

## Chapter 4

### The development of new regulations

Predictable and systematic procedures for making regulations improve the transparency of the regulatory system and the quality of decisions. These include forward planning (the periodic listing of forthcoming regulations), administrative procedures for the management of rule-making, and procedures to secure the legal quality of new regulations (including training and guidance for legal drafting, plain language drafting, and oversight by expert bodies).

*Ex ante* impact assessment of new regulations is one of the most important regulatory tools available to governments. Its aim is to assist policy makers in adopting the most efficient and effective regulatory options (including the “no regulation” option), using evidence-based techniques to justify the best option and identify the trade-offs involved when pursuing different policy objectives. The costs of regulations should not exceed their benefits, and alternatives should also be examined. However, the deployment of impact assessment is often resisted or poorly applied, for a variety of reasons, ranging from a political concern that it may substitute for policy making (not true- impact assessment is a tool that helps to ensure a policy which has already been identified and agreed is supported by effective regulations, if they are needed), to the demands that it makes on already hard pressed officials. There is no single remedy to these issues. However experience around the OECD shows that a strong and coherent focal point with adequate resourcing helps to ensure that impact assessment finds an appropriate and timely place in the policy and rule making process, and helps to raise the quality of assessments.

Effective consultation needs to be an integral part of impact assessment. Impact assessment processes have – or should have – a close link with general consultation processes for the development of new regulations. There is also an important potential link with the measurement of administrative burdens (use of the Standard Cost Model technique can contribute to the benefit-cost analysis for an effective impact assessment).

The use of a wide range of mechanisms, not just traditional “command and control” regulation, for meeting policy goals helps to ensure that the most efficient and effective approaches are used. Experience shows that governments must lead strongly on this to overcome inbuilt inertia and risk aversion. The first response to a problem is often still to regulate. The range of alternative approaches is broad, from voluntary agreements, standardisation, conformity assessment, to self regulation in sectors such as corporate governance, financial markets and professional services such as accounting. At the same time care must be taken when deciding to use “soft” approaches such as self regulation, to ensure that regulatory quality is maintained.

An issue that is attracting increasing attention for the development of new regulations is risk management. Regulation is a fundamental tool for managing the risks present in society and the economy, and can help to reduce the incidence of hazardous events and their severity. A few countries have started to explore how rule-making can better reflect the need to assess and manage risks appropriately.

## Assessment and recommendations

### *General context*

*There is a broad consensus in France which is critical of regulatory inflation.* This issue, raised in numerous government reports (including the 2009 report by the *Council of State* and the *Warsmann* report published in January 2009), arose very frequently in the OECD team's interviews with both representatives of the administration and external stakeholders. The production of too many regulations within very short periods of time was considered to be a source of legal insecurity. Regulatory inflation also weighs upon local and regional governments, which must implement the regulations. Although a number of EU countries show regular growth in the volume of regulations produced each year, France stands out because of the attention paid to this problem which specifically translates into significant efforts to measure the volume of regulatory production. This concern has contributed greatly to the efforts made to control the flow of regulatory output. The analysis is based essentially on precise statistics on the production of regulation. It would be useful to develop a more strategic analysis of the effects of production (e.g. on a particular production sector or on SMEs).

### *Procedures for producing regulations*

*Since 2004, steps have been taken to strengthen rule-making processes.* The government's work programme, drawn up every six months, establishes the government's overall orientation, containing the list of bills, orders and decrees. It remains an internal government document which enables the government to schedule the business of the *Council of State*, the Council of Ministers and manage parliament's agenda for the part belonging to the government.

*Reduction in the time limits for implementing enabling decrees for legislation.* The length of time between the promulgation of a law and the entry into effect of enabling decrees has, in the past, posed a major problem for the correct implementation of the law. The government has reinforced the monitoring system, which has led to a significant improvement compared to comparison to 2004 (Box 4.1). *The rate of implementation of laws enacted since the start of the current legislative period (June 2007) stood at 84% at 31 December 2009, compared with 60% at 30 June 2008.* The provisions of the framework law also require a provisional list of enabling application texts to be drawn up when the impact study is carried out.

*Development of an application to create a fully virtual regulatory production chain.* This chain ensures the real-time transmission of bills from the initiating ministry to the managers of the Official Journals in which they are published. It has reduced transmission times and heightened security.

*Strengthening of tools used to help draft regulation.* The rules for drafting regulatory texts have been compiled in a "good legislation guide". This voluminous guide (500 pages) focuses on the drafting of legislation and does not adopt an overall approach to the production of regulations. It has not yet been incorporated into on-line regulation production tools. The good legislation guide has helped to ensure that greater account is taken of the requirements regarding to the drafting of regulations. The need to strengthen the capacity for drafting legislation in the various ministries was frequently stressed the OECD interviews, notably to achieve clearer and more easily accessible texts.

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**Recommendation 4.1. Continue to reinforce basic processes for making new regulations. Further develop online tools, in particular by integrating the *legistic guide* and developing training programmes in parallel. Continue to focus on monitoring delays for issuing secondary regulations necessary for the implementation of laws and for transposing directives. Publish the government programme to increase its visibility.**

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*Attention needs to be paid to draft legislation proposed by the parliament.* The potentially greater initiative given to parliament under the constitutional revision of 2008 raises the issue of the need to improve the procedures ensuring the quality of bills proposed by legislators, including with regard to impact studies. The risk often mentioned is that of providing a “short-cut” procedure by passing governmental initiatives through the parliamentary procedure. See also impact studies below.

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**Recommendation 4.2. Encourage strengthening of procedures for making new regulations when they are initiated by members of parliament.**

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#### **Box 4.1. Excerpts from the 2004 OECD report: Access to the law and enabling decrees**

##### **Access to the law**

Despite the major efforts being made to ensure de jure transparency and the indisputable technical investment, the fact remains that the large number of regulations actually prevents the general public and small businesses from understanding the regulatory framework and analysing the nature of their obligations. De facto, access to the law for the non-specialist is trickier than it at first appears. The need for the style of writing to be clear and accessible has only very recently been made official and a number of legal documents remain dense and highly technical.

##### **Enabling decrees**

##### **Recommendation**

##### ***Improve legal certainty by enhancing the transparency of the procedures to implement the law***

Legal certainty and transparency are key elements for the quality of regulation. Yet while the French regulatory system is highly consistent from a legal perspective, elements of weakness are apparent, particularly the delay in publishing the decrees necessary to implement laws. In some cases, the lack of decrees has made certain laws wholly or partially inapplicable. This generates ambiguous legal situations that can be harmful. Thought should be given to imposing official deadlines on the administration for publishing implementation decrees, with provisions for sanctions and legal appeals in case those deadlines are missed.

##### **Evaluation**

Normally, the SGG ensures that decrees for implementing laws are published within a time frame that must not exceed 6 months after the enactment of the law. The ministry responsible for the bill must provide a provisional timetable listing the implementing decrees envisaged and a file setting out the basic provisions of these texts. Sometimes, however, the implementing decrees are never enacted, preventing the law from being implemented and creating an ambiguous legal situation. Thus, according to the available figures, the growing number of laws is generating bottlenecks, with some 21 laws

passed since 1981 that still remain unimplemented and 169 laws that have been partially implemented. At the same time, there is no particular rule relating to the preparation of subsidiary legislation other than the general directives on the preparation of regulations distributed to the administration by the prime minister's office. This situation does not therefore promote transparency for citizens.

The official procedures governing the preparation of regulatory texts in France only concern the wording of most important laws and to some extent decrees, which are subject to a mandatory opinion of the *Council of State*. However, in France the difficulty arises because of the multitude of lower-ranking regulations, which mean that the citizens affected by the regulations do not always know how the processes involved work.

Source: OECD (2004).

### ***Ex ante impact assessment of new regulations***

*The new impact studies system introduced by France places it at the forefront in Europe, at least in principle.* Since 1 September 2009, impact studies have been a constitutional requirement, which is a “first” in relation to other countries. Under the new provisions, an impact study must be attached to bills sent by the Government to parliament, failing which the Speakers of either of the two assemblies may refuse to place it on the agenda, including if they find it inadequate. If there is a disagreement between parliament and the prime minister, the matter is referred to the *Constitutional Council*. The impact study must also describe “accurately” how the bill fits in with Community law and domestic legislation, the status of implementation of the law in the fields concerned by the bill and the procedures for implementing texts. This extensive system does not exist so clearly in many other EU countries.

*A very stringent requirement and one which seems credible.* Recourse to a constitutional, framework text underscored the difficulty of making headway on impact assessment in the rule-making process without imposing a substantial constraint. Earlier efforts (based on prime ministerial circulars) did not succeed in making impact assessment a part of ministries' practice and culture. They also failed because of a lack of rigour and penalties. In the current system, three elements should be of help: the system results from a review process in which all players (government, parliament, *Council of State*, administration) are engaged. The obligations and the practical details for control are laid down very precisely by a framework law, and may not therefore be easily changed. Substantial penalties may be incurred if an assessment turns out to be inadequate (*Council of State* comments, refusal to put the draft regulation on the parliament's agenda, which may subsequently be endorsed by the *Constitutional Council*).

*The first months of the new regime are encouraging.* The provisions were legally applied on 1 September but had been introduced ahead of time in April 2009. Draft laws brought before the parliament now have a wide-ranging impact assessment which is published on the *Légifrance* site. The SGG has developed methodologies and reference materials, while leaving each ministry room for manoeuvre to adapt the impact assessment's structure and content to its field of activity. The initial months show that impact assessment dossiers have started to be used as arguments during the parliamentary debate, and are also taken into consideration in the broader public debate. The report by the National Assembly Committee of Evaluation of Public Policy, issued in November 2009, which draws up an overview of the application of the impact studies since April 2009, highlighted the improvement in the quality of the studies over time, while noting the preponderance accorded to legal considerations in comparison to economic analyses.

*The current interest in impact studies must be maintained over time and various types of pressure must be resisted.* Commitment – at the policy and administrative level – of the various stakeholders, starting with the prime minister, the *Council of State* and the Law Committee of the National Assembly, has been a key factor in implementing the system. It is essential that the government and parliament continue to give a high policy priority to impact studies in the future if the threat of sanctions is remain credible.

*The system does not clearly incorporate public consultation procedures and does not sufficiently draw attention to the option of maintaining the status quo.* To ensure that impact studies are a genuine decision-making tool, it is essential that they are accompanied by a public consultation process to gather the elements required for good decision-making. The studies' publication (and the important comments received) should contribute to the tool's quality. For the tool to be useful in practice, it is essential to summarise the main conclusions in a short version which enables the various options to be easily compared. During the interviews, many respondents highlighted the pressure that existed to produce legislation quickly without necessarily considering the need to have recourse to a regulation first of all. The impact study should enable the question of the need for the law to be very clearly posed during the process. This requires that studies start sufficiently far upstream of the reform project.

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**Recommendation 4.3. Define a policy for consultation regarding impact assessment. Clearly integrate the “zero option” into the initial phase of the impact assessment process.**

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*The methodological tools must be strengthened.* Developing impact assessment requires the methodology to be updated and developed in greater detail, particularly for the economic analysis and the cost calculations (so far as possible), a point raised by several interviewees. With regard to calculating the cost of administrative information obligations, the *Oscar* tool must continue to be developed and updated so that it remains relevant. The effort to determine what statistics need to be collected must also continue. Particular attention should be given to the impacts on France's competitiveness internationally.

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**Recommendation 4.4. Strengthen the methodological tools, including quantification of costs as far as possible. Establish an adequate framework and sufficient resources for the maintenance of the *Oscar* database.**

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*The right balance must be struck when determining the system's scope and the proportionality of the effort devoted to impact assessment.* Many agree in saying that impact studies should be targeted if the system is to be made operational. The concern for proportionality should not, however, lead to important projects being left to one side. The current system is mandatory for all bills brought by the government and does not include bills brought by the parliament. Nor does the obligation of an impact study apply to draft decrees, even if the government considers carrying out a complementary study when drawing up enabling texts to be good practice. No details are given as to the updating of the impact study to take account of amendments to a draft law. The impact study should be seen as an incremental process which ends with the adoption of the law. It would also be useful to initiate deliberation on the content and degree of accuracy of the study on the basis of the importance of the draft text, to determine the appropriate scale of efforts (see the United Kingdom, for example). “Common sense” should prevail.

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**Recommendation 4.5. Consider extending impact assessment to draft decrees. Encourage a similar development for draft laws initiated by members of Parliament as well as for parliamentary amendments.**

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*An ambitious reform has been initiated, and institutional capacities need to match this ambition.* The SGG must ensure that impact assessments are undertaken from the start of the drafting process, that a methodology is developed, and that support tools are put in place. The quality and the reliability of the current impact assessments depend to a large degree on individual ministries. It is important to improve economic skills so that economic aspects are better taken into account, both in the SGG and in the ministries. Calling on consultants would not be the right way to solve this problem. One of the main reasons for impact studies is to encourage the administration to initiate deliberation on the various options open. If the studied is prepared externally, this opportunity is lost. What is therefore required is investment aimed at strengthening assessment capacities within the administration. It is also important to strengthen the *Council of State's* capacities to evaluate impact assessments.

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**Recommendation 4.6. Integrate economists into the teams in charge of impact assessment. Set up a common training programme across ministries to promote culture change.**

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*Evaluation is a key element in ensuring the robustness and effectiveness of impact studies.* It is already predictable that impact studies will be subject to a thorough examination by the government's Secretariat General, the *Council of State*, the parliament and (if consulted) the *Constitutional Council*. Regular evaluation of the system is essential to ensure not only that the impact studies are indeed carried out, but also that they constitute high-quality aids to decision-making and provide the support required for the optimal drafting of rules. It may also be that with hindsight, the studies may not have accurately targeted the effects of a law. The evaluation must also enable the system to be adapted (e.g. extension of its scope, development of quantification methods and tools). The system should be sufficiently accurate and visible.

*There is currently no time limit scheduled for regular evaluation of the system.* Three bodies are or may be called upon to carry out this evaluation. Firstly, the National Assembly Committee of Evaluation of Public Policy, recently established following the constitutional reform, is already responsible for analysing the quality of special impact studies and could provide overall monitoring of the system. Its report of November 2009 on the control criteria of impact studies constitutes a step in this direction. Secondly, the *Council of State*, in the section of its annual report devoted to its consultative role, could also be called upon to draw up a report on the application and effectiveness of the system. Thirdly, the *Cour des comptes* could also intervene to evaluate the system over a longer cycle, notably by evaluating the quality of forecasts on the basis of what actually happened in practice and by assessing, in a more global fashion, the policies of regulatory governance (as the European Union Court of Auditors has just done).

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**Recommendation 4.7. Evaluate the implementation of impact assessment in a regular and detailed way. Publish these evaluations. This could be integrated into the annual report proposed.**

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*The new system must dovetail into the broader scope of regulatory governance; it is a tool for collecting the stock and throughput which may enable a “virtuous circle” to be created.* Impact studies, as important as they are, are only part of the scope of regulatory governance. The studies must serve as a support for the other actions carried out by the government. It is an excellent tool for evaluating every draft rule taken individually, but it must also serve to provide an overall view of the evolution of regulation (what is on-going, to what extent the various sectors, the different areas in the country, companies, etc., have been affected by regulatory burdens). For example, if it proves that one sector of activity has been particularly affected over the previous year, this could provide potential ways forward in deliberating about the measures to be taken subsequently. This overall view would be completed by a regrouping with the simplification initiatives.

**Recommendation 4.8. Highlight possible ways of integrating *ex ante* impact assessment and *ex post* simplification.**

#### Box 4.2. Excerpts from the 2004 OECD report: *Ex ante* impact studies

##### Recommendation

***Institute an effective practice of Regulatory Impact Analysis as a strategic tool to support regulatory policy***

In many OECD countries, the effective and systematic use of Regulatory Impact Analysis (RIA) is a key component in ensuring regulatory quality. While France conducts some *ex ante* assessments, these are often un-co-ordinated and do not systematically take into account the overall costs and benefits of regulations from a social and economic perspective, and they are drafted prior to the RIAs, which are often no more than a formal exercise conducted after the decision has been made. This situation could be improved by using the RIA process as a systematic framework to rationalise existing practice and to ensure a relevant and consistent *ex ante* evaluation. This improvement would also allow for a sounder *ex ante* decision-making process, in terms of an evidence-based economic approach. To this end, RIA needs to be made a part of the legal framework governing the preparation of regulations, in order to ensure that a real impact analysis is conducted, and that it is subject to sanctions. To confine the RIA to significant proposals (perhaps a hundred a year), the quality enforcement authority could define precise criteria for identifying regulations subject to the assessment requirement, and it could have the power to demand a RIA in certain cases. The impact study process should also include prior consultations and their results should be made public in a timely manner. A methodological guide and training materials should be prepared for this purpose, for example by the central institution responsible for the quality of regulations.

##### Evaluation

At present, assessment of French practice remains difficult. An assessment of the impact studies performed in 2002 revealed that, while the formalities were observed, the contents of the document produced were of uneven depth and quality and did not sufficiently clarify the decision in question. The shortcomings noted during the analysis and observed by the *Council of State* have not really been rectified. According to the *Mandelkern* report of 2002, and the analysis of the *Council of State* of 2002 on a sample of impact studies, these documents remain a formality, drawn up only as a result of the obligation imposed by the *Council of State* and the Government Office of Secretary General. However, this does not mean that the *ex ante* assessment is not carried out, but that it is done differently, outside this framework.

Integrating the RIAs with the policy-making process, by starting at as early a stage as possible, should bring to the policy making process the discipline of systematic assessment of costs and benefits, provide for identifying alternatives and seeking the best policy option. France’s deviation from this

principle has effectively rendered impact studies meaningless: usually the study is carried out late, *ex post*, on average 48 hours after the decision has been brokered, and it amounts essentially to a summary justifying the legislation in question. This necessarily prevents the impact study from being an overview tool contributing to the decision. It is therefore just a formality and an additional administrative cost.

### **Political support over time**

The use of the RIA must be supported by the highest levels of government. Despite a clear political commitment in 1995-96, when the practice was begun, it has to be pointed out that with the end of the State Reform Commission in 1997, the whole impetus was no longer the same and there was strong scepticism among most of the government departments and senior officials. The document recommending the impact studies, which is a circular, does not have much force of law within the French administrative legal system. Because, apart from the political sphere, the idea had no permanent champion within the government, it fell into abeyance as political support weakened.

### **Consultation**

In France, the impact study is made public, but only at the end when it is submitted to the Council of Ministers, which in fact prevents any involvement of the public beforehand. The publication of the RIAs as early as possible should encourage those responsible to improve their draft analysis, as it will be made public.

### **Methodology**

In France, the content of impact studies is of uneven depth and quality, insufficient to clarify the decision. This does not mean that decisions are not analysed, but analyses do not use a general framework for taking into account the costs and benefits in terms of social and economic externalities. The difficulty of measuring social benefits, and the absence of any structured and systematic approach severely reduces the usefulness of the impact study approach for supporting decision-making.

Data collection strategies exist within the economic studies and statistics analysis departments of the ministries, and the INSEE (French National Institute of Economic and Statistical Information). Where data exists, a quantitative analysis may be carried out. Where it does not exist, RIA requirements are not currently sufficient to orient the production of the statistics system, which is being carried out over the long term using powerful tools.

### **Targeting**

RIA efforts should be targeted at regulations with the greatest impact and greatest likelihood of improving results. However, in France, impact studies have been required for all legislation and decrees in *Council of State*, being based on the legal importance of the legislation and not its economic impact. In the United States, RIA requirements are subject to an economic impact threshold of USD 100 million, or where the rules might generate costs for a specific sector or region, or adversely affect competition, employment, investment, productivity or innovation.<sup>1</sup> Consequently, the enforcement of the impact study becomes too significant in relation to the technical resources available in the ministries, and is only observed from a formal perspective. For legislation prepared with a sufficiently long time frame, these studies are particularly detailed and of high quality. Thus, the examples quoted for universal health insurance and bio-ethics, in fact, follow an important inter-departmental preparatory document within the framework of the Planning Agency for the former, and with an experts advisory authority for the latter.

### **Responsibilities and capacities**

In order to involve the regulatory authorities, while assuring quality control and consistency, responsibility for the RIA should be shared between the regulatory authorities and the central body in charge of quality. However, in France, the official responsibility of the central unit, the General

Secretariat of the Government, is to ensure that there is an impact study, not to control its quality. In doing so, the General Secretariat of the Government conforms to its role of Statutory Office, ensuring that procedures are followed in terms of the official and legal environment framework, but not the intrinsic substantive contents of the legislation. The *Council of State* examines the legislation from a legal perspective, but as such, impact studies have no legal effect, and the *Council of State* has no legal means to control their economic content.

The officials drafting the legislation should have the necessary training to prepare the RIAs in order to assess the quality of the regulation, and to understand the methodological pre-requisites and data collection strategies. Training is necessary for the RIA to be perceived as a vehicle for structural change within the actual government departments. In France, the high quality of the initial training does not, however, leave any room specifically for the preparation of impact studies. This is also related to the lack of a methodological framework for impact studies.

Source: OECD (2004).

### ***Alternatives to regulation***

*Seeking alternative instruments to regulation is poorly integrated into French administrative and political culture.* It is often said that recourse to legislation is seen as the immediate response to a given problem. Rules are preferred to other alternative instruments. A subject not much mentioned during the interviews.<sup>2</sup> Impact studies can play a major role in moving this culture forward by posing two key questions:

- Does legislation exist already and, if so, is it applied (effective implementation might be an alternative solution)?
- Is the adoption of a law necessary to achieve the given objective?

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**Recommendation 4.9. Ensure that impact studies fully integrate the analysis of alternatives to regulation (including the option of the maintaining the legal status quo – see Recommendation 4.3).**

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### **Box 4.3. Excerpt from the 2004 OECD report: Alternatives to regulation**

Seeking alternatives to regulation is not a key feature of the French system. This is due to both the centralised practice of a country with written Roman law, and to the role of the European framework. However, there is concern on a political level: a government directive of May 2002 requires ministers to try to prevent excessive legislation and regulation and to seek alternative solutions to enacting laws. Nevertheless, these directives have no legal value and are not supported by a systematic approach aimed at questioning the necessity of any new regulation.

Source: OECD (2004).

## **Background**

### ***The legislative and regulatory structure in France***

The power to introduce legislation is vested in the prime minister, deputies and senators. Bills can be introduced by the prime minister (government bills) and by Members of Parliament (parliamentary bills). The vast majority of texts passed by parliament are government bills (almost 90% at the last session of parliament in 2007 to

2008). There are substantially more parliamentary bills put before the parliamentary assemblies than government bills.<sup>3</sup> Legislative initiatives by Members of Parliament have become much more frequent since October 1995, when monthly sittings were reserved for an agenda tabled by the assembly. This trend is set to intensify as the constitutional revision of 23 July 2008 introduced a shared agenda for each of the assemblies and the executive (effective since March 2009). Another significant change in procedure is that debates on bills as a general rule now focus on the texts adopted by the Commission.

Normative instruments are ranked according to whether they are legislative or regulatory instruments. Article 34 of the 1958 Constitution restrictively defines subjects pertaining to the legislative domain following specific criteria, which are neither organic (dependent on parliament) nor procedural (the legislative procedure).<sup>4</sup> If a text is not considered a law, then it belongs by default to the “regulatory” domain. Most regulatory documents (decrees and orders) are designed to stipulate conditions under which a law will be applied.

#### Box 4.4. The legislative and regulatory structure in France

It should be noted that all of the great French jurisdictions (the *Council of State*, the *Constitutional Council* and the *Court of Cassation*) as well as most of the supreme courts of European Union member states have found that international treaties, particularly EU treaties have greater force than law, but less force than the Constitution, which is the highest of the laws of the land. Nevertheless, the supremacy of the Constitution must take into account requirements relating to France’s membership of the European Community.

##### Legislative texts

Other than “simple” or “ordinary” laws, passed by parliament on the legislative subjects stipulated in the Constitution, there are two special categories of law.

- *Constitutional laws* revise the constitution in accordance with a procedure set out in Article 89 of the Constitution. A bill must be voted on the same terms by both assemblies. The revision is final once approved by referendum. However, in the case of a prime minister’s Bill, the President of the Republic may decide not to submit it to referendum and instead submit it to parliament meeting in Congress (both assemblies meet) where it can be passed by a majority of three-fifths.
- *Organic laws*, according to Article 46 of the constitution, are primarily intended to clarify the workings of public authorities and to a strict constitutionality check and special voting procedures. Before being enacted, they are routinely subject to a constitutionality check by the *Constitutional Council* and, if the two assemblies disagree, they can be passed only by an absolute majority at the final reading in the national Assembly.
- *Budget laws*. These are subject to specific rules of procedure (*i.e.* brought before the national Assembly first, 70-day period beyond which the provisions can be implemented by ordinances).
- *Social Security Budget Laws*. Are subject to special rules of procedure, based on the rules for Budget Laws.
- *Expenditure planning laws* set out government policy objectives in a given area and the resources it plans to devote to them over a period of several years.

- *Laws authorising the ratification of international commitments.* They represent between a quarter and a third of annual output. They are government initiatives and are not amended.
- *Enabling laws.* The government may ask parliament to authorise the taking of measures that are normally in the domain of statute law by means of ordinances (Article 38 of the Constitution). The authorisation is granted under a law stipulating the time limit for the authorisation, its purpose and the field in which the government intends to implement the measures. The ordinances are adopted by the Council of Ministers after consultations with the *Council of State* and are effective immediately but lapse if the ratification Bill is not presented within the time limit set by the enabling law. This mechanism is used for highly technical subjects (administrative simplification). It has sometimes been used for highly sensitive reforms (1996 Social Security Reforms).

### **Regulatory texts (decrees, orders, circulars)**

Regulatory texts are intended to stipulate the conditions under which the law will be applied.

- *Decrees.* These are regulatory acts normally signed by the prime minister, who, according to the Constitution, has standard regulatory authority. Certain decrees are however discussed in the Council of Ministers, and therefore signed by the President of the Republic, who presides over the Council of ministers, either because a text of higher level stipulates so, or because the government thinks that the text deserves such process. The laws often stipulate that certain decrees which are necessary to their implementation, will be taken according to the *Council of State*, in order to better guarantee their legal quality. The decrees taken after advice of the *Council of State* and those taken after a discussion in the Council of Ministers (a decree can have both), can only be amended following a decree taken under the same circumstances as the original.
- *Orders.* These are acts lower in rank than decrees, emanating from a lower administrative authority than the President of the Republic or the prime minister: ministers, prefects, mayors, presidents of departmental or regional councils. They form part of the subsidiary regulatory power that ministers have to ensure that the services under their authority operate properly. They can also enact regulatory measures in matters where a legislative or regulatory bill has given them this power. Apart from these cases, ministers do not have any regulatory power. The order, like the decree, includes both introductions that refer to previous regulations and enacting clauses specifying the contents of the document and its legal effects. The orders can be of a regulatory nature when they set down a general rule, (*e.g.*, a municipal order prohibiting parking) or an individual order (*e.g.*, appointment).
- *Circulars.* These are instructions sent by the prime minister to his ministers or by superior administrative authorities (ministers, chancellors, prefects, etc.) to their subordinates. Circulars may include clarifications on the interpretation of a law or a decree, as well as instructions on what to do to implement it. Over 10 000 circulars are drafted by the different ministries each year. The public can file for judicial review of a circular especially if it contains compulsory provisions [SB34]. Judicial review of the legality of circulars centres mainly on the correct interpretation of the decree in force.
- Used mainly in the fiscal field, *advance rulings* allow the administration to take a stance on a (fiscal) situation ahead of time (prior consultation by a member of the public). Advance rulings can be a means of simplifying things and increasing legal certainty for citizens. They can be upheld before the courts, but their scope of application is limited inasmuch as a given advance ruling can only apply (and be upheld) to situations that are strictly identical.
- Some *authorities* have regulatory power, which consists in organising a sector of activity by establishing rules. This regulatory power, which is vested in the prime minister or the

President of the Republic in principle, is exceptionally granted to arm's length agencies. It is by no means an autonomous regulatory power: it applies only to limited measures and remains subordinate to laws and decrees. In some independent administrative authorities, this practice extends to issuing sometimes detailed general regulations (see, for instance, the general regulations of the Financial Market Authority) and powers of "recommendation". Even though these frameworks are not legally binding, they are applicable *de facto* to the vast majority of operators. These non-binding regulations (soft law) tend to be especially important for independent administrative authorities which act as arbitrators in a competitive system, as the preferred consensus-based mode of regulation.

- Decisions of *competent professional bodies* regarding self-regulation and devolution of a derived regulatory power.

### *Soft laws*

In theory, France's institutional framework leaves very little room for the "soft law" system. In practice, complex laws and laconic wording make interpretive texts necessary. These interpretations can sometimes exceed their strictly non-mandatory role and take on a regulatory character, although judicial review by the *Council of State* keeps this process in check. In actual fact, this "soft law" system has a major impact, even though no restrictive drafting rules necessarily apply and the economic impact may not necessarily have been properly assessed. Together, these circulars and instructions could form a sort of "underground legislation" (Warsmann, 2009).

### *Trends in regulatory output*

Regulatory inflation, as evidenced by the increasing volume and complexity of substantive law, is regularly condemned in France as giving rise to legal uncertainty, to indirect costs for the economy and society and to doubts about the credibility of public policy. The issue is very much to the fore in a number of reports published on regulatory quality over the past few years, including the 2002 *Mandelkern* report, the 2006 report by the *Council of State*<sup>5</sup> and indeed the 2000 *Warsmann* report. It was highlighted in the 2004 OECD report (Box 4.11) and was raised by practically all of those interviewed (government departments and stakeholders) by the OECD team in 2009. While several EU countries are reporting a steady increase in the number of regulations produced each year, what makes France different is the attention it gives to the problem.

#### **Box 4.5 2004 OECD report: Regulatory inflation in France**

The costs of regulatory inflation gradually became obvious: growing economic and social intervention by the state generated massive reliance on regulation. In thirty years, the average number of laws rose each year by 35%. This data underestimates the true facts because laws are only one part of the regulatory system alongside decrees, orders and circulars of all sorts. For instance, there were 82 000 decrees in force in 1991, and annual output at the time was 670 decrees per year. Production has greatly increased over the last few years with more than 11 000 additional decrees issued between 1995 and 2002. Moreover, the average length of such texts increased from 93 lines for a law in 1950 to 220 lines in the 1990s. The official gazette was 2.4 times as large in 1990 as in 1976. These data are for flows, since there is no statistical instrument for systematically measuring the existing regulatory stock. However, some analysts estimate the stock at 8 000 laws and 400 000 various regulatory documents including decrees, orders and circulars.

As in other OECD Member countries, one reason for the increasing complexity of the law is the increasing number of sources, particularly international and community law and new areas of intervention. Another is what the *Council of State* termed “regulatory excesses” or the *Warsmann* report, the “French malady” *i.e.* using norms as a means of communication and response to crises, professional lobbying, and public opinion in favour of new laws and the symbolic force of the law which still permeates French legal culture (*Conseil d’État*, 2006). Those interviewed by the OECD, referred to France as a “country of regulation”.

Efforts to gauge regulatory output reflect this concern. The SGG keeps a count of the legislative and regulatory texts available on the *Légifrance* website. According to its count, the volume of laws and decrees measured in number of pages of the official gazette increased by 30% from 1970 to 1990 and by a further 30% since 1990. The number of new laws and ordinances rose from 410 over the period 1994 to 2000 to 535 over the period 2001 to 2007, while the number of new decrees rose from around 8 500 to close on 10 700. As of 1 July 2008, the number of legislative texts stood at 2 619 (of which 20% were ordinances) and the number of regulatory texts stood at 22 883 decrees (as of 1 July 2007).

**Table 4.1. New texts produced, 2001 to 2007**

	2001	2002	2003	2004	2005	2006	2007	Total period
Laws	40	34	56	40	50	45	40	305
Ordinances	19	12	18	53	85	28	15	230
Total legislative texts	59	46	74	93	135	73	55	535
Council of Ministers decrees	44	77	42	54	67	65	70	419
<i>Council of State</i> decrees	496	638	504	562	707	765	792	4 464
Decrees	790	890	758	864	919	955	1 029	6 205
Total decrees	1 286	1 528	1 262	1 426	1 626	1 720	1 821	10 669

*Notes:*

- Laws authorising the ratification of international treaties or agreements are not counted.
- Joint *Council of State* and Council of Ministers Decrees are included under the heading “Council of Ministers Decrees”.

Source: [www.Légifrance.gouv.fr](http://www.Légifrance.gouv.fr)

### ***The development of legislation***

#### ***The process of drafting new legislation***

When drafting legislation or regulations, the government must comply with a certain number of legal mechanisms, the content of which may not be avoided but which may vary depending on the category of the legislation. The various stages in drafting legislation (Annex B) depend above all on the type of text involved (government-initiated bill, parliament-initiated bill, order, decree). Specific provisions are in place for the transposition of European directives (see Chapter 7). There is no such detailed preparation circuit for orders and circulars as for laws and decrees and they may be signed by one or more ministers (or by the director of a central administration under the aegis of the minister) before being published in the official gazette.

### Box 4.6. The stages in the legislative process

#### 1. The initiative

The initiative for a law lies both with government and members of parliament (members of the lower and upper houses). Both the government and members of parliament may introduce bills.

The *Council of State* must be consulted on any draft legislation prior to its being put before any Council of Ministers meeting. The procedure for drafting a bill includes other consultative obligations which must be accompanied upstream by the examination of the draft legislation by the *Council of State*.

Inter-ministerial consultation generally gives rise to one or more *ad hoc* meetings chaired by the prime minister or by a member of his cabinet in order to clarify the terms of the decision and to try to obtain a solution based on consensus. There are more than 1 000 inter-ministerial meetings per year, the purpose of which is to finalise a draft law or decree. Framework legislation relating to overseas affairs calls for consultation of the territorial assemblies for draft legislation relating to them (or which include at least specific adaptation provisions). Similarly, draft laws or decrees containing provisions specific to Corsica must be submitted to the Corsican Assembly for preliminary consideration.

Consultation of external stakeholders occurs via consultative bodies within central administrations and which include representatives of the various parties involved. This consultation may have a mandatory or optional character (see Chapter 3).

European Community regulations contain obligations to notify the European Commission in advance in certain areas (government aid, technical regulations, broadcasting regulations, new essential requirements for exercising a service activity).

#### 2. Submission of legislation

Government- and parliament-initiated draft legislation must be examined by both houses of parliament which exercises the legislative power (adoption of law and checks on executive power). In France, the parliament is composed of two chambers: the National Assembly and the Senate. A bill may be submitted indifferently (with certain exceptions) either to the Bureau of the National Assembly or that of the Senate. A parliament-initiated bill must, however, be submitted to the Bureau of the assembly in which the member of parliament who introduced the bill sits.

#### 3. Examination by the first assembly

Draft legislation is first examined by the parliamentary commission competent in the areas concerned by the bill. The commission nominates a *rapporteur* who studies the text and writes a report. The *rapporteur* may, just like the other members of the commission, propose amendments to the text of the future legislation. The report is then adopted by the commission.

#### 4. The vote by the first assembly

The draft law, once introduced on to the agenda, may be examined by the first assembly before which it was brought (National Assembly or Senate). Depending on the case, deputies or senators vote first on each article and amendment, before voting on the whole text. Once adopted, the draft legislation is sent to the second assembly (Senate or National Assembly).

#### 5. The shuttle

The second assembly examines the bill according to the same rules. Amendments may also be voted upon. The draft legislation must then go back to the first assembly to be re-examined. This is known as the shuttle. During this phase only modified articles are studied.

## 6. Adoption

The draft or bill is adopted under the same terms by the two assemblies. In the event of disagreement, the Government may convene a mixed parity commission. It is composed of 7 deputies and 7 senators who must propose a joint bill voted subsequently by each assembly. Should this fail, the bill is re-examined in both assemblies and the Government may ask the National Assembly to have the final say.

## 7. Promulgation

The bill is then promulgated by the President of the Republic within 15 days. During this time the President may request a re-examination of the bill and the *Constitutional Council* may be called upon to check that it is not contrary to the Constitution. The promulgated bill enters into force after being published in the Official Journal of the French Republic in which the laws and regulations and application decrees are published.

The procedure for drafting bills and decrees (initiated by the executive) is characterised by the following factors:

- The initiative for and drafting of legislation are decentralised within each government department, which chooses its own internal organisation. Draft bills are drawn up by the department administrators (and not by specialised legal teams) who are also responsible for carrying out any impact assessments necessary.
- Preparation of draft bills and decrees includes various formal obligations relating to inter-ministerial consultations and consultative committees (Box 3.2). Draft parliamentary-initiated legislation is not subject to the same obligations.
- The *Council of State* must examine all draft laws and orders (once the inter-ministerial consultation and consultative committee stages have been completed) before they are submitted to the Council of Ministers, as well as the most important draft decrees, known in law as “*Council of State* decrees” (Box 4.7).
- The prime minister supervises legislative production emanating from the various government departments and arbitrates in the event of disagreement between ministers. It is to him, constitutionally, that the initiative for new law falls, concurrently with members of parliament (Article 39 of the Constitution) and it is his duty to ensure that the laws are executed (Article 21 of the Constitution).<sup>6</sup> Draft bills or decrees must have the formal approval of the prime minister before being submitted to the *Council of State* and to the Council of Ministers.
- The General Secretariat of the Government (in close co-operation with the prime minister’s cabinet) plays a co-ordinating and monitoring role in drafting new legislation. It is informed at an early stage of the draft legislation. It formally intervenes when the draft law or decree is introduced into the government’s working programme. It determines, with the minister carrying the bill, the impact assessment and intervenes in settling any inter-ministerial disputes. It is present at all the main stages of the process, such as requesting the *Council of State’s* opinion, entering in the Council of Ministers’ meeting agenda and when the bill is presented in Parliament (Box 4.7).

In application of Article 61 of the Constitution, laws definitively adopted by parliament may be challenged, within a certain time frame preceding their promulgation, in the *Constitutional Council*, which has one month to give its verdict (eight days if the government activates the emergency procedure). This right applies to the President of the Republic, the prime minister, the National Assembly speaker, the Senate speaker or to 60 members of the lower or upper house. A provision which is declared unconstitutional on the basis of Article 61 may be neither promulgated nor applied. Regulatory decrees issued by the government may be contested in the *Council of State* within two months of their publication.

#### **Box 4.7. The role of the General Secretariat of the Government and of the *Council of State* in the process of drafting legislation**

The General Secretariat of the Government plays an important role as “checkpoint guard” in monitoring the preparation of legislation and regulations. In addition to its role far upstream in the scheduling of government work, it intervenes at decisive stages in the drafting of legislation. In certain cases the legislation and law quality department (within the Government Secretariat General) may contribute to the first stages of drafting legislation by providing expertise, for example on a legal problem or on the impact assessment. In any event, the department intervenes in the final stages of preparation of the text, before the text is passed on to the *Council of State*. It provides its expertise to the prime minister’s cabinet in arbitration at the stage of inter-ministerial validation of legislative or regulatory draft bills. It also intervenes before regulations (decrees and orders) are presented for signature by the prime minister or by the President of the Republic prior to publication in the Official Journal. This check relates both to the legality of the draft law and to the editorial quality of the legislation. It prepares the six-monthly schedule for the government’s work, on the basis of ministerial proposals, and the scheduling of the enabling texts. It ensures the validity and quality of the draft legislation presented at Council of Ministers meetings and thus carries out an upstream check on the check done by the *Council of State*.

The *Council of State* issues a recommendation on the validity of the legislation. More specifically, when it examines draft legislation, it gives its opinion on:

- the presentation, ensuring that draft legislation is well-written;
- the validity, checking that competence rules are complied with and, in respect of content, compliance with hierarchically superior legislation; and
- the expediency, drawing up an assessment of the advantages and disadvantages of the legislation. This does not mean political expediency.

The government is not obliged to follow the advice of the *Council of State* but it may only enact the bill adopted by the *Council of State* or the draft in its initial state. However, if it decides not to pay any attention to an irregularity pointed out by the *Council of State* it runs a greater risk of litigation.<sup>8</sup> Even if the *Council of State* recommendation in its consultative form does not include its contentious parts, it is very rare for the core analysis to be different. The government has the option of consulting it for a recommendation on any other regulatory legislation. The *Council of State*’s recommendation is secret but the government may make it public and the annual report of the Council may refer to mention certain *ex post* recommendations.

### *Scheduling new legislation*

#### The government's programme of work

The government's programme of work (PGT), which details the main orientations of the government, field by field, is set out every six months. This enables a political will to be expressed and priorities adapted by checking that government policies are consistent. It includes the list of draft legislation that the government intends to submit to a vote in parliament, the list of draft ordinances and decrees for which introduction into the agenda of the Council of Ministers' meeting will be proposed, and the list of matters that are to be the subject of a communication in the Council of Ministers (oral presentation by ministers of their action within a field under their charge). The programme of work is therefore an instrument for organising legislative and regulatory activity, allowing the forward planning and timely scheduling of the business of the *Council of State*, the Council of Ministers and the parliamentary agenda for the government's part. Since the programme of work is simply indicative, if necessary it can be modified to take account of new requirements arising from current events (economic recovery plan following the financial crisis, for example).

The themes included in the work programme are subject to proposals made by each member of the government. These proposals are collected by the SGG, which puts them into a uniform format. They are all then submitted to arbitration by the prime minister. The government's programme of work is not made public, without necessarily being classed as being in any way confidential. Special provisions apply to the programming of the transposition of Community legislation (see Chapter 7).

#### The programming of enabling decrees

The prime minister oversees the drafting of new legislation emanating from the various ministries. In the case of disagreement, it is the prime minister who arbitrates. In matters other than those relating to the law, but also in order to take the implementing measures required, he has regulatory power under the ordinary law, subject to the President of the Republic's own powers. Ministers themselves only possess a subsidiary regulatory power, in order to determine, by means of an order, the terms of technical implementation, when a text of higher value so provides, and to determine organisational rules for the departments placed under their authority.

The full effect of legislative reforms depends upon rapid publication of the necessary implementing measures (decrees and orders). Delays, or the absence of publication of decrees regarding the implementation of laws have succeeded in rendering legislation totally or partially inapplicable in certain cases, such as those noted in the 2004 OECD report. A circular from the prime minister issued on 29 February 2008 defines an obligation of result for each member of the government in order to ratify the implementing legislation within a maximum period of six months from promulgation of the legislation. It establishes a follow-up system comprising three principal elements.

- Each minister must designate within his central administration a structure charged with co-ordinating the work of implementing laws and reporting to the prime minister's private office and to the SGG.<sup>9</sup>
- An inter-ministerial scheduling meeting is organised following promulgation of every law. A provisional schedule of the necessary enabling decrees is drawn up,

communicated to parliament and published on the *Légifrance* website (where they are updated as and when the expected legislation is published).<sup>10</sup>

- A report on the implementation of legislation is made every six months with regard to every government department and published on the Internet.<sup>11</sup> The obligation to take action before implementation measures are published is also included in the impact assessment (see below).

The circular of 29 February 2008 is based on or around several systems for the oversight of the application of laws by parliament:

- Under National Assembly rules,<sup>12</sup> the *rapporteur* of a law or, by default, another deputy designated by the competent commission, presents a report to the latter on implementation of the law six months after its entry into force. If the necessary regulatory draft legislation has not been adopted, the commission hears its *rapporteur* after a further six-month period.
- In the Senate, a report on the implementation of legislation summarising the observations of the standing committees has been presented every year since 2005 to the Conference of Speakers and is published.<sup>13</sup>
- Article 67 of the Legal Simplification Act N° 2004-1343 of 9 December 2004 provides henceforth for the presentation by the government of a report on the implementation of every item of legislation after a six-month period following its entry into force.

The rate of implementation of legislation (*i.e.* enacting of implementing regulations) has increased in recent times. Efforts have specifically concerned the implementation of newly-adopted laws. The six-monthly assessment at the end of 2009 demonstrated that the enforcement rate of laws promulgated between the start of the legislative period (1 July 2007) and mid-2009 was 84%, compared with 60% at 30 June 2008.<sup>14</sup> This rate takes account of the total number of provisions requiring an implementing text (which varies widely from one law to another).<sup>15</sup> The Senate's annual reports on the implementation of legislation indicate that the proportion of laws voted since 2001 awaiting regulatory follow-up has remained around 16% since 2004.<sup>16</sup>

### *Verifying legal quality*

The *Constitutional Council*, in its case law, has stressed the problem of the quality of legislation and regulations. In a 1999 decision, the *Constitutional Council* recognised the accessibility and intelligibility of the law as an objective of constitutional value,<sup>17</sup> which it reiterated in several rulings (see also Chapter 3). The principle is to be found applied in a law from 2000 relating to citizens' relations with government which states: "Administrative authorities are required to organise simple access to the rules of law that they enact. The making available and distribution of texts of law constitute a public service mission, the correct achievement of which is the responsibility of the administrative authorities". In a decision dating from 2003,<sup>18</sup> it was specifically considered that: "equality before the law [...] and the guarantee of rights [...] would not be effective if citizens did not have sufficient knowledge of the rules applicable to them if these rules presented unnecessary complexity.

In addition to accessibility to legislation, the accessibility of the law in France also requires a major effort to be made to present the law in force in a coherent and intelligible way, which is the aim of the codification programme (see Chapter 5) and the promotion of good legislation rules. It is backed up by widespread use of information and communication technologies. France, moreover, sought to promote access to the law by information technologies as an element in its own right of the European Union's "Legislating better" programme during its presidency of the European Union in the second half of 2008. For a decade or so, greater attention has been paid to the implementation of a precise methodology for producing legislation/regulations. It reflects a traditionally important consideration given to the drafting of legislation and a concern (expressed by several of the people who spoke to the OECD mission) to raise the level of quality of drafting of legislation and to harmonise drafting rules in a context in which legislative output is spread far and wide across the various government departments.<sup>19</sup>

The rules for drawing up new legislation, which were until now regularly cited in circulars from the prime minister, have been collected in the *Guide for drafting legislation (Guide pour l'élaboration des textes législatifs and réglementaires)*, often referred to as the "guide de légistique" (Box 4.8). This guide is considered by its originators (*Council of State* and SGG) as a key element in improving quality. It is used as an aid to organised training, notably at the initiative of several government departments and often with the help of members of the *Council of State*, for their own writers. Its wide distribution has, according to several people who spoke to the OECD mission, significantly contributed to a better understanding of quality requirements when drafting legislation by the various draftsmen throughout the administration. It is difficult to appreciate its reach precisely in the work of drafters of legislation. It is possible, however, to note that the guide, which is conventional in form, as well as hefty (550 pages), focuses on drafting legislation and does not include the entire process of preparing legislation.

#### Box 4.8. The good legislation guide

Drafted jointly by the *Council of State* and the General Secretariat of the Government, the good legislation guide was first published in 2004, then reprinted in a supplemented version in February 2008. It is available on the *Légifrance* site ([www.Légifrance.gouv.fr](http://www.Légifrance.gouv.fr)).

The work is presented in the form of topic-based datasheets which detail the rules for drawing up legislation (laws and orders) and regulations via theoretical considerations and practical application cases. The guide contains around one hundred datasheets compiled into the following sections:

- Preparation of legislation: this introductory section, which includes several reminders about the hierarchy of legislation and the various categories of legislation, aims above all to incite authors of draft legislation to question, first and foremost, the usefulness and efficacy of their draft legislation.
- Stages in the drafting of legislation: this section deals with questions of procedure by reproducing a large portion of the instructions of the prime minister.
- Preparing draft legislation: good practice or rules as solutions to problems posed when drafting have been listed and organised around ten or so topics.
- Rules specific to international and European Community legislation and to individual measures: it appeared necessary to develop specifically questions related to the preparation, monitoring and introduction into domestic law of international and EC legislation and to present the procedural specificities of individual decisions, combined with a reminder of the

rules of competence in the area.

Flowcharts and practical examples: several charts are proposed in order to summarise responses to the main questions (relating to content, form and procedure) that government must ask itself when drawing up a text. For text categories – or sections of texts – which occur very frequently, datasheets present a *vade-mecum*: legal considerations, questions to be resolved and, insofar as possible, drafting models.

The deployment of an application since mid-2007 has enabled the legislation preparation chain to be made entirely virtual, from initiating government departments, via the *Council of State* where necessary, via the Government Secretariat General, up to the management of the Official Journals for publication.<sup>20</sup> It organises real-time transparent communications between the various stages of the process, enabling it to be speeded up and ensuring a high level of security. In this area it seems that France is above the average of EU countries.<sup>21</sup>

The *Warsmann* report proposed undertaking a comprehensive examination of the drafting of regulations in order to further reinforce legal quality. Several possible ways forward could be taken from this work: reinforcing the ability to draft legislation (better training, constituting teams of legal experts within ministries, as is the case in the British system, for example) and developing on-line tools to help those responsible for drafting. The report states that if legal teams are separate, the discussion is not centred solely on the drafting of a text. It is only in a subsequent stage that specialists raise questions which are truly based on law such as where to insert the new provisions and “is it a legislative or regulatory issue?”

### *The role of parliament*

The constitutional revision of 23 July 2008 (Annex D) made significant amendments to parliament’s role in respect of legislation. The difficulties encountered by governments during the Fourth Republic in getting their bills approved inspired a series of provisions aimed at ensuring control over legislative work by the government. The reform of July 2008 alleviated these constraints, notably with the institution of a sharing of the meeting agenda between the government and parliament (the agenda until then was under government control). The reach of parliamentary initiatives remains severely restricted by Article 40 of the constitution which prevents draft legislation which would reduce public resources or increase expenditure. The potentially greater portion left to parliamentary initiative following the constitutional revision raises the question of whether the procedures ensuring the quality of legislation proposed by members of parliament, including in the area of impact studies, needed to be strengthened. The risk often mentioned is that of offering a “shortened” procedure by dealing with government initiatives under the parliamentary initiative procedure.

### *Ex ante impact studies*<sup>22</sup>

#### *The policy in relation to impact studies*

#### The practice of impact studies until 2008

The introduction of impact studies in France dates back to the second half of the 1990s (to the 1970s for environmental impact studies). Until 2008, this was done via circulars from the prime minister to members of the government.

- A circular dated 26 July 1995 provided for impact studies for draft legislation and the main draft decrees to be carried out from 1 January 1996 onwards.
- Following an trial phase and its evaluation, a new circular from the prime minister dated 26 January 1998 made the performance of impact studies mandatory. The field of analysis chosen was quite broad at the outset: legal, administrative impact, impact on employment and on “general interest other than employment”, financial and budgetary effects.
- Two circulars from the prime minister, dated 26 August 2003 and 30 September, introduced greater flexibility into the system by recommending a more selective obligation in order to focus efforts on a quality-led approach capable of truly influencing the orientations of projects. They provided for the organisation of inter-ministerial scheduling meetings aimed at verifying the expediency<sup>23</sup> of the draft laws and decrees, studying alternatives to legislation and deciding on the need to carry out an impact assessment and the conditions under which it would be carried out.
- From 2006 onwards, the selection of draft bills calling for a detailed impact assessment was made at six-monthly government work scheduling meetings. In 2008, the government initiated impact studies for around one third of draft legislation, excluding laws authorising ratification of an international agreement or laws validating orders.

Successive reports devoted to the practice of impact studies unanimously highlighted the difficulty of ensuring that government departments exercised the necessary discipline. In 2002, the *Mandelkern* report stressed that the “exercise remains formal and tardy, the content is of unequal density and quality” (Mandelkern, 2002). The OECD 2004 report and the *Lasserre* report to the prime minister came to similar conclusions. In 2006 in its annual report, the *Council of State* acknowledged some progress in the organisation of ministerial departments but concluded: “The vast majority of *Council of State* draft legislation continues to be prefaced by a simple summary of the reasoning, which in effect is a justification, with varying degrees of argumentation, of the draft legislation by the department which drew it up. A step backwards has even been observed in this respect: after having remained purely formal, impact studies have been implicitly abandoned” (*Council of State*, 2006).

The discussions on impact studies demonstrated the need for a more constraining obligation. Ministerial departments have complied unequally with the instructions of successive circulars. As in many OECD countries, the difficulties of implementing impact studies stem from the accelerating pace at which draft legislation is prepared and, above all, from the lack of adaptation of the administrative culture and organisation. Another factor of difficulty has arisen from the absence of any real legal or political sanction in the event of non-application of the circulars on impact studies. The *Council of State* considered in its public report for 2006 “that it was now necessary to question the expediency of turning to a legal instrument higher up in the hierarchy of norms and designed to set out some procedural obligations, in particular to make the submission of a draft bill to both houses contingent on being accompanied by a prior evaluation of the impact of the reform”. It consequently proposed including such an obligation in a Framework Act, which implied that the Constitution itself referred to this beforehand.

### Fundamental review: Framework Act 15 April 2009

Following deliberations initiated in 2006, the constitutional revision of summer 2008 led to the instigation of the obligation for the government to accompany the submission of draft legislation to an impact assessment from 1 September 2009 onwards. Following the adoption by the two houses (upper and lower) of the Constitutional Act of 23 July 2008, Article 39 of the Constitution provided for a Framework Act to determine the conditions under which draft legislation is submitted to the National Assembly and the Senate and provided for the possibility of delaying the introduction of a bill into parliament's agenda, or consulting the *Constitutional Council*, should knowledge of these conditions be poor.

The Framework Act of 15 April 2009 defined these conditions, stipulating that “Draft legislation shall be the subject of an impact assessment” and defining precisely the basic content of the impact assessment (Box 4.15). The obligation does not limit itself to the existence of an impact assessment but covers all conditions determining the quality of this study. The impact assessment must cover the economic, financial, employment relations and environmental consequences and must include a “cost-benefit analysis expected from the envisaged provisions”. The impact assessment must also “accurately” explain how the draft legislation fits in with EC law and national law, the status of application of the law in the areas concerned by the project and the conditions under which the legislation is applied. Lastly, the Framework Act opens up the possibility for internal regulations within the assemblies to provide for the conditions under which government amendments must be subject to an impact assessment.

### Scope of application of the new mechanism

The Framework Act does not extend the obligation to carry out an impact assessment to all legislative output. In addition to parliament-initiated draft legislation, draft constitutional legislation, finance scheduling legislation and draft legislation bills extending states of emergency are totally exonerated. Bills to obtain authorisation for ratifying or approving international treaties or agreements, in application of Article 53 of the Constitution, enter the field of prior evaluation as provided for by the draft Framework Act in a form adapted to their specific character. Draft law provisions under which the government asks parliament for authority to take certain measures within the area of legislation by way of orders and also draft bills aimed at obtaining parliamentary ratification of orders approved by the President of the Republic are subject to the obligation to produce the key elements for prior evaluation, as provided for by the Framework Act.

Nor does the obligation apply to draft decrees, even if the government considers that carrying out an additional study is good practice in drawing up implementing legislation. The *Warsmann* report (January, 2009) had recommended including the main implementation decrees for laws and to provide for a gradual extension of scope to all new legislation (Warsmann, 2009). The decision was made to limit this to government draft bills to avoid the trap of falling back into the formalism that had been widespread until then. Moreover, the government considers that the prior evaluation of implementation legislation may be carried out upstream when drawing up a draft law by envisaging, in advance, the conditions of application which will later be specified.

## Local authorities

Although there is no binding obligation for an impact assessment to be carried out for draft government legislation concerning local authorities, a specific consultative body has been set up to assess the financial impact on local authorities of draft regulations that concern them. The Consultative Commission for evaluating legislation (CCEN), officially inaugurated in September 2008, is composed of two-thirds local elected members and one-third representatives of government departments. It is mandatorily called upon to act by ministers on the financial impact of regulatory draft texts (decrees and orders) concerning local authorities and by the General Secretary for European Affairs on the financial impact of EC draft legislation which impacts local authorities either technically or financially. The government must communicate the draft to it with a presentation report and a financial impact datasheet which must enable the direct and indirect financial effects of the measures proposed to be assessed for the various local authority levels (see Chapter 8 for more details).

### Box 4.9. Legislation relating to impact assessment obligations

#### Excerpt from the Constitution

Art. 39. – [...]

Entry into force under the conditions laid down in law and Framework Acts necessary for their application (Article 46-I of the Constitutional Act N° 2008-724 of 23 July 2008).

The presentation of the draft laws brought before the National Assembly or the Senate shall comply with the conditions laid down by a Framework Act.

Draft laws may not be placed on the agenda if the Conference of Speakers of the first assembly observes that the rules set by the Framework Act are not well-understood. In the event of disagreement between the Conference of Speakers and the Government, the speaker of the assembly concerned or the prime minister may call upon the *Constitutional Council* for its opinion, which it gives within eight days.

Under the conditions provided for in law, the speaker of one assembly may submit a draft law brought by one of the members of this assembly, for its recommendation, to the *Council of State*, before its examination by the commission, unless this is opposed by the Council.

#### Excerpt from Framework Act N° 2009-403 of 15 April 2009 relative to the implementation of Articles 34-1, 39 and 44 of the Constitution

Article 8

Bills are subject to an impact assessment. Documents detailing this impact assessment are appended to the draft legislation as soon as it is communicated to the *Council of State*. They are submitted to the bureau of the first assembly called upon to give its opinion at the same time as the bill to which they relate. These documents lay down the objectives pursued by the bill, list the possible options, excluding the intervention of new legal regulations, and present the justification for recourse to new legislation. They specifically detail:

- the way the bill dovetails with European legislation in force or being prepared, and its impact on the domestic legal system;
- the status of application of the law at national level in the area(s) covered by the bill;
- the conditions of application over time of the envisaged provisions, the legislative and regulatory texts to be abrogated and the transient measures proposed;

- the conditions of application of the envisaged provisions in the local authorities governed by Articles 73 and 74 of the Constitution, in New Caledonia and in the French South Seas and Antarctic Territories, justifying, where applicable, the adaptations proposed and the absence of application of the provisions to some of these authorities;
- the evaluation of the economic, financial, employment and environmental impact and the financial costs and benefits expected from the provisions envisaged for each category of public administration and natural and legal persons concerned, indicating the calculation method used;
- the evaluation of the consequences of the provisions on public-sector employment;
- the consultations carried out prior to the *Council of State* being called upon; and
- the provisional list of implementation legislation necessary.

#### Article 9

The Conference of Speakers of the assembly to the bureau of which the draft bill has been submitted, has ten days following submission to determine any non-compliance with the rules set out in the present. If parliament is not in session, this deadline is suspended until the tenth day preceding the start of the following session.

#### Article 15

The regulations of the assemblies may determine the conditions under which amendments by members of parliament, at the request of their author, or amendments by the commission called upon to give a ruling on the content may be subject to a previous evaluation communicated to the assembly before their discussion in session.

### *Institutional framework*

#### Role of principal stakeholders

The impact studies system applicable since 1 September 2009 applies several levels of control to the quality of impact studies and provides for a high level of political, or possibly legal, sanction.

- *The General Secretariat of the government.* Insofar as the impact studies are the responsibility of the entire government, just like the draft bills preceding them, they are submitted for comment to the other ministries concerned, under the aegis of the government's General Secretariat. The legislation and quality of law department within the Secretariat plays a co-ordinating and support role and in practice is significantly involved in this mechanism. It submits to the government departments a certain number of documents and tools for preparing impact assessments (impact assessment *vade-mecum*, map of existing resources for carrying out the impact studies). When work starts on a reform it also sets out, with the government department putting forward the reform, specifications for drawing up the impact assessment and identifies the contributions that could be asked of other government departments. The legislation department is thus also often called upon to give its assessment of the quality of impact studies on an informal basis. A team of 5 people is devoted to impact assessments.
- *The Council of State.* The government must append the impact assessment to preliminary draft bills submitted to the *Council of State* for an advisory opinion (mandatory for all draft bills). In its examination the *Council of State* is, then, called

upon to assess the quality of the impact assessment in respect of the requirements of the Framework Act.

- *Parliament.* When submitting a bill to parliament, the Conference of Speakers of the first assembly called upon may refuse to add it to the agenda on the grounds of non-compliance with the requirements of the Framework Act. When reforming its regulation in May 2009, the National Assembly set up the Committee for Evaluating and Controlling Public Policies, which may be called upon by the Speaker of the National Assembly or by the speaker of a standing committee to give its opinion on an impact study. The committee may also be called upon to carry out the preliminary evaluation of an amendment by a deputy or of an amendment by the commission called upon to express its opinion on the content.
- *The Constitutional Council.* Should there be disagreement between the prime minister and parliament as to the quality of impact studies in respect of the Framework Act, the prime minister and speaker of the assembly consulted may call upon the *Constitutional Council* to resolve the conflict.

The control and sanction mechanism primarily rests on the threat of referral to the *Constitutional Council*. The *Council of State* also plays a major role, based on referral to the *Constitutional Council*. Its opinion is merely indicative, but will be communicated to the *Constitutional Council* should the latter be consulted. All those whom the OECD team spoke to stressed that this mechanism constitutes a credible threat. The active participation of the *Council of State* and the parliament (and in particular the chairman of the Laws Commission) in discussions on impact studies over the past few years corroborates this view. Likewise, the opinion that the government Secretariat General gives may carry even greater weight insofar as it aims to prevent problems raised by the *Council of State*. The success of the mechanism also relies on the capacities and resources of parliament and the *Council of State* to control the quality of the impact studies. The National Assembly committee for the evaluation and oversight of public policies presented an initial evaluation report on the impact studies which confirms the level of requirement of the parliamentarians on the content of the impact studies and underlines the need for the National Assembly to adapt its internal organisation (National Assembly, 2009).

### Support and training

The SGG (legislation and law quality department) and strategic analysis centre (prime minister's department) are charged with providing methodological support to the ministries to carry out impact studies or to set up study teams, as necessary. The SGAE may also provide its support for matters relating to the transposition of EU directives. Provision has been made for additional training.

### *Methodology and procedures*

The reference methodology for carrying out impact studies has been revised over the last few years, in particular in 2006 following recommendations in the *Council of State's* public report. An impact study extranet has been set up. The latest edition of the good legislation guide (October 2007) includes guidelines for carrying out impact studies<sup>22</sup>, and government departments have a reference checklist for conducting impact studies (available on the impact studies extranet). The good legislation guide recommends that

specifications are drafted in conjunction with the other government departments concerned and the SGG so that a precise framework for evaluation can be drawn up.<sup>25</sup> These effects are described in general terms (for example, impact is not specified in terms of administrative costs nor is the effect on competition). It should also be noted that the guide is presented in a “literary” format and that there are no pre-established forms or checklists for the impact study.

The constitutional revision of 23 July 2008 and the Framework Act of 15 April 2009 should lead to significant changes in the methodology and, consequently, revision of the guide. The Framework Act imposes precise conditions, notably for quantifying impacts. It indicates that the evaluation of the economic, financial, employment and environmental consequences and the costs and benefits for each category of public administration and of physical and legal persons concerned must be done “accurately” and that the impact study must indicate the calculation method used.

The SGG has developed a *vade-mecum* (guide) which aims to help ministries make progress in terms of their analysis and to promote a standard format for the presentation of impact studies submitted to parliament. However, it was felt individual ministries should be left room for manoeuvre and to propose a reference tool which could be adapted to their own particularities (Annex C). A review of the methodology was started under the aegis of the SGG. In particular, the *Oscar* tool was developed to measure the cost impact of new regulations on the administrative burden of firms and government departments, based on the Standard Cost Model (SCM). This is a web application made available to ministries on the inter-ministerial intranet (Box 4.10). The SGG considers that systematic quantification is not feasible on a monetary basis, but that the quantification of types of impact is possible in physical or material terms, or even via a detailed description of the effects.

The DGME (French State Modernisation Agency) has drawn up a detailed guide to using the *Oscar* measuring tool, along with training aids. It helps ministries carry out measurement studies and to use *Oscar*. In 2009, when developing the tool, it was used to carry out five impact studies with the economy, budget and foreign affairs ministries. It also was used with the State Secretariat for Tourism in connection with law of the development and modernisation of tourism services and with the Ministry of Foreign and European Affairs in connection with a draft bill on government foreign action.

#### **Box 4.10. Oscar: Simulation tool for the administrative cost of new legislation**

The aim of *Oscar* is to enable the calculation, by simulation, of the administrative burden induced by new regulations on companies and government administrations for the civil service and has currently reached “the operational qualification phase”. The aim is to present it in the form of a web application accessible on line from the inter-ministerial intranet.

The aim of *Oscar* is to enable the calculation, by simulation, of the administrative burden induced by new regulations on companies and government administrations, thus helping determine its economic and financial impact (cost/benefit). The aim of *Oscar* is to obtain an idea of the scale of the administrative impact caused by new legislation.

It is presented in the form of a spreadsheet. It guides the user “step-by-step” through the calculations, providing a structured frame of reference and reference data to complete the study in question. A detailed user’s guide has been drawn up by the DGME along with training aids for users.

The method is based on the modelling of administrative costs of a new provision, divided into three phases:

- *Preparation*: this phase starts when the initiating department has a preliminary draft bill and finishes with the publication of the implementing legislation. In practice, this phase may not be taken into consideration due to its limited weight in the evaluation.
- *Initial deployment*: this phase lists all investments that the administration will have to make to transform the new provision into reality (training, modification of information systems, and distribution of forms).
- *Recurrent application*: this phase enables the administrative costs of implementation of the legislative and regulatory provisions to be calculated year-on-year for government and for companies.

*Oscar* uses reference data collected from DGAFP (*Direction générale de l'administration et de la fonction publique*), the INSEE statistics office and the Budget Directorate on the hourly costs of civil servants and the cost of company employees for each socio-professional category and sector of activity. Furthermore, the database resulting from the work of the MRCA (Measure to reduce the Administrative Burden) provides preliminary information on the default values in *Oscar* for the “initial deployment” phase and the additional learning cost and indicates reference values for the recurrent application phase to the user.

### *Public consultation and publication*

The Framework Act of 15 April 2009 provides that impact studies should accurately detail the consultations held before referral to the *Council of State*. How consultations will be integrated into the process of preparing impact studies has not yet been determined, however. The internal regulations of the National Assembly, following their reform in 2009, state that the impact study must be made available electronically “in order to collect all comments that may be made”.<sup>24</sup> This provision thus offers a possibility of opening up impact studies to public consultation, although this particular consultation takes place late in the regulation process.

Whereas to date, impact studies have remained internal government documents, publishing them became the norm on 1 September 2009. In fact, the prime minister took the decision to put impact studies on line on *Légifrance* when submitting draft bills to the parliament bureau. However, the government impact studies were not intended, as a general rule, to be published before a draft bill had been approved. The government does not exclude publication of the impact study prior to submitting a draft bill to the parliamentary bureau (a practice used for the law generalising active solidarity income), but has not as yet set out any precise policies in this area. It should be noted that, under the Act of 17 July 1978 on access to administrative documents, while the opinions issued by the *Council of State* with regard to draft bills are not documents that can be freely released to the general public, since 1976 numerous opinions have been published in its annual report with the consent of the government.

*Evaluation: Progress achieved*

Over the last few years, the impact study mechanism has been subject to numerous evaluations via *ad hoc* studies commissioned by the government and *Council of State* reports. These reports have made a significant contribution to the reform implemented with the constitutional revision of 23 July 2008 and the Framework Act of 15 April 2009.

The report of the National Assembly Committee of Evaluation of Public Policy, presented in November 2009, assessed the application of impact studies since April 2009. During the transitional period (April to September 2009), some twenty or so impact studies were submitted to the Parliamentary Assemblies. The Committee noted that greater weight was given to legal considerations than to studying the alternative options and the quantification of impacts. It stressed, however, that the quality of studies had improved over time. The committee analysed three impact studies carried out since 1 September 2009 and proposed a certain number of recommendations aimed at improving their presentation, content and procedures. It specifically demonstrated a level of requirement in respect of the evaluation of consequences and their quantification.

A major reflection on how to secure a closer alignment between initiatives aimed at controlling legislative throughput and stock was recently initiated.<sup>25</sup> The aim is not to think in terms of simple measures (one law repealed for every law adopted), but to reflect on implementing a series of mechanisms based on common objectives, *i.e.* managing regulatory output, improving the quality of the law and evaluating the effects on the economy.

***Ex post evaluation of regulations***

Several organisations monitor the correct implementation of regulation and supply information for evaluating regulations once they have been implemented:

- *The general inspectorates in the ministries monitor their respective administrations, and have a status which guarantees the objectivity and technical quality of their work.*<sup>26</sup> Their reports call upon the administration to react and are addressed to the minister. They can formulate proposals for reform. These reports are generally not published unless authorised by the minister.
- *The Council of State, the Cour des Comptes, and the Cour de Cassation publish an annual report which plays an important role in evaluating and advising on the application of regulations.*
- *The National Assembly Law Commission publishes a yearly report on the implementation of approved laws and an overall assessment for each legislature. It examines the ability of the government to implement the law using enabling decrees (on the monitoring of the publication of the enabling decrees).*

***Alternatives to legislation****Taking account of alternatives when drafting legislation*

The impact study undertaking during the drafting of legislation provides for analysis of several options, including the option of not legislating or regulating in response to the problem posed. For any draft bill, the Framework Act of 15 April 2009 requires the government to integrate possible alternatives to legislation into the impact study and to

describe the justification for recourse to new legislation. The good legislation guide proposes a list of alternatives to be considered.<sup>27</sup> It should be noted that the reflection on impact studies which preceded the 2009 reform, dealt with the question of alternatives to legislation in a relatively marginal way. The *Warsmann* report, for example, does not mention it in any detailed fashion in its proposal for a strategy towards better quality legislation.

### Principal forms of alternatives to legislation

#### Self-regulation

The legal powers granted to private citizens to issue regulations or an impersonal and general nature is relatively limited in French law. Although self-regulation is practised in certain professions, the idea that firms can be trusted to propose rules and accept self-discipline and that the market can be trusted to sanction practices contrary to these rules is not very widespread in France. Where the area is of a technical nature and requires the association of professionals for legislation to appear legitimate, the law may entrust regulatory power to a body within the profession and, in most cases, subject to ministerial approval. Private authorities holding limited regulatory power may exercise it only insofar as the law allows them to do so and subject to control by the administrative courts. With regard to these authorities, minister and their departments exercise various types and degree of prerogatives depending upon the bodies involved: power to appoint leaders, presence of a government representative in the management structures, power to approve regulations.

The two principal examples of the delegation of regulatory powers are professional bodies and sporting federations.

- Eleven professions have professional bodies,<sup>28</sup> which enjoy various prerogatives of public power with a regulatory power granted to them by law. The responsibilities of these bodies are limited (organisation and internal functioning of bodies, drafting of essential clauses for model contracts for the profession). Ethical codes are prepared by the body but are implemented under a decree issued by the *Council of State*. The administrative judge has fairly wide-ranging competence with regard to professional bodies. Any unilateral administrative decisions taken by such bodies in the performance of their public service mission may be referred to the judge, whether such acts are of a regulatory or individual nature. The *Council of State* can also overturn jurisdictional decisions taken by bodies in the exercise of their disciplinary powers. The decisions taken by professional bodies can also give rise to actions for liability referred to the administrative judge.
- Sports federations, which are private-law associations, as part of the public service mission entrusted to them, take decisions of which some may be of a general, and therefore regulatory, nature and which apply to all associations or committees under their responsibility.

#### Regulations negotiated as part of a contract

The use of contractual means is increasingly frequent, as noted by the *Council of State* in its public report for 2008 (*Council of State*, 2008). This is a variation on, rather than an alternative to, regulations in to the extent that the contract does not replace the regulation: extension or approval orders are always needed to make agreements reached

with professional bodies applicable to all (*erga omnes*). Traditionally used in the area of labour law (collective agreements), the use of contracts has developed in several areas, notably in relations between government and civil servants (agreement protocols) as well as with state-run companies (programme contracts) and local authorities (conditions for transfer of competences). The movement towards use of contracts also reflects the emergence of a concerted economic right and authorisation or sanction procedures that are quasi-negotiated, notably by independent authorities. The use of contracts has spread to new fields such as social security (agreements on objectives with social security bodies), the fight against social exclusion (return to employment contract) and tax legislation.

The Act of 31 January 2007 regarding the modernisation of social dialogue may increase the role of collective bargaining agreements compared with regulation in respect of employment relations. It provides that any government project involving reforms in the field of employment relations, employment or occupational training must first comprise a phase of discussion with the social partners (employee and employer inter-professional union organisations acknowledged at national level) aimed at providing a basis on which to open negotiations. These negotiations are based on proposals previously established by the government (“guideline documentation”) detailing its diagnosis, its aims and, where appropriate, the negotiating procedures envisaged. The social partners must inform public bodies should they wish to negotiate and what period they deem necessary so to do.

The use of a contract negotiated between the social partners may make the negotiated regulation more acceptable and ensure that it is properly implemented, although there is a risk that this might lead to a loss of general interest and the signing of “insider” agreements. It should be noted, however, that the government and the legislator remain in control of the final decisions as the laws adopted may differ from the agreement between the social partners if the government considers the latter to be insufficient. The agreements signed following the Act of 2007 on the modernisation of social dialogue provide contrasting examples. The rejection of the single draft work contract shows the limits of a reform strategy founded on negotiations between social partners. The new unemployment insurance agreement, which provides notably for a reduction from six to four months in time that a worker must be registered before being entitled to benefit offers an example of an agreement between social partners which improves the situation for “outsiders” (OECD, 2009).

#### Use of alternative economic instruments

Over and above the traditional alternatives to self-regulation and contracts, the environmental domain, as in other OECD countries, has illustrated the possibility of recourse to incentive-based economic instruments as an alternative to traditional prescriptive regulation. A broad range of economic instruments is used for environmental policy, such as the negotiable permit market and planning instruments (state-region contracts). Taxation is used very widely as an alternative instrument to regulation and the draft bills of the *Grenelle* Environment forum make taxation a key instrument in protecting the environment. Voluntary agreements are another interesting alternative for limiting economic losses related to public intervention, and were used by as early as 1975-76 to reduce pollution in classified facilities. Since then, voluntary agreements have been signed by certain companies in the automobile, glass production, aluminium and certain heavy chemicals industries. The agreements, however, require credible sanctions for non-compliance with the undertakings entered into and, until now, their legal value has not been acknowledged by the *Council of State*.<sup>29</sup>

### *Taking account of risk*

France has reorganised the way uncertainty and risk are integrated into regulatory output and, more generally, public policies, but according to a specific approach based on the general principle of “precaution”. According to this approach, taking risk into account implies that the public decision may result in “reversible measures” only, the implementation of which leave room for evaluation and enable the decision-maker to take control back at any time. The precaution principle thus provides transient risk management in relation to public service decisions. This approach is different from that developed by other countries such as the United Kingdom where the emphasis is placed on gaining a better understanding of risk factors in the very earliest stages of policy design, notably through innovative forms of consultation.

Food and environmental risk management (in particular following the food crises in the 1990s) has led to three distinct activities being singled out within the risk management model: evaluation of risk via scientific expertise, risk management *per se* and communication to/information of the public.<sup>30</sup> The food crises demonstrated the opacity often characterising the relationship between experts and public decision-makers in risk management mechanisms. The area of “expertise” has developed in committees, enabling risk evaluation and management to be separated. New structures have been created such as the Food Agency (Agence française de la sécurité sanitaire des aliments) and the Pharmaceuticals Agency (Agence française de la sécurité sanitaire des produits de santé). The government has also implemented preliminary information and consultation tools for the public, aimed at reducing potential risks that may arise out of lack of public understanding or the opacity of the system. This is the case, for example, with consultations relating to waste burial projects (within the framework of the CNDP), the promotion of the figure of the user and, on a more daily basis, the sounding-out of citizens’ expectations with regard to radio frequencies.<sup>31</sup>

## Notes

1. This means that the OMB administration examines around 600 regulations each year, *i.e.* 15 to 17% of the rules published (OECD 2002, From Interventionism to Regulatory Governance).
2. Several of those interviewed described France as a “country of regulations”.
3. From 1 October 2007 to 30 September 2008, 127 government bills and 436 parliamentary bills were brought before the National Assembly or the Senate. Over the same period, 89 government bills and 14 parliamentary bills were passed. *Source: Statistiques de l'activité parlementaire à l'Assemblée nationale* ([www.assemblee-nationale.fr/13/seance/statistiques-13leg.asp](http://www.assemblee-nationale.fr/13/seance/statistiques-13leg.asp); accessed 22 January 2010).
4. Organic laws are intended to clarify the workings of public authorities and are subject to a strict constitutionality check and special voting procedures (OECD 2004).
5. The general considerations of which were entitled “Legal security and complexity of law”.
6. In topics other than those in the area of law, but also to ratify the necessary application measures, the Prime Minister has regulatory power under the ordinary law, subject to the President’s own power. Ministers only have a subsidiary regulatory power to determine the conditions of technical application if higher value legislation so provides and to determine organisational rules for departments placed under their authority.
7. Note that new Article 61-1 of the Constitution, resulting from the constitutional reform of summer 2008, forms the basis of a constitutionality check by way of exception. See chapter 6.
8. The government may also not follow a recommendation given by the Council of State if the latter is founded not on criteria of legality or constitutionality but on a criterion of administrative expediency, but this remains the exception.
9. Circular of 30 September 2003. A leading civil servant in charge of the quality of regulation is appointed in every government department in which there is also a regulation quality charter.
10. [www.legifrance.gouv.fr/html/application\\_des\\_lois/liste\\_lois\\_13eme.html](http://www.legifrance.gouv.fr/html/application_des_lois/liste_lois_13eme.html).
11. [www.legifrance.gouv.fr/html/application\\_des\\_lois/accueil.html](http://www.legifrance.gouv.fr/html/application_des_lois/accueil.html).
12. In application of Article 86 of the National Assembly rules as modified by resolution N° 256 of 12 February 2004.
13. [www.senat.fr/doctrav.rapports\\_annuels.html#rapport](http://www.senat.fr/doctrav.rapports_annuels.html#rapport).
14. *Source:* [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)

15. The enforcement rate is the number of provisions having been applied as a percentage of the number of provisions requiring an implementing decree.
16. Latest data available September 2008.
17. With the decision of the Constitutional Council N° 99 421 on the Codification Act.
18. Decision N° 2003-473 DS of 26 June 2003.
19. The *Warsmann* report noted a drop in quality. The Council of State noted that laws are increasingly detailed. For others, this can be summarised by “overly abundant, illegible legislation”.
20. *SOLON* application (online legislation operations organisation system).
21. *i.e.* is the timing right? Is the approach appropriate/relevant?
22. [www.legifrance.gouv/html/Guide\\_legistique\\_2/112.htm](http://www.legifrance.gouv/html/Guide_legistique_2/112.htm).
23. The guide proposes the following sections: (i) description of reference situation de facto and de jure and of the problems the reform is designed to solve, (ii) formulation of one or more aims, (iii) analysis of possible options, (at least one of which should be an alternative to regulation); (iv) assessment of positive and negative effects in terms of legal and administrative, social and economic, sustainable development, environmental protection, social cohesion and regional balance, and impact on public finances, aspects.
24. Article 83 of the National Assembly regulations. [www.assemblee-nationale.fr/connaissance/reglement.asp](http://www.assemblee-nationale.fr/connaissance/reglement.asp).
25. Appreciation of the existing legislation, the assessment of the possible options aside from new regulation may enable the current situation to be re-examined; what needs modifying and/or simplifying, what needs abrogating and what new regulation needs to be introduced (*Warsmann 2009*).
26. Their checks may be legal or financial, concern the functioning of services, technical aspects or more generally the implementation of ministerial policy.
27. “Recourse to agreement-based solutions, incentives in the form of specific assistance or communication or training measures, reinforcement of the effectiveness of the law in force (enhancing monitoring or inspections, adjusting sanctions), developing mediation, introducing self-regulation possibly supported by public authority recommendations, or sending directives to services in order to establish a uniform approach while reserving the option to diverge from it to take account of the diversity of situations in the field”.
28. Doctors, midwives, dentists, lawyers, surveyors, accountants, architects, pharmacists, vets, physiotherapists and chiropodists.
29. AJDA 1985.
30. General Plan Commission. *La Décision publique...*, *op.cit.* p. 139.
31. [www.afsset.fr](http://www.afsset.fr) page accessed on 17 September 2008.

