

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?

*Council of State of the Kingdom of the Netherlands
 Advisory Division
 Kneuterdijk 22
 P.O. Box 20019
 2500 EA Den Haag*

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)?

The Council of State has two separated divisions. The Advisory Division has at the moment eighteen members, so-called state councillors, selected on basis of a range of expertise and experience (former parliamentarians and ministers, professors constitutional law, former public officials, legal experts, economist, and three state councillors from the Caribbean countries within the Kingdom (Aruba, Curacao and St. Maarten) and a tax specialist). The law does not prescribe a maximum number of state councillors. State councillors are appointed for life, but retire at the age of seventy. It is a main job for 3 to 4 days a week. The King is the symbolic chair of the Council of State, but the vice-president of the Council is according to law chair of the Advisory Division.

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

³ Please proceed to question 38.



Based on Article 5 of the Council of State Act, incompatible with the office of vice president or state councillor are:

- *public positions, to which a fixed remuneration or allowance is attached.*
- *membership of bodies governed by public law, the choice of which is made at elections called by law.*
- *the office or profession of lawyer, notary, accountant, tax consultant or fiduciary.*
- *positions the performance of which is undesirable with a view to the proper performance of their office or to the maintenance of their impartiality and independence or of confidence therein.*

Furthermore, the constitution and formal law prohibit members of (EU-)parliament to be staff-member or state councillor of the Council of State.

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

The Advisory Division is divided into four sections and three special committees, which are responsible for the preparation of advisory opinions. All advisory opinions are discussed in the weekly plenary meeting of the Advisory Division and adopted by the majority vote of state councillors. In practice, however, decision-making occurs by consensus. The unity of advisory opinions is ensured by taking into account former advisory opinions or deliberately deviate from it. An adopted advisory opinion is signed by the vice-president, send to government and publicized on the site of the Council.

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

The Advisory Division is supported by the Advisory Directorate, where approximately thirty-five people work. Most of them are academic legal experts. Since a few years some other academic fields have also been represented (tax, economics and political science).

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

On average between 350 and 450.

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

46 days in both 2022 and 2023. Note: a significant portion of the opinions are not substantive and consent to the submittance of the draft legislation to parliament.

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

Yes

No

Sometimes. Please explain:



In most cases no mandatory deadline exists. The Advisory Division uses internal deadlines: one month for non-complicated proposals, two months for medium complicated proposals and three months for complicated proposals. For urgent advisory opinions, an advisory opinion may be issued through an emergency procedure within one month.

Besides our core business regarding the legislative advisory function, we issue a limited number of advisory opinions which have a legal deadline. The annual advisory opinion on the national budget has to be given before government sends the budget proposals to parliament (government has to respond and both the opinion of the Advisory Division and the response are part of the parliamentary papers). And some other periodical advisory opinions (aimed at monitoring the progress of e.g. the implementation of the Climate Law) also have a mandatory deadline.

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:

Most advisory opinions will be issued before a proposed bill is sent to and discussed in parliament. Government has to respond to the opinion and may make changes to the proposal. Government and parliament can also decide to ask an additional advisory opinion during the parliamentary legislative process (for instance if the proposal is seriously amended or when new questions are raised concerning the proposal). This does not happen very often.

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)?

- | | | |
|-------------------------------------|--|---------|
| <input checked="" type="checkbox"/> | Mandatory advisory opinions on national legislation | (340) |
| <input checked="" type="checkbox"/> | Non-mandatory advisory opinions on national legislation | (1) |
| <input type="checkbox"/> | Mandatory advisory opinions on decentral legislation | () |
| <input type="checkbox"/> | Non-mandatory advisory opinions on decentral legislation | () |
| <input checked="" type="checkbox"/> | Solicited thematic advisory opinions | (3) |
| <input checked="" type="checkbox"/> | Unsolicited thematic advisory opinions | (1) |
| <input type="checkbox"/> | Verbal advisory opinions | () |
| <input type="checkbox"/> | Visuals / movie clips | () |
| <input type="checkbox"/> | All of the above | () |
| <input checked="" type="checkbox"/> | Other (reports, books, studies etc) | (1) |

Explanation if desired:

In the first category three mandatory monitoring opinions are included (two on the budget and one on the implementation of the Climate Law). Solicited thematic



opinions can be asked for by government or one of both chambers of parliament. The second category, relates to opinions on request and occurs occasionally. In the last category one publication comes particularly into mind: the annual report with all the relevant highlights of the previous year and general recommendations to government and parliament.

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:

Parliament and government are the two formal addressees. In practice of course civil servants, media, academics take notice. Indirectly the advisory opinions often are used in academic work, and sometimes referred to in judicial case law.

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:

Apart from the information provided by the ministry, which has prepared the proposed bill (for example advices and reports from implementing and supervisory authorities and specialised advisory bodies regarding the proposal), the Advisory Division usually makes use of all knowledge available in the public domain. This knowledge can come



from many different organisations and institutions, nationally or abroad. In some rare cases experts and/or officials can be asked specific questions, technical or other. If necessary, the staff of the Advisory division has regularly informal contact with the civil servants of the relevant ministry responsible for the draft legislation in order to collect additional information. If desired by the Advisory Division there is a formal procedure by which a minister can be invited to come over to discuss the proposal, usually when there is strong criticism from the Advisory Division on this particular proposal. This happens once or twice a year.

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

- 0 Yes
 No

Explanation if desired:

Case law most often speaks for itself, so no additional contact is needed. Of course, the Council of State does take notice of publications of the judiciary (for instance the annual reports) to learn their analysis and opinion on certain relevant general topics. Furthermore, state councillors of both divisions exchange views and knowledge concerning general legal and constitutional questions which occur in their profession, just as they do in interaction with the academic world.

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?

- 0 Yes
 No

Explanation if desired:

All advisory opinions are made public. Possible undesirable consequences of legislation will be described in the advisory opinion and the judiciary – like all other institutions – will be able to take notice of our views through the advisory opinion. In the advisory opinion possible undesirable consequences for the judiciary are taken into account.



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:

The analysis of the implementation and the effects on legal practice.

Explanation if desired:

This includes, among other things, an analysis regarding possible challenges or undesirable effects regarding the implementation. See further the attached assessment framework of the Advisory Division.

Note: The policy analysis and the legal analysis are often interconnected, for example on questions of necessity and proportionality.

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:

We examine whether the proposed legislation fits within higher-ranking law, like the constitution, the Statute of the Kingdom and treaties, as well as EU law. We also check whether the approach of the problem is legally well arranged, including issues of competencies of ministers, provinces and municipalities. Also the options to derive from the legislation to prevent unnecessary consequences are evaluated. Furthermore we check how supervision, enforcement and legal protection are arranged and whether transitional law is necessary from the old to the new legal regime.

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



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

In case of technical remarks, only major shortcomings will be addressed in the advisory opinions. This means that in all other cases, technical remarks will be forwarded to the relevant department without becoming public.

Explanation if desired:

.....

21) 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:

The Advisory division is not involved in the drafting of EU legal acts itself but during the negotiation phase the government can ask a non-mandatory advisory opinion regarding legal aspects of the proposal of the European Commission or amendments of the European Parliament on behalf of its own negotiation position. This happens not very often (once in a few years).

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:

There is less room for policy analysis when it concerns implementation of legal acts of the EU. Because, the question of necessity is no longer an issue. Note: The policy analysis and the legal analysis are often interconnected, for example on questions of necessity and proportionality. In this case the legal analysis involves questions such as: is the implementation correct and the choice of embedding in the national system logical? The analysis of the implementation in these cases involves questions as: are the implementing and supervisory authorities up to their new tasks and will the implementation be on time and adequate? Are the new rules 'doable' for the citizens and businesses?

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



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

When there is relevant case law of the Court of Justice of the EU that could question the legality of an EU legal act (for example, the conformity with higher law such as the right to privacy or the right to property), we sometimes advise the government to discuss this with the European Commission, stating that this does not derogate from the duty to implement.

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:

All of the above are relevant, see also answer to question 18. Please furthermore refer to assessment framework pages 9-10 (see attachment).

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:

All of the above are relevant, see also answer to question 18. Please refer to assessment framework pages 9-10 (see attachment).



26) 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
- All of the above
- 0 Other, namely:

.....

Explanation if desired:

It is difficult to determine in advance which of the aforementioned methods of interpretation (or a combination thereof) should be applied in a concrete case. As far as possible, without lapsing into theoretical exercises, we attempt to make explicit in the advisory opinion how we have interpreted a constitutional provision by including a paragraph with a "constitutional framework."

Normally, constitutional interpretation logically begins by interpreting the exact wording and the legal and legislative background of (a) constitutional provision(s). This allows the original intent of the (constitutional) legislator of constitutional provisions and their application to be reconstructed. This starting point assumes a certain objectivity because the text and the (parliamentary) genesis and application history are leading.

However, it is not sufficient to view a constitutional provision in isolation. The underlying constitutional system must also be considered; the system of the Constitution, as well as the constitution in a broader sense (including treaties with equivalent provisions). Thus, the place of a constitutional provision in a particular chapter of the Constitution and its relationship to other constitutional norms must be considered in order to properly interpret the meaning and scope of a provision. It is also important to look at existing legislation in the formal sense, in which a constitutional provision is elaborated. This may also include European legislation (systematic and contextual interpretation).

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

- Yes
- 0 No

Please explain:

When there is relevant judicial case law, which contains constitutional review ex post, it is taken into account when drafting the advisory opinion. For example, it could become part of the paragraph "constitutional framework."



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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:

The policy analysis starts by investigating what is going on exactly. What is the problem, what is the cause and background of it? Then the approach of the problem will be reviewed. Could this proposal solve the problem? Why did they choose this solution? How effective is it? Also, we look at the involvement of stakeholders during the legislative process. To what extent are their remarks taken into account? And are there not too many rules for society? Please refer to pages 11-13 of the assessment framework (see attachment).

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

To some extent we may suggest potential solutions, but this is not expected as a standard. The Advisory division is not required to draft alternative texts, nor does the division propose them.

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:

Once the Advisory Division adopts an advisory opinion it is published the week after and therefore becomes public.

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:

Each adopted opinion begins with a (cover) brief summary of the main remarks and conclusions, unless the Advisory division has no remarks what so ever. It depends on the subject-matter whether the advisory opinion will be made public accompanied with a press summary. This occurs, for example in case of media-sensitive proposals. In that case a press summary is prepared in cooperation with the Communications Department. This is then published along with the advisory opinion and is also published on social media channels, such as LinkedIn.

A press conference is only organised for our annual advisory opinion on the budget of the government, the annual advisory opinion on the compliance with the targets in the Climate Act and the annual report.



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:

Based on standard practice, the government is obliged to respond to the advisory opinion before it is submitted to parliament (article 8.18 Instructions for drafting legislation – not made explicit in formal law or the constitution).

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:

We reflect on the reaction of the government on our advisory opinion during our meetings and we also follow the parliamentary discussions on more substantive or politically sensitive pieces of legislation, and which role our advisory opinion plays in the discussions.

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:

We publish an annual report in which we reflect on the functioning of the rule of law in general and also publish an overview of our advisory opinions, including most important trends and topics.

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

Lawyers and judges may refer to advisory opinions in their positions or judgment. To what extent that happens needs further examination.



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 if there is a lack in a legal basis or competence in the law.

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:

.....

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 3 April 2024, ECLI:NL:RVS:2024:1387, paragraph 13 (in translation):

"Feedback to the legislator

As the Division considered under 8 to 9.3, due to the lack of elaboration in further regulations, Article 59, eight paragraph, of the Aliens Act 2000 cannot be used as a basis for investigating mobile phones of aliens in custody without their consent. The provision does provide the beginnings of a basis for this, but it is insufficiently clear and precise, given the nature of the interference in private life that the investigation of a phone entails today. This means that the legislator needs to elaborate on this basis if it wants to make it possible to investigate mobile phones of aliens in custody without their consent."

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:

.....

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:

Informal meetings with the directors of legislation of the ministries about the annual report of the Council of State, starting in 2024. See also the answer to question 49.

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

Judgment of 24 January 2024, [ECLI:NL:RVS:2024:155](#), paragraph 20 (in translation):

“Feedback to the legislator

In response to the argument of [appellant] and B. at the hearing on assistance to victims in criminal proceedings, the Division considers the following. The position of the victim in criminal proceedings has changed considerably in recent years. In the Division's view, it is unclear whether the legal aid system is fully geared to this development. The Division is of the opinion that it is up to the legislator to weigh up whether this development should be reason to implement changes in the system of legal aid on this point.”

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

The Administrative Jurisdiction Division does not propose a solution. Sometimes a judgment contains suggestions made by parties in the presentation of their arguments. Generally this is done with the statement that it is up to the legislature to follow up those kind of suggestions if desired.

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 Administrative Jurisdiction Division sees feedback to the legislature as one of its core tasks to contribute to the quality, enforcement and implementation of law. Feedback to the legislature is part of a constitutional dialogue between the state powers. At the same time, the Administrative Jurisdiction Division is limited in this regard by the separation of powers. In light of this, it only reluctantly offers feedback



when it comes to more than just giving a legal decision on, for instance, the applicability or bindingness of legislation. Furthermore, the Administrative Jurisdiction Division does not suggest solutions to the issues raised (see also the answer to the previous question).

A consideration to be taken into account when determining the need for feedback is if a problem arose in more cases already or could likely occur again in more future cases. If a problem is more structural in nature, the judge cannot solve it in a durable way by only giving a customized solution in the judgment in the case at hand. In that case, there is more reason to provide feedback to the legislator.

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 Administrative Jurisdiction Division aims to give an overview of the given feedback in its annual reports, starting with the annual report of 2024.

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:

In 2024, the vice president of the Council of State instituted an internal commission that exclusively deals with matters concerning feedback. This commission, the so-called Commissie Terugkoppeling ("Commission Feedback"), consists of five State Councillors, of whom four work in the Administrative Jurisdiction Division, and one in the Advisory Division of the Council of State. The Commission is still in the process of shaping itself, but plans to contact the government via its ministries on a regular basis, in order to monitor the effectiveness of its feedback. See also the answer to question 44.

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:



Given the separation of powers, it is up to the legislator to decide what to do with feedback. If it decides not to respond, that is a political choice that lays outside the domain of the Administrative Jurisdiction Division. See also the answer to question 47.

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:

Only about general issues of feedback, not about individual cases. See also the answer to questions 44 and 49.

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:

When drafting legislation, the legislator makes use of public consultation, i.e. it enables Dutch citizens and institutions to give their opinion on draft legislation. The Administrative Jurisdiction Division sometimes uses this opportunity to issue a consultative opinion. Moreover, when a draft statute directly concerns the activities of the Administrative Jurisdiction Division, it is normally expressly asked to do so.

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:

See the answer to question 49. The Commission Feedback consists of both State Councillors from the Administrative Jurisdiction Division, and a State Councillor from the Advisory Division. Through the Commission, the Administrative Jurisdiction Division may suggest topics for an advisory opinion of the Advisory Division.

