

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.

In the Republic of Slovenia, we do not have independent general advisory body (such as the Advisory Division of the Dutch Council of State). Nevertheless, we have (to some extent) divided roles regarding legislative advisory function.

The Judicial Council of the Republic of Slovenia is an autonomous and independent state authority which performs tasks as determined by law, protects the autonomy and independence of the judiciary, and ensures the quality of work of courts and judges and the public reputation of the judiciary (paragraph one of Article 2 of the Judicial Council Act) In terms of the organisation of state authority, the Judicial Council is a state authority sui generis, which cannot be classified into any of the three branches of government. The main framework of its position and powers is set out in Articles 130, 131 and 132 of the Constitution of the Republic of Slovenia. Within its powers, the Judicial Council decides autonomously in an authoritative and professional manner, and thus independently of the three constitutionally defined branches of government, thereby decisively contributing to ensuring the independence of the judiciary and judges and ensuring the exercise of judicial power at a high level of quality.

The Judicial Council does not possess a general legislative advisory function. Its mandate is limited to issuing opinions on laws that specifically regulate the courts and the judicial service (on the basis of Article 27 of the Judicial Council Act).

The Supreme Court of the Republic of Slovenia (as one institution it has several judicial divisions, one of it being also an Administrative Division, as well as judicial administration) began its organized and consistent response to requests from the Ministry of Justice regarding the preparation of regulations as early as 2018. This practice was later extended to include draft laws from other governmental departments. As a further enhancement of its organizational approach to legislative monitoring, a Legislative Department was established as a part of judicial administration. It consists of the head of the department, who is the advisor to the President of the Supreme Court and (currently) 1 judicial councillor with bar exam.

The Supreme Court is involved in the legislative process during the inter-ministerial coordination phase of drafting the legislation. It actively participates in reviewing and providing input on legislative proposals that may impact the judiciary, ensuring that the perspective of the courts is considered in the drafting and amending of laws.

The legislative proposals or proposed amendments are always forwarded to relevant internal stakeholders, the Supreme court judges (heads of Supreme Court departments),



presidents of district courts, presidents of high courts, and the Project Management Office organized within the Supreme court, for their opinion (remarks).

Its responsibilities primarily include drafting judicial opinions on legislative proposals and bylaws, responding to EU regulatory proposals, and collaborating with various ministries during the coordination process of regulatory proposals. In 2023, judiciary representatives participated in several sessions of the relevant committee of the National Assembly of the Republic of Slovenia, the Constitutional Commission of the National Assembly of the Republic of Slovenia, the National Council, as well as various expert meetings at the Ministry of Justice.

Given the separation of powers, the role of the judges in this process is limited. However judges also participate as members of a working groups at the Supreme Court or at ministries. The role of judges as members of legislative working groups is predominantly advisory in nature. Leveraging their extensive jurisprudential expertise, they are in a position to critically assess and draw attention to potential legal deficiencies within the proposed statutory amendments. This is particularly crucial when there is a prima facie indication of a violation of constitutional principles. Their participation ensures that legislative drafting is conducted in accordance with the rule of law, safeguarding against provisions that could lead to unconstitutional interpretations or legal uncertainty. By providing informed opinions, judges contribute to the refinement of legal frameworks, ensuring their alignment with both constitutional mandates and established judicial precedent.

In 2023, a Legislative Department delivered 80 opinions (remarks) on legislative proposals and bylaws in various areas of law, with a strong emphasis on the administrative field.

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?

X Yes ²
0 No ³

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

*The scope of competence to give opinions about drafting of legislation is limited in its scope, as mentioned above, to issuing opinions on laws that **specifically regulate the courts and the judicial service.***

*Sodni svet Republike Slovenije / Judicial Council of the Republic of Slovenia
Trdinova ulica 4*

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

3 Please proceed to question 38.



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

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

.....

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

The Council consists of eleven members. Five members are elected by the National Assembly of the Republic of Slovenia on the proposal of the President of the Republic from among university professors of law, lawyers and other lawyers; six members are elected from among themselves by judges who hold judicial office on a permanent basis: one member is elected by judges who hold judicial office at the Supreme Court of the Republic of Slovenia, one by judges in courts of higher court status, one by judges in courts of district court rank and one by judges in local courts; two members are elected by all judges (Article 131 of the Constitution and Articles 10 and 18 of the Judicial Council Act).

The office of a member of the Judicial Council is honorary and is exercised in a non-professional capacity. The term of office of a member of the Judicial Council is six years. Every three years, two or three new members of the Judicial Council are elected by the National Assembly, and three new members from among themselves by judges who hold judicial office on a permanent basis (Article 12 of the Judicial Council Act).

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

Judicial Council formulates and adopts opinions in sessions. Decisions are taken by public vote and by a majority vote of all members, unless otherwise provided by law or the Rules of Procedure. The Judicial Council validly decide if at least eight members are present at the session.

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

Judicial Council is supported by professional service that employs 17 people, of which 4 are assigned judges- among them is the Secretary-General who leads the team, 4 judicial councillors with bar exam and other civil servants in the fields of human resources, finance, administration and IT support.



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

On average Judicial Council has given 17 opinions in the last 5 years (years 2019-2023).

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

The Judicial Council endeavours to deliver opinions as soon as possible within the time limits requested.

However, deadlines set by external institutions (National Assembly, Ministry of Justice, etc.) for preparation of opinions on draft laws or for giving opinions on legal and organisational content, are not always time-acceptable and long enough so that the Judicial Council could formulate an opinion in its regular sessions and transmit it to the State Assembly in a timely manner. Judicial Council has already pointed out this problem.

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

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

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

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

- Mandatory advisory opinions on national legislation (12)
- Non-mandatory advisory opinions on national legislation ()
- 0 Mandatory advisory opinions on decentral legislation ()
- 0 Non-mandatory advisory opinions on decentral legislation ()
- Solicited thematic advisory opinions (3)
- 0 Unsolicited thematic advisory opinions ()
- 0 Verbal advisory opinions ()
- 0 Visuals / movie clips ()
- 0 All of the above ()
- 0 Other (reports, books, studies etc) ()



Explanation if desired:

The numbers refer to opinions given in 2023.

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

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

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

- Yes
- No

16) Does the institute in any way provide feedback the other way around, i.e. by advising the supreme administrative court from a legislative-advisory point of



view, for instance by pointing out the potentially undesirable consequences of legislation?

- Yes
- No

Explanation if desired:

Given that the Judicial Council is competent to issue opinions on laws that regulate the courts and the judicial service, communication with the Supreme Court in the manner described above is possible and expected.

The Judicial Council monitors the open matters and possible issues also on the field of the administrative law especially from the view of the judicial independence and adopts opinions that are among others addressed to the Supreme Court as well.

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.

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

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

.....

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

- Relation to higher-ranking law (constitution and international and European law)
- General principles of law



- Legal systemic aspects (e.g. competence, discretionary powers, supervision, enforcement and legal protection, transitional law and evaluation)
- Technical legislative quality and requirements
- Other

Explanation if desired:

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

- Own views and ideas
- Technical remarks
- Supporting remarks
- None:

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.

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)

The answer to question 21 is negative.

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

- Yes, (almost) always
- No.

Explanation if desired:

.....

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



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

Explanation if desired:

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

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

Explanation if desired:

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

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

Explanation if desired:

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

- Yes
- No



Please explain:

When there is relevant judicial case law, which contains constitutional review ex post, it is taken into account when drafting the advisory opinion.

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

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

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

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

Explanation if desired:

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

To some extent the Judicial Council may suggest potential solutions, but this is not expected as a standard. The Judicial Council is not required to draft alternative texts, nor does 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



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- 0 Yes, by the (principal) addressee
- 0 Sometimes, depending on:

By law, the Judicial Council produces advisory opinions during its sessions. The minutes of its sessions are made public. If the matter is of major importance (relating to the judiciary), the opinion is additionally published on the Judicial Council's website.

.....

- 0 No

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

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

.....

Explanation if desired:

Once Judicial Council adopts an advisory opinion it is published approximately 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
- 0 No
- 0 Sometimes, depending on:



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

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

.....
Explanation if desired:

Based on standard practice, the government is obliged to respond to the advisory opinion before it is submitted to parliament (– 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:

The Judicial Council reflect on the reaction of the government on our advisory opinion during our meetings and they 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:

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.

At this point, it is important to emphasize that under Article 125 of the Constitution, judges are independent in the performance of their judicial function and are bound by the Constitution and the law.

The court must (pursuant to Article 156 of the Constitution and the first and second paragraphs of Article 23 of the Constitutional Court Act) stay the proceedings and refer the matter to the Constitutional Court if it determines that the law it is obliged to apply is unconstitutional.

The judges are also obliged to assess the constitutionality or legality of subordinate regulations and general acts for the exercise of public authority, and if they find such discrepancies, they must refuse to apply them (exceptio illegalis).

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



- 0 Journal articles
- 0 Conferences/meetings
- 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*
- 0 Explicitly in a paragraph that directs itself to the legislator
- By way of a legal decision on the applicability or bindingness of legislation*
- 0 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 30. November 2023, X lps 17/2023, paragraphs (16.-18., 23. in 24.)

“16. The court may not interpret the law in a manner that attributes to it a meaning that the legislator should not have determined under the stated conditions. If the interpretation of the third paragraph of Article 8 of the ZIKS-1 were accepted in the case at hand, which may initially appear correct upon reading this provision, it would impose an obligation on the commission to always conduct only a simplified ascertainment procedure and would not permit hearing the party when deciding on conditional releases. However, such an interpretation would constitute an infringement of Article 22 of the Constitution, for which there does not appear to be any constitutionally permissible objective. Moreover, even by accelerating the speed of the aforementioned procedure in this manner, neither significant public interest nor the constitutional rights of others (Article 15 of the Constitution) would be protected. The convicted person is serving a prison sentence imposed by a final judgment, and the decision regarding his conditional release would, by its nature, require a more in-depth assessment in the administrative decision-making process to protect constitutional values, not a less thorough one. In light of this, the Supreme Court cannot accept such an interpretation of the law, as it would lead to an unacceptable infringement of the mentioned constitutional right of the party.

Constitutionally Compliant Interpretation of the Law

17. In light of the above, it is the task of the Supreme Court to seek an alternative interpretation of the aforementioned provision of the ZIKS-1 that is consistent with the Constitution. A constitutionally compliant interpretation of the law means placing it



within the legal system of the Republic of Slovenia without creating conflicts between its norms and the provisions of the Constitution. As the highest court in the country (Article 127 of the Constitution), the Supreme Court is obliged to provide an interpretation of statutory law that does not lead to violations of the Constitution or other regulations that are superior to the law under the Constitution. In doing so, it can only derive from possible interpretations of the law based on established methods of legal interpretation and only within the semantic framework established by the legislator.

18. The constitutionally compliant interpretation of the third paragraph of Article 8 of the ZIKS-1 emerges when situating the authority to decide in a simplified ascertainment procedure within a broader understanding of the fundamental characteristics of administrative proceedings. In administrative proceedings, the administrative authority is obliged, in accordance with the principle of material truth, to ascertain the actual state of facts and all facts relevant to the decision (Article 8 of the Administrative Procedure Act- ZUP). In the related ascertainment procedure, the authority must ensure that the party can protect its rights and legal interests in accordance with the principles of safeguarding the rights of parties and the principle of hearing the party (Articles 7 and 9 of the ZUP).

23. Since the ZIKS-1 does not regulate the cases in which a special ascertainment procedure must be conducted, the Supreme Court cannot determine this either. A constitutionally compliant interpretation of the law must not exceed what is necessary to ensure constitutionality or supplement the law by including what may be beneficial or suitable for the regulation of a specific area. This is the task of the legislator (A. Vosskuhle, p. 189).

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 *through the remarks, opinions of Legislative Department of the Supreme Court*
- Annual review
- Journal articles
- Conferences/meetings
- Formal or informal contacts with representatives of the legislator/civil servants
- All of the above
- Other, namely:

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

Judgment of 26 August 2020, X Ips 22/2020

The Supreme Court has concurred with the position of the Constitutional Court that that the main hearing in administrative disputes has the same nature and meaning as the main hearing before any other court. All of this leads to the conclusion that the Administrative Court has to conduct a main hearing in the majority of cases, and is only able to decide in a session in exceptional cases.

As a result of the aforementioned ruling of the Supreme Court, the legislator adopted an amendment to the Administrative Dispute Act (ZUS-1), which, among other things, more clearly defines the exceptional situations in which the Administrative Court is not required to conduct a main hearing. This statutory arrangement aims to establish that the main hearing is the central point of adjudication in administrative disputes.

Paragraphs 14. - 17. (in translation):

"14. In cases where the factual situation is disputed between the parties, it must be considered that Article 22 of the Constitution establishes the right to a main hearing in administrative disputes not only for the presentation of evidence but also for gathering evidence necessary for the assessment that the Administrative Court must undertake, based on direct oral and public hearings (as stated in point 8 of the reasoning above).



15. Therefore, the main hearing in administrative disputes is also intended for deciding which evidence should be presented to clarify the disputed factual situation. Thus, the conduct of the main hearing is not contingent upon the assessment of which evidence may or must be presented during the main hearing; rather, this assessment must also be carried out at the actual main hearing. According to the explicit position of the Constitutional Court, the evaluation of whether the conditions for presenting proposed evidence at the main hearing have been met is not a permissible exceptional reason for the Administrative Court to deny the conduct of the main hearing. This perspective also indicates the need for further development of the case law of the Supreme Court regarding the interpretation and application of exceptions to the obligation to conduct a main hearing within the statutory framework of administrative disputes.

15. In the current statutory framework for administrative disputes, exceptions to the fundamental obligation to conduct a main hearing are defined only in one statutory provision (Article 59 of the ZUS-1), which must be interpreted in accordance with the Constitution and restrictively. It should also be emphasized that, according to the law, if a main hearing is not conducted and the Administrative Court decides in a closed session, the court is fully bound by the previously established factual situation as determined by the respondent (Article 60 of the ZUS-1). This means that if the Administrative Court does not conduct a main hearing, it cannot reevaluate the facts established in the administrative proceedings and cannot make a new (different) finding about the factual situation, which significantly limits the scope of assessment in the administrative dispute.

16. The second paragraph of Article 59 of the ZUS-1 explicitly states that the Administrative Court may decide without a main hearing even "if the factual situation between the claimant and the respondent is disputed, but the parties present only those new facts and evidence that the court cannot consider in accordance with this law (Article 52 of the ZUS-1) or if the proposed new facts and evidence are not relevant to the decision" (second subparagraph of the second paragraph of Article 59 of the ZUS-1). Given the right to a main hearing under Article 22 of the Constitution, which stems from the aforementioned positions of the Constitutional Court, it must be considered that this statutory provision is unconstitutional, as it constitutes an impermissible exception to the main hearing (as stated in point 15 of the reasoning above). However, the Supreme Court is not required to suspend the proceedings and file a request for a review of the constitutionality of the ZUS-1 before the Constitutional Court, as the protection of the human right to a main hearing in administrative disputes under Article 22 of the Constitution can also be ensured without this. The application of the provision in the second subparagraph of the second paragraph of Article 59 of the ZUS-1 is, in fact, a procedural option (and not an obligation) for the Administrative Court to decide in a session instead of after conducting a main hearing. It is merely a procedural authorization for the court, which should not be used if it would unduly infringe upon the constitutional right of the parties to a main hearing.



17. From the law, it follows that even in cases where the reasons outlined in the second subparagraph of the second paragraph of Article 59 of the ZUS-1 are present, it is a matter of further procedural decision by the Administrative Court whether it will decide in a session or after conducting a main hearing. However, the omission of the main hearing based on the reasons stated therein constitutes a violation of the parties' human right to a main hearing under Article 22 of the Constitution. Therefore, the Administrative Court should no longer use the aforementioned statutory provisions as a basis for deciding in a session. If it were to apply this provision in a specific case, it would, according to the interpretation of Article 22 of the Constitution by the Constitutional Court and the constitutionally compliant interpretation of the ZUS-1 by the Supreme Court, constitute a violation of Article 22 of the Constitution, leading to the annulment of the judgment based on this violation in appeal or review proceedings. "

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

Generally, the Supreme Court (Administrative Division) does not propose a solution. Sometimes a judgment contains suggestions made by parties in the presentation of their arguments.

Nevertheless, The Supreme Court has actively participated in proceedings to ensure more effective judicial protection; it has cooperated in the coordination of the draft amendment to the Administrative Dispute Act and has given several remarks regarding the regulation of legal remedies in international protection procedures.

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?

Feedback to the legislature is part of a constitutional dialogue between the state powers. At the same time, the Supreme Court 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 Division does not suggest solutions to the issues raised (see also the answer to the previous question).

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 annual report of the Supreme Court includes a chapter on legislation, which outlines the main opinions, responses, and findings of the Legislative Department at the Supreme Court.

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 Head of the Administrative Department attended meetings at the Administrative Court with representatives of the relevant ministries regarding the introduction of new competences for the Administrative Court (regarding the implementation of the EU Regulation on Digital Services and the EU Regulation on Terrorist Content).

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 Supreme Court. 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. These contacts are performed by civil servants in the Supreme Court administration, not by judges.

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 enables institutions to give their opinion on draft legislation. One of them is also the Supreme Court. In the professional coordination of laws, Supreme Court judges from the Administrative Department participate and provide opinions on draft laws through the Legislative Department at the Supreme Court.

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:

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See the answer to question 16

