

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



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

Explanation:

Ireland has a Council of State (as provided for in its Constitution), but it does not give advisory opinions *ex ante* aimed at the improvement of the quality of legislation. It acts as an advisory board to the President of Ireland, not the legislator. Its sole function is to advise the President of Ireland on the exercise of certain functions of his or her office, as provided for by the Constitution of Ireland, on an *ad hoc* basis.

The President may seek the advice of members of the Council of State on Bills which have been referred to him or her for signing into law, after the parliamentary legislative process has been concluded. Having consulted with the Council of State, the President may refer a Bill to the Supreme Court, to review its constitutionality (pursuant to Article 26 of the Constitution) or to the People of Ireland, where it contains a proposal of such national importance that the will of the People ought to be ascertained (under Article 27). It does not provide feedback on legislation in any capacity, beyond these limited contexts. The Council of State does not provide a unitary advisory opinion, nor does it solicit expertise from elsewhere.

In these circumstances, Ireland does not have an independent governmental institution such as is the subject of Questions 1 – 37 of this questionnaire.

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

³ Please proceed to question 38.



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?

- X Yes
0 No

Explanation if desired:

The Supreme Court provides feedback on legislation to the legislator insofar as it indicates where legislation is incompatible with higher law (the Constitution or EU Law) or the European Convention on Human Rights.

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

- X Judgments
0 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:

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:

.....

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

Judgment of O'Donnell C.J. in *O'Meara & Ors v Minister for Social Protection & Ors* [2024] IESC 1, at para. 159:

"Accordingly, I would make a declaration that s. 124 of the 2005 Act is inconsistent with the Constitution insofar as it does not extend to Mr O'Meara as a parent of the second, third and fourth appellants... This is not a complete solution for the appellants since it would require a legislative amendment to positively provide for benefit in their case. It remains a matter for the Oireachtas to consider how best to make provision for benefit consistent with the provisions of Article 40.1 of the Constitution."

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?

- Yes
- No

Explanation if desired:



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

- 0 Judgments
- 0 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:

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

N/a

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

The Supreme Court does not propose potential solutions for issues in legislation, as that is solely a matter for the Oireachtas.

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 Supreme Court is limited by the separation of powers to reviewing the compatibility of legislation with higher law. It will indicate where legislation is incompatible, *via* a declaration to that effect or by striking down said legislation. It will not direct the legislator on the remedy to the issue identified (as recently reiterated in [Re Article 26 of the Constitution and the Judicial Appointments Commission Bill 2022 \[2023\] IESC 34](#)).

49) 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:

The Supreme Court does not keep track of or collate feedback given to the government.

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?



- 0 Yes
X No

Please explain:

The Supreme Court does not monitor the effectiveness of its feedback.

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

- 0 Yes
X No

Please explain:

There is not any “follow-up” on issues with legislation raised by the Supreme Court, as the legislator respects and adheres to the Court’s findings of incompatibility with higher law. In circumstances where the Supreme Court strikes down legislation on the basis that it is unconstitutional, the legislator will follow the decision of the Court. In so far as something is incompatible with EU law, the legislator will respond to that.

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?

- 0 Yes
X No

Please explain:

The Supreme Court does not interact with the legislator in this manner.

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?

- 0 Yes
X No

Please explain:

The only *ex ante* “feedback” provided by the Supreme Court to the legislator is a review of a Bill’s constitutionality, should said Bill be referred by the President under Article 26 of the Constitution.

This power is rarely exercised, but, as explained earlier, Article 26 of the Constitution established a mechanism where the President may refer a Bill passed by both Houses of the Oireachtas (the legislator) to the Supreme Court for a ruling on its constitutionality. In circumstances where the Supreme Court determines that a Bill is unconstitutional, the



President will decline to sign that Bill into law, in which case, it is up to the legislator to remedy the issue. Where a Bill is held to be compatible with the Constitution, the President will sign that Bill into law.

The President of Ireland has exercised the power of referral to the Supreme Court on sixteen occasions since 1937.

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:

