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

“Better Regulation”

The Hague 15 May 2017

Answers to questionnaire: Germany



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.

The questionnaire comprises the following questions:

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?

If so:

The mechanisms by which the courts including the highest court deliver an input or advice prior to the drafting of legislation are marginal. For an explanation see below, 2.

- a. Are the courts consulted structurally or incidentally at this stage, and in what way? Is case law for example consulted?

In this phase the courts are structurally only consulted, if the object of legislation is the procedural law of the relevant jurisdiction or if the organization or the work of the courts are directly affected by the legislation to be adopted.

- 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?

A feedback from the courts usually is consulted by and given to the Ministry of Justice. As part of the government the Ministry is directly involved in the legislative process. The government has the constitutional right to propose new legislation to Parliament. In fact, by far the largest number of legislative proposals is elaborated by the government.

- 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?

Courts usually restrain from doing so (see below, 2.).

- d. What aspects of the quality of the legislation are specifically addressed and can you give an example?

Courts are only consulted if the legislation concerns the procedural law of the relevant jurisdiction or if the organization or the work of the courts are directly affected by the legislation. Due to their experience in their own field of work the courts are usually more apt to assess what the practical effect of a proposed legislation would be and what it would mean for their daily work.

One example: In a reform of the law of legal charges the government proposed the revision of a rule which was deemed to determine more precisely the value of claims. The consulted courts could show that the proposed rule was very complicated, thus encumbering the judges' work with a seriously increased research obligation, while the outcome in most cases was similar applying the already existing rule, which was easy to handle. The relationship between the increase of work on the side of the court and the improvement of the material situation was apparently disproportionate. In this specific case, the legislator did not follow the advice given by the court.

- e. To what extent is the given input public?

The input is not publicized.

If not:

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

No (see below, 2.).

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

The consultation of affected courts is part of the governmental practice.

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?

The division of powers as a fundamental principle of the modern state of law separates the competences of the legislative, the executive and the judiciary. The German constitution does not provide for a strict separation of powers; it rather contains a system of checks and balances. Yet, the main competence of the judiciary is not only the application of the law, but also the assessment of the legality of the given laws themselves. It falls within its competence to revoke laws which are found unlawful. If a parliamentary law is found to breach the constitution it is the privilege of the Federal Constitutional Court to revoke the law. Legal rules of a lower hierarchy, usually emanating from the government such as decrees and ordinances may directly be revoked by every court.

Thus, it does imply some difficulties if courts are consulted in the legislative process, while it falls in their responsibility to control the legality of these laws and where necessary revoke them after they have entered into force. Under these circumstances the German system gives a clear preference to the objectivity and neutrality of the function of the judiciary. At the same time it deprives itself of the expertise the courts could present in the legislative process.

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?

See above, 2.

B) Input from advisory bodies

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?

Yes, especially the government, which statistically drafts most legislation, solicits input from advisory bodies on a large-spread scale. Four main groups of advisory bodies may be identified: One group consists of government appointees, each of which has the task to watch over a particular assignment. Presently there are twenty appointees. To give some examples, there are appointees for the matters of foreign

persons, for the economic feasibility of administration, for arms control, for the matters of handicapped persons, for human rights and for data security. These government appointees enjoy material independence, but, of course, as they are appointed by the government they are not personally independent. Yet, state practice has proven, that critical voices are being tolerated.

Secondly, public bodies such as the federated states (Länder), the municipalities or other authorities, among which may be included the courts, are invited to give their advice in matters that affect their competences.

A third group consists of independent bodies whose interests may be affected by the legislation. These are mostly associations in form of interest groups acting on the federal level.

At last, every draft legislation is subject to the assessment by the National Council of Norms Control, an independent body created by law whose task it is to contribute to better regulation and the reduction of (the costs of) bureaucracy.

Apart from this, it is within the discretion of Parliament to have a public hearing to which experts as well as interest groups may be invited.

If so:

- a. Are the advisory bodies consulted structurally or incidentally at this stage, and in what way?

The above-named advisory bodies are consulted structurally, if their field of interest or assignment is involved. The National Council of Norms Control is consulted in every case.

Parliament has expert hearings incidentally.

- 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?

Theoretically any interested formation may contact the government and give unsolicited advice within its constitutional right of petition. Since the government solicits advice on such a wide-spread scale there usually is only little room for such a need.

- c. What aspects of the quality of legislation are specifically addressed and can you give an example?

There is no limitation as to the kind of advice interested advisory bodies, public or private, may give. There may be technical and practical advice as well as material objections. The National Council on Norms Control aims at better regulation and at reducing (the costs of) bureaucracy.

- d. To what extent is the given input public?

It is within the discretion of the government to publicize the input given. Many times private interest groups will make their statement public.

Written advice in parliamentary hearings is published on-line by Parliament.

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?

The consultation as described before is provided for in the rules of procedure of the federal ministries (Gemeinsame Geschäftsordnung der Bundesministerien – GGO) and the parliamentary rules of procedure.

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?

The Constitution lays the competence for the passing of legislation in the hands of the parliament and the government. Both are well-advised to assess the advice given carefully. Yet, the legislation to be proposed remains in the responsibility of government, parliament and the chamber of federated states (Bundesrat), the legislation to be adopted remains in the sole responsibility of Parliament and Bundesrat. The risks of biased advice can best be encountered by a wide-spread consultation practice which triggers a large diversity of opinion.

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?

Given the constitutional competence and responsibility of the relevant organs unsolicited advice should not cause any risks.

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?

No.

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

No.

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

A) Feedback from courts

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?

The formal feedback mechanisms for the courts are their decisions. They leave room not only to revoke legislation. Within the reasons given courts may point at structural deficits, incompletenesses, contradictions or technical shortcomings.

In rare cases such shortcomings may be addressed directly towards government, usually on an informal and incidental basis. To maintain the objectivity and neutrality of the courts such informal contact is limited to pointing at apparently unwanted errors of a rather formal or technical type. Courts would not intervene to criticize the contents of legislation.

If so:

- a. Are the courts consulted structurally or incidentally at this stage, and in what way? Is case law for example consulted?

Not directly. Yet, government diligently evaluates the case law of the courts, and especially of the supreme courts.

- 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?

No.

- 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?

The courts are very reluctant to give unsolicited advice to the legislator (see above, Part 1, A), 2.). As to rare exceptions, see above, 9.

- d. What aspects of the quality of the legislation are specifically addressed and can you give an example??

See above, 9.

- 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?

Any perceptible increase of workload which is not marginal may result in an application for a raise of budget and personnel which is to be directed towards the government. Within the application the reasons for the demand will be stated. This may be considered an indirect form of feedback.

- f. To what extent is the given feedback public?

Court decisions are mostly public. Informal advice is not public.

- g. If feedback is given (solely) by judgment by the court, how is this done (for example obiter dictum, prospective ruling)?

There may be different techniques applied, depending on the merits of the case. If the contents of the decision depend on the validity or the substance of the incriminated rule, then the "advice" will be at the core of the court's reasoning.

Otherwise obiter dicta may be spoken, depending on the practice and discretion of the competent panel.

If not:

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

To uphold the objectivity and neutrality of the courts, which form the basis of their authority, I consider it best to give criticism and advice by the way of court decisions.

- 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 risks to the objectivity and neutrality of the courts may not be quite as apparent as it is with the advice given beforehand in the process of drafting legislation (see above, Part 1, A), 2. Yet, also in form of a feedback the advice given by courts may inflict a risk to their objectivity and neutrality. This counts in the case where advice is successfully given and results in a revision of the law. It is also valid in the case where the advice given by the court is rejected by the legislator. In both cases the objectivity and neutrality of the court are reduced if the incriminated rule is challenged in a future law suit.

The risk may be reduced if the advice is not given by the competent panel, but by the court's administration. Yet, it is almost unimaginable that the court's administration will not have consulted the expertise of the competent panel. In this case the risk may be reduced, but not resolved.

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?

See above, 10.

B) Feedback from advisory bodies

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?

The National Council on Norms Control contributes to better regulation and the reduction of (the costs of) bureaucracy. His task is not only the evaluation of draft legislation but also the evaluation of existing legislation. Also, the Federal Court of Auditors has the obligation and the right to control the cost effects of given legislation. Both institutions have the right to give unsolicited advice to existing legislation.

The rules of procedure of the federal government also provide for an evaluation of new legislation. Every draft legislation has to stipulate whether and when an evaluation of the effectiveness, the costs and the (unintended) side effects of new

legislation has to be conducted by the government. Should the evaluation process lead to a revision of the law, the process of consultation as described in part 1 of this questionnaire will apply again.

Apart from this, there is no formalized procedure to attract feedback from advisory bodies. Yet, all government appointees as well as public and private interest groups are free to present their unsolicited feedback to the government.

If so:

- a. Are the advisory bodies consulted structurally or incidentally in this phase, and in what way?

See above, 12.

- 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?

The forms of advice are as manifold as the advisory bodies themselves, since there is no structural soliciting process as to existing laws.

- c. What aspects of the quality of legislation are specifically addressed and can you give an example?

As described before, aspects of the costs of legislation, the material effects and (unintended) side effects.

- d. To what extent is the given feedback public?

The feedback is not structurally publicized, it may of course be made public by its non-governmental author.

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?

The basis for the governmental evaluation process are the rules of procedure of the federal ministries. The National Council for Norms Control has a legal basis for its conduct.

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?

No.

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?

No.

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?

No.

16. Have you any additional or other remarks about feedback mechanisms after legislation has been drafted?

No.