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Answers to questionnaire: Croatia



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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.

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

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 only one statute law mechanism in the Republic of Croatia when court provides opinion in the phase before legislation is drafted, is: plenum of judges of the Supreme Court of the Republic of Croatia shall give opinions regarding draft laws or other regulations which are intended to regulate the powers of the court or other questions important for the operation of the courts or the exercise of judicial practice.

If so:

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

Beside mentioned above (under point 1.), the courts as well as High Administrative Court of the Republic of Croatia, are consulted incidentally by the specific ministry to provide an input or advice in the phase before legislation is drafted.

- 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 feedback from the courts does not go directly to the legislator, but to the ministry which has passed the draft to the courts.

- 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?

The courts as well as High Administrative Court of the Republic of Croatia sometimes take the initiative to draw attention to the quality of legislation by means of unsolicited proposal for better regulation, not the legislator but the responsible ministry.

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

The High Administrative Court of the Republic of Croatia, usually addresses administrative law legislation (the most recent feedback was given about the Public procurement law, Law on the expropriation, Law on courts, Act on administrative dispute). Aspects of the quality of the legislation are varying: e.g. conflict with other laws applicable in the specific question, improvement of procedural guarantees.

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

The given input is not public.

If not:

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

The input mechanisms for the courts would be desirable at this stage. The legislative authority can improve the quality of legislation if it is aware of the practical experiences of judges in implementing and enforcing the law, and of any shortcomings. The consequence of such cooperation could be reasonable, realistic regulations that can be properly implemented and enforced.

Concerning form of the input mechanisms, it should be desirable if it is some kind of obligatory and public form.

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

The described existing mechanisms in the Republic of Croatia (except the one mentioned under point 1.) are usual practice.

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?

At the moment and without practical experience in this field, we found no objections or risks attached to the formal consultation of the courts at the stage before legislation is drafted.

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?

We found no objections or risks attached to giving unsolicited advice at the stage before legislation is drafted. On the contrary, we consider it very useful because the legislator can respect relevant case – law and avoid future shortcomings.

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?

In the Republic of Croatia there are no any advisory bodies on institutional basis which are authorised to give solicited or unsolicited input or advice at the stage before legislation is drafted.

If so:

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

In Croatian legal system there are no advisory bodies at all.

- 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?
- c. What aspects of the quality of legislation are specifically addressed and can you give an example?
- d. To what extent is the given input public?

If not:

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

Without any constitutional tradition or practical experience with advisory bodies giving solicited or unsolicited input or advice at the stage before legislation is drafted, it is hard to say is that desirable mechanism.

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

It should be a statutory base.

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?

Probably there are some risks attached to the formal consultation of advisory bodies at the stage before legislation is drafted, meaning that possible interest groups can affect the legislation process, whose interest may not be in compliance with public interest.

This can be resolved by finding some balance, maybe with inclusion of court's input in the drafting process.

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?

The risks can be the same as the one mentioned under point 5. (attached to the formal consultation of advisory bodies at the stage before legislation is drafted) as well as elimination of the risk.

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?

According to Act on the right of access to information State administration bodies, other state bodies, local and regional self-government units and legal persons with public authority are required to conduct public consultations prior to the adoption of acts and subordinate legislation, and in the adoption of general acts or other strategic or planning documents where these affect the interests of citizens and legal persons.

The state administration bodies, via the central state website for public consultations, and other state authorities, local and regional self-government units and legal persons with public authority, via their websites or via the central state website for public consultation, release the draft of the regulation, general act or other document, with a substantiation of the reasons and objectives to be achieved through adoption of the regulation, act or other document, and inviting the public to submit their proposals and opinions.

The public authority bodies from paragraph 1 of this Article are obliged to conduct public consultations as a rule, for a duration of 30 days, except in cases when such consultations are conducted pursuant to regulations governing the procedure of assessment of the effect of regulations.

Upon the expiry of the deadline for the submission of opinions and proposals, the public authority body is obliged to draft and publish on the central state website for public consultations or its website, a report on the public consultation, which contains the received proposals and comments, and responses thereto, with the reasons for rejection of individual proposals and comments. The report on the public consultation must be submitted by the body responsible for its drafting to the body that adopts or issues the regulation, general act or document.

The public authority body is obliged to publish its annual plan for public consultations on its website no later than by the end of the current calendar year. The public authority body is also obliged to inform the public in the same manner of any amendments to the public consultation plan.

The public consultation plan contains the name of the regulation, general act or document for which public consultation is conducted, the expected time of its adoption or issuance, approximate time of conducting the on-line consultation process, and other envisaged ways in which consultation is planned to be conducted, such as public debates, distribution of the draft regulation to the interested public via electronic mail, participation in working groups, etc.

Upon completion of the consultation process, the documentation created in the public consultation process, either in electronic or hardcopy form, shall be kept by the public authority body in accordance with the regulations on archive materials.

According to the Rules of procedure of the Government of the Republic of Croatia if a public consultation was conducted in accordance with special regulations or the Code of consultation with the interested public in procedures of adopting laws, central government bodies referring to the Government shall submit a corresponding report on the consultation with the drafts of laws, other regulations and acts. This provision does not apply in cases when such consultations are conducted pursuant to regulations governing the procedure of assessment of the effect of regulations.

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

No.

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 any formal or informal feedback mechanisms in the Republic of Croatia for the courts to provide solicited or unsolicited input or advice after legislation has been drafted and some experience has been gained with implementation and enforcement.

The only possible way to do so is by reasoning in concrete judgement (or other court's decision).

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?
- d. What aspects of the quality of the legislation are specifically addressed and can you give an example??
- 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?
- f. To what extent is the given feedback public?
- g. If feedback is given (solely) by judgment by the court, how is this done (for example obiter dictum, prospective ruling)?

If not:

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

Yes, such feedback mechanisms for the courts would be desirable because it could provide a better regulation and avoidance of future disputes.

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

It should be a statutory base.

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?

We find no risks attached to the formal consultation of courts at the stage after legislation has been drafted but only benefits.

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 same as under point 10., we find it useful.

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?

In Croatian legal system there are no advisory bodies at all. So, there are no any formal or informal feedback mechanisms 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.

If so:

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

In Croatian legal system there are no advisory bodies at all.

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?

Without any constitutional tradition or practical experience with advisory bodies feedback mechanisms at the stage after legislation is drafted, it is hard to say is that desirable mechanism.

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

It should be a statutory base.

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?

Without any constitutional tradition or practical experience with advisory bodies feedback mechanisms at the stage after legislation is drafted, it is hard to speculate about the objections of that mechanism or predict any risks.

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?

Answer is the same as under point 13. Without any constitutional tradition or practical experience with advisory bodies feedback mechanisms at the stage after legislation is drafted, it is hard to speculate about the objections of that mechanism or predict any risks.

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?

Some specific independent bodies in the Republic of Croatia which are competent for the specific department (e.g. Ombudswoman and specialized ombudswoman (for children, persons with disabilities, gender equality), the Information Commissioner, the Commission for the Resolution of Conflicts of Interest etc.) are submitting reports to the Parliament about the implementation and shortcomings about the specific law they are competent for.

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

No.