



SIGMA

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The Scrutiny of Legislative Drafts and the Organization of Administrative Procedures for Complaints raised by Taxpayers in Germany

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“Organisation of the legal services of the ministry of finance:
the experience of EU Member States”**

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I. The Scrutiny of Legislative Proposals

Three parties play a crucial role in the legislative procedure of the Federal Republic of Germany: the Federal Government, the *Bundestag* (parliament) and the *Bundesrat* (second chamber). As will be specified in more detail below, the Federal Government's role is mainly in the sphere of defining political priorities and initiating legislation. The *Bundestag* is the central body in the legislative process. That is where all federal draft legislation is examined in three readings prior to its adoption. Through the *Bundesrat* also the *Länder* (federal states) take part in the legislation and administration of the Federation. This paper provides an overview of the German legislative process with special focus on the preparation of legal drafts by federal ministries and the scrutiny of such legislative proposals prior to their adoption through the Federal Government.

I.1 Legislative Planning and Initiation of the Legislative Process

An important source of new legislative projects is the Federal Government's programme presented at the beginning of every electoral term, which lists the Government's political priorities for the next four years. In addition, political and legislative priorities are set by the competent federal ministry, for example, by preparing particular strategic concepts, such as the current reform of the health care system.

The essential provisions on the legislation process are contained in the German constitution, the Basic Law (*Grundgesetz*). According to this, a legislative initiative may come from the Federal Government, from within the *Bundestag* or from the *Bundesrat* (Art. 76 of the Basic Law).

In practice, however, more than 80 per cent of bills are drawn up by the Federal Government which is typical of the German parliamentary system of government. About 500 bills on average are passed in each legislative term. Because the government and the parliamentary majority are identical in political terms, it is appropriate for the bills which this parliamentary majority wishes to adopt to be drawn up and drafted by the Federal Government and its civil servants.

I.2 The Federal Chancellor and the Federal Ministries

The Federal Government consists of the Federal Chancellor and the Federal Ministers (Art. 62 of the Basic Law). Under the German constitution the Federal Chancellor determines and is responsible for the general guidelines of policy. However, within these limits each federal minister conducts the affairs of his department independently and on his own responsibility (Art. 65 of the Basic Law). In return the federal ministries will inform the Federal Chancellery in good time of all matters of fundamental political importance. It is a principle of the Federal Government's work that the Federal Chancellor and the federal ministers decide jointly on matters of general political importance. When there are differences of opinion between ministers, the Federal Chancellor mediates (as a "primus inter pares"). Cabinet decisions are based on majority rule.

Due to the principle of departmental autonomy, the functions of policy development and the drafting of legislative acts are mainly undertaken by the officials of the competent federal ministry. The officials of the competent ministry have expertise in the particular subject matter and also a good awareness of developments and problems in their respective area of competence so that they can identify the need to develop policy and legislative proposals.

I.3 Law Drafting Procedures and Inter-Ministerial Consultation

The work assignment plans of federal ministries do not provide for special legal drafting divisions. Rather the division responsible for the relevant subject according to the work assignment plan is also responsible for drafting legislation related to that subject. As these divisions are not constantly engaged in drafting legislation, it is important that the responsible staff can rely on rules of procedure that define the qualitative requirements for legislative proposals as well as the range of required involvement during the process of drafting legislation.

These requirements are specified in the Joint Rules of Procedure of the Federal Ministries (*Gemeinsame Geschäftsordnung der Bundesministerien*) which have been adopted by the Federal Government in 2000 and in the meantime have been revised several times, the last time in June 2009¹. The Joint Rules help to improve legislative quality and to streamline co-operation between the federal ministries, the Federal Government and other constitutional bodies. Regarding new legislative projects they specify procedural rules stating which agency is to be involved in drafting or scrutinizing the legislative proposal at each stage of its passage. This mandatory involvement is intended to ensure that all those who are supposed to be involved have the opportunity to contribute their specialist knowledge during the process of preparing the legislation. The lead federal ministry is responsible for involving all parties in a timely manner.

The lead federal ministry must seek additional comprehensive input from other federal ministries whose remits are affected by the planned legislation. When submitting the ministry draft to other federal ministries, steps must be taken to ensure that all those involved have sufficient time, usually four weeks, to examine and debate questions falling within their competence.

Each competent ministry whose input is solicited must make sure that drafts arriving from other federal ministries for co-signature are processed and forwarded quickly. Comments on the draft bill must be submitted to the federal ministries concerned. If any comment is marked as “fundamental” the lead ministry must deal with it and try to find a consensual solution. If such a solution is not possible, according to the Joint Rules extensive or expensive workings should not be started or instigated before the Federal Cabinet has taken a decision. When drawing up bills which impinge on the interests of the *Länder* or local councils, the views of the *Länder* and the national associations of local authorities should be obtained before settling a draft.

Furthermore, the preparation of draft legislation is subject to the provisions of the Guidelines for Drafting Legal Provisions and Administrative Regulations (*Handbuch zur Vorbereitung von Rechts- und Verwaltungsvorschriften*), issued by the Federal Ministry of the Interior. The structuring of draft legislation is governed by the Rules set out in the Handbook on Formal Requirements for Drafting Legislation (*Handbuch der Rechtsförmlichkeit*) issued by the Federal Ministry of Justice, and also subject to the recommendations of the Federal Ministry of Justice in individual cases.

Regarding the structure of Federal Government bills the Joint Rules set out that Federal Government bills must include the draft text of the bill, an explanatory memorandum and an introductory summary (cover sheet).

¹ An English translation of the Joint Rules of the Federal Ministries is available under <http://www.en.bmi.bund.de> (last visited on 03.09.2009)

In the explanatory memorandum the lead ministry is obliged to take the following criteria into account and to respond to them as concretely as possible:

1. The purpose and necessity of the bill and its individual provisions;
2. The matters of fact underlying the bill and the findings on which the draft bill is based;
3. Whether there are other regulatory alternatives, in particular, whether the task can be performed by private parties, and the considerations that led to rejecting these alternatives;
4. Whether duties of disclosure, other administrative obligations or reservations on the granting of permission are being introduced or extended, together with corresponding government monitoring and permission procedures, and what reasons argue against replacing them by voluntary obligations of the addressee of the legal norm;
5. The regulatory impacts of the law;
6. Whether the law can be limited as to time;
7. Whether the bill proposes to simplify the law and administrative procedures, and in particular, whether it simplifies or supersedes current regulations;
8. Whether the bill has reference to and is in compliance with the law of the European Union;
9. In case the bill transposes a directive into national law, whether and if so, to what extent, the bill contains additional provisions exceeding European requirements;
10. Whether the bill is in compliance with international treaty law; and
11. Changes to the current legal position.

I.4 Regulatory Impact Assessment

Regulatory Impact Assessment (RIA) plays a prominent part in the preparation of Federal Government bills. Regulatory impact means the main impacts of a law. This covers its intended effects and unintended side effects. The account of the foreseeable regulatory impacts must be drawn up by the lead ministry in consultation with other federal ministries. The Federal Ministry of the Interior issued a comprehensive Handbook on Legal Impact Assessment (*Handbuch der Gesetzesfolgenabschätzung*) and also a checklist (*Prüfliste*) which specifies all criteria which have to be addressed to by the ministry responsible for the legislative proposal.

The findings of the regulatory impact assessment have to be presented and explained in the explanatory memorandum of the draft bill and according to the Joint Rules must include the following costs:

- Budgetary expenditure excluding implementation costs
- Implementation costs
- Other costs (e.g. costs to the economy, costs to social security systems, effects on the price level, particularly on retail prices).
- Administrative costs caused by information obligations introduced for enterprises, citizens or the public administration.

Prior to submitting the draft bill to the Federal Government for adoption the lead ministry has to transmit the draft bill including explanatory memorandum and cover sheet to the Federal Ministry of the Interior for review. By examining the presentation of the findings in the explanatory memorandum with regard to accuracy and completeness of the impact assessment this ministry provides a kind of quality control. The Federal Ministry of the Interior, however, will not review the

ex ante assessment of administrative costs which is the main task of the National Regulatory Control Council (*Nationaler Normenkontrollrat*).

The National Regulatory Control Council (NRCC) was established in 2006 as part of the Federal Government's "Bureaucracy Reduction" program. The NRCC's principal function is to review draft legislation to determine the extent to which the requirements of the Joint Rules regarding impact assessment have been taken into account. Until May 2009, the NRCC has reviewed about 900 legislation proposals and in doing so contributed to reducing administrative costs of about 3.7 bn EURO (www.normenkontrollrat.de). In general, the evaluation by the NRCC encompasses especially three questions:

1. Have the expected administrative costs – resulting from information obligations – been quantified and described in a comprehensible manner?
2. Have appropriate efforts been made to consider alternatives which might cause less administrative costs?
3. Was the alternative with the smallest burden chosen within the scope of the intended regulation aim?

The Joint Rules stipulate that the NRCC is to be involved in proposed legislation at the same time as other ministries (Para. 45 (1)). The NRCC has issued a so-called Guide to the ex ante assessment of administrative costs in accordance with the standard cost model (SCM)² which serves as a working aid for the legislative branches within the federal ministries. It contains lessons learned and suggestions for incorporating the ex-ante assessment into draft laws. In order to facilitate the calculation a specific administrative burden calculation tool has been developed by the Federal Statistical Office (*Statistisches Bundesamt*). In case of complex measurements the Federal Statistical Office will also provide assistance. The NRCC has no veto power. However, its comments are to be included in the cover sheet when submitting the draft bill to the Federal Government for adoption.

I.5 Financial Review

If the proposed legislation can be expected to affect the income or expenditure of the Federation, the *Länder* or local authorities, the Federal Ministry of Finance is to be involved.

As part of the regulatory impact assessment, the Joint Rules stipulate that impacts on public budgetary income and expenditure (gross) must be presented by the lead ministry in the explanatory memorandum, including also foreseeable impacts resulting from the implementation of the law. The income and expenditure accrued to the federal budget must be broken down for the period of the federation's multi-year planning, stating whether and if so, to what extent, the additional expenditure or reduced revenues are taken into account in the multiyear financial planning, and how they can be compensated for.

Any impacts on the budgets of the *Länder* and local authorities must be stated separately. The lead ministry, therefore, must obtain details of expenditure from the *Länder* and national associations of local authorities in good time.

² An English translation of the Guide to the ex ante assessment of administrative costs in accordance with the standard cost model (SCM) is available under <http://www.normenkontrollrat.bund.de> (last visited on 03.09.2009).

In addition to the provisions set out in the Joint Rules, in 2007, the Federal Ministry of Finance in consultation with the Federal Ministry of the Interior issued a Working Aid for the Presentation of Budgetary Impacts of Legislative Proposals (*Allgemeine Vorgaben für die Darstellung von Gesetzgebungsvorhaben auf Einnahmen und Ausgaben von öffentlichen Haushalten*). Topics of this Working Aid are in particular:

- the order not to conceal any ascertained or ascertainable costs,
- the dispensability of a cost assessment,
- the accuracy of the cost calculation which must be broken down for the federation's multi-year planning and
- the compatibility with budgetary situation.

According to this Working Aid, cost calculations of the lead ministry may be based *inter alia* on available statistical data provided by the Federal Statistical Office, model calculations carried out by the lead ministry itself or external surveys. The explanatory memorandum must specify cost assessments for capital and recurring costs as well as personnel and organizational costs. In case no reliable data for a cost calculation can be obtained, it may become necessary to estimate these costs in consultation with the Federal Ministry of Finance.

1.6 Constitutional Compliance

Once the text of the ministerial draft has been coordinated with the federal ministries involved, the bill is forwarded to the Federal Ministry of Justice.

By examining the bill's constitutionality and its regulatory impact in accordance with principles of systematic and legal scrutiny, the Ministry of Finance also provides a kind of quality control. Without a positive result in this regard, the draft legislation will not be submitted to the Federal Government for approval.

The Ministry of Justice is concerned only to ensure that the law is observed and, thus, can offer independent impartial advice. The scrutiny encompasses a so-called Vertical and Horizontal Legal Scrutiny and the compliance with formal drafting requirements.

When performing a Vertical Legal Scrutiny the Federal Ministry of Justice checks that draft legislation complies with the constitution, European law and international law. For the scrutiny of compliance with the constitution a review questionnaire is used stating *inter alia* the following questions:

- 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?

In the course of a Horizontal Legal Scrutiny, the following issues are examined:

- 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 legal language, *etc.*

As regards the scrutiny of compliance with formal drafting requirements the Federal Ministry of Justice examines if the requirements as to form, construction and design of legal drafts as specified in the Handbook on Formal Requirements for Drafting Legislation have been met.

Revision in the Federal Ministry of Justice is carried out by some 30 counterpart divisions, each specializing in one sector such as cartel law, energy law, data protection law *etc.* and also a number of horizontal units for fundamental questions such as basic rights or basic principles of legal scrutiny. The civil servants responsible for the legal scrutiny of draft legislation are helped in their task by web-based legal information systems such as *juris* offering access to all federal laws, their amendments and related data such as case-law³, organs for promulgation⁴ and the parliament's public database⁵, the Handbook on Formal Requirements for Drafting Legislation, a drafting software for uniform creation of draft bills called "eNorm" and linguistic advisers in parliament.

After having received the confirmation of the Federal Ministry of Justice that it has no objections to the ministerial draft the lead ministry will submit the bill to the Federal Cabinet for a decision to be taken on it.

I.7 Parliamentary Consideration of Draft Legislation

I.7.1 First Stage in the Bundesrat

Following its adoption by the Federal Government, the draft bill is forwarded directly to the *Bundesrat* for comment. The *Bundesrat* is entitled to present its opinion within a six-week deadline and in specific cases it has three or nine weeks to comment. The *Bundesrat* makes use of this right in almost all cases. The experience of the *Länder* in the implementation of laws, almost all of which are implemented by them, is incorporated into federal legislation in this so-called first stage. The committees of the *Bundesrat* assess the bill from every possible standpoint, *i.e.* in terms of constitutionality, technical expertise, finances and political factors. Quite often, amendments, additions or alternatives are proposed. At this stage, the *Bundesrat's* assessment of the bill is not binding on the Federal Government. However, its assessments cannot be ignored by the Federal Government because they are an important indication to what the second assessment and the *Bundesrat's* final word will be in the so-called second stage. In practice, it rarely happens that a bill which has been rejected in total by the *Bundesrat* is still submitted to the *Bundestag* by the Federal Government.

Once the *Bundesrat* has submitted its comments, these are passed on to the Federal Government - which then has the opportunity to respond. The Federal Government's response is drafted by the competent division of the Federal Ministry of Justice and is adopted by the Cabinet. At this juncture, three documents – the so-called government draft bill, the observations of the *Bundesrat*, and the

³ <http://www.juris.de> or <http://www.gesetze-im-internet.de>

⁴ <http://www.bundesanzeiger.de>

⁵ <http://www.dip.bundestag.de>

response of the Federal Government to those observations – are forwarded to the President of the *Bundestag*.

1.7.2 Three readings in the plenary of the Bundestag

The *Bundestag* generally examines draft legislations in three readings.

The first reading serves to inform the Members of the *Bundestag* and the public that a legislative process is underway with regard to a particular subject matter. At the end of the first reading the draft bill is referred to one or more designated committees of the *Bundestag* which are made up of members from all parliamentary groups. The deliberating on the draft bill in the committees represents the core of the legislative process in the *Bundestag*. Most bills are revised to a greater or lesser extent as a result of collaboration between the designated committees.

After the lead committee has issued its recommendation for decision, a second reading of the draft bill is held in the *Bundestag*. Following the general debate of the bill, all provisions of the bill may be considered individually in this second reading. If the plenary adopts the amendments suggested the draft bill will be revised accordingly. These amendments to the government draft bill, usually, are drafted by the relevant lead ministry in a process known as “assistance to legislative formulation”.

The final vote on the bill is generally taken during the third reading in the *Bundestag*.

1.7.3 Second Stage in the Bundesrat

After the *Bundestag* has adopted a bill in its third reading, the bill is forwarded by the President of the *Bundestag* to the *Bundesrat* for a so-called second stage of deliberation. In this second stage the scope for *Bundesrat*'s intervention depends on whether the bill adopted by the *Bundestag* requires the explicit consent of the *Bundesrat* or if the *Bundesrat* may (only) lodge an objection to the adoption of the bill. If the *Bundestag* and *Bundesrat* cannot agree on a consent bill, they will refer the bill to the Mediation Committee (*Vermittlungsausschuss*) which aims to resolve the conflict. The *Bundestag* must if necessary vote again on any amendments to the bill proposed by the Mediation Committee. In cases where a bill does not require the consent of the *Bundesrat* the *Bundestag* can reject an objection of the *Bundesrat* with the required majority.

1.7.4 Countersignature, Signature, Promulgation

After its passage through *Bundestag* and *Bundesrat* the bill must be counter-signed by the respective lead minister and the Federal Chancellor, duly authorized by the Federal President (*Bundespräsident*) and be promulgated in the Federal Law Gazette (*Bundesgesetzblatt*).

II. Organization of Administrative Procedures for Complaints raised by Taxpayers

Although the German tax law is considered to be one of the most complicated in the world, regarding tax administration structures Germany is usually taken as a model case because of its well-organized and efficient decentralized tax administration. In the following, firstly, a broad overview will be given on the organizational structure of the German tax administration. After that a description of the objection procedure, which takes place if a taxpayer lodges an objection against his tax assessment, will be provided. Finally, the basic principles of legal proceedings before fiscal courts and the Federal Fiscal Court will be outlined.

II.1 Organisation of German Tax Administration

The German tax administration is split into two main parts, the Federal and the *Länder* administrations. The underlying principle is that there should be no parallel tax authorities of the Federation and the *Länder* for identical or connected taxes. There are federal tax authorities to administer customs duties, fiscal monopolies and excise duties subject to federal legislation. This is a federal administration with its own administrative structure (see Art. 108 (1) of the Basic Law).

The administration of all other taxes is assigned to the tax authorities of the *Länder*. The organisation of these authorities and the uniform training of their civil servants are regulated by federal law (Art. 108 (2) of the Basic Law).

To the extent that taxes accrue wholly or in part to the Federation (i.e. VAT, corporation tax, income tax) they are administered by the *Länder* on behalf of the Federation (Art. 108 (3) of the Basic Law). In this context, the Federation has more extensive powers to intervene in the activities of *Land* tax authorities, and the Federal Ministry of Finance in particular is entitled to issue instructions and to exercise supervision. These powers are intended to safeguard the financial interests of the Federation and the uniform application of tax law, especially where there is scope for discretionary action.

The tax administration of Saxony-Anhalt operates with a three-level-structure and consists of the Ministry of Finance, one Regional Finance Office (*Oberfinanzdirektion*) and, currently, 20 tax offices (*Finanzämter*). In the course of the current administration reform in Saxony-Anhalt the number of tax offices will be reduced to 14 in near future in order to adjust tax administration structures to the shrinking population figures in Saxony-Anhalt.

The most important duties of the Ministry of Finance include administering all state income and expenditure, compiling the annual budget and providing medium-term financial planning. The Ministry of Finance is also the regulatory authority for the *Land's* real estate and property management, and responsible for the investments of Saxony-Anhalt in companies and institutions. Credit management is also of particular importance. The Ministry of Finance is usually not involved in the objection procedure.

The main task of the Regional Finance Office is to supervise the executive activities of the tax offices and thereby to safeguard a uniform application of tax law. Furthermore, the Regional Finance Office provides supporting services to the tax offices, for example, tax administration software or an intranet-based legal information service. The Regional Finance Office is divided into 4 Departments including one Organisational Department, one Department for Capital, Income and Transfer Taxes (*Besitz- und Verkehrssteuerabteilung*), one Department providing Financial Services (including main cash office (*zentrale Hauptkasse*), remuneration of civil servants (*Bezügeverwaltung*)) and one Electronic Data Processing Centre (*Finanzrechenzentrum*).

The uniform taxation of all liable persons and entities resident in their district is the task of the local tax offices. Tax offices are subdivided into a number of departments (*Sachgebiete*). Each tax office is headed by a director (*Vorsteher*) who is also in charge of the Department of General Affairs. The head of the second department is the deputy director, who usually has another managerial position as well, for instance, as head of the Department of Dispute Resolution (*Rechtsbehelfsstelle*). The remaining departments in a tax office have been assigned various duties in the areas of preparing and deciding tax assessments (*Veranlagung*), collection (*Erhebung*), enforcement and recovery of taxes (*Vollstreckung*), examination of books and accounts (*Betriebsprüfung*), and accounting and computerisation. Each of the departments is headed by a department manager (*Sachgebietsleiter*).

On average a tax office employs between 130 to 550 persons. The civil servants working in a tax office can be classified in one of the following groups, depending on their formal education:

- Lawyers in leaderships positions: upper administrative level (*Höhere Dienst*)
- Senior management: higher administrative level (*Gehobene Dienst*)
- Middle management: middle administrative level (*Mittlere Dienst*).

The management team of a tax office usually consists of lawyers, *i.e.* the head of a tax office and his deputy. The civil servants of the higher level have had three years of formal education at the tax academy (*Fachhochschule*) after their customary pre-university education. Civil servants of the higher level are engaged in the areas of preparing and deciding tax assessments, settling objections and the examination of books and accounts. Civil servants of the middle level have completed two years of formal education at the tax academy and often are deployed as tax auditors of small entities or tax collectors in the enforcement and recovery department.

The organisational structure in Saxony-Anhalt is not necessarily reproduced in every other *Land*. Not every *Land* has a Regional Finance Office; in some *Länder* the responsibilities are distributed between the departments of the state ministry of finance and sometimes even between some of the tax offices. Several *Länder*, for example, provide for specialized enforcement, investigation or corporation tax offices, structured according to their respective tasks.

II.2 Legal Remedies against unlawful Administrative Acts

German administrative law provides two kinds of legal remedies against an administrative act: A complaint, lodged to the issuing authority, and legal proceedings before a court.

II.2.1 Objection Procedure

If no other provisions apply, the tax liability is determined by a tax assessment notice (*Steuerbescheid*). In case a taxpayer is dissatisfied with his tax assessment, for example, because he

missed claiming a deduction in his income tax return, he is entitled to lodge an objection (*Einspruch*) to the assessment with his tax office.

The standard administrative procedure to be followed by all tax offices when an objection against an administrative act is filed by a taxpayer is laid down in the German Fiscal Code (*Abgabenordnung*).

An objection should be filed in writing or verbally. In the latter case according to the Fiscal Code an official report (*Niederschrift*) of the objection should be made. The taxpayer has to lodge an objection within a month after the receipt of the tax assessment notice otherwise the tax assessment will become final (permanently valid), regardless of whether it is lawful or defective. This is called the "Power of Duration" (*Bestandskraft*). This one-month-period starts only if the tax office has supplied instructions concerning the objection procedure (*Rechtsbehelfsbelehrung*). These instructions must be attached to the tax assessment notice. Basically, a final tax assessment can be reviewed only, if, at a later date, new facts or evidence have become known to the tax office.

In the first instance an objection will be reassessed by the tax officer responsible for the tax assessment based on the new information provided by the taxpayer. Tax assessments can be cancelled, amended, or corrected only if and to the extent permitted under the Fiscal Code. This applies irrespectively whether the error causing the cancellation, amendment, or correction is to the advantage or disadvantage of the taxpayer. Typing or calculation errors of the tax officer, of course, will be corrected in this first review of the tax assessment. The same applies, if a taxpayer missed claiming a deduction and files the supporting documents.

If, however, the dispute cannot be settled in this first review, the notice of objection is passed to the Department of Dispute Resolution (*Rechtsbehelfsstelle*). The Department of Dispute Resolution, again, will review the decision with regard to legality and expediency of the act. This Department can still allow the objection in whole or part and either cancel, amend or otherwise correct the tax assessment.

If the Department of Dispute Resolution comes to the conclusion that it cannot uphold the objection and the taxpayer is not prepared to withdraw his objection, the department will issue a written objection decision (*Einspruchsentscheidung*). In cases of unsettled legal questions of fundamental importance it will consult the Regional Finance Office prior to issuing a final decision. The form of the decision resembles a decision of a court; it includes a summary of the facts of the case and a statement of legal justification. Finally, the decision must include instructions for the taxpayer that he is entitled to lodge an appeal at the fiscal court within one month.

The tax office is authorized to involve other parties in the objection procedure as well. It can do so ex officio, or upon request. The tax office will use this authority in particular with respect to persons who are liable for the same tax as the taxpayer who filed the objection. In doing so, it prevents duplication and deviating decisions.

Under the Fiscal Code an administrative review is compulsory before a citizen can take legal action. Only in rare cases, where facts have already been ascertained and it is clear that the tax office will not change its earlier position, can the citizen go directly to the Fiscal Court provided that the local tax office agrees (*Sprungklage*). If, however, the tax office fails to settle an objection within a reasonable period of time (usually 6 months), the tax payer is entitled to bring his case before the fiscal court without having obtained an objection decision (*Untätigkeitsklage*).

The objection procedure is free of charge for both parties. As a consequence, any fees of a tax consultant or expenses of legal counsel incurred by the taxpayer cannot be recovered from the tax office, even if the objection is awarded.

The objection procedure serves as an internal control mechanism which allows the tax administration to review an administrative decision without introducing or instigating a legal proceeding before the fiscal court. In addition, the objection procedure contributes to taking the burden off the fiscal courts (filter effect).

II.2.2 Appeal at the Fiscal Court

The Department of Dispute Resolution is not only charged with settling objections but also represents the tax office in subsequent appeal proceedings.

Under German law, tax judicature is exercised by independent special administrative courts. The fiscal courts and the Federal Fiscal Court (*Bundesfinanzhof*) located in Munich have jurisdiction over all matters of fiscal law, excluding administrative fines and criminal law cases. The constitution of the court and the rules of procedure are essentially governed by the Fiscal Court Regime (*Finanzgerichtsordnung*). There are 19 fiscal courts in total which usually adjudicate in a cast of three vocational and two honorary judges. In certain straightforward cases, regulated by law, a single judge can also decide.

The fiscal court examines the facts *ex officio*, and is not bound or restricted by what both parties bring forward. Any obligation of the taxpayer to pay is not suspended by lodging an appeal. The taxpayer, however, can request the tax office for a deferral of payment.

A fiscal court has no power to issue a new administrative act, in other words, the court can annul a tax assessment but it cannot substitute or amend it. In case the legal action of the taxpayer is successful, the tax office will issue a new tax assessment with regard to the legal opinion of the court.

A significant difference to the objection procedure is that the taxpayer can challenge only the legality of the decision, not its expediency. The fiscal court must not scrutinise the merits of a decision. Arguments put to a fiscal court, must be put as a matter of law. If the courts have to scrutinise a discretionary decision, they are only allowed to investigate whether the tax office has abused or wrongfully used its discretion.

As a basic principle, the burden of evidence for the facts on which any addition to the taxable amounts are based rests with the tax office. The burden of proof for deductibles rests with the taxpayer.

The judicial procedure is subject to costs. The party against whom the fiscal court takes action is ordered to pay the costs (court fees, expenses of legal counsel), which are linked to the amount at stake.

II.2.3 Appeal for a reversal at the Federal Fiscal Court

Both the taxpayer and the tax office have the right to lodge an appeal for a reversal (Revision) against a decision of the fiscal court at the Federal Fiscal Court. Such an appeal should be filed within a month after the judgment of the fiscal court has been served.

The Federal Fiscal Court reviews the fiscal courts' judgements regarding the legitimate application of federal law, in exceptional cases also of state law. Contrary to the fiscal court, the Federal Fiscal Court does not judge on facts. The Federal Fiscal Court consists of eleven chambers of five to six judges each. Each of these chambers has a different area of expertise.

An appeal for a reversal can be lodged only if the fiscal court has granted leave to appeal in its judgment, or if the Federal Fiscal Court has allowed the appeal itself following an appeal of the taxpayer against the fiscal court's refusal of leave to appeal (*Nichtzulassungsbeschwerde*). The appeal is to be allowed

- if the legal matter is of fundamental importance, or
- if the development of law or safeguarding of a uniform interpretation of law call for a decision of the Federal Fiscal Court; and/or
- a mistake in procedure has been made.

The precondition that leave to appeal is necessary aims at taking work load from the Federal Fiscal Court in cases that are not of fundamental importance or where there are no violations of the rules of procedure. Otherwise the Federal Fiscal Court would not be able to fulfil its task of developing the law and safeguard a uniform interpretation. For this reason only about 5% of the judgments are being arraigned before the Federal Court of Finance.

Whereas in appeal proceedings before the fiscal courts there is no obligation for either party to be represented by an attorney at law (*Rechtsanwalt*) or tax consultant (*Steuerberater*), before the Federal Fiscal Court the taxpayer is obliged to have himself represented by an attorney at law. The tax office can be represented by one of its civil servants provided that he or she holds a degree of law and has been granted a specific power of attorney by the head of the local tax office. If it happens to be the case that neither the head nor the deputy head of the local tax office hold a degree in law, a lawyer from the Regional Finance Office will represent the Tax Office before the Federal Fiscal Court.

In addition, it may also occur that the Federal Ministry of Finance will represent the tax office before the Federal Fiscal Court if, for example, the crucial question in an appeal proceeding is about the constitutionality of a federal tax law provision. The same applies to proceedings of fundamental importance with regard to the federal budget. For this reason, it is important to ensure that the superior authority is kept informed on such legal proceedings from the beginning.

The jurisdiction of the Federal Fiscal Court has considerable effects on the legal practice of the tax administration and, as a consequence, also has extensive impact on the federal budget. Although its decisions can only bind the respective parties, they are still authoritative for other taxpayers where the same facts of case apply. The pronouncements, thus, contribute to the development of tax law in conformity with the Basic Law and, finally, may result in new administrative guidelines or provide the Ministry of Finance with ideas for legal new legislative projects.