

Summary

Study into the recommendations made by the Council of State in respect of the quality of legislation

The objective of the study is to use the perusal and analysis of parliamentary documents to find an answer to the question to what extent the Council of State, in its legislative advice, refers to the View to legislation and, as an extension thereof, the Directives for regulations, what other quality requirements may be expressed in its recommendations and how, in light of the current policy on legislative quality, the Government and Parliament deal with the recommendations issued by the Council of State.

A total of 78 recommendations were studied from the years 2001 and 2002. In the selection a certain distribution between the Ministries was observed. An effort was also made to maintain the best possible proportionality between recommendations regarding legislative proposals on the one hand and draft Governmental Decrees on the other hand. However, in a quantitative sense the study cannot be considered representative. In order to obtain the best possible insight into the Council of State's verification methods, recommendations in which the Council addresses one or more quality aspects were mostly selected. Recommendations without comment and bill-related recommendations were not included in the investigation. As a result of this selection method a relatively high number of recommendations with a heavy operative component were studied.

The second phase of the study focused on the Government's response to the recommendations and the Parliamentary treatment following the submission of the legislative proposals. Thirteen of the 78 regulations from the first phase were studied in more detail.

Six quality requirements have been formulated with a View to legislation:

- lawfulness and focus on the realisation of legal principles;
- effectiveness and practicality;
- subsidiarity and proportionality;
- practicability and enforceability;
- coordination with other regulations;
- simplicity, clarity and accessibility.

The study shows that, in its legislative advice, the Council of State does not use the criteria from View to legislation as an explicit starting point. The Council's recommendations never expressly refer to the criteria in question. However, the criteria used in View to legislation are sometimes identical to those of the verification framework developed by the Council itself, and the Council sometimes expresses itself in comparable terms. In addition, it must be concluded that the recommendations made by the Council are difficult to describe in accordance with the criteria from View

to legislation. The study shows that the classification of passages from the recommendations in accordance with these criteria frequently results in a tortuous and somewhat arbitrary character. From a material point of view, the Council's recommendations mostly relate to the same subjects and questions as those covered by the criteria from View to legislation. In the studied recommendations, the Council generally does not use points for attention that cannot, in one way or the other, be brought under the heading of one or more of the criteria from View to legislation. However, in the comparison between the criteria from View to legislation and the verification framework developed by the Council, a number of situations were identified that give rise to discussion.

The Directives for regulations generally play a somewhat more important role in the recommendations of the Council of State. However, the extent to which and the way in which they do this depends strongly on the circumstances. Based on the tripartition used by the Council (policy-analytical verification, legal verification and legislative verification), the following picture emerges. Insofar as it concerns the verification of policy-related aspects, the Council refers to the Directives for regulations seldom or not at all. In the legal verification, explicit referencing to the Directives occurs equally seldom. In the legislative verification, finally, strong parallels may be noted between the Council's procedures and the content of the Directives. It is in this area that the Directives are the most concrete and comprehensive and often provide a useful basis for verification. However, explicit references to the Directives were not found in the studied recommendations.

Neither does the Council refer explicitly to its own verification framework in the studied recommendations. The criteria contained therein can only be found as such in the recommendations with great difficulty. On the basis of this study it is difficult to determine whether the verification framework has, so far, had equally little influence on the procedure. However, it does not appear that, at the time of the study, the verification framework took up a dominant position in the Council's daily procedures.

Looking at the content of the recommendations and the reasoning contained therein, they appear to have more of a tendency towards a common sense approach that it is strongly focused on the concrete proposal than towards the strict application of an abstract verification framework. For the moment, it therefore appears that the role of the verification framework is of a supplementary nature. When it concerns the method of recommendation, a distinction must be made between policy-related and legal aspects. In its recommendations on the more policy-related aspects of a regulation, the Council does not explicitly look into the correctness or incorrectness of policy choices that are the basis

of the regulation in question. In this context, the Council particularly focuses its criticism, if there is concrete reason for such criticism, on the substantiation of the proposal. The legal and legislative recommendations are normally of a different nature. In its recommendations, the Council pays comprehensive attention to the legal dimension and sometimes also issues unvarnished opinions. In this context there is, in principle, no major reticence. It is generally not possible to demonstrate a clear connection between the nature of the operative part and a negative opinion on the basis of one or more quality criteria.

The Government's response to the Council's recommendations differs strongly in the cases analysed in this study. The response differs from legislative proposal to legislative proposal and from case to case. The studied recommendations did not generally result in the reconsideration of the proposed regulation. The recommendations did, however, relatively often result in (mostly minor) adjustments to the text of the proposal or the clarification of the proposal. Insofar as the studied recommendations contained comments of a policy-related nature, these did not generally result in different policy choices and therefore neither did they result in reconsidering the proposal as a whole. The Government often takes recommendations of a legal nature into consideration in some way.

As a result of the study, the question arises whether, in the realisation of their tasks in the legislative process, the Government and the Council of State should use the same criteria in respect of legislative quality. This study takes the standpoint that harmonisation of the requirements that good legislation must meet can contribute to a more transparent and consistent verification of criteria for legislative quality. It may also result in increased mutual insight and understanding on the part of the parties in the legislative process. The study makes a suggestion for a basic structure. This basic structure consists of three components: policy aspects, legal aspects and legislative aspects. It corresponds with the general verification framework currently used by the Council of State.