Seminar organized by the Council of State of the Netherlands and ACA-Europe

"Better Regulation"

The Hague 15 May 2017

Answers to questionnaire: Czech Republic

Seminar co-funded by the «Justice » program of the European Union

ACA Europe Questionnaire
Better regulation

Better regulation
The legislature, the national administration and the judiciary are dependent on each other to function well. The democratic constitutional state functions better if the various branches of state power learn from one another. Good judgments also depend on good legislation. The legislative authority can improve the quality of legislation if it is aware of the practical experiences of judges and their advisory bodies in implementing and enforcing the law, and of any shortcomings. These experiences can be incorporated into the legislative process through various mechanisms thus engendering a feedback loop, enabling practical experiences to contribute to the quality of legislation. Quality here means juridical/legal quality as well as whether the legislation is sound, effective and enforceable. The Member States have developed different mechanisms for this.

Whether legislation is sound and effective is a theme commanding attention at national and European level. The present European Commission announced that the Better Regulation programme would be a policy objective when it entered office in 2014, containing as it does an extensive package of reforms to streamline EU decision-making and make it more transparent, and to improve the quality of new legislation. Instruments such as impact assessments and policy evaluations are intended to play a vital role in the effective and efficient implementation of EU policy. Impact assessment involves the systematic prior analysis of various policy options and the accompanying costs and benefits, including the mapping of the administrative burden. The aim is to arrive at reasonable, realistic regulations that can be properly implemented and enforced. Public consultation will also be used in evaluating existing legislation.

Wider public consultation is being or has been introduced as part of the effort to ensure that legislation is more open and transparent. Any citizen or interested party is entitled to give feedback and make suggestions during a period of eight weeks after the Commission has approved a proposal; these are then included in the legislative debate in the European Parliament and the Council. It turns out that these consultations are used notably by private stakeholders, including lobby groups.

National input mechanisms
Different instruments or mechanisms exist at national level (formal and regulated as well as informal) for allowing input, solicited or unsolicited, to be given on future and existing legislation by legal institutions and independent advisory bodies (both advisors on legislation and bodies that advise on the quality of legislation based on their position or expertise). Examples that spring to mind are instruments used prior to legislation being drafted (‘consultation’) and those used in response to existing legislation (‘feedback’). On 11 December 2015 an ACA seminar in Brussel discussed consultation *prior* to drafting as an example of the first category, which above all focuses on the usefulness of and need for the proposed legislation and the technical aspects. No clear picture is available of other input mechanisms in the phase of legislative drafting, or in the subsequent phase of implementation and enforcement.

In light of the European Commission’s Better Regulation programme, such a survey would be desirable, and for the ACA extremely interesting. Hence on 15 May 2017 an ACA seminar is being planned on the subject of Better Regulation. By way of preparing for the seminar we are asking you to complete this questionnaire so we can find out more about existing forms

of consultation and feedback in the context of experiences with case law and advisory opinions.

ACA 'better regulation' questionnaire

The questionnaire will be used to produce an overview of the various formal and informal input mechanisms in the Member States. What instruments for consultation and feedback do independent advisors and the courts use, irrespective of the individual way these functions are organized in the various Member States, and which ones are adopted by the national legislator?

Independent advisors are advisors or advisory bodies who, based on their position or expertise, give advice, solicited or unsolicited, about the quality of legislation. This may involve legal expertise in general or with respect to a particular legal specialism or area of interest. This therefore also includes Councils of State insofar as they advise on legislation. The courts are courts or advisory bodies comprising judges who give advice, solicited or unsolicited, about the quality of legislation in the form of a judgment or otherwise.

The focus of the questionnaire is on the quality of legislation, and how both independent advisors and the courts can contribute to it. Legislation is defined as generally binding regulations. This is not just a matter of verifying the juridical quality of the legislation (for example constitutional or technical legal scrutiny), but also of assessing whether it is sound, effective and enforceable. Hence the questionnaire expressly does not limit itself to the institutional tasks of those ACA members with a dual function as a Council of State, and goes further than the matters discussed at the ACA seminar in Brussels on 11 December 2015. It also examines the other formal and informal mechanisms used by independent advisors and the courts for input about the quality of legislation, for example through an annual report or publications.

The questionnaire distinguishes between two phases.

The first phase is the legislative drafting stage, when consultation takes place. Input is given through the normal advisory process. However, it would be interesting to know more about the different ways in which advisors and courts are or have been involved at this stage. The main aim is to give an overview of the formal and informal instruments currently used in the Member States.

The second phase covers feedback after the legislation has come into force and some practical experience of it has been gained. Again, the priority is to take stock of the formal and informal instruments currently used by advisors and the courts in the various Member States to provide feedback about their experiences.

The findings may spark a discussion about the need for improved or new input mechanisms to enhance the quality of legislation.

Please give as many concrete examples as you can when answering the questions.

Supreme Administrative Court of the Czech Republic

Preliminary note by the SAC:
We feel it is essential to point out several circumstances before answering the questions, as these might provide a better understanding of our answers.
It is important to keep in mind that the Czech Republic is a country, where the Supreme Administrative Court does not have the advisory function or powers. This is a result of the development as one of the post-communist countries. Even now, more than 20 years after, the development or transformation towards the democratic system is still not completely finished as we are still dealing with the radical change itself, as well as with the fact that we adopted many bad habits from the previous era.
Until 1990, we only had the national legislation (which was quite rigid), but ever since then we had to implement the international law, mainly as a result of joining the Council of Europe, we also had to constitute the constitutional law as a fundament and a base for the future development and constitute the Constitutional Court itself. Then in 1993 the dissolution of the former Czechoslovakia presupposed even more changes and further customization of the national legislation.
In 2004, we then faced another substantial challenge – becoming a member of the EU. To be able to do this, we had to adjust and conform all our legislation to the vast amount of EU law all at once, which was definitely not an easy task, especially compared to the former members of the EU who did not need to undertake any of this, as they were developing the law gradually. The membership in the EU therefore implied a massive expansion of the legislation, for which we unfortunately did not have enough high-quality legislators.
Aside from all that was just mentioned from the legal point of view, the Czech Republic also underwent a vast social transformation including the change of the economical system towards the market oriented economy.
The ambition of this short note is then to make sure, that anyone reading our answers would take all abovementioned circumstances into consideration when further analysing our responses.

Part 1: Input mechanisms *prior* to the drafting of legislation

A) Input from the courts

1. Are there any general mechanisms in your Member State for the courts, and more specifically the highest courts, to provide solicited or unsolicited input or advice in the phase before legislation is drafted?

A document called Legislative Rules (issued by the Government) guides the government and ministries in the course of the legislative process.
Article 5(1)(e) of the Legislative Rules states that the organ which prepared a draft of a statute has to insert it into the Electronic library (a tool available for all persons who might be involved in the legislative process).
The Electronic library notifies, inter alia, the Constitutional Court, the Supreme Court and the Supreme Administrative Court about the new drafts related to them. Since the insertion, the courts mentioned above have 15 days (by default) to submit their comments on the draft. The draft is then modified according to the comments.

The Legislative Rules also state that the statute drafts have to be in accordance with the Constitutional Court's case law.

The draft must also be designed in accordance with the case law of the Constitutional Court and ECHR.

If so:

a. Are the courts consulted structurally or incidentally at this stage, and in what way? Is case law for example consulted?
   *Unfortunately, the process is not very well organised and courts are not addressed systematically when it comes to new legislation. We generally receive a lot of drafts to comment on, but unfortunately it is important to point out that it happens quite often that we are not notified about **all** of the proposed drafts and what is more, sometimes even drafts that are closely related to our scope of action can escape our attention. It may even happen, that we are not consulted on purpose, only be avoided as a potential obstacle in the process of drafting new legislation. What also happens often is that even if we are notified, the deadlines for any comments and proposals are too short for us to be able to provide a qualified feedback.*

b. Does feedback from the courts go directly to the legislator or indirectly to advisory bodies which can then decide to pass this on to the legislator?
   Any feedback provided goes directly to the legislator, via the Electronic Library.

c. To what extent do the courts themselves take the initiative to directly or indirectly advise the legislator or draw attention to the quality of legislation, for example by means of unsolicited advice, a response to a public consultation, or a contribution on that subject to the annual report?
   Regarding our own initiative, the President of our court prefers the policy of being more restraint, so we usually do not intervene. It is mainly to keep up with the principle of separation of powers, as we do not want to interfere with what is the responsibility of the executive power – the Government.
   That being said, we definitely would provide our opinions or even our own proposals if the proposed legislation would be considered as severely in conflict with long-established case law, if we considered the proposed changes to be pointless or potentially generating preventable law-suits etc.

d. What aspects of the quality of the legislation are specifically addressed and can you give an example?
   When we do provide any comments or proposals, they are usually aimed at more general questions and aspects as for instance the unity and consistency of the whole legal order, the attempt to look at the proposed drafts and the existing legislation from a systematic point of view and to keep the legislation consistent etc.

e. To what extent is the given input public?
   It is not public, only bodies with access to the Electronic Library can see the given input. However in reality, when it comes to important legislation the media usually monitor this and inform the public.

~~If not:~~

~~f. Do you think input mechanisms for the courts would be desirable at this stage, and in what form?~~

g. ~~What is the basis (for example, constitutional, statutory or unwritten law) for the existing mechanisms?~~

2. Are there objections or risks attached to the formal consultation of the courts at the stage before legislation is drafted? If so, what are they? How can they be resolved?
   Given our policy of being more restraint, what we perceive as the biggest threat is the risk of a breach of the principle of separation of powers. We strongly believe that a judge needs to bear in mind his role within this principle.
   It did happen in the past (and that is the reason why we want to prevent this from happening ever again) that judges did participate in the legislative process much more, they proposed and drafted new legislation, they were very active during the process of preparation, then they were the ones who also write commentaries on this legislation, lecture about it, and at the very and they are the ones who interpret these laws and adjudicate the case law – as if this judge was the one person who has the "monopoly for the truth". This is what we believe a major threat or a risk which can be prevented by not allowing the judges to participate in the legislative process too actively, but only to let them express their opinions and views from outside.
3. Are there objections or risks attached to giving unsolicited advice at the stage of the drafting of legislation, for example by means of an unsolicited opinion, an annual report or publication? If so, what are they? How can they be resolved?
   Same as the previous answer.

B) Input from advisory bodies – *the Supreme Administrative Court does not exercise this power*

4. ~~Are there any general mechanisms in your Member State for advisory bodies to give solicited or unsolicited input or advice at the stage before legislation is drafted?~~

   ~~If so:~~

a. ~~Are the advisory bodies consulted structurally or incidentally at this stage, and in what way?~~
b. ~~To what extent do the advisory bodies themselves take the initiative to advise the legislator or draw attention to the quality of legislation, for example by means of unsolicited advice, a response to a public consultation, a publication or a contribution on that subject to the annual report?~~
c. ~~What aspects of the quality of legislation are specifically addressed and can you give an example?~~
d. ~~To what extent is the given input public?~~

   ~~If not:~~

e. ~~Do you think such input mechanisms for advisory bodies at this stage would be desirable, and in what form?~~

f. ~~What is the basis (for example, constitutional, statutory or unwritten law) for the existing mechanisms?~~

5. ~~Are there objections or risks attached to the formal consultation of advisory bodies at the stage before legislation is drafted? If so, what are they? How can they be resolved?~~

6. ~~Are there objections or risks attached to advisory bodies giving unsolicited advice on the drafting of legislation, for example by means of an unsolicited opinion, a publication or a contribution on the subject in the annual report? If so, what are they? How can they be resolved?~~

C) General

7. Are there any general or specific input mechanisms in your Member State (except for those for the courts and advisory bodies) at the stage before legislation is drafted, for example public consultation via the internet or otherwise?

   There is no specific mechanism like public consultation etc. but public bodies, Chamber of Commerce, trade unions, professional chambers (e.g. Bar Association, Chamber of Notaries, Chamber of Executors etc.), local governments etc. can submit their comments on the drafts of statutes.

8. Do you have any additional or other remarks about input mechanisms before legislation is drafted?

   From our point of view the biggest problem in the process of the adoption of new legislation is the fact, that we have too much legislation which is often not perfected before being finally adopted – the legislator often prefers to adopt an imperfect norm which is then modified by (usually several) amendments.
   What we also perceive as a major difficulty in the legislative process is the competence of the members of the Chamber of Deputies of the Parliament to propose new legislation – such a proposal does not undergo the same process of consultation with all the resorts concerned and it is enough if the Government expresses its agreement. On the other hand, the Senate of the Parliament can only propose new legislation as a whole.
   Another related issue is the competence of the members of the Chamber of Deputies of the Parliament to propose changes to drafts that have been already previously prepared and discussed (and usually even adjusted according to the results of those discussions) within the Government. In this case the opinion or the agreement of the Government is not necessary and the Chamber can directly vote about the proposed change.
   It has happened (even recently with a very important law on international protection) that major changes were proposed to a drafted legislations when at the same time these were either not at all discussed previously with the resorts concerned, or even worse – they have been previously rejected by them.
   All of the mentioned circumstances make the legislative process confusing, too complex and precipitate.

   Another objection against the legislative process would be the different position of Government and judiciary when they provide substantial comments towards the drafted texts – when a ministry provides them, they had to be officially discussed and dealt with whereas when for example a court provides them, they can, but do not have to be. This is a major disparity, that should be balanced pro futuro, so that the vast experiences of the judiciary would be taken into consideration.

Part 2: Input mechanisms *after* legislation has been drafted

A) <u>Feedback from courts</u>

9. Are there any formal or informal feedback mechanisms in your Member State for the courts, and more specifically the highest courts, to provide solicited or unsolicited input or advice *after* legislation has been drafted and some experience has been gained with implementation and enforcement?

One of the competences of the courts is to initiate proceedings on annulment of selected legal provisions in case they consider these provisions to be in conflict with the Constitution. In this case the Constitutional Court of the Czech Republic is empowered to quash a statute or its part if it is in conflict with the Constitution – it acts as "a negative legislator".
So far we have used this competence 38 times, out of which 3 petitions are still pending, 12 petitions has been dismissed, 3 have been partially dismissed, 7 has been dismissed as inadmissible, in one case the Constitutional Court discontinued the proceedings and in 12 cases the Constitutional Court has annulled the legal provisions.

If so:

a. Are the courts consulted structurally or incidentally at this stage, and in what way? Is case law for example consulted?
   Because all our case law is easily accessible and all ministries have their own analytical departments, they should be the ones who monitor and consult the case law and propose changed if needed.
   It is the role of the executive power to monitor and evaluate existing legislation and practice before proposing amendments or changes. Contrary to this, the role of the judiciary is to interpret and apply the legislation in force, and what is more, even bad legislation has to be interpreted and applied in a manner that would ensure fairness and justice.

   Other than this, we have the possibility to attend the meetings and consultations of the Government Legislative Council (an advisory body of the Government for the legislative work) as a guest, which we do take advantage of when we consider it necessary (either the President of the Court himself or a designated judge). We have been offered to have a judge as a permanent member of this council, but accordingly with our policy of being more restraint we prefer to attend ad guests.

b. Does feedback from the courts go directly to the legislator or indirectly to advisory bodies which can then decide to pass on the feedback to the legislator?
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c. To what extent do the courts themselves take the initiative to directly or indirectly advise the legislator or draw attention to the quality of legislation, of the lack of it, for example by means of unsolicited advice, a response in a public consultation, or a contribution on that subject to the annual report?
   Courts usually do not take this kind of initiative – they may point out some problematic areas of a legislation that is missing or imperfect, but we are not supposed to formally address the executive as this is not our role. We can comment, from an independent position – from "outside", but other than that we should not be engaged in the process itself.
   As an example of this the judiciary was trying a long time already to point out that article 46 of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection needs to be implemented into the national legal order, but this has not happened yet, unfortunately.

d. What aspects of the quality of the legislation are specifically addressed and can you give an example??
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e. What is the reply if a problem arises in the practical implementation of the legislation that results in an acute increase in the workload of the (highest) court?
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f. To what extent is the given feedback public?
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g. If feedback is given (solely) by judgment by the court, how is this done (for example obiter dictum, prospective ruling)?

~~If not:~~

~~h. Do you think such feedback mechanisms for the courts would be desirable, and in what form?~~

~~i. What is the basis (for example, constitutional, statutory or unwritten law) for the existing mechanisms?~~

10. Are there objections or risks attached to the formal consultation of courts at the stage after legislation has been drafted? If so, what are they? How can they be resolved?
The ones we have already mentioned – mainly the risk of undermining the independence of the courts/judiciary and the principle of separation of powers.

11. Are there objections or risks attached to drawing the attention of the legislator, unsolicited, to shortcomings in the quality of legislation, including its soundness and implementability, for example by means of an annual report or publication? If so, what are they? How can they be resolved?
Given that the feedback is provided in a way that does not threat the abovementioned principles, then we do not think there would be any other significant risk.

B) Feedback from advisory bodies – *the Supreme Administrative Court does not exercise this power*

~~12. Are there any formal or informal feedback mechanisms in your Member State for the advisory bodies to provide solicited or unsolicited input or advice *after* legislation has been drafted and some experience has been gained with implementation and enforcement?~~

~~If so:~~

~~a. Are the advisory bodies consulted structurally or incidentally in this phase, and in what way?~~
~~b. To what extent do the advisory bodies themselves take the initiative to advise the legislator or draw attention to the quality of legislation, or the lack of it, for example by means of unsolicited advice, a publication or a contribution on that subject to the annual report?~~
~~c. What aspects of the quality of legislation are specifically addressed and can you give an example?~~
~~d. To what extent is the given feedback public?~~

~~If not:~~

~~e. Do you think feedback mechanisms for advisory bodies at this stage would be desirable, and in what form?~~

~~f. What is the basis (for example, constitutional, statutory or unwritten law) for the existing mechanisms?~~

13. ~~Are there objections or risks attached to formal feedback from advisory bodies at the stage after legislation has been drafted? If so, what are they? How can they be resolved?~~

14. ~~Are there objections or risks attached to advisory bodies giving unsolicited advice on the quality of legislation, including its soundness and implementability, for example by means of an annual report or publication? If so, what are they? How can they be resolved?~~

C) General

15. Are there any general or specific input mechanisms in your Member State (except for those for the courts and advisory bodies) at the stage after legislation has been drafted, for example public consultation via the internet or otherwise?
Nothing specific, but of course the legislation is monitored and commented on by the public.

16. Have you any additional or other remarks about feedback mechanisms after legislation has been drafted?
No.