Chapter 6

Compliance, enforcement, appeals

Whilst adoption and communication of a law sets the framework for achieving a policy objective, effective implementation, compliance and enforcement are essential for actually meeting the objective. An *ex ante* assessment of compliance and enforcement prospects is increasingly a part of the regulatory process in OECD countries. Within the EU's institutional context these processes include the correct transposition of EU rules into national legislation (this aspect will be considered in chapter 9).

The issue of proportionality in enforcement, linked to risk assessment, is attracting growing attention. The aim is to ensure that resources for enforcement should be proportionately higher for those activities, actions or entities where the risks of regulatory failure are more damaging to society and the economy (and conversely, proportionately lower in situations assessed as lower risk).

Rule-makers must apply and enforce regulations systematically and fairly, and regulated citizens and businesses need access to administrative and judicial review procedures for raising issues related to the rules that bind them, as well as timely decisions on their appeals. Tools that may be deployed include administrative procedures acts, the use of independent and standardised appeals processes,[1] and the adoption of rules to promote responsiveness, such as "silence is consent".[2] Access to review procedures ensures that rule-makers are held accountable.

Review by the judiciary of administrative decisions can also be an important instrument of quality control. For example scrutiny by the judiciary may capture whether subordinate rules are consistent with the primary laws, and may help to assess whether rules are proportional to their objective.

Assessment and recommendations

Compliance rates are likely to be high but they are not monitored. At the federal level, and in most *Länder*, no systematic record is kept of compliance rates. Reasons for this may be that the *Länder* are mainly in charge of implementation and enforcement, and that a strongly embedded respect for the rule-of-law has been assumed to ensure high compliance rates. The *ex post* evaluation of regulations which is provided for in the impact assessment process provides a framework in principle for checking what really happens, and whether regulations have actually achieved the objectives originally set.

Recommendation 6.1. Keeping track of compliance rates helps to determine whether a regulation has been well framed (a low level of compliance would suggest that issues of compliance and enforcement were not effectively addressed in the development of the regulation). Ensure that the *ex post* evaluation of regulations is used effectively for assessing compliance rates. Ensure that the *ex ante* impact assessment of draft regulations examines enforcement issues downstream.

The German system of "executive federalism" requires attention to the way in which the Länder implement federal laws. Most legislation adopted at the federal level is implemented and enforced by the *Länder*. Another important feature of implementation and enforcement in the German context is that the *Länder* rely extensively on the districts and counties, as well as the municipalities, to execute state and even federal legislation. It was beyond the scope of this review to look at enforcement issues in detail, but it is clear that the system generates challenges for streamlining enforcement practices and for adopting new approaches. The German authorities are conscious of these challenges. It will be important to evaluate the impact of the federal reform in practice, as this may give rise to an increasing diversity of approaches by the *Länder*. Risk based approaches to enforcement (taking a proportionate approach to inspections based on an assessment of the risk that compliance will be poor) are gathering momentum in some other European countries, because they minimise burdens on business and are less costly to the administration. This approach could be encouraged.

Recommendation 6.2. Ensure that the impact of the 2006 federal reform is evaluated for its effect on *Länder* implementation of federal legislation. Consider whether further dialogue with interested *Länder* would be helpful in order to stimulate new approaches to enforcement, such as risk based inspections.

As might be expected in a system that is strongly framed by the rule of law, a range of appeal processes are available, and accessibility is being improved. The constitution and the administrative procedures act set out general obligations for the authorities to consult with affected parties, and to inform affected parties or the general public about administrative decisions. The main appeal options for citizens and businesses are internal review, court action and (for citizens only) constitutional challenge. The principle of judicial review is a major element of the German tradition. The judicial system is reported to work smoothly although there can be some delays at tribunals due to budget or staff constraints. Initiatives such as the citizen phone contact point support accessibility. The aim is to facilitate the delivery of administrative services, helping citizens to understand the "who's who" and "who does what" in the federal public administration.

Background

Compliance and enforcement

General context

The nature of federalism implies that regulations are adopted and therefore implemented and enforced at different levels of government within the state. At the same time, the German system is often referred to as "executive federalism", as most legislation adopted at the federal level is implemented and enforced by the *Länder* (the Basic Law - Article 83 - states that the *Länder* are to execute federal laws unless otherwise stated). The

2006 federal reform abolished the instrument of framework federal laws. The reform reduced complex decision-making procedures by updating the allocation of competences between the federation and the *Länder* and reducing the number of cases where the consent of the *Bundesrat* is mandatory (Zustimmungsgesetze). Between September 2006 and February 2009, that number fell to 39%, compared to 53% under the old regime. By clarifying legislative competences and responsibilities between the two levels of government it is also expected to improve transparency in the interface between the federation and the *Länder*, including as regards implementation and enforcement. Another important feature of implementation and enforcement in the German context is that the *Länder* rely extensively on the districts and counties (*Landkreise*) and municipalities (*Kommunen*) to execute state and even federal legislation.

Enforcement of federal regulations

There are three forms of implementation for federal legislation, the first of which is the most common:

- *Länder* implementation as a "matter of their own concern" (in their own right). Federal supervision is restricted to verifying the legality of the enforcement.

- *Länder* implementation on behalf of the federation (federal commission). The federation's supervisory powers in this case also include control of the expediency of law enforcement.[3]

- The federation implements statutes directly itself. This is the case for example in some areas of foreign affairs, the administration of the federal army and of the federal budget. In such cases, many of the ordinances adopted by the federal Cabinet require the approval of the *Bundesrat*.

A noteworthy feature which emerges from the above is that different jurisdictions (federal, *Land*, agency) may carry out enforcement responsibilities on the same territory. For example, in any given *Land*, federal, *Land* and agency authorities may be responsible for enforcing different regulations.

Enforcement of federal law at the level of the *Länder* is generally incumbent upon lower government authorities and municipalities. Depending on the legal and actual requirements, enforcement includes monitoring of compliance with the procedure provided by law (*e.g.* licensing procedure); issuance of orders in individual cases; inspections in case of suspected violation of law; random checks; procedure for threat or use of force (*e.g.* coercive fine) in order to prevent further violation of law; and fine proceedings to punish vioalation of law. The decision on whether to carry out non-incident-related checks and what resources should be used depends on the consequences of non compliance with relevant provisions. The frequency of checks is higher in areas associated with higher risks for public security and health (*e.g.* food safety). Each *Land* government has the authority to issue instructions and has supervisory powers in order to ensure coherent enforcement in conformity with the law.

The constitution stipulates some access for the federal government to supervise the implementation of federal law by the *Länder*, although it should be noted that the federation does not have administrative offices in the *Länder*. The scope of its oversight depends on whether a federal law is implemented by the *Länder* in their own right or on federal commission.

If the *Länder* execute a federal law in their own right, federal oversight is exercised solely to ensure that the execution is in accordance with the law. If a *Land* violates the law, the federal government will call on the *Land* to correct the identified deficiency. The remedies available to the federation are procedurally lengthy and burdensome. Should its request go unheeded, the federal government must first appeal to the *Bundesrat* for a formal declaration that enforcement of the law is subject to deficiencies ("formal complaint"). Only if the *Land* still fails to take action after this formal declaration, the federal government may appeal to the supreme court (*Bundesverfassungsgericht*).[4] The *Bundesrat* can consent on necessary steps taken by the government to compel the *Land* to comply with its duties. The government can choose the measures it deems most adequate, provided that they are proportionate. If the *Bundesrat* refuses to formally recognise the existence of a deficiency, direct enforcement action is not admissible and the only option remaining to the federal government is file appeal to the supreme court.

When the *Länder* execute federal laws on federal commission, the federal oversight covers not only the legality, but also the appropriateness of execution (Art. 85.4 of the Basic Law). To this end, the lead federal ministry can issue instructions to the *Länder*, and the federal government can require the *Länder* to submit reports and documents, as well as sending commissioners not only to the *Länder* ministries but to all *Land* authorities. The federation may adopt acts governing the authorities' organisation or administrative procedure. It may also adopt general administrative regulations, with the *Bundesrat*'s consent, which are binding for the *Länder*. For example, general administrative regulations were adopted for authorisation procedures under environmental law enforcing the German Road Traffic Regulations; guidelines for criminal proceedings; for proceedings for the collection of fines; guidelines for enforcing prison sentences; as well as detailed provisions on the implementation of tax law.

In cases of deficient law enforcement, the federal government is authorised to institute federal enforcement directly with the consent of the *Bundesrat*, or can appeal to the supreme court.

The *Länder* have the right to appeal to the supreme court against formal complaints or enforcement measures by the federal government in accordance with the procedure for disputes between the federal government and the *Länder*.

There is no higher, institutionalised monitoring of implementation. Enforcement is ensured through legal and expert oversight carried out at the various levels of government, depending on which entity is responsible for the issue. Under the principle of loyalty to the federation (*Bundestreue*), the *Länder* have the duty to act favourably in the interests of the federation. Risk-based approaches to enforcement, as pioneered in some countries, are not explicitly practiced in Germany. Enforcement mechanisms differ from *Land* to *Land*. The supervising federal ministry sometimes seeks to promote co-ordination and harmonisation of approaches by setting up mixed federal-*Land* committees and working groups.

Implementation and enforcement mechanisms are likely to vary, as well as the methods and their efficiency. The implementation of federal legislation also depends on the resources allocated to the enforcement of the regulation. In some areas, variations in *Länder* resources allocated to enforcement have created differences in regulatory practices between the *Länder*. To avoid too many differences in the application of food control provisions every year, a food monitoring plan has been adopted by the federal parliament.

Enforcement of Land regulations

The *Länder* implement *Land* regulation and federal regulation in the same way. The counties and local authorities are also agents for implementation *Land*.

Compliance

At the federal level, and in most *Länder*, there is no formalised procedure to measure compliance rates, and hence no systematic record is kept of these. In the case of a dispute, compliance issues are assigned to the courts for a decision. There has been no general examination of compliance rates. Reasons for this may be that the *Länder* are mainly in charge of implementation and enforcement, and that a strongly embedded respect for the rule-of-law has been assumed to ensure high compliance rates.

Appeals

General context

The constitution and the 1977 Administrative Procedures Act set out general obligations for the authorities to consult with affected parties (as defined by the law and the authorities), and to inform affected parties or the general public about administrative decisions. Furthermore the Public Administration Act stipulates certain time limits as to when to launch appeals. Administrative procedures, including authorities' obligations to inform plaintiffs and applicants may vary, for example depending whether the issue relates to planning or housing. There are indications that sector specific administrative procedures are proliferating. Although this may improve the quality of the individual, tailor-made procedures, such proliferation may also reduce the overall transparency of and accessibility to administrative procedure rules.

The principle of judicial review is a major element of the German administrative and legal tradition which, in turn, flows from the rule of law tradition. There are potentially two levels of appeal for citizens and businesses against administrative decisions and actions, and one further measure available to citizens:

- *Internal review.* As a rule, administrative appeal proceedings (preliminary proceedings) are submitted initially to the authority which took the decision. The next higher authority rules on the appeal if the authority which issued the administrative act does not provide a remedy. Administrative acts may be appealed to courts only if internal administrative appeal proceedings have been carried out. However, the *Länder* may decide that an internal review is not necessary. The administrative decision may still be reviewed by courts. Appeals must be filed within a given period of time, usually one month after the date of notification. In exceptional cases, shorter deadlines may be required (*e.g.* when recruiting persons liable for military or civilian service) or longer periods may be provided for (*e.g.* when imposing coercive fines). The decision taken in the appeal procedure may also be appealed; such an appeal has to be filed within one month after notification of the decision (notification of appeal). If no appeal procedure is carried out, the deadline is one month after notice has been given of the administrative decision.

- *Court action.* If the administrative ruling is not amended in the objection proceedings, an action may be filed with a court. Objection proceedings are not possible if the initial authority is a Superior federal Authority (*Bundesoberbehörde im Geschäftsbereich eines Bundesministeriums).* An action may be brought before one of the three independent branches of jurisdiction – administrative (three tiers), social (three tiers) or fiscal (two tiers). As a general principle the courts examine the legality as well as the substance of the cases brought before them.

- *Constitutional challenge.* Any citizen considering that their fundamental rights have been directly violated by a public power may directly file a constitutional complaint. Such a complaint may be lodged against a measure carried out by an authority, against the judgment of a court, or against a legal provision. The constitutional complaint is as a rule only admissible after the complainant has unsuccessfully seized the courts of the matter which otherwise have jurisdiction. The supreme court only examines compliance with fundamental rights or rights equivalent to fundamental rights. The evaluation of other legal issues and the establishment of facts are incumbent solely on the other courts. Insofar as no fundamental rights are violated here, the supreme court is bound by such rulings. Approximately 2.5% of constitutional complaints are successful. Despite this small number, the constitutional complaint is a significant legal recourse for citizens. A positive decision may have an impact far beyond the individual case.

In administrative and social matters, the dispute over a decision by the administration has suspending effects. Courts can issue temporary measures when the suspension of the administrative decision is not possible or sufficient. In financial matters, appeals do not provoke the automatic suspension of the administrative decision, but financial courts can impose it. In such cases, temporary measures by the courts are possible.

Box 6.1. Review of administrative decisions by the courts

Administrative decisions are reviewed by the competent administrative, social and finance courts in accordance with their respective codes of procedure: the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*); the Act on Social Courts (*Sozialgerichtsgesetz*); and the Code of Procedure for Fiscal Courts (*Finanzgerichtsordnung*). In some cases, ordinary courts are responsible, in particular in the fields of public procurement law, investigating administrative offences, executing sentences and imprisonment.

Depending on the type of court and the decision to be reviewed, courts of first instance distinguish between appeals on questions of fact and law and appeals on questions of law only. Further objections can be lodged to the court of second instance within two weeks after the decision. Decisions by finance courts and decisions by social and administrative courts of second instance are reviewed on questions of law only.

If no ruling is handed down by the authority in response to an objection within a reasonable period and with no satisfactory reason, the plaintiff may file a complaint for failure to act. This is to render the administration unable to prevent or delay citizens' actions by long waiting periods.

The Administrative Courts review the legality and proportionality of administrative action. If the court doubts of the constitutionality of the legal instrument on which the administrative act was based, special proceedings are required. The legal provision in question has to be reviewed (judicial review). To this end, the Administrative Court submits the legal provision it deems to be unconstitutional to the federal constitutional Court (*Bundesverfassungsgericht*) for review. The federal constitutional court has exclusive jurisdiction over the constitutionality of legal provisions. The same system applies at the *Land* level, where the State constitutional Courts (*Landesverfassungsgerichte*) have ultimate jurisdiction over *Land*-related legislation.

The scope of the powers of the courts depends on the nature and content of the appealed file. Courts are always entitled to annul provisions which are contrary to the law, and in certain cases they can force administrative authorities to take specific decisions. In many domains, however, administrations maintain a relative margin of manoeuvre and the remit of the court is to check whether the introduced act conforms to the law, is proportionate, and results from a correct estimation by the responsible administrative body.

The plaintiff and the accused may appeal to the Higher Administrative Court against the ruling of a court of first instance. Such an appeal refers to questions of fact and law. Decisions of the Higher Administrative Court may be reviewed only on questions of law and exclusively by the federal Administrative Court.

Court action mainly takes place in *Länder* (state) courts. The state courts may examine the compatibility with the constitution of legal provisions that have been adopted by parliament. If a court considers a statutory provision which is relevant to the ruling to be unconstitutional, it submits it to the supreme court, according to the so-called "concrete proceedings on the constitutionality of a statute". Over and above this, the federal government, a *Land* government or one-third of the members of the *Bundestag* may request the examination of the constitutionality of a legal provision ("abstract proceedings on the constitutionality of a statute").

Administrative appeals: regulatory agencies

Objections against a decision of a regulatory agency have to be lodged with the agency that initially took the decision. If the regulatory agency fails to decide within three months about the objection, the plaintiff may bring an action before court. Administrative appeal proceedings against decisions of a regulatory agency are not permissible. Instead, the matter must be dealt with by the courts. Action brought against decisions of the federal Cartel Office and sector-specific authorities pursuant to law on competition are dealt with by the Düsseldorf Higher Regional Court.

Performance of the system

The judicial system in Germany is reported to work smoothly on the whole. In specific cases, however, delays may occur mainly due to the budgetary and staff constraints on tribunals. The issue of possible delays is taken seriously, notably in the framework of the case law of the European Court for Human Rights. In this respect, the federal Ministry of Justice is trying out legal solutions to improve the legal status of plaintiffs victim of delayed procedures.

On average, judicial procedures in German administrative courts lasted 13.9 months in 2007. The duration was of 12.4 months for procedures in front of the Higher Administrative Court. In the same year, procedures in front of the financial courts and the social courts averaged 18.5 and 13.7 months, respectively. The discrepancy between *Länder* is nonetheless significant, with extremes in administrative procedures ranging from a minimum of 4.8 to a maximum of 35 months on average in 2007.

Alternative dispute settlement mechanisms[5]

The German system does not include the institution of ombudsmen either at the federal or the *Länder* level. Only in Mecklenburg-Vorpommern, Rheinland-Palatinate, Schleswig-Holstein and Thüringen are there so-called Citizen Commissioners *(Bürgerbeauftragte*), to whom citizens can have recourse in case of disputes with the public administration. Nonetheless, federal and *Land* law generally provides for the right to petition. Every citizen may lodge a petition with the parliament or directly with the government; the latter are required to deal with the petition and notify the petitioner of the result of their review.

The appeal by the plaintiff starts a procedure internal to the administration (*Rechtsbehelfverfahren*), which forces the administration to review its decision anew. Exceptions to such a procedure may occur in cases explicitly provided for by the law. The directly higher administrative instance decides over opposition or objection (*Widerspruch oder Einspruch),* checking both the legality and the appropriateness of the decision. Any pronouncements by the higher instance on the initial considerations do not impinge on the powers of the courts.

Pilot projects have been introduced in a number of *Länder* that offer the parties the possibility to mediate within the judicial procedure in front of the court. The federal Ministry of Justice is working on regulating the internal and external mediation in the framework of the transposition by May 2011 of the EU Directive on certain aspects of mediation in civil and commercial matters (Directive 2008/52/EC).

Notes

1. Administrative review by the regulatory enforcement body, administrative review by an independent body, judicial review, ombudsman.
2. Some of these aspects are covered elsewhere in the report.
3. To this end, the federal ministry responsible for a federal law may issue directives to the *Länder* pursuant to Art. 85 (3) of the Basic Law. Beyond this, the federal Government may also require the *Länder* to provide information and records and to dispatch commissioners not only to the *Länder* ministries but to all *Länder* authorities, in accordance with Art. 85 (4), sentence 2 of the Basic Law. The formal recognition procedure does not require to be carried out in cases of flawed law enforcement. The federal Government is authorised to institute federal enforcement directly with the consent of the *Bundesrat*, or can appeal to the federal constitutional Court in accordance with the procedure for disputes between the federation and the *Länder. Source*: Government of Germany, answers to review questionnaire.
4. In accordance with Article 93(1) no. 3 of the Basic Law in conjunction with Section 13 no. 7 of the Act on the federal constitutional Court.
5. This section refers to disputes arising between public administrations and the citizens or stakeholders, only. On alternative resolution in the field of disputes between consumers and companies, commercial disputes, or disputes between individuals, see: *http://ec.europa.eu/civiljustice/adr/adr_ger_en.htm* (last accessed 28 May 2009).