

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.

Assessment and recommendations

Trends in the production of new regulations

Germany's federal structure means that the control of regulatory production is especially important. Reflecting the federal nature of the German state, Germany's regulatory production system is complex, as already noted in Chapter 2. Regulations are produced at the federal level, covering areas of federal competence. These laws are usually fleshed out in secondary regulations produced by the *Länder*, as part of their responsibilities for implementing federal legislation (the *Länder* may in turn delegate implementation responsibilities to the counties and municipalities, which may give rise to further subsidiary regulations and instructions). The *Länder* also issue laws and regulations in respect of their exclusive competences (with an equivalent delegation process to counties and municipalities). The trend in the number of federal regulations has been on a consistently downward path since 2005, partly because of a "spring clean" of the regulatory stock (see Chapter 6), but also because of a significant reduction in the number of new federal laws and subordinate regulations. The OECD peer review team did not have access to data on *Länder* regulations, which is important to complete the overall picture. However the recent federal reform which abolished framework legislation is intended to reduce the scope for unnecessary further (and divergent) production at the *Länder* level.

Recommendation 4.1. Ensure that future data on regulatory production trends cover the picture at the *Länder* as well as the federal level (in consultation with the *Länder* over how to do this). Refine the data and its interpretation to ensure that trends and their causes are clear, and help to shed light on what Better Regulation processes need to tackle (for example, consider whether the reduction in number of federal regulations could be due at least in part to longer and more complex laws, and whether this raises any issues).

Administrative procedures for making new regulations

A strong formal process is in place which covers most of the necessary procedures at federal level. Forward planning, administrative procedures, and legal quality are generally well covered, reflecting the importance that Germany traditionally attaches to a sound and formal framework for law making and a concern to sustain legal quality. At a general level, the Administrative Procedures Act sets the framework and some important obligations, including the obligation to provide reasons for decisions in writing, appeal mechanisms, and obligations to consult on and communicate important decisions. These are backed up in more detail as regards the development of new regulations by the *Joint Rules of Procedure* which must be applied by all federal ministries. The latter includes requirements for the *Länder* to be consulted at an early stage. Legal quality is an especially strong feature of the German system, with important recent developments which include the "Electronic Guide to Law Drafting", the eNorm software tool, and a project recently launched to improve linguistic clarity. By the standards of many other European countries the comprehensiveness of this overall framework is impressive.

The eNorm software tool for law making is especially interesting. Based on the European Commission's equivalent tool, and aimed at improving productivity and consistency in law making, it proposes a standard format for drafting laws and incorporates automatic quality checks. It is used not only by most of the federal ministries, but has also been adopted by some of the *Länder* and used by the federal parliament, which is progressively integrating it. Together with the electronic guide to law drafting, it provides a

comprehensive checklist for law drafters, speeding up the drafting and amendment process, and standardising both format and media for use (potentially) throughout the law making process to enactment. In the context of autonomous ministries it sets an important central standard, aids co-ordination, and enhances transparency.

Forward planning procedures have received an internal boost with the establishment of a dedicated unit in the federal chancellery, but there is more to be done. The planning unit set up in 2005 is an important step forward. The unit maintains an electronic database of projects which is shared across federal ministries, boosting co-ordination, and which allows the chancellery to check that the main lines of the coalition agreement are being followed. Federal ministries nonetheless retain significant discretion in setting their calendar, and the highly political nature of the law making process limits the chancellery's influence. The most influential channels for strategic planning remain the meetings and dialogue between the chancellor, the vice-chancellor, and the heads of the coalition parties. There is no annual work programme to flesh out the coalition Agreement, as exists in some other European countries. This has repercussions on the timeliness and length of consultations with external stakeholders. Also, the arrangements are internal to the administration. The general public must fall back on the coalition Agreement for information on the government's draft legal projects.

Recommendation 4.2. Consider further steps to enhance the transparency of forward planning procedures, including the establishment of an annual forward look, and the provision of more and timelier information to external stakeholders.

The initiative to further encourage plain language drafting is also important. The Joint Rules already encourage drafters to use a language that is “correct and understandable to everyone as far as possible” and to submit drafts to the German Language Society at the *Bundestag* to review the correctness and comprehensibility of a bill. In practice this facility is rarely used. Most officials as well as the business and consumer representatives with whom they interact are lawyers by background. The Justice ministry is seeking to embed the principle that legal drafting must involve linguistic experts from the start.

However strong underlying procedures and traditions also act as a brake on the development of new approaches. An underlying structural problem common to many European countries, including Germany, is that longstanding administrative procedures and legal quality control mechanisms tend to be used as the basis for the development of impact assessment processes, even if they are not very well suited to this role. *Ex ante* impact assessment processes tend to be added on, and there is no fundamental re-engineering of underlying requirements to make room for a new approach. Another issue braking progress on Better Regulation in the German context is the difficulty of imposing requirements on autonomous ministries. The centrifugal forces at work in the German system are evident from the way the eNorm and electronic guide to law drafting initiatives were taken forward. They emerged from two different ministries (Justice and Interior, respectively), collaborating with different experts. Neither are binding, with ministries free to decide whether to use them.

Recommendation 4.3. Consider whether the eNorm and electronic guide to law drafting initiatives could be joined up, where this is relevant, and made binding on all federal ministries.

Ex ante impact assessment of new regulations

*Germany's ex ante impact assessment procedures have a long history, as part of the general framework for the development of new regulations. The policy dates back to the mid-1980s and is embedded in the *Joint Rules of Procedure*. The current approach is based on changes introduced as part of the "Modern State-Modern Administration" programme in the late 1990s. It is backed up by a comprehensive handbook issued by the Interior ministry in 2006 (which also oversees the *Joint Rules of Procedure*), and consists of a preliminary assessment (is the regulation necessary; alternatives), a concurrent assessment (carried out as the law is developed) and a retrospective assessment or *ex post* evaluation (to check whether the adopted law has met the anticipated objectives). Key impacts are covered including environmental, economic and social impacts. The process is applied to primary legislation, and only covers some secondary regulations. The most important recent change has been the integration of requirements flowing from the federal government's administrative burden reduction programme for businesses (quantification of the information obligations found in draft legislation), which has added a significant new dimension. The development of a sustainability impact assessment is currently under discussion.*

The inclusion of a quantified assessment of information obligations in new federal legislation is an important development which should open the way to other improvements. Ex ante impact assessment has some way to go still and as Chapter 6 explains in more detail, the administrative burdens assessment has started a change of culture, with a greater appreciation by ministries of the perspective of stakeholders affected by a new law. The OECD peer review team heard that this had been a "shock" to ministries, forcing them to a realisation that regulation has costs and affects real people.

There is some way to go still for impact assessment to inform decision making as it should. Ex ante impact assessment needs further development and anchoring in the decision-making process, not least so that Germany can react appropriately to post financial crisis pressures for regulation. The team did not pick up any clear evidence of its influence. The approach is comprehensive on paper, but practice appears to fall some way short of the conceptual objective, an issue that had already been largely commented on in the 2004 OECD report (Box 4.1 below). Assessments tend to come at a relatively late stage of the law making process. Part of the problem may be a political and cultural reluctance to use it in a context where decision-making is very politicised from an early stage, ministries are used to acting autonomously, and key stakeholders are used to the relatively closed process of building up consensus on an issue, which many feel works well enough. Yet impact assessment is to be seen as a tool for evidence based decision making so that the inevitable trade-offs are soundly based, not a technocratic substitute for the decision itself.

If impact assessment is to have a stronger influence on decision-making and outcomes, four main issues need to be tackled: the institutional framework, methodological support, transparency and scope. The institutional framework for the management of impact assessments is highly fragmented. Each ministry in practice goes its own way. Methodology is well covered by the Interior ministry guidelines but stops short of guidance on quantification and is undermined by the proliferation of guides produced by individual ministries. The process is not transparent. This affects the internal stakeholders (other ministries) but more particularly external stakeholders who are not part of the established

inner circle of informal consultations carried out by ministries. Last but not least, the current system covers primary laws but only some secondary regulations, may need to be extended to cover sustainability (which is under discussion) and has an uncertain reach as regards the parliament and the *Länder*. These issues are considered in more detail below.

Box 4.1. Recommendations from the 2004 OECD report

Address identified shortcomings in the RIA-process.

The current RIA requirements and guidelines provide an important basis for a continued and needed improvement of RIA practices. As a first step, the German government should establish safeguards to ensure a consistent and coherent application of these requirements by assuring that resources and expertise are available for a centre of government unit charged with monitoring, guiding and possibly sanctioning compliance with these standards. In particular, it should be mandatory that draft regulations sent to public consultation are always accompanied by RIAs. Based on the existing RIA concept, the German government should consider sequencing the RIA process into a two or three step model, allowing for early, informed and flexible responses to draft regulations. This would help target the efforts and resources on the impact on only major regulations. RIA guidelines should also be reviewed and consolidated with a view to make the guidelines more operational and aligned to the actual regulatory process, and, preferably, coupled with a clarification of ministries' obligations during a sequenced RIA procedure. Furthermore, the German government should consider enhancing accountability for RIAs by having responsible ministers "sign off" and guarantee the quality of impact assessments presented to Cabinet and Parliament.

Although the 1999 "Modern State – Modern Administration" Programme launched the preparation of RIA manuals, there is currently insufficient political commitment to RIA in the day-to-day regulatory process. Commitments to regulatory quality are of a general nature, primarily emphasising *ex post* initiatives in the form of reviews.

With the important exception of administrative costs, the institutional framework for supporting impact assessment is fragmented. As in most other European countries, each ministry is responsible for carrying impact assessments on its own proposals (a good thing as it forces ministries to take charge of their own work). However, unlike some other European countries, there is no co-ordinating or monitoring unit to oversee the process and to encourage ministries into taking the process seriously and to do it well. It is the responsibility of the proponent ministry, from start to finish, to consult other ministries and to assemble the required impact assessments with their help. The Interior Ministry is responsible for the production of the *Joint Rules of Procedure* and the RIA handbook, and the federal chancellery administers a purely procedural check for compliance with the *Joint Rules of Procedure* before a proposal is tabled to the Cabinet. Beyond these two aspects, there is no other centralised oversight. Inter ministerial consultation is used extensively, as ministries help each other to produce the different impacts, but this does not in practice amount to a quality check. Also, individual ministries are unlikely to see the whole picture as the only document which is made systematically available to them is a summary of impact assessment results attached to the bill sent to the Cabinet. The Cabinet does not see (and therefore does not consider) the underlying analysis. Moreover, no central record of the results of impact assessment is kept by the federal government. Institutional fragmentation does not allow the systematic and strategic integration of the different analyses, and the quality of impacts may vary significantly from one case to another (political pressures often being used to explain why some impacts are rushed).

Box 4.2. Comments from the 2004 OECD report

In Germany, as in virtually all OECD countries, the responsibility to prepare RIAs are clearly with the proponent ministry, who, in the preparatory process, must involve and consult with relevant stakeholders. The involvement and co-ordination between ministries exercising quality control is not clear. Currently the ministries of the Interior, Economics and Technology, and Justice have horizontal responsibilities. The Ministry of the Interior is charged with testing compliance with the *Joint Rules of Procedure*, the Ministry of Economics and Technology with business and price impacts, and the Ministry of Justice with constitutionality and technical quality issues. However the task to assume overall responsibility for the substantive quality of the required impact assessments has not yet been defined or allocated.

In reviewing compliance with the *Joint Rules of Procedure* obligations, the Ministry of the Interior and the Ministry of Economics and Labour have no formal sanction mechanisms. Relying on their respective political leverage and professional specialisation, sector ministries are most often successful in maintaining their own understanding of adherence to the *Joint Rules*. Furthermore, the resources available to carry out the reviews in the Ministry of the Interior, who has the overall responsibility for monitoring compliance with RIA requirements, are minuscule compared to the task,

There are not sufficient resources at the centre of government to guide, drive and challenge ministries' efforts to prepare high-quality RIAs. The absence of monitoring functions and sanctions for non-compliance with the obligations to prepare RIAs also reduce incentives for ministries to do so.

A major exception to the general approach is the process for assessing the costs of information obligations on business. Two central institutions (the federal chancellery Better Regulation unit, and the NRCC) provide internal and external oversight, and in the case of the NRCC, may challenge the quality of the assessment. The challenge function of the NRCC in respect of administrative costs is critical to the success of this part of the process. Ministries know that they will not be challenged on other assessments. Indeed, the underlying framework is a form of soft law (the *Joint Rules of Procedure* are not legally binding), with no sanctions for non compliance, other than the possibility of political pressure in some cases.

Recommendation 4.4. Consider whether it is possible to adapt the process in place for overseeing administrative burden impacts and extend this to cover the other forms of impact. This could be developed in stages. For example, the procedural check by the federal chancellery could be extended in a first stage to cover a more in depth review of whether key aspects such as consultation, quality of assessments etc, have been effectively covered. Consider whether there is a role for the NRCC, bearing in mind that quantification of broader impact assessments can be a challenge, compared with the established methodology for administrative burdens (and that in the absence of objectively verifiable figures its involvement may be considered too political). Ensure that central monitoring units are adequately resourced for the task.

Methodology, guidance and training also need attention. The starting point is sound. The 2006 guide by the Interior Ministry provides a clear and comprehensive explanation of how to assess the impacts of proposed legislation, as recommended by the 2004 OECD review. It covers important issues such as checking whether there are alternatives to regulation. There is, however, little guidance on quantification (the *Joint Rules of Procedure* do not give any guidance on analytical methods), and the main guide is supplemented (or duplicated) by ministries' own often highly developed guides. More

detailed guidance is necessary up to a point (for example, the Economics ministry needs to lay out the technical aspects of cost benefit analysis in respect of prices), but care should be taken to ensure that the different guides are complementary, so that the strategic value of the main guide is not undermined, and uniform standards apply. Training on impact assessment also needs to be boosted. There is as yet no systematic approach to this.

Recommendation 4.5. Check the main guide for weaknesses such as the time specified for completing an impact assessment ahead of a proposal being tabled before the Cabinet. Review the different guides available and streamline them to ensure that the strategic core requirements are clearly contained in the main guide, with ministries’ own guides as a technical supplement to core requirements. Commission a review of quantification methodologies for different forms of impact assessment, drawing on the knowledge and experiences of other countries, in order to move forward on quantification where possible. Review training for impact assessment and make it a systematic requirement for officials engaged in law drafting.

Box 4.3. Comments from the 2004 OECD report

RIA training currently made available to regulators in Germany consists of a 2-3 hours module as part of a voluntary one week introduction to the operations and procedures of law-making process. This is insufficient, not least given the German civil service’s legal tradition, as opposed to the primarily economic approach adopted in RIAs. New, extended training methods are currently being developed by the federal Academy of Public Administration (*Bundesakademie für öffentliche Verwaltung, BAKÖV*) in co-ordination with the federal Ministry of the Interior. It is important that units responsible for promoting regulatory quality across government build and maintain core competencies on how to prepare and scrutinise RIA. External contributions to the development of the RIA system can be very useful, but “in-house” capacities should be in place to guide and apply such input.

Transparency and public consultation require further attention. The *Joint Rules of Procedure* require consultation of, and communication with, key stakeholders at the different stages of the impact assessment process, and this is also picked up in the guidelines of the Interior ministry. This requirement is followed and consultation is generally a routine part of the regulatory development process. Ministries tend to approach consultation in their own way, which may also vary between proposals. There is no standard procedure for interacting with stakeholders during the drafting of an impact assessment. Government plans regarding proposed new legislation are traceable through a website, and individual draft bills (together with an explanatory memorandum giving the main elements of the impact assessment) are published on the Internet once they have been submitted to the parliament. However the impact assessment is not made available in full, and is not publicly available at an earlier stage. Communication to the public thus falls somewhat short of OECD best practice.

Box 4.4. Comments from the 2004 OECD report

To the extent federal ministries choose to carry out public consultations, the consultation documents rarely include RIAs or explanatory memoranda, despite the fact that the *Joint Rules of Procedure* requires all draft regulations to be accompanied by an introductory summary (“front sheet”) as well as an explanatory memorandum (*Joint Rules of Procedure*, § 42,1). In the public consultation process, any information about regulatory impacts on citizens.

Recommendation 4.6. An effective and simple way forward would be to post all impact assessments on line at a single website, alongside the Interior ministry guidelines (and the guidelines of other ministries), which would allow stakeholders to make up their own minds about whether the system is operating according to their satisfaction (boosting quality control).

The scope of the current system also needs review as regards the coverage of federal regulations, and the issue of sustainability. As matters stand, primary laws and some secondary regulations are covered by the system. This may omit regulations which may have a significant impact down the line (and which (see below) are likely to involve the *Länder*). Adding a sustainability dimension to impact assessment seems to be attracting broad support. It will be important to preserve the integrity and strategic perspective of the system if it is added - it should not develop separately from existing assessments and should be part of the same framework.

Recommendation 4.7. Consider how to extend impact assessment so that it covers all important secondary regulations, ensuring that efforts are targeted at the most significant regulations. Ensure that the sustainability impact assessment framework does not develop separately from the rest. Avoid fragmentation, and work towards an integrated system.

Quality control of draft laws by the legislature is a weak spot. As in most other European countries, there is no strong parliamentary tradition in respect of impact assessment. The federal parliament does not appear to take any systematic interest in impact assessment whether of its own drafts or those of the executive. Although the German system confers an especially prominent role on the parliament in the development and enactment of legislation (40% of draft laws emanate from the parliament), Better Regulation tools and processes do not feature very directly in the parliament's approach, the exception being the parliament's support for the eNorm software (developed by the Ministry of Justice to improve drafting, and used throughout the federal decision-making process). The highly politicised nature of policy and legislative development at the federal level tends to hold back any significant efforts to review drafts from the regulatory quality perspective, which might destabilise the consensus reached on the underlying proposal. Much time must be spent in negotiation, especially federal-*Länder*, reflecting the fact that *Bundesrat* is the *Länders'* main opportunity to influence the most important legislation (which they must then generally implement).

Recommendation 4.8. Consider whether there is scope to strengthen the dialogue between the federal government and the parliament with respect to the efficient development of legislation, and to sustaining regulatory quality through to the final stage of enactment. Consider, with the federal parliament, whether there are ways in which impact assessment can be deployed where this matters (significant amendments to government bills, the parliament's own draft legislation).

*There is, finally, the institutional issue of how to link the *Länder* into the process where this is important for legal quality as well as policy and regulatory coherence.* The *Bundesrat* is the main formal entry point for debate by the *Länder* on the implications for them of federal legislation. This is backed up by early consultations with the relevant ministries, and the requirement for impacts on *Länder* budgets to be assessed. But is this

enough to ensure that all relevant aspects are captured (notably the implications of federal drafts for implementation, enforcement and compliance, which is often their responsibility)? What about areas of shared competence such as transport and the environment? There is also the issue of policy areas where competences may be exclusive but there may be a shared interest in working together, in which cases co-operation on impact assessment of relevant regulations at both levels should be considered.

Recommendation 4.9. Review, with interested *Länder*, whether the current arrangements for their involvement in the development of federal legislation is enough to secure a clear view of implications for implementation downstream, and the scope for working together on impact assessment in areas of shared interest.

Alternatives to regulations

There do not appear to have been any significant developments since the 2004 report. It was beyond the scope of this review to take a close look at this important issue. However, not much seems to have changed since the last OECD report. The level of consideration, scrutiny and assessment of regulatory alternatives does not seem to reflect the provisions set in the *Joint Rules of Procedure*. “No alternatives” is almost always stated in each draft bill’s cover sheet under the section devoted to the consideration of alternatives. This does not do justice of any assessment of alternatives to regulation done by the administrations. It also prevents decision-makers and the public from having the opportunity to discuss concrete alternatives to command-and-control regulation, or the zero-option (no action). Recourse to alternatives is unlikely to happen as often as it might.

Box 4.5. Recommendation from the 2004 OECD report

Ensure that promotion of self-regulation and alternatives is supported by thorough analysis.

Germany should further promote and support systematic consideration of self-regulation and regulatory alternatives for new regulatory proposals. Considerations about the use of self-regulation and soft-law alternatives should be matched with the same scrutiny, transparency and accessibility that applies for traditional regulation. It should also develop practice-orientated guidelines including examples and criteria for the use of regulatory alternatives. Improving and encouraging a more wide-spread use of alternatives is contingent on an increased awareness among regulators about the potential benefits of non-regulatory alternatives, and on improving the monitoring of regulators’ obligation to consider alternatives.

Systematic considerations and the use of regulatory alternatives in Germany are supported by clear formal obligations on regulators to consider alternatives and to justify when they opt for “traditional” regulatory solutions instead of self-regulation. The requirements are set out in the *Joint Rules of Procedure*’s § 43, which obliges ministries to include rationales pertaining to regulatory alternatives in draft regulations’ *explanatory memoranda* and to include a summary of these rationales in the introductory one-page *front sheet*.

However the actual consideration, scrutiny and assessment of regulatory alternatives are lagging behind the political ambitions mirrored in the *Joint Rules of Procedure*’s obligations. First, the explanatory memoranda, which should include considerations pertaining to, among others, the use of regulatory alternatives, are not systematically prepared in the first place, and only rarely constitute a part of the information made available during consultation procedures. Second, basically without exceptions, the one-page front sheet attached to each draft regulation summarises considerations of alternatives as “no alternatives”. As a consequence, policy makers and the public rarely have the opportunity to discuss concrete alternatives to command-and-control regulation in cases where the latter is the option preferred by the proposing ministry.

The *Joint Rules of Procedure* includes basic consideration when to opt for self-regulatory solutions. Like many other OECD countries, Germany has not yet developed more specific guidelines or criteria for when self-regulation should be preferred to other tools. However, a recent research project commissioned by the German Federal Commissioner for Cultural and Media Affairs provided some suggestions for when self-regulation could be preferable to command-and-control regulation, as well providing guidelines to what to consider when establishing a regulatory regime based on self-regulation.

Recommendation 4.10. Consider a review of the extent to which alternatives to regulation is picked up as an option before the decision is made to proceed with a regulation, using the existing very complete checklist for identifying opportunities for regulatory alternatives as a guide. Associate this with a commitment to strengthen impact assessment processes more generally.

Background

General context

The structure of regulations in Germany

Reflecting the federal nature of the German state, Germany's regulatory system is complex. It turns primarily on two regulatory "production" systems:

- Regulations covering areas of federal competence. Federal laws are usually fleshed out in secondary regulations issued by the *Länder*, as part of their responsibilities for implementing federal legislation. The *Länder* in turn may delegate implementation responsibilities to the counties and municipalities, which may involve a further layer of subsidiary regulations and instructions. In some cases, federal laws may be given effect in federal secondary regulations.
- Regulations covering areas of exclusive *Land* competence. The *Länder* issue their own laws and regulations. Again, they may delegate implementation responsibilities to the counties and municipalities, involving the production of further subsidiary regulations and instructions.

Box 4.6. The structure of regulations in Germany

General hierarchy

The main written sources of domestic law are the constitution, legislation, statutory instruments and bye-laws. Notwithstanding the general principle that federal law prevails, the hierarchical status of legal instruments always derives from their source, *i.e.* the status depends on the enacting body.

- The *Basic Law (Grundgesetz)* is at the apex of federal law, and certain key components of the Basic Law cannot be amended.
- *The rules of international law, including EU law, occupy the space between the constitution and the laws.* That said, EU law takes precedence over German law (as it does in other EU member states) where the EU has exclusive competence (*Costa v Enel, 1964*).
- *Federal laws rank below the constitution.* They are adopted by the *Bundestag* jointly with the *Bundesrat*.
- *Statutory instruments such as ordinances (Rechtsverordnungen) rank below legislation.* They

are issued by the executive (federal government, federal ministers, and Land governments). Because they rank lower than laws they must not contravene them (precedence of a law). Substantive decisions with major significance for the persons affected cannot be made in the form of a statutory instrument but only within the law itself (legal reservation).

- *Bye-laws such as statutes and regulations (Satzungen or Ordnungen) are legal provisions issued by a legal person constituted under public law as defined by the State (public corporation including municipalities, institution or foundation). The main areas of use are in the administrations of municipalities and academic, professional and social security bodies (e.g. bye-laws covering municipal charges for street cleaning and refuse collection, or the statutes of universities).*

Länder regulations

The same type, hierarchy, and order of the federal law apply at the *Land* level in respect of their own exclusive competences, with the exception of the federal rules governing the status of the general provisions of international law, which have no equivalence at *Land* level.

Municipality regulations

The Municipalities (*Kommunen*) do not have legislative powers *per se*, but they can issue implementing bye-laws in their responsibility for granting most of the permits, licenses, and running public utilities.

“Soft law”

Besides legal acts, the German regulatory system (as in most other countries) includes *Verwaltungsvorschriften*, i.e. forms of so-called “soft law” (instructions, usually based on a regulation, which seek to explain, develop or clarify the latter, and which may in some cases be judiciable). A form of soft law often used in Germany is documents accompanying legal acts that explain their technical aspects, indicate standards and technical processes and requirements necessary to implement the legal act to which they relate (*technische Anleitungen*).

Soft law also covers instructions internal to the administration and which are binding on the latter. Ancillary documents may be issued by the executives (both at the federal and the *Land* level) to define and organise administrative procedures (*Richtlinien* and *Arbeitshilfe*). Examples of this kind of soft law are the *Joint Rules of Procedures* of the federal ministries, the guidelines on RIA and the application of the Standard Cost Model.

Source: http://ec.europa.eu/civiljustice/legal_order/legal_order_ger_en.htm.

Trends in the production of new regulations

The trend in the number of federal regulations in force has been on a consistently downward path since 2005 (Table 4.1). This is partly because of a “spring clean” by the federal government of the regulatory stock, with the repeal of large numbers of regulations, including redundant regulations related to re-unification (see Chapter 5). Table 4.1 also shows, however, a significant reduction in the number of new federal laws and subordinate regulations adopted.

Table 4.1. Number of federal laws in force at the start of each year

Number of new laws /total number of laws	2001	2002	2003	2004	2005	2006	2007	2008
	56 1.982	68 2.004	32 2.025	51 2.043	33 2.034	41 1.804	45 1.753	11 1.709
Number of new subordinate regulations (ordinances, others)/total number of subordinate regulations	2001	2002	2003	2004	2005	2006	2007	2008
	166 3.061	184 3.098	156 3.147	167 3.182	160 3.225	146 2.799	113 2.669	89 2.647

Note: The numbers only comprise regulations at federal level. Regulations of the German *Länder* are not included. For each year, the numbers stated on the first line indicate the new regulations adopted, while the ones on the second line (after the “/”) indicate the total number of regulations in force within the relevant year. The numbers of 2008 include new legislation effective by 15th August 2008. The number of new subordinate regulations comprises only statutory instruments (*Rechtsverordnungen*).

Source: German federal Government, OECD Regulatory Indicators Questionnaire 2008.

Procedures for making new regulations at the federal level

The law making process and the role of the federal executive

Legislative initiative at the federal level is multiple. A bill can be introduced into the *Bundestag* by:

- a parliamentary group or at least 5% of all parliament members (in some 25% of the cases);
- the *Bundesrat* (15% of the cases); or
- the federal government. This is the most frequent approach (about 60 % of cases).

The relevant federal ministry also sometimes takes over the preparation of the bill proposal in the first two instances, but through more informal channels and procedures.

The procedure that federal ministries must follow when preparing their own legislative proposals is by contrast described in the *Joint Rules of Procedure* of the federal Ministries (*Gemeinsame Geschäftsordnung der Bundesministerien, GGO*) (See Box 4.8). The procedure to be followed when the proposal originates from parliament is outlined in the rules of procedures of the *Bundestag*. Collaboration between the executive and the legislature has evolved based on the model of the so-called “aid to drafting” (*Formulierungshilfe für Gesetzentwürfe aus der Mitte des Bundestages*). This is an assistance provided by the responsible ministry. The procedure is not regulated and unfolds informally and on an *ad hoc* basis. The *Joint Rules of Procedures* merely ask the ministry to inform without delay the other ministries and the chancellery if the procedure has led to proposals that deviate in substance from decisions taken by the government.

The law making process and the federal parliament

The legislature is very active in the initiation and preparation stages of the law-making process. Both chambers hold rights of legislative initiative (see section above), and compared with many other European countries, a significant proportion of draft laws (40%) emanate from the parliament. The *Bundesrat*, representing the *Länder*, plays a prominent role, both at the initial drafting stage, and in the process of approval of federal laws. Prior to the 2006 federal reform, over half of the laws passed by the *Bundestag* required approval by the *Bundesrat*, which involved a long and often arduous process. One of the key aims of the reform was to address this, with a view to reducing to less than half the number of cases where approval is needed.

Box 4.7. Drafting a bill in the German federal government

When a federal Ministry intends to initiate legislation, it informs the federal chancellor. Each ministry is responsible for advancing the proposal through all the stages described in the *Joint Rules of Procedures*. The following main stages can be identified:

- *Consultation and forms of Impact Assessment.* These practices take place relatively early in the process, starting with so-called “pre-consultation rounds” that involve the *Länder* and local authorities as well as, where relevant, affected organised interests and experts. Scientific advisory committees may be consulted too on an *ad hoc* basis.
- *Internal co-ordination.* The lead ministry is also responsible for internal co-ordination, submitting the draft to interested federal ministries and obtaining the necessary collective agreement. The stage at which the internal co-ordination takes place and its duration are left to the discretion of the lead ministry. The federal Ministry of the Interior and the federal Ministry of Justice must be consulted on all draft regulations, notably on the constitutionality of the drafts. The first inter alia in relation to compliance with the requirements set out in the *Joint Rules of Procedures*, the latter also on the quality of legal drafting. Each ministry is then responsible for assessing the regulatory impacts in its area of responsibility (see Annex A).
- *Administrative burden reduction.* The National Regulatory Control Council (*Normenkontrollrat*) checks and comments on the administrative costs calculated by the ministry on the basis of the Standard Cost Model (SCM). The *NRCC*’s opinion is forwarded to the ministry, and is also included in the annex to the draft bill when it is submitted to the federal Cabinet.
- *Legal drafting and final scrutiny.* Before final adoption by the federal Cabinet, the federal Ministry of Justice proceeds to a final legal and language review, also relying on external linguists.
- *Mandatory notification.* In certain cases, EU legal provisions require a mandatory notification of the draft bill to the European Commission and the other EU Member States, giving them the possibility to examine its compatibility with EU law. During the following three months, the draft bill may not be accepted for discussion by the federal cabinet.

The draft bill is then submitted to the federal Cabinet accompanied by an explanatory memorandum; a cover sheet providing basic data on the proposed legislation; and the *NRCC* opinion. Dissenting opinions from other ministries must also be reported. These documents are important parts of the procedure, for they provide the basic information on the proposed legislation.

Box 4.8. Stages in the law-making process: Federal parliament

The *Bundesrat*'s first reading

The *Bundesrat* in particular is involved by the executive at a very early stage. The government must submit the bill to the *Bundesrat* for comment during the drafting phase. Through this first stage, the *Länder* may express their position, notably in relation to constitutional, budgetary, political and implementation aspects. This stage allows the *Länder* to enter a formal dialogue with the federal executive early in the process. The assessment is not binding on the federal government. Yet, it is usually taken into account and a bill totally rejected at this stage is rarely forwarded to the *Bundestag*. The federal government normally issues a "counter-statement", which is sent together with the bill and the *Bundesrat*'s assessment to the parliament.

The first stage in the *Bundesrat* does not take place if the proposal originates from the *Bundestag*. Particularly urgent legislative initiatives are thus often started directly by political groups in the *Bundestag*. The government can compensate this bypass by sending an initial governmental proposal to the *Bundesrat* (*Paralleleinbringung*).

Review by the *Bundestag*

As a rule, the bill is discussed during three readings in the *Bundestag*. The Council of Elders is responsible for assisting the president of the *Bundestag* in the co-ordination and conduction of the parliament's business, notably by planning and agreeing its plenary agenda. While the first reading serves as a general debate on the political impact of the bill, legislative proposals are often submitted to the *Bundestag* standing expert committees without prior discussion. These committees normally reflect the portfolios of the federal government. They can call upon government officials and ministers to participate in the meetings, which normally are not open to the public. The federal government has no direct influence on the bill during the committee stage. Public hearings may be organised on the initiative of the committee, to which external experts may be invited. The responsible committee then submits its version of the bill with a report with recommendations to the plenary for the second reading, where each Member of parliament can table amendments. The bill's version adopted in the second reading is the basis for the third reading. Amendments are still possible but very rare, since they have to be tabled by a parliamentary group or at least 5% of the members. Further to this final reading, the *Bundestag* casts a final vote adopting or rejecting the law including the prior amendments. As a rule, laws are adopted by a simple majority of the votes cast. In some cases, however, an absolute majority is required. Amendments of the constitution require a two-thirds majority of all Members of parliament.

Second stage in the *Bundesrat* and mediation

Every bill adopted by the *Bundestag* must be submitted to the *Bundesrat*. It normally has three weeks for its second reading. Bills that were initiated by the *Bundestag* and which therefore had not been previously assessed are subject to a more detailed scrutiny.

Should the *Bundestag* and the *Bundesrat* not reach agreement on a piece of legislation, a so-called Mediation Committee is convened. The Committee is composed of 16 representatives of the *Bundesrat* (one representative per *Land*) and 16 representatives of the *Bundestag* (reflecting the distribution of the seats there). The Committee members are not bound by instructions, which facilitates the draft of a confidential compromise proposal that needs to be subsequently adopted by both chambers in plenary. The Mediation Committee can only make proposals. It has no decision-making power. However, it has become an important body in the legislative process. Since 1949, the Committee has been called upon in connection with about every eighth bill. The Committee is quite successful, as only about 1% of the bills passed by the *Bundestag* have failed to be approved so far.

The Committee proposes amendments to reach a compromise between the chambers. If both the *Bundesrat* and *Bundestag* agree on the Committee's version, the law is considered adopted in that version. Should the *Bundesrat* still object, further steps depend on the type of law. The legislative process distinguishes between laws which imperatively require *Bundesrat* consent

(*Zustimmungsgesetze*) and laws against which the *Bundesrat* may lodge an objection which, however, can be outvoted by the *Bundestag* (*Einspruchsgesetze*). Laws requiring *Bundesrat* consent include laws amending the Basic Law or replacing existing federal laws; laws which govern the administrative procedure for their implementation by the *Länder* without any possibility of deviation of the *Länder*; as well as laws that cause additional administrative costs to the *Länder*, or that require the *Länder* to assume financial responsibility towards a third party, or include provisions on taxes which are partly or wholly passed on to the *Länder*. This implies that the number of cases for which approval by the *Bundesrat* is required is quite significant, as it suffices that a bill contains only one provision affecting one of these cases to be considered by the *Länder* in its entirety. The Basic Law thus grants the *Bundesrat* considerable rank and power. If the *Bundesrat* rejects such bills, no law can be adopted.

If, on the other hand, the *Bundesrat* consent is not required, the *Bundestag* may outvote an objection lodged by the *Bundesrat* in another vote by a majority equal to the result achieved in the *Bundesrat*. For example, if the Upper House lodges an objection with a two-thirds majority, the *Bundestag* must reject this objection also with a two-thirds majority. If the *Bundestag* cannot outvote the objection, the law has irrevocably failed. Up to now, the *Bundesrat* has nonetheless very rarely raised objections of this nature.

There are no exact numbers indicating the proportion of laws requiring *Bundesrat* consent or giving simply the right to object, since this depends on the individual subject of the law. In the past, it was nonetheless estimated that about 65% of all the laws passed by the *Bundestag* required approval by the Upper House. The reform introduced in 2006 sought to reduce such ratio, for it was felt that requiring the *Bundesrat*'s consent so frequently prevented a smooth legislative process at the federal level. It is foreseen that the reform approved by the *federalismus Kommission I* will reduce the number of instances in which the consent is required to 40% of the total laws passed.

Enactment

If the *Bundesrat* gives its consent or does not object to the bill presented by the *Bundestag*, the law has passed, and the federal government submits it to the federal president for certification and promulgation. Laws become legally binding and normally come into force upon their publication in the federal Law Gazette.

Forward planning

The coalition agreement adopted by the coalition parties at the beginning of each legislative term sets the general framework within which the federal chancellor presents the main elements of the government's policy and lays down the main projects. Forward planning is thus strongly based on political priorities and negotiations. In addition, as stated in the Basic Law, the federal chancellor cannot go beyond determining general policy guidelines. In accordance with the principle of ministerial authority, each federal minister conducts the affairs of his/her department independently and on his/her own responsibility, which includes deciding when and how to launch a new policy or legislative project.

Projects are nevertheless closely monitored across the federal government. The federal chancellery is the central co-ordinating body. Ministers have to inform the chancellor about important policy measures and projects. They participate in closed-door conferences convened by the chancellor throughout the legislative term to discuss key policy objectives. Based on the results of these meetings, the chancellery summarises ongoing and future ministerial projects in an overall political strategy, which is regularly updated. Regular rounds of discussion take place between the permanent State Secretaries and in the federal cabinet. Each week, the chancellery draws up a list of the proposals that are sufficiently advanced to be submitted to the federal cabinet for adoption within the following six weeks. At these weekly conferences, progress on the implementation of the agreed policy objectives is monitored.

In 2005, the chancellery set up a Planning Unit headed by a Minister without portfolio. Together with the federal ministries, it maintains an electronic database for project planning. This allows the government to share detailed electronic information, to have a comprehensive overview of activities, and to check that the main lines of the coalition Agreement are being implemented. A “project documentation” system sets priorities. The system also contributes to the co-ordination of inter-ministerial activities (integrated planning system). The information gathered is used for internal steering purposes in the federal government and is not published.

Some ministries have adopted the electronic process control tool *ELVER* (*ELektronische VERfahrenssteuerung*), which allows them to record and manage the scheduling and current status of their major projects.

Administrative procedures

Both the constitution and the Administrative Procedures Act (*Verwaltungsverfahrensgesetz*), which entered into force in 1977, set out a framework of general administrative procedure requirements. The Administrative Procedures Act provides a general framework for decision-making procedures of all federal administrative bodies, including the obligation to provide reasons for decisions in writing; a description of general appeal mechanisms; the obligation to consult with stakeholders on important decisions; and the obligation to communicate decisions.

More elaborate standardised procedures to create new legislation at the federal level are set out in the *Joint Rules of Procedure* of the federal ministries (*Gemeinsame Geschäftsordnung der Bundesministerien, GGO*). These Rules do not have legal status but are binding on all federal ministries. Further administrative procedure requirements and guidelines are included in guidance material on RIAs, and the legislative techniques and requirements prepared by the Ministry of the Interior and the Ministry of Justice, as well as other line ministries in respect of their policy areas.

As a rule, the *Länder*, local authorities’ national associations and the representations of the *Länder* to the federation must be informed of all proposed federal legislation and ordinances as soon as possible, if and when their concerns are affected. The prompt involvement of central and umbrella associations¹ and of the expert community is also actively sought. If a bill is sent to one of the actors mentioned above as a part of the consultation process, it must also be sent to the *Bundestag* and the *Bundesrat*. In short, external stakeholders and the subnational levels of government are treated on an equal footing for purposes of consultation.

Legal quality

The Ministry of Justice and the Ministry of the Interior are the key players. The Ministry of Justice is the reference point for the examination of draft legislation in accordance with systematic and legal scrutiny principles. Before a bill is sent to the federal cabinet, it checks the constitutionality of the proposal and its compatibility with EU and international law (vertical scrutiny). Regulations based on EU law are also reviewed by the lead Ministry for their compliance with the principles of subsidiary and proportionality. The Justice Ministry also performs a horizontal legal scrutiny, checking compatibility with other laws and the internal consistency of the draft. The *Joint Rules of Procedures* grants the Ministry the right to “protest” against the adoption of a bill if this is not consistent with current law. Finally, the Ministry checks compliance with formal drafting requirements. The overall scrutiny may last up four weeks, but the lead ministries normally reduce this period considerably.

The Ministry of the Interior is responsible for monitoring compliance with the *Joint Rules of Procedure*, in case of uncertainty. In addition, the Interior Ministry checks the constitutionality of the proposed draft, alongside with the scrutiny made by the Justice Ministry.

The *Joint Rules of Procedure* provide that the language used in bills must be “correct and understandable to everyone as far as possible” (Section 42-5). Generally, bills are submitted to the relevant editorial offices² to review the accuracy and comprehensibility of the language used. The federal Ministry of Justice provides support by issuing a “Manual of Legal Drafting”, which is also available in the Internet. The Manual focuses on concrete suggestions on the content, structure and form of laws and regulations. The Manual also contains technical suggestions on legal definitions, stylistic criteria, references, and other linguistic components.

An important development is the “Electronic Guide to Drafting Legislation”, aimed at improving legal quality. It was developed by the federal Academy of Public Administration under the aegis of the federal Ministry of Interior, and in co-operation with the federal Ministry of Justice. The aim was to address a series of problems observed in the federal public administration. First, desk officers could not easily locate the required quality drafting requirements. In addition, lead services rarely put the necessary rigour into legal clarity at an early stage. Third, although desk officers often have a legal background, they have not been specifically trained to draft legislation. It should be noted that this is against the background that ordinary officials draft legislation, not a special body of officials as, for example, in, the United Kingdom. This generates long learning periods, increases the chances of errors and mistakes, and prevents the formalisation of procedures. The Electronic Guide provides drafters with the latest information simply and directly on their computers; it allows rapid updates; it provides examples and templates, and establishes links to background documents. Some 1 700 desk officers have used the guide over the past four years.

The “e-Norm” software is a tool to improve the quality of legislation. It has been developed by the federal Ministry of Justice on the basis of the “LegisWrite” software used by the European Commission. E-Norm helps comply with formal and editorial requirements and is intended to make the use of the same format possible throughout the lawmaking process. E-Norm offers document templates, indicating the necessary elements of draft legislation in the proper order. It also offers an automated quality check and correction functions, and a function to produce and consolidate synoptic documents automatically.³ The adoption of the tool is not binding. Eleven out of fourteen federal Ministries have so far introduced e-Norm or are planning to do so. The German *Bundestag* and the *Bundesrat* are also closely involved in this project, and are integrating it progressively into their activities. Four parliamentary committees have already embraced the initiative. Eleven of the sixteen *Länder* have concluded a licence agreement with the federal Ministry of Justice to use the software.

In 2007 and 2008, the Justice Ministry conducted a project on “understandable legislation”. The project found that the comprehensibility and clarity of draft legislation could be improved significantly by involving relevant experts, lawyers and linguists at a very early stage. As a result, such multi-disciplinary linguistic counselling was institutionalised as of 2009. Training was provided to other administrations. As a part of this commitment, additional posts were created and overall ten staff within the Justice Ministry working exclusively on easily understandable legal language.

Ex ante impact assessment of new regulations at the federal level

Policy on Impact Assessment

Germany's policy on Regulatory Impact Assessment (RIA) at the federal level is based on longstanding and robust conceptual requirements. Instruments supporting the introduction and spread of RIA practices have been developed since the mid-1980s. The so-called *Blaue Checklist* (Blue Checklist) introduced in 1984 was one of the first attempts among OECD countries to draw officials' attention to factors affecting regulatory quality, including the consideration of alternatives to "command-and-control" regulation as well as legal clarity. The influence of the Blue Checklist on actual regulatory practices was limited, however, because of the lack of guidelines, institutional support, and sanctions for non-compliance. The 1996 revision of the *Joint Rules of Procedure* made the "assessment of the effects of law" (*Gesetzesfolgenabschätzung*) mandatory for federal ministries.

As the term indicates, the procedure applies to all legislative proposals. Some types of secondary regulations and "soft law" are covered to some extent.⁴ The guidance requires an analysis that is proportionate to the scope and complexity of the proposal. The main rationale behind the tool was – and still is – informing decision-makers and reducing the costs of regulation.

The current RIA system is based upon the changes introduced under the leadership and co-ordination of the federal Ministry of the Interior in the late 1990s, as part of the "Modern State-Modern Administration" programme launched by the then government. This included the development of a RIA manual as one of its "guiding projects". To this end, the Ministry of Interior in October 1998 commissioned the German college for administrative science in Speyer to prepare a RIA handbook and a practically oriented RIA guideline, with the involvement of Baden-Württemberg's Ministry of the Interior. In 2000, RIA Guidelines (*Leitfaden zur Gesetzesfolgenabschätzung*) and a comprehensive RIA Handbook (*Handbuch zur Gesetzesfolgenabschätzung*) were published by the Ministry of the Interior. The 2000 RIA model introduced three types of analysis that are performed at different stages of the regulatory process:

- a *preliminary* RIA, aimed at testing whether regulation is necessary as well as identifying and comparing alternatives;
- a *concurrent* RIA, which should be used to check whether regulatory measures match and suit the regulatees and the regulatory context; and
- a *retrospective* RIA, which seeks to assess whether the regulatory objective were achieved after implementation (*i.e. ex post* evaluation).⁵

The *Joint Rules of Procedures* were upgraded in 2000 and ideas from the *Leitfaden* and the *Handbuch* were picked up. The federal government is bound by the *Joint Rules of Procedure* to examine regulatory impacts and make them transparent in the statement of legislative intent for each draft bill. The Rules define "regulatory impact" as the main impact of a law. This covers both the intended and unintended consequences. According to the 2009 updated version of the *Joint Rules of Procedures*, the ministries must describe whether the impacts of the proposed legislation meet considerations of a sustainable developments, including therefore also long-run economic, environmental, and social impacts.⁶

The main change since then has been to integrate requirements flowing from the policies aimed at reducing administrative burdens on business originated from information obligations. This has added a significant new dimension to *ex ante* RIA. Since December 2008, the *ex ante* assessment of administrative costs using the SCM has also become been

part of the standard procedure. The Ministry of Interior initially updated the federal RIA methodological working aid to reflect this in 2006, and revised them in 2008.

Debate on the role of RIA continues, however. Current debate is focused on assessing the sustainability of federal legislation and ordinances. In the winter of 2008, the federal government decided to expand the scope of RIA to reflect its Sustainable Development Strategy. This decision followed a recommendation made in March 2008 by the Parliamentary Advisory Council on Sustainable Development (established by the *Bundestag* in 2006). The *Joint Rules of Procedures* and the general RIA methodological working aid are being amended accordingly.

Institutional framework

As in most other OECD countries, each ministry is responsible for carrying out RIAs on its own proposals. There is no centrally dedicated unit for the co-ordination or monitoring of RIA. The main part of the process is devolved to ministries, which monitor the quality of the assessments done in their specialist area (see Annex A). It is the responsibility of the proponent ministry, from start to finish, to consult other ministries which have an interest in the proposal and to assemble the required RIAs. The ministries check each others' work for compliance with the formal provisions on RIA and the quality of the analysis, but ultimately it is up to the lead ministry to decide whether and what kind of assessment is required. In this respect, the underlying principle for RIA practice is the same as for the other issues covered by the *Joint Rules of Procedure*.

The Ministry of the Interior and the chancellery do, however, represent elements of a unifying role. A final unitary procedural check takes place only before the proposal is tabled to the Cabinet. At that stage, the federal chancellery checks compliance with the provisions set out in the *Joint Rules of Procedure* (it does not have the staff to carry out more than a procedural check). The Ministry of the Interior's co-ordinating responsibility for the *Joint Rules of Procedure* give it an overall oversight role, in terms of formally checking that the latter's provisions for impact assessment are being followed, and it is responsible, if needed, for guidance on implementing the impact assessment methodological guide. As reducing regulatory burdens is a priority of the government, the part of the procedure dealing with administrative costs is co-ordinated by the chancellery's Better Regulation Unit, in collaboration with the *NRCC*. The resources of the co-ordinating unit in the Interior Ministry are small. The chancellery and the other Ministries do not have a formal budget for RIA. The engagement of the *NRCC* in the process now allows feedback on the quality of assessments as regards administrative burdens. In general, the *NRCC* rates the assessments as "very good".⁷ There is no equivalent systematic check on the quality of other assessments.

The process works through the following stages:

- Specialised divisions in the lead ministry usually carry out the assessment and presentation of the various impacts, in consultation with the relevant ministries.

- The relevant ministries (*Joint Rules of Procedure* §44) then examine those aspects relating to their specific area of responsibility. For instance, the Ministry of Finance checks the quality of the assessment of the impacts on the federal, *Länder* and municipality budgets. Similarly, the Ministry for the Environment, Nature Conservation and Nuclear Safety is responsible for ensuring that environmental aspects and interests have been adequately considered in any given legislative proposal. The Economics Ministry participates actively in the assessment of economic impacts.
- The Economics and Finance Ministries are responsible for checking the quality of the financial implications on the public administrations and the general costs on the economy, respectively.
- If the proposal involves more than one policy area (*i.e.* it is a joint proposal), a statement is obtained from the relevant other ministries.
- The proponent ministry presents the results in a cover sheet and an explanatory memorandum, which are then examined by the other ministries as regards those aspects relating to their area of responsibility.
- Ministries may insist on a further assessment, if they consider it necessary, and may go so far as to withhold their consensus for the proposal to be forwarded to Cabinet, which means that they have a *de facto* veto power.
- Finally, the draft bill is checked by the chancellery for compliance with the *Joint Rules of Procedure* before it is submitted to the federal Cabinet for decision, together with a summary of the assessments.

Training on RIA is provided by the federal Academy for Public Administration (*Bundesakademie für öffentliche Verwaltung, BaköV*) as a session of the general training on “legislation” organised four times a year or upon request of individual Ministries. A seminar of three days on “Regulatory Impact Assessment” took place in 2008 and in 2009, respectively. A further seminar on “Genesis, Impact Assessment and Implementation of EU Directives” (two days) is organised since 2008. In addition, internal training sessions are organised by individual ministries. Training on RIA has also been organised with members of the parliament, to spread understanding and the potential of the tool for the legislature.

The federal parliament and RIA

As in most other OECD countries, there is no strong parliamentary tradition in respect of impact assessment. The parliament’s procedures for assessing its own legislative proposals are weak and unsystematic, and it does not take any systematic steps to check the quality of impact assessments carried out on draft bills proposed by the executive. Besides the lack of infrastructure and resources, the government tends to be considered as an emanation of the majority in the parliament and in the spirit of neutrality, systematic scrutiny of assessments carried out by the executive branch are not considered appropriate. The secretariat of the parliament therefore tends to stand aside. Quality checks and evaluations, including for the preparation of draft bills initiated by the House, are left to the discretion of the political groups, which carried them out directly. If the *rapporteur* deems that more information is necessary, he or she can organise *ad hoc* hearings or gather information informally.

As regards its own proposals, (one quarter of legislative initiatives, often tabled as an urgent political matter), there are provisions in the so-called “*Formulierungshilfe procedure*” (for proposals initiated in the *Bundestag*), but these are less stringent than the *Joint Rules of Procedure*,⁸ and the *NRCC*’s opinion is not required as regards possible administrative burdens. There is no obligation to carry out a RIA, and there are no mechanisms to control the quality of assessments if they are carried out. Linguistic clarity is not reviewed.

Methodology and process

The *Joint Rules of Procedures* outline a three-stage examination procedure that the lead ministries must follow when producing their RIAs. The aim is to ensure that all impacts and consequences associated with proposed legislation are taken into account. The procedural stages are:

- an in depth explanation of the intended effects and unintended side-effects of the proposed legislation;
- the identification and assessment of a series of impacts, including impacts on gender equality; on the federal public budget and the public budgets of the *Länder* and municipalities; on private industry, in particular small and medium-sized enterprises (SMEs); on consumers; on unit prices and the price level in general; as well as on administrative costs under the SCM methodology; and
- the provision of details of any further impacts, if so requested by a federal ministry, a federal Government Commissioner (including the federal Performance Commissioner), or the *NRCC*.

According to the methodological working aid of the federal Interior Ministry, Impact Assessments should follow these steps:

- *Step 1*: Analysis of the regulatory area (problem and system analysis);
- *Step 2*: Identification and definition of policy objectives;
- *Step 3*: Development of alternatives to regulation;
- *Step 4*: Examination and evaluation of alternatives to regulation, including the “zero option” (taking no action); and
- *Step 5*: Result documentation.

RIA should be started at the latest when the draft proposals are sent to the relevant ministries and the *NRCC*. The latter are to be involved in the preparation of the draft as early as possible.⁹ The *Joint Rules of Procedure* indicate at least four weeks for the final examination period, which should include RIA, consultation and legal checking.¹⁰ In practice, the time dedicated to undertaking RIAs varies substantially, but it usually quite short, generally lasting a few weeks rather than months.¹¹

The focus is on analysing the costs as well as the benefits, in both monetary and non-monetary terms. To assess the economic, ecological and social impacts, a predefined questionnaire (checklist) is used to draw attention to possible effects in all three areas examined. The RIA methodological working aid insists on identifying and evaluating alternatives to regulation, including the option of taking no action (step 4 above). The official conducting the RIA is supposed to refer to the competent Ministry and conduct internal checks, and consult an expert in the field in question for a more in-depth RIA.

The *Joint Rules of Procedure* do not give any binding instructions on analytical methods. To assist the lead ministry, the Ministry of the Interior produced general guidance and recommendations for conducting RIAs in 2006. A further set of guidelines published by the Interior Ministry in 2006 cover impact assessment at the level of the EU.¹² In addition, each ministry has produced tailored guidelines on the specific aspects under their portfolios.¹³ For instance, the federal Economics Ministry guidelines support officials on how to carry out cost-benefit and cost-effectiveness analyses, and estimate prices in a structured way. They also provide a variety of examples. The emphasis is on the analysis of costs and burdens rather than the benefits of regulation.

Administrative burdens on business were added in 2006, using the quantitative approach of the SCM methodology. Plans to further extend the scope of the costs to be assessed are being made. The so-called “Regulatory Cost Model” has been proposed as a possible methodology to be applied in the future, on the initiative of a parliamentary Committee.¹⁴ The inclusion of a Sustainable Impact Assessment is also under discussion.

Public consultation and communication

The *Joint Rules of Procedures* require consultation of, and communication with, key stakeholders as integral elements of the RIA process. This is reiterated in the guidelines of the federal Ministry of Interior, which stress the importance of these practices to increase the acceptance of proposed legislation. These requirements are of a general nature. Consultation is a routine part of the development of new regulations. Each ministry translates the requirements into different practices, depending on the proposal it is preparing, the analysis to be carried out, and the input to be sought. Thus, there is no standard procedure for interacting with stakeholders during the drafting of a RIA. There is no specific obligation to publish detailed information on the assessment, its process, contributors and findings in detail, and provide feedback on how the final assessment has been determined. It is, however, mandatory to give the findings of the RIA on the cover sheet and in the explanatory memorandum of the draft bill to be sent to the Cabinet. Once adopted by the Cabinet, the draft proposal and explanatory memorandum is submitted to the *Bundestag*, and published by the latter.

Ex post evaluation

Evaluation of the validity of *ex ante* analyses is also carried out. The application of RIA tools was jointly evaluated by various federal ministries in 2002¹⁵ on the basis of selected RIAs.¹⁶ The resulting report was presented to the federal Cabinet and approved.

All information obligations entailed by the Standard Cost Model are recorded in a database which is accessible to the public. After a period of two years and upon the amendment of legislation, the federal statistical office measures the burden anew, which corresponds to a review of the *ex ante* estimate. This means that a check is made as to whether the simplification of legal provisions has had the anticipated effects.

Land involvement in federal impact assessment

Federal consultation with the *Länder* on federal policy and legislative development is considerable, especially if the law requires the consensus of the *Bundesrat*, and reflecting the fact that the *Länder* play a major role in the implementation of federal law. Areas of shared competence such as transport and the environment also require shared discussion. The *Länder* are closely involved in federal impact assessment processes, through policy working groups. So-called Lower Working Groups (*Unterarbeitskreise*) are part of the structure of the Conferences of Ministers ensure continuous contacts at the working level between the federal ministries and the *Länder*.

Alternatives to regulation

Clear formal provisions in the *Joint Rules of Procedure* indicate how to consider regulatory alternatives and to justify when recourse to them is made.¹⁷ Ministries must include rationales relating to regulatory alternatives in the explanatory memorandum and introductory one-page front sheet attached to draft bills when these are submitted to the Cabinet and then to the parliament.

Box 4.9. The German checklist for identifying opportunities for regulatory alternatives

The *Joint Rules of Procedure* of the federal Ministries stipulates that draft regulations must be accompanied by an explanatory memorandum, which among others must explain:

- whether there are other possible solutions to regulation;
- whether the identified policy objective can be performed by private parties; and
- the considerations that led to the rejection of non-regulatory options.

An annex to the Joint Rules provides a checklist for identifying opportunities for self-regulation:

1. What kind of regulation arrangement is appropriate to address the problem? Is self-regulation sufficient? What structures or procedures should the state provide to enable self-regulation? Would it be possible for the state to make self-regulation mandatory?
2. Provided the task can be carried out by non-governmental or private bodies: how is it ensured that the non-governmental service providers will provide their services for the common good (nation-wide coverage, etc.)? What regulatory measures and bodies does this require? How is reassignment of tasks to governmental institutions ensured in the case of bad performance?
3. Can the problem be solved in co-operation with private bodies? What requirements for the legal design of such co-operative relationships should be imposed? What practical design is suitable and necessary to enable or support such co-operative relationships in organisational terms?
4. If it seems that the problem can only be solved adequately on the basis of a programme or other target-oriented basis: what minimum content of regulation is required by the rule of law (e.g. stipulations on competence, aims, procedures etc.).

Source: Government of Germany (2000c).

In practice, and as in most other OECD countries, alternatives are most developed and widely used in the area of environmental policy. Economic instruments such as user charges, deposit-refunds, and tax incentives are the approaches often used. Voluntary agreements are also relatively widely used, although their nature and scope vary considerably.¹⁸

Co-regulation (or delegated regulation)¹⁹ is another important alternative to command and control regulation which is widely used in Germany. Recourse is often made to the so-called “state-of-the-art” notion. This term characterises the stage of development of advanced processes, facilities and operational methods that leading experts certify as guaranteeing that the specified goals can be achieved.²⁰ Experts contribute to the development of technical standards (e.g. for measurement procedures, noise control, etc.). Such standards are defined, among others, by the standards committees of the German *Institute for Standardisation (Deutsches Institut für Normung, DIN, e.g. the Radiology*

Standards Committee and the Noise Control and Vibration Engineering Standards Committee in DIN) or professional associations, such as the Association of Engineers (*Verein Deutscher Ingenieure, VDI*), or medical expert organisations. Some of these institutions and organisations receive financial support from the federal Ministry for the Environment, Nature Conservation and Nuclear Safety for their work in this regard.

Other examples of alternatives to command-and-control regulation can be found in the remit of the federal Ministry of Health and include the rules of self-regulatory bodies (health insurance funds) such as guidelines, circulars, common announcements, contracts, agreements, etc. as well as the guidelines of the Joint Federal Committee of Physicians and Health Insurance Funds.

Risk-based approaches

Risk assessment is explicitly addressed by the RIA methodological working aid issued by the federal Ministry of the Interior, which notes that it is an integral part of the process of developing regulations.²¹ The expected inclusion of the sustainability dimension means that ministries will soon be required to take account of the interests of future generations when assessing the risks and threats raised by proposed regulations. Other structures and initiatives pick up different aspects of risk, for example the work of the federal Institute for Risk Assessment (Box 4.10).

Box 4.10. The Federal Institute for Risk Assessment

The Federal Institute for Risk Assessment (*Bundesinstitut für Risikobewertung, BfR*, www.BfR.bund.de/cd/template/index_en), established in 2002, is the scientific agency of the Federal Republic of Germany. A scientific advisory council and several expert committees support the work of the *BfR*. The focus of the work of *BfR* is on consumers. It prepares expert reports and opinions on food and feed safety as well as on the safety of substances and products. Its tasks include the assessment of existing and the identification of new health risks, the drawing up of recommendations on risk reduction, and the communication of this process. The results of its work serve as the basis for scientific advice to the relevant federal ministries and agencies, such as the federal Office of Consumer Protection and Food Safety (*BVL*) and the federal Institute for Occupational Safety and Health (*BAuA*). By means of its science-based risk assessment, *BfR* provides important stimulus for consumer health protection both inside and outside Germany. The *BfR* engages in scientific co-operation with international institutions and organisations and with the institutions of other countries involved in consumer health protection and food safety. One focus of its work is its co-operation with the European Food Safety Authority, *EFSA*.

The parliament has also developed tools and institutions to consider risks, although not for assessing individual legislative proposals directly. In 1990, the *Bundestag* established the “Office for Technology Assessment at the German *Bundestag*” (*Büro für Technikfolgen-Abschätzung, TAB*, www.tab.fzk.de/home_en.htm) as an independent scientific body. The eight *TAB* scientists located in Berlin and some 70 experts associated with the *Institut für Technikfolgenabschätzung und Systemanalyse (ITAS)* in Karlsruhe support decision-making by exploring the potential of new scientific/technological developments; their societal, economic, and environmental impacts; as well as the framework conditions necessary to implement them. The *TAB* does not make final recommendations, does not have the right to initiate a project, and its resources and budget are controlled by the House. However it is a well established partner of the *Bundestag*, with a current planned collaboration over the period 2008-13, making the Office independent of the parliament’s political term. *TAB* is also an important partner of the European Parliamentary Technology Assessment (*EPTA*) network.

Notes

1. “Associations” means all unions of natural or legal persons or groups promoting common interests. This includes for instance the employers’ associations and the associations of workers and employees.
2. The German Language Society (*Gesellschaft für deutsche Sprache*) operates an office at the federal Ministry of Justice which is open for use by all federal ministries. It is responsible for examining draft bills for correct language usage, comprehensibility etc.
3. See: *www.enorm.bund.de* (last accessed 15 April 2009).
4. See: the *Joint Rules of Procedure*, para. 62(2) GGO, and 70(1).
5. For more details, see: C. Böhret/G. Konzendorf (2001), *Handbuch Gesetzesfolgenabschätzung* (GFA), Nomos, Baden Baden.
6. See Section 44 (1), second sentence of the *Joint Rules of Procedure*.
7. Presentation by the NRCC to the team on 10 March 2009.
8. In the practice it is understood that the *Joint Rules of Procedures*, which are silent on how federal ministries should handle external proposals, “imply” by assumption that they ought to follow the same procedure as if they were own draft proposals.
9. See: Section 45, paragraph 1 of the *Joint Rules of Procedures*.
10. See: Section 50 of the *Joint Rules of Procedures*.
11. According to the 2008 report from the EVIA Project (Evaluating Integrated Impact Assessments), see *www.userpage.fu-berlin.de/ffu/evia/*.
12. Ministry of the Interior (2006), Guide to Impact Assessment in the European Union, Berlin.
13. The ministerial guidance follows the provisions of the *Joint Rules of Procedures* and include:
 - Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (2005), Gender mainstreaming in drafting of legislation (*Gender Mainstreaming bei der Vorbereitung von Rechtsvorschriften*) – (in accordance with section 2 of the Joint Rules of Procedures).
 - Federal Ministry of the Interior (2000), Guide to regulatory impact assessment (*Leitfaden zur Gesetzesfolgenabschätzung*); and (2009, draft) RIA guide for practitioners (*Arbeitshilfe zur Gesetzesfolgenabschätzung*), – (section 44 (1) of the GGO).
 - Federal Ministry of Finance (2006), General requirements of the federal Ministry of Finance for statements of the impacts of legislative proposals on the income and expenditure of public budgets (*Allgemeine Vorgaben des Bundesministeriums der Finanzen für die Darstellung der Auswirkungen von Gesetzgebungsvorhaben auf Einnahmen und Ausgaben der öffentlichen Haushalte*); and (2008), Regulatory impact assessment in tax law (*Gesetzesfolgenabschätzung im Steuerrecht*) – (section 44 (2) of the GGO).

- Federal Ministry of Economics and Technology (2008), Guide for Practitioners; and Costs to private industry and price impacts (*Kosten für die Wirtschaft und Auswirkung auf die Preise*) – (section 44 (4) of the GGO).
 - Federal government (2008), Guidelines for the ex-ante impact assessment of administrative burdens using the standard cost model (*Leitfaden für die ex-ante-Abschätzung der Bürokratiekosten nach dem Standardkosten-Modell*) – (section 44 (5) of the GGO).
14. Cfr. Proposal by the Bundestag’s Economics and Technology Committee, *Schwerpunktsetzung beim Bürokratieabbau ist erfolgreich, Entschließungsantrag der Mitglieder der Fraktion der CDU/CSU sowie der Fraktion der SPD im Ausschuss für Wirtschaft und Technologie zu dem Jahresbericht 2008 des Nationalen Normenkontrollrates (1 6-1 0039) und dem Bericht der Bundesregierung 2008 zur Anwendung des StandardkostenModells* (16-11486), of 21 April 2009.
 15. See “2002 Regulatory Impact Assessment – A Field Test” (quoted from Germany’s reply to the OECD questionnaire, p.174).
 16. RIAs on the following draft bills:
 - Federal Ministry of the Interior – federal Data Protection Audit Act (*Bundesdatenschutzauditgesetz*) and the Act on Electoral Statistics (*Wahlstatistikgesetz*).
 - Federal Ministry for Family Affairs, Senior Citizens, Women and Youth – Act on the Organisation of Services for the Elderly (*Altenhilfestrukturgesetz*).
 - Federal Ministry of Finance – business taxation.
 - Federal Ministry of Labour (*ordinance on orthopaedics, Orthopädieverordnung*) and the evaluation of various acts.
 - Federal Ministry of Justice with regard to the act governing mediation between perpetrators and victims (*Täter-Opfer-Ausgleichsgesetz*) and the Witness Protection Act (*Zeugenschutzgesetz*).
 17. See paragraph 43 of the *Joint Rules of Procedure*.
 18. The description made in the 2004 OECD review is still accurate.
 19. Germany understands the two terms as synonyms.
 20. Cfr. federal Ministry of Justice, Manual of Legal Drafting, 3rd edition 2008, paragraph 256.
 21. The Guidelines explicitly draw on Section 44 of the *Joint Rules of Procedures*.