

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?

In Portugal, there is a Council of State, but it is a political body that advises the President of the Republic (Article 141 of the Constitution of the Portuguese Republic - CRP), whose main competence is exclusively political and not to support or supervise legislative activity.

In fact, historically, the Council of State has never had this role, as Portugal moved from an absolutist monarchy to a centralised constitutional monarchy and a form of government that was very dependent on a Head of State (now the President of the Republic) with moderating political power, which included the right to veto legislation for political reasons.

The origins of the Portuguese Council of State can be traced back to the King's Council in the monarchical period, which always had political advisory functions. It was abolished with the establishment of the Republic in 1910. It returned as the National Political Council with the military dictatorship of 1931 and was restored in 1933 (with the Constitution that would be in force during the Estado Novo period) as the Council of State, but always with the function of providing political advice to the Head of State. With the approval of the current Constitution (1976), also the result of a military coup, the Council of the Revolution replaced the Council of State. It was not until the constitutional revision of 1982 that the Council of the Revolution was abolished, giving way to the current Council of State and the creation of the Constitutional Court.

Some authors argue that the Constitutional Court can be seen as an extension of the Council of State, but it is obvious that this is the case, since the advisory function clearly did not include concern for the quality of legislation, but rather for the political expediency of solutions. In any case, the Constitutional Court has been entrusted, among other things, with the power of preventive and abstract review of the constitutionality of certain normative acts (a rule contained in an international treaty submitted to it for ratification, a decree submitted to it for promulgation as a law or a decree law, or an international agreement whose decree of approval has been submitted to it for signature), always at the request of the President of the Republic (with a very limited exception in the case of organic laws) - Article 278 of the CRP.

In short, in Portugal there is not, and never has been, an independent service that carries out a prior and consultative analysis of the quality of legislative acts. This task is the responsibility of the internal services of the legislative bodies, be it the Assembly of the Republic or the Council of Ministers.

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



See previous answer.

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

Since the majority of the legislative bodies are responsible for advising on legislation, there is no guarantee of independence.

Only in the case of the preventive control of constitutionality can it be said that this guarantee exists because of the status of the judges of the Constitutional Court, who are mostly appointed by Parliament (political appointment) and then exercise their function with the guarantees proper to holders of judicial power (Article 222 of the CRP).

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 answer is limited to the case of the Constitutional Court.

In Portugal, the Constitutional Court is provided for in Articles 221 to 224 of the Constitution of the Portuguese Republic. It is responsible for "the administration of justice in matters of a legal and constitutional nature" and is composed of 13 judges, 10 of whom are appointed by the Assembly of the Republic and the remaining three are co-opted by it. Six of these judges must be chosen from among the judges of the other courts, while the others are chosen from among jurists.

Article 13 of Law No. 28/82 of 15 November 1982 - Organization, Functioning and Procedure of the Constitutional Court - establishes the requirements to be met by the candidates: they must be Portuguese citizens in full possession of their civil and political rights, with a doctorate, master's degree or bachelor's degree in law, only doctorates, master's degrees and bachelor's degrees from a Portuguese school or officially recognized in Portugal will be considered, or be judges of the other courts.

Only the Assembly of the Republic is involved in the appointment of the judges of the Constitutional Court, a process that begins with the submission to the President of the Assembly of the Republic of one or more lists of candidates, signed by at least 25 and no more than 50 deputies, containing a number of names equal to the number of vacancies to be filled. Before the election takes place, the candidates are heard by the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees (Article 257 of the Rules of Procedure of the Assembly of the Republic).

The election shall be by closed ballot and the list obtaining at least two-thirds of the votes of the deputies present shall be deemed elected, provided that it exceeds the absolute majority of the deputies in office.

The procedure for the co-optation of the remaining three judges is regulated by articles 17 to 19 of Law 28/82 of November 15.



The term of office of the judges of the Constitutional Court is nine years and is not renewable.

The President and the Vice-President of the Constitutional Court are elected by secret ballot by the judges of the Constitutional Court for a term equal to half of the term of office of a judge of the Constitutional Court, and may be re-elected.

The exercise of the office of judge of the Constitutional Court shall be incompatible with the exercise of functions in organs of sovereignty, autonomous regions or local authorities, as well as with the exercise of any other office or function of a public or private nature, with the exception of the unpaid exercise of teaching functions or scientific research of a legal nature. Furthermore, the Judges of the Constitutional Court may not exercise any functions in the bodies of political parties, political associations or related foundations, nor may they engage in public party political activities.

The judges of the Constitutional Court shall be independent and irremovable and shall not cease to hold office before the expiration of the term for which they were appointed, except in case of death or permanent physical incapacity, resignation, acceptance of an office or commission of an act legally incompatible with the exercise of their functions, or compulsory resignation or retirement as a result of disciplinary or criminal proceedings.

In the case of the Parliament, the Law on the Organization and Operation of the Services of the Assembly of the Republic (Law No. 77/88, of July 1) stipulates that the technical advisory services are under the authority of the Secretary General of the Assembly of the Republic, who is appointed by the President of the Assembly of the Republic on a commission basis and for the duration of the legislative term.

As for the Council of Ministers, which is responsible for approving decree-laws, which are legislative acts of ordinary legislative power that the Constitution confers on the Government in matters not reserved to the Assembly of the Republic (this is a peculiarity of the Portuguese system, in which the Government has not only emergency legislative power, but also ordinary legislative power), these services depend on the organization of the Council of Ministers, which is approved by each government. Again, there is no independence.

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

There is no advisory opinion in Portugal. There is, however, a preventive abstract review, the purpose of which is to assess the constitutionality of rules that are not yet in force because they are part of international treaties that have been submitted to the President of the Republic for ratification, or of decrees of the Assembly of the Republic or of the Government that have been submitted to the President of the Republic for promulgation as laws or decree-laws, or of international agreements (agreements in simplified form) whose decree of approval has been submitted to him for signature. Only the most important rules of the Portuguese legal system may be subject to this procedure.



At the request of the President of the Republic, the Constitutional Court shall preventively review the rules contained in international treaties that have been submitted to the President of the Republic for ratification, diplomas of the Assembly of the Republic or of the Government that have been submitted to the President of the Republic for promulgation as laws or decree-laws, and international agreements that have been submitted to the President of the Republic for signature. In the case of rules contained in a regional legislative decree, the respective Representative of the Republic may request preventive supervision.

In the case of rules contained in decrees of the Assembly of the Republic that have been sent to the President of the Republic for promulgation as organic laws (Article 166, paragraph 2, of the Constitution of the Portuguese Republic), the review may also be requested by the Prime Minister or by one fifth of the members of the Assembly of the Republic in full exercise of their functions.

In the preventive review procedure, the Constitutional Court, in addition to its procedural decisions - i.e. not to hear the request - takes two types of decisions: it rules that each of the rules before it is unconstitutional (in whole or in part), or it does not rule that each of the rules before it is unconstitutional.

If the Court decides that a law is unconstitutional, the President of the Republic or the Deputy of the Republic is obliged to veto the law and return it to the body that passed it, which must comply with the Court's decision.

If the law is amended by the body that approved it and the provision or provisions found to be unconstitutional are removed, or, in the case of the Assembly of the Republic or the Legislative Assemblies of the Autonomous Communities, the law is approved by a qualified majority of two thirds (Article 279 of the Constitution), the President of the Republic or the Delegate of the Republic shall have the power to promulgate or sign it, notwithstanding the judgment of unconstitutionality. This does not prevent the Constitutional Court from later declaring these regulations unconstitutional in the context of other forms of constitutional review.

On the other hand, if the law is redrafted and does not simply remove the provisions that the Constitutional Court has declared unconstitutional, the President of the Republic or the Deputy of the Republic, as the case may be, may again request a preventive review of any of its provisions (Article 279(3) of the Constitution).

If the Constitutional Court rules that the provisions of an international treaty are unconstitutional, the President of the Republic simply informs Parliament that he cannot ratify the treaty. The treaty may be re-approved by the Assembly of the Republic by a two-thirds majority, and the President of the Republic retains the power to ratify it (Article 279(4) of the Constitution).

If the Court does not declare the treaty to be unconstitutional, the President of the Republic or the Deputy of the Republic, as the case may be, must promulgate or sign the law, although they may exercise the right of political veto, with the time limit running from the publication of the decision of the Constitutional Court (Article 136, paragraphs 1 and 4, and Article 233, paragraph 2, of the Constitution).

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



The Constitutional Court is made up of the President's and Vice-President's Offices, which provide advice and support to the President and Vice-President respectively; the Support Office for the Judge Advisors, which is made up of advisors who must have a law degree, many of whom are magistrates or academics; and the External Relations Office, which provides support in various areas, being responsible for Protocol and International Relations as well as institutional relations: organizing meetings, conferences and seminars on the Court's initiative; disseminating information about the Court and its activity; attending to the media who come to the Court; organizing and hosting visits to the Court, among others.

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

In 2023, the Constitutional Court handed down 6 judgments under the preventive abstract review and 1 in 2024.

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

The preventive review must be requested within eight days (counted consecutively - articles 56, paragraph 1, and 57, paragraph 1, of the Constitutional Court Act - CCA) from the date of receipt of the decree, if the applicant is the President of the Republic or a Member of Parliament, or from the date on which the President of the Assembly of the Republic notifies the Prime Minister and the parliamentary groups that the decree has been sent to the President of the Republic for promulgation as an organic law, if the applicant is the Prime Minister or one fifth of the members of the Assembly of the Republic.

The Constitutional Court must rule on the petition within twenty-five days, a period which may be reduced by the President of the Republic for reasons of urgency (Article 278(8) of the Constitution).

Once the case has been received by the registry, it is submitted to the President of the Constitutional Court, who may, within one day, admit the case, notify the applicant to remedy any deficiencies (the applicant must do so within two days) or, if he considers that the case should not be admitted, submit it to the plenary session, whereupon the Court must decide within two days and, in the event of a decision not to admit the case, notify the applicant (articles 57 and 52 of the CCA).

If the case is admitted and there are no deficiencies to be remedied, a rapporteur must be drawn by lot within one day (Article 58(1) of the CCA) and the body which adopted the contested rule must be notified so that, if it so wishes, it can reply to the request within three days (Article 54 of the CCA).

The Judge-Rapporteur has five days in which to draw up a memorandum "setting out the questions on which the Court is called upon to rule and the solution which he proposes, accompanied by a brief statement of the grounds", which the Registry shall send to all the Judges, together with a copy of the application and of the reply (Article 58(2) and (3) of the CCA).



Upon receipt of a copy of the memorandum, the President places the case on the agenda of the plenary session within ten days of receipt of the request. The decision may not be taken until two days after copies of the memorandum have been distributed to all the judges (Article 59(1) and (2) of the CCA).

Once the deliberation has been completed and the decision has been taken, the case is referred to the Judge-Rapporteur, who has seven days to prepare the judgment, which is then signed (Article 59(3) of the CCA).

All time limits for the processing of the case are shortened by the President of the Court if the President of the Republic has shortened the time limit for the decision of the Constitutional Court (Article 60 of the CCA).

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

Yes

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

Parliamentary legislative process

Please explain:

The decree, signed by the President of the Assembly of the Republic, is sent to the President of the Republic for promulgation.

Once promulgated, the decree becomes a law and is sent to the Government for referendum (signature of the Prime Minister) and then to the National Press for publication in the first series of the *Diário da República*.

The President of the Republic may exercise his right of veto for political reasons, which must be stated in a reasoned message, or, if he considers that the decree approved by the Assembly of the Republic contains provisions that contradict the Constitution, he may request a preventive review by the Constitutional Court.

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)?

Non-mandatory advisory opinions on national legislation

Explanation if desired:

As stated above, the Constitutional Court can only rule preventively in cases in which it is requested to do so, and only when the rules in question have not yet entered into force because they are part of international treaties that have been submitted to the President of the Republic for ratification, or decrees of the Assembly of the Republic or



of the Government that have been sent to the President of the Republic for promulgation as laws or decree-laws, or international agreements (agreements in simplified form) whose approval decree has been sent to him for signature.

However, in Portugal, the Supreme Management and Disciplinary Councils of the Judiciary and the Public Prosecutor's Office (the Superior Council of the Judiciary, the Superior Council of the Administrative and Tax Courts and the Superior Council of the Public Prosecutor's Office) may be asked to give an advisory opinion on legislative initiatives concerning matters directly or indirectly related to their jurisdiction, and must abstain from giving an opinion on aspects relating to eminently political options.

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

Parliament
Government

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

No

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

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

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?

No



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)

Explanation if desired:

In the preventive control carried out by the Constitutional Court, the analysis is strictly legal, specifically an analysis of the constitutionality of legislative projects that have not yet been promulgated by the President of the Republic.

In the case of advisory opinions requested by the Superior Council of the Administrative and Fiscal Courts (the administrative and disciplinary body for judges of the Administrative and Fiscal Courts), the analysis is legal, but may also include judgments on the merits and appropriateness of the proposed measures, given the reality of the court.

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

Yes, (almost) always

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

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

Technical remarks

Supporting remarks

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

Sometimes, depending on:



As mentioned above, the Constitutional Court may be called upon to give a preventive ruling on the provisions contained in international treaties that have been submitted to the President of the Republic for ratification, or in international agreements (agreements in simplified form) whose decree of approval has been sent to him for signature.

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)

Mainly, legal analysis.

The Portuguese Constitution contains an explicit rule on counter-limits: Article 8(4) of the CRP ["The provisions of the Treaties governing the European Union and the rules emanating from its institutions, in the exercise of their respective competences, shall apply in the internal order, in the terms defined by Union law, with respect for the fundamental principles of the democratic rule of law"]. And this dimension has to be analysed.

It should be noted, however, that domestically, especially institutionally, there still seem to be doubts about the relationship between European law and constitutional law, which perhaps explains why the Constitutional Court has never put questions to the Court of Justice of the European Union.

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

No

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

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



- 0 Economic, social and cultural rights
- 0 Institutional norms
- X All of the above

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
- X All of the above

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

No

Please explain:

The decision of the Constitutional Court in a preventive abstract review does not prejudge its possible future control, namely in successive abstract and concrete reviews, in relation to the same rules.

As for the influence that a previous review by the Constitutional Court may have on the preventive review, the question only arises if we are talking about the review of a bill that amends a previous law, because only in that case can such a question make sense. And the way in which the Court deals with precedents in this case does not differ from the general rules on the matter.

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

Sometimes, depending on:

In the case of an advisory opinion of the Supreme Administrative and Tax Court on matters on which it is required to give an opinion (Article 74(2)(j) and (l) of the Statute of the Administrative and Tax Court), this opinion may also focus on policy, implementation and execution aspects.

As far as the preventive abstract review of the Constitutional Court is concerned, this type of analysis does not take place in order to respect the principle of separation of powers.

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



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- 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
- X All of the above

Explanation if desired:

It should be noted that this analysis is only carried out in the opinions presented by the Superior Council of the Administrative and Tax Courts.

- 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?**

- X Yes, by the institution that produces them
- X Yes, by the (principal) addressee

The decisions of the Constitutional Court are published in the second series of the Diário da República and on the official website of the Court.
As for the opinions of the Superior Council of Administrative and Tax Courts, they are published on the website of the Assembly of the Republic.

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

Upon adoption of the advisory opinion

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

Yes, (almost) always



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

No.

And it should not do so because of the separation of powers.

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

No.

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

Yes, (almost) always

The Constitutional Court, in its annual activity report, indicates the number of cases decided in the context of concrete review, and generally highlights judgements handed down in this area as having the greatest impact on society.

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

As mentioned above, in the case of a preventive abstract review, if the Constitutional Court declares the decree unconstitutional, the President of the Republic is obliged to veto it and return it to the Assembly of the Republic, which may amend or repeal the provision deemed unconstitutional or confirm the decree by a qualified two-thirds majority.

The act of confirmation does not, however, remedy the defect identified by the Constitutional Court, but merely allows for the exceptional application of rules whose contradiction with fundamental law should, in the strictest sense, lead to their invalidity and, consequently, to their non-application. By virtue of this decision, the confirmed rules become part of the positive legal order, but they are not genetically affected by the vice of unconstitutionality.

In this way, the declaration of unconstitutionality, once the rule in question has entered the legal order, may open the way for it to be challenged again, either in a successive abstract review or in a concrete review (with the obligation for the Public Prosecutor's Office to appeal to the Constitutional Court if a court applies the previous rule declared unconstitutional in a concrete case).





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

The Supreme Administrative Court (STA) does not provide, directly to the legislator, information on technical legal issues. What often happens is, as part of its judicial functions, the Supreme Court makes an assessment regarding the legislation' interpretation and application (lack of a legal basis, legislative error and/or incompetence of the law) through its judgements, which are published in the Institute for the Financial Management and Justice Equipment (IGFEF) database.

However, it can never replace the legislator.

In administrative law, there is a procedural form that allows the court to order the administration to approve an act or a rule whenever there is a legally founded subjective right or an unlawful regulatory omission. However, where the law confers a discretionary power, the court can only indicate the values that must be present in the act, not its content. Nor can it fill the regulatory gap, except through the rules of hermeneutics (e.g. filling legal gaps) and to the strict extent necessary to decide a specific case.

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

Judgments

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

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Implicitly in the reasoning of the judgments
By way of a legal decision on the applicability or bindingness of legislation

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

For instance, the 29th of September 2004 Supreme Administrative Court' judgement, when assessing a legislative error, the following was considered:

'The reference made in the original no. 4, article 282 of the CPPT 'failure to declare an intention to plead, according with no. 1 was due to an oversight on the part of the legislator, since in the no. 1 is no longer offered to the appellant the possibility of pleading before the court of appeal (...). From the CPT to the CPPT, the legislator wanted to put an end to the appellant's option of arguing before the court of appeal (...). By mistake, the legislator kept it in the no. 4, article 282 of the CPPT, rising doubts in the interpretation.

The Supreme Administrative Court has favoured that this proviso interpretation was due to a legislator oversight, maintained due to inertia and without any useful effect (...).

Recognising this oversight, the Decree-Law no. 160/2003, of 19 July, removed this legal provision, leaving the no. 4, article 282 of the CPPT with the following wording: 'In the absence of the pleadings, under the terms of no. 3, the appeal shall immediately be dismissed by the appealed court'.

It was the recognition of the previous legislative error, interpretative by nature, since it gathered an uniform Supreme Administrative Court' case law and simply put an end to the doubt regarding the legal operators.' (see Case no. 0602/03)².

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

No

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

² Available at

<https://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/5c4849f74cfe273680256f2b00565ac8?OpenDocument>



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

.....

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

No

Explanation if desired:

The Supreme Administrative Court does not provide directly to the legislator information on structural problems, it does so indirectly through court rulings (see answer to question 38).

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?

The principle of separation of powers leads to a different solution. During the financial crisis, when Portugal was feeling the effects of the financial support programmes, social security had to be reformed.

The legislator considered that this reform should include a definitive reduction in the value of some old-age pensions, which would be essential to ensure sustainability and intergenerational equity.

The project was declared unconstitutional by the Constitutional Court in a preventive review, on the grounds that such a measure would not in theory be contrary to constitutional rules and principles, but in the specific case the rules adopted were not in line with constitutional principles. Parliament prepared another bill with amendments, and the Constitutional Court ruled in the same way.

This led to a discussion in the country about the 'appropriateness' of a model of preventive control in which the Court could give guidance on how the measure could



be approved in accordance with the Constitution. But the legislation and the constitution were not.

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

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?

Yes.

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

No.

The Supreme Administrative Court' competences are defined in articles 24 and 26 of the Statute of the Administrative and Tax Courts (approved by Law no. 13/2002, of 12 February). In none of the mentioned legal provisions is made any reference to the above situation.

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?

No

See answer to question 49.

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

No

Please explain:

In Portugal, the legislative power is independent from the judicial one, giving the legislator some free operating area. Nevertheless, the national legislator remains attentive to the case law issued by the Superior Courts and acts accordingly (see Supreme Administrative Court' judgement of 29th of September 2004).



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:

Articles 110 and 111 of the Constitution of the Portuguese Republic states that the sovereignty organs (the President of the Republic, the Government, Parliament and the Courts) are independent bodies which, in the justiceship exercise, comply and respect with the principle of the separation of powers enshrined in the Constitution.

Even in cases where the Constitutional Court verifies unconstitutionality by omission, i.e. it assesses and verifies "non-compliance with the Constitution by omitting the legislative measures necessary to make constitutional norms enforceable" (Article 283 of the Constitution), given the great sensitivity of the problem of "legislative omissions" and the exercise of this important competence of the Constitutional Court, if the Constitutional Court concludes that there is an omission, it cannot edit the missing norm or norms, or even order the competent body to do so: Both would be contrary to its nature as a judicial body. Rather, the Court will confine itself to "verifying" the existence of an unconstitutional omission and "informing" the legislative body.

It should also be noted that, in the above-mentioned preventive constitutional review procedure, if the rules under review are declared unconstitutional, the Constitutional Court will not be able to indicate to the legislative body what wording should be given to them in order to bring them into conformity with the Constitution.

A paradigmatic example of the consequences of such an impossibility are the two rulings of the Constitutional Court (in 2021 and 2023), in the context of preventive review, on two legislative initiatives aimed at decriminalising and regulating medically assisted death in the Portuguese legal system. In both cases, the Constitutional Court ruled that the initiatives were unconstitutional, in particular because of their vagueness as to the exact scope of their application.

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?

No
See answers to questions 49 and 52.

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

No
See answers to questions 49 and 52.

