



**Seminar organized by the Council of State of Belgium and ACA-  
Europe**

**Better regulation through smarter consulting  
“Best practices”  
regarding regulatory advisory opinions in Europe**

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## ACA Seminar – Brussels – 11th December 2015

### Better regulations for smarter consulting

#### “Best practices” regarding regulatory advisory opinions in Europe Report

### Introduction

Responses to the questionnaire were received from thirteen Member States. Nine States completed the questionnaire and four States stated that they have no genuine advisory body.

This report features a concise analysis and discussion of the answers to the questionnaire. Discussion points are also instigated for each topic separately (in a box).

The order of the questions in the questionnaire has been rearranged somewhat for the purpose of writing this report. For this reason, the numbers of the questions in the questionnaire to which that particular topic relates, are indicated at the beginning of each topic.

Explanation of the terms used:

- *authority requesting the advisory opinion*: the official body (minister/government department/parliament/etc.) requesting the advisory opinion
- *request for advisory opinion*: the formal submission of the request for an advisory opinion, together with the required documents
- *advisory body*: your institution, issuing the advisory opinion to the authority requesting the advisory opinion
- *draft text*: the draft legal text to be submitted by the authority requesting the advisory opinion
- *laws*: legislation issued by parliament
- *regulations*: legislation issued by the executive branch

### Topic 1 - Contacts with the authority requesting the advisory opinion

#### 1. Information and documents required to be submitted with the request for an advisory opinion

##### Question [1] of the questionnaire

The questionnaire asked which of the following documents are required to be submitted with the request for an advisory opinion: explanatory note, regulation impact analysis (*ex ante*), transposition table of European directives, advisory opinions from other advisory bodies that have already been consulted, documents on budgetary scrutiny.

In most States (67%) an explanatory note is required to be provided with the request for an advisory opinion. This is also the case for the advisory opinions from advisory bodies already consulted (67%) and for documents relating to budgetary scrutiny (63%).

Somewhat moreover surprising is that an *ex ante* regulation impact analysis is required for the majority of States (67%).

In many States (56%) a transposition table of European directives must also be provided. In some States (33%), this is a possibility, but not an obligation.

One State indicates that a consolidated draft text has to be submitted with the request for an advisory opinion (this is a basic draft text which includes the changes contained in the draft amendment text submitted for an advisory opinion). Accordingly, this was not asked in the questionnaire; however, it may be of interest for this issue to be covered in the discussion.

#### **Discussion:**

- To what extent does the advisory body take account of a regulation impact analysis when examining the text? Can this regulation impact analysis be of any value for the legal review of the text (for example when it relates to the need to impose penalties, or to the application of the principle of equality)?
- Is this also the case for advisory opinions from other advisory bodies? Are these used for the legal assessment of the draft text?
- Does the obligation for the authority requesting the advisory opinion to submit a transposition table of European directives facilitates the review of the correct transposition of European directives? Would it not be better to make it mandatory or to encourage it to do so in States where submission is not yet obligatory? Will this transposition table also be used later in the decision-making process (for example in parliamentary documents)?
- Would it be of interest to encourage or oblige the authority requesting the advisory opinion to submit a consolidated draft text with the request for an advisory opinion? Should the advisory bodies themselves collate the necessary documentation (with the relevant legal rules) for the examination of the draft text?

## **2. Contacts/consultation between the advisory body and the authority requesting the advisory opinion**

### **Questions [2] to [6] of the questionnaire**

In the majority of States (78%), direct consultation between the advisory body and the authority requesting the advisory opinion is possible and a contact person can provide an explanation about the draft text on behalf of the authority requesting the advisory opinion. In the majority of States (57% always, 29% usually), this contact person is designated in advance.

In almost all cases, the contact person is able to provide an explanation about the draft text and answer the questions from the advisory body. More far-reaching powers, such as the contact person

expressing points of view on behalf of the authority requesting the advisory opinion about modifications to the draft text proposed by the advisory body in the event of problems occurring, or the contact person himself/herself proposing changes to the draft text in that case, are found in two or three States.

In the advisory opinions in most States, mention is seldom or never made of the result of that consultation with the contact person.

#### **Discussion:**

- There is the question of whether more extensive options for interaction with the contact person might contribute to better advisory opinions. On the one hand, by having more interaction, the advisory body could work more constructively and, for example, propose modifications to the text that resolve a legal problem and which at the same time correspond with the policy vision of the authority requesting the advisory opinion. On the other hand, however, there is the risk that the advisory body, precisely due to this greater interaction with the contact person, might no longer act as independently and impartially as it should.
- Another question is whether the explanation by the contact person will make an effective contribution to a better understanding of the draft text. Does it happen regularly that the advisory body is in the dark about the actual scope of a draft text and that the contact person is able to provide important clarifying information about it? Or is the contact person only required occasionally and is the draft text itself used as the base for discussion, instead of the explanation/information given by the contact person?
- Is the contact person someone who is involved in policy for the authority requesting the advisory opinion or does that contact person also have a certain degree of independence (for example an external expert or an official who is able to act independent of the policy vision of the authority requesting the advisory opinion)?
- Is it desirable, in addition to the contact person, also to involve external experts in examining the draft text? For example, could professors or other academics be consulted? Does that raise problems regarding their independence? Is that involvement supervised?

## **Topic 2 – Formal presentation and quality of the advisory opinions**

### **1. Formulating conclusions in advisory opinions**

#### **Questions [7] to [13] of the questionnaire**

In some States (50%), summarising conclusions are made in advisory opinions, while for others (50%) they are not. If there are summarising conclusions, they are usually not based on standard formulas (67%). For other States, there are standard formulas for some more specific comments in the advisory opinion (44%), but not in other States (56%).

It is possible in most States (67%) to make a comment in the advisory opinion with some kind of reservation. For example, this may be the case when a rule of law can be interpreted in various ways, or if there are several possible ways of proceeding put forward in the advisory opinion, or when

assessing the principle of equality, or when an urgent advisory opinion is being given and only a very brief examination can be conducted of an important legal issue.

In none of the States the conclusion of the advisory opinion is necessarily restricted to a ruling on the legal acceptability of the draft text. It is possible in all States, in principle, to make alternative suggestions to adapt the draft text in a particular sense.

Individual perceptions as to the likelihood of advisory opinions being understood differs according to the target audience. It is admitted in all States that an advisory opinion may not be so clear or may be difficult to understand for the uninitiated. For better-educated citizens, an advisory opinion is reasonably clear, whereas for citizens with legal training, experts in the matter and academics the advisory opinions are very clear or reasonably clear. The level of comprehension of advisory opinions for politicians is somewhat lower, but they are still reasonably clear in the main part.

The majority of States (78%) say that they pay attention to the drafting of advisory opinions, for example through internal editorial instructions or training sessions. However, the way in which explanations to the questions are given is very diverse.

#### **Discussion:**

- Would it make sense, in those States where it is not the case, to formulate summarising conclusions either at the beginning or at the end of the advisory opinion? This might make it easier for politicians and journalists to understand the essence of the advisory opinion. The way in which problems in the advisory opinion can be identified and resolved might also be formulated more clearly. Standard formulas for final conclusions could also provide a sort of “score” given to the draft text, not in the form of figures, but by way of a straightforward description.
- Formulating a reservation in a comment has its advantages and disadvantages. The big disadvantage is that the advisory body itself could come across as doubting and unsure – and that the advisory opinion contains itself the counterarguments for not adhering to the advisory opinion. On the other hand, the law is not an exact science and there is sometimes a need to give a nuanced answer to a particular question. Much can also depend on how the draft text is to be implemented and applied. Reference in this regard can be made to the regulations on European state support. It is often unclear whether a particular regulation is exempt from notification to the European Commission. If this is the case, how should the advisory body act then? To err on the side of caution, should the recommendation be to notify the draft text to the European Commission, or should it merely be mentioned that there are arguments for not having to do so?
- The ideal way for an advisory body to fulfil its advisory function is for it to formulate alternative suggestions. This is precisely the area in which an advisory body differs from a court of law, which makes a judgment about the text afterwards. But that does not mean that formulating alternative suggestions is straightforward. Sometimes there are policy-related aspects that might be or must be taken into account. Are there cases in which a conscious choice is made not to formulate an alternative suggestion, even if strictly speaking that were possible? What happens when there is uncertainty about the alternatives? Or when one knows that these alternatives will not be followed?
- Must advisory opinions be understandable only for the people they are intended to address? Must the same standard in relation to ease of comprehension be applied for

advisory opinions as for court rulings? When advisory opinions are – out of necessity – more difficult to understand, should a summary be provided in more accessible language? (Also see point 1 of this discussion)

- Are internal editorial changes needed to give the advisory opinion a uniform and structured form, or does everyone simply write in their own “writing style”? Are training sessions held aimed specifically at drafting advisory opinions, or is such training given in a more informal way? Is the way in which advisory opinions are drafted an in-house oral tradition, or is there a formal “codification” of this writing style?

## 2. Quality of the advisory opinions

### Question [21] of the questionnaire

As to the question of whether the overall caseload (the number of advisory opinion requests pending) and the period within which the advisory opinion may be requested have an influence on the quality of the advisory opinion, the answers differ greatly. For some States (25%), this factor plays a major role, while for other States, the answer is somewhat (25%), hardly (25%) or not at all (25%).

The answers are also very wide-ranging regarding the scope and degree of legal difficulty of the draft text. For the majority of States (63%), a longer and/or more legally complex text has hardly any or no influence at all on the attention paid to each separate part of that text. For some States (38%), this is the case somewhat or to a large extent.

For all States, the social relevance of a draft text and the size of the group of stakeholders appear to have little or no influence on the quality of an advisory opinion. As a matter of fact, this is also something that should be expected of an independent and impartial advisory opinion body.

#### Discussion:

- The circumstances in which the advisory opinion is given differ sharply from State to State. In some States, the caseload or the speed at which work has to be carried out, is clearly at the expense of the depth of the advisory opinion. In most States, this is much less the case. Does this mean that in these latter States there is no pressure from policymakers to issue advisory opinions quickly? Are they truly given the time they need to issue an advisory opinion?
- How do advisory bodies deal with very voluminous and/or complex texts? Is there the feeling, taken overall, that less good advisory opinion may be given for these types of texts than for smaller or more straightforward texts?

## Topic 3 – Review framework and implementation of European law

### 1. Nature of the legal review

### Question [14] of the questionnaire

The survey shows that the review of the draft text within the hierarchy of legal norms is a central issue for the majority of advisory bodies. This includes compatibility with treaties, the correct implementation of European law, the constitutionality of laws and the legality of regulations. However, some States admit that they do not review some of these areas (such as the constitutionality of laws). This may have to do with the constitutional identity of that State.

A great deal of attention is also paid to the internal and external consistency of the draft text, as well as to technical legislative aspects.

More policy-related comments or comments of a technical and non-legal nature are made in half of States. In other words, half of the advisory opinion bodies restrict themselves to a strict legal examination of the draft text.

#### Discussion:

- Does the review of the constitution and international and European law mean that the advisory body is regularly required to make judgments about which a constitutional court or other high court of justice will make a ruling at a later stage? So should we be cautious in drafting our advisory opinions because there will be a subsequent review? Or precisely not?
- Do comments about internal and external legal consistency and about legal drafting aspects have a lower priority than comments relating to the hierarchy of legal norms?
- It would be of interest to know what sort of policy-related comments are being made (in the State where this is the case). To what extent can an advisory body become involved in the policy aspects of a draft text and yet still remain independent and impartial? Do such comments lead to tensions with the authority requesting the advisory opinions?

## 2. Monitoring of the implementation of European law

### Questions [15] to [20] of the questionnaire

In most States, a transposition table is requested from the authority requesting the advisory opinion either for all draft texts (43%) or for most texts (29%) for texts in which European law is implemented. This table is never drawn up by the advisory body itself.

Almost all advisory bodies seldom (38%) or never (50%) contact the European Commission for questions relating to the scope of European law. However, one State always does so.

With regard to a conclusive check on the full transposition of directives when this transposition is spread across more than one draft text, the answer is very wide-ranging: in half of States, this happens seldom (25%) or never (25%); in the other half, this happens always (38%) or often (13%).

Just under half of States (44%) have an internal unit specialising in the compliance and implementation of European law. However, the answers to this question show that it is not always necessarily an *internal* unit as such.

In a number of States, the emergence of new European directives and guidelines is sometimes (44%) monitored proactively by the advisory body itself. In the majority of States, this happens seldom (6%) or never (50%).

#### Discussion:

- Do the advisory bodies encounter problems when requesting transposition tables? What is the quality of these tables? Is it also recommended by the advisory body to publish these tables later in the decision-making process (e.g. publication in parliamentary documents)?
- Would more intensive contacts between the advisory bodies and the European Commission be preferable? Or does this not comply with the independence of the advisory body? Is the aim of doing this to prevent the Commission from becoming aware of possible breaches of European law?
- It would be interesting to find out from those States where checks on the full transposition of a directive are actually carried out, how in fact that works. Is a fully conclusive check possible with an advisory body? In fact, it is possible that a problem will only be established after an advisory opinion has been given about several of the various transposition texts. Is this then notified afterwards? And to whom?
- How exactly does the internal consultation work inside the advisory body about problems of European law? What have experiences with it been? Does this slow down the advisory process?
- Would not the proactive monitoring of new European directives and guidelines be of interest? Such as for the forthcoming European data protection directive. Or does it make no sense to get involved beforehand?

## Topic 4 – Consequences and public nature of advisory opinions

### 1. Reaction of the authority requesting the advisory opinion to the advisory opinion itself

#### Questions [22] to [29] of the questionnaire

Only in one State is the advisory opinion binding for the authority requesting the advisory opinion. In all other States, the advisory opinion is not binding.

When it comes to drafting legislative texts, the authority requesting the advisory opinion is obliged in the majority of States to respond to the advisory opinion, either formally (57%), or in practice (29%). This is different for important decisions by the executive power: in this case, there is only a slight majority of States where a response from the authority requesting the advisory opinion is obligatory, either formally (50%) or in practice (13%). For subordinate decisions made by the executive power, this is equally only the case for a small majority of States (38% formally, 25% in practice).



Responses from the authority requesting the advisory opinion to the advisory opinion itself are usually described as sufficient (58%), although in one case rather concise and in one other case as virtually non-existent.

It is interesting to note that in half of the States, the advisory body is able to respond to the reaction of the authority requesting the advisory opinion, but in only one case can that be done in public; in other cases, it is only to the authority requesting the advisory opinion. In half of the States, no response is possible.

The survey shows that the impact of the advisory opinion about legal texts has a major (44%) or reasonable (31%) impact on discussion in parliament. Only in two States (25%) is this impact non-existent.

Advisory opinions are mostly followed in virtually all States. This is an encouraging observation. However, when it is a matter of important issues, the advisory opinions given are followed less than the average. For legal and technical details, by contrast, the advisory opinions are followed more than the average. In most States (67%) there is no fixed procedure for assessing the consequences given to the advisory opinions.

#### Discussion:

- Will the obligation for the authority requesting the advisory opinion to respond to the advisory opinion result in advisory opinions being followed more often than if it was not compulsory? Does this give advisory opinions greater authority?
- Are there any techniques that might enhance the scope and quality of those responses? Is an advisory body able to further those techniques? Can the parliament play a role in this? The opposition in parliament is usually also interested in a conclusive response by the government to advisory opinions.
- What experiences have there been with the reaction by the advisory body to the response from the authority requesting the advisory opinion? Do they contribute to a better justification of the (non-) adoption of the comments in the advisory opinion? Might it lead to conflicts with the authority requesting the advisory opinion?
- It would be interesting to learn about some examples of the impact of an advisory opinion on discussions in parliament. Is it always the opposition that uses advisory opinions, or are there also members of parliament on the majority side of the House who refer to them? Is it possible that the government may not adopt an advisory opinion initially, but subsequently yields to a majority in parliament, resulting in the advisory opinion ultimately being adopted?
- It would be interesting to gain more insight into cases where advisory opinions have not been adopted for important, sensitive political issues. Does this lead to a commotion in the press, the legal world, in parliament?

## 2. Advisory opinions and disputes before the courts

Questions [30] to [33] of the questionnaire

In most States, advisory opinions are sometimes put forward in legal arguments for domestic law courts. It is worth noting that this has never happened in two States.

When advisory opinions come up in domestic law courts in such a way, these courts usually (14% always, 29% often, 29% sometimes) come to the same viewpoint as the advisory body made in its advisory opinion. In two States (29%) this has never happened.

In half of States, not adopting advisory opinions can sometimes result in disputes for domestic law courts. This is not the case in two States, while in one State it is seldom the case.

**Discussion:**

- Can a case be made from this to say that advisory opinions are, as it were, strengthened by subsequent rulings by courts regarding legal rules about which these advisory opinions are given? Can it be stated that when deciding whether to adopt an advisory opinion or not, the authority requesting the advisory opinions takes account of the possibility that it may later be ruled incorrect by a court of law?

### 3. Publication of advisory opinions

#### Questions [34] to [42] of the questionnaire

In most States, advisory opinions both about laws as well as about important regulations made by the executive power are systematically made public. In one State only does this never happen.

Advisory opinions on subordinate regulations made by the executive power are, in the majority of States, always made public, although in a few States, this is seldom or never.

It is worth noting that such publication is not always based on a legal arrangement. In a number of cases there is a basis in law, but not in virtually all other cases.

In most cases (75%), however, there are exceptions to the way advisory opinions are made public. In some States, advisory opinions about legislative texts are not published until they have been put before parliament. In some other States, advisory opinions about certain sorts of texts (budget laws, military matters) are not made public. In yet other States, for some texts, there is a principle of confidentiality, although this can be lifted to promote freedom of information.

In approximately half of the States, there is a publicly accessible database from which advisory opinions can be retrieved based on content-related criteria or keywords. In the majority of States, there is an internal database from which advisory opinions can be retrieved based on content-related criteria or keywords.

In three States, when the publication of advisory opinions has been introduced, this introduction has led to better compliance. One State reports that publication was introduced too recently to be able to make a proper assessment. In two States where the publication of advisory opinions has been introduced, this introduction has not led to better compliance.

In most States (63%), a summary has never been made of the advisory opinions for the wider public.

The text for which the advisory opinion is requested is not made public by the advisory bodies during the period the request for an advisory opinion is being dealt with.

An advisory opinion is published either as soon as the advisory opinion has been issued, or from the time the text to which the advisory opinion relates has been made public. There is no clear majority for one or other time.

**Discussion:**

- In those States where there is no legal arrangement, but where advisory opinions are nevertheless made public in practice, is this based on a constitutional principle of freedom of information? Or is there in that case actually no legal obligation to make the advisory opinion public?
- In two or three States where the publication of advisory opinions has been introduced, this introduction has led to better compliance. Can this be seen as an encouragement for those States where there is not yet any publication of advisory opinions?
- Is there really no need for summarised advisory opinions? If advisory opinions are made public immediately after they are issued, might not such a summary be of value for the media?