

# Omissions in the Implementation of Public Consultations in the Procedure of Adopting General Acts Through the Practice of the High Administrative Court of the Republic of Croatia

Gordan Struić

## ABSTRACT

Croatian local and regional self-government units are obliged to conduct public consultations when adopting general acts that affect the interests of citizens and legal entities. Bearing that in mind, the aim of this paper is to determine whether there are certain omissions – confirmed by the High Administrative Court of the Republic of Croatia – in the implementation of public consultations in the procedure of adopting general acts and, if there are, what they consist of. To this aim, the paper analyzes the decisions of the mentioned Court in procedures for assessing the legality of general acts adopted by local and regional self-government units. After the first introductory part, the second part briefly explains the normative framework, the third part states the methodology used, the fourth part analyzes the judicial practice, and in the fifth part, concluding remarks are stated. The analysis shows that since 2013, when the obligation to conduct public consultation was introduced, the Court has abolished 11 general acts. In the process of adopting those acts, the public consultation procedure was not conducted in accordance with the law: the first and the most common reason for contesting the general act was the absence of public consultation, and the second reason for that was non-compliance with the prescribed deadline of 30 days. Although practice has shown some other reasons as well, they all boil down to the fact that public consultation was not conducted.

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**G. Struić\***

Office of the President of the Croatian Parliament, Croatia.

(e-mail: gordan.struic@gmail.com)

\*Corresponding Author

## I. INTRODUCTION

Although the participation of citizens in decision-making procedures on local and regional issues is usually achieved only indirectly, through the election of members of representative bodies, the importance of the direct participation of citizens in these procedures recently has been increasingly emphasized (e.g., Blagojević & Tucak, 2021; Koprić & Manojlović, 2013). Participation is most directly achieved at the local level of government, where bodies are most closely related to citizens and make decisions that directly impact their everyday lives. This is accomplished through various forms, such as the co-opting of citizens into collegial bodies (e.g., commissions, working groups, and so on), occasional advisory meetings, and public consultations (Džinić & Škarica, 2017; Koprić & Klarić, 2015; Koprić & Manojlović, 2013; Struić, 2022).

In accordance with the Right to Access to Information Act (2013) (hereinafter: RAIA), Croatian local and regional self-government units (hereinafter: self-government units) are obliged to conduct public consultations prior to the adoption of general acts<sup>1</sup> that affect the interests of citizens and legal entities. However, the actual degree of the implementation of public consultations in practice is assessed as low, especially because almost half of them fail to publish the public consultation plan or to conduct public consultations within the prescribed period of 30 days (Struić, 2022). The key challenges in practice are, *inter alia*, the identification of acts for which public consultations are necessary, their duration, the quality of the report, and the explanation of non-adopted proposals (Struić, 2022).

The supervision of the implementation of the public consultation is conducted by the inspectors of the Office of the Information Commissioner, who are authorized, among other things, to issue orders to take

<sup>1</sup> These are acts of sub-legal force which, by their nature, generally (in an abstract way) foresee a series of future, repeatable social relations (Perić, 1983, p. 119) and contain general norms (Vrban, 2003, p. 322), i.e., norms whose addressees are not specified by their first and last name but abstractly as groups of subjects (Visković, 2006, p. 174). In accordance with the Local and Regional Self-Government Act (2001), representative bodies of self-government units (i.e., municipalities, cities, and counties) make decisions and other general acts (e.g., rules of procedure) in accordance with their statutes (Article 73 paragraph 1).

appropriate measures to eliminate identified violations, irregularities, or deficiencies. The Information Commissioner is an independent state body responsible for the protection, monitoring, and promotion of the right to access (and re-use) information. It informs the central body of state administration responsible for the system and organization of local and regional self-government about the non-implementation of the measure imposed due to the elimination of illegality.<sup>2</sup> The Information Commissioner cannot invalidate general acts adopted without (or with incorrect) implementation of public consultations, so an assessment of their legality should be requested before the High Administrative Court of the Republic of Croatia.

Bearing that in mind, the aim of this paper is to determine whether there are omissions – confirmed by the Croatian High Administrative Court – in the implementation of public consultations in the procedure of adopting general acts and, if there are, what they consist of. To this end, the paper analyzes the decisions of the mentioned Court in procedures for assessing the legality of general acts adopted by local and regional self-government units. Compared to some previous research on this topic,<sup>3</sup> the issue of omissions in the implementation of public consultations in the procedure of adopting general acts through the practice of the Croatian High Administrative Court so far has not been the focus of research attention. After the first introductory part, the second part explains the normative framework, the third part states the methodology used, the fourth part analyzes the judicial practice, and the fifth part comprises concluding remarks. It is expected that the results of this research will provide new insights into the issue of the implementation of public consultations at the local level, as well as stimulate further research on this issue.

## II. NORMATIVE FRAMEWORK

Consultation with the public in Croatian local and regional self-government was regulated for the first time in 2009 when the Government of the Republic of Croatia passed a conclusion on the acceptance of the Code of Consultation with the Interested Public in the Procedures of Enacting Laws, Other Regulations and Acts (2009) (hereinafter: the Code). It is a non-binding document that applies, among others, to local self-government units when adopting general acts with a direct effect on the fulfillment of citizens' needs, as well as regulating other issues aimed at the interest of the general well-being of natural and legal persons from their area, and area of their activity. In accordance with the Code, the bodies of the self-government units should publish the draft of the general act on the website or make it publicly available in any other appropriate way. This allows the interested public<sup>4</sup> to submit their proposals and comments within a certain period, preferably not shorter than 15 days from its publication. All proposals and comments (and responses to them) must be made public, along with an explanation of those that were not accepted.

Further legal regulation of public consultations at the local and regional level followed in 2013 with the adoption of the RAIA, which was amended twice in 2015 and 2022. The RAIA explicitly stipulates the obligation of self-government units to conduct public consultations when adopting general acts and other strategic or planning documents that are expected to impact the interests of citizens or legal entities. To fulfill this obligation, self-government units must publish draft acts and documents on the website or the central state internet portal for public consultation “in an easily searchable manner and in a machine-readable form” (Article 10, paragraph 1). They are required to provide the reasons and objectives for adopting their drafts, disclose the composition of the working group that prepared the draft, and invite the public to submit their proposals and comments on the draft, respecting the prescribed consultation period of 30 days.<sup>5</sup> After the consultation period expires, they are obliged to create and publish a report (on their website or the central state internet portal) on the conducted consultation, including the proposals and comments from the public, as well as an explanation of those that were not accepted.

Bearing in mind that the inspectors of the Office of the Information Commissioner supervise whether the consultation is conducted in accordance with the RAIA and that the supervision may be conducted on the petition of the beneficiary of the right of access to information (i.e., any domestic or foreign natural and legal person), a proposal by a third party or *ex officio*, there is a possibility of contacting Information Commissioner in cases where the adoption of certain general act raises suspicion of a specific deficiency, irregularity, or breach of the obligation to conduct public consultation. Inspectors are obliged to consider

<sup>2</sup> Based on the Article 10 paragraph 5 of the Structure and Scope of State Administration Bodies Act (2020), responsible central body of state administration is the Ministry of Justice and Administration.

<sup>3</sup> For example, analysis and systematization of the most common forms of citizen participation in local self-government (e.g., Koprić & Klarić, 2015; Koprić & Manojlović, 2013), European standards in the regulation of public participation at the subnational level (Dobrić Jambrović, 2020), and the analysis of the regulation, challenges, and perspectives of e-consultations in local and regional self-government (Struić, 2022).

<sup>4</sup> There is no generally accepted definition of the concept of interested public, but the Code defines that it consists of “citizens, civil society organizations (informal civic groups or initiatives, associations, foundations, funds, private institutions, trade unions, associations of employers), representatives of the academic community, chambers, public institutions, and other legal entities performing a public service or who might be affected by the law, other regulation or act which is being adopted, or who are to be included in its implementation”.

<sup>5</sup> Since the deadline in the Code and in the RAIA do not coincide, it should be emphasized that the RAIA takes precedence over the Code both in terms of time (as a later act, *lex posterior*) and hierarchy (as a higher-ranking act, *lex superior*).

allegations of these deficiencies, irregularities, or violations, and they have the authority to issue orders to take appropriate measures for their elimination. If the imposed measure was not taken, the Information Commissioner would report that to the Ministry of Justice and Administration, and the responsible person in the body of the self-governing unit would be fined if they failed to allow the inspector to have an unhindered supervision or eliminate deficiencies, irregularities, or violations within the stipulated period.

However, even if the general act is adopted by the local and regional self-government unit with specific deficiency, irregularity, or breach of the obligation to conduct public consultation, there is a possibility of initiating the procedure for assessing its legality before the High Administrative Court, which may result in the abolition of the general act. Namely, according to the Administrative Disputes Act (2010) (hereinafter: ADA), the High Administrative Court initiates a procedure for assessing the legality of a general act at the request of a natural or legal person or at the request of a group of persons connected by a common interest, provided that their individual rights or legal interests were violated by an individual decision of a public law body (which also includes self-government units) based on the general act.<sup>6</sup> Also, the High Administrative Court can initiate the procedure *ex officio* upon notification of citizens and the ombudsman or at the request of the court.<sup>7</sup> The High Administrative Court decides on the legality of general acts in a public session, and before making a decision on the merits of the matter, it can use the possibility of holding a consultative hearing, to which it can invite participants of the proceeding, as well as representatives of the scientific and professional public. If the High Administrative Court determines that the entire general act or a part of it is not in accordance with the law (or the statute), it will be abolished, and the general act or its provision will cease to be valid on the day the decision is published in the Official Gazette.

### III. METHODOLOGY

As previously pointed out, the aim of this paper is to determine whether there are certain omissions – confirmed by the Croatian High Administrative Court – in the implementation of public consultations in the procedure of adopting general acts and, if there are, what they consist of. Since the decisions of the High Administrative Court on the abolition of general acts have to be published in the Official Gazette, its online database (<https://narodne-novine.nn.hr/>) was used for searching for those decisions, in the time frame from the date of entry into force of the RAIA (March 8, 2013), which introduced the obligation to conduct public consultation, until the last publication of the Official Gazette at the time of writing this paper (June 7, 2023).

The search included all decisions of the High Administrative Court published in the Official Gazette within the specified period from 2013 to 2023, and an analysis of their content was carried out. The research focused on examining the text of those decisions that resulted in the abolition of contested general acts adopted by self-government units. In the text of the latter decisions, the reasons for contesting the general act were examined, as well as the position taken by the High Administrative Court. Additionally, the statements of the adopters of contested general acts in response to the allegations of the submitter of the initiative to the High Administrative Court were also reviewed.

In order to compare the number of decisions that abolished the contested general act with the total number of submitted initiatives to start the procedure for assessing the legality of general acts adopted by self-government units due to non-compliance with the RAIA in the considered period, the author of this paper submitted a request for access to information to the Croatian High Administrative Court. However, in the Decision of the Information Officer (2023) of the High Administrative Court No. 26 PPI-4/2023-2, which rejected the said request, it was pointed out, in essence, that the eSpis<sup>8</sup> system does not include provisions on the basis of which a certain procedure was initiated, i.e., dispute; as a result of which the High Administrative Court could not find the requested information by searching the eSpis system, but “exclusively by individually entering each case of the assessment of the legality of general acts in the requested period which represents a burden for the Court Registry Office.” Since the High Administrative Court found that there is no required statistical data, the Decision of the Information Officer (2023) concluded that this would “require the creation of new information, which is not considered a request for access to information in accordance with Article 18 paragraph 5 of the RAIA”.<sup>9</sup> Consequently, this paper

<sup>6</sup> The request must be submitted within 30 days after delivery of the decision, and the applicant, in addition to the personal name or name and address, the name of the act and its adopter, contested provisions, explanation of illegality and signature, is obliged to “make it probable that the application of the general act violated his right or legal interest” (Article 84 paragraphs 1 and 2).

<sup>7</sup> In that case, there is no deadline for submitting the notification to the High Administrative Court.

<sup>8</sup> It is an information system in which cases are handled by municipal, commercial, county, administrative courts, the High Criminal Court, the High Misdemeanor Court, the High Commercial Court, the High Administrative Court, and the Supreme Court of the Republic of Croatia. It made it possible, among other things, for the statistical and analytical data of all courts to be stored and processed in one place, and for management reports to be applied equally in all courts (Ljubanović & Britvić Vetma, 2020, 317).

<sup>9</sup> Article 18 paragraph 5 of the RAIA stipulates: “A request for insight into the entire case file, explanation or instructions concerning the exercise of a right or execution of an obligation, conducting an analysis or interpretation of a regulation, or the creation of new information, shall not be considered a request for access to information”.

was unable to determine the number of submitted initiatives to start the procedure for assessing the legality of general acts adopted by self-government units, as well as the percentage of decisions that abolished contested general acts in relation to the total number of submitted initiatives in the specified period. However, despite this limitation, it is still possible to address the research question posed in this paper, i.e., whether there are omissions in the implementation of public consultations in the procedure of adopting general acts and, if there are, what they consist of. To this end, it is necessary to take a closer look at the judicial practice.

#### IV. JUDICIAL PRACTICE

From the practice of the High Administrative Court in the considered period of a whole decade of application of RAIA, it was established that a total of 11 general acts of self-government units (The High Administrative Court of the Republic of Croatia, 2017, 2021, 2022a, 2022b, 2022c, 2022d, 2022e, 2022f, 2022g, 2022h, 2023) were abolished in the procedure for assessing their legality due to certain omissions in the implementation of public consultations in the procedure of adopting general acts. Although this leads to the conclusion that, on average, the High Administrative Court abolished only slightly more than one general act per year, a closer look reveals that in 2017, the High Administrative Court, for the first time, abolished one general act adopted by the self-government unit, after which no general acts were abolished in 2018, 2019 and 2020; in 2021 another general act was abolished, in 2022 eight of them, and at the beginning of 2023 one more general act for which omissions were determined in the procedure for assessing its legality. Also, it was established that the High Administrative Court initiated the procedure *ex officio* every time; eight times (72.7%) it was based on notices (initiatives) from citizens, and three times (27.3%) by legal entities.

When it comes to the reasons for contesting general acts, it follows that the first, and the most common reason for contesting the general act, presented to the High Administrative Court by the submitter of the initiative, was the absence of public consultation, which can be found in 10 decisions (90.9%) (The High Administrative Court of the Republic of Croatia, 2021, 2022a, 2022b, 2022c, 2022d, 2022e, 2022f, 2022g, 2022h, 2023), of which the submitters *explicite* referred to it in four cases (The High Administrative Court of the Republic of Croatia, 2022a, 2022e, 2022h, 2023) and *implicite* in six cases (The High Administrative Court of the Republic of Croatia, 2021, 2022b, 2022c, 2022d, 2022f, 2022g), while the second reason was non-compliance with the prescribed deadline of 30 days, which was established in one decision<sup>10</sup> (9.1%) (The High Administrative Court of the Republic of Croatia, 2017). Beside that, there are some examples in practice in which submitters of the initiative to the High Administrative Court cited several other reasons for contesting the general act. These are: the omission to publish the draft of the general act with an explanation of the reasons and goals to be achieved by its adoption, which was identified in eight decisions (72.7%) (The High Administrative Court of the Republic of Croatia, 2021, 2022a, 2022b, 2022c, 2022e, 2022f, 2022h, 2022g), the omission to publish the report on the conducted public consultation, which was mentioned in two decisions<sup>11</sup> (18.2%) (The High Administrative Court of the Republic of Croatia, 2022a, 2022f), and the omission of self-government units to invite the public to submit proposals and opinions, which was found in only one decision (9.1%) (The High Administrative Court of the Republic of Croatia, 2022a). However, bearing in mind that in the latter examples of omissions, there was also no consultation with the public, they all essentially point to the fundamental omission of not conducting public consultations.<sup>12</sup>

On the other side, in their statements, the adopters of general acts provided different explanations, the most common of which were the following: it was a valid general act (four cases) (The High Administrative Court of the Republic of Croatia, 2022b, 2022c, 2022e, 2022g), the competent body of the state administration for monitoring the legality of general acts in accordance with the law had no objections to the contested general act (four cases) (The High Administrative Court of the Republic of Croatia, 2017, 2021, 2022d, 2022f), the contested general act did not affect the interests of citizens or legal entities (four cases) (The High Administrative Court of the Republic of Croatia, 2021, 2022d, 2022f, 2023), and there were reasons for urgent action (three cases) (The High Administrative Court of the Republic of Croatia, 2017, 2022f, 2023). Less frequently, they relied on the following explanations: it was a published general act with which the public was familiar (two cases) (The High Administrative Court of the Republic of Croatia, 2022d, 2022e), there was a public review of the procedure for adopting general act and there were

<sup>10</sup> Public consultation for the general act lasted only seven days.

<sup>11</sup> Both decisions make it evident that submitters in both cases cited several reasons for contesting the general act, with the primary reason being the absence of public consultation at the time of its adoption, meaning that the report on the public consultation could not be published.

<sup>12</sup> For example, this results from decisions of the High Administrative Court (e.g., 2021, 2022a, 2022b, 2022c) wherein it is explicitly mentioned that the provisions of the act referred to by its adopter do not provide a valid basis for the adoption of a general act "without conducting public consultation".



no comments or objections (one case) (The High Administrative Court of the Republic of Croatia, 2022a), the adoption of the general act has been harmonized with the current law (one case) (The High Administrative Court of the Republic of Croatia, 2022b), a new general act was currently in the process of consultation with the public (one case) (The High Administrative Court of the Republic of Croatia, 2022g), a new general act was adopted in the meantime (one case) (The High Administrative Court of the Republic of Croatia, 2022h), the very fact of (not) conducting public consultation does not affect the legality of the general act (one case) (The High Administrative Court of the Republic of Croatia, 2022a); and, the contested act is not even a general act (one case) (The High Administrative Court of the Republic of Croatia, 2022f).

The decisions of the High Administrative Court show that in the largest number of cases, the said Court expressed its opinion that the contested act of the local self-government unit is a general act that directly regulates issues of interest to citizens and legal entities in its area (10 decisions,<sup>13</sup> i.e., 90.9%), establishing that – bearing in mind the requirements of “the rule of law and (...) the realization of the security of an objective legal order” – there is no valid legal basis for the adoption of a general act without conducting consultation with the public (eight decisions, i.e., 72.7%) (The High Administrative Court of the Republic of Croatia, 2021, 2022a, 2022b, 2022c, 2022e, 2022f, 2022h, 2022g). In this sense, the High Administrative Court emphasized the obligation of self-government units as adopters of general acts to comply with the legally prescribed procedure for adopting such acts within their jurisdiction; this adherence ensures the formal conditions of the legality of their actions, as well as the legality of the acts they adopt (five decisions, i.e., 45.5%) (The High Administrative Court of the Republic of Croatia, 2022a, 2022b, 2022c, 2022e, 2022f). Also, the Court pointed out that the very fact that the competent body of the state administration for monitoring the legality of general acts in accordance with the law had no objections to the contested general act (two decisions, i.e., 18.2%) is not of decisive importance (The High Administrative Court of the Republic of Croatia, 2021, 2022a). Finally, the High Administrative Court expressed the opinion that the publication of the adopted general act (The High Administrative Court of the Republic of Croatia, 2022e, 2022f) or the public inspection of the general act (The High Administrative Court of the Republic of Croatia, 2022a), regardless of the moment of its entry into force, cannot rectify the illegality committed during the adoption process, as it is necessary to inform the public before its adoption (The High Administrative Court of the Republic of Croatia, 2022e, 2022f); i.e., conducting a legally prescribed public consultation during the adoption process, is necessary to address the illegality (The High Administrative Court of the Republic of Croatia, 2022d). Taking into consideration the obligation to respect the prescribed 30-day period for public consultation, the High Administrative Court is of the opinion that the deviation from that period is allowed only in exceptional and justified circumstances; an alternative interpretation in specific cases could call into question the application of the deadline itself. Namely, since the aim of the public consultation is to inform the interested public about the draft of the general act, its realization could not be impeded by circumstances concerning the regular work of the self-government unit. These circumstances may include the time required for convening a session and preparing materials or the fact that the date of the session was not known prior to the commencement of the public consultation (The High Administrative Court of the Republic of Croatia, 2017).

## V. CONCLUSION

After analyzing the practice of the Croatian High Administrative Court – in order to determine whether there are certain omissions, confirmed by the said Court, in the implementation of public consultations in the procedure of adopting general acts that resulted in their abolition, and, if there are, what they consist of – it is concluded that, since 2013, when the obligation to conduct public consultation was introduced, the Court has abolished 11 general acts when it comes to procedures assessing their legality due to certain omissions in the implementation of public consultations during their adoption procedures. Furthermore, the judicial practice shows the tendency of a rapid increase in the number of such decisions, since in just 14 months – from November 29, 2021, to January 30, 2023 – the Court abolished 10 general acts due to the omissions in the implementation of public consultations during their adoption procedures.

The first and the most common omission was the absence of public consultation, which can be found in 10 decisions (90.9%), while the second reason was non-compliance with the prescribed deadline of 30 days, which was established in one decision (9.1%). Besides that, there were examples of other reasons for contesting the general act: the omission to publish the draft of the general act with an explanation of the reasons and goals to be achieved by its adoption (72.7%), the omission to publish the report on the conducted public consultation (18.2%), and the omission of self-government units to invite the public to submit proposals and opinions (9.1%). However, considering that there was also no consultation with the public in the latter examples of omissions, it was concluded that they all essentially boil down to the

<sup>13</sup> These are all cases in which the public consultation was absent.

fundamental omission of not conducting the public consultation.

These results are consistent with earlier research on a similar topic based on the official reports of the Croatian Information Commissioner (Struić, 2022), in which it was pointed out that in the implementation of the RAIA, there were repeated deficiencies related to, *inter alia*, the planning of normative processes, the identification of acts for which the implementation of public consultation is mandatory, the duration of the public consultation and the visibility of its public announcement. This strongly points to the necessity of continuous training of civil servants in local and regional self-government who are responsible for the implementation of public consultations in accordance with the RAIA. Furthermore, it underscores the importance of establishing best practices through the creation of guidelines addressing key challenges in consultation implementation, as well as educational activities aimed at strengthening the dialogue between local and regional self-government units and the public (Struić, 2022). This may, ultimately, reduce the necessity for some later interventions by the Information Commissioner and the High Administrative Court.

In the largest number of decisions (90.9%), the High Administrative Court expressed its opinion that the contested acts, by their nature, constitute general acts of self-government units that directly regulate issues of interest to citizens and legal entities in their area. In its decisions (72.7%), the Court also referred to the importance of imperatives of the rule of law and security on which the objective legal order must rest, with the conclusion that there is no valid legal basis for adopting a general act without conducting public consultation and informing the interested public. Moreover, in its decisions (45.5%), the Court holds that self-government units, as adopters of general acts, must ensure formal conditions for the legality of their actions and general acts; therefore, this also applies to the implementation of consultations with the public in accordance with the law. In its decisions (8.2%), the Court further emphasizes that the decisive factor in such cases is not whether the competent body of the state administration for monitoring the legality of general acts had any objection to that general act but whether the public was informed, and whether the public was enabled to submit its proposals and opinions on the draft of the general act in the process of its adoption.

Such opinions of the High Administrative Court in its decisions essentially coincide with the opinion of the Constitutional Court of the Republic of Croatia (2013) expressed in Decision No. U-II-1304/2013, according to which adherence to “the prescribed procedure, but also democratic standards when adopting (...) general acts is the smallest (...) measure of demand that is placed before their adopters in a democratic society based on the rule of law”. This is particularly relevant at the local and regional level of government, whose bodies should be closest to citizens and make informed decisions on various important issues and topics with a direct impact on their everyday lives, facilitating their interaction with public representatives in democratic processes.

In addition to this topic, other relevant issues could also be closely examined, such as public consultation from the perspective of the Croatian Constitutional Court’s practice or through the perspective of comparative law and practice. However, these and other issues should be addressed in separate research, which would considerably exceed the aim and scope of this paper.

#### CONFLICT OF INTEREST

The views expressed in this paper are those of the author and do not represent the views of the Croatian Parliament. All translations into English belong to the author unless stated otherwise.

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