

Raad
van State



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Answers to questionnaire: Austria



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ACA Europe Questionnaire Better regulation

Better regulation

The legislature, the national administration and the judiciary are dependent on each other to function well. The democratic constitutional state functions better if the various branches of state power learn from one another. Good judgments also depend on good legislation. The legislative authority can improve the quality of legislation if it is aware of the practical experiences of judges and their advisory bodies in implementing and enforcing the law, and of any shortcomings. These experiences can be incorporated into the legislative process through various mechanisms thus engendering a feedback loop, enabling practical experiences to contribute to the quality of legislation. Quality here means juridical/legal quality as well as whether the legislation is sound, effective and enforceable. The Member States have developed different mechanisms for this.

Whether legislation is sound and effective is a theme commanding attention at national and European level. The present European Commission announced that the Better Regulation programme would be a policy objective when it entered office in 2014, containing as it does an extensive package of reforms to streamline EU decision-making and make it more transparent, and to improve the quality of new legislation. Instruments such as impact assessments and policy evaluations are intended to play a vital role in the effective and efficient implementation of EU policy. Impact assessment involves the systematic prior analysis of various policy options and the accompanying costs and benefits, including the mapping of the administrative burden. The aim is to arrive at reasonable, realistic regulations that can be properly implemented and enforced. Public consultation will also be used in evaluating existing legislation.

Wider public consultation is being or has been introduced as part of the effort to ensure that legislation is more open and transparent. Any citizen or interested party is entitled to give feedback and make suggestions during a period of eight weeks after the Commission has approved a proposal; these are then included in the legislative debate in the European Parliament and the Council. It turns out that these consultations are used notably by private stakeholders, including lobby groups.

National input mechanisms

Different instruments or mechanisms exist at national level (formal and regulated as well as informal) for allowing input, solicited or unsolicited, to be given on future and existing legislation by legal institutions and independent advisory bodies (both advisors on legislation and bodies that advise on the quality of legislation based on their position or expertise). Examples that spring to mind are instruments used prior to legislation being drafted ('consultation') and those used in response to existing legislation ('feedback'). On 11 December 2015 an ACA seminar in Brussel discussed consultation *prior* to drafting as an example of the first category, which above all focuses on the usefulness of and need for the proposed legislation and the technical aspects. No clear picture is available of other input mechanisms in the phase of legislative drafting, or in the subsequent phase of implementation and enforcement.

In light of the European Commission's Better Regulation programme, such a survey would be desirable, and for the ACA extremely interesting. Hence on 15 May 2017 an ACA seminar is being planned on the subject of Better Regulation. By way of preparing for the seminar we are asking you to complete this questionnaire so we can find out more about existing forms of consultation and feedback in the context of experiences with case law and advisory opinions.

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ACA 'better regulation' questionnaire

The questionnaire will be used to produce an overview of the various formal and informal input mechanisms in the Member States. What instruments for consultation and feedback do independent advisors and the courts use, irrespective of the individual way these functions are organized in the various Member States, and which ones are adopted by the national legislator?

Independent advisors are advisors or advisory bodies who, based on their position or expertise, give advice, solicited or unsolicited, about the quality of legislation. This may involve legal expertise in general or with respect to a particular legal specialism or area of interest. This therefore also includes Councils of State insofar as they advise on legislation. The courts are courts or advisory bodies comprising judges who give advice, solicited or unsolicited, about the quality of legislation in the form of a judgment or otherwise.

The focus of the questionnaire is on the quality of legislation, and how both independent advisors and the courts can contribute to it. Legislation is defined as generally binding regulations. This is not just a matter of verifying the juridical quality of the legislation (for example constitutional or technical legal scrutiny), but also of assessing whether it is sound, effective and enforceable. Hence the questionnaire expressly does not limit itself to the institutional tasks of those ACA members with a dual function as a Council of State, and goes further than the matters discussed at the ACA seminar in Brussels on 11 December 2015. It also examines the other formal and informal mechanisms used by independent advisors and the courts for input about the quality of legislation, for example through an annual report or publications.

The questionnaire distinguishes between two phases.

The first phase is the legislative drafting stage, when consultation takes place. Input is given through the normal advisory process. However, it would be interesting to know more about the different ways in which advisors and courts are or have been involved at this stage. The main aim is to give an overview of the formal and informal instruments currently used in the Member States.

The second phase covers feedback after the legislation has come into force and some practical experience of it has been gained. Again, the priority is to take stock of the formal and informal instruments currently used by advisors and the courts in the various Member States to provide feedback about their experiences.

The findings may spark a discussion about the need for improved or new input mechanisms to enhance the quality of legislation.

Please give as many concrete examples as you can when answering the questions.

The questionnaire comprises the following questions:

Part 1: Input mechanisms *prior* to the drafting of legislation

Regarding the topic of the questionnaire, the working program of the Austrian Federal Government for 2013 - 2018 provides for an important strategy in the legislative period with a variety of measures concerning "Better Regulation"

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(<https://www.bmf.gv.at/budget/better-regulation-initiativen/better-regulation-initiativen.html>). The initiative "Reducing administrative costs for companies" (implemented from 2006-2012) and the initiative "Relieving citizens in administrative proceedings" (started in 2009) contribute to the improvement of legislation - "Better Regulation". Better Regulation or improved legislation basically includes the following aspects: the simplification of existing laws, outcome-oriented impact assessment, public consultations as well as ex post evaluation

(https://service.bmf.gv.at/BUDGET/Budgets/2014_2015/beilagen/Better_Regulation_2014_2015.pdf).

In this connection, the establishment of the temporary "Task Reform and Deregulation Commission" must be mentioned. This Commission issued 5 reports and a final report concerning suggestions in view of "Better Regulation" for topics such as deregulation, streamlining of the authorities' organisation, improved administrative cooperation, simplification of economic and environmental law, e-government, faster processing of administrative proceedings as well as legislative processes (<http://www.aufgabenreform.at/>).

Concerning the role of the Supreme Administrative Court of Austria, we would like to draw your attention to the fact that the Supreme Administrative Court of Austria does not have additional functions such as Conseil d'Etat, for example as legal advisor of the executive branch. Therefore the Supreme Administrative Court of Austria does not participate in all legislative processes but only in those which would directly affect it.

General remarks to the legislative process in Austria:

Due to the scope of the questionnaire, we have to limit our responses to the federal level. The processes at the level of the 9 provinces in Austria are similar to the federal level; however, they vary from province to province.

Legislative proposals are submitted to the National Council as motions by its members, by the Federal Council or by one third of the Federal Council's members, and as bills by the Federal Government (Art. 41 (1) B-VG). The citizens also have the option to introduce bills by means of a popular initiative, which has to relate to a matter that can be settled by Federal legislation (Art. 41 (2) B-VG). A popular initiative may take the form of a bill, i.e. contain the concrete wording of a text to be adopted, but it is also sufficient if the concern is described in detail. A popular initiative bearing the signatures of at least 100,000 persons entitled to vote or of one sixth of those entitled to vote three Federal Provinces has to be submitted to the National Council for deliberation. Information about current popular initiatives can be found on the website of the Parliament.

However, the vast majority of bills and adopted texts come from the Federal Government. Therefore, government bills play the most important role.

The procedure concerning government bills starts with a ministerial proposal, which is formulated by the competent ministry. A ministerial proposal undergoes an expert review before it is adopted by the Council of Ministers. After a ministerial proposal is formulated, it is sent out to interested parties, entities likely to be affected and expert groups and at the

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same time published on the website of the Parliament. The next step is an expert review, whereby interest groups, authorities and organisations can present their views and criticisms, all of which is also published on the internet. As a general rule, the consulted institutions should have a minimum period of six weeks for reviewing the ministerial proposal. The period of review depends on the matter, scope and urgency of the planned rule.

Prior to the expert review in certain cases a preliminary expert review can take place. In the social resort, it is quite common to have a preliminary review preceded by the expert review in the case of complex new legislation. In the course of such preliminary review, the bill is sent to a small circle directly concerned for their opinion. On the basis of the opinions received and the results of the discussions conducted with the affected bodies, the original bill can/will be revised. The amended bill, which has already been agreed with the relevant authorities, is then subjected to the expert review.

After the expert review the ministry may, but is not forced to modify its draft. If the latter is approved by the Federal Government it is introduced in the National Council as a government bill. Current government bills are also published on the website of the Parliament.

The member of the Federal Government or the organ being responsible for budget matters, within whose remit the draft is prepared, shall append an outcome-oriented impact assessment to every draft legislative proposal. Only the substantial effects shall be the subject of the impact assessment; financial effects shall in any event be deemed substantial.

Once a bill has been introduced in the National Council, it is distributed to the members of the National Council. Subsequently the President of the National Council has to assign it to a committee in order for the bill to be deliberated. The object of deliberations in committee is to allow members with special expertise and experience with the matter in hand to discuss the bill in detail. Arguments for and against the proposal or parts thereof are advanced and discussed by the members in detail. Committees also frequently call on experts or other witnesses. A summary of every committee sitting is published by the Parliamentary Media Service so that the public may follow proceedings and the results of voting.

In case the legislative procedure is initiated by the Parliament, there is a so-called committee expert review, which follows the scheme of the abovementioned expert review.

A) Input from the courts

1. Are there any general mechanisms in your Member State for the courts, and more specifically the highest courts, to provide solicited or unsolicited input or advice in the phase before legislation is drafted?

The initiation to pass a new law often comes from outside the Parliament or the Government: various organisations and initiatives address their proposals to politicians.

There aren't any general mechanisms in Austria for the courts to provide input or advice in the phase before legislation is drafted. However, a decision of the Constitutional Court can have a similar effect. If the Constitutional Court holds a law (a legal provision) to be

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unconstitutional, it has to repeal it. This leads indirectly to a new legislation in the matter affected since a new law has to be passed.

Once a legislative proposal has been drafted - as already mentioned in the general remarks - an expert review takes place. Within the framework of the expert review, interest groups, authorities, courts and organisations can present their views and criticisms, all of which is also published on the internet. The consultation of the examining authorities is based on legal provisions as well as on longstanding administrative practice. The circle of the consulted authorities depends on the subject of the ministerial proposal. The highest courts are also part of the consulted institutions, if the subject of the ministerial proposal is of relevance for the courts or if the courts are directly affected by the bill.

If so:

- a. Are the courts consulted structurally or incidentally at this stage, and in what way? Is case law for example consulted?

Basically, see general remarks and answer to question A 1.

In case the Supreme Administrative Court is affected by the ministerial proposal, the bill is sent to the court within the procedure of expert review. As a general rule, the consulted institutions should have a minimum period of six weeks for reviewing the ministerial proposal. The period of review depends on the matter, scope and urgency of the planned rule.

In several occasions case law of the highest courts was consulted.

- b. Does feedback from the courts go directly to the legislator or indirectly to advisory bodies which can then decide to pass this on to the legislator?

The statements of the reviewing institutions are sent back to the ministry, which formulated the ministerial proposal, as well as to the presidium of the National Council. All these statements are also accessible on the website of the Parliament.

- c. To what extent do the courts themselves take the initiative to directly or indirectly advise the legislator or draw attention to the quality of legislation, for example by means of unsolicited advice, a response to a public consultation, or a contribution on that subject to the annual report?

As mentioned above, the initiation to pass a new law often comes from outside the Parliament or the Government.

By means of the annual activity report, the Supreme Administrative Court has already proposed suggestions for improvement and recommendations. For example, the Supreme Administrative Court has pointed out in several of its annual activity reports that the reform of the administrative jurisdiction should be treated as primary objective (the reform of the administrative jurisdiction entered into force in January 2014 essentially by creating 11 administrative courts and limiting the access to the Supreme Administrative Court to questions of fundamental importance).

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Furthermore, the Supreme Administrative Court has already taken the initiative to draw attention to the legislator by means of an ongoing legislative process: The Constitutional Court repealed a provision of the Federal Act on Proceedings of Administrative Courts, which granted financial aid before the administrative courts only in administrative criminal proceedings but not in administrative proceedings. The legislator passed a new provision concerning the granting of financial aid and the Supreme Administrative Court delivered a statement in the framework of the expert review. In this statement, the Supreme Administrative Court not only supported the new provision extending the possibility of being granted legal aid but also suggested the introduction of new provisions into the Supreme Administrative Court Act. All these suggestions were fully adopted by the legislator.

- d. What aspects of the quality of the legislation are specifically addressed and can you give an example?

As an example, subject of criticism was the unequal treatment of judges of the Federal Administrative Court/Federal Financial Court and the Supreme Administrative Court. Also see answer to question A 1c.

- e. To what extent is the given input public?

The legislative proposals and the statements of the reviewing institutions can be found on the website of the Parliament (<https://www.parlament.gv.at/PAKT/MESN>). The decisions of the Constitutional Court can be found in the legal information system (<http://www.ris.bka.gv.at/defaultEn.aspx>) as well as on the website of the Constitutional Court (selected decisions). Furthermore, the repeal of a legal provision has to be promulgated without delay by the Federal Chancellor and/or the Governor of the province in the federal or provincial law gazette.

If not:

- f. Do you think input mechanisms for the courts would be desirable at this stage, and in what form?

The Supreme Administrative Court is not in the position to respond to political questions.

- g. What is the basis (for example, constitutional, statutory or unwritten law) for the existing mechanisms?

In case of the function of the Constitutional Court, it is constitutional law. The obligation to prepare an annual activity report is entailed in para. 20 of the Supreme Administrative Court Act.

2. Are there objections or risks attached to the formal consultation of the courts at the stage before legislation is drafted? If so, what are they? How can they be resolved?

The Supreme Administrative Court is not aware of such risks and objections. In order to maintain its independence, the Supreme Administrative Court restrains itself from daily politics.

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3. Are there objections or risks attached to giving unsolicited advice at the stage of the drafting of legislation, for example by means of an unsolicited opinion, an annual report or publication? If so, what are they? How can they be resolved?

Compare answer to question 2.

B) Input from advisory bodies

4. Are there any general mechanisms in your Member State for advisory bodies to give solicited or unsolicited input or advice at the stage before legislation is drafted?

The initiation to pass a new law may also come from interest groups, such as the chambers, or from certain unions. Moreover, various laws entail provisions which allow chambers (for example Chamber of Commerce, Chamber of Labour, etc) or courts to submit suggestions for legislation. Such suggestions, which merely should induce the exercise of legislative competence, are to be strictly distinguished from legislative proposals. However, the future of such legislative suggestions merely depend on the political will. The Constitution does not entail provisions regarding the consequences of such proposals.

Once a legislative proposal has been drafted - as already mentioned in the general remarks - an expert review takes place. Within the framework of the expert review, interest groups, authorities, courts and organisations can present their views and criticisms, all of which is also published on the internet. The consultation of the examining authorities is based on legal provisions as well as on longstanding administrative practice. The circle of the consulted authorities depends on the subject of the ministerial proposal.

An example for an advisory body is the Data Protection Council. The Data Protection Council may transmit its observations, concerns and suggestions for improvements of data protection in Austria to the Federal Government and the Provincial Governments as well as to the legislative bodies by way of these organs. Furthermore, the Data Protection Council advises the Federal Government and the Provincial Governments on requests in political matters of data protection. For this purpose, the Data Protection Council can deliberate on questions of fundamental importance for data protection and may issue opinions by itself or commission an expert to deliver an opinion. It may also transmit its observations, concerns and suggestions for improvements of data protection in Austria to the Federal Government and the Provincial Governments, as well as to the legislative bodies by way of these organs.

The Bioethics Commission also functions as an advisory body: its task is to consult the Federal Chancellor in all social, scientific and legal questions from an ethical point of view, which arise in connection with the development of science in the field of human medicine and human biology. Therefore the Bioethics Commission submits proposals concerning necessary legal provisions and provides opinions to special questions.

The Federal Environment Agency also acts as an advisory body. One of its multiple tasks is to deliver professional statements to national environmental-related legislative proposals as well as to environmental-related programs and plans of the public authorities. Furthermore, the Federal Environment Agency issues professional statements to questions concerning the implementation, application and execution of environmental-related directives and regulations of the EU.

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If so:

- a. Are the advisory bodies consulted structurally or incidentally at this stage, and in what way?

Prior to drafting advisory bodies may make suggestions for legislation (see above). After a legislative proposal has been drafted, they may express their views and criticism within the framework of expert review. However, as mentioned above, the consultation of the examining authorities and bodies depend on the subject of the bill.

- b. To what extent do the advisory bodies themselves take the initiative to advise the legislator or draw attention to the quality of legislation, for example by means of unsolicited advice, a response to a public consultation, a publication or a contribution on that subject to the annual report?

See answer to question B 4.

- c. What aspects of the quality of legislation are specifically addressed and can you give an example?

See answer to question B 4 with regard to the Data Protection Council and the Bioethics Commission as examples. Furthermore, within the expert review to the amendment of the Federal Care Act the Chamber of Commerce addressed financial aspects hereto.

- d. To what extent is the given input public?

Statements given by interest groups during the expert review are all published on the website of the Parliament.

If not:

- e. Do you think such input mechanisms for advisory bodies at this stage would be desirable, and in what form?

The Supreme Administrative Court is not in the position to respond to political questions.

- f. What is the basis (for example, constitutional, statutory or unwritten law) for the existing mechanisms?

The basis for the existing mechanisms is statutory law. The legislation of various chambers each entail provisions, which foresee the affected chambers to be consulted during the expert review.

5. Are there objections or risks attached to the formal consultation of advisory bodies at the stage before legislation is drafted? If so, what are they? How can they be resolved?

The Supreme Administrative Court is not aware of such risks and objections.

6. Are there objections or risks attached to advisory bodies giving unsolicited advice on the drafting of legislation, for example by means of an unsolicited opinion, a publication or a contribution on the subject in the annual report? If so, what are they? How can they be resolved?

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The Supreme Administrative Court is not aware of such risks and objections.

C) General

7. Are there any general or specific input mechanisms in your Member State (except for those for the courts and advisory bodies) at the stage before legislation is drafted, for example public consultation via the internet or otherwise?

As already mentioned above, a ministerial proposal as well as the statements given during the expert review can be seen on the website of the Parliament. Private persons as well as associations and unions also have the possibility to give statements. As an example, this was the case during the expert review to the amendment of the Animal Protection Act.

8. Have you any additional or other remarks about input mechanisms before legislation is drafted?

Part 2: Input mechanisms *after* legislation has been drafted

A) Feedback from courts

9. Are there any formal or informal feedback mechanisms in your Member State for the courts, and more specifically the highest courts, to provide solicited or unsolicited input or advice *after* legislation has been drafted and some experience has been gained with implementation and enforcement?

There are no feedback mechanisms in Austria to provide input/advice after legislation has entered into force. However, feedback can be given either as informal suggestion or in the course of the legislative process concerning another topic (see the example concerning the provision regarding the granting of financial aid in question A 1c).

As already mentioned in the previous answers, apart from the participation of affected courts in the expert review, the courts can propose suggestions for improvement as well as criticism regarding existing laws in the annual activity report but also informally during meetings with the Federal Government.

If so:

- a. Are the courts consulted structurally or incidentally at this stage, and in what way? Is case law for example consulted?
- b. Does feedback from the courts go directly to the legislator or indirectly to advisory bodies which can then decide to pass on the feedback to the legislator?
- c. To what extent do the courts themselves take the initiative to directly or indirectly advise the legislator or draw attention to the quality of legislation, of the lack of it, for example by means of unsolicited advice, a response in a public consultation, or a contribution on that subject to the annual report?

See answer to question A 9.

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- d. What aspects of the quality of the legislation are specifically addressed and can you give an example??

See answer to question A 1c.

- e. What is the reply if a problem arises in the practical implementation of the legislation that results in an acute increase in the workload of the (highest) court?

See answer to question A 1c.

- f. To what extent is the given feedback public?

If such feedback is mentioned in the annual activity report, then it can be found on the website of the Supreme Administrative Court, where the annual activity reports are published.

The decisions of the Constitutional Court can be found in the legal information system (RIS) and selectively on the Court's website. Furthermore, the repeal of a legal provision has to be promulgated without delay by the Federal Chancellor and/or the Governor of the province in the federal or provincial law gazette.

- g. If feedback is given (solely) by judgment by the court, how is this done (for example obiter dictum, prospective ruling)?

The Supreme Administrative Court does not give feedback by judgment.

This can, however, be the case when the Constitutional Court repeals a legal provision on the grounds of unconstitutionality (in this context see also answer to question A 1). The repeal of a legal provision has to be promulgated without delay by the Federal Chancellor and/or the Governor of the province in the federal or provincial law gazette. However, the Constitutional Court may set a deadline for the "repair" of the provision, if its immediate repeal would result in serious practical problems. Thus, the legislator is given time to elaborate a new solution by the deadline set. In the meantime, the repealed provision remains in effect. The Court may also rule that the repealed provision is not to be applied any longer ("retroactive repeal"). This means that neither authorities nor courts are allowed to apply the provision in their assessment of a case that occurred before the provision was repealed.

If not:

- h. Do you think such feedback mechanisms for the courts would be desirable, and in what form?

The Supreme Administrative Court is not in the position to respond to political questions.

- i. What is the basis (for example, constitutional, statutory or unwritten law) for the existing mechanisms?

The basis for feedback as elaborated in question 9 is longstanding practice. In case of the function of the Constitutional Court, it is constitutional law. The obligation to prepare an annual activity report is entailed in para. 20 of the Supreme Administrative Court Act.

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10. Are there objections or risks attached to the formal consultation of courts at the stage after legislation has been drafted? If so, what are they? How can they be resolved?

The Supreme Administrative Court is not aware of such risks and objections.

11. Are there objections or risks attached to drawing the attention of the legislator, unsolicited, to shortcomings in the quality of legislation, including its soundness and implementability, for example by means of an annual report or publication? If so, what are they? How can they be resolved?

The Supreme Administrative Court is not aware of such risks or objections.

B) Feedback from advisory bodies

12. Are there any formal or informal feedback mechanisms in your Member State for the advisory bodies to provide solicited or unsolicited input or advice *after* legislation has been drafted and some experience has been gained with implementation and enforcement?

See answer to question A 9.

If so:

- a. Are the advisory bodies consulted structurally or incidentally in this phase, and in what way?
- b. To what extent do the advisory bodies themselves take the initiative to advise the legislator or draw attention to the quality of legislation, or the lack of it, for example by means of unsolicited advice, a publication or a contribution on that subject to the annual report?
- c. What aspects of the quality of legislation are specifically addressed and can you give an example?
- d. To what extent is the given feedback public?

If not:

- e. Do you think feedback mechanisms for advisory bodies at this stage would be desirable, and in what form?

The Supreme Administrative Court is not in the position to respond to political questions.

- f. What is the basis (for example, constitutional, statutory or unwritten law) for the existing mechanisms?

The basis for feedback as elaborated in question 9 - and referred to in question 12 - is longstanding practice.

13. Are there objections or risks attached to formal feedback from advisory bodies at the stage after legislation has been drafted? If so, what are they? How can they be resolved?

The Supreme Administrative Court is not aware of such risks and objections.

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14. Are there objections or risks attached to advisory bodies giving unsolicited advice on the quality of legislation, including its soundness and implementability, for example by means of an annual report or publication? If so, what are they? How can they be resolved?

The Supreme Administrative Court is not aware of such risks or objections.

C) General

15. Are there any general or specific input mechanisms in your Member State (except for those for the courts and advisory bodies) at the stage after legislation has been drafted, for example public consultation via the internet or otherwise?

No, there are no such input mechanisms in Austria.

16. Have you any additional or other remarks about feedback mechanisms after legislation has been drafted?