Seminar organized by the Council of State of the Netherlands and ACA-Europe

"Better Regulation"

The Hague 15 May 2017

Answers to questionnaire: Lithuania

Seminar co-funded by the «Justice » program of the European Union

ANSWERS TO THE QUESTIONNAIRE BY
THE SUPREME ADMINISTRATIVE COURT OF LITHUANIA
2 Zygimantu st., LT-01102 Vilnius, Lithuania,
tel. + 370 5 2791005, fax. +370 5 268 58 75, e-mail: info@lvat.lt

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?
   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 this on 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, for example by means of unsolicited advice, a response to 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. To what extent is the given input public?
   If not:
   f. Do you think input mechanisms for the courts would be desirable at this stage, and in what form?

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

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?

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?

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?

   If so:

a. Are the advisory bodies consulted structurally or incidentally at this stage, 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, 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?

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

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?

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?

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?

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

In order to thoroughly present the different regulatory impact before and after the legislation is adopted in Lithuania, one should be acquainted with the overall legislative process. In general, according to the Constitution of the Republic of Lithuania, Lithuanian Parliament, the Seimas, considers and adopts amendments to the Constitution and passes laws. The right of legislative initiative at the Seimas belongs to the Members of the Seimas, the President of the Republic, and the Government.

The Constitution establishes that laws are adopted at the Seimas according to the procedure provided by law. Laws are deemed adopted if the majority of the Members of the Seimas participating in the sitting vote in favour thereof. Constitutional laws of the Republic of Lithuania are adopted if more than half of all the Members of the Seimas vote in favour thereof, and they are altered by not less than a 3/5 majority vote of all the Members of the Seimas. The Seimas establishes the list of constitutional laws by a 3/5 majority vote of the Members of the Seimas.

The President of the Republic signs and promulgates laws adopted by the Seimas or refers them back to the Seimas according to the procedure established by the Constitution. In addition, the Government of the Republic of Lithuania prepares draft laws and presents them to the Seimas for consideration.

The Seimas Statute provides for a more detailed explanation of the legislative procedure. First of all, a draft law or any other act of the Seimas is submitted at a Seimas sitting by the initiator of the draft or his representative (a representative of the President of the Republic, the Prime Minister, a minister or vice minister authorised by the Government, or a representative of citizens), who briefly describes the draft and answers questions of the Members of the Seimas. Thereafter, the Chair of a sitting shall familiarise the Members of the Seimas with the conclusions of the Legal Department of the Office of the Seimas and the conclusions of the Seimas committees, the Government and the European Law Department under the Ministry of Justice and shall put proposals to the vote.

Consequently, the committee which has been appointed by the Seimas as a lead committee for the consideration of a draft law, in respect whereof the consideration procedure has been commenced, must, within one week, discuss at a sitting the preparedness to consider the draft in the committee. To this end, the committee assigns responsible committee members - persons in charge of drafting the committee's conclusions (as a rule, one from the Seimas majority, one from the Seimas minority), shall stipulate which experts' opinions need to be heard, may request additional conclusions from other committees or state institutions, shall specify time limits for submission of comments, proposals and amendments by other interested persons to the committee and shall take other preliminary decisions. Notably, if the committee decides to improve the draft law, a working group may be formed for this purpose.

Crucially for the regulatory questionnaire, the lead committee must, according to the procedure established by the Board of the Seimas, announce on the website of the Seimas the information regarding the time limit designated for submission of proposals and comments by interested persons and the access to the text of the draft law. The lead committee must forward the draft law to interested state institutions and, where necessary, to public organisations, local authorities, and political parties for them to send their evaluations. The Board of the Seimas or the Conference of Chairs may specify the institutions or persons to whom the draft must be forwarded or may relieve the lead committee of the lead committee's obligations defined in this paragraph.

In consideration of draft laws and other issues, assigned to the competence of the Seimas by the Constitution, the Seimas may form special committees consisting of the members of the Parliament, commissions and working groups.

In essence, the committees are responsible for the consideration of the Seimas legislative proposals, amendments and recommendations for their improvement. The list of committees is established by the Seimas Statute. In terms of regulatory impact provided by governmental institutions, for the purposes of parliamentary control, the committees may hear the ministries and other public institutions of the government on such issues as the implementation of law, they may also provide conclusions, suggestions and recommendations on specific topics, addressed to the government. If a committee decides on hearing a member of the government or other public authorities (*except for the courts*), the invited officer attends the meeting of the committee on the respective predetermined issue no later than in two weeks after the official invitation by the committee. Thus, the executive is involved in the law making process from the very initial stages and may impact the regulatory situation in Lithuania.

Different Parliamentary committees work in specific spheres and consult the public at different occasions. At the moment, sixteen specific committees of the Parliament are established.

Another important parliamentary body which takes part in the legislative process is the parliamentary commission. Currently, the Commissions on Ethics and Procedures, Petitions, Criminal Intelligence Parliamentary Control and Migration are formed permanently. In order to address more short-term and narrower issues the Parliament may form research, control, audit, preparatory, editorial and other temporary commissions.

The Board of the Seimas may also form specific working groups in order to prepare draft laws and carry out the orders of the Seimas or the Board. In terms of the assurance of better regulation and consultation, the working groups could be considered to be the most efficient consulting mechanisms in legislature since the members of the working groups may not only be the Members of the Parliament but also experts and advisors who do not represent a governmental organisation, providing expertise knowledge.

Lithuanian citizens also have the right of legislative initiative which is granted by the Constitution of Lithuania. 50 000 Lithuanian citizens, who have the right to vote, can submit a project of a law to the Parliament which is then required to consider it. If at least 300 000 Lithuanian citizens, who have the right to vote, request a referendum, it shall be announced. In addition, the Constitution of Lithuania grants its citizens the petition right. It enables the citizens to be directly involved in the ruling of the country as the questions of petitions are associated with the interest of the whole society. The petition right and the process thereof differs from the processes of the legislative initiative and referendum as the strict requirements for the number of citizens involved do not apply. The petition applications are evaluated by the Seimas Petition Commission which then provides its conclusions on the petition to the Parliament. If the requirements and recommendations are accepted by the Commission, a draft law may be prepared or a specific commission or a work group is formed in order to prepare the draft law.

Notably, when preparing the projects of new laws, the Parliament is required to take the opinion of the society into account and evaluate submitted remarks. Thus, citizens, civic organizations and business associations can engage with the government on the content and scope of new regulation and laws, the civic society and different organisations are consulted online, usually through special government platforms. Public meetings with the society are also organised through the initiatives of politicians or work groups of the Parliament. The public consultation entails legislative initiatives from the citizens, preparation of draft legislation, enacting legislation and monitoring its implementation. All these matters involve citizen participation and require social feedback. The objective of the public consultations is ensuring transparency, openness and the dialogue with the society. The crucial aspect associated with public consultation is timing – in order for the consultation to be effective, the procedures have to be initiated well in advance leaving enough time to evaluate the feedback and publish the feedback evaluation results.

Over the past few decades, the Parliament has opened its policy-making processes to greater public scrutiny and input. It began posting the text of proposed regulations and laws online for citizens to evaluate and comment on, as well as contacting specific stakeholders and experts to discuss particular areas of concern. The public notices include a wide range of information on the proposed regulation. In Lithuania, a short summary of the proposed regulation and the explanation as to why the regulation is needed, what it is intended to change and when it is expected to enter into force, are provided. Also, the expected positive and negative consequences of the regulatory change and the planned consultation process are detailed.

According to the laws of Lithuania, all future legislation shall undergo the regulatory impact assessment. When preparing the project of a new law or a law that would change regulation significantly, the regulatory impact assessment is always required. The assessment entails the positive and negative effects of the new law on citizens, economy and finances of the government, social environment, expected administrative burden, regional development and other issues.

In sum, the initial regulatory framework includes (1) giving notice of proposed regulations and publishing drafts, 2) requesting comments on results of the consultation process, and 3) conducting regulatory impact assessments.

In terms of more concrete input from the courts, it is crucial to stress that the competence of the Supreme Administrative Court of Lithuania does not include the provision of formal advisory opinions regarding the draft legislation of the Government or Parliament. However, under certain circumstances the Court is asked to give its opinion on the draft legislation or regulation.

In the vast majority of cases the Court is asked to provide its opinion on the draft texts while exercising its administrative function. In other words, it acts as any other interested state institution

or individual concerned. These references made to the Court usually concern matters closely related to its functions, e.g. particular amendments to the Law on the Administrative Proceedings or the Law on Courts etc. In these cases all relevant draft documents are public or can be accessed online. In this regard one should mention the explanatory note which provides rather comprehensive information regarding the aims of the proposed legislation or regulation, whether the draft text is in compliance with the supranational law, whether it affects the state budget etc. These opinions on the draft text issued by the Court are by no means binding. However, in practice it is regarded as a complementary information source and the legislator in most of the cases is willing to analyse it.

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?

   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?

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

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?

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?

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?

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?

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

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?

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?

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?

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

Judgements of certain courts, in particular the judgements of the Supreme Administrative Court of Lithuania and the Supreme Court of Lithuania, could be considered as not only applying legislative acts but also having legislative effect in the broad sense in so far as these judgements set the precedents for courts in Lithuania to follow. To this end, the Supreme Administrative Court has more than one so-called procedural tool and other measures.

First, in this context references to the Constitutional Court shall be mentioned. The Constitutional Court of Lithuania decides whether laws and other acts of the Seimas conflict with the Constitution and also whether the acts of the President of the Republic and the Government are not in conflict with the Constitution or the law. In cases when there is reason to believe that the law or other legal act which should be applied in a particular situation, is unconstitutional, a judge shall suspend the proceedings and appeal to the Constitutional Court which decides if the law or other legal act is in conformity with the Constitution or not.

Within one month after the issue of the ruling of the Constitutional Court, the legal Department of the Seimas, having regard to the interpretation of the constitutional norms and principles, provides

proposals on the implementation of the judgement to the Seimas Committee of the Law and Order. The Committee then considers the submitted proposals. If the Constitutional Court decides that a particular law, other act of the Parliament or a part thereof is unconstitutional, the Seimas Committee on Law and Order or another committee or a special working group prepares and submits the draft law on the amendments of the unconstitutional law or act of the Parliament. In general, the Parliament has four months to implement the changes to the law, addressed by the Constitutional Court. When preparing the draft law on the legal amendments, special reference has to be made to the regulatory gaps, legal inconsistencies and other shortcomings mentioned. This process is controlled by the Seimas Committee on Law and Order.

Second, one should also note that the general jurisdiction and specialised courts have the possibility to stay the proceedings and address the administrative courts in cases when there are doubts whether a particular regulatory administrative act (or its part thereof), which should be applied in a particular case, does not infringe another law or a government regulatory act. In this regard, the Supreme Administrative Court of Lithuania is the only and final instance for cases concerning the legality of regulatory administrative acts adopted by the central state administration bodies.

Third, the Supreme Administrative Court may also fill in the regulatory gaps on a *ad hoc* basis, thus, providing guidance on specific laws and their shortcomings. The judgements resulting in the Court's declaration that the rule of law or equity requires to fill in legal lacunas immediately could be considered as indirectly affecting the regulation and the legislative process as such legal shortcomings are supposed to be corrected by the Parliament or other regulatory bodies.

Fourth, in terms of indirect practical impact associated with the said court, the Supreme Administrative Court also develops and ensures a uniform interpretation and application of the law. The Supreme Administrative Court examines national, European and international case law and other sources of law, prepares case summaries, reviews, publishes information about its activities, publishes its bulletin, provides relevant information and carries out other activities within its competence. Notably, decisions, rulings and interpretations of the Supreme Administrative Court are taken into account by the state institutions, other institutions and other persons, applying the same laws and regulations. Thus, an indirect regulatory effect exists in this sense too.