

ACA QUESTIONNAIRE FOR THE 2025 SEMINAR IN THE HAGUE ON CONTRIBUTING TO THE QUALITY OF LEGISLATION

Looking into the role of advisory bodies, like Councils of State ex ante, but also the role of Supreme Administrative Courts ex ante or ex post (giving feedback to the legislature) aimed to improve practical effectiveness, proportionality and fairness of legislation

INTRODUCTION

The role of state powers in the legislative process

Laws order society, protect and give direction. Laws regulate the behaviour of citizens and government and are an important pillar to give citizens legal certainty. Legislation must therefore offer clarity but also flexibility in a changing society. Developments in society require choices that sometimes, but not always, also lead to legislation. Given this, the deployment and use of legislation must be handled with care because the expectations it raises must be fulfilled and the law must retain its validity in the long term.

Legislation ideally comes about in a continuous and constructive dialogue between the state powers. The executive and the judiciary branch depend on good legislation. Legislation that is carefully drafted, with sufficient attention to all relevant interests and values, including enforceability, will in practice lead to fewer problems and thus fewer lawsuits. And legislators can improve the quality of legislation by drawing in part on the previous practical experiences of executive agencies and (administrative) judges in implementing and enforcing the law and any shortcomings they have found.

There are various (formal, regulated but also informal) instruments or mechanisms through which (solicited or unsolicited) input from executive agencies and the judicial branch, as well as from independent general advisory bodies regarding future and existing legislation is or can be provided. For example, instruments that are used prior to the creation of legislation (simply referred to as 'consultation' or ex ante) and instruments that are used in response to existing legislation (simply referred to as 'feedback' or ex post).

On May 15, 2017, an ACA seminar in The Hague discussed the tools and mechanisms existing in different countries that can contribute to good legislative quality. Almost all ACA members who responded (28 in total) reported having some experience in providing feedback, whether on a regular basis or not, to legislators on trends and other developments they have observed. This input is provided in various ways; not only through independent opinions and (administrative) court rulings, but also through various formal and informal mechanisms used by consultants, executive agencies, regulators, and judges.

Now several years later, there is again a need to organize a new seminar on the contribution to legislative quality to further explore this topic among members of the



ACA-EUROPE and beyond, with a particular focus on legislative advice and judicial feedback to the legislator. To that end, this questionnaire is drafted.

Legislative advice

Legislative advice can contribute to the quality of legislation. In that case- in short- it is tested whether a legislative proposal fits within existing laws and the legal system as a whole, is implementable and enforceable. In doing so, numerous aspects of legislative quality can be examined, both legal and policy aspects. And to that extent, legislative advice can respond to and make use of the interaction between the state powers. After all, the state powers each have an interest and a role to play in the legislative process based on their responsibility at any given moment. Policy, legislation and implementation can work closely together in the cyclical legislative process in order to provide solicited or unsolicited feedback on the quality of the proposed law.

Against this background, the Advisory Division of the Dutch Council of State conducts as part of its regular advisory task an analysis that examines whether, among other things, the experiences and views of executive agencies (including local and regional authorities) and the judicial branch have been adequately taken into account in the drafting of the bill. To this end, in addition to a constitutional and legal analysis, the Advisory Division also conducts a policy and implementation analysis and, where appropriate, also analyses the consequences for legal practice. No ranking or order exists between these parts of the assessment. The policy and implementation analysis may in themselves give rise to comments but also provide important input to the legal and constitutional analysis, for example with respect to the proportionality of the bill.

The Belgian Council of State, on the other hand, only carries out a legal examination, which in any case concerns the competence of the legislator, the existence of a sufficient legal basis for regulatory acts and compliance with higher legal standards, as well as compliance with the mandatory formal requirements for the creation of the new law. If it follows from the applicable higher legal standards or principles, a proportionality test, a test of substantive motives or an effectiveness test shall also be carried out where appropriate. In no case, however, does the opinion concern the mere policy expediency of a new legal norm.

Communication between state powers

In order to function well the legislative, executive and judicial state powers are separated but also mutually dependent. There might be tension between the state powers sometimes, for example as a result of legislation which does not take certain interests or general principles of law into account. For a dynamic and healthy balance between the state powers judicial (constitutional) review *ex ante* and *ex post* are very relevant.

Depending on the design of an *ex post* constitutional review, this raises the question of what this means for the *ex-ante* constitutional review conducted within that framework. Of course, as legislative institutions, government and parliament are primarily responsible for the quality of legislation and ideally already conduct a thorough review of the constitution, higher law and fundamental legal principles during the creation of legislation. What impact does the possibility of *ex post* judicial constitutional review



have on an ex ante constitutional review by an independent general advisory body, such as an Advisory Division of a Council of State? And in how far do administrative courts provide feedback to the legislator in case they encounter more or less technical problems in legislation? But also vice versa, which influence does constitutional review ex ante have on judgements by (administrative) courts?

ACA questionnaire

In light of these themes and developments and in the interest of the quality of legislation, a further survey of the instruments of feedback is desirable and also of great interest in the ACA context. For this reason, the Dutch and Belgium Council of State organise an ACA seminar in The Hague on March 17-18, 2025 on the topic of legislative advice and feedback. In preparation for that seminar, we are pleased to submit to you the questionnaire below, which aims to map the design of legislative advice and interaction with the (administrative) courts against the background of developments in the relationship between state powers in general and constitutional review in particular.

The purpose of this questionnaire (chapters 1-3) is to obtain an inventory of the existence, design and working method of independent general advisory bodies.¹ What is that working method and what are the points of interest in the legal, constitutional ex ante review? What influence and significance does an opinion have in the legislative process?

In addition, the questionnaire (chapter 4) makes an inventory of the modes of influence of case law on legislation and the design of ex post judicial constitutional review in different countries. This may offer more insight into the interaction between legislative advice and the judiciary. What trends are visible and how can the ex-ante and ex post constitutional test reinforce each other?

In the case you as ACA-member and Supreme Administrative Court do not yourself have an advisory function ex ante please feel free to consult the institution in your country that has such a function.

¹ Not being specialized advisory bodies that focus on certain sub-interests or sectors or that perform a more technical review, for example, focused on the regulatory burden.



CHAPTER 1 GENERAL INFORMATION ON ADVISORY FUNCTION

In the European Union and beyond, there is no clear overview of which countries have a state body with a general legislative advisory function. This chapter aims to get a clearer overview of this.

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?

- 0 Yes ²
 No ³

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

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

- 0 In the national Constitution
 0 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)?

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?

- 0 Yes

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

³ Please proceed to question 38.



- 0 No
- 0 Sometimes. Please explain:

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

- 0 Preparatory legislative process
- 0 Parliamentary legislative process
- 0 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)?

- 0 Mandatory advisory opinions on national legislation ()
- 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)

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

Explanation if desired:

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

- 0 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
- 0 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:

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

- 0 Yes
- 0 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?

- 0 Yes
- 0 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)

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

Explanation if desired:

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

- 0 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)

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

Explanation if desired:

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

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

Explanation if desired:

.....

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

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



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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
- 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)

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

Explanation if desired:

0

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

- 0 Yes
- 0 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?

- 0 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
- 0 All of the above
- 0 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?**

- 0 Yes, by the institution that produces them
- 0 Yes, by the (principal) addressee
- 0 Sometimes, depending on:

.....

- 0 No

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

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

.....

Explanation if desired:

- 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
- 0 Sometimes, depending on:

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

- 0 Yes, (almost) always



- 0 No
- 0 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?

- 0 Yes, (almost) always
- 0 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?

- 0 Yes, (almost) always
- 0 No

Explanation if desired:

0

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?

- Yes
- No

Explanation if desired:

The Analysis and Interpretation Unit of the Supreme Administrative Court, which consists of judges, prepares opinions on draft laws submitted for consideration to the National Assembly and the Council of Ministers, as well as on draft sub-legislative acts concerning the administration of justice and constitutional cases, prepares analysis of the adopted interpretative decisions of the Supreme Administrative Court.

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:

.....

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:

The Supreme Administrative Court provides feedback in its judgments by drawing conclusions about the facts of the case, the applicable law, and relevant legal principles. While the Republic of Bulgaria does not have a precedential legal system, the quality of a judgment is enhanced by referencing past judicial decisions. This practice assists judges in resolving legal disputes and helps prevent inconsistent rulings.

.....



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

Judgment № 4700/ 15.04.2024 case № 1464/2024, paragraph 13

“It is a consequence of the legislator to preclude any possibility for a conflict of interest or abuse of rights in the event of non-compliance with the stipulations set forth in Article 41, paragraph 1, in accordance with the explicit provision of Article 3 of the Local government and local administration act (LGLA).

In the present case the mayor's mandate is subject to early termination in the event of a breach Article 42, par. 1, item 5 of the LGLA.

The objective of the legislator, which is to prevent the existence of two parallel legal relationships, which may conflict or call into question, independence and integrity in the exercise of powers, rights and duties, has been achieved. This is evidenced by the fact that the reconciliation of public functions with activities in the private sphere, which is undesirable by law, has been eliminated. ”

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

- Yes
- No

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

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

.....

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

- Yes
- No

Explanation if desired:

The Analysis and Interpretation Unit of the Supreme Administrative Court examines the case law on the interpretative decisions adopted by the Court, prepares opinions on draft laws to be considered. It organizes opinions on draft laws submitted to the National Assembly for consideration and prepares draft regulations only concerning its activities.



.....

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:

For example, in the Annual Report on the activities of the SAC for 2023, it is stated that: "The main tasks of the Analysis and Interpretation Unit of the Supreme Administrative Court during this reporting period were the preparation of opinions on draft laws and regulations relevant to the administration of justice, the preparation of opinions on constitutional cases, the examination of signals received regarding contradictory or erroneous decisions of courts and administrative courts and the Supreme Administrative Court, as well as the formulation of proposals for the initiation of interpretative cases in this regard"

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

Judgment № 6189/21.05.2024 case № 6494/2023, paragraph 6-10

The dispute between the parties concerns the length of service of V. as a non-working mother and whether it can be counted as actual contributory service, after which the substantive grounds under Article 68(3) of the Social Insurance Code would be present for granting personal pension for retirement and age.

Pursuant to §9 (1) of the Transitional and Final Provisions of the Social Insurance Code, time counting as length of employment service and as length of employment service required for retirement logged until the 31st day of December 1999, according to the provisions effective theretofore shall count as contributory service under this Code.

The differentiation of the contributory service period from the employment period occurred with the adoption of the Social Insurance Code, which added new criteria for defining the contributory service period.

For the period in question of 1 year, 3 months and 23 days, the provision of Article 80 of the Pension Law Implementation Regulations (as amended) was in force, which indicates that the time spent in the statutory paid and unpaid leave, which is recognised under the Labour Code, is counted as employment service for the purposes of the Pension Law. According to the Instruction No 2492 / 29.12.1967 on the procedure and manner of issuing documents on employment service, which was in force at the time of acquisition of the employment service in question, the time spent on sick leave, leave due to pregnancy and childbirth, paid and unpaid leave, shall be counted as employment service (i.e. contributory service) under the Pensions Act (repealed).

The court reasonably held that by adopting §1, item 12 of the Supplementary Provisions of the Social Insurance Code the legislator did not intend to abolish the right to count maternity leave as a period of employment and contributory service, therefore the



pension authority unlawfully refused to recognize the period of 1 year, 3 months and 23 days as actual contributory service. Its duration is determined by the aggregate of the applicant's maternity leave for her three children pursuant to Council of Ministers Decree No 61/1967 on the promotion of births.

The non-counting of the time of maternity as an actual contributory service also contradicts Articles 17 and 47 of the Constitution of the Republic of Bulgaria regulating the protection of maternity and the equality of mothers in terms of employment and contributory rights, and the considerations on how these texts should be interpreted are set out in Decision No. 2 of 04.04.2006 in Constitutional Case No. 9/2005 of the Constitutional Court of the Republic of Bulgaria.

The conclusions of the administrative court are correct that the pension authorities did not apply Article 68(3) of the Social Insurance Code accurately in holding that one of the cumulative substantive grounds for the acquisition of the right to personal pension for retirement and age, namely, contributory service of 15 years, is not present. That ground is also present and the authorities of the National Social Security Institute are under an obligation to issue the administrative act claimed to be positive for the party, acting under conditions of binding competence.

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

The Supreme Administrative Court of the Republic of Bulgaria does not propose a solution. The SAC carries out research and analysis on the existence of contradictory or incorrect jurisprudence in its court and administrative courts of first instance. Before carrying out such activities on the application of certain legal norms, it is requested by the judges or the public through the Analysis and Interpretation Activity Unit.

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?

Pursuant to Article 119(2)(6) of the Judiciary Act, the Supreme Administrative Court is empowered to give opinions to the Council of Ministers and the National Assembly on draft laws concerning the activities of the Supreme Administrative Court.

For example, on November 15th 2002, the Plenum of the Supreme Administrative Court issued an opinion in connection with a forthcoming public debate in the Constitutional Committee of the 49th National Assembly on the Draft Law on Amendments and Additions to the Constitution of the Republic of Bulgaria with signature No. 49-354-01-83 (Draft Law on the Constitution of the Republic of Bulgaria).

Notwithstanding this opinion, the SAC is not empowered to request formal feedback from the legislator on the proposed amendments.

Judges of the SAC may participate in working groups of the Ministry of Justice when drafting laws and regulations related to the judiciary and activities within the competence of the Minister of Justice. In such working groups, when certain issues are considered in relation to amendments to laws, feedback on the application of a particular text of a law may be sought within the working group. The powers of SAC must participate in law drafting workshops and to give opinions are strictly in accordance with



the principle of the separation of powers laid down in Article 8 of the Constitution of the Republic of Bulgaria.

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

0 Yes
 No

Please explain:

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?

0 Yes
 No

Please explain:

51) 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:

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?

0 Yes
 No

Please explain:

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?

0 Yes
 No

Please explain:

54) 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
 No

Explanation if desired:



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