



Scrutiny of Legal Provisions and Consolidation of Legislation -

Contribution of the Federal Ministry of Justice to Better Regulation



Contribution of the FMJ to Better Regulation - Scrutiny of Legal Provisions -

1. Why does the Ministry of Justice scrutinise the legislative initiatives?
2. What does the Ministry of Justice scrutinise?
3. How does the Ministry of Justice perform its scrutiny?
4. What aids are available?
5. What desires does the Ministry of Justice have in terms of improving the quality of laws?

Contribution of the FMJ to Better Regulation - Scrutiny of Legal Provisions -

1. Why does the Ministry of Justice scrutinise the legislative initiatives?

- a) Historical background
As a reaction to the weak position of the Ministry of Justice during the Weimar Republic and to the Nazi regime of injustice - Resolution of the Federal Government of 21 October 1949:

The Ministry of Justice will be a central independent authority to engage in legal scrutiny of legislative initiatives

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1. Why does the Ministry of Justice scrutinise the legislative initiatives?

- a) ...
b) Substantive independence

“The Ministry of Justice, freed from ties to administrative interests and concerned only with preserving the law, is particularly suited to fulfilling these tasks...”

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1. Why does the Ministry of Justice scrutinise the legislative initiatives?

- a) ...
- b) ...
- c) Office with a particular responsibility for the uniformity and quality of the legal system
 - The Federal Government initiates approx. 90 % of laws
 - Takes criticisms of legislation seriously
 - Too many rules
 - Provisions too detailed
 - Provisions too fragmented
 - Amendments made too often
 - Effective practical implementation too seldom taken into account
 - Lack of comprehensibility, etc.

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1. ...

2. What does the Ministry of Justice scrutinise?

- a) What provisions exist in this regard?
 - Joint Rules of Procedure of the Federal Ministries, § 46:
"Before a bill is submitted to the Federal Government for adoption, it must be sent to the Federal Ministry of Justice to be examined in accordance with systematic and legal scrutiny. ..."
 - Rules of Procedure of the Federal Government, § 26:
"According to these rules the Minister of Justice ... can protest against the adoption of a bill if it is inconsistent to the current law."

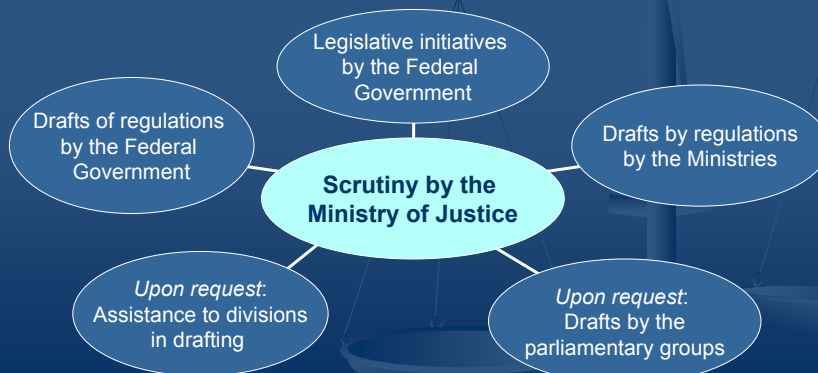
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1. ...

2. What does the Ministry of Justice scrutinise?

a) ...

b) What is the subject matter of the scrutiny?



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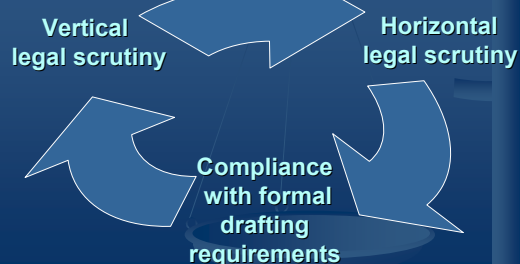
1. ...

2. What does the Ministry of Justice scrutinise?

a) ...

b) ...

c) What does the scrutiny encompass?



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1. ...

2. What does the Ministry of Justice scrutinise?

a) ...

b) ...

c) What does the scrutiny encompass?

Vertical legal scrutiny:

- Constitutionality
- Compatibility with EU law
- Compatibility with international law

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1. ...

2. What does the Ministry of Justice scrutinise?

a) ...

b) ...

c) What does the scrutiny encompass?

Horizontal legal scrutiny

- Relationships with other laws,
- Consistency within the draft,
- Appropriate relationship between rules and exceptions,
- Avoidance of dual or contradictory rules,
- Clear references to other provisions,
- Comprehensible formulation, etc.

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1. ...

2. What does the Ministry of Justice scrutinise?

a) ...

b) ...

c) What does the scrutiny encompass?

Compliance with formal drafting requirements

= Requirements as to form, construction and design of drafts

- Ministry of Justice has the right to make recommendations
- Collection of recommendations in the Handbook on Formal Requirements for Drafting Legislation



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1. ...

2. ...

3. How does the Ministry of Justice scrutinise?

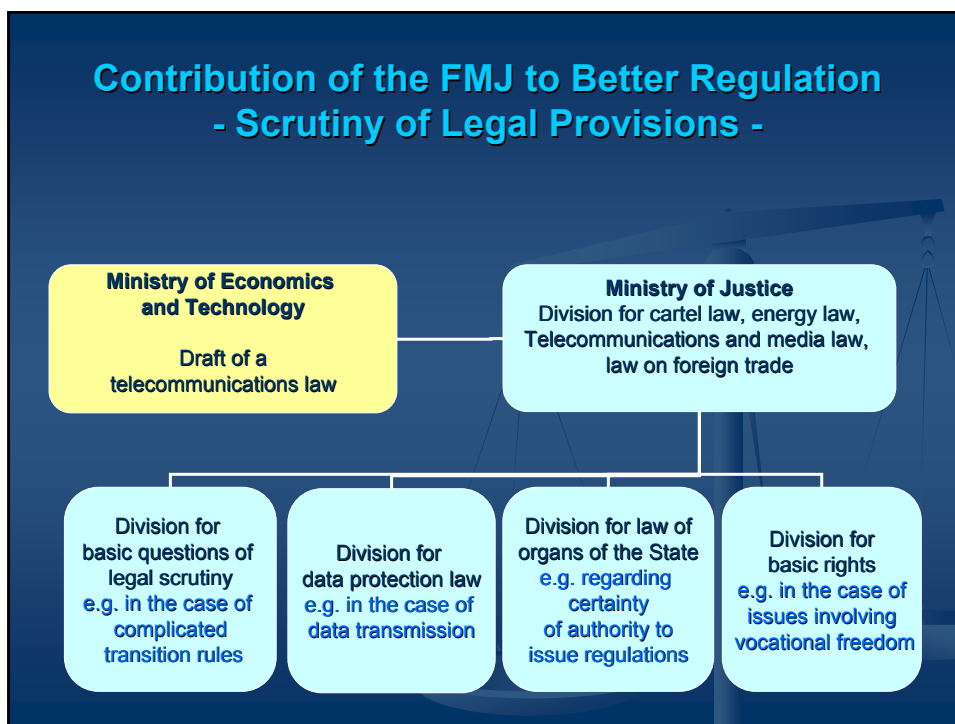
a) Counterpart divisions (approx. 30)

b) Cross-sectoral divisions:

- Basic rights
- Basic principles of legal scrutiny

c) Participation of other divisions if their area of responsibility is affected

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Common constitutional issues:

- Is the draft compatible with general constitutional principles (democracy, social welfare state, rule of law, separation of powers, federalism)?
- Does it affect basic rights?
- Is the intervention permissible?
- Has the principle of proportionality been maintained?
- Has the principle of protection of legitimate expectations been taken into account?
- Have legal clarity and legal certainty been taken into account?
- ...

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Implementation of EU Law and Legal Scrutiny

Meeting implementation deadlines for Directives and Framework Decisions is made more difficult by

- Complicated technical issues
- Highly politically controversial Directives (e.g. Equal Treatment Directive) or constitutionally sensitive Framework Decisions (e.g. European Arrest Warrant)
- Political events (e.g. premature end of a legislative term)
- ...

Consequence: Less time for legal scrutiny; quality of provisions suffers.

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1....
2....

3. How does the Ministry of Justice perform its scrutiny?

Quality laws take time.

"The period for final examination of a bill... is normally four weeks. It may be reduced, if all parties involved agree. For bills which are extensive or difficult in legal terms, the time allowed is extended to eight weeks ..."

(§ 50 Joint Rules of Procedure of the Federal Ministries)

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1. ...
2. ...
3. ...

4. Which aids are available?

- Organs for promulgation (<http://www.bundesanzeiger.de>)
- Data bases
 - "juris" legal information system (<http://www.iuris.de> or <http://www.gesetze-im-internet.de>)
 - Data bases of parliament (<http://djp.bundestag.de>)
- Handbook on Formal Requirements for Drafting Legislation
- eNorm = Software for uniform creation of draft bills
- Language consulting by the editorial staff of the Society for the German Language at the German Bundestag

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1. ...
2. ...
3. ...
4. ...

5. What desires does the Ministry of Justice have in terms of improving the quality of laws?

- Actual deadlines for scrutiny should be consistent with those provided for in the Joint Rules of Procedure of the Federal Ministries
- The Ministry's legal scrutiny ends with the Cabinet resolution –parliament needs its own office for this purpose

Contribution of the FMJ to Better Regulation - Consolidation of Laws -

Expectations of valid law

- Those who deal with law must be able to easily find all relevant provisions and recognise which law is to be applied to existing, new or past factual situations.
- Valid law should contain only those legal provisions that must be complied with for current and future legal relationships, and it should be consolidated into sensible and clear sets of regulations.

Contribution of the FMJ to Better Regulation - Consolidation of Laws -

- **1958-1968** first consolidation of laws – determination of all valid language in its consolidated form = collected in the Federal Law Gazette III
- **1986** 1st and 2nd Act for the Consolidation of Laws
- **1990** 3rd Act for the Consolidation of Laws
- As of **2003** Project for bureaucracy reduction and better regulation

Contribution of the FMJ to Better Regulation - Consolidation of Laws -

Success of current consolidation of laws since 2003

- 10 Acts for the consolidation of laws
- Repeal of 800 laws and other legal provisions
- Additional legislation for the consolidation of laws is in preparation

Contribution of the FMJ to Better Regulation - Consolidation of Laws -

Concept of consolidation of laws

- Divisional responsibility
- Initiator and consultant: Ministry of Justice
- Oversight: Ministry of the Interior, report to Federal Government
- FOCUS: superfluous laws without a current area of application
- Determination of criteria

Contribution of the FMJ to Better Regulation - Consolidation of Laws -

Criteria for searching for superfluous law worthy of repeal

- Little-known legal provisions – Means of recognition: never amended
- Special rules that exist in addition to a law on the same legal matter – Means of recognition: the only still-valid regulation of an Act amending existing law
- Very old provisions – Means of recognition: pre-constitutional terminology, e.g. “Reichsminister”

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