

# Process of Legislation (Methodology)

Felix Uhlmann

Bar Ilan Law School

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**University of  
Zurich<sup>UZH</sup>**

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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

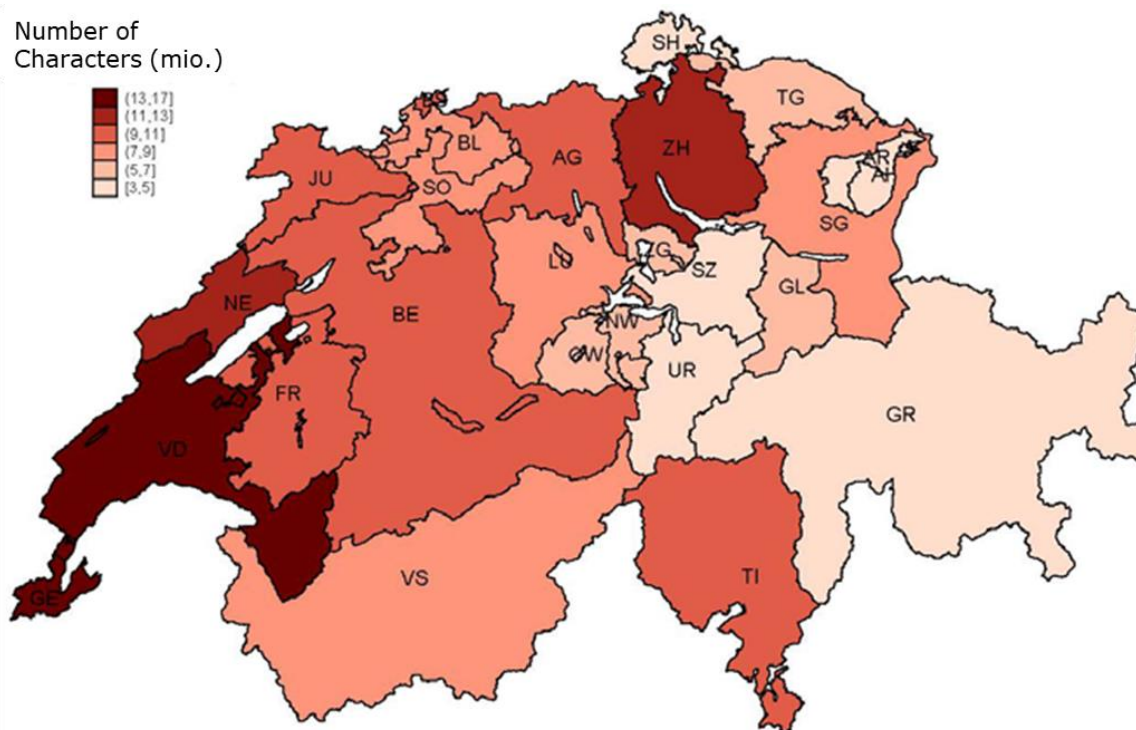
### **Good legislation ...**

- ... is clearly and understandably drafted (drafting quality),
- ... is constitutional and proportional,
- ... 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

## Excuse – Drowning by Numbers?

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



# II. Function and Limitation of Legislation

## 1. Function of Legislation

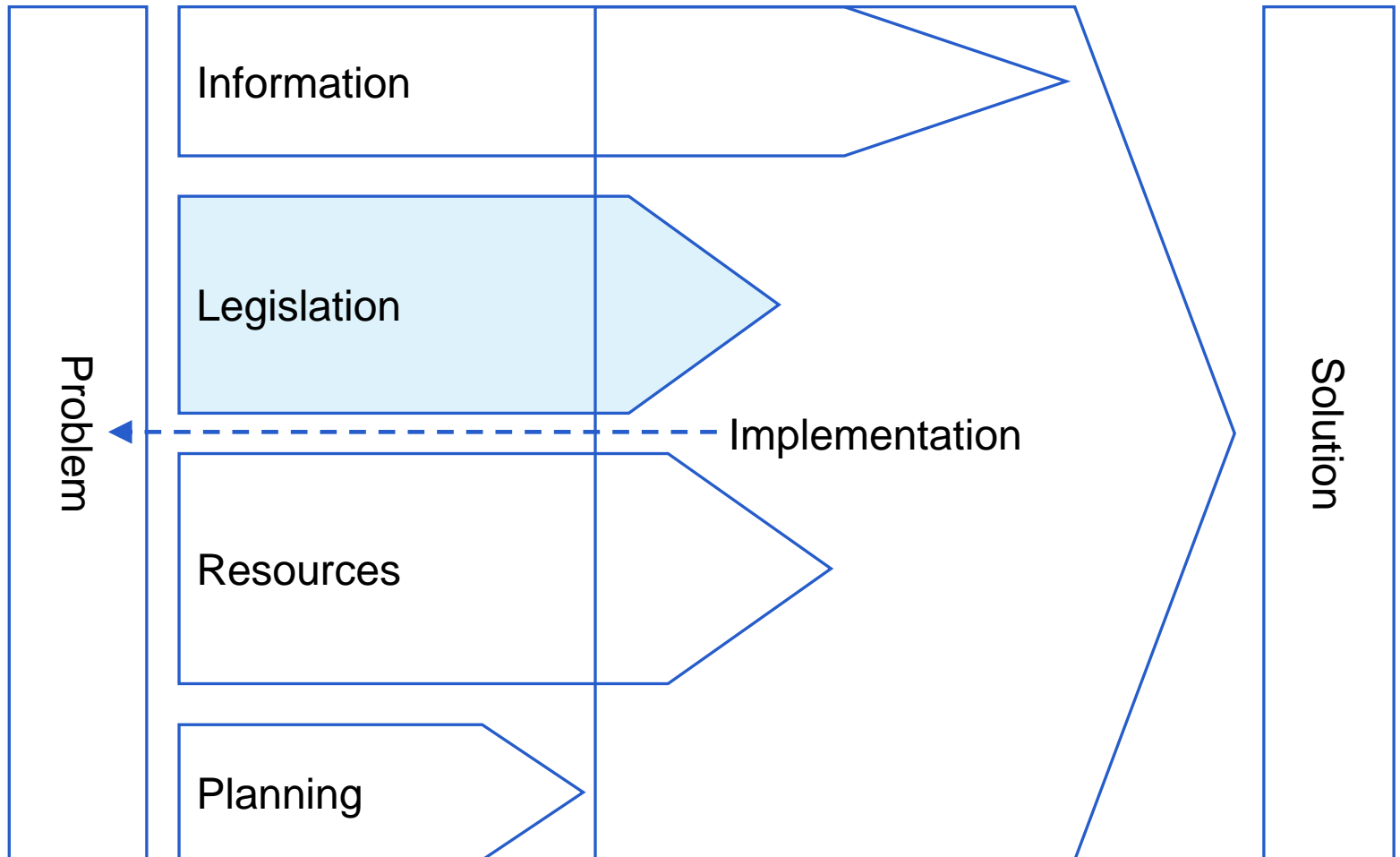
### Function of Legislation

- 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 (Policy)

## Policy and Goals

"Policy is a deliberate system of guidelines to guide decisions and achieve rational outcomes. A policy is a **statement of intent** and is implemented as a procedure or protocol" (Wikipedia).

How gets policy "translated" into law?

# III. Goals in Legislation (Policy)

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 (Policy)

420.1

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

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

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

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### **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 (Policy)

## **Goals in legislation matter because ...**

- ... they translate policy into law and 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)

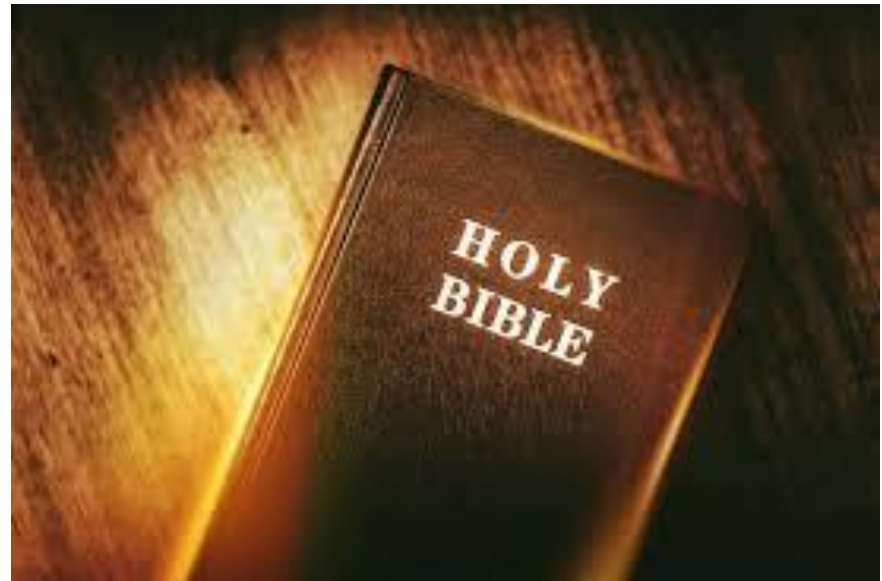


# IV. Regulatory Instruments

## 1. Prohibitions and Sanctions

**"Thou shalt not kill"**

**"Thou shalt not steal"**



# IV. Regulatory Instruments

## 2. Targets and Principles

### REGULATIONS

**REGULATION (EU) 2021/1119 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**of 30 June 2021**

**establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law')**

*Article 2*

#### **Climate-neutrality objective**

1. Union-wide greenhouse gas emissions and removals regulated in Union law shall be balanced within the Union at the latest by 2050, thus reducing emissions to net zero by that date, and the Union shall aim to achieve negative emissions thereafter.



# 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)

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**Chapter 4<sup>47</sup> Waste**

**Section 1 Avoidance and Disposal of Waste**

**Art. 30 Principles**

<sup>1</sup> The production of waste should be avoided wherever possible.

<sup>2</sup> Waste must be recovered wherever possible.

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

# IV. Regulatory Instruments

## 3. Incentives (negative)



**Art. 35b<sup>bis</sup> 72** Sulphur content of petrol and diesel

<sup>1</sup> 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

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

<sup>2</sup> It may commission or support research studies and technology assessments.<sup>107</sup>

<sup>3</sup> 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.<sup>108</sup>

# IV. Regulatory Instruments

## 4. Information (and Nudging)

### Chapter 4<sup>28</sup> Environmental Information

#### Art. 10e Environmental information and advice

<sup>1</sup> 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.

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

<sup>3</sup> 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.

<sup>4</sup> Environmental information must if possible be made available as open digital data records.

# IV. Regulatory Instruments

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## 4. Information (and Nudging)

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**STOP  
AIDS.**

# IV. Regulatory Instruments

## 5. Public Services

### Chapter 4<sup>28</sup> Environmental Information

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# IV. Regulatory Instruments

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## 5. Public Services

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### **Section 2      Waste Management and the Disposal Obligation**

#### **Art. 31      Waste management**

<sup>1</sup> 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.

<sup>2</sup> They notify the Confederation of their waste management plan.



# IV. Regulatory Instruments

## 5. Public Services



# IV. Regulatory Instruments

## 6. Cooperation and Self-Regulation

### Section 2a<sup>93</sup> Cooperation with the Private Sector

#### Art. 41a

<sup>1</sup> The Confederation and, within the scope of their responsibilities, the cantons shall cooperate with private sector organisations in enforcing this Act.

<sup>2</sup> They may promote sectoral agreements by setting quantitative targets and deadlines for meeting them.

<sup>3</sup> 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

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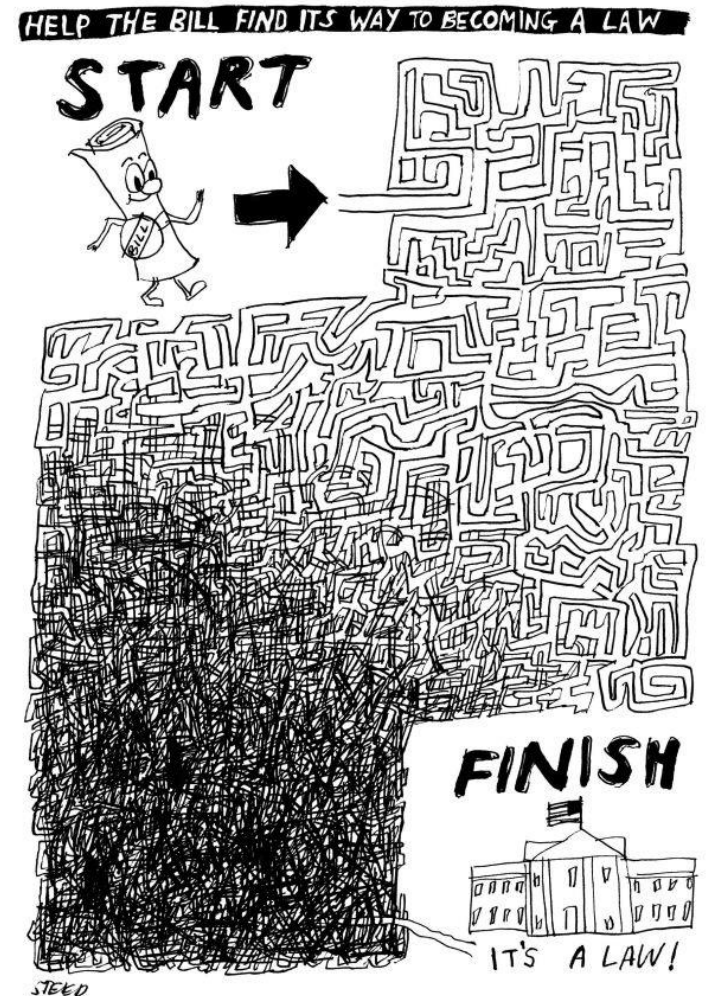
## 8. Choice between Regulatory Instruments

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- 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)**

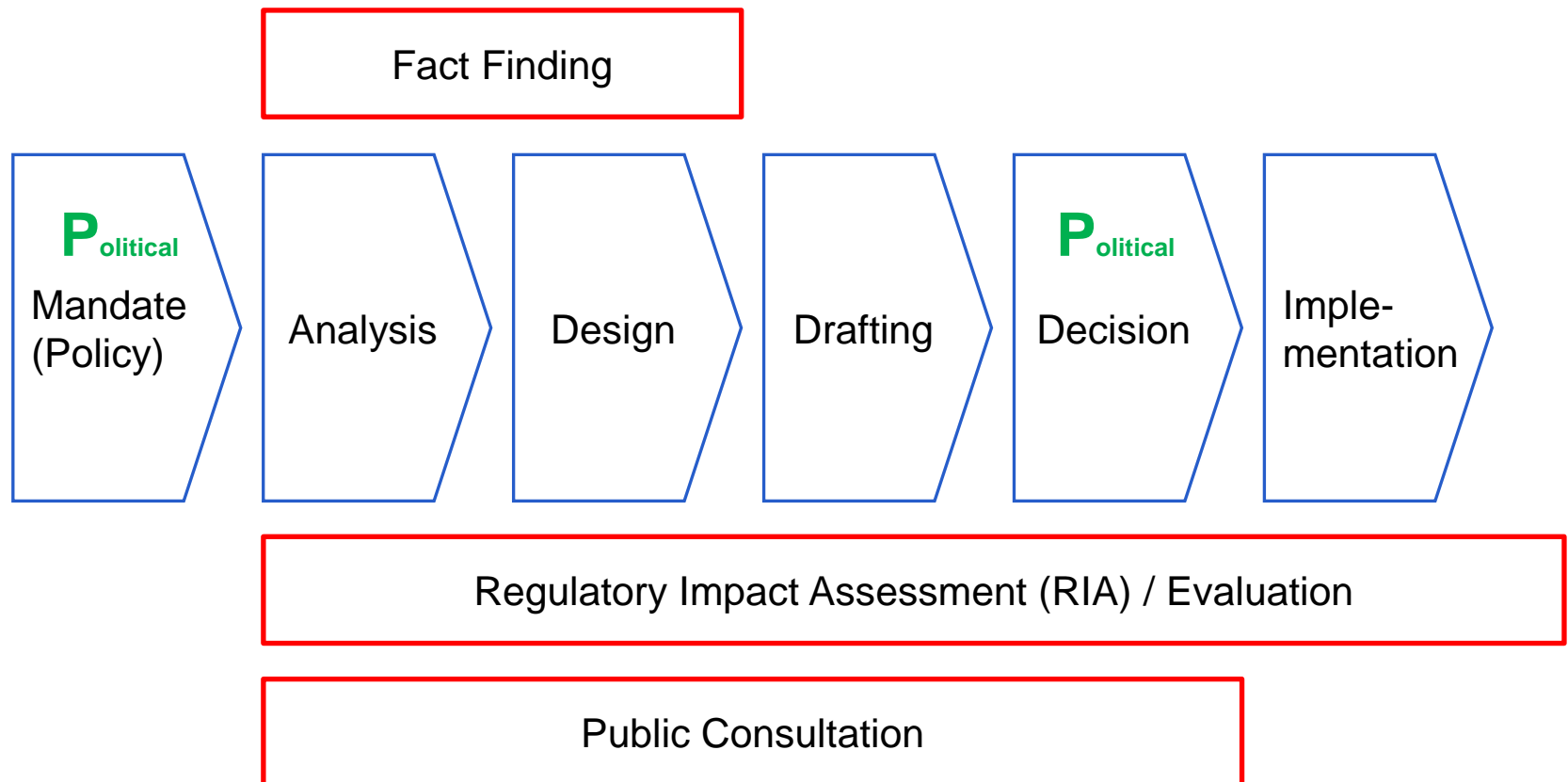
"Although it is traditional for judges to accord the same presumption of regularity to the legislative process no matter how obvious it may be that a busy Congress has acted precipitately, I see no reason why the character of their procedures may not be considered relevant to the decision whether the 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. Concept

1.

### **A concept ...**

- ... allows for conceptual thinking,
- ... allows for alternatives,
- ... helps to avoid premature decisions,
- ... is efficient if properly used.





# V. Legislative Process

## 4. 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

## 5. Regulatory Impact Assessment and Evaluations

The screenshot shows a web browser displaying the OECD website page for Regulatory Impact Assessment. The browser address bar shows the URL: <https://www.oecd.org/regreform/regulatory-policy/ria.htm>. The page features the OECD logo and navigation menus. The main content area is titled "Regulatory impact assessment" and includes a brief definition of RIA, a paragraph about OECD analysis, and a section for "Best practice principles for regulatory policy" with a link to "Regulatory Impact Assessment". A "Latest updates" section is also visible, dated 7 November 2022, with a link to "The SME Test: Taking SMEs and entrepreneurs into account when regulating: Annex to the OECD Best Practice Principles". The page also includes a search bar, social media icons, and a footer with the date 30.12.2022.

Regulatory impact assessment

OECD.org Data Publications More sites News Job vacancies

OECD  
BETTER POLICIES FOR BETTER LIVES

OECD Home About Countries Topics COVID-19 Ukraine Français

Regulatory impact assessment

Regulatory policy

Regulatory reform and competition policy

### Regulatory impact assessment

Regulatory impact assessment (RIA) is a systemic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives. As employed in OECD countries it encompasses a range of methods. It is an important element of an evidence-based approach to policy making.

OECD analysis shows that conducting RIA within an appropriate systematic framework can underpin the capacity of governments to ensure that regulations are efficient and effective in a changing and complex world. Some form of RIA has now been adopted by all OECD members, but they have all nevertheless found the successful implementation of RIA administratively and technically challenging.

This page provides links to the considerable research undertaken by the OECD on methodological issues and country experiences with the implementation of RIA and includes guidance material to improve the performance of RIA, its early integration with policy making and the promotion of more coherent regulatory policy across government.

**Best practice principles for regulatory policy**

[Regulatory Impact Assessment](#)

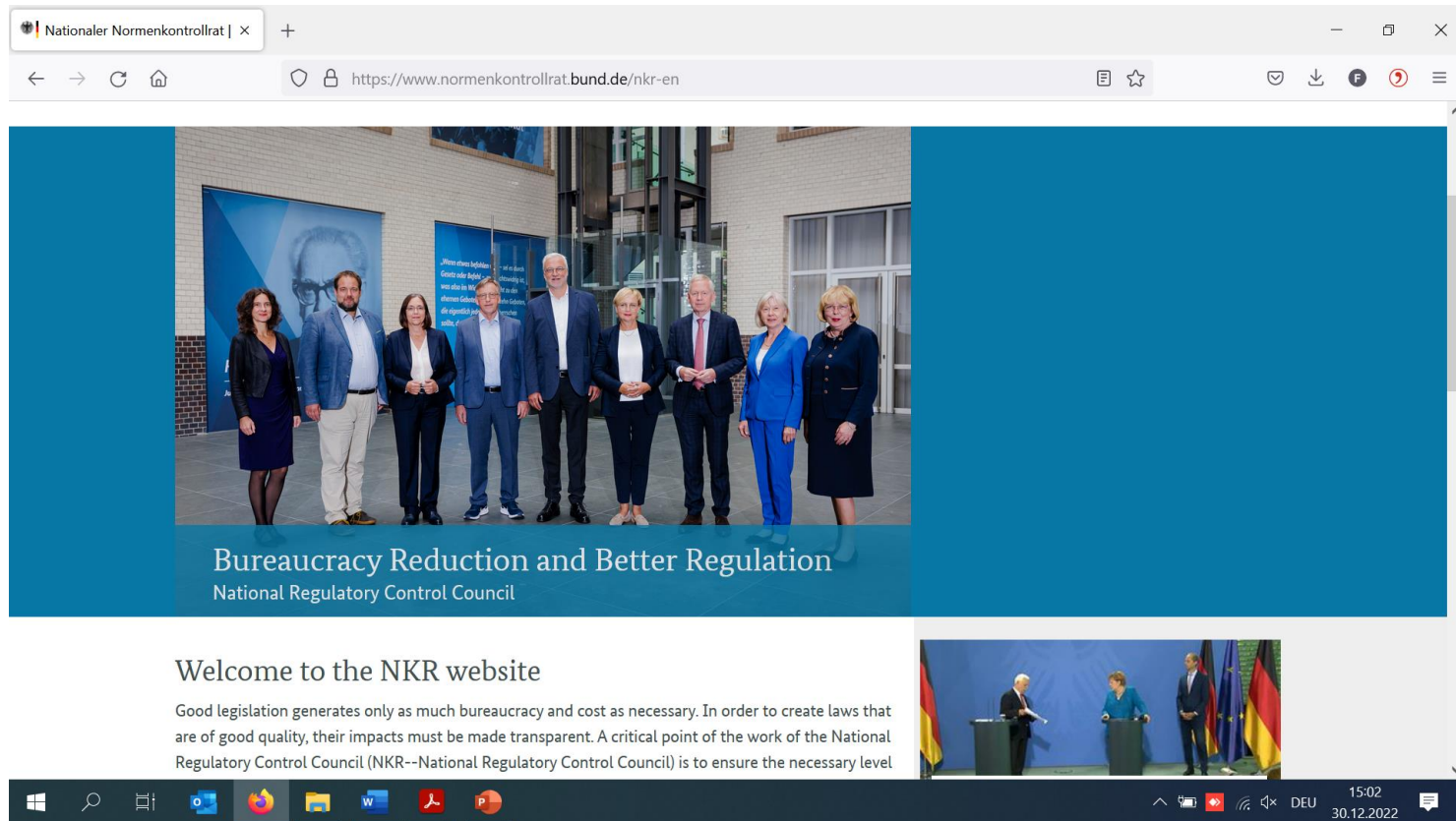
**Latest updates**

**7 November 2022**

[The SME Test: Taking SMEs and entrepreneurs into account when regulating: Annex to the OECD Best Practice Principles](#)

# V. Legislative Process

## 5. Regulatory Impact Assessment and Evaluations



The screenshot shows a web browser window with the address bar displaying <https://www.normenkontrollrat.bund.de/nkr-en>. The main content area features a large blue banner with a group photo of nine people standing in front of a building. Below the photo, the text reads "Bureaucracy Reduction and Better Regulation" and "National Regulatory Control Council". Below the banner, there is a heading "Welcome to the NKR website" followed by a paragraph: "Good legislation generates only as much bureaucracy and cost as necessary. In order to create laws that are of good quality, their impacts must be made transparent. A critical point of the work of the National Regulatory Control Council (NKR--National Regulatory Control Council) is to ensure the necessary level". To the right of this text is a small video player showing a man speaking at a podium. The Windows taskbar is visible at the bottom, showing the date and time as 15:02 on 30.12.2022.

# V. Legislative Process

## 5. Regulatory Impact Assessment and Evaluations

1.

**Regulatory impact assessment** and **evaluations** are important prerequisites for good legislation but ...

... will work only if taken seriously,

... require substantial resources, and

... should be used rather targeted than sweeping.

# V. Legislative Process

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## 6. Public Consultation (Participation)

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

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

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#### **Art. 2** Purpose of the consultation procedure

<sup>1</sup> 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.

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

# V. Legislative Process

## 6. 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](https://ec.europa.eu/info/consultations_en). The page features a navigation menu with 'Commission and its priorities' and 'Policies, information and services'. The European Commission logo is visible on the left, and a search bar with the text '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 states: '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

## 6. Public Consultation (Participation)



# V. Legislative Process

## 6. Public Consultation (Participation)

### **Public Consultation (Functions)**

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





# V. Legislative Process

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## 6. Public Consultation (Participation)

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### **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 (for the bill).

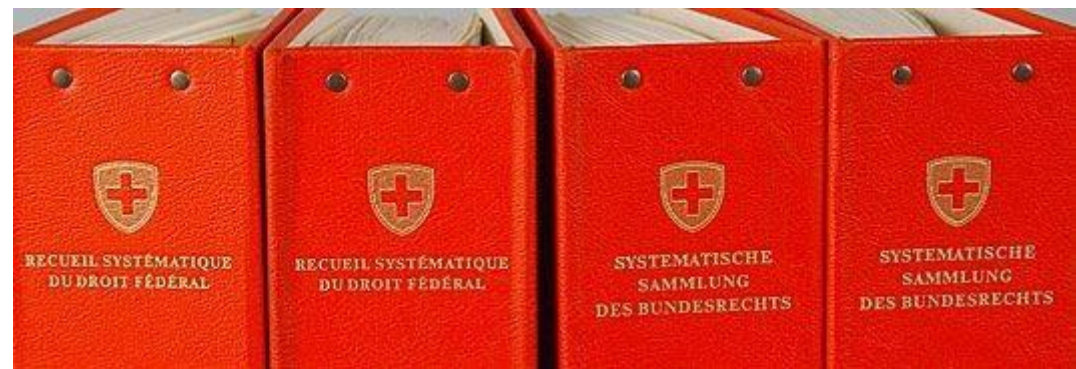
# VI. Publication and Consolidation

## 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

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## 1. Publication

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### **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

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## 2. Consolidation (Techniques of Amendments)

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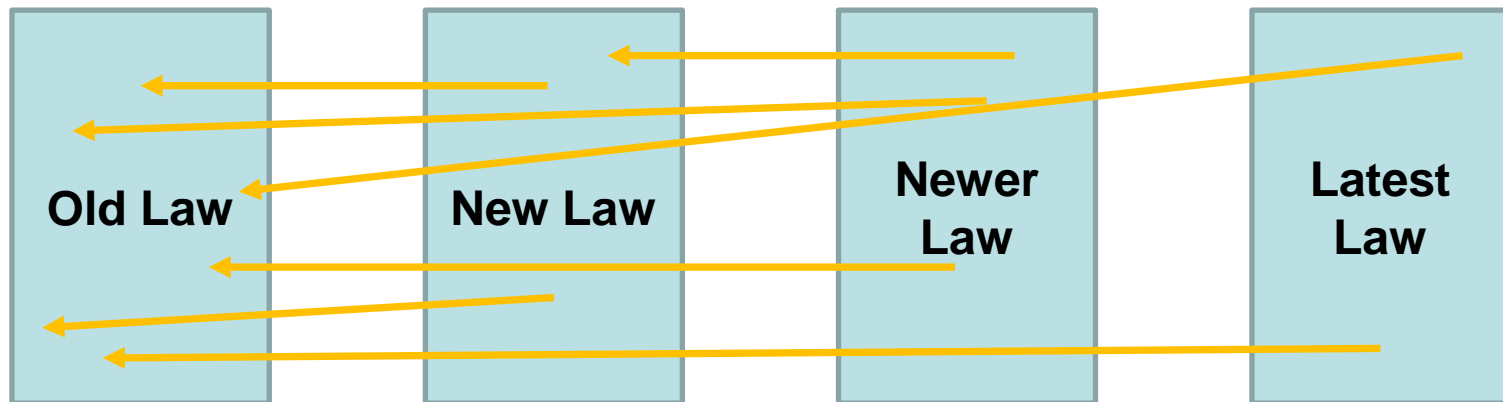
### **Royal Decree No. 49/84 on the promulgation of the Publications and Publishing Law (Oman)**

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. 7<sup>10</sup> Form and duration

<sup>1</sup> 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.

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

<sup>3</sup> 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.

<sup>10</sup> 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 dilligently 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.



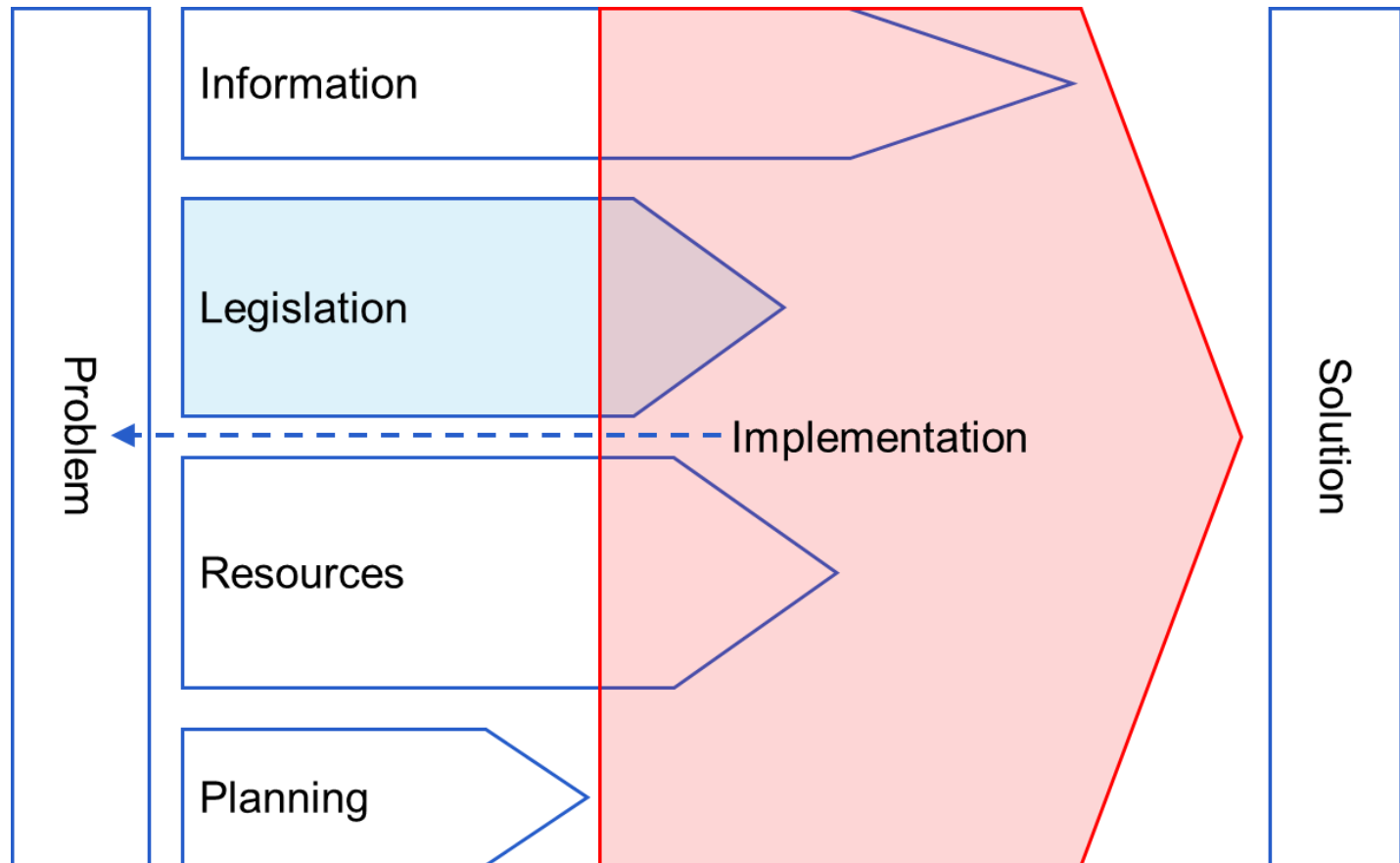
# VII. Implementation and Supervision

## 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:<sup>48</sup> Evaluation**

##### **Art. 59a**

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

<sup>2</sup> 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

*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 13 February 2022)

#### **Art. 130<sup>81</sup>** Value added tax\*

<sup>1</sup> 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.<sup>123</sup> Transitional provision to Art. 130 (Value Added Tax)<sup>124</sup>*

<sup>1</sup> The power to levy value added tax is limited until the end of 2035.<sup>125</sup>

# 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 Phases<sup>320</sup>

#### Art. 112b<sup>321</sup> ...<sup>322</sup>

<sup>1</sup> 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.

<sup>2</sup> 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 FNA<sup>323</sup> in relation to the organisation of first instance asylum proceedings and the removal proceedings and related financial issues.

<sup>3</sup> 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.

<sup>4</sup> The ordinance lists all the statutory provisions from which it deviates.

<sup>5</sup> The test phases last no longer than two years.

# VII. Implementation and Supervision

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## 3. Sunset and Experimental Clauses

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### **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. 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?