

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

Answers from the Administrative Law Chamber of the Supreme Court of Estonia

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 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?

Yes ²
 No ³

2) If yes, what is the name and address of this institution?

3) In what way is the independent position of this institution guaranteed?

In the national Constitution
 In a formal law
 Through customary law
 In some other way, please explain:

.....

4) How many members does this institution have? What are the selection criteria and incompatibilities? What kind of appointment do they get (e.g. full time / main job versus part time / additional job, for life versus a fixed period etc)?

5) Who has the competence to adopt the advisory opinion and how is the unity of advisory opinions ensured?

6) How much support staff is assisting this institution and what is their background (legal experts, other academic experts, communication professionals, et cetera)?

7) How many advisory opinions does this institution give yearly (on average)?

8) On average, how many weeks will it take for an advice to be finished?

9) Do any mandatory (e.g. legal) deadlines apply for the production of advisory opinions?

Yes
 No
 Sometimes. Please explain:

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

³ Please proceed to question 38.



10) In which phase of the legislative process is the advisory opinion given? (more answers are possible)

- Preparatory legislative process
- Parliamentary legislative process
- Post-parliamentary process

Please explain:

11) What kind of advisory opinions does this institution give? (more answers are possible) And how much of those advisory opinions do you give annually (approximately)?

- Mandatory advisory opinions on national legislation ()
- Non-mandatory advisory opinions on national legislation ()
- Mandatory advisory opinions on decentral legislation ()
- Non-mandatory advisory opinions on decentral legislation ()
- Solicited thematic advisory opinions ()
- Unsolicited thematic advisory opinions ()
- Verbal advisory opinions ()
- Visuals / movie clips ()
- All of the above ()
- Other (reports, books, studies etc) ()

Explanation if desired:

12) Who are the main addressees for the work of this institute? (more answers are possible)

- Parliament
- Government
- Judiciary
- Civil servants
- Universities
- Media
- General public
- All of the above

Explanation if desired:

13) When preparing an opinion, are insights from outside the institution used?

- Yes
- No

14) If yes, what kind of information can be used? (more answers are possible)

- Public (written) knowledge from scientific or other knowledge institutions, advisory councils or experts



Additional information provided by the ministry (reports, consultations, et cetera)

Ad hoc (written or verbal) insights on request from (academic) experts

Ad hoc (written or verbal) insights on request from government officials

Insights from implementation experts

Insights from stakeholders or lobby groups

Case law by (administrative) courts

All of the above

Other

Explanation if desired:

15) In case the institute uses case law by administrative courts, does it have any contact with the judiciary about these issues?

Yes

No

Explanation if desired:

16) Does the institute in any way provide feedback the other way around, i.e. by advising the supreme administrative court from a legislative-advisory point of view, for instance by pointing out the potentially undesirable consequences of legislation?

Yes

No

Explanation if desired:



CHAPTER 2 THE CONTENT OF AN ADVISORY OPINION

17) What are the main components of the analysis to draft an advisory opinion? (more options are possible)

- Legal analysis (see further questions 17–26)
- Policy analysis (see further questions 27-28)
- Other, namely:

Explanation if desired:

18) Does the advisory opinion generally contain a legal analysis of the draft legislation?

- Yes, (almost) always
- No
- Yes, sometimes, depending on:

.....

19) If yes, what are the elements of the legal analysis? (more answers are possible)

- Relation to higher-ranking law (constitution and international and European law)
- General principles of law
- Legal systemic aspects (e.g. competence, discretionary powers, supervision, enforcement and legal protection, transitional law and evaluation)
- Technical legislative quality and requirements
- Other

Explanation if desired:

20) What other aspects can be part of an advisory opinion?

- Own views and ideas
- Technical remarks
- Supporting remarks
- None
- Other, namely:

Explanation if desired:

.....

21) Is the advisory body in any way involved in the drafting of legal acts of the European Union?

- 0 Yes, (almost) always
- 0 No



Sometimes, depending on:

- 22) When the draft legislation concerns implementation of legal acts of the European Union, what are the main components of the analysis to draft an advisory opinion? (more options are possible)**

Legal analysis
Policy analysis
Other:

Please explain the differences with the answer to question 16:

- 23) Does the advisory opinion also contain a legal analysis of legal acts of the European Union?**

Yes, (almost) always
No
Sometimes, depending on:

Explanation if desired:

.....

- 24) If the advisory opinion contains a constitutional review (ex-ante), what are the relevant documents / sources to be used? (more answers are possible)**

National constitution
Law of the European Union
International treaties
Customary law
General principles of law
Case law (national, European, international)
All of the above
Other, namely:

.....

Explanation if desired:

- 25) If the advisory opinion contains a constitutional review (ex-ante), which elements are taken into account? (more answers are possible)**

Civil and political rights
Economic, social and cultural rights
Institutional norms
All of the above
Other, namely:

.....



Explanation if desired:

26) If the advisory opinion contains a constitutional review (ex-ante), which interpretations are taken into account? (more answers are possible)

- Literal interpretation
- Historical interpretation
- Teleological interpretation
- Systematic or contextual interpretation
- All of the above
- Other, namely:

.....

Explanation if desired:

27) If the advisory opinion contains a constitutional review (ex-ante), does it take constitutional review ex post into account?

- Yes
- No

Please explain:

28) Does the advisory opinion also contain an analysis of the draft legislation focused on aspects of policy, implementation, execution and enforcement?

- Yes, (almost) always
- No
- Sometimes, depending on:

.....

29) If the advisory opinion contains a policy analysis, which elements are taken into account? (more answers are possible)

- Analysis of the problem
- Approach to the problem
- Suitability and objective
- Effects
- Proportionality
- Implementation
- Execution
- Enforcement
- Legal practice
- All of the above
- Other, namely:



.....
Explanation if desired:

- 30) To what extent does the advisory opinion suggest potential solutions for the issues (legal-technical or other) raised in the opinion?**

CHAPTER 3 THE FOLLOW-UP OF AN ADVISORY OPINION

- 31) Will advisory opinions be made public?**

Yes, by the institution that produces them
Yes, by the (principal) addressee
Sometimes, depending on:

.....
No

- 32) If yes, at what point will the advisory opinion be made public?**

Upon adoption of the advisory opinion
Upon submission of the draft legislation to the parliament
Upon adoption of the legislation
Other
Sometimes, depending on:

.....
Explanation if desired:

- 33) If advisory opinions are made public does the institution work with press releases, summaries, press conferences, et cetera?**

Yes, (almost) always
No
Sometimes, depending on:

- 34) Is there an obligation for the government to (publicly) respond to an advisory opinion?**

Yes, (almost) always
No
Sometimes, depending on:



.....
Explanation if desired:

35) Does the advisory body evaluate its functioning and are the effects of the advisory opinions taken into account?

Yes, (almost) always

No

Explanation if desired:

36) Are general reports or annual reports issued in which the institution reflects upon trends and topics in its advisory opinions?

Yes, (almost) always

No

Explanation if desired:

37) To what extent and in what way does ex post constitutional review, whether by a constitutional court or not, rely on advisory opinions?



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:

For example, that the existing regulation should be more precise, or an issue should be regulated systematically.

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:

Advisory opinions about legislative intent and draft laws.

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



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- 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:

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

For example, in a case no 3-17-2784/20⁴, that concerned a question about the member of local government's right to appeal in internal dispute matters, the Administrative Law Chamber explained, that currently the law does not state the member a right to appeal, but the legislator can establish appropriate regulation to give council members the right to appeal in important internal disputes (p 11). In the second case no 3-22-2094/13⁵, that dealt with the same issue, the Administrative Law Chamber first referred to the case mentioned above and stated furthermore, that it is within the competence of the legislator to decide whether to establish such a regulation for the settlement of disputes arising from internal disputes. If the legislator creates such a set of regulations and deems it necessary to grant the right of appeal, then issues arising from internal disputes should be resolved systematically and comprehensively, also providing for the necessary legal remedies that the council member would be able to use in the event of a violation of their rights (p 14).

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:

.....

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

⁴ Available in Estonian: <https://www.riigikohus.ee/et/lahendid/?asjaNr=3-17-2784/20>

⁵ Available in Estonian: <https://rikos.rik.ee/?asjaNr=3-22-2094/13>



- X Yes
No

Explanation if desired:

.....

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

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

Advisory opinions about legislative intent and draft laws.

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

For example, in a case no 3-22-2331/45⁶, which concerned the compliance of the complaint with mandatory pre-action rules, the Administrative Law Chamber drew attention to the unambiguity of the regulation. Namely, the Court referred to its previous case law, where it explained the nature of legal relationships related to the provision of healthcare services to inmates in prison and concluded that all disputes related to healthcare services to inmates in prison are public, therefore administrative courts have jurisdiction over these disputes (before that decision, the civil courts had the jurisdiction). Therefore, the Administrative Law Chamber stated that on the 1st of July 2024, amendments to §§ 49-53 of the Imprisonment Act will enter into force, according to which the Estonian Health Insurance Fund will organize health care services in prisons. From the explanations given on page 13 of the bill's explanatory memorandum (Estonian Parliament XIV composition 699 SE) on the distinction between a prison as a public-law institution and a healthcare service provider as an institution operating under a private-law contract when determining the competent court, it can be seen that the purpose of the drafters of the law is to refer disputes related to health care services in prisons from 1st of July 2024 back to civil court proceedings. Nevertheless, the text of the law may not be unambiguous enough to make it clear without controversy which court will have jurisdiction in the future to resolve disputes related to the provision of health care services in prisons (p 11).

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

⁶ Available in Estonian: <https://rikos.rik.ee/LahendiOtsingEriVaade?asjaNr=3-22-2321/45>



The main task of courts, including the Administrative Law Chamber of the Supreme Court, is to administer justice, therefor also interpret and implement the law. In case the regulation in force has some shortcomings, it is a task of the Chamber to point it out. However, in most cases the Chamber gives a legal decision on a concrete case and interprets and implements the law in force to solve a case. If there is a need to give feedback to the legislator, the Administrative Law Chamber in its judgments usually points out potential problems or explains in which way the legislator could solve a concrete problem. The final decision on how to act is left to the legislator. In case an adoption of new legislation is needed, the Chamber do not propose a concrete wording of the legal norms in its judgments.

When the feedback is provided to the legislator *ex ante*, that is a legislative intent is sent to the Supreme Court for its opinion, the Chamber usually analyses, whether the legislation intended to adopt, could have any potential shortcomings considering its compliance with the Constitution or the regulations currently in force. However, when a legal draft is sent to the Chamber for its opinion, in some cases the feedback also concerns suggestions about (precise) wording of the draft legislation.

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?

The separation of powers should be born in mind. It has to be considered, that the general feedback given is not mandatory for the legislator to take into account. The Chamber in its opinions states that the opinion does not express the binding position of the Supreme Court. The Supreme Court formulates binding positions only during the proceedings of cases in the Supreme Court. Furthermore, to avoid a possible conflict, in its suggestions the Administrative Law Chamber does not make a direct statement on whether a certain proposed provision is unconstitutional or not, but rather expresses doubts or points to possible problems. Only the Constitutional Review Chamber of the Supreme Court or the Supreme Court *en banc* has the jurisdiction to declare a legislative or regulatory instrument unconstitutional.

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 Court bears in mind, whether it has pointed out a specific problem already before in its case law or via advisory opinions. However, since it is not mandatory for the legislator to follow the feedback, no special list is formed.

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:

As explained before, the general feedback given to the legislator is not binding for the legislator to follow. The Court can only itself bear in mind, whether it has pointed out a specific problem already before in its case law or via advisory opinions.

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:

As explained, it is up to the legislator to decide how to act on the feedback. The final responsibility of adopting a legislation falls in the scope of the legislator. If compliance with the Constitution could be an issue, the main risks may be related to the possibility that the Supreme Court will later have to review the act in constitutional review proceedings.

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:

For example, when a legal draft is sent to the Administrative Law Chamber for its advisory opinion, occasionally representative of the Chamber is asked to join the meeting of the committee of the Estonian Parliament, which is responsible for the legislative proceedings of the draft in the Parliament. The feedback of the Chamber to the legal draft is being discussed. Occasionally also members of the Chamber participate in working groups, which are responsible for drafting a concrete regulation. In the working groups, only specific regulation and its draft or legislative intent is being discussed.

In addition, once a year the Chief Justice of the Supreme Court presents a review to the Parliament concerning courts administration, administration of justice and the uniform application of law. In this review, the Chief Justice may draw attention to current issues arising from legislation.

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?



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Yes
 No

Please explain:

The institution preparing the draft act usually draws up a legislative intent (not required in only a few instances). After the legislative intent, a draft act (and explanatory memorandum) is being prepared.⁷ Both, the legislative intent and/or the draft act could be sent to the Administrative Law Chamber for its opinion if necessary. It is not compulsory for the Chamber to deliver an opinion or make a proposal. However, the Chamber usually gives its opinion, and when necessary expresses its concerns, especially when the regulation in question concerns the overall functioning of the courts.

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:

⁷ Precise rules concerning drawing up a legislative intent and a draft law are formulated in the Rules for Good Legislative Practice and Legislative Drafting. Available in English: <https://www.riigiteataja.ee/en/eli/508012015003/consolide>

