

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

Answers of the Republic of Serbia

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.

- 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?**

No ²

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

- 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)?**
- 5) **Who has the competence to adopt the advisory opinion and how is the unity of advisory opinions ensured?**
- 6) **How much support staff is assisting this institution and what is their background (legal experts, other academic experts, communication professionals, et cetera)?**
- 7) **How many advisory opinions does this institution give yearly (on average)?**
- 8) **On average, how many weeks will it take for an advice to be finished?**
- 9) **Do any mandatory (e.g. legal) deadlines apply for the production of advisory opinions?**

Yes

No

² Please proceed to question 38.



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:

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

Explanation if desired:

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

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

Explanation if desired:

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

Yes



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No

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

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

Explanation if desired:

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:



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:

Explanation if desired:

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

Other, namely:

Explanation if desired:

.....

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



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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:

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

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

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



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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:

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



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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?

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:

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:



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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:

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:

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?



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?

X Yes

Explanation if desired:

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:

If they notice deficiencies in the application of the law in practice, the courts may point out to the authorized proponents the deficiencies of particular legal solutions.

Judges participate in expert meetings (conferences, seminars) on the topic of the quality of a specific regulation and they can draw attention to inconsistencies in the application of a particular legal solution. Also, by participating in the Conferences of All Judges, latest trends and effects in the application of the law are considered, among others, within thematic units.



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Judges can be the authors of professional papers and publications on the topic of the quality of laws and the harmonization with the case law.

The Government of the Republic of Serbia made a decision on the management and the use of the e-Consultation Portal, which aims at enabling the public to participate in the process of preparation and adoption of all public policy documents and regulations electronically (online) in one place. Public authorities in the Republic of Serbia are obliged to use this portal for conducting consultations and public hearings in the process of adopting regulations and planning documents.

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

Implicitly in the reasoning of the judgments

Explicitly in a paragraph that directs itself to the legislator

By way of a legal decision on the applicability or bindingness of legislation

All of the above

Explanation if desired:

If they notice deficiencies in the application of the law in practice, the courts may indicate the deficiencies of a particular legal solutions to the authorized proponents.

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

Judgment as of 13 June 2024;

In fiscal cases, according to Article 36 of the Law on Tax Procedure and Tax Administration, it is prescribed that, if the delivery of the tax act is made by sending a registered mail, the tax act is considered delivered on the day of delivery, and if delivery was not possible, the tax act is considered delivered on the 15th day from the day of submission of the tax act to the post office.

That means that the legislator must elaborate when it is considered that the delivery of the act was not possible, if they want to regulate this issue through the lex specialis in a way that is different from the way the issue is regulated by the Law on General Administrative Procedure.

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

X Yes



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

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

.....

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

X Yes

Explanation if desired:

If the Court finds that there is a need to amend the legal solution, it can forward the information about the need to consider amendments to the law.

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:

Through written proposals and communication with the authorities competent for specific area. Through events held in the form of a round-tables or court open days, which represent discussion forums between the representatives of judiciary and representatives of state authorities for the purpose of better understanding and addressing the current problems in the application of the law in practice, as well as the way in which the courts act in a specific matters.

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

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



The court may indicate the existence of inconsistencies or observed problems in the application of the law if it encounters such problem in its case law, but the court does not propose solutions.

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 the Constitution of the Republic of Serbia the legal order shall be unified, the organization of government shall be based on the separation of powers into legislative, executive and judicial, and the relationship between the three powers shall be based on mutual scrutiny and balances, and the judicial power shall be independent.

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

Please explain:

In its Annual Report on the Work, the Administrative Court provides an overview of entire report on the work of the court, which includes statistical data on the work of the court, the court's actions within its jurisdiction, as well as other data of importance for the work of the court, so that the report also contains information related to the participation of judges in the work of working groups for the drafting of laws, monitoring of current drafts of laws as well as participation in public debates on draft laws and written information regarding perceived needs for amendments to laws that the court referred to the competent ministry.

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

Please explain:

The Administrative Court provides judicial protection in the administrative dispute in over 160 legal matters which implies application of 356 substantive laws and several hundreds of by-laws which further indicate the width of jurisdiction of this Court. On a daily basis, the Administrative Court monitors the changes within the framework of the legislation through the Official Gazette of the Republic of Serbia, which is delivered to all the judges in order to monitor jurisdiction and new legal regulations, which, among others, include legal regulations that have recently been the subject of public debate in which the Court participated.



In particular, it is monitored whether the proponent of the law adopted the suggestions and comments pointed out by the Court. Also, as stated in the answer to question number 39, the *E-consultation* portal enables unhindered use and monitoring of relevant information in the entire process of adopting regulations and planning documents.

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

No

Please explain:

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

Please explain:

When forming working groups for the draft legislation, judges are often members of these groups, who in performing their duties deal with the matter that should be regulated by law. Thus, the Working group dealing with the drafting of the laws can become familiar with the relevant case-law.

53) Is there a role for the highest administrative court in the process of legislation, i.e. by advising the legislator *ex ante* during the process of legislation?

No

Please explain:

The adoption of laws in the Republic of Serbia is under the jurisdiction of the National Assembly. The National Assembly forms permanent working bodies (boards) aimed at, among others, considering the draft laws and other acts/documents submitted to the National Assembly. The competent board of the National Assembly adopts an act regulating unique methodological rules for drafting laws and other acts passed by the National Assembly. The Rules of Procedure of the National Assembly regulate rules for the adoption of the law (who can propose the law and procedure). In order to prepare the draft law, the authorized proposers form working groups, whose members are experts in various professions, to which the matter, which should be regulated, refers to. After the legislation has been drafted and prior to submitting to the National Assembly, public consultations on the draft legislation are being



scheduled, aiming at discussion on the quality of a certain legal solution, so that proposal may be subject to amendments prior to its submitting to the National Assembly.

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

No

Explanation if desired:



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