

Process of Legislation (Methodology)

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I. The Quest for "Good" Legislation

1. Introduction



"Laws are Like Sausages. Better Not to See Them Being Made."

I. The Quest for "Good" Legislation

1. Introduction



**"Regulatory
Tsunami"**

I. The Quest for "Good" Legislation

1. Introduction

"From all Western States we clearly hear the same lament: There are too many laws and the ones made are bad." (Markus Lammer)*

*Aus allen westlichen Industriestaaten ertönt deutlich vernehmbar ein Klagelied des immer gleichen Inhalts: Es gibt zu viele Gesetze, und sie sind auch noch schlecht gemacht.



I. The Quest for "Good" Legislation

2. Criteria for Good Legislation

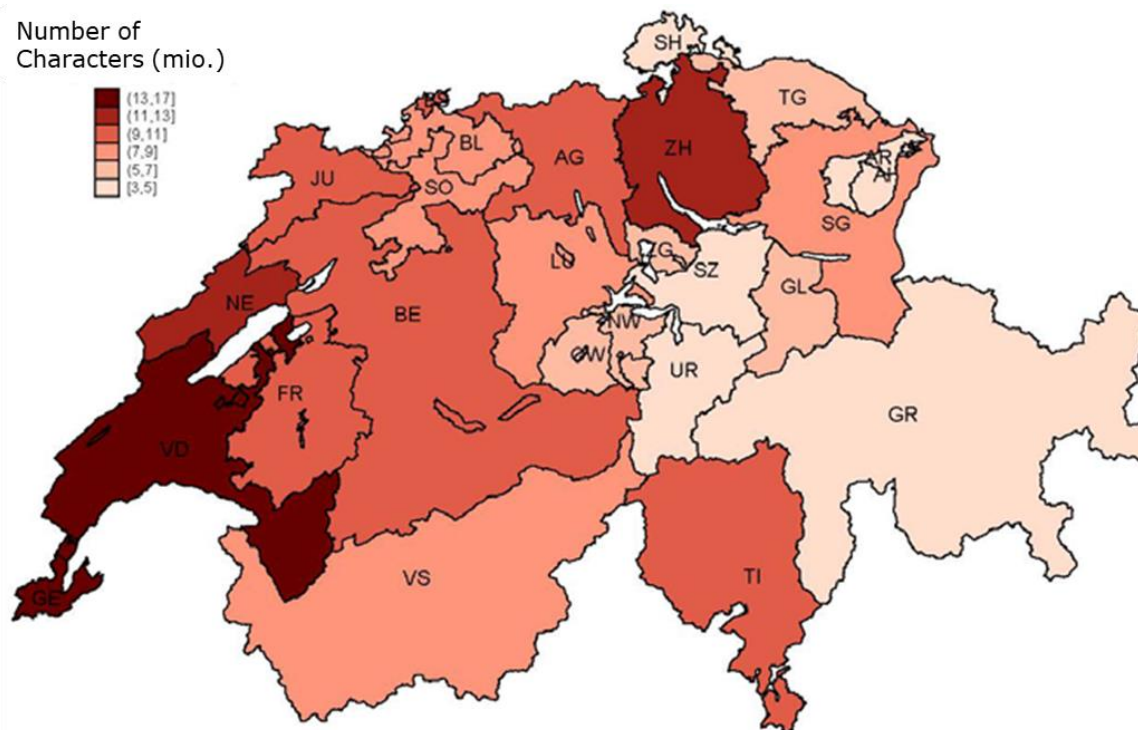
Good legislation ...

- ... is clearly and understandably drafted (drafting quality),
- ... solves the problem it targets (effectiveness),
- ... does not have negative side effects,
- ... is cost-efficient,
- ... is accepted by everybody,
- ... is fair and just.

I. The Quest for "Good" Legislation

2. Criteria for Good Legislation

There is no generally accepted benchmark for "good legislation".



I. The Quest for "Good" Legislation

2. Criteria for Good Legislation

Title: Age of Sale - Nicotine Inhaling Products IA No: 3132 Lead department or agency: The Department of Health Other departments or agencies:			Impact Assessment (IA)		
			Date: 18/02/2015		
			Stage: Final		
			Source of intervention: Domestic		
			Type of measure: Secondary Legislation		
			Contact for enquiries: Policy Lead - Andrew Black Analytical Lead - Rob Unsworth		
Summary: Intervention and Options			RPC Opinion: RPC Opinion Status		
Cost of Preferred (or more likely) Option					
Total Net Present Value -£2.1m	Business Net Present Value -£2.31m	Net cost to business per year <small>(EANCB on 2009 prices)</small> £0.20m	In scope of One-In, Two-Out? Yes	Measure qualifies as IN	

Quelle: http://www.legislation.gov.uk/ukia/2015/226/pdfs/ukia_20150226_en.pdf

II. Function and Limitation of Legislation

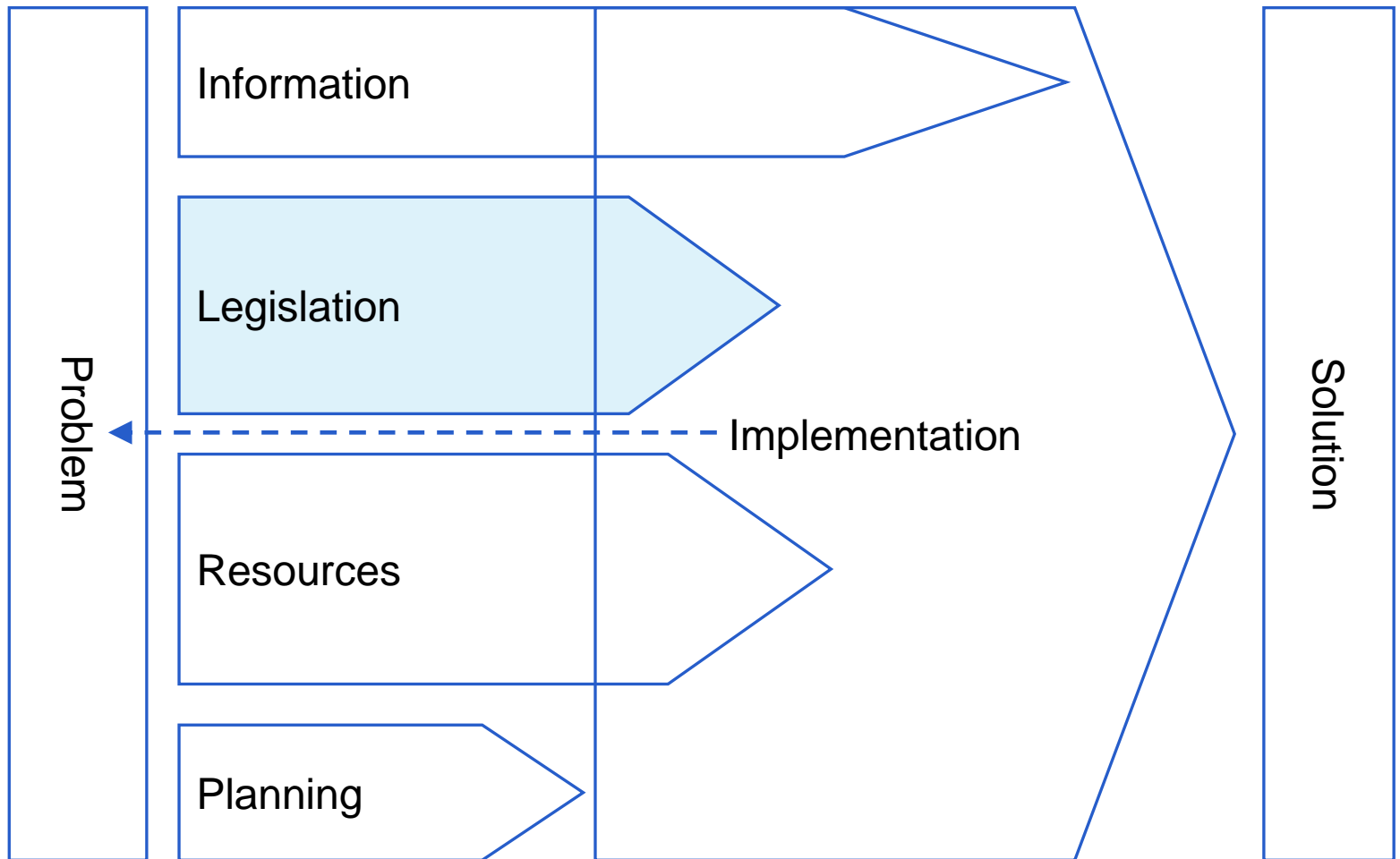
1. Function of Legislation

Function of Legislation

- Stabilization (e.g. Civil Code)
- **Problem Solving**
- Legitimacy and Discourse

II. Function and Limitation of Legislation

2. Problem Solving Capacity



II. Function and Limitation of Legislation

2. Problem Solving Capacity

The problem solving capacity of legislation is limited because ...

- ... legislation is language and language is never perfectly clear,
- ... a legislator cannot anticipate all possible cases under a given law,
- ... legislation must be open for tailor-made solution,
- ... of negative and evasive behavior of the citizens,
- ... of practical limitations (costs for control etc.),
- ... of bad implementation.

III. Goals in Legislation

27.12.2017

EN

Official Journal of the European Union

L 345/1

I

(Legislative acts)

REGULATIONS

**REGULATION (EU) 2017/2394 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 12 December 2017**

**on cooperation between national authorities responsible for the enforcement of consumer
protection laws and repealing Regulation (EC) No 2006/2004**

(Text with EEA relevance)

- (5) Consumers should also be protected against infringements covered by this Regulation that have already ceased, but the harmful effects of which may continue. Competent authorities should have the necessary minimum powers to investigate and to order the cessation of such infringements or their prohibition in the future, in order to prevent them from being repeated, and in so doing, to ensure a high level of consumer protection.

III. Goals in Legislation

420.1

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Federal Act on the Promotion of Research and Innovation (RIPA)

of 14 December 2012 (Status as of 1 January 2018)

Chapter 1 General Provisions

Art. 1 Purpose

With this Act, the Confederation aims to:

- a. encourage scientific research;
- b. encourage science-based innovation;
- c. support the analysis and exploitation of research results;
- d. ensure cooperation between research bodies;
- e. ensure the economical and effective use of federal funding for scientific research and science-based innovation.

III. Goals in Legislation

Goals in legislation matter because ...

- ... they reveal legislative preferences,
- ... they set priorities over conflicting goals,
- ... they enhance statutory interpretation,
- ... they enhance proper implementation,
- ... they serve as a benchmark for legislative success (accountability)

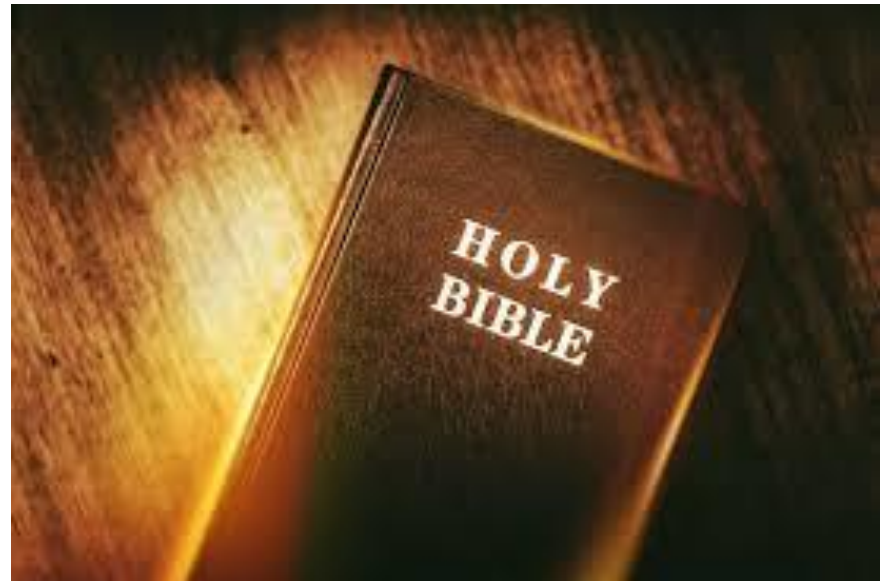


IV. Regulatory Instruments

1. Prohibitions and Sanctions

"Thou shalt not kill"

"Thou shalt not steal"



IV. Regulatory Instruments

2. Targets and Principles

814.01

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**Federal Act
on the Protection of the Environment
(Environmental Protection Act, EPA)**

of 7 October 1983 (Status as of 1 January 2018)

Chapter 4⁴⁷ Waste

Section 1 Avoidance and Disposal of Waste

Art. 30 Principles

¹ The production of waste should be avoided wherever possible.

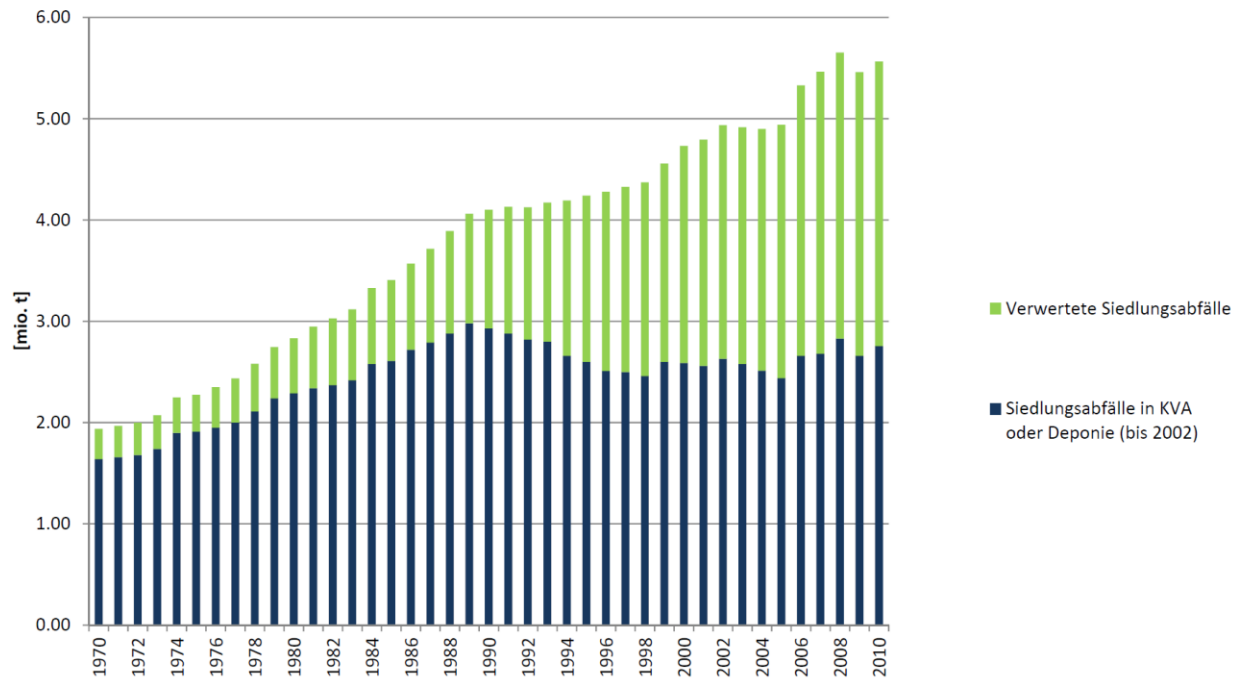
² Waste must be recovered wherever possible.

³ Waste must be disposed of in an environmentally compatible way and, insofar as this is possible and reasonable, within Switzerland.

IV. Regulatory Instruments

2. Targets and Principles

Recycled and non-recycled municipal solid waste 1970 - 2010



Recycled municipal solid waste

Municipal solid waste incinerated
or placed in a landfill (until 2002)

Federal Office of the Environment, 2011

IV. Regulatory Instruments

3. Incentives (negative)



Art. 35b^{bis} 72 Sulphur content of petrol and diesel

¹ Any person who imports, or in Switzerland produces or extracts petrol or diesel with a sulphur content of more than 0.001 per cent (% by mass) pays the Confederation an incentive tax.

IV. Regulatory Instruments

3. Incentives (positive)



IV. Regulatory Instruments

3. Incentives (positive)

Chapter 2 Promotional Measures

Art. 49 Training and research

¹ The Confederation may promote the basic and continuing education and training of personnel entrusted with duties in terms of this Act.¹⁰⁶

² It may commission or support research studies and technology assessments.¹⁰⁷

³ It may promote the development of installations and processes that can reduce pollution in the public interest. **Financial aid** may not normally exceed 50 per cent of the costs. In the event of the commercial exploitation of the development results, it must be refunded in proportion to the earnings made. The Federal Council makes a general assessment of the effect of the promotion and reports to the Federal Assembly on the results at five-yearly intervals.¹⁰⁸

IV. Regulatory Instruments

4. Information (and Nudging)

Chapter 4²⁸ Environmental Information

Art. 10e Environmental information and advice

¹ The authorities shall inform the public adequately about environmental protection and levels of environmental pollution; in particular:

- a. they shall publish studies on environmental pollution and on the success of measures under this Act (Art. 44);
- b. they may, provided it is of general interest and having consulted those concerned, publish:
 1. the results of the conformity assessment of series-produced installations (Art. 40),
 2. the results of inspections of installations,
 3. the information under Article 46.

² Overriding private and public interests in confidentiality and manufacturing and business secrecy are reserved in every case.

³ The environmental protection agencies shall advise the authorities and private individuals. They shall advise the public on environmentally sound behaviour and recommend measures to reduce environmental pollution.

⁴ Environmental information must if possible be made available as open digital data records.

IV. Regulatory Instruments

4. Information (and Nudging)

**STOP
AIDS.**

IV. Regulatory Instruments

5. Public Services

Chapter 4²⁸ Environmental Information

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IV. Regulatory Instruments

5. Public Services

Section 2 Waste Management and the Disposal Obligation

Art. 31 Waste management

¹ The cantons draw up a waste management plan. In particular, they establish their requirements for waste disposal facilities, avoid over-capacity, and decide on the sites for the waste disposal facilities.

² They notify the Confederation of their waste management plan.

IV. Regulatory Instruments

5. Public Services



IV. Regulatory Instruments

6. Cooperation and Self-Regulation

Section 2a⁹³ Cooperation with the Private Sector

Art. 41a

- ¹ The Confederation and, within the scope of their responsibilities, the cantons shall cooperate with private sector organisations in enforcing this Act.
- ² They may promote sectoral agreements by setting quantitative targets and deadlines for meeting them.
- ³ Before enacting implementing regulations, they must examine voluntary private sector measures. Wherever possible and necessary, they shall incorporate sectoral agreements into the implementing regulations in whole or in part.

IV. Regulatory Instruments

7. Compensation Rules



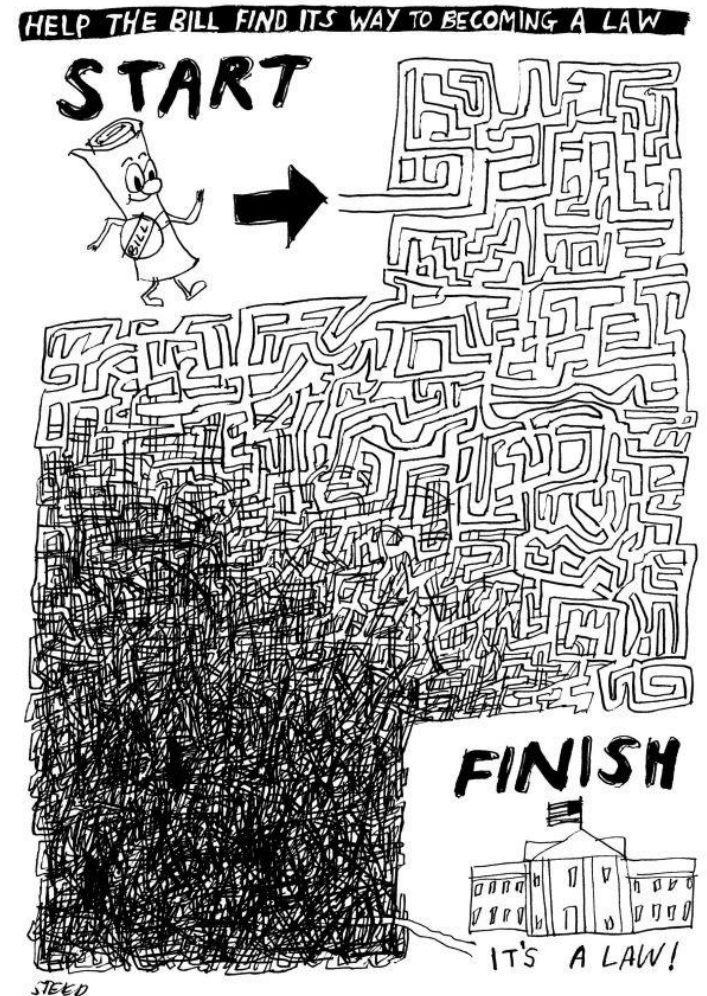
IV. Regulatory Instruments

8. Choice between Regulatory Instruments

- 1. The optimal instrument is the most effective, least intrusive with minimal cost (→ possible trade-offs)**
- 2. Instruments may be used in sequence (e.g. warning – fine).**
- 3. Instruments may be used combined (e.g. information – fine).**
- 4. The optimal instrument may change over time (→ evaluation)**

V. Legislative Process

1. "Due Process of Lawmaking" (LINDE)?



V. Legislative Process

1. "Due Process of Lawmaking" (LINDE)?

U.S. Supreme Court, Fullilove v. Klutznick, (448 U.S. 448 at 550 (1980), Stevens, J., dissenting)

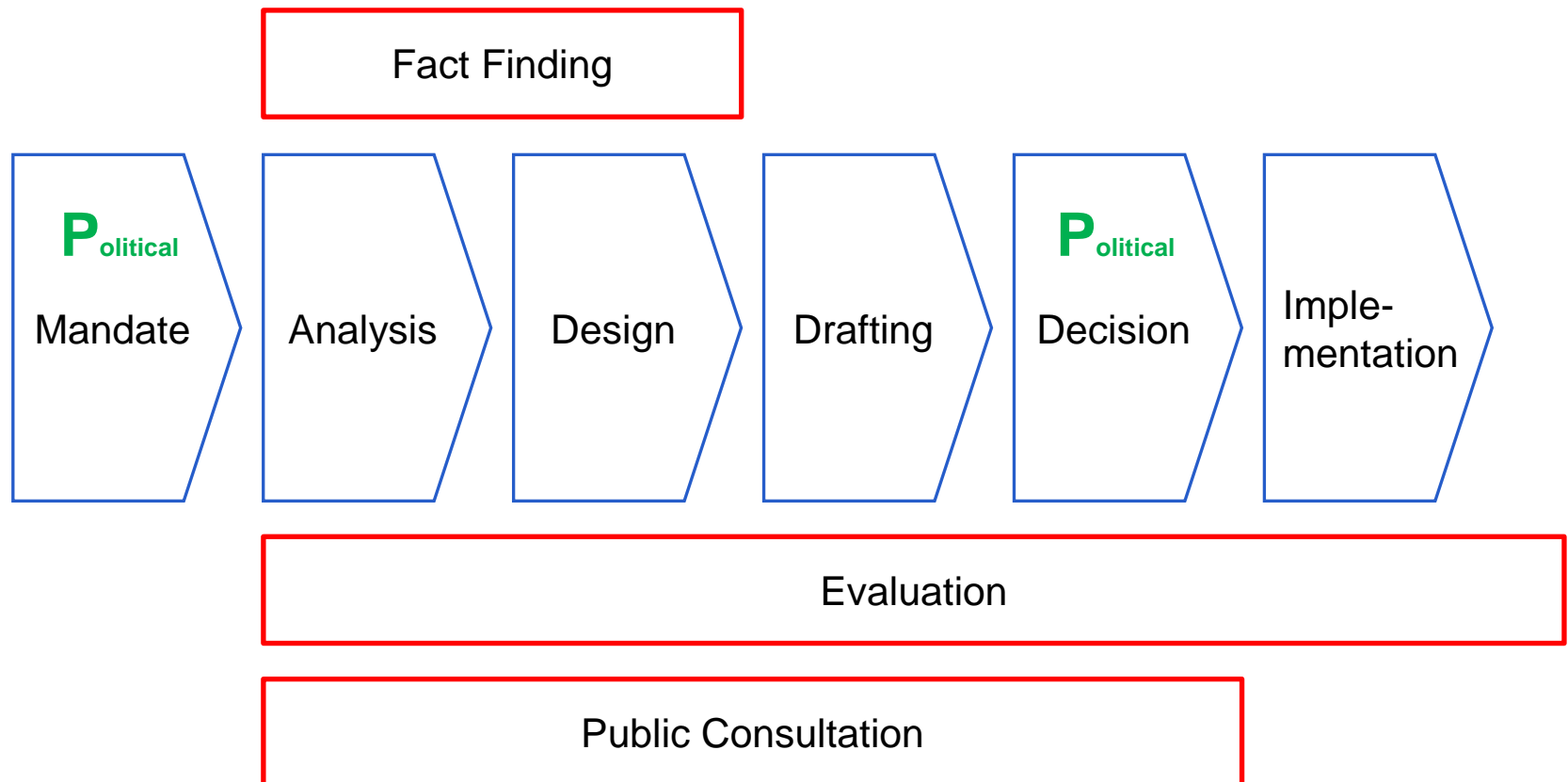
"Although it is traditional for judges to accord the same presumption of regularity to the legislative process no matter how obvious it may be that a busy Congress has acted precipitately, I see no reason why the character of their procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law."

"The Lawmaker owes nothing but the law."

(CHRISTIAN WALDHOFF: "Der Gesetzgeber schuldet nichts als das Gesetz." Zu alten und neuen Begründungspflichten des parlamentarischen Gesetzgebers. In: Festschrift für Josef Isensee, 2007, S. 325 ff.)

V. Legislative Process

2. Model of the Legislative Process



V. Legislative Process

3. Fact Finding

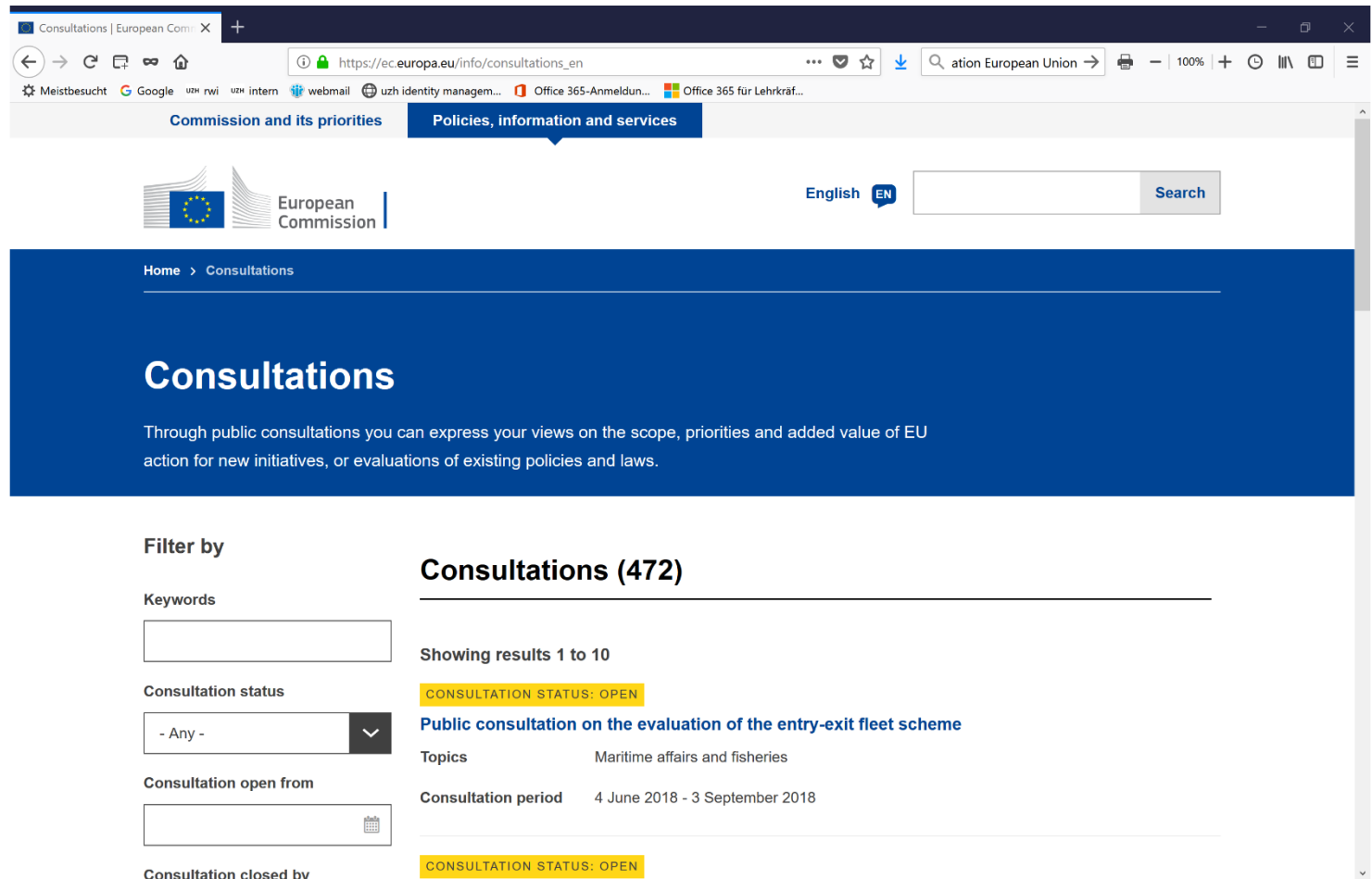
Fact Finding ...

- ... may be crucial for the outcome,
- ... requires resources and time,
- ... is hence difficult for single MPs,
- ... may be hampered by biased data,
- ... should be transparent and well documented,
- ... may go hand in hand with evaluation.



V. Legislative Process

4. Public Consultation (Participation)



The screenshot shows a web browser window displaying the European Commission's public consultations page. The browser's address bar shows the URL https://ec.europa.eu/info/consultations_en. The page features a navigation bar with "Commission and its priorities" and "Policies, information and services". The European Commission logo is visible on the left, and a search bar with "English EN" and a "Search" button is on the right. The main content area has a blue header with "Home > Consultations" and a large "Consultations" title. Below the title, a paragraph explains that public consultations allow users to express views on EU initiatives. A filter section on the left includes a "Filter by" heading, a "Keywords" search box, a "Consultation status" dropdown menu set to "- Any -", and a "Consultation open from" date picker. The main content area displays "Consultations (472)" and "Showing results 1 to 10". The first result is a yellow box labeled "CONSULTATION STATUS: OPEN" followed by the title "Public consultation on the evaluation of the entry-exit fleet scheme". Below the title, the "Topics" are listed as "Maritime affairs and fisheries" and the "Consultation period" is "4 June 2018 - 3 September 2018". A second yellow box at the bottom of the result indicates "CONSULTATION STATUS: OPEN".

Commission and its priorities | Policies, information and services

European Commission

English EN

Search

Home > Consultations

Consultations

Through public consultations you can express your views on the scope, priorities and added value of EU action for new initiatives, or evaluations of existing policies and laws.

Filter by

Keywords

Consultation status

- Any -

Consultation open from

Consultation closed by

Consultations (472)

Showing results 1 to 10

CONSULTATION STATUS: OPEN

Public consultation on the evaluation of the entry-exit fleet scheme

Topics: Maritime affairs and fisheries

Consultation period: 4 June 2018 - 3 September 2018

CONSULTATION STATUS: OPEN

V. Legislative Process

4. Public Consultation (Participation)



V. Legislative Process

4. Public Consultation (Participation)

Federal Act on the Consultation Procedure (Consultation Procedure Act, CPA)

of 18 March 2005 (Status as of 1 April 2016)

Art. 2 Purpose of the consultation procedure

¹ The consultation procedure has the aim of allowing the cantons, political parties and interested groups to participate in the shaping of opinion and the decision-making process of the Confederation.

² It is intended to provide information on material accuracy, feasibility of implementation and public acceptance of a federal project.

V. Legislative Process

4. Public Consultation (Participation)

Participation (Functions)

- Information and Transparency
- Legitimacy
- Political Feasibility
- Fact Finding
- Implementation and Practicability
- Drafting



V. Legislative Process

4. Public Consultation (Participation)

Participation (Characteristics)

- The object of participation is a draft law.
- Participation has no binding effect on government.
- The typical participants are private individuals.
- Participation is a formalized process.
- There is no standard format for participation.
- Participation is not an opinion poll.
- Participation is not an expert opinion.
- Participation is not lobbying.

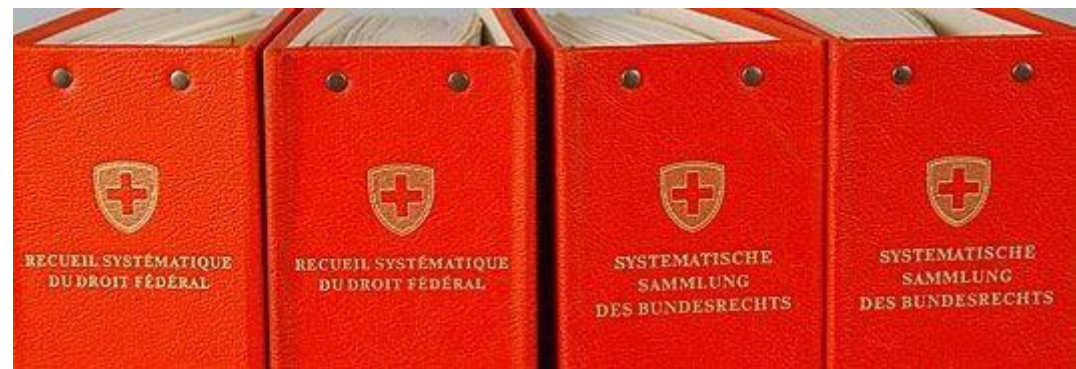
VI. Publication and Consolidation

1. Publication

*"A state in which there are more laws than a citizen can remember is a poorly organized state, and a citizen who does not know all the laws by heart is a bad citizen."

*"Tout État où il y a plus de lois que la mémoire de chaque citoyen n'en peut contenir est un État mal constitué, et tout homme qui ne sait pas par coeur les lois de son pays est un mauvais citoyen."

JEAN-JACQUES ROUSSEAU, Fragments politiques



VI. Publication and Consolidation

1. Publication

Publication ...

- ... is essential for the validity of the law,
- ... must be up to date,
- ... must be easily accessible for everybody (internet),
- ... may be supplemented by explanatory materials.

VI. Publication and Consolidation

2. Consolidation (Techniques of Amendments)

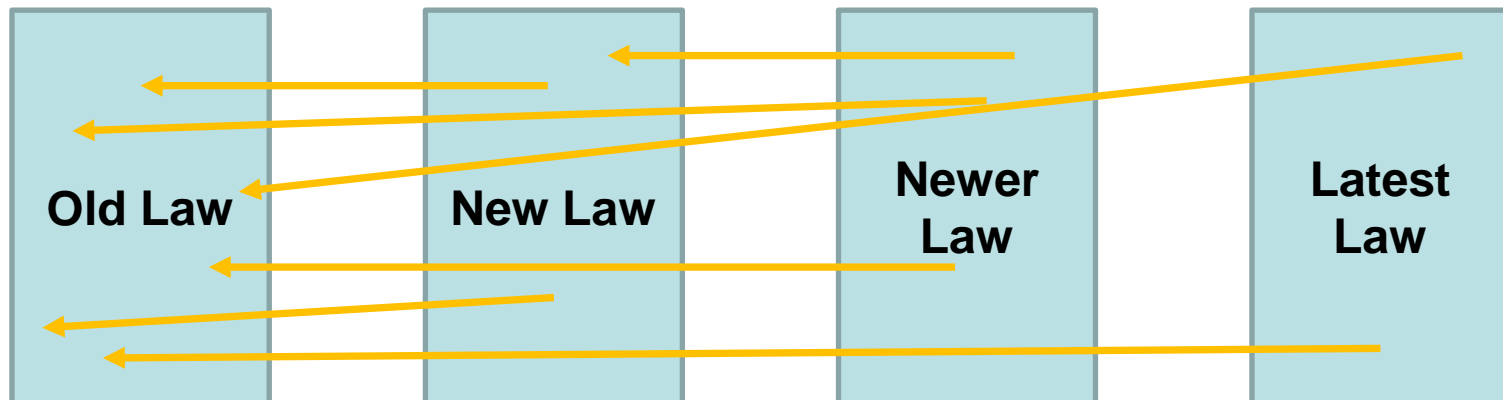
Royal Decree No. 49/84 on the promulgation of the Publications and Publishing Law (Oman)

ARTICLE (3): The Publications Law No. 3/75 and any other regulations in contradiction or contravention of the provisions of the attached law are deemed null and void

VI. Publication and Consolidation

2. Consolidation (Techniques of Amendments)

Indirect Method



VI. Publication and Consolidation

2. Consolidation (Techniques of Amendments)

Direct Method

Art. 7¹⁰ Form and duration

¹ The consultation documents are made available in paper or electronic form. The Federal Council may provide that consultation procedures be carried out exclusively online provided the necessary technical requirements are met.

² The authority responsible for carrying out the consultation procedures may also invite interested groups to meetings. Minutes must be taken of these meetings.

³ The duration of the consultation period is at least three months. This period may be extended appropriately to take account of public holidays as well as the content and size of the proposal. The minimum period is extended for consultation procedures:

- a. that include the period from 15 July to 15 August: by three weeks;
- b. that include the Christmas and New Year period: by two weeks;
- c. that include Easter: by one week.

¹⁰ Amended by No I of the Federal Act of 26 Sept. 2014, in force since 1 April 2016 (AS 2016 925; BBl 2013 8875).

VI. Publication and Consolidation

2. Consolidation (Techniques of Amendments)

Direct Method

732.1

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Nuclear Energy Act (NEA)

of 21 March 2003 (Status as on 1 January 2018)

Art. 105 Repeal and amendment of current legislation

The repeal and amendment of current legislation is regulated in the Annex.

VI. Publication and Consolidation

2. Consolidation (Techniques of Amendments)

The direct method is preferable over the indirect method of amendment because ...

- ... the user reading the original text may overlook later amendments,
- ... several amendments make the original text illegible,
- ... legislator must diligently consider all possible effects to existing law when enacting new legislation,
- ... legislation is consolidated and there is no need for special consolidation,
- ... legislator "learns" the technique easily.

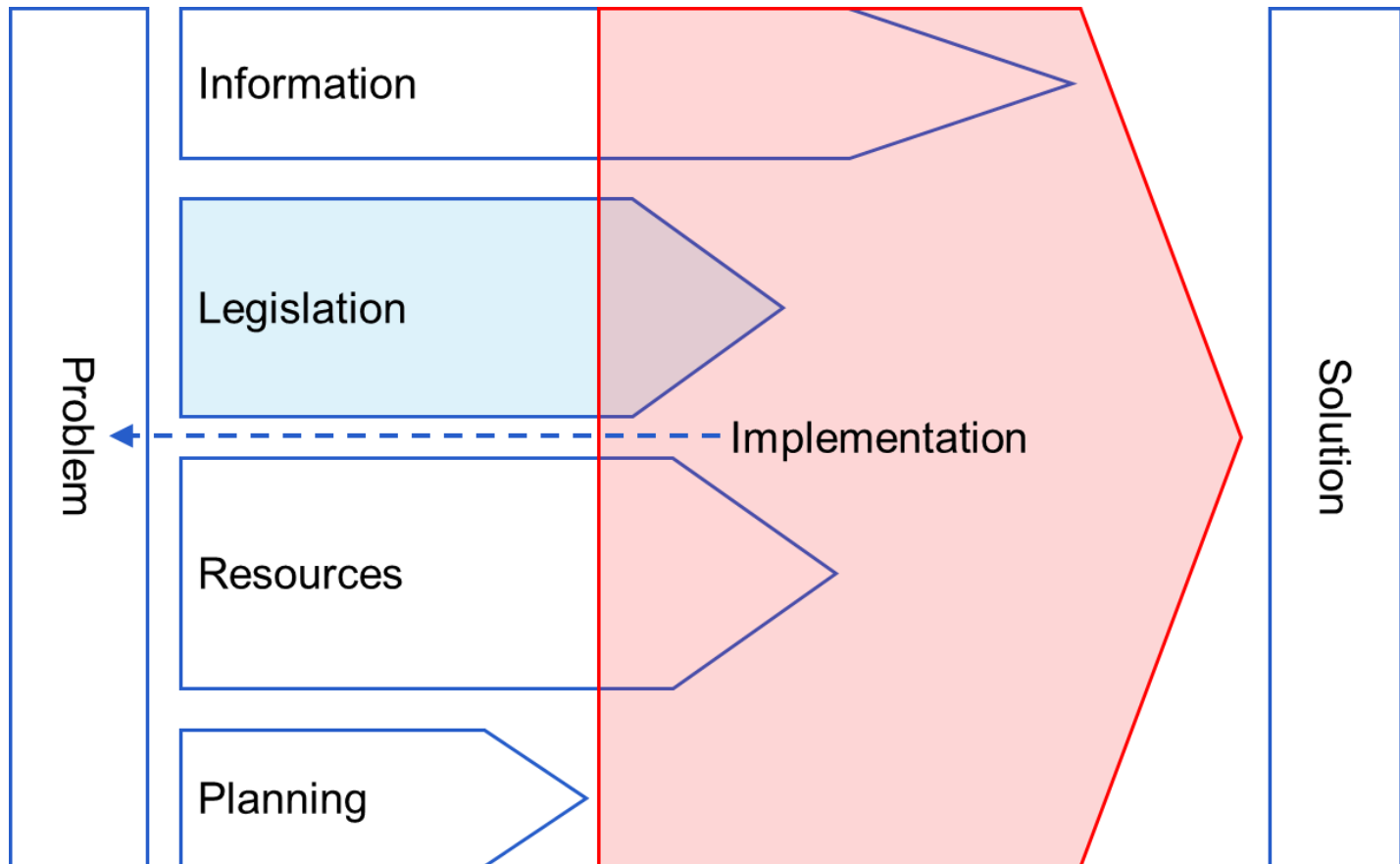
VII. Implementation and Supervision

1. Implementation



VII. Implementation and Supervision

1. Implementation



VII. Implementation and Supervision

2. Supervision



VII. Implementation and Supervision

2. Supervision

Legislator must not "forget" its law once passed but ...

- ... consider effective implementation early in the process,
- ... foresee possible costs and opposition,
- ... establish adequate processes for supervision (→ evaluation),
- ... reconsider and amend (or abolish) the law if necessary.

VII. Implementation and Supervision

2. Supervision

251

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Federal Act on Cartels and other Restraints of Competition (Cartel Act, CartA)

of 6 October 1995 (Status as of 1 December 2014)

Chapter 6a:⁴⁸ Evaluation

Art. 59a

¹ The Federal Council shall arrange for the evaluation of the effectiveness of the measures and the application of this Act.

² After conclusion of the evaluation and at the latest five years after this provision has come into force, the Federal Council shall report to Parliament and submit proposals for further action.



VII. Implementation and Supervision

3. Sunset and Experimental Clauses

101

English is not an official language of the Swiss Confederation. This translation is provided for information purposes only and has no legal force.

Federal Constitution of the Swiss Confederation

of 18 April 1999 (Status as of 12 February 2017)

Art. 130⁸¹ Value added tax*

¹ The Confederation may levy value added tax on the supply of goods, on services, including goods and services for personal use, and on imports, at a standard rate of a maximum of 6.5 per cent and at a reduced rate of at least 2.0 per cent.

14.¹¹⁸ Transitional provision to Art. 130 (Value Added Tax)¹¹⁹

¹ The power to levy value added tax is limited until the end of 2020.

VII. Implementation and Supervision

3. Sunset and Experimental Clauses



142.31

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Asylum Act (AsylA)

of 26 June 1998 (Status as of 1 January 2018)

VII. Implementation and Supervision

3. Sunset and Experimental Clauses

Chapter 8a Asylum Proceedings in Test Phases³²⁰

Art. 112b³²¹ ...³²²

¹ The Confederation may provide for test phases to assess new procedures if a test phase is required for such procedures prior to amending the law due to the complex organisational and technical measures involved.

² The Confederation regulates the details of the test phases in an ordinance. In doing so it may deviate from the terms of this Act and the FNA³²³ in relation to the organisation of first instance asylum proceedings and the removal proceedings and related financial issues.

³ It may reduce the deadline for filing an appeal under Article 108 paragraph 1 in test phases from 30 days to ten days, provided effective legal protection for the asylum seekers concerned is guaranteed by suitable measures.

⁴ The ordinance lists all the statutory provisions from which it deviates.

⁵ The test phases last no longer than two years.

VII. Implementation and Supervision

3. Sunset and Experimental Clauses

Reasons for Sunset Clauses

- Temporary Problem
- Temporal Public Commitment
- Political Compromise
- Need for confirmation
- Experiment

VII. Implementation and Supervision

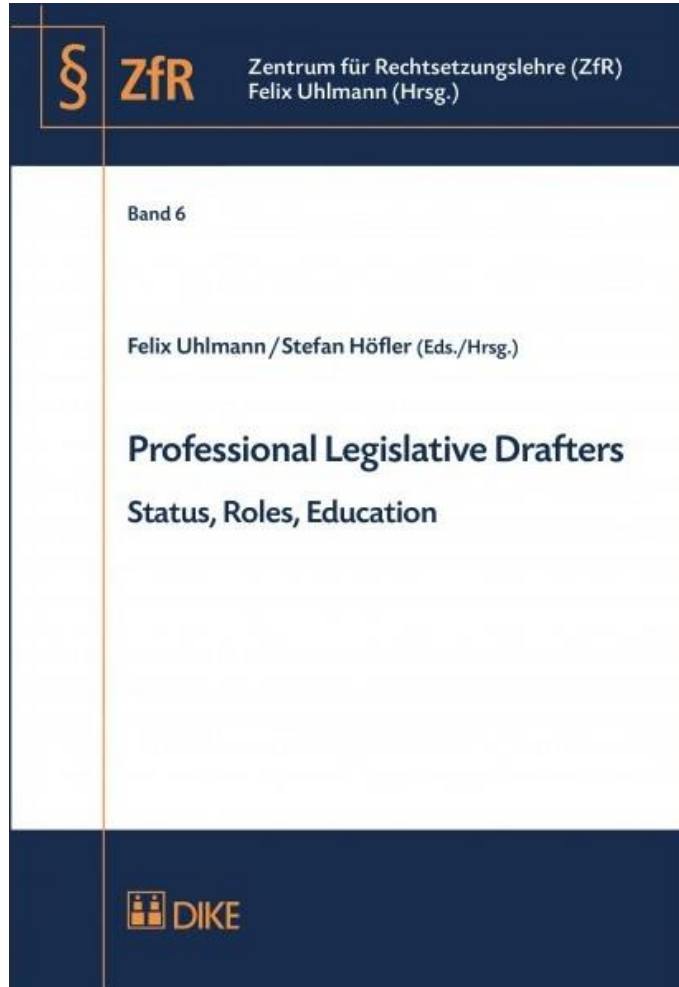
3. Sunset and Experimental Clauses

Experimental Clauses must clearly state

- ... competencies for the experiment,
- ... goals of the experiment,
- ... guard railing (safeguards),
- ... time limits,
- ... evaluation,
- ... form of the experiment (if necessary).



VIII. Education



(IX. Practical Questions

Federal Act on Data Protection

(<https://www.admin.ch/opc/en/classified-compilation/19920153/index.html>)

Read the Federal Act on Data Protection.

1. What are the goals (explicit and implicit) of this law? What problems are addressed?
2. What regulatory instruments are used in this law? Would other or additional instruments be possible?
3. If you had to write regulation on data protection from scratch: what are the facts and data you would be interested in? How would you gather these facts?
4. Do you see room for evaluation, sunset, or experimental clauses?
5. What other remarks do you have?)