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

## *"Better Regulation"*

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## Answers to questionnaire: Poland

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**ACA Europe Questionnaire Better regulation**

**REPORT FROM POLAND**

Better regulation

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 Brussels 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?**

The administrative courts are generally consulted incidentally - at the central level, the Supreme Administrative Court (Naczelny Sąd Administracyjny – hereinafter the NSA or Court) is consulted.

First of all it should be mentioned, that pursuant to Article 1 (3) of the Act of 23 November 2002 Law on the Supreme Court, it gives opinions on draft laws and other normative acts of law which form the basis for rendering decisions by the courts and their operations, as well as other laws to the extent that it deems advisable. This provision is the legal base for the Supreme Court to take the initiative to directly advise the legislator or draw attention to the quality of the drafted legislation.

In comparison to the Supreme Court Act, the Act of the 25 July 2002 Law on the system of administrative courts does not contain any such provision. Therefore, the NSA does not usually initiate – in comparison to the Supreme Court – the giving of unsolicited opinions to the legislator.

In the legislative processes, the NSA is treated on the same basis as other specific public entities that should be consulted in the general process of drafting legislation (see answer Part I. C “General”). The legal ground for the Supreme Administrative Court’s participation in the legislative process are the provisions of the resolution of the Council of Ministers No 190 of 29 October 2013 – the Council of Ministers’ Rules of Procedure, as well as the provisions of the resolution of the Sejm of the Republic of Poland of 30 July 1992 – Standing Orders of the Sejm of the Republic of Poland and the resolution of the Senate of the Republic of Poland of 23 November 1990 – Standing Orders of the Senate of the Republic of Poland..

The Council of Ministers' Rules of Procedure introduce the division of the consultations into two separate processes:

- as part of the public consultations, the draft act is presented to social organisations or other interested entities or institutions whose opinion is welcomed due to the subject matter of the draft act;
- as part of an opinion soliciting process, the draft act is sent to specific entities, if such a requirement arises under separate legal regulations or if the draft act applies to the functioning of such entities (it is sent, for instance, to the Supreme Administrative Court, Supreme Court of the Republic of Poland, National Council of the Judiciary).

The NSA is able to express its views in legislative processes related to issues of status and the organisation of the judiciary, procedural laws, *etc.* It usually takes the form of a written opinion on draft law, issued by the President of the Court.

If needed, and in certain circumstances, the representatives of the President of the NSA (other members of the management of the NSA, judges or law clerks / legal specialists) take part as guests in the consensus conferences organised by the respective ministries and in the meetings of Sejm or Senate committees during the legislative proceedings related to draft laws concerning or affecting the scope of jurisdiction or powers of the administrative judiciary.

The case-law of administrative courts is available to the public, in anonymised versions, on the website of the Court via the Central Database of the Jurisprudence of Administrative Courts (http://orzeczenia.nsa.gov.pl/ - Centralna Baza Orzeczeń Sądów Administracyjnych, hereinafter CBOSA).

The ministries or central authorities (e.g. regulatory bodies) have legal or legal and case-law departments within the structure of their Offices that analyse courts' case-law concerning matters falling within their substantive jurisdiction.

**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?**

Feedback from the NSA goes directly to the legislator (e.g. the ministry, the President of the Republic, the Prime Minister, the central public authority – e.g. the Ombudsman, the General Inspector for Personal Data Protection or the Chief Inspector for Environmental Protection).

**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 Supreme Court gives opinions on draft laws and other normative acts of law which form the basis for rendering decisions by the courts and their operations, as well as other laws to the extent that it deems advisable. The Law on the system of administrative courts does not contain any such provision.

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

The following aspects can be noted: comprehensibility and clarity of drafted provisions, implementability, lack of transitional provisions, and consistency with particular areas of law.

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

The given input in the case of governmental draft legislation should be published using the electronic system called Rządowy Proces Legislacyjny – RPL "Government's Legislative Process – RPL" which shows the Government's work in the area of drafting law. The system began operating on 1 February 2011 and, since then, has been collecting all (earlier dispersed) information on the government's legislative process in one location.

If the interested ministry or central public authority organised public consultations via their own websites, the opinion given by the NSA should be published on these. The respective documents should also be published on the webpage of the Public Information Bulletin – the legal bases are: article 8 (2 (3) in connection with Art. 9 (2) of the Act on access to public information, § 9 (1) of the regulation of the Minister of Interior and Administration of 18 January 2007 on the Public Information Bulletin.

Also all plenary meetings as well as meetings of Sejm's and Senate's Committees are broadcasted and publicly available on the web sites. From the web sites of Sejm and Senate the transcripts of these meetings can by downloaded.

Issues related to the transparency of the legislative process were often the subject of case-law of the administrative courts.
In its judgment of 11 March 2014 (case No. I OSK 118/14) the NSA stated that the documents prepared for the exchange of information, for working meetings as well as for agreeing on the views and positions concerning the President's official promulgation of the Law are not public information. Also business email correspondence between clerks of the Prime Minister Office on the amendments of the law is not public information (judgment of the NSA of 21 June 2012, case No. I OSK 666/12 and of 14 September 2012, case No. I OSK 1203/12). In the judgment of 25 April 2014. (case No. I OSK 2499/13) NSA decided that the persons who prepare expert opinions on possible legislative changes for the President's Office are not persons performing public functions, in consequence their personal data are not public information.

However, the content of expert opinions regarding possible legislative changes is the public information (judgment of the NSA of 27 January 2012, case No. I OSK 2130/11 and of 29 February 2012, case No. I OSK 2196/11).

**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?**

No, it seems that there are no direct objections or risks, mainly because the NSA takes part in the consultations in a very limited extent.

The risk of the NSA being omitted from the process of consulting public institutions at the stage before legislation is drafted usually exists.

**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?**

No, it seems that there are no direct objections or risks. The risk of the NSA being omitted at the stage when the legislation is drafted usually exists.

**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 Poland the Legislative Council (Rada Legislacyjna – hereinafter RL or Legislative Council) may be considered as an advisory body, because it is an advisory and consulting body for the President of the Council of Ministers and for the Council of Ministers. Currently, the Legislative Council acts pursuant to Article 14 of the Act of 8 August 1996 on the Council of Ministers and the ordinance of the President of the Council of Ministers of 23 December 2010 on the tasks of the Legislative Council and detailed principles and the mode of its functioning issued on the basis of the Act.

Pursuant to the provisions of the ordinance, the Legislative Council's responsibilities include:

1) issuing opinions on government draft documents, in particular on the drafted versions of assumptions to draft acts, draft acts and drafted versions of other normative acts in terms of their compliance with the Constitution of the Republic of Poland, European Union law and the existing legal system;
2) issuing opinions on draft acts of particular importance, prepared upon the initiative of members of the Sejm, members of the Senate, the President of the Republic of Poland or a group of citizens, addressed to the Council of Ministers for the purpose of soliciting its position or issuing opinions on a drafted version of the Council of Ministers' position on such proposals;
3) preparing conclusions or opinions on the methods and manners of solving problems related to the application of the Constitution of the Republic of Poland, as well as methods and manners of implementing European Union law;
4) preparing conclusions or opinions on matters related to the law-making process, including on Legislative drafting principles;
5) assessing the application of the existing law in terms of its consistency, effectiveness and proper regulation of social phenomena;
6) analysing the need to change law.

The Council performs the tasks upon its own initiative or upon the request of the President of the Council of Ministers, the chairperson of the Standing Committee of the Council of Ministers, the Head of the Prime Minister's Chancellery, the President of the Government Legislation Centre or the Secretary of the Council of Ministers.

The Council consists of up to 20 persons outstanding in terms of legal knowledge and experience in legal practice (including the judges of the Supreme Administrative Court) appointed by the President of the Council of Ministers.

Also the National Council of Judiciary (Krajowa Rada Sądownictwa – hereinafter KRS or Council) may be considered as an advisory body *sensu largo*.

According to Art. 186(1) of the Constitution of Poland, the main function of the KRS is to safeguard the independence of courts and judges, understood as *sensu largo*, which also includes the safeguarding of the right of access to the independent court and fair trial. Therefore, one of the most important powers of the KRS is the ability to express opinions on matters concerning the judiciary.

The KRS (Article 187 (1) of the Constitution) is a collegial body composed of: the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic; 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts; 4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators.

The structure, scope and mode of operation of the KRS and the method of choosing its members is currently stipulated by the Act of 12 May 2011 on the National Council of Judiciary (hereinafter the Act on the KRS).

According to Art. 3 (1) point 6 of the Act on the KRS, the Council gives opinions on draft legislation concerning the judiciary, judges and trainee judges, and puts forward proposals in this regard.

**If so:**

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

Conclusions and opinions of the Legislative Council are adopted at the RL meetings. The meetings of the Legislative Council or its teams are attended, upon the invitation of the chairperson of the Council, by ministers in charge of matters related to the issue considered, heads of central offices, the President of the National Bank of Poland or their authorised representatives. The chairperson of the Council may invite to the Council's meetings the representatives of state bodies, in particular: the President of the Constitutional Tribunal, the First President of the Supreme Court, the President of the Supreme Administrative Court or deputies thereof or authorised representatives thereof.

Opinions, assessments and conclusions of the Legislative Council and of Council teams are not binding, but they are presented to the author of the proposal and the President of the Council of Ministers immediately after they are adopted. The copies of opinions, assessments and conclusions are submitted to the chairperson of the Standing Committee of the Council of Ministers, competent ministers and heads of central offices, the Secretary of the Minister of Council as well as to the President of the Government Legislation Centre.

As far as the KRS is concerned, giving opinions on draft legislation concerning the judiciary, judges and trainee judges, and presenting proposals in this regard, is a statutory obligation of the KRS. Therefore, omitting the opinion of the KRS causes procedural unconstitutionality (see judgment of the Constitutional Tribunal of 24 June 1998, case No. K 3/98). The competence of the KRS to give its opinions regarding the proposed solutions relevant to the judiciary applies to the entire legislative process: from the assumptions to the draft acts, works of the government on draft acts, through to the final project, which initiates the proceedings in the Sejm (first chamber of the Polish Parliament).

The KRS deliberates during plenary meetings. The plenary meetings of the Council are convened by the Chairman of the Council on an "as needed" basis, at least once every two months (Art. 20 of the Act on KRS). In order for the opinions of the Council to be valid, the presence of at least half of the

Council's composition is required. The Council adopts opinions by an absolute majority of votes cast in an open ballot.

**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?**

Pursuant to § 6 of the Ordinance, the Chairperson of the Legislative Council presents an annual report on the functioning of the Council to the President of the Council of Ministers. The report is available on the Legislative Council's website.

According to Art. 4 of the Act on KRS, the Council presents information to the Sejm, the Senate and the President of the Republic of Poland, no later than by 31 May of the following year, on the annual activity of the Council, as well as postulates concerning current matters and needs of the justice system. No voting is carried out in the Sejm and the Senate on this information. Annual information on the activities of the Council is publicly available on the Council's website.

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

For instance, in 2015, the Legislative Council expressed its opinion on the legislator's compliance with the principle of citizen's trust towards the state arising from Article 2 of the Constitution or the ownership right under Article 64 of the Constitution.

The KRS' competency to give opinions concerns all aspects of the independence of courts and judges (see judgments of the Constitutional Tribunal of 9 December 2015, case No K 35/15, in which the Tribunal stated that the Council's advisory powers include all judges, including the judges of the Constitutional Tribunal).

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

All opinions of the RL and of the KRS are publicly available on their web sites.

**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?**

   No, it seems that there are no direct objections or risks.

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 risk of the KRS being omitted from the process of draft legislation exists, although – as indicated above - omission of the Council's opinion causes procedural unconstitutionality. In consequence, a factual "lack" of an opinion from the KRS in the legislative process could also be regarded as a state of unconstitutionality.

## 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?**

   Below, we describe the mechanism of participation for interested entities in the legislative process.

   At the stage of the government legislative process, interested entities (social stakeholder) may take part in consultations and present their opinion at various stages of legislative work (after assumptions for the draft act are presented or after the draft act as such is presented for consensus, opinion soliciting and public consultation purposes) through: 1) submission of their opinions to the author of the draft act by the deadline specified, and 2) participation of the representatives of the social stakeholder in consensus conferences, after prior presentation of its opinion in the consultation process.

   The legal ground for carrying out the consultations are the provisions of Chapter 3 in Section III of the Council of Ministers' Rules of Procedure. In particular, pursuant to § 36, having regard to the content of the drafted assumptions to the draft act, the draft act or the draft ordinance, as well as other circumstances, including the importance of the proposal and expected social and economic effects of the proposal, complexity and urgency thereof, the applying body forwards the proposal to public consultations, including it may forward the proposal to social organisations or other interested entities or institutions so that they express their position. A consensus conference may be arranged for all the entities that file comments, or such entities may be invited to a meeting organised for other entities.

At the stage of procedures in the Sejm and in the Senate, the generally applicable form of participation in the legislative process is the presence of the representative of the social stakeholder in the meetings of a parliamentary sub-committee or committee working on the proposal, provided that such presence is notified to its chairperson in advance. To increase the efficiency of such presence, the wording of the opinion to be summarised at the meeting should be sent to the address of the committee chairperson.

At the stage of the President's involvement in the legislative process, the participation of the social stakeholder should consist in forwarding a relevant opinion to the President's Chancellery, including the summary of the issue and the opinion on the proposal considered, as well as the opinion on potential irregularities that may have happened while the draft act was proceeded with by the Parliament.

However, social participants of consultations cannot treat their opinions and postulates as binding on the administration. Consultations are a form of an asymmetric dialogue. The government retains its prerogatives to make final decisions, but also to face political consequences of such *status quo.*

Consultations are a necessary tool to conduct a reliable and comprehensive Impact Assessment. Widely understood consultations should be carried out by the administration at each stage of decision-making or working on the proposed solution. Consultations are commenced as early as possible, in particular at the conceptual stage (in the case of acts, at the stage of preparing assumptions for the acts).

Public consultations do not replace obtaining opinions on the draft legal acts, but they supplement them by reaching the widest possible circle of participants. The objective of public consultations is to collect comments on the government draft document from entities outside the sector of public bodies and institutions, in particular from social organisations and citizens who express their willingness to make such comments. Therefore, they should be open and generally available to the public, and each citizen should be allowed to access the documents consulted, comment on them, and receive answers with reasonably comprehensive supporting arguments to the comments raised.

The notion of public consultations refers exclusively to the work on government drafts (acts, ordinances, assumptions for acts, strategies, programmes, government opinions on the draft acts sponsored by the members of the Sejm).

The draft act may be forwarded for public consultations (similarly as it may be forwarded for consensus or opinion soliciting), after it is entered into the list of legislative work of the Council of Ministers.

Another notion, which should not be confused with consultations, is lobbying. Lobbying is any action taken with the use of lawful methods aimed at exerting

influence on public administration bodies in the process of law-making. A specific type of lobbying is for-profit lobbying carried out on behalf of third parties with a view to their interests being taken into account in the process of law-making (professional lobbying). Professional lobbying activity may be conducted exclusively after an entry is made in the register of professional lobbying entities kept by the minister responsible for public administration matters.

Pursuant to the Act of 7 July 2005 on lobbying activity in the process of law-making, such activity may be carried out by means of filing a form or by participating in a public hearing. Lawful lobbying is aimed at providing information that is reliable, accurate and helpful in taking actions and making decisions. The essence of lawful lobbying is transparency as regards whose interest a lobbyist represents; this allows a correct assessment of arguments presented by such a person to be made.

The existence of an electronic system should also be mentioned – a website devoted to public consultations in terms of expressing opinions on draft legislation, called konsultacje.gov.pl – a governmental website for public consultations, maintained by the Ministry of Development. Only selected draft legislation is published on the website, which is the subject of specific public interest.

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

It is worth mentioning that the working group was established by the decision of the President of the Supreme Administrative Court No. 8 of 10 October 2012.

The main goal of the abovementioned group was to prepare the concept for modifying the Code of Administrative Proceedings. The group consisted of administrative judges, academics and practising lawyers and representatives of the Ministry of Interior and Administration and the Ministry of Infrastructure and Building.

The group prepared a Report, which included the proposed solutions, concerning inter alia: simplified procedures; administrative sanctions; administrative contracts; mediation; and harmonisation of the Code regulations with EU law. The Report was submitted to the Government in 2016 and the legislative process was initiated.

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

### A) <u>Feedback from courts</u>

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?**

Pursuant to Article 15 of the Law on the System of Administrative Courts, "the President of the Supreme Administrative Court shall inform the President of the Republic of Poland and the National Council of the Judiciary about the activity of the administrative courts." (para.1) and "shall inform the Prime Minister about problems faced in the functioning of public administration in association with matters considered by administrative courts" (para. 2).

These general provisions give the President of the NSA the opportunity to draw attention to the quality of legislation – substantive and procedural laws applied and interpreted by administrative courts in individual cases.

**If so:**

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

At this stage, the NSA is consulted rather incidentally. The case law of the administrative courts is available to the public in anonymised versions on the website of the Court via the CBOSA database.

Besides, as indicated above, every interested ministry or central authority (e.g. regulatory body) has, within the structure of their Offices, legal or legal and case-law departments that analyse courts' case-law concerning matters falling within their substantive jurisdiction.

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?**

Feedback from the NSA is most likely to go to the public entities that have the power to initiate works on draft legislation (e.g. the respective ministry or the President of the Republic, the Prime Minister or the National Council of Judiciary).

According to Article 15 of the Law on the system of administrative courts, the President of the Supreme Administrative Court informs the President of the Republic of Poland and the National Council of the Judiciary about the activity of the administrative courts. The President of the NSA informs also the Prime Minister about problems faced in the functioning of public administration in association with matters considered by administrative 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, 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?**

A "special" session of the General Assembly of Judges of the Supreme Administrative Court, adopts – by resolution – the *Annual Information on the Activities of Administrative Courts* presented during that session by the President of the NSA. This takes place once a year (in April).

That session of the General Assembly is also attended by invited guests, among others by representatives of constitutional state authorities: the President of the Republic, the Sejm, the Senate, the Council of Ministers, the Ministry of Justice, the Ministry of Finance, the Supreme Court, the Constitutional Tribunal, the Human Rights Ombudsman, the Children's Ombudsman, the Supreme Chamber of Control**,** the Inspector General for Personal Data Protection, and the Government Legislative Centre.

The NSA President's presentation of the annual information is also an opportunity to communicate some reflections on certain problems and irregularities in the functioning of the law system and public administration, faced in the case-law of the administrative courts.

Moreover, the President of the NSA (or one of the vice-presidents of the Court) presents the *Annual Information on the Activities of Administrative Courts* before the Polish Parliament – the Sejm (first chamber of the legislature) - not during the plenary session, but during the sessions of the committees of the Sejm (i.e. the Justice and Human Rights Committee or the Local Government and Regional Policy Committee).
It can also provide an opportunity to communicate to the legislative power with regard to issues concerning the quality of the legislation.

The *Annual Information on the Activities of Administrative Courts* is publicly available at the website of the Supreme Administrative Court.

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

The general aspects of quality of legislation that are often mentioned are: soundness and implementability, and the lack of transitional provisions.

For example, as regards tax law: instability and lack of transparency in the Polish tax system, caused by changes in the regulations and inconsistent tax law interpretation, the high level of formalisation in tax regulations and the strict sanction regulations.

The *Annual Information on the Activities of Administrative Courts* includes also a part entitled "Legislative topics" which includes observations on provisions that raised interpretation difficulties in the process of enforcing law through courts in cases heard. In 2010–2015, interpretation problems were observed in relation to, for example, tax provisions (VAT, excise duty); regulations on spatial planning and development; regulations on the protection of classified information or regulations on construction works concessions.

**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?**

Such problems are usually raised in the *Annual Information on the Activities of Administrative Courts.*

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

The *Annual Information on the Activities of Administrative Courts* is publicly available on the Court's website. Also, the case law of administrative courts is available to the public in an anonymised version on the website of the NSA via the CBOSA database.

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

The possible feedback is not given solely by jurisprudence of the NSA. But, in terms of the case-law of the administrative courts, the feedback concerning assessment of the current legislation (its soundness, shortcomings in quality, constitutionality, conformity with EU law) can be raised by the NSA in judgments in individual cases as obiter dictum, in its resolutions, questions of law to the Constitutional Tribunal, referral for a preliminary ruling to the Court of Justice of the European Union and so called signalling orders.

Apart from adjudicating on complaints in individual cases, the NSA may also adopt resolutions – their aim is to safeguard the unity of administrative court jurisprudence. They provide legal certainty and legal safety for individuals. Resolutions guarantee the observance of the principle of equality. They are adopted in order to clarify those provisions of law that were interpreted differently by the administrative courts. The subject of such a resolution is the clarification of legal doubts.
Resolutions are directly binding only upon the administrative courts. However, public administration may not disregard the NSA's resolutions. Therefore, the administrative courts indicate that resolutions are also indirectly binding upon all public authorities.

The impact of resolutions adopted by the Supreme Administrative Court on the actions of the legislator is visible.

In its resolution of 25 June 2001 (FPS 7/00), the Supreme Administrative Court recognised a non-trading Saturday to be a statutory public holiday in the

meaning of Article 57(4) of the Code of Administrative Proceedings (a resolution with similar interpretation of the provision of the Code of Administrative Proceedings was adopted by the Supreme Administrative Court on 15 June 2011, I OPS 1/11). The case-law discussion between the Supreme Administrative Court and the Supreme Court in this regard led to changing law. In Article 83(2) of the Administrative Proceedings Law Saturdays were made equal to the statutory public holidays in administrative court proceedings. The same solution was applied also in Article 12(5) of the Tax Ordinance.

Influenced by the resolution of the Supreme Administrative Court of 11 April 2005 (II OPS 11/05), the legislator amended Article 18(2)(13) of the Act on the Commune Self-Government; the commune council was granted competence to adopt resolutions on the names of internal roads in the meaning of the Act of 21 March 1985 on public roads.

Under the influence of the resolution of the Supreme Administrative Court of 8 January 2007 (ref. No I FPS 1/06) concerning VAT, in which the Supreme Administrative Court expressed its opinion that perpetual usufruct is the supply of goods (and not a service), the legislator amended the VAT Act (Article 7(1)(6) and (7)). The amended provisions stipulate that both the establishment of perpetual usufruct and disposition thereof constitutes the supply of goods, which is significant for the arising of a tax obligation.

According to Article 193 of the Constitution of Poland, “any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, a ratified international agreement or statute, if the answer to such question of law will determine an issue currently before such court.” Every question referred by the administrative court, especially by the NSA, should draw the attention of the legislator in terms of assessment of the quality, legality and constitutionality of legislation applied in administrative law cases.

Furthermore, pursuant to Article 192 (in connection with Article 189) of the Constitution the President of the Supreme Administrative Court may make application to the Constitutional Tribunal in respect of matters concerning disputes over authority between central constitutional organs of the State.

If the NSA or administrative court of first instance refer a preliminary question to the Court of Justice of the European Union concerning compatibility of domestic legislation with regard to implementing EU law provisions, then every such case should be treated by the legislator as an expression of doubt on the quality of already binding legislation.

Administrative courts, due to doubts on the compliance of regulations they apply with EU law, have referred so far 60 requests for preliminary rulings to the CJEU (in 2005–2016).

Worth mentioning is the request of 28 June 2016 concerning Case II OSK 1346/16, in which the Supreme Administrative Court referred the following

question: “Must Article 32(3) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), having regard to recital 29 of the Visa Code and the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as requiring the Member States to guarantee an effective remedy (appeal) before a court of law?”
A reply to the question will be significant not only for administrative courts, but also for the Polish legislator.

In the grounds to the request for a preliminary ruling, the Supreme Administrative Court emphasised that the existing Polish legal order did not provide for judicial control, and it is impossible to determine on the basis of the wording of Article 32(3) of the Visa Code whether the intention of the EU legislator, using the notion of “appeal” (*odwołanie*), was to guarantee the right to any legal remedy envisaged under national law or whether the explicit granting of the right to appeal before a competent court was intended. If the Court of Justice states that the “appeal” referred to in Article 32(3) of the Visa Code means an appeal before the court, this means that excluding judicial control in the Polish legal system is not compliant with the requirements envisaged by EU law, in particular with Article 47 of the EU Charter of Fundamental Rights, as well as the requirements under the EU principles of equivalence and effectiveness.

The impact of case-law on the legislator is not always the same, as proven by practical examples illustrating the influence on the tax legislator.

The tax legislator’s response to problems faced by case-law differs depending on the level of acceptance of a given line of reasoning presented in the case-law. Sometimes the legislator takes over case-law heritage (by giving it a normative form). An example, which was a breakthrough, was supplementing the definition of deductible costs by the costs of maintaining or securing the source of revenue.

If the line of reasoning presented in case-law is not favourable for tax authorities, the legislator responds fast and changes regulations. An example may be amendments to acts on income taxes and introduction of the definition of undistributed profits in response to the unaccepted interpretation of the notion by courts.

An example of lack of the legislator’s response when it is indispensable is the issue of the notion of representation, which was not defined by the legislator (even though it is used in law), but is important in the area of regulations on deductible costs.

An interesting case illustrating the impact of case-law on tax law and its systemic principles is the introduction by the legislator of a principle known as “in dubio pro tributario” applied in case-law. In case-law of administrative courts (see resolutions of the Supreme Administrative Court of 17 November 2014, II FPS 3/14 and II FPS 4/14; resolution of 19 December 2016, II FPS 4/16), the principle was derived from the constitutional principle of the

democratic state of law (Article 2 of the Constitution of the Republic of Poland) and from the principle of the statutory regulation of tax tribute law (Articles 48 and 217 of the Constitution of the Republic of Poland).

Since 1 January 2016, the amended provision of Article 2a of the Tax Ordinance has been binding, pursuant to which any doubts on the regulations of tax law that cannot be dispersed are resolved to the benefit of the taxpayer. The principle of resolving doubts to the benefit of the taxpayer covers doubts regarding the interpretation of legal regulations. Direct addressees of Article 2a of the Tax Ordinance are tax authorities and tax control authorities. The provision may be quoted by a taxpayer if in the taxpayer's opinion there are doubts regarding the interpretation of tax law regulations that cannot be dispersed, but authorities failed to apply the provision. The *in dubio pro tributario* rule applies, in particular, to tax proceedings that are concluded by the issue of sovereign acts (i.e. decisions and orders). It also applies, however, to individual tax interpretation proceedings. "Benefit of the taxpayer" means an optimum legal solution among solutions that presented themselves during interpreting a regulation.

The indirect communication to the executive – public administration authorities - on the quality of legislation applied by these bodies is also possible via so called "signalling resolutions / orders" on the basis of Art. 155 § 1 PPSA, " In the event that substantial violations of law or circumstances affecting their occurrence have been ascertained in the course of hearing the case, an adjudicating panel of the court may inform the appropriate authorities, or their superior bodies, in the form of an order, about such irregularities."

**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?**

No, it seems that there are no direct objections or risks. The risk of the NSA being omitted from the process of consulting public institutions at the stage after legislation has been drafted usually exists.

**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?**

No, it seems that there are no direct objections or risks. The risk of the NSA being omitted from the process of drafting amendments to already binding laws usually exists.

## 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?**

According to Article 186 (2) of the Constitution, the KRS may make an application to the Constitutional Tribunal regarding the conformity to the Constitution of normative acts, to the extent to which they relate to the independence of courts and judges. This competence has a control character; it can lead to elimination of legislation contrary to the independence of courts and judges.

Additionally, Art. 3 (1) point 5 of the Act on KRS states that one of the roles of the KRS is to express opinions on matters concerning the judiciary, judges and trainee judges, brought under its remit by the President of the Republic of Poland, other public authorities or bodies of judicial self-government. The enforcement of this legal provision can lead, in practice, to the KRS expressing an opinion on current legislation in the area of the judiciary and its quality in terms of its practicability and enforceability.

**If so:**

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

The above mentioned kind of KRS' activity is performed ex officio.

**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?**

The KRS takes the initiative to advise the legislator or draw attention to the quality of legislation within its constitutional and statutory powers concerning the safeguarding of the independence of courts and judges.

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

For example, in 2015, the Council issued a stance concerning the draft of the Act on the system of common courts. The important part of the draft legislation was incompatible with constitutional guarantees of the separation of the

judiciary from other powers and the independence of judges. The Council's comments concentrated on the constitutional rights and freedoms of citizens within the area of data protection.

**d. To what extent is the given feedback public?**

The applications and stances of the KRS are publicly available at the Council's web site.

**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?**

The basis for existing mechanisms in the case of the KRS is both constitutional and statutory.

**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?**

No, it seems that there are no direct objections or 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?**

The risk of the KRS being omitted from the process of drafting amendments to already binding laws exists.

**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?**

As a matter of fact, there are no general mechanisms at this stage. As already mentioned in Part 1 C, public consultation via the internet and in other ways is likely to concern the stage of drafting laws.

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

No, we have not.