveal the priority given by the administration to the consultation system. Apparently, high and slightly increasing priority is given to consultation across the different branches of government administration.

If interpreted with some caution, the same holds true when it comes to the consultation partners. On average and across all policy fields and the time covered by this analysis, each invitation to consultation results in approximately 20 responses from a range of consultation partners and other government bodies and this number seems to have a small tendency in an upward-going direction (at least until the parliamentary session of 2019-2020 but the drop in this year can be due to the sampling), see table 2. Moreover, the maximum number of consultation letters received is – again: if we do not take the latest year into account as the drop here can be caused by the sampling – slightly rising.

20 consultation letters might not seem of much. However, this sums up to well above 4,000 consultation letters per year, and we must assume that considerable amounts of time and effort has been put into every single letter of consultation, and that each letter of consultation represent a considerable workload to the ministry as each letter must be thoroughly scrutinised, taken into consideration, and finally summarised in the consultation report. And this analysis only covers consultations of primary laws – which is far from all consultations (albeit the most important ones). Analysing and considering the detailed legal and political comments in 20 or so consultation letters is not an easy task for the individual government official to whom this task is handed. And on top of that workload, we can add the preparations for consultations; these are, however, independent from the number of responses. It is, however, beyond doubt that much energy it put into the system – and both the administration’s and the consultation partners’ priority of the system seem to have increased throughout the last couple of years.

Table 2. Average, minimum and maximum number of responses to consultations. The session 2018-19 (2) has been excluded here, as this parliamentary session was so short and only included a few budget bills.

Session of parliament	Average number of responses	Minimum number of responses	Maximum number of responses
2014-15 (1)	19,9	2	62
2014-15 (2)	22,2	1	41
2015-16	20,3	2	62
2016-17	20,5	1	128
2017-18	20,4	1	76
2018-19 (1)	20,6	0	86
2019-20 (by 30 January)	19,1	1	51

This is an interesting situation: Both the administration and the consultation partners seem to strengthen the system as more and more bills are sent through it and the average number of consultation letters seem to be slightly rising. A more cautious conclusion would be that status quo regarding the priority given to the system is upheld throughout the years. Either way, it is obvious that we cannot identify any tendencies of falling priority given to the system among the consultation partners. And this reflects an explicit and active choice.

Those were the average numbers, and they cover some variation. Some policy fields attract more attention from consultation partners than others. By itself, this is not surprising as some areas of society have a larger population of organisations that both can and will participate. This could, for instance, be the case in areas characterised by economic interests or policy fields characterised by many constituents.

However, the analysis reveals two surprising patterns. First, that neither economic interest nor a large number of constituents are the only factors explaining why a certain policy field consistently attracts attention from

consultation partners. In the analysis, three policy fields stand out as ones that over time again and again attract the most attention: Business regulation, education, and migration/citizenship.

This picture becomes clear, when we identify the parliamentary committees that receive the most consultation letters per bill they handle: Approximately half of the parliamentary committees that per bill receive more consultation responses than the average of committees does, are committees related to business regulation, educational policy, or migration/citizenship; the other half shows no structure in the political topics they cover. Or to put it differently: If we rank the parliamentary committees after the number of consultation responses they receive per bill, committees related to business regulation, educational policy, and migration/citizenship are almost consistently found in the top of the list. And this picture is consistent across the parliamentary sessions investigated – except the two very short sessions of 2014-15 (2) and 2018-19 (2), in which only very few bills were presented (9 and 3, respectively). Table 3 illustrates.

Table 3. Committees that receive more consultation responses than the general average number of responses received, excluding the sessions 2014-15 (2) and 2018-19 (2).

Session of parliament	N of committees that receive more consultation responses than average	Business regulation, educational policy, and migration/citizenship committees as part hereof
2014-15 (1)	8	4/8 (50 per cent)
2015-16	11	5/11 (46 per cent)
2016-17	6	5/6 (83 per cent)
2017-18	8	4/8 (50 per cent)
2018-19 (1)	7	4/7 (57 per cent)
2019-20 (by 30 January)	11	5/11 (46 per cent)

The prevalence of business regulation committees among the committees that receive the most consultation letters per bill might be explained by the economic interests at stake, and the prevalence of committees dealing with educational policy among the committees that receive the most consultation letters per bill might be explained by the large number of institutions affected by (educational) regulation. All of this is hardly surprising. But none of these two factors can explain why bills considered by committees related to migration/citizenship also attract more consultation responses than most other policy fields.

To sum up, the analysis shows us that both the Danish central administration and the consultation partners in Denmark seemingly have increased their use of consultation over time – or at least consistently have upheld the already high priority given to the system. And we can identify three policy fields that relative to other policy fields and consistently over time attract more attention from consultation partners: Business regulation, educational policy, and migration/citizenship.

Discussion: Is Consultation a Mechanism to Support Input or Output Legitimacy?

As described earlier in this paper, a consultation system theoretically plays an important role in securing regulatory quality – and thus in the end also output legitimacy. However, it can only fulfil this role if it is efficient – i.e. if the energy put into and priority given to the system corresponds to the effects of the system. A low degree of amenability in the consultation system is no problem at all if this system only plays a minor role in securing regulatory quality. If, on the other hand, the system is highly prioritised and energy consuming but still only shows minimal effect on legislation, it is hard to dub it efficient in ensuring the regulatory quality it is designed to support. And such a situation would undermine the very argument for having a formal consultation instrument in the first place.

And this seems to be the case: Apparently, both the administration and the consultation partners use formal consultation in an increasingly consequent manner or at least uphold the status quo of high priority already given to the system, despite the system not being mandatory. But at the same time, a previous study (Pedersen 2018b) has clearly shown that the effects of participating in consultation is at best superfluous, and another study (Binderkrantz et al. 2014) – however, on a somewhat lower level of detail – has suggested that consultation might have some but not ground-breaking effects but that these effects are unequally dispensed across different ministries and policy fields.

This is perplexing. If policy actors act rationally (at least to some degree), why do the scarce gains from participating in consultation not lead to a gradual fall in the number of consultation responses? Why do consultation partners not shift their focus towards other canals of influence? An obvious answer is that the consultation partners participate in consultation for reasons that goes beyond a pure rational calculus of cost/benefit and the actual effects on the specific bill in question.

From a perspective of regulatory quality this is a situation worth dwelling by. The strength of formalised consultation lies in its transparency and the ability to openly filter useful advice from political idiosyncrasies. But if consultation partners accept and give high – perhaps even increasing – priority to a system with a low degree of amenability (i.e. if the system is inefficient), perhaps they do not participate to give such useful advice? What, then, drives their apparent interest in participating in consultation anyway? Revealing this could be a useful qualification of the findings in this study.

This brings back the fundamental discussion of legitimacy. The commonly used argument in favour of consultation is one of output legitimacy: consultation gives regulators a knowledge they did not have before, and this increases the probability of making rules and regulations that are effective, do not cause conflict, are easy to understand, solve the problem they are designed to solve and so forth. In short: consultation supports regulatory quality that supports output legitimacy. As such, consultation can be seen as a classical better regulation tool that seeks to make sure that rules are “proportionate to the objective being sought (...) and that they should be targeted to the particular objective and

should not generate a wide range of costs relating to matters which are not within the objectives” (Scott 2018: 14).

However, if the system is inefficient, such an argument fails. Or to put the paradox more directly: We install a certain meta-regulatory institution to inform and support regulatory quality, but the institution is inefficient in doing so and yet we honour it. The reason could be that the system serves other aims than regulatory quality. Based on the results and analysis above, formal consultation systems might therefore be better understood in terms of input legitimacy as this would better explain the high – and apparently increasing – priority given to the system despite its lack of effect.

If this is the case, the very concept of formal consultation needs to be revisited – at least in the Danish conception hereof. Formal consultation as a way of primarily securing input legitimacy would transform the focus of the system from the specificities of the draft bill under scrutiny to more general and political reflections. A system that rests upon late-stage invitations to specific and detailed commenting on draft bills (such as the Danish one) does not appear an obvious way to do that. Instead, a system as the one commonly used by for example EU institutions – with formal consultation placed much earlier in the regulatory process and formal consultation resting on surveys rather than commenting – would perhaps be better suited as it would be easier and more clearly allow for alignment of expectations to the system among regulators and regulatees.

This is not in itself an argument for a more “politicised” consultation system; it is, however, an argument for better congruence between the understanding of the system and the practical use and effect hereof. The opposite argument could just as well be made: That this situation calls for a strengthening of the formal foundations of the Danish consultation system to make it better suited to serve its purpose of ensuring regulatory quality – a stronger setup for consultations is then needed. The point here is that the design and function of a consultation system need to be aligned with its actual – and not theoretical – purpose in the democratic decision-making. But as the Danish case above shows us, such an alignment is not necessarily to be taken for granted.

Conclusions

If a formal system of consultation shall be able to lift its task as a source of regulatory quality – and thus also output legitimacy – it must not only be effective; it must also be efficient. A formal system of consultation that demands high priority from its participants and yet only allows for minor changes in the bills under scrutiny in the consultation system is inefficient and thus cannot properly serve its function as a support for regulatory quality. In this situation, a simple rational decision model would expect the consultation partners – on whom the system is dependant – to put their energy in other canals.

To investigate if this is the case in Denmark, I collected data on the number of consultation responses to draft bills from 2014 and the following five years – approximately 1200 bills in total. The idea was to investigate whether the number of consultation responses is growing or declining, using this number as an indicator of the priority given to the system among consultation partners. This

could then be related to studies of amenability and combining these two – an impression of the priority given to consultation and established knowledge on amenability – leads to an understanding of the relationship between the energy put into the system and its effect. This I have dubbed the efficiency of the formal consultation system.

The analysis showed us that the Danish administration seems to have strengthened its already widespread use of formal consultation through the last couple of years: At slightly larger proportion of all bills debated in parliament have been scrutinised by consultation partners before the begin of the parliamentary debacle – despite no legal obligation for the administration to do so. Moreover, a similar development can be identified among the consultation partners, as the average number of consultation responses seem to have gone up a little. Even if we interpret the numbers with more caution, we can easily conclude that the very high priority given to the system is upheld throughout the years, and that no decline in consultation can be identified. The analysis also showed some systematic variations in which policy field that attract responses from consultation partners. Bills on business regulation, education policy and migration/citizenship simply attract more attention and consultation responses than other bills, it seems.

Relating these findings to earlier studies on the amenability in the Danish consultation system, we should expect a declining interest among the consultation partners to participate in formal consulting as participating does not lead to much change in the proposed bills. But as mentioned above, such a tendency cannot be identified. Despite the fact that the system has scarce effect on legislation, consultation partners keep on participating – perhaps even in growing numbers. The reasons for this must therefore be found not in the system's contribution to regulatory quality but somewhere else.

This opens for broader questions on the design of such formal consultation systems. The main argument for the existence of consultation systems is that the systems contribute to regulatory quality and thus – in the end – output legitimacy. But if the system has little effect on legislation, this argument flaws. And if consultation partners keep on participating in consultations, they must do so for other reasons. This situation, however, is not reflected in the design of the system and a discrepancy between the design and the use of the Danish consultation system apparently exists. This leads both the administration, consultation partners, and the public to wrong and mislead expectations to the system. Therefore, if formal consultation is an integrated part of the democratic nerve system, we seem to need a skilled surgeon.

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