

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



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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?

- 0 In the national Constitution
- 0 In a formal law
- 0 Through customary law
- 0 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)?

Does not apply.

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

Does not apply.

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

Does not apply.

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

Does not apply.

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

³ Please proceed to question 38.



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

Does not apply.

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

- 0 Yes
- 0 No
- 0 Sometimes. Please explain:

Does not apply.

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

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

Please explain:

Does not apply.

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)?

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

Explanation if desired:

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

- 0 Parliament
- 0 Government
- 0 Judiciary
- 0 Civil servants



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- 0 Universities
- 0 Media
- 0 General public
- 0 All of the above

Explanation if desired:

13)

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

- 0 Yes
- 0 No

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

- 0 Public (written) knowledge from scientific or other knowledge institutions, advisory councils or experts
- 0 Additional information provided by the ministry (reports, consultations, et cetera)
- 0 Ad hoc (written or verbal) insights on request from (academic) experts
- 0 Ad hoc (written or verbal) insights on request from government officials
- 0 Insights from implementation experts
- 0 Insights from stakeholders or lobby groups
- 0 Case law by (administrative) courts
- 0 All of the above
- 0 Other

Explanation if desired:

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

- 0 Yes
- 0 No

Explanation if desired:

17) 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?

- 0 Yes
- 0 No

Explanation if desired:





CHAPTER 2 THE CONTENT OF AN ADVISORY OPINION

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

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

Explanation if desired:

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

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

.....

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

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

Explanation if desired:

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

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

Explanation if desired:

.....

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



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

23) 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:

24) 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:

.....

25) 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:

26) 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



- 0 Institutional norms
- 0 All of the above
- 0 Other, namely:

.....

Explanation if desired:

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

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

.....

Explanation if desired:

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

- 0 Yes
- 0 No

Please explain:

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

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

.....

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

- 0 Analysis of the problem
- 0 Approach to the problem
- 0 Suitability and objective
- 0 Effects
- 0 Proportionality



- 0 Implementation
 - 0 Execution
 - 0 Enforcement
 - 0 Legal practice
 - 0 All of the above
 - 0 Other, namely:
-

Explanation if desired:

- 31) 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

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

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

- 0 No

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

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

Explanation if desired:

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

- 0 Yes, (almost) always
- 0 No



0 Sometimes, depending on:



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35) Is there an obligation for the government to (publicly) respond to an advisory opinion?

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

.....

Explanation if desired:

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

- 0 Yes, (almost) always
- 0 No

Explanation if desired:

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

- 0 Yes, (almost) always
- 0 No

Explanation if desired:

38) 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.

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

- Yes
- No

Explanation if desired:

40) 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:

.....

41) 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:

.....

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

BVerwG, judgement of 7 July 2021- 2 C 2/21-, BVerwGE 173, 81-101

In view of the importance of performance appraisals for the selection decision to be made solely in accordance with Article 33(2) of the Basic Law, the requirements for the preparation of performance appraisals cannot be left to administrative regulations alone. The basic requirements for their preparation must be regulated in legal norms. The principle of the rule of law and the principle of democracy oblige the legislator to



essentially make the relevant regulations for the realisation of a fundamental right or- as in this case- a right equivalent to a fundamental right itself and not to leave these to the actions and decision-making power of the executive. Essential in this sense are all regulations that are of considerable importance for the realisation of this right and affect it particularly intensively (para. 32).

...

The legal norms in force in Rhineland-Palatinate at the time of the assessment and still in force today are inadequate. However, the existing legal norms and the administrative regulations based on them can continue to be applied for a transitional period in order to avoid a situation that is even more distant from the constitutional order (para. 40).

43) 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

44) 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:

.....

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

- Yes
- No

Explanation if desired:

There is no organised or standardised collection of information about structural problems of legislation within the Federal Administrative Court. Yet, every panel may during legal proceedings identify such a problem and address it in its judgement, if it is of relevance in a specific case.

.....

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

- Judgments
- Indirectly by signalling structural problems to the advisory body



- 0 Annual review
- 0 Journal articles
- 0 Conferences/meetings
- 0 Formal or informal contacts with representatives of the legislator/civil servants
- 0 All of the above
- 0 Other, namely:

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

See question 42.

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

This absolutely depends on the competent panel in the case. There is no general line of conduct. Usually, the panels would be reluctant to offer a solution, out of respect for the legislator's discretion.

49) 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?

There might be a hint in the direction of the legislator, if a panel encounters a mere technical problem and only one solution appears to be feasible. The more legislative discretion the legislator has to address a problem the more hesitation there will be to give recommendations. This has to do with the separation of powers. Generally, the courts are limited to give the reasons which uphold their decisions. These do not usually include recommendations to the legislator.

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

- 0 Yes
- X No

Please explain:

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

- 0 Yes
- X No

Please explain:

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



- 0 Yes
 No

Please explain:

If the court raises an issue because it is relevant in its case and the same issue arises in another case, then there might be a follow-up decision by the court with most likely the same contents as in the older decision.

- 53) 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
0 No

Please explain:

Not the court as such, but some of the panels have informal contacts with representatives of the federal ministries. The purpose is never to discuss a single case, but to discuss new legislation, general developments or the necessity of new or clarifying legislation in certain fields.

- 54) 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
0 No

Please explain:

When drafting legislation, the legislator makes use of institutional consultation, i.e. it enables relevant institutions to give their opinion on draft legislation. The Federal Administrative Court is always consulted if legislations affects it directly, i.e. its staff or the Code of Administrative Court procedure. In these cases the Federal Administrative Court will always participate in the consultation process by giving a written statement. The responsibility lies with the President of the Court. The Federal Administrative Court often (not always) is also being consulted if legislation which falls in its competence to adjudicate is being drafted. In these cases the Federal Administrative Court usually participates in the consultation process. In these consultations the court will always have to consider whether by giving advice in advance it prejudices its liberty to decide in judicial independence a later case which may arise from this legislation. Formally, there is no problem on this behalf, since the responsibility for the consultation lies with the President and the one for the possible later jurisprudence lies with the competent panel.

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



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0 Yes
 No

Explanation if desired:

There is no advisory body.



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