

Chapter 3

Transparency through consultation and communication

Transparency is one of the central pillars of effective regulation, supporting accountability, sustaining confidence in the legal environment, making regulations more secure and accessible, less influenced by special interests, and therefore more open to competition, trade and investment. It involves a range of actions including standardised procedures for making and changing regulations, consultation with stakeholders, effective communication and publication of regulations and plain language drafting, codification, controls on administrative discretion, and effective appeals processes. It can involve a mix of formal and informal processes. Techniques such as common commencement dates can make it easier for business to digest regulatory requirements. The contribution of e-Government to improve transparency, consultation and communication is of growing importance.

This chapter focuses on two main elements of transparency: public consultation and communication on regulations (other aspects are considered elsewhere in the text – for example appeals are considered in Chapter 6).

Assessment and recommendations

Public consultation on regulations

There have been few significant changes in public consultation on draft regulations since the last OECD report in 2004. The assessments and conclusions of the 2004 report remain broadly valid. Public consultation by the federal government is formally regulated by the *Joint Rules of Procedure*, which specifies that ministries must consult early and extensively with a range of stakeholders. In practice, the process is in the hands of individual ministries to take forward in their own way, including on issues such as feedback, timing, publication of comments, selection of consultation partners etc. Informal pre-consultation rounds (with the *Länder*, municipalities and associations) are the norm, at an early stage in the process before a bill is drafted. The results are fed into the drafting, and the same parties are consulted a second time. In short, consultation takes the form of institutionalised negotiation and bargaining with key stakeholders and it is driven by a search for consensus.

E-consultation is an important and slowly emerging feature. “e-participation” is a federal government focus area. This is still at an early stage of implementation. For example, there was an e-consultation on the Citizens Portal Act in 2008, the first time that citizens could make direct comments on a draft federal bill. The roll out of the federal

programme for reducing burdens on business has provided an opportunity to test new and more open approaches to public consultation, through direct contact with businesses.

The combination of informality based on a strongly anchored tradition appears to be well liked by those in the system, and has certain strengths in the German context. The OECD peer review team did not have much opportunity to test the views of external stakeholders directly (SMEs, consumers, citizens, businesses). However the level of satisfaction would appear to be generally satisfactory, at least among those who are part of the process. Compared to many other countries, the consultation machinery is activated at an early stage. It is felt that economic and societal interests are heard and taken into consideration. While the process is not particularly transparent, it facilitates consensus building and is valued for this. Getting consultation “right” is a particular challenge in a large country. Compared with some of its European neighbours, Germany comes out relatively well.

The approach, however, falls short of a fully effective, modern and inclusive public consultation system. The issues raised by the 2004 OECD report remain largely valid. The two most important issues are the lack of transparency and the fact those outside the established system have little if any opportunity for their voices to be heard. This increases the risk of bias and capture in interpreting the results. Although annual reports by ministries providing information on their consultation practices are submitted to the parliament and the Court of Auditors, there has so far been no aggregate evaluation of this information (number of consultations held, stakeholders consulted etc). The OECD peer review team considered that there was a “black box” feel to the system. It is difficult to see into the box in order to form a judgment about the quality of the process. In any event, the exclusion of stakeholders who are not part of the traditional system is likely to stifle innovative ideas and miss useful inputs. It also puts citizens and individual businesses at arm’s length from the administration, which is unhelpful to the task of building a constituency in support of Better Regulation.

Box 3.1. Recommendation from the 2004 OECD report

Establish standards for consultation procedures and improve accessibility to existing regulations.

There is scope for improving current consultation and communication mechanisms. Germany should improve regulatory transparency by establishing formally defined standards for consultation procedures and by improving accessibility to existing regulations. The discretion left to ministries and the lack of minimum standards for the timing, content, process and scope of consultation procedures raises concern about the costs, transparency and accessibility of the process for stakeholders not familiar with or frequently operating in this framework. The German government should: establish uniform and clear obligations for consultation procedures for all regulation on the federal level, *i.e.* a notice and comment procedure with minimum standards for the timing, content, process and scope of consultation processes; establish a single, easy searchable, free of charge, consolidated, Internet based database for all federal laws and regulations; establish a notice-and-comment procedure to replace or supplement the current practice of consulting with selected parties; consider making responses to consultation papers publicly available; improve and expand information available to the public about future planned legislation, for example by drawing more on information already available in internal government planning systems; and reduce the proliferation of sector-specific administrative procedures, and work towards reduction of current exceptions.

Background comments

In most policy areas, German practices in consultation procedures are governed by traditions and internal government policies. This relatively informal framework governs a system of consultation that

is longstanding, intensive and consensus driven. Early informal consultations and significant exchange of information with organised interests are sustained throughout the legislative development.

Formal rules for public consultation are set out in the *Joint Rules of Procedure*. They prescribe in detail the procedural requirements for the intra-governmental co-ordination. They also prescribe requirements to consult with sub-federal levels of government. As for intra-governmental co-ordination, the *Joint Rules of Procedure* requires sub-federal consultation as early as possible and substantive involvement of these stakeholders in the regulatory process. However, the *Joint Rules of Procedure* requirements for involving other stakeholders and the general public at large are significantly more flexible and leave much discretion to the lead ministry.

As a consequence of the discretion left to ministries on how to consult, draft regulations are not made systematically available for public consultation. The actual consultation procedures vary significantly between ministries in terms of who is invited, by which means, and in terms of the documents made available to support the consultation procedure. Individual ministries choose on a discretionary basis which draft regulations they will make available for public comments, as well as for how long. Comments from stakeholders that do participate and provide written input to draft regulations are not made publicly available. The federal Web portal www.bund.de does not make available a single contact point for consultation of federal regulation. The *Joint Rules of Procedure* stipulates that draft bills must include an explanatory memorandum (which should include a RIA) and an introductory summary sheet.

There has been no recent evaluation of the German government's public consultation practices, nor does data exist on the involvement of stakeholders not familiar with or not frequently participating in the regulatory process. In general, however, there seems to be a high level of satisfaction with the current procedures among the organisations representing industry and labour.

The system is also weakened by the lack of clearly visible and enforceable rules to be applied by all ministries. Each ministry interprets the Joint Rules of Procedure differently, which means that no stakeholder (whether part of the system or outside the traditional network) can be sure of how consultation will be organised. A particular concern of some "insider" stakeholders is that deadlines for consultation rounds can be unpredictable and often very short. This not only puts pressure on stakeholders to produce comments at short notice, but also raises concerns that officials will not have time to digest comments received adequately, if the race is on to complete the draft. More generally, variations in approaches between ministries mean that quality standards cannot be uniform. Some consultations may work effectively, and others will fall short. The lack of controls on what is done and of enforceable sanctions is another weakness of the system. The Joint Rules of Procedure also lack teeth. The issue of enforceability was specifically raised with the OECD peer review team by the municipalities (who suggested that a constitutional provision might help to anchor and formalise requirements).

Recommendation 3.1. Carry out a comprehensive evaluation of consultation practices by federal ministries, as a starting point for establishing a clear and enforceable set of common guidelines for public consultation. Ensure that the guidelines emphasise transparency, with clear provisions for consultations and their results, including feedback on the more important comments received, to be posted on the internet. Cover both the established processes, and the use of more open "notice and comment" procedures, building on the recent efforts to promote e-consultation. Consider whether to engage the help of the Court of Auditors for the review and guidelines, and keep the federal parliament informed.

There needs to be a strong link between ex ante impact assessment and consultation. 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 (see Chapter 5). But in practice, ministries go their own way.

Public communication on regulations at the federal level

Public communication of adopted federal regulations follows the same approach as most other OECD countries. When a law or ordinance is enacted, it is published in the federal Law Gazette. There are also several online databases, mostly free of charge. A database of federal administrative regulations has been in place since 2006, for access by the general public. The lead ministry decides whether to publish draft bills, and in this regard, it should be noted that the federal Ministry of Finance publishes its legislative proposals.

Background

Public consultation on regulations at the federal level

Policy on public consultation by the federal executive

Public consultation by the federal government is regulated by the Joint Rules of Procedure. They apply to both primary legislation and subordinate regulations. They leave scope for considerable flexibility as to their application. It is the lead Ministry that decides on the timing, scope and selection of consultation partners, as well as on the practical execution of the consultation process. Normally, Ministries proceed to so-called pre-consultation rounds, which are conducted at an early stage prior to drawing up a bill. This initial consultation involves the *Länder*, municipalities, the expert community and associations on the basis of a key elements paper. The results of this consultation contribute to drafting the bill, on which the same parties are later consulted for a second time. These procedures may be conducted by submitting the draft in paper or through electronic form. If necessary, a meeting follows. The federal chancellery must be informed of the involvement of the various parties. The lead federal Ministry considers the comments and objections of those involved in the draft bill “in an adequate manner”.

Consultation deadlines are only provided by the *Joint Rules of Procedures* for the final examination of draft bills (normally four weeks). As to the other parts of the procedure, there are no set deadlines for consultations or for replies. It is common practice by the Ministries to allow periods for consultation adequate to the purpose and scope of the proposed regulation. The same applies to the provision of information to the parties to be consulted.

The form and intensity of the feedback to the stakeholders on the consultation are also left to the discretion of each Ministry. The consultation results are generally fed into the draft bill and the assessment of the bill’s impacts in the explanatory memorandum, and made public when the bill is transmitted to the parliament. Before that stage, there is no binding obligation to publish draft regulations, or the written inputs by the stakeholders. Ministries tend nonetheless to maintain a continuous dialogue with stakeholders throughout the preparatory stage.

An emerging use of ICT for consultation

The federal government has set “e-participation” as one of its focus areas. Strengthening the involvement of stakeholders and the citizens through new media and information technologies is seen as a means to enhance the transparency of the decision-

making process; understand the needs of those affected by the proposed regulation; and identify various types of regulatory impacts (Box 3.2). The federal government has nonetheless not yet established a single web portal for all current and previous consultation on federal initiatives.

Box 3.2. Online consultation in Germany

Under the input of some federal Ministries, the German government is progressively introducing forms of on-line consultation and using information and communications technology (ICT) for consultation proceedings.

An example is the e-consultation on the Citizen Portals Act (*Bürgerportalgesetz*) initiative, at www.e-konsultation.de. The on-line consultation was designed to make the project transparent. In particular, it sought to provide a platform for direct citizen participation and to gather the views of the public on the project and the related draft regulation.

The online consultation ran from 20 November to 12 December 2008. This was the first time that citizens could make direct comments on a draft bill at the federal level. The website was visited approximately 12 000 times, and 108 comments were entered. The inputs were taken into account together with the involvement of associations in the proposal adopted by the Cabinet in February 2009¹).

A further online consultation ran till 30 September 2009 on "*e-Government 2015 - Ideen für eine nationale e-Government-Strategie*". It allows evaluating, receiving feedback and complementing the main elements of the national e-Government strategy. Since the overarching goal of the strategy is the creation of a common framework for a federal e-Government in Germany, co-operation between the federation, the *Länder* and the municipalities plays an important role together with issues such as trust, security in Internet, efficiency and effectiveness, data protection, transparency and e-participation.

Consultation during the federal legislative process

Once the bill is adopted by the federal Cabinet, further hearings are conducted in the *Bundestag* and the *Bundesrat* as a part of the parliamentary legislative procedure (first reading). Discussions in the committees are normally not open to the general public, unless the Committee decides otherwise. The Committees may organise hearings with experts and/or stakeholders. If at least one quarter of the members of the responsible committee so demand, the Committee must organise such hearings. If the committee hearings are public, they are transmitted live on the parliamentary television or may be heard on line at www.Bundestag.de/aktuell/archiv/2006/anhoerungen/index.html. The stakeholders and the expert community can also interact with individual members of parliament or the secretariat of the responsible committees outside these events, and submit written comments prior to, or in the course of the deliberations of a bill.

Public communication on regulations at the federal level

Communication on existing regulations

There are several channels for informing the public about existing regulations. Once a law or an ordinance is enacted, it is promulgated in the federal Law Gazette (*Bundesgesetzblatt, BGBl.*) Ordinances may also be promulgated elsewhere if so stipulated by law, for instance in the Act Governing the Promulgation of Legal Ordinances. A number of specific gazettes exist to this end. The federal Gazette (*Bundesanzeiger*) and the Electronic federal Gazette (www.eBundesanzeiger.de) are examples.

There are many databases accessible on the Internet, mostly free of charge. Federal laws and ordinances in force are provided free on *www.gesetze-im-internet.de*. The administrative provisions applying to the supreme federal authorities are published at *www.verwaltungsvorschriften-im-internet.de*. Consolidated texts of legislation can also be accessed in the federal law database (*www.juris.de*), which includes older versions and provides comprehensive search options. In addition, annual directories of federal law and international agreements are published on CD-ROM, containing reference data of applicable law (acts and ordinances). Associations and other stakeholders inform their members about relevant legislative proposals in special publications and their Internet sites.

A database of current federal administrative regulations has been in operation since October 2006 (*www.verwaltungsvorschriftenim-internet.de*). A public enquiry service was added to the database in November 2007. Any citizen can now access the updated validated data on-line.

Communication on proposed regulations

The federal government does not publish in advance the list of the legislative and non-legislative proposals that it plans to adopt in the year. Government activity is nonetheless traceable through a website devoted to the various initiatives launched.²

Decisions as to whether to put a bill on the federal government's intranet or on the Internet are taken by the lead Ministry jointly with the federal chancellery and the other federal ministries involved. This is current practice by the federal Ministry of Finance, which publishes its proposals and information on the status of the related procedure on its webpage at the moment of starting public consultation.³ The importance of the proposed legislation and the public interest are the key factors underpinning such decisions. Should this be the case, the lead Ministry decides on the type and scope of information provided, where appropriate after consultation with the chancellery.

Bills adopted by the federal Cabinet that have entered the legislative process are then published with the related accompanying documentation as a parliamentary document on the Internet once the document has been forwarded to the *Bundestag*. The document contains an introductory summary (cover sheet) which briefly addresses selected regulatory Impact Assessment issues, and further information such as:

- aim and necessity of the bill;
- background and sources of information;
- alternative solutions;
- reporting obligations, administrative obligations and authorisation requirements;
- regulatory impact;
- possibility to set a time limit for the law;
- possible legal and administrative simplification;
- compatibility with EU law; and
- amendments to existing law.

The opinion of the National Regulatory Control Council is also attached if available. *DIP (Dokumentations- und Informationssystem für Parlamentarische Vorgänge)*, the information system jointly managed by the *Bundestag* and the *Bundesrat*, allows the public to keep track of the entire legislative process; read minutes of the plenary sessions and the various committees; and access the initiatives of the members of the parliament (www.Bundestag.de/bic/index.html).

Notes

1. Some 68 comments relating directly to the content of the draft were legally examined and led to substantial changes. The result of that e-consultation and the evaluation report can be downloaded from the internet (https://www.e-konsultation.de/buergerportale/discoursemachine.php?page=infopage&id_page=17&menucontext=30).
2. See: www.bundesregierung.de/Webs/Breg/DE/GrundgesetzGesetze/GesetzesvorhabenundNeuregelungen/gesetzesvorhaben-und-neuregelungen.html (last accessed 7 May 2009).
3. See: http://www.bundesfinanzministerium.de/nn_54/DE/BMF__Startseite/Service/Gesetze__Gesetzentwurfe/node.html (last accessed 25 November 2009).



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), "Transparency through consultation and communication", in *Better Regulation in Europe: Germany 2010*, OECD Publishing, Paris.

DOI: <https://doi.org/10.1787/9789264085886-7-en>

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