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vanState



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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?

In the Republic of Slovenia there is in general the same system for everyone - courts, advisory bodies and general public - to participate in the proceedings prior and after drafting of legislation. The Rules of Procedure of the Government of Slovenia (hereinafter the Rules) in Article 9 state:

“Proposals and opinions addressed by expert circles and the general public to the Government, the competent ministry or a government office shall be examined and, if possible, taken into consideration in drawing up the next regulation.

The proposer of a regulation shall invite experts and the general public to participate in drawing up a regulation by publishing a general invitation, together with a draft regulation, on its website.

The proposer of a regulation may also highlight particular issues and address them to a specific organisation, person from civil society or expert, together with an invitation to participate and the enclosed draft regulation.

The groups referred to in the second paragraph of this Article must respond by the deadline, which is set by the proposer and ranges from 30 to 60 days from the day of publication on its website, or in accordance with the agreement on participation referred to in the preceding paragraph.

The proposer of a regulation shall inform the expert circles and general public referred to in the second paragraph of this Article in writing of the essential proposals and opinions that were not taken into consideration and explain the reasons for this within 15 days of the adoption of the regulation or the submission of the proposed regulation for further procedure.

The public shall not be invited to participate in drawing up proposed regulations in cases where this is not possible due to the nature of the issue concerned (i.e. measures adopted under an emergency procedure, measures that must be adopted and implemented immediately, with a specified day of entry into force without prior notification of the public).

The public shall not be invited to participate in drawing up the following proposals: for a national budget, a revised national budget, a law on the implementation of the national budget and its implementing regulations, the annual financial statement of the national budget, the rules of procedure of the Government; an ordinance, a resolution, with the exception of a resolution on the national programme in a particular field, development and planning documents and documents on the implementation of development policies, a declaration, acts ratifying international treaties and an official decision.

The provisions contained in the second to the fifth paragraph of this Article shall not apply where the participation of the public in drawing up regulations is regulated by law.”

In addition article 10 of these Rules provides for a publication on the websites. It states: “Material referred to in the second paragraph of the preceding Article and published on websites shall include: draft regulation; summary of the content with expert bases, key questions and objectives; duration of public presentation during which positions, proposals, opinions, and comments may be submitted; date and place of possible public debate or any other form of participation; and official electronic address and telephone number of the proposer. Concretely this website is called “e-democracy”.

On that basis everyone can participate in drafting a legislation.

Courts (in accordance to the second paragraph of the Rules) regularly receive proposals of draft legislation, with a request to form an opinion, especially from the Government (or the competent ministry), which is the main proposer of laws in Slovenia.

Representatives of the judiciary (usually representatives of courts, Judicial Council and the Judges' Association) are often involved in the legislative procedure as experts. They are

members of various work groups, established by the Ministry, competent for the preparation of legislative materials and they also participate in meetings of the competent working bodies of the National Assembly, when they discuss a draft laws or proposed modifications and amendments to the existing legislation.

If so:

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

The courts are consulted in the context of public participation in the preparation of the draft law and are invited to provide the relevant remarks and proposals.

In all of the aforementioned cases of cooperation of the judiciary with the executive and legislative branch, the representatives of judiciary regularly draw attention to the relevant case law.

- 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?

The feedback of the courts goes directly to the proposer of draft law (Government or on its behalf the competent Ministry) or to the legislator, depending on the stage of the legislative procedure.

- 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 judiciary draws attention to certain issues of the draft legislation, when the judiciary considers this to be necessary, but especially when there is a need to prevent from the undue interference with the independence of the judiciary.

If the proposal relates to a certain provision or law, the court often gives specific and explained proposals, which are given directly to the legislator. It is not a general practice for the court to give a general opinion for example in a public newspaper, because the principle of impartiality could be compromised.

Contribution in a general meaning is made in an annual report of the court. For example, in the last year's annual report of the Supreme Court a criticism was given because in the last few years laws were often adopted in urgent or summary proceedings (in 2015 30 % of all laws). Experience has shown that the adoption of laws in urgent or summary proceedings often bring into force hasty solutions which also affect the trial and the whole function of the judiciary. In the aforementioned annual report the court pointed out, that less than half of all the laws were adopted through the ordinary procedure, but even these are in some cases inconsistent, nomotechnically insufficient, inadequately reasoned, and also that the financial consequences for the judiciary are not adequately evaluated. Entry of insufficient or inappropriate regulations into force has a significant impact on the efficiency and effectiveness of the courts. This is mainly reflected in bankruptcy, enforcement and various other non-litigious proceedings and in proceedings before the Labour and Social Court.

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

Aspects of the quality of legislation vary depending on a specific question. The court can address a legal gap, impractical aspect of a certain provision or it can propose an improvement of existing legislation based on its experience.

The last proposal for example concerned the provisions of the Administrative Dispute Act. The conditions to file a revision as an extraordinary legal remedy to the Supreme Court were different in civil law and in administrative law (where the Civil Procedure Act is used subsidiary), which only confused the parties and their lawyers. So the proposal was to unify this conditions, which is better for the court (it is easier to have an unified jurisprudence) and also for the parties of a dispute.

e. To what extent is the given input public?

The judiciary regularly informs public about its work and publishes all the important information transparently on its website. That goes for the court's judgements, however it does not always apply for the proposals to draft or change legislation. Even if such proposal is not published, the proposer of draft law has to explain in a publicly announced final report before the adoption of the law, which proposals from which organ were accepted and which rejected, along with the reasons for such decision.

In addition information regarding any kind of interaction or cooperation between the legislative, judicial and administrative branch (which are in a form of a document) may be requested by any person exercising the right to access public information according to the Access to Public Information Act. Of course there are exceptions due to the content of a document.

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?

There is a statutory basis in the Courts Act, which states in Article 110 that the Plenary session of the Supreme Court decides on initiatives for issuing or amending a law.

Also, (as fully explained in the answer to question 1) the Article 9 of the Rules of procedure of the Government of Republic of Slovenia state that the proposer of a regulation invites experts and the general public to participate in drawing up a regulation by publishing a general invitation on its website and may also highlight particular issues and address them to a specific organization (for example courts), person from civil society or expert, together with an invitation to participate and the enclosed draft regulation.

In addition, according to Article 28 of the Courts Act the Judicial Council is competent to provide the National Assembly with an opinion on laws regulating the status, rights and duties of judges, as well as court staff. Judicial Council also gives an opinion on the budget proposal for courts. In addition according to Article 41 of the Rules of procedure of Judicial Council the Judicial Council may while exercising its powers and duties address the appropriate initiatives, proposals, requests and other proposal acts to the state authorities and other entities.

- 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?

This is a question concerning an issue on how we see the role of judiciary in the process of drafting legislation. There are concerns, that judges should not actively participate in such discussions as the appearance of impartiality of a judge must be constantly protected. If a judge in a particular case should decide on legal issues, regarding which he or she has already stated an opinion in the legislative process, the impartiality in this case could be questioned. Following this position the courts should be extremely conservative at the stage of drafting legislation.

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?

Please see answer to previous question.

B) Input from advisory bodies

General note from the Supreme Court: The Supreme Court does not have a close overview of the practice of advisory bodies regarding their participation in drafting legislation. Therefore we can not answer this part of the questionnaire. However, as explained in the answer to question 1, in the Republic of Slovenia the procedure for participation in drafting legislation is in general the same for everyone.

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

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?

All of the mechanisms, mentioned in the first part of this questionnaire, also apply for the process of amending an already existing law.

Furthermore the courts are institutions which use formal legal sources in practice, so the courts draw attention on weaknesses of legislation also through its case law.

If so:

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

The courts are consulted through the already mentioned mechanisms in the first part of this questionnaire to discuss the proposed modifications and amendments to the existing legislation.

If so:

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

Please see answer to previous question.

- 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?

It depends whether the feedback was given through the aforementioned mechanisms, or through the court's case law. In the first case it goes directly to the proposer of the amendments to the law or to the legislator. To the contrary judgments of courts are primarily intended to the parties of the court proceedings, so the potential feedback regarding legislation, which may be included in the reasoning of a judgment, goes to the legislator indirectly.

- 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?

Judiciary responds with suggestions for improvements of legislation, if the judiciary considers this to be necessary.

- d. What aspects of the quality of the legislation are specifically addressed and can you give an example??
- 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?
- f. To what extent is the given feedback public?

As already mentioned in question 1. e judiciary regularly informs the public about its work, also information regarding any kind of interaction or cooperation between the legislative, judicial and administrative branch (which are in a form of a document) may be requested by any person exercising the right to access public information.

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

The feedback may be included obiter dictum in the reasoning of a court's judgment. However, that is not a general practice of the Supreme Court. The more common way is to propose changes through above mentioned mechanisms.

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?

There is no written law in that regard.

- 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 a judge in a particular case decides on legal issues, regarding which he or she has already stated an opinion, the impartiality of a judge could be questioned.

- 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?

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?

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?
As already explained in the answer to question 1, there is a website called "e-democracy", where the general public can submit its proposals and comments.
16. Have you any additional or other remarks about feedback mechanisms after legislation has been drafted?