

Chapter 7

The interface between member states and the EU

An increasing proportion of national regulations originate at EU level. Whilst EU regulations¹ have direct application in member states and do not have to be transposed into national regulations, EU directives need to be transposed, raising the issue of how to ensure that the regulations implementing EU law are fully coherent with the underlying policy objectives, do not create new barriers to the smooth functioning of the EU Single Market, avoid “gold plating” and the placing of unnecessary burdens on business and citizens. Transposition also needs to be timely, to minimise the risk of uncertainty as regards the state of the law, especially for business.

The national (and subnational) perspective on how the production of regulations is managed in Brussels itself is important. Better Regulation policies, including impact assessment, have been put in place by the European Commission to improve the quality of EU regulations. The view from “below” on the effectiveness of these policies may be a valuable input to improving them further.

Assessment and recommendations

The influence of EU origin regulations is significant, as in other EU countries. The German legal system is strongly influenced by EU law. In some areas such as agriculture and the environment, this affects up to 80% of regulations. The recent measurement of administrative burdens on business established that EU or international origin regulations accounted for some EUR 25 billion, roughly half of the overall annual administrative burdens on enterprises.

The co-ordination of EU issues is shared by two ministries, with individual ministries taking the policy lead. As in most other EU countries, the federal government does not have a single policy lead for the management of EU affairs. Each federal ministry is responsible for its area of competence. Co-ordination is mainly carried out through the federal foreign office and the federal Ministry of Economics. The role of the federal parliament is also a defining feature of the German structure. It is significant and can extend to replacing the federal government during the negotiations. The parliament is also the place where EU issues that need to be shared between the federation and the *Länder* are agreed.

Impact assessment on EU origin regulations follows the same track as for national legislation. In principle impact assessment is applied the same way as for national laws. The Interior ministry provided guidelines for EU impact assessment in 2006. Priority and resources go to ensuring consultation with the *Länder*, business and labour organisations, and to assuring the constitutionality of the new measures. Business and the unions told the OECD peer review team that consultation procedures for EU origin regulations should be improved.

Recommendation 7.1. Review the extent to which impact assessment is applied for EU origin regulations, both at the negotiation and the transposition stages, and the approach which is taken. Consider how the process could be improved, taking account of the European Commission’s own impact assessment processes. Consider in particular whether there is a need to strengthen consultation with stakeholders.

The German record on transposition is average and the system does not include any clear sanctions to ensure timely implementation. In the latest EU Scoreboard, Germany’s implementation deficit was 3% of European directives to be transposed, ranking about average among EU Member States, although well above the target of 1.5% set by the European Councils. A database helps to track progress in transposition against deadlines, and other monitoring tools are used. The OECD peer review team heard that the *Länder* consider transposition to be a challenge because directives lack precision, are too general, and do not correspond with German legal terminology.

Recommendation 7.2. Carry out a review of transposition processes, in co-ordination with the *Länder*. Consider how the system could be improved with incentives (and sanctions) for late transposition.

In recent years Germany has intensified its contribution to the European debate on Better Regulation. In particular, it has been close to developments relating to administrative burden reduction programmes, and was instrumental in the launch of the EU programme. The NRCC interacts closely with the European High Level Group of Independent Stakeholders on Administrative Burdens (*Stoiber Group*), and is a respected player in the European SCM network. There is considerable interest and concern about the need to better manage EU aspects of Better Regulation (which was acknowledged to be as much the responsibility of member states as the EU institutions).

Recommendation 7.3. Use the EU dimension to frame German Better Regulation more clearly as a potentially key contributor to growth, competitiveness and jobs.

Background

General context

As in other EU countries, the German legal system is strongly influenced by EU law. In some areas such as agriculture and environment protection, this affects up to 80% of regulations. The recent measurement of administrative burdens on business established that regulations derived from the transposition of EU or international laws accounted for some EUR 25 billion, which is slightly more than the half of the annual overall administrative burden on enterprises (see Table 5.1 above).² The German baseline measurement showed a total burden of approximately EUR 18 billion for the transposed legal acts of the European Commission’s Action Programme (*i.e.* the EU directives related to the 13 priority areas selected at EU level: approximately EUR 4.1 billion from EU company law plus approximately EUR 13.9 billion from the other twelve areas (status: September 2008)).³

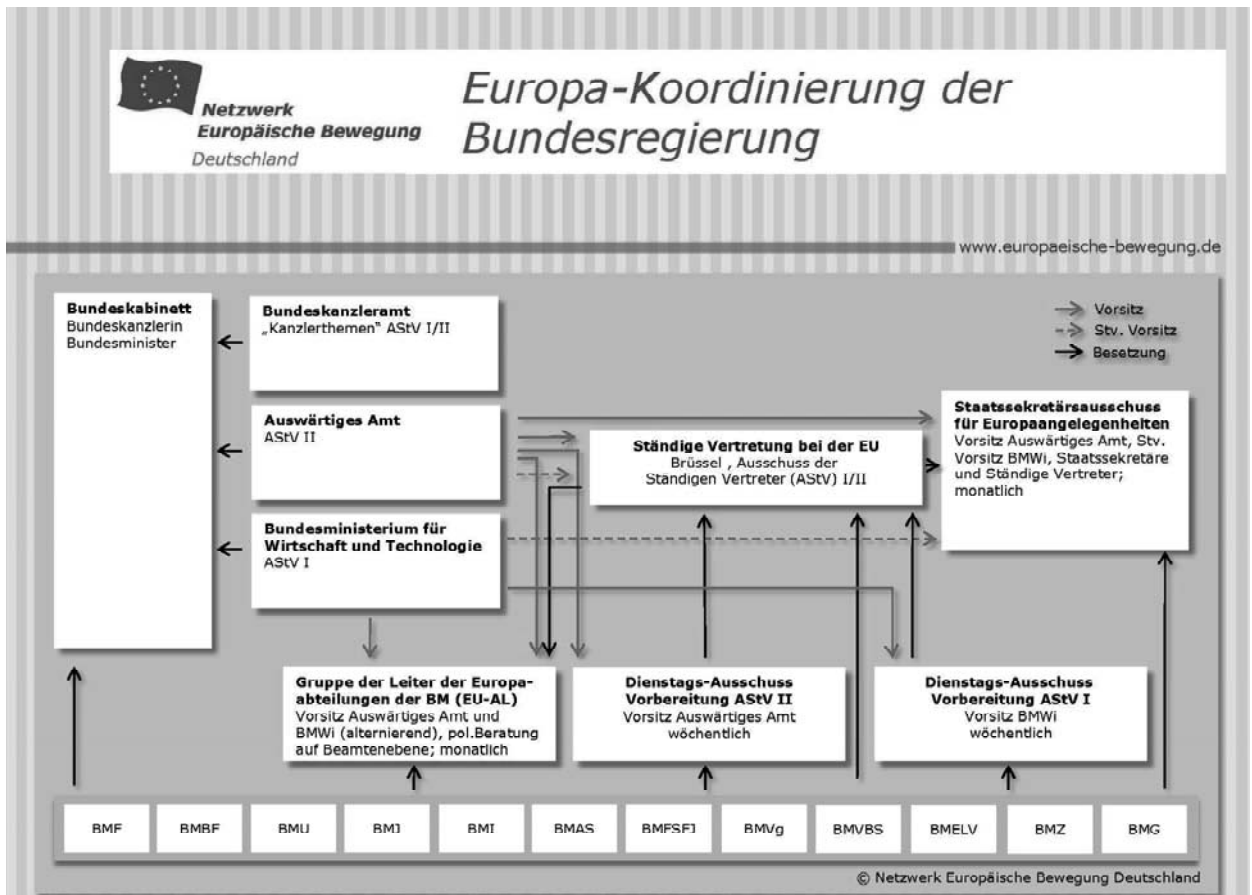
Negotiating EU regulations

Institutional framework and processes

As with most other EU countries, the federal government does not have a central policy lead for the management of EU affairs. In its areas of competence, each federal ministry is responsible for all matters related to the preparatory process leading to the adoption of a proposal by the European Commission (and, as outlined below, for its implementation), although the participation of the federal foreign office is always required in matters of fundamental importance. Co-ordination is shared primarily between two ministries (the Ministry of Economics and Technology and the Foreign Affairs Office). However, the Better Regulation Unit and the Finance Ministry are also involved:

- General policy co-ordination is divided between the *Ministry of Economics and Technology and the federal foreign office*. While the first prepares topics discussed by *COREPER I*, the latter covers *COREPER II* dossiers.⁴ Instructions for *COREPER* are therefore transmitted through either of these Ministries, depending on the issue. Policy co-ordination units take up the issues where disagreement exists and address them in the regular meetings of Directors-General responsible for EU matters (whose chair alternates between the Foreign Office and the federal Ministry of Economics) or the Secretaries of State that deal with EU matters (chaired by the Minister of State for Europe at the Foreign Office).
- The *Ministry of Economics and Technology* enjoys a prominent position as it co-ordinates the government's responses to many ongoing developments in the EU. In particular, the Ministry is the main co-ordinator on matters related to Better Regulation, representing Germany in the relevant committees at EU level, notably the Competitiveness Council and the working group dealing with competitiveness and growth. The Ministry also co-ordinates the measures taken by other ministries in relation to Better Regulation in the EU. It represents the federal government in the EU High Level Group on Better Regulation,⁵ jointly with the chancellery.
- The *Better Regulation Unit within the federal chancellery* serves as the German interlocutor of the European Commission in the framework of the "Single Point of Contact" (SPOC) Action Programme and co-ordinates the latter within the federal government. The Unit serves also as a contact point for discussion of administrative burden reduction at the EU level as well as among EU member states.
- *The Ministry of Finance* is involved in financial matters.

Figure 7.1. The responsibilities and co-ordination mechanisms within the federal government on European affairs



Source: www.europaeische-bewegung.de/index.php?id=4566.

When the European Commission adopts a new proposal, the responsible federal ministry checks whether German law is in line with the proposal and tries to remove possible discrepancies during the negotiations. At the federal level, the consultation procedures on EU matters are conducted along the lines of the procedure for national regulatory proposals, with the responsible ministry ensuring that the interests of stakeholders are appropriately taken into account.

Germany systematically attempts to contribute the decision-making process of the European Commission. Although there is no empirical evidence available to judge the success of these efforts, Germany has in several cases been successful in promoting options for the implementation of certain EU directives which were particularly appropriate to the German context, *i.e.* the option to choose negotiated access as a means to liberalise gas and electricity markets.

The role of parliament and the involvement of the Länder

The role of the *Bundestag* and the *Bundesrat* in the negotiating phase is considerable. The parliament is, crucially, the place where EU issues that need to be shared between the federation and the *Länder* are debated and agreed. The federal government must inform the *Bundestag* and the *Bundesrat* of all EU legislative acts at the earliest possible time.⁶ The *Bundestag* scrutinises the European policy of the federal government throughout the

negotiating phase. In accordance with Article 23 of the Basic Law, the *Länder* participate in matters concerning the European Union. The *Bundesrat* may give its opinion on EU draft legislation and the government must take such an opinion into account when negotiating in Brussels.

When the legislative powers of the *Länder*, the structure of *Land* authorities, or *Land* administrative procedures are “primarily affected”, the position of the *Bundesrat* “shall be given the greatest possible respect.” The consent of the government is nonetheless always required in matters that may result in increased expenditures or reduced revenues for the federation. When exclusive legislative powers of the *Länder* are primarily affected, notably concerning schools, culture, and broadcasting, the mandate for conducting negotiations within the Council of European Ministers “shall be” delegated to a State representative (usually a minister) designated by the *Bundesrat*. These rights shall be exercised with the participation and concurrence of the federal government. In this context, the *Bundesrat* as chamber representing the *Länder* and not as legislative organ, not only participates in determining the German position domestically, but directly takes over the function of representing the Federal Republic of Germany as a member of the EU. In cases involving areas other than the three specified above, the *Länder* can appoint a representative only in consultation with the federal government.

The *Länder* also participate in the European Committee of the Regions, sharing ownership of its opinions and reports. Furthermore, all of the *Länder* have a liaison office in Brussels, which enables a direct exchange of information with, as well as lobbying of the EU institutions.

Ex ante impact assessment

The responsibility of each federal Ministry in EU affairs includes the consideration of whether impact assessments should be carried out during negotiations on the Commission proposal in the EU legislative process, and subsequently throughout the national law-making process. After the submission of a proposal by the Commission, the lead ministry is also supposed to analyse whether a plausible estimate of the expected administrative burden has taken place, and make such an assessment if it has not been done. The Ministry of Interior provided guidelines concerning EU impact assessment in 2006. These guidelines contain information on the methodologies for analysis as well as indications on the way impact assessments are prepared and used at the EU level. They also provide federal ministries with concrete recommendations on how to best make use of the tool, and encourage them to critically consider the European Commission’s own impact assessments to ensure that German interests are taken into account at an early stage in the decision-making process.

Transposing EU regulations

Institutional framework and processes

Responsibilities for implementing EU legislation are distributed in accordance with the allocation of legislative and implementing competences between the federal government and the *Länder*. Within the federal government, drafts implementing EU legislation are prepared by the federal ministry responsible for the subject area, as governed by the *Joint Rules of Procedure*. The allocation of responsibilities during the transposition phase does not significantly differ from the negotiation stage (see above).

When adopting new national legislation on the basis of EU legislation, the responsible ministry determines whether the regulatory proposal is in line with European legislation, if necessary in consultation with the Ministry of Economics and Technology, the Ministry of Justice, the Foreign Office, and other bodies concerned. Since there are rules on procedures and responsibilities, conflicts regarding responsibilities are rare. The federal chancellery arbitrates in case of disagreement on how to allocate the tasks. In exceptional cases, the chancellor shall make use of his/her power to impose policy guidelines.

The position of the *Länder* is taken into account to different degrees by the federal government, depending on the matter. As a rule, the procedures leading to the adoption of transposition acts are the same as the decision-making process followed in the case of domestically initiated bills. The responsible federal ministry still functions as a co-ordinator even if competence for the transposition of a directive lies with the *Länder*. The ministry provides help on request and collects the relevant information for an efficient monitoring and final notification to the EU Commission.

Federal structures pose specific challenges for timely transposition and Germany is no exception. The existence of various layers of governments as well as different institutional authorities intervening according to the different policy areas makes transposition particularly complex. The 2006 federalism Reform contributed to streamline the process by abolishing “framework legislation”. This type of legislation allowed for wide legislative discretion by the *Länder*, leading in some cases (such as environment protection) to dozens of different acts linked to the transposition of the same directive. Further to the reform, only one federal transposition act is necessary, although it may involve the adoption of secondary implementation measures in each *Land*.

Legal provisions and the role of parliament

During the transposition phase, both chambers are involved in the adoption of legislation implementing EU directives. The transposition of directives follows the general procedures of legislation laid down in the Basic Law. There are no specific rules or fast-track procedures. In general, draft legislative acts transposing an EU directive are sent to the parliament one by one. To the federal government’s knowledge, this does not cause any problem for the parliament in terms of keeping up with the pace of the European agenda.

Ex ante impact assessment

It is the responsibility of each responsible federal ministry to organise the transposition process, provided that the provisions included in the *Joint Rules of Procedures* are respected. Accordingly, the type of RIA and the kind of analysis carried out are not dissimilar to what federal ministries normally do when preparing bills of domestic origin. Impact assessments are automatically carried out in the case of enacted EU legislation, since transposition into national law is by means of a national legal act.

Monitoring transposition

In addition to the federal Ministry of Economics and Technology, which is responsible for overseeing the implementation of EU legislation at the federal level, each Ministry directly affected by an EU legal act is responsible for ensuring the implementation of the relevant EU legislation. EU Directors-General and EU State Secretaries, as well as other bodies responsible for co-ordinating EU affairs within the federal government are consulted if necessary. Various mechanisms are in place to monitor transposition:

- Monitoring by regular meetings of Directors-General and of State Secretaries responsible for EU matters.
- Obligation to report to the *Bundestag* in accordance with § 4 (4) nos. 2 and 3 of the Act on Co-operation between the federal Government and the German *Bundestag* in Matters concerning the European Union (*EuZBBG*).
- Obligation to co-ordinate with, and report to the *Länder* in accordance with para. VI nos. 1 and 2 of the annex to § 9 of the Act on Co-operation between the federation and the *Länder* in Matters concerning the European Union (*EuZBLG*).

As regards the relation between the federation and the *Länder*: liability for failure to meet specified deadlines; See Art. 104a para. 6 of the Basic Law (GG).

Gold-plating is not considered a negative practice per se by the federal government, provided it does not delay transposition. It may even be considered a useful tool, for the better integration of transposition measures into the existing legal framework. Some stakeholders even suggest that gold-plating has been “a matter of course” for successive governments. Nonetheless, the principle that gold-plating must be avoided if it puts at risk the timely transposition of a directive has been agreed by the federal ministries’ State Secretaries responsible for European affairs.

At the *Länder* level, transposing EU legislation is reported to offer significant challenges partly because they are often too imprecise, too general and not formulated closely enough in line with German legal terminology. This makes it difficult to integrate them into the federal legal system. Also for this reason, one-to-one transposition, although stated as a principle in many *Länder*, is often problematical, leading to instances of gold-plating.

Interface with Better Regulation policies at EU level

In recent years, Germany has intensified its contribution to the European debate on Better Regulation. It has for instance been very active in promoting the administrative cost reduction agenda at the European level. It was not a coincidence that the EU Action Programme to cut administrative burdens was adopted during the German Presidency of the EU in 2007. Germany’s government programme, which was initiated before the Action Programme was launched, fits within this overall framework. As one of the five Member States⁷ conducting their own burden measurement, Germany has identified burdens on business resulting from the implementation of EU regulations. Germany’s measurement data are being incorporated into the EU totals.

Box 7.1. Germany's performance in the transposition of EU Directives

Germany's backlog in transposing EU legislation has been below the rate of 1% required by the European Council. The latest European Commission Internal Market scoreboard reports at 0.8% the deficit in July 2009, ranking Germany at the 13th place. Thus, Germany has regularly ranked among the top half of Member States as regards transposition of Internal Market Directives. With regard to the transposition of EU directives in all sectors, Germany ranked at the first place in September 2009.

The number of open infringement proceeding is by contrast well above average. With 73 pending cases initiated by the European Commission, Germany is sixth after Italy, Spain, Belgium, Greece and France in terms of disputes on the *acquis communautaire*. The number of cases decreases continuously, but remains at a certain base rate *inter alia* because of the number of alleged infringements of public procurement law by municipalities (ca. 12 000 municipalities in Germany with 82 million inhabitants). Cases pending before the ECJ, however, are at a very low level (six judgments in infringement cases in 2008, and only in three of them the ECJ held that Germany actually infringed Community law).

DE	Nov-97	May-98	Nov-98	May-99	Nov-99	May-00	Nov-00	May-01	Nov-01	May-02
Transposition deficit as % in terms of Internal Market Directives	8.5	5.4	2.7	2.4	2.9	3.4	3.1	2.8	2.6	2.4
	Nov-02	May-03	Jul-04	Jul-05	Dec-05	Jul-06	Nov-06	Jul-07	Nov-07	Jul-08
	2.7	3	3.5	1.4	1.3	1.8	1	1	0.9	0.5

DE	Aug-00	Mar-01	Oct-01	May-02	Oct-02	Apr-03	Oct-03	Apr-04	Nov-04	May-05	Nov-05
Directives for which no national measures (implementing all adopted directives) have been notified as %	11.2	5.78	4.57	4.43	4.09	3.62	2.98	2.26	2.48	0.78	0.5
	May-06	Nov-06	Mar-07	May-07	Jul-07	Oct-07	Nov-07	Feb-08	Apr-08	Jun-08	Aug-08
	1.09	1.11	0.83	0.57	0.64	0.32	0.39	0.49	0.51	0.41	0.51

DE	Mar-07	May-07	Jul-07	Oct-07	Nov-07	Feb-08	Apr-08	Jun-08	Aug-08
Directives for which no national measures (implementing all directives in force) have been notified as %	1.37	0.95	1.07	0.53	0.65	0.82	0.86	0.68	0.85

European Commission Impact assessments are used in particular during the negotiating process. Germany considers that they often provide useful information *e.g.* for the assessment of the subsidiarity and proportionality principles, or the economic effects of a planned piece of legislation. They also reveal if such an assessment has not (or insufficiently) been carried out. The quality of EU Impact assessments is considered in general to have steadily improved over recent years. The Impact Assessment Board plays an important role in this context. Nevertheless, there is some room for improvement. This concerns on the one hand the assessment of administrative burdens and the assessment of effects on SMEs, which Germany believes would benefit from (additional) external scrutiny. The scope for EU Impact assessments could also be broadened.

The *NRCC* interacts closely with the European High-Level Group of Independent Stakeholders on Administrative Burdens (so-called “*Stoiber Group*”). It is also a respected reference institution in the inter-governmental dialogue between EU Member States, holding regular contacts with similar oversight bodies in the Netherlands and in Sweden as well as representatives of the European SCM Network. The *NRCC* also supports the federal government on questions of EU policies concerning Better Regulation in general.

Notes

1. Not to be confused with the generic use of the term “regulation” for this project.
2. Costs resulting from directly applicable EU law, *i.e.* EU regulations, were not identified comprehensively, but only in selected areas.
3. See: federal Government, 2008 Report on the Use of the Standard Cost Model, p.35. The EU Action Programme includes both directives and regulations.
4. With the exception of trade policy matters, which are in the competence of the federal Ministry of Economics. *COREPER* (from the French *Comité des représentants permanents*) is the Committee of Permanent Representatives within the Council of European Ministers. Its task is to prepare the meetings of the European Council. It consists of two formations, the so-called *COREPER I* (composed by the deputy heads of mission and dealing largely with social and economic issues); and the *COREPER II*, whose members are the heads of mission (with usually the rank of ambassador). The *COREPER II* deals political, financial and foreign policy issues.
5. Composed by national regulatory experts, the EU High Level Group on Better Regulation was set up in 2006 by the European Commission in order to advise the Commission on its general strategy to simplify and improve European legislation and to facilitate the development of better regulation measures at both national and EU level (see: http://ec.europa.eu/enterprise/regulation/better_regulation/high_level_group_en_version.htm, last accessed 29 May 2009).
6. This obligation is enshrined in the Basic Law (Art.23) and a number of legal text, including the “Act on Co-operation between the federal Government and the German *Bundestag* in Matters concerning the European Union” (*Gesetz über die Zusammenarbeit von Bundesregierung und deutschem Bundestag in Angelegenheiten der Europäischen Union, EUZBBG*).
7. The States are Austria, Denmark, Germany, the Netherlands and the UK (status: April 2009. *Source*: European Commission).



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