

Chapter 8

The interface between subnational and national levels of government

Multilevel regulatory governance- that is to say, taking into account the rule-making and rule-enforcement activities of all the different levels of government, not just the national level- is another core element of effective regulatory management. The OECD's 2005 Guiding Principles for Regulatory Quality and Performance "encourage Better Regulation at all levels of government, improved co-ordination, and the avoidance of overlapping responsibilities among regulatory authorities and levels of government". It is relevant to all countries that are seeking to improve their regulatory management, whether they are federations, unitary states or somewhere in between.

In many countries local governments are entrusted with a large number of complex tasks, covering important parts of the welfare system and public services such as social services, health care and education, as well as housing, planning and building issues, and environmental protection. Licensing can be a key activity at this level. These issues have a direct impact on the welfare of businesses and citizens. Local governments within the boundaries of a state need increasing flexibility to meet economic, social and environmental goals in their particular geographical and cultural setting. At the same time, they may be taking on a growing responsibility for the implementation of EC regulations. All of this requires a pro active consideration of:

- The allocation/sharing of regulatory responsibilities at the different levels of government (which can be primary rule-making responsibilities; secondary rule-making responsibilities based on primary legislation, or the transposition of EC regulations; responsibilities for supervision/enforcement of national or subnational regulations; or responsibilities for service delivery).
- The capacities of these different levels to produce quality regulation.
- The co-ordination mechanisms between the different levels, and across the same levels.

Assessment and recommendations

Better Regulation initiatives by the Länder are largely separate from federal initiatives, in keeping with their independent status. The Länder are not directly subject to the federal level Better Regulation agenda. For example, they are not formally part of the federal government's administrative burden reduction programme, although there has been some co-operation through pilot projects. Instead, most of the Länder have developed aspects of

Better Regulation on their own account and suited to their own context. Some initiatives go back a long way, to the mid 1970s. It was beyond the scope of this review to assess the situation in detail, but the reduction of administrative burdens and modernisation of the public administration appear to be the current focus of the *Länder*'s Better Regulation agenda. Initiatives are not confined to the *Länder* level, with a number of cities taking initiatives too.

There appears to be a patchwork of Better Regulation initiatives at the Länder level, some of which are quite highly developed. A few Länder are well advanced in Better Regulation policies, sometimes beyond the federal initiatives. A number of Länder have established dedicated central units for Better Regulation or some form of oversight. They commonly make use of the Internet to consult and communicate with stakeholders. Administrative burden reduction is the most widely used process, backed up by a decision of the Bundesrat in 2007 on a series of measures restricting the density of regulations and reducing the number of standards and administrative provisions. There are marked differences as regards the deployment of ex ante impact assessment procedures. It is acknowledged that practice is so far not optimal and there is room for improvement. The implementation of the EU Services Directive (as in other EU countries) is having a marked impact on the organisation of services.

Federal-Länder co-operation starts at the top with the engagement of the Bundesrat. The relevance of the Länder for the implementation of federal legislation lies in their active role throughout the processes used to shape the latter, not least via their consent expressed in the Bundesrat, which represents the sixteen Länder governments. The Joint Rules of Procedure require ministries to involve representatives from the Länder "as early as possible" in the regulatory process. Every bill passed by the Bundestag must be submitted to the Bundesrat, either requiring its consent or allowing it to lodge an objection. Beyond this strong formal engagement between the federal level and the Länder, regular information exchanges take place via the federal chancellery Better Regulation unit. There are also specialised conferences and a network of working groups to pick up issues of shared interest.

Recommendation 8.1. Consider a review/evaluation of co-operation agreements and working groups, to pinpoint what works and what works less well (and why). Seek to identify Better Regulation processes (such as administrative burden reduction) or issues (such as sustainability) where there is shared interest in enhanced co-operation, and focus efforts on these issues.

There appear to be some challenges with federal-Länder co-operation mechanisms leading to a suboptimal handling of important issues. The OECD peer review team heard some concerns about the implementation of federal laws (their complexity and inflexibility) which suggests that the system does not always work smoothly. The fact that federal and Länder Better Regulation initiatives are largely disconnected also suggests that the mechanisms for co-operation are not fully effective in promoting a shared agenda where this is appropriate, for example in the area of administrative burdens. Both levels of government lose out on the added value of working together. The failure to co-ordinate effectively may partly be explained by the fact that there are too many (not too few) working groups, and focus is lost.

Co-operation inevitably has a political nature which can undermine the enforcement of any resulting agreements.

Competition is more evident than co-operation between the Länder. The scope for competition in a federal system can have a positive impact on the introduction of Better Regulation tools and the development of best practices. Germany considers that the complexity of a federal state is balanced by the advantage of competition between the *Länder*. It positively encourages this approach, as evidenced by the planned introduction of a benchmarking provision in the Basic Law (the first provision of its kind in Europe). Each *Land* appears to concentrate on its own needs, though some are willing to co-operate with others over best practice, and the co-operation network appears to be growing. The OECD peer review team were told that it was important not to take too structured an approach. Sharing of best practice was best spread informally. *Länder* vary a lot in size (city size to country size) and economic strength. Variable geometry may allow more flexibility and dynamism but there is also the risk of duplication of effort. The question which also needs to be asked is how do companies cope when they “migrate” across *Länder* boundaries with different regulations?

Recommendation 8.2. Consider an evaluation of the extent to which competition between the *Länder* really does stimulate best practices, and the extent to which these are picked up across the *Länder*. Consider a survey of business views to check attitudes to the German internal market and its efficiency (in terms of harmonised regulatory approaches across the *Länder*).

Background

Structure, responsibilities and funding of local governments

Structure of subnational governments

There are three levels of government (federal, *Land* and local). There are sixteen *Länder* which are states in their own right, exercising state authority - including the right to develop and enact legislation - in the areas set out in the Basic Law (see below). Each *Land* has its own constitution, parliament, government, administrative structures, and courts. The municipalities (*Kommunen*) comprise 12 200 cities and communities, and 301 rural districts and counties (*Landkreise*).

Responsibilities and powers of subnational governments

Länder responsibilities

The federal nature of the German state means that significant powers and responsibilities are with the *Länder*, linked to their competences under the constitution.

Areas subject to concurrent competences include civil and criminal law, public welfare, food and medicines law, transport, protection of the environment, university admission and diplomas, and regional planning. The power to legislate lies with the *Länder* until the federation does not hand down any statutes of its own in those fields. In some domains, the federation is entitled to legislate only if it is necessary to create equivalent living conditions on the federal territory or to maintain legal or economic unity in the overall state interest. In some cases of concurrent legislation, the *Länder* have a right to derogate in principle and are entitled to adopt their own derogating laws, even after the federation has handed down laws. In this case, the most recently adopted statute applies. Areas where the derogation principle applies include nature conservation, regional planning, admission to and graduation from higher education institutes.¹

The *Länder* exclusive competences include their own constitutions, internal security and policing, education, cultural affairs, and radio legislation. A key exclusive competence is over local government (see below). Only the *Länder* are entitled to delegate tasks to the local level, and they have exclusive responsibility for the organisation of local government. According to Art. 84 (1) of the Basic Law, the *Länder* are entitled to decide on the establishment of authorities and administrative procedures, as well as related implementing acts and ordinances, which mainly address municipalities (*Kommunen*) in their implementation tasks.

County and municipality responsibilities

The federal system laid down by the Basic Law establishes that the municipalities are constituent parts of the *Länder*. The *Länder* therefore set the framework for the operation of local governments. At the same time, in line with a constitutional tradition which goes back to the early nineteenth century, the municipalities and counties have had self-governing rights in all local community matters under their responsibility within the framework of the laws. The Basic Law stipulates that they must be given the opportunity “to regulate all local affairs on their own responsibility, within the limits prescribed by the laws”. This right of self-administration specifically covers public local transport, public road-building, water, gas and electricity supplies, sewage disposal services and town planning. In addition, they play a traditionally very active and autonomous role in the delivery of a broad range of public services. These include social assistance, local land-use and infrastructure provisions. They implement almost three-quarters of federal and *Länder* legislation. The functional (though not rule making) importance of local governments in Germany is therefore significant compared to most other OECD countries.

Municipalities and counties may initiate their own projects and policies to improve enforcement, within the framework of local self-administration. They grant licences, implement procedures, draw up plans etc. Over 800 local utilities cover activities such as electricity, gas and water services, many of which are partly or wholly owned by the municipalities. Within the framework of municipal self-government, supervision of the *Länder* is limited to the legality of the administrative procedures used.

Funding of subnational governments

The federation has almost exclusive power to legislate on taxes. The total tax revenues are shared between the federation, the federal states (*Länder*) as a whole and each *Land*. In addition, the financial equalisation among the *Länder* designed to remedy structural differences between financially stronger and weaker states by sharing tax revenue helps also disadvantaged *Länder* meet their obligations and enjoy their sovereignty. This is to ensure equal living conditions throughout the federal territory. In addition, the federation may allocate additional grants from its own funds to less favoured *Länder*, *i.e.* in addition to the redistribution among the *Länder*. In each *Land* there are similar equalisation systems in place to remedy differences between municipalities.

Public revenue is divided between a “separation system” and a “*connex system*” (Art. 106 of the Basic Law). Under the first form, proceeds of taxes are allocated to a single level of the system (either the federal, the *Land*, or the municipal level). By contrast, various levels share the proceeds of the latter form of taxes (these are also called joint taxes). Some 70% of Germany’s tax receipts is collected through the “*connex system*”.

There are three schemes for *Länder* development projects. “Joint Fiscal Tasks” are jointly decided by the federal government and all *Länder*, and cover fields such as subsidies to improve regional economic structures, and financial aid for R&D. “Investment Aid” can be granted for major investment projects by the *Länder* or communities to promote balanced economic development. Grants for the “Disbursement of Funds” support social transfers by the *Länder*. Complex institutional arrangements are in place to regulate these transfers, but a number of factors are said to hinder optimal efficiency in resource allocation. Major taxes like the individual income tax or the value added tax (VAT) are for instance divided between the federal, *Land*, and, sometimes, local levels according to complex rules. Co-financing (*i.e.* the joint funding of projects by the three layers of government) is perhaps the most important issue hindering cost-efficiency, for split responsibilities for a project not only seriously impede effective project evaluation but also project control.²

The introduction of a new common debt rule for the federation and the *Länder* as of the budgetary year 2011 was the core of federalism Reform II (*Föderalismusreform II*), which entered into force in August 2009. According to this reform, no credit is allowed to balance the federal and state budgets. Only a few exemptions are admitted. Five financially particularly weak *Länder* receive consolidation aids to ensure compliance with this rule.

Better Regulation policies deployed at subnational level

General context

The *Länder* are not directly subject to the federal level Better Regulation agenda or processes as regards their own regulatory activities. Most of their regulatory activities (development and implementation of their own legislation, implementation of federal legislation in their own right) are carried out independently, in keeping with their independent status under the constitution. The *Länder* are not, for example, an integral part of the federal government’s “Bureaucracy Reduction and Better Regulation” programme. Apart from exchanges of information, data and experience with the Better Regulation Unit at the federal chancellery, the programme is not a joint programme involving all levels of government.

Most of the *Länder* have developed elements of an approach to Better Regulation tailored to their specific needs. Interest and initiatives go back a long way. In some *Länder*, policies to promote quality regulation date back to the mid-1970s. Germany was among the first EU member states to develop quality standards for a wide range of public organisations (from rent insurance companies, to museums and regional councils) and this included the *Länder*. From the early 1990s measures aimed at reducing administrative burden and promoting innovative solutions to bureaucratic issues were developed through the Speyerer Qualitätswettbewerb. The reduction of administrative burdens and modernisation of the public administration appear to be the current main focus of the *Länder* Better Regulation agenda.

Initiatives have not been confined to the *Länder* level. Among other initiatives a number of cities developed innovative approaches to city management as well as solutions leading to their further effective development.³ The local level has triggered debate and action with respect to the New Public Management reforms, which continue today.

The scope for competition in a federal system can have a positive impact on the introduction of Better Regulation tools, notably with regard to streamlining public administration, simplifying the legislative environment, and spreading e-Government. Individual state and local authorities may compete with each other for new residents or

businesses. This competition encourages a search for best practices and makes it possible to test different approaches. The German system positively encourages this approach, as evidenced by the introduction of a provision for benchmarking in the Basic Law. Better Regulation is generally seen as important for the promotion of the economy, playing its part alongside other policies to promote an attractive fiscal environment and secure effective infrastructure.

Institutional framework for Better Regulation

A number of *Länder* have established dedicated central units for Better Regulation policies and/or oversight bodies located at the centre of their government. Some of them were introduced in the early 1990s. “Regulatory review bodies” are quite common at the *Länder* level. Their mandates range from providing advice to formally checking the quality of legislative drafts and monitoring compliance with administrative procedures.

Public consultation and communication

Länder commonly make use of the Internet, to involve stakeholders and communicate their Better Regulation initiatives. Information is also often channelled through the state and local chambers of commerce. The *Länder* manage their own official gazette where enacted state-level legal acts are notified and published. The majority of the *Länder* complement this with online registers. Some *Länder* post the rules of procedures of the state government as well as the guidelines for impact assessment. Brochures and newsletters are also widely used.

Ex ante impact assessment of new regulations

Differences between *Länder* are significant, both with regard to the legal framework and procedures. Most *Länder* have binding provisions on RIA, among which the *ex ante* assessment of risks may be covered. Sunset clauses are regularly used in many *Länder*, in some cases for many years.

The *Länder* are relatively advanced in their considerations to institutionalise parliaments’ assessments of the impacts and quality of draft bills. Like at the federal level, the responsibility for RIA lies with the lead ministry. The mechanisms introduced by the *Länder* to examine the preparation of legislation usually encompass also the monitoring of the RIAs carried out. The results of the assessments are usually reported in the legislative proposal, and can be accessed by the State parliament and the consulted parties for examination. Initiated by the *Land* Rhineland-Palatia, the Conference of the presidents of the *Länder* Parliaments have since 1996 been discussing measures to strengthen the effectiveness of the regulatory quality checks made by the parliaments. In 1998, the presidents of all *Land* parliaments called for an extended use of regulatory quality assurance mechanisms to complement analysis and assessments by the executive. This included recommendations for parliaments to oblige their governments to report, after a certain period of time, on the effects of a new regulation, and that parliaments’ committees systematically apply a set of regulatory quality test questions in their scrutiny of bills.⁴ A number of *Länder* also considered formalising RIA and other regulatory assurance mechanisms in the respective *Länder* rules of procedure.

In Rheinland-Palatia, early considerations included creating a specific body charged with carrying out assessments for the Parliament of the quality of bills.⁵ This idea was rejected, apparently because the Parliament considered the task to be technical and scientific, and possibly constraining the Parliament in its political deliberations. The Rheinland-Palatia Parliament instead opted for a closer co-operation and more frequent

exchange of information with the government on assessments of draft regulations. An agreement effective from January 2001 between the Parliament and the government of Rheinland-Palatia aims at improving the *ex ante* assessment of bills by obligating the government to inform the Parliament at a very early stage of law drafting if RIAs of future planned regulation will be prepared.

Transposition of EU legislation

In their areas of exclusive competence the *Länder* follow the same procedures as they apply to the development of their domestic legislation.

Reduction of administrative burdens

The *Länder* agreed with a decision of the *Bundesrat* of July 2007 on a series of measures restricting the density of regulations and reducing the number of standards and administrative provisions. These initiatives aim at a long-term burden relief for enterprises, especially SMEs, and expanding the municipalities and local administrations' scope for action to reduce burdens. Among others, the *Länder* measures include the introduction of a regulatory impact analysis taking account of all major interests of citizens and enterprises, as well as of a capping system for administrative provisions (systematic review of the number of administrative provisions in the *Land* at regular intervals). A review to consider how to reduce the number of administrative regulations and improving their flexibility (less binding) is also under discussion. Possibilities are being investigated of deregulation in areas in which the *Länder* were granted new legislative competences after the federalism Reform (*e.g.* law on administrative proceedings). The establishment in the *Länder* of a central legislation examination /supervision body is also under consideration.⁶ When they apply the SCM, the *Länder* have used the approach developed by the federal authorities.

Five *Länder* took part in two pilot projects conducted by the Bertelsmann Foundation on the reduction of administrative burdens for businesses, using a simplified version of the SCM (“SCM quick scan of *Land* law”) in 2006.⁷ On that occasion the applicability of the SCM to sub-national legislation was put to the test for the first time.

One-stop shops and the EU services directive

The implementation of the EU Services Directive (Directive 2006/123/EC) is having a range of impacts on the municipalities, since these are responsible for approximately 80% of the necessary permits and procedures for service providers. Accordingly, under the regime of the Directive, municipalities are intended to serve as standard points of contact in the larger *Länder* with a stronger economic base. This evolution formally institutionalises the already widespread process of consolidating one-stop shops in counties and municipalities. The necessary infrastructure is being created where it did not previously exist.⁸

Model local authorities

Various *Länder* have introduced experimental acts which provide either a limited number of so-called “model local authorities” or all their local authorities with an opportunity to deviate from certain standards defined under *Land* law for a limited period. These experiments are evaluated, accompanied by scientific analyses in some areas, with the aim of introducing successful practice to reduce superfluous regulations into *Land* law on a permanent basis.

Local level initiatives

The New Public Management reforms led to the implementation of a package of “control” reforms starting from the re-construction of the budget to the development of modern audit/inspection tools at the local level. The so-called *Neue Steuerungsmodell* was oriented at the local level and, above all, at the modernisation of local budgets. The *Kommunale Gemeinschaftsstelle fuer Verwaltungsmanagement (KGSt)* was also established in the wake of that reform wave.⁹ It is a voluntary co-operation platform of municipalities that has supported their members in their administrative reform. The *KGSt* today provides consulting services to local public organisations. It also serves as a common network to all the municipalities (with over 35 years of experience in some of its services (for instance *KIKOS Wissensdatenbank*, and *IKON Vergleichdatenbank* since 1971). It also facilitates the organisation of awareness/communication campaigns and events on administrative reforms. A *KGSt* Forum takes place every three years and has become a standard event for the German municipalities.

Co-ordination mechanisms

Vertical co-ordination

Co-ordination over the development of federal legislation

The major responsibilities of the *Länder* for the implementation of federal legislation means that they are active participants in the processes used to shape the latter, not least via the *Bundesrat*, which represents the sixteen *Länder* governments. The *Joint Rules of Procedure* requires ministries to involve representatives from the *Länder* “as early as possible” in the regulatory process. Each ministry has its own procedural rules. Generally, the *Bundestag* and all federal ministries are involved. There is no lead ministry. The Joint Rules also require that draft regulations include estimates of impacts on *Land* and local government budgets. The constitution requires that every bill passed by the *Bundestag* must be submitted to the *Bundesrat*, either requiring the *Bundesrat*’s consent, or providing it with the opportunity to lodge an objection (see Chapter 4).

Co-ordination over other regulatory activities

Vertical co-ordination between the different levels of government

A regular exchange of information takes place between the federation, the *Länder* and the local authorities’ national association through the Better Regulation Unit at the federal chancellery. Moreover, the *Länder* use the “standing specialised conferences” (*Fachministerkonferenzen*), federation-*Länder* work groups and *Länder* work groups or similar (e.g. the “Bureaucracy Reduction Network”)¹⁰ for the purposes of co-ordination and the mutual exchange of information. The specialised conferences meet regularly and are organised in several layers of Working groups and Lower Working Groups. Decisions taken by these bodies are, as a rule, not binding but guarantee a common approach of the federal and *Länder* authorities. The “*Deutschland-Online*” conference of State Secretaries serves as the steering body for the various layers of government for the purposes of co-ordinating reform projects in the area of e-Government.

Further to the *Föderalismusreform II*, a new process was introduced to avoid budgetary crises. A newly created Stability Council (*Stabilitätsrat*) took over co-ordination functions from the former Financial Planning Council. Members of the Stability Council are the federal Ministers of Finance and of Economy, as well as the finance ministers of the

Länder. The mandate of the Council is to monitoring the federal budget and the budgets of each *Land*; the examination of possible crisis situations on the basis of common criteria; and the creation and control of a recovery procedure to avoid the crisis.

The Standing Conference of the Interior Ministers of the *Länder* (IMK) generally meets twice a year, unless current political developments or threats to the public security require special meetings. Most issues discussed by the ministers and state secretaries are prepared by the six permanent IMK working groups, whose organisational structure mirrors the portfolio of the interior ministries. In addition to the topics prepared by the working groups, the *Länder* and the federation may request other items to be put on the agenda of the meetings, too. Shortly before the IMK meets, the state secretaries and state councillors also hold a conference during which they review the results of the working groups and the additional items for the agenda, and prepare them for the subsequent debate of ministers and senators. Possibility to abstain from voting. If a *Land* or the federation holds a different position, it may abstain from voting and explain its view in the minutes to the meeting. Normally, decisions of the IMK are made public, unless a *Land* or the federation objects to the publication.

Horizontal co-ordination

Horizontal co-operation between the *Länder* is through conferences of each ministry as well as the Conference of the Minister-presidents (the chief-executives of the state governments), which meets at least bi-annually. Several permanent working groups support the conferences. Horizontal co-operation is also *ad hoc*, including direct bilateral collaboration agreements and joint projects as well as co-operation across regions. Examples are inter-state treaties and other agreements to improve co-operation between the northern German *Länder* in the areas of consumer protection and *Land* laboratories or on IT matters. The implementation of the EU Services Directive has triggered rapid and intense rationalisation and collaboration of the provision of administrative services between *Länder* and municipalities.

“Benchmarking” is an important feature of the German system. Germany is the first country in the EU to enshrine the principle of benchmarking in a provision of the constitution to promote competition and continuous assessment. The necessary constitutional amendment entered into force in summer 2009. Because of the variety of experiences among the *Länder* and their willingness to experiment, comparisons, lesson-drawing and sharing of good practices are often used to advance reform. The approach deployed by Germany sensibly seeks to make the most of the juxtaposition of competition between the *Länder* and mutually helpful co-operation, with a view to reducing the significant current disparities between *Länder*.

Notes

1. This right has so far only been used once, in relation to hunting legislation.
2. See OECD Report 2004, p.54.
3. See for instance: H. Hill/H. Klages (1994), *Lernen von Spitzenverwaltungen*, RAABE; H.Hill/H. Klages (1995), *Reform der Landesverwaltung*, RAABE; H.Hill/H. Klages (1996), *Reform der Landesverwaltung II*, RAABE; H.Hill/H. Klages (1997), *Reform der Landesverwaltung III*, RAABE.
4. The recommendations of the presidents explicitly mention the use of the federal Governments' checklist questions in case there is no Land-specific questionnaire.
5. *Landtags-Drucksache Rheinland-Pfalz 13/3172*.
6. Cfr. The National Reform Programme. Germany 2005 – 2008. Implementation and Progress Report 2007, 8 August 2007, at: http://ec.europa.eu/growthandjobs/pdf/nrp2007/GE_nrp_en.pdf (last accessed 2 May 2009), p.46.
7. Bertelsmann Stiftung (2005), *Der SKM Quick-Scan im Überblick*, Gütersloh.
8. An example of successful facilitation of business start-ups is Rhineland-Palatia, where the procedure for setting up a business has been transferred to “Starter Centers”, *i.e.* chambers of commerce. People who want to set up their own business can now file several registrations with a single agency.
9. It initially operated under the name of *Kommunale Gemeinschaftsstelle für Verwaltungsvereinfachung*.
10. The “Bureaucracy Reduction Network” was established in 2007 on the initiative of Brandenburg to provide a forum for the exchange of views and information on topical issues between the bodies involved in efforts to reduce bureaucracy in all the federal *Länder*, the staff of the secretariat of the NRCC and the Better Regulation Unit at the federal Chancellery? At the same time, the network serves as a co-ordinating platform for the allocation of responsibilities and a common lobbying body. A jointly used database in which every Land can post current projects or literature facilitates the exchange of information.



From:
Better Regulation in Europe: Germany 2010

Access the complete publication at:
<https://doi.org/10.1787/9789264085886-en>

Please cite this chapter as:

OECD (2010), "The interface between subnational and national levels of government", in *Better Regulation in Europe: Germany 2010*, OECD Publishing, Paris.

DOI: <https://doi.org/10.1787/9789264085886-12-en>

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