

Raad
van State



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Answers to questionnaire: the Netherlands



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ACA Europe Questionnaire: Better regulation

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

N.B.: A variety of general mechanisms for input from the courts and advisory bodies will be explained to ensure that the answers to questions 1a, 1e, 1f and 4a are complete. The rest of the answers focus on mechanisms for input from the Council of State's Advisory Division and Administrative Jurisdiction Division.

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?**

In the Netherlands a number of courts and related bodies provide solicited advice in the phase before legislation is drafted.

If so:

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

As stated above, a variety of bodies are consulted at this stage.

The Administrative Jurisdiction Division of the Council of State¹ is the highest general administrative court in the Netherlands.² The Administrative Jurisdiction Division is

¹ For more information see: <https://www.raadvanstate.nl/the-council-of-state.html>.

² The Administrative Jurisdiction Division – as the highest general administrative court – hears appeals against decisions or orders given by municipal, provincial or central government and disputes between two public authorities. The Administrative Jurisdiction Division is furthermore competent to hear appeal cases against decisions of a number of autonomous administrative authorities (*zelfstandige bestuursorganen*). Two other highest courts are competent in administrative appeals in specialised branches of administrative law. The Central Appeals Court for Public Service and Social Security Matters (*Centrale Raad van Beroep*) hears appeals in cases concerning social security and labour law and cases involving public servants, while the Administrative Court for Trade and Industry (*College van Beroep voor het bedrijfsleven*) hears cases in the field of economic public law, such as competition law and telecommunications law. Finally, tax cases are dealt with by the Supreme Court (*Hoge Raad*), which also hears civil and criminal cases in cassation. Although they each have different competences in terms of content, these four judicial institutions have a shared responsibility to promote the development and coherence of administrative law, particularly with respect to procedural law, as they all apply the General Administrative Law Act (*Algemene wet bestuursrecht*), which regulates procedural administrative law. Without horizontal contact or coordination between these highest judicial institutions, there would be a risk of differentiated application of administrative law (including EU law).

composed of three chambers: the General Chamber, the Spatial Planning Chamber and the Aliens Chamber. In some cases the government avails itself of the Administrative Jurisdiction Division's expertise in the phase when legislation is being drafted because of possible consequences for case load or organisational implications. Requests for consultation are tabled for discussion as soon as they are received. During the discussion the Administrative Jurisdiction Division decides which State Councillors and lawyers have the expertise required to prepare the response to the request. In assessing a bill, it focuses on whether the bill has implications for the practice of administrative law and if so, what they are. More specifically it examines the following issues.

- The quantitative impact of the bill: whether it creates or abolishes powers, either directly or indirectly, and whether it abolishes, limits or expands existing avenues of appeal.
 - The bill's qualitative impact on the administration of justice: here the focus is on the judicial system as a just and effective means of providing legal protection. More specifically, the Administrative Jurisdiction Division examines whether the application of the proposed legislation would create the forms of legal status envisaged by the legislator or whether it would undermine the legal status of citizens as protected by the constitution or international law. The Administrative Jurisdiction Division also assesses whether the legislation will result in the desired legal status in an effective and efficient manner. In addition, the societal aspects of the administration of justice are considered: would the bill affect access to the administrative courts, the speed with which these courts can settle disputes, the costs of review and appeal or the effectiveness of court judgments? Finally, the administration of justice is viewed from an operational perspective: would the proposed legislation increase the number and complexity of proceedings, would cases become more difficult to assess, is the court system equipped to deal with the cases expected to be brought under the new legislation and will it require investment in ICT capacity?

Once a response has been drafted the President of the Administrative Jurisdiction Division sends it to the ministry in question.³ In its response to the request for consultation, the Administrative Jurisdiction Division has to be careful not to pre-empt

³ The Vice-President of the Council of State, the Secretary and the director of the Advisory Department all receive a copy.

the advisory opinion of the Advisory Division or its own response to questions that may arise in cases before it if the proposed legislation is ultimately adopted.

The Council for the Judiciary was set up in 2002 to act as an independent intermediary between the courts, the Central Appeals Court for Public Service and Social Security Matters, the Administrative Court for Trade and Industry and government.⁴ The Council is the coordinating administrative body for the Dutch judiciary: eleven district courts, four appeal courts, the Administrative Court for Trade and Industry and the Central Appeals Court for Public Service and Social Security Matters.⁵ The Council also advises the government and parliament in the following areas.

- The content of legislative and policy proposals. The Council examines whether legal protection for citizens is guaranteed, if fundamental rights are respected and whether the proposal is likely to be effective.
- Impact on the organisation of the judiciary and its case load. Will a particular legislative or policy proposal create more/less work or more/fewer cases for the courts and court officials? The Council reviews proposals in light of its case concentration assessment framework and decides whether certain cases should be dealt with by a single court or several courts. In addition, it calculates the costs of the projected case load so that extra funds can be applied for from the relevant ministry if necessary.
- Feasibility. The Council checks whether the bill is properly structured and if the courts can apply it. For example, it checks for mutually contradictory provisions and ambiguous definitions.

The Dutch Supreme Court is the Netherlands' highest court in civil, criminal and tax cases.⁶ It does not come within the purview of the Council for the Judiciary. The President of the Supreme Court and the Procurator General at the Supreme Court make joint recommendations, mainly on proposals for legislation or plans that affect the organisation of the judiciary. Their advice is usually given in response to a request made by the Minister of Security and Justice on behalf of the government.

⁴ For more information see: <https://www.rechtspraak.nl/English>.

⁵ With the exception of the Supreme Court and the Council of State.

⁶ For more information see: <https://www.rechtspraak.nl/English/Judicial-system/Pages/Supreme-Court.aspx>.

The Dutch Association for the Judiciary⁷ (NVvR) is the professional body for public prosecutors and judges. Seventy per cent of this group are members of the NVvR. The Association promotes the interests of its members, protects their independence and monitors the quality of the administration of justice. It advises on the feasibility, content and consequences of legislation. It also examines the possible impact on the legal system. The NVvR's Technical Committee was set up to assess bills. The Committee examines the judicial aspects and practical consequences of proposed legislation and asks questions about the desirability of certain proposals and solutions in a broader context.

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?

If the government asks the courts for advice, their feedback goes directly to 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?

The Administrative Jurisdiction Division does not respond to public consultations on its own initiative. If its attention is drawn to a consultation, possibly online, which is not addressed to it but which could be relevant, the departmental management will ensure that it receives a request for consultation.

In addition, the Administrative Jurisdiction Division draws attention to a number of legislative problems in its annual report, including defects it has identified in legislation in the field of administrative law. These are topical issues and information on problem areas is passed on to the legislator.

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

⁷ For more information see: http://www.nvvr.org/view.php?Pagina_Id=1.

Aspects of quality of legislation are outlined in the answer to question 1a above. One example is the letter of 30 January 2014 from the President of the Administrative Jurisdiction Division to the State Secretary for Security and Justice regarding the bill to amend the Aliens Act 2000 with a view to implementing the recast Asylum Procedures Directive.⁸

The Division's conclusion reads as follows: 'The bill has raised a number of questions, particularly with regard to the introduction of a complete ex-nunc examination. The Administrative Jurisdiction Division would point out that this would lead to a substantial increase in the work load, and the Division's task of monitoring and promoting legal uniformity and equality before the law would become more onerous. If capacity remains the same, this will have a serious impact on the duration of appeal proceedings and consequently on the number of successive applications by aliens.'

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

The Administrative Jurisdiction Division has no statutory power to give advice. The government has a constitutional duty to consult the Council of State on bills (article 73 of the Constitution), but such requests for consultation are addressed to the Advisory Division. The Advisory Division has a constitutional obligation to advise, whereas the Administrative Jurisdiction Division has no such obligation.

The Council for the Judiciary has a statutory duty to advise the government, enshrined in section 95 of the Judiciary (Organisation) Act. Subsection 1 of this section states: 'The Council is tasked with advising the government and the States General on generally binding regulations and the policy to be pursued by central government in relation to the administration of justice. Opinions of the Council are adopted after consultation with the courts.' In addition, section 95, subsection 2 of the Act states that Chapter 4 (advice and position) of the Advisory Bodies Framework Act applies *mutatis mutandis*.⁹

Article 118, paragraph 3 of the Constitution states that 'Additional duties may be assigned to the Supreme Court by Act of Parliament'. The Supreme Court's duty to

⁸ For more information see: <https://zoek.officielebekendmakingen.nl/blg-415323.pdf>. (in Dutch).

⁹ In practice, the Council for the Judiciary gives a broad interpretation to its duty to advise.

advise is laid down in section 74 of the Judiciary (Organisation) Act ('The Supreme Court must give an opinion or provide information if requested by the government'). This power is a broad one, not limited to advising on bills.

The Dutch Association for the Judiciary may give advice on the basis of unwritten law. Under article 10, paragraph 1 of its constitution the different sections and study groups are competent – after consultation with the executive committee – to submit requests to government or to offer advice, taking into account paragraph 2 of the same article ('The requests and advisory opinions addressed to government by the sections and study groups must be sent to the Executive Committee, which forwards them to government as quickly as possible. The Executive Committee is empowered to offer its own commentary together with a request or opinion to government. It may not send such a commentary to government before consulting the section or study group concerned and must send a copy of the commentary to the section or study group. If the Executive Committee sees fit, it will ascertain the views of the Council of Members as quickly as possible. The views of the Council of Members will in any event be ascertained if no agreement is reached between the section or study group concerned and the Executive Committee.')

f. To what extent is the given input public?

The advisory opinions of the Administrative Jurisdiction Division,¹⁰ the Council for the Judiciary¹¹ and the Dutch Association for the Judiciary¹² are public and can be consulted on their websites.

At the end of 2014 the Supreme Court started publishing current and past advisory opinions to increase transparency. According to the website, the overview contains opinions of the Supreme Court and the Procurator General 'if and insofar as these are to be made public'.¹³

If not:

¹⁰ For an overview see: <https://www.raadvanstate.nl/adviezen.html> (in Dutch).

¹¹ For an overview see: <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Wetgevingsadvies/Paginas/default.aspx> (in Dutch).

¹² For an overview see: <http://www.nvvr.org/bibliotheek-11.php> (in Dutch).

¹³ For an overview see: <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Over-de-Hoge-Raad/Publicaties/Paginas/default.aspx> (in Dutch).

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

Input mechanisms for the courts at this stage are regarded as highly desirable. They improve the quality of legislation. In addition, they offer academics the chance to address certain problems in the professional literature.

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 Administrative Jurisdiction Division sees no objections or risks attached to formal consultation. On the contrary: see the answers to questions 1d and 1g. Furthermore, it obviates any possible objections by stating explicitly in its response to a request for consultation that the response does not pre-empt answers to any questions that could arise in proceedings before it should the bill in question be adopted.

The Administrative Jurisdiction Division's advisory role is interpreted in such a way that its opinions are confined to the scope of the legislative proposal to be advised on. In addition, it exercises great restraint in offering alternatives. This secures its independent position and makes it possible to resolve any objections that may be raised concerning this formal consultation.

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?

There is a risk that giving unsolicited advice at the drafting stage of legislation could be interpreted as adopting a party political position. As a result, the independence of the body concerned could be called into question. Furthermore, giving unsolicited advice could have consequences if a question of law were to subsequently arise in a dispute that is connected to the subject of the unsolicited advice.

If the Administrative Jurisdiction Division has given unsolicited advice on legislation that later becomes the subject of proceedings before it, a situation could arise in which the parties to those proceedings question its independence and impartiality. For this reason, the Administrative Jurisdiction Division should not give unsolicited advice.

Risks can be managed by reviewing cases in the annual report and indicating what additions or adjustments are needed to resolve specific difficulties (for example by ‘tweaking’ the legislation). In addition, as also stated in the answer to question 1c, steps can be taken to ensure that the Administrative Jurisdiction Division receives a formal request for consultation if so desired. In this case, the risk that the advice could be seen as politically motivated no longer arises. In this context, see also the answers in Part 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, the Advisory Division of the Council of State and other bodies provide input or advice.

If so:

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

There is structural consultation with the Advisory Division of the Council of State on all bills and draft orders in council. This takes place after the government has concluded its decision-making on the bill and is thus the final step before a bill is introduced in parliament. The Advisory Division is also asked to advise on private members’ bills. In addition, the government may request its advice on legislative or administrative matters not directly related to the substance of a specific legislative proposal, but then the advice is referred to as ‘information’.

Requests for information generally concern a fairly detailed proposal. The depth and scope of the information the Advisory Division provides is primarily based on what it deems to be relevant to the further discussion of the bill by the government and the two houses of parliament. Responding to a request for information does not primarily

– if at all – involve assessing a legislative proposal: the aim is to answer one or more specific questions. There is therefore no final conclusion.¹⁴

For example, information may be requested concerning amendments submitted during a bill's passage through the House of Representatives. 'Information' in this context is a form of supplementary advice. However, information can be requested at any time or in any form and may, for example, be requested at the beginning of the legislative process before there is a completed bill. One example is the information requested on the outline policy document regarding the modernisation of the Code of Criminal Procedure.

Another advisory body that is consulted in all policy areas is Actal (the Dutch Advisory Board on Regulatory Burden).¹⁵ Actal advises the government and both houses of parliament on the regulatory burden borne by businesses, citizens and professionals. The regulatory burden includes administrative costs (incurred through reporting obligations to government) as well as compliance costs and costs arising from supervision by the authorities. One of Actal's tasks is to advise on the impact of proposed legislation on the regulatory burden (prior assessment). The assessment framework is as follows.

1. Is legislation necessary (has the zero option been considered)?
2. Is the regulatory burden proportionate to the policy aim? Are there any less burdensome alternatives?
3. Is there provision for an appropriate means of implementation?

Actal's mandate runs out in 2017. The government has decided that even after Actal's mandate has expired, proposed legislation should be assessed for its impact on the regulatory burden by an external, independent advisory body.¹⁶ The first stage at which assessment and advice will take place will be at the beginning of the legislative process. The next stage will be during the online public consultation phase. The aim is for the new advisory body to submit and publish its formal advice during this phase. For this purpose, a regulatory impact assessment will need to have been drawn up by this stage by the ministry concerned and appended to the explanatory memorandum

¹⁴ See the Council of State's 2012 annual report: http://jaarverslag2012.raadvanstate.nl/de-raad-als-adviseur/verzoeken-om-voorlichting/verzoeken-om-voorlichting/cDU289_Verzoeken-om-voorlichting.aspx (in Dutch).

¹⁵ For more information see: <http://www.actal.nl/english/about-actal/>.

¹⁶ See: https://www.tweedekamer.nl/kamerstukken/brieven_regering/vergaderjaar_2016-2017, 29 515, (Tackling the regulatory burden and administrative costs, no. 397). (in Dutch).

accompanying all relevant proposals for new legislation. The last assessment will be made using the version on which the Cabinet bases its decision.

Generally speaking, other advisory bodies are usually consulted whenever their specific expertise is required (these include the Dutch Data Protection Authority, the Electoral Council, the Council for Health and Society, the Public Administration Council and the Education Council. Implementing agencies are generally given the opportunity to respond to legislative proposals and to test their feasibility at an earlier stage in the legislative process. The Local and Central Government Relations Code creates scope for sub-national authorities (municipalities and provinces) to advise well beforehand on legislation that affects them.

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 Advisory Division of the Council of State is empowered to give unsolicited advice, but does this only sporadically (in 2015 it gave unsolicited advice on a single occasion on sanction systems in legislation; for several years prior it gave no unsolicited advice and it has not done so since 2015). In its annual report the Advisory Division draws attention to broader trends in legislation, especially where quality issues arise.

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

The Advisory Division makes use of an assessment framework, which is published on its website. Roughly speaking, an assessment has three main components.

1. A policy analysis (a critical analysis of the policy aspects of a legislative proposal, focusing in particular on a description of the problem, how it is tackled and feasibility). To illustrate, an example from the advisory opinion on the bill partially prohibiting clothing that covers the face (July 2015):
'The bill introduces a ban on wearing clothing that covers the face on public transport, in education and care institutions and in public buildings. The Advisory Division notes that these public sectors are capable of setting their own rules. Furthermore, they may be expected to exercise their powers in an appropriate manner and to enforce such rules (whether or not with police

assistance). In other words, a sector-specific ban on face coverings is already a factual and legal reality where it has a function. It has not emerged that the absence of uniformity suggested by the explanatory memorandum has led to a lack of clarity or to legal uncertainty. The bill, which itself assumes that enforcement is primarily the responsibility of the institutions themselves, is therefore unnecessary’.

2. A legal assessment (to determine the legal quality of a bill by examining it in light of higher law and conformity with existing law). An example of the higher law test can be found in an advisory opinion on the bill prohibiting profit distribution by care insurers (October 2016). ‘The Netherlands has a private care insurance system that is subject to conditions imposed under public law. In such a system it is logical for profits and losses to be borne by the insurer. The introduction of a ban on profit distribution further removes possible incentives for care insurers to take efficiency measures. The Advisory Division would point to a number of legal and practical complications. It would question the justification for the bill set out in the explanatory memorandum and based on article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR; protection of property) and article 63 of the Treaty on the Functioning of the European Union (TFEU; free movement of capital). The Advisory Division is not convinced that the private member’s bill can survive scrutiny in light of these treaty provisions.’

3. Technical assessment (examining the technical quality of the bill, for instance whether its structure is logical and systematic and whether it is internally consistent and uses the correct terminology). The technical assessment of the advisory opinion on the Nature Conservation Decree (September 2016) reads as follows. ‘The statutory norms governing the Nitrate Reduction Programme are repeated practically in their entirety in the draft decree. However, it is not the intention for provisions from higher legislation to be repeated in implementing legislation, unless it is unavoidable. Repeating provisions from higher legislation can give rise to unintended discrepancies that make interpretation difficult. Furthermore, those who have to comply with the legislation are compelled to familiarise themselves with both the higher provisions and the implementing provisions, which in the case of long and complex pieces of legislation (as is the case here) can be a complicated

matter. The Advisory Division recommends scrapping the repetitions in the draft decree except where they are absolutely necessary.’

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

Article 73, paragraph 1 of the Constitution states that the Council of State is to be consulted on bills and draft orders in council. This is thus a permanent situation laid down at the highest level of law. The Council of State Act contains supplementary provisions on the Advisory Division, including the options of unsolicited advice and information (sections 21 and 21a of the Council of State Act).

Article 79, paragraph 1 of the Constitution states that permanent bodies to advise on matters relating to legislation and administration of the State are to be established by or pursuant to Act of Parliament. Various Acts impose an obligation to consult a specific advisory body (see for example the provisions regarding the Dutch Data Protection Authority and the Education Council).

The Advisory Bodies Framework Act contains a general provision governing advisory bodies that have a public-law task to advise the government on generally binding regulations and the policy to be pursued by central government.

e. To what extent is the given input public?

The advisory opinions and information supplied by the Advisory Division are published by the government together with the government’s response to the advisory opinion in the subsequent report (article 26 of the Council of State Act). Advisory opinions on private members’ bills are published by the House of Representatives together with the response of the member in question. After they appear in the official publications,¹⁷ advisory opinions can also be consulted on the Council of State’s website.¹⁸

If not:

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

¹⁷ Parliamentary Papers and Government Gazette, available at www.overheid.nl (in Dutch).

¹⁸ For an overview of advisory opinions see: <https://www.raadvanstate.nl/adviezen.html> (in Dutch).

Yes, independent advice improves the quality of legislation. The Advisory Division can encourage rational political decision-making by the legislator and ensure that legislation is in line with the rule of law; in this process the consistency and coherence of policy and legislation are essential values. Advice can also influence the attention devoted to legislation by legal specialists and academics.

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?

On the contrary, formal consultation at this stage benefits the quality of legislation. Restrictions on advisory bodies or a reduction in their number – a constant aim of government and parliament on the grounds of cost control and efficiency – could lead to a weakening of the countervailing powers essential to a democracy governed by the rule of law.

Objections may arise if advisory bodies are asked to provide advice concerning their own status (for example, if the Advisory Division were to be asked to advise on the Council of State Act), or on issues that are strongly politicised. In such cases, great restraint is exercised.

An assessment framework in the public domain is used conscientiously to avoid the risk of an advisory body finding itself in party political waters. The assessment framework of the Council of State's Advisory Division is published on the Council of State website.

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?

There is a possible risk of unsolicited advice being seen as politically motivated. This could raise questions about the objectivity and impartiality of the body in question. Unsolicited advice should therefore always be confined to subjects that are not politically charged. See for example the Advisory Division's opinion on sanction systems.¹⁹ Raising

¹⁹ Advisory Division, Council of State, unsolicited opinion no. Wo3.15.0138/II, 13 July 2015 (in Dutch).

certain themes in an annual report can facilitate a more reflective and retrospective view of developments in legislation (see also the answer to question 12).

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?

Bills are frequently posted for online public consultation in the preparatory phase. (www.internetconsultatie.nl). Usually it is the government that is responsible for publication, but in some cases private members' bills also appear on the website. Citizens, businesses and interest groups can subsequently respond, if they so desire. Advisory bodies are often invited to respond to such a preparatory version of the bill.

In some cases, the government opts for broad cooperation with as many of the parties involved in implementation as possible. Rounds of talks and conferences are held where interested parties can provide input, enter into discussions with each other and respond to the relevant ministry's ideas. This approach was adopted in the preparatory phases of the Aliens Act, the Environment and Planning Act and the modernisation of the Code of Criminal Procedure.

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

An internal discussion is ongoing within the Advisory Division on the exact phase of preparation of legislation in which advice should be requested and provided. The request for advice is based on a legislative proposal which reflects the – often divergent – views of a variety of actors. In the interests of effectiveness, it might be better to obtain advice earlier in the process.

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?

Since 1997 the Council of State has devoted more attention to the active provision of feedback. The 1998 annual report contained a review of the objections the Council of State sees – both in its role as advisory body and as highest court – to the increasing use of specific Acts governing large-scale projects.

In 2001 the Council of State set up a Knowledge and Research Section. One of its tasks was to promote feedback from the courts to the legislator.²⁰ In 2003 it was agreed that the chamber coordinators would report back in the weekly consultations with the Knowledge and Research Section on problems experienced with legislation.

An internal symposium on feedback to the legislator held in 2005 led to the creation of an internal reporting system based on a standard form.²¹

Subsequently the internal organisation of the Council of State was further improved. Since 2016 the Council has had an internal monitoring committee, an informal feedback mechanism, in which both the Advisory Division and the Administrative Jurisdiction Division are represented at the level of State Councillors and staff. Although a judgment in administrative proceedings is the most appropriate way of addressing a problem, it is not always suited to drawing the legislator's attention to a difficult legal question, minor technical defects or a broader issue. The committee therefore ensures that structural problems and technical shortcomings are identified and, where necessary, reported to the Advisory Division. It is then up to Division to decide whether to pass on the information, either officially or informally, to the legislator. The Administrative Jurisdiction Division sometimes provides feedback to the legislator informally, at State Councillor level. This only occurs in the case of minor technical shortcomings that mostly arise from an omission on the part of the legislator.

If so:

²⁰ Since abolished.

²¹ Jan van Kreveld, *Rapport: Terugkoppelen naar de wetgever*, (Report on feedback to the legislature), August 2006.

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

The Administrative Jurisdiction Division is not formally consulted after legislation has been adopted. Lawyers working in the Administrative Jurisdiction Department and State Councillors in the Administrative Jurisdiction Division keep an eye out for structural problems and technical defects in legislation and implementation, and raise these issues during hearings, consultations and deliberations. Such discussions are often based on problems identified in the case law, which may be structural – for example, the observation that a statutory instrument ‘invites’ litigation and in that sense is ineffective – or may involve more purely technical problems. Other more general issues related to the effectiveness of legislation may be identified. These must be problems that the courts themselves cannot resolve in a judgment and which the legislator therefore has a duty to address.

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?

See above. This is always done through the Advisory Division, except where minor technical defects are concerned. This Division decides the route to be followed, depending on whether it is drafting an advisory opinion that is related to the problem in question or if a request for advice is expected that would enable the Advisory Division to raise the problem in its response.

When the Administrative Jurisdiction Division identifies a problem it is introduced as a point for consideration in chambers, during the evaluation of hearings and on the agenda of consultations and deliberations. It is also passed on to the monitoring committee, which decides whether it should be reported to the Advisory Division, preferably accompanied by an indication of a possible solution. The Advisory Division can incorporate the issue in regular advisory opinions or in its (informal) consultations with the ministry in question. It can also include it in an unsolicited opinion or raise the issue in the Council of State’s annual report.

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?

Apart from raising minor technical problems, which can be included in informal feedback, the Administrative Jurisdiction Division does not draw the legislator's attention to defects in the quality of legislation on its own initiative. See also the answer to question 9b.

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

Only quality of legislation considerations (i.e. not political or administrative reasons) play a role in decisions as to whether to identify problems and incorporate them in feedback. More specifically, quality assurance and legal protection are the motivating factors. Recent issues requiring feedback include a procedural question regarding the suspension of decision-making deadlines, a question regarding a gap in legal protection and a transitional law issue. In addition, general problems concerning the effectiveness of legislation may be addressed.

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

The monitoring committee has no statutory basis since it is a purely internal, informal feedback mechanism. Nor is there a statutory basis for the discussion of such issues in the annual report.

f. 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?

As explained in the answer to question 9c, the Administrative Jurisdiction Division does not take the initiative to draw the legislator's attention to defects in the quality of legislation (except for the cases described therein). Consequently, it would not take the initiative to inform the legislator of any increase in work load. Furthermore, the annual report looks back on the previous year and speaks in general terms about legislation.

g. To what extent is the given feedback public?

See the answer to question 9f.

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

To illustrate the way in which feedback is given, please see the Administrative Jurisdiction Division's judgment of 20 December 2016 (ABRvS 201609138/3/V2, ECLI:NL:RVS:2016:3350). In this ruling, the President of the Administrative Jurisdiction Division, acting as interim relief judge, examined for the first time the consequences of the judgment of the European Court of Human Rights (ECtHR) of 5 July 2016 in the case of *A.M. v. the Netherlands* (ECLI:CE:ECHR:2016:0705JUD002909409). The ECtHR ruled that an appeal lodged with the Administrative Jurisdiction Division in asylum proceedings, in which an 'arguable claim' under article 3 of the European Convention on Human Rights (ECHR) is at issue, is not an effective legal remedy, because Dutch law does not allow for automatic suspensive effect in such proceedings. This means that in principle, the person in question cannot await the outcome of his/her appeal in the Netherlands and can be removed to the country of origin. The ECtHR held that an asylum seeker need not therefore first lodge an appeal with the Administrative Jurisdiction Division before applying to the ECtHR.

The interim relief judge noted that the Dutch legislator had not provided for automatic suspensive effect for appeals lodged with the Administrative Jurisdiction Division. Aliens can therefore apply directly to the ECtHR without first lodging an appeal with the Administrative Jurisdiction Division. This gives rise to the risk that the Administrative Jurisdiction Division will no longer be able to fulfil its task of promoting legal uniformity, the development of the law and legal protection in general.

The interim relief judge held that it is primarily the task of the legislator to decide whether appeal to the Administrative Jurisdiction Division in asylum proceedings should have suspensive effect and how this should be done. Nevertheless, the interim relief judge of the Administrative Jurisdiction Division will ensure that rulings are more closely aligned with ECtHR case law, as far as possible, by ordering more often than in the past that non-nationals must not be removed before a decision is

given on their appeal. This will also be the case if no specific date for removal has been set.

If not:

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

In the cases in which the Administrative Jurisdiction Division does so, it is highly desirable.

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?

If the legislator wishes to consult the courts, it is essential for party political interests to be excluded. In addition, just as with prior consultation, there must be an objective report of problems with legislation. The same risks arise in connection with formal advice in the drafting stage of legislation, which in practice are reduced to a minimum. We have no experience of formal consultation of the courts after legislation has been adopted.

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?

The most commonly expressed objections to establishing a mechanism whereby the legislator's attention is drawn to shortcomings in legislation are twofold: first, the risk of vulnerability, and second, the risk of creating a situation in which the independence and impartiality of the courts can be questioned, possibly leading to the recusal of judges at their own request or the request of parties to litigation.

In this context a number of cases heard by the ECtHR are worthy of note. These include the *Procola*,²² *Kleyn*²³ and *Sacilor*²⁴ cases. In 1995 a discussion arose on the position of the Dutch Council of State when the ECtHR ruled in *Procola* that the Luxembourg

²² ECtHR *Procola v. Luxembourg*, 28 September 1995, appl. no.14570/9.

²³ ECtHR *Kleyn and others v. the Netherlands*, 6 May 2003, appl. nos 39343/98, 39651/98, 43147/98 and 46664/99.

²⁴ ECtHR *Sacilor Lormines v. France*, 9 November 2006, appl. no. 65411/01.

Council of State could not be regarded as an impartial tribunal within the meaning of article 6 of the ECHR since a number of its members had had to rule on orders made under a legislative measure on which they had previously advised. At the time, the structure and procedures of the Luxembourg Council of State were very similar to those of its Dutch counterpart. The judgment led to a number of practical adjustments to the Dutch Council of State's procedures, in order to guarantee a better separation of its advisory and judicial functions. In the case of *Kleyn v. the Netherlands*, the position of the Administrative Jurisdiction Division was explicitly raised before the ECtHR. The Court took the view that the independence of the Administrative Jurisdiction Division in relation to the Advisory Division was sufficiently guaranteed. There was therefore no incompatibility with the right to a fair hearing by an independent and impartial tribunal (article 6, paragraph 1 of the ECHR).

It is frequently argued that drawing the legislator's attention to legislative problems is incompatible with the courts' constitutional position. Evidently, it is not the courts' task to assess the correctness of political and policy considerations. But this need not prevent the courts from pointing out legal defects in legislation or problems in implementation that were probably not foreseen by the legislator. Feedback can contribute to the quality of legislation.

The monitoring committee at the Council of State observes this functional division. Feedback is not linked to individual cases. And only the merits of the issue – not political or administrative considerations – play a role in the decision to draw attention to a question and then pass it on to the Advisory Division.

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?

Many advisory bodies are empowered to provide unsolicited advice on legislation. To do so, they may make use of experience with implementation and enforcement. Evaluation of legislation is normally carried out or commissioned by the government and not by advisory bodies.

If so:

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

The government does not ask the Advisory Division for input on how experience with implementation and enforcement could lead to legislative amendments. If the evaluation of legislation leads to proposals for amendments these are of course submitted to the Advisory Division for its advice. Parliament (House of Representatives and Senate) sometimes consults the Advisory Division on an informal basis. Experiences with the quality of legislation are exchanged at such meetings.

The Court of Audit checks the implementation of policy by central government. This may result in the Court concluding that legislation is not working as intended. Parliament sometimes consults with the Court of Audit.

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 Advisory Division makes little use of its power to submit unsolicited advice (see the answer to question 4b). Some years ago the Council of State, acting as an advisory body, issued one such opinion based on the experiences of the Administrative Jurisdiction Division.²⁵ The Advisory Division also uses its annual report to highlight broader experience with legislation. In general, this does not refer to particular experiences with a specific item of legislation.

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

As outlined in the answer to question 6, the annual report takes a more reflective approach that looks back over the previous period to draw attention to developments in legislation. One example is the passage in the Council of State's 2015 annual report in which the Advisory Division, with a view to making legislation more durable,

²⁵ Advisory opinion of 7 October 2005, Parliamentary Papers, House of Representatives 2005/2006, 30300 VI, no. 169.

called for greater care in legislative drafting in order to avoid the need for frequent amendments.

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

There are no statutory mechanisms for input from independent advisors after legislation has taken effect.

e. To what extent is the given feedback public?

Feedback through annual reports is in the public domain. The Council of State's annual reports can be found online.

If not:

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

The knowledge acquired by advisory bodies on the quality of legislation can be useful in providing the legislator with feedback on problems. There are a number of ways in which this can be done.

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?

It is important for advisory bodies to be adequately equipped to make a good assessment of the impact of legislation. Sufficient expertise and capacity are essential. Where these are not present, it might be possible to commission an independent research agency to investigate the effects of legislation or to evaluate a specific Act. An advisory body could then be asked to formulate recommendations. The existing instrument of information supplied by the Advisory Division would be suitable for this purpose.

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?

In theory, unsolicited identification and analysis of shortcomings would not in itself be problematic. However, if advisory bodies provide unsolicited solutions to the problems identified, they must be aware of the risk that their advice could be regarded as being of a party political nature.

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?

The evaluation mechanisms described above could probably be seen in this light. There is no general input mechanism via internet in the Netherlands for experience with legislation. However, the government regularly commissions studies of the impact of legislation. This research is often conducted via user panels or network meetings.

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

No further remarks.