

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?

Lagrådet
 Box 2066
 10212 Stockholm

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 Legislation (Lagrådet) is normally composed of six members, two ordinary judges from the Supreme Court, two ordinary judges from the Supreme Administrative Court and one retired judge from each court. The council is formally attached to the Supreme Court, but is an independent institution within the legislative process as proscribed in the constitution and in a special law.

Legislation is scrutinised by panels of three members, so normally the council consists of two panels. The judges serving in the council are on full-time leave from their respective courts for one or two years, something the individual judge decides. Retired judges are appointed for a year. If the legislative process so demands, the Government may expand the council and this is primarily done by appointing more retired judges and establishing temporary panels. However, there must always be an acting, ordinary judge in each panel so there is a limit for how such an expansion can be done without

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

³ Please proceed to question 38.



affecting the work of the courts, as more ordinary judges may have to be appointed (but only temporarily) to the council. This is very unusual, but not unknown, to happen.

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

The panels of the Council adopt their opinions independently of each other. Older opinions are consulted in order to ensure consistency, but since the opinions are only advisory full consistency is not a goal in itself.

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

One person assists the council with administrative issues. The members of the council may use the resources of their respective courts regarding research etc.

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

On average between 90 and 130.

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

We do not have any statistics on this but about two weeks would be a fair estimation.

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

- Yes
 No
 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

Please explain:

Usually, the Government presents the council with a draft bill before it is sent to parliament. The opinion of the council will then be processed in government. It may lead the Government to adjust the bill and to comment on the opinion of the Council. The opinion is attached to the final bill.



There is also a possibility for a parliamentary committee to send a proposal to the council, which happens, but not very often, and mostly in connection with proposals that origin in parliament itself and thus have not been included in a formal draft bill from the government.

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)?

X	Mandatory advisory opinions on national legislation	(120)
0	Non-mandatory advisory opinions on national legislation	()
0	Mandatory advisory opinions on decentral legislation	()
0	Non-mandatory advisory opinions on decentral legislation	()
0	Solicited thematic advisory opinions	()
0	Unsolicited thematic advisory opinions	()
0	Verbal advisory opinions	()
0	Visuals / movie clips	()
0	All of the above	()
0	Other (reports, books, studies etc)	()

Explanation if desired:

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

X	Parliament
X	Government
0	Judiciary
0	Civil servants
0	Universities
0	Media
0	General public
0	All of the above

Explanation if desired:

The government are the formal addressee of opinions (if not the parliament as describe above). In practice of course courts, civil servants, media, academics take notice. Indirectly the advisory opinions often are used in academic work.

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

X	Yes
0	No

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

0	Public (written) knowledge from scientific or other knowledge institutions, advisory councils or experts
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- 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:

When presented to the council, the draft bill is always accompanied by the opinions of various authorities, stakeholders and experts that the government are required to consult during the preparatory work (Instrument of Government, Ch 7 § 2). This gives the council a wide range of information on legal, practical and other issues in connection with the proposal. It is also free for all to contact the council with written or oral comments, but this is not common. The council is furthermore free to use any information that it may come across in media, science or elsewhere.

Every draft bill is presented to the council by experts from the relevant ministry of the government. They are obliged to assist the council with further information if necessary.

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

- Yes
- No

Explanation if desired:

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:

The composition of the council is specially made up to provide for pointing out how the proposed legislation may have unwanted consequences in legal practice. All advisory opinions are made public.





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)**

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

Explanation if desired:

The instrument of Government regulates what aspects of a draft bill the council will give its views on (Ch 8 § 22). This includes the relation to the constitution, other existing legislation, the legal technique of the bill, its effects on legal certainty and whether the purpose of the legislation will be achieved or not as well as an analysis of practical problems that may arise in its application.

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

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

.....

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

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

Explanation if desired:

See 17 above.

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

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



The council will often provide its own suggestions of how a legal norm should be drafted, as an alternative to the one provided by the government. This is normally accepted by the government in the later procedure before parliament. Most of this will be technical remarks on legal drafting. Supporting remarks are often given besides the formal opinion – they are thus not made public – but these are typically on issues of language, wording, phrasing etc.

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:

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:

The same rules apply in these situations as described above (17). An issue has been the way government often tries to implement legal acts of the EU in a way that is very close to the wording and structure of the directive etc. This often leads to conflict with established legal techniques in national legislation, use of legal concepts, accessibility to the legislation (in the meaning of being easy to understand) etc. The council very often points out these difficulties as to migrate them in the further work to be done by government and parliament.

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

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

When appropriate union law may play a part in the analysis of the council, especially concerning the “true” meaning of EU-law in regard to national measures. The council may for example discuss whether to purposed legislation does what it is intended to do (see 17) in that relation.



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:

It should be mentioned that Swedish constitutional law is rather weak on economic, social and cultural rights so in that regard the review is also rather limited.

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:

There is no prescribed method of interpretation of constitutional provisions, but this must as in all interpretation vary according to the text, its context etc. With that said, in general constitutional interpretation in Sweden tends to be rather textual, and other factors are only given weight if necessary. As Sweden have no fewer than four constitutional documents, such "extended" interpretation is necessary from time to time.

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

- X Yes
- 0 No

Please explain:

As constitutional case-law are part of the legal frame-work of any analysis it is included.

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

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

.....

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

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

.....

Explanation if desired:



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See 17 for basic background. As the council is obliged to analyse whether the draft bill will achieve its purpose, both the problem to be solved by the bill and the solution must be addressed to some degree. The council will however generally not comment on “pure” policy issues, but the lines for this may be blurred. It happens (rarely) that the council advises against legislation as a tool for achieving the goals of the government.

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

Almost all opinions will have solutions to legal-technical issues and provide alternative texts. To some extent suggestions on the solution of other issues may be provided but only in a rather clear legal context, i.e. providing a proportionality test to balance competing interests that the government may have not done (properly).

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:

When the council has adopted an opinion it will be published as soon as possible on its website.

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:

There is no formal hinder for the council to engage in such activities but up to date this has not occurred.

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.

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

- Yes
 No

Explanation if desired:

Not in any other way than by its decisions that may signal a need for legislative initiative. The SAC may for example point out that the legislation seems to have unintended results that cannot be addressed by legal interpretation, but this happens rarely.

35) 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:

.....

36) 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:

See answer above 34, that covers some of the options in 35 and 36.

.....

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

In the case HFD 2022 ref 10 (plenary), concerning the absence of a right to economic compensation for legal costs in administrative courts in Sweden, the court held:

“To the extent it is nonetheless deemed to be critical to create a possibility for the administrative courts to award individuals compensation for their litigation costs, questions of both principle and practice arise which require considerations which should befall the legislature. Accordingly, such a regime should not – when the right to a fair trial does not so require – be implemented by means of case law.”

(33. I den mån det ändå skulle bedömas som angeläget att skapa en möjlighet för förvaltningsdomstolarna att tillerkänna enskilda ersättning för rättegångskostnader väcks både principiella och praktiska frågor som kräver överväganden som det bör ankomma på lagstiftaren att göra. En sådan ordning bör därför inte - när rätten till en rättvis rättegång inte kräver det - införas genom rättspraxis.)

38) 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

39) 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:

.....

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

- Yes
- No

Explanation if desired:

It is not the role of the Swedish SAC to provide such input.

However, it should be mentioned that the Parliamentary Ombudsman (*Justitieombudsmannen*), who decides on individual complaints against the public administration and the courts, does provide the parliament with a yearly report in which structural problems with the legislation and its application are identified and discussed. Sometimes solutions are hinted at in that context.

.....

41) 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:

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

Not relevant, see above.

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

In the context of deciding cases, the SAC does not involve itself with such issues.



- 44) 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?**

Apart from deciding individual cases and in that context discussing the content and applicability of legal norms, the SAC does not provide feedback in this meaning to the legislator. There are no explicit reasons for this way of shaping its role in the constitution and the procedural legislation, but it most certainly has to do with the separation of powers.

- 45) 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
0 No

Please explain:

Not relevant, see above.

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

0 Yes
0 No

Please explain:

Not relevant, see above.

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

0 Yes
 No

Please explain:

Not relevant, see above.

- 48) 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?**

X Yes
0 No



Please explain:

On limited issues of budget or procedural reform concerning the supreme courts etc some formal and informal contacts with the government and/or the parliament may occur.

49) 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?

X Yes
0 No

Please explain:

When drafting legislation, the government is obliged to consult various experts, authorities, stake holders and the general public. The SAC has a role in this context when the legislation concerned affects the supreme courts or is of more principled importance (constitutional reform, issues of basic legal principles).

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

0 Yes
x No

Explanation if desired:

There is no formal contact between the SAC and the Council of legislation on such issues. However, as explained above (4) the council consists of members of the supreme courts, so general and specific knowledge is transferred this way.

