

ACA QUESTIONNAIRE FOR THE 2025 SEMINAR IN THE HAGUE ON CONTRIBUTING TO THE QUALITY OF LEGISLATION

Looking into the role of advisory bodies, like Councils of State ex ante, but also the role of Supreme Administrative Courts ex ante or ex post (giving feedback to the legislature) aimed to improve practical effectiveness, proportionality and fairness of legislation

INTRODUCTION

The role of state powers in the legislative process

Laws order society, protect and give direction. Laws regulate the behaviour of citizens and government and are an important pillar to give citizens legal certainty. Legislation must therefore offer clarity but also flexibility in a changing society. Developments in society require choices that sometimes, but not always, also lead to legislation. Given this, the deployment and use of legislation must be handled with care because the expectations it raises must be fulfilled and the law must retain its validity in the long term.

Legislation ideally comes about in a continuous and constructive dialogue between the state powers. The executive and the judiciary branch depend on good legislation. Legislation that is carefully drafted, with sufficient attention to all relevant interests and values, including enforceability, will in practice lead to fewer problems and thus fewer lawsuits. And legislators can improve the quality of legislation by drawing in part on the previous practical experiences of executive agencies and (administrative) judges in implementing and enforcing the law and any shortcomings they have found.

There are various (formal, regulated but also informal) instruments or mechanisms through which (solicited or unsolicited) input from executive agencies and the judicial branch, as well as from independent general advisory bodies regarding future and existing legislation is or can be provided. For example, instruments that are used prior to the creation of legislation (simply referred to as 'consultation' or ex ante) and instruments that are used in response to existing legislation (simply referred to as 'feedback' or ex post).

On May 15, 2017, an ACA seminar in The Hague discussed the tools and mechanisms existing in different countries that can contribute to good legislative quality. Almost all ACA members who responded (28 in total) reported having some experience in providing feedback, whether on a regular basis or not, to legislators on trends and other developments they have observed. This input is provided in various ways; not only through independent opinions and (administrative) court rulings, but also through various formal and informal mechanisms used by consultants, executive agencies, regulators, and judges.

Now several years later, there is again a need to organize a new seminar on the contribution to legislative quality to further explore this topic among members of the



Co-funded by
the European Union

ACA-EUROPE and beyond, with a particular focus on legislative advice and judicial feedback to the legislator. To that end, this questionnaire is drafted.

Legislative advice

Legislative advice can contribute to the quality of legislation. In that case- in short- it is tested whether a legislative proposal fits within existing laws and the legal system as a whole, is implementable and enforceable. In doing so, numerous aspects of legislative quality can be examined, both legal and policy aspects. And to that extent, legislative advice can respond to and make use of the interaction between the state powers. After all, the state powers each have an interest and a role to play in the legislative process based on their responsibility at any given moment. Policy, legislation and implementation can work closely together in the cyclical legislative process in order to provide solicited or unsolicited feedback on the quality of the proposed law.

Against this background, the Advisory Division of the Dutch Council of State conducts as part of its regular advisory task an analysis that examines whether, among other things, the experiences and views of executive agencies (including local and regional authorities) and the judicial branch have been adequately taken into account in the drafting of the bill. To this end, in addition to a constitutional and legal analysis, the Advisory Division also conducts a policy and implementation analysis and, where appropriate, also analyses the consequences for legal practice. No ranking or order exists between these parts of the assessment. The policy and implementation analysis may in themselves give rise to comments but also provide important input to the legal and constitutional analysis, for example with respect to the proportionality of the bill.

The Belgian Council of State, on the other hand, only carries out a legal examination, which in any case concerns the competence of the legislator, the existence of a sufficient legal basis for regulatory acts and compliance with higher legal standards, as well as compliance with the mandatory formal requirements for the creation of the new law. If it follows from the applicable higher legal standards or principles, a proportionality test, a test of substantive motives or an effectiveness test shall also be carried out where appropriate. In no case, however, does the opinion concern the mere policy expediency of a new legal norm.

Communication between state powers

In order to function well the legislative, executive and judicial state powers are separated but also mutually dependent. There might be tension between the state powers sometimes, for example as a result of legislation which does not take certain interests or general principles of law into account. For a dynamic and healthy balance between the state powers judicial (constitutional) review ex ante and ex post are very relevant.

Depending on the design of an ex post constitutional review, this raises the question of what this means for the ex-ante constitutional review conducted within that framework. Of course, as legislative institutions, government and parliament are primarily responsible for the quality of legislation and ideally already conduct a thorough review of the constitution, higher law and fundamental legal principles during the creation of



legislation. What impact does the possibility of ex post judicial constitutional review have on an ex ante constitutional review by an independent general advisory body, such as an Advisory Division of a Council of State? And in how far do administrative courts provide feedback to the legislator in case they encounter more or less technical problems in legislation? But also vice versa, which influence does constitutional review ex ante have on judgements by (administrative) courts?

ACA questionnaire

In light of these themes and developments and in the interest of the quality of legislation, a further survey of the instruments of feedback is desirable and also of great interest in the ACA context. For this reason, the Dutch and Belgium Council of State organise an ACA seminar in The Hague on March 17-18, 2025 on the topic of legislative advice and feedback. In preparation for that seminar, we are pleased to submit to you the questionnaire below, which aims to map the design of legislative advice and interaction with the (administrative) courts against the background of developments in the relationship between state powers in general and constitutional review in particular.

The purpose of this questionnaire (chapters 1-3) is to obtain an inventory of the existence, design and working method of independent general advisory bodies.¹ What is that working method and what are the points of interest in the legal, constitutional ex ante review? What influence and significance does an opinion have in the legislative process?

In addition, the questionnaire (chapter 4) makes an inventory of the modes of influence of case law on legislation and the design of ex post judicial constitutional review in different countries. This may offer more insight into the interaction between legislative advice and the judiciary. What trends are visible and how can the ex-ante and ex post constitutional test reinforce each other?

In the case you as ACA-member and Supreme Administrative Court do not yourself have an advisory function ex ante please feel free to consult the institution in your country that has such a function.

¹ Not being specialized advisory bodies that focus on certain sub-interests or sectors or that perform a more technical review, for example, focused on the regulatory burden.



CHAPTER 1 GENERAL INFORMATION ON ADVISORY FUNCTION

In the European Union and beyond, there is no clear overview of which countries have a state body with a general legislative advisory function. This chapter aims to get a clearer overview of this.

1) Does your country have an independent governmental institution – such as a Council of State – giving advisory opinions ex ante aimed at the improvement of the quality of legislation?

- 0 Yes ²
X No ³

The Czech Republic does not have such an *independent* governmental institution. Nevertheless, there is an institution called the Government Legislative Council (the GLC). It has been established as an advisory body to the Government of the Czech Republic (Section 28a of Act No. 2/1969) and forms part of the Office of the Government. It is presided over by a Minister, and its members are appointed and dismissed by Government resolution. The legislation does not provide any institutional guarantees of the GLC's independence. It is therefore not an independent body.

The GLC consists of 30 members, the majority of whom are external experts who receive only symbolic reimbursement. The GLC members rank from among professors of law and other academics, renown legal practitioners, members of Parliament, former or even current judges [e. g. former judge and President of the Supreme Administrative Court (the Court), Michal Mazanec, currently acts as a member of the GLC].

The GLC serves as a consulting body to the Government during the preparation of government draft bills. It convenes, as a rule, once every 14 days and issues approximately 30 to 40 opinions per year. In its opinion, the GLC examines the draft bill from the perspective of its compatibility with constitutional law, national law, binding international treaties, international customary law, general principles of law, EU law and case law of national as well as international courts. The constitutional review encompasses both institutional constitutional law and human rights review. The GLC assesses the necessity, clarity and certainty of all provisions and compliance of the draft bill with the rules of the legislative process.

In addition, other institutions, including the Court, may take part in the preparation of government draft bills as consulting bodies. The opinions of these consulting bodies are taken into consideration, and the draft bill might be subsequently modified. The sponsor of the bill is required to prepare a reconciliation form including reasoning how the comments of consulting bodies were addressed. In the case of so-called "substantial comments", the sponsor is obliged to resolve them. However, the Court belongs to a group of consulting bodies that cannot raise "substantive comments". It can raise advisory or formal comments. If there is a disagreement regarding the sponsor's

² If you as ACA Member are not that institution, please ask their assistance in answering this questionnaire.

³ Please proceed to question 38.



resolution of comments, the sponsor convenes a reconciliation meeting. This meeting is attended by representatives of the consulting bodies and the sponsor. If consensus is not reached, the draft bill is submitted to the Government, including the noted disagreements.

Once the draft bill has been approved by the Government, it is submitted to the Parliament. Consequently, the work of the GLC as well as the consulting procedure is focused on the preparatory part of the legislative process and only on governmental drafts of bills.



CHAPTER 4 JUDICIAL FEEDBACK TO THE LEGISLATOR

Dealing with cases, the judiciary can be confronted with more or less systemic problems in the interpretation and application of legislation. The following questions are based on the distinction between two kinds of these problems. Firstly, there may arise more or less technical legal issues such as inconsistencies in legislation, a missing legal base or an incompatibility with higher law. Secondly, the administrative courts may come across more structural problems that are not strictly technical in nature and may be more sensitive and complex. Think, for instance, of difficulties for the administration in implementing a certain statute or the exceptionally harsh consequences that legislation might have in certain types of individual cases.

In short, legal or practical reality may differ from what the legislator had in mind. Problems like these cannot always be remedied in the judicial decision. It is then conceivable that the administrative courts decide to signal these points of attention to the legislator in their decisions or by other means, in order to help improving the quality of legislation and the effectiveness of the implementation of law in practice. That kind of judicial feedback to the legislator is the subject of the following questions.

38) Does the highest administrative court provide the legislator with feedback on technical legal issues that arise from legislation?

- Yes
 No

Explanation if desired:

In its decision-making activities, the Supreme Administrative Court adheres to the principles of separation of powers and seldom proposes *de lege ferenda* suggestions.

Concurrently, the Supreme Administrative Court serves as a consulting body for the area of legislation that pertains to its activities. Consequently, the Court is able to offer an opinion on proposed legislation potentially affecting its functioning and point out deficiencies and errors. As mentioned above, the Court belongs to a group of consulting bodies that cannot raise "substantive comments". Therefore, the comments cannot create a so-called "contradiction"; which the submitter is obliged to resolve.

An example of the consulting procedure is the drafting process of the Building Act of 2020. The Supreme Administrative Court stated that the draft bill is focused only on changes that are intended to fundamentally weaken the position of public administration as a defender and enforcer of public interests for the benefit of real estate developers, ultimately weakening the protection of individuals' rights in both spatial planning and building permit procedures. The Court further red-flagged the non-compliance with the rules of the consulting procedure, as well as the poor linguistic quality of the draft and grammatical errors that could lead to interpretative ambiguities.

Aside from the consulting procedure, the Supreme Administrative Court is occasionally invited to participate in roundtable discussions organised by ministries or parts of the Parliament. For example, the Court attended a roundtable organised by the constitutional law committee of the Parliament to discuss general issues of the judiciary.



39) If yes, where does it provide this feedback on technical legal issues (more options are possible)?

- Judgments
- Indirectly by signalling structural problems to the advisory body
- Annual review
- Journal articles
- Conferences/meetings
- Formal or informal contacts with representatives of the legislator/civil servants
- All of the above
- Other, namely:

The Supreme Administrative Court may provide feedback on technical legal issues when it acts as a consulting body and participates in roundtable discussions at the invitation of the relevant parties.

40) If the highest administrative court provides feedback in its judgments, how does it do this (more options are possible)?

- Implicitly in the reasoning of the judgments
- Explicitly in a paragraph that directs itself to the legislator
- By way of a legal decision on the applicability or bindingness of legislation
- All of the above

Explanation if desired:

The Supreme Administrative Court has occasionally addressed technical and structural issues of legislation in its judgments. In the past, this occurred in connection with the review of elections, when the Court pointed out inappropriately designed electoral documentation and ballot papers and proposed alternative solutions.

The Supreme Administrative Court traditionally states in its judgments that it is only competent to assess the legality of decisions and procedures of administrative bodies *de lege lata*, and not to project *de lege ferenda* considerations on the most appropriate arrangement of legal relations into its decision-making activities and to assess the activities of public administration bodies from this perspective.

In the Czech legal system, it is solely the Constitutional Court that has the power to annul legislation due to its conflict with the constitutional order. It also *ex ante* reviews the compatibility of an international treaty under Article 10a and Article 49 of the Constitution with the constitutional order prior to its ratification. The exercise of this authority regarding international treaties is historically rare.

Judges of general courts, such as Supreme Administrative Court, are bound by the law and international treaties forming part of the Czech legal order. They are solely entitled to review the compatibility of by-laws with the statutory provisions or with international treaties. According to Article 95(2) of the Constitution, a general court may file a motion



to the Constitutional Court to declare a law unconstitutional if it concludes that the law it is about to apply conflicts with the constitutional order.

Therefore, if the Supreme Administrative Court comes to the conclusion that a law is unconstitutional, it turns to the Constitutional Court with a proposal for its annulment.

41) Could you give an example of this kind of feedback in the highest administrative court's judgments?

Judgment of 19 November 2017, No. Vol 58/2017-72, [ECLI:CZ:NSS:2017:Vol.58.2017.72](#), Parliament election, paragraph 90:

In this judgment, the Supreme Administrative Court provided very strong feedback on technical and structural issues accompanying the election process for the Chamber of Deputies. As a result of these issues, the Court declared the election of one candidate invalid and recognized another candidate as the duly elected member of the Chamber of Deputies:

"The Supreme Administrative Court, based on the recalculation of preferential votes for the candidates of the Civic Democratic Party, found a different election result. It concluded that this was not merely a typical human error in the counting process but is convinced that the identified violation of the election law was significantly influenced by systemic deficiencies in the preparation and organization of the October elections to the Chamber of Deputies, including shortcomings in the applicable legal regulations, for which the Ministry of the Interior, as the central state administrative body for elections, is primarily responsible. The key issue is the use of double-sided ballots. Although the current legal framework neither prohibits nor explicitly mandates that candidates may be printed on both sides of the ballot papers, from the perspective of ensuring equality among candidates and in light of the confirmed higher error rate in determining the election results by district election commissions, the future use of such printed ballots, at least for elections to the Chamber of Deputies, is hardly acceptable."

Judgment of 30 September 2015, No. 6 As 114/2014-55, [ECLI:CZ:NSS:2015:6.As.114.2014.55](#), on traffic offence, paragraph 38:

The court addressed the system of administrative punishment for traffic offences, specifically the imposition of penalty points. Upon attaining 12 points on the driving licence, the offender may be disqualified from driving for a specified period of time, or their driving licence may be revoked.

"If a driver disagrees with the recorded points in the driver's register, they may, pursuant to Section 123f(1) of the Road Traffic Act, submit written objections against the recording to the relevant municipal authority. Similarly, according to Section 123f(4) of the Road Traffic Act, a driver may file objections against a record that has resulted in a total of 12 points. It follows from the cited legal provisions that while reaching 12 points is automatically notified to the driver, to obtain information about individual point records and the current point status, the driver must take their own initiative and submit a request to the relevant municipal authority or public administration contact point. Given



that even a single point record in the driver's register constitutes a "punishment" within the meaning of Article 40(6) of the Charter and the second sentence of Article 7(1) of the Convention, it appears more appropriate de lege ferenda that the driver should also be officially notified of each individual record"

42) Does the highest administrative court gather information about structural problems that might arise from legislation, such as its unforeseen or exceptionally harsh consequences?

Yes
 No

43) If yes, from what sources does it gather information about these structural problems (more options are possible)?

Arguments raised by parties
 Case law
 Advisory opinions on draft legislation
 Journal articles
 Conferences/meetings
 All of the above
 Other, namely:

The Supreme Administrative Court does not have a formalised procedure for gathering information on structural problems. Rather, such information is acquired mainly through the exercise of its judicial function.

44) Does the highest administrative court provide the legislator with feedback about these structural problems?

Yes
 No

Explanation if desired:

Generally, the Court provides feedback on structural issues in the context of the legislative consultation procedure. In some cases, it does so also through the reasoning of its decision.

45) If yes, where does it provide this kind of feedback (more options are possible)?

Judgments
 Indirectly by signalling structural problems to the advisory body
 Annual review
 Journal articles
 Conferences/meetings
 Formal or informal contacts with representatives of the legislator/civil servants
 All of the above
 Other, namely:



The Supreme Administrative Court may provide feedback on structural legal issues when it acts as a consulting body and participates in roundtable discussions at the invitation of the relevant parties. See also the answer to question 38.

46) Could you give an example of this kind of feedback?

Judgment of 15 February 2024, No. 7 Azs 186/2022-48, [ECLI:CZ:NSS:2024:7.Azs.186.2022.48](#), on subsidiary protection, paragraph 57:

"The EU law-compliant interpretation of Section 14a of the Asylum Act does not relieve the legislature of its obligation to protect, by other means (national legislation), foreigners upon departure against serious harm resulting from the domestic situation, taking into account the legally protected ties they have established here. On the contrary, it would be desirable for the legislature to more broadly consider cases that fall outside the scope of asylum and subsidiary protection, as it already does to a limited extent with national humanitarian asylum (Section 14 of the Asylum Act). However, the legislature cannot do so by expanding subsidiary protection in contravention of its logic, as this stems from EU law, which significantly constrains the national legislature in implementing subsidiary protection."

Judgment of 1 June 2023, No. 1 As 15/2023-38, [ECLI:CZ:NSS:2023:1.As.15.2023.38](#), on home birth, paragraph 32:

"In accordance with the principle of separation of powers, it is incumbent upon the legislature to address the current legal framework and its amendment, potentially in the direction advocated by the complainant. Similar conclusions are, indeed, held by the Grand Chamber of the ECtHR in the judgment of Dubská and Krejzová. Therein, it stated that the current preference for hospital-only births is problematic in relation to low-risk parturients; however, it does not violate the Convention-guaranteed rights of either the complainants (potential clients in the case at hand) or the midwives themselves. Although the ECtHR in the cited judgment refers generally to the Czech authorities (paragraph 189), it is, with regard to the separation of powers and the wording of the statutory regulation, primarily the legislature that 'should keep the relevant legal provisions under constant review, so as to ensure that they reflect medical and scientific developments whilst fully respecting women's rights in the field of reproductive health, notably by ensuring adequate conditions for both patients and medical staff in maternity hospitals across the country.'"

47) To what extent does the highest administrative court suggest potential solutions for the issues (legal-technical or other) raised?

In light of the principle of separation of powers, it is not within the purview of the Supreme Administrative Court to propose legislative solutions. In some cases, a judgment may include proposals put forward by parties as part of their argumentation. Typically, this is accompanied by a statement that it is up to the legislator to consider these proposals and potentially implement them if deemed appropriate.



- 48) What kind of considerations determine whether and to what extent the highest administrative court provides feedback? Does the separation of powers limit the court in this regard and if so, how?**

As neither the Supreme Administrative Court, nor any part of it, have the position of an independent legislative advisory body, its decision-making adheres to the principle of separation of powers and the legislator's prerogative to choose appropriate legislative solutions. For this reason, its *de lege ferenda* considerations are rarely included in its case law. To a much greater extent, it can provide feedback during the consultation procedure of a proposed law, addressing general and structural issues it encountered in the course of its decision-making.

- 49) Does the highest administrative court keep track of the given feedback, for instance in a list that is annexed to an annual review?**

Yes
 No

Please explain:

The Supreme Administrative Court does not keep track of the feedback in the form of a summary list, but it does keep records of individual legislative comments.

- 50) Does the highest administrative court monitor the effectiveness of feedback, for instance by speaking to representatives of the government or by monitoring new legislation?**

Yes
 No

Please explain:

The Supreme Administrative Court does not formally monitor the effectiveness of its feedback in the legislative process. As previously indicated in response to question 1, when it participates as a consulting body during the consultation process of a legislative proposal, it is entitled to submit comments. Nevertheless, the Court is one of a number of consulting bodies that are unable to submit "substantive comments". If there is a disagreement with how the comments were addressed, the sponsor convenes a reconciliation meeting where representatives of the commenting authorities and the sponsor personally discuss the comments. If no agreement is reached, the draft bill is submitted to the Government, including the noted disagreements.

If the draft bill undergoes substantial revision during the consultation procedure, the Government's legislative rules provide for a repetition of the consultation procedure.

- 51) Is there any follow-up if the legislator does not respond to issues that are raised by the highest administrative court?**

Yes



No

Please explain:

Beyond the procedure described in question 50, there is no other procedure in which the legislator would be obliged to respond to the feedback.

52) Does the highest administrative court have any formal or informal contacts with the legislator, for instance via its civil servants? If so, what kind of issues does it discuss there?

Yes

No

Please explain:

Aside from the consulting procedure, the Supreme Administrative Court may be invited to participate in roundtable discussions organised by parts of the Parliament as was mentioned above.

53) Is there a role for the highest administrative court in the process of legislation, i.e. by advising the legislator *ex ante* during the process of legislation?

Yes

No

Please explain:

As already noted, the Supreme Administrative Court, as well as the Constitutional Court and the Supreme Court, have, as consulting bodies, the opportunity to provide comments on draft bills in so far as they are concerned by them.

54) Does the highest administrative court have contact with the advisory body about problems (legal-technical or other) that arise from its case law?

Yes

No

Explanation if desired:

As mentioned above, the Supreme Administrative Court acts as a consulting body for the area of legislation that pertains to its activities. In its comments to draft bills, it can thus highlight the problems that arise from its case law.

