

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



Co-funded by
the European Union

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?

X Yes ²
0 No ³

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

Italian Council of State
Chamber of Deputies' Committee for the legislation
Senate's Committee for the legislation

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 Italian Council of State was established on 18 August 1831 - with the edict of Racconigi, issued by Carlo Alberto, sovereign of the Kingdom of Sardinia - and is presided over by the same King with the function of advising him in his decisions. From 1889, with the establishment of the 4th Section, the Council of State also assumed jurisdictional functions.

Article 100 of the Italian Constitution gives the Council of State the title of having a dual function «of legal-administrative advice and protection of justice in the administration». Advisory function of Council of State is carried out by the First Advisory Section and the Advisory Section on regulatory acts.

Law n. 127 of 1997 provided for the cases of mandatory opinions on the schemes of regulation of the Government, on the extraordinary appeals to the President of the Republic, on the general schemes of contracts-the Council of Ministers, and has established a consultative section of the Council of State for the examination of the schemes of regulatory acts for which the

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

³ Please proceed to question 38.



opinion of the Council of State is prescribed by law or is otherwise required by the administration.

The First Advisory Section adopts the mandatory opinion on extraordinary appeals to the President of the Republic (decree of Presidente of Republic n. 1199 of 1971), on the general models of standard contracts, agreements and conventions drawn up by one or more ministers.

The art. 14 of Royal Decree n. 1054/1924 provides that the Council of State may be delegated by the Government to draft legislation or regulations.

This was the case for the code of administrative trial and the code of public procurements.

The First Advisory Section and the Advisory Section on regulatory acts are composed of State Councillors.

Currently, each of the two sections is composed of two presidents and eight state councilors for each, some of whom are assigned to both sections.

The 25% of the State Councillors are from special exam, 25% from government appointments and 50% from courts of first instance.

The members of the advisory sections may, like those of all other judicial sections, come from each of these three categories.

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

The advisory Section on regulatory acts performs the functions of the State Council in support of quality regulation giving opinions on Government and ministerial regulatory schemes (unless otherwise provided for by individual licensing law), draft legislative decrees (when the opinion of the Council of State is provided for in the individual law of delegation or if it is a code).

The Advisory Section examines, if requested by the President of the Council of Ministers, the draft of regulatory acts of EU legislation.

The opinion of the Council of State is always given in General Assembly for the schemes of legislative acts and regulations referred to by the section or the President of the Council of State because of their particular importance.

In the case of particular complexity of the matter to be decided on, the President of the Council of State may set up a special commission composed of councillors from both the judicial and advisory sections.

The consistency of advisory opinions is ensured by taking into account previous advisory opinions or by deliberately diverging from them.

Each advisory opinion adopted is signed by the President of the section, sent to the government and published on the Council's website.

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

The Advisory Sections of the Council of State are supported by a director and administrative servants, as are all other sections of the Council of State.

No legal experts or other professionals with specific expertise to support these sections are provided.

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

It is necessary to distinguish:

a) Opinions given by the Advisory Section for regulatory acts on drafts/schemes of regulation or other regulatory acts on average between 75 and 76;

b) Opinions given by the first Advisory Section:

- on extraordinary appeals to the Head of State: on average between 1300 and 1500;

- on questions about the interpretation of current laws: on average between 5 and 20.



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

Advisory Section for regulatory acts: 45 days both in 2022 and in 2023;
first Advisory Section: 124 days both 2022 and 2023 for extraordinary appeals to the Head of State; 45 days both 2022 and 2023 for questions about the interpretation of current laws.

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

- ☒ Yes
☐ No
☐ Sometimes. Please explain:

The advisory opinion of the Council of State, in accordance with the law, must be given within 45 days of receipt of the request.

After this time limit, the administration may proceed without obtaining an opinion.

The deadline can only be extended once for the inquiry's purposes, and the opinion must be given conclusively within twenty days of receiving the results by the relevant administrations (Article 17, 17, paragraph 27, law n. 15 May 1997, n. 127).

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:

The final draft of the regulatory act, after the agreement of the other ministers concerned and the other preliminary agreements required, is submitted to the Council of State for its opinion.

According to art. 17 of the law n. 127 of 1997 that has established the advisory section for regulatory acts the "examination of the schemes of regulatory acts for which the opinion of the Council of State is prescribed by law or is otherwise required by the administration" cannot proceed on the basis of a provisional text which is still in progress.

This must be the last act intended to guide the final approval, in a political context, of the legislative measure by the Council of Ministers, before forwarding it, where provided for, to the competent parliamentary committees (art. 2, paragraph 3, lit. c), Law n. 400/1988).

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

- | | | |
|-------------------------------------|----------------------------------------------------------|------|
| <input checked="" type="checkbox"/> | Mandatory advisory opinions on national legislation | (75) |
| <input type="checkbox"/> | Non-mandatory advisory opinions on national legislation | () |
| <input type="checkbox"/> | Mandatory advisory opinions on decentral legislation | () |
| <input type="checkbox"/> | Non-mandatory advisory opinions on decentral legislation | () |
| <input checked="" type="checkbox"/> | Solicited thematic advisory opinions | (10) |
| <input type="checkbox"/> | Unsolicited thematic advisory opinions | () |
| <input type="checkbox"/> | Verbal advisory opinions | () |
| <input type="checkbox"/> | Visuals / movie clips | () |
| <input type="checkbox"/> | All of the above | () |
| <input type="checkbox"/> | Other (reports, books, studies etc) | () |

Explanation if desired:

According to art. 17 of the law n. 127 of 1997 a consultative section of the Council of State is established for the examination of the schemes of regulatory acts for which the opinion of the Council of State is prescribed by law or is otherwise required by the administration.

The section also examines, if requested by the President of the Council of Ministers, the drafts of legislative acts of the European Union.

The opinion of the Council of State is always given in General Assembly for the schemes/drafts of legislative acts and regulations referred by the section or the President of the Council of State because of their particular importance.

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

- | | |
|-------------------------------------|------------------|
| <input type="checkbox"/> | Parliament |
| <input checked="" type="checkbox"/> | Government |
| <input type="checkbox"/> | Judiciary |
| <input type="checkbox"/> | Civil servants |
| <input type="checkbox"/> | Universities |
| <input type="checkbox"/> | Media |
| <input type="checkbox"/> | General public |
| <input type="checkbox"/> | All of the above |

Explanation if desired:

Government is the formal addressee.

Indirectly, advisory opinions are often used in academic work and sometimes cited in case law.

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

- | | |
|-------------------------------------|-----|
| <input checked="" type="checkbox"/> | Yes |
| <input type="checkbox"/> | No |

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



Co-funded by
the European Union

- 0 Public (written) knowledge from scientific or other knowledge institutions, advisory councils or experts
- ☒ Additional information provided by the ministry (reports, consultations, et cetera)
- 0 Ad hoc (written or verbal) insights on request from (academic) experts
- 0 Ad hoc (written or verbal) insights on request from government officials
- 0 Insights from implementation experts
- 0 Insights from stakeholders or lobby groups
- 0 Case law by (administrative) courts
- 0 All of the above
- 0 Other

Explanation if desired:

The Council of State, when adopting its advisory opinion, takes into account:

- the explanatory report of the Ministry which prepared the draft regulatory act in which the aims of the legislation are highlighted;
- the regulatory technical analysis, which considers the European, constitutional and legislative interactions of the scheme to be adopted;
- the regulatory impact analysis (RIA), which also uses statistical data to justify the reasons for the choice of regulation in comparison with other possible options, including the so-called zero option;
- the verification of regulatory impact (VIR), especially in the case of modification or replacement of existing legal texts;
- consultations where necessary (for example, stakeholders, trade associations, unions);
- the opinions of the authorities, if any (anti-corruption authority, Drug Agency etc etc).

No informal contacts with the Ministry responsible for the draft regulatory act are planned to gather further information.

If the advisory Section so wishes, there is a formal procedure whereby a minister or his legislative staff may be invited to discuss the draft, normally when there are strong criticisms from the advisory Section on it. This is rarely the case.

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

- 0 Yes
- ☒ No

Explanation if desired:

Case law speaks for itself, so no additional contact is needed.

As already explained, the Consultative Section is one of the seven sections of the Council of State and there are no special rules for the selection of its members who are Councillors of State.

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



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

0 Yes
☒ No

Explanation if desired:

See answer to question 15.

All advisory opinions are published on the administrative justice website, so the judiciary – like all other institutions – will be able to take notice of the advisory opinion.

The advisory opinion takes into account possible undesirable consequences for the jurisprudence, especially on the profile of uncertainty and lack of clarity of the provision that could give rise to conflicts in the interpretation of the law.



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)
- X Other, namely:

The analysis of possible challenges or undesirable effects regarding the implementation and the effects on practice.

Explanation if desired:

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:

The Section examines whether the proposed legislation complies with higher-ranking laws, such as the Constitution, EU law, national law and whether there are conflicts related to interactions between them.

The Sections verifies too the compliance with national and supranational jurisprudence, adoption procedure (including the acquisition of the consent of the various administrations concerned, the verification of the coverage of financial charges by the General Accounts of the State, coordination between the administrations).

We also check whether the approach to the problem is legally well organised, including issues falling within the competence of ministers and other public bodies concerned.

Options to be drawn from the legislation in order to avoid unnecessary consequences are also considered.

Furthermore, we check how monitoring and enforcement are organised and whether a transitional right from the old to the new legal regime is needed.



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

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

Explanation if desired:

The advisory activity on regulatory acts is not expressly bound to criteria set by law. However, it is possible to reconstruct these criteria considering opinions given over time, from which emerge the features of both control and cooperation and a constant attention to quality, both formal and substantive of the legislative texts submitted for opinion. The advisory opinions of Council of State also contains recommendations and remarks on drafting issues.

Through its opinions, the Council of State aims to improve the quality of legislation in many respects. Among the various criteria, the Council of State considers drafting according to the guidelines laid down in 2001 by the Presidency of the Council of Ministers as an important tool for reducing uncertainties in interpretation and avoiding future disputes.

We often suggest introducing a transitional provision if we think it is necessary to switch from the old regime to the new one or to provide monitoring systems, which are useful for checking compliance and implementation of the new rules.

Monitoring systems in our experience are fundamental for future action in the same fields because they are the basis for a good V.I.R. and for choosing whether and how to change the regulatory act.

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:

According to art. 17 of the law n. 127 of 1997 the advisory section examines, if requested by the President of the Council of Ministers, the drafts of legislative acts of the European Union.

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:



As the Netherlands stated in their reply, there is less room for policy analysis when it comes to implementing EU legal acts because of mandatory application.

We can agree that the analysis in these cases raises questions such as: will implementation be timely and adequate? Are the new rules 'feasible' for citizens and businesses? Adequate human and financial resources have been provided, where necessary, to implement the European legislation?

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

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

Explanation if desired:

The Department for European Affairs normally assists the Prime Minister or the political authority delegated by him ensuring coordination during the drafting of European legislation and its transposition into Italian law.
See answer to question 21.

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

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

.....

Explanation if desired:

In the Italian legal system, the Constitutional Court is the competent judge to decide whether a provision of law complies with the Constitution.

In its opinion on a regulatory act, the Council of State may point out that a particular legal provision is not in conformity with the Constitution.

In this case, if a constitutional interpretation of the provision is not possible, even taking into account the jurisprudence of the Constitutional Court, an interlocutory opinion is adopted to refer the matter to the competent ministry and suggest an amendment of the provision.

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



Co-funded by
the European Union

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

Explanation if desired:

See answer to question 24.

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:

See answer to question 24.

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

- ☐ Yes
- ☒ No

Please explain:

See answer to question 24.

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:

See answer to questions 14, 19, 20

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

The advisory section may suggest potential solutions, but this is not expected as a standard. The advisory section is not obliged to produce alternative texts, nor does it propose them, but this often happens in a spirit of dialogue and collaboration from the perspective of the interest of the law.

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



Co-funded by
the European Union

- 0 Other
0 Sometimes, depending on:

.....

Explanation if desired:

Once the Section adopts an advisory opinion it is published on the website as all the opinions and the rulings of the Italian Council of State.

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

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

Depends on the matter of the advisory opinion.

In the case of sensitive media and public opinion matters, the State Council's Communication Office prepares a press release.

This is published on press agency and social media channels.

There are generally no press conferences.



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:

In case of an interlocutory opinion with which the Section highlights the presence of critical issues of such consistency that it opts for a rewriting of the scheme under consideration, the responsible administration must resubmit it, giving reasons why eventually do not comply with formal or substantive suggestions.

In case of a final opinion, the administration concerned may or may not accept the remarks and recommendations of the Council of State, which may strengthen them, adopting a favourable opinion on the condition that some of them are implemented or that all the missing procedural steps are adopted.

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

- ☒ Yes, (almost) always
☐ No

Explanation if desired:

We check whether the government has implemented our advisory opinion by ex post checking the regulatory act published in the official journal.

This review is also useful for the drafting of subsequent opinions.

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

- ☒ Yes, (almost) always
☐ No

Explanation if desired:

We publish an annual report on the consultative and judicial activity of the Council of State.

As for the judicial functions, we highlight the most important judgments and their impact, also for opinions we highlight trends by examining the most relevant opinions adopted over the years.

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 of Council of State in their positions or judgment as well as they could refer to other acts.



CHAPTER 4 JUDICIAL FEEDBACK TO THE LEGISLATOR

Dealing with cases, the judiciary can be confronted with more or less systemic problems in the interpretation and application of legislation. The following questions are based on the distinction between two kinds of these problems. Firstly, there may arise more or less technical legal issues such as inconsistencies in legislation, a missing legal base or an incompatibility with higher law. Secondly, the administrative courts may come across more structural problems that are not strictly technical in nature and may be more sensitive and complex. Think, for instance, of difficulties for the administration in implementing a certain statute or the exceptionally harsh consequences that legislation might have in certain types of individual cases.

In short, legal or practical reality may differ from what the legislator had in mind. Problems like these cannot always be remedied in the judicial decision. It is then conceivable that the administrative courts decide to signal these points of attention to the legislator in their decisions or by other means, in order to help improving the quality of legislation and the effectiveness of the implementation of law in practice. That kind of judicial feedback to the legislator is the subject of the following questions.

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

- ☒ Yes
☐ No

Explanation if desired:

For example, if there is an antinomy between different laws that cannot be overcome by interpretation or if there is uncertainty in relation to the regime to be applied due to the lack of clarity of the provisions.

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

- ☒ Judgments
☐ Indirectly by signalling structural problems to the advisory body
☒ Annual review
☐ Journal articles
☐ Conferences/meetings
☐ Formal or informal contacts with representatives of the legislator/civil servants
☐ All of the above
☒ Other, namely:

Advisory opinions.

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

Co-funded by
the European Union

- ☐ 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:

According to article 58 of the Royal Decree n. 444 of 1942, the Council of State, in advisory function, refers government cases of laws not updated and not coordinated and of legislation difficult to interpret and apply.

The practice has extended this reporting power to judgment.

The above-mentioned rule and practice is an implementation of art. 100 of the Italian Constitution, which recognizes the Council of State «... as a body for legal advice and administrative protection of justice in the administration».

The Office of studies and documentation, pursuant to art. 14 *ter*, paragraph 3, of the Regulation on the organization of administrative justice offices, has the task of preparing files to report such information to the President of the Council of State to make more effective the application of art. 58 of the Royal Decree no. 444 of 1942.

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

Council of State, Section II, judgment n. 1489 of 2023

Feedback to the legislator

Possible conflict between the definition of «dehors» and other «elements of urban furniture», characterized as «temporary» structures, as well as «functional» the activity of food and beverage and their submission to the procedure for assessing the compatibility with the landscape, provided for by Legislative Decree n. 42 of 2004.

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:



Co-funded by
the European Union

.....

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

☒ Yes
☐ No

Explanation if desired:

See answer to question 40.

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

☒ Judgments
☐ Indirectly by signalling structural problems to the advisory body
☒ Annual review
☐ Journal articles
☐ Conferences/meetings
☐ Formal or informal contacts with representatives of the legislator/civil servants
☐ All of the above
☒ Other, namely: **Advisory opinions**

See answer to questions 40 and 41.

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

Council of State, section I, advisory opinion n. 1085 of 2023

Feedback to the legislator

Any legal antinomies arising from the interaction between the d.lgs. n. 24 of 2023 of transposition of the European legislation on whistleblowing and national regulations governing military or civilian armed forces, as well as the consequences of assigning the role of whistleblower to a person belonging to these categories in relation to organizational, disciplinary and precautionary measures.

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

The Council of State points out the antinomies but does not suggest potential solutions for the legal-technical or other issues 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?



According to article 58 of the Royal Decree n. 444 of 1942, the Council of State, in judicial function, refers government cases of laws not updated and not coordinated and of legislation difficult to interpret and apply to contribute to the quality, enforcement and implementation of law.

See answer to questions 40 and 41.

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

☒ Yes
☐ No

Please explain:

See answer to question 40.

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:

See answer to question 40.

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 the legislator decides not to respond, it is a political choice that lays outside the domain of the Council of State. See also the answer to question 40.

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:

See also the answer to question 40.



Co-funded by
the European Union

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?

X Yes
0 No

Please explain:

See the answer to questions of chapter 1 and 2.

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

X Yes
0 No

Explanation if desired:

See the answer to questions of chapter 1 and 2.

