Better Regulation in Europe

# GERMANY

OECD

# Better Regulation in Europe: Germany 2010

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# *Foreword*

The OECD Review of Better Regulation in Germany is one of a series of country reports launched by the OECD Public Governance and Territorial Development Directorate in partnership with the European Commission. The objective is to assess regulatory management capacities in the 15 original member states of the European Union (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom). This includes reviewing trends in their development and identifying gaps in relation to good practice as defined by the OECD and the EU in their guidelines and policies for Better Regulation.

The project is also an opportunity to discuss the follow-up to the OECD's multidisciplinary reviews, for those countries which were part of this process, (Austria, Belgium, Luxembourg and Portugal were not covered by these previous reviews) and to find out what has happened in respect of the recommendations made at the time. The multidisciplinary review of Germany was published in 2004 [OECD (2004), *OECD Reviews of Regulatory Reform: Germany: Consolidating Economic and Social Renewal*, OECD, Paris].

Germany is part of the second group of countries to be reviewed – the other five are Belgium, Finland, France, Spain and Sweden. The first group of reports, covering Denmark, the Netherlands, Portugal and the United Kingdom, were initially released in May 2009 and reports on the remaining countries will follow in the second half of 2010. This report was discussed and approved for publication at a meeting of the OECD's Regulatory Policy Committee on 15 April 2010.

The completed reviews will form the basis for a synthesis report, which will also take into account the experiences of other OECD countries. This will be an opportunity to put the results of the reviews in a broader international perspective, and to flesh out prospects for the next ten years of regulatory reform.

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# *Abbreviations and Acronyms*

| | |
|---|---|
| **ATLAS** | Automated Customs Tariff and Local Processing Application System |
| **BaFin** | Federal Financial Supervisory Authority |
| **BakövV** | Federal Academy of Public Administration |
| **BDI** | Federation of German Industries |
| **BfR** | Federal Institute for Risk Assessment |
| **BGBl** | Federal Law Gazette |
| **BK** | Federal chancellery |
| **BMI** | Federal Ministry of the Interior |
| **BMJ** | Federal Ministry of Justice |
| **BMU** | Federal Ministry for the Environment |
| **BWV** | Federal Performance Commissioner |
| **BMWi** | Federal Ministry of Economics |
| **CCDs** | Common commencement dates |
| **CDU** | Christian Democratic Party |
| **CIO** | Chief Information Officer |
| **CSU** | Christian Social Union |
| **DGB** | Confederation of German Trade Unions |
| **DIHK** | German Chambers of Industry and Commerce |
| **DIN** | German Institute for Standardisation |
| **DLT** | German County Association |
| **eANV** | Electronic record-keeping for waste recovery and disposal |
| **EEG** | Renewable Energy Sources Act |
| **ELENA** | Electronic earnings statements |
| **ePRTR** | Electronic pollutant release and transfer register |
| **EPTA** | European Parliamentary Technology Assessment |
| **EuZBBG** | Co-operation between the federal government and the German Bundestag in Matters concerning the European Union |
| **eVA** | Electronic feedback on money laundering |
| **FDP** | Free Democratic Party |
| **GGO** | Joint Rules of Procedure of the federal Ministries |
| **IMK** | Standing Conference of the Interior Ministers of the Länder |
| **MEG** | Small Companies Act |

| | |
|---|---|
| **NKR** | National Regulatory Control Council |
| **NRCC** | National Regulatory Control Council |
| **RKM** | Regulatory Cost Model |
| **SBD** | Federal statistical office |
| **SCM** | Standard Cost Model |
| **SDP** | Social Democratic Party |
| **SFAs** | Superior Federal Authorities |
| **SME** | Small and Medium sized enterprises |
| **TAB** | Office for Technology Assessment at the German Bundestag |
| **VDI** | Association of Engineers |
| **VwGO** | Rules of the Procedure of the Administrative Courts |
| **ZDH** | German Confederation of Skilled Crafts |

*Country Profile - Germany*


*Source*: CIA factbook *https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html.*

# *Country Profile – Germany*

| | | |
|---|---|---|
| **The land** | | |
| Total Area (1 000km$^2$): | 357 | |
| Agricultural (1 000km$^2$): | 53 (2006) | |
| Major regions/cities (thousand inhabitants): | Berlin | 3 395 |
| | Hamburg | 1 774 |
| | Munich | 1 260 |
| **The people** | | |
| Population (thousands): | 82 257 | |
| Number of inhabitants per sq km: | 230 | |
| Net increase (2005/06): | 0.1 % | |
| Total labour force (thousands): | 42 520 | |
| Unemployment rate (% of civilian labour force): | 8.2% (2009) | |
| **The economy** | | |
| Gross domestic product in USD billion: | 2 927 | |
| Per capita (PPP in USD): | 35 600 | |
| Exports of goods and services (% of GDP): | 45 | |
| Imports of goods and services (% of GDP): | 40 | |
| Monetary unit: | Euro | |
| **The government** | | |
| System of executive power: | Parliamentary | |
| Type of legislature: | Bicameral | |
| Date of last federal general election: | 27 September 2009 | |
| Date of next federal general election: | 2013 | |
| State structure: | Federal Republic | |
| Date of entry into the EU: | Founding member | |
| Composition of the main chamber (Number of Seats): | Christian Democratic Union/ Christian Social Union (CDU/CSU) | 239 |
| | Social Democratic Party (SDP) | 146 |
| | Free Democratic Party (FDP) | 93 |
| | The Left | 76 |
| | Alliance 90/The Greens | 68 |
| | **Total** | **622** |

*Note*: 2008, unless otherwise stated.

*Sources*: OECD Economic Survey of Germany 2008, OECD in Figures 2009, OECD Employment Outlook 2009 and OECD Government at a Glance 2009.

# Executive Summary

## Economic context and drivers of Better Regulation

A commitment to streamline the regulatory state, reduce the bureaucratic machinery and simplify the legislative environment has been a feature of German policy through successive governments over the last couple of decades. As in many other OECD countries, regulatory reform has been seen as a necessary adjunct to structural and other reforms aimed at modernising the German economy as well as the public administration. Progress, however, has often been slow and tentative, with reform initiatives not always yielding effective results.

There have been significant developments since the last review of regulatory reform by the OECD in 2004, based on a renewed political commitment to Better Regulation. Better Regulation was formally identified as a major support for economic goals in the coalition agreement between the CDU, CSU and SPD of 11 November 2005 "*Working together for Germany – with courage and compassion*", which formed the basis of the then government's programme. The long-term goal is "to bring Germany back to the top" over the next ten years. Faced with significant complaints from business over red tape, the federal government decided to launch a major new programme to reduce administrative burdens on business and streamline administrative procedures in order to free companies up for new initiatives and more productive activities. Intensified efforts have been made across several other fronts to accelerate progress and to identify new ways of addressing issues such as the roll out of e-Government, as well as new institutional support structures.

Better Regulation is also strongly framed by the EU Lisbon Strategy for Growth and Jobs. Germany emphasises a strong link between its Better Regulation agenda and the Lisbon Strategy. Initiatives at the EU level are positively channelled into action at the federal level. Germany has reacted constructively to external stimuli. The need to set administrative burden reduction targets, and implement the Services Directive, are clear examples. The continued modernisation of the state, bringing the administration closer to citizens and making it more efficient through e-Government are further important factors in the current commitment to Better Regulation.

Securing regulatory quality is not only a concern of the federal executive. The federal parliament has also been active, notably as regards the establishment of the independent watchdog for burden reduction, the National Regulatory Control Council.[1] For their part, the *Länder* have, to varying degrees, a longstanding tradition of developing relevant initiatives, many of these mirroring those at the federal level, such as modernising their public administrations and addressing administrative burdens on business. As far as the SCM is used for the latter, methodological comparability and co-ordination with the federal level is ensured.The public governance context for Better Regulation

## Public governance context for Better Regulation

As in other OECD countries, regulatory management is heavily influenced by constitutional and public governance structures and traditions. In Germany's case, these are important assets which have successfully secured stability and a deeply rooted respect for the law. At the same time, the system poses significant challenges for moving forward

speedily, for the promotion of a strong collective view of reform needs, and for the emergence of an approach that positions Better Regulation as something much more than the assurance of legal quality. The legal state (*Rechtstaat)* tradition confers a very positive respect for the law, but it also tends to hold back innovation and the development of a broader view of regulatory quality. Ministerial autonomy within the federal executive poses challenges for the development of a collective view. Not least, Germany's federal system, which gives the *Länder* a crucial role not only in respect of their own areas of competence as states in their own right, but also in the implementation of federal legislation, makes for a complex environment in which to take decisions. Two important reforms of the federal system of governance are underway, aimed at providing a more effective backdrop for reform efforts and addressing aspects of the system which slow up change. Box 0.1 outlines the main features of the German federal system.

It is considered that the first phase of the federalism reform is one of the most extensive changes ever made to the Basic Law. The reform is primarily aimed at improving federal and *Land* authorities' ability to act and make decisions, at assigning political responsibilities more clearly, and at speeding up and simplifying decision-making processes within the legislative procedure.

**Box 0.1. The federal structure and competences across the levels of government**

The Federal Republic of Germany is a parliamentary federal democracy, established in 1949. Further to the reunification of 1990, five states from the former Democratic Republic brought to sixteen the number of federal states (*Länder*) composing the federation. Each state has its own constitution, parliament, government, administrative structures and courts. Germany's institutional and legal system rests on a longstanding and strong tradition of "legal state" (*Rechtsstaat*) and co-operative federalism.

There are three levels of government (federal, *Land* and local). The sixteen *Länder* are states in their own right, exercising state authority in the areas set out in the Basic Law (see below). The municipalities comprise 12 200 cities and communities, and 301 rural districts. While they are an integral part of the *Länder* structure, municipalities have some of their own residual responsibilities and a certain independence (see Chapter 8).

In 2006, an important constitutional reform, the federalism Reform I, clarified the relationship and division of competences between the federation and the *Länder*. The reform (among other changes) strengthened the legislative competences of the federation in areas of supranational importance; abolished "framework" legislation; reallocated a number of previously concurrent competences either to the federal or to the *Länder* level; and reduced the scope for political blockages by reducing the number of laws requiring the consent of the *Bundesrat*. The new regime extended the legislative competences of the *Länder*, as these are newly responsible for the penal system, association rights, as well as store closing times. The *Länder* continue to execute federal law in their own right. However, if the federation provides for the administrative procedure and establishing agencies, the *Länder* may adopt deviating regulations. Such deviation is possible only in very limited exceptional cases, which require the consent of the *Bundesrat*.

The reform has helped improve federal and *Land* authorities' ability to act and make decisions, and assign political responsibilities more clearly. It has helped expedite the legislative procedure and improve its transparency. It has helped increase the expediency and efficiency of the legislative procedure. An important effect is that the number of laws requiring the consent of the *Bundesrat* was reduced. Between September 2006 and February 2009, 39% of laws required the consent of the *Bundesrat*, compared to 53% before the reform. The *Länder* have made use of their new competences. They may enact laws at variance with federal legislation with respect to substantive matters, in accordance with Art. 72 (3) of the Basic Law. In accordance with Art. 84 of the Basic Law, the *Länder* may enact deviating regulations concerning the administrative procedure and the establishment of requisite authorities. As of July 2009: Art. 72 (3) of the Basic Law was used by two *Länder* on two occasions (for matters related to hunting); Art. 84 (1) (2) was used on two occasions (social legislation).

**Legislative competences**

The Basic Law (*Grundgesetz*) lays out in great detail the allocation of legislative competences. These can fall within the remit of the states; be devolved to the federation; or be "concurrent".

- *Exclusive federal competences*. The federation is exclusively responsible in the areas of legislation and implementation only if expressly mentioned or implied in the Basic Law, or where responsibility derives from an unwritten competence. Such areas cover those typically falling within the competence of central states, as well as those for which uniformity across the territory is needed. Among others, they include foreign affairs, the army, defence, citizenship, currency, customs, trade with foreign countries, border protection, railways, air transport, postal and telecommunication services, copyright, counter-terrorism and nuclear energy.
- *Concurrent competences*. Areas subject to concurrent competences (competences allocated to the *Länder* until the federation legislates) include civil and criminal law, public welfare, food and medicines law, transport, protection of the environment, university admission and diplomas, and regional planning. The power to legislate lies with the *Länder* if the federation does not hand down any statutes of its own in those fields. In some domains the federation can wield its legislative right only if, and as long as it is necessary to create equivalent living conditions on the federal territory or to maintain legal or economic unity in the overall state interest.
- *Länder competences*. Their exclusive competences are relatively few but important. They include their own constitutions, internal security and policing, education, cultural affairs, and radio legislation. A key exclusive competence is over local government. Only the *Länder* are entitled to delegate tasks to the local level, and they have exclusive responsibility for the organisation of local government.

**Administrative (implementation) competences**

In practice, most legislation is adopted at the federal level, and implemented by the *Länder*, which have a relative freedom as to how they apply federal laws as well as their own laws. For this reason, the German system is often described as "executive federalism". Three forms of implementation can be identified. The first approach is the general rule:

- As a rule, the *Länder* are fully responsible for the implementation of federal statutes, while the federation merely supervises the lawfulness of that administrative activity and may issue general administrative provisions. The administrative costs are met by the *Länder*.
- The *Länder* may implement federal statutes on behalf of the federation. In this case, the federation bears the relevant costs.
- The federation implements statutes directly itself. This is the case, for example, in foreign affairs, the administration of the federal army and the management of the federal budgets. In such cases, many of the ordinances adopted by the federal Cabinet require the approval of the *Bundesrat*.

The 2006 federal reform has had an important effect on the capacity of the *Länder* to self-organise. The abolition of framework legislation and the creation of the right to deviate from federal provisions have strengthened their organisational sovereignty. Generally, the *Länder* are responsible for the establishment of authorities and the regulation of administrative procedures. Even if a regulation is adopted at the federal level in this area, the *Länder* are now entitled to adopt their own regulations, in derogation of federal law. Any statutory exclusion of this possibility of deviation on the part of the *Länder*, which would require the consent of the *Bundesrat*, is now only permissible in exceptional cases involving a special need for uniform nationwide regulation. Such a need exists, for example, in the case of procedural environmental law.

## Developments in Better Regulation and main findings of this review

### *Strategy and policies for Better Regulation*

**There have been significant developments since the last OECD review in 2004.** The main pillar of current federal policy on Better Regulation is a carefully structured programme to reduce administrative burdens on business ("Bureaucracy Reduction and Better Regulation") adopted in 2006. There is also a wide ranging programme to take forward e-Government in support of businesses and citizens ("Focused on the Future: Innovations for Administration", including the e-Government 2.0 programme) also adopted in 2006. There is a growing interest in developing a sustainability dimension to the agenda. Legal quality continues to receive attention, supported by recent initiatives such as the deployment of the eNorm software, and efforts to improve linguistic clarity. Measures to simplify the legislative stock have also been vigorously promoted.

**The federal government is now driving some important changes, together with a few *Länder*.** Better Regulation has been brought closer to the centre of government with the establishment of the federal chancellery Better Regulation unit, and the initiatives of key frontline ministries including the ministries of Justice and Interior. The federal burden reduction programme, in particular, has raised awareness of the costs of regulation and the impact on business (and citizens), sowing the seeds of further developments. Most recently, the federal government and parliament have been developing plans for a sustainability impact assessment.

**Better Regulation processes remain tailored to German traditions.** The link between the longstanding and often highly sophisticated older structures and processes for law making (epitomised by the *Joint Rules of Procedure*), and new processes such as impact assessment, the burden reduction programme, and more open consultations remains fragile. The new tools tend to be adapted to fit the existing framework, instead of being used as an opportunity to act as a lever of more fundamental change. Impact assessment for example does not stand out with a clear identity from the broader framework of the *Joint Rules of Procedure* for law making. This misses an opportunity to take a fresh look at how public policies are launched and developed.

**The strategic relationship with high level public policy goals, especially economic goals, is not yet clearly evident.** Although the link between burden reduction and business competitiveness is underlined, the strategic value of Better Regulation is not prominent, and the programme is not clearly linked to broader economic policies in support of competitiveness and post crisis recovery. Effective regulatory management (going beyond burden reduction) has an important contribution to make in sustaining economic performance and supporting further structural reforms. The sustainability dimension is also not yet fully exploited.

**There is no "joined up" perspective on Better Regulation as yet.** This fragmentation was already noted in the 2004 OECD report. As well as overall coherence, the linkages between specific programmes need attention. Better Regulation policy needs a stronger and clearer identity, for the benefit both of internal and external stakeholders.

**The scope of Better Regulation processes remains somewhat narrow, and the administrative burden reduction programme appears to have absorbed a large part of the political impetus.** The agenda leans disproportionately towards the measurement (and reduction) of costs, leaving the analysis of benefits in the background. At the same time, *ex ante* impact assessment needs to be strengthened. The development of a sustainability dimension provides an opportunity to do this. Communication has so far been largely

limited to the administrative burden reduction programme. The government's recent annual report on the administrative burden reduction programme has been the main specific communication related to Better Regulation available to the general public. Communication on overall Better Regulation strategy and policies is not evident, beyond the fact that is referenced in the coalition agreements. This leaves stakeholders (inside and outside the administration) short of a clear picture of what is being achieved, and how it helps broader policy objectives.

***Ex post* evaluation of the successes and failures of Better Regulation programmes tends to be *ad hoc*.** One notable exception is the e-Government programme which was reviewed prior to the launch of the current programme. There has been no evaluation of the effectiveness of current *ex ante* impact assessment processes. Regular programme evaluation will enhance the effectiveness of future reforms, and can also be used to engage business and citizens in the results.

**E-Government is a cornerstone of the federal government's policy to modernise and streamline public administration at the federal level, with significant effects for Better Regulation.** E-Government initiatives can also help to speed culture change within the administration, as the I.T. society challenges the assumption of independent and isolated federal ministries. There is unexploited scope for e-Government to address administrative burdens as well as to support greater transparency in public consultation and communication. The "e-Government 2.0" programme is an integral part of the strategy, and includes several useful initiatives including the single public administration telephone number, shared with the *Länder*. The EU Services directive has been a major boost to the development of one-stop shops and the electronic processing of services (as in other EU countries). Results are promising but Germany is conscious that ICT potential has further to go. The development of e-Government initiatives in a federal state is acknowledged to be a major challenge.

### *Institutional capacities for Better Regulation*

**There have been important institutional developments to support Better Regulation since the 2004 OECD review.** The creation of a Better Regulation unit in the federal chancellery, together with the establishment of an independent advisory body, the National Regulatory Control Council (*Normenkontrollrat-NRCC*) appear as the landmark developments. The chancellery Planning unit underlines efforts to improve co-ordination on proposed legislation. A growing interest in sustainable development is reflected in the creation of another special unit within the chancellery, as well as two advisory bodies, the Parliamentary Advisory Council on Sustainable Development and the independent German Council for Sustainable Development. Change is also underway in the line ministries, with the identification of dedicated units or staff working on Better Regulation related issues, notably for the business administrative burden reduction programme. The e-Government strategy is also supported by a new institutional structure.

**These developments are important in terms of counteracting the centrifugal forces at work in the German context, set against the tradition of silo ministries, an inward looking administration, and a weak centre.** The new chancellery units have active advocacy, management and evaluation responsibilities. The establishment of the *NRCC* as an independent watchdog is equally striking in the context of German institutional tradition. An important feature of the *NRCC* is that its mandate transcends the political cycle. Institutional structures for supporting Better Regulation nevertheless remain disconnected. There is an increasingly urgent need to consolidate the new approach, with further institutional development to strengthen the coherence and clarity of Better Regulation

management (not only for those inside the administration but also for external stakeholders), and to fully secure its sustainability over political cycles. A "networked" approach to institutional management of Better Regulation is being tested across several EU countries with some success, and for the same reasons as in Germany (to fit with existing public governance traditions). But such an approach is not a soft option, still relies on some form of visible flagship unit, and needs careful development.

**As a first step, the future, location and mandate of the federal chancellery Better Regulation unit needs to be confirmed.** It should be strengthened as a core player, anchor and orchestrator of Better Regulation policies across the federal government. Its location is a key issue. The experience of other European countries highlights two main options for such a unit, the first of which is to put it at the centre of government, and the second of which is to embed it within a key central ministry with a policy interest in Better Regulation. In order to act as a recognisable flagship for Better Regulation, the unit's mandate needs to be extended beyond the important but narrow issue of administrative burdens. Its sustainability needs to be addressed, which means looking again at budget and staffing, as well as how to secure its survival beyond the political cycle. As a linked second step, the scope of the *NRCC*'s mandate needs to be extended. In the German context the *NRCC* is an institutional innovation which is an essential adjunct to the structures internal to the federal administration.

**A strong co-ordination network is needed to bind the work of different parts of the administration on Better Regulation together.** This issue was already raised in the 2004 OECD report. Compartmentalisation of initiatives that should be related to each other needs to be vigorously tackled. Beyond the federal chancellery, four key ministries have important Better Regulation related responsibilities (the Interior ministry which shares the task of checking constitutionality of draft regulations with the Justice ministry, checks compliance with the *Joint Rules of Procedure* for the preparation of draft legislation and is also responsible for e-Government roll out; the Justice ministry which is responsible for legal quality and constitutionality; the Economics ministry which reviews costs to companies and consumers of draft regulations and co-ordinates and represents German positions on EU matters; and the Finance ministry which assesses budgetary effects of draft regulations). There is no need to centralise these responsibilities if a strong enough framework exists to bring the ministries together round the table. This implies the need to revisit current co-ordination arrangements and to strengthen and expand their reach. The only current co-ordinating structure of this kind - the Committee of State Secretaries on Bureaucracy Reduction - has a remit confined to administrative burdens.

**There has been progress since the last OECD review on cultural change within the administration.** The need to assess business administrative burdens in draft legislation has focused attention on costs and generated some awareness of the implications of government intervention, but this interest has not yet spread to other impact assessments. The approach to further culture change needs to be two pronged. First, it needs teeth. Quality control, incentive mechanisms and sanctions for non compliance are needed to ensure that processes are respected and that poor drafts are turned down. Second, training for Better Regulation needs to have a higher profile.

**The federal parliament is an important player beyond the executive and has played a positive role in the emergence of the administrative burden reduction programme.** The parliament has also been an active participant in legislative simplification. Finally, it has a fast growing interest in sustainability issues, through the Parliamentary Advisory Council on Sustainable Development. As in some other European countries this suggests that the parliament is taking a growing interest in Better Regulation.

**The long run success of Better Regulation in Germany depends on enhanced co-operation between the federal government and the *Länder*, including the development of shared goals.** Reflecting the federal nature of the German state, Germany's regulatory production system is complex. Regulations are produced at the federal level, covering areas of federal competence. These laws are usually fleshed out in secondary regulations produced by the *Länder*, as part of their responsibilities for implementing federal legislation (the *Länder* may in turn delegate implementation responsibilities to the counties and municipalities, which may give rise to further subsidiary regulations and instructions). The *Länder* also issue laws and regulations in respect of their exclusive competences (with an equivalent delegation process to counties and municipalities). The quality of regulations and the burdens contained in this regulatory "cascade" can only be addressed through a shared effort.

**As matters stand, nearly all of Germany's Better Regulation initiatives are exclusive either to the federal level or to the *Länder*.** However, there is a growing awareness of the need to join up, notably as regards the federal burden reduction programme, which now includes pilot projects to capture the downstream effects of implementing federal legislation in the *Länder*. A greater presence of the *Länder* in Better Regulation is evident. There is a willingness to experiment, involving like-minded *Länder*. It appears that a growing number of *Länder* are taking a dynamic approach both to co-operation with the federal government and in terms of their own initiatives.

### *Transparency through consultation and communication*

**There have been few significant changes in public consultation on draft regulations since the 2004 OECD report.** Public consultation by the federal government is formally regulated by the *Joint Rules of Procedure*, which specifies that ministries must consult early and extensively with a range of stakeholders. In practice, individual ministries have significant latitude on such issues as feedback, timing, publication of comments, selection of consultation partners etc. Informal pre-consultation rounds (with the *Länder*, municipalities and associations) are the norm, at an early stage in the process before a bill is drafted. The results are fed into the drafting, and the same parties are consulted a second time. Consultation thus takes the form of institutionalised negotiation and bargaining with key stakeholders and is driven by a search for consensus.

**E-consultation is an important and steadily emerging feature.** For example, there was an e-consultation on the Citizens Portal Act in 2008, the first time that citizens could make direct comments on a draft federal bill. The roll out of the federal programme for reducing burdens on business has provided an opportunity to test new and more open approaches to public consultation, through direct contact with businesses.

**Compared to many other countries, the consultation machinery is activated at an early stage.** It is felt that economic and societal interests are heard and taken into consideration. While the process is not particularly transparent, it facilitates consensus building and is valued for this. Getting consultation "right" is a particular challenge in a large country. Compared with some of its European neighbours, Germany comes out relatively well.

**The approach, however, falls short of a fully effective, modern and inclusive public consultation system.** The issues raised by the 2004 OECD report remain largely valid. The two most important issues are the lack of transparency and the fact those outside the established system have little if any opportunity for their voices to be heard. This increases the risk of bias and capture in interpreting the results. The exclusion of stakeholders who are not part of the traditional system is likely to stifle innovative ideas and miss useful

inputs. It also puts citizens and individual businesses at arm's length from the administration, which is unhelpful to the task of building a constituency in support of Better Regulation.

**The system is also weakened by the lack of clearly visible and enforceable rules to be applied by all ministries.** Each ministry interprets the *Joint Rules of Procedure* differently, which means that no stakeholder (whether part of the system or outside the traditional network) can be sure of how consultation will be organised. A particular concern of some "insider" stakeholders is that deadlines for consultation rounds can be unpredictable and often very short. The lack of controls on what is done and of enforceable sanctions is another weakness of the system. The *Joint Rules of Procedure* lack teeth.

**The link between *ex ante* impact assessment and consultation needs attention.** The *Joint Rules of Procedure* require consultation of, and communication with, key stakeholders at the different stages of the impact assessment process. But in practice, ministries go their own way.

### *The development of new regulations*

**The trend in the number of federal regulations has been on a consistently downward path since 2005, partly because of a "spring clean" of the regulatory stock, but also because of a significant reduction in the number of new federal laws and subordinate regulations.** The recent federal reform which abolished framework legislation is intended to reduce the scope for unnecessary production at the *Länder* level.

**Administrative procedures, legal quality and forward planning are generally well covered at the federal level, reflecting the importance that Germany traditionally attaches to a sound and formal framework for law making and a concern to sustain legal quality.** The Administrative Procedures Act sets the framework and is backed up by the *Joint Rules of Procedure*. The latter includes requirements for the *Länder* to be consulted at an early stage. Legal quality is an especially strong feature of the German system, with important recent developments which include the "Electronic Guide to Law Drafting", the eNorm software tool, and a project recently launched to improve linguistic clarity. By the standards of many other European countries the comprehensiveness of this overall framework is impressive. The eNorm software tool for law making is especially interesting. In the context of autonomous ministries, it sets an important central standard, aids co-ordination and enhances transparency.

**Forward planning procedures have received an internal boost with the establishment of a dedicated unit in the federal chancellery, but there is more to be done.** There is no annual work programme to flesh out the coalition agreement, as exists in some other European countries. This has repercussions on the timeliness and length of consultations with external stakeholders. The arrangements are internal to the administration. The general public must fall back on the coalition agreement for information on the government's draft legal projects.

**Strong traditions also act as a brake on the development of new approaches.** An underlying structural problem common to many European countries, including Germany, is that longstanding administrative procedures and legal quality control mechanisms tend to be used, for example, as the basis for the development of impact assessment processes, even if they are not very well suited to this role. There is no fundamental re-engineering of underlying requirements to make room for a new approach.

**Germany's *ex ante* impact assessment policy dates back to the mid-1980s and is embedded in the *Joint Rules of Procedure*.** The current approach is based on changes introduced as part of the "Modern State-Modern Administration" programme in the late 1990s. It consists of a preliminary assessment (is the regulation necessary; alternatives), a concurrent assessment (carried out as the law is developed) and a retrospective assessment or *ex post* evaluation (to check whether the adopted law has met the anticipated objectives). Key impacts are covered including environmental, economic and social impacts. The process is applied to primary legislation, and only covers secondary regulations partially. The most important recent change has been the integration of requirements flowing from the federal government's administrative burden reduction programme for businesses (quantification of the information obligations found in draft legislation), which has added a significant new dimension. The development of a sustainability impact assessment is currently under discussion. The administrative burdens assessment has started a change of culture, with a greater appreciation by ministries of the perspective of stakeholders affected by a new law.

**There is some way to go still for impact assessment to inform decision making as it should, not least so that Germany can react appropriately to post crisis pressures for regulation.** The approach is comprehensive on paper, but practice appears to fall some way short of the conceptual objective, an issue that had already been largely commented on in the 2004 OECD report. Assessments tend to come at a relatively late stage of the law making process. Part of the problem may be a political and cultural reluctance to use it in a context where decision-making is very politicised from an early stage, ministries are used to acting autonomously, and key stakeholders are used to the relatively closed process of building up consensus on an issue. Yet impact assessment is to be seen as a tool for evidence based decision making so that the inevitable trade-offs are soundly based, not a technocratic substitute for the decision itself.

**If impact assessment is to have a stronger influence on decision-making and outcomes, four main issues need to be tackled: the institutional framework, methodological support, transparency and scope.** The institutional framework for the management of impact assessments is fragmented. Each ministry in practice goes its own way. Methodology is well covered by the Interior ministry guidelines but stops short of guidance on quantification and is undermined by the proliferation of guides produced by individual ministries. The process could be more transparent. This affects the internal stakeholders (other ministries) but more particularly external stakeholders who are not part of the established inner circle of informal consultations carried out by ministries. Last but not least, the current system only covers some secondary regulations, may need to be extended to cover sustainability (which is under discussion) and has an uncertain reach as regards the parliament and the *Länder*.

**There do not appear to have been any significant developments as regards the use of alternatives to regulation since the 2004 report.** It was beyond the scope of this review to take a close look at this important issue. However, the level of consideration, scrutiny and assessment of regulatory alternatives does not seem to reflect the provisions set in the *Joint Rules of Procedure*.

### *The management and rationalisation of existing regulation*

**The federal government has engaged in a "spring clean" of the existing regulatory stock, with significant results since the 2004 OECD report.** The report had already noted that Germany puts substantial efforts on its reviews of existing legislation. The federal government has passed eleven laws to repeal redundant regulations, and a Simplification Act to clean up the stock of environmental regulations. The federal legislative stock was reduced from 2 039 laws and 3 175 ordinances to 1 728 laws and 2 659 ordinances, the greatest reduction since 1968. This is a major achievement relative to many other European countries, where legislative simplification has tended to take a back seat to administrative burden reduction programmes (which are not the same thing, although a side effect of the latter can be to remove unnecessary regulations). However, the German system does not particularly encourage sunset clauses or other devices that would trigger reviews of individual regulations.

**A well developed federal programme (The federal "Bureaucracy Reduction and Better Regulation" programme) aimed at reducing administrative burdens for business has been established and is already making a measurable difference.** The 2004 OECD review had highlighted the absence of any systematic approach, which has now been made good. The programme has a precise, carefully defined objective. It seeks to capture the information obligations in all federal legislation using the SCM methodology. The formal target is to reduce administrative costs calculated as at September 2006 by 25% by the end of 2011 (a full baseline measurement was carried out), with half of the goal to be achieved by the end of 2009. The business community is a strong supporter of the programme. By 2008, EUR 6.8 billion of reductions had already been confirmed or given effect.

**The programme has triggered positive changes in a number of directions. The most important effect of the programme has been to change attitudes.** Germany's approach to law making is traditionally less concerned with the perspective of the enterprise (or citizens), seeking instead to ensure a high standard of legal clarity, coherence and comprehensiveness of the law. In fact, both perspectives are important and need to back each other up. Ministries have established a network of internal co-ordinators to liaise with the federal chancellery and the *NRCC*, and the programme has raised their consciousness of the costs of regulation for external stakeholders, not least by putting a figure on those costs (which- as in most other countries- are significant). The programme has also entailed new and more transparent approaches to public communication and consultation.

**The establishment of the *NRCC* and the Better Regulation unit in the federal chancellery to oversee the programme's implementation are important institutional innovations.** The *NRCC* is now a well established advisory and assessment body for quality control as well as methodological issues. Federal ministries must submit their draft bills to the *NRCC* as a part of the inter-ministerial co-ordination and the *NRCC*'s opinion is necessary for a draft bill to reach Cabinet. If the federal government does not follow the *NRCC* opinion, it must address a written response to the parliament.

**The programme nevertheless has important limitations and needs to be further developed, if it is to reach its full potential.** The scope of the programme is limited to information obligation burdens arising exclusively from federal legislation. The target is not at this stage "allocated" between ministries, but is an overall federal government goal, and this deprives the programme of a strong institutional incentive to meet the target. Also, it is not explicitly a net target to ensure that overall burdens are kept under control. An evaluation of the programme so far in order to set the scene for further development would be helpful.

**The programme only covers the burdens in federal laws, and does not capture the burdens in secondary implementing regulations, which thus excludes the *Länder* dimension.** This issue was already highlighted in the 2004 OECD report. While up to 95% of legislation affecting business is adopted at the federal level, implementation mainly takes place at the *Land* or local level, which gives rise to further substantive obligations (not necessarily the same in each *Land*) as well as "irritants". This cascade of regulatory obligations is likely to be affecting the competitiveness of the German internal market as well as international competitiveness. There is a growing awareness of the need to look beyond federal legislation if all the burdens affecting the business community are to be captured. So far, however, co-ordination between the federal level and the *Länder* has been confined to a few pilot projects.

**The burden reduction programme was a major step forward in Germany, is now well established and ready for further development, which will also help to sustain momentum.** A broader programme will require adequate institutional support and resources, if it is to extend its reach to cover broader compliance costs, and enhanced co-operation with the *Länder*, as well as a tighter approach to targets.

**The burden reduction programmes for citizens and for the public administration are not as well developed as the one for business.** There is a commitment to develop a programme for reducing burdens on citizens, and this is work in progress, which includes the development by the federal chancellery Better Regulation unit and the *NRCC* of an adapted methodology.

### *Compliance, enforcement, appeals*

**Compliance rates are likely to be high but they are not monitored.** Reasons for this may be that the *Länder* are mainly in charge of implementation and enforcement, and that a strongly embedded respect for the rule-of-law has been assumed to ensure high compliance rates. The *ex post* evaluation of regulations which is provided for in the impact assessment process provides a framework in principle for checking what really happens, and whether regulations have actually achieved the objectives originally set.

**The German system of "executive federalism" requires attention to the way in which the *Länder* implement federal laws.** Most legislation adopted at the federal level is implemented and enforced by the *Länder*. Another important feature of implementation and enforcement in the German context is that the *Länder* rely extensively on the districts and counties, as well as the municipalities, to execute state and even federal legislation. The system generates challenges for streamlining enforcement practices and for adopting new approaches. It will be important to evaluate the impact of the recent federal reform in practice, as this may give rise to an increasing diversity of approaches by the *Länder*. Risk based approaches to enforcement (taking a proportionate approach to inspections based on an assessment of the risk that compliance will be poor) could be encouraged.

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

### *The interface between member states and the European Union*

**The influence of EU origin regulations is significant, as in other EU countries.** The German legal system is strongly influenced by EU law. In some areas such as agriculture and the environment, this affects up to 80% of regulations. The recent measurement of administrative burdens on business established that EU or international origin regulations accounted for some EUR 25 million, roughly half of the overall annual administrative burdens on enterprises.

**The co-ordination of EU issues is shared by two ministries, with individual ministries taking the policy lead.** As in most other EU countries, the federal government does not have a single policy lead for the management of EU affairs. Each federal ministry is responsible for its area of competence. Co-ordination is mainly carried out through the federal foreign office and the federal Ministry of Economics. The role of the federal parliament is also a defining feature of the German structure. It is significant and can extend to replacing the federal government during the negotiations. The parliament is also the place where EU issues that need to be shared between the federation and the *Länder* are agreed. Impact assessment on EU origin regulations follows the same track as for national legislation. In principle impact assessment is applied the same way as for national laws.

**The German record on transposition is average and the system does not include any clear sanctions to ensure timely implementation.** In the latest EU Scoreboard, Germany's implementation deficit was 3% of European directives to be transposed, ranking about average among EU Member States, although well above the target of 1.5% set by the European Councils. A database helps to track progress in transposition against deadlines, and other monitoring tools are used. Transposition may be seen as a challenge by the administration because directives lack precision, are too general, and do not correspond with German legal terminology.

**In recent years Germany has intensified its contribution to the European debate on Better Regulation.** In particular, it has been close to developments relating to administrative burden reduction programmes, and was instrumental in the launch of the EU programme. The *NRCC* interacts closely with the European High Level Group of Independent Stakeholders on Administrative Burdens (*Stoiber Group*). There is considerable interest and concern about the need to better manage EU aspects of Better Regulation (which was acknowledged to be as much the responsibility of member states as the EU institutions).

### *The interface between subnational and national levels of government*

**Better Regulation initiatives by the *Länder* are largely separate from federal initiatives, in keeping with their independent status.** The *Länder* are not directly subject to the federal level Better Regulation agenda. For example they are not formally part of the federal government's administrative burden reduction programme, although there has been some co-operation through pilot projects. Instead, most of the *Länder* have developed aspects of Better Regulation on their own account and suited to their own context. Some initiatives go back a long way, to the mid 1970s. The reduction of administrative burdens and modernisation of the public administration appear to be the current focus of the *Länder* Better Regulation agenda. Initiatives are not confined to the *Länder* level, with a number of cities taking initiatives too.

**A number of *Länder* are well advanced in Better Regulation policies, sometimes beyond the federal initiatives.** A number of *Länder* have established dedicated central units for Better Regulation or some form of oversight. They commonly make use of the Internet to consult and communicate with stakeholders. Administrative burden reduction is the most widely used process. There are marked differences as regards the deployment of *ex ante* impact assessment procedures. It is acknowledged that there is room for improvement. The implementation of the EU Services Directive is having a marked impact on the organisation of services.

**Federal-*Länder* co-operation starts at the top with the engagement of the *Bundesrat*, which represents the sixteen *Länder* governments.** The relevance of the *Länder* for the implementation of federal legislation is given expression in their active role throughout the processes used to shape the latter, not least via their consent in the *Bundesrat*. The *Joint Rules of Procedure* require ministries to involve representatives from the *Länder* "as early as possible" in the regulatory process. Every bill passed by the *Bundestag* must be submitted to the *Bundesrat*, either requiring its consent or allowing it to lodge an objection. Beyond this strong formal engagement between the federal level and the *Länder*, regular information exchanges take place via the federal chancellery Better Regulation unit. There are also specialised conferences and a network of working groups to pick up issues of shared interest.

**There appear nonetheless to be some challenges with federal-*Land* co-operation mechanisms, leading to a suboptimal handling of important issues.** The fact that federal and *Länder* Better Regulation initiatives are largely disconnected suggests that the mechanisms for co-operation are not fully effective in promoting a shared agenda where this is appropriate, for example in the area of administrative burdens. Both levels of government lose out on the added value of working together. The failure to co-ordinate effectively may partly be explained by the fact that there are too many (not too few) working groups, and focus is lost.

**Competition is more evident than co-operation between the *Länder*.** The scope for competition in a federal system can have a positive impact on the introduction of Better Regulation tools and the development of best practices. Germany considers that the complexity of a federal state is balanced by the advantage of competition between the *Länder*. It positively encourages this approach, as evidenced by the planned introduction of a benchmarking provision in the Basic Law (the first provision of its kind in Europe). Each *Land* appears to concentrate on its own needs, though some are willing to co-operate with others over best practice, and the co-operation network appears to be growing. *Länder* vary a lot in size (city size to country size) and economic strength. Variable geometry may allow more flexibility and dynamism but there is also the risk of duplication of effort. The question which also needs to be asked is how companies cope when they "migrate" across *Länder* boundaries with different regulations.

## Key recommendations

| ***Better Regulation strategy and policies*** | |
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| 1.1. | Make sure that there is a balanced development of Better Regulation policies. Consider how to strengthen *ex ante* impact assessment as well as the burden reduction programme. Consider the issue of a name for the strategy which reflects its broad reach. For example, Better Regulation (*Bessere Rechtsetzung*) should be preferred to *Bürokratieabbau* (Reducing Bureaucracy). |
| 1.2. | Consider the development of a White Paper which proposes an ambitious and interesting vision for future developments. The White Paper should identify key programmes, their linkages, and targets to be achieved (qualitative or other), to be shared across the federal ministries and with those *Länder* that wish to participate. Consult widely and seek out partners to help flesh out the vision. Ensure that the strategic link with economic and sustainability goals and performance is clearly spelt out. Once the baseline paper has been agreed, back it up with an annual report on developments, signed by all the relevant federal ministries and interested *Länder*. |
| 1.3. | Continue efforts to identify areas where Better Regulation initiatives can be shared with the *Länder*. |
| 1.4. | Alongside the development of a more joined up policy for Better Regulation, develop a communication strategy which sets out developments and explains the link between Better Regulation and practical outcomes and advantages for businesses, citizens and the economy. Encourage the German business community to raise their profile as advocates for Better Regulation. |
| 1.5. | Commission evaluation studies of key programmes from universities, think tanks or private foundations on a regular basis. Consider whether the Court of Auditors might play a role. |

| ***Institutional capacities for Better Regulation*** | |
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| 2.1. | Confirm, clarify and communicate, as soon as possible, the shape of a strengthened and internally coherent Better Regulation institutional network to support key initiatives such as the burden reduction programme and ex ante impact assessment, and to make the necessary links between them. |

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| 2.2. | Confirm the future of the Better Regulation unit and its role as the visible face of Better Regulation in the federal structures. Ensure that its future is assured, as far as possible, through secure staffing and budget lines. The unit, for example, should have its own staff as well as secondments from other ministries. Consider whether there is a way to secure its position institutionally over the long term. In the absence of a strong policy decision to orientate Better Regulation in support of a specific policy objective (environmental sustainability, competitiveness/economic recovery), in which case the unit might be attached to the relevant ministry, it should be confirmed as part of the federal chancellery, which covers all policy areas from a strategic perspective. Extend the scope of its mission to cover all key Better Regulation issues (not necessarily as leader of these issues) including *ex ante* impact assessment and the EU dimension. |
| 2.3. | Confirm a commitment to the *NRCC* as a valuable external adjunct to internal structures in support of Better Regulation. Expand its mandate in line with the proposed developments in Better Regulation tools and processes so that it plays a broader role in the *ex ante* assessment of draft legislation. Confirm its role as a facilitator in the dialogue with the *Länder*. Ensure that the resources available to it are adequate to these tasks. |
| 2.4. | Consider how to strengthen co-operative mechanisms between core Better Regulation ministries (Interior, Justice, Economics and Finance, as well as Environment for sustainability) so that synergies between related initiatives are captured, and to enhance the coherence of the federal government's Better Regulation policy. Establish the Better Regulation unit as the co-ordinator of this process, fronted by a senior chancellery minister. It is preferable not to duplicate arrangements. One structure should suffice (political committee, supported by a shadow officials' committee). |
| 2.5. | Consider how to strengthen capacities and interest in regulatory quality among officials, including and not least for *ex ante* impact assessments. Strengthen the carrots and sticks for good performers, drawing on ideas from other EU countries. Review training for civil servants and ensure that training in Better Regulation techniques is an integral part of this and is a requirement for all officials (including senior officials) who need to be aware of regulatory quality issues. |
| 2.6. | Strengthen the dialogue with the *Länder* on Better Regulation, building on existing initiatives. Consider mechanisms for raising awareness of shared issues and exchanging ideas. For example, intensify a programme of secondments between the federal government and the *Länder* for officials to experience issues at first hand. |

| *Transparency through public consultation and communication* | |
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| 3.1. | Carry out a comprehensive evaluation of consultation practices by federal ministries, as a starting point for establishing a clear and enforceable set of common guidelines for public consultation. Ensure that the guidelines emphasise transparency, with clear provisions for consultations and their results, including feedback on the more important comments received, to be posted on the internet. Cover both the established processes, and the use of more open "notice and comment" procedures, building on the recent efforts to promote e-consultation. Consider whether to engage the help of the Court of Auditors for the review and guidelines, and keep the federal parliament informed. |

| *Development of new regulations* | |
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| 4.1. | Ensure that future data on regulatory production trends cover the picture at the *Länder* as well as the federal level (in consultation with the *Länder* over how to do this). Refine the data and its interpretation to ensure that trends and their causes are clear, and help to shed light on what Better Regulation processes need to tackle (for example, consider whether the reduction in number of federal regulations could be due at least in part to longer and more complex laws, and whether this raises any issues). |
| 4.2. | Consider further steps to enhance the transparency of forward planning procedures, including the establishment of an annual forward look, and the provision of more and timelier information to external stakeholders. |
| 4.3. | Consider whether the eNorm and electronic guide to law drafting initiatives could be joined up, where this is relevant, and made binding on all federal ministries. |
| 4.4. | Consider whether it is possible to adapt the process in place for overseeing administrative burden impacts, and extend this to cover the other forms of impact. This could be developed in stages. For example, the procedural check by the federal chancellery could be extended in a first stage to cover a more in depth review of whether key aspects such as consultation, quality of assessments etc, have been effectively covered. Consider whether there is a role for the *NRCC*, bearing in mind that quantification of broader impact assessments can be a challenge, compared with the established methodology for administrative burdens (and that in the absence of objectively verifiable figures its involvement may be considered too political). Ensure that central monitoring units are adequately resourced for the task. |

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| 4.5. | Check the main guide on impact assessment for weaknesses such as the time specified for completing an impact assessment ahead of a proposal being tabled before the Cabinet. Review the different guides available and streamline them to ensure that the strategic core requirements are clearly contained in the main guide, with ministries' own guides as a technical supplement to core requirements. Commission a review of quantification methodologies for different forms of impact assessment, drawing on the knowledge and experiences of other countries, in order to move forward on quantification where possible. Review training for impact assessment and make it a systematic requirement for officials engaged in law drafting. |
| 4.6. | An effective and simple way forward would be to post all impact assessments on line at a single website, alongside the Interior ministry guidelines (and the guidelines of other ministries), which would allow stakeholders to make up their own minds about whether the system is operating according to their satisfaction (boosting quality control). |
| 4.7. | Consider how to extend impact assessment so that it covers all important secondary regulations, ensuring that efforts are targeted at the most significant regulations. Ensure that the sustainability impact assessment framework does not develop separately from the rest. Avoid fragmentation, and work towards an integrated system. |
| 4.8. | Consider whether there is scope to strengthen the dialogue between the federal government and the parliament with respect to the efficient development of legislation, and to sustaining regulatory quality through to the final stage of enactment. Consider, with the federal parliament, whether there are ways in which impact assessment can be deployed where this matters (significant amendments to government bills, the parliament's own draft legislation). |
| 4.9. | Review, with interested *Länder*, whether the current arrangements for their involvement in the development of federal legislation is enough to secure a clear view of implications for implementation downstream, and the scope for working together on impact assessment in areas of shared interest. |
| 4.10. | Consider a review of the extent to which alternatives to regulation is picked up as an option before the decision is made to proceed with a regulation, using the existing very complete checklist for identifying opportunities for regulatory alternatives as a guide. Associate this with a commitment to strengthen impact assessment processes more generally. |

| *The management and rationalisation of existing regulations* | |
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| 5.1. | Keep up the "spring cleaning" of legislation at regular intervals. Strengthen the law making procedures to encourage officials to consider the inclusion of a review mechanism in individual draft regulations, or even a sunset clause (beyond which the law automatically expires) where appropriate. |
| 5.2. | Consider how the new approaches used for engaging and informing enterprises and the public on the burden reduction programme might be used for other issues or sectors which carry an important weight of regulations. |
| 5.3. | Consider extending the organisational setting used for the burden reduction programme (centralisation of political/administrative support, independent oversight, creation of a network of contacts in the line ministries) to cover other aspects of Better Regulation and notably *ex ante* impact assessment. |
| 5.4. | Commit to the continuation of the programme and to its development in terms of scope. Arrange for a rapid but complete independent evaluation of the programme to pinpoint how and to what extent it should be developed, with the participation of the federal parliament and of interested *Länder*, and with input from external stakeholders (notably business). |
| 5.5. | Expand the methodological scope of the programme with a view to covering substantive compliance costs as well as irritants. Review the approaches which are being developed by other countries for this, as well as the proposals of independent institutions. Ensure that there is adequate quantification of costs. |
| 5.6. | Tighten up the current target. Divide it between ministries. Confirm it as a net target. |
| 5.7. | Consider how to include relevant agencies and other bodies attached to federal ministries, taking a proportionate approach (only those which may be generating significant burdens). Engage a dialogue with the federal parliament over the best way to capture burdens arising from their role in the law making process. |
| 5.8. | Commission an independent survey of the "burden cascade". Where do burdens (and irritants) actually arise, and who is responsible for the relevant regulations that contain them? Use the results to engage a dialogue with interested *Länder* over a shared approach to future burden reduction that links the federal programme with *Land* initiatives, and identifies specific issues for co-operation (for example, databases). |
| 5.9. | Review the capacities and resources of the federal chancellery Better Regulation unit and of the *NRCC* for supporting an enhanced programme. |

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| 5.10. | Commit to the development of programmes to address burdens on citizens and within the administration and make this known as part of the federal government's Better Regulation policy. Draw on the experiences of other countries that have already travelled down this road. Ensure that these initiatives are appropriately connected with e-Government initiatives. |

| ***Compliance, enforcement, appeals*** | |
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| 6.1. | Ensure that the *ex post* evaluation of regulations is used effectively for assessing compliance rates. Ensure that the *ex ante* impact assessment of draft regulations examines enforcement issues downstream. |
| 6.2. | Ensure that the impact of the 2006 federal reform is evaluated for its effect on *Länder* implementation of federal legislation. Consider whether further dialogue with interested *Länder* would be helpful in order to stimulate new approaches to enforcement, such as risk based inspections. |

| ***The interface between member states and the European Union*** | |
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| 7.1. | Review the extent to which impact assessment is applied for EU origin regulations, both at the negotiation and the transposition stages, and the approach which is taken. Consider how the process could be improved, taking account of the European Commission's own impact assessment processes. Consider in particular whether there is a need to strengthen consultation with stakeholders. |
| 7.2. | Carry out a review of transposition processes, in co-ordination with the *Länder*. Consider how the system could be improved with incentives (and sanctions) for late transposition. |
| 7.3. | Use the EU dimension to frame German Better Regulation more clearly as a potentially key contributor to growth, competitiveness and jobs. |

| ***The interface between subnational and national levels of government*** | |
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| 8.1. | Consider a review/evaluation of co-operation agreements and working groups, to pinpoint what works and what works less well (and why). Seek to identify Better Regulation processes (such as administrative burden reduction) or issues (such as sustainability) where there is shared interest in enhanced co-operation, and focus efforts on these issues. |

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| 8.2. | Consider an evaluation of the extent to which competition between the *Länder* really does stimulate best practices, and the extent to which these are picked up across the *Länder*. Consider a survey of business views to check attitudes to the German internal market and its efficiency (in terms of harmonised regulatory approaches across the *Länder*). |

## Note

1. Article 1.1 of the Act on the Establishment of a National Regulatory Control Council of 14 August 2006 states that the *NRCC* « is bound only by the mandate conferred by this Act and is independent in its work ». Its work is financed by the federal Chancellery. This includes the secretariat office of the *NRCC* which, nonetheless, is completely independent and subject only to the instructions of the *NRCC*. Thus, the *NRCC* and its structures are part of the federal Chancellery but only insofar as its budget is concerned. Apart from that, the Government notes that it is completely independent and external to the administration.

# *Introduction: Conduct of the review*

## Peer review and country contributions

The review was conducted by a team consisting of members of the OECD Secretariat, and peer reviewers drawn from the administrations of other European countries with expertise in Better Regulation. The review team for Germany was:

- Caroline Varley, Project Leader for the EU 15 reviews, Regulatory Policy Division of the Public Governance Directorate, OECD.
- Lorenzo Allio, Independent consultant on public governance and regulatory reform, attached to the OECD Secretariat for this review.
- Michel Hainque, Economic and Financial Controller General, Ministry for the Economy, Industry and Employment, Ministry for the Budget, Public Accounts, the Civil Service and State Reform, Mission on law simplification, France.
- Panagiotis Karkatsoulis, Lawyer, Policy Adviser and Task Force Member to the Ministry of Public Administration and Decentralisation and other Greek ministries.

The review team held discussions in Berlin with German officials and external stakeholders on 21 January and 9-13 March 2009. The report takes account of major initiatives and developments since this mission and prior to the federal elections on 27th September 2009.

The team interviewed representatives of the following organisations:

- Confederation of German Trade Unions (DGB).
- Federal Academy of Public Administration (*BakövV*).
- Federal chancellery (BK).
- Federal Ministry for the Environment (BMU).
- Federal Ministry of Economics (BMWi).
- Federal Ministry of Justice (BMJ).
- Federal Ministry of the Interior (BMI).
- Federal Parliament (*Bundestag* and *Bundesrat*).
- Federal statistical office (SBD).
- Federation of German Industries (BDI).
- German Association of Cities and Municipalities.
- German Chambers of Industry and Commerce (DIHK).
- German Confederation of Skilled Crafts (ZDH).

- German County Association (DLT).
- National Regulatory Control Council (NKR).
- Office of Technology Assessment.
- Representatives of the *Land* of Baden-Württemberg, Brandenburg, Hessen, Lower Saxony.

## Structure of the report

The report is structured into eight chapters. The project baseline is set out at the start of each chapter. This is followed by an assessment and recommendations, and background material.

- **Strategy and policies for Better Regulation.** This chapter first considers the drivers of Better Regulation policies and the country's public governance framework seeks to provide a "helicopter view" of Better Regulation strategy and policies. It then considers overall communication to stakeholders on strategy and policies, as a means of encouraging their ongoing support. It reviews the mechanisms in place for the evaluation of strategy and policies aimed at testing their effectiveness. Finally, it (briefly) considers the role of e-Government in support of Better Regulation.
- **Institutional capacities for Better Regulation.** This chapter seeks to map and understand the different and often interlocking roles of the entities involved in regulatory management and the promotion and implementation of Better Regulation policies. It also examines training and capacity building within government.
- **Transparency through consultation and communication.** This chapter examines how the country secures transparency in the regulatory environment, both through public consultation in the process of rule- making and public communication on regulatory requirements.
- **The development of new regulations.** This chapter considers the processes, which may be interwoven, for the development of new regulations: procedures for the development of new regulations (forward planning; administrative procedures, legal quality); the *ex ante* impact assessment of new regulations; and the consideration of alternatives to regulation.
- **The management and rationalisation of existing regulations.** This chapter looks at regulatory policies focused on the management of the "stock" of regulations. These policies include initiatives to simplify the existing stock of regulations, and initiatives to reduce burdens which administrative requirements impose on businesses, citizens and the administration itself.
- **Compliance, enforcement, appeals.** This chapter considers the processes for ensuring compliance and enforcement of regulations, as well administrative and judicial review procedures available to citizens and businesses for raising issues related to the rules that bind them.
- **The interface between member states and the EU.** This chapter considers the processes that are in place to manage the negotiation of EU regulations, and their transposition into national regulations. It also briefly considers the interface of national Better Regulation policies with Better Regulation policies implemented at EU level.

- **The interface between subnational and national levels of government.** This chapter considers the rule-making and rule-enforcement activities of local/sub federal levels of government, and their interplay with the national/federal level. It reviews the allocation of regulatory responsibilities at the different levels of government, the capacities of the local/sub federal levels to produce quality regulation, and co-ordination mechanisms between the different levels.

## Methodology

The starting point for the reviews is a "project baseline" which draws on the initiatives for Better Regulation promoted by both the OECD and the European Commission over the last few years:

- The OECD's 2005 Guiding Principles for Regulatory Quality and Performance set out core principles of effective regulatory management which have been tested and debated in the OECD membership.
- The OECD's multidisciplinary reviews over the last few years of regulatory reform in 11 of the 15 countries to be reviewed in this project included a comprehensive analysis of regulatory management in those countries, and recommendations.
- The OECD/SIGMA regulatory management reviews in the 12 "new" EU member states carried out between 2005 and 2007.
- The 2005 renewed Lisbon Strategy adopted by the European Council which emphasises actions for growth and jobs, enhanced productivity and competitiveness, including measures to improve the regulatory environment for businesses. The Lisbon Agenda includes national reform programmes to be carried out by member states.
- The European Commission's 2006 Better Regulation Strategy, and associated guidelines, which puts special emphasis on businesses and especially small to medium-sized enterprises, drawing attention to the need for a reduction in administrative burdens.
- The European Commission's follow up Action Programme for reducing administrative burdens, endorsed by the European Council in March 2007.
- The European Commission's development of its own strategy and tools for Better Regulation, notably the establishment of an impact assessment process applied to the development of its own regulations.
- The OECD's recent studies of specific aspects of regulatory management, notably on cutting red tape and e-Government, including country reviews on these issues.

The report, which was drafted by the OECD Secretariat, was the subject of comments and contributions from the peer reviewers as well as from colleagues within the OECD Secretariat. It was fact checked by Germany.

The report is also based on material provided by Germany in response to a questionnaire, including relevant documents, as well as relevant recent reports and reviews carried out by the OECD and other international organisations on linked issues such as e-Government and public governance.

Within the OECD Secretariat, the EU 15 project is led by Caroline Varley, supported by Sophie Bismut. Elsa Cruz de Cisneros and Shayne MacLachlan provided administrative and communications support, respectively, for the development and publication of the report.

## Regulation: what the term means for this project

The term "regulation" in this project is generally used to cover any instrument by which governments set requirements on citizens and enterprises. It therefore includes all laws (primary and secondary), formal and informal orders, subordinate rules, administrative formalities and rules issued by non-governmental or self-regulatory bodies to whom governments have delegated regulatory powers. The term is not to be confused with EU regulations. These are one of three types of EC binding legal instrument under the Treaties (the other two being directives and decisions).

# *Chapter 1*

# Strategy and policies for Better Regulation

Regulatory policy may be defined broadly as an explicit, dynamic, and consistent "whole-of-government" policy to pursue high-quality regulation. A key part of the OECD's 2005 Guiding Principles for Regulatory Quality and Performance is that countries adopt broad programmes of regulatory reform that establish principles of "good regulation", as well as a framework for implementation. Experience across the OECD suggests that an effective regulatory policy should be adopted at the highest political levels, contain explicit and measurable regulatory quality standards, and provide for continued regulatory management capacity.

Effective communication to stakeholders is of growing importance to secure ongoing support for regulatory quality work. A key issue relates to stakeholders' perceptions of regulatory achievements, and how progress can be effectively communicated (business, for example, may continue to complain about regulatory issues that are better managed than previously).

Governments are accountable for the often significant resources as well as political capital invested in regulatory management systems. There is a growing interest in the systematic evaluation of regulatory management performance, *i.e.* "measuring the gap" between regulatory policies as set out in principle and their efficiency and effectiveness in practice. How do specific institutions, tools and processes perform? What contributes to their effective design? The systematic application of *ex post* evaluation and measurement techniques can provide part of the answer and help to strengthen the framework.

E-Government is an important support tool for Better Regulation. It permeates virtually all aspects of regulatory policy from consultation and communication to stakeholders, to the effective development of strategies addressing administrative burdens, and not least as a means of disseminating Better Regulation policies, best practices, and guidance across government, including local levels. Whilst a full evaluation of this aspect is beyond the scope of this project and would be inappropriate, the report makes a few comments that may prove helpful for a more in depth analysis.

## Assessment and recommendations

### *Development of Better Regulation strategy and policies*

*There have been significant developments since the last OECD review in 2004.* The 2005 coalition agreement includes important references to Better Regulation. The main pillar of current federal policy on Better Regulation is a carefully structured programme to reduce administrative burdens on business ("Bureaucracy Reduction and Better Regulation") adopted in 2006. Although Germany started its programme relatively late, it is

well anchored, not least through cross party consensus of the need for action. A clear and full baseline has been established covering all federal legislation, and a quantitative target has been set. The programme is independent of the political cycle (end date 2011). There is also a wide ranging programme to take forward e-Government in support of businesses and citizens ("Focused on the Future: Innovations for Administration", including the e-Government 2.0 programme) also adopted in 2006. There is a growing interest in developing a sustainability dimension to the agenda. At the same time legal quality continues to receive attention, supported by recent initiatives such as the "Electronic Guide to Law Drafting", the deployment of the eNorm software to guide drafters and increase productivity, and efforts to improve linguistic clarity. Measures to simplify the legislative stock have also been vigorously promoted, with encouraging results (the number of regulations has been significantly reduced).

*Developments are based on a discernable change in attitude.* The federal government is now driving some important changes, together with a few *Länder*. There is interest in going further (as it was put to the OECD peer review team "the system is not frozen, it has adaptive capacities"). Better Regulation has been brought closer to the centre of government with the establishment of the federal chancellery Better Regulation unit, and the initiatives of key frontline ministries including Justice and Interior. Resources are being deployed to build up capacity, although these need to be strengthened in some cases. The federal burden reduction programme, in particular, has raised awareness of the costs of regulation and the impact on business (and citizens), sowing the seeds of further developments. Most recently, the federal government and parliament have been developing plans for a sustainability impact assessment.

*Better Regulation processes remain, however, tailored to German traditions, and in search of a clearer identity.* The link between the longstanding and often highly sophisticated older structures and processes for law making (epitomised by the *Joint Rules of Procedure*), and new processes such as impact assessment, the burden reduction programme, and more open consultations remains tenuous. There is a sense that the new tools are being adapted to fit the existing framework, instead of being used as an opportunity to act as a lever of more fundamental change. Impact assessment for example does not stand out with a clear identity from the broader framework of the *Joint Rules of Procedure* for law making. This misses an opportunity to take a fresh look at how public policies are launched and developed. As a result Better Regulation continues to struggle for a clear identity. As one interviewee put it, "Germany needs the courage to break out of its traditions". This is possible, without dismantling all the good effects of a strong and (generally co-operative) legal state which many interviewees said works smoothly. Using pilots to smooth the way seems to work well in the German context, provided that these are followed through robustly and do not fade out.

*A related issue is that the approach is not co-ordinated.* As in many other OECD countries there is no specific strategy document on Better Regulation. There is no "joined up" perspective on Better Regulation as yet. The current picture is fragmented. The Interior Ministry's engagement in Better Regulation leans the process toward citizens and the administration. The Justice ministry pursues its valuable legal quality initiatives somewhat apart. Guiding principles for Better Regulation (meaning a clear view of core elements and how they interact) are unclear. This fragmentation was noted in the 2004 OECD report. As well as overall coherence, the linkages between specific programmes need attention. For example, is enough being done to exploit the synergies between the burden reduction programme and e-Government initiatives? A coherent Better Regulation reform agenda is needed, which links up the different initiatives to give Better Regulation policy a clear identity, for the benefit both of internal and external stakeholders.

### Box 1.1. Recommendations from the 2004 OECD report

**Close the implementation gap between regulatory policies and practices**

The immediate challenge for regulatory governance in Germany is to close the implementation gap between existing regulatory policies and practices by enhancing and improving the political, institutional and practical support for high quality regulation. This can be done by expanding, converting and making operational existing tools and concepts into coherent and consistently applied regulatory practices. Meeting this challenge would include improving and enhancing the current support for these policies – political, institutional as well as practical support.

**Strengthen regulatory policies by setting out a single government-wide regulatory policy**

Germany should strengthen regulatory policies as a permanent, high priority for the government, with an integrated approach to the use of regulatory tools, procedures and institutions. Several programmes and policy commitments address different aspects of a regulatory policy in Germany, but with a notable emphasis on *ad hoc* projects focussing on *ex post* reviews and the reduction of administrative burdens. Germany does not have a single explicit or published policy promoting a government-wide regulatory policy. Many regulatory policy elements are applied *ad hoc*, depending on the political strength of individual ministers, without a permanent, government-wide and institutionalised management structure to support it. Policy-makers and civil servants have no strong incentives to pursue a consistent and coherent application of the regulatory policy guidelines already in place. An explicit government-wide policy on the quality of regulation, with the institutions and legal support to carry it out, would boost the benefits of reform for Germany. It is equally important that the policy endorses the systematic use of evaluations and quantitative, evidence-based assessments as the basis for regulatory decision-making and for the review and revisions of existing regulation.

*The scope of Better Regulation processes remains somewhat narrow, and the administrative burden reduction programme appears to have absorbed a large part of the political impetus.* The agenda leans disproportionately towards the measurement (and reduction) of costs, leaving the analysis of benefits in the background. The federal administrative burden reduction programme only covers federal legislation, and only considers information obligations on companies, not other forms of compliance costs. The framework for this programme needs to be broader. At the same time, *ex ante* impact assessment needs to be strengthened – the development of a sustainability dimension provides an opportunity to do this. Longstanding processes are in place, but there is no strong guidance or challenge to secure the quality of assessments and their timeliness in relation to decision-making.

**Recommendation 1.1. Make sure that there is a balanced development of Better Regulation policies. Consider how to strengthen *ex ante* impact assessment as well as the burden reduction programme (see Chapters 5 and 6 for more detail). Consider the issue of a name for the strategy which reflects its broad reach. For example, Better Regulation (*Bessere Rechtsetzung*) should be preferred to *Bürokratieabbau* (Reducing Bureaucracy).**

*The strategic relationship with high level public policy goals, especially economic goals, is not clearly evident.* Despite the valuable link which is underlined between burden reduction and business competitiveness, the strategic value and purpose of Better Regulation is not as prominent as it should be. Strikingly, post crisis, the overall economic dimension to Better Regulation in Germany remains weak. There is only marginal participation by the Economics and Finance Ministries. Although there are considerable

advantages in having the federal chancellery as co-ordinator of the burden reduction programme, the downside is that the programme is not clearly linked to broader economic policies in support of competitiveness and post crisis recovery. Effective regulatory management (going beyond burden reduction) has an important contribution to make in sustaining economic performance and supporting further structural reforms. The sustainability dimension is also not yet fully exploited. Further work to define the strategic scope of Better Regulation, and to raise its profile, would benefit from the input of key external stakeholders, including (but not only) the business community.

**Recommendation 1.2. Consider the development of a white paper which proposes an ambitious and interesting vision for future developments. The white paper should identify key programmes, their linkages, and targets to be achieved (qualitative or other), to be shared across the federal ministries and with those *Länder* that wish to participate. Consult widely and seek out partners to help flesh out the vision. Ensure that the strategic link with economic and sustainability goals and performance is clearly spelt out. Once the baseline paper has been agreed, back it up with an annual report on developments, signed by all the relevant federal ministries and interested *Länder* (using examples of successful processes from other countries such as the United Kingdom).**

*Encouragingly, efforts are being made to encourage federal-Länder co-operation in areas where a shared approach is important, such as burdens on business.* A greater presence of the *Länder* in Better Regulation is evident. Pilot projects have been set up by the federal government to link up federal initiatives and *Länder* programmes (notably as regards administrative burdens and e-Government). There is a willingness to experiment, involving like-minded *Länder*. It appears that a growing number of *Länder* are taking a dynamic approach both to co-operation with the federal government and in terms of their own initiatives. The federal and *Länder* initiatives nevertheless remain largely separate. Given the federal context, joining them up is likely to be a slow work in progress, but the pilots show promise.

**Recommendation 1.3. Continue efforts to identify areas where Better Regulation initiatives can be shared with the *Länder*.**

### *Communication on Better Regulation strategy and policies*

*Communication has so far been largely limited to the administrative burden reduction programme.* The government's annual report on the administrative burden reduction programme has been the main specific recent communication related to Better Regulation available to the general public.

*Communication on other aspects of Better Regulation remains fairly invisible.* Communication on Better Regulation strategy and policies is not evident, beyond the fact that is referenced in the coalition agreements. This is perhaps not surprising as there is some work to be done giving the policy shape and coherence (see above). In the German context, with autonomous ministries, there is the further challenge that the federal government does not always speak with one voice and there are different communication cultures within the administration. However, the overall effect is to leave stakeholders (inside and outside the administration) well short of a clear picture of what is being achieved, and how it helps broader policy objectives. The component parts of Better Regulation remain a somewhat internal affair, driven by officials, and it is not yet seen as an opportunity for the public administration to develop a more evidence-based, client-

oriented approach. The rather closed approach to public consultation (see Chapter 3) does not help matters. The external dimension is weak, with little obvious input from the business community to advocate for Better Regulation alongside the government, as exists in a number of other European countries (the Swedish Board of Industry and Commerce for Better Regulation-NNR- is a very good example).

**Recommendation 1.4. Alongside the development of a more joined up policy for Better Regulation, develop a communication strategy which sets out developments and explains the link between Better Regulation and practical outcomes and advantages for businesses, citizens and the economy. Encourage the German business community to raise their profile as advocates for Better Regulation.**

### *Ex post evaluation of Better Regulation strategy and policies*

*As in most other OECD countries, ex post evaluation of the successes and failures of Better Regulation programmes is ad hoc.* With a few exceptions, there is no attempt to evaluate programmes in order to inform future developments. One notable exception is the e-Government programme which was reviewed prior to the launch of the current programme, and the results were used to shape the latter. There has been no evaluation, for example, of the effectiveness of current *ex ante* impact assessment processes. It is important to distinguish between evaluation and monitoring exercises. For example, the annual reports on the administrative burden reduction programme are not a substitute for an *ex post* evaluation of the programme as a whole. Regular programme evaluation will enhance the effectiveness of future reforms, and can also be used to engage business and citizens in the results.

**Recommendation 1.5. Commission evaluation studies of key programmes from universities, think tanks or private foundations on a regular basis. Consider whether the Court of Auditors might play a role (as is the case in several other EU countries, including the United Kingdom and the Netherlands).**

### *E-Government in support of Better Regulation*

*E-Government is a cornerstone of the federal government's policy to modernise and streamline public administration at federal level, with significant knock on effects for Better Regulation.* The Interior ministry closed the chapter on the first programmes, and has started afresh. Objectives have, importantly, been set beyond the lifespan of the current government. The "e-Government 2.0" programme is an integral part of the strategy. It has been developed in compliance with the European Action Plan i2010, drawing on the achievements and experience of the previous legislature. The strategy includes several useful initiatives for Better Regulation including the single public administration telephone number (citizens can phone the number to ask any questions they like), which is a shared initiative with the *Länder*, currently in the pilot phase. The legal framework for e-Government roll out has also been strengthened, although more is needed to support data re use and interoperability. The EU Services directive has been a major boost to the development of one-stop shops and the electronic processing of services (as in other EU countries).

*Results so far are promising but Germany is conscious that ICT potential is a long way from being fully exploited.* The development of e-Government initiatives in a federal state is acknowledged to be a major challenge. For example, the federal government, *Länder* and

municipalities operate over 7 000 websites that are barely integrated. At the same time, e-Government initiatives can help to speed culture change within the administration. The IT society challenges the assumption of independent and isolated federal ministries. The new institutional framework for e-Government (CIO officers in each ministry, the creation of an IT Council) is a promising support for the process. The planned establishment of the Planning Council of Representatives of the federal government and the *Länder* for e-Government initiatives should help to lubricate co-operation between the levels of government. There is unexploited scope for e-Government to address administrative burdens as well as to support greater transparency in public consultation and communication. Feedback to the OECD peer review team suggested that more streamlined public service delivery has some way to go yet.

## Background

### *Main developments in the German Better Regulation agenda*

**Table 1.1. Milestones in the development of Better Regulation policies in Germany**

| | |
|---|---|
| 1958 | *Joint Rules of Procedure* of the federal ministries. Revisions in 2000 introduce obligations to prepare Regulatory Impact Analysis. |
| 1977 | Administrative Procedure Act. |
| 1984 | The Blue Test Questions on regulatory quality issues endorsed by Cabinet. |
| 1996 | Act to Expedite Approval Procedures. |
| 1991 | Manual on Legal Drafting endorsed by Cabinet. |
| 1997 | Established in 1995, the independent Lean State Advisory Council tables its final report to the federal chancellor. |
| 1999 | Government programme Modern State – Modern Administration introduces the enabling state. |
| 2001 | RIA methodological working aid issued by the Ministry of the Interior. |
| 2003 | Agenda 2010.<br>Initiative to Reduce Administrative Burdens. |
| 2006 | Cabinet Decision on the federal government's Bureaucracy Reduction and Better Regulation Programme.<br>Programme Innovations for Administration including the e-Government 2.0 Programme. |
| 2007 | Baseline Measurement for businesses begins.<br>Cabinet Decision on the 25 % Reduction Target (by end 2011).<br>Definition of an intermediate target of (about) 12.5 % (by end 2009). |
| 2008 | Conclusion of Baseline Measurement for businesses. |
| 2009 | Start of the *ex ante* assessment of administrative burdens on the citizens. |

### *Guiding principles for the current Better Regulation policy agenda at the federal level*

There is no specific strategy document on Better Regulation as exists in a few (not many) other EU countries. The 2005 coalition agreement, which was the basis of the federal government's policy programmes in the previous legislative term, as well as the Cabinet decision on the Programme "Bureaucracy Reduction and Better Regulation Programme of the federal government" of April 2006 include important references to Better Regulation. The main pillars of current federal policy on Better Regulation – against the backdrop of continuing strong emphasis on legal and administrative procedures for law making – are the programme to reduce administrative burdens, with a strong emphasis on business, and a wide ranging programme to take forward e-Government in support of businesses and citizens. There is a growing interest in developing a sustainability dimension to the agenda by including this in the *ex ante* impact assessment of new regulations. Core processes relating to legal quality and clarity, as well as legislative simplification, continue to be vigorously promoted. Increasingly, efforts are being made to encourage federal *Länder* co-operation in areas where a shared approach is important, such as burdens on business and citizens.

### *Main Better Regulation policies at the federal level*

Flagship initiatives:

- *Programme "Bureaucracy Reduction and Better Regulation"*, adopted in 2006. The programme aims at reducing unnecessary administrative costs resulting from information obligations from federal legislation which was in force on the baseline date (30 September 2006) by 25% by 2011,[1] using the SCM.
- *E-Government programme "Focused on the Future: Innovations for Administration",* including the e-Government 2.0 programme, adopted in 2006. Its overall objective is to create user centric services, and accelerate administrative processes. It includes action plans to improve federal government e-services, optimise the electronic interface between business and the public administration, set up an electronic national identity card, and strengthen the communication infrastructure with business and citizens via portals for example. It also includes an initiative for a single government service telephone number for citizens, across the territory.
- *Legal quality initiatives.* These include, notably, the "Electronic Guide to Law Drafting", the deployment of the "eNorm" software to help drafters comply with formal and editorial requirements in the same format throughout the law making process, and an initiative to boost linguistic clarity.

Other measures:

- Three acts on relief for small businesses from excessive regulation, since 2005, and a catalogue of accompanying measures, including a database of information on federal and *Länder* regulations affecting SMEs, adopted in 2006.
- Legislative simplification initiative. The enactment since 2003 of eleven laws repealed some thousand redundant laws and regulations.
- Data base of current federal administrative regulations, set up in 2006, with a public enquiry service.

federal/*Länder* measures:

- Constitutional amendment to promote benchmarking among the *Länder* administrations, between the federation and the *Länder*, and within the federal administration.
- Pilot programmes to link up the federal administrative burden reduction initiatives with the *Länder* burden reduction programmes.
- *Deutchsland - Online*, set up in 2003, to foster integrated e-Government across the different levels of government.
- Implementation of the EU Services Directive including the establishment of Points of Single Contacts.

### *Communication on the Better Regulation agenda at the federal level*

The Press and Information Office of the federal government is responsible for the executive's official communication policy. So far, the Better Regulation policy and agenda have not been centrally communicated. Communication is normally left to the individual Ministries, which set their own priorities and put varying emphasis on the relevance of the agenda for their activities.

Communication with stakeholders on Better Regulation also takes place in the form of frequent and regular working level meetings and through special conferences organised by stakeholders, at which government representatives have the opportunity to outline recent developments.[2]

The government's annual reports on the administrative burden reduction programme have been the main specific recent communication related to Better Regulation available to the general public.

### *Ex post evaluation of Better Regulation strategy and policies*

*Ex post* evaluation of Better Regulation policies tends to be *ad hoc*, as in many other EU countries. It can be quite well developed, and often takes the shape of reports presented to the *Bundestag* or the responsible committees. An example is the report on renewable energy sources.[3] The responsibility for regular *ex post* evaluation often lies with specific institutions, typically federal authorities. At least 14 bodies have formal evaluation instructions within the federal administration. Recent estimates calculated the budget devoted to *ex post* evaluation and related activities by the federal government in 2007 to be EUR 112.3 million. *Ex post* evaluations may also be carried out by privatised actors (*e.g.* the post, telecommunication and railways sectors), special fund of the *KfW* banking group (*Sondervermögen* (*KfW*), as well as social organisations (*e.g.* in the framework of the health care system).

The federal government presents an "Annual Economy Report" to the *Bundestag* and the *Bundesrat* in accordance with section 2 of the Law to Promote Economic Stability and Growth (*Gesetz zur Förderung der Stabilität und des Wachstums*).[4]

Perhaps the most visible evaluations are the reports on the administrative burden reduction programme, which are provided for in the law establishing the *NRCC*. The *NRCC* reports back to the federal chancellor annually on the status of the *ex ante* procedure. It may also present recommendations to the federal government at any time. The government reports to the *Bundestag* annually on the status of the overall programme. Both reports are discussed by the competent parliamentary committees.

E-Government was reviewed prior to launching the current programme. The Report on the "*BundOnline 2005*" initiative served as a benchmark for developing the current e-Government 2.0 programme.

### *E-Government in support of Better Regulation*

E-Government is a cornerstone of the federal government's policy to modernise and streamline public administration at the federal level. The adoption of a comprehensive strategy "Focused on the Future: Innovations for Administration" (*Zukunftsorientierte Verwaltung durch Innovationen*) in September 2006 launched a clear signal of renewed commitment in this field. With regard to Better Regulation, the programme seeks to enhance the federal administration's effectiveness and efficiency; reduce unnecessary bureaucracy; and improve law enforcement. More recently, the conclusions of a bi-cameral commission (*Kommission zur Modernisierung der Bund-Länder-Finanzbeziehungen*) of March 2009 set IT as the basis for developing structural communication in the 21st century and recommended amending the Basic Law accordingly. The government has also sent a clear signal of the need to take the long view, by setting objectives beyond its life span (the time horizon of the "e-Government 2.0" programme is 2010, while the "CIO Strategy" lasts until 2011). The website *www.verwaltung-innovativ.de* provides complete information on the measures launched and updates on the progress made, allowing accountability towards stakeholders and the public.

#### *BundOnline 2005 and the e-Government 2.0 programme*

The "e-Government 2.0" programme is an integral part of the strategy (Box 1.2). It has been developed in compliance with the European Action Plan i2010. The strategy draws on the achievements and experience of the previous legislature, notably the "*BundOnline 2005*" initiative. This initiative, co-ordinated by the Ministry of the Interior, lasted from 2000 until 2005 and sought to make available on line all services of the federal administration by 2005. A central programme management system was set up, covering methods and specifying five base components.[5] A knowledge-management system was also implemented to share experiences. The initiative was judged to be a success. By the end of 2005, some 440 services had been made accessible on the Internet, beyond the initial target of 400. It is estimated that the initiative generated annual savings of EUR 430 million for citizens and businesses. Internal savings are calculated to be EUR 350 million per year, mainly realised by a reduction of 1.5% in staff. Nevertheless, the current government decided that a new and even broader impetus was needed.

**Box 1.2. E-Government at the federal level: The e-Government 2.0 programme**

The objectives of the "e-Government 2.0" programme are to create user-centric services; optimise administrative processes and accelerate them by 15-30%; and reduce costs by 15%. The e-Government 2.0 programme builds on the following four fields of action, all centred on the Internet as the main channel for communication and service delivery:

- **Portfolio** – This refers to improving federal e-Government services in terms of quantity and quality. In particular, it addresses both the opportunity for all individuals to be part of the information society in social and technical terms (e-inclusion) and the enhancement of participation of businesses and the citizens in policy-making and administrative processes (e-participation). The pilot on-line consultation on the Citizen Portals Act is an example of the latter. In 2007, the federal Ministry of Interior conducted two studies on e-inclusion and e-participation that surveyed the stage of development reached in Germany and provided European comparisons.*

- **Process chains** – This seeks to optimise the interface between public administration and private businesses by establishing electronic collaboration through common process chains. Specifically, the action involves 32 pilot projects related *inter alia* to the electronic feedback on money laundering (eVA); electronic record-keeping for waste recovery and disposal (eANV); the electronic pollutant release and transfer register (ePRTR); and the research project IT Food Trace.
- **Identification** – This consists of introducing an electronic national identity card and developing e-identity strategies. A draft law has been adopted by the federal cabinet and is currently being debated by the parliament. The new eID Card is planned to be launched in November 2010.
- **Communication** – This aims to secure communication infrastructure for citizens, businesses and public administrations (*e.g.* through certified portals).

* See *www.ifib.de/publikationsdateien/study_e-participation_engl.pdf* (last accessed 14 April 2009).

### *Single Government Service Telephone Number*

The e-Government strategy contributes to the implementation of projects on simpler, better and cost-effective access to the public administration. An example is the single public administration telephone number 115, a shared initiative of the three governmental levels under the leadership of the federal Interior Ministry and the *Land Hessen* (Box 1.3). This is a promising initiative. To ensure it reaches its full potential and the largest number of citizens it needs to be vigorously backed up with regular information campaigns and user surveys to sustain user interest and track progress.

#### Box 1.3. The Single Government Service Telephone Number (115)

This is a single phone number (115) for replying to questions addressed to any public administration across the territory.* The idea originates from the difficulties faced by citizens to understand who is who in the public administration and find out the responsible office for a given procedure or service. Because of the country's federal structure, the German public is confronted with a variety of pubic authorities across the territory. The goal is to answer 75% of calls within 30 seconds, and reply to at least 55% (later up to 80%) of the questions on the first call. As the service develops, a database will be continuously updated to include information on all levels of government.

The initiative started as a pilot project in March 2009 and involved a number of federal administrations and four *Länder*. The population initially covered is 10 million citizens (*ca.* 1/8 of Germany's total population). Participation in the project is on a voluntary basis, and it is expected that interest in the initiative will spill over across an increasing number of public administrations. The population not yet covered by the service receives an automatic answer when calling the 115 number informing them that their region has not joined the initiative. This should increase public awareness of the benefits of such service and put pressure on the laggards.

In the first week of service, the 115 call centre registered more than 150 000 calls, half of which in the regions and cities participating in the project.

* See *www.d115.de* (last accessed 14 April 2009).

### *CIO Strategy*

The Cabinet decision "IT management at the federal level" of December 2007 is another important building block in the government's efforts to modernise.[6] The so-called "CIO Strategy" is mainly aimed internally at the administration, with a view to rationalisation and promoting innovation. New institutional structures support it. Since June 2008, an Action Plan complements the CIO Strategy. The plan covers a three-year implementation period and lasts until the end of 2011.

### *Legal provisions and the role of the parliament*

The supporting legal framework has been strengthened over the past few years. The Electronic File Management Act of March 2005 allowed the German judiciary to process legal files and documents electronically and to pave the way for a paperless judiciary system. In summer 2005, the federal parliament adopted the Freedom of Information Act granting the public a general right to access federal government information. There are some explicitly defined exceptions, as Germany traditionally has a strict data protection regime.[7] The law also contains an "Internet clause" that obliges federal administration bodies to make a number of items publicly available on line. In the follow-up, eleven *Länder* have adopted similar legal requirements.[8] These laws follow a number of legal acts related to e-Government, covering e-Commerce (2001), e-Communication (2004), e-Signatures (2001, 2005), e-Procurement (2006), as well as the re-use of Public Sector Information (2006).

### *E-Government and other levels of government in Germany*

The e-Government 2.0 programme is aimed at developing e-Government uniquely within the federal administration. Designing and implementing an integrated approach to e-Government in a federal state is a major challenge, not least because different authorities tend to develop different IT applications for the same purposes. This also implies an inefficient fragmentation of public investment in IT. In Germany, the federal government, the *Länder* and the municipalities operate over 7 000 websites that are barely integrated.[9] Several important initiatives seek to address this issue on a continuous basis.

### *Deutschland Online*

"*Deutschland-Online*" is a joint strategy devised by the federal government, the *Länder* and the municipalities in 2003. It seeks to foster co-operation and co-ordination for integrated e-Government.[10] The strategy is based on priorities ranging from the development of integrated e-services, and the interconnection of Internet portals, to the development of common infrastructures and standards and the transfer of experiences and knowledge. The Conference of State Secretaries for e-Government in federal and *Land* governments ensures political co-ordination of the implementation of *Deutschland-Online*. National associations of local authorities also take part in the Conference. Reports are sent annually to the heads of government.

Annual "*Deutschland-Online* Action Plans" operationalise the strategy. The latest Action Plan was set up in December 2008. Besides insisting on the introduction of a secure, national communication infrastructure for administering the three layers of government in Germany, the 2008 Action Plan gives priority to a number of projects, including vehicle registration (under the leadership of Hamburg); civil status registration (led by Bavaria); and a revision of the registration system (led by the federal government). Particular emphasis is given to the implementation of the IT requirements included in the "Services

Directive" (European Directive 2006/123/EC on services in the internal market). Baden-Württemberg and Schleswig-Holstein are jointly responsible for this project, which was also supported by an on line consultation in autumn 2008.[11]

Within the framework of the *Deutschland-Online* initiative, "*XRepository*"[12] is a new on-line library for XML based Data Exchange Formats. Launched in January 2009, this website constitutes a central location for the publication of a broad spectrum of data relating to e-Government projects, allowing re-use by other administrations and designers of business processes. The website also facilitates online research on standards and interfaces, which can be subsequently downloaded at no cost.

### *One-Stop Shops (Single Point of Contact) and the EU Services Directive*

There are some 220 One-Stop Shops in Germany, where various registration and licensing applications can be filed with a single desk, for example, business registrations. These One-Stop Shops also offer advice and assistance to entrepreneurs who want to start their own business. The establishment and design of these One-Stop Shops is the responsibility of subnational authorities such as municipalities, chambers of commerce, and business groups.

The EU Services Directive (2006/123/EC) provides a significant boost to one-stop shops as it requires a uniform system across the EU internal market, and electronic processing of services. Within the framework of the Directive, "Single Points of Contact" have been set up throughout the country since 28 December 2009 (*www.einheitlicher-ansprechpartner-deutschland.de*). This was a priority project for "*Deutschland Online*". A blueprint for implementation was presented in late 2008. This called for gradual expansion until all processing by public administration is conducted electronically. Co-operation between the federation, the *Länder* and municipalities within the project is reported to have been smooth, drawing, especially, from practical experience at the local level.

Since the adoption of the federalism Reform II in August 2009, the competence for establishing a nation-wide IT liaison network has been conferred exclusively on the federation.[13] These changes are to be implemented by a future law (*Gesetz über die Verbindung der informationstechnischen Netze des Bundes und der Länder, IT-NetzG*), as well as by an implementing agreement expected to enter into force in April 2010. At the same time, an IT Planning Council of Representatives of the federal government and the *Länder* is to be set up to develop binding IT standards to enhance security and comparability across levels of government. Moreover, the Planning Council will be charged with the overall IT co-ordination, the design of the liaison network, and the implementation of e-Government projects.

### *Progress to date*

The Implementation Action Plan for 2009 provides a detailed overview of the progress achieved in 2008 with respect to 32 modernisation projects. Processes using IT developed under the e-Government 2.0 programme and linked to the programme to reduce administrative burdens include the following:

- Excise taxes are now calculated largely automatically using special IT processes. These reduce processing times and help determine the level of fiscal burden sooner. Companies therefore receive earlier, reliable notification of what taxes they owe. Entry errors by staff in the responsible main customs offices have been reduced using computer-based plausibility routines. The possibility to file tax returns on line is planned. The most important regulatory content is presented in easy-to understand form on the Internet and in information sheets.

- With its Automated Customs Tariff and Local Processing Application System (ATLAS) for the German Customs Administration, the federal Ministry of Finance has created the conditions for largely automated processing and monitoring of cross-border goods traffic. With ATLAS, written customs declarations and administrative acts (such as notices of import duties) have been replaced by electronic messages. Most customs processing and administrative tasks have been automated, simplified and accelerated. Every office of the German Customs Administration is equipped with the specialised ATLAS programmes needed for its area of responsibility.
- Draft legislation proposed by the federal Ministry of Economics and Technology would introduce procedures for "electronic earnings statements" (ELENA). Proof of income is required when applying for some types of unemployment benefit, family allowances and housing allowances. For example, the Labour Administration uses employer-issued employment certificates to determine claims for unemployment benefits. Current legislation requires them to be printed out on paper. Every year, roughly 3 million employers issue about 60 million such statements. Under the planned future system, the employers will instead send their employees' monthly income details electronically to a central database, saving up to EUR 85.6 million per year starting in 2012.

As a result of efforts made in the recent past, German society and the economy are now well tuned on accessing the Internet (75% of households and 95% of enterprises had access to the web in 2008). There is nonetheless still scope for improving the interface between users and the public administration on a number of services (Box 1.4). It will also be important to ensure that citizens who do not have access to the internet still have access to alternative ways of connecting with the administration.

### Box 1.4. Information Society indicators in Germany

- Percentage of households with Internet access: 75% (2008).
- Percentage of enterprises with Internet access: 95% (2008).
- Percentage of individuals using the Internet at least once a week: 68% (2008).
- Percentage of households with a broadband connection: 55% (2008).
- Percentage of enterprises with a broadband connection: 84% (2008).
- Percentage of individuals having purchased/ordered on line in the last three months: 42% (2008).
- Percentage of enterprises having received orders on line within the previous year: 24% (2007).
- Percentage of individuals using the Internet for interacting with public authorities: obtaining information 31.1%, downloading forms 16.2%, returning filled forms 10.5% (2008).
- Percentage of enterprises using the Internet for interacting with public authorities: obtaining information 47%, downloading forms 48%, returning filled forms 45% (2008).

*Source*: *e-Practice, e-Government Factsheets. Germany*. Edition 11.0. January 2009, p.2 (based on Eurostat data).

# Notes

1. With reference to the baseline of 30 September 2006.
2. Examples of such conferences are meetings on the implementation of the sustainability strategy of the government, as well as events with representatives of the *Gemeinschaftsausschuss der Deutschen Gewerblichen Wirtschaft* and the Chambers of Commerce. Internationally renowned special conferences in 2008 included the 2008 International Regulatory Reform Conference (IRRC 08), organised by the Bertelsmann Foundation; the "Modern State" fair; and the "New Administration" fair.
3. See the Experience Report supplied by the federal Ministry for the Environment, Nature Conservation and Nuclear Safety with regard to the Renewable Energy Sources Act (*Erneuerbare-Energien-Gesetz (EEG)* (7.11.2007), at *www.erneuerbare-energien.de/inhalt/40342/.* The Renewable Energy Sources Act was amended in line with the Experience Report, see: *www.erneuerbare-energien.de/inhalt/40508/.*
4. The Annual Report on the Economy for 2009 is entitled: Growth policy geared to economic cycle fluctuations (*Konjunkturgerechte Wachstumspolitik - Jahreswirtschaftsbericht 2009*). See: *www.bmwi.de/BMWi/Redaktion/PDF/Publikationen/jahreswirtschaftsbericht-2009,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf.*
5. The five base components for e-Government developed under the programme *BundOnline 2005* as one-for-all-applications were: (1) the content-management system (about 100 implementations); (2) the Virtual Post Box (about 40 implementations); (3) the ePayment-Plattform (about 25 implementations); (4) the Formular Management System (about 25 implementations); and (5) the portal Bund.de (nearly all government agencies at the state level). In addition, different frameworks, methods, and software tools have been deployed, independent from *BundOnline 2005* and e-Government 2.0 (see: *www.cio.bund.de/cln_093/DE/E-Government/E-Government-Programm/e-Government-programm_node.html*, last accessed 5 May 2009).
6. See: *www.cio.bund.de/cln_102/DE/Grundlagen_IT-Steuerung_Bund/grundlagen_it-steuerung_node.html* (last accessed 14 April 2009).
7. Cfr. the federal Data Protection Act of 2003.
8. See: *www.bfdi.bund.de/cln_030/nn_743466/IFG/Gesetze/Landesgesetze/Landesgesetze__node.html__nnn=true* (last accessed 14 April 2009).
9. See: *ePractice.eu*, e-Government Factsheets – Germany – Strategy, at: *www.epractice.eu/en/document/288242* (last accessed 14 April 2009).
10. See: *www.deutschland-online.de* (last accessed 14 April 2009).
11. See: *IT-Umsetzung zur EG-Dienstleistungsrichtlinie*, at: *www.deutschland-online.de/DOL_Internet/broker.jsp?uMen=58c105dd-ba3e-a511-4fbf-1b1ac0c2f214* (last accessed 14 April 2009).

12. See: *www.xrepository.deutschland-online.de/xrepository/* (last accessed 14 April 2009).

13. See the new Art. 91.c of the Basic Law.

# *Chapter 2*

## Institutional capacities for Better Regulation

Regulatory management needs to find its place in a country's institutional architecture, and have support from all the relevant institutions. The institutional framework within which Better Regulation must exert influence extends well beyond the executive centre of government, although this is the main starting point. The legislature and the judiciary, regulatory agencies and the subnational levels of government, as well as international structures (notably, for this project, the EU), also play critical roles in the development, implementation and enforcement of policies and regulations.

The parliament may initiate new primary legislation, and proposals from executive rarely if ever become law without integrating the changes generated by parliamentary scrutiny. The judiciary may have the role of constitutional guardian, and is generally responsible for ensuring that the executive acts within its proper authority, as well as playing an important role in the interpretation and enforcement of regulations. Regulatory agencies and subnational levels of government may exercise a range of regulatory responsibilities. They may be responsible (variously) for the development of secondary regulations, issue guidance on regulations, have discretionary powers to interpret regulations, enforce regulations, as well as influencing the development of the overall policy and regulatory framework. What role should each actor have, taking into account accountability, feasibility, and balance across government? What is the best way to secure effective institutional oversight of Better Regulation policies?

The OECD's previous country reviews highlight the fact that the institutional context for implanting effective regulatory management is complex and often highly fragmented. Approaches need to be customised, as countries' institutional settings and legal systems can be very specific, ranging from systems adapted to small societies with closely knit governments that rely on trust and informality, to large federal systems that must find ways of dealing with high levels of autonomy and diversity.

Continuous training and capacity building within government, supported by adequate financial resources, contributes to the effective application of Better Regulation. Beyond the technical need for training in certain processes such as impact assessment or plain drafting, training communicates the message to administrators that this is an important issue, recognised as such by the administrative and political hierarchy. It can be seen as a measure of the political commitment to Better Regulation. It also fosters a sense of ownership for reform initiatives, and enhances co-ordination and regulatory coherence.

## Assessment and recommendations

*There have been important institutional developments to support Better Regulation since the last OECD review in 2004.* Regulatory developments in the past tended to follow underlying structural and procedural traditions, based on formality, legal conformity and clarity in rule making. While these traditions remain strong, there is growing evidence of initiatives and experiments to test new approaches. The creation of a Better Regulation unit in the federal chancellery, together with the establishment of an independent advisory body, the National Regulatory Control Council (*Normenkontrollrat*), both of which support the business administrative burden reduction programme, appear as the landmark developments. The chancellery Planning unit is also relatively recent and underlines efforts to improve co-ordination on proposed legislation. A growing interest in sustainable development is reflected in the creation of another special unit within the chancellery, as well as two advisory bodies, the Parliamentary Advisory Council on Sustainable Development and the independent German Council for Sustainable Development. Change is also underway in the line ministries, with the identification of dedicated units or staff working on Better Regulation related issues, notably for the business administrative burden reduction programme. The e-Government strategy is supported by a new institutional structure, including the establishment of a federal Government Commissioner for Information Technology and Chief Information Officers for each ministry. These developments are important in terms of counteracting the centrifugal forces at work in the German context.

*The federal chancellery Better Regulation unit and the other new chancellery units imply a break with the tradition of silo ministries, an inward looking administration, and a weak centre.* Unlike the more traditional chancellery units which co-ordinate and monitor the activity of the highly autonomous line ministries, these units have more active advocacy, management and evaluation responsibilities. The Better Regulation unit is responsible for piloting the federal business administrative burden reduction programme and supporting the related work of the National Regulatory Control Council.

*The establishment of the National Regulatory Control Council (NRCC) as an independent watchdog is equally striking in the context of German institutional tradition.* The *NRCC* emerged out of an agreement between the main political parties in 2005, and was set up to be an autonomous advisory and control body external to the executive. The *NRCC*'s mandate is to support the federal government in reducing administrative burdens found in federal legislation. It currently focuses exclusively on administrative costs. Part of its mandate is to track EU administrative burden initiatives, and it has also used its position to promote closer links with *Länder* initiatives to reduce burdens. An important feature of the *NRCC* is that its mandate transcends the political cycle (it was originally set up for five years *i.e.* to 2011). The *NRCC* is an important gatekeeper in the federal law making process (draft bills cannot be tabled before the Cabinet without first undergoing scrutiny by the *NRCC*), and ministries tend to follow its recommendations. Its opinions are published. In a relatively short time it has become a well established feature of the institutional landscape.

*Institutional structures for supporting Better Regulation nevertheless remain disconnected, and there is an increasingly urgent need to consolidate the new approach.* As in most other European countries, no single central manager of all aspects of Better Regulation in the federal executive has yet emerged. In this respect the recommendation of the 2004 OECD review has not been followed. Such a development is unlikely - and perhaps unnecessary - given Germany's traditions. A lesson learnt from the last few years across the OECD is that a careful balance needs to be struck between the powers of a central unit and the importance of keeping ministries responsible. Chapter 1 has already

noted that the current German set up suffers from compartmentalisation – there are no clear links between the different initiatives. For example, important e-Government initiatives are not always clearly joined up with the efforts to take forward burden reduction. There is a pressing need to come out of what appears to be a transition, with further institutional development to strengthen the coherence and clarity of Better Regulation management (not only for those inside the administration but also for external stakeholders), and to fully secure its sustainability over political cycles. The seeds have been sown with the chancellery and *NRCC* developments. It is a now matter of growing them, and of making essential connections between all the key institutional actors. A "networked" approach to institutional management of Better Regulation is being tested across several EU countries with some success, and for the same reasons as in Germany (to fit with existing public governance traditions). But such an approach is not a soft option, still relies on some form of visible flagship unit, and needs careful development. Specific proposals for taking it forward are explored below.

**Recommendation 2.1. Uncertainty and lack of focus are damaging for the long term work of consolidating Better Regulation as an established policy in Germany. Confirm, clarify and communicate, as soon as possible, the shape of a strengthened and internally coherent Better Regulation institutional network to support key initiatives such as the burden reduction programme and *ex ante* impact assessment, and to make the necessary links between them (see specific proposals below).**

*As a first step, the future, location and mandate of the federal chancellery Better Regulation unit needs to be confirmed, and its sustainability secured beyond political cycles.* It would be a very unfortunate backward step if this unit were lost in any reorganisation. On the contrary, it needs to be strengthened as a core player, anchor and orchestrator of Better Regulation policies across the federal government. Its location is a key issue. The experience of other European countries highlights two main options. The first is to put the Better Regulation unit at the centre of government, and the second is to embed it within a key central ministry with a policy interest in Better Regulation. The advantage of the first is a more neutral, broader and strategic perspective that can draw in and arbitrate between different ministries and interests (citizens, business etc.), but it can feel distant from real policy issues. The advantage of the second is that it anchors Better Regulation more firmly in the "real world" and in support of key policy issues (business or other), but other ministries may not buy in so easily. In order to act as a recognisable flagship for Better Regulation, the unit's mandate needs to be extended beyond the important but narrow issue of administrative burdens. Finally, its sustainability needs to be addressed, which means looking again at budget and staffing, as well as how to secure its survival beyond the political cycle (Belgium's Administrative Simplification Agency, which sits within that country's federal chancellery, offers an interesting example).

**Box 2.1. Recommendation from the 2004 OECD report**

**Equip a technical unit in the centre of government with capacities to support regulatory quality.**

The German government should equip a unit located in the centre of government with the mandate and resources needed – in particular economic expert capacities – to promote, advise, support and evaluate a government-wide and comprehensive regulatory policy. The current criteria, sanctions and staff resources available to enforce RIA obligations are insufficient. A centre-of-government unit with stronger and more credible capacities would oversee the RIA system and provide technical opinions on the *substantive* – not just technical – quality of proposed measures. The unit could also offer training and provide advice on regulatory instruments. As part of this, evaluations of applied regulatory tools and procedures would constitute an important feedback loop to on-going improvements and revisions of the regulatory policy. Another option could be to equip the unit with a formal challenge function *vis-à-vis* ministries' regulatory proposals.

**Recommendation 2.2. Confirm the future of the Better Regulation unit and its role as the visible face of Better Regulation in the federal structures. Ensure that its future is assured, as far as possible, through secure staffing and budget lines. The unit, for example, should have its own staff as well as secondments from other ministries. Consider whether there is a way to secure its position institutionally over the long term. Absent a strong policy decision to orientate Better Regulation in support of a specific policy objective (environmental sustainability, competitiveness/economic recovery), in which case the unit might be attached to the relevant ministry, it should be confirmed as part of the federal chancellery, which covers all policy areas from a strategic perspective. Extend the scope of its mission to cover all key Better Regulation issues (not necessarily as leader of these issues) including *ex ante* impact assessment and the EU dimension.**

*As a linked second step, the scope of the NRCC's mandate needs to be extended. Like the Better Regulation unit, this is an institutional innovation which needs to be nurtured, as an essential adjunct to the structures internal to the federal administration.* Independent watchdogs have proved their worth in several other European countries as committed advocates of Better Regulation across the political cycle, bringing new perspectives to the administration and hands on experiences (the United Kingdom has recently reinstated its watchdog; following the German example, Sweden has set up a watchdog; the Netherlands ACTAL continues to speak out on issues that need attention). The *NRCC* needs to be given a stronger role, building on existing strengths. In the context of a broader approach to the burden reduction programme (see Chapter 6), this should at the least include the examination of all compliance costs associated with new federal regulations, and a role beyond this to review quality standards and *ex ante* impact assessments should be considered.

**Recommendation 2.3. Confirm a commitment to the *NRCC* as a valuable external adjunct to internal structures in support of Better Regulation. Expand its mandate in line with the proposed developments in Better Regulation tools and processes (see Chapters 5 and 6) so that it plays a broader role in the *ex ante* assessment of draft legislation. Confirm its role as a facilitator in the dialogue with the *Länder*, and in monitoring relevant EU developments. Consider whether it should play a role in the *ex post* evaluation of regulatory programmes and policies. Ensure that the resources available to it are adequate to these tasks.**

*A strong co-ordination network is needed to bind the work of different parts of the administration on Better Regulation together.* This issue was already raised in the 2004 OECD report. Compartmentalisation of initiatives that should be related to each other needs to be vigorously tackled. Beyond the federal chancellery, four key ministries have important Better Regulation related responsibilities (the Interior ministry which shares the task of checking constitutionality of draft regulations with the Justice ministry, checks compliance with the *Joint Rules of Procedure* for the preparation of draft legislation and is also responsible for e-Government roll out; the Justice ministry which is responsible for legal quality and constitutionality; the Economics ministry which reviews costs to companies and consumers of draft regulations and co-ordinates and represents German positions on EU matters; and the Finance ministry which assesses budgetary effects of draft regulations). The growing interest in sustainability issues means that the Environment ministry is also likely to be a key future player. There is no need to centralise these responsibilities if a strong enough framework exists to bring the ministries together round the table. This implies the need to revisit current co-ordination arrangements and to strengthen and expand their reach. The only current structure for this is the Committee of State Secretaries on Bureaucracy Reduction. Its remit does not extend beyond administrative burdens (for example, it does not cover *ex ante* impact assessment, or the EU aspects of regulatory management). Denmark offers an example of how establish a robust committee structure to orchestrate Better Regulation policies.

**Box 2.2. Recommendation from the 2004 OECD report**

**Select a permanent ministerial committee responsible for promoting regulatory policy.**

Once adopted at the highest political level, a permanent ministerial committee should be established or adapted to support Germany's regulatory policy. The committee should increase accountability for regulatory reform results within the ministries by establishing a systematic process of oversight, against which ministries will be held accountable. Such a committee could be particularly valuable in the context of adopting and reviewing a regulatory policy, and it would provide the necessary "championship" to drive forward the effective implementation of a regulatory policy. Past experience with *ad hoc* committees of civil servants implementing selected regulatory policy issues have not been sufficient to change the political agenda towards comprehensive and consistently applied regulatory policies.

**Recommendation 2.4. Consider how to strengthen co-operative mechanisms between core Better Regulation ministries (interior, justice, economics and finance, as well as environment for sustainability) so that synergies between related initiatives are captured, and to enhance the coherence of the federal government's Better Regulation policy. Establish the Better Regulation unit as the co-ordinator of this process, fronted by a senior chancellery minister. It is preferable not to duplicate arrangements (have more than one committee for this purpose). One structure should suffice (political committee, supported by a shadow officials' committee).**

*There is a discernable wind of cultural change within the administration on Better Regulation, but more is needed.* There has been progress since the last OECD review. The OECD peer review team were told that there had been considerable culture change within the federal administration - for example, the recruitment of non-lawyers, and lawyers being deployed into "non-legal jobs" (although most graduates in the civil service are still lawyers). The need to assess business administrative burdens in draft legislation has focused attention on costs and generated some awareness of the implications of government intervention, but this interest has not yet spread to other impact assessments. There is no doubting the technical capacities and qualities of individual ministries to prepare laws (and to design innovative tools such as eNorm), but they need encouragement to go further, and embrace the broader concept of regulatory quality. In the German context, the capacity of officials to work effectively and enthusiastically with Better Regulation tools and processes is key, given the political backdrop, and might indeed encourage politicians to buy into the process too. The approach to further culture change needs to be two pronged. First, it needs teeth. Quality control, incentive mechanisms and sanctions for non compliance are needed to ensure that processes are respected and that poor drafts are turned down. Quality control is already assured to some extent by the *NRCC* (at least for administrative burdens) but could be reinforced by equipping the Better Regulation unit (and/or ministries) with some capacity to challenge and send back inadequate work. Several European countries have also developed mechanisms such as linking Better Regulation performance to budgets and officials' performance appraisal (rewarding the good work which often goes unnoticed). Second, training for Better Regulation needs to have a high profile. Training for civil servants is significant, and training in specific Better Regulation techniques is starting to permeate the system, but it needs to be more systematic in terms of content and coverage.

**Box 2.3. Recommendation from the 2004 OECD report**

**Encourage — especially by training — the continued development of an administrative culture supporting regulatory quality management.**

A continued effort is needed to embed good regulatory practices not only in procedural guidelines but also into the culture of the public administration. Government actions rely on an excessively legalistic approach as the standard for quality. The appreciation on the part of some officials of the benefits associated with early integration of regulatory impact analysis in the policy-making process needs to be extended to other departments and regulatory authorities in order to support a broad and continuous development of high quality regulation. The development of such a culture could be encouraged by making regulatory quality management an integral part of the training not only of junior civil servants engaged in the regulatory process, but, as importantly, also of senior civil servants.

**Recommendation 2.5. Consider how to strengthen capacities and interest in regulatory quality among officials, including and not least for *ex ante* impact assessments. Strengthen the carrots and sticks for good performers, drawing on ideas from other EU countries. Review training for civil servants and ensure that training in Better Regulation techniques is an integral part of this and is a requirement for all officials (including senior officials) who need to be aware of regulatory quality issues.**

*The federal parliament is an important player beyond the executive and has played a positive role in the emergence of the administrative burden reduction programme.* The federal parliament has played an active role in the emergence of the federal administrative burden reduction programme, not least by supporting the establishment of the *NRCC*. Draft bills include a statement by the *NRCC* on the expected administrative costs for business, an annual report on progress is presented to the parliament, and it can consult the *NRCC* at any time, which has generated further parliamentary interest in regulatory costs. The so-called "Regulatory Cost Model" (see Chapter 6) has been proposed as a possible future methodology on the initiative of a parliamentary Committee. The parliament has also been an active participant in legislative simplification. Finally, it has a fast growing interest in sustainability issues, through the Parliamentary Advisory Council on Sustainable Development. As in some other European countries this suggests that the parliament is taking a growing interest in Better Regulation.

*Last but not least, the Länder are key players in any future Better Regulation strategy, if this to make a real difference.* The long run success of Better Regulation in Germany depends on enhanced co-operation between the federal government and the *Länder*, including the development of shared goals. Reflecting the federal nature of the German state, Germany's regulatory production system is complex. Regulations are produced at the federal level, covering areas of federal competence. These laws are usually fleshed out in secondary regulations produced by the *Länder*, as part of their responsibilities for implementing federal legislation (the *Länder* may in turn delegate implementation responsibilities to the counties and municipalities, which may give rise to further subsidiary regulations and instructions). The *Länder* also issue laws and regulations in respect of their exclusive competences (with an equivalent delegation process to counties and municipalities). The quality of regulations and the burdens contained in this regulatory "cascade" can only be addressed through a shared effort. As matters stand, nearly all of Germany's Better Regulation initiatives are exclusive either to the federal level or to the *Länder*. However, there is a growing awareness of the need to join up, notably as regards the federal burden reduction programme, which now includes pilot projects to capture the downstream effects of implementing federal legislation in the *Länder*.

**Recommendation 2.6. Strengthen the dialogue with the *Länder* on Better Regulation, building on existing initiatives. Consider mechanisms for raising awareness of shared issues and exchanging ideas. For example, intensify a programme of secondments between the federal government and the *Länder* for officials to experience issues at first hand. See chapter 8 for further recommendations on strengthening the federation-*Land* relationship.**

## Background

### *Germany's public governance context*

The German public governance framework is characterised by the following features:

- *The legal state (Rechtsstaat).* This grants the constitution (Basic Law – *Grundgesetz*) a pivotal status. For historical reasons, the constitution is deeply respected, as are formal process rules derived from it. Regulatory reform has therefore tended to respect underlying structural and procedural traditions, and is based on gradual evolution rather than abrupt changes which break the mould. Formality, legal conformity and clarity in rule making are strong traditional features of the system. However while tradition remains strong, there is growing evidence of initiatives and experiments to test new approaches (such as the establishment of the *Normenkontrollrat*).
- *Co-operative federalism.* The federation-*Länder* relationship is based on the principle of co-operative federalism, which is complex. For historical and other reasons, the *Länder* are considered to be fully-fledged states in their own right, which multiplies the number of decision points in the system as well as generating a diversity of approaches to the reform agenda. Politicisation of the agenda, from the start of debate, is also stronger than in some other jurisdictions, as there is a need to negotiate and maintain an often delicate political balance between the interests of the different parts of the federation. This also has a tendency to slow the decision making process. *Länder* views on policy need to be integrated formally and from an early stage, for instance by sending draft legislative proposals to the *Bundesrat* (which represents them) before the *Bundestag*. A key aim of the 2006 constitutional reform was to streamline, clarify and speed up important parts of the decision making process.
- *Autonomous federal ministries*. Co-operation and consensus building are also key features of the way in which the federal executive works. The principle of ministerial autonomy means that the chancellery acts more as a co-ordinator than a driver of policy and law making. Centrifugal forces need to be kept in check and the system raises a significant challenge for the centralisation of reform, the establishment of clear reform leadership in the executive centre of the federal government, and the development of a collective, whole-of-government approach to reform.
- *A political system based on consensus and compromise.* The nature of coalition governments and the different cycles for the federal and *Länder* elections add to the political complexity of steering policy.

**Box 2.4. Institutional framework for the German policy, law making and law execution process (federal level)**

**The executive**

The federal government is composed of the federal chancellor and the federal ministers. The federal chancellor is the only elected member of the federal government. The chancellor has the constitutional right to determine the number of ministries and their portfolios and to select the ministers. In the 2005-2009 legislative term there were 14 ministries.

The federal chancellor sets the general policy guidelines, *i.e.* binding priorities for government activities. In the case of defence, the chancellor is the supreme commander of the German armed forces. These powers provide the chancellor with a range of executive instruments which can stand comparison with the power of presidents in presidential democracies.

At the beginning of each legislative term, the federal chancellor is proposed by the federal president and elected by the *Bundestag*.

The actual powers of the chancellor are more limited in practice. First, no single party generally achieves a majority in the *Bundestag*, and a coalition (alliance between parties) is necessary to elect a chancellor. Coalition agreements cover specific topics such as the allocation of ministerial portfolios in the federal cabinet. The coalition also issues the policy programme determining the broad course of action during the government's term of office.

Numerous legislative procedures require the consent of the *Bundesrat* which represents the *Länder*. Because elections in the *Länder* do not necessarily correspond to the federal parliamentary term, the political composition of the *Bundesrat* can vary during the mandate of the federal government, and supporting majorities can therefore shift. To avoid this, in 2006 the grand coalition agreed on a reform of the constitution that limits the number of bills that must be approved by the *Bundesrat*.

A third factor limiting the powers of the chancellor is the independence of federal ministers. These are fully responsible for running their respective ministries and initiating legislation, in line with the guidelines set by the chancellor. According to this "principle of ministerial autonomy", the latter cannot intervene in individual policy issues. If a certain issue affects more than one ministry, the responsible ministry must involve the other ministries concerned. If no agreement on drafts or statements can be reached, the federal cabinet decides as a college by majority ("principle of joint cabinet decision-making"). If no solution is found, the chancellor as a *primus inter pares* settles the issue.

All federal ministries have the same structure. Each federal minister is supported by one or two "parliamentary state secretaries" and one or more "permanent state secretaries". The former are members of the *Bundestag* that assist the minister in his/her parliamentary work, in addition to their own political mandate. The latter are top civil servants who support the minister in leading the ministry. Heads of Department and Secretaries of State are political officials and can be dismissed by their minister at any time. Numerous ministries have an advisory board which supports them in fulfilling their tasks. Federal and *Länder* authorities co-ordinate their work through permanent, institutionalised Specialised Ministers' Conferences which are supported by numerous permanent working groups. In addition, there are various informal panels, mostly composed of representative of both the federal and *Länder* level, to consult on specific policies.

Executive tasks at the federal level are carried out by the federal administration. This is divided into a direct administration (comprising all agencies which are directly accountable to a federal ministry) and an indirect administration. In this latter case, federal administrative tasks are assigned to independent organisations having legal capacity (*i.e.* entitled to act on their own behalf), and which are led by self-regulatory panels. The federal ministries merely check whether the tasks are performed according to the law. At the federal level, this principle is mainly used for the administration of social insurance systems (pension, health, nursing, accident and unemployment insurance).

### The legislature at the federal level

The legislature at the federal level has two pillars. The *Bundestag* is the parliament of all the German people and is the primary legislative organ at the federal level. It is directly elected every four years, and is made up of at least 598 members. Depending on the election result, additional "overhang seats" can be allocated to parties on a proportional basis. To prevent fragmentation, a political party can be represented in the *Bundestag* only if it secures at least three seats in the direct vote of individual constituencies, or 5% of the total vote. The main task of the *Bundestag* is to pass legislation and control the executive. It also elects the chancellor.

In addition to the *Bundestag*, the *Bundesrat* is an independent constitutional body (and therefore not a "second chamber"), where the *Länder* are represented at the federal level and participate in federal legislation as well as in EU affairs. Its members are directly appointed by the government of each *Land*.

They are therefore not elected delegates but represent the *Land* executives. Seats in the *Bundesrat* are

distributed according to the demographic weight of the state, ranging from three to a maximum of six votes for the most populated *Länder*. Votes must be cast as a block. *Bundesrat* delegates follow the voting instruction of their state government. Each state can only vote unanimously. In the case of disagreement among coalition partners in a state government, delegates normally abstain. All bills and statutory instruments must be submitted to the *Bundesrat* for its approval or opinion. The Basic Law provides for two forms of participation, according to the type of legislation. If the *Bundesrat* does not agree on laws which require its consent, the so-called Mediation Committee may be convened.

### The federal president

The federal president is the Head of state. He or she represents the federal republic inside the country and abroad. The president also appoints the chancellor, the members of the federal government, the judges, high-ranking civil servants and military officers. The president can dismiss the government and, in exceptional cases, dissolve the parliament and call for anticipated elections. However, state authority is exercised by the federal government. The president promulgates legislative acts (makes them legally binding). Should a constitutional dispute exist, the president may refuse the promulgation but has no political right of veto. The president is elected by the federal convention (composed of the members of the *Bundestag* and an equal number of persons elected by the state parliaments), with a mandate of five years, renewable once.

### The judiciary

The German legal system draws from the European codified civil law tradition. Germany's Civil Code (*Bürgerliches Gesetzbuch*, *BGB*) was developed in the late nineteenth century, and has served as a template for other civil law jurisdictions.

The federal constitutional Court (*Bundesverfassungsgericht*) in Karlsruhe is the supreme court. The 16 judges of the supreme court monitor adherence to and compliance with the Basic Law, they adjudicate competence disputes between the federation and the *Länder*. They rule only upon petitions and their decisions are final. The supreme court holds a monopoly on interpretation of the constitution with regard to all German jurisdictions. All organs of the federation are bound to uphold to the rulings of the supreme court.

Each *Land* has a state constitutional court. If a *Land* law is regarded as being incompatible with the respective *Land* constitution, the courts seek a ruling from the *Land* constitutional Court which has jurisdiction in accordance with *Land* law. If a norm is declared unconstitutional by the court, it has to be submitted to the constitutional Court for an independent review (concrete proceedings on the constitutionality). Norms can also be examined by the court irrespective of any specific application (abstract proceedings on the constitutionality).

Besides ordinary courts which deal with criminal and almost all civil cases, the administration of justice consist of, labour, administrative, social, and financial "specialised" courts. Justice is administered by some 21 000 independent judges, generally appointed for life.

### Regulatory agencies

Regulatory agencies at the federal level cover issues within the federal government's exclusive competence. They have evolved on an *ad hoc* basis over time, reflecting the specificities of the sectors or issues that they cover. They are mostly concerned with the execution and enforcement of laws and regulations, and (with some significant exceptions) do not have rule making powers of their own. Some were established soon after the establishment of the federal Republic (the federal Cartel Office (*Bundeskartellamt*, for example, in 1958). Others are quite recent (the federal Financial Supervisory Authority (*Bundesanstalt fur Finanzdientsleistungsaufsicht*), for example, in 2002, by merging three previous supervisory offices).

There are three main categories of agency (see Annex B). The first category consists of the Superior Federal Authorities (SFAs), which generally execute laws and statutory instruments under "expert and legal supervision" of the federal ministries. A second category is made up of self regulatory agencies

established for the execution of federal tasks at arms-length, mainly in the social insurance sector. The third category comprises agencies responsible for federal administration activities, as well as other significant federal activities. They include the federal financial administration, the waterways and shipping administration, the federal armed forces (*Bundeswehr*) and the federal Police.

There are some 440 agencies at federal level. Of the 474 000 federal employees 5% work in the federal ministries and 95% in the subordinate agencies.[1]

*Notes*

1. In the 16th legislative term, there were 14 ministries: foreign affairs, interior affairs, justice, finance, economy, labour and social affairs, food and agriculture, defence, family and women, health, transport and building, environment, education and research, and economic co-operation.

2. Coalition government is the norm: there have been 21 of such executives since 1949. Usually, large parties prefer associating with small ones. Durable alliances were, for example, the Social Democrat/Liberal coalition (1969-1982), the CDU/CSU and FDP coalition (1982-1998), and the Social Democrat/Green alliances (1998-2005). A "grand coalition" of CDU/CSU and SPD has been in power since 2005.

3. According to section 47 of the Rules of the Procedure of the Administrative Courts (VwGO) and section 13 (number 6, 76 et seqq.) of the federal constitutional Court Act (*Bundesverfassungsgerichtsgesetz, BVerfGG*).

### *Developments in the public governance context*

The overall institutional setting in Germany is characterised by stability and robustness, based on the 1949 constitution. The absorption of the five eastern *Länder* into the German state in the 1990s was a fundamental change at one level, but the institutional and governance aspects of this absorption were mitigated by the decision to keep to the same model for the new *Länder* as for the existing *Länder*. In short this event did not give rise to major reforms of the German state. Underlying public governance structures have not therefore changed significantly since 1949.

That said, two major federal reforms address some key issues relating to the respective competences of the federal and *Länder* levels of government, the nature of federal legislation and consequent implementation of this legislation by the *Länder*, and the financial relationships between the different levels of government (Box 2.5).

The strategic capacity of the federal government has also been enhanced in recent years with the creation of a Planning Unit within the federal chancellery in 2005, headed by a federal Minister for Special Affairs, the Head of the chancellery (rather than a lower level State Secretary). The aim was to strengthen forward planning of federal policy and legislation, as well as the chancellery position *vis-à-vis* the *Länder* Prime Ministers, but in practice the leverage of this Unit has remained limited. At the same time, a growing interest in sustainable development has been reflected in the creation of a dedicated Unit within the federal chancellery as well as two advisory bodies: the Parliamentary Advisory Council on Sustainable Development (*Parlamentarischen Beirats für Nachhaltige Entwicklung*),[1] and the independent German Council for Sustainable Development (*Rat für Nachhaltige Entwicklung*).[2] Last but not least the chancellery now has a Better Regulation Unit, as per Cabinet decision of 25 April 2006, co-ordinating the implementation of the Bureaucracy Reduction and Better Regulation Programme to reduce administrative burdens, which was set up at the same time as the Secretariat of the *Normenkontrollrat* (see below).

### Box 2.5. German federal reforms

**The Federalism Reform I (modernisation of the federal system)**

The first wave of reforms, which entered into force in 2006, aimed at enhancing the ability of the federal government and the *Länder* to act and take decisions; better allocating political competencies and enhancing the transparency, expediency and efficiency of implementation. The reform amended the Basic Law and adopted the related Act Accompanying Reform of the federal system (*Föderalismusreformbegleitgesetz*).

Key reform measures included the following:

- strengthening of the legislative competencies of the federal government in areas of supra-regional importance and of the *Länder* in areas of regional importance;
- abolition of framework federal legislation, and at the same time clarifying the division of responsibilities between the federal government and the *Länder*;
- elimination of mutual blockages by reducing the number of laws requiring the consent of the *Bundesrat*;
- strengthening the scope for strategic co-operation between the federal government and the *Länder* in the area of education and science;
- elimination of mixed finance; and
- incorporation of the national Stability Pact into the Basic Law, and introduction of a distribution system as between the federal government and the *Länder* (65/35%) for sanctions imposed due to violations of the European Stability and Growth Pact.

The reform also sought to strengthen the autonomy of institutions of higher education. It therefore eliminated framework legislation making it possible to abolish the Framework Act for Higher Education (*Hochschulrahmengesetz*).

**The Federalism Reform II (federal/*land* financial relations)**

The second wave of reform was launched by the Decision of the *Bundestag* and *Bundesrat* in December 2006 to set up a Joint Commission for Modernisation of the federal government / *Länder* on Financial Relations. The Commission was charged with drawing up proposals to modernise financial relations between the federal government and the *Länder* with a view to adapting them to the changed general conditions inside and outside Germany.

The reform included the introdution of a ceiling for debt incurrence as a measure for limiting government indebtedness at federal and state level. Other measures aimed at preventing and managing budgetary crises as well as enhancing the efficiency of local governments' discharging of tasks. The reform was completed in August 2009. The restriction of debt incurrence possibilities was adopted with a two-thirds majority of all members of the *Bundestag* and a two-thirds majority of all members of the *Bundesrat*; any amendment to this decision requires the same majorities.

***Länder* involvement**

The *Länder* were engaged in the coalition discussions of 2005 with regard to the federalism reform. The coalition agreement noted that the *Bundestag* and the *Länder* would be consulted concerning the proposed constitutional amendments and accompanying legislation. Conferences of Prime Ministers of the *Länder* discussed and approved the proposals. For other aspects of the federal Better Regulation agenda, the coalition agreement does not commit the *Länder* explicitly.

*Source*: The National Reform Programme. Germany 2005 – 2008. Implementation and Progress Report 2007, 8 August 2007, at *http://ec.europa.eu/growthandjobs/pdf/nrp2007/GE_nrp_en.pdf* (last accessed 2 May 2009), p.26-27).

### *Developments in German Better Regulation institutions*

The creation of a Better Regulation unit in the chancellery, together with the establishment of the National Regulatory Control Council (*Normenkontrollrat*), appear as the landmark developments since the 2004 OECD report. The chancellery Planning unit is also relatively recent and underlines efforts to improve co-ordination on proposed legislation. The new structures to take forward policy on e-Government are also noteworthy. At the same time, some ministries have sought to strengthen their capacities to take forward aspects of Better Regulation: for example, the Justice Ministry with a project, supported by linguists, to improve the clarity of draft legislation. The project was institutionalised in 2009. Change has also occurred in the line ministries, with the creation and/or consolidation of dedicated units and staff working on Better Regulation related issues, notably as regards the administrative burden reduction programme and the e-Government strategy.

**Table 2.1. Milestones in the development of Better Regulation institutions in Germany**

| | |
|---|---|
| 1992 | Establishment in all federal Ministries of units dedicated to co-ordinate and transpose EU legislation. |
| 1999 | Establishment of a "de-bureaucratisation" unit in the Ministry of Economics and Labour. |
| 2001 | Establishment of a State Secretaries Committee on Sustainability. |
| 2005 | Establishment of a Planning unit in the federal chancellery. |
| 2006 | Establishment of the National Regulatory Control Council.<br>Establishment of a Better Regulation Unit in the federal chancellery.<br>Establishment of a Sustainability Sub-Unit in the federal chancellery. |

## *Key institutional players for Better Regulation policy at the federal level*

### *The executive centre of government*

There is no single central co-ordinator responsible for all aspects of Better Regulation in the federal executive. The following ministries, however, carry important responsibilities in respect of different parts of the Better Regulation agenda, and in some cases, have strengthened their co-ordination function in recent years:

- *The federal chancellery.* The chancellery's main function is to act as co-ordinator and negotiating platform for the federal ministries. It consists of units mirroring the line ministries, mostly made up of staff seconded from the latter, which shadow their work and seek to ensure that differences are resolved and that proposals for new legislation are in line with the overall policy agenda. Since 2005, the Committee of Permanent Secretaries co-ordinates the Programme "Bureaucracy Reduction and Better Regulation". In this task, the Committee is supported by a special Better Regulation unit dedicated to co-ordinating the administrative burden reduction programme for business, which works in tandem with an external advisory body, the National Regulatory Control Council (see below).
- *The federal Ministry of Interior.* The Ministry plays a key role in the regulatory process. Like the federal Ministry of Justice, it examines the constitutionality of legislative proposals. The Ministry has overall responsibility for monitoring compliance by federal ministries with the *Joint Rules of Procedure*s when they prepare draft legislation, which includes a check that the relevant RIAs have been carried out. The Ministry provides support on legal and procedural aspects in the

preparation of legislative proposals, notably through its electronic guide to law drafting. The Ministry is also the pivot for the federal government's e-Government strategies (including e-consultation), increasing its visibility with external stakeholders. As such, it provides the secretariat of the Committee of Permanent Secretaries responsible for the Programme "*Zukunftsorientierte Verwaltung durch Innovationen* einschließlich *des Programms e-Government 2.0*" (e-Government 2.0 programme).

- *The federal Ministry of Justice.* The Ministry plays a crucial role in the development of laws. It must be consulted, and issue a statement on whether a proposal meets legal requirements before the proposal can be forwarded to the federal Cabinet. The Ministry is responsible for technical legal quality, and like the federal Ministry of Interior it takes a position on compatibility of draft legislation with higher ranking legal acts, notably the constitution.
- *The federal Ministry of Economics and Technology.* The Ministry must be consulted on the mandatory RIA elements of assessing costs to industry and SMEs, and on the impacts on unit prices, price levels and effects on consumers. It plays a central role in the co-ordination of EU affairs including the transposition process into German law. Prior to the new SCM based policy on administrative burden reduction which is co-ordinated by the chancellery, it played a more central role in simplification and the reduction of burdens, as explained in the 2004 OECD report.
- *The federal Ministry of Finance.* It assesses the effects on public expenditure and revenues and is consulted on any budgetary implications of new proposals.

### Chancellery Better Regulation Unit

The chancellery's Better Regulation Unit (*Geschäftsstelle für Bürokratieabbau*) was created through a Cabinet Decision of 25 April 2006. It co-ordinates and monitors the implementation of the "Bureaucracy Reduction and Better Regulation" programme. It consists of some 12 officials seconded from line ministries. The Unit liaises with a unit of the federal statistical office (some 100 staff) on technical aspects related to the SCM methodology, as well as with the *NRCC*, and with line ministries on their burden reduction plans. The chancellery State Minister serves as the federal government's Co-ordinator for Bureaucracy Reduction and Better Regulation and chairs the Committee of State Secretaries on Bureaucracy Reduction (see below).

The unit also supports the State Minister in the implementation of the "Bureaucracy Reduction and Better Regulation" programme.

### National Regulatory Control Council

The National Regulatory Control Council (*Normenkontrollrat*, *NRCC*) was set up to be an independent advisory and control body external to the executive. The establishment of the *NRCC* was agreed by the CDU, CSU and the SPD in the coalition agreement of 2005 and ratified by law in August 2006.[3] The *NRCC*'s mandate is to support the federal government in reducing administrative burdens found in federal legislation. Its mandate requires it to focus exclusively on administrative costs. Its scrutiny therefore does not cover substantive compliance costs, direct financial costs, or so-called "irritating" burdens (burdens which irritate business but which are not necessarily captured by the SCM methodology). The *NRCC* is, in particular, involved in the preparatory phase of law drafting, before proposals are presented to the federal Cabinet for decision. If requested, the *NRCC* also intervenes during the decision-making process, and may advise the committees of the *Bundestag*. Its mandate covers the following:

- *ex ante assessment* of burdens, providing assistance with the examination and measurement of administrative burdens of new regulations;
- *ex post assessment,* providing advice with the ongoing measurement of information obligations in existing regulations;
- assisting with the identification of possible reduction measures;
- supporting the development of the Standard Cost Model (SCM) methodology; and
- tracking the administrative burden reduction initiatives at EU level.

The *NRCC* is composed of eight members appointed by the federal president upon proposal by the chancellor in September 2006. Their mandate lasts five years (so this takes them beyond the electoral cycle) and is renewable. The members are representatives of business, politics, science, the public administration and the judiciary. They serve on an independent and voluntary basis, and do not perceive remuneration (just cost reimbursements). The *NRCC* is assisted by a Secretariat located in the chancellery, which currently consists of nine officials.

### Institutional support for e-Government strategy

The increased prominence of e-Government strategies at the federal level has led to the establishment of a new institutional structure to shape and co-ordinate the strategy (Box 2.6).

**Box 2.6. Institutional support for e-Government strategies in the public administration**

**Federal Government Commissioner for Information Technology**

A cornerstone of the "CIO Strategy" inaugurated in 2007 is the federal Government Commissioner for Information Technology (*Beauftragter der Bundesregierung für Informationstechnik).* Based within the federal Ministry of Interior, the Commissioner serves as the central point of contact for the *Länder*, municipalities and trade associations for co-operation on IT-related issues. S/he is charged with expanding inter-ministerial IT co-ordination within the federal government into inter-ministerial IT management. In addition, the Commissioner's mandate includes:

- developing e-Government, IT and IT security strategy at the federal level;
- overseeing federal IT security management;
- developing architecture, standards and methods for federal IT; and
- overseeing the provision of central federal IT infrastructure.

Moreover, the Commissioner is involved in all legislative and other regulatory projects with substantive impact on IT in the public administration. The Commissioner intervenes via the IT-Council and the IT-Steering Group and via statements.

Since 1 January 2008, the State Secretary at the federal Ministry of the Interior has held the position of federal Government Commissioner for Information Technology. The post is supported by about 100 staff in the Office of the Chief Information Officer (a department of the federal Ministry of Interior). The members of the Office are information scientists, political scientist, lawyers and economists. Within the second economic stimulus package, the Commissioner was given the responsibility for a budget of about EUR 500 million. The money will be spent on about 300 IT projects and e-Government to stimulate the IT-industry.

**Chief Information Officers**

Besides the appointment of the IT Commissioner, the CIO Strategy provides for all government ministries to set up a Chief Information Officer (CIO) with wide-ranging powers, including general responsibility for monitoring the proper application of IT projects in his/her own department.

**IT Council and IT Steering Group**

All CIOs convene in the IT Council, which is the central decision-making body for inter-ministerial IT management at federal level. The IT Council is chaired by the IT Commissioner and deliberates unanimously. A further body established by the December 2007 decision is the federal IT Steering Group. It consists of the IT Commissioner, the State Secretary of the federal Ministry of Finance responsible for budgetary matters and the head of the Central Directorate-General at the federal chancellery. Their main task is to ensure congruence between IT issues, budgeting and overall political planning. The Group also centrally co-ordinates large-scale IT projects.

### *Co-ordination on Better Regulation across the federal government*

A Permanent Committee of State Secretaries on Bureaucracy Reduction is in place, chaired by a chancellery State Minister who is also the federal government co-ordinator for the programme on Bureaucracy Reduction and Better Regulation. The tasks of the co-ordinator and of the Committee of State Secretaries include in particular:

- the implementation and co-ordination of the "Programme for Bureaucracy Reduction and Better Regulation";
- resolutions on uniform, binding methods for surveys according to the SCM;
- managing, monitoring and refining the method; and
- mediating in cases of dispute between the federal ministries and the National Regulatory Control Council.

A Permanent Committee of State Secretaries on Sustainability also exists since 2001. Its members are mostly the same as those forming the Committee on Bureaucracy Reduction, but it is chaired by the Head of the federal chancellery, not the chancellery State Minister.

### *Better Regulation and regulatory agencies*

Superior federal Authorities (SFAs) do not generally issue regulations of their own and have not generally speaking developed Better Regulation strategies of their own. However the *Joint Rules of Procedure* provide for SFA participation in the development by ministries of federal regulations that affect them. As regards consultation and communication to the public, they are not covered by any general rules or guidelines. A few agencies have taken their own Better Regulation initiatives. The *BaFin*, for instance, calculates the regulatory costs of draft laws and by-laws falling under the responsibility the federal Ministry of Finance. This activity is often subject to consultation procedures.

Social insurance agencies now participate in the Better Regulation and Bureaucracy Reduction Programme (see Chapter 5).

### *Better Regulation and the legislature*

The federal parliament has played an active role in supporting the emergence of the federal executive's Better Regulation and Bureaucracy Reduction initiative, not least through an initiative of the majority political groups in 2006 to establish the independent oversight and advisory body (*NRCC*, *Normenkontrollrat*). Draft bills sent to parliament now contain not only the traditional information on regulatory impacts, but also a statement by the *NRCC* on the expected administrative costs for business (quantified, using the SCM). Moreover, the *Bundestag* and the *Bundesrat* can consult the *NRCC* in their deliberations at any time. This strengthens the consideration of the assessment of administrative burdens in the legislative process. At the end of the past legislature, the *Bundestag* called upon the government to consider also other regulatory costs. The so-called "Regulatory Cost Model" has been proposed as a possible methodology to be applied by the *NRCC* in the future, on the initiative of a parliamentary Committee.[4] The parliament has also been an active participant in legislative simplification, including the spring clean of legislation which has taken place since 2003, to repeal redundant legislation. Eleven simplification laws have been adopted to this end. A database-aided monitoring procedure will allow, from 2009 onwards, to examine the implications of amendments tabled during the parliamentary procedure on bureaucracy.

The issue of bureaucracy reduction is discussed by the responsible committees. There is, however, no parliamentary committee in either house, as exists in a few other European countries (for example, the United Kingdom) with a remit to consider Better Regulation or simplification as an issue in its own right.

Although the German system confers an especially prominent role on the parliament in the development and enactment of legislation, Better Regulation tools and processes do not feature very directly in the parliament's approach, the exception being the parliament's support for the eNorm software (developed by the Ministry of Justice to improve drafting, and used throughout the federal decision-making process). As in most other OECD countries, there is no strong parliamentary tradition in respect of impact assessment, either as regards legislation initiated by the parliament itself, or by the federal executive (see Chapter 4). The secretariats to the political groups do not play any significant role in this regard. The highly politicised nature of policy and legislative development at the federal level tends to hold back any significant efforts to review drafts from the regulatory quality perspective, which might destabilise the consensus which has been reached on the underlying proposal.

#### Box 2.7. Impact assessment and the federal parliament

Around 50% of the bills presented to the Parliament are amended. During its deliberations, the *Bundestag* relies to a large extend on the information provided by the federal Government about the bills' expected impacts, possible alternatives, etc. However, a number of independent tools and scrutiny mechanisms are available to the *Bundestag*, including official questions to the government by individual parliamentarians or parliamentary groups during Parliaments plenary discussions and hearings. The *Bundestag* can also make use of external expertise to analyse the impact of a proposed regulations. To prepare decisions on complex and important subjects, so-called *Enquete-commissions* can be formed to investigate possibilities for alternative regulations and analyse the impact of different regulatory approaches under discussion. Finally, the *Bundestag* has at its disposal a permanent scientific service intended to provide committees and individual MoP with expert opinions on various aspects of the proposed regulation.

There is a perception and discomfort among some deputies that decisions on new regulations are not always based on a systematic analysis of the regulatory impacts. An important reason is that RIAs prepared by the government are not of sufficient quality or that the information provided by the government to the parliament about RIA that have been carried out is inadequate. As a response to this, several initiatives have been launched in order to institutionalise mechanism ensuring the quality of impact assessments presented to Parliament and/or prepared by Parliament as part of its deliberations.

At the federal level, consultations on how to institutionalise regulatory quality assurance mechanisms in the parliamentary process have been made with representatives of federal government audit-office and the federal office for statistics. A draft, institutionalising such mechanisms in the *Bundestag*, analogous to the *Joint Rules of Procedure* of the federal Ministries, has been discussed in the responsible parliamentary committee. According to the proposal, the leading parliamentary committee would be responsible for determining and requesting scale and scope of a RIA for a draft law under discussion.

### *Better Regulation and the judiciary*

The federal supreme court plays an important formal role monitoring adherence to, and compliance with the Basic Law, and adjudicates competence disputes between the federation and the *Länder*. *Länder* courts play an equivalent role in respect of the *Land* areas of competence. The principle of judicial review is a major element of the German administrative and legal tradition, and the German courts therefore play a significant role in dealing with appeals from citizens and businesses in respect of administrative decisions.

### *Other important players*

#### The German Court of Audit

The German Court of Audit (*Bundesrechnungshof*)[5] is an independent supreme federal authority. Its primary task is to examine federal financial management. Its audit functions in a wide array of areas such as defence, road works, taxation, or the federation's activity in private-law enterprises of which it is a shareholder. The court provides advice and makes recommendations to the audited bodies, to the parliament and the federal government. Its consultancy activities have grown and set out significant recommendations for quality improvement, pointing up the potential for savings or increases in revenue. It reports annually to the *Bundestag* and the *Bundesrat* as well as to the federal government. In addition, the court may at any time submit special reports on matters of major significance to the executive and legislative branches. The court also comments – orally or in writing – on topical issues such as government bills and major procurement projects, or in the course of the annual budget procedure.

With regard to Better Regulation, the president of the Court of Audit traditionally serves as federal Performance Commissioner (*Bundesbeauftragten für Wirtschaftlichkeit in der Verwaltung, BWV*). The task of the Commissioner is to put forward proposals, recommendations, reports and opinions in order to enhance the efficiency of, and accordingly better organise the federal administration.[6] In addition, the Commissioner is involved in editing drafts for federal legislation, ordinances and administrative regulations. According to the *Joint Rules of Procedure*, federal departments involve the federal Performance Commissioner at an early stage in relevant drafts for inputs in the form of lessons learnt, assessments and findings generated by the Court's audits.

### *Resources and training*

Most civil servants with university degree are lawyers. They have therefore undergone general legal training. Considerable emphasis is put on on-the-job further training. For instance, in the preparation of draft bills staff members may use the electronic aid of the federal Academy for Public Administration (*Bundesakademie für öffentliche Verwaltung, BakövV*) on legislative procedures, which is constantly updated. This information system portrays the legislative procedure in all its detailed steps with detailed explanations. Various manuals and guidelines are available providing relevant information on Better Regulation. Further training on issues relevant to Better Regulation is available as follows:

- Each ministry runs internal training courses on specific topics related to Better Regulation, not least in the SCM area, which has become an integral part of the basic training on "legislation".
- Where needed, the federal Ministry of Justice carries out training courses on legal language, on review of laws, on the legislative procedure and on the use of the eNorm programme. The training courses target everyone participating in legislation and review of laws. Training and exercise materials have been drawn up and guidelines issued on the use of the eNorm programme (see Chapter 4).
- The *BakövV* is an overarching institution providing further training for federal administration staff. The range of seminars and courses offered by the Academy is wide and covers fundamental aspects as well as special topics such as RIA, administrative language and techniques, as well as training programmes on EC law.

It is virtually impossible to calculate the number of public servants who receive training in the framework of the regulatory process.

The *Länder* also maintain their own training institutions, which add to the efforts made by the federation. Moreover, a large number of the training courses take place locally and/or in-house. Each year some 120-150 staff attend the *BakövV* regular seminars. The officials attending seminars organised by the *BakövV* specially for their authorities should be added. Their number fluctuates from one year to the other, ranging roughly from 100 to 130 staff members.

# Notes

1. See: *www.bundestag.de/htdocs_e/parliament/bodies/sustainability/index.html* (last accessed 4 May 2009).
2. See: *www.nachhaltigkeitsrat.de/en/home/* (last accessed 4 May 2009).
3. Cfr. Act on the Establishment of the National Regulatory Control Council of 14 August 2006, at: *www.gesetze-im-internet.de/NRCCg/index.html* (last accessed 30 April 2009).
4. Cfr. Proposal by the *Bundestag*'s Economics and Technology Committee, *Schwerpunktsetzung beim Bürokratieabbau ist erfoigreich, Entschlielssungsantrag der Mitglieder der Fraktion der CDU/CSU sowie der Fraktion der SPD im Ausschuss für Wirtschaft und Technologie zu dam Jahresberlcht 2008 des Natlorialen Normenkontrollrates (1 6-1 0039) und dem Berlcht der Bundesreglerung 2008 zur Anwendung des StandardkostenModeIls* (16-11486), of 21 April 2009.
5. See: *www.sam-consulting.de:7070/Testportal/home-en?set_language=en.*
6. See for instance: *www.sam-consulting.de:7070/Testportal/bundesbeauftragter-bwv/reporting?set_language=de* (last accessed on 28 May 2009).

# *Chapter 3*

# Transparency through consultation and communication

Transparency is one of the central pillars of effective regulation, supporting accountability, sustaining confidence in the legal environment, making regulations more secure and accessible, less influenced by special interests, and therefore more open to competition, trade and investment. It involves a range of actions including standardised procedures for making and changing regulations, consultation with stakeholders, effective communication and publication of regulations and plain language drafting, codification, controls on administrative discretion, and effective appeals processes. It can involve a mix of formal and informal processes. Techniques such as common commencement dates can make it easier for business to digest regulatory requirements. The contribution of e-Government to improve transparency, consultation and communication is of growing importance.

This chapter focuses on two main elements of transparency: public consultation and communication on regulations (other aspects are considered elsewhere in the text – for example appeals are considered in Chapter 6).

## Assessment and recommendations

### *Public consultation on regulations*

*There have been few significant changes in public consultation on draft regulations since the last OECD report in 2004.* The assessments and conclusions of the 2004 report remain broadly valid. Public consultation by the federal government is formally regulated by the *Joint Rules of Procedure*, which specifies that ministries must consult early and extensively with a range of stakeholders. In practice, the process is in the hands of individual ministries to take forward in their own way, including on issues such as feedback, timing, publication of comments, selection of consultation partners etc. Informal pre-consultation rounds (with the *Länder*, municipalities and associations) are the norm, at an early stage in the process before a bill is drafted. The results are fed into the drafting, and the same parties are consulted a second time. In short, consultation takes the form of institutionalised negotiation and bargaining with key stakeholders and it is driven by a search for consensus.

*E-consultation is an important and slowly emerging feature. "e-participation" is a federal government focus area.* This is still at an early stage of implementation. For example, there was an e-consultation on the Citizens Portal Act in 2008, the first time that citizens could make direct comments on a draft federal bill. The roll out of the federal

programme for reducing burdens on business has provided an opportunity to test new and more open approaches to public consultation, through direct contact with businesses.

*The combination of informality based on a strongly anchored tradition appears to be well liked by those in the system, and has certain strengths in the German context.* The OECD peer review team did not have much opportunity to test the views of external stakeholders directly (SMEs, consumers, citizens, businesses). However the level of satisfaction would appear to be generally satisfactory, at least among those who are part of the process. Compared to many other countries, the consultation machinery is activated at an early stage. It is felt that economic and societal interests are heard and taken into consideration. While the process is not particularly transparent, it facilitates consensus building and is valued for this. Getting consultation "right" is a particular challenge in a large country. Compared with some of its European neighbours, Germany comes out relatively well.

*The approach, however, falls short of a fully effective, modern and inclusive public consultation system.* The issues raised by the 2004 OECD report remain largely valid. The two most important issues are the lack of transparency and the fact those outside the established system have little if any opportunity for their voices to be heard. This increases the risk of bias and capture in interpreting the results. Although annual reports by ministries providing information on their consultation practices are submitted to the parliament and the Court of Auditors, there has so far been no aggregate evaluation of this information (number of consultations held, stakeholders consulted etc). The OECD peer review team considered that there was a "black box" feel to the system. It is difficult to see into the box in order to form a judgment about the quality of the process. In any event, the exclusion of stakeholders who are not part of the traditional system is likely to stifle innovative ideas and miss useful inputs. It also puts citizens and individual businesses at arm's length from the administration, which is unhelpful to the task of building a constituency in support of Better Regulation.

**Box 3.1. Recommendation from the 2004 OECD report**

**Establish standards for consultation procedures and improve accessibility to existing regulations.**

There is scope for improving current consultation and communication mechanisms. Germany should improve regulatory transparency by establishing formally defined standards for consultation procedures and by improving accessibility to existing regulations. The discretion left to ministries and the lack of minimum standards for the timing, content, process and scope of consultation procedures raises concern about the costs, transparency and accessibility of the process for stakeholders not familiar with or frequently operating in this framework. The German government should: establish uniform and clear obligations for consultation procedures for all regulation on the federal level, *i.e.* a notice and comment procedure with minimum standards for the timing, content, process and scope of consultation processes; establish a single, easy searchable, free of charge, consolidated, Internet based database for all federal laws and regulations; establish a notice-and-comment procedure to replace or supplement the current practice of consulting with selected parties; consider making responses to consultation papers publicly available; improve and expand information available to the public about future planned legislation, for example by drawing more on information already available in internal government planning systems; and reduce the proliferation of sector-specific administrative procedures, and work towards reduction of current exceptions.

***Background comments***

In most policy areas, German practices in consultation procedures are governed by traditions and internal government policies. This relatively informal framework governs a system of consultation that

is longstanding, intensive and consensus driven. Early informal consultations and significant exchange of information with organised interests are sustained throughout the legislative development.

Formal rules for public consultation are set out in the *Joint Rules of Procedure*. They prescribe in detail the procedural requirements for the intra-governmental co-ordination. They also prescribe requirements to consult with sub-federal levels of government. As for intra-governmental co-ordination, the *Joint Rules of Procedure* requires sub-federal consultation as early as possible and substantive involvement of these stakeholders in the regulatory process. However, the *Joint Rules of Procedure* requirements for involving other stakeholders and the general public at large are significantly more flexible and leave much discretion to the lead ministry.

As a consequence of the discretion left to ministries on how to consult, draft regulations are not made systematically available for public consultation. The actual consultation procedures vary significantly between ministries in terms of who is invited, by which means, and in terms of the documents made available to support the consultation procedure. Individual ministries choose on a discretionary basis which draft regulations they will make available for public comments, as well as for how long. Comments from stakeholders that do participate and provide written input to draft regulations are not made publicly available. The federal Web portal *www.bund.de* does not make available a single contact point for consultation of federal regulation. The *Joint Rules of Procedure* stipulates that draft bills must include an explanatory memorandum (which should include a RIA) and an introductory summary sheet.

There has been no recent evaluation of the German government's public consultation practices, nor does data exist on the involvement of stakeholders not familiar with or not frequently participating in the regulatory process. In general, however, there seems to be a high level of satisfaction with the current procedures among the organisations representing industry and labour.

*The system is also weakened by the lack of clearly visible and enforceable rules to be applied by all ministries.* Each ministry interprets the *Joint Rules of Procedure* differently, which means that no stakeholder (whether part of the system or outside the traditional network) can be sure of how consultation will be organised. A particular concern of some "insider" stakeholders is that deadlines for consultation rounds can be unpredictable and often very short. This not only puts pressure on stakeholders to produce comments at short notice, but also raises concerns that officials will not have time to digest comments received adequately, if the race is on to complete the draft. More generally, variations in approaches between ministries mean that quality standards cannot be uniform. Some consultations may work effectively, and others will fall short. The lack of controls on what is done and of enforceable sanctions is another weakness of the system. The *Joint Rules of Procedure* also lack teeth. The issue of enforceability was specifically raised with the OECD peer review team by the municipalities (who suggested that a constitutional provision might help to anchor and formalise requirements).

**Recommendation 3.1. Carry out a comprehensive evaluation of consultation practices by federal ministries, as a starting point for establishing a clear and enforceable set of common guidelines for public consultation. Ensure that the guidelines emphasise transparency, with clear provisions for consultations and their results, including feedback on the more important comments received, to be posted on the internet. Cover both the established processes, and the use of more open "notice and comment" procedures, building on the recent efforts to promote e-consultation. Consider whether to engage the help of the Court of Auditors for the review and guidelines, and keep the federal parliament informed.**

*There needs to be a strong link between ex ante impact assessment and consultation.* The *Joint Rules of Procedure* require consultation of, and communication with, key stakeholders at the different stages of the impact assessment process, and this is also picked

up in the guidelines of the Interior ministry (see Chapter 5). But in practice, ministries go their own way.

### *Public communication on regulations at the federal level*

*Public communication of adopted federal regulations follows the same approach as most other OECD countries.* When a law or ordinance is enacted, it is published in the federal Law Gazette. There are also several online databases, mostly free of charge. A database of federal administrative regulations has been in place since 2006, for access by the general public. The lead ministry decides whether to publish draft bills, and in this regard, it should be noted that the federal Ministry of Finance publishes its legislative proposals.

## Background

### *Public consultation on regulations at the federal level*

#### *Policy on public consultation by the federal executive*

Public consultation by the federal government is regulated by the Joint Rules of Procedure. They apply to both primary legislation and subordinate regulations. They leave scope for considerable flexibility as to their application. It is the lead Ministry that decides on the timing, scope and selection of consultation partners, as well as on the practical execution of the consultation process. Normally, Ministries proceed to so-called pre-consultation rounds, which are conducted at an early stage prior to drawing up a bill. This initial consultation involves the *Länder*, municipalities, the expert community and associations on the basis of a key elements paper. The results of this consultation contribute to drafting the bill, on which the same parties are later consulted for a second time. These procedures may be conducted by submitting the draft in paper or through electronic form. If necessary, a meeting follows. The federal chancellery must be informed of the involvement of the various parties. The lead federal Ministry considers the comments and objections of those involved in the draft bill "in an adequate manner".

Consultation deadlines are only provided by the *Joint Rules of Procedure*s for the final examination of draft bills (normally four weeks). As to the other parts of the procedure, there are no set deadlines for consultations or for replies. It is common practice by the Ministries to allow periods for consultation adequate to the purpose and scope of the proposed regulation. The same applies to the provision of information to the parties to be consulted.

The form and intensity of the feedback to the stakeholders on the consultation are also left to the discretion of each Ministry. The consultation results are generally fed into the draft bill and the assessment of the bill's impacts in the explanatory memorandum, and made public when the bill is transmitted to the parliament. Before that stage, there is no binding obligation to publish draft regulations, or the written inputs by the stakeholders. Ministries tend nonetheless to maintain a continuous dialogue with stakeholders throughout the preparatory stage.

#### *An emerging use of ICT for consultation*

The federal government has set "e-participation" as one of its focus areas. Strengthening the involvement of stakeholders and the citizens through new media and information technologies is seen as a means to enhance the transparency of the decision-

making process; understand the needs of those affected by the proposed regulation; and identify various types of regulatory impacts (Box 3.2). The federal government has nonetheless not yet established a single web portal for all current and previous consultation on federal initiatives.

**Box 3.2. Online consultation in Germany**

Under the input of some federal Ministries, the German government is progressively introducing forms of on-line consultation and using information and communications technology (ICT) for consultation proceedings.

An example is the e-consultation on the Citizen Portals Act (*Bürgerportalgesetz*) initiative, at *www.e-konsultation.de*. The on-line consultation was designed to make the project transparent. In particular, it sought to provide a platform for direct citizen participation and to gather the views of the public on the project and the related draft regulation.

The online consultation ran from 20 November to 12 December 2008. This was the first time that citizens could make direct comments on a draft bill at the federal level. The website was visited approximately 12 000 times, and 108 comments were entered. The inputs were taken into account together with the involvement of associations in the proposal adopted by the Cabinet in February 2009[1]).

A further online consultation ran till 30 September 2009 on "*e-Government 2015 - Ideen für eine nationale e-Government-Strategie*". It allows evaluating, receiving feedback and complementing the main elements of the national e-Government strategy. Since the overarching goal of the strategy is the creation of a common framework for a federal e-Government in Germany, co-operation between the federation, the *Länder* and the municipalities plays an important role together with issues such as trust, security in Internet, efficiency and effectiveness, data protection, transparency and e-participation.

### *Consultation during the federal legislative process*

Once the bill is adopted by the federal Cabinet, further hearings are conducted in the *Bundestag* and the *Bundesrat* as a part of the parliamentary legislative procedure (first reading). Discussions in the committees are normally not open to the general public, unless the Committee decides otherwise. The Committees may organise hearings with experts and/or stakeholders. If at least one quarter of the members of the responsible committee so demand, the Committee must organise such hearings. If the committee hearings are public, they are transmitted live on the parliamentary television or may be heard on line at *www.Bundestag.de/aktuell/archiv/2006/anhoerungen/index.html*. The stakeholders and the expert community can also interact with individual members of parliament or the secretariat of the responsible committees outside these events, and submit written comments prior to, or in the course of the deliberations of a bill.

## ***Public communication on regulations at the federal level***

### *Communication on existing regulations*

There are several channels for informing the public about existing regulations. Once a law or an ordinance is enacted, it is promulgated in the federal Law Gazette (*Bundesgesetzblatt, BGBl.*) Ordinances may also be promulgated elsewhere if so stipulated by law, for instance in the Act Governing the Promulgation of Legal Ordinances. A number of specific gazettes exist to this end. The federal Gazette (*Bundesanzeiger*) and the Electronic federal Gazette (*www.eBundesanzeiger.de*) are examples.

There are many databases accessible on the Internet, mostly free of charge. Federal laws and ordinances in force are provided free on *www.gesetze-im-internet.de*. The administrative provisions applying to the supreme federal authorities are published at *www.verwaltungsvorschriften-im-internet.de*. Consolidated texts of legislation can also be accessed in the federal law database (*www.juris.de*), which includes older versions and provides comprehensive search options. In addition, annual directories of federal law and international agreements are published on CD-ROM, containing reference data of applicable law (acts and ordinances). Associations and other stakeholders inform their members about relevant legislative proposals in special publications and their Internet sites.

A database of current federal administrative regulations has been in operation since October 2006 (*www.verwaltungsvorschriftenim-internet.de*). A public enquiry service was added to the database in November 2007. Any citizen can now access the updated validated data on-line.

### *Communication on proposed regulations*

The federal government does not publish in advance the list of the legislative and non-legislative proposals that it plans to adopt in the year. Government activity is nonetheless traceable through a website devoted to the various initiatives launched.[2]

Decisions as to whether to put a bill on the federal government's intranet or on the Internet are taken by the lead Ministry jointly with the federal chancellery and the other federal ministries involved. This is current practice by the federal Ministry of Finance, which publishes its proposals and information on the status of the related procedure on its webpage at the moment of starting public consultation.[3] The importance of the proposed legislation and the public interest are the key factors underpinning such decisions. Should this be the case, the lead Ministry decides on the type and scope of information provided, where appropriate after consultation with the chancellery.

Bills adopted by the federal Cabinet that have entered the legislative process are then published with the related accompanying documentation as a parliamentary document on the Internet once the document has been forwarded to the *Bundestag*. The document contains an introductory summary (cover sheet) which briefly addresses selected regulatory Impact Assessment issues, and further information such as:

- aim and necessity of the bill;
- background and sources of information;
- alternative solutions;
- reporting obligations, administrative obligations and authorisation requirements;
- regulatory impact;
- possibility to set a time limit for the law;
- possible legal and administrative simplification;
- compatibility with EU law; and
- amendments to existing law.

The opinion of the National Regulatory Control Council is also attached if available. *DIP (Dokumentations- und Informationssystem für Parlamentarische Vorgänge)*, the information system jointly managed by the *Bundestag* and the *Bundesrat*, allows the public to keep track of the entire legislative process; read minutes of the plenary sessions and the various committees; and access the initiatives of the members of the parliament (*www.Bundestag.de/bic/index.html*).

## Notes

1. Some 68 comments relating directly to the content of the draft were legally examined and led to substantial changes. The result of that e-consultation and the evaluation report can be downloaded from the internet (*https://www.e-konsultation.de/buergerportale/discoursemachine.php?page=infopage&id_page=17&menucontext=30*).
2. See: *www.bundesregierung.de/Webs/Breg/DE/GrundgesetzGesetze/GesetzesvorhabenundNeuregelungen/gesetzesvorhaben-und-neuregelungen.html* (last accessed 7 May 2009).
3. See: *http://www.bundesfinanzministerium.de/nn_54/DE/BMF__Startseite/Service/Gesetze__Gesetzentwuerfe/node.html* (last accessed 25 November 2009).

# *Chapter 4*

## The development of new regulations

Predictable and systematic procedures for making regulations improve the transparency of the regulatory system and the quality of decisions. These include forward planning (the periodic listing of forthcoming regulations), administrative procedures for the management of rule-making, and procedures to secure the legal quality of new regulations (including training and guidance for legal drafting, plain language drafting, and oversight by expert bodies).

*Ex ante* impact assessment of new regulations is one of the most important regulatory tools available to governments. Its aim is to assist policy makers in adopting the most efficient and effective regulatory options (including the "no regulation" option), using evidence-based techniques to justify the best option and identify the trade-offs involved when pursuing different policy objectives. The costs of regulations should not exceed their benefits, and alternatives should also be examined. However, the deployment of impact assessment is often resisted or poorly applied, for a variety of reasons, ranging from a political concern that it may substitute for policy making (not true- impact assessment is a tool that helps to ensure a policy which has already been identified and agreed is supported by effective regulations, if they are needed), to the demands that it makes on already hard pressed officials. There is no single remedy to these issues. However experience around the OECD shows that a strong and coherent focal point with adequate resourcing helps to ensure that impact assessment finds an appropriate and timely place in the policy and rule making process, and helps to raise the quality of assessments.

Effective consultation needs to be an integral part of impact assessment. Impact assessment processes have- or should have- a close link with general consultation processes for the development of new regulations. There is also an important potential link with the measurement of administrative burdens (use of the Standard Cost Model technique can contribute to the benefit-cost analysis for an effective impact assessment).

The use of a wide range of mechanisms, not just traditional "command and control" regulation, for meeting policy goals helps to ensure that the most efficient and effective approaches are used. Experience shows that governments must lead strongly on this to overcome inbuilt inertia and risk aversion. The first response to a problem is often still to regulate. The range of alternative approaches is broad, from voluntary agreements, standardisation, conformity assessment, to self regulation in sectors such as corporate governance, financial markets and professional services such as accounting. At the same time care must be taken when deciding to use "soft" approaches such as self regulation, to ensure that regulatory quality is maintained.

## Assessment and recommendations

### *Trends in the production of new regulations*

*Germany's federal structure means that the control of regulatory production is especially important.* Reflecting the federal nature of the German state, Germany's regulatory production system is complex, as already noted in Chapter 2. Regulations are produced at the federal level, covering areas of federal competence. These laws are usually fleshed out in secondary regulations produced by the *Länder*, as part of their responsibilities for implementing federal legislation (the *Länder* may in turn delegate implementation responsibilities to the counties and municipalities, which may give rise to further subsidiary regulations and instructions). The *Länder* also issue laws and regulations in respect of their exclusive competences (with an equivalent delegation process to counties and municipalities). The trend in the number of federal regulations has been on a consistently downward path since 2005, partly because of a "spring clean" of the regulatory stock (see Chapter 6), but also because of a significant reduction in the number of new federal laws and subordinate regulations. The OECD peer review team did not have access to data on *Länder* regulations, which is important to complete the overall picture. However the recent federal reform which abolished framework legislation is intended to reduce the scope for unnecessary further (and divergent) production at the *Länder* level.

**Recommendation 4.1. Ensure that future data on regulatory production trends cover the picture at the *Länder* as well as the federal level (in consultation with the *Länder* over how to do this). Refine the data and its interpretation to ensure that trends and their causes are clear, and help to shed light on what Better Regulation processes need to tackle (for example, consider whether the reduction in number of federal regulations could be due at least in part to longer and more complex laws, and whether this raises any issues).**

### *Administrative procedures for making new regulations*

*A strong formal process is in place which covers most of the necessary procedures at federal level.* Forward planning, administrative procedures, and legal quality are generally well covered, reflecting the importance that Germany traditionally attaches to a sound and formal framework for law making and a concern to sustain legal quality. At a general level, the Administrative Procedures Act sets the framework and some important obligations, including the obligation to provide reasons for decisions in writing, appeal mechanisms, and obligations to consult on and communicate important decisions. These are backed up in more detail as regards the development of new regulations by the *Joint Rules of Procedure* which must be applied by all federal ministries. The latter includes requirements for the *Länder* to be consulted at an early stage. Legal quality is an especially strong feature of the German system, with important recent developments which include the "Electronic Guide to Law Drafting", the eNorm software tool, and a project recently launched to improve linguistic clarity. By the standards of many other European countries the comprehensiveness of this overall framework is impressive.

*The eNorm software tool for law making is especially interesting.* Based on the European Commission's equivalent tool, and aimed at improving productivity and consistency in law making, it proposes a standard format for drafting laws and incorporates automatic quality checks. It is used not only by most of the federal ministries, but has also been adopted by some of the *Länder* and used by the federal parliament, which is progressively integrating it. Together with the electronic guide to law drafting, it provides a

comprehensive checklist for law drafters, speeding up the drafting and amendment process, and standardising both format and media for use (potentially) throughout the law making process to enactment. In the context of autonomous ministries it sets an important central standard, aids co-ordination, and enhances transparency.

*Forward planning procedures have received an internal boost with the establishment of a dedicated unit in the federal chancellery, but there is more to be done.* The planning unit set up in 2005 is an important step forward. The unit maintains an electronic database of projects which is shared across federal ministries, boosting co-ordination, and which allows the chancellery to check that the main lines of the coalition agreement are being followed. Federal ministries nonetheless retain significant discretion in setting their calendar, and the highly political nature of the law making process limits the chancellery's influence. The most influential channels for strategic planning remain the meetings and dialogue between the chancellor, the vice-chancellor, and the heads of the coalition parties. There is no annual work programme to flesh out the coalition Agreement, as exists in some other European countries. This has repercussions on the timeliness and length of consultations with external stakeholders. Also, the arrangements are internal to the administration. The general public must fall back on the coalition Agreement for information on the government's draft legal projects.

**Recommendation 4.2. Consider further steps to enhance the transparency of forward planning procedures, including the establishment of an annual forward look, and the provision of more and timelier information to external stakeholders.**

*The initiative to further encourage plain language drafting is also important.* The Joint Rules already encourage drafters to use a language that is "correct and understandable to everyone as far as possible" and to submit drafts to the German Language Society at the *Bundestag* to review the correctness and comprehensibility of a bill. In practice this facility is rarely used. Most officials as well as the business and consumer representatives with whom they interact are lawyers by background. The Justice ministry is seeking to embed the principle that legal drafting must involve linguistic experts from the start.

*However strong underlying procedures and traditions also act as a brake on the development of new approaches.* An underlying structural problem common to many European countries, including Germany, is that longstanding administrative procedures and legal quality control mechanisms tend to be used as the basis for the development of impact assessment processes, even if they are not very well suited to this role. *Ex ante* impact assessment processes tend to be added on, and there is no fundamental re-engineering of underlying requirements to make room for a new approach. Another issue braking progress on Better Regulation in the German context is the difficulty of imposing requirements on autonomous ministries. The centrifugal forces at work in the German system are evident from the way the eNorm and electronic guide to law drafting initiatives were taken forward. They emerged from two different ministries (Justice and Interior, respectively), collaborating with different experts. Neither are binding, with ministries free to decide whether to use them.

**Recommendation 4.3. Consider whether the eNorm and electronic guide to law drafting initiatives could be joined up, where this is relevant, and made binding on all federal ministries.**

### *Ex ante impact assessment of new regulations*

*Germany's ex ante impact assessment procedures have a long history, as part of the general framework for the development of new regulations.* The policy dates back to the mid-1980s and is embedded in the *Joint Rules of Procedure*. The current approach is based on changes introduced as part of the "Modern State-Modern Administration" programme in the late 1990s. It is backed up by a comprehensive handbook issued by the Interior ministry in 2006 (which also oversees the *Joint Rules of Procedure*), and consists of a preliminary assessment (is the regulation necessary; alternatives), a concurrent assessment (carried out as the law is developed) and a retrospective assessment or *ex post* evaluation (to check whether the adopted law has met the anticipated objectives). Key impacts are covered including environmental, economic and social impacts. The process is applied to primary legislation, and only covers some secondary regulations. The most important recent change has been the integration of requirements flowing from the federal government's administrative burden reduction programme for businesses (quantification of the information obligations found in draft legislation), which has added a significant new dimension. The development of a sustainability impact assessment is currently under discussion.

*The inclusion of a quantified assessment of information obligations in new federal legislation is an important development which should open the way to other improvements. Ex ante* impact assessment has some way to go still and as Chapter 6 explains in more detail, the administrative burdens assessment has started a change of culture, with a greater appreciation by ministries of the perspective of stakeholders affected by a new law. The OECD peer review team heard that this had been a "shock" to ministries, forcing them to a realisation that regulation has costs and affects real people.

*There is some way to go still for impact assessment to inform decision making as it should. Ex ante* impact assessment needs further development and anchoring in the decision-making process, not least so that Germany can react appropriately to post financial crisis pressures for regulation. The team did not pick up any clear evidence of its influence. The approach is comprehensive on paper, but practice appears to fall some way short of the conceptual objective, an issue that had already been largely commented on in the 2004 OECD report (Box 4.1 below). Assessments tend to come at a relatively late stage of the law making process. Part of the problem may be a political and cultural reluctance to use it in a context where decision-making is very politicised from an early stage, ministries are used to acting autonomously, and key stakeholders are used to the relatively closed process of building up consensus on an issue, which many feel works well enough. Yet impact assessment is to be seen as a tool for evidence based decision making so that the inevitable trade-offs are soundly based, not a technocratic substitute for the decision itself.

*If impact assessment is to have a stronger influence on decision-making and outcomes, four main issues need to be tackled: the institutional framework, methodological support, transparency and scope.* The institutional framework for the management of impact assessments is highly fragmented. Each ministry in practice goes its own way. Methodology is well covered by the Interior ministry guidelines but stops short of guidance on quantification and is undermined by the proliferation of guides produced by individual ministries. The process is not transparent. This affects the internal stakeholders (other ministries) but more particularly external stakeholders who are not part of the established

inner circle of informal consultations carried out by ministries. Last but not least, the current system covers primary laws but only some secondary regulations, may need to be extended to cover sustainability (which is under discussion) and has an uncertain reach as regards the parliament and the *Länder*. These issues are considered in more detail below.

**Box 4.1. Recommendations from the 2004 OECD report**

**Address identified shortcomings in the RIA-process.**

The current RIA requirements and guidelines provide an important basis for a continued and needed improvement of RIA practices. As a first step, the German government should establish safeguards to ensure a consistent and coherent application of these requirements by assuring that resources and expertise are available for a centre of government unit charged with monitoring, guiding and possibly sanctioning compliance with these standards. In particular, it should be mandatory that draft regulations sent to public consultation are always accompanied by RIAs. Based on the existing RIA concept, the German government should consider sequencing the RIA process into a two or three step model, allowing for early, informed and flexible responses to draft regulations. This would help target the efforts and resources on the impact on only major regulations. RIA guidelines should also be reviewed and consolidated with a view to make the guidelines more operational and aligned to the actual regulatory process, and, preferably, coupled with a clarification of ministries' obligations during a sequenced RIA procedure. Furthermore, the German government should consider enhancing accountability for RIAs by having responsible ministers "sign off" and guarantee the quality of impact assessments presented to Cabinet and Parliament.

Although the 1999 "Modern State – Modern Administration" Programme launched the preparation of RIA manuals, there is currently insufficient political commitment to RIA in the day-to-day regulatory process. Commitments to regulatory quality are of a general nature, primarily emphasising *ex post* initiatives in the form of reviews.

*With the important exception of administrative costs, the institutional framework for supporting impact assessment is fragmented.* As in most other European countries, each ministry is responsible for carrying impact assessments on its own proposals (a good thing as it forces ministries to take charge of their own work). However, unlike some other European countries, there is no co-ordinating or monitoring unit to oversee the process and to encourage ministries into taking the process seriously and to do it well. It is the responsibility of the proponent ministry, from start to finish, to consult other ministries and to assemble the required impact assessments with their help. The Interior Ministry is responsible for the production of the *Joint Rules of Procedure* and the RIA handbook, and the federal chancellery administers a purely procedural check for compliance with the *Joint Rules of Procedure* before a proposal is tabled to the Cabinet. Beyond these two aspects, there is no other centralised oversight. Inter ministerial consultation is used extensively, as ministries help each other to produce the different impacts, but this does not in practice amount to a quality check. Also, individual ministries are unlikely to see the whole picture as the only document which is made systematically available to them is a summary of impact assessment results attached to the bill sent to the Cabinet. The Cabinet does not see (and therefore does not consider) the underlying analysis. Moreover, no central record of the results of impact assessment is kept by the federal government. Institutional fragmentation does not allow the systematic and strategic integration of the different analyses, and the quality of impacts may vary significantly from one case to another (political pressures often being used to explain why some impacts are rushed).

**Box 4.2. Comments from the 2004 OECD report**

In Germany, as in virtually all OECD countries, the responsibility to prepare RIAs are clearly with the proponent ministry, who, in the preparatory process, must involve and consult with relevant stakeholders. The involvement and co-ordination between ministries exercising quality control is not clear. Currently the ministries of the Interior, Economics and Technology, and Justice have horizontal responsibilities. The Ministry of the Interior is charged with testing compliance with the *Joint Rules of Procedure*, the Ministry of Economics and Technology with business and price impacts, and the Ministry of Justice with constitutionality and technical quality issues. However the task to assume overall responsibility for the substantive quality of the required impact assessments has not yet been defined or allocated.

In reviewing compliance with the *Joint Rules of Procedure* obligations, the Ministry of the Interior and the Ministry of Economics and Labour have no formal sanction mechanisms. Relying on their respective political leverage and professional specialisation, sector ministries are most often successful in maintaining their own understanding of adherence to the *Joint Rules*. Furthermore, the resources available to carry out the reviews in the Ministry of the Interior, who has the overall responsibility for monitoring compliance with RIA requirements, are minuscule compared to the task,

There are not sufficient resources at the centre of government to guide, drive and challenge ministries' efforts to prepare high-quality RIAs. The absence of monitoring functions and sanctions for non-compliance with the obligations to prepare RIAs also reduce incentives for ministries to do so.

*A major exception to the general approach is the process for assessing the costs of information obligations on business.* Two central institutions (the federal chancellery Better Regulation unit, and the *NRCC*) provide internal and external oversight, and in the case of the *NRCC*, may challenge the quality of the assessment. The challenge function of the *NRCC* in respect of administrative costs is critical to the success of this part of the process. Ministries know that they will not be challenged on other assessments. Indeed, the underlying framework is a form of soft law (the *Joint Rules of Procedure* are not legally binding), with no sanctions for non compliance, other than the possibility of political pressure in some cases.

**Recommendation 4.4. Consider whether it is possible to adapt the process in place for overseeing administrative burden impacts and extend this to cover the other forms of impact. This could be developed in stages. For example, the procedural check by the federal chancellery could be extended in a first stage to cover a more in depth review of whether key aspects such as consultation, quality of assessments etc, have been effectively covered. Consider whether there is a role for the *NRCC*, bearing in mind that quantification of broader impact assessments can be a challenge, compared with the established methodology for administrative burdens (and that in the absence of objectively verifiable figures its involvement may be considered too political). Ensure that central monitoring units are adequately resourced for the task.**

*Methodology, guidance and training also need attention.* The starting point is sound. The 2006 guide by the Interior Ministry provides a clear and comprehensive explanation of how to assess the impacts of proposed legislation, as recommended by the 2004 OECD review. It covers important issues such as checking whether there are alternatives to regulation. There is, however, little guidance on quantification (the *Joint Rules of Procedure* do not give any guidance on analytical methods), and the main guide is supplemented (or duplicated) by ministries' own often highly developed guides. More

detailed guidance is necessary up to a point (for example, the Economics ministry needs to lay out the technical aspects of cost benefit analysis in respect of prices), but care should be taken to ensure that the different guides are complementary, so that the strategic value of the main guide is not undermined, and uniform standards apply. Training on impact assessment also needs to be boosted. There is as yet no systematic approach to this.

**Recommendation 4.5. Check the main guide for weaknesses such as the time specified for completing an impact assessment ahead of a proposal being tabled before the Cabinet. Review the different guides available and streamline them to ensure that the strategic core requirements are clearly contained in the main guide, with ministries' own guides as a technical supplement to core requirements. Commission a review of quantification methodologies for different forms of impact assessment, drawing on the knowledge and experiences of other countries, in order to move forward on quantification where possible. Review training for impact assessment and make it a systematic requirement for officials engaged in law drafting.**

**Box 4.3. Comments from the 2004 OECD report**

RIA training currently made available to regulators in Germany consists of a 2-3 hours module as part of a voluntary one week introduction to the operations and procedures of law-making process. This is insufficient, not least given the German civil service's legal tradition, as opposed to the primarily economic approach adopted in RIAs. New, extended training methods are currently being developed by the federal Academy of Public Administration (*Bundesakademie für öffentliche Verwaltung*, *BAKÖV*) in co-ordination with the federal Ministry of the Interior. It is important that units responsible for promoting regulatory quality across government build and maintain core competencies on how to prepare and scrutinise RIA. External contributions to the development of the RIA system can be very useful, but "in-house" capacities should be in place to guide and apply such input.

*Transparency and public consultation require further attention.* The *Joint Rules of Procedure* require consultation of, and communication with, key stakeholders at the different stages of the impact assessment process, and this is also picked up in the guidelines of the Interior ministry. This requirement is followed and consultation is generally a routine part of the regulatory development process. Ministries tend to approach consultation in their own way, which may also vary between proposals. There is no standard procedure for interacting with stakeholders during the drafting of an impact assessment. Government plans regarding proposed new legislation are traceable through a website, and individual draft bills (together with an explanatory memorandum giving the main elements of the impact assessment) are published on the Internet once they have been submitted to the parliament. However the impact assessment is not made available in full, and is not publicly available at an earlier stage. Communication to the public thus falls somewhat short of OECD best practice.

**Box 4.4. Comments from the 2004 OECD report**

To the extent federal ministries choose to carry out public consultations, the consultation documents rarely include RIAs or explanatory memoranda, despite the fact that the *Joint Rules of Procedure* requires all draft regulations to be accompanied by an introductory summary ("front sheet") as well as an explanatory memorandum (*Joint Rules of Procedure, §* 42,1). In the public consultation process, any information about regulatory impacts on citizens.

**Recommendation 4.6. An effective and simple way forward would be to post all impact assessments on line at a single website, alongside the Interior ministry guidelines (and the guidelines of other ministries), which would allow stakeholders to make up their own minds about whether the system is operating according to their satisfaction (boosting quality control).**

*The scope of the current system also needs review as regards the coverage of federal regulations, and the issue of sustainability.* As matters stand, primary laws and some secondary regulations are covered by the system. This may omit regulations which may have a significant impact down the line (and which (see below) are likely to involve the *Länder*). Adding a sustainability dimension to impact assessment seems to be attracting broad support. It will be important to preserve the integrity and strategic perspective of the system if it is added - it should not develop separately from existing assessments and should be part of the same framework.

**Recommendation 4.7. Consider how to extend impact assessment so that it covers all important secondary regulations, ensuring that efforts are targeted at the most significant regulations. Ensure that the sustainability impact assessment framework does not develop separately from the rest. Avoid fragmentation, and work towards an integrated system.**

*Quality control of draft laws by the legislature is a weak spot.* As in most other European countries, there is no strong parliamentary tradition in respect of impact assessment. The federal parliament does not appear to take any systematic interest in impact assessment whether of its own drafts or those of the executive. Although the German system confers an especially prominent role on the parliament in the development and enactment of legislation (40% of draft laws emanate from the parliament), Better Regulation tools and processes do not feature very directly in the parliament's approach, the exception being the parliament's support for the eNorm software (developed by the Ministry of Justice to improve drafting, and used throughout the federal decision-making process). The highly politicised nature of policy and legislative development at the federal level tends to hold back any significant efforts to review drafts from the regulatory quality perspective, which might destabilise the consensus reached on the underlying proposal. Much time must be spent in negotiation, especially federal-*Länder*, reflecting the fact that *Bundesrat* is the *Länder*s' main opportunity to influence the most important legislation (which they must then generally implement).

**Recommendation 4.8. Consider whether there is scope to strengthen the dialogue between the federal government and the parliament with respect to the efficient development of legislation, and to sustaining regulatory quality through to the final stage of enactment. Consider, with the federal parliament, whether there are ways in which impact assessment can be deployed where this matters (significant amendments to government bills, the parliament's own draft legislation).**

*There is, finally, the institutional issue of how to link the Länder into the process where this is important for legal quality as well as policy and regulatory coherence.* The *Bundesrat* is the main formal entry point for debate by the *Länder* on the implications for them of federal legislation. This is backed up by early consultations with the relevant ministries, and the requirement for impacts on *Länder* budgets to be assessed. But is this

enough to ensure that all relevant aspects are captured (notably the implications of federal drafts for implementation, enforcement and compliance, which is often their responsibility)? What about areas of shared competence such as transport and the environment? There is also the issue of policy areas where competences may be exclusive but there may be a shared interest in working together, in which cases co-operation on impact assessment of relevant regulations at both levels should be considered.

**Recommendation 4.9. Review, with interested *Länder*, whether the current arrangements for their involvement in the development of federal legislation is enough to secure a clear view of implications for implementation downstream, and the scope for working together on impact assessment in areas of shared interest.**

### *Alternatives to regulations*

*There do not appear to have been any significant developments since the 2004 report.* It was beyond the scope of this review to take a close look at this important issue. However, not much seems to have changed since the last OECD report. The level of consideration, scrutiny and assessment of regulatory alternatives does not seem to reflect the provisions set in the *Joint Rules of Procedure*. "No alternatives" is almost always stated in each draft bill's cover sheet under the section devoted to the consideration of alternatives. This does not do justice of any assessment of alternatives to regulation done by the administrations. It also prevents decision-makers and the public from having the opportunity to discuss concrete alternatives to command-and-control regulation, or the zero-option (no action). Recourse to alternatives is unlikely to happen as often as it might.

**Box 4.5. Recommendation from the 2004 OECD report**

**Ensure that promotion of self-regulation and alternatives is supported by thorough analysis.**

Germany should further promote and support systematic consideration of self-regulation and regulatory alternatives for new regulatory proposals. Considerations about the use of self-regulation and soft-law alternatives should be matched with the same scrutiny, transparency and accessibility that applies for traditional regulation. It should also develop practice-orientated guidelines including examples and criteria for the use of regulatory alternatives. Improving and encouraging a more wide-spread use of alternatives is contingent on an increased awareness among regulators about the potential benefits of non-regulatory alternatives, and on improving the monitoring of regulators' obligation to consider alternatives.

Systematic considerations and the use of regulatory alternatives in Germany are supported by clear formal obligations on regulators to consider alternatives and to justify when they opt for "traditional" regulatory solutions instead of self-regulation. The requirements are set out in the *Joint Rules of Procedure*'s § 43, which obliges ministries to include rationales pertaining to regulatory alternatives in draft regulations' *explanatory memoranda* and to include a summary of these rationales in the introductory one-page *front sheet.*

However the actual consideration, scrutiny and assessment of regulatory alternatives are lagging behind the political ambitions mirrored in the *Joint Rules of Procedure's* obligations. First, the explanatory memoranda, which should include considerations pertaining to, among others, the use of regulatory alternatives, are not systematically prepared in the first place, and only rarely constitute a part of the information made available during consultation procedures. Second, basically without exceptions, the one-page front sheet attached to each draft regulation summarises considerations of alternatives as "no alternatives". As a consequence, policy makers and the public rarely have the opportunity to discuss concrete alternatives to command-and-control regulation in cases where the latter is the option preferred by the proposing ministry.

The *Joint Rules of Procedure* includes basic consideration when to opt for self-regulatory solutions. Like many other OECD countries, Germany has not yet developed more specific guidelines or criteria for *when* self-regulation should be preferred to other tools. However, a recent research project commissioned by the German Federal Commissioner for Cultural and Media Affairs provided some suggestions for when self-regulation could be preferable to command-and-control regulation, as well providing guidelines to what to consider when establishing a regulatory regime based on self-regulation.

**Recommendation 4.10. Consider a review of the extent to which alternatives to regulation is picked up as an option before the decision is made to proceed with a regulation, using the existing very complete checklist for identifying opportunities for regulatory alternatives as a guide. Associate this with a commitment to strengthen impact assessment processes more generally.**

## Background

### *General context*

#### *The structure of regulations in Germany*

Reflecting the federal nature of the German state, Germany's regulatory system is complex. It turns primarily on two regulatory "production" systems:

- Regulations covering areas of federal competence. Federal laws are usually fleshed out in secondary regulations issued by the *Länder*, as part of their responsibilities for implementing federal legislation. The *Länder* in turn may delegate implementation responsibilities to the counties and municipalities, which may involve a further layer of subsidiary regulations and instructions. In some cases, federal laws may be given effect in federal secondary regulations.
- Regulations covering areas of exclusive *Land* competence. The *Länder* issue their own laws and regulations. Again, they may delegate implementation responsibilities to the counties and municipalities, involving the production of further subsidiary regulations and instructions.

**Box 4.6. The structure of regulations in Germany**

**General hierarchy**

The main written sources of domestic law are the constitution, legislation, statutory instruments and bye-laws. Notwithstanding the general principle that federal law prevails, the hierarchical status of legal instruments always derives from their source, *i.e.* the status depends on the enacting body.

- The *Basic Law* (*Grundgesetz*) is at the apex of federal law, and certain key components of the Basic Law cannot be amended.
- *The rules of international law, including EU law, occupy the space between the constitution and the laws.* That said, EU law takes precedence over German law (as it does in other EU member states) where the EU has exclusive competence (Costa v Enel,1964).
- *Federal laws ranks below the constitution*. They are adopted by the *Bundestag* jointly with the *Bundesrat*.
- *Statutory instruments such as ordinances (Rechsverordnungen) rank below legislation. They*

*are issued by the executive (federal government, federal ministers, and Land governments).* Because they rank lower than laws they must not contravene them (precedence of a law). Substantive decisions with major significance for the persons affected cannot be made in the form of a statutory instrument but only within the law itself (legal reservation).

- *Bye-laws such as statutes and regulations (Satzungen or Ordnungen) are legal provisions issued by a legal person constituted under public law as defined by the State (public corporation including municipalities, institution or foundation).* The main areas of use are in the administrations of municipalities and academic, professional and social security bodies (*e.g.* bye-laws covering municipal charges for street cleaning and refuse collection, or the statutes of universities).

*Länder* regulations

The same type, hierarchy, and order of the federal law apply at the *Land* level in respect of their own exclusive competences, with the exception of the federal rules governing the status of the general provisions of international law, which have no equivalence at *Land* level.

**Municipality regulations**

The Municipalities (*Kommunen*) do not have legislative powers *per se*, but they can issue implementing bye-laws in their responsibility for granting most of the permits, licenses, and running public utilities.

**"Soft law"**

Besides legal acts, the German regulatory system (as in most other countries) includes *Verwaltungsvorschriften*, *i.e.* forms of so-called "soft law" (instructions, usually based on a regulation, which seek to explain, develop or clarify the latter, and which may in some cases be judiciable). A form of soft law often used in Germany is documents accompanying legal acts that explain their technical aspects, indicate standards and technical processes and requirements necessary to implement the legal act to which they relate (*technicsche Anleitungen*).

Soft law also covers instructions internal to the administration and which are binding on the latter. Ancillary documents may be issued by the executives (both at the federal and the *Land* level) to define and organise administrative procedures (*Richtlinien* and *Arbeitshilfe*). Examples of this kind of soft law are the *Joint Rules of Procedure*s of the federal ministries, the guidelines on RIA and the application of the Standard Cost Model.

*Source*: *http://ec.europa.eu/civiljustice/legal_order/legal_order_ger_en.htm.*

## *Trends in the production of new regulations*

The trend in the number of federal regulations in force has been on a consistently downward path since 2005 (Table 4.1). This is partly because of a "spring clean" by the federal government of the regulatory stock, with the repeal of large numbers of regulations, including redundant regulations related to re-unification (see Chapter 5). Table 4.1 also shows, however, a significant reduction in the number of new federal laws and subordinate regulations adopted.

**Table 4.1. Number of federal laws in force at the start of each year**

| Number of new laws /total number of laws | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 |
|---|---|---|---|---|---|---|---|---|
| | 56<br>1.982 | 68<br>2.004 | 32<br>2.025 | 51<br>2.043 | 33<br>2.034 | 41<br>1.804 | 45<br>1.753 | 11<br>1.709 |
| | | | | | | | | |
| Number of new subordinate regulations (ordinances, others)/total number of subordinate regulations | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 |
| | 166<br>3.061 | 184<br>3.098 | 156<br>3.147 | 167<br>3.182 | 160<br>3.225 | 146<br>2.799 | 113<br>2.669 | 89<br>2.647 |

*Note:* The numbers only comprise regulations at federal level. Regulations of the German *Länder* are not included. For each year, the numbers stated on the first line indicate the new regulations adopted, while the ones on the second line (after the "/") indicate the total number of regulations in force within the relevant year. The numbers of 2008 include new legislation effective by 15th August 2008. The number of new subordinate regulations comprises only statutory instruments (*Rechtsverordnungen*).

*Source*: German federal Government, OECD Regulatory Indicators Questionnaire 2008.

## *Procedures for making new regulations at the federal level*

### *The law making process and the role of the federal executive*

Legislative initiative at the federal level is multiple. A bill can be introduced into the *Bundestag* by:

- a parliamentary group or at least 5% of all parliament members (in some 25% of the cases);
- the *Bundesrat* (15% of the cases); or
- the federal government. This is the most frequent approach (about 60 % of cases).

The relevant federal ministry also sometimes takes over the preparation of the bill proposal in the first two instances, but through more informal channels and procedures.

The procedure that federal ministries must follow when preparing their own legislative proposals is by contrast described in the *Joint Rules of Procedure* of the federal Ministries (*Gemeinsame Geschäftsordnung der Bundesministerien, GGO*) (See Box 4.8). The procedure to be followed when the proposal originates from parliament is outlined in the rules of procedures of the *Bundestag*. Collaboration between the executive and the legislature has evolved based on the model of the so-called "aid to drafting" (*Formulierungshilfe für Gesetzentwürfe aus der Mitte des Bundestages*). This is an assistance provided by the responsible ministry. The procedure is not regulated and unfolds informally and on an *ad hoc* basis. The *Joint Rules of Procedure*s merely ask the ministry to inform without delay the other ministries and the chancellery if the procedure has led to proposals that deviate in substance from decisions taken by the government.

### *The law making process and the federal parliament*

The legislature is very active in the initiation and preparation stages of the law-making process. Both chambers hold rights of legislative initiative (see section above), and compared with many other European countries, a significant proportion of draft laws (40%) emanate from the parliament. The *Bundesrat*, representing the *Länder*, plays a prominent role, both at the initial drafting stage, and in the process of approval of federal laws. Prior to the 2006 federal reform, over half of the laws passed by the *Bundestag* required approval by the *Bundesrat*, which involved a long and often arduous process. One of the key aims of the reform was to address this, with a view to reducing to less than half the number of cases where approval is needed.

**Box 4.7. Drafting a bill in the German federal government**

When a federal Ministry intends to initiate legislation, it informs the federal chancellery. Each ministry is responsible for advancing the proposal through all the stages described in the *Joint Rules of Procedure*s. The following main stages can be identified:

- *Consultation and forms of Impact Assessment.* These practices take place relatively early in the process, starting with so-called "pre-consultation rounds" that involve the *Länder* and local authorities as well as, where relevant, affected organised interests and experts. Scientific advisory committees may be consulted too on an *ad hoc* basis.

- *Internal co-ordination.* The lead ministry is also responsible for internal co-ordination, submitting the draft to interested federal ministries and obtaining the necessary collective agreement. The stage at which the internal co-ordination takes place and its duration are left to the discretion of the lead ministry. The federal Ministry of the Interior and the federal Ministry of Justice must be consulted on all draft regulations, notably on the constitutionality of the drafts. The first inter alia in relation to compliance with the requirements set out in the *Joint Rules of Procedure*s, the latter also on the quality of legal drafting. Each ministry is then responsible for assessing the regulatory impacts in its area of responsibility (see Annex A).

- *Administrative burden reduction.* The National Regulatory Control Council (*Normenkontrollrat*) checks and comments on the administrative costs calculated by the ministry on the basis of the Standard Cost Model (SCM). The *NRCC*'s opinion is forwarded to the ministry, and is also included in the annex to the draft bill when it is submitted to the federal Cabinet.

- *Legal drafting and final scrutiny.* Before final adoption by the federal Cabinet, the federal Ministry of Justice proceeds to a final legal and language review, also relying on external linguists.

- *Mandatory notification.* In certain cases, EU legal provisions require a mandatory notification of the draft bill to the European Commission and the other EU Member States, giving them the possibility to examine its compatibility with EU law. During the following three months, the draft bill may not be accepted for discussion by the federal cabinet.

The draft bill is then submitted to the federal Cabinet accompanied by an explanatory memorandum; a cover sheet providing basic data on the proposed legislation; and the *NRCC* opinion. Dissenting opinions from other ministries must also be reported. These documents are important parts of the procedure, for they provide the basic information on the proposed legislation.

### Box 4.8. Stages in the law-making process: Federal parliament

#### The *Bundesrat*'s first reading

The *Bundesrat* in particular is involved by the executive at a very early stage. The government must submit the bill to the *Bundesrat* for comment during the drafting phase. Through this first stage, the *Länder* may express their position, notably in relation to constitutional, budgetary, political and implementation aspects. This stage allows the *Länder* to enter a formal dialogue with the federal executive early in the process. The assessment is not binding on the federal government. Yet, it is usually taken into account and a bill totally rejected at this stage is rarely forwarded to the *Bundestag*. The federal government normally issues a "counter-statement", which is sent together with the bill and the *Bundesrat*'s assessment to the parliament.

The first stage in the *Bundesrat* does not take place if the proposal originates from the *Bundestag*. Particularly urgent legislative initiatives are thus often started directly by political groups in the *Bundestag*. The government can compensate this bypass by sending an initial governmental proposal to the *Bundesrat* (*Paralleleinbringung*).

#### Review by the *Bundestag*

As a rule, the bill is discussed during three readings in the *Bundestag*. The Council of Elders is responsible for assisting the president of the *Bundestag* in the co-ordination and conduction of the parliament's business, notably by planning and agreeing its plenary agenda. While the first reading serves as a general debate on the political impact of the bill, legislative proposals are often submitted to the *Bundestag* standing expert committees without prior discussion. These committees normally reflect the portfolios of the federal government. They can call upon government officials and ministers to participate in the meetings, which normally are not open to the public. The federal government has no direct influence on the bill during the committee stage. Public hearings may be organised on the initiative of the committee, to which external experts may be invited. The responsible committee then submits its version of the bill with a report with recommendations to the plenary for the second reading, where each Member of parliament can table amendments. The bill's version adopted in the second reading is the basis for the third reading. Amendments are still possible but very rare, since they have to be tabled by a parliamentary group or at least 5% of the members. Further to this final reading, the *Bundestag* casts a final vote adopting or rejecting the law including the prior amendments. As a rule, laws are adopted by a simple majority of the votes cast. In some cases, however, an absolute majority is required. Amendments of the constitution require a two-thirds majority of all Members of parliament.

#### Second stage in the *Bundesrat* and mediation

Every bill adopted by the *Bundestag* must be submitted to the *Bundesrat*. It normally has three weeks for its second reading. Bills that were initiated by the *Bundestag* and which therefore had not been previously assessed are subject to a more detailed scrutiny.

Should the *Bundestag* and the *Bundesrat* not reach agreement on a piece of legislation, a so-called Mediation Committee is convened. The Committee is composed of 16 representatives of the *Bundesrat* (one representative per *Land*) and 16 representatives of the *Bundestag* (reflecting the distribution of the seats there). The Committee members are not bound by instructions, which facilitates the draft of a confidential compromise proposal that needs to be subsequently adopted by both chambers in plenary. The Mediation Committee can only make proposals. It has no decision-making power. However, it has become an important body in the legislative process. Since 1949, the Committee has been called upon in connection with about every eighth bill. The Committee is quite successful, as only about 1% of the bills passed by the *Bundestag* have failed to be approved so far.

The Committee proposes amendments to reach a compromise between the chambers. If both the *Bundesrat* and *Bundestag* agree on the Committee's version, the law is considered adopted in that version. Should the *Bundesrat* still object, further steps depend on the type of law. The legislative process distinguishes between laws which imperatively require *Bundesrat* consent

(*Zustimmungsgesetze*) and laws against which the *Bundesrat* may lodge an objection which, however, can be outvoted by the *Bundestag* (*Einspruchsgesetze*). Laws requiring *Bundesrat* consent include laws amending the Basic Law or replacing existing federal laws; laws which govern the administrative procedure for their implementation by the *Länder* without any possibility of deviation of the *Länder*; as well as laws that cause additional administrative costs to the *Länder*, or that require the *Länder* to assume financial responsibility towards a third party, or include provisions on taxes which are partly or wholly passed on to the *Länder*. This implies that the number of cases for which approval by the *Bundesrat* is required is quite significant, as it suffices that a bill contains only one provision affecting one of these cases to be considered by the *Länder* in its entirety. The Basic Law thus grants the *Bundesrat* considerable rank and power. If the *Bundesrat* rejects such bills, no law can be adopted.

If, on the other hand, the *Bundesrat* consent is not required, the *Bundestag* may outvote an objection lodged by the *Bundesrat* in another vote by a majority equal to the result achieved in the *Bundesrat*. For example, if the Upper House lodges an objection with a two-thirds majority, the *Bundestag* must reject this objection also with a two-thirds majority. If the *Bundestag* cannot outvote the objection, the law has irrevocably failed. Up to now, the *Bundesrat* has nonetheless very rarely raised objections of this nature.

There are no exact numbers indicating the proportion of laws requiring *Bundesrat* consent or giving simply the right to object, since this depends on the individual subject of the law. In the past, it was nonetheless estimated that about 65% of all the laws passed by the *Bundestag* required approval by the Upper House. The reform introduced in 2006 sought to reduce such ratio, for it was felt that requiring the *Bundesrat*'s consent so frequently prevented a smooth legislative process at the federal level. It is foreseen that the reform approved by the *federalismus Kommission I* will reduce the number of instances in which the consent is required to 40% of the total laws passed.

**Enactment**

If the *Bundesrat* gives its consent or does not object to the bill presented by the *Bundestag*, the law has passed, and the federal government submits it to the federal president for certification and promulgation. Laws become legally binding and normally come into force upon their publication in the federal Law Gazette.

### *Forward planning*

The coalition agreement adopted by the coalition parties at the beginning of each legislative term sets the general framework within which the federal chancellor presents the main elements of the government's policy and lays down the main projects. Forward planning is thus strongly based on political priorities and negotiations. In addition, as stated in the Basic Law, the federal chancellor cannot go beyond determining general policy guidelines. In accordance with the principle of ministerial authority, each federal minister conducts the affairs of his/her department independently and on his/her own responsibility, which includes deciding when and how to launch a new policy or legislative project.

Projects are nevertheless closely monitored across the federal government. The federal chancellery is the central co-ordinating body. Ministers have to inform the chancellor about important policy measures and projects. They participate in closed-door conferences convened by the chancellor throughout the legislative term to discuss key policy objectives. Based on the results of these meetings, the chancellery summarises ongoing and future ministerial projects in an overall political strategy, which is regularly updated. Regular rounds of discussion take place between the permanent State Secretaries and in the federal cabinet. Each week, the chancellery draws up a list of the proposals that are sufficiently advanced to be submitted to the federal cabinet for adoption within the following six weeks. At these weekly conferences, progress on the implementation of the agreed policy objectives is monitored.

In 2005, the chancellery set up a Planning Unit headed by a Minister without portfolio. Together with the federal ministries, it maintains an electronic database for project planning. This allows the government to share detailed electronic information, to have a comprehensive overview of activities, and to check that the main lines of the coalition Agreement are being implemented. A "project documentation" system sets priorities. The system also contributes to the co-ordination of inter-ministerial activities (integrated planning system). The information gathered is used for internal steering purposes in the federal government and is not published.

Some ministries have adopted the electronic process control tool *ELVER* (*ELektronische VERfahrenssteuerung*), which allows them to record and manage the scheduling and current status of their major projects.

### *Administrative procedures*

Both the constitution and the Administrative Procedures Act (*Verwaltungsverfahrensgesetz*), which entered into force in 1977, set out a framework of general administrative procedure requirements. The Administrative Procedures Act provides a general framework for decision-making procedures of all federal administrative bodies, including the obligation to provide reasons for decisions in writing; a description of general appeal mechanisms; the obligation to consult with stakeholders on important decisions; and the obligation to communicate decisions.

More elaborate standardised procedures to create new legislation at the federal level are set out in the *Joint Rules of Procedure* of the federal ministries (*Gemeinsame Geschäftsordnung der Bundesministerien, GGO).* These Rules do not have legal status but are binding on all federal ministries. Further administrative procedure requirements and guidelines are included in guidance material on RIAs, and the legislative techniques and requirements prepared by the Ministry of the Interior and the Ministry of Justice, as well as other line ministries in respect of their policy areas.

As a rule, the *Länder*, local authorities' national associations and the representations of the *Länder* to the federation must be informed of all proposed federal legislation and ordinances as soon as possible, if and when their concerns are affected. The prompt involvement of central and umbrella associations[1] and of the expert community is also actively sought. If a bill is sent to one of the actors mentioned above as a part of the consultation process, it must also be sent to the *Bundestag* and the *Bundesrat*. In short, external stakeholders and the subnational levels of government are treated on an equal footing for purposes of consultation.

### *Legal quality*

The Ministry of Justice and the Ministry of the Interior are the key players. The Ministry of Justice is the reference point for the examination of draft legislation in accordance with systematic and legal scrutiny principles. Before a bill is sent to the federal cabinet, it checks the constitutionality of the proposal and its compatibility with EU and international law (vertical scrutiny). Regulations based on EU law are also reviewed by the lead Ministry for their compliance with the principles of subsidiary and proportionality. The Justice Ministry also performs a horizontal legal scrutiny, checking compatibility with other laws and the internal consistency of the draft. The *Joint Rules of Procedure*s grants the Ministry the right to "protest" against the adoption of a bill if this is not consistent with current law. Finally, the Ministry checks compliance with formal drafting requirements. The overall scrutiny may last up four weeks, but the lead ministries normally reduce this period considerably.

The Ministry of the Interior is responsible for monitoring compliance with the *Joint Rules of Procedure*, in case of uncertainty. In addition, the Interior Ministry checks the constitutionality of the proposed draft, alongside with the scrutiny made by the Justice Ministry.

The *Joint Rules of Procedure* provide that the language used in bills must be "correct and understandable to everyone as far as possible" (Section 42-5). Generally, bills are submitted to the relevant editorial offices[2] to review the accuracy and comprehensibility of the language used. The federal Ministry of Justice provides support by issuing a "Manual of Legal Drafting", which is also available in the Internet. The Manual focuses on concrete suggestions on the content, structure and form of laws and regulations. The Manual also contains technical suggestions on legal definitions, stylistic criteria, references, and other linguistic components.

An important development is the "Electronic Guide to Drafting Legislation", aimed at improving legal quality. It was developed by the federal Academy of Public Administration under the aegis of the federal Ministry of Interior, and in co-operation with the federal Ministry of Justice. The aim was to address a series of problems observed in the federal public administration. First, desk officers could not easily locate the required quality drafting requirements. In addition, lead services rarely put the necessary rigour into legal clarity at an early stage. Third, although desk officers often have a legal background, they have not been specifically trained to draft legislation. It should be noted that this is against the background that ordinary officials draft legislation, not a special body of officials as, for example, in, the United Kingdom. This generates long learning periods, increases the chances of errors and mistakes, and prevents the formalisation of procedures. The Electronic Guide provides drafters with the latest information simply and directly on their computers; it allows rapid updates; it provides examples and templates, and establishes links to background documents. Some 1 700 desk officers have used the guide over the past four years.

The "e-Norm" software is a tool to improve the quality of legislation. It has been developed by the federal Ministry of Justice on the basis of the "LegisWrite" software used by the European Commission. E-Norm helps comply with formal and editorial requirements and is intended to make the use of the same format possible throughout the lawmaking process. E-Norm offers document templates, indicating the necessary elements of draft legislation in the proper order. It also offers an automated quality check and correction functions, and a function to produce and consolidate synoptic documents automatically.[3] The adoption of the tool is not binding. Eleven out of fourteen federal Ministries have so far introduced e-Norm or are planning to do so. The German *Bundestag* and the *Bundesrat* are also closely involved in this project, and are integrating it progressively into their activities. Four parliamentary committees have already embraced the initiative. Eleven of the sixteen *Länder* have concluded a licence agreement with the federal Ministry of Justice to use the software.

In 2007 and 2008, the Justice Ministry conducted a project on "understandable legislation". The project found that the comprehensibility and clarity of draft legislation could be improved significantly by involving relevant experts, lawyers and linguists at a very early stage. As a result, such multi-disciplinary linguistic counselling was institutionalised as of 2009. Training was provided to other administrations. As a part of this commitment, additional posts were created and overall ten staff within the Justice Ministry working exclusively on easily understandable legal language.

## *Ex ante impact assessment of new regulations at the federal level*

### *Policy on Impact Assessment*

Germany's policy on Regulatory Impact Assessment (RIA) at the federal level is based on longstanding and robust conceptual requirements. Instruments supporting the introduction and spread of RIA practices have been developed since the mid-1980s. The so-called *Blaue Checklist* (Blue Checklist) introduced in 1984 was one of the first attempts among OECD countries to draw officials' attention to factors affecting regulatory quality, including the consideration of alternatives to "command-and-control" regulation as well as legal clarity. The influence of the Blue Checklist on actual regulatory practices was limited, however, because of the lack of guidelines, institutional support, and sanctions for non-compliance. The 1996 revision of the *Joint Rules of Procedure* made the "assessment of the effects of law" (*Gesetzesfolgenabschätzung*) mandatory for federal ministries.

As the term indicates, the procedure applies to all legislative proposals. Some types of secondary regulations and "soft law" are covered to some extent.[4] The guidance requires an analysis that is proportionate to the scope and complexity of the proposal. The main rationale behind the tool was – and still is – informing decision-makers and reducing the costs of regulation.

The current RIA system is based upon the changes introduced under the leadership and co-ordination of the federal Ministry of the Interior in the late 1990s, as part of the "Modern State-Modern Administration" programme launched by the then government. This included the development of a RIA manual as one of its "guiding projects". To this end, the Ministry of Interior in October 1998 commissioned the German college for administrative science in Speyer to prepare a RIA handbook and a practically oriented RIA guideline, with the involvement of Baden-Württemberg's Ministry of the Interior. In 2000, RIA Guidelines (*Leitfaden zur Gesetzesfolgenabschätzung*) and a comprehensive RIA Handbook (*Handbuch zur Gesetzesfolgenabschätzung*) were published by the Ministry of the Interior. The 2000 RIA model introduced three types of analysis that are performed at different stages of the regulatory process:

- *a preliminary* RIA, aimed at testing whether regulation is necessary as well as identifying and comparing alternatives;
- *a concurrent* RIA, which should be used to check whether regulatory measures match and suit the regulatees and the regulatory context; and
- *a retrospective* RIA, which seeks to assess whether the regulatory objective were achieved after implementation (*i.e. ex post* evaluation).[5]

The *Joint Rules of Procedure*s were upgraded in 2000 and ideas from the *Leitfaden* and the *Handbuch* were picked up. The federal government is bound by the *Joint Rules of Procedure* to examine regulatory impacts and make them transparent in the statement of legislative intent for each draft bill. The Rules define "regulatory impact" as the main impact of a law. This covers both the intended and unintended consequences. According to the 2009 updated version of the *Joint Rules of Procedure*s, the ministries must describe whether the impacts of the proposed legislation meet considerations of a sustainable developments, including therefore also long-run economic, environmental, and social impacts.[6]

The main change since then has been to integrate requirements flowing from the policies aimed at reducing administrative burdens on business originated from information obligations. This has added a significant new dimension to *ex ante* RIA. Since December 2008, the *ex ante* assessment of administrative costs using the SCM has also become been

part of the standard procedure. The Ministry of Interior initially updated the federal RIA methodological working aid to reflect this in 2006, and revised them in 2008.

Debate on the role of RIA continues, however. Current debate is focused on assessing the sustainability of federal legislation and ordinances. In the winter of 2008, the federal government decided to expand the scope of RIA to reflect its Sustainable Development Strategy. This decision followed a recommendation made in March 2008 by the Parliamentary Advisory Council on Sustainable Development (established by the *Bundestag* in 2006). The *Joint Rules of Procedure*s and the general RIA methodological working aid are being amended accordingly.

### *Institutional framework*

As in most other OECD countries, each ministry is responsible for carrying out RIAs on its own proposals. There is no centrally dedicated unit for the co-ordination or monitoring of RIA. The main part of the process is devolved to ministries, which monitor the quality of the assessments done in their specialist area (see Annex A). It is the responsibility of the proponent ministry, from start to finish, to consult other ministries which have an interest in the proposal and to assemble the required RIAs. The ministries check each others' work for compliance with the formal provisions on RIA and the quality of the analysis, but ultimately it is up to the lead ministry to decide whether and what kind of assessment is required. In this respect, the underlying principle for RIA practice is the same as for the other issues covered by the *Joint Rules of Procedure*.

The Ministry of the Interior and the chancellery do, however, represent elements of a unifying role. A final unitary procedural check takes place only before the proposal is tabled to the Cabinet. At that stage, the federal chancellery checks compliance with the provisions set out in the *Joint Rules of Procedure* (it does not have the staff to carry out more than a procedural check). The Ministry of the Interior's co-ordinating responsibility for the *Joint Rules of Procedure* give it an overall oversight role, in terms of formally checking that the latter's provisions for impact assessment are being followed, and it is responsible, if needed, for guidance on implementing the impact assessment methodological guide. As reducing regulatory burdens is a priority of the government, the part of the procedure dealing with administrative costs is co-ordinated by the chancellery's Better Regulation Unit, in collaboration with the *NRCC*. The resources of the co-ordinating unit in the Interior Ministry are small. The chancellery and the other Ministries do not have a formal budget for RIA. The engagement of the *NRCC* in the process now allows feedback on the quality of assessments as regards administrative burdens. In general, the *NRCC* rates the assessments as "very good".[7] There is no equivalent systematic check on the quality of other assessments.

The process works through the following stages:

- Specialised divisions in the lead ministry usually carry out the assessment and presentation of the various impacts, in consultation with the relevant ministries.

- The relevant ministries (*Joint Rules of Procedure* §44) then examine those aspects relating to their specific area of responsibility. For instance, the Ministry of Finance checks the quality of the assessment of the impacts on the federal, *Länder* and municipality budgets. Similarly, the Ministry for the Environment, Nature Conservation and Nuclear Safety is responsible for ensuring that environmental aspects and interests have been adequately considered in any given legislative proposal. The Economics Ministry participates actively in the assessment of economic impacts.
- The Economics and Finance Ministries are responsible for checking the quality of the financial implications on the public administrations and the general costs on the economy, respectively.
- If the proposal involves more than one policy area (*i.e.* it is a joint proposal), a statement is obtained from the relevant other ministries.
- The proponent ministry presents the results in a cover sheet and an explanatory memorandum, which are then examined by the other ministries as regards those aspects relating to their area of responsibility.
- Ministries may insist on a further assessment, if they consider it necessary, and may go so far as to withhold their consensus for the proposal to be forwarded to Cabinet, which means that they have a de facto veto power.
- Finally, the draft bill is checked by the chancellery for compliance with the *Joint Rules of Procedure* before it is submitted to the federal Cabinet for decision, together with a summary of the assessments.

Training on RIA is provided by the federal Academy for Public Administration (*Bundesakademie für öffentliche Verwaltung, BakövV*) as a session of the general training on "legislation" organised four times a year or upon request of individual Ministries. A seminar of three days on "Regulatory Impact Assessment" took place in 2008 and in 2009, respectively. A further seminar on "Genesis, Impact Assessment and Implementation of EU Directives" (two days) is organised since 2008. In addition, internal training sessions are organised by individual ministries. Training on RIA has also been organised with members of the parliament, to spread understanding and the potential of the tool for the legislature.

### *The federal parliament and RIA*

As in most other OECD countries, there is no strong parliamentary tradition in respect of impact assessment. The parliament's procedures for assessing its own legislative proposals are weak and unsystematic, and it does not take any systematic steps to check the quality of impact assessments carried out on draft bills proposed by the executive. Besides the lack of infrastructure and resources, the government tends to be considered as an emanation of the majority in the parliament and in the spirit of neutrality, systematic scrutiny of assessments carried out by the executive branch are not considered appropriate. The secretariat of the parliament therefore tends to stand aside. Quality checks and evaluations, including for the preparation of draft bills initiated by the House, are left to the discretion of the political groups, which carried them out directly. If the *rapporteur* deems that more information is necessary, he or she can organise *ad hoc* hearings or gather information informally.

As regards its own proposals, (one quarter of legislative initiatives, often tabled as an urgent political matter), there are provisions in the so-called "*Formulierungshilfe procedure*" (for proposals initiated in the *Bundestag*), but these are less stringent than the *Joint Rules of Procedure*,[8] and the *NRCC*'s opinion is not required as regards possible administrative burdens. There is no obligation to carry out a RIA, and there are no mechanisms to control the quality of assessments if they are carried out. Linguistic clarity is not reviewed.

### *Methodology and process*

The *Joint Rules of Procedure*s outline a three-stage examination procedure that the lead ministries must follow when producing their RIAs. The aim is to ensure that all impacts and consequences associated with proposed legislation are taken into account. The procedural stages are:

- an in depth explanation of the intended effects and unintended side-effects of the proposed legislation;
- the identification and assessment of a series of impacts, including impacts on gender equality; on the federal public budget and the public budgets of the *Länder* and municipalities; on private industry, in particular small and medium-sized enterprises (SMEs); on consumers; on unit prices and the price level in general; as well as on administrative costs under the SCM methodology; and
- the provision of details of any further impacts, if so requested by a federal ministry, a federal Government Commissioner (including the federal Performance Commissioner), or the *NRCC*.

According to the methodological working aid of the federal Interior Ministry, Impact Assessments should follow these steps:

- *Step 1*: Analysis of the regulatory area (problem and system analysis);
- *Step 2*: Identification and definition of policy objectives;
- *Step 3*: Development of alternatives to regulation;
- *Step 4*: Examination and evaluation of alternatives to regulation, including the "zero option" (taking no action); and
- *Step 5*: Result documentation.

RIA should be started at the latest when the draft proposals are sent to the relevant ministries and the *NRCC*. The latter are to be involved in the preparation of the draft as early as possible.[9] The *Joint Rules of Procedure* indicate at least four weeks for the final examination period, which should include RIA, consultation and legal checking.[10] In practice, the time dedicated to undertaking RIAs varies substantially, but it usually quite short, generally lasting a few weeks rather than months.[11]

The focus is on analysing the costs as well as the benefits, in both monetary and non-monetary terms. To assess the economic, ecological and social impacts, a predefined questionnaire (checklist) is used to draw attention to possible effects in all three areas examined. The RIA methodological working aid insists on identifying and evaluating alternatives to regulation, including the option of taking no action (step 4 above). The official conducting the RIA is supposed to refer to the competent Ministry and conduct internal checks, and consult an expert in the field in question for a more in-depth RIA.

The *Joint Rules of Procedure* do not give any binding instructions on analytical methods. To assist the lead ministry, the Ministry of the Interior produced general guidance and recommendations for conducting RIAs in 2006. A further set of guidelines published by the Interior Ministry in 2006 cover impact assessment at the level of the EU.[12] In addition, each ministry has produced tailored guidelines on the specific aspects under their portfolios.[13] For instance, the federal Economics Ministry guidelines support officials on how to carry out cost-benefit and cost-effectiveness analyses, and estimate prices in a structured way. They also provide a variety of examples. The emphasis is on the analysis of costs and burdens rather than the benefits of regulation.

Administrative burdens on business were added in 2006, using the quantitative approach of the SCM methodology. Plans to further extend the scope of the costs to be assessed are being made. The so-called "Regulatory Cost Model" has been proposed as a possible methodology to be applied in the future, on the initiative of a parliamentary Committee.[14] The inclusion of a Sustainable Impact Assessment is also under discussion.

### *Public consultation and communication*

The *Joint Rules of Procedure*s require consultation of, and communication with, key stakeholders as integral elements of the RIA process. This is reiterated in the guidelines of the federal Ministry of Interior, which stress the importance of these practices to increase the acceptance of proposed legislation. These requirements are of a general nature. Consultation is a routine part of the development of new regulations. Each ministry translates the requirements into different practices, depending on the proposal it is preparing, the analysis to be carried out, and the input to be sought. Thus, there is no standard procedure for interacting with stakeholders during the drafting of a RIA. There is no specific obligation to publish detailed information on the assessment, its process, contributors and findings in detail, and provide feedback on how the final assessment has been determined. It is, however, mandatory to give the findings of the RIA on the cover sheet and in the explanatory memorandum of the draft bill to be sent to the Cabinet. Once adopted by the Cabinet, the draft proposal and explanatory memorandum is submitted to the *Bundestag*, and published by the latter.

### *Ex post evaluation*

Evaluation of the validity of *ex ante* analyses is also carried out. The application of RIA tools was jointly evaluated by various federal ministries in 2002[15] on the basis of selected RIAs.[16] The resulting report was presented to the federal Cabinet and approved.

All information obligations entailed by the Standard Cost Model are recorded in a database which is accessible to the public. After a period of two years and upon the amendment of legislation, the federal statistical office measures the burden anew, which corresponds to a review of the *ex ante* estimate. This means that a check is made as to whether the simplification of legal provisions has had the anticipated effects.

### *Land involvement in federal impact assessment*

Federal consultation with the *Länder* on federal policy and legislative development is considerable, especially if the law requires the consensus of the *Bundesrat*, and reflecting the fact that the *Länder* play a major role in the implementation of federal law. Areas of shared competence such as transport and the environment also require shared discussion. The *Länder* are closely involved in federal impact assessment processes, through policy working groups. So-called Lower Working Groups (*Unterarbeitskreise*) are part of the structure of the Conferences of Ministers ensure continuous contacts at the working level between the federal ministries and the *Länder*.

### *Alternatives to regulation*

Clear formal provisions in the *Joint Rules of Procedure* indicate how to consider regulatory alternatives and to justify when recourse to them is made.[17] Ministries must include rationales relating to regulatory alternatives in the explanatory memorandum and introductory one-page front sheet attached to draft bills when these are submitted to the Cabinet and then to the parliament.

**Box 4.9. The German checklist for identifying opportunities for regulatory alternatives**

The *Joint Rules of Procedure* of the federal Ministries stipulates that draft regulations must be accompanied by an explanatory memorandum, which among others must explain:

- whether there are other possible solutions to regulation;
- whether the identified policy objective can be performed by private parties; and
- the considerations that led to the rejection of non-regulatory options.

An annex to the Joint Rules provides a checklist for identifying opportunities for self-regulation:

1. What kind of regulation arrangement is appropriate to address the problem? Is self-regulation sufficient? What structures or procedures should the state provide to enable self-regulation? Would it be possible for the state to make self-regulation mandatory?
2. Provided the task can be carried out by non-governmental or private bodies: how is it ensured that the non-governmental service providers will provide their services for the common good (nation-wide coverage, etc.)? What regulatory measures and bodies does this require? How is reassignment of tasks to governmental institutions ensured in the case of bad performance?
3. Can the problem be solved in co-operation with private bodies? What requirements for the legal design of such co-operative relationships should be imposed? What practical design is suitable and necessary to enable or support such co-operative relationships in organisational terms?
4. If it seems that the problem can only be solved adequately on the basis of a programme or other target-oriented basis: what minimum content of regulation is required by the rule of law (*e.g.* stipulations on competence, aims, procedures etc.).

*Source*: Government of Germany (2000c).

In practice, and as in most other OECD countries, alternatives are most developed and widely used in the area of environmental policy. Economic instruments such as user charges, deposit-refunds, and tax incentives are the approaches often used. Voluntary agreements are also relatively widely used, although their nature and scope vary considerably.[18]

Co-regulation (or delegated regulation)[19] is another important alternative to command and control regulation which is widely used in Germany. Recourse is often made to the so-called "state-of-the-art" notion. This term characterises the stage of development of advanced processes, facilities and operational methods that leading experts certify as guaranteeing that the specified goals can be achieved.[20] Experts contribute to the development of technical standards (*e.g.* for measurement procedures, noise control, etc.). Such standards are defined, among others, by the standards committees of the German *Institute for Standardisation (Deutsches Institut für Normung, DIN*, *e.g.* the Radiology

Standards Committee and the Noise Control and Vibration Engineering Standards Committee in DIN) or professional associations, such as the Association of Engineers (*Verein Deutscher Ingenieure, VDI*), or medical expert organisations. Some of these institutions and organisations receive financial support from the federal Ministry for the Environment, Nature Conservation and Nuclear Safety for their work in this regard.

Other examples of alternatives to command-and-control regulation can be found in the remit of the federal Ministry of Health and include the rules of self-regulatory bodies (health insurance funds) such as guidelines, circulars, common announcements, contracts, agreements, etc. as well as the guidelines of the Joint Federal Committee of Physicians and Health Insurance Funds.

### *Risk-based approaches*

Risk assessment is explicitly addressed by the RIA methodological working aid issued by the federal Ministry of the Interior, which notes that it is an integral part of the process of developing regulations.[21] The expected inclusion of the sustainability dimension means that ministries will soon be required to take account of the interests of future generations when assessing the risks and threats raised by proposed regulations. Other structures and initiatives pick up different aspects of risk, for example the work of the federal Institute for Risk Assessment (Box 4.10).

**Box 4.10. The Federal Institute for Risk Assessment**

The Federal Institute for Risk Assessment (*Bundesinstitut für Risikobewertung*, *BfR*, *www.BfR.bund.de/cd/template/index_en*), established in 2002, is the scientific agency of the Federal Republic of Germany. A scientific advisory council and several expert committees support the work of the *BfR*. The focus of the work of *BfR* is on consumers. It prepares expert reports and opinions on food and feed safety as well as on the safety of substances and products. Its tasks includes the assessment of existing and the identification of new health risks, the drawing up of recommendations on risk reduction, and the communication of this process. The results of its work serve as the basis for scientific advice to the relevant federal ministries and agencies, such as the federal Office of Consumer Protection and Food Safety (*BVL*) and the federal Institute for Occupational Safety and Health (*BAuA*). By means of its science-based risk assessment, *BfR* provides important stimulus for consumer health protection both inside and outside Germany. The *BfR* engages in scientific co-operation with international institutions and organisations and with the institutions of other countries involved in consumer health protection and food safety. One focus of its work is its co-operation with the European Food Safety Authority, *EFSA*.

The parliament has also developed tools and institutions to consider risks, although not for assessing individual legislative proposals directly. In 1990, the *Bundestag* established the "Office for Technology Assessment at the German *Bundestag*" (*Büro für Technikfolgen-Abschätzung, TAB*, *www.tab.fzk.de/home_en.htm*) as an independent scientific body. The eight *TAB* scientists located in Berlin and some 70 experts associated with the *Institut für Technikfolgenabschätzung und Systemanalyse (ITAS)* in Karlsruhe support decision-making by exploring the potential of new scientific/technological developments; their societal, economic, and environmental impacts; as well as the framework conditions necessary to implement them. The *TAB* does not make final recommendations, does not have the right to initiate a project, and its resources and budget are controlled by the House. However it is a well established partner of the *Bundestag*, with a current planned collaboration over the period 2008-13, making the Office independent of the parliament's political term. *TAB* is also an important partner of the European Parliamentary Technology Assessment (*EPTA*) network.

# Notes

1. "Associations" means all unions of natural or legal persons or groups promoting common interests. This includes for instance the employers' associations and the associations of workers and employees.
2. The German Language Society (*Gesellschaft für deustche Sprache*) operates an office at the federal Ministry of Justice which is open for use by all federal ministries. It is responsible for examining drat bills for correct language usage, comprehensibility etc.
3. See: *www.enorm.bund.de* (last accessed 15 April 2009).
4. See: the *Joint Rules of Procedure,* para. 62(2) GGO, and 70(1).
5. For more details, see: C. Böhret/G. Konzendorf (2001), *Handbuch Gesetzesfolgenabschätzung* (GFA), Nomos, Baden Baden.
6. See Section 44 (1), second sentence of the *Joint Rules of Procedure.*
7. Presentation by the NRCC to the team on 10 March 2009.
8. In the practice it is understood that the *Joint Rules of Procedures,* which are silent on how federal ministries should handle external proposals, "imply" by assumption that they ought to follow the same procedure as if they were own draft proposals.
9. See: Section 45, paragraph 1 of the *Joint Rules of Procedures.*
10. See: Section 50 of the *Joint Rules of Procedures.*
11. According to the 2008 report from the EVIA Project (Evaluating Integrated Impact Assessments), see *www.userpage.fu-berlin.de/ffu/evia/.*
12. Ministry of the Interior (2006), Guide to Impact Assessment in the European Union, Berlin.
13. The ministerial guidance follows the provisions of the *Joint Rules of Procedures* and include:

    — Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (2005), Gender mainstreaming in drafting of legislation (*Gender Mainstreaming bei der Vorbereitung von Rechtsvorschriften*) – (in accordance with section 2 of the Joint Rules of Procedures).

    — Federal Ministry of the Interior (2000), Guide to regulatory impact assessment (*Leitfaden zur Gesetzesfolgenabschätzung*); and (2009, draft) RIA guide for practitioners (*Arbeitshilfe zur Gesetzesfolgenabschätzung*), – (section 44 (1) of the GGO).

    — Federal Ministry of Finance (2006), General requirements of the federal Ministry of Finance for statements of the impacts of legislative proposals on the income and expenditure of public budgets (*Allgemeine Vorgaben des Bundesministeriums der Finanzen für die Darstellung der Auswirkungen von Gesetzgebungsvorhaben auf Einnahmen und Ausgaben der öffentlichen Haushalte*); and (2008), Regulatory impact assessment in tax law (*Gesetzesfolgenabschätzung im Steuerrecht*) – (section 44 (2) of the GGO).

— Federal Ministry of Economics and Technology (2008), Guide for Practitioners; and Costs to private industry and price impacts (*Kosten für die Wirtschaft und Auswirkung auf die Preise*) – (section 44 (4) of the GGO.

— Federal government (2008), Guidelines for the ex-ante impact assessment of administrative burdens using the standard cost model (*Leitfaden für die ex-ante-Abschätzung der Bürokratiekosten nach dem Standardkosten-Modell*) – (section 44 (5) of the GGO).

14. Cfr. Proposal by the Bundestag's Economics and Technology Committee, *Schwerpunktsetzung beim Bürokratieabbau ist erfoigreich, Entschlielssungsantrag der Mitglieder der Fraktion der CDU/CSU sowie der Fraktion der SPD im Ausschuss für Wirtschaft und Technologie zu dam Jahresberlcht 2008 des Natlorialen Normenkontrollrates (1 6-1 0039) und dem Berlcht der Bundesreglerung 2008 zur Anwendung des StandardkostenModells* (16-11486), of 21 April 2009.

15. See "2002 Regulatory Impact Assessment – A Field Test" (quoted from Germany's reply to the OECD questionnaire, p.174).

16. RIAs on the following draft bills:

— Federal Ministry of the Interior – federal Data Protection Audit Act (*Bundesdatenschutzauditgesetz*) and the Act on Electoral Statistics (*Wahlstatistikgesetz*).

— Federal Ministry for Family Affairs, Senior Citizens, Women and Youth – Act on the Organisation of Services for the Elderly (*Altenhilfestrukturgesetz*).

— Federal Ministry of Finance – business taxation.

— Federal Ministry of Labour (*ordinance on orthopaedics, Orthopädieverordnung*) and the evaluation of various acts.

— Federal Ministry of Justice with regard to the act governing mediation between perpetrators and victims (*Täter-Opfer-Ausgleichsgesetz*) and the Witness Protection Act (*Zeugenschutzgesetz*).

17. See paragraph 43 of the *Joint Rules of Procedure*.

18. The description made in the 2004 OECD review is still accurate.

19. Germany understands the two terms as synonyms.

20. Cfr. federal Ministry of Justice, Manual of Legal Drafting, 3rd edition 2008, paragraph 256.

21. The Guidelines explicitly draw on Section 44 of the *Joint Rules of Procedures.*

# *Chapter 5*

## The management and rationalisation of existing regulations

This chapter covers two areas of regulatory policy. The first is simplification of regulations. The large stock of regulations and administrative formalities accumulated over time needs regular review and updating to remove obsolete or inefficient material. Approaches vary from consolidation, codification, recasting, repeal, *ad hoc* reviews of the regulations covering specific sectors, and sun setting mechanisms for the automatic review or cancellation of regulations past a certain date.

The second area concerns the reduction of administrative burdens and has gained considerable momentum over the last few years. Government formalities are important tools to support public policies, and can help businesses by setting a level playing field for commercial activity. But they may also represent an administrative burden as well as an irritation factor for business and citizens, and one which tends to grow over time. Difficult areas include employment regulations, environmental standards, tax regulations, and planning regulations. Permits and licences can also be a major potential burden on businesses, especially small and medium-sized enterprises. A lack of clear information about the sources of and extent of administrative burdens is the first issue for most countries. Burden measurement has been improved with the application by a growing number of countries of variants on the Standard Cost Model (SCM) analysis to information obligations imposed by laws, which also helps to sustain political momentum for regulatory reform by quantifying the burden.[1]

A number of governments have started to consider the issue of administrative burdens inside government, with the aim of improving the quality and efficiency of internal regulation in order to reduce costs and free up resources for improved public service delivery. Regulation inside government refers to the regulations imposed by the state on its own administrators and public service providers (for example government agencies or local government service providers). Fiscal restraints may preclude the allocation of increased resources to the bureaucracy, and a better approach is to improve the efficiency and effectiveness of the regulations imposed on administrators and public service providers.

The effective deployment of e-Government is of increasing importance as a tool for reducing the costs and burdens of regulation on businesses and citizens, as well as inside government.

## Assessment and recommendations

### *Simplification of regulations*

*The federal government has engaged in a "spring clean" of the existing regulatory stock, with significant results.* The 2004 OECD report had already noted that Germany expends substantial efforts on its reviews of existing legislation. Since 2004, there has been a significant "spring clean". The federal government has passed eleven laws to repeal redundant regulations, and a Simplification Act to clean up the stock of environmental regulations. The effect has been quite dramatic. The federal legislative stock was reduced from 2 039 laws and 3 175 ordinances to 1 728 laws and 2 659 ordinances, the greatest reduction since 1968. This is a major achievement relative to many other European countries, where legislative simplification has tended to take a back seat to administrative burden reduction programmes (which are not the same thing, although a side effect of the latter can be to remove unnecessary regulations). However, unlike some other countries, the German system does not particularly encourage sunset clauses or other devices that would trigger reviews of individual regulations. It sends out mixed signals – the *Joint Rules of Procedure* require an indication of whether a draft is to be time limited, but there is a principle that laws should be permanent, and in practice sunset clauses are rarely used. The 2004 OECD report also drew attention to this issue.

**Box 5.1. Background comments from the 2004 OECD report**

**Legislative simplification**

As part of the Initiative to Reduce Bureaucracy the Ministry of Justice is currently reviewing existing legislation with a view to identify legal provisions which no longer have any regulatory content.

Germany has expended substantial effort on its reviews of existing legislation. The increase in repeals in 1994, 1998 and 2001-2002 coincide with the end of federal electoral terms and associated peaks in legislative activities. New regulations often include repeals of the regulations they replace. There is no systematic policy in place to review existing laws and regulations, but recent initiatives are important steps towards the establishment of an integral concept for reviewing and updating existing regulations.

Independent committees have been commonly used as a means to review and simplify existing regulations, and to review government administration and procedures. Usually the committees are appointed by and provided with a general mandate from the government, and composed by representatives from academia and industry, trade, and labour organisations.

**Review of individual regulations**

The principle of reviewing existing laws is enshrined in rudimentary form in the *Joint Rules of Procedure*. These stipulate that draft regulations' explanatory memoranda must explain: (a) whether a time limit can be applied to the law concerned, and (b) whether and when the effects intended by the law will be assessed, and whether the accrued costs are proportionate to the results.

In some cases, mandatory reporting obligations require and/or allow regulators to include considerations on possible revisions of relevant laws in light of their experiences with implementing and enforcing the law. For example, RegTP, the *Monopolkommission* and the *Bundeskartellamt* in their bi-annual reports to the *Bundestag* also submit views on selected aspects of regulation.

However, this effect will require a genuine appreciation among regulators of the benefits of such efforts as well as the political support to prioritise such efforts. A systematic approach to the review of existing regulations would help to ensure consistency in approaches and review criteria, would generate momentum and ensure that important area are not exempted from reform due to lobbying by powerful special interests.

It is notable that the mechanisms for reviews of existing regulations are *ad hoc* in nature, rather than being systematic and regular. There is no forward-looking programme for reviews and the actual use of sunsetting as an automatic review requirement is very limited. More importantly, as a general rule, criteria and "tests" for the reviews of existing regulations have not been established *ex ante*, that is, prior to launching the actual reviews. Instead, regulations subjected to reviews and the criteria applied for the actual review have been established as part of the work process, and often with the affected stakeholders participating in the process of selecting the criteria and subjects for the review. *Ex ante* test criteria could be based on cost-benefit assessments, promotion of competitiveness or productivity.

**Recommendation 5.1. Keep up the spring cleaning of legislation at regular intervals. Strengthen the law making procedures to encourage officials to consider the inclusion of a review mechanism in individual draft regulations, or even a sunset clause (beyond which the law automatically expires) where appropriate.**

### *Administrative burden reduction for businesses*

*A well developed federal programme aimed at reducing administrative burdens for business has been established and is already making a measurable difference.* The federal "Bureaucracy Reduction and Better Regulation" programme was a major new initiative of the incoming government in 2005. The 2004 OECD review had highlighted the absence of any systematic approach, which has now been made good. The programme has a precise, carefully defined objective. It seeks to capture the information obligations in all federal legislation using the SCM methodology. The formal target is to reduce administrative costs calculated as at September 2006 by 25% by the end of 2011 (a full baseline measurement was carried out), with half of the goal to be achieved by the end of 2009. However, since the actual process for taking forward the project includes the identification and measurement of burdens in draft new legislation, the target may be considered a net target (overall, burdens must come down by 25%, which means that any new burdens from the adoption of new regulations must be offset by corresponding reductions in existing regulations). The business community is a strong supporter of the programme. By 2008, EUR 6.8 billion of reductions had already been confirmed or given effect.

*The programme has been an engine of change for Germany's approach to Better Regulation.* The programme has triggered changes in a number of directions. The most important effect of the programme has been to change attitudes. Germany's approach to law making is traditionally less concerned with the perspective of the enterprise (or citizens), seeking instead to ensure a high standard of legal clarity, coherence and comprehensiveness of the law. In fact, both perspectives are important and need to back each other up. Ministries have established a network of internal co-ordinators to liaise with the federal chancellery and the *NRCC*, and the programme has raised their consciousness of the costs of regulation for external stakeholders, not least by putting a figure on those costs (which - as in most other countries - are significant). The OECD peer review team were told that there is a "new culture of cost awareness". The importance of evidence based decision is now more clearly understood, which should have positive knock on effects for the future development of *ex ante* impact assessment. Strategically, use of the SCM methodology means that the federal government is now better placed to formulate quantitative goals, determine the degree to which they have been reached, and portray them in an understandable form.

### Box 5.2. Recommendation from the 2004 OECD report

**Develop a strategy and methodology to estimate and monitor administrative compliance costs.**

Germany should continue efforts recently initiated under the "Reducing Bureaucracy Initiative" to establish targets for burden reduction projects. To match the significant political focus on reducing administrative burdens, mechanisms and procedures should be established to quantify administrative burdens and to systematically integrate these assessments in the RIA process. The measurement of the size of existing burdens can be an important information-based approach to developing a policy on burden reduction and the basis for the evaluation of policy initiatives taken. Where possible the German government should attach specific, quantitative targets to new and existing administrative simplification initiatives. The German government should continue to pursue efforts for a nation-wide strategy to reduce administrative burdens – credibly committing the federation as well as the *Länder*.

***Background comments***

The German Government does not have a methodology or practice in place to measure systematically the administrative burdens imposed by new or existing regulations. This is a challenge shared with many OECD countries. Despite the numerous administrative simplification initiatives launched by OECD governments over the past decades, governments – somewhat paradoxically – often do not have a detailed understanding of the extent of the burdens imposed on business. This means that policy is made in an information vacuum, and that the size of the actual burdens (as well as progresses and setbacks in reducing them) may remain unappreciated. In some countries there are innovative and advanced practices in place providing detailed estimates of administrative burdens and to various degrees integrating these estimates in the regulatory process.

Appraisals of Germany's long-lasting and politically high-profile efforts to reduce administrative burdens are fundamentally hampered by the fact that there is no systematic evidence available on the actual size of the actual burdens imposed, nor any methodology in place to do so. The measurement of the size of existing burdens can be an important information-based approach to developing a policy on burden reduction and the basis for the evaluation of policy initiatives taken. The size of existing burdens can raise awareness amongst politicians and help to develop and sustain initiatives and policies on burden reduction. federation-wide simplification initiatives with comprehensive and committed participation of the *Länder* would be an important factor for success and dynamic effects of such initiatives.

Federation-wide implementation of simplification projects seems to be constrained by the lack of authority at federal level to decide upon and implement policies in those policy areas where administrative burdens are traditionally high – and would benefit from more uniform structures, incentives, and procedures. The question whether to impose a national programme from above or whether to leave freedom for regional and local initiatives is to a large extent only theoretical in the German context, since federal structures and tradition forbid a centralised approach to administrative and regulatory reforms. The challenge is therefore to improve co-operation with and incentives for the *Länder* to commit to a coherent and consistent strategy to reduce administrative burdens.

*The programme has entailed new and more transparent approaches to public communication and consultation.* Use of the SCM methodology also meant the deployment of some novel or little used approaches (for Germany) to capture the views of stakeholders directly and to make the process transparent to the public – including expert panels with business, telephone interviews, simulations and surveys for the baseline measurement - as well as publicly available progress reports. This has sown the seeds of a more inclusive and transparent approach to public consultation in other areas.

**Recommendation 5.2. Consider how the new approaches used for engaging and informing enterprises and the public on the burden reduction programme might be used for other issues or sectors which carry an important weight of regulations.**

*The establishment of the NRCC and the Better Regulation unit in the federal chancellery to oversee the programme's implementation are important institutional innovations.* The *NRCC* in particular was a novel approach for Germany's traditional institutional settings, and in a relatively short time, has been able to establish itself as an actor of some weight in the process of developing regulations, establishing a network of informal relationships with ministries. Both the Act establishing the *NRCC* and the *Joint Rules of Procedure* require federal ministries to submit their draft bills to the *NRCC* as a part of the inter-ministerial co-ordination four weeks before they are forwarded to the Cabinet. The *NRCC*'s opinion is necessary for a draft bill to reach the Cabinet table. If the federal government is not following the *NRCC* opinion, it must address a written response to the parliament. The *NRCC* is now a well established advisory and assessment body for quality control as well as methodological issues.

**Recommendation 5.3. Consider extending the organisational setting used for the burden reduction programme (centralisation of political/administrative support, independent oversight, creation of a network of contacts in the line ministries) to cover other aspects of Better Regulation and notably *ex ante* impact assessment.**

*The programme nevertheless has important limitations and needs to be further developed.* There are a number of issues to be addressed if the programme is to reach its full potential. First and most important, the scope of the programme is narrow, limited to information obligation burdens arising exclusively from federal legislation. Second, the target has some loose ends. It is not at this stage "allocated" between ministries, but is an overall federal government goal, and this deprives the programme of a strong institutional incentive to meet the target. Also, it is not explicitly a net target to ensure that overall burdens are kept under control. These issues are considered more closely below. An evaluation of the programme so far in order to set the scene for further development would be helpful.

**Recommendation 5.4. It is important to walk before you can run, and the establishment of the burden reduction programme was a major step forward in Germany. However it is now well established and ready for further development, which will also help to sustain momentum at a stage where the "low hanging fruits" of the first stage have probably been harvested. Commit now to the continuation of the programme and to its development in terms of scope. Arrange for a rapid but complete independent evaluation of the programme to pinpoint how and to what extent it should be developed, with the participation of the federal parliament and of interested *Länder*, and with input from external stakeholders (notably business).**

*The scope is defined in terms of information obligations, and does not seek to cover other compliance costs.* Information obligations are only a small part of the burdens on business. Substantive compliance costs, direct financial costs, or so-called "irritating" burdens (burdens which irritate business but which are not necessarily captured by the SCM methodology) are not covered in the current approach. The more established burden

reduction programmes in Europe (including in the United Kingdom, Denmark and the Netherlands) are now seeking to broaden their base in order to cover all compliance costs, and following pressure from their business communities. The Bertelsmann Foundation has proposed a methodology for this, the so called "Regulatory Cost Model" (*Regulierungskostenmodell, RKM*), which builds on the existing SCM approach.

**Recommendation 5.5. Expand the methodological scope of the programme with a view to covering substantive compliance costs as well as irritants. Review the approaches which are being developed by other countries for this, as well as the proposals of independent institutions. Ensure that there is adequate quantification of costs.**

*The target is not disaggregated between ministries and is not explicitly a net target.* Countries with well established programmes (UK, Netherlands) have taken care to set ministries individual targets in support of the overall target. This incentivises ministries to pay attention as they know that they will not be able to melt their efforts into those of others. The current target also does not do justice to the fact that the programme puts significant effort into assessing the burdens in proposed new regulations. A clear commitment to a net target would ensure that there is no burden creep from new regulations.

**Recommendation 5.6. Tighten up the current target. Divide it between ministries. Confirm it as a net target.**

*The scope of the programme also falls short of covering the burdens generated by other institutions at federal level, beyond the federal ministries.* Parliamentary amendments to federal legislation, as well as the laws which it initiates, fall outside the scope of the programme (as might be expected) and relevant agencies attached to the federal ministries are not systematically covered, nor are self regulatory bodies. The federal parliament has already taken a considerable interest the federal executive's own programme and might therefore be expected to show interest in further dialogue.

**Recommendation 5.7. Consider how to include relevant agencies and other bodies attached to federal ministries, taking a proportionate approach (only those which may be generating significant burdens). Engage a dialogue with the federal parliament over the best way to capture burdens arising from their role in the law making process.**

*Last but not least, the scope of the programme only covers the burdens in federal laws, and does not capture the burdens in secondary implementing regulations, which thus excludes the Länder dimension.* This issue was already highlighted in the 2004 OECD report (Box 5.2 above), which noted that efforts should be directed at "credibly committing the federation as well as the *Länder*", and that the "challenge is to improve co-operation with and incentives for the *Länder* to commit to a… strategy to reduce administrative burdens". The programme does not capture the burdens imposed by *Länder* (and local authorities) in their implementation of federal laws. While up to 95% of legislation affecting business is adopted at the federal level, implementation mainly takes place at the *Land* or local level, which gives rise to further substantive obligations (not necessarily the same in each *Land*) as well as "irritants". This cascade of regulatory obligations likely to be affecting the competitiveness of the German internal market as well as international competitiveness. There is a growing awareness of the need to look beyond federal

legislation if all the burdens affecting the business community are to be captured. So far, however, co-ordination between the federal level and the *Länder* has been confined to a few pilot projects.

**Recommendation 5.8. German burden reduction will require the support of all levels of government if it is to succeed. Commission an independent survey of the "burden trail". Where do burdens (and irritants) actually arise, and who is responsible for the relevant regulations that contain them? Use the results to engage a dialogue with interested *Länder* over a shared approach to future burden reduction that links the federal programme with *Land* initiatives, and identifies specific issues for co-operation (for example, databases).**

*A broader programme will require adequate institutional support and resources.* If the federal programme is to extend its reach to cover broader compliance costs, and enhanced co-operation with the *Länder*, as well as a tighter approach to targets, its institutional support will need strengthening. For example, the *NRCC* currently only has seven support staff (which is already stretching them in terms of their current responsibilities).

**Recommendation 5.9. Review the capacities and resources of the federal chancellery Better Regulation unit and of the *NRCC* for supporting an enhanced programme.**

### *Administrative burden reduction for citizens and for administration*

*The burden reduction programmes for citizens and for the public administration are not as well developed as the one for business; they deserve more attention.* There is a commitment to developing a programme for reducing burdens on citizens, and this is work in progress, which includes the development by the federal chancellery Better Regulation unit and the *NRCC* of an adapted methodology. The OECD peer review team heard some concern that removing burdens from citizens might simply transfer burdens to the administration unless the approach is carefully constructed. A few other countries in the EU have gone some way in the development of programmes to address burdens on citizens (including Denmark and the Netherlands). Their experiences, including the methodology deployed, would be of interest in the German context. This is an area where strong links need to be forged with e-Government initiatives. The same holds true of reducing burdens within the administration, where Denmark's experiences are especially interesting.

**Recommendation 5.10. Commit to the development of programmes to address burdens on citizens and within the administration and make this known as part of the federal government's Better Regulation policy. Draw on the experiences of other countries that have already travelled down this road. Ensure that these initiatives are appropriately connected with e-Government initiatives.**

## Background

### *Background comments*

#### *Simplification of regulations at the federal level*

##### General reviews of legislation

The principle of concentration of law applies. This means that all regulation covering a given policy area or sector should (at least in principle) be contained within a single legislative act. If no formal codification is undertaken, general regulations for a single area are compiled within a single act which then contains the fundamental regulations for the entire area. Within its area of responsibility, each ministry independently monitors the need for legislative action.

Simplification measures can take various forms, ranging from "legislative clearing" (*Rechtsbereinigung*) to codification. The latter method in particular has been used to rationalise the legislative stock of specific policy areas, although it has sometimes faced insurmountable challenges (*e.g.* the failed environmental code). Particularly "young" policy areas may offer scope for segmenting pieces of legislation in order to consolidate parts of them into a new legal act. This procedure is nonetheless rare, as Germany has an extensive legislative body.

Since 2004, there has been a significant "spring clean". The federal government has enacted eleven legislative acts repealing a total of 1 040 federal laws, ordinances and other regulations, including legislation adopted during the occupation period after the World War II and diverse transitional laws related to the German re-unification. In spring 2009 the federal government prepared a Simplification Act repealing some 85 acts and ordinances concerning environmental policy. Although the clearing was partly offset by newly adopted legislation, the federal legislative stock was reduced from 2 039 laws and 3 175 ordinances to 1 728 laws and 2 659 ordinances during the 16th legislature.[2] In the same period, the number of individual regulations in force fell from 86 334 to 83 044. The federal government has thereby achieved the greatest reduction in the federal legislative stock since 1968.[3] The simplification efforts include the removal of approximately 950 legal terms and concepts dating back to imperial Germany as well as regulations predating the Basic Law which are obsolete in terms of language or substance.

There is no specific (fast-track) procedure for legislative simplification. The adoption, amendment and repeal of legislation occur through the same parliamentary legislative process. The law making procedure is also valid also for their abolition. Similarly, the allocation of competences and responsibilities among the various institutions (including co-ordination between the levels of government) remains the same.

Legislative simplification has also involved EU-origin regulations, on agriculture for instance. Many simplification measures were initiated during Germany's EU Presidency in the first half of 2007 and relate to farm payments; cross-compliance checks; and energy crop premiums.

#### *Review and sunset clauses for individual legislation*

The *Joint Rules of Procedure* require an indication of whether the law is to be time limited.[4] In principle, laws are intended to create permanent regulations. Clauses requiring later review or sun setting mechanisms for entire legislative acts are not systematically included. However, they may be added, for example where a new approach is being tested,

or it is important to check what happened in practice. The lead ministry decides whether an evaluation clause should be included. As a rule, sunset or review clauses do not apply to entire laws but only to specific elements. The procedure aims to focus on critical items and prevent an excess of parliamentary evaluations and extensions.[5]

### *Initiative to reduce bureaucracy*

Eliminating superfluous or obsolete regulations is also carried out in the framework of the initiative to Reduce Bureaucracy (*Büreaukratieabbau*). Examples of simplification in this context include the repeal of all administrative regulations not included in the database of federal administrative regulations by 1 October 2006; and the consolidation into a single "integrated landfill ordinance" of all legislation on waste disposal and storage as well as on landfill recovery.

## ***Administrative burden reduction for businesses at the federal level***

### *Early policies*

Reduction of administrative burdens – *Bürokratieabbau* – was an important focus for the 1999 Modern Government – Modern Administration programme. It was also prominent in the 2002 Government Coalition Programme, and was a priority of the government's programme "Agenda 2010 of April 2003: Courage for Change".[6] Initiatives were brought together in the February 2003 Master Plan to "Reduce Bureaucracy – Promoting Small Business, Creating Employment, Strengthening Civil Society". While setting out broad and ambitious goals, these were not quantified, and there was also a relative lack of clarity as to the specific contribution of supporting projects. The plan was led by the Ministry of the Interior. A dedicated unit in the Ministry of Economics and Labour was charged specifically with reducing administrative burdens on SMEs.[7]

### *Current policy on administrative burden reduction for businesses*

In 2005, the federal government started a major new initiative. It set the reduction of administrative burdens on business, citizens and public administration as one of the cornerstones of its "Bureaucracy Reduction and Better Regulation" programme. The new thrust was prompted by the priorities set in the 2005 coalition agreement and formalised by the related federal Cabinet decision to introduce the Standard Cost Model (SCM) to measure administrative costs resulting from information obligations included in federal legislation. The target is to reduce administrative costs calculated as at 30 September 2006 by 25% by the end of 2011. Half of this goal (12.5%) is to be achieved by the end of 2009. The focus is on those burdens originating in information obligations included in federal legislation.

A full baseline measurement carried out on information obligations embedded in federal legislation in September 2006 showed that administrative costs to business were roughly EUR 47.6 billion annually. Because the regulation screened had national, EU and international origins, the costs were differentiated into two main categories. Roughly EUR 22.5 billion of the total arose out of national law, while EUR 25.1 billion originated in EU and international law. The 25% reduction target is, in principle, based on the administrative burdens identified on the baseline date (*i.e.* existing burdens). In practice, the process includes the identification and measurement of burdens in draft new legislation, which implies that the target is a net target.

The importance given to this policy is reflected in the institutional developments that accompanied it. A dedicated Better Regulation Unit was established in the federal chancellery, and not least, an independent advisory and control body outside the government, the National Regulatory Control Council (*Normenkontrollrat*, *NRCC*) was set up. Both were innovative institutional developments that contrast with the traditional institutional setting of the federal government.

### *Institutional framework*

#### Federal chancellery Better Regulation Unit and line ministries

Within the federal government, the federal chancellery oversees and co-ordinates the programme, through its Better Regulation Unit. It monitors progress and keeps track of administrative burden reductions achieved. The Unit is politically supported in its work by a Committee of State Secretaries on the reduction of bureaucracy. The Committee meets some 6 to 8 times a year, as needed. All ministries participate in it.

However, as in most other European countries, the actual process is largely in the hands of the relevant federal ministries responsible for the legislation. Within each ministry, some 2-3 staff have been designated for the task of taking forward the steps needed to contribute to the 25% reduction target (which is not, as in some other EU countries, sub-divided between ministries). This has given rise to an internal co-ordinating "SCM network" of contact points between line ministries. These officials are not necessarily full-time on the programme, but they are important actors for sustaining the relationship between operational line ministries, the co-ordinating centre (the Better Regulation Unit in the chancellery), the federal statistical office and the *NRCC*. They also contribute to training on SCM that each ministry organises internally. The Better Regulation Unit, the *NRCC* and the SCM contacts meet regularly every second month to discuss methodological refinements and simplification proposals.

#### *NRCC*

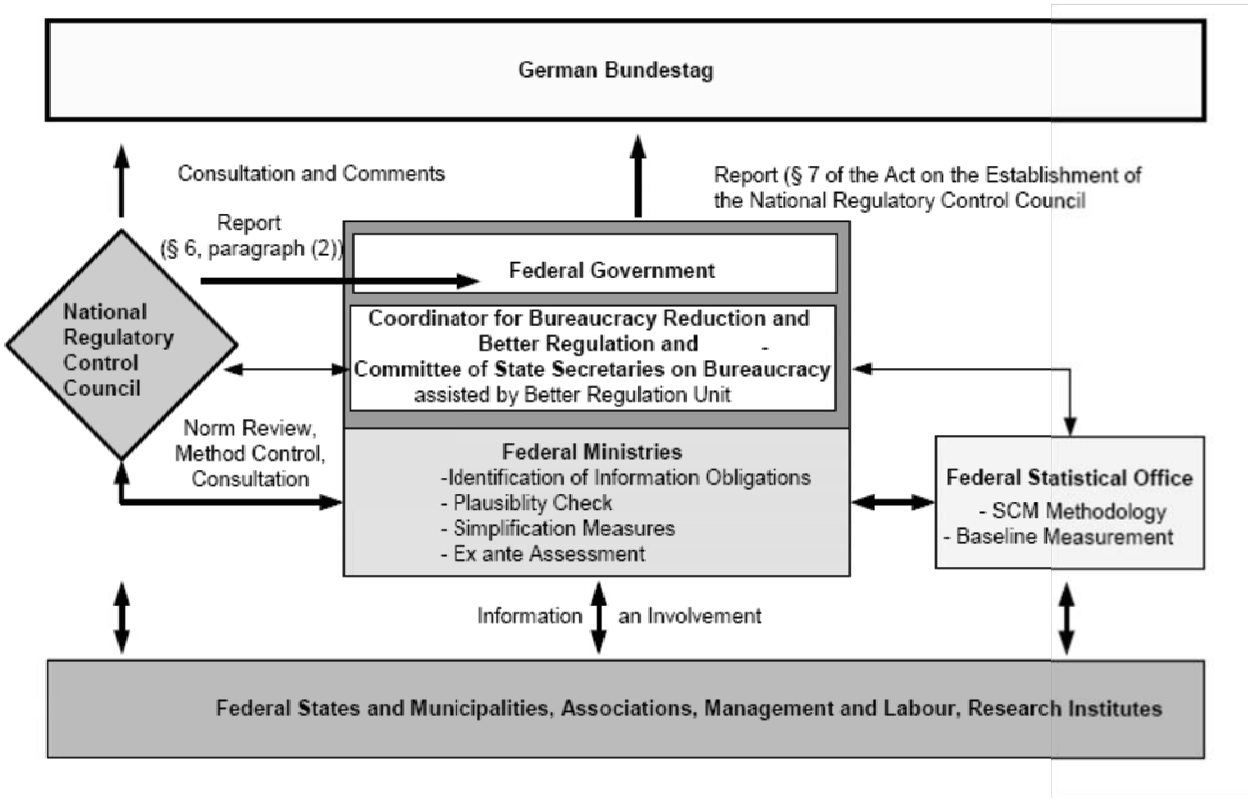
The *NRCC* provides advice on, and checks the quality of the assessments by the line ministries of draft new legislation. *NRCC* members organise themselves as "*rapporteurs*" (*Berichertatter*) for specific policy areas. Each *rapporteur* drafts a proposal for decision for every new draft bill falling in his/her area of competence. The proposals are then discussed by the *NRCC* board and formalised in an official *NRCC* opinion. The opinion is not only forwarded to the lead ministry but is also included in the annex to the draft bill which is submitted to the federal Cabinet and subsequently passed on to the parliament together with the Cabinet decision. *NRCC* opinions are therefore public and seek to draw the attention of decision-makers and stakeholders to the administrative costs involved in the regulatory proposal. In practice, the interface between the federal ministries and the *NRCC* is tighter and more intense than the formal procedure prescribed by the *Joint Rules of Procedure*s. Federal officials tend to involve the *NRCC* at a very early stage on an informal basis to share the data gathered, test ideas for measurement reductions, and receive technical and methodological advice. Thanks to this close interaction, the opinions of the *NRCC* have so far been quite supportive of ministry estimates.

### Other players

Two divisions in the federal Ministry of Economics and Technology work on the *Bürokratieabbau* initiative, one of which partially also covers the administrative burden reduction programme. The federal statistical office supports the process by consolidating the baseline measurement, running a database of simplification proposals, and assisting in the development of the SCM methodology.

Figure 5.1 below outlines the interaction among the parties involved in the administrative burden reduction process within the federal government (and beyond).

**Figure 5.1. Administrative burden reduction process in the federal government**




*Source*: Federal chancellery (Better Regulation Unit), March 2009.

## *Methodology and process*

### Definition and scope of administrative burdens

The programme covers the information obligations contained in federal regulations. This means that only legal acts adopted at the federal level are considered. Information obligations are defined by the Act establishing the *NRCC* (Art.2) as "obligations existing on the basis of laws, ordinances, by-laws or administrative regulations to procure or keep available for, or transfer to, authorities or third parties data and other information." Information obligations in practice are typically imposed by the government, take the form of a general abstract rule, and require the record or transmission of data in written, electronic or other forms. Examples are applications for permissions, entry in a register, or the provision of statutory information.

The programme mainly concerns federal ministries. However, the responsible bodies for self-government tasks (social security system carriers and social insurers) implement federal law and in some cases are also responsible for enforcing federal law within their remits. In addition, within the framework of the self-government tasks delegated to them, they create their own statutes, administrative provisions, etc. The federal government notes therefore that in order to achieve a full cross-level and inter-ministerial reduction of administrative burdens, it would be appropriate to involve these bodies as independent partners in the implementation of the "Bureaucracy Reduction and Better Regulation" programme of the federal government. Such involvement would be expected to increase the number of information obligations examined and make the resulting costs more transparent. Model analyses are now being conducted for individual areas by working groups composed of representatives from the relevant social insurance agencies, the federal chancellery Better Regulation Unit, the *NRCC* Secretariat, the federal statistical office, as well as experts from the responsible federal ministries. In certain cases, representatives of the Confederation of German Employers' Associations also take part.

Since May 2009, co-operation is also ongoing with organisations of the Chambers of Commerce.

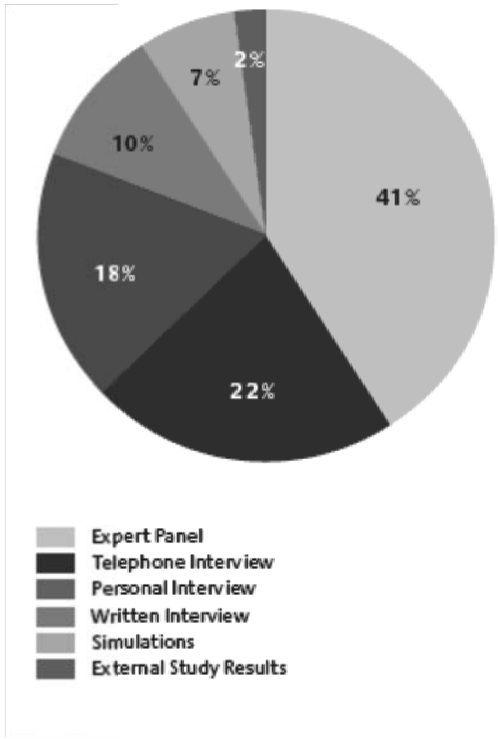
### Baseline measurement

Much of the period since the programme started in 2006 has been devoted to establishing a baseline measurement against which the target reduction could be measured. Germany opted to screen the entire stock of existing federal legislation, thereby differing from the approach followed by the European Commission, which concentrates on selected legislative acts in defined areas. The baseline date for the German SCM measurement is 30 September 2006. The federal ministries took inventory of approximately 10 400 information obligations for business stemming from federal law which were in force on that day. This included legislative acts adopted by the federation to implement EU and international law. The calculations were finalised in December 2008 and published in the second annual report of the federal cabinet on the programme in the same year.

The procedure takes into account specifically German features, including above all the adaptation of concepts such as the definition of the term "business" and a measurement sequence based on a procedure developed by the federal statistical office. In addition, unlike other countries using the SCM, Germany does not add a standard charge for overhead (costs of rent, telephone, heating, electricity, etc.), which in other countries accounts for 25–30% of the total costs measured. Another difference from international practice is that write-offs of necessary capital expenditure are included. In calculating labour costs, social contributions and other indirect labour costs are included. To calculate hourly costs, the federal statistical office uses official tables tailored to specific branches and qualification levels. Additional indirect costs such as postage, fees, etc. are explicitly itemised.

A variety of tools and channels were used to collect data, including expert panels; phone, personal and written interviews; simulations and external studies (See Figure 5.2).

**Figure 5.2. Data collection tools used in the measurement process**




*Source*: Federal government, *Administrative Costs: The Effort to Identify, Measure and Reduce Them. The 2007 federal Government Report on the Use of the Standard Cost Model*, October 2007, p.19.

At its own initiative and with the support of business associations, the federal statistical office asked businesses to report on a voluntary basis the time needed to comply with information obligations. It obtained additional relevant information to determine the administrative costs via expert panels and expert discussions. Together with the experts, the office carried out additional research for determining administrative costs.

### Implementation and the role of the *NRCC*

Line ministries are responsible for designing simplification measures, using the 2006 measurements as a starting point. The federal government amended the *Joint Rules of Procedure* in 2006 accordingly. Because this was a new competence requiring specific skills, supporting guidance material has also been prepared. The procedure and methodology used for the SCM are described in detail in a manual available on line, including in English. Additional information for ministries, such as the guidelines for *ex ante* assessment of administrative costs, is also available on line.

Simplification measures may include the following:

- simplification of the law (*e.g.* by removing information obligations, reducing the number of enterprises affected, or reducing the frequency of the information transmission);

- simplification of administrative processes (*e.g.* excluding duplicate assessments, or simplifying forms);

- e-Government (notably by transmitting information electronically); and
- improvement of communication (in particular by seeking advice from government bodies when introducing new regulations).

New regulations are also covered by the process, which requires federal ministries to identify and cost the burdens embedded in new regulatory proposals, using the SCM methodology.[8] The federal statistical office assists the ministries in the measurement. The lead ministry must state in the explanatory memorandum to a draft bill which information obligations it plans to abolish, amend or introduce, using the SCM. Both the Act establishing the *NRCC* and the *Joint Rules of Procedure* require federal ministries to submit their draft bills to the *NRCC* as a part of the inter-ministerial co-ordination four weeks before they are forwarded to the Cabinet. All legislative proposals submitted to the *NRCC* are documented in a database maintained by the *NRCC*. Since 1 December 2006, federal ministries have submitted a total of 1089 draft bills (for laws, ordinances and administrative regulations), approximately half of which contained information obligations to businesses. The *NRCC* has given its opinion on 996 of these.[9] This represents the examination of 2 296 obligations for private businesses to provide information. Of these information obligations, 1 339 were new, 629 were amended and 328 were repealed.

The *NRCC* assesses draft bills against criteria based on the following questions:

- Has the responsible federal ministry clearly quantified the expected administrative costs using the SCM?
- Has the responsible federal ministry sufficiently examined less costly alternatives?
- Has the responsible federal ministry chosen the least burdensome alternative while taking the legislative intent into due consideration?

### Database and the federal statistical office

The federal statistical office runs a database of all information obligations. It planned to launch a new Internet database in mid-2009 (*www.destatis.de/webskm*). The new platform will allow anyone to access information obligations data and to the proposed simplification measures on-line without prior registration. The tool will operate an extensive search and filtering system. An inter-ministerial decision is nonetheless still needed in this regard. The database allows interested business associations to notify the federal statistical office of additional data such as missing quantities for individual information obligations, suggested options for simplification.

### *Public consultation and communication*

The programme is based on the active and continuous participation of stakeholders (business associations, social partners and economic research institutes), both in the identification and costing of information obligations in current legislation and in the development of options for simplification. Stakeholders are provided with federal ministries' estimated administrative burden measurements as part of the impact assessment process, before the costings are finalised. This enables them to inform the competent federal ministries about diverging experience or estimations, where appropriate. The strong emphasis on transparency and early involvement of stakeholders aims to capture only "genuine" burdens, as some government requirements for the collection and provision of data are a useful and integral part of business processes. The federal statistical office database (see above) is also a means of ensuring the active participation of stakeholders.

Both the federal government and the *NRCC* are legally required to report annually on the programme (the burdens and the reductions achieved). These reports are an important tool for encouraging results. The first government report was presented to the parliament and the public in October 2007. An interim report drafted by the Committee of State Secretaries on the reduction of bureaucracy was presented to the federal cabinet in April 2008. The 2008 report was adopted by the cabinet on 10 December 2008. The second report of the Committee of State Secretaries was issued in June 2009. All reports are available on line on the central federal government's homepage relating to the reduction of bureaucracy. The *NRCC* also publishes an annual activity report, which is available on line in German and English on its website.[10]

### *Relationship of the federal programme with the sub-federal levels of government*

The federal initiative is focused on federal legislation. The federal nature of the German state means that any shared initiatives with the *Länder* are developed on an optional, voluntary basis, respecting the competences conferred on each authority by the Basic Law. That said, there is a growing awareness of the need to look beyond federal legislation if the overall programme is to capture all of the burdens affecting the business community. While most legislation (up to 95% of legislation affecting business) is adopted at the federal level, implementation mainly takes place at the *Länder* or local level. Federal legislation, for example, is usually implemented by the *Länder* which will issue their own implementing regulations. The *Länder* in turn may delegate aspects of implementation to the counties and municipalities. The *NRCC* plays an important role in co-ordinating and supporting initiatives between different levels of the German government to reduce administrative burdens overall. It is an integral part of joint pilot projects carried out by the federal government and the *Länder* on credit to parents, housing benefits, and student loan legislations (Box 5.3).

#### Box 5.3. Co-ordinated measurement of administrative costs in Germany

Two joint projects, involving respectively three and four *Länder* and selected local authorities (counties and municipalities), were launched in spring 2009 with the participation of the Better Regulation Unit of the federal chancellery, the National Regulatory Control Council, with the aim of examining the potential for simplifying and optimising enforcement of administrative regulations in the three areas of the federal Education Assistance Act. The legal areas addressed are those of parental allowances and benefits, as well as housing benefits (*Einfacher zum Wohngeld und Elterngeld Projekt*).

The municipalities are contributing their experience, including the challenges related to the implementation phase. The federation is supporting the projects by compiling overviews of the relevant information obligations under federal law and undertaking corresponding assessments. The SCM method will be used to assess enforcement in the legal areas of housing benefits and parental allowances. Where appropriate, the relevant information obligations under federal law may be amended. The results of the project were published in September 2009.

A third project is at the pilot stage. This concerns student loans (*Einfacher zum Studierenden-BAföG*) and is being designed with the participation of seven *Länder* and 14 Offices for the Promotion of Education, besides the federal chancellery and the *NRCC*.

These projects are to be considered as a starting point for closer interaction and integration. The relevance of this project is two-fold. It not only tests current co-ordination mechanisms between the levels of government, but it also helps to establish which burdens are created at what level and by which authority.

The government has also proceeded to targeted calls for proposals from the *Länder* to reduce bureaucracy. Red tape-cutting proposals from the *Länder* and *Länder* industry and administrations were examined as to their feasibility and could be implemented, at least in

some cases. Overall, as a first step, every third proposal (48 out of 138) submitted by the regions in the second round of calls for proposals to reduce bureaucracy and on deregulation have been implemented. Further to a change in the government, the system changed and included all remaining proposals. 58 additional measures were implemented through three special laws (see Box 5.4).

The federal government has involved the local authorities' national associations in implementation of the government programme. This has happened in the context of the government's co-operation with key industrial and business associations, as well as through the collaboration of their national associations with the federal government and the *Länder* in bureaucracy reduction.

The local authorities and the *Länder* co-operate on Better Regulation policy. The local authorities' experience as enforcement agencies is used in *Länder* projects aimed at reducing bureaucracy, and the resulting proposals from local authorities are said to receive due consideration by the parties involved. The SCM remains the privileged methodology.

### *Achievements so far*

The 2009 interim report of the federal government lists 357 among already realised or planned reduction measures for businesses, which represent an overall reduction of EUR 7.2 billion, of which EUR 6.8 billion have already been confirmed through a Cabinet decision or effected through ordinances (*untergesetzliche Verfahrensänderungen*). If all measures become effective as scheduled, up to 15 % (*i.e.* over half the overall target of 25%) would be achieved by the end of 2009, meeting thereby the intermediate target set in the 2005 coalition agreement (see Table 5.1).[11] The *NRCC* has assessed that new regulations have yielded reduction measures of EUR 4.46 billion. At the same time, new regulations are estimated to have produced an increase of EUR 1.2 billion in administrative costs. The net saving in administrative costs for new regulations is therefore estimated to be EUR 3.3 billion.[12]

**Table 5.1. Reducing burdens from information obligations in Germany – An overview**

| Administrative costs for the economic sector<br>As per 30 September 2006 | | Total | National law (D) | National law originating from EU and international law | EU and international law (I) |
|---|---|---|---|---|---|
| Registered information obligations | *Number* | 10 407 | 5 804 | 1 961 | 2 642 |
| Measured information obligations | *Number* | 9 234 | 5 804 | 1 961 | 1 469 |
| Overall burden | *in thousand EUR* | 47 614 422 | 22 502 068 | | 25 112 354 |

| Simplification measures | | | Division of reduction of burden according to | | |
|---|---|---|---|---|---|
| | | Total | National law (D) | | EU and international law (I) |
| Measures | *Number* | 338 | | | |
| Measures quantified | *Number* | 167 | | | |
| Reduction of burden for the economic sector | *in thousand EUR* | 7 110,385 | 6 618,365 | | 492 020 |
| Measures already decided on | *in thousand EUR* | 6 577 793 | 6 168,068 | | 409 724 |
| Measures planned | *in thousand EUR* | 452 592 | 370 296 | | 82 296 |
| Other | *in thousand EUR* | 80 000 | 80 000 | | |
| Other reductions of burden (public administration sector) | *in thousand EUR* | 352 907 | | | |

*Status*: 10 December 2008.

*Source*: Federal chancellery, Second Annual Report on applying the standard cost model and on the status of bureaucracy reduction, April 2009, Annex 3.

### Box 5.4. Examples of simplification measures for business

Federal government simplification measures within the framework of the government programme "Bureaucracy Reduction and Better Regulation" include initiatives on on-line registration. An integrated, fully automated procedure was for instance created for social insurance registration and contributions and discontinuing employer notifications in paper form in the registration procedure for 2006 and 2009. This has already resulted in multi-sector relief for business totaling more than EUR 1.4 billion. Moreover, administrative burdens on businesses in a variety of sectors have been reduced by EUR 262 million as a result of discontinuing paper wage and tax statements and introducing the programme *ELSTERLohn II* for electronic access to the relevant tax information. Further planned initiatives include the ELENA project (see above), as well as the possibility for employers to send requests for reimbursement to health insurance funds in electronic form, so that the request can be processed automatically. The resulting reduction in notification and processing costs is estimated at roughly EUR 37 million per year. The gradual introduction of electronic health cards and electronic prescriptions for anaesthetics may reduce administrative costs by at least EUR 16 million.

In terms of repealed and discontinued regulations, the Second Ordinance Amending Transport Staff Regulations, which entered into force in early 2008, provided relief estimated at EUR 36.5 million a year, especially for crafts and trades businesses. It abolished obligations for certain vehicles between 2.8 and 3.5 tonnes to keep records of driving and rest times. Ending the registration requirement in hospitals and care homes freed all institutions from the obligation to keep special records of admissions. The admitting institution will in future be able to record client reservation data already in electronic form on the admission form. Relief for relevant institutions is estimated at EUR 119.1 million. The abolishment of the requirement for employers to submit accident insurance data when making their annual report to the relevant agency is planned for 1 January 2012, reducing administrative costs for businesses in every sector by EUR 56 million.

In accounting law, a threshold size was set for assigning a buisness to one of the categories "small", "medium", or "large". As a result, there is a greater number of businesses that now belong to the category of small - or medium-sized businesses and therefore enjoy less strict accounting obligations (auditing duty, disclosure of balance sheet, annex information). In addition, the duty to keep books of account under the Commercial Code will be lifted for nearly 500 000 unicorporated enterprises. These measures will reduce the burden on the private sector by EUR 2.5 billion per year.

### *Other simplification measures for businesses*

Germany has continued to invest in facilitating business start-ups to boost its economy. Since 2006, the *Startothek* (*www.Startothek.de*) is a database providing entrepreneurs and consultants with information on relevant federal and *Länder* legislation and secondary regulations affecting businesses, especially SMEs. As a part of the policy in support of SMEs, a series of important simplification measures have been taken at the federal level (Box 5.5). Subnational authorities, notably municipalities, are largely responsible for issuing licensing and permits in various policy sectors, and simplification measures are also taking place at that level. Significant facilitation effects have been achieved at the local government level by the introduction of electronic licensing and registration procedures (model projects), for example for business registration.

**Box 5.5. Simplify to promote entrepreneurship: Germany's small companies acts**

In 2005 the federal government agreed to free companies from excessive regulation hindering growth; to support Small and Medium-sized Enterprises (SMEs); and to encourage start-ups. Parallel to the measures aimed at reducing the related administrative burdens, the government adopted three legislative acts to reduce bureaucratic obstacles for SMEs ("Small Companies Acts").

The First Small Companies Act (MEG I), enacted in 2006, included 16 measures to reduce administrative burdens for SMEs particularly in the area of statistics and accounting, for total savings of approximately EUR 970 million.

The Second Small Companies Act (MEG II) was adopted in 2007 and included 16 measures to reduce administrative burdens in the areas of statistics, accounting, and law on social insurance, trade, pricing and road traffic, especially for SMEs and start-ups. The bill contained, inter alia, a reduction in burdens imposed by statistics, bookkeeping, social insurance, commercial law, price legislation and road traffic regulations. At the same time, it further promoted regional economic structures. This act reduced administrative burdens for business by an additional EUR 203 million.

The Third Small Companies Act (MEG III) was adopted in 2009. It provides for additional 23 measures to reduce administrative burdens by roughly EUR 100 million. The main features of the draft legislation are the simplification of the crafts and trades census and a series of measures simplifying trade law requirements.

The *Länder* are also contributing to administrative simplification by developing a nationwide network of start-up agencies (so-called "Starter Centres"), which offer start-up entrepreneurs advice and practical services. The *Länder* have also promoted training for graduate students as well as "incubators" at higher education institutes. Enterprises in Germany can meanwhile register within a few hours, with registration taking one day at most. Entrepreneurs setting up a limited liability company should expect the registration process to take four or five days on average.[13] It has also been made easier for employers to hire staff.[14]

### *Administrative burden reduction for citizens at federal level*

The federal government is also committed to reduce administrative burdens generated from information obligations that fall on citizens. Compared to the analysis of the business sector, the programme for measuring and reducing administrative burden on citizens is less developed and still work in progress. Because of the special nature of this target group, the SCM needs to be applied in a modified form (*e.g.* by quantifying the burden not in monetary terms but in time units). The federal government has developing the methodology jointly with the *NRCC*. The *ex ante* assessment of citizens' information obligations began on 1 January 2009 with the drafting of policy papers. The guidelines for the *ex ante* assessment of administrative burdens were revised accordingly.

As part of the *ex ante* assessment, the competent ministries also analyse the baseline information obligations on which the current project is based. It is up to them to decide whether it would be advisable to measure the administrative burdens using the SCM. They also decide at their own discretion and on a case-by-case basis whether the impacts for individual groups of persons (burden reduction or increase) should also be determined and analysed in depth. They can also request that the information obligations associated with particular circumstances or areas of life be analysed, independently of an *ex ante* evaluation. The overall objective remains a complete baseline measurement.

### *Administrative burden reduction for the administration at federal level*

The "Bureaucracy Reduction and Better Regulation" programme government also seeks to significantly reduce administrative costs bearing upon the federal administration. Particular emphasis is put on reducing the burdens from mandatory information obligations and avoiding the creation of new information obligations.

Unlike business, however, processing information is often a core activity of public administrations. The methods used for business and citizens cannot be directly applied to measure government burdens. A number of ministries have started pilot projects with a view to tailoring and refining the analytical and methodological approach. The SCM is for instance believed to be useful in determining the success of simplification measures or identifying particularly burdensome administrative tasks. The federal chancellery intends to develop a method to be applied uniformly to all federal ministries after evaluating the results of these tests.

The critical review of tasks and ongoing improvement of operating procedures are additional methods applied within the public administration. Measures introduced to reduce burdens on businesses and/or citizens also provide relief for government. The use of e-Government and the electronic transmission of data accelerate data processing and allow standardisation. In this respect, the Government programme "Focused on the Future: Innovations for Administration", which includes the e-Government 2.0 programme, has helped streamline and rationalise administrative processes. The federal Ministry of Defence is using the SCM to monitor the success of own burden-reduction measures. The aim of one in-house programme is to reduce unnecessary bureaucracy in distinct, logical and clearly recognisable steps.

# Notes

1. Programmes to reduce administrative burdens may include the review and simplification of whole regulatory frameworks or laws, so there can be some overlap with policies aimed at simplification through consolidation. There may also be some overlap with the previous chapter on the development of new regulations, as administrative burden reduction programmes are often conducted on a net basis, that is taking account of the impact of new regulations in meeting target reductions.

2. As of 6 March 2009.

3. Cfr. federal Ministry of Justice*, Programm der* Bundesregierung "*Bürokratieabbau und bessere Rechtsetzung*". *Bericht zum Stand der Rechtsbereinigung,* Berlin, 26 March 2009.

   — See:*www.normenkontrollrat.bund.de/Webs/NRCC/DE/Publikationen/ publikationen.html (*last accessed 30 April 2009).

   — Cfr. Section 45 of the Joint Rules of Procedures. See *www.normenkontrollrat.bund.de/Webs/NKR/DE/Homepage/home.html* (last accessed 25 May 2009).

   — Cfr. the National Reform Programme. Germany 2005 – 2008. Implementation and Progress Report 20.

4. Section 43 (1), no.6.

5. Sunset and review clauses have for instance been included in the Act on "Prevention by the federal Criminal Police Office of threats from international terrorism" of December 2008. The Act assigns the task of preventing international terrorist threats to the federal Criminal Police Office (*BKA*) and provides for giving the *BKA* the powers necessary to fulfil this task. In addition to standard police powers, the *BKA* will be authorised to carry out covert interventions in IT systems (also referred to as "conducting remote searches of computer hard drives"). Provision has been made for an evaluation of the relevant parts of the Act "with the assistance of a technical expert five years after entry into force" of the Act. This evaluation clause was inserted because so far there has been no regulatory example for the instruments in question, or because there has been no regulatory example in federal legislation, and because therefore there is a lack of experience/empirical data. In view of the degree of interference with the fundamental rights, this is to prevent the instruments from interfering unreasonably with citizens' fundamental rights. In addition, it is intended to evaluate the impact and the implementation of the Act. Moreover, the relevant paragraph on accessing information technology systems will automatically expire on 31 December 2020, requiring legislators to address this issue again in 12 years.

6. See for example: *www.bundesregierung.de/basisattribute,-469070/Weichen-fuer-umfassenden-Buero.htm.*

7. Referat VIII A7 (*Bürokratieabbau*).

8. See: federal Government (2007), Administrative Costs: To Efforts to Identify, Measure and Reduce Them, The 2007 federal Government Report on the Use of the Standard Cost Model, Section D.1.3., p.25.

9. Status: October 2009.

10. August 2007, at: *http://ec.europa.eu/growthandjobs/pdf/nrp2007/GE_nrp_en.pdf* (last accessed 2 May 2009), p.45.

11. Cfr. the federal government's Annual Report for 2008 on applying the standard cost model and on the status of bureaucracy reduction.

12. Status: October 2009.

13. As estimated by the *Instituts für Mittelstandsforschung* Bonn.

14. See: National Reform Programme Germany (2005-2009), Implementation and Progress Report 2007, August 2007, p.7.

# *Chapter 6*

# Compliance, enforcement, appeals

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

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

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

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

## Assessment and recommendations

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

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

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

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

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

## Background

### *Compliance and enforcement*

#### *General context*

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

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

### *Enforcement of federal regulations*

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

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

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

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

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

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

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

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

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

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

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

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

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

### *Enforcement of Land regulations*

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

### *Compliance*

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

## ***Appeals***

### *General context*

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

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

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

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

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

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

**Box 6.1. Review of administrative decisions by the courts**

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

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

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

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

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

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

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

### *Administrative appeals: regulatory agencies*

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

### *Performance of the system*

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

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

### *Alternative dispute settlement mechanisms*[5]

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

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

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

## Notes

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

# *Chapter 7*

# The interface between member states and the EU

An increasing proportion of national regulations originate at EU level. Whilst EU regulations[1] have direct application in member states and do not have to be transposed into national regulations, EU directives need to be transposed, raising the issue of how to ensure that the regulations implementing EU law are fully coherent with the underlying policy objectives, do not create new barriers to the smooth functioning of the EU Single Market, avoid "gold plating" and the placing of unnecessary burdens on business and citizens. Transposition also needs to be timely, to minimise the risk of uncertainty as regards the state of the law, especially for business.

The national (and subnational) perspective on how the production of regulations is managed in Brussels itself is important. Better Regulation policies, including impact assessment, have been put in place by the European Commission to improve the quality of EU regulations. The view from "below" on the effectiveness of these policies may be a valuable input to improving them further.

## Assessment and recommendations

*The influence of EU origin regulations is significant, as in other EU countries. The German legal system is strongly influenced by EU law.* In some areas such as agriculture and the environment, this affects up to 80% of regulations. The recent measurement of administrative burdens on business established that EU or international origin regulations accounted for some EUR 25 billion, roughly half of the overall annual administrative burdens on enterprises.

*The co-ordination of EU issues is shared by two ministries, with individual ministries taking the policy lead.* As in most other EU countries, the federal government does not have a single policy lead for the management of EU affairs. Each federal ministry is responsible for its area of competence. Co-ordination is mainly carried out through the federal foreign office and the federal Ministry of Economics. The role of the federal parliament is also a defining feature of the German structure. It is significant and can extend to replacing the federal government during the negotiations. The parliament is also the place where EU issues that need to be shared between the federation and the *Länder* are agreed.

*Impact assessment on EU origin regulations follows the same track as for national legislation.* In principle impact assessment is applied the same way as for national laws. The Interior ministry provided guidelines for EU impact assessment in 2006. Priority and resources go to ensuring consultation with the *Länder*, business and labour organisations, and to assuring the constitutionality of the new measures. Business and the unions told the OECD peer review team that consultation procedures for EU origin regulations should be improved.

**Recommendation 7.1. Review the extent to which impact assessment is applied for EU origin regulations, both at the negotiation and the transposition stages, and the approach which is taken. Consider how the process could be improved, taking account of the European Commission's own impact assessment processes. Consider in particular whether there is a need to strengthen consultation with stakeholders.**

*The German record on transposition is average and the system does not include any clear sanctions to ensure timely implementation.* In the latest EU Scoreboard, Germany's implementation deficit was 3% of European directives to be transposed, ranking about average among EU Member States, although well above the target of 1.5% set by the European Councils. A database helps to track progress in transposition against deadlines, and other monitoring tools are used. The OECD peer review team heard that the *Länder* consider transposition to be a challenge because directives lack precision, are too general, and do not correspond with German legal terminology.

**Recommendation 7.2. Carry out a review of transposition processes, in co-ordination with the *Länder*. Consider how the system could be improved with incentives (and sanctions) for late transposition.**

*In recent years Germany has intensified its contribution to the European debate on Better Regulation.* In particular, it has been close to developments relating to administrative burden reduction programmes, and was instrumental in the launch of the EU programme. The *NRCC* interacts closely with the European High Level Group of Independent Stakeholders on Administrative Burdens (*Stoiber Group),* and is a respected player in the European SCM network. There is considerable interest and concern about the need to better manage EU aspects of Better Regulation (which was acknowledged to be as much the responsibility of member states as the EU institutions).

**Recommendation 7.3. Use the EU dimension to frame German Better Regulation more clearly as a potentially key contributor to growth, competitiveness and jobs.**

## Background

### *General context*

As in other EU countries, the German legal system is strongly influenced by EU law. In some areas such as agriculture and environment protection, this affects up to 80% of regulations. The recent measurement of administrative burdens on business established that regulations derived from the transposition of EU or international laws accounted for some EUR 25 billion, which is slightly more than the half of the annual overall administrative burden on enterprises (see Table 5.1 above).[2] The German baseline measurement showed a total burden of approximately EUR 18 billion for the transposed legal acts of the European Commission's Action Programme (*i.e.* the EU directives related to the 13 priority areas selected at EU level: approximately EUR 4.1 billion from EU company law plus approximately EUR 13.9 billion from the other twelve areas (status: September 2008).[3]

## *Negotiating EU regulations*

### *Institutional framework and processes*

As with most other EU countries, the federal government does not have a central policy lead for the management of EU affairs. In its areas of competence, each federal ministry is responsible for all matters related to the preparatory process leading to the adoption of a proposal by the European Commission (and, as outlined below, for its implementation), although the participation of the federal foreign office is always required in matters of fundamental importance. Co-ordination is shared primarily between two ministries (the Ministry of Economics and Technology and the Foreign Affairs Office). However, the Better Regulation Unit and the Finance Ministry are also involved:

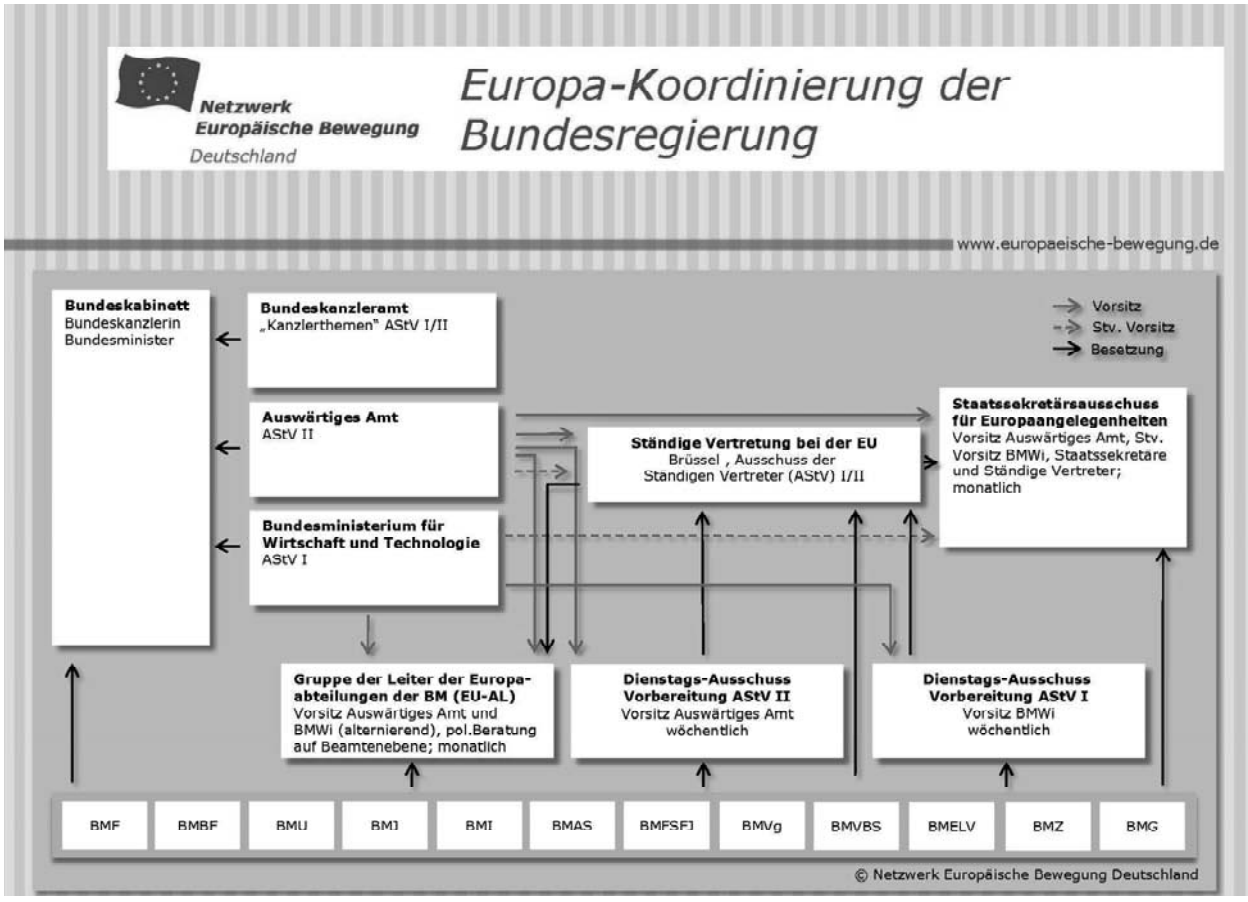
- General policy co-ordination is divided between the *Ministry of Economics and Technology and the federal foreign office*. While the first prepares topics discussed by *COREPER* I, the latter covers *COREPER* II dossiers.[4] Instructions for *COREPER* are therefore transmitted through either of these Ministries, depending on the issue. Policy co-ordination units take up the issues where disagreement exists and address them in the regular meetings of Directors-General responsible for EU matters (whose chair alternates between the Foreign Office and the federal Ministry of Economics) or the Secretaries of State that deal with EU matters (chaired by the Minister of State for Europe at the Foreign Office).

- The *Ministry of Economics and Technology* enjoys a prominent position as it co-ordinates the government's responses to many ongoing developments in the EU. In particular, the Ministry is the main co-ordinator on matters related to Better Regulation, representing Germany in the relevant committees at EU level, notably the Competitiveness Council and the working group dealing with competitiveness and growth. The Ministry also co-ordinates the measures taken by other ministries in relation to Better Regulation in the EU. It represents the federal government in the EU High Level Group on Better Regulation,[5] jointly with the chancellery.

- The *Better Regulation Unit within the federal chancellery* serves as the German interlocutor of the European Commission in the framework of the "Single Point of Contact" (SPOC) Action Programme and co-ordinates the latter within the federal government. The Unit serves also as a contact point for discussion of administrative burden reduction at the EU level as well as among EU member states.

- *The Ministry of Finance* is involved in financial matters.

**Figure 7.1. The responsibilities and co-ordination mechanisms within the federal government on European affairs**




*Source*: *www.europaeische-bewegung.de/index.php?id=4566.*

When the European Commission adopts a new proposal, the responsible federal ministry checks whether German law is in line with the proposal and tries to remove possible discrepancies during the negotiations. At the federal level, the consultation procedures on EU matters are conducted along the lines of the procedure for national regulatory proposals, with the responsible ministry ensuring that the interests of stakeholders are appropriately taken into account.

Germany systematically attempts to contribute the decision-making process of the European Commission. Although there is no empirical evidence available to judge the success of these efforts, Germany has in several cases been successful in promoting options for the implementation of certain EU directives which were particularly appropriate to the German context, *i.e.* the option to choose negotiated access as a means to liberalise gas and electricity markets.

### *The role of parliament and the involvement of the Länder*

The role of the *Bundestag* and the *Bundesrat* in the negotiating phase is considerable. The parliament is, crucially, the place where EU issues that need to be shared between the federation and the *Länder* are debated and agreed. The federal government must inform the *Bundestag* and the *Bundesrat* of all EU legislative acts at the earliest possible time.[6] The *Bundestag* scrutinises the European policy of the federal government throughout the

negotiating phase. In accordance with Article 23 of the Basic Law, the *Länder* participate in matters concerning the European Union. The *Bundesrat* may give its opinion on EU draft legislation and the government must take such an opinion into account when negotiating in Brussels.

When the legislative powers of the *Länder*, the structure of *Land* authorities, or *Land* administrative procedures are "primarily affected", the position of the *Bundesrat* "shall be given the greatest possible respect." The consent of the government is nonetheless always required in matters that may result in increased expenditures or reduced revenues for the federation. When exclusive legislative powers of the *Länder* are primarily affected, notably concerning schools, culture, and broadcasting, the mandate for conducting negotiations within the Council of European Ministers "shall be" delegated to a State representative (usually a minister) designated by the *Bundesrat*. These rights shall be exercised with the participation and concurrence of the federal government. In this context, the *Bundesrat* as chamber representing the *Länder* and not as legislative organ, not only participates in determining the German position domestically, but directly takes over the function of representing the Federal Republic of Germany as a member of the EU. In cases involving areas other than the three specified above, the *Länder* can appoint a representative only in consultation with the federal government.

The *Länder* also participate in the European Committee of the Regions, sharing ownership of its opinions and reports. Furthermore, all of the *Länder* have a liaison office in Brussels, which enables a direct exchange of information with, as well as lobbying of the EU institutions.

### *Ex ante impact assessment*

The responsibility of each federal Ministry in EU affairs includes the consideration of whether impact assessments should be carried out during negotiations on the Commission proposal in the EU legislative process, and subsequently throughout the national law-making process. After the submission of a proposal by the Commission, the lead ministry is also supposed to analyse whether a plausible estimate of the expected administrative burden has taken place, and make such an assessment if it has not been done. The Ministry of Interior provided guidelines concerning EU impact assessment in 2006. These guidelines contain information on the methodologies for analysis as well as indications on the way impact assessments are prepared and used at the EU level. They also provide federal ministries with concrete recommendations on how to best make use of the tool, and encourage them to critically consider the European Commission's own impact assessments to ensure that German interests are taken into account at an early stage in the decision-making process.

## *Transposing EU regulations*

### *Institutional framework and processes*

Responsibilities for implementing EU legislation are distributed in accordance with the allocation of legislative and implementing competences between the federal government and the *Länder*. Within the federal government, drafts implementing EU legislation are prepared by the federal ministry responsible for the subject area, as governed by the *Joint Rules of Procedure*. The allocation of responsibilities during the transposition phase does not significantly differ from the negotiation stage (see above).

When adopting new national legislation on the basis of EU legislation, the responsible ministry determines whether the regulatory proposal is in line with European legislation, if necessary in consultation with the Ministry of Economics and Technology, the Ministry of Justice, the Foreign Office, and other bodies concerned. Since there are rules on procedures and responsibilities, conflicts regarding responsibilities are rare. The federal chancellery arbitrates in case of disagreement on how to allocate the tasks. In exceptional cases, the chancellor shall make use of his/her power to impose policy guidelines.

The position of the *Länder* is taken into account to different degrees by the federal government, depending on the matter. As a rule, the procedures leading to the adoption of transposition acts are the same as the decision-making process followed in the case of domestically initiated bills. The responsible federal ministry still functions as a co-ordinator even if competence for the transposition of a directive lies with the *Länder*. The ministry provides help on request and collects the relevant information for an efficient monitoring and final notification to the EU Commission.

Federal structures pose specific challenges for timely transposition and Germany is no exception. The existence of various layers of governments as well as different institutional authorities intervening according to the different policy areas makes transposition particularly complex. The 2006 federalism Reform contributed to streamline the process by abolishing "framework legislation". This type of legislation allowed for wide legislative discretion by the *Länder*, leading in some cases (such as environment protection) to dozens of different acts linked to the transposition of the same directive. Further to the reform, only one federal transposition act is necessary, although it may involve the adoption of secondary implementation measures in each *Land*.

### *Legal provisions and the role of parliament*

During the transposition phase, both chambers are involved in the adoption of legislation implementing EU directives. The transposition of directives follows the general procedures of legislation laid down in the Basic Law. There are no specific rules or fast-track procedures. In general, draft legislative acts transposing an EU directive are sent to the parliament one by one. To the federal government's knowledge, this does not cause any problem for the parliament in terms of keeping up with the pace of the European agenda.

### *Ex ante impact assessment*

It is the responsibility of each responsible federal ministry to organise the transposition process, provided that the provisions included in the *Joint Rules of Procedure*s are respected. Accordingly, the type of RIA and the kind of analysis carried out are not are not dissimilar to what federal ministries normally do when preparing bills of domestic origin. Impact assessments are automatically carried out in the case of enacted EU legislation, since transposition into national law is by means of a national legal act.

### *Monitoring transposition*

In addition to the federal Ministry of Economics and Technology, which is responsible for overseeing the implementation of EU legislation at the federal level, each Ministry directly affected by an EU legal act is responsible for ensuring the implementation of the relevant EU legislation. EU Directors-General and EU State Secretaries, as well as other bodies responsible for co-ordinating EU affairs within the federal government are consulted if necessary. Various mechanisms are in place to monitor transposition:

- Monitoring by regular meetings of Directors-General and of State Secretaries responsible for EU matters.

- Obligation to report to the *Bundestag* in accordance with § 4 (4) nos. 2 and 3 of the Act on Co-operation between the federal Government and the German *Bundestag* in Matters concerning the European Union (*EuZBBG*).

- Obligation to co-ordinate with, and report to the *Länder* in accordance with para. VI nos. 1 and 2 of the annex to § 9 of the Act on Co-operation between the federation and the *Länder* in Matters concerning the European Union (EuZBLG).

As regards the relation between the federation and the *Länder*: liability for failure to meet specified deadlines; See Art. 104a para. 6 of the Basic Law (GG).

Gold-plating is not considered a negative practice per se by the federal government, provided it does not delay transposition. It may even be considered a useful tool, for the better integration of transposition measures into the existing legal framework. Some stakeholders even suggest that gold-plating has been "a matter of course" for successive governments. Nonetheless, the principle that gold-plating must be avoided if it puts at risk the timely transposition of a directive has been agreed by the federal ministries' State Secretaries responsible for European affairs.

At the *Länder* level, transposing EU legislation is reported to offer significant challenges partly because they are often too imprecise, too general and not formulated closely enough in line with German legal terminology. This makes it difficult to integrate them into the federal legal system. Also for this reason, one-to-one transposition, although stated as a principle in many *Länder*, is often problematical, leading to instances of gold-plating.

## Interface with Better Regulation policies at EU level

In recent years, Germany has intensified its contribution to the European debate on Better Regulation. It has for instance been very active in promoting the administrative cost reduction agenda at the European level. It was not a coincidence that the EU Action Programme to cut administrative burdens was adopted during the German Presidency of the EU in 2007. Germany's government programme, which was initiated before the Action Programme was launched, fits within this overall framework. As one of the five Member States[7] conducting their own burden measurement, Germany has identified burdens on business resulting from the implementation of EU regulations. Germany's measurement data are being incorporated into the EU totals.

### Box 7.1. Germany's performance in the transposition of EU Directives

Germany's backlog in transposing EU legislation has been below the rate of 1% required by the European Council. The latest European Commission Internal Market scoreboard reports at 0.8% the deficit in July 2009, ranking Germany at the 13th place. Thus, Germany has regularly ranked among the top half of Member States as regards transposition of Internal Market Directives. With regard to the transposition of EU directives in all sectors, Germany ranked at the first place in September 2009.

The number of open infringement proceeding is by contrast well above average. With 73 pending cases initiated by the European Commission, Germany is sixth after Italy, Spain, Belgium, Greece and France in terms of disputes on the *acquis communautiare*. The number of cases decreases continuously, but remains at a certain base rate *inter alia* because of the number of alleged infringements of public procurement law by municipalities (ca. 12 000 municipalities in Germany with 82 million inhabitants). Cases pending before the ECJ, however, are at a very low level (six judgments in infringement cases in 2008, and only in three of them the ECJ held that Germany actually infringed Community law).

| DE | Nov-97 | May-98 | Nov-98 | May-99 | Nov-99 | May-00 | Nov-00 | May-01 | Nov-01 | May-02 |
|---|---|---|---|---|---|---|---|---|---|---|
| Transposition deficit as % in terms of Internal Market Directives | 8.5 | 5.4 | 2.7 | 2.4 | 2.9 | 3.4 | 3.1 | 2.8 | 2.6 | 2.4 |
| | Nov-02 | May-03 | Jul-04 | Jul-05 | Dec-05 | Jul-06 | Nov-06 | Jul-07 | Nov-07 | Jul-08 |
| | 2.7 | 3 | 3.5 | 1.4 | 1.3 | 1.8 | 1 | 1 | 0.9 | 0.5 |

| DE | Aug-00 | Mar-01 | Oct-01 | May-02 | Oct-02 | Apr-03 | Oct-03 | Apr-04 | Nov-04 | May-05 | Nov-05 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Directives for which no national measures (implementing all adopted directives) have been notified as % | 11.2 | 5.78 | 4.57 | 4.43 | 4.09 | 3.62 | 2.98 | 2.26 | 2.48 | 0.78 | 0.5 |
| | May-06 | Nov-06 | Mar-07 | May-07 | Jul-07 | Oct-07 | Nov-07 | Feb-08 | Apr-08 | Jun-08 | Aug-08 |
| | 1.09 | 1.11 | 0.83 | 0.57 | 0.64 | 0.32 | 0.39 | 0.49 | 0.51 | 0.41 | 0.51 |

| DE | Mar-07 | May-07 | Jul-07 | Oct-07 | Nov-07 | Feb-08 | Apr-08 | Jun-08 | Aug-08 |
|---|---|---|---|---|---|---|---|---|---|
| Directives for which no national measures (implementing all directives in force) have been notified as % | 1.37 | 0.95 | 1.07 | 0.53 | 0.65 | 0.82 | 0.86 | 0.68 | 0.85 |

European Commission Impact assessments are used in particular during the negotiating process. Germany considers that they often provide useful information *e.g.* for the assessment of the subsidiarity and proportionality principles, or the economic effects of a planned piece of legislation. They also reveal if such an assessment has not (or insufficiently) been carried out. The quality of EU Impact assessments is considered in general to have steadily improved over recent years. The Impact Assessment Board plays an important role in this context. Nevertheless, there is some room for improvement. This concerns on the one hand the assessment of administrative burdens and the assessment of effects on SMEs, which Germany believes would benefit from (additional) external scrutiny. The scope for EU Impact assessments could also be broadened.

The *NRCC* interacts closely with the European High-Level Group of Independent Stakeholders on Administrative Burdens (so-called "*Stoiber Group*"). It is also a respected reference institution in the inter-governmental dialogue between EU Member States, holding regular contacts with similar oversight bodies in the Netherlands and in Sweden as well as representatives of the European SCM Network. The *NRCC* also supports the federal government on questions of EU policies concerning Better Regulation in general.

# Notes

1. Not to be confused with the generic use of the term "regulation" for this project.
2. Costs resulting from directly applicable EU law, *i.e.* EU regulations, were not identified comprehensively, but only in selected areas.
3. See: federal Government, 2008 Report on the Use of the Standard Cost Model, p.35. The EU Action Programme includes both directives and regulations.
4. With the exception of trade policy matters, which are in the competence of the federal Ministry of Economics. *COREPER* (from the French *Comité des représentants permanents*) is the Committee of Permanent Representatives within the Council of European Ministers. Its task is to prepare the meetings of the European Council. It consists of two formations, the so-called *COREPER* I (composed by the deputy heads of mission and dealing largely with social and economic issues); and the *COREPER* II, whose members are the heads of mission (with usually the rank of ambassador). The *COREPER* II deals political, financial and foreign policy issues.
5. Composed by national regulatory experts, the EU High Level Group on Better Regulation was set up in 2006 by the European Commission in order to advise the Commission on its general strategy to simplify and improve European legislation and to facilitate the development of better regulation measures at both national and EU level (see: *http://ec.europa.eu/enterprise/regulation/better_regulation/high_level_group_en_version.htm*, last accessed 29 May 2009).
6. This obligation is enshrined in the Basic Law (Art.23) and a number of legal text, including the "Act on Co-operation between the federal Government and the German *Bundestag* in Matters concerning the European Union" (*Gesetz über die Zusammenarbeit von Bundesregierung und deutschem Bundestag in Angelegenheiten der Europäischen Union, EUZBBG*).
7. The States are Austria, Denmark, Germany, the Netherlands and the UK (status: April 2009. *Source*: European Commission).

# *Chapter 8*

# The interface between subnational and national levels of government

Multilevel regulatory governance- that is to say, taking into account the rule-making and rule-enforcement activities of all the different levels of government, not just the national level- is another core element of effective regulatory management. The OECD's 2005 Guiding Principles for Regulatory Quality and Performance "encourage Better Regulation at all levels of government, improved co-ordination, and the avoidance of overlapping responsibilities among regulatory authorities and levels of government". It is relevant to all countries that are seeking to improve their regulatory management, whether they are federations, unitary states or somewhere in between.

In many countries local governments are entrusted with a large number of complex tasks, covering important parts of the welfare system and public services such as social services, health care and education, as well as housing, planning and building issues, and environmental protection. Licensing can be a key activity at this level. These issues have a direct impact on the welfare of businesses and citizens. Local governments within the boundaries of a state need increasing flexibility to meet economic, social and environmental goals in their particular geographical and cultural setting. At the same time, they may be taking on a growing responsibility for the implementation of EC regulations. All of this requires a pro active consideration of:

- The allocation/sharing of regulatory responsibilities at the different levels of government (which can be primary rule-making responsibilities; secondary rule-making responsibilities based on primary legislation, or the transposition of EC regulations; responsibilities for supervision/enforcement of national or subnational regulations; or responsibilities for service delivery).
- The capacities of these different levels to produce quality regulation.
- The co-ordination mechanisms between the different levels, and across the same levels.

## Assessment and recommendations

*Better Regulation initiatives by the Länder are largely separate from federal initiatives, in keeping with their independent status.* The *Länder* are not directly subject to the federal level Better Regulation agenda. For example, they are not formally part of the federal government's administrative burden reduction programme, although there has been some co-operation through pilot projects. Instead, most of the *Länder* have developed aspects of

Better Regulation on their own account and suited to their own context. Some initiatives go back a long way, to the mid 1970s. It was beyond the scope of this review to assess the situation in detail, but the reduction of administrative burdens and modernisation of the public administration appear to be the current focus of the *Länders*' Better Regulation agenda. Initiatives are not confined to the *Länder* level, with a number of cities taking initiatives too.

*There appears to be a patchwork of Better Regulation initiatives at the Länder level, some of which are quite highly developed.* A few *Länder* are well advanced in Better Regulation policies, sometimes beyond the federal initiatives. A number of *Länder* have established dedicated central units for Better Regulation or some form of oversight. They commonly make use of the Internet to consult and communicate with stakeholders. Administrative burden reduction is the most widely used process, backed up by a decision of the *Bundesrat* in 2007 on a series of measures restricting the density of regulations and reducing the number of standards and administrative provisions. There are marked differences as regards the deployment of *ex ante* impact assessment procedures. It is acknowledged that practice is so far not optimal and there is room for improvement. The implementation of the EU Services Directive (as in other EU countries) is having a marked impact on the organisation of services.

*Federal-Länder co-operation starts at the top with the engagement of the Bundesrat.* The relevance of the *Länder* for the implementation of federal legislation lies in their active role throughout the processes used to shape the latter, not least via their consent expressed in the *Bundesrat*, which represents the sixteen *Länder* governments. The *Joint Rules of Procedure* require ministries to involve representatives from the *Länder* "as early as possible" in the regulatory process. Every bill passed by the *Bundestag* must be submitted to the *Bundesrat*, either requiring its consent or allowing it to lodge an objection. Beyond this strong formal engagement between the federal level and the *Länder*, regular information exchanges take place via the federal chancellery Better Regulation unit. There are also specialised conferences and a network of working groups to pick up issues of shared interest.

**Recommendation 8.1. Consider a review/evaluation of co-operation agreements and working groups, to pinpoint what works and what works less well (and why). Seek to identify Better Regulation processes (such as administrative burden reduction) or issues (such as sustainability) where there is shared interest in enhanced co-operation, and focus efforts on these issues.**

*There appear to be some challenges with federal-Land co-operation mechanisms leading to a suboptimal handling of important issues.* The OECD peer review team heard some concerns about the implementation of federal laws (their complexity and inflexibility) which suggests that the system does not always work smoothly. The fact that federal and *Länder* Better Regulation initiatives are largely disconnected also suggests that the mechanisms for co-operation are not fully effective in promoting a shared agenda where this is appropriate, for example in the area of administrative burdens. Both levels of government lose out on the added value of working together. The failure to co-ordinate effectively may partly be explained by the fact that there are too many (not too few) working groups, and focus is lost.

Co-operation inevitably has a political nature which can undermine the enforcement of any resulting agreements.

*Competition is more evident than co-operation between the Länder.* The scope for competition in a federal system can have a positive impact on the introduction of Better Regulation tools and the development of best practices. Germany considers that the complexity of a federal state is balanced by the advantage of competition between the *Länder*. It positively encourages this approach, as evidenced by the planned introduction of a benchmarking provision in the Basic Law (the first provision of its kind in Europe). Each *Land* appears to concentrate on its own needs, though some are willing to co-operate with others over best practice, and the co-operation network appears to be growing. The OECD peer review team were told that it was important not to take too structured an approach. Sharing of best practice was best spread informally. *Länder* vary a lot in size (city size to country size) and economic strength. Variable geometry may allow more flexibility and dynamism but there is also the risk of duplication of effort. The question which also needs to be asked is how do companies cope when they "migrate" across *Länder* boundaries with different regulations?

**Recommendation 8.2. Consider an evaluation of the extent to which competition between the *Länder* really does stimulate best practices, and the extent to which these are picked up across the *Länder*. Consider a survey of business views to check attitudes to the German internal market and its efficiency (in terms of harmonised regulatory approaches across the *Länder*).**

## Background

### *Structure, responsibilities and funding of local governments*

#### *Structure of subnational governments*

There are three levels of government (federal, *Land* and local). There are sixteen *Länder* which are states in their own right, exercising state authority - including the right to develop and enact legislation - in the areas set out in the Basic Law (see below). Each *Land* has its own constitution, parliament, government, administrative structures, and courts. The municipalities (*Kommunen*) comprise 12 200 cities and communities, and 301 rural districts and counties (*Landkreise*).

#### *Responsibilities and powers of subnational governments*

#### *Länder* responsibilities

The federal nature of the German state means that significant powers and responsibilities are with the *Länder*, linked to their competences under the constitution.

Areas subject to concurrent competences include civil and criminal law, public welfare, food and medicines law, transport, protection of the environment, university admission and diplomas, and regional planning. The power to legislate lies with the *Länder* until the federation does not hand down any statutes of its own in those fields. In some domains, the federation is entitled to legislate only if it is necessary to create equivalent living conditions on the federal territory or to maintain legal or economic unity in the overall state interest. In some cases of concurrent legislation, the *Länder* have a right to derogate in principle and are entitled to adopt their own derogating laws, even after the federation has handed down laws. In this case, the most recently adopted statute applies. Areas where the derogation principle applies include nature conservation, regional planning, admission to and graduation from higher education institutes.[1]

The *Länder* exclusive competences include their own constitutions, internal security and policing, education, cultural affairs, and radio legislation. A key exclusive competence is over local government (see below). Only the *Länder* are entitled to delegate tasks to the local level, and they have exclusive responsibility for the organisation of local government. According to Art. 84 (1) of the Basic Law, the *Länder* are entitled to decide on the establishment of authorities and administrative procedures, as well as related implementing acts and ordinances, which mainly address municipalities (*Kommunen*) in their implementation tasks.

## County and municipality responsibilities

The federal system laid down by the Basic Law establishes that the municipalities are constituent parts of the *Länder*. The *Länder* therefore set the framework for the operation of local governments. At the same time, in line with a constitutional tradition which goes back to the early nineteenth century, the municipalities and counties have had self-governing rights in all local community matters under their responsibility within the framework of the laws. The Basic Law stipulates that they must be given the opportunity "to regulate all local affairs on their own responsibility, within the limits prescribed by the laws". This right of self-administration specifically covers public local transport, public road-building, water, gas and electricity supplies, sewage disposal services and town planning. In addition, they play a traditionally very active and autonomous role in the delivery of a broad range of public services. These include social assistance, local land-use and infrastructure provisions. They implement almost three-quarters of federal and *Länder* legislation. The functional (though not rule making) importance of local governments in Germany is therefore significant compared to most other OECD countries.

Municipalities and counties may initiate their own projects and policies to improve enforcement, within the framework of local self-administration. They grant licences, implement procedures, draw up plans etc. Over 800 local utilities cover activities such as electricity, gas and water services, many of which are partly or wholly owned by the municipalities. Within the framework of municipal self-government, supervision of the *Länder* is limited to the legality of the administrative procedures used.

### *Funding of subnational governments*

The federation has almost exclusive power to legislate on taxes. The total tax revenues are shared between the federation, the federal states (*Länder*) as a whole and each *Land*. In addition, the financial equalisation among the *Länder* designed to remedy structural differences between financially stronger and weaker states by sharing tax revenue helps also disadvantaged *Länder* meet their obligations and enjoy their sovereignty. This is to ensure equal living conditions throughout the federal territory. In addition, the federation may allocate additional grants from its own funds to less favoured *Länder*, *i.e.* in addition to the redistribution among the *Länder*. In each *Land* there are similar equalisation systems in place to remedy differences between municipalities.

Public revenue is divided between a "separation system" and a "*connex system*" (Art. 106 of the Basic Law). Under the first form, proceeds of taxes are allocated to a single level of the system (either the federal, the *Land*, or the municipal level). By contrast, various levels share the proceeds of the latter form of taxes (these are also called joint taxes). Some 70% of Germany's tax receipts is collected through the "*connex system*".

There are three schemes for *Länder* development projects. "Joint Fiscal Tasks" are jointly decided by the federal government and all *Länder*, and cover fields such as subsidies to improve regional economic structures, and financial aid for R&D. "Investment Aid" can be granted for major investment projects by the *Länder* or communities to promote balanced economic development. Grants for the "Disbursement of Funds" support social transfers by the *Länder*. Complex institutional arrangements are in place to regulate these transfers, but a number of factors are said to hinder optimal efficiency in resource allocation. Major taxes like the individual income tax or the value added tax (VAT) are for instance divided between the federal, *Land*, and, sometimes, local levels according to complex rules. Co-financing (*i.e.* the joint funding of projects by the three layers of government) is perhaps the most important issue hindering cost-efficiency, for split responsibilities for a project not only seriously impede effective project evaluation but also project control.[2]

The introduction of a new common debt rule for the federation and the *Länder* as of the budgetary year 2011 was the core of federalism Reform II (*Föderalismusreform* II), which entered into force in August 2009. According to this reform, no credit is allowed to balance the federal and state budgets. Only a few exemptions are admitted. Five financially particularly weak *Länder* receive consolidation aids to ensure compliance with this rule.

## *Better Regulation policies deployed at subnational level*

### *General context*

The *Länder* are not directly subject to the federal level Better Regulation agenda or processes as regards their own regulatory activities. Most of their regulatory activities (development and implementation of their own legislation, implementation of federal legislation in their own right) are carried out independently, in keeping with their independent status under the constitution. The *Länder* are not, for example, an integral part of the federal government's "Bureaucracy Reduction and Better Regulation" programme. Apart from exchanges of information, data and experience with the Better Regulation Unit at the federal chancellery, the programme is not a joint programme involving all levels of government.

Most of the *Länder* have developed elements of an approach to Better Regulation tailored to their specific needs. Interest and initiatives go back a long way. In some *Länder*, policies to promote quality regulation date back to the mid-1970s. Germany was among the first EU member states to develop quality standards for a wide range of public organisations (from rent insurance companies, to museums and regional councils) and this included the *Länder*. From the early 1990s measures aimed at reducing administrative burden and promoting innovative solutions to bureaucratic issues were developed through the Speyerer Qualitätswettbewerb. The reduction of administrative burdens and modernisation of the public administration appear to be the current main focus of the *Länder* Better Regulation agenda.

Initiatives have not been confined to the *Länder* level. Among other initiatives a number of cities developed innovative approaches to city management as well as solutions leading to their further effective development.[3] The local level has triggered debate and action with respect to the New Public Management reforms, which continue today.

The scope for competition in a federal system can have a positive impact on the introduction of Better Regulation tools, notably with regard to streamlining public administration, simplifying the legislative environment, and spreading e-Government. Individual state and local authorities may compete with each other for new residents or

businesses. This competition encourages a search for best practices and makes it possible to test different approaches. The German system positively encourages this approach, as evidenced by the introduction of a provision for benchmarking in the Basic Law. Better Regulation is generally seen as important for the promotion of the economy, playing its part alongside other policies to promote an attractive fiscal environment and secure effective infrastructure.

### *Institutional framework for Better Regulation*

A number of *Länder* have established dedicated central units for Better Regulation policies and/or oversight bodies located at the centre of their government. Some of them were introduced in the early 1990s. "Regulatory review bodies" are quite common at the *Länder* level. Their mandates range from providing advice to formally checking the quality of legislative drafts and monitoring compliance with administrative procedures.

### *Public consultation and communication*

*Länder* commonly make use of the Internet, to involve stakeholders and communicate their Better Regulation initiatives. Information is also often channelled through the state and local chambers of commerce. The *Länder* manage their own official gazette where enacted state-level legal acts are notified and published. The majority of the *Länder* complement this with online registers. Some *Länder* post the rules of procedures of the state government as well as the guidelines for impact assessment. Brochures and newsletters are also widely used.

### *Ex ante impact assessment of new regulations*

Differences between *Länder* are significant, both with regard to the legal framework and procedures. Most *Länder* have binding provisions on RIA, among which the *ex ante* assessment of risks may be covered. Sunset clauses are regularly used in many *Länder*, in some cases for many years.

The *Länder* are relatively advanced in their considerations to institutionalise parliaments' assessments of the impacts and quality of draft bills. Like at the federal level, the responsibility for RIA lies with the lead ministry. The mechanisms introduced by the *Länder* to examine the preparation of legislation usually encompass also the monitoring of the RIAs carried out. The results of the assessments are usually reported in the legislative proposal, and can be accessed by the State parliament and the consulted parties for examination. Initiated by the *Land* Rhineland-Palatia, the Conference of the presidents of the *Länder* Parliaments have since 1996 been discussing measures to strengthen the effectiveness of the regulatory quality checks made by the parliaments. In 1998, the presidents of all *Land* parliaments called for an extended use of regulatory quality assurance mechanisms to complement analysis and assessments by the executive. This included recommendations for parliaments to oblige their governments to report, after a certain period of time, on the effects of a new regulation, and that parliaments' committees systematically apply a set of regulatory quality test questions in their scrutiny of bills.[4] A number of *Länder* also considered formalising RIA and other regulatory assurance mechanisms in the respective *Länder* rules of procedure.

In Rheinland-Palatia, early considerations included creating a specific body charged with carrying out assessments for the Parliament of the quality of bills.[5] This idea was rejected, apparently because the Parliament considered the task to be technical and scientific, and possibly constraining the Parliament in its political deliberations. The Rheinland-Palatia Parliament instead opted for a closer co-operation and more frequent

exchange of information with the government on assessments of draft regulations. An agreement effective from January 2001 between the Parliament and the government of Rheinland-Palatia aims at improving the *ex ante* assessment of bills by obligating the government to inform the Parliament at a very early stage of law drafting if RIAs of future planned regulation will be prepared.

### *Transposition of EU legislation*

In their areas of exclusive competence the *Länder* follow the same procedures as they apply to the development of their domestic legislation.

### *Reduction of administrative burdens*

The *Länder* agreed with a decision of the *Bundesrat* of July 2007 on a series of measures restricting the density of regulations and reducing the number of standards and administrative provisions. These initiatives aim at a long-term burden relief for enterprises, especially SMEs, and expanding the municipalities and local administrations' scope for action to reduce burdens. Among others, the *Länder* measures include the introduction of a regulatory impact analysis taking account of all major interests of citizens and enterprises, as well as of a capping system for administrative provisions (systematic review of the number of administrative provisions in the *Land* at regular intervals). A review to consider how to reduce the number of administrative regulations and improving their flexibility (less binding) is also under discussion. Possibilities are being investigated of deregulation in areas in which the *Länder* were granted new legislative competences after the federalism Reform (*e.g.* law on administrative proceedings). The establishment in the *Länder* of a central legislation examination /supervision body is also under consideration.[6] When they apply the SCM, the *Länder* have used the approach developed by the federal authorities.

Five *Länder* took part in two pilot projects conducted by the Bertelsmann Foundation on the reduction of administrative burdens for businesses, using a simplified version of the SCM ("SCM quick scan of *Land* law") in 2006.[7] On that occasion the applicability of the SCM to sub-national legislation was put to the test for the first time.

### *One-stop shops and the EU services directive*

The implementation of the EU Services Directive (Directive 2006/123/EC) is having a range of impacts on the municipalities, since these are responsible for approximately 80% of the necessary permits and procedures for service providers. Accordingly, under the regime of the Directive, municipalities are intended to serve as standard points of contact in the larger *Länder* with a stronger economic base. This evolution formally institutionalises the already widespread process of consolidating one-stop shops in counties and municipalities. The necessary infrastructure is being created where it did not previously exist.[8]

### *Model local authorities*

Various *Länder* have introduced experimental acts which provide either a limited number of so-called "model local authorities" or all their local authorities with an opportunity to deviate from certain standards defined under *Land* law for a limited period. These experiments are evaluated, accompanied by scientific analyses in some areas, with the aim of introducing successful practice to reduce superfluous regulations into *Land* law on a permanent basis.

### *Local level initiatives*

The New Public Management reforms led to the implementation of a package of "control" reforms starting from the re-construction of the budget to the development of modern audit/inspection tools at the local level. The so-called *Neue Steuerungsmodell* was oriented at the local level and, above all, at the modernisation of local budgets. The *Kommunale Gemeinschaftsstelle fuer Verwaltungsmanagement (KGSt*) was also established in the wake of that reform wave.[9] It is a voluntary co-operation platform of municipalities that has supported their members in their administrative reform. The *KGSt* today provides consulting services to local public organisations. It also serves as a common network to all the municipalities (with over 35 years of experience in some of its services (for instance *KIKOS Wissensdatenbank*, and *IKON Vergleichdatenbank* since 1971). It also facilitates the organisation of awareness/communication campaigns and events on administrative reforms. A *KGSt* Forum takes place every three years and has become a standard event for the German municipalities.

## *Co-ordination mechanisms*

### *Vertical co-ordination*

#### Co-ordination over the development of federal legislation

The major responsibilities of the *Länder* for the implementation of federal legislation means that they are active participants in the processes used to shape the latter, not least via the *Bundesrat*, which represents the sixteen *Länder* governments. The *Joint Rules of Procedure* requires ministries to involve representatives from the *Länder* "as early as possible" in the regulatory process. Each ministry has its own procedural rules. Generally, the *Bundestag* and all federal ministries are involved. There is no lead ministry. The Joint Rules also require that draft regulations include estimates of impacts on *Land* and local government budgets. The constitution requires that every bill passed by the *Bundestag* must be submitted to the *Bundesrat*, either requiring the *Bundesrat*'s consent, or providing it with the opportunity to lodge an objection (see Chapter 4).

#### Co-ordination over other regulatory activities

##### *Vertical co-ordination between the different levels of government*

A regular exchange of information takes place between the federation, the *Länder* and the local authorities' national association through the Better Regulation Unit at the federal chancellery. Moreover, the *Länder* use the "standing specialised conferences" (*Fachministerkonferenzen*), federation-*Länder* work groups and *Länder* work groups or similar (*e.g.* the "Bureaucracy Reduction Network")[10] for the purposes of co-ordination and the mutual exchange of information. The specialised conferences meet regularly and are organised in several layers of Working groups and Lower Working Groups. Decisions taken by these bodies are, as a rule, not binding but guarantee a common approach of the federal and *Länder* authorities. The "*Deutschland-Online*" conference of State Secretaries serves as the steering body for the various layers of government for the purposes of co-ordinating reform projects in the area of e-Government.

Further to the *Föderalismusreform* II, a new process was introduced to avoid budgetary crises. A newly created Stability Council (*Stabilitätsrat*) took over co-ordination functions from the former Financial Planning Council. Members of the Stability Council are the federal Ministers of Finance and of Economy, as well as the finance ministers of the

*Länder*. The mandate of the Council is to monitoring the federal budget and the budgets of each *Land*; the examination of possible crisis situations on the basis of common criteria; and the creation and control of a recovery procedure to avoid the crisis.

The Standing Conference of the Interior Ministers of the *Länder* (IMK) generally meets twice a year, unless current political developments or threats to the public security require special meetings. Most issues discussed by the ministers and state secretaries are prepared by the six permanent IMK working groups, whose organisational structure mirrors the portfolio of the interior ministries. In addition to the topics prepared by the working groups, the *Länder* and the federation may request other items to be put on the agenda of the meetings, too. Shortly before the IMK meets, the state secretaries and state councillors also hold a conference during which they review the results of the working groups and the additional items for the agenda, and prepare them for the subsequent debate of ministers and senators. Possibility to abstain from voting. If a *Land* or the federation holds a different position, it may abstain from voting and explain its view in the minutes to the meeting. Normally, decisions of the IMK are made public, unless a *Land* or the federation objects to the publication.

### *Horizontal co-ordination*

Horizontal co-operation between the *Länder* is through conferences of each ministry as well as the Conference of the Minister-presidents (the chief-executives of the state governments), which meets at least bi-annually. Several permanent working groups support the conferences. Horizontal co-operation is also *ad hoc*, including direct bilateral collaboration agreements and joint projects as well as co-operation across regions. Examples are inter-state treaties and other agreements to improve co-operation between the northern German *Länder* in the areas of consumer protection and *Land* laboratories or on IT matters. The implementation of the EU Services Directive has triggered rapid and intense rationalisation and collaboration of the provision of administrative services between *Länder* and municipalities.

"Benchmarking" is an important feature of the German system. Germany is the first country in the EU to enshrine the principle of benchmarking in a provision of the constitution to promote competition and continuous assessment. The necessary constitutional amendment entered into force in summer 2009. Because of the variety of experiences among the *Länder* and their willingness to experiment, comparisons, lesson-drawing and sharing of good practices are often used to advance reform. The approach deployed by Germany sensibly seeks to make the most of the juxtaposition of competition between the *Länder* and mutually helpful co-operation, with a view to reducing the significant current disparities between *Länder*.

# Notes

1. This right has so far only been used once, in relation to hunting legislation.
2. See OECD Report 2004, p.54.
3. See for instance: H. Hill/H. Klages (1994), *Lernen von Spitzenverwaltungen, RAABE; H.Hill/H. Klages (1995), Reform der Landesverwaltung, RAABE; H.Hill/H. Klages (1996), Reform der Landesverwaltung II, RAABE; H.Hill/H. Klages (1997), Reform der Landesverwaltung III, RAABE.*
4. The recommendations of the presidents explicitly mention the use of the federal Governments' checklist questions in case there is no Land-specific questionnaire.
5. *Landtags-Drucksache Rheinland-Pfalz* 13/3172.
6. Cfr. The National Reform Programme. Germany 2005 – 2008. Implementation and Progress Report 2007, 8 August 2007, at: *http://ec.europa.eu/growthandjobs/pdf/nrp2007/GE_nrp_en.pdf* (last accessed 2 May 2009), p.46.
7. Bertelsmann Stiftung (2005), *Der SKM Quick-Scan im Überblick, Gütersloh.*
8. An example of successful facilitation of business start-ups is Rhineland-Palatia, where the procedure for setting up a business has been transferred to "Starter Centers", *i.e.* chambers of commerce. People who want to set up their own business can now file several registrations with a single agency.
9. It initially operated under the name of *Kommunale Gemeinschaftsstelle für Verwaltungsvereinfachung.*
10. The "Bureaucracy Reduction Network" was established in 2007 on the initiative of Brandenburg to provide a forum for the exchange of views and information on topical issues between the bodies involved in efforts to reduce bureaucracy in all the federal *Länder*, the staff of the secretariat of the *NRCC* and the Better Regulation Unit at the federal Chancellery? At the same time, the network serves as a co-ordinating platform for the allocation of responsibilities and a common lobbying body. A jointly used database in which every Land can post current projects or literature facilitates the exchange of information.

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# *Annex A*

## Ministerial responsibility for assessing regulatory impacts in the German federal government

Depending on the subject, responsibilities and interests, the different federal ministries contribute to the assessment of the legislative proposal along the following lines:

*Federal Ministry of the Interior:*

- compatibility with the Basic Law;
- examination whether the planned legislation can be incorporated into the existing legal system without giving rise to any inconsistencies;
- interests of local authorities;
- interests of data protection;
- interests of the public service;
- interests of sport; and
- interests of information technology, in particular impact of bills on public service IT.

*Federal Ministry of Justice:*

- compatibility with the Basic Law;
- examination whether the planned legislation can be incorporated into the existing legal system without giving rise to any inconsistencies; and
- examination in accordance with systematic and legal scrutiny principles.

*Federal Ministry of Finance:*

- impacts on public budget revenues or expenditures (federal, *Länder* and local level); and
- provisions on taxes and duties.

*Federal Ministry of Economics and Technology:*

- impact of bills on costs for the private sector (in particular for small and medium-sized businesses); and
- impact on prices for individual goods and the overall price level.

*Federal foreign office*

- for drafts incorporating international treaties into domestic law.

*Federal Ministry of Food, Agriculture and Consumer Protection:*

- impacts on food or agriculture are to be expected.

*Federal Ministry for Labour and Social Affairs:*

- impact on the labour market, labour law, and occupational health and safety;
- impact on social security; and
- interests of persons with a disability.

*Federal Ministry of Defence*, if defence interests are concerned or the Ministry of Defence is involved in implementation.

*Federal Ministry for Family Affairs, Senior Citizens, Women and Youth:*

- impact on equal opportunities; and
- interests of families, elderly people, children and youths.

*Federal Ministry of Health*, if health interests are concerned.

*Federal Ministry of Transport, Building and Urban Development:*

- impact on transport; and
- regulations under public law which affect urban development or requirements for buildings.

*Federal Ministry for the Environment, Nature Conservation and Nuclear Safety:*

- impacts on the environment.

*Federal Ministry of Education and Research:*

- impacts on education and research.

*Federal Ministry for Economic Co-operation and Development*, regarding the question whether issues of economic development are concerned.

*Federal Government Commissioner for Culture and the Media,* if interests of culture and media policy are concerned.

# *Annex B*

## Regulatory agencies

### *Superior federal Authorities (SFAs)*

"Superior federal Authorities" (SFAs) are independent higher federal authorities responsible to the ministry dealing with a given policy area (*Bundesoberbehörde im Geschäftsbereich eines Bundesministeriums*). There is no single legislative framework for the establishment of such authorities. SFAs have been established *ad hoc* as the need arises, by law or ordinance, to cover specific sectors or issues. Their mandate, powers and functioning are tailored to the sector or issues which they cover. Their structure generally corresponds to the structure of the ministries. There is an agency head, supported by directorates-general and divisions. SFAs are funded largely by the federal budget. Income through fees is secondary. They form part of their parent ministry's budget system. An exception is the *BaFin*, whose funding consists exclusively of fees, reimbursements, and contributions from the institutions and undertakings it supervises.

#### *Rule making powers*

Generally speaking, these agencies implement regulations, with discretionary powers to interpret these and to take decisions on enforcement, but they do not make regulations themselves. There are, however, significant exceptions, with some important agencies entrusted with rule making powers. The main agencies with powers to develop regulations are the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin*); the so-called "Federal Network Agency" (Bundesnetzagentur, covering the electricity, gas, telecommunications, post and railway sectors); and the German federal (Social) Insurance Office (*Bundesversicherungsamt*).

#### *Autonomy and accountability*

The agencies are accountable to a parent ministry. They must report regularly to the ministry on their activities and are subject to the latter's legal and substantial supervision. If they do not fulfil their tasks properly, their parent ministry may intervene directly ("expert and legal supervision"). In certain cases, the agency head is seconded from the ministry, and the members of the administrative council appointed by it. The agency's administrative statutes are often subject to the approval of the responsible ministry. That said, they generally have substantial autonomy in their implementation and enforcement decisions, with parent ministries rarely intervening in these matters. They are generally authorised by law to make final decisions in individual cases.

*Guidelines on ministry supervision*

Federal ministries have established common principles for federal ministries in their supervision of agencies, and enshrined the relevant provision in the updated version of the *Joint Rules of Procedure*s (paragraph 3, first sentence).[1] This was part of the Implementation Plan 2009 for the government's project "Focused on the Future: Innovations for Administration".

*Self regulatory agencies (indirect federal administration)*

Federal tasks may be taken over in certain fields by independent administrations ("indirect federal administration"). These agencies are not directly accountable to a federal ministry but are led by self-regulatory panels. As a rule, they are composed of representatives of the parties concerned. The ministries merely check whether the tasks are performed in line with the law. They cannot influence how tasks are carried out, *i.e.* they only exercise legal supervision. The approach is mainly used for the administration of social insurance systems (pension, health, nursing, accident and unemployment insurance).

These social insurance agencies usually have a three-tier structure: a full-time director responsible for day-to-day business, a board composed of several persons which represents the social insurance agency, and the representative committee – the supreme panel – which elects the board and the director, adopts the budget and determines the terms of reference. The board and the representative committee constitute the self regulatory panel. They are composed of volunteers who represent the contributors, *i.e.* employers and employees.

An example of a social insurance agency is the German Pension Fund (*Deutsche Rentenversicherung*). It unites the *Deutsche Rentenversicherung Bund, the Deutsche Rentenversicherung Knappschaft-Bahn*-See and 14 regional agencies of the pension fund.

## Note

1. See: *Grundsätze zur Ausübung der Fachaufsicht der Bundesministerien über den Geschäftsbereich* (Status 2 May 2008), at: *www.verwaltunginnovativ.de/cln_162/nn_684674/SharedDocs/Publikationen/DE/20080515__24__grundsaetze__ausuebung__fachaufsicht,templateId=raw,property=publicationFile.pdf/20080515_24_grundsaetze_ausuebung_fachaufsicht.pdf* (last accessed 25 May 2009).

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## Better Regulation in Europe

# GERMANY

The importance of effective regulation has never been so clear as it is today, in the wake of the worst economic downturn since the Great Depression. But how exactly can Better Regulation policy improve countries' economic and social welfare prospects, underpin sustained growth and strengthen their resilience? What, in fact, is effective regulation? What should be the shape and direction of Better Regulation policy over the next decade? To respond to these questions, the OECD has launched, in partnership with the European Commission, a major project examining Better Regulation developments in 15 OECD countries in the EU, including Germany.

Each report maps and analyses the core issues which together make up effective regulatory management, laying down a framework of what should be driving regulatory policy and reform in the future. Issues examined include:

- Strategy and policies for improving regulatory management.
- Institutional capacities for effective regulation and the broader policy making context.
- Transparency and processes for effective public consultation and communication.
- Processes for the development of new regulations, including impact assessment, and for the management of the regulatory stock, including administrative burdens.
- Compliance rates, enforcement policy and appeal processes.
- The multilevel dimension: interface between different levels of government and interface between national processes and those of the EU.

The participating countries are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom.



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